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POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

FRIENDS OF TOPPENISH CREEK, PUGET
SOUNDKEEPER ALLIANCE, CENTER FOR
FOOD SAFETY, SIERRA CLUB,
WATERKEEPER ALLIANCE

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF
ECOLOGY,

Respondent.

Notice of Appeal

1. Identity of Appealing Parties and Representatives

The appealing parties are:

Friends of Toppenish Creek, Puget Soundkeeper Alliance, Center for Food Safety, Sierra Club, and
Waterkeeper Alliance

The representatives of the appealing parties are:

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1 **2. Identification of Other Parties**

2 The respondent in this appeal is the Washington State Department of Ecology (“Ecology”).

3 **3. Decision Under Appeal**

4 This is an appeal of a combined National Pollutant Discharge Elimination System and State
5 Waste Discharge (“NPDES”) General Permit for Concentrated Animal Feeding Operations
6 (“CAFOs”) (“Combined Permit”), and a State Waste Discharge General Permit for CAFOs (“State
7 Permit”) (collectively the “Permits”) issued on December 7, 2022. Copies of the Permits are attached.
8 In addition, this is an appeal of Ecology’s Determination of Nonsignificance (“DNS”), under the State
9 Environmental Policy Act (“SEPA”). A copy of Ecology’s DNS is attached.

10 **4. Short and Plain Statement of the Grounds for Appeal**

11 The Permits are contrary to law because they are inconsistent with the requirements and
12 intent of the federal Clean Water Act and its governing regulations promulgated by the U.S.
13 Environmental Protection Agency (“EPA”) and the Washington State Water Pollution Control Act
14 and its governing regulations promulgated by Ecology. Ecology’s issuance of the DNS and failure to
15 comply with SEPA are contrary to law because these actions and inactions are inconsistent with the
16 requirements and intent of SEPA and Ecology’s implementing regulations.

17 **5. Statement of Facts and Preliminary Identification of Issues**

18 CAFOs closely confine animals, feed, manure and urine, dead animals, and production
19 operations on a small land area. In Washington, the vast majority of CAFOs are dairies and cattle
20 feedlots. Specifically, Washington is home to approximately 285 dairies across 28 of the 39
21 Washington counties. Combined, these dairies keep approximately 277,000 cows. Adult dairy cows
22 in Washington collectively produce between 16 and 40 million pounds of manure daily.

23 In addition to a variety of other pollutants, the animal waste from these facilities contains
24 nitrogen. This nitrogen transforms into ammonia, nitrite, and nitrate as it moves through the
25 environment after being discharged. Nitrates and nitrites in drinking water are hazardous to human
26 health, especially infants. Courts have found that CAFOs in Washington have contaminated the

1 state’s waters with nitrate and other pollutants, causing an imminent and substantial endangerment to
2 health and the environment.

3 Nitrate contamination threatens drinking water, especially in communities with high
4 concentrations of CAFOs. Ecology and the United States Geological Survey report that 29 percent
5 of sampled wells in the Sumas Blaine aquifer in Whatcom County and over 20 percent of wells in
6 the Yakima Valley exceed the nitrate maximum contaminant level. Nitrates are problematic for
7 residents to detect because they are odorless, colorless, and flavorless. Their ingestion causes
8 multiple adverse health outcomes such as methemoglobinemia (“blue baby syndrome”),
9 cardiovascular harm, strokes, reproductive problems such as miscarriages, thyroid problems, and
10 some cancers. The high costs of remedial measures (such as filtration or bottled water) impose
11 substantial burdens on low-income community members as well as immigrants, Black, Latino, Asian
12 American and Pacific Islanders, and other people of color living in Washington State. The added risk
13 and cost of this polluted drinking water adds to the cumulative environmental burdens faced by these
14 members of communities already experiencing disproportionate health impacts as a result of historic
15 and ongoing state action. Additionally, there are disproportionate impacts, including economic
16 burdens, on Indigenous people, Tribal members, and Tribes themselves.

