

1 **POLLUTION CONTROL HEARINGS BOARD**  
2 **STATE OF WASHINGTON**

3 RONALD SPARKS, RONALD FODE, and  
4 RANDY AND MICHELE KIESZ,

5 Appellants,

6 v.

7 STATE OF WASHINGTON,  
8 DEPARTMENT OF ECOLOGY,

9 Respondent.

PCHB No. 18-002c

AMENDED FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER  
ON REMAND

10 **I. INTRODUCTION**

11 The Pollution Control Hearings Board (Board) issues this order to amend the Findings of  
12 Fact and Conclusions of Law following the Court of Appeals decision in *Fode v. Dep't. of*  
13 *Ecology*, 22 Wn. App. 2d 22, 509 P.3d. 325 (2022). There are two sets of appeals in this matter:  
14 the appeals of the Administrative Orders requiring Appellant, Ronald Fode, to cease and desist  
15 irrigation (cease and desist appeals) and the appeals of the monetary penalties issued for  
16 continuing to irrigate (penalty appeals). The cease and desist appeals were dismissed by the  
17 Board as untimely. *Fode et al. v. Ecology*, PCHB No. 17-064c (September 11, 2017). Fode  
18 appealed the Board's Order on the cease and desist appeals to the Grant County Superior Court  
19 which reversed the Board's decision on the untimeliness of the appeal. Ecology appealed the  
20 Grant County decision to the Court of Appeals. While the cease and desist appeals were  
21 pending, the Board held a hearing on the penalty appeals and reduced the penalties from  
\$618,000 to \$260,000. *Fode et al. v. Ecology*, PCHB No. 18-002c (June 27, 2019). The Board's

AMENDED FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND ORDER  
PCHB No. 18-002c

1 decision in the penalty appeals was appealed to the Grant County Superior Court where it is  
2 stayed awaiting this amended order.

3 In the cease and desist appeals, the Court of Appeals held that the Board erred in  
4 applying *res judicata* to bar some of Mr. Fode’s technical assistance evidence. *Fode v. Dep’t.*  
5 *of Ecology*, 22 Wn. App. 2d 22, 35, fn. 5, 509 P.3d. 325 (2022). The Court of Appeals remanded  
6 the cease and desist appeals to the Grant County Superior Court judge handling the penalty  
7 appeals to remand the decision back to the Board for additional fact-finding on erroneously  
8 excluded technical assistance. *Id.*, at 37.

9 On July 18, 2022, Grant County Superior Court issued the Joint Motion and Stipulated  
10 Order Remanding Appeals to Pollution Control Hearings Board pursuant to  
11 RCW 34.05.562(2)(c) (Stipulated Order). The Stipulated Order remanded the penalty appeals to  
12 the Board “under RCW 34.05.562(2)(c) with directions to admit any erroneously excluded  
13 technical assistance evidence and to enter amended findings of fact and conclusions of law  
14 consistent with the Court of Appeals opinion...”

15 On remand, the following agreement and legal issues were identified by the parties and  
16 incorporated into the Fifth Amended Prehearing Order:

17 The scope of new evidence that the parties can present on remand will be limited to  
18 evidence relating to (1) Fode’s or Fode’s lessors’ efforts to obtain technical assistance from  
19 Ecology and (2) Ecology’s efforts to provide Fode with technical assistance, predating the  
20 issuance of Administrative Order Docket Nos. 14204 and 14205.

1           1. Appellant Ron Fode challenges the sufficiency of Ecology’s technical assistance  
2 under RCW 90.03.605 prior to, and subsequent to, Ecology’s issuance of the administrative  
3 orders and notices of penalty in these consolidated matters. Based upon this alleged lack of  
4 technical assistance:

5           a. Did Ecology have the authority to issue the penalties in the first place?

6           b. Does the alleged lack of technical assistance void or mitigate the amount of the  
7 penalties?

8           2. Whether Ecology properly issued Notice of Penalty, Docket No. 15590.

9           3. Whether the penalty associated with Notice of Penalty, Docket No. 15590 is  
10 reasonable.

11           4. Whether Ecology properly issued Notice of Penalty, Docket No. 15591.

12           5. Whether the penalty associated with Notice of Penalty, Docket No. 15591 is  
13 reasonable.

14           6. Whether Ecology properly issued Notice of Penalty, Docket No. 15592.

15           7. Whether the penalty associated with Notice of Penalty, Docket No. 15592 is  
16 reasonable.

17           On June 21, 2023, the Board held a hearing on remand. The Board was comprised of  
18 Board Chair Carolina Sun-Widrow, and Members Michelle Gonzalez and Neil L. Wise.  
19 Administrative Appeals Judge Heather L. Coughlan (formerly Francks) presided for the Board.  
20 Attorney Thomas M. Pors represented Mr. Fode. Assistant Attorneys General Stephen H. North  
21 and Clifford Kato represented Ecology. The Board received sworn testimony of witnesses,

1 admitted exhibits, heard arguments on behalf of the parties, and received written closing  
2 arguments. The Board enters the following additional findings of fact and conclusions of law  
3 which are identified throughout by the preceding phrase “on remand”:

4 **2018 Penalty Appeals Procedural History**

5 Appellant Ronald Fode filed an appeal with the Board on January 17, 2018, challenging  
6 Notice of Penalty Docket No. 15590 in the amount of \$103,000, Notice of Penalty Docket No.  
7 15591 in the amount of \$206,000, and Notice of Penalty Docket No. 15592 in the amount of  
8 \$309,000 issued by the Department of Ecology (Ecology).<sup>1</sup>

9 The Board conducted a hearing on the penalty appeals on March 18-20, 2019, in  
10 Tumwater, Washington.

11 The following issues<sup>2</sup> were identified by the parties and incorporated into the Third  
12 Amended Prehearing Order for the appeal:

- 13 3. Appellants challenge the sufficiency of Ecology’s technical assistance under  
14 RCW 90.03.605 prior to, and subsequent to, Ecology’s issuance of the administrative  
15 orders and notices of penalty in these consolidated matters. Based upon this alleged  
16 lack of technical assistance:
- 17 a. Did Ecology have authority to issue the penalties in the first place?
  - 18 b. Does the alleged lack of technical assistance void or mitigate the amount of the  
19 penalties?

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19 <sup>1</sup> On December 19, 2017, Ecology issued notices of penalty to Ronald Sparks, Randy and Michele Kiesz, and  
20 Ronald Fode. The recipients separately appealed their penalty to the Board and the cases were consolidated for  
21 hearing. Shortly before the hearing in the consolidated matter, Ecology rescinded the penalties against appellants  
Sparks and Kiesz, who then withdrew their appeals. The case proceeded to hearing with Mr. Fode as the lone  
appellant. Some of the exhibits proposed by Appellants Kiesz (marked AK) were admitted and used at hearing by  
Mr. Fode.

<sup>2</sup> At the March 2019 hearing, the parties agreed Issues 1, 2, 10 and 11 listed in the Third Amended Prehearing Order  
were no longer at issue.

- 1 4. Whether Ecology properly issued Notice of Penalty, Docket No. 15590.
- 2 5. Whether the penalty associated with Notice of Penalty, Docket No. 15590 is  
3 reasonable.
- 4 6. Whether Ecology properly issued Notice of Penalty, Docket No. 15591.
- 5 7. Whether the penalty associated with Notice of Penalty, Docket No. 15591 is  
6 reasonable.
- 7 8. Whether Ecology properly issued Notice of Penalty, Docket No. 15592.
- 8 9. Whether the penalty associated with Notice of Penalty, Docket No. 15592 is  
9 reasonable.

