No. 404498

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

RON FODE,
Appellant,

vs.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,
Respondent.

APPELLANT'S PETITION FOR REVIEW

LAW OFFICE OF THOMAS M. PORS
Thomas M. Pors, WSBA #17718
1700 7th Avenue, Suite 2100
Seattle, WA 98101
(206) 357-8570
Attorney for Appellant Ron Fode

TABLE OF CONTENTS

I. IDENTITY OF PETITIONER 1

II. DECISION BELOW 1

III. INTRODUCTION AND ISSUES PRESENTED FOR REVIEW 1

IV. STATEMENT OF THE CASE 4

A. Relevant Facts 5

B. Procedural History 8

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED 10

A. Interpretation of the sequence of enforcement statute, RCW 90.03.605(1)(b), is of substantial public importance.. 10

B. The Court of Appeals APA rule-making decision is inconsistent with Supreme Court precedent, and review is of substantial public importance 19

VI. CONCLUSION 255

VII. APPENDICES 277

A. Court of Appeals Opinion 277

B. Order Denying Reconsideration 27

C. Relevant Statutes / Constitutional Provisions 27

TABLE OF AUTHORITIES

CASES

Akrie v. Grant, 178 Wn. App. 506, 512, 315 P.3d 567 (2013) . 12
Failor's Pharmacy v. Department of Social & Health Services, 125 Wn.2d 488, 886 P.2d 147 (1994) 22, 25
Fode v. Dep't of Ecology, 22 Wn.App.2d 22, 509 P.3d 325 (2022) 8, 9, 12
Hillis v. Dept. of Ecology, 131 Wn.2d 373, 932 P.2d 139 (1997) ..... passim
Overton v. Econ. Assistance Auth., 96 Wn.2d 552, 555, 637 P.2d 652 (1981) 18
Simpson Tacoma Kraft Co. v. Department of Ecology, 119 Wn.2d 640, 649, 835 P.2d 1030 (1992) 20
State v. Brown, 142 Wn.2d 57, 62, 11 P.3d 818, 820 (2000).... 15
Wash. State Legis. v. Inslee, 198 Wn.2d 561, 567, 498 P.3d 496 (2021) 18

STATUTES

Laws of 2002, Ch. 329 12
RCW 34.05.010(16) 20
RCW 34.05.010(16)(c)..... 3, 21
RCW 34.05.570(2)(c)..... 20
RCW 90.03.390 ……20, 24
RCW 90.03.605 (1)(b)..... passim
RCW 90.54.010(2) 17

I. IDENTITY OF PETITIONER

The Petitioner is Ron Fode, who owns and operates Fode Farms, a family farm located in the Moses Lake area.

II. DECISION BELOW

On December 18, 2025, the Court of Appeals issued an unpublished opinion in *Fode v. Washington State Department of Ecology*, No. 404498, affirming the Amended Findings of Fact, Conclusions of Law and Decision of the Pollution Control Hearings Board ("PCHB") entered on November 16, 2023. The December 18, 2025 Opinion and the Court of Appeals' January 12, 2026 Order Denying Motion for Reconsideration are provided in the Appendix.[1]

III. INTRODUCTION AND ISSUES PRESENTED FOR REVIEW

This case presents issues of first impression and substantial public importance concerning the interpretation and

[1] The December 18 Opinion is cited below as "Op. at __" and the Clerks Papers are cited below in the same manner as in the Opinion, as "CP at __."

enforcement of Washington's water rights enforcement statutes and related rule-making requirements at issue when an administrative agency alters the public's rights and its own duties in respect to those laws.

As Justice Gregory J. Hobbs, Jr., longtime member of the Colorado Supreme Court, observed, "Water law is the most complex and technical body of law developed in the American West." After decades of experience with the complexity of the Washington Water Code and the importance of achieving both compliance and effective utilization of Washington's scarce water resources, the 2002 Legislature insisted that the Washington State Department of Ecology ("Ecology") follow a precise sequence of steps to educate and assist water users before resorting to statutory penalty authority. RCW 90.03.605.

The Court of Appeals allowed Ecology to evade two of this statute's requirements, shirking the judiciary's essential role in ensuring that statutory safeguards, particularly those protecting property rights and due process, are faithfully enforced. The Court of Appeals gave Ecology's informal remedy

to its own inconvenience — a so-called "office deadline" — the same status as a Washington statue barring the agency from assisting Appellant.

The challenged statutory interpretation of the Water Code here has state-wide implications, governing Ecology's regulation of all types of water uses. The related rule-making decision eliminates APA rulemaking requirements when administrative discretion is involved in "the enjoyment of benefits or privileges conferred by law" (RCW 34.05.010(16)(c)), thereby eviscerating APA protections.

The issues presented are:

1. Whether Ecology can meet its obligation to "offer information and technical assistance to the person in writing identifying one or more means to accomplish the person's purposes within the framework of the law" (RCW 90.03.605(1)(b)), when it rejects viable compliance options and orders a farmer to stop irrigating.

2. Whether an agency may alter (or foreclose) the procedural options available to a regulated party to obtain a

benefit or relief available under the law by informally adopting a deadline without first providing APA notice and comment procedures?

3. Whether Ecology's refusal to offer technical assistance based on its asserted "office deadline" put a means of technical assistance — a seasonal transfer of other water rights onto the disputed ground — outside the "framework of the law" for purposes of RCW 90.03.605(1)(b), or whether that informal "office deadline" was itself outside the framework of law as an agency rule not promulgated in compliance with the APA.

IV. STATEMENT OF THE CASE

The Legislature required the Department of Ecology to use its compliance staff and water masters to achieve voluntary compliance with water laws, using education, information, and technical assistance to accomplish water users' goals within the framework of the law *before* issuing enforcement orders or penalties. Water rights are complicated, especially where, as here, groundwater rights and canal rights using reclamation

water overlap, agricultural economics change from year to year, and seasonal water transfer transactions have become commonplace. Often there are solutions to compliance issues short of leveling hefty fines or requiring the fallowing of land, which is why the sequence of enforcement statute favors assistance before penalties.

The Court of Appeals gave Ecology free rein to ignore the sequence of enforcement statute in favor of penalizing a water user by using an informal office policy to circumvent an otherwise viable and legal compliance solution. The Court of Appeal's endorsement of Ecology's excuse for failing to assist the Appellant to comply with the law before penalizing him sets a dangerous precedent that could allow other state agencies to circumvent legislative conditions and mandates they find cumbersome or annoying. Contrary to Supreme Court precedent, it gives informal agency policies the impact of laws and formal regulations.

A. Relevant Facts

The enforcement and penalty orders in this case relate to several contiguous irrigated parcels near Moses Lake that were owned or leased by Fode in 2017 as part of his family business, Fode Farms, collectively known as the "Wheeler Property." Division III's unpublished opinion sets forth an incomplete statement of the facts, omitting key details relating to Fode's assignments of error in the PCHB's amended final decision.[2]

After Ecology's water master informed Fode in February 2017 that they would not approve his January 2017 seasonal change application, Fode prepared a plan to irrigate the Wheeler Property in compliance with the law by seasonally transferring other valid water rights in the same aquifer system that he leased from Michele Kiesz. Op. at 5; Tr. 105:23 to 106:17, CP 3022-23; Exs. AF-46 and AF-47, CP 1473-76. Fode and Kiesz proposed this seasonal transfer several times to Ecology from March through July 2017, but Ecology refused to accept or process it

[2] The facts cited in this Petition were also cited in Fode's appellate briefs. Appellant requests that the Court of Appeals make the appellate briefs and Clerks Papers available to the Supreme Court for its review of this Petition.

because it was past Ecology's February 15 "office deadline" for seasonal change applications. Tr. 112:9 to 113:14, CP 3029-30; Tr. 44:23 to 50:20, CP 2961-67. Ecology admitted in testimony below that its February 15 deadline was not hard and fast and was not a formally adopted rule or departmental policy or an action taken pursuant to a statute. Tr. 63:1-2, CP 2323; Tr.240:25 to 241:15, CP 2501-02.

Ecology also admitted in testimony that other Ecology water masters and regional offices have been patient with years of technical assistance to water users and promoted water right transfers to achieve compliance with the Water Code. Tr. 264:10 to 271:19, CP 2525-32. Exs. AF 87-90, CP 1553-61. But in Fode's case, Ecology used its office policy as an excuse to refuse to assist him with a seasonal transfer and eliminated all compliance options except one -- to "shut off the water." When asked why written technical assistance complying with the statute was not offered to Mr. Fode, Ecology's regional Water Resources Program manager testified, "That's just something we didn't do." Tr. 394:5-23, CP 2655.

Ecology issued cease and desist orders to Fode and his lessors on June 26, 2017. Op. at 6. Believing Ecology's enforcement orders to be invalid, Fode appealed them to the PCHB and continued to irrigate the Wheeler Property. Op. at 6-7.

B. Procedural History

Fode filed timely appeals of Ecology's enforcement orders in August 2017, but they were improperly dismissed by the PCHB on timeliness grounds. *See Fode v. Dep't of Ecology*, 22 Wn.App.2d 22, 509 P.3d 325 (2022). While Fode's successful appeal of the PCHB's timeliness ruling was still pending in Grant County Superior Court, Ecology issued penalty orders in December 2017 which were also timely appealed by Fode to the PCHB. After the PCHB denied Fode's motion to stay the penalty orders pending the enforcement order appeal in superior court, it held a three-day hearing in March 2019. The PCHB dismissed some of the violations for lack of evidence but upheld other penalties after ruling that Fode was barred by res judicata

(through its dismissal of Fode's appeal of the enforcement orders) from raising the defense that Ecology's refusal to offer mandatory technical assistance violated the sequence of enforcement statute and thereby foreclosed Ecology's authority to levy penalties.