17 The discharge of pollutants from CAFOs, including nutrients, toxics, and pathogens, also
18 significantly impacts the surface water quality of the state’s rivers, streams, and marine waters,
19 causing or contributing to the state’s water quality crisis. Indeed, Ecology itself reports that excess
20 nutrients in the water—i.e., nitrogen and phosphorous—are driving a reduction in the levels of
21 dissolved oxygen to the point that in parts of Puget Sound these critically low levels are negatively
22 impacting shellfish, salmon, Southern Resident orcas, and other species, many of which are listed as
23 threatened or endangered. Yet, despite being well aware of the threat nutrients pose to Washington
24 State’s unique waters, including many already impaired by pollutants discharged from CAFOs,
25 Ecology’s approach to CAFO management ignores the clear connection between ongoing pollution
26

1 from these operations, the Sound’s failure to meet water quality standards, and the threats to these
2 species.

3 In addition to the ground- and surface-water quality impacts caused by this pollution,
4 CAFOs significantly contribute to the climate crisis. Dairies, especially those that confine cows and
5 use manure lagoons, drive climate change by emitting greenhouse gasses such as nitrous oxide and
6 methane. These pollutants are less abundant than carbon dioxide (CO₂), but they are much more
7 potent: methane has a Global Warming Potential (“GWP”) 84-87 times that of CO₂ over 20 years,
8 and nitrous oxide has a GWP of 264-268 times that of CO₂ for the same period. Livestock
9 production is the dominant source of methane in the United States, and manure management is the
10 fastest-growing major source of methane, increasing by more than 50 percent between 1990 and
11 2008.

12 Washington is already experiencing the catastrophic effects of climate change through
13 dwindling snowpack and freshwater resources, unprecedented and deadly heat waves, and increased
14 wildfire. Those most vulnerable to climate change are people of color and others already subject to
15 disproportionate impacts from historic and ongoing systemic and structural racism. Climate change
16 also disproportionately impacts Tribes and Indigenous people, particularly when it comes to cultural
17 resources. Importantly, impacts to water quality caused by and exacerbated by a changing climate,
18 such as increased temperature, lower dissolved oxygen, and nuisance algal growth, are the same
19 impacts caused by discharges from CAFOs. As a result, CAFO pollution both causes water pollution
20 and makes it significantly worse by driving the climate crisis. Understanding the impact of CAFO
21 pollution on water quality requires incorporating information about the current dynamic hydrological
22 and weather regime rather than relying on historical trends.

23 In Washington, state law and the federal Clean Water Act (“CWA”) work in tandem to
24 establish the regulatory framework for controlling and eventually eliminating pollution discharged
25 into the state’s waters. The Washington Water Pollution Control Act declares the “public policy of
26 the state of Washington to maintain the highest possible standards to insure the purity of all waters of

1 the state consistent with public health and public enjoyment thereof, the propagation and protection
2 of wildlife, birds, game, fish and other aquatic life, and the industrial development of the state.”
3 RCW 90.48.010. Thus, “[c]onsistent with this policy, the state of Washington will exercise its
4 powers, as fully and as effectively as possible, to retain and secure high quality for all waters of the
5 state [and] work[] cooperatively with the federal government in a joint effort to extinguish the
6 sources of water quality degradation.” *Id.* To achieve these objectives, both state law and federal law
7 make it unlawful for any person to discharge pollutants from a point source—any discernible,
8 confined, and discrete conveyance—into the state’s surface waters without a permit. RCW
9 90.48.080, RCW 90.48.160; WAC 173-226-020; *see also* 33 U.S.C. §§ 1311(a), 1362(12). These
10 permits must include “effluent limitations” for the pollutants being discharged. The permit’s effluent
11 limits must ensure compliance with the laws’ two independent requirements: (1) technology-based
12 effluent limitations; and (2) water quality-based effluent limitations. 33 U.S.C. § 1342(a)(2); 40
13 C.F.R. §§ 122.4(a), (d); 122.44(d); RCW 90.54.020(3)(b); WAC 173-226-070.

