
WA CAFO Permit Fact Sheet

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Citizen Law Suits & NPDES Permits for CAFOs

On Friday, June 9, 2023, attorneys¹ for Friends of Toppenish Creek, Community Association for Restoration of the Environment, and Center for Food Safety filed a proposed Consent Decree (CD) with DBD Washington, LLC and SMD, LLC, two factory farm dairies in Yakima Valley, WA owned by Austin Jack DeCoster and DeCoster Enterprises in the United States District Court for the Eastern District of Washington.²

This consent decree requires the dairies to line manure lagoons with synthetic liners, restrict application of manure to fields as fertilizer when soil nitrate and phosphorus levels are too high, monitor nitrogen and phosphorus levels in groundwater, test pipes and other manure conveyance systems for leaks, manage leachate from compost piles and silage, and fund pilot projects to evaluate ways to treat excess nitrogen in groundwater.

This decree is significant because these two dairies have held NPDES permits since 2006.³ Although the case did not go to trial, the plaintiffs (FOTC, CARE & CFS) provided preliminary evidence that the dairies “employ, and have employed, improper manure management practices that constitute the “open dumping” of solid waste in violation of Section 4005(a) of RCRA. 42 U.S.C. § 6945(a)” all while under permits. The Consent Decree states: “Plaintiffs shall be considered the prevailing party for purposes of settlement.”

Here is a quote from the plaintiff’s soil expert, Dr. Michael Russelle⁴:

A similar story occurred for Field 3. While the Defendants reported in their Annual Report that a total of 626,400 gallons applied to Field 3 at unknown times and in unstated weather conditions, DAIRIES-00000554, in reality the Defendants’

application records show at least 761,600 gallons were applied. I note that the Annual Report again fails to identify the total amount of nitrogen fertilizer applied to this field. The Fall, 2018 soil samples, however, were very high: 256 lbs/ac, 183 lbs/ac, and 53 lbs/ac nitrate in each foot of the soil column. Such excessive residual nitrate amounts show that Defendants' applications in 2018 to Field 3 were not agronomic and applied too much nitrogen to the soil that the crop could effectively use as fertilizer.

There are many more examples of over application of manure to cropland as well as instances of incomplete, inaccurate record keeping. FOTC asks why regulators from Ecology's NPDES program did not catch these problems while reviewing the dairies' annual reports.

One possible answer is lack of resources. According to Ecology's reports to the legislature^{5, 6, 7}, the agency employs 1.12 FTEs to administer the NPDES program for CAFOs and spends about \$100,000 per year for permit writing and compliance. One person must write permits and make sure that the approximately 25 permittees comply with permit conditions. That person presumably must also investigate CAFO discharges and compel polluters to apply for permits. In reality, one person cannot accomplish all this work, even if he/she worked 24 hours a day 7 days a week.

Pursuant to RCW 90.64 Ecology has a Memorandum of Understanding (MOU) with the WA State Dept. of Agriculture whereby WSDA inspects all WA dairies and reports discharges to Ecology.⁸ In 1998 when Ecology had responsibility for dairy inspections, there were seven dairy inspectors statewide.⁹ Now there are four inspectors, and only one inspector is responsible for all Eastern Washington where 2/3 of the state's dairy cows are housed. This one inspector inspects each dairy once every two years. Typically, the inspector spends a few hours on the facility and then reviews paperwork submitted by the dairy. This is simply not enough time for a thorough inspection. WSDA almost never recommends that discharging dairies should apply for NPDES permits.

To prepare the case against DBD/SMD the plaintiff's attorneys spent hundreds of hours pouring over documents, conferring with experts, and visiting the dairies. Costs ran into the hundreds of thousands of dollars. But they uncovered significant violations of permits and egregious discharges to groundwater. Ecology simply

does not have the resources to do this for an entire state, while simultaneously dealing with political pressure from the dairy industry.

Here are nitrate-n levels at the two foot level for DBD fields as reported in the dairy’s 2022 annual NPDES report:

