

1  
2  
3  
4  
5  
6  
7 SUPERIOR COURT OF WASHINGTON  
FOR THE COUNTY OF THURSTON

8 H.C. BURKHOLDER,

No. 22-2-00706-34

9 Petitioner,

10 FINAL ORDER ON PETITION FOR  
JUDICIAL REVIEW

11 vs.

12 POLLUTION CONTROL HEARINGS  
13 BOARD; STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

14 Respondents.

15  
16 I. INTRODUCTION

17 Petitioner H.C. Burkholder ("Burkholder") wants to drill 14 groundwater wells on land he  
18 owns in the Methow River Basin as part of a planned residential development. The Department of  
19 Ecology ("Ecology") has placed restrictions on new appropriations of groundwater in the Methow  
20 River Basin and prospective water users are required to obtain its approval before drilling wells in  
21 the restricted area. WAC 173-548-50. Burkholder submitted 14 requests to drill wells in early  
22 2018, which Ecology denied on June 5, 2020. AR 7-37 and 458. Burkholder timely appealed the  
23 denials to the Pollution Control Hearings Board ("Board"), which denied Burkholder's cross-  
24 motion for summary judgment and granted Ecology's cross-motion for summary judgment on  
25 January 26, 2022. AR 1228-57. Following the Board's denial of his motion for reconsideration,  
26 AR 1347-49, Burkholder petitioned this Court for review of the Board's ruling on the

1 cross-motions for summary judgment.

2 Having considered the entire certified agency record and supplemental evidence submitted  
3 by the parties pursuant to the Court's order of November 4, 2022, the briefing of the parties and  
4 their oral argument heard on August 18, 2023, the Court affirms the Board's order granting  
5 Ecology's cross-motion for summary judgment. The Court also finds no merit to Burkholder's  
6 claims that the Board's decision-making process and procedures were unlawful or arbitrary and  
7 capricious.

## 8 II. FACTS

### 9 A. Washington water law and the Methow Rule.

10 Burkholder owns approximately 180 acres of land in Okanogan County, in the Methow  
11 River Basin. AR 3-4, 509, 513, 587, 663, and 1031. A significant portion of his property is situated  
12 in the Thompson Creek subarea. AR 3-4 and 367-68. Thompson Creek flows from the Cascade  
13 Mountains to the Methow River, just below the city of Winthrop. The headwaters area of  
14 Thompson Creek regularly runs dry during the summer and fall, and the lower portion runs low.  
15 AR 367-68. Burkholder plans to subdivide and develop single-family homes on part of his property  
16 in the Thompson Creek subarea, each of which would be served by its own well. AR 669-72.

17 Ecology is responsible for ensuring that water resources are utilized for the best interest of  
18 the public and is authorized to implement regulations consistent with this charge. RCW 90.54.040.  
19 It promulgated rules in 1976 that regulate waters within the Methow River Basin. Ch. 173-548  
20 WAC. Specifically, WAC 173-548-050 (the "Methow Rule") closed for consumptive  
21 appropriation 15 tributary streams and 17 lakes in the Methow River Basin, including Thompson  
22 Creek. The Methow Rule was amended in 1991 to close ground water hydraulically connected  
23 with those streams and lakes to further consumptive appropriation. Wash. St. Reg. 91-23-093  
24 (Order 91-27, filed Nov. 19, 1991, effective Dec. 20, 1991). As amended, the Methow Rule serves  
25 to prohibit new wells, including those that would otherwise be exempt from permit requirements  
26 under RCW 90.44.050 (exempting from permits wells for domestic use not exceeding

1 5,000 gallons per day) unless at least one of four specified exceptions is satisfied.

2 WAC 173-548-050. One of those exceptions is applicable in this case:

3 No wells shall be constructed for any purposes, including those exempt from  
4 permitting under RCW 90.44.050, unless one or more of the following conditions  
5 have been met and construction of the well has been approved in writing by the  
6 department prior to the beginning of well construction:

6 ....

7 (4) If the groundwater being sought for withdrawal has been determined by the  
8 department not to be hydraulically connected with surface waters listed as closed,  
9 the department may approve a withdrawal. When insufficient evidence is  
10 available to the department to make a determination that ground and surface  
11 waters are not hydraulically connected, the department shall not approve the  
12 withdrawal of groundwater unless the person proposing to withdraw the  
13 groundwater provides additional information sufficient for the department to  
14 determine that hydraulic continuity does not exist and that water is available.

12 WAC 173-548-050(4). In short, Ecology could potentially approve Burkholder's proposed wells  
13 if either it had previously determined that the wells draw from groundwater not hydraulically  
14 connected to Thompson Creek, or Burkholder provided information sufficient evidence for the  
15 Department to determine that the wells draw from groundwater not hydraulically connected to  
16 Thompson Creek and that water is available.

17 B. Hydrology reports.

18 There are a number of hydrology reports referenced by the parties throughout their  
19 correspondence and briefs. The significance and relevance of each report to Burkholder's proposed  
20 bedrock wells is contested by the parties.

21 1. 1991 Peterson and Larson Report.

22 The earliest report is the "Thompson Creek and Patterson Lake, Methow River Closed  
23 Tributary Report," authored by James Peterson and Arthur Larson in August 1991 ("1991 Peterson  
24 and Larson Report"). AR 1110-31. The purpose of the report was "to support the Ecology  
25 Permanent Rule Making process with substantive, verifiable information on the hydrogeologic  
26

1 conditions of the Thompson Creek and Patterson Lake Basins, with emphasis on the conditions of  
2 hydraulic continuity that apply there.” AR 1111. The authors concluded that

3 the glacial-fluvial sediments in the Thompson Creek and Patterson Lake basins  
4 are generally similar to those deposited in the Methow River Valley. We  
5 discovered no conditions that might isolate the ground water in these sediments  
6 from the two surface water bodies. If such conditions do exist, we believe them  
7 to be limited in spacial [sic] extent. We conclude that a high degree of hydraulic  
continuity exists between the ground water in the glacial-fluvial sediments and  
both Thompson Creek and Patterson Lake.

8 AR 1116.

9 The only reference to deeper, bedrock wells appears to relate to three wells in the Patterson  
10 Lake basin, not the Thompson Creek area, and the report notes that the higher yielding well of the  
11 three “is probably receiving water from the glacial-fluvial sediments through which it penetrates  
12 above the bedrock.” AR 1116. The 1991 Peterson and Larson Report does not conclude there is  
13 an absence of hydraulic continuity between bedrock wells and Thompson Creek.

14 2. 1996 Lenchek Well Report.

15 The record includes a one-page Ecology well drilling report prepared for landowner Tom  
16 Lenchek (“1996 Lenchek Well Report”). AR 600. The report is handwritten and apparently  
17 prepared by a well constructor on September 24, 1996. AR 600. Burkholder has estimated that the  
18 Lenchek well is about one mile from his proposed wells. AR 439. The report includes brief  
19 descriptions of the 12 strata between the surface and 305 feet deep. The report shows the presence  
20 of a layer of “hard black shale” between 40 and 100 feet below the surface, which Burkholder  
21 asserts acts as an aquiclude. Burkholder argues that Ecology would not have permitted the Lenchek  
22 well or permitted continued consumptive withdrawal from the well if Ecology did not agree that  
23 this aquiclude confirmed there was no hydraulic continuity present. Opening Br. Of Petitioner  
24 Burkholder (Op. Br.) at 6. However, Burkholder has also acknowledged that it is “impossible to  
25 know whether the geology under [his] land was the same as, or different from, the geology at the  
26 site of the Lenchek well, without drilling wells and determining the presence or absence of

1 aquicludes.” AR 536. The record contains no other documentation related to the Lenchek well or  
2 the associated one-page report.

3 3. 2005 PGG Report.

4 The Pacific Groundwater Group (PGG) was engaged by Ecology to investigate the  
5 hydrogeology of Burkholder’s property and produce a report (“2005 PGG Report”).<sup>1</sup> AR 472. The  
6 investigation was related to water right applications made by Burkholder for a portion of his  
7 property in the Upper Elbow Coulee area of the Methow Valley. AR 472. The report stated that  
8 this area is considered within the boundaries of the Thompson Creek Basin which, it noted, was  
9 closed to further consumptive appropriations, but that “[i]n response to [Burkholder’s] inquiries,  
10 Ecology performed an analysis that indicated the Upper Elbow Coulee may be an isolated basin  
11 from which the applicant could pursue water rights.” AR 475 (emphasis in original). The report  
12 further noted that “additional technical work would be required to demonstrate this isolation.”  
13 AR 475.