## 10 **II. AMENDED FINDINGS OF FACT**

### 11 1.

12 The water rights at issue in this matter are located in the Odessa Groundwater Subarea  
13 (OGS), in central Washington, the segment of the Columbia Basin groundwater system centered  
14 around the community of Odessa. WAC 173-128A-020; Ex. R-35. The OGS extends  
15 approximately 1,000 square miles and includes parts of Adams, Grant, Franklin, and Lincoln  
16 counties. Downes Testimony. Since 1967, the OGS has experienced a steady decline in  
17 groundwater levels. WAC 173-128A-020. In the area at issue, water levels in wells have  
18 declined approximately 150-200 feet since the mid-1970s. WAC 173-130A-120; Ex. AK-22.  
19 As a result of the decline, withdrawals of groundwater from the OGS are regulated by the OGS  
20 Management Policy (OGSMP) contained in WAC Chapter 173-130A. One of the strategies to  
21 deal with the decline is to provide surface water from the federal Columbia Basin project to  
owners of state groundwater rights in the OGS. Downes Testimony. In 2004, the Legislature

1 determined that if lands that are served by state water rights come to be served with federal  
2 surface water delivered by the Columbia Basin project, the state water rights as a matter of law  
3 become “standby or reserve” rights that cannot be used when federal water is available.  
4 RCW 90.44.510.

5 2.

6 In 2006, the legislature found that groundwater availability in the Odessa was in great  
7 jeopardy. RCW 90.44.520. In response to the decline, the state has invested tens of millions of  
8 dollars in the Odessa Groundwater Replacement Program (OGWRP). Downes Testimony;  
9 Ex. R-4. Unpermitted use of groundwater in the OGS increases the decline of the groundwater  
10 levels. Downes Testimony.

11 3.

12 Kevin Brown is Ecology’s Columbia Basin Watermaster and its liaison with the East  
13 Columbia Basin Irrigation District (ECBID). The ECBID provides surface water owned by the  
14 United States Bureau of Reclamation (USBR) from the Columbia River to landowners in the  
15 area through a series of canals. ECBID enters into individual water service contracts with each  
16 landowner. Brown Testimony. The surface water from ECBID comes through the East Low  
17 Canal to the property at issue.

18 4.

19 Irrigation of Columbia Basin project lands lying west of the East Low Canal and canal  
20 leakage have caused development of a groundwater mound lying generally under the Canal.

1 WAC 173-130A-120. The irrigated property at issue is within the mound in Sections 1, 2, and 3  
2 of T. 19 N., R. 29 E.W.M. Brown Testimony; Ex. R-35.

3 **Ecology's Role**

4 5.

5 Ecology enforces the water codes of the state set forth in chapters 90.03 and 90.44 RCW.  
6 One of the ways Ecology accomplishes this is through approving seasonal change applications  
7 for water rights transfers. Ecology sends out a notice to applicants in the preceding November  
8 stating that seasonal change applications must be filed by February 15. The February deadline  
9 provides Ecology time to review the request and complete all statutory requirements (including  
10 publication and time for public comments) before the irrigation season begins. Brown  
11 Testimony. On remand Mr. Brown testified that he processes between 100 to 130 seasonal  
12 change applications each year before he turns to his other duties of permitting, complaint  
13 investigation, enforcement and compliance. Brown Testimony.

14 6.

15 In 2006, Ecology's budget was cut by the Legislature and the agency was instructed to  
16 focus on permitting rather than enforcement. Stoffel Testimony. Keith Stoffel, Ecology's  
17 former Eastern Regional Office Water Resources Section Manager, supervised 35 staff in 2006.<sup>3</sup>  
18 By 2018, Mr. Stoffel supervised only 20 staff. Stoffel Testimony. One result of the staff  
19  
20  
21

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<sup>3</sup> By the time of the 2019 hearing, Mr. Stoffel had retired from Ecology.

1 reduction was that Ecology stopped issuing written decisions on seasonal water rights change  
2 applications. Stoffel Testimony.

3 **Mr. Fode**

7.

4 Mr. Fode is a longtime family farmer in the Odessa. Mr. Fode owns farmland and also  
5 leases land that he farms. Mr. Fode has been active in the Columbia Basin Development League  
6 (League). The League is an organization that educates and lobbies to obtain surface water to  
7 replace the groundwater from the declining OGS aquifer. Fode Testimony. Mr. Fode served as  
8 a League trustee in 2006, board member in 2007 and vice president in 2008, before becoming  
9 president of the League from 2010-12. Fode Testimony; Ex. AF-2. Mr. Fode stepped down  
10 from the League in 2016. Fode Testimony.

11 **Relevant Fields**

8.

12 The three penalties at issue relate to three parcels: one owned by Mr. Fode (Fode Parcel)  
13 and two leased by Mr. Fode. The leased parcels include one owned by Mr. Sparks as  
14 representative of the Schmidt estate<sup>4</sup> (Sparks Parcel) and one owned by Mrs. Kiesz (Kiesz  
15 Parcel). Within the three parcels, the five fields at issue are referred to as Pivots 1-5 by Ecology.  
16 Ex. R-3. Mr. Fode refers to them collectively as the Wheeler property and Circles 21, 22, 23, 9  
17 and 14 respectively. Ex. R-34. Pivots 1, 4 and 5 are standard ¼ section pivots approximately  
18  
19  
20

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21 <sup>4</sup> For purposes of clarity, this opinion will use the terms Mr. Sparks and the Sparks Parcel when discussing the property owned by the Schmidt estate and any other matters relating to Mr. Schmidt.



1 1,300 feet long irrigating 130 acres. Brown Testimony. Pivot 2 irrigates between 170 to180  
2 acres. Pivot 3 irrigates 35-40 acres. Brown Testimony

3 9.

4 The Kiesz Parcel is comprised of land irrigated by Pivots 1, 2, 3, and the east half of  
5 Pivot 4. The Sparks Parcel is comprised of land irrigated by the west half of Pivot 4. The Fode  
6 Parcel is comprised of land irrigated by Pivot 5. Fode Testimony.

7 10.

8 Mr. Fode leases Pivots 1, 2, 3 and the east half of Pivot 4 from Kiesz. Fode Testimony;  
9 Ex. AF-40. The lease provides that Mr. Fode pay Mrs. Kiesz a flat amount of \$100 per acre per  
10 year to use the land. Ex. R-38. Mrs. Kiesz does not receive any profits from Mr. Fode's crops  
11 grown on her land. Exs. AK-14, AK-19. Similarly, the lease for the Sparks Parcel for the west  
12 half of Pivot 4 is a flat fee per acre per year. Ex. R-44.

13 11.

14 In 2017, Odessa Farms, a subtenant of Mr. Fode, grew potatoes on the land irrigated by  
15 Pivot 1. Ex. AF-6. Mr. Fode grew alfalfa on land served by Pivots 2-4, and Timothy hay at  
16 Pivot 5. *Id.*

17 12.

18 The Kiesz Parcel had one water right identified as Groundwater Certificate 647-A, which  
19 authorized the irrigation of a defined 80 acres of the parcel's 415 acres. Ex. R-55. The Sparks  
20 Parcel had no ground water right. Mr. Fode's property had no ground water rights. Brown  
21 Testimony.



1 southwest ¼ of Section 2. *Id.* Contract No. 190/39 was renewed in 2005 and again in 2015.  
2 Exs. R-7; AF-38. Contract No. 190/40 was renewed in 2015. Ex. AF-38. Both of these  
3 contracts provided surface water to parts of the land covered by G3-22345C.

