

Regulatory Framework Relevant to Livestock/CAFO Work Group

Federal regulations promulgated pursuant to the Clean Water Act (40 CFR, Part 122) define dairies with 750 or more animals and feedlots with 1000 or more animals as Large Concentrated Animal Feeding Operations (CAFO). Large CAFOs are defined as point sources of water pollution and subject to requirement to obtain an NPDES permit if they have a discharge or potential to discharge. The Washington Department of Ecology develops and administers the CAFO permit, decides when a facility is required to apply for a permit, approves the nutrient management plan that is required under the permit and is responsible for enforcing the permit.¹ Ecology issued a CAFO General permit in 2006. Coverage under that general permit is based on previous documentation of a discharge, and thus only 5 of the 69 dairies in Yakima County are covered by the permit. The permit expired of its own terms in 2011, but was extended by administrative order of the Department of Ecology. None of the 11 small or medium sized dairies in the county are considered CAFOs and are not covered by the CAFO permit. There is one permitted feedlot currently in the county.

Local Conservation Districts are authorized to provide dairies and other farms with technical assistance and planning services (RCW 89.08.560) and are required to approve and certify all plans. The required elements of the plans address the collection, storage, transfer and application of manure, waste feed and litter, and any potentially contaminated runoff at the site. Plans focus on management of nitrogen, and phosphorus as well as preventing bacteria and other pollutants, such as sediment, from reaching surface or ground water. Excess nutrients must be exported off site.

Washington State Department of Health regulations, WAC 246-203-130, regarding keeping of animals, provides:

(1) Any person, firm or corporation is prohibited from keeping or sheltering animals in such a manner that a condition resulting from same shall constitute a nuisance.

(2) In populous districts, stable manure must be kept in a covered watertight pit or chamber and shall be removed at least once a week during the period from April 1st to October 1st and, during the other months, at intervals sufficiently frequent to maintain a sanitary condition satisfactory to the health officer. Manure on farms or isolated premises other than dairy farms need not be so protected and removed unless ordered by the health officer.

(3) Manure shall not be allowed to accumulate in any place where it can prejudicially affect any source of drinking water

¹ "The fee for an individual permit issued for a dairy farm as defined under chapter 90.64 RCW shall be fifty cents per animal unit up to one thousand two hundred fourteen dollars for fiscal year 1999. The fee for a general permit issued for a dairy farm as defined under chapter 90.64 RCW shall be fifty cents per animal unit up to eight hundred fifty dollars for fiscal year 1999. Thereafter, these fees may rise in accordance with the fiscal growth factor as provided in chapter 43.135 RCW." RCW 90.48.465 (5).

Operation of feed lots within Yakama Nation Reservation and the exportation of excess manure to tribal lands: Bureau of Indian Affairs authority: Indian Agricultural Resources Management Act, 25 U.S.C. 3701-3746, (see 3701(2), 3703 (1)).

Yakama Nation Tribal Council Resolution T-103-92 (5/5/92) “unlawful for any person or entity to discharge, or threaten to discharge pollution into the land, air or waters of the Reservation environment, which discharge or threatened discharge presents an imminent and substantial endangerment to the health, safety and welfare of the reservation population.” Authorizes suits in Tribal court in restraint of pollution, written cease and desist orders; Authorizes office of legal counsel and Department of Natural Resources to implement interim minimum standards and regulations; authorizes collection of costs of administration and enforcement, and triple damage costs for repeated acts of pollution.

Yakama Nation Tribal Council Resolution T-174-08 (7/3/08) “bans” the “expansion of any existing dairy, dairy replacement operation, feedlot operation or FAFO; and no additional operations shall be allowed on the Yakama Reservation.

“A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Montana v. United States*, 450 US. 544, 565-66 (1981).

In Washington State, dairies that are licensed to sell Grade A milk and who generate large quantities of animal waste that can pollute surface water and groundwater must have an “approved” Nutrient Management Plan (NMP) on site within 6 months after licensing, which plan must be “certified” within two years after licensing. (RCW 90.64.026) The purpose of such plans is to prevent the discharge of livestock nutrients to surface and ground waters of the state. An employee of the South Yakima Conservation District often writes the NMP. “Approved” means the local conservation district has determined that the facility’s plan to manage nutrients meets all the elements identified on a checklist established by the Washington Conservation Commission. Certified means the local conservation district has determined all plan elements are in place and implemented as described in the plan. To be certified, both the dairy operator and an authorized representative of the local conservation district must sign the plan. Dairies whose NPDES permits require dairy nutrient management plans need not be otherwise “certified.” “Farm Plans,” developed by conservation districts for farmers, must include “livestock nutrient management measures.” RCW 89.08.560.

The elements of a dairy nutrient management plan must include methods and technologies of the nature prescribed by the Natural Resources Conservation Service, a department of the U.S. Department of Agriculture. RCW 90.64.026(3).²

² The provision of that statute establishing a dairy nutrient program advisory and oversight committee, Ch. 262, Laws of 1988, § 8, that would “clearly” describe the elements of dairy nutrient management plans was vetoed.

NRCS provides technical assistance to farmers and other private landowners and managers. NRCS has six mission goals: high quality, productive soils; clean and abundant water; healthy plant and animal communities; clean air; an adequate energy supply; and working farms and ranchlands.