14 The 2005 PGG Report detailed what this additional technical work would need to address.  
15 It acknowledged that “[w]ells completed in bedrock in the Methow River Basin can produce  
16 sufficient water to meet a single-home domestic need, but in many cases this may require a well  
17 exposed to several hundred feet of bedrock...” AR 479. However, it also noted that the formations  
18 in the area “may be parted and fractured” and that “[d]epending on the depth of fracturing, bedrock  
19 beneath the site could provide a hydraulic connection to adjacent basins via deep flow (e.g., Twisp  
20 Basin) and/or via shallow flow (e.g., Thompson Creek Basin).” AR 479. The report recognized  
21 that groundwater might be hydraulically connected to the surface water but did not reach a  
22 firm conclusion:

23 The permeability of the bedrock will control the degree of hydraulic connection.  
24 For instance, if the upper 10-20 feet of the bedrock are relatively fractured, the  
25 shallow groundwater flow system may include flow through both unconsolidated  
26 sediments and shallow bedrock. In this case, the two units could be viewed as  
joined components of the same shallow groundwater flow system. The hydraulic

---

<sup>1</sup> Burkholder apparently covered the cost of the study under a cost reimbursement program. AR 472.

1 properties of both shallow and deeper bedrock will need to be considered as part  
2 of future hydrogeologic investigation.

3 AR 479.

4 The remainder of the report addressed many hydrogeologic issues in detail and summarized  
5 five scenarios for Burkholder's project and the technical issues his consultant would need to  
6 address. AR 480-501. It is not clear what light the 2005 PGG Report sheds on Burkholder's current  
7 well requests, which are primarily located in the Thompson Creek subarea. However, the report  
8 does suggest there is a possibility of hydraulic continuity between the groundwater available to  
9 Burkholder's property and closed surface waters.

10 4. 2018 Walker Report.

11 Ecology staff hydrogeologist Kurt Walker completed an "Update to Ecology's 1991  
12 Thompson Creek – Methow River Closed Tributary Report" on June 25, 2018 ("2018 Walker  
13 Report"). AR 461-67. The report noted that in 1991 Ecology had "assembled broad technical  
14 findings into a collection of small reports" (including the 1991 Peterson and Larson Report) but  
15 that these had "failed to fully describe the stream reach behavior and controls from the mouth of  
16 each tributary bedrock canyon to the confluence with the Methow River." AR 461. This report was  
17 Ecology's attempt to "provid[e] additional information in an effort to update the record and  
18 provide a more complete understanding of the hydraulic relationship between surface and  
19 groundwater in the Thompson Creek basin." AR 461. Specifically, the report addressed the "local  
20 hydrologic conditions and behavior in the lower Thompson Creek watershed primarily between  
21 the previously described restricted area and the Methow River." AR 461. A figure in the report  
22 shows the updated area located to the east and downgrade of the previously described area with  
23 some overlap. AR 461. The report explained that the 1991 Peterson and Larson Report found that  
24 groundwater within unconsolidated sediments outside the Methow River Valley were more likely  
25 than not in hydraulic continuity with the tributary stream but that "[g]roundwater within the  
26 bedrock units was generally not considered to be in hydraulic continuity with the stream" and that  
"[t]here is currently no effort to re-investigate these conclusions." AR 461. According to

1 John Kirk, an Ecology staff hydrogeologist, the 2018 Walker Report focused on areas downstream  
2 of Burkholder's property and is therefore not relevant to the hydrology of his proposed well sites.  
3 AR 368.<sup>2</sup>

4 C. Burkholder well permit applications.

5 Burkholder submitted 14 well authorization requests to Ecology in early 2018.  
6 AR 669-700.<sup>3</sup> All but one of the proposed wells is in the Thompson Creek subarea and subject to  
7 the Methow Rule and the other is in the Elbow Coulee area. AR 368.<sup>4</sup> A group of residents  
8 associated with the Pine Forest community adjoining Burkholder's property, learned of his  
9 proposal and engaged counsel to send a letter on March 5, 2018, to Ecology expressing their  
10 concerns about the wells. AR 422-25. The letter strongly opposed the well requests for several  
11 reasons, including that neither Ecology or Burkholder had demonstrated that there was no  
12 hydraulic continuity between the proposed wells and Thompson Creek. AR 423-24. Ecology also  
13 received a copy of an April 26, 2017, letter from the Confederated Tribes and Bands of the Yakama  
14 Nation ("Yakama Nation") to Okanogan County in advance of a public hearing regarding  
15 Burkholder's proposed development. This letter also challenged Burkholder's conclusions, drawn  
16 from the hydrology reports, that there was no hydraulic continuity between his proposed wells and  
17 Thompson Creek. AR 432-34.

18 After submitting his well requests, Burkholder frequently reached out to Ecology staff for  
19 updates. He sent an email on March 13, 2018, to Ecology's Well Construction Coordinator, Avery  
20 Richardson, expressing his desire to receive the well authorizations by Friday, March 23, 2018, in  
21 advance of a scheduled meeting of the Pine Forest board scheduled for the following weekend.  
22 AR 395-96. The email included a list of parcel numbers for each of the proposed wells. *Id.*

24 <sup>2</sup> The report adjusted the boundaries of the Thompson Creek restricted area to exclude a portion of Elbow Coulee.  
25 AR 464. According to Kirk, one of Burkholder's 14 proposed wells would be in the Elbow Coulee area, but it is not  
26 clear if this is due to the boundary adjustment. AR 368.

<sup>3</sup> Burkholder originally requested 12 wells in January 2018 but shortly thereafter requested two additional wells for a  
total of 14. AR 4.

<sup>4</sup> Burkholder does not argue that the Elbow Coulee well request should be treated differently than the others.

1 Richardson replied the same day, stating that the list provided by Burkholder would be useful “for  
2 double checking the parcel numbers on the authorizations going out to you.” AR 395. Although  
3 he cautioned Burkholder against presuming that Ecology saw “something positive about your  
4 proposal,” Richardson told Burkholder that he had a template letter for well authorizations so that  
5 it was “very simple to write” new authorization letters and assured him that he “will have the letters  
6 in hand before March 23, 2018.” AR 395.

7 Burkholder did not have the letters by March 23, 2018. On April 1, 2018, he sent Ecology  
8 a detailed response to the Pine Forest residents’ letter, refuting point-by-point their charges, and  
9 disputing the conclusions made in the Yakama Nation letter. AR 436-40. On April 3, 2018,  
10 Ecology’s Central Regional Officer Water Resources Program Section Manager, Trevor Hutton,  
11 emailed Burkholder to thank him for his patience while he was waiting for Ecology’s decisions.  
12 He explained that Ecology was working on related guidance for Okanogan County on the Methow  
13 Rule. AR 420.

14 It took about eight months for Ecology to deliver its guidance to Okanogan County. On  
15 December 4, 2018, Hutton sent a letter to Okanogan County’s Board of Commissioners explaining  
16 Ecology’s position regarding water availability in the upper reaches of tributaries closed to further  
17 consumptive appropriation under the Methow Rule. AR 442-43. Hutton’s letter explained that  
18 when the Methow Rule was amended in 1991, the “deeper fractured bedrock aquifers were not  
19 believed to be in direct hydraulic continuity with the closed tributaries,” and were therefore not  
20 closed to new appropriations. AR 442 (emphasis in original). Ecology had therefore allowed wells  
21 to be constructed into the bedrock aquifers even though there might be indirect hydraulic  
22 continuity between the bedrock aquifers and closed streams. AR 442.

23 The letter to Okanogan County went on to explain that two Washington Supreme Court  
24 decisions issued since the 1991 amendment had changed the legal landscape and contributed to  
25 Ecology’s more current interpretation of the Methow Rule. AR 442-43. The letter explained that  
26 the first of these decisions, *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68,



1 11 P.3d 726 (2000), held that applications for new water rights that impact a closed stream must  
2 be denied, even if the impact is de minimis. AR 442. It added that the second decision, *Swinomish*  
3 *Indian Tribal Community v. Dept. of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013), extended  
4 *Postema* to permit-exempt wells. AR 442. The letter explained that in Ecology's view, these  
5 decisions brought into question the legal availability of water in the bedrock aquifers of closed  
6 tributary basins because Ecology could not be certain there was not even indirect hydraulic  
7 continuity between the bedrock aquifers and closed streams:

8       Following these Court decisions, bedrock wells in the closed tributary basins  
9 present formidable challenges from the standpoint of demonstrating legal water  
10 availability. While these wells draw from an aquifer that may or may not be in  
11 direct hydraulic continuity with the closed tributary, these fractured bedrock  
12 systems capture water during certain times of the year that would otherwise have  
13 discharged to the closed tributary stream through near-surface runoff. For  
14 example, a well drilled into a bedrock fracture and pumped for domestic use  
draws down the water stored in that fracture system, creating a void in the aquifer.  
This void within the bedrock fracture captures water that ordinarily would have  
flowed into the closed tributary. This manifests as an impact to the tributary, i.e.,  
an indirect hydraulic connection to the closed stream.