4 16.

5 In 2004, the legislature enacted RCW 90.44.510 addressing the relationship between  
6 groundwater rights and surface water delivered from the Columbia Basin project. Pursuant to  
7 RCW 90.44.510, where land is being irrigated with surface water from the Columbia Basin  
8 project, any right to use groundwater to irrigate those same lands must be held in reserve and  
9 may only be used when the delivery of surface water is curtailed or otherwise unavailable.  
10 RCW 90.44.510; Ex. AK-22. If Mr. Fode received surface water from ECBID for land covered  
11 by G3-22345C, the groundwater authorized for use under G3-22345C became a standby or  
12 reserve right. As such, it was not available for seasonal transfer. Brown Testimony; Ex. AK-22.

13 17.

14 The 190 Contracts executed by Roy Fode and Mr. Fode did not state that use of any  
15 underlying groundwater right was restricted, nor did they contain a reference to RCW 90.44.510.  
16 Exs. AF-36, R-7. Mr. Brown testified that the G3-22345C permit itself and the Report of  
17 Examination (ROE) both indicated that the state groundwater right could only be used until  
18 federal surface water was available. Brown Testimony. Mr. Fode believed that, because his 190  
19 Contract did not contain a condition restricting his use of groundwater when receiving federal  
20 surface water, he had two levels of water rights (surface water and ground water) for those  
21

1 properties. Fode Testimony. Mr. Fode did not review the permit or the ROE and was not aware  
2 of RCW 90.44.510. Fode Testimony.

3 18.

4 Mr. Fode has also entered into 390 Contracts with ECBID. In 2006, Mr. Fode entered  
5 into a 390 Contract with ECBID that required a reduction in the withdrawal of groundwater from  
6 the OGS from G3-20666 during the term of the contract. Ex. AF-37. In addition, based on a  
7 conversation with ECBID staff, Mr. Fode was under the impression that cessation of the use of a  
8 groundwater well was required only when a 390 Contract provided surface water to the same  
9 lands. Fode Testimony. Mr. Brown testified that, unlike a 190 Contract, a 390 Contract was not  
10 based on receiving water from the Columbia Basin project. A 390 Contract was part of the  
11 OGWRP and was only available for existing valid water rights in the basin. Brown Testimony.

12 **Mr. Fode's Prior History**

13 19.

14 On May 15, 2000, Ecology issued an Administrative Order 00WRER-1118 (Order 1118)  
15 to Mr. Fode to the irrigation of land for which he did not have a valid water right. Ex. AF-14.  
16 Mr. Fode provided Ecology with a written response to Order 1118. In his letter, Mr. Fode  
17 referenced text from a 1998 water right change approval which stated: "Period of Use as the  
18 Irrigation Season, Domestic; Continuous." Mr. Fode asserted that it was his understanding this  
19 language meant that the approved seasonal change was still in place. Fode Testimony; Ex. AF-  
20 15. Mr. Fode believed that the term "continuous" meant that he did not have to renew the  
21 seasonal change order every year. Fode Testimony. After receipt of Order 1118, Mr. Fode filed

1 a new seasonal change application to correct the issue. Fode Testimony; Ex. AF-15. On June 5,  
2 2000, Ecology rescinded Order 1118. Ex. AF-16.

3 20.

4 On May 15, 2000, Ecology issued Administrative Order 00WRER-1119 (Order 1119) to  
5 Mr. Fode ordering him to cease and desist the irrigation of “all of the lands within the S½ of  
6 Section 1, T. 19 N., R. 29 E.W.M., Grant County, (WRIA 41).” Mr. Fode was further ordered to  
7 “identify the source of water to serve the pivot sprinkler installed within the S 1/2 of Section 1.”  
8 Ex. R-19. Order 1119 related to Pivot 5. Fode Testimony.

9 21.

10 On May 19, 2000, Mr. Fode sent a letter to Ecology indicating that the circle was not  
11 being irrigated and had never been irrigated. Fode Testimony, Ex. R-20. Mr. Fode stated that he  
12 intended to, and later did, file a seasonal change application for G3-22345C for the irrigation of  
13 Pivot 5. Ecology approved that seasonal change request in 2001. Fode Testimony, Ex. AF-19.  
14 Mr. Fode received seasonal change approvals for G3-22345C every year from 2001-2009. Fode  
15 Testimony; Exs. AF-19, AF-20, AF-22, AF-24, AF-26, AF-28, AF-30, AF-31, AF-33. Each of  
16 these seasonal change approvals included a sentence stating: “This seasonal change is granted in  
17 accordance with RCW 90.03.390 until the end of the [applicable year] irrigation season, at which  
18 time it shall automatically revert back ...” Exs. AF-19, AF-20, AF-22, AF-24, AF-26, AF-28,  
19 AF-30, AF-31, AF-33.

1 22.

2 In 2009, Mr. Fode filed three applications for seasonal change of G3-22345C. Ecology  
3 denied two of the applications. Ex. R-21, R-22. In the denial letters, Ecology noted that G3-  
4 22345C contained the following condition:

5 Water allocated for irrigation purposes in this permit may be withdrawn until such  
6 time as water from Project facilities becomes available to the permittee or his  
7 successor in interest for all or a portion of the lands described herein as the place  
of use. At that time, volumetric withdrawal shall be proportionally reduced to  
correspond to the acreage, if any, for which project water is not available.

8 *Id.* Because Mr. Fode was receiving water from ECBID to irrigate the lands at  
9 issue, G3-22345C was not transferable. *Id.*

10 23.

11 Mr. Fode's third 2009 seasonal change application was approved because the lands  
12 sought to be irrigated with G3-22345C were not subject to water service contracts entered into  
13 with the ECBID. Ex. R-23 at 1. This allowed water to be transferred to Pivot 1. Fode  
14 Testimony. Mr. Fode testified that he did not fully understand the contents of Ecology's change  
15 approval letter and that the letter quoted language that was not contained in the original  
16 certificate or certificate of change for G3-22345C. Fode Testimony; Exs. AF-10, AF-12.  
17 According to Mr. Fode, prior to 2009, he had been allowed to move the water right despite also  
18 having a contract with ECBID. Fode Testimony.

19 24.

20 From 2010 to 2016, Mr. Fode did not file any seasonal change requests and he continued  
21 to irrigate and farm the Wheeler property. Fode Testimony. Mr. Brown reviewed aerial

1 photographs that show green and growing fields on the Wheeler property during those years.  
2 Brown Testimony. On remand, Mr. Fode testified that he thought that the seasonal change  
3 authorizations from 2009 were continuing during this time. Fode Testimony.

4 25.

5 In 2016, through his work with the League and in discussions with other farmers,  
6 Mr. Fode questioned whether he fully understood his own water rights. Fode Testimony.  
7 Mr. Fode consulted an attorney, sending him relevant documents including the water certificate  
8 and certificate for change for G3-22345C. Fode Testimony. On February 22, 2016, Mr. Fode  
9 received a letter from the attorney stating that he had reviewed the documents and that the  
10 language quoted by Ecology in the seasonal change denials did not appear in the certificate or  
11 certificate of change. Ex. R-41. The attorney recommended filing a public records request to  
12 confirm that the language identified by Ecology was included in G3-22345C's permit. Ex. R-41.  
13 Mr. Fode did not pursue his attorney's recommendation. Fode Testimony.

14 **2017 Events**

15 26.