The Court of Appeals upheld Fode's timeliness appeal in a published decision, *Fode v Dep't of Ecology, id.*, ruling that Fode was not barred by res judicata from raising the technical assistance defense. By agreement of the parties, the superior court ordered a remand of the penalty order appeals to the PCHB for additional evidence on Fode's technical assistance defense. Op. at 9. Following a remand hearing in June 2023, the PCHB revised but largely affirmed its earlier decision which both Fode and Ecology appealed. In May 2024, the superior court granted the parties' joint motion to certify the matter for direct review by the Court of Appeals. On December 18, 2025, the Court of Appeals issued its unpublished opinion denying both parties'

appeals and then denied Fode's motion for reconsideration on January 12, 2026.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Interpretation of the sequence of enforcement statute, RCW 90.03.605 (1)(b), is of substantial public importance.

This is the first appellate decision interpreting the sequence of enforcement statute and the scope of its technical assistance requirement prior to the issuance of enforcement orders or penalties, therefore it will guide Ecology's ongoing enforcement efforts. The compliance and enforcement issues presented here affect all water users statewide, including agricultural irrigators, municipal water systems, and industrial water users. Thus, the interpretation of this statute impacts a wide variety of business decisions, planning, and financial investments surrounding the beneficial use of water.

Water uses are both closely regulated and constantly subject to modification consistent with economic and population changes, new technology, and climate challenges. The

complexity of regulation gives rise to ongoing compliance issues and the importance of enforcing the Legislature's direction that Ecology provide sensible compliance solutions when available.

RCW 90.03.605(1)(b) establishes the Legislature's mandatory prerequisites for Ecology's exercise of civil penalty authority. The statute unambiguously contains three mandates regarding technical assistance:

> When the department determines that a violation has occurred or is about to occur, it shall first attempt to achieve voluntary compliance. As part of this first response, **the department shall offer** information and **technical assistance** to the person **in writing identifying one or more means to accomplish the person's purposes within the framework of the law** …"

RCW 90.03.605(1)(b) (emphasis added). The Legislature recognized the importance of informing and assisting water users before punishing them for noncompliance and enacted the mandatory technical assistance requirements in the Water Code as a precondition to the Department of Ecology's authority to issue civil penalties. 2002, EHB 2993, Laws of 2002, Ch. 329 (Appendix C to this petition). Section 2 of this bill related to

water rights information and enforcement sequencing and was codified at RCW 90.03.605.

The technical assistance directive in RCW 90.03.605 (1)(b) is not optional, it is mandatory. The entire section begins with the directive "The department shall … achieve compliance with the water laws and rules of the state of Washington in the following sequence: …" and continues with "the department shall offer information and technical assistance to the person in writing identifying one or more means to accomplish the person's purposes within the framework of the law," leaving no doubt that the sequential steps are mandatory and not merely permissive. The Legislature's use of the word "shall" is significant. The word "shall" creates a mandatory duty for Ecology when enforcing the Water Code, unlike the word "may." *Akrie v. Grant*, 178 Wn. App. 506, 512, 315 P.3d 567 (2013), *rev'd on other gds.*, 183 Wn.2d 665, 355 P.3d 1087 (2015).

In its prior decision, *Fode v. Dep't of Ecology*, the Court of Appeals held that this statute requires Ecology to provide written technical assistance prior to issuing cease-and-desist

orders or penalties. 22 Wn. App. 2d at 36. However, it did not analyze what "technical assistance" means. Op. at 13. In its recent opinion, however, the Court of Appeals adopted Ecology's interpretation of RCW 90.03.605 that it provided Fode with "technical assistance" despite substantial evidence in the record that Ecology's communications to Fode were not in writing and only ordered him to stop irrigating, without addressing his objective of irrigating the Wheeler Property legally through a seasonal transfer.

Significantly, the Opinion below mistakenly adopts an Ecology argument that "Ecology did not have a duty, nor an ability, to waive legal requirements to accommodate Mr. Fode's desire to irrigate property for which he did not possess water rights" and therefore "the only technical assistance Ecology could provide to Mr. Fode was information that he did not have adequate water rights and that he could not withdraw and use public groundwater until he obtained legal authorization." Op. at 15. That was mere notice of a violation, not "technical assistance" within the plain meaning of the statute. It misses the

entire point of the statute, which requires Ecology to assist in "accomplish[ing] the person's purposes within the framework of the law" (RCW 90.03.605(1)(b)) whether the means involves water rights "possessed" by Fode or rights which might be transferred from others.

It is undisputed that Ecology offered no means by which Mr. Fode could accomplish his purpose of growing crops on the Wheeler Property. The statute's mandatory requirement to "offer information and technical assistance to the person in writing identifying one or more means to accomplish the person's purposes within the framework of the law" recognizes that Ecology has substantial authority in the form of water rights transfers, water banking, and other methods to avoid fallowing productive agricultural land. Ecology was supposed to use those authorities where available instead of denying access to them and ordering water users to stop irrigating.

Ecology could and should have provided Mr. Fode with "technical assistance" by informing him that he could come into compliance through a seasonal water right transfer, which he had

planned and could implement. Ecology was aware of his plan but rejected it as "too late" based on its informal office deadline. This raises the important question of whether or not action on the seasonal transfer was outside "the framework of the law" within the meaning of RCW 90.03.605(1)(b).

It is axiomatic that informal agency policies such as an "office deadline" — particularly one honored in the breach — does not have the "force of law". *State v. Brown*, 142 Wn.2d 57, 62, 11 P.3d 818, 820 (2000) ("To have the force of law, an administrative regulation must be properly promulgated pursuant to a legislative delegation.") It was not, therefore, "outside the framework of the law" for Ecology to process a seasonal transfer application for Mr. Fode, because it is undisputed that Ecology's informal February 15 deadline was not binding or based on a statute or rule. CP 2323, CP 2501-02. The deadline was but a matter of administrative convenience for Ecology, which it was free to ignore. *Id.*[3] The Legislature was concerned with balancing

[3] Significantly, if the deadline is interpreted as binding and part of the "framework of the law" that would make the deadline a "rule" that could

water code compliance with economic benefit, not with preserving the administration's convenience or their discretion to help some while punishing others. The Legislature's use of mandatory language in the statute is the strongest indicator that it did not intend to give Ecology the wide range of discretion interpreted by Ecology and the Court of Appeals, making Supreme Court review necessary to ensure uniform and predictable application of the law consistent with Legislative intent.

The Court of Appeals also erased the statute's requirement that technical assistance be offered " to the person in writing" by ruling that a May 16, 2017 letter addressed to Fode's landlords but not to Fode complied with the "written technical assistance" requirement of the statute. Op. at 15-16. But that letter did not comply with the plain meaning of the statute because it was not addressed to Fode, it did not acknowledge his irrigation goals in

---

not be enforced because Ecology failed to comply with the APA's notice and comment requirements for rule makings. RCW 34.05.320. *See infra*, Argument V(B).

2017 or his desire to transfer other valid water rights, and it did not allow this legal alternative to enforcement or penalties. In sum, the Court of Appeals' interpretation allowed Ecology to evade two specific mandatory requirements of the statute so that Ecology was not required to provide anything resembling actual assistance to Mr. Fode that would help him irrigate legally. Instead, Ecology bypassed the "assistance" stage required by statute and proceeded directly to enforcement and penalties, contrary to the Legislature's unambiguous intent.

Ecology and the Court of Appeals thus ignored the Legislature's delicate balancing of interests between assisting water users and penalizing Water Code violators. Not only did this fail to "insure that waters of the state are protected *and* fully utilized for the greatest benefit to the people of the state of Washington" (RCW 90.54.010(2)), but it also offends due process of law by allowing Ecology to subjectively discriminate between different water users, helping some and not others.

The Court of Appeals' interpretation also violates separation of powers by affirming an agency interpretation of

RCW 90.03.605(1)(b) that ignores the Legislature's mandatory prerequisites for the exercise of civil penalty authority. The separation of powers doctrine forbids judicial or executive encroachment on the legislature's role. Fundamentally, it requires the judiciary to embrace its duty to "say what the law is" even when that interpretation serves as a check on the activities of another branch." *Wash. State Legis. v. Inslee*, 198 Wn.2d 561, 567, 498 P.3d 496 (2021); *Overton v. Econ. Assistance Auth*., 96 Wn.2d 552, 555, 637 P.2d 652 (1981).

Here, the Court of Appeals breached the Legislature's role by giving Ecology a pass for noncompliance with legislative preconditions to the exercise of delegated civil penalty authority. The Opinion states, "Though it is prudent for Ecology to render its technical assistance via letter directly to the individual who is the subject of Ecology's enforcement action, we decline to invalidate otherwise valid penalties for this circumstance, which was inconsequential here." Op. at 15. Not only did that ruling deny relief to Fode in this case, but it is a dangerous precedent that encourages Ecology and other state agencies to ignore

legislative limits on their authority and to expand the power of administrative agencies without legislative or judicial checks and balances.

B. The Court of Appeals APA rule-making decision is inconsistent with Supreme Court precedent, and review is of substantial public importance.

Ecology used its February 15 "office deadline" as an excuse to refuse accepting or processing a seasonal transfer application by Fode or Kiesz in 2017 and thereupon excluded that option for technical assistance to Fode, who wanted to legally irrigate the Wheeler Property and avoid violations and penalties. This denied public notice and the opportunity for input regarding the impact of the deadline on Water Code compliance, violating APA rulemaking requirements. The Court of Appeals Opinion to the contrary is inconsistent with Supreme Court precedent.

The purpose of rule-making procedures is to ensure that members of the public can participate meaningfully in the development of agency policies which affect them. *Simpson*

Tacoma Kraft Co. v. Department of Ecology, 119 Wn.2d 640, 649, 835 P.2d 1030 (1992). The APA requirement for imposing a new standard or limitation for exercising a legal right is adoption of a rule. *Hillis v. Dept. of Ecology*, 131 Wn.2d 373, 400, 932 P.2d 139 (1997). "Rule" is legislatively defined as "any agency order, directive, or regulation of general applicability … (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law…." RCW 34.05.010(16). Courts must declare a rule invalid if it was adopted without statutory rule-making procedures. RCW 34.05.570(2)(c).

