

# WRAC LEGAL UPDATE

## OCTOBER 21

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## TOPICS:

- New PCHB case: *Underwood vs. Ecology*
- Hearing report: *Wagner vs. Ecology*
- Appellate report: *Burkholder* and *Fode* appeals
- PCHB Report: SJ motions filed in *RAN Genl. P-ship* and *Vancour vs. Ecology* cases
- December hearings

# New PCHB case: *Underwood vs. Ecology*

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- Appeal of Ecology Cease and Desist Order and Request for Stay (Appeal Dated October 14<sup>th</sup>)
- On September 18<sup>th</sup> Ecology issued Cease and Desist Order to Underwood ordering them to cease and desist from construction of individual wells for domestic use to serve a plat that Franklin County approved in July.
- Order requires compliance with RCW 90.44.050 and RCW 18.104 (GW and well construction authorities)
- Can developer rely on group domestic exemption?
- Was Ecology required to file a LUPA appeal when FC approved the plat?

# Hearing report: *Wagner vs. Ecology*

## PCHB 22-054

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- Appeal of Ecology denial of application to appropriate SW from Five Mile Creek in Stevens County
- Four part test case: Is water available? Will it impair existing rights? Detriment to the public interest?
- Hearing October 7<sup>th</sup> to 10<sup>th</sup> in Tumwater
- HGs disagree on availability/impairment
- Fish experts disagree on whether appropriation will negatively impact fish (are there any fish?)
- Can the *PCHB* grant relief in the form of approving the application for less water?
- Can the PCHB remand to Ecology?
- Decision expected within 90 days!

# Appellate report: *Burkholder* and *Fode* appeals

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- **Burkholder vs. Ecology**: Appeal of PCHB SJ decision that affirmed Ecology's denial of Dr. Burkholder's application to drill several wells in a closed basin in the Methow Valley
- Did the PCHB properly grant SJ to Ecology (Applicant must show continuity with closed source)
- Did the PCHB engage in improper procedure? (Dr. Burkholder raises question as to whether record shows PCHB did not consider his SJ response brief before granting SJ to Ecology)
- Opening brief filed, response in progress
- **Fode vs. Ecology**: Cross-appeals by Ecology and PCHB of PCHB order that reduced a penalty against Mr. Fode for unauthorized irrigation in 2017 from 618K to 260K
- Should penalties be voided because Ecology did not provide proper technical assistance to Mr. Fode?
- Did the PCHB err when it concluded Ecology may only penalize for illegal irrigation for directly observed violations?
- Opening brief filed in September, response in progress. Then reply and then cross-reply

# PCHB Report: SJ motions filed in *RAN Genl. P-ship* and *Vancour vs. Ecology* cases

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- ***Ran General Partnership vs. Ecology, PCHB 23-040***: Appeal of Ecology Penalty Order, 12,000 for unauthorized irrigation of blueberries
- Ecology filed for Partial Summary Judgment on RAN's liability for the illegal irrigation. RAN has opposed
- Hearing scheduled for December 5-6
- ***Vancour vs. Ecology, PCHB 23-060***: Appeal by 3<sup>rd</sup> party (neighbors) of Ecology decision approving transfer of a water right to a GW well for irrigation of vineyards. Neighbors maintain that exercise of the right will impair their GW well
- Ecology filed for SJ, including a declaration of a HG that the drawdown of the neighboring well will be insignificant and will not impair the neighbor's exercise of their right. Response filed. Reply due.
- Hearing scheduled for December 17-19