16 In January 2017, as a test of his understanding of his water rights, Mr. Fode applied for a  
17 seasonal change of G3-22345C. Ex. R-6. Ecology denied the seasonal change because it was a  
18 state groundwater right within the OGS subject to an ECBID contract and, therefore, not  
19 available for transfer. Brown Testimony; Ex. R-6. On remand, Mrs. Kiesz testified that  
20 Mr. Fode asked if she had any water rights available to transfer to the Wheeler property. Kiesz  
21

1 Testimony. On January 30, 2017, Mrs. Kiesz sent a text to Mr. Fode stating that she had 134  
2 acres available from her Kageleville property that could be seasonally transferred. Ex. R-80.

3 27.

4 On February 14, 2017, Mr. Brown called Mr. Fode to tell him the seasonal change was  
5 denied. Brown Testimony. Mr. Brown asked Mr. Fode if he wanted a formal written denial and  
6 Mr. Fode said no. Brown Testimony. Exs. R-6, R-14 at 3. Mr. Fode does not recall saying he  
7 did not want a written denial. Fode Testimony. Mr. Brown also told Mr. Fode not to irrigate the  
8 Kiesz Parcel or the Sparks Parcel. Brown Testimony; Ex. R-39.

9 **Fallowing the Schrag Property**

10 28.

11 In 2017, shortly after being informed that his seasonal change application (Ex. R-6) was  
12 being denied by Ecology, Mr. Fode prepared multiple plans for transferring water rights to the  
13 Wheeler Property. Fode Testimony; Ex. AF-6. One of these plans included transferring water  
14 rights from the Schrag property to the Wheeler property. Mr. Fode testified that there were  
15 sufficient water rights on the Schrag property that could be seasonally transferred to the Wheeler  
16 property to cover the areas that Mr. Fode wanted to irrigate on the Wheeler property. Fode  
17 Testimony. Mr. Fode discussed with Mrs. Kiesz moving the water rights from the Schrag  
18 property, which Mr. Fode also leased from Mrs. Kiesz. Fode Testimony; Ex. AF-46. While  
19 Mrs. Kiesz did not testify in the 2019 hearing, she did testify on remand.



1 29.

2 In order to transfer water rights, the landowner (in this case, Mrs. Kiesz) must sign the  
3 seasonal change application. Mr. Fode testified that he chose not to irrigate the Schrag property  
4 with the available water rights and to instead fallow the Schrag property so that he could move  
5 the Schrag water rights from the Schrag property to the Wheeler property and come into  
6 compliance with Ecology. Fode Testimony.

7 Mr. Fode fallowed just under 600 acres of the Schrag property in anticipation of  
8 Mrs. Kiesz signing the application to transfer the Schrag water rights. The Schrag property is  
9 located approximately six miles from the Wheeler property and the properties are both irrigated  
10 from the OGS aquifer. Fode Testimony. Mr. Fode testified that he fallowed more acres on the  
11 Schrag property than he irrigated on the Wheeler property in order to ensure the OGS aquifer did  
12 not decline. Fode Testimony; Ex. AF-46.

13 30.

14 Mr. Fode provided evidence to the Board demonstrating that the Schrag property was  
15 fallowed in 2017 to cut back on water usage on the Schrag property (other than Circle 99 which  
16 was rotationally cropped in potatoes and irrigated in 2017) to fulfill Mr. Fode's plan to transfer  
17 Schrag water rights to the Wheeler property. From 2016 to 2017 Mr. Fode significantly cut back  
18 on irrigating alfalfa fields on the Schrag property. On remand, Mr. Fode provided hay contracts  
19 and sales data for canola from the Schrag property indicating a reduction in tonnage of hay and  
20 canola from 2016 to 2017. Exs. AF-95 and 96. Furthermore, on remand, Mr. Fode provided the  
21 Board with the records of electrical usage prepared at his request by Big Bend Electric

1 Cooperative for the Schrag meters in 2016 and 2017. Ex. AF-94. Mr. Fode testified that the well  
2 pumps were electric. Fode Testimony. The records of electrical usage presented the reduced  
3 power usage that took place on the Schrag property from 2016 to 2017. Mr. Fode submitted the  
4 records of electrical usage to the Board as evidence that he cut back on water usage on the  
5 Schrag property to fulfill his plan to transfer Schrag water rights to the Wheeler property.  
6 Ex. AF-94.

7 31.

8 Circle 99 consists of 43 acres on the Schrag property. Mr. Fode testified that he did not  
9 fallow Circle 99 on the Schrag property and instead irrigated it because he had a contract to grow  
10 potatoes on Circle 99 and the potatoes needed water to grow. Fode Testimony. Mr. Fode testified  
11 that Circle 99 was the only field that he irrigated out of all the Schrag property in 2017. Fode  
12 Testimony.

13 32.

14 To rebut Mr. Fode's evidence that he fallowed Schrag property except for Circle 99, on  
15 remand, Mr. Brown submitted two aerial photographs of the Schrag property from 2017, one  
16 from Google Earth and one from the Ecology GIS system. Exs. R-78,79. Mr. Brown testified that  
17 the photographs showed the Schrag circles were green, and that it appeared to him from the  
18 photos that the Schrag property was planted, cropped, and irrigated in 2017. Brown Testimony.  
19 On cross examination, Ecology demonstrated that in his 2019 deposition, Mr. Fode had testified  
20 that he lightly or conservatively irrigated parts of the Schrag property in 2017. Fode Testimony.  
21 Weighing the evidence presented, the Board gives more weight to Ecology's evidence and does

1 not find credible Mr. Fode's remand testimony that he did not artificially irrigate the Schrag  
2 property in 2017 (except for Circle 99).

3 **Ecology Meetings and Communications**

4 33.

5 On remand, Mrs. Kiesz testified that she owns multiple parcels and has been doing water  
6 rights transfers on a seasonal basis with the Ecology staff since 1998 or so. Kiesz Testimony.  
7 When she learned from Mr. Fode there were issues with the water rights to the Wheeler Property,  
8 she called the Ecology office and asked for a meeting with Mr. Brown. Kiesz Testimony.

9 On March 22, 2017, Mr. Brown and Mrs. Kiesz met in person and discussed Mr. Fode's  
10 plan for moving water rights for 2017. Ex. AF-46. Mr. Fode testified that he gave Mrs. Kiesz a  
11 drawing of his plan to fallow the Schrag Property to transfer the water rights to the Wheeler  
12 property. Fode Testimony, Ex. AF-92. On remand, Mrs. Kiesz testified that she did not recall  
13 whether she gave Mr. Brown the drawing prepared by Mr. Fode. Kiesz Testimony. Mrs. Kiesz  
14 further testified that she asked about transferring the Schrag or Kageleville water rights to the  
15 Wheeler property and that Mr. Brown told her it was past the February 15 deadline for seasonal  
16 change applications. Mrs. Kiesz testified that she was surprised by Mr. Brown's response  
17 because Mr. Brown had been approving seasonal water rights transfers for her for years and they  
18 had a good working relationship. Kiesz Testimony. In the 2019 hearing, Mr. Brown testified that  
19 during this meeting, Mrs. Kiesz said she did not want to transfer any of her water rights to the  
20 Wheeler property. Brown Testimony; Ex. AK-23

1 34.