NRCS helps landowners develop conservation plans and provides advice on the design, layout, construction, management, operation, maintenance, and evaluation of the recommended, voluntary conservation practices.³ NRCS activities include farmland protection, upstream flood prevention, emergency watershed protection, urban conservation, and local community projects designed to improve social, economic, and environmental conditions. To aid in this they also conduct soil surveys, conservation needs assessments, and the National Resources Inventory to provide a basis for resource conservation planning activities.

NRCS' 2012 State Resource Assessment: Priority Resource Concerns for Washington State (SRA) is based on parameters and guidance established by the NRCS National Office. Within these national parameters, NRCS Washington utilized the state resource inventory and assessment products that were developed through the Local Work Group (LWG) process in 2009, 2010 and 2011, and the 2012 Tribal Resource Assessment (TRA). It addresses locally identified resource concerns on five land uses: crop, forest, range, pasture and other associated agriculture lands. Once the LWGs and tribes identified their local priority resource concerns for each of these land uses, the assessment process is used to identify the targeted treatment areas and associated acreages.

NRCS offers voluntary programs to eligible landowners and agricultural producers to provide financial and technical assistance to help manage natural resources in a sustainable manner. Those who are under contract with NRCS must adhere to relevant standards for the projects that are being funded. Current Washington state Financial Assistance program include:

- The Agricultural Management Assistance (AMA) helps agricultural producers use conservation to manage risk and solve natural resource issues through natural resources conservation.
- The Conservation Stewardship Program (CSP) helps agricultural producers maintain and improve their existing conservation systems and adopt additional conservation activities to address priority resources concerns.
- The Environmental Quality Incentives Program (EQIP) provides financial and technical assistance to agricultural producers in order to address natural resource concerns and deliver environmental benefits such as improved water and air quality, conserved ground and surface water, reduced soil erosion and sedimentation or improved or created wildlife habitat.

Each conservation practice standard contains information on why and where the practice is applied, and sets forth the minimum quality criteria that must be met during the application of that

³ NRCS' Conservation Practice Standards are included in a National Handbook of Conservation Practices, NRCS General Manual, Title 450, Part 401, Section 401.12. A Conservation Practice lifespan is the minimum time (years) the implemented practice is expected to be fully functional for its intended purpose(s). The established conservation practice lifespans are based on following an operation and maintenance plan developed for the practice.

practice. State conservation practice standards are available through the Field Office Technical Guide (FOTG).

Relevant Standards include:

- Standard 590 – Nutrient Management which focuses on managing the amount (rate), source, placement (method of application), and timing of plant nutrients and soil amendments. This practice applies to all lands where plant nutrients and soil amendments are applied. This standard does not apply to one-time nutrient applications to establish perennial crops. The purpose of this standard is:
 - To budget, supply, and conserve nutrients for plant production.
 - To minimize agricultural nonpoint source pollution of surface and groundwater resources.
 - To properly utilize manure or organic by-products as a plant nutrient source.
 - To protect air quality by reducing odors, nitrogen emissions (ammonia, oxides of nitrogen), and the formation of atmospheric particulates.
 - To maintain or improve the physical, chemical, and biological condition of soil.
- Standard 313 – Waste Storage Facility which is defined as a waste storage impoundment made by constructing an embankment and/or excavating a pit or dugout, or by fabricating a structure. The purpose of the practice is to temporarily store wastes such as manure, wastewater, and contaminated runoff as a storage function component of an agricultural waste management system. This practice applies:
 - Where the storage facility is a component of a planned agricultural waste management system;
 - Where temporary storage is needed for organic wastes generated by agricultural production or processing;
 - Where the storage facility can be constructed, operated and maintained without polluting air or water resources;
 - Where site conditions are suitable for construction of the facility; To facilities utilizing embankments with an effective height of 35 feet or less where damage resulting from failure would be limited to damage of farm buildings, agricultural land, or township and country roads;
 - To fabricated structures including tanks, stacking facilities, and pond appurtenances.
- Standard 449 – Irrigation Water Management which outlines the process of determining and controlling the volume, frequency, and application rate of irrigation water. This practice is applicable to all irrigated lands and its purpose includes:
 - Improve irrigation water use efficiency
 - Minimize irrigation induced soil erosion
 - Decrease degradation of surface and groundwater resources
 - Manage salts in the crop root zone
 - Manage air, soil, or plant micro-climate
 - Reduce energy use

All NRCS actions approving contracts for the distribution of funds must comply with the National Environmental Policy Act. All contracts are for reimbursement of expenses at a range from 25-75% of the cost of the improvement. All contracts contain an itemized budget.

NRCS believes that Nutrient Management for the protection of groundwater, although different on each farm, is best accomplished through best management practices beginning with those stated in Standard 449 – Irrigation Water Management and Standard 590 – Nutrient Management.

NRCS' Conservation Practice Standard, "Nutrient Management," Code 590 "applies to all lands where plant nutrients and soil amendments are applied." Its purposes are to: budget, supply, and conserve nutrients for plant production, minimize agricultural nonpoint source pollution of surface and groundwater resources, properly utilize manure or organic by-products as a plant nutrient source, protect air quality by reducing odors, nitrogen emissions (ammonia, oxides of nitrogen), and the formation of atmospheric particulates, and maintain or improve the physical, chemical, and biological condition of soil. See Appendix B. NRCS Code 