Two benefits conferred by law are impacted by Ecology's office deadline. First is the statutory right to request a seasonal or temporary change of point of diversion or place of use with the permission of the water master. RCW 90.03.390. Op. at 18. There is no statutory deadline to exercise this right under RCW 90.03.390, therefore the office deadline plainly "establishes, alters, or revokes any qualification or requirement" relating to the enjoyment of this benefit within the meaning of the APA

definition of "rule." RCW 34.05.010(16)(c). Second, water users have the right to technical assistance under RCW 90.03.605(1) to accomplish their goals within the framework of the law prior to issuance of penalties, and the processing of seasonal transfers is one the typical means of achieving this goal.

Ecology's office deadline was not adopted as a rule with notice to the public and an opportunity for comment on its broad impact to water users in the enforcement context. Therefore, Fode argued that it was not part of the binding "framework of law" that could be invoked by Ecology to refuse technical assistance in achieving his goal of irrigating the Wheeler Property in 2017. The standards for approval of seasonal transfers were not altered by the February 15 deadline, but the right to have an application accepted after the deadline and then investigated and decided was revoked by that deadline, as was Fode's right to technical assistance prior to penalties in the form of a seasonal transfer.

The Court of Appeals rejected Fode's argument on the basis that Ecology has no duty to grant a seasonal change

application, concluding on that basis that the February 15 deadline was not a rule. Op. at 18. If no "rule" is involved whenever benefits are subject to an administrative determination, much of the purview of the APA rule-making requirement is destroyed. All forms of administrative applications require an agency to make a non-arbitrary decision when reviewing an application for a discretionary government benefit. Allowing an agency to refuse to accept and process an application without APA rulemaking compliance alters legal rights and benefits regardless of the application's outcome.

In *Failor's Pharmacy v. Department of Social & Health Services,* 125 Wn.2d 488, 886 P.2d 147 (1994), this Court determined that it is the effect on the eventual recipient's benefit conferred by law that makes an administrative policy a rule. *Id*. at 497. Establishing a new deadline not authorized by statute for accepting a seasonal or temporary transfer application alters the water user's benefit of the processing of their application, and in this case, for the receipt of technical assistance that could have avoided violations and penalties.

The Court of Appeals decision squarely conflicts with this Court's holding in the *Hillis* case. In *Hillis*, Ecology processed water right applications out of line from older pending applications and prioritized watershed assessments without a rule, which delayed action on older applications. Like seasonal or temporary transfers, Ecology has no duty to approve water right applications, and the standards for approval had not changed as a result of Ecology's new processing priorities or, in this case, filing deadline. The Supreme Court nevertheless concluded that (1) applicants have a right to have their applications investigated and decided upon, and (2) "when Ecology sets out priorities and establishes prerequisites to those decisions, the agency should engage in rule making so the public has some input into those decisions." *Hillis* at 399.

The same principle applies to creating a deadline for accepting and processing temporary or seasonal applications under RCW 90.03.390 and using Ecology's office deadline to deny technical assistance under RCW 90.03.605 -- it alters an applicant's benefits conferred by law. Applicants have a right

under the statute to have their applications investigated and decided upon that can only be altered by a rulemaking in compliance with the APA. If Ecology could not establish water right processing priorities for water right applications without a rule-making process under *Hillis*, then Ecology cannot create a deadline for accepting seasonal transfer applications and using that deadline to deny technical assistance to water users who seek to voluntarily comply with the Water Code. In either case, it is the duty to process the application, not its outcome, that gives rise to a rulemaking when the criteria are altered by Ecology.

In this case, like *Hillis*, the standards for approval of seasonal transfers were not altered by the February 15 deadline, but the right to have an application accepted, investigated, and decided was revoked by it, as was Fode's right to technical assistance prior to penalties in the form of a seasonal transfer of water rights. Ecology used the February 15 office deadline as an excuse not to accept or process a seasonal transfer application by Fode or Kiesz in 2017 and thereupon provided no option for technical assistance to Fode that would make his irrigation

conform to legal requirements. That is a textbook example of instituting a new directive or requirement that limited a legal, statutory right. The remedy when an agency has made a decision which should have been made after engaging in rule-making procedures is invalidation of the action. *Hillis*, at 399-400, citing *Failor's Pharmacy*, 125 Wn.2d at 497.

The "enjoyment" of nearly all "benefits or privileges conferred by law" involves an administrative determination of the scope and availability of such privileges. Thus, the Court of Appeals' rejection of an APA rule-making violation on the basis that Ecology had no duty to grant a seasonal change application has broad state-wide impact involving virtually every economic or personal activity that requires administrative processing and decision-making. That is a substantial public interest that prompts the need for Supreme Court review.

VI. CONCLUSION

This case meets the criteria for discretionary review under RAP 13.4(b). Petitioner respectfully requests that this Court

grant review and reverse the decision of the Court of Appeals and the PCHB decision below.

This document contains 4284 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated: February 11, 2026

Respectfully submitted,

Thomas M. Pors

Thomas M. Pors, WSBA # 17718
Attorney for Appellant

VII. APPENDICES

A. Court of Appeals Opinion
B. Order Denying Reconsideration
C. Relevant Statutes / Constitutional Provisions

FILED
DECEMBER 18, 2025
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

RON FODE, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, AND THE ENVIRONMENTAL AND LAND USE HEARING OFFICE, Respondents.	)	No. 40449-8-III UNPUBLISHED OPINION
RON FODE, Appellant, v. WASHINGTON STATE DEPARTMENT OF ECOLOGY, Respondent.	)	

APPENDIX A

WASHINGTON DEPARTMENT OF ECOLOGY,	)
Appellant,	)
v.	)
RON FODE; WASHINGTON STATE POLLUTION CONTROL HEARINGS BOARD,	)
Respondent.	)

COONEY, J. — Ron Fode was issued monetary penalties by the Department of Ecology (Ecology) for irrigating his crops without a water right. He appealed the penalties to the Pollution Control Hearings Board (PCHB), which affirmed the lawfulness of the penalties but reduced the amount from what Ecology had issued. Both Ecology and Mr. Fode appeal.

On appeal, Mr. Fode argues: (1) he was not provided adequate technical assistance before the issuance of fines; (2) Ecology's office deadline for water rights transfers violated the Administrative Procedure Act rulemaking requirements and was arbitrary and capricious; (3) Ecology is not statutorily permitted to assess separate fines based on property ownership; and (4) the PCHB misapplied evidentiary standards and erroneously found the fines were reasonable. Ecology argues in its cross appeal that the PCHB erred in reducing the fines. We disagree with both Mr. Fode's and Ecology's arguments and affirm.

APPENDIX A

BACKGROUND

Ecology is responsible for the "supervision of public waters within the state and their appropriation, diversion, and use" including groundwater. RCW 43.21A.064(1); RCW 90.44.040. RCW 90.44.050 mandates that "no withdrawal of public groundwaters of the state shall be begun . . . unless an application to appropriate such waters has been made to the department and a permit has been granted by it as herein provided," subject to some exceptions. RCW 90.03.380 authorizes changes to the point of diversion, place of use, or purpose of use of water rights under certain circumstances. RCW 90.44.100 allows changes to groundwater rights. Moreover, RCW 90.03.390 allows temporary or "seasonal" changes to the "place of use of water" with the "permission of the water master of the district in which such a proposed change is located." Relevant here, the "Odessa Groundwater Management Subarea" of the state has "experienced a steady decline in groundwater levels" since 1967 and is therefore of particular concern. WAC 173-128A-020.

Mr. Fode is a longtime farmer in Grant County, Washington, specifically the Odessa Groundwater Management Subarea. Mr. Fode owns some of the parcels he farms and leases the others. At issue in this appeal are three parcels (collectively "the Wheeler Property") consisting of a parcel owned by Mr. Fode (Fode Parcel), a parcel owned by Michele Kiesz (Kiesz Parcel) and leased by Mr. Fode, and a parcel owned by Ronald Sparks, as representative of the Schmidt Estate (Sparks Parcel), and leased by Mr. Fode. "The Kiesz

Parcel is comprised of land irrigated by Pivots[1] 1, 2, 3, and the east half of Pivot 4. The Sparks Parcel is comprised of land irrigated by the west half of Pivot 4. The Fode parcel is comprised of land irrigated by Pivot 5." Clerk's Papers (CP) at 2228. Additionally, Ms. Kiesz owns land known as the "Schrag Property"[2] that Mr. Fode also leases from her.

Ms. Kiesz holds a groundwater right that authorizes irrigation of 80 of the Kiesz Parcel's 415 acres. The Fode Parcel and the Sparks Parcel do not have water rights authorizing groundwater irrigation. Mr. Fode possesses a groundwater right, G3-22345C, that authorizes irrigation of other lands he owns. He was granted seasonal changes to this water right's place of use between 2001 and 2009. Generally, these seasonal changes authorized irrigation of different portions of the Kiesz, Sparks, or Fode Parcels.

Mr. Fode submitted an application to Ecology in January 2017 for a seasonal change to the place of use for groundwater right G3-22345C in order to authorize irrigation of the Fode Parcel. Ecology denied his application because the place of use for the relevant portion of the water right he sought to change was irrigated by surface water from the federal Columbia Basin project, resulting in the groundwater right becoming an

---

[1] "Pivots" are the sprinklers that irrigate each field. *See* Clerk's Papers at 396.

[2] Mr. Fode testified that he did not irrigate the Schrag Property in 2017 so he could transfer the water right associated with it to the Wheeler Property. Additional facts relevant to this issue are included in the analysis below.

unavailable reserve right. RCW 90.44.510.[3] Ecology informed Mr. Fode in February that his application was denied and instructed him to refrain from irrigating the Kiesz and Sparks Parcels.