2 Mr. Fode was not present for the March 22, 2017, meeting because Mrs. Kiesz told him  
3 not to attend as she would take care of the matter. Fode Testimony. Mr. Fode and Mrs. Kiesz  
4 subsequently discussed the outcome of her meeting with Ecology. Mrs. Kiesz reported that  
5 Mr. Brown informed her that it was “too late” to file a seasonal transfer. Fode Testimony;  
6 Ex. AK-10. Mr. Fode testified that Mr. Stoffel, Ecology’s former Eastern Regional Office Water  
7 Resources Section Manager, said the February 15 deadline for seasonal water rights transfers for  
8 irrigation was an arbitrary deadline. Fode Testimony.

9 35.

10 On March 27, 2017, Mr. Brown called Mr. Fode and told him not to irrigate his property  
11 or the Kiesz Parcel. Brown testimony; Ex. R-39.

12 36.

13 On May 3, 2017, Mr. Brown visited the Fode Parcel, photographed the alfalfa planted  
14 and being irrigated in Pivot 5. Brown Testimony: Ex. R-1A at 22-28; Ex. R-14 at 3.

15 37.

16 On May 16, 2017, Ecology sent letters to Mrs. Kiesz and Mr. Sparks requesting  
17 information about the water rights available for the E ½ of Section 2 (Pivot 4) and the N ½ of  
18 Section 1 (Pivots 2 and 3). Ex. R-8. On remand, Mrs. Kiesz testified that she received this  
19 request for information (RFI) letter from Ecology that was addressed to her and Michael Schmidt  
20 c/o Mr. Sparks. Kiesz Testimony. This letter was not sent to Mr. Fode but was shared with him

1 by Mrs. Kiesz. Ex. AK-9. Mrs. Kiesz also testified on remand that she contacted Mr. Fode about  
2 the letter. Kiesz Testimony.

3 38.

4 On May 22, 2017, Mr. Brown had a telephone conversation with Mr. Sparks who indicated  
5 there were no water rights on the Sparks Parcel, the west half of Pivot 4. Brown Testimony;  
6 Ex. R-39.

7 39.

8 On June 1, 2017, Mr. Brown had a telephone conversation with Mrs. Kiesz who stated  
9 that only 80 of the 415 acres of the Kiesz Parcel had irrigation water under Water Right  
10 Groundwater Certificate 647-A. Brown Testimony; Exs. R-36, R-39.

11 40.

12 On June 2, 2017, Mr. Fode sent a text message to Mrs. Kiesz regarding an ECBID  
13 meeting the next morning and said “Mr. Brown will likely be there too. So, I’m turning off  
14 circles until 9:30 today.” Fode Testimony; Ex. R-27.

15 41.

16 On June 21, 2017, Ecology staff Mr. Brown, Mr. Stoffel and Dan Tolleson met with  
17 Mrs. Kiesz. Brown Testimony; Ex. R-38. They discussed Mr. Fode’s irrigation of the Kiesz  
18 Parcel and Mrs. Kiesz indicated, “she has told Ron to stop irrigating.” Brown Testimony; Ex. R-  
19 38. On remand, Mrs. Kiesz testified that at the meeting the Ecology staff gave her “all kinds of  
20 information” about the water rights to the Wheeler property. Kiesz Testimony. However, the  
21

1 Ecology staff were unwilling to allow her to transfer her water rights from the Schrag property to  
2 the Wheeler property because it was way past the February 15 deadline. Kiesz Testimony.

3 42.

4 On June 22, 2017, Mr. Brown spoke with Mr. Fode and told him there are no water rights  
5 covering the Fode or Kiesz Parcels (Pivots 1, 2, 3 and W ½ of 4.) Brown Testimony; Exs. R-37,  
6 R-39. Mr. Fode asked if there was any way to keep irrigating potatoes. Mr. Brown responded  
7 that Ecology was not interested in making a decision at that time. Brown Testimony; Ex. R-37.

8 On remand, Mr. Fode testified that he was dumbfounded that Ecology was not interested in  
9 making that decision. Fode Testimony. On remand, Fode also testified that he did not submit any  
10 seasonal change application to Ecology in 2017 because he was discouraged from doing so. Fode  
11 Testimony.

12 43.

13 On June 26, 2017, Ecology issued Administrative Order 14204 (cease and desist order  
14 14204) to Mr. Fode. Ex. R-9. Ecology also issued Administrative Order No. 14205 (cease and  
15 desist order 14205) to Mr. and Mrs. Kiesz and Michael Schmidt c/o Mr. Sparks. Ex. R-10. The  
16 cease and desist orders required the landowners to cease and desist from irrigation of the  
17 properties listed. Brown Testimony. On remand, Mrs. Kiesz testified that she spoke with  
18 Mr. Brown about the cease and desist order. Mrs. Kiesz testified that Mr. Brown told her she  
19 would have to turn off the water. Mrs. Kiesz asked again whether she could transfer the Schrag  
20 water rights. Kiesz Testimony.

1 44.

2 Mr. Fode appealed cease and desist order 14204 to the Board. Mrs. Kiesz, Mr. Sparks  
3 and Mr. Fode appealed cease and desist order 14205 to the Board. The appeals were  
4 consolidated and subsequently dismissed as not timely filed. *Fode et al. v. Ecology*,  
5 PCHB No. 17-064c (September 11, 2017). After the 2019 hearing on the penalty appeals, the  
6 Grant County Superior Court reversed the Board's dismissal of the cease and desist appeals. The  
7 Court of Appeals affirmed the Superior Court's ruling but remanded the case back to Superior  
8 Court with instructions to remand the penalty appeals to the Board to admit any erroneously  
9 excluded technical assistance evidence. At the time of the remand, the penalty appeals were  
10 stayed at Superior Court awaiting this order.

11 45.

12 After issuance of the cease and desist orders, Ecology observed the Wheeler property  
13 repeatedly to determine if irrigation was continuing. Ecology took photographs documenting its  
14 site inspections. Mr. Brown created a form for other Ecology employees who visited the  
15 property to create a record of their observations of (1) when the visits occurred, (2) where the  
16 pivots were located, (3) whether the pivots were on and irrigating, and/or (4) whether the fields  
17 were wet. Ex. R-1; Brown Testimony. Ecology staff did not enter the fields, instead making  
18 their observations about the various fields from the public roadway. Ecology created a field  
19 book of the forms (Odessa Field Book). Ex. R-1. Occasionally, the forms contained local  
20 temperature data. *See* Ex. R-1 at 24, 26, 27, and 34. Ecology employees took more than 200  
21

1 photographs during these visits. Ex. R-1A. Ecology reported a pivot “on” or a field “wet” on 52  
2 days. Ex. R-1.

3 46.

4 Mr. Fode reviewed the Odessa Field Book and created a spreadsheet for each penalty.  
5 The spreadsheet included each day of the irrigation season and noted whether the fields were  
6 reported to be wet or being irrigated. Fode Testimony; Exs. AF-76, AF-77, AF-78. Mr. Fode  
7 testified that other possible explanations for a field being “wet” included evapotranspiration and  
8 dew. Fode Testimony.

9 47.

