



WRAC LEGAL UPDATE

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TOPICS:

- Resolved PCHB Appeal: *Tackman vs. Ecology*
- Appellate report: *Fode* cross-appeals; Burkholder
- PCHB Decisions Report: *Vancour vs. Ecology; Wagner vs. Ecology*

RESOLVED (sort of):

Tackman vs. Ecology, PCHB No. 24-073

- November 18th Appeal of Ecology/OCR Order of Cancellation, Dated October 21, 2024
- Cancellation alleged failure to develop new permit (April 2016) that would be mitigated with water provided by MVID
- 13th of December, Ecology issues order Rescinding Cancellation
- Original Cancellation Order did not provide 60 days to show cause why the permit should not be cancelled per RCW 90.03.320
- Ecology filed unopposed motion to dismiss based on its cancellation and mootness of the appeal
- Waiting for confirmation of the dismissal from the Board

Appellate report: *Fode* appeal

- **Fode vs. Ecology**: Cross-appeals by Ecology and PCHB of PCHB order that reduced a penalty against Mr. Fode for unauthorized irrigation in 2017 from 618K to 260K
- Should penalties be voided because Ecology did not provide proper technical assistance to Mr. Fode?
- Did the PCHB err when it concluded Ecology may only penalize for illegal irrigation for directly observed violations?
- Did Ecology engage in unauthorized “violation spreading?” (3 separate penalties on 3 separate properties)
- ALL BRIEFING COMPLETE!

Appellate report: *Burkholder vs. Ecology*

- Ecology denied Burkholder's requests to drill 14 wells in the Methow basin, near Thompson Creek. Thompson Creek is closed to new appropriations. WAC 173-548-050
- Burkholder claims his wells should be allowed under WAC 173-548-050(4):
 - If Ecology determines groundwater is not hydraulically connected to closed surface water; or
 - If Ecology has insufficient information to make such a determination, then prospective appropriator may provide additional information sufficient for Ecology to determine hydraulic continuity does not exist and that water is available
- Ecology prevailed on SJ. Superior Court Affirms. On Appeal to Div II
- All briefing complete. Ecology's Motion to Strike Reply Brief as overlength denied (Ecology asserted Burkholder made improper argument in appendices submitted with is reply brief)
- "Any arguments raised in an appendix will generally not be considered by the Court. But that determination is at the discretion of the panel. There is no need to strike the offending material."

PCHB Decision Report:

***Vancour vs. Ecology*, PCHB No. 23-060**

- Appeal by 3rd party (neighbors) of Ecology decision approving transfer of a water right to a GW well for irrigation of vineyards. Neighbors maintain that exercise of the right will impair their GW well
- Ecology filed for SJ, including a declaration of a HG that the drawdown of the neighboring well will be insignificant and will not impair the neighbor's exercise of their right.
- Appellants did not substantively respond to Ecology's SJ motion
- Nov. 19th PCHB sends letter informing parties that it will be granting SJ and dismissing the case, cancelling hearing dates (December 17 to 19)
- Nov. 22, Appellants send a lengthy letter to the Board that more substantively states their objections to the transfer and what evidence they would have put on at hearing
- Ecology moves to strike the letter

PCHB Decision Report:

Vancour vs. Ecology, PCHB No. 23-060

- PCHB issues its Order Dismissing Appeal on Summary Judgment on Jan. 21 2025
- Board declines to rule on Ecology's Motion to Strike Vancour's letter that they submitted in response to the Board' December letter
- Classic SJ decision: If moving party satisfies its burden, the non-moving party must present evidence demonstrating that material facts are in dispute. Bare assertions are insufficient
- Vancours did not respond to Ecology's technical analysis regarding well drawdown
- "Ecology has presented a convincing technical analysis, supported by expert opinion, that lays out the standards it must meet in approving a water change certificate from a surface water right to a groundwater right, and demonstrated how those standards are met. **The Board gives great weight to Ecology's interpretation of the laws it administers and due deference to the specialized knowledge and expertise of the agency for complex scientific or technical judgments.**"
- Board reaffirms that GW and SW authorities apply: "Because this application involves a change in the point of diversion from surface water to a well drawing on groundwater, it must comply with RCW 90.03.290, RCW 90.03.380 and RCW 90.44.100."