14 The CWA provides that the EPA may authorize states to carry out the NPDES permit
15 program. 33 U.S.C. § 1342(b). EPA has authorized Washington to issue some NPDES permits, and
16 Ecology is the state Water Pollution Control Agency in Washington. RCW 90.48.260. Washington
17 law must meet the federal minimum requirements. 33 U.S.C. § 1370.

18 As a threshold matter, Ecology failed to fulfill its obligation to identify the facilities that may
19 be required to obtain permit coverage under the Permits. Ecology must list in the Fact Sheet “[a]
20 listing or some other means of identifying the facilities proposed to be covered under the general permit.”
21 WAC 173-226-110(1)(d); WAC 173-226-130(e)(v) (“The department shall make available during the
22 public comment period . . . [a] listing or some other means of generally identifying the facilities
23 proposed to be covered under the general permit.”). By failing to identify which existing facilities may be
24 required to obtain permit coverage, and identify those areas of the state where CAFOs may be sited in the
25 future, Ecology has made it virtually impossible to ensure the Permits’ terms and conditions will comply
26 with the state and federal permitting requirements.

1 Ecology's NPDES Permit must establish requirements at least as stringent as the federal
2 implementing regulations for CAFO Permits. 33 U.S.C. § 1370; *see also* 33 U.S.C. § 1311(b)(1)(C);
3 33 U.S.C. § 1313(e)(3)(A); 40 C.F.R. § 123.25. As a result, the federal CAFO Rules, 40 C.F.R. §
4 122.42(e); 40 C.F.R. § 412, apply to Ecology's NPDES permits, and the Combined Permit must
5 conform to these requirements. *See* 40 C.F.R. § 123.25. Ecology failed to adhere to these rules. In
6 particular, the Combined Permit fails to comply with the CAFO Rule's requirements concerning the
7 requirements for Large CAFOs, CAFOs that discharge to impaired waters, public participation in the
8 development of pollution controls, mandatory Nutrient Management Plan requirements, and
9 minimum enforceable and site-specific waste management and land application standards and
10 requirements for nitrogen and phosphorus. In addition, the Combined Permit allows surface water
11 discharges specifically prohibited under federal law, including so-called "agricultural stormwater"
12 discharges, under a definition that conflicts with the minimum standards of the federal CAFO Rule.

13 Under Washington law, state technology-based effluent limits in all waste discharge permits
14 must also include "all known, available, and reasonable methods of preventing, controlling and
15 treating" pollutants—namely, Washington's "AKART" standard. RCW 90.48.010. This
16 fundamental permit requirement seeks to ensure that the state's waters are protected to the maximum
17 extent possible by requiring dischargers to keep pace with improvements in treatment technology.
18 That is, AKART "shall represent the most current methodology that can be reasonably required for
19 preventing, controlling, or abating the pollutants associated with a discharge." WAC 173-201A-020.
20 Once Ecology establishes what pollution removal treatment qualifies as AKART for a particular
21 discharge, it must translate that technology into permit limitations. WAC 173-226-070. AKART is
22 an evolving standard that mirrors the development of new pollution removal technologies because,
23 by definition, the technology that is "known," "available," and "reasonable" will change over time.
24 Thus, to implement AKART, Ecology must require dischargers to use increasingly more stringent
25 treatment as technological advancements become known, available, and reasonable to prevent,
26 control, and abate the discharge of pollutants. *See* WAC 173-201A-020 ("AKART shall represent

1 *the most current* methodology that can be reasonably required for preventing, controlling, or abating
2 the pollutants associated with a discharge.”) (emphasis added). Despite this clear statutory mandate,
3 Ecology has failed to ensure that the CAFOs covered under the Permits will develop, employ,
4 implement, and maintain the measures necessary to comply with AKART to control the discharge of
5 pollutants to surface waters and groundwater. As a result, these CAFOs will likely discharge
6 pollutants from the liquid storage facilities, solid waste storage facilities, production areas, and
7 manure land application sites in excess of what is allowable under state law.