10 Mr. Fode testified that he continued to irrigate after the cease and desist orders were  
11 issued because he believed that he and Mrs. Kiesz could reach an accommodation with Ecology.  
12 Fode Testimony. Mr. Fode also testified that he kept irrigating the Wheeler property because he  
13 had contracts he did not want to breach. Mr. Fode subleased Pivot 1 to Odessa Farms, to grow  
14 potatoes. The sublease with Odessa Farms required Mr. Fode to provide irrigation water. Fode  
15 Testimony; Ex. R-24 at 8. Bogaard Hay Company had contracts with Mr. Fode to buy 1,150  
16 acres of alfalfa and 130 acres of Timothy hay. Ex. R-50. Mr. Fode received the following  
17 payments for crops grown on the Wheeler property in 2017: (1) \$135 per ton for the first cutting  
18 of alfalfa on Pivot 2 (Ex. R-51); (2) \$150 per ton for the second cutting of alfalfa on Pivot 2  
19 (Ex. R-52); (3) \$270 per ton for the cutting of Timothy hay on Pivot 5 (Ex. R-53); (4) \$120 per  
20 ton for the third cutting of alfalfa on Pivot 2 (Ex. R-54); and (5) \$150 per ton for the third cutting  
21 of alfalfa on Pivot 4 (Ex. R-54). Mr. Fode provided a profit and loss statement for the Wheeler



1 property and his 2017 federal income tax form reflecting overall losses incurred. Exs. AF-82,  
2 AF-83. On remand, Mrs. Kiesz testified that she wrote in a letter to herself and Mr. Fode that  
3 Mr. Fode chose to irrigate “to avoid the loss of very valuable crops that were sub-contracted to a  
4 3<sup>rd</sup> party stating that if you were found in fault and there were fines involved, it would be much  
5 less than the total loss of the crops.” Kiesz Testimony: Ex. R-71.

6 48.

7 On July 6, 2017, and again on July 10, 2017, Mr. Brown spoke with Mrs. Kiesz and  
8 reported that Mr. Fode was still irrigating her property. Brown Testimony; Ex. R-39. On  
9 remand, Mrs. Kiesz testified that she wrote a letter dated July 26, 2017, to Mr. Brown and copied  
10 Ecology Director Maia Bellon and Senator Schoesler (Mrs. Kiesz’s neighbor) asking for  
11 assistance to resolve the issue with other water rights she had available to transfer. Kiesz  
12 Testimony; Ex. R-12. Mrs. Kiesz testified that Director Bellon’s staff informed her that the  
13 Director had received the letter. Kiesz Testimony.

14 **Penalty Calculation**

15 49.

16 On December 19, 2017, Ecology issued Mr. Fode Notices of Penalty Nos. 15590, 15591  
17 and 15592. Exs. R-16, R-17 and R-18. In each, Ecology imposed a penalty comprised of a  
18 daily dollar amount for 103 days. The daily dollar amount was derived from Ecology’s penalty  
19 matrix. The 103 days constituted the time period from the date of receipt of the cease and desist  
20 orders (June 30, 2017) to the last time during the 2017 irrigation season Ecology visited the  
21 Wheeler property (October 10, 2017). Exs. R-13, R-14 and R-15.

1 50.

2 For violations of the water code, Ecology is authorized to level civil penalties from one  
3 hundred dollars to five thousand dollars per day. RCW 90.03.600. When establishing a penalty,  
4 Ecology is required to “consider the seriousness of the violation, whether the violation is  
5 repeated or continuous after notice of the violation is given, and whether any damage has  
6 occurred to the health or property or other persons.” *Id.* Ecology has developed a penalty matrix  
7 to assist with determining the amount of the penalty for a violation of the water code. Exs. R-13,  
8 R-14, R-15. Applying the factors in the penalty matrix to the facts, Ecology concluded that (a)  
9 Mr. Fode’s irrigation of the Wheeler property without valid water rights was definitely willful or  
10 knowing; (b) Mr. Fode had definitely failed to obtain necessary permits and received an  
11 economic benefit; (c) Mr. Fode’s actions had definitely caused environmental or resource  
12 damage and damage to the property of others or impairment of beneficial uses and definitely  
13 caused damage to the health of others; and (d) Mr. Fode had definitely been unresponsive in  
14 correcting the violation. *Id.* The analysis resulted in a per day penalty of \$5,000. *Id.*

15 51.

16 Rather than multiply the 103 days by \$5,000, Ecology chose to use a daily penalty based  
17 on the size of the parcel being irrigated and considering the enforcement history of owner. For  
18 the Sparks Parcel, Ecology imposed a penalty of \$1,000 per day due to the small (65 acre) size of  
19 the parcel and the fact that Ecology had not issued any previous penalty to Mr. Sparks or the  
20 underlying landowner, Mr. Schmidt. Ex. R-13; Brown Testimony. Multiplying the penalty  
21 amount by the number of days in the irrigation season resulted in a penalty of \$103,000.

1 Ecology calculated that Mr. Fode used approximately 195 acre-feet of OGS groundwater to  
2 irrigate the Sparks Parcel. Ex. R-13.

3 52.

4 For the Fode Parcel, Ecology imposed a daily penalty of \$2,000 per day due to the  
5 moderate size of the property and the fact that Ecology had not issued any previous penalty to  
6 Mr. Fode. Ex. R-14; Brown Testimony. Multiplying the penalty amount by the number of days  
7 in the irrigation season resulted in a penalty of \$206,000. Ecology calculated that Mr. Fode used  
8 approximately 390 acre-feet of OGS groundwater to irrigate the Fode Parcel. Ex. R-14.

9 53.

10 In calculating the penalty for the Kiesz Parcel, Ecology gave Mr. Fode credit for the 80  
11 acres of the parcel for which there was a valid water right, leaving 335 acres having been  
12 illegally irrigated. Ex. R-10 at 2. Taking into consideration the large size of the parcel and the  
13 fact that Ecology had not issued any previous penalty to Mrs. Kiesz, Ecology imposed a penalty  
14 of \$3,000 per day. Ex. R-15; Brown Testimony. Multiplying the penalty amount by the number  
15 of days in the irrigation season resulted in a penalty of \$309,000. Ecology calculated that  
16 Mr. Fode used approximately 1,005 acre-feet of OGS groundwater to irrigate the Kiesz Parcel.  
17 Ex. R-15.

18 54.

19 Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

20 Based on the foregoing Findings of Fact, the Board enters the following:



1 the opinion of the department the nature of the violation is causing harm to other  
2 water rights or to public resources.

3 (Emphasis added.)

4 3.

5 While technical assistance is not defined, it is required to be within the framework of the  
6 law. That is, Ecology must identify legally available options for compliance. On remand, the  
7 Board received additional testimony about the nature of Ecology's technical assistance  
8 throughout the 2017 season, including before the cease and desist orders were issued. The Board  
9 concludes Ecology's 2017 technical assistance related to the Wheeler property was as follows:

- 10 • February 14, 2017- Mr. Brown, Ecology's Watermaster, spoke with Mr. Fode by  
11 telephone reporting that he was denying Mr. Fode's 2017 seasonal change  
12 request for Mr. Fode's water right (G3-22345C). Brown testified that he asked  
13 Mr. Fode if he wanted a formal written denial and Mr. Fode said no. Mr. Fode  
14 does not recall saying he did not want a written denial. In the phone call, Mr.  
15 Brown also told Mr. Fode not to irrigate without water rights. Brown Testimony,  
16 Fode Testimony, Ex. R-39, Finding of Fact (FF) 27.
- 17 • March 22, 2017- Mrs. Kiesz, who had discussed with Mr. Fode that she would  
18 meet with Mr. Brown to assist getting approval to transfer some of her other  
19 water rights, met with Mr. Brown in person to discuss transferring other Kiesz  
20 water rights to the Wheeler parcel. Mr. Brown told Mrs. Kiesz it was past the  
21