15       This has not been our traditional understanding of "hydraulic connectivity" for  
16 purposes of the rule closure and Ecology's previous implementation of the rule.  
17 However, we now believe that under current standards, and under the lens of the  
aforementioned Court decisions, there is a question whether water is legally  
available in these tributaries.

18       The current rule requires that no wells be constructed in these closed tributaries  
19 unless Ecology has determined that the groundwater sought for withdrawal is not  
20 hydraulically connected with the closed surface water. While our best available  
21 science and history of allowing these wells has indicated that the bedrock fracture  
22 systems are likely not in direct hydraulic connection to the closed streams, we  
cannot conclude with certainty that these connections do not exist in some  
locations, or at some small scale.

23       Due to lack of certainty that water is legally available, Ecology will no longer  
24 authorize the construction of new wells in the bedrock aquifers of the closed  
25 tributary basins. Nor will we consider analysis of hydraulic continuity on requests  
26 for new wells in the closed tributary basins, unless a water user provides a valid  
way to mitigate for the use. Ecology will continue to allow for authorizations to

1 drill replacement wells for existing homes provided that the new wells are legally  
2 constructed into the same source aquifer as previously developed.

3 AR 443.

4 After receiving a copy of Ecology's letter to Okanogan County, Burkholder met with  
5 Hutton and Kirk on February 15, 2019. AR 533. Burkholder gave Hutton and Kirk a list of issues  
6 prior to the meeting. AR 533. In this document, Burkholder asserted that "there is no rational, non-  
7 discriminatory reason to deny [his] proposal" and requested that Ecology allow the well drilling  
8 immediately. AR 798. He continued, "[w]e can never know for certain that there is no hydraulic  
9 continuity between 'bedrock' aquifers and the near-surface aquifer without drilling all the wells  
10 and sealing them. Considerable time and effort is required to prepare for that drilling. We have the  
11 possibility that one particular opponent will try to delay the start of field work with frivolous legal  
12 action." AR 798.

13 Following his meeting, Burkholder felt that his request was not receiving Ecology's  
14 attention. AR 533. He scheduled a second meeting with Hutton and Kirk, but adding Okanogan  
15 County's Director of Planning and Development, Perry Huston. AR 533. On March 19, 2019, the  
16 day before their meeting, Hutton emailed Burkholder. AR 378. Hutton's email laid out two options  
17 to Burkholder: proceeding with his development using wells outside of the Thompson Creek  
18 restricted area or allowing Ecology to formally deny his well requests so that he could appeal the  
19 decision. AR 378. At the meeting, Burkholder proposed an alternative: that he be allowed to inject  
20 a tracer into a near-surface well aquifer and test to see if the tracer flowed into a downgradient  
21 well drilled into the bedrock aquifer. AR 534. Burkholder left the meeting thinking that the  
22 Ecology representatives "appeared to embrace" this proposal. AR 534.

23 After their second meeting, Hutton sent a letter to Burkholder on April 3, 2019. AR 453.  
24 The letter raised concerns about the overall scale of Burkholder's project<sup>5</sup> but expressed  
25 confidence that Burkholder would be able to reduce the scale of his proposal to a level that would  
26 not disqualify it for permit exemptions under RCW 90.44.050. AR 453. Hutton summarized three

---

<sup>5</sup> Burkholder had filed additional short plats with Okanogan County, for a total of 24 lots. AR 453.

1 options for moving forward proposed by Ecology: (1) locate the wells on portions of Burkholder's  
2 property outside the restricted areas; (2) drill the wells within the restricted areas but replace the  
3 water consumed with water from the unrestricted areas of his property; or (3) allow Ecology to  
4 formally deny the well requests to permit Burkholder to file an appeal. AR 453-54. The letter also  
5 expressed Ecology's skepticism that Burkholder's tracer testing proposal would yield proof that  
6 there was no hydraulic continuity between the bedrock aquifers and Thompson Creek:

7 [Y]ou have identified some proposed testing that would allow you to construct  
8 bedrock wells in the Thompson Creek Restricted Area without need for additional  
9 mitigation. This pathway is uncertain and it is entirely reasonable to expect that  
10 you may spend a lot of money on further testing without yielding sufficient proof  
11 to substantiate that your project will not impact Thompson Creek. However, if  
12 this is the route you elect, we recommend that you enlist the services of a  
13 consultant specializing in complex bedrock hydrogeology. We will require that  
14 prior to drilling the wells you request your consultant to provide us with a written  
15 assessment of the likelihood that they can, with a high degree of confidence,  
16 determine that a) the water in the bedrock fractures of the area where the wells  
17 will be drilled is not hydraulically connected to Thompson Creek AND b) that  
18 none of the water recharging the fractures feeding into those wells originates from  
19 within the Thompson Creek Basin or alternatively, if it does originate within the  
20 basin, that the water would never have made it to Thompson Creek regardless of  
21 the bedrock recharge conditions. As we talked about, Ecology believes that it will  
22 be very difficult to demonstrate that no water falling in the upland portion of  
23 Thompson Creek would end up in these bedrock wells. Regardless of whether  
24 continuity exists, the use of water in these areas is presumed to reduce water  
25 available that otherwise would have discharged to the closed tributary.

19 AR 453-54.

20 Burkholder made multiple efforts to engage Ecology staff throughout the remainder of  
21 2019. The record is replete with examples of emails and letters sent by Burkholder generally  
22 attempting to persuade Ecology to either issue his well requests or enter a joint agreement with  
23 Okanogan County on a tracer-based hydrologic testing program to show whether hydraulic  
24 continuity between the bedrock aquifers and Thompson Creek existed. This includes an email sent  
25 to Sage Park, Hutton's supervisor, on April 9, 2019. AR 806-08. The email expressed Burkholder's  
26 hope that Ecology, Okanogan County, and he could work together on his proposed tracer testing

1 program. AR 806. Burkholder also expressed his frustrations that Ecology had not already  
2 approved his well requests based on its earlier assumption that bedrock aquifers were not in  
3 hydraulic continuity with Thompson Creek. AR 806-07.

4 Park responded to Burkholder by letter on June 4, 2019, explaining that before Ecology  
5 could evaluate whether his project could proceed under the Methow Rule, he needed to either  
6 reduce the number of short plats he had on file with Okanogan County to a number that would  
7 qualify for the permit exemption or provide mitigation for the existing water right applications.  
8 AR 817-18. After receiving additional emails and correspondence from Burkholder, Park wrote  
9 him again on July 22, 2019, reiterating her earlier explanation and stating that Ecology does not  
10 have authority to enter a development agreement that Burkholder had drafted and delivered to her  
11 office. AR 835. Park also said she would be happy to agree to his meeting request but asked for a  
12 list of questions and agenda items in advance. AR 835.

13 Burkholder replied by letter on September 13, 2019, arguing that Ecology could in fact  
14 enter a development agreement. He asked Ecology to honor the agreement he believed had been  
15 reached in March 2018, before he would agree to reduce the number of short plats he had filed  
16 with Okanogan County. AR 837-40. The letter also included a list of five questions generally  
17 seeking the legal bases for several Ecology decisions made with respect to his well requests.  
18 AR 839. Having received no response to this letter, Burkholder again wrote Park on  
19 November 20, 2019, reiterating his request for a meeting, arguing that Ecology was empowered to  
20 authorize his well requests, and offering to mitigate the consumption of water from aquifers near  
21 the surface with water from aquifers in unrestricted portions of his property. AR 845-46.

22 Park responded to Burkholder on February 10, 2020, responding to his two prior letters.  
23 AR 884-87. She explained that before Ecology could consider his proposed development  
24 agreement, he would need to reduce the number of lots on file with the county, and “[s]ubmit a  
25 hydrologic report that fully explains the tracer test you keep referring to. We need details of how  
26 it would work before we can consider authorizing preliminary permits for testing. The hydrologic

1 report will also need to detail how water will be available – how will you mitigate the impact of  
2 the use of the wells on the closed stream.” AR 885. Park also suggested that as an alternative,  
3 Burkholder could develop his property outside the restricted area without a hydrologic report. AR  
4 885. Park also answered Burkholder’s five questions but suggested that a meeting would be most  
5 productive when Burkholder was ready to discuss the details of the hydrologic report. AR 885-87.

6 While waiting for Park’s letter, Burkholder also wrote to Ecology Director Laura Watson  
7 on February 10, 2020. AR 890. When Watson did not reply to that letter, he wrote her again on  
8 February 27, 2020, to request a joint meeting with Ecology and Okanogan County as a precursor  
9 to Ecology authorizing his 14 well requests. AR 922-24. Ecology did not respond to these letters.