PCHB Decision Report: *Wagner vs. Ecology*

- Four-part test case
- Is water unavailable for the Wagner's proposed appropriation (1.0 cfs for irrigation from Five Mile Creek)
- Will the use impair existing users? What about the SWSL (surface water source limitation)?
- Is the use detrimental to the public welfare (are there any fish in the creek?)
- Hearing October 7-10. PCHB issues Final Findings of Fact, Conclusions of Law and Order on Jan. 8, 2025
- *The Pollution Control Hearings Board (Board) finds and concludes that the Appellants demonstrated there is water available to be diverted from Fivemile Creek without decreasing its water level and that **Appellants' application requires Ecology to determine what amount of water is available for appropriation in Fivemile Creek without the weight initially attributed to the surface water source limitation. The Board remands Appellants' application to Ecology for further evaluation consistent with the findings and conclusions of this Order.***

PCHB Decision Report:

Wagner vs. Ecology

- How did the Board get to its remand conclusion? How much water did the Board find to be available?
- 1967 Water Right Associated with the property, now relinquished, was conditioned with a 1.0 CFS SWSL to protect downstream users. **SWSL was expressly associated with this water right.** No ISF on five mile creek
- At hearing, Appellants showed that there is water available in Fivemile Creek, **but not 1.0 CFS as proposed in the Application.** (why wasn't this game over? Application was for 1 cfs)
- **Ecology did not consider whether an amount less than 1.0 CFS was available,** would impair the rights of downstream users, or would be detrimental to the public welfare
- “Appellants demonstrated that there is an amount of water available from Wagner Pond that would not reduce downstream contributions to Fivemile Creek. As we explain, below, the SWSL is not a strict closure of Fivemile Creek like a minimum instream flow or administrative closure. In addition, the SWSL applicable to Fivemile Creek is not sufficiently persuasive evidence to justify Ecology’s decision”

PCHB Decision Report:

Wagner vs. Ecology

- “Aspect Consulting’s measurements of Fivemile Creek between 2022-2024 demonstrate that, at times, there is at least 1.0 CFS in Fivemile Creek and support Turk’s conclusion that there is 100 GPM continuously available without a decrease to the instream flow. FOFs 10-11; Turk Testimony; Ex. A-120. The Board concludes that Appellants’ demonstration must be included when considering “what amount, if any, is available for appropriation” in Fivemile Creek”
- What about the SWSL? “A SWSL is not an administrative rule or court order, however, and does not result from an administrative process like minimum instream flows or administrative closures.”
- The Board considers the weight to assign the SWSL, although here “the Board concludes that the SWSL holds less weight as a factor due to multiple aspects of its infrangibility with a relinquished water right and the changed conditions of Fivemile Creek as the surface water source
- Other SWSLs may be important, but “the most important distinction” of this SWSL is the relinquishment of the right with which it was issued

PCHB Decision Report:

Wagner vs. Ecology

- Board does not reach impairment and public interest in light of remand
 - The Board remands the Application to Ecology **for a renewed evaluation** without the weight previously associated with the SWSL and with the evidence presented by the Appellants (Ecology gave too much weight to the SWSL)
- “The Board remands this matter to Ecology to reevaluate the Application consistent with this Order, including whether the appropriation will impair existing water rights and whether the appropriation will be a detriment to the public welfare.”
- APPEALS???

PCHB Decision Report: *Wagner vs. Ecology*

- The WAGNERS appeal to Stevens County Superior Court
 - Order Ecology to approve the water right for 100 gpm without finding any harm to the public welfare or impairment of other users, or remand with instruction to the Board with instruction to clarify that Ecology *must issue the water right for a minimum of 100 gpm*
 - Declare the SWSL invalid because it is a rule of general applicability