1 February 15, 2017 deadline to file a seasonal change application. Brown  
2 Testimony, Kiesz Testimony: FF 33-34.

- 3 • March 27, 2017- Mr. Brown called Mr. Fode and told him not to irrigate his  
4 property or the Kiesz parcel. Brown testimony; Ex. R-39: FF 35.
- 5 • May 16, 2017- Mr. Brown sent letters to Mrs. Kiesz and Mr. Sparks requesting  
6 information about water rights for their parcels noting that “you have planted  
7 potatoes and alfalfa” and [t]he property was wet and had been recently  
8 irrigated.” Ex. R-8. The letter was shared with Mr. Fode. Brown Testimony;  
9 Kiesz Testimony, Ex. AK-9, R-8: FF 37.
- 10 • May 22, 2017- Mr. Brown spoke with Mr. Sparks by phone confirming he had  
11 no water rights on the Sparks parcel. Brown Testimony; Ex. R-39; FF 38.
- 12 • June 1, 2017- Mr. Brown spoke by phone with Mrs. Kiesz who indicated that 80  
13 of the 415 acres of the Kiesz parcel had water rights. Brown Testimony; Kiesz  
14 Testimony; Ex. R-36, R-39; FF 39.
- 15 • June 21, 2017- Mrs. Kiesz met in person with Ecology’s Mr. Brown, Mr. Stoffel  
16 and Mr. Tolleson and discussed water rights to the Wheeler property. Kiesz  
17 Testimony, Brown Testimony; Ex. R-38; FF 41. During the meeting, Mrs. Kiesz  
18 asked to transfer some of her other water rights to the Wheeler property and  
19 Ecology said they could not do that because it was way past the deadline. Kiesz  
20 Testimony; FF 41.

- 1 • June 22, 2017- Mr. Brown spoke by phone with Mr. Fode explaining that no  
2 water rights covered the Fode and Kiesz parcels (except the 80 acres). Brown  
3 Testimony; Fode Testimony; Exs. R-37, R-39; FF 42.
- 4 • June 26, 2017- Ecology issued the cease and desist orders to Mr. Fode (Ex. R-9),  
5 Mrs. Kiesz and Mr. Sparks (Ex. R-10). FF 43.

6 Mr. Brown provided un rebutted testimony about the necessity for a February 15 deadline  
7 for the 100-150 seasonal change applications that he had to process before turning to his other  
8 duties of fieldwork, compliance, and enforcement as the irrigation season commenced. FF 5. The  
9 Board considers this evidence of Ecology’s legal framework for managing seasonal water rights  
10 transfers. In addition, Ecology has the authority to ensure compliance with water law in the state,  
11 as part of the “framework of the law”. RCW 90.03.605(1)(b). In other words, written technical  
12 assistance to help accomplish Mr. Fode’s purposes must be within the framework of the law.  
13 Ecology argues that in this case technical assistance means explaining to Mr. Fode and his  
14 landlords that the Wheeler property lacked adequate water right coverage and that they cannot  
15 withdraw and use public groundwater until they obtained legal authorization to do so. *Ecology*  
16 *Closing Statement, p. 4*. The Board agrees. Acquiring a valid water right is one means to  
17 accomplish Mr. Fode’s purpose to irrigate the Wheeler property within the framework of the law.  
18 Technical assistance does not mean Ecology was required to find alternatives for Mr. Fode after  
19 the February 15, 2017, deadline for a seasonal change application.

20 The Board has considered and finds Mrs. Kiesz’ testimony credible. Mrs. Kiesz added  
21 facts from her perspective to the meetings and telephone calls that Mr. Fode and Mr. Brown had

1 testified about in the 2019 hearing. FF 33, 37, 41, 43, 47, 48. Mrs. Kiesz testified that she had a  
2 good working relationship with Ecology and with Mr. Fode as evidenced by Mr. Brown meeting  
3 with Mrs. Kiesz in person and multiple phone conversations with Mr. Fode to discuss their  
4 irrigation goals. Ex. R-37; FF 33-34, 37, 39-41, 43, 47-48. Viewing the course of oral and  
5 written communications between Mr. Fode, Mrs. Kiesz, and Ecology, the Board concludes that  
6 Mrs. Kiesz’s two in-person meetings with Mr. Brown (as well as other Ecology staff), the  
7 request for information letters, and multiple phone calls constitute technical assistance, provided  
8 by Ecology to satisfy RCW 90.03.605(1)(b). The written technical assistance requirement is  
9 satisfied in this instance through the request for information letter. FF 37. Furthermore, Ecology  
10 provided additional technical assistance through multiple in-person meetings. FF 33-34, 41.

11 4.

12 In 2019, the Board concluded that Ecology gave sufficient technical assistance to the  
13 parties after issuance of the cease and desist orders. Mr. Fode is not an inexperienced water user.  
14 He is a longtime farmer in the OGS, as well as a former president and board member of the  
15 League which focuses on obtaining water to compensate for the declining aquifer in the OGS.  
16 From 2001-2009, Mr. Fode filed seasonal change requests with Ecology to obtain water rights to  
17 irrigate the Wheeler property. In 2019, the Board concluded that Mr. Fode’s assertion that he  
18 continued to irrigate after receiving the cease and desist orders on the assumption that he could  
19 “work something out” with Ecology was not consistent with his June 2, 2017, text message to  
20 Mrs. Kiesz that he would “turn off the circles” in case Mr. Brown drove by on his way to the  
21



1 ECBID meeting. Mr. Fode was well aware that Ecology considered his continued water use to  
2 be in violation of the law.

3 **Propriety and Reasonableness of Penalties (Remand Issues 2-7)**

4 5.

5 In an appeal of a penalty, the agency issuing the penalty has the burden of proving that a  
6 party is liable for a civil penalty. The agency must prove that the violation occurred and that the  
7 penalty was reasonable by a preponderance of evidence. *Energy Northwest v. Ecology*,  
8 PCHB No. 08- 052 (July 15, 2009); WAC 371-08-485(2).

9 6.

10 Ecology is authorized to issue civil penalties for non-compliance with regulatory orders  
11 issued under the Water Code, Chapter 90.03 RCW:

12 In determining the amount of a penalty to be levied, the department shall consider  
13 the seriousness of the violation, whether the violation is repeated or continuous  
14 after notice of the violation is given, and whether any damage has occurred to the  
15 health or property of other persons. Except as provided in RCW 43.05.060 through  
16 43.05.080 and 43.05.150, the department of ecology may levy civil penalties  
ranging from one hundred dollars to five thousand dollars per day for violation of  
any of the provisions of this chapter and chapters 43.83B, 90.22, and 90.44 RCW,  
and rules, permits, and similar documents and regulatory orders of the department  
of ecology adopted or issued pursuant to such chapters.

17 RCW 90.03.600. The Board considers three factors when it evaluates the reasonableness of a  
18 penalty: (1) the nature of the violation, (2) the prior history of the violator, and (3) the remedial  
19 actions taken by the penalized party. *Crestview Development, Inc. v. PSCAA*, PCHB No. 04-059  
20 (Dec. 23, 2004). The purpose of a civil penalty is to influence behavior, encourage compliance  
21 and deter future violations both by the violator and others in the same field. *Johnson v. Ecology*,

1 PCHB No. 17-008 at 9 (October 17, 2017); *Douma v. Ecology*, PCHB No. 00-019 at 9  
2 (March 30, 2005).

3 7.

4 The violation here is extremely serious. The Legislature has found that the OGS is in  
5 great jeopardy after decades of declining aquifer levels. RCW 90.44.520 [2006 c.168 § 1]. The  
6 OGSMP was created specifically to find replacement water to reduce the decline of the OGS  
7 aquifer. The Board is concerned that farmers in the OGS understand that if they are receiving  
8 surface water through a contract with an irrigation district, in this case ECBID, they cannot  
9 continue to use the groundwater from their wells. RCW 90.44.510. Most importantly, when  
10 Ecology issues an order requiring water use to cease and desist, the water use should stop  
11 immediately.