10 Burkholder notified Ecology of his intent to drill 14 bedrock wells by email on  
11 May 14, 2020, and by mail on May 26, 2020. AR 45 and 47. Ecology formally denied his requests  
12 on June 5, 2020,<sup>6</sup> and gave him notice of his right to appeal its decision. AR 458-59. Burkholder  
13 appealed the denials to the Board on June 5, 2020. AR 1-47.

14 D. Litigation following well permit denial.

15 Following discovery, the parties filed cross-motions for summary judgment before the  
16 Board in August 2021. AR 327-57 and 516-1029. On November 3, 2021, the Board informed the  
17 parties by letter that it was striking the hearing set for December 2021 and would be issuing an  
18 order granting Ecology’s motion for summary judgment, denying Burkholder’s motion, and  
19 dismissing the appeal. The Board explained that the letter was being “provided as a courtesy to the  
20 parties so the parties need not devote further time and resources for hearing preparation” and was  
21 not the Board’s final decision and order. The Board asked for the parties’ patience until it issued  
22 an order. AR 1223.

23 The Board issued its final order on January 26, 2022. AR 1227-57. Finding that the material  
24 facts are not subject to reasonable dispute, it held that Burkholder failed to carry his burden of  
25

26 <sup>6</sup> There are two versions of Ecology’s denial letter in the record, one dated June 5, 2020, and the other dated June 9,  
2020. AR 1001-02 and AR 1003-04.

1 proving the denial of his well requests was contrary to law. AR 1243. It granted Ecology's cross-  
2 motion for summary judgment on five issues:

3 1. Whether Ecology failed to follow the provisions of the Washington Administrative  
4 Procedure Act;

5 2. Whether Ecology failed to follow the provisions of the Methow Rule as they existed  
6 at the time and/or introduced new requirements into the administration of the code without the  
7 approval of the Washington Legislature;

8 3. Whether Ecology failed to fulfill its statutory duty to serve the public interest;

9 4. Whether Ecology failed to follow Washington Law in any other respect as a result  
10 of new facts and logic revealed during the discovery process; and

11 5. Whether Ecology improperly denied Burkholder's request to drill wells pursuant to  
12 WAC 173-548-050(4).

13 The Board also noted that because the Washington Attorney General was not named as a  
14 respondent or served, the Board lacked jurisdiction to decide whether the Washington Attorney  
15 General failed its statutory duty to serve the public interest by not appointing legal counsel to  
16 represent the public interest in this proceeding. AR 1240-41 and 1256-57.<sup>7</sup>

17 Burkholder filed a petition for reconsideration by the Board on February 4, 2022.  
18 AR 1260-1327. Ecology filed an answer to the petition on February 18, 2022. AR 1333-45. The  
19 Board denied the petition for reconsideration on March 9, 2022. AR 1347-49. The Board noted  
20 that the petition reiterated the same arguments raised in Burkholder's briefing in support of his  
21 motion for summary judgment and found no grounds for reconsideration under Civil Rule 59(a).  
22 AR 1348-49. Burkholder filed a petition for review in this Court on April 4, 2022.

23  
24  
25 <sup>7</sup> In addition, the Board found that it had no jurisdiction or authority under RCW 43.21B.110 to review various other  
26 claims that Burkholder raised in his briefing, including that Ecology failed to comply with the federal  
Administrative Procedure Act, that there was a conspiracy to thwart his development plans, and that there was  
malfeasance by Assistant Attorney Generals and Ecology employees. AR 1242.

1 III. ISSUES

2 Burkholder's petition for review identifies eight issues (Op. Br. at 15-16), paraphrased for  
3 clarity here:

4 1. Whether Ecology withheld the approval letters for the drilling and testing of  
5 Burkholder's 14 proposed wells in violation of RCW 34.05.570(3) or the common law.

6 2. Whether Ecology attempted to coerce Burkholder into abandoning legally vested  
7 development alternatives as preconditions for approving his 14 proposed wells in violation of  
8 RCW 34.05.570(3) or RCW 90.54.130.

9 3. Whether Ecology denied Burkholder's requests for authorization to drill and test  
10 his 14 proposed wells in violation of RCW 34.05.570(3), RCW 90.03.005, or RCW 90.44.020.

11 4. Whether Ecology denied Burkholder's requests for authorization to drill and test  
12 his 14 proposed wells in violation of RCW 34.05.570(3), WAC 173-548-050(4) or  
13 5 U.S.C. § 706(2)(A).

14 5. Whether Ecology denied Burkholder's requests for authorization to drill and test  
15 his 14 proposed wells in violation of RCW 34.05.570(3), WAC 173-548-050(4) or  
16 5 U.S.C. § 706(2)(F).

17 6. Whether Ecology imposed a complete moratorium on the drilling of bedrock wells  
18 in the Methow Valley without the approval of the Washington State Legislature in violation of  
19 RCW 34.05.570(3) or ch. 173-548 WAC.

20 7. Whether the Board failed to consider the entire record before it informed the parties  
21 on November 3, 2021, of its intent to grant Ecology's motion for summary judgment in violation  
22 of RCW 34.05.570(3).

23 8. Whether the Board, when it ruled on the parties' cross-motions for summary  
24 judgment, failed to state specific reasons for rejecting Burkholder's facts and arguments in  
25 violation of RCW 34.05.570(1) and RCW 34.05.570(3).  
26

Ecology reframes these issues as two broader issues:

1. Whether the Board properly ruled on summary judgment that Burkholder's request to drill 14 wells must be denied under WAC 173-548-050.

2. Whether the Board's summary judgment decision was the result of an unlawful procedure or decision-making process, and if so, whether the Board's decision should be reversed.

No matter how they are framed and stated, the issues raise both threshold procedural and substantive questions.

#### IV. ANALYSIS

##### A. Standard of review.

The Court reviews the Board's orders under the Washington Administrative Procedure Act (APA), ch. 34.05 RCW. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004). Under the APA, judicial review is restricted to the administrative record before the Board. *Id.*; RCW 34.05.558.<sup>8</sup> The Court must review the Board's decision by applying the standards of review in RCW 34.05.570.

The Court may set aside the Board's order if it determines that

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

...

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

---

<sup>8</sup> The Court may receive additional evidence if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding defects in the decision-making process. RCW 34.05.562(1).



1 RCW 34.05.570(3). “The burden of demonstrating the invalidity of agency action is on the party  
2 asserting invalidity.” RCW 34.05.570(1)(a). The Court may only grant relief to the party seeking  
3 relief if it determines that the party has been “substantially prejudiced by the action complained  
4 of.” RCW 34.05.570(1)(d).

5 The Court reviews an agency’s legal determinations using the “error of law” standard,  
6 under RCW 34.05.570(3)(d), which permits it “to substitute our view of the law for that of the  
7 [agency’s]”. *Verizon Nw., Inc. v. Washington Employment Sec. Dep’t*, 164 Wn.2d 909, 915,  
8 194 P.3d 255 (2008). See also, *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings*  
9 *Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998) (“With respect to issues of law under  
10 RCW 34.05.570(3)(d), we essentially review such questions de novo.”). The Court “accord[s]  
11 deference to an agency interpretation of the law where the agency has specialized expertise in  
12 dealing with such issues, but [is] not bound by an agency’s interpretation of a statute.” *Redmond*,  
13 136 Wn.2d at 46. Arbitrary and capricious agency action means “willful and unreasoning action,  
14 taken without regard to or consideration of the facts and circumstances surrounding the action.  
15 Where there is room for two opinions, an action taken after due consideration is not arbitrary and  
16 capricious even though a reviewing court may believe it to be erroneous.” *Id.* at 46-47  
17 (citations omitted).

18 “[W]here the original administrative decision was on summary judgment, the reviewing  
19 court must overlay the APA standard of review with the summary judgment standard.” *Verizon*  
20 *Nw., Inc.*, 164 Wn.2d at 916. Under this standard, the Court will view the facts in the record in the  
21 light most favorable to the nonmoving party and affirm an order granting summary judgment only  
22 if the moving party was entitled to judgment as a matter of law. *Id.* “We evaluate the facts in the  
23 administrative record de novo and the law in light of the above articulated ‘error of law’  
24 standard.” *Id.*

25 Burkholder has suggested that even though he has identified eight issues for this Court’s  
26 review, “there are fourteen potential findings of unlawful conduct, any one of which would enable

1 him to drill and test his 14 bedrock wells. The Court needs to evaluate each one individually in  
2 order to reveal the true character of the regulatory abuse that was present.” He further suggests  
3 that the Court must make separate and distinct rulings for accepting or rejecting the facts and  
4 arguments supporting each of the “fourteen possible outcomes.” Reply Br. of Petitioner  
5 Burkholder (Reply Br.) at 4 (emphasis in original). At oral argument, Burkholder clarified that he  
6 reached the number 14 based on the different statutes cited within his eight issues. However, the  
7 Court is not bound by Burkholder’s parsing of the issues, and will evaluate each of the material  
8 issues identified by the parties necessary to a decision on this appeal.