Shortly thereafter, Mr. Fode and Ms. Kiesz discussed transferring a water right from the Schrag Property to the Wheeler Property. Ms. Kiesz scheduled a meeting with Kevin Brown, Ecology's Columbia Basin Watermaster, to discuss transfering water rights for the 2017 irrigation season. Ms. Kiesz would later testify that Mr. Brown informed her it was past the February 15 deadline for seasonal change applications.

Mr. Brown testified that in addition to the late request, Ms. Kiesz stated at the meeting that she did not want to transfer any water rights to the Wheeler Property. After this meeting, Mr. Brown called Mr. Fode and instructed him not to irrigate "his property or the Kiesz parcel." CP at 2239. Neither Ms. Kiesz nor Mr. Fode submitted an application for a seasonal change of water rights associated with the Schrag Property for the 2017 growing season.

[3] "The department shall issue a superseding water right permit or certificate for a groundwater right where the source of water is an aquifer for which the department adopts rules establishing a groundwater management subarea and water from the federal Columbia Basin project is delivered for use by a person who holds such a groundwater right. The superseding water right permit or certificate shall designate that portion of the groundwater right that is replaced by water from the federal Columbia Basin project as a standby or reserve right that may be used when water delivered by the federal project is curtailed or otherwise not available."

Mr. Brown traveled to the Wheeler Property in May and observed irrigation as well as planted potatoes, growing crops, and harvested hay. On May 16, 2017, Mr. Brown mailed letters to Ms. Kiesz and Mr. Sparks stating it appeared their parcels had been irrigated and requesting information about water rights Ecology may have "overlooked." CP at 1083. Ms. Kiesz shared this letter with Mr. Fode. Mr. Brown followed up by telephone with Ms. Kiesz and Mr. Sparks who both confirmed there were no water rights on the Sparks Parcel and there was only authorization to irrigate 80 of 415 acres on the Kiesz Parcel.

Ecology staff, including Mr. Brown, met with Ms. Kiesz in late June to discuss Mr. Fode's ongoing unauthorized irrigation. Ms. Kiesz indicated she had told Mr. Fode to stop irrigating the Kiesz Parcel. The next day, Mr. Brown had a telephone call with Mr. Fode and again told Mr. Fode he did not have authorization to irrigate the Wheeler Property.

On June 26, 2017, Ecology issued administrative orders to Mr. Fode, Ms. Kiesz, and Mr. Sparks directing them to cease and desist from any irrigation without water rights. One of the administrative orders was issued to Mr. Fode while another was issued to his landlords, Ms. Kiesz and Mr. Sparks. The cease-and-desist orders explained that Mr. Fode and his landlords were violating RCW 90.44.050 and chapter l73-130A WAC by irrigating absent legal authorization. Mr. Fode appealed the cease-and-desist order directed at him and those directed at his landlords. *See Fode v. Dep't of Ecology*, 22 Wn. App. 2d 22, 26, 509 P.3d 325 (2022).

Mr. Fode continued to irrigate throughout the remainder of the 2017 irrigation season. Ecology staff periodically visited the Wheeler Property throughout the 2017 irrigation season to document Mr. Fode's unauthorized irrigation. Mr. Brown created a form for Ecology employees who visited the Wheeler Property to record their observations of "(1) when the visits occurred, (2) where the pivots were located, (3) whether the pivots were on and irrigating, and/or (4) whether the fields were wet." CP at 2242. Ecology staff recorded and compiled their observations in the "Odessa Site Field Book." CP at 795-1062. Ecology staff visited the Wheeler Property "thirty-five to forty" times during the 2017 irrigation season. CP at 2366. Of those visits, 31 took place after Ecology issued its cease-and-desist orders. Ecology reported a pivot was "on" or a field was "wet" on 26 of the days Ecology employees visited the Wheeler Property after its cease-and-desist orders were served. CP at 2243.

Ecology assessed three civil penalties, one for each parcel, against Mr. Fode, Ms. Kiesz, and Mr. Sparks for Mr. Fode's illegal irrigation during the 2017 irrigation season. There were daily fines assessed, per parcel, for each day that Mr. Fode illegally irrigated after issuance of the cease-and-desist orders, totaling 103 days. Mr. Fode was fined $2,000 per day for illegal irrigation of the Fode Parcel totaling $206,000. Mr. Fode and Mr. Sparks were fined $1,000 per day for illegal irrigation of the Sparks Parcel totaling $103,000. Finally, Mr. Fode and Ms. Kiesz were fined $3,000 per day for illegal irrigation

of the Kiesz Parcel totaling $309,000. The fines totaled $618,000. Mr. Fode, Ms. Kiesz, and Mr. Sparks appealed the penalties to the PCHB.[4]

Following a three-day hearing in 2019 (2019 Hearing), the PCHB issued its "Findings of Fact, Conclusions of Law and Order." CP at 1700-29. The PCHB affirmed the penalties as lawful but reduced the penalty amount to $260,000. In reducing the penalties, the PCHB noted that, "Ecology proved that Mr. Fode illegally irrigated on all of the days Ecology noted the pivots 'on' or 'wet,'" though it was more likely than not that Mr. Fode was irrigating throughout the 2017 season. CP at 1726. The PCHB held the "evidence presented by Ecology established that (a) Pivot 4 [Sparks Parcel] was 'on' or 'wet' on 12 days, (b) Pivot 5 [Fode Parcel] was 'on' or 'wet' on 15 days, and (c) Pivots 1, 2, or 3 [Kiesz Parcel] were 'on' or 'wet' on 25 days." CP at 1726-27. Thus, the PCHB concluded Ecology presented evidence of pivots "on" or "wet" for a total of 52 days. CP at 1727. The PCHB imposed a penalty of $5,000 per day for the 52 days of illegal irrigation resulting in a fine of $260,000. Both Mr. Fode and Ecology appealed the PCHB's decision.

Meanwhile, this court decided the appeal of Ecology's cease-and-desist orders. *Fode*, 22 Wn. App. 2d 22. There, Ecology appealed the trial court's summary judgment

[4] Ecology ultimately rescinded the penalties against Mr. Sparks and Ms. Kiesz, and Mr. Fode therefore became solely liable for all three penalties.

order concluding that Mr. Fode's appeals of the cease-and-desist orders were timely. *Id.* at 24. We affirmed the trial court. *Id.* Ecology also appealed the trial court's later order remanding the appeal of the cease-and-desist orders to the PCHB and staying Mr. Fode's and Ecology's penalty appeals. *Id.* We reversed that order, ruling, "the trial court should have instead remanded the appeal of the penalties to the PCHB." *Id.* Moreover, we recognized that "RCW 90.03.605(1) does require Ecology to provide written technical assistance prior to issuing a cease-and-desist order or penalties." *Id.* at 36. We urged the trial court to remand the penalty appeal to the PCHB with instructions to admit "any erroneously excluded technical assistance evidence and to enter amended findings of fact and conclusions of law." *Id.* at 37.

Following this court's decision, Mr. Fode and Ecology agreed to a limited remand of the penalty appeal for additional fact finding regarding Ecology's technical assistance efforts. The PCHB held a limited remand hearing (Remand Hearing) in 2023.

Ms. Kiesz, Mr. Fode, and Mr. Brown testified at the Remand Hearing. Mr. Fode chiefly argued that the penalties were invalid because he was not provided "technical assistance" before they were imposed. CP at 2204.

Following the Remand Hearing, the PCHB issued its "Amended Findings of Fact, Conclusions of Law and Order on Remand." CP at 2220-58. The PCHB's amended order largely affirmed and reiterated its earlier findings and conclusions. The PCHB concluded

that Ecology provided sufficient technical assistance and affirmed its earlier decision to reduce Mr. Fode's penalties to $260,000.

In May 2024, the superior court granted the parties' joint motion to certify the matter for direct review under RCW 34.05.518(1)(a), and the parties proceeded with their appeals.

ANALYSIS

Appeals from administrative decisions of the PCHB are governed by Washington's Administrative Procedure Act (APA), chapter 34.05 RCW. *Burbank Irr. Dist. #4 v. Dep't of Ecology*, 27 Wn. App. 2d 760, 771, 534 P.3d 833 (2023). The APA provides that a reviewing court:

> [S]hall grant relief from an agency order in an adjudicative proceeding only 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;
>
> (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
>
> . . . .
>
> (i) The order is arbitrary or capricious.

RCW 34.05.570(3).

Our review is de novo under RCW 34.05.570(3)(b) through (d), determining whether the decision contains an error of law. *Kittitas County v. E. Wash. Growth Mgmt. Hr'gs Bd.*, 172 Wn.2d 144, 155, 256 P.3d 1193 (2011). We "accord substantial weight to an agency's interpretation of a statute within its expertise . . . and to an agency's interpretation of rules that the agency promulgated." *Verizon NW, Inc. v. Wash. Employ. Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008) (citation omitted).

We apply the substantial evidence standard to challenges under RCW 34.05.570(3)(e) and determine whether there is "'a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.'" *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998) (quoting *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510 (1997)). We review the evidence in the light most favorable to the party who prevailed in the highest forum that exercised fact finding authority. *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001). We accept the fact-finder's views regarding credibility of witnesses and the weight to be given competing inferences. *Id.*

For arbitrary and capricious challenges under RCW 34.05.570(3)(i), we determine whether the decision constitutes "'willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.'" *City of Redmond*, 136 Wn.2d at 46-47 (quoting *Kendall v. Douglas, Grant, Lincoln, & Okanogan Counties*

Pub. Hosp. Dist. No. 6, 118 Wn.2d 1, 14, 820 P.2d 497 (1991)). "'Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.'" *Id.* at 47.

The burden of demonstrating the invalidity of an agency action is on the party asserting the invalidity. RCW 34.05.570(1)(a). On review, "[t]he pertinent record is the record before the [PCHB]." *City of Union Gap v. State Dep't of Ecology*, 148 Wn. App. 519, 525, 195 P.3d 580 (2008).

TECHNICAL ASSISTANCE UNDER RCW 90.03.605

Mr. Fode argues that written technical assistance is a prerequisite to issuing penalties but that he was not provided with such assistance by Ecology. Therefore, Mr. Fode contends Ecology failed to follow a proscribed procedure under RCW 34.05.570(3)(c) and (d). Ecology responds that it provided Mr. Fode with technical assistance before issuing penalties and that the PCHB's findings to this effect are supported by substantial evidence. We agree with Ecology.

RCW 90.03.605(1) states:

> (b) When the department determines that a violation has occurred or is about to occur, it shall first attempt to achieve voluntary compliance. As part of this first response, the department shall offer information and *technical assistance to the person in writing* identifying one or more means to accomplish the person's purposes within the framework of the law[.]
>
> (c) If education and technical assistance do not achieve compliance the department shall issue a notice of violation, a formal administrative order under RCW 43.27A.190, or assess penalties under RCW 90.03.600 unless the

> noncompliance is corrected expeditiously or the department determines no impairment or harm.

(Emphasis added.) In this court's prior decision, *Fode v. Department of Ecology*, we held "RCW 90.03.605(1) does require Ecology to provide written technical assistance prior to issuing cease-and-desist orders or penalties." 22 Wn. App. 2d. at 36. However, we did not analyze what "technical assistance" means.

The meaning of a statute is a question of law we review de novo. *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001). The court's fundamental objective is to ascertain and carry out the legislature's intent. *Id.* If the statute's meaning is plain on its face, then the court gives effect to that plain meaning. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). "Unlikely, absurd or strained results are to be avoided." *Morris v. Blaker*, 118 Wn.2d 133, 143, 821 P.2d 482 (1992).

According to the Senate Bill Report, the legislature's goal in enacting RCW 90.03.605 was to "achieve compliance with water laws by, first, using education and information; then, using information and technical assistance to achieve voluntary compliance; and, if neither of those achieves compliance, taking enforcement action." Senate Bill Report, 57th Leg. Sess., EHB 2993 (2002) at 1. The legislature's intent in requiring "technical assistance" before issuing penalties was to achieve voluntary compliance with Washington's water laws.

Here, Ecology attempted to work with Mr. Fode collaboratively to achieve his voluntary compliance with the law to no avail. The record reflects that Mr. Fode was told his seasonal change request was denied in February 2017, and he was instructed not to irrigate without water rights. In March, Mr. Brown called Mr. Fode and advised him once again not to irrigate the properties for which he did not have sufficient water rights. On May 16, 2017, Ecology sent letters to Ms. Kiesz and Mr. Sparks requesting information about water rights for their parcels, noting they had recently been irrigated. Though these letters were not sent directly to Mr. Fode, it is undisputed that the letters were shared with him. Mr. Fode and his landlords participated in numerous other phone calls with Mr. Brown in which water rights, or lack thereof, were discussed. Ms. Kiesz also participated in at least two in-person meetings with Mr. Brown regarding water rights. Finally, Ecology issued cease-and-desist orders to Mr. Fode in June and began assessing monetary fines against him.

Mr. Fode first contends that Ecology failed to provide him technical assistance within the meaning of RCW 90.03.605(1)(b). Mr. Fode argues technical assistance must be provided to "the person" who is the subject of Ecology's enforcement, here Mr. Fode. Appellant's Opening Br. at 41. Moreover, Mr. Fode posits the assistance must be "in writing," so, "a letter, email or written order" should have been delivered to him. Appellant's Opening Br. at 42. He argues Ecology failed to meet these requirements. Ecology responds that the PCHB correctly concluded that Ecology satisfied the technical assistance requirement of RCW 90.03.605(1)(b).

In this instance, the only technical assistance Ecology could provide to Mr. Fode was information that he did not have adequate water rights and that he could not withdraw and use public groundwater until he obtained legal authorization. Ecology did not have a duty, nor an ability, to waive legal requirements to accommodate Mr. Fode's desire to irrigate property for which he did not possess water rights. Mr. Fode seems to criticize the fact that some of the technical assistance that he was provided was given telephonically instead of through written instruments and that the letter he received was not provided directly to him.

Though it is prudent for Ecology to render its technical assistance via letter directly to the individual who is the subject of Ecology's enforcement action, we decline to invalidate otherwise valid penalties for this circumstance, which was inconsequential here. Further, even if we did not consider the phone calls or in-person meetings to be "technical assistance" within the meaning of RCW 90.03.605(1)(b), the May 16, 2017, letter satisfies the "in writing" requirement of the statute. CP at 1082-83. In that letter, Ecology noted that there was a substantial amount of land being irrigated "without authorization." CP at 1083. Ecology also requested records it "may have overlooked" that would authorize irrigation of those lands. CP at 1083. This was sufficient technical assistance as it informed Mr. Fode and his landlords that he was irrigating without a water right and requested records from him or his landlords if they had information to the contrary. Furthermore, though this letter was sent to Mr. Fode's landlords, there is no dispute the letter was provided to him. In sum,

Ecology provided Mr. Fode with adequate technical assistance before issuing cease-and-desist letters and assessing fines against him.

OFFICE DEADLINE FOR SEASONAL WATER RIGHT TRANSFERS

Mr. Fode argues that Ecology violated APA rule-making requirements when it implemented a February 15 office deadline for seasonal water right change requests. He additionally argues the February 15 office deadline is arbitrary and capricious because it is not strictly enforced. RCW 34.05.570(3)(i). We disagree.

APA Rule Making

Mr. Fode challenges Ecology's February 15 office deadline as an invalid rule under the APA. Ecology argues the office deadline is not a "rule" and that it was therefore not required to go through the APA's rule-making procedures before adopting the deadline.

The APA defines a "rule" as "any agency order, directive, or regulation of general applicability . . . which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law." RCW 34.05.010(16)(c). If a rule is adopted without compliance with statutory rule-making procedures, "the court shall declare the rule invalid." RCW 34.05.570(2)(c).

Mr. Fode relies on *Hillis v. Department of Ecology* to support his argument. 131 Wn.2d 373, 932 P.2d 139 (1997). In *Hillis*, water right applicants filed a writ of mandamus seeking to force Ecology to process their applications. *Id.* at 377-78. Due to budget restraints and staff shortages, there were about 5,000 outstanding applications seeking the

appropriation of public water. *Id.* at 378. Consequently, Ecology established criteria to prioritize certain water rights applications over others. *Id.* at 378-79. The trial court found that Ecology had not followed the rule-making process of the APA as it pertained to Ecology's duty to investigate. *Id.* at 379-80. Our Supreme Court affirmed, reasoning that "water applicants have the right under [RCW 90.03.290] to have their application investigated and decided upon." *Id.* at 399. Thus, the court held that "when Ecology sets out priorities and establishes prerequisites to those decisions, the agency should engage in rule making so the public has some input into those decisions." *Id.* The court noted that the "purpose of rule-making procedures is to ensure that members of the public can participate meaningfully in the development of agency policies which affect them." *Id.*

Here, like in *Hillis*, the question is whether Ecology's February 15 office deadline for seasonal water transfers is a "qualification or requirement" relating to the enjoyment of benefits conferred by law. *Hillis*, 131 Wn.2d at 399; *see also* RCW 34.05.570(2)(c). Mr. Fode argues, "Ecology's refusal to accept and assist with a late-filed seasonal transfer application, and later issuance of penalties, alters or revokes a water user's right to processing of seasonal transfer applications and Ecology's duty to provide technical assistance in the form of those transfers." Appellant's Opening Br. at 46.

First, as explained above, Ecology did not have a duty to provide technical assistance by finding water for Mr. Fode's use. Instead, Ecology was required to, and did, provide technical assistance by informing Mr. Fode he did not have legally available water and

requesting that he stop using water without authorization. Second, there is no right for water users to have their seasonal change applications processed on a certain timeline. RCW 90.03.390 states:

> RCW 90.03.380 shall not be construed to prevent water users from making a seasonal or temporary change of point of diversion or place of use of water when such change can be made without detriment to existing rights, but in no case shall such change be made without the permission of the water master of the district in which such proposed change is located, or of the department.

The benefit conferred by law is the ability to request "a seasonal or temporary change of point of diversion or place of use" with "the permission of the water master." RCW 90.03.390.

Mr. Fode's argument is that the February 15 office deadline is a "qualification" on the right to make a seasonal change. Importantly, however, the statute does not guarantee that a seasonal change application will be granted. In contrast, in *Hillis*, the statute at issue, RCW 90.03.290, states Ecology has a "duty to investigate the application, and determine what water, if any, is available for appropriation." 131 Wn.2d at 384. The court in *Hillis* reasoned Ecology's decision to prioritize certain applications over others was a qualification on a water user's right to have their application investigated. *Id.* at 399.

Furthermore, Mr. Brown testified before the PCHB that Ecology receives over 100 seasonal change applications per year, and it can take him up to three months to work through them. Unlike in *Hillis* where permit applications were processed over a period of

years, seasonal change applications are just that: seasonal. They become moot within months.

Ecology's February 15 deadline for submission of seasonal change applications was not a "rule" and therefore did not require APA rule-making procedures.

Arbitrary and Capricious

Mr. Fodes next argues the February 15 office deadline is arbitrary and capricious under RCW 34.05.570(3)(i) because it is not strictly enforced. Mr. Fode points to Ecology's admission that it processes some seasonal water right transfers after the February 15 office deadline.

As Ecology points out, the testimony before the PCHB was that a "majority of [Ecology's] seasonal change requests are" relatively simple while some other "applications can be more extensive." CP at 2321-22. Mr. Brown testified that many of Ecology's "seasonal change participants have a long history of being in the program" and are "easier to work with than some that are brand-new or have other complications."
CP at 2322. Mr. Brown also testified that Ecology "typically send[s] out a notice to all participants [from] the previous year, sometime around November, reminding them of the seasonal change" program for the next year and informing them of the February 15 deadline for application submission. CP at 2322.

Mr. Brown claimed that he offered to process a late-filed seasonal change application for Ms. Kiesz the following year but pointed out that he had already been working with her

and Mr. Fode on the seasonal transfer "for three months." CP at 2504. In contrast, in 2017, the year at issue, Ms. Kiesz first discussed attempting to do a seasonal water transfer with Mr. Brown in March, well after the February 15 office deadline.

Given the facts and circumstances surrounding Ecology's decision not to accept Mr. Fode's or Ms. Kiesz's late seasonal change application, had one been filed, it was not arbitrary and capricious. Moreover, Ecology's February 15 office deadline for filing of seasonal water right transfer applications was not arbitrary and capricious.

DAILY PENALTIES FOR EACH ILLEGALLY IRRIGATED PARCEL UNDER RCW 90.03.600

Mr. Fode argues Ecology exceeded its statutory authority when it levied penalties against him for more than the $5,000 per day statutory limit. RCW 34.05.570(3)(b). He also argues Ecology's assessment of penalties was arbitrary and capricious. RCW 34.05.570(3)(i). We disagree.

RCW 90.03.600 provides, in relevant part:

> Except as provided in RCW 43.05.060 through 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. The procedures of RCW 90.48.144 shall be applicable to all phases of the levying of a penalty as well as review and appeal of the same.

(Emphasis added.)

Statutory Authority

Mr. Fode contends Ecology exceeded its statutory authority when it issued penalties based on the property ownership of each parcel that, when combined, exceeded the $5,000 per day limit. In other words, Mr. Fode argues he was erroneously issued individual penalties for unauthorized irrigation of the Fode Parcel, the Kiesz Parcel, and the Sparks Parcel that exceeded the $5,000 per day statutory limit.

This issue hinges on the definition of "violation" as used in RCW 90.03.600. Mr. Fode argues his daily unauthorized irrigation was one violation while Ecology posits that it was well within its authority to treat the unlawful irrigation of each parcel as separate violations.

Ecology relies on *Honeywell v. Department of Ecology*, 2 Wn. App. 2d 601, 413 P.3d 41 (2017). In *Honeywell*, the Honeywells purchased 40 acres of land on the southwestern shoreline of San Juan Island and hired a contractor to clear brush and trees from their property. *Id.* at 604. The waters adjacent to the Honeywells' property are considered a "shoreline of statewide significance" under the Shoreline Management Act of 1971 (SMA), chapter 90.58 RCW. *Id*. It was discovered that about 80 trees had been cut down, and Ecology therefore imposed "a shoreline penalty of $55,000 on the Honeywells for the unauthorized removal of vegetation, including the 80 trees." *Id.* at 605. Ecology treated the cutting of each tree with a diameter greater than five inches as a separate violation. *Id.* at 606.

On appeal, the Honeywells argued Ecology was limited to a $1,000 penalty per violation under RCW 90.58.210 and that the cutting of the trees was one single violation. *Id.* at 606. The court found RCW 90.58.210 ambiguous as it did not define "what acts constitute separate violations." *Id.* at 609. However, the court held interpreting the statute as limiting Ecology to a single $1,000 civil penalty per instance of unpermitted cutting would lead to absurd results because a single unpermitted tree cutting would have the same penalty as 100 unauthorized tree cuttings. *Id.* at 610. The court reasoned that adopting the Honeywells' interpretation "would limit [Ecology] to imposing at most a $1,000 penalty in both situations, despite the significant disparity in the harm caused." *Id.* at 609-10. Thus, the court held that each cut tree was a separate violation of the SMA. *Id.* at 610.

We find *Honeywell* persuasive. Like in *Honeywell*, Mr. Fode's proposed interpretation would lead to absurd results. As Ecology points out, under Mr. Fode's interpretation, an individual or corporation could illegally irrigate hundreds of expansive parcels and Ecology would only be authorized to issue, at most, one $5,000 penalty per day. Meanwhile, an individual unlawfully irrigating a single small parcel could be subject to the same penalty, though the harm caused would be much less.

Additionally, the legislative intent behind chapter 90.03 RCW is 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." RCW 90.03.005 (emphasis added). Chapter 90.44 RCW, titled "Regulation of Public Groundwaters" is a supplemental chapter to 90.03 RCW and was "enacted for the purpose of extending the application of such surface water statutes to the appropriation and beneficial use of groundwaters within the state." RCW 90.44.020. Importantly, the Odessa Groundwater Management Subarea has been of particular concern because it has experienced a steady decline in groundwater since 1967. WAC 173-128A-020. Restricting Ecology to imposing one fine for illegal irrigation of multiple parcels would frustrate its ability to enforce the legislature's clear intent to protect and preserve Washington's water resources.

Mr. Fode also posits that allowing daily penalties for each parcel resulted in penalties exceeding the $5,000 maximum per day penalty for violations. RCW 90.03.600. This argument is unpersuasive. Because Mr. Fode committed three separate violations by illegally irrigating three parcels, Ecology was allowed to assess up to a $5,000 penalty, per day, per violation. Moreover, accepting Mr. Fode's argument, that Ecology could only assess a total of $5,000 in fines per day no matter how many distinct violations were committed, would lead to absurd results. It would mean an individual who committed 20 water code violations would be subject to the same maximum penalty as someone who committed a single violation. We decline to interpret RCW 90.03.600 as allowing a maximum of $5,000 in penalties per day regardless of the number of violations an

individual commits. Ecology did not exceed its statutory authority when it treated Mr. Fode's unlawful irrigation of each parcel as a separate violation.

Arbitrary and Capricious

Mr. Fode also argues that Ecology's decision to issue penalties per day for the illegal irrigation of multiple parcels was arbitrary and capricious because Ecology could "expand its penalty authority and arbitrarily impose penalties beyond the statutory maximum by dividing a violation . . . into multiple units, such as acres, plants, sprinklers or even molecules of water." Appellant's Opening Br. at 52; *see also* RCW 34.05.570(3)(i). Mr. Fode's argument requires us to speculate about whether Ecology's potential future decisions to fine individuals would be arbitrary and capricious. We decline to do so.

Here, Ecology's decision to assess individual per day penalties for each parcel Mr. Fode illegally irrigated was not arbitrary and capricious. If, in the future, Ecology attempts to penalize Mr. Fode or others for individual "molecules of water" unlawfully irrigated, that individual could and should bring an action challenging Ecology's decision as arbitrary and capricious. Appellant's Opening Br. at 52. However, here, Ecology's decision to issue separate penalties for each parcel Mr. Fode illegally irrigated was not an unreasonable action taken without regard to the specific facts and circumstances of this case and was therefore not arbitrary and capricious.

Ecology's decision to penalize Mr. Fode for each parcel he illegally irrigated did not exceed Ecology's statutory authority nor was it arbitrary and capricious.

CONTINUOUS VIOLATIONS UNDER RCW 90.03.600

In its cross appeal, Ecology argues the PCHB erred by reducing Mr. Fode's fines because it based its decision on an erroneous interpretation of the law. RCW 34.05.570(3)(d). Mr. Fode responds that PCHB's decision to reduce his fines was proper. We agree with Mr. Fode.

RCW 90.44.050 prohibits the withdrawal of public groundwater without a permit. Moreover, RCW 90.03.600 states:

> In determining the amount of a penalty to be levied, the department shall consider the seriousness of the violation, whether the violation is repeated or continuous after notice of the violation is given, and whether any damage has occurred to the health or property of other persons. Except as provided in RCW 43.05.060 through 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.

Ecology argues the PCHB erroneously interpreted RCW 90.03.600 to only allow penalties for days Ecology directly observed unlawful irrigation. Mr. Fode responds that the PCHB correctly concluded he could be penalized only for those days that Ecology directly observed his unlawful irrigation.

Following the Remand Hearing, the PCHB upheld its 2019 decision to reduce Mr. Fode's penalties from $618,000 to $260,000. The PCHB found Ecology only proved a violation on "days that Ecology reported that a pivot was 'on' or 'wet.'" CP at 2256.

Ecology posits the plain language of the statute contemplates a continuing violation lasting more than a day and that the statute does not require that Ecology prove each violation with direct evidence that it observed irrigation on that day. Mr. Fode contends the statute merely requires Ecology to consider whether a violation is continuous as one of several factors in assessing the amount of the fine and that the PCHB properly required Ecology to prove his violations with direct evidence it observed irrigation. Based on the facts before us, we conclude the PCHB did not misinterpret the law.

RCW 90.03.600 clearly contemplates "per day" penalties for violations. Once a violation is established, Ecology then considers the seriousness of the violation and whether the violation is repeated or continuous in determining the amount of a penalty to be levied. In other words, Ecology may not levy fines for every single day of the irrigation season without providing evidence from which a trier of fact finds that an individual *actually* illegally irrigated on a continuous basis. As Mr. Fode points out, the plain language of the statute demonstrates that whether a violation is "continuous" is a factor used in assessing the amount of a fine. RCW 90.03.600. Furthermore, though the statute does not explicitly or implicitly require that Ecology directly observe each distinct violation, it does state that Ecology may levy a fine "per day for violation of" the water code. RCW 90.03.600.

Ecology argues it can prove "continuing violations" occurred over a period of time by, for instance, presenting evidence that crops with substantial irrigation requirements are observed green and growing. Although the "continuing violations" provision of the statute

goes to the amount of the penalty to be levied, we agree that Ecology may prove repeated daily violations without Ecology staff having to witness illegal irrigation on each day of the growing season. Ecology may meet this burden by presenting competent evidence, presumably through an expert witness, supporting a trier of fact in finding directly or by inference that water was necessarily used for crops to grow at a specific rate. Here, Ecology failed to meet this burden before the PCHB, and with the evidence that Ecology presented, the PCHB declined to draw an inference of continuous violation in the manner Ecology sought. Instead, Ecology's only competent evidence regarding the days Mr. Fode illegally irrigated was its staff's observations.

Ecology further contends that, if it could only prove violations by sending its employees out to remote locations to observe irrigation, its resources would be constrained and individuals could simply irrigate at off times to avoid detection. Because alternative means may be presented to prove illegal irrigation, we disagree.

The PCHB did not err when, based on the record before it, the PCHB required that Ecology prove Mr. Fode illegally irrigated on the days it assessed penalties levied against him. Thus, the PCHB's decision to reduce Mr. Fode's penalties to $260,000, reflecting penalties assessed only for days Ecology staff directly observed irrigation or wet crops or pivots, was not erroneous.

REASONABLENESS OF THE $260,000 PENALTY

Mr. Fode argues the PCHB misapplied evidentiary standards and erroneously found Ecology's $260,000 fine was reasonable. Specifically, Mr. Fode argues the PCHB misapplied evidentiary standards by basing daily fines on observed "wetness" and allowing undated aerial imagery and expert testimony as evidence that Mr. Fode did not fallow[5] the Schrag Property. Further, he argues the PCHB mistakenly found his testimony that he fallowed the Schrag Property not credible. Finally, Mr. Fode argues the PCHB misapplied the penalty reasonableness factors and imposed unreasonable penalties. We disagree.

Daily Fines for Observed "Wetness"

Mr. Fode argues Ecology did not meet its burden of proof when it found 52 distinct violations based on Ecology's observations of wet fields or active irrigation. Specifically, he contends that he provided evidence that observed "wetness" could be explained by evapotranspiration, osmotic pressure, capillary action from plants, and dew action. Appellant's Opening Br. at 54. We conclude Ecology provided sufficient evidence that Mr. Fode irrigated on the days in question.

Following the Remand Hearing, the PCHB affirmed its 2019 conclusion that "Ecology proved that Mr. Fode illegally irrigated on all of the days that Ecology noted the

[5] "Fallow" is defined as "the plowing or tilling of land without sowing it for a season." MERRIAM-WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 819 (1961).

pivots 'on' or 'wet,'" on 52 days in total and that "Mr. Fode did not rebut Ecology's evidence on this issue." CP at 2256. On appeal, Mr. Fode argues he did rebut Ecology's evidence at the 2019 Hearing when he testified that a field may appear wet for days or weeks after it was last irrigated. He contends the PCHB ignored "substantial evidence" provided by him that observed wetness was not due to irrigation and that Ecology should not be permitted to prove irrigation violations by mere observed "wetness." Appellant's Opening Br. at 55.

At the 2019 Hearing, Mr. Fode testified that "evapotranspiration," "osmotic pressure," or "dew action" could cause a field to look wet on days that irrigation did not occur. CP at 2846-50. When asked whether that would "explain . . . many of the wet observations taken in the a.m. hours," Mr. Fode answered, "Yes." CP at 2847. However, Mr. Fode did not identify which days he argued wetness was not caused by irrigation.

Moreover, substantial evidence in the record supports the court's findings and conclusions that Ecology proved Mr. Fode illegally irrigated on at least 52 days in 2017. Mr. Fode points out that "Ecology's own record of inspections includes evidence that 'wetness' on some days was most likely caused by rainfall." Appellant's Opening Br. at 55. On one day, the field book did note that the wet fields were likely due to rain the night before but the PCHB did not assess a penalty for any of the parcels for this day. On another day that wet fields were observed, which Mr. Fode now argues could have been because of

rain, active irrigation was observed on the same parcel therefore warranting a fine regardless.

Mr. Fode's argument boils down to the weight that should be given to Ecology's evidence of wet fields in determining whether Mr. Fode illegally irrigated that day. In light of competing evidence, we will not substitute our judgment for that of the PCHB. *Port of Seattle v. Pollution Control Hr'gs Bd.*, 151 Wn.2d 568, 588, 90 P.3d 659 (2004). Based on the evidence before it, the PCHB did not err in concluding Mr. Fode unlawfully irrigated on days Ecology observed his fields were wet. Thus, the court's conclusion that Ecology proved Mr. Fode illegally irrigated on at least 52 days, even where Ecology only observed "wetness" is supported by substantial evidence.

Evidence Mr. Fode did not Fallow the Schrag Property

Mr. Fode next argues the PCHB erred when it allowed undated aerial images and expert testimony as evidence the Schrag Property was not fallowed.[6] Ecology responds that the PCHB correctly admitted this evidence.

We review the PCHB's evidentiary rulings for abuse of discretion. *Port of Seattle*, 151 Wn.2d at 642. Here, at the Remand Hearing, the hearing officer admitted an aerial

[6] Mr. Fode argues that whether he fallowed the Schrag Property is important because he allegedly did this so that water rights for the Schrag Property could be seasonally transferred to avoid violations. He also argues it is relevant to the "seriousness of the violation" factor for penalty reasonableness. Appellant's Opening Br. at 56.

photograph and a Google Earth photograph over Mr. Fode's objection. Mr. Brown gave his opinion, based on the photographs and his experience, regarding whether the Schrag Property was irrigated in 2017. Mr. Fode contends this was error because Mr. Brown has no expertise in farming or irrigation.

WAC 371-08-500(1) states that "[e]vidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs" at hearings before the PCHB. *See also* RCW 34.05.452(1). The rule also provides that "[a]ll relevant evidence is admissible which, in the opinion of the presiding officer, is the best evidence reasonably obtainable, having due regard for its necessity, availability and trustworthiness." WAC 371-08-500(1).

At the Remand Hearing, Mr. Fode objected to admission of Google Earth photographs depicting the Schrag Property in 2017 based on a lack of foundation. The hearing officer disagreed, stating the images were "the kind of evidence on which reasonably prudent persons are accustomed to rely on the conduct of their affairs." CP at 3108. Based on the provisions of WAC 371-08-500(1), this was not error and the hearing officer did not abuse her discretion.

Furthermore, Mr. Brown testified that based on the aerial photographs, it was his opinion that the Schrag Property was being "irrigated and farmed" in 2017. CP at 3111. Prior to Mr. Brown's testimony, Mr. Fode objected, arguing Mr. Brown was not

"appropriately qualified as an expert." CP at 3104. The hearing officer did not rule on the objection but instead stated she wanted to "look at the exhibit first." CP at 3104. Mr. Fode's objection to Mr. Brown's testimony was not revisited. Now, Mr. Fode argues Mr. Brown should not have been permitted to provide his opinion on whether the Schrag Property was fallowed in 2017.

Whether a witness may provide expert testimony is a two-pronged inquiry: (1) the witness must qualify as an expert, and (2) the witness' opinion must be helpful to the trier of fact. *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 102, 882 P.2d 703, 891 P.2d 718 (1994). Assuming the error is preserved, the hearing officer did not abuse her discretion when she allowed Mr. Brown to provide his expert opinion. Ecology noted at the Remand Hearing that Mr. Brown was "qualified as an expert on irrigated agriculture given his familiarity and his experience and his education" at the 2019 Hearing. CP at 3099. Mr. Brown, at the 2019 Hearing, was allowed to provide his opinion regarding "whether a green field has been irrigated." CP at 2387. At the 2019 Hearing, Mr. Brown testified to his education, experience, and familiarity with the Washington State Irrigation Guide. Based on Mr. Brown's qualifications, the hearing officer did not abuse her discretion when she allowed him to testify to his opinion about whether aerial imagery of the Schrag Property showed it had been irrigated.

Finding that Mr. Fode did not Fallow the Schrag Property

Next, Mr. Fode argues "substantial evidence" showed he fallowed the Schrag Property in 2017. Appellant's Opening Br. at 57. Following the hearing on remand, the PCHB "g[ave] more weight to Ecology's evidence and [did] not find credible" Mr. Fode's testimony that he did not irrigate the Schrag Property in 2017. CP at 2237-38. We decline to disturb the PCHB's credibility determination and supported factual finding.

Mr. Fode points to his testimony at the Remand Hearing that he fallowed the Schrag Property in 2017 as well as exhibits demonstrating reduced crop yields and reduced power usage from 2016 to 2017. As explained above, Mr. Brown testified it was his opinion, based on aerial photographs, that Mr. Fode irrigated the Schrag Property in 2017. Additionally, though Mr. Fode testified at the Remand Hearing that he did not irrigate the majority of the Schrag Property, he was impeached with his deposition testimony in which he admitted to growing alfalfa and "lightly irrigating" portions of the Schrag Property in 2017. CP at 3076.

We do not reweigh credibility or substitute our judgment for that of the PCHB. *Port of Seattle*, 151 Wn.2d at 588. On appeal, we will not find persuasive what the PCHB did not. The PCHB's finding is supported by substantial evidence in the record.

Reasonableness of Penalties

Finally, Mr. Fode argues the PCHB misapplied penalty reasonableness factors and imposed unreasonable penalties. He contends, in assessing the seriousness of the violations,

Ecology and the PCHB failed to consider his fallowing of the Schrag Property to avoid negatively impacting the groundwater supply, as well as Ecology's "failure to provide technical assistance." Appellant's Opening Br. at 5. Further, Mr. Fode argues the record reflects he has not committed repeat violations. Finally, he posits Ecology had no evidence that his illegal irrigation damaged the health or property of others. Mr. Fode requests that we "re-evaluate the seriousness of any violations and determine a reasonable penalty amount based on the record." Appellant's Opening Br. at 61.

RCW 90.03.600 provides the relevant factors to be considered in imposing penalties: "In determining the amount of a penalty to be levied, the department shall consider the seriousness of the violation, whether the violation is repeated or continuous after notice of the violation is given, and whether any damage has occurred to the health or property of other persons."

As to his arguments regarding the "seriousness of the violation" factor, we already determined that Ecology *did* provide adequate technical assistance. RCW 90.03.600. Thus, the PCHB did not err when it did not consider Ecology's alleged lack of technical assistance in assessing the reasonableness of the fines. Moreover, though the PCHB did not find Mr. Fode's testimony that he fallowed the Schrag Property credible, it nevertheless noted that his decision to "fallow some of the Schrag acreage" was a "remedial action." CP at 2254. However, the PCHB explained Mr. Fode never informed Ecology any acreage was being

fallowed. The PCHB properly considered the "seriousness of the violation" factor, and its findings are supported by substantial evidence. RCW 90.03.600.

As to whether the violation is repeated or continuous, the PCHB found Mr. Fode did not have any previous administrative orders that resulted in penalties. However, it did find that water use should have stopped immediately after Ecology issued its cease-and-desist order. The PCHB properly considered whether Mr. Fode's violations were "repeated or continuous," and its findings related to this factor are supported by substantial evidence. RCW 90.03.600.

Finally, as to whether damage occurred to the health and property of others, the PCHB, in finding the violation was "extremely serious," noted that the Odessa Groundwater Management Subarea "is in great jeopardy after decades of declining aquifer levels." CP at 2253; *see also* WAC 173-128A-020. WAC 173-128A-020(1) states, "Since 1967, the segment of the Columbia basin groundwater system centered around the community of Odessa has experienced a steady decline in groundwater levels." Mr. Fode argues there was no direct evidence of harm to the Odessa Groundwater Management Subarea's groundwater resources, just "inferences and assumptions." Appellant's Opening Br. at 60. However, any unauthorized use of groundwater is harmful as it further depletes already declining groundwater resources. The PCHB properly considered this factor and its findings are supported by substantial evidence.

The PCHB did not misapply evidentiary standards and the penalties totaling $260,000 were reasonable.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Cooney, J.

WE CONCUR:

Murphy, J.

Birk, J. †

† The Honorable Ian S. Birk is a Court of Appeals, Division One, judge sitting in Division three pursuant to CAR 21(a).

Tristen L. Worthen
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals of the State of Washington Division III

500 N. Cedar St.
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

January 12, 2026

E-Mail:
Thomas Mann Pors
Law Office of Thomas M. Pors
1700 7th Ave Ste 2100
Seattle, WA 98101-1360
tompors@comcast.net

E-Mail:
Stephen H North
Attorney General of Washington
PO Box 40117
Olympia, WA 98504-0117
Stephen.north@atg.wa.gov

Lisa M. Peterson
WA State Attorney General's Office
800 5th Ave Ste 2000
Seattle, WA 98104-3188
Lisa.petersen@atg.wa.gov

Clifford Hiroshi Kato
Office of the Attorney General
PO Box 40117
Olympia, WA 98504-0117
Clifford.kato@atg.wa.gov

CASE # 404498
Ron Fode v. Washington Department of Ecology
GRANT COUNTY SUPERIOR COURT No. 172012820

Mr. Fode & Counsel:

Enclosed is a copy of an order filed by the court today denying appellant Ron Fode's motion for reconsideration of this court's December 18, 2025, opinion.

A party may seek discretionary review by the Washington Supreme Court of a Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review of the December 18, 2025, opinion must file a petition for review in this Court within 30 days after the attached order on reconsideration is filed. RAP 13.4(a); see also RAP 12.4(h). Please file the petition electronically through the Court's e-filing portal. The petition for review will then be forwarded to the Supreme Court. The petition must be received in this court on or before the date it is due. RAP 18.5(c).

If the party opposing the petition for review wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service on the party of the petition. RAP 13.4(d). The address of the Washington Supreme Court is Temple of Justice, P.O. Box 40929, Olympia, WA 98504-0929.

Sincerely,

Tristen Worthen
Clerk/Administrator

TLW: hcm
Attachment

APPENDIX B

FILED
JANUARY 12, 2026
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

RON FODE,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, AND THE ENVIRONMENTAL AND LAND USE HEARING OFFICE,

Respondents.

RON FODE,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Respondent.

WASHINGTON DEPARTMENT OF ECOLOGY,

Appellant,

v.

RON FODE; WASHINGTON STATE POLLUTION CONTROL HEARINGS BOARD,

Respondent.

No. 40449-8-III

ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered Appellant Ron Fode's motion for reconsideration of this court's opinion dated December 18, 2025, and the file and record therein.

Therefore, IT IS ORDERED, the motion for reconsideration is hereby denied.

PANEL: Judges Cooney, Murphy, and Birk

FOR THE COURT:

Lawrence-Berrey, C.J.

ROBERT E. LAWRENCE-BERREY
Chief Judge

2002

SESSION LAWS

OF THE

STATE OF WASHINGTON

REGULAR SESSION
FIFTY-SEVENTH LEGISLATURE
Convened January 14, 2002. Adjourned March 14, 2002.

Published at Olympia by the Statute Law Committee under Chapter 6, Laws of 1969.

GARY REID
Acting Code Reviser

http://slc.leg.wa.gov

APPENDIX C

~~(8)~~))) This section does not apply to an operator or passenger who possesses written verification from a licensed physician that the operator or passenger is unable to wear a safety belt for physical or medical reasons.

(((~~9~~))) (8) The state patrol may adopt rules exempting operators or occupants of farm vehicles, construction equipment, and vehicles that are required to make frequent stops from the requirement of wearing safety belts.

NEW SECTION. **Sec. 3.** Section 1 of this act expires July 1, 2002.

NEW SECTION. **Sec. 4.** Section 2 of this act takes effect July 1, 2002.

Passed the House February 14, 2002.
Passed the Senate March 7, 2002.
Approved by the Governor April 2, 2002.
Filed in Office of Secretary of State April 2, 2002.

CHAPTER 329

[Engrossed House Bill 2993]
WATER POLICY

AN ACT Relating to water policy; amending RCW 90.46.010, 90.46.030, 90.46.130, 90.38.020, 90.42.040, 90.42.080, and 90.03.370; adding a new section to chapter 90.54 RCW; adding a new section to chapter 90.03 RCW; adding a new section to chapter 90.46 RCW; adding a new section to chapter 43.155 RCW; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. **Sec. 1.** A new section is added to chapter 90.54 RCW to read as follows:

The legislature recognizes the critical importance of providing and securing sufficient water to meet the needs of people, farms, and fish. The legislature finds that an effective way to meet the water needs of people, farms, and fish is through strategies developed and implemented at the local watershed level. The objectives of these strategies are to supply water in sufficient quantities to satisfy the following three water resource objectives:

(1) Providing sufficient water for residential, commercial, and industrial needs;

(2) Providing sufficient water for productive fish populations; and

(3) Providing sufficient water for productive agriculture.

The legislature affirms its intent to provide continued support for watershed strategies and provides the tools in this bill to assist local watersheds in meeting these objectives.

NEW SECTION. **Sec. 2.** A new section is added to chapter 90.03 RCW to read as follows:

(1) The department shall, through a network of water masters appointed under this chapter, stream patrollers appointed under chapter 90.08 RCW, and other assigned compliance staff to the extent such a network is funded, achieve

compliance with the water laws and rules of the state of Washington in the following sequence:

(a) The department shall prepare and distribute technical and educational information to the general public to assist the public in complying with the requirements of their water rights and applicable water laws;

(b) When the department determines that a violation has occurred or is about to occur, it shall first attempt to achieve voluntary compliance. As part of this first response, the department shall offer information and technical assistance to the person in writing identifying one or more means to accomplish the person's purposes within the framework of the law; and

(c) If education and technical assistance do not achieve compliance the department shall issue a notice of violation, a formal administrative order under RCW 43.27A.190, or assess penalties under RCW 90.03.600 unless the noncompliance is corrected expeditiously or the department determines no impairment or harm.

(2) Nothing in the section is intended to prevent the department of ecology from taking immediate action to cause a violation to be ceased immediately if in the opinion of the department the nature of the violation is causing harm to other water rights or to public resources.

(3) The department of ecology shall to the extent practicable station its compliance personnel within the watershed communities they serve. To the extent practicable, compliance personnel shall be distributed evenly among the regions of the state.

Sec. 3. RCW 90.46.010 and 2001 c 69 s 2 are each amended to read as follows:

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Greywater" means wastewater having the consistency and strength of residential domestic type wastewater. Greywater includes wastewater from sinks, showers, and laundry fixtures, but does not include toilet or urinal waters.

(2) "Land application" means application of treated effluent for purposes of irrigation or landscape enhancement for residential, business, and governmental purposes.

(3) "Person" means any state, individual, public or private corporation, political subdivision, governmental subdivision, governmental agency, municipality, copartnership, association, firm, trust estate, or any other legal entity whatever.

(4) "Reclaimed water" means effluent derived in any part from sewage from a wastewater treatment system that has been adequately and reliably treated, so that as a result of that treatment, it is suitable for a beneficial use or a controlled use that would not otherwise occur and is no longer considered wastewater.

(5) "Sewage" means water-carried human wastes from residences, buildings, industrial and commercial establishments, or other places, together with such

PROOF OF SERVICE

I certify that on this date, I electronically filed this document with the Clerk of the Court using the Washington State Appellate Courts' e-file portal, which will send notification of such filing to all counsel of record at the following addresses:

Stephen H. North (stephen.north@atg.wa.gov)
Clifford H. Kato (clifford.kato@atg.wa.gov)
Lisa Peterson (lisa.petersen@atg.wa.gov)
Alternate Email for Ecology (ECYOlyEF@atg.wa.gov)

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED this 11th day of February 2026, at Seattle, Washington.

Thomas M. Pors

_____

Thomas M. Pors