Adaptive Management Data DBD, WA Fall 2022

Low Risk Level Fall Soil Nitrate Test Range <ul style="list-style-type: none"> • < 15 ppm • < 55 lbs/acre 	Field	Nitrate at 2 ft - ppm
	Field 25	3.3
	Old Mint	2.0
Medium Risk Level Fall Soil Nitrate Test Range <ul style="list-style-type: none"> • 15 – 30 ppm • 55 – 110 lbs/acre 	Field	Nitrate at 2 ft - ppm
	Field 01B	27.2
	Field 01C	20.1
	Field 02 SWB	22.8
	Field 05	30.5
	Field 06	19.1
	Field 07	25.3
	Field 21	22.8
	Field 22 CP	22.6
	Field 22 SS	20.2
	Field 23	27.6
	Field 24	27.5
High Risk Level Fall Soil Nitrate Test Range <ul style="list-style-type: none"> • 31 – 45 ppm • 111 – 165 lbs/acre 	Field	Nitrate at 2 ft - ppm
	Field 02 EC	36.3
	Field 02 WC	36.8
	Field 04	33.3
Very High Risk Level Fall Soil Nitrate Test Range <ul style="list-style-type: none"> • > 45 ppm • > 165 lbs/acre 	Field	Nitrate at 2 ft - ppm
	Field 02 EB	47.8
	Field 02 NWB	57.4
	Field 03 B	72.3
	Field 03 C	143.4

	Field 08 – 11 B	62.4
	Field 08 – 11 C	90.7

Groundwater testing of monitoring wells on the dairies shows significant discharge to the underlying aquifer. The data below was collected by a consultant hired by DBD/SMD.¹⁰

Well Number	Total Nitrogen mg/kg	Nitrate mg/kg	Ammonia mg/kg	Phosphorus mg/kg
FMW-01-15	290	72	73.9	920
FMW-01-35	200	9.6	44.8	820
FMW-04	380	< 0.59	78.6	880
FMW-05	160	4.2	54.1	770
FMW-06	200	36	41.7	870
FMW-07	330	47	48.1	790
FMW-08	560	<0.63	557	890
FMW-09-25	250	<0.64	63.6	1,100
FMW-09-5	390	<0.65	279	1,000
FMW-10	56	42	30.2	910

What is the public benefit when dairies that have enjoyed NPDES permits for fifteen years continue to over apply manure to cropland without penalty?

The Consent Decree between environmental groups and DBD/SMD requires the dairies to reduce phosphorus application when soil phosphorus levels exceed 45 mg/kg. The most recent version of Ecology’s NPDES permit for CAFOs places no restrictions on phosphorus applications. Adaptive management in the 2023 permits focuses entirely on nitrate levels.

FOTC recently studied WSDA dairy inspection reports for all WA dairies except those on Indian reservations from January 2020 to February 2023. 40% of Western Washington dairy fields and 29% of Eastern Washington dairy fields had soil phosphorus levels above 100 ppm.¹¹

Ecology and WSDA have not fulfilled their missions to protect the waters of the state and have fostered a system that tolerates pollution.

Currently the only option for impacted citizens is going to court, as the people of South Yakima County did in CARE et al v. DBD. This is easier said than done. It is extremely difficult for relatively poor people to find the hundreds of thousands of dollars necessary to mount a citizen lawsuit. It is disheartening when we know that WA agencies are funded, albeit inadequately, to do this work on our behalf.

The only way to protect the waters of WA State from CAFO related pollution is to write strong permits that require immediate action when dairies discharge to ground and surface waters.

Thank you for reading.

Friends of Toppenish Creek

You have received this Fact Sheet because you are on a list of potentially interested parties. If you do not want to receive further information, please contact Jean Mendoza at jeanmendoza@icloud.com

1 Charles Tebbutt & Jon Frohnmayer from Tebbutt Law, Daniel Snyder from Public Justice, Amy Van Saun from Center for Food Safety

2 Consent Decree available at

<http://www.friendsoftoppenishcreek.org/cabinet/data/Care%20v.%20DBD%20Consent%20Decree.pdf>

3 WA Ecology Water Quality Permitting and Reporting Information System (PARIS) at <https://apps.ecology.wa.gov/paris/PermitSearch.aspx>

4 Dr. Michael Russelle - Adjunct Professor, Department of Soil, Water, and Climate, University of Minnesota Member of the Graduate Faculty in Soil, Water, and Climate Formerly: Research Soil Scientist, USDA-Agricultural Research Service (32 years)

5 Wastewater and Stormwater Discharge Permit Fee Program Report to the Legislature State Fiscal Years 2014- 2017. Table C, page 20. [GetPDF \(wa.gov\)](#)

6 Wastewater and Stormwater Discharge Permit Fee Program Report to the Legislature State Fiscal Years 2018- 2019.

<https://apps.ecology.wa.gov/publications/documents/2010004.pdf>

7 Wastewater and Stormwater Discharge Permit Fee Program Report to the legislature State Fiscal Years 2020- 2021.

<https://apps.ecology.wa.gov/publications/documents/2110060.pdf>

8 Memorandum of Understanding WA Ecology & WA State Dept. of Agriculture.

<https://ecology.wa.gov/DOE/files/6f/6f30de07-feb0-463a-958e-cf48df3a43bf.pdf>

9 DNMP Timeline. Available at

<http://www.friendsoftoppenishcreek.org/cabinet/data/GWMA%20MR%20Attachm ent%2076%20DNMP%20Timeline.pdf>