9 B. The Board’s decision-making process as it considered the cross-motions for summary  
10 judgment was not arbitrary and capricious.

- 11 1. The Board did not fail to consider the entire record either before it  
12 informed the parties on November 3, 2021, of its intent to grant Ecology’s  
13 motion for summary judgment or before it issued its final order on January  
14 26, 2022. (Burkholder Issue #7)

15 Burkholder argues that the Board did not have his response to Ecology’s motion for  
16 summary judgment when it sent a letter to the parties on November 3, 2021, informing them that  
17 it would be issuing an order granting Ecology’s motion for summary judgment and dismissing  
18 Burkholder’s appeal. AR 1031-78. Burkholder initially sent the brief by email on  
19 September 2, 2021. AR 1079. The cover letter to this brief bears a date stamp applied by the Board  
20 showing it was received by mail on September 8, 2021, with a handwritten notation indicating it  
21 was also received by email on September 2, 2021. AR 1030. Burkholder argues that  
22 notwithstanding these date stamps, his brief did not become part of the record until  
23 January 20, 2022, long after the Board had signaled its intent to rule in favor of Ecology, and that  
24 this was either an unlawful procedure or decision-making process, or failure to follow a prescribed  
25 procedure under RCW 24.05.570(3)(c). Op. Br. at 24.

26 This is speculation. Burkholder believes that metadata produced by the Board proves that  
his response brief was not included in the record before the Board at the time it issued the letter

1 and later its final decision.<sup>9</sup> Burkholder Decl. (Dkt. 84) ¶ 5, Ex. I and Ex. Q. Specifically, he calls  
2 attention to the “Date Modified” field on a screenshot of Ecology’s directory containing documents  
3 related to the motion for summary judgment. The screenshot shows a folder titled “app response  
4 to MSJ” and presumably containing Burkholder’s Response Brief was last modified on January  
5 20, 2022. Burkholder Decl. (Dkt. 84) ¶ 5, Ex. I. From this, he concludes that his Response Brief  
6 did not enter the record until January 20, 2022. Burkholder Decl. (Dkt. 84) ¶ 5, Ex. Q. In response,  
7 the Board has submitted declarations from the Executive Director of the Environmental and Land  
8 Use Hearings Office (the umbrella agency that performs administrative work for the Board)  
9 confirming that Burkholder’s response brief was received and reviewed by the Board before its  
10 November 3, 2021, letter and again before its January 26, 2022, order. Soliz Decl. (Dkt. 97),  
11 ¶¶ 9 and 13, Attach. E. That decision included Burkholder’s response brief in its list of documents  
12 considered by the Board. AR 1230. The Board also cited his brief several times in its decision. AR  
13 1246, 1248, 1252, and 1256. This provides additional evidence that it was included in the record  
14 before the Board as well as considered by the Board in making its decision.

15 Even if the Court was to find Burkholder’s version of the facts correct, the Board’s  
16 November 3, 2021, letter expressly stated that it was not its final decision and order. AR 1223.  
17 Under RCW 43.218.100, the letter could not have been a final decision because it had no findings  
18 of fact and was not signed by two members of the Board. Burkholder alleges that his response  
19 brief did not enter the record until January 20, 2022, but the Board’s decision was issued on  
20 January 26, 2022, six days after he alleges his brief entered the record. AR 1227. As noted above,  
21 the Board’s decision specifically referenced Burkholder’s response brief. Even if these facts are  
22 viewed in the light most favorable to Burkholder, he has not shown that he was substantially  
23 prejudiced by the alleged delay in reviewing his brief. *Alpha Kappa Lambda Fraternity v.*  
24

---

25 <sup>9</sup> The Court granted Burkholder’s motion to supplement the record, and the record was supplemental with the  
26 Declaration of H.C. Burkholder in Support of Motion Requesting Supplementation of the Record, (“Burkholder  
Decl.”) (Dkt. 84). The Court also ordered that the Declaration of Dominga Soliz in Support of Board’s Response to  
Plaintiff’s Second Motion for Court-Required Correction of Record and Request to Show Cause (“Soliz Decl.”)  
(Dkt. 97) be added to the record. Order Granting Supplementation of Record (Nov. 4, 2022) (Dkt. 95).

1 *Washington State Univ.*, 152 Wn. App. 401, 414, 216 P.3d 451 (2009) (court may grant relief from  
2 procedural error only if petitioner shows that agency did not follow its own procedures and they  
3 were substantially prejudiced by the action complained of).

4 2. The Board did not fail to state specific reasons for rejecting Burkholder's facts and  
5 arguments. (Burkholder Issue #8)

6 Burkholder argues that the Board's final order does not contain separate and distinct rulings  
7 on each material issue on which it based its decision in violation of RCW 34.05.570(1)(c). "[T]hat  
8 failure led to the presence of reasons for granting Ecology's Motion that were contradicted by the  
9 content of Dr. Burkholder's Motion...." Op. Br. at 25. This statutory requirement applies to judicial  
10 review of agency action, not to the Board's decision-making process. See RCW 34.05.510  
11 ("[Ch. 34.05 RCW] establishes the exclusive means of judicial review of agency action....").  
12 Nevertheless, RCW 43.21B.100 requires the Board to "make findings of fact and prepare a written  
13 decision in each case decided by it" and WAC 371-08-535 requires the Board's final decision and  
14 order to "contain findings and conclusions as to each contested issue of fact and law material to  
15 the disposition of the matter." There is no express requirement that the Board make separate and  
16 distinct rulings on each material issue. It is also obvious that interested parties will frequently  
17 disagree over which issues are material to a case. The Board may have to decide that some disputes  
18 do not concern material issues and do not bear extensive discussion. Regardless, the Court finds  
19 that the Board's written final decision and order includes findings of fact and conclusions that  
20 adequately address every material issue.

21 The Board identified seven legal issues at a prehearing conference, including five proposed  
22 by Burkholder. AR 118-19. Ecology withdrew one of its issues and the Board addressed each of  
23 the remaining six issues in its 30-page decision and order on the cross-motions for summary  
24 judgment. AR 1240-41. It dismissed one issue for lack of jurisdiction and specifically ruled in  
25 Ecology's favor on the cross-motions as to five other issues. AR 1257. Its decision is thorough,  
26 detailed and fully explained. Burkholder does not identify any specific issues that were not  
adequately addressed in the Board's decision but appears to disagree with the Board's presentation

1 of the facts and conclusions it draws from those facts. Op. Br. at 25. He clearly disagrees with the  
2 outcome but has not shown that the Board's written order and decision violates RCW 34.05.570  
3 (which does not apply to the Board), RCW 43.21B.100, or WAC 371-08-535.

4 C. Ecology was entitled to judgment as a matter of law and the Board did not err in granting  
5 its motion for summary judgment.

6 With respect to this Court's review of the Board's summary judgment order, the Court  
7 must view the facts in the light most favorable to Burkholder and may affirm the order only if it  
8 finds that Ecology was entitled to judgment as a matter of law. *Verizon Nw., Inc.*, 164 Wn.2d at  
9 916. However, Burkholder has the burden of demonstrating that Ecology's actions were invalid.  
10 RCW 34.05.570(1)(a). Because Burkholder cannot show from the facts in the record that  
11 Ecology's actions were invalid, Ecology is entitled to summary judgment as a matter of law.

12 1. Ecology did not initially approve Burkholder's well requests and subsequently  
13 unlawfully withhold the approval letters. (Burkholder Issue #1)

14 Burkholder argues that Ecology approved his 14 well requests on March 13, 2018, when  
15 Richardson's email said Burkholder would have his authorization letters "in hand before March  
16 23, 2018." AR 395. This approval, Burkholder argues, was consistent with Ecology's application  
17 of the Methow Rule at that time and within Richardson's authority. Op. Br. at 18-19.

18 Burkholder gives far too much import to Richardson's email. It is evident from the email  
19 exchange between Burkholder and Richardson that both understood approval could not be  
20 conveyed in an email and formal authorization letters would need to be issued before any Ecology  
21 action would be deemed final. AR 395-96. At most, the email indicated that those authorization  
22 letters would be forthcoming. The email did not contain any analysis of whether the well requests  
23 satisfied WAC 173-548-050 (4). Burkholder further argues that a subsequent email from Hutton  
24 on April 3, 2018, confirmed that there were no issues with his well requests and did nothing to  
25 contradict Richardson's approval. Op. Br. at 19; AR 420. In fact, Hutton's email acknowledged  
26 that Burkholder was waiting for Ecology's decisions and thanked him for his patience. Hutton

1 explained that the decision-making process was taking longer than he had originally thought, due  
2 in part to the guidance Ecology was preparing for Okanogan County on the Methow Rule. The  
3 email closed with Hutton's hope that "we can get you something soon" and assurance that he  
4 would keep Burkholder apprised of their progress. AR 420. Hutton's email could not be clearer  
5 that Ecology had not issued a final decision on Burkholder's well requests ("I realize you've been  
6 waiting for our decisions...."). AR 420. These emails cannot be read, separately or together, as  
7 Ecology's approval of Burkholder's well requests.