8 While technology-based effluent limits ensure permit limits keep pace with advances in
9 available treatment technology, the second type of required permit limit, water quality-based effluent
10 limits (“WQBELs”), are aimed at achieving minimum water quality standards pending the eventual
11 cessation of all polluting discharges. *See* 33 U.S.C. §§ 1311(b)(1)(C), 1342(a)(2). These limits are
12 derived from state water quality standards, which define the minimum water quality that must be
13 attained—without exception—in the receiving waterbody to protect human health and aquatic life.
14 *See* 33 U.S.C. § 1313(a)(3), (c)(2)(A). Water quality-based effluent limits are necessary when, even
15 after imposing any required technology-based controls, the discharge will still “cause [or have] the
16 reasonable potential to cause” an exceedance of applicable water quality standards. 40 C.F.R. §
17 122.44(d)(1)(i); WAC 173-226-070(2), (3); Ecology, Water Quality Program Permit Writer’s
18 Manual (“When reviewing a permit application or renewal, the permit writer must first determine the
19 proper technology-based limits. Then the writer must decide if these limits are stringent enough to
20 ensure that water quality standards are not violated in the receiving water. If they are not, then water
21 quality-based limits must be developed.”). Specifically, every permit must include effluent limits
22 that “control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic
23 pollutants) which the [permitting authority] determines are or may be discharged at a level which
24 will cause, have the reasonable potential to cause, or contribute to an excursion above any State
25 water quality standard, including State narrative criteria for water quality.” 40 C.F.R. §
26 122.4(d)(1)(i); *id.* § 122.44(d)(1)(vii)(A); WAC 173-226-070(2)(b). Thus, “[n]o permit may be

1 issued: . . . [w]hen the imposition of conditions cannot ensure compliance with the applicable water
2 quality requirements of all affected States.” 40 C.F.R. § 122.4(d). Accordingly, Ecology may not
3 issue an NPDES permit that allows violations of water quality standards. *Id.*; WAC 173- 226-070(2).
4 Ecology’s rules mandate that every general NPDES permit must “insure compliance” with water
5 quality-based effluent limits. WAC 173-226-070(2), (3). The Permits do not include the water-
6 quality based effluent limits sufficient to meet these standards. As a result, the CAFOs operating
7 under these Permits will likely discharge pollutants from the liquid storage facilities, solid waste
8 storage facilities, production areas, and manure land application sites to both surface waters and
9 groundwater in excess of what is allowed under state and federal law.

10 All NPDES permits must contain conditions that require both monitoring and reporting of
11 monitoring results. 33 U.S.C. § 1342(a)(2); 40 C.F.R. § 122.44(i)(1) & (2). Similarly, Ecology’s
12 permitting regulations require the imposition of reasonable monitoring requirements on all pollutants
13 a general permit authorizes to be discharged into state waters. WAC 173-226-090(1). Despite this,
14 Ecology has failed to include the necessary monitoring requirements to ensure permittees will comply
15 with the Permits’ effluent limits, terms, and conditions, and ensure that the Permits’ effluent limits,
16 terms, and conditions themselves are properly implementing state and federal requirements.

17 For example, the Permits fail to include the monitoring requirements necessary to ensure
18 compliance with the terms and conditions of the Permits for discharges to surface waters. For
19 example, the Permits do not have the monitoring requirements necessary to ensure that the
20 CAFOs will detect unpermitted discharges to surface water, or to ensure that any permitted
21 discharges comply with state-mandated and federal-mandated effluent limits, including but not
22 limited to ensuring compliance with numeric and narrative water quality standards. Similarly, the
23 Permits’ groundwater monitoring requirements are inadequate as they fail to ensure that all
24 permitted facilities will monitor the pollutants being discharged, capture the information
25 necessary to ensure the facilities comply with the Permits, and identify violations of the Permits’
26 effluent limits, terms, or conditions.

1 The legislature enacted the Washington State Environmental Policy Act (“SEPA”) to
2 carry out its policy that “each person has a fundamental and inalienable right to a healthful
3 environment and that each person has a responsibility to contribute to the preservation and
4 enhancement of the environment” as well as “the responsibilities of each generation as trustee of
5 the environment for succeeding generations.” RCW 43.21C.020 (2), (3). SEPA “directs that, to
6 the fullest extent possible: (1) The policies, regulations, and laws of the state of Washington shall
7 be interpreted and administered in accordance with the policies set forth in this chapter.” RCW
8 43.21C.030. As a result, SEPA overlays governmental decision-making across the state.

9 SEPA explicitly mandates that state agencies, among other things, “[u]tilize a systematic,
10 interdisciplinary approach which will insure the integrated use of the natural and social sciences and
11 the environmental design arts in planning and in decision making which may have an impact on the
12 environment;” and “[r]ecognize the worldwide and long-range character of environmental problems
13 and, where consistent with state policy, lend appropriate support to initiatives, resolutions, and
14 programs designed to maximize international cooperation in anticipating and preventing a decline in
15 the quality of the world environment.” RCW 43.21C.030(a), (f). So, for example, under SEPA,
16 agencies must consider climate change when making decisions. *Washington State Dairy Fed'n v.*
17 *State*, 18 Wn. App. 2d 250, 490 P.3d 290 (2021). In addition to the broad effect of SEPA across agency
18 decision-making, SEPA directs any agency proposing a major action “significantly affecting the
19 quality of the environment” to complete an environmental impact statement (“EIS”). RCW
20 43.21C.030(c). Actions under SEPA include “project” actions, which include “agency decisions to [
21]cense, fund, or undertake any activity that will directly modify the environment,” and “nonproject”
22 actions, which “involve decisions on policies, plans, or programs.” WAC 197-11-704(1)(a), (b). The
23 first step of the EIS process for any action involves the “threshold determination” of whether the
24 proposed action is “likely to have a probable significant adverse environmental impact.” WAC 197-
25 11-310(1), (3).

1 Under SEPA, this threshold determination is made by the lead agency’s designated responsible
2 official. RCW 43.21C.033(1) (stating that “the responsible official shall make a threshold
3 determination on a completed application within ninety days after the application and supporting
4 documentation are complete”). The “responsible official” is “that officer or officers, committee,
5 department, or section of the lead agency designated by agency SEPA procedures to undertake its
6 procedural responsibilities as lead agency (WAC 197-11-910).” WAC 197-11-788; WAC 197-11-910
7 (every agency must either designate the responsible official for its SEPA compliance or provide a
8 method “of designating the responsible official with speed and certainty.”).

9 Under SEPA, the responsible official’s threshold determination must be based upon
10 “information reasonably sufficient to evaluate the environmental impact of a proposal.” WAC 197-
11 11-335. The elements of the environment that the responsible official must consider when making the
12 threshold determination include, but are not limited to, the earth (soils, topography, erosion), air (air
13 quality, odor, climate), water (surface water quality, runoff, floods, groundwater quality, public water
14 supplies), plants and animals (habitat for and numbers and diversity of species of plants, fish, or other
15 wildlife, and unique species), natural and scenic resource; environmental health (release of toxic or
16 hazardous materials), land and shoreline use, aesthetics, recreation, historic and cultural resources,
17 agricultural crops, and public services and utilities (water/stormwater). WAC 197-11-444, 960. When
18 a proponent is considering a nonproject action, as opposed to a project action, the responsible
19 official’s consideration additionally must include, but is not limited to, the extent that activities likely
20 to result from the proposal would be affected at a “greater intensity” or “faster rate” than if the
21 proposal was not implemented. WAC 197-11-960. This analysis cannot “balance whether the
22 beneficial aspects of a proposal outweigh its adverse impacts, but rather, shall consider whether a
23 proposal has any probable significant adverse environmental impact. . . .” WAC 197-11-330(5).
24 Based on this analysis, if the responsible official determines that a proposal “may have a probable
25 significant adverse environmental impact,” they must prepare and issue a determination of
26 significance (“DS”) and initiate scoping in anticipation of the issuance of an EIS. WAC 197-11-

1 360(1). Only if the responsible official determines there will be “no probable significant adverse
2 environmental impacts from a proposal” may it prepare and issue a determination of nonsignificance
3 (“DNS”) excusing an applicant from undertaking an EIS. WAC 197-11-340(1).