10 Steven L. Hicks, Inland Earth Sciences, Expert Report. July 22, 2022.

11 Friends of Toppenish Creek. Elevated Nitrate N and Phosphorus in Soils that Receive Dairy Manure in Washington State. Available at

<http://www.friendsoftoppenishcreek.org/cabinet/data/Analysis%20of%20Dairy%2 0Inspections%20III.pdf>

Glossary

Adaptive Management: Is a decision process that promotes flexible decision making that can be adjusted in the face of uncertainties as outcomes from management actions and other events become better understood. Careful monitoring of these outcomes both advances scientific understanding and helps adjust policies or operations as part of an iterative learning process. Adaptive management also recognizes the importance of natural variability in contributing to ecological resilience and productivity. It is not a ‘trial and error’ process, but rather emphasizes learning while doing. Adaptive management does not represent an end in itself, but rather a means to more effective decisions and enhanced benefits. Its

true measure is in how well it helps meet environmental, social, and economic goals, increases scientific knowledge, and reduces tensions among stakeholders.

U.S. Dept. of the Interior at

<https://www.doi.gov/sites/doi.gov/files/uploads/TechGuide-WebOptimized-2.pdf>

Consent Decree: (also known as a **consent order**) Is a **decree** made by a **judge** with the **consent** of all **parties**. It is not strictly a **judgment**, but rather a **settlement agreement** approved by the **court**. The agreement is submitted to the court in writing after the parties have reached a settlement, and once approved by the judge, the agreement is binding and enforceable on both parties. A consent decree is not **appealable**, except that it can be set aside by the court for **fraud** on the part of one party, or for **error** on the part of both parties. Cornell University Law School, Legal Information Institute at

https://www.law.cornell.edu/wex/consent_decree

Discharge (pollutant discharge): The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft. Clean Water Act Section 502: General Definitions.

<https://www.epa.gov/cwa-404/clean-water-act-section-502-general-definitions>

Limited Liability Corporation (LLC): Is a non-incorporated business organization that retains elements of both **partnerships** and **corporations**. The LLC form allows a lot of flexibility in arranging the organizations to the specific needs of its investors. An LLC can be composed of members that each own and control equal parts of the business, or an LLC can be managed by some members with different control and profit allocations among all the members. Also, an LLC can receive **pass-through taxation** like partnerships or may choose corporate taxation should it be preferred. While retaining this flexibility, the investors in an LLC have **limited personal liability** in the business. Cornell University Law School, Legal Information Institute at

https://www.law.cornell.edu/wex/limited_liability_company_llc

Memorandum of Understanding (MOU): Is an agreement between two parties that is not legally binding, but which outlines the responsibilities of each of the parties to the agreement. An MOU is often the first step toward creating a legally

binding contract. In the U.S., an MOU can be considered identical to a letter of intent, which is another kind of non-binding agreement that suggests that a binding agreement will soon follow. Legal Dictionary.

<https://legaldictionary.net/memorandum-of-understanding/>

National Pollutant Discharge Elimination System (NPDES) permit: Will generally specify an acceptable level of a pollutant or pollutant parameter in a discharge (for example, a certain level of bacteria). The permittee may choose which technologies to use to achieve that level. Some permits, however, do contain certain generic 'best management practices' (such as installing a screen over the pipe to keep debris out of the waterway). NPDES permits make sure that a state's mandatory standards for clean water and the federal minimums are being met. U.S. Environmental Protection Agency. <https://www.epa.gov/npdes/npdes-permit-basics>

Resource Conservation and Recovery Act (RCRA): Gives EPA the authority to control hazardous waste from cradle to grave. This includes the generation, transportation, treatment, storage, and disposal of hazardous waste. RCRA also set forth a framework for the management of non-hazardous solid wastes. 42 U.S.C. §6901 et seq. (1976). U.S. Environmental Protection Agency.

<https://www.epa.gov/laws-regulations/summary-resource-conservation-and-recovery-act>

Synthetic lagoon liners: A manufactured hydraulic barrier consisting of a functionally continuous sheet of synthetic or partially synthetic, flexible material. PURPOSES To restrict, impede, and control seepage of water and contaminants from water and waste impoundment structures for water conservation and environmental protection. Indian NRCS Field Office Technical Guide.

https://www.in.gov/idem/cfo/files/guidance_standards_code_521a.pdf