8 Even if Richardson's email could generously be read as granting Burkholder's well  
9 requests, Richardson did not have authority to issue such approvals. Well Construction  
10 Coordinators, like Richardson, are classified as "field and enforcement staff" and do not have  
11 authority to make binding decisions for Ecology. AR 363. Burkholder argues that Ecology did not  
12 have a written "express-approval" requirement that would have prevented Richardson from  
13 approving well requests. Op. Br. at 19. However, Ecology's Signature and Authority Matrix shows  
14 specifically that field and enforcement staff do not have authority to approve well drilling licenses.  
15 AR 414-15.<sup>10</sup> Even viewing the facts in the light most favorable to Burkholder, there is not support  
16 in the record for his assertion that Richardson had authority to approve his well requests or that  
17 Ecology violated RCW 34.05.570(3) in deciding not to issue authorization letters following  
18 Richardson's email.<sup>11</sup>

---

20 <sup>10</sup> Burkholder argues that the matrix does not require express approval for an Ecology-licensed company to drill  
21 wells, only if the applicant seeks to drill their own wells. Op. Br. at 8. There is no support for this assertion in the  
22 record.

23 <sup>11</sup> Burkholder alternatively argues that Ecology's decision not to issue authorization letters violates the common law.  
24 He cites no caselaw or other authority in support of this argument but states that the "[c]ommon law is based on  
25 common sense, not statute." Reply Br. at 6 (emphasis in original). This is an oversimplification. The common law  
26 applies "so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of  
Washington nor incompatible with the institutions and condition of society in this state." RCW 4.04.010. To the  
extent common law is inconsistent with a statute, the statute controls. *State ex rel. Madden v. Pub. Util. Dist. No. 1*  
*of Douglas Cnty.*, 83 Wn.2d 219, 221-22, 517 P.2d 585 (1973). Our Supreme Court determines the common law and  
lower courts are bound by its precedents. *McGinn v. N. Coast Stevedoring Co.*, 149 Wash. 1, 12, 270 P. 113 (1928).  
In other words, the common law is embodied in caselaw and applies only where there is not an applicable statute. An  
appeal to this Court's common sense is not a substitute for citation to authority showing what the applicable  
common law is and how it applies to the facts.

2. Ecology did not unlawfully deny Burkholder's well requests.

a. Ecology's decision does not unlawfully fail to obtain the maximum net benefits from the use of the state's waters. (Burkholder Issues # 3 and 4)

Burkholder points to RCW 90.03.005 and ch. 90.44 RCW as requiring Ecology to maximize the net benefits from the state's groundwaters. He argues that approving his well requests would promote this goal by extracting "deep bedrock water" not in hydraulic continuity with closed streams and tributaries and eventually introducing those waters into the "near-surface aquifer" where it can be used on its journey to the Methow River. He further argues that Ecology's failure to approve his well request therefore does not obtain the maximum net benefits from the use of the state's public waters and is therefore an erroneous interpretation or application of the law or an arbitrary or capricious decision, in violation of RCW 34.05.570. Op. Br. at 21.

RCW 90.03.005 does not require Ecology to approve Burkholder's well requests. RCW 90.03.005 provides:

It is the policy of the state to promote the use of the public waters in a fashion which provides for obtaining maximum net benefits arising from both diversionary uses of the state's public waters and the retention of waters within streams and lakes in sufficient quantity and quality to protect instream and natural values and rights. Consistent with this policy, the state supports economically feasible and environmentally sound development of physical facilities through the concerted efforts of the state with the United States, public corporations, Indian tribes, or other public or private entities. Further, based on the tenet of water law which precludes wasteful practices in the exercise of rights to the use of waters, the department of ecology shall reduce these practices to the maximum extent practicable, taking into account sound principles of water management, the benefits and costs of improved water use efficiency, and the most effective use of public and private funds, and, when appropriate, to work to that end in concert with the agencies of the United States and other public and private entities.

Washington courts have held that the "maximum net benefits" language in both RCW 90.03.005 and RCW 90.54.020 "instructs [Ecology] how to generally exercise its discretion and expertise in water management" but "does not impose a formal test." *Bassett v. Dep't of Ecology*, 8 Wn. App. 2d 284, 305, 438 P.3d 563 (2019). This is a statement of policy which does not create enforceable rights and duties. *Id.* at 303. Ecology was not required to take any specific

1 action with respect to the evaluation of Burkholder's well requests, such as specific measurements  
2 on the impact of the proposed wells on closed streams and tributaries.

3 Even if RCW 90.03.005 and RCW 90.54.020 required Ecology to measure whether  
4 Burkholder's proposed wells would result in the maximum net benefits, it was not an abuse of  
5 discretion for Ecology to deny the well requests. Burkholder's argument is premised upon his  
6 conclusion that the proposed wells would draw from bedrock aquifers not in hydraulic continuity  
7 with closed streams and tributaries. Op. Br. at 20-21. This is not a foregone conclusion, as  
8 discussed at greater length below.

9 b. Ecology's decision does not violate the Washington Administrative  
10 Procedure Act. (Burkholder Issues #4 and 5)

11 Burkholder argues that the Court is required to interpret provisions of the Washington  
12 Administrative Procedure Act, ch. 34.05 RCW, in a manner consistent with the Federal  
13 Administrative Procedure Act, 29 U.S.C. §§ 551-559. He then points to "Abuse-of-Discretion  
14 Reversal Basis 'A'" and "Reversal Basis 'F'" of the Federal Administrative Procedure Act. These  
15 provisions do not appear to be part of the Federal Administrative Procedure Act or federal  
16 regulations. They appear to be taken from a treatise that is either summarized or quoted in an  
17 appendix to Burkholder's brief.<sup>12</sup> Op. Br. at 18. The Federal Administrative Procedure Act is not  
18 binding authority in this case, and it is not clear what persuasive weight, if any, the Court should  
19 give this apparently secondary authority cited by Burkholder.

20 The Court evaluates Burkholder's claim that Ecology arbitrarily or capriciously: (1) either  
21 "relied on factors that may not be taken into account under, or ignored factors that must be taken  
22 into account under" WAC 173-548-050(4), Op. Br. at 21-22, and (2) took action "without  
23 legitimate reason and adequate explanation, inconsistent with prior agency policies or precedents."  
24 Op. Br. at 22-23.

25  
26  

---

<sup>12</sup> Burkholder appears to cite the *Washington Administrative Law Practice Manual*. Op. Br. at 18, Appx. 3 and 4.



1 Burkholder asserts:

2 WAC 173-548-050(4) directs Ecology's management of bedrock wells and states  
3 that when insufficient evidence is available to determine that ground and surface  
4 waters are not hydraulically connected, it shall not approve the withdrawal of  
5 ground water from such wells unless the applicant provides additional  
6 information sufficient to determine that hydraulic continuity does not exist. Thus,  
7 that administrative code gives applicants the right to drill and test wells in order  
8 to provide the "additional information" necessary to confirm the absence of  
9 hydraulic continuity between the bedrock aquifers and near-surface aquifers  
10 under their land.

11 Op. Br. at 22 and 22-23 (passage repeated; emphasis in original). This is incorrect.  
12 WAC 173-548-050 does not give applicants a right to drill and test wells.

13 Ecology asked Burkholder for additional information about his proposed tracer-based  
14 hydrologic test. AR 885. It also recommended that he hire a qualified expert to provide a written  
15 assessment of the hydraulic continuity of his proposed wells. AR 453-54. Burkholder has taken  
16 the position that he cannot provide additional information without being allowed to drill test wells.  
17 This ignores the plain language of WAC 173-548-050 which states that "[n]o wells shall be  
18 constructed for any purposes" unless Ecology has sufficient evidence to determine there is no  
19 hydraulic continuity with closed surface waters. There is not an exception to permit test wells on  
20 the basis that the present evidence is insufficient to make a determination.<sup>13</sup> Nor is this a case of  
21 Ecology choosing to ignore Burkholder's proposal. Rather, as it explained to Burkholder, it needed  
22 more information about the details of the proposed tracer-based testing plan before it could  
23 authorize drilling wells. Specifically, it requested that a consultant specializing in complex bedrock  
24 hydrogeology provide a written assessment of the likelihood that the tracer-based testing plan  
25 would allow them to determine, "with a high degree of confidence," that there is no hydraulic  
26 continuity between the proposed wells and Thompson Creek. AR 454. Burkholder declined to  
engage a consultant for that purpose.

---

<sup>13</sup> Ecology notes that Burkholder could have alternatively applied for a preliminary permit under RCW 90.03.290(2)(a). Respondent Department of Ecology's Responding Br. at 17.

1 To the extent that Ecology's actions could be seen as inconsistent with its prior policies or  
2 precedents, it has provided legitimate reasons and adequate explanations. Burkholder claims that  
3 Ecology had previously determined that bedrock wells in the Thompson Creek area are not  
4 hydraulically connected to the closed Thompson Creek. The record does not reasonably support  
5 this assertion. Burkholder points to several hydrology reports, discussed above, as evidence that  
6 until it denied his well requests Ecology had concluded that there was no hydraulic continuity  
7 between bedrock aquifers and surface waters in the Thompson Creek area. The 1991 Peterson and  
8 Larson Report did not focus on bedrock wells in the Thompson Creek area and concluded that  
9 there was a "high degree" of hydraulic continuity between the groundwater in the glacial-fluvial  
10 sediments and Thompson Creek. AR 1116.

11 The 1996 Lenchek Well Report does not document any decision or conclusion by Ecology.  
12 Burkholder acknowledges that the Lenchek well is about one mile from his proposed wells and  
13 that it is impossible to know without drilling wells whether the geology of the Lenchek well site  
14 is the same as on his property. AR 439 and 536. Indeed, Ecology asserts that the shale bedrock at  
15 the Lenchek well site is different than the conglomerate under Burkholder's proposed well sites.  
16 AR 369. The 2005 PGG Report concluded that hydraulic continuity between closed surface waters  
17 and bedrock wells may exist in the Methow River Basin but does not directly address Burkholder's  
18 proposed well sites. AR 479.

19 The only study contemporaneous with Burkholder's well requests is the 2018 Walker  
20 Report, but it focused on areas downstream of Burkholder's proposed well sites. AR 368.  
21 Burkholder principally relies on two sentences within the following paragraph from the  
22 2018 Walker Report:

23 Among the key conclusions of the 1991 closed tributary reports, Ecology found  
24 that groundwater within the unconsolidated sediments outside the main Methow  
25 River Valley are, more likely than not, in hydraulic continuity with the tributary  
26 stream (Peterson and Larson 1991). Groundwater within the bedrock units was  
generally not considered to be in hydraulic continuity with the stream. There is  
currently no effort to re-investigate these conclusions. However, Ecology

1 recognizes the need to extend our understanding beyond the previously described  
2 areas to also include the lower most reaches of some closed streams.

3 AR 461 (emphasis added). Burkholder additionally argues that Hutton reaffirmed, in a  
4 March 19, 2019, email, that bedrock aquifers under his proposed well sites were not in hydraulic  
5 continuity with the near-surface aquifer. Op. Br. at 5. However, Hutton's complete statement was  
6 more equivocal:

7 I do not dispute the hydrogeologic analysis presented in the [2018 Walker  
8 Report], but that report alone is an incomplete picture of water management in  
9 the closed tributary basins. The December 4, 2018 letter to Okanogan County  
10 presents information on the legal and policy considerations on water availability  
11 that must also be taken into account beyond the technical rationale.... Ecology  
12 has an obligation to be protective of existing water rights holders on tributaries  
13 closed by rule to all further consumptive appropriation. We cannot conclude that  
14 new uses in these areas will not have an effect on these closed water bodies, even  
15 where that connection is small. It would be imprudent to allow new homeowners  
16 to construct their homes with this significant legal uncertainty regarding water  
17 availability.

18 AR 800.

19 Together, these reports and statements do not show that Ecology had concluded there is no  
20 hydraulic continuity between bedrock aquifers under Burkholder's proposed well sites and  
21 Thompson Creek. As noted above, this was not the subject of the 1991 Peterson and Larson Report.  
22 Nor was this a subject of the 2018 Walker Report which specifically cautioned that "additional  
23 investigation may be warranted depending on the degree of certainty needed and the information  
24 available" and that the report's "conclusions and interpretations should not be construed as a  
25 warranty of the subsurface conditions." AR 465. The report directed readers to other reports by  
26 Ecology and the U.S. Geologic Survey "for a more holistic description of the hydrogeology of the  
main Methow River Valley." AR 461 (emphasis added). As Ecology has noted, the 2018 Walker  
Report does not look at the impact to Thompson Creek through indirect connectivity where  
fractures subject to pumping in the bedrock under the proposed well sites would capture water  
from near-surface groundwater that may otherwise feed Thompson Creek. AR 368. There has not  
been a site-specific analysis of hydraulic continuity under Burkholder's proposed well sites.

1 In addition, Hutton's March 19, 2019, email referred to legal uncertainty about granting  
2 new well permits in the Thompson Creek area. Even though Ecology had once permitted bedrock  
3 wells in the Thompson Creek area, the legal landscape changed with a series of Washington  
4 Supreme Court cases beginning with the *Postema* decision in 2000.

5 *Postema* involved a number of consolidated cases arising from Ecology's denial of  
6 hundreds of groundwater appropriation permits because the groundwater sources were in hydraulic  
7 continuity with closed or restricted surface waters. *Postema*, 142 Wash.2d at 74. The appellant  
8 contended that even if some hydraulic continuity is present, there must be a direct and measurable  
9 impact on the surface water flow or levels before a groundwater application for consumptive use  
10 is denied. *Id.* at 94. Using standard stream measuring devices, a measurable effect would be about  
11 five percent of stream flow. *Id.* The Board ruled that as a matter of law Ecology could not approve  
12 a groundwater application for consumptive use where there is hydraulic continuity with surface  
13 water that has been closed by rule. *Id.* The Supreme Court agreed, holding that "a proposed  
14 withdrawal of groundwater from a closed stream or lake in hydraulic continuity must be denied if  
15 it is established factually that the withdrawal will have any effect on the flow or level of the surface  
16 water." *Id.* at 95 (emphasis added).

17 In 2013, the *Swinomish Indian Tribal Community* decision extended *Postema* to exempt  
18 domestic well permits, holding that Ecology could not adopt a rule that impaired restricted surface  
19 waters by reserving water for future domestic wells. *Swinomish Indian Tribal Community*,  
20 178 Wn.2d at 598-99.

21 These decisions compelled a shift in the standard used by Ecology to evaluate groundwater  
22 appropriation permits. Previously, it could grant permits if there was a de minimis impact on the  
23 closed surface water. After *Postema* and *Swinomish Indian Tribal Community*, it could no longer  
24 tolerate even a de minimis impact. AR 370 and 1106. Burkholder counters that these decisions  
25 deal with near-surface aquifers and did not involve bedrock aquifers. Reply Br. at 3. Burkholder  
26 does not provide a citation for this statement or explain how it matters. The Supreme Court's

1 holdings are not so narrow. The point is not that *Postema* and *Swinomish Indian Tribal Community*  
2 determined that hydraulic continuity exists in near-surface or bedrock wells, but that Ecology  
3 cannot accede to even a de minimis amount of hydraulic continuity between a well and a closed  
4 surface water.

5 Following *Postema* and *Swinomish Indian Tribal Community*, Ecology reasonably  
6 concluded that it could not approve a well request unless it had sufficient evidence of no hydraulic  
7 continuity with closed surface waters. As discussed above, Ecology had never taken the position  
8 or established a precedent that there is an absence of hydraulic continuity between bedrock aquifers  
9 and Burkholder's proposed well sites. Rather, it assumed that such hydraulic continuity was, at  
10 most, minimal. There is now a legitimate reason for Ecology to question whether it has sufficient  
11 evidence to determine that there is no hydraulic continuity between bedrock aquifers and closed  
12 surface waters in the Thompson Creek area. Ecology did not arbitrarily and capriciously deny  
13 Burkholder's well requests. *State, Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 598,  
14 957 P.2d 1241 (1998) (Ecology's change from unlawful method of measuring water right to a  
15 lawful measure not arbitrary and capricious).

16 3. Ecology did not unlawfully attempt to coerce Burkholder into abandoning legally  
17 vested development rights. (Burkholder Issue #2)

18 Burkholder claims that Ecology attempted to coerce him into abandoning legally vested  
19 development alternatives as a precondition for the issuance of his 14 well requests. Op. Br. at 20.  
20 Burkholder explains that in June 2018 he filed a second set of short plats with Okanogan County.  
21 Op. Br. at 14. Ecology staff cautioned him that it appeared that he sought to develop a total of 24  
22 lots, which would make the project too large to qualify for the groundwater permit exemption in  
23 RCW 90.44.050 and effectively leave no viable course for drilling his 14 proposed wells or  
24 developing the lots. AR 802-03. Burkholder explains that he had only requested 14 wells and had  
25 filed the additional short plats as a hedge if Ecology did not authorize his preferred well requests.  
26 Op. Br. at 9-10.

1 Burkholder argues that Ecology's entreaties that he reduce the size of his development  
2 project and choose which lots to develop was unlawful coercion. He cites RCW 90.54.130, which  
3 permits Ecology to recommend land use management policy recommendations to state regulatory  
4 agencies, water systems, and local governments, including counties. This, he argues, limits  
5 Ecology's authority and prohibits it from attempting to invalidate his subdivision applications  
6 vested under RCW 58.17.033(1). He further argues that these violations are actionable under  
7 RCW 34.05.570(3)(b) and (i). Op. Br. at 21.

8 RCW 34.05.570(3)(b) permits a court to grant relief from an agency order if it determines  
9 that the order is outside the statutory authority or jurisdiction of the agency. RCW 34.05.570(3)(i)  
10 permits a court to grant relief from an order that is arbitrary and capricious. Both standards of  
11 review apply to an agency's orders. Burkholder complains that Ecology attempted to coerce him  
12 but there is no agency order forcing him to relinquish any vested development alternatives.  
13 RCW 90.54.130 does not restrict Ecology's authority to regulate public water resources such as it  
14 did when it denied his well requests on June 5, 2020. AR 458-59. There is not an order by either  
15 Ecology or the Board affecting any vested development alternatives and RCW 34.05.570 is  
16 inapplicable as a matter of law.

17 Even if these statutes were applicable, the record does not support Burkholder's factual  
18 assertions. The record shows that Ecology recognized a statutory obstacle to Burkholder's well  
19 requests and attempted to help him identify and evaluate viable options for developing his 14 lots.  
20 It explained several times that the scope of his project must be limited to qualify for the  
21 groundwater permit exemption potentially available under RCW 90.44.050. AR 378, 448-51,  
22 453-54 and 835.

23 Most critically, and perhaps decisive to this issue, Ecology grounded its denial on the  
24 application of the Methow Rule and its determination that it lacked sufficient evidence that would  
25 allow it to determine that the groundwater at the well sites is not hydraulically connected to the  
26 closed surface water of Thompson Creek. AR 458-59. It did not base its determination on

1 Burkholder's decision to reject Ecology's recommendations that he reduce the scope of his project.  
2 There was no unlawful coercion on the part of Ecology.

3 4. Burkholder has not demonstrated that Ecology's application of the Methow Rule  
4 exceeded its authority. (Burkholder Issue #6)

5 Burkholder argues that by sending its letter to Okanogan County's Board of  
6 Commissioners on December 4, 2018, Ecology established a "universal, bedrock-well-drilling  
7 moratorium" in the Methow Valley that contradicts ch. 173-548 WAC. He further argues that this  
8 action is an erroneous interpretation or application of the law under RCW 34.05.570(3)(d) and  
9 arbitrary and capricious under RCW 34.05.570(3)(i), permitting this Court to grant his relief.  
10 Op. Br. at 23-24.

11 There is no contradiction between ch. 173-548 WAC and Ecology's interpretation and  
12 application of the Methow Rule in its letter to Okanogan County or to Burkholder's well requests.  
13 As applicable to this case, the Methow Rule principally states that no wells shall be permitted  
14 unless Ecology has determined that the groundwater sought for withdrawal is not hydraulically  
15 connected with closed surface waters, including Thompson Creek. "When insufficient evidence is  
16 available to [Ecology] to make a determination that ground and surface waters are not hydraulically  
17 connected, [Ecology] shall not approve the withdrawal of groundwater . . ."  
18 WAC 173-548-050(4) (emphasis added). Following the *Postema* and *Swinomish Indian Tribal*  
19 *Community* decisions, it was reasonable for Ecology to interpret and apply the Methow Rule to  
20 not allow even de minimis hydraulic continuity between ground water and closed surface waters  
21 in the Methow Valley Basin.

22 Burkholder misinterprets the Methow Rule. He argues that Ecology has no evidence that  
23 demonstrates the presence of hydraulic continuity between bedrock aquifers and surface waters in  
24 the Methow Valley. Even assuming for purposes of his appeal that this is true, it is irrelevant to  
25 the issue. The Methow Rule requires that before Ecology can grant Burkholder's well requests it  
26 must determine that there is an absence of hydraulic continuity. The rule does not require Ecology  
to prove the presence of hydraulic continuity. As explained above, Ecology has never determined

1 that the bedrock aquifers under Burkholder's proposed well sites are not in indirect or de minimis  
2 hydraulic continuity with the closed surface waters of Thompson Creek. Ecology summarized its  
3 position in its letter to Okanogan County: "While our best available science and history of allowing  
4 these wells has indicated that the bedrock fracture systems are likely not in direct hydraulic  
5 connection to the closed streams, we cannot conclude with certainty that these connections do not  
6 exist in some locations, or at some small scale." AR 443 (emphasis added). After *Postema* and  
7 *Swinomish Indian Tribal Community*, Ecology would have had to determine that there was no  
8 possibility of even de minimis hydraulic continuity. It clearly did not and therefore could not grant  
9 Burkholder's well requests.

10 This is not the end of the analysis. The record shows that Ecology never treated the Methow  
11 Rule as a moratorium on bedrock wells as alleged by Burkholder. Although there is "insufficient  
12 evidence" available to permit Ecology to determine that there is an absence of hydraulic continuity  
13 between the bedrock aquifers under Burkholder's proposed well sites and the closed Thompson  
14 Creek, Ecology may approve well drilling if "the person proposing to withdraw the groundwater  
15 provides additional information sufficient for [Ecology] to determine that hydraulic continuity  
16 does not exist and that water is available." WAC 173-548-050(4). In other words, Burkholder bears  
17 the burden of providing information that would allow Ecology to determine an absence of  
18 hydraulic continuity.

19 Ecology attempted multiple times to explain to Burkholder what information he could  
20 provide that would allow Ecology to determine whether there was no hydraulic continuity, both in  
21 person and in correspondence. AR 378, 448-51, 453-54, 835, 884-87. Burkholder proposed that  
22 he be allowed to perform a tracer-based hydrologic test of his own design, using his "unique  
23 expertise" as a Ph.D. in chemical engineering and research experience to serve as his own expert  
24 witness. AR 1028; Op. Br. at 13. Ecology understood the proposal to be that Burkholder would be  
25 allowed to drill his 14 wells and inject a tracer to determine whether the water made its way to  
26 Thompson Creek. AR 369. It asked Burkholder for additional information about his proposal



1 several times. AR 448-49, 453-54. Burkholder claims that Ecology unreasonably frustrated his  
2 efforts to perform his proposed test. Before Ecology would agree to consider a development  
3 agreement with Burkholder or permit drilling of test wells, Ecology required a hydrologic analysis  
4 prepared by a licensed hydrogeologist. "If you want to pursue developing and drilling in the  
5 restricted area then you will need to... [s]ubmit a hydrologic report that fully explains the tracer  
6 test you keep referring to. We need details of how it would work before we can consider  
7 authorizing preliminary permits for testing. The hydrologic report will also need to detail how  
8 water will be available – how you will mitigate the impact of the use of the wells on the closed  
9 stream." AR 884-85. Burkholder protests that "no one could possibly fully plan the testing without  
10 first having: 1) drilled the wells, 2) collected samples of both the geologic media and the  
11 groundwater, and 3) made sorption measurements of the interaction of potential tracers with those  
12 materials." Op. Br. at 14 (emphasis in original).

13 Even assuming that *Postema* and *Swinomish Indian Tribal Community* permitted the  
14 drilling of test wells that might prove to draw from aquifers hydraulically connected to closed  
15 surface waters, Burkholder did not provide an analysis by a licensed hydrogeologist. Ecology  
16 never rejected his proposal because it did not have a detailed analysis to evaluate. Such an analysis  
17 might have explained why limited test wells would be necessary or proposed an alternative to  
18 tracer-based testing. It was not unreasonable for Ecology to insist that a licensed hydrogeologist  
19 offer an opinion on Burkholder's proposed test. Having failed to satisfy Ecology's reasonable  
20 request, Burkholder's claims that Ecology arbitrarily and capriciously refused his proposal to  
21 perform a tracer-based test fail as a matter of law.

## 22 V. CONCLUSION AND ORDER

23 For the reasons explained above, the Board's decision-making process was not unlawful  
24 or arbitrary or capricious and even viewing all the evidence in the light most favorable to  
25 Burkholder, there is no material issue in dispute. Ecology complied with the Methow Rule and  
26 other applicable law and regulations and was entitled to summary judgment as a matter of law.

1           **NOW, THEREFORE** the Court orders that the Board's decision is hereby **AFFIRMED**.  
2 Burkholder's requested relief as set forth in his Petition for Review of Administrative Cross-  
3 Summary Judgment Order is hereby **DENIED**.

4  
5           DATED: November 14, 2023

6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
  
Judge Allyson Zipp