4 Ecology violated SEPA in several ways. First, Ecology failed to identify the nature and scope
5 of the action under review. Specifically, Ecology improperly defined its issuance of the Permits as a
6 “nonproject” action. WAC 197-11-704(2)(a), (b); WAC 197-11-774. In addition, Ecology defined the
7 proposal too narrowly and thus failed to evaluate the true scope of the proposed action. WAC 197-11-
8 060(3)(a), (b); WAC 197-11-784.

9 Second, Ecology acted inconsistently with SEPA policies, in violation of the SEPA’s broad
10 overlay across the state’s statutory schemes. Specifically, the agency failed to act consistent with its
11 trust duty to future generations in issuing the Permits by failing to consider the individual and
12 cumulative impact of current and future permitted CAFOs on the state’s greenhouse gas emissions.
13 Relatedly, by failing to consider these impacts, the agency also failed to comply with SEPA’s mandate
14 towards supporting international cooperation in combating the global degradation of the earth’s
15 environment. Further, Ecology failed to consider current, ongoing, and projected climate change
16 impacts that are and will amplify the adverse environmental effects of these operations, including, but
17 not limited to, changes in hydrological cycles, altered weather patterns, increased water temperatures,
18 increased air pollution from forest fires, and more frequent and more extreme adverse weather events.
19 Moreover, Ecology, when crafting the Permit’s effluent limits, terms, and requirements, failed to
20 recognize that past climatic conditions, including historical weather patterns and water conditions, do
21 not adequately describe the current physical and biological conditions of Washington state waters
22 under the new climate regime.

23 Third, in issuing its threshold determination, Ecology did not rely on “information reasonably
24 sufficient to evaluate the environmental impact of a proposal.” WAC 197-11-335. The responsible
25 official relied on a SEPA checklist that failed to provide information regarding the likely impact of
26 the proposal on most of the enumerated elements of the environment, including erosion, soils, odors,

1 surface waters, floodplains, groundwater, discharged waste material, plants, threatened or endangered
2 species, animals, plants, migration routes, environmental health, hazardous conditions, special
3 emergency services, environmentally sensitive areas, aesthetics, and historic and cultural preservation.
4 Moreover, Ecology relied on an impermissible balance of the “benefits” of the permit against the
5 potential impacts to support its determination. *See* WAC 197-11-330(5).

6 Fourth, Ecology’s issuance of the DNS is impermissible under SEPA because the permit may
7 have probable significant direct, indirect, and cumulative adverse impacts on multiple elements of the
8 environment, including, but not limited to, soils and the likelihood of erosion, air quality, odors, the
9 climate, surface water quantity and quality, runoff, the probability and impact of floods, groundwater
10 quantity and quality, availability of public water supplies, the habitat, and the numbers and diversity
11 of plants and animals, including unique species, the conservation of natural and scenic resources,
12 environmental health, the release of toxic or hazardous materials, land and shoreline use, aesthetics,
13 recreation, historic and cultural preservation, and agricultural crops. Further, as articulated above, the
14 permit violates the CWA and state water law.

15 Finally, Ecology did not comply with SEPA’s procedural mandates. First, Ecology failed to
16 ensure that the appropriate, designated responsible official made the threshold determination. WAC
17 197-11-910; WAC 173-802-050. Second, Ecology failed to provide adequate notice and the
18 opportunity for public comment on its threshold determination. WAC 197-11-502(3).

19 **6. Request for Relief**

20 Appellants request that the Board order the Department of Ecology to modify the Permits
21 to comply with all applicable legal requirements, as identified in this appeal. Appellants also
22 request that the Board set aside the DNS, order the Department of Ecology to undertake an EIS,
23 and otherwise comply with SEPA.

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1 DATED this 6th day of January 2023.

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Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on January 6, 2023, I caused to be served the Notice of Appeal and attachments in the above-captioned matter upon the following:

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the foregoing being the last known addresses.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 6th day of January 2023, in Seattle, Washington.

s/ Andrew Hawley
Andrew Hawley