12 8.

13 Although Mr. Fode had irrigated these parcels since 2010 without filing a seasonal  
14 change application with Ecology, Mr. Fode's expectation that he could continue to irrigate after  
15 receiving a cease and desist order was not reasonable. Mr. Fode was well aware of how to file a  
16 seasonal change application as he had previously done so for several years. FF 21. Ecology has  
17 limited resources and Mr. Fode economically benefitted from Ecology's lack of oversight from  
18 2010 through 2016. FF 5-6, 24.

1 9.

2 Mr. Fode's prior history consisted of one<sup>6</sup> administrative order issued in May 2000 that  
3 did not result in a penalty. Mr. Fode installed a pivot system in anticipation of applying for a  
4 seasonal water right transfer for the next season. In 2001, Mr. Fode filed a seasonal change  
5 application that Ecology granted to obtain water for the relevant parcel.

6 10.

7 The only remedial action taken by Mr. Fode was to fallow some of the Schrag acreage he  
8 leased from Mrs. Kiesz. However, Mr. Fode never informed Ecology that any acreage was being  
9 fallowed. This information was first provided to Ecology during Mr. Fode's testimony at the  
10 2019 hearing. No seasonal change application was filed in 2017 for this water right. FF 42.  
11 Because Mrs. Kiesz owns the Schrag property, she would have had to approve any such  
12 application. While Mr. Fode's fallowing may have resulted in a reduction of water removed  
13 from the OGS, Mr. Fode failed to present sufficient evidence at the 2019 hearing for the Board to  
14 determine the amount of water saved or whether the water right was transferrable. On remand,  
15 Mr. Fode testified he used less energy and less water on the Schrag property than in earlier years.  
16 FF 29-30. Mr. Fode also presented evidence that the yields for the alfalfa and canola crops on the  
17 Schrag parcel were lower in 2017 than 2016 due to the fallowing. FF 30. The Board concludes  
18 that the evidence presented by Mr. Fode on remand does not alter the Board's earlier conclusion  
19 – the evidence is still insufficient for the Board to determine the amount of water saved or

20  
21 <sup>6</sup> A second administrative order, also issued in May 2000, was later rescinded by Ecology. The Board is not considering this violation as part of Mr. Fode's prior history.

1 whether the Schrag water right was transferable. In 2017, neither Mr. Fode nor Mrs. Kiesz  
2 submitted a seasonal water right change application to transfer water rights from the Schrag to  
3 Wheeler property. FF 41- 42.

4 11.

5 The Board appreciates that Ecology lacks the resources to visit every site for enforcement  
6 purposes. At the same time, in order to meet its burden of proof on a penalty, Ecology must have  
7 evidence of the violation. At the 2019 hearing, the evidence submitted by Ecology was the  
8 Odessa Field Book, photographs of the Wheeler property, and the testimony of Mr. Brown and  
9 Mr. Stoffel. Exs. R-1 and R-1A; FF 45.

10 12.

11 During the 2017 growing season, Ecology could not often visit the Wheeler property.  
12 Exs. AF-76, AF-77, AF-78; FF 45. Given the crops that Mr. Fode was able to harvest in 2017  
13 and the amount of irrigation those crops generally require, in 2019 the Board concluded it was  
14 more likely than not that irrigation was occurring on other days. *See* Ex. R-70. The Board has  
15 considered the supplemental evidence and finds there is no reason to change this finding.

16 Mr. Sparks and Mrs. Kiesz are the owners of the properties Mr. Fode leased. Two of the  
17 three penalties at issue were issued jointly to Mr. Fode and Mr. Sparks, and to Mr. Fode and  
18 Mrs. Kiesz. Shortly before the 2019 hearing, Ecology rescinded the penalties against Mr. Sparks  
19 and Mrs. Kiesz. As a result, Mr. Fode is solely liable for all three penalties. In 2019, Mr. Sparks  
20 and Mrs. Kiesz did not testify at hearing. On remand, Mrs. Kiesz testified about her  
21

1 communications with Mr. Fode and Ecology. FF 33-34, 37, 39-41, 43, 47-48. The Board  
2 concludes that Mr. Fode alone irrigated the Wheeler property without proper water rights.

3 13.

4 Ecology issued three penalties to Mr. Fode, totaling \$618,000, for illegal irrigation of the  
5 Wheeler property. In 2019, the Board gave consideration to, but was not bound by, Ecology's  
6 penalty calculation. In 2019, the Board concluded that Ecology proved that Mr. Fode illegally  
7 irrigated on all of the days that Ecology noted the pivots "on" or "wet." Ecology showed: (a)  
8 Pivot 4 was "on" or "wet" on 12 days, (b) Pivot 5 was "on" or "wet" on 15 days, and (c) Pivots  
9 1, 2, or 3 were "on" or "wet" on 25 days. Therefore, the pivots were "on" or "wet" for a total of  
10 52 days in 2017. FF 45. Mr. Fode did not rebut Ecology's evidence on this issue.

11 14.

12 Considering the penalty factors employed in our prior decisions and the criteria set forth  
13 in RCW 90.03.600, the Board in 2019 concluded that a penalty of \$5,000 per day was reasonable  
14 for each of the days that Ecology reported that a pivot was "on" or "wet." Applying that formula  
15 resulted in the following revised penalties: Penalty No. 15590 for the Sparks Parcel was  
16 \$60,000; Penalty No. 15591 for the Fode Parcel was \$75,000; Penalty No. 15592 for the Kiesz  
17 Parcel was \$125,000. Therefore, the Board concluded in 2019 the total penalty that should be  
18 imposed on Mr. Fode for irrigating land without a valid water right was \$260,000.



1 On remand, on Issues 2, 4 and 6 the Board concludes that Ecology properly issued  
2 Notices of Penalty Nos. 15590, 15591 and 15592 against Mr. Fode. On remand, on Issues 3, 5  
3 and 7 the Board concludes the penalties as calculated by the Board in 2019 were reasonable. On  
4 remand, the Board AFFIRMS the total penalty amount of \$260,000.

5 SO ORDERED this 16th day of November, 2023.

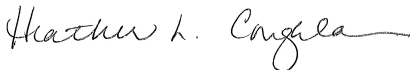
6  
7 **POLLUTION CONTROL HEARINGS BOARD**  
8 **Remand panel<sup>7</sup>**

9 

10 \_\_\_\_\_  
11 CAROLINA SUN-WIDROW, Chair

12 

13 \_\_\_\_\_  
14 MICHELLE GONZALEZ, Acting Chair

15 

16 \_\_\_\_\_  
17 HEATHER L. COUGHLAN (fka FRANCKS), Presiding  
18 Administrative Appeals Judge

19 This is a FINAL ORDER for purposes of appeal to Superior Court within 30 days. *See*  
20 Administrative Procedures Act (RCW 34.05.542) and RCW 43.21B.180.

21 You are being given the following notice as required by RCW 34.05.461(3): Any party  
may file a petition for reconsideration with the Board. A petition for reconsideration must be filed  
with the Board and served on all parties within ten days of mailing of the final decision. WAC 371-  
08-550.

<sup>7</sup> Board Member Wise retired from the Board before the Amended Findings of Fact, Conclusions of Law and Order  
on Remand was finalized and, therefore, did not participate in the issuance of the final decision in this matter. Board  
decisions are effective upon being signed by two or more Board members. RCW 43.21B.100; WAC 371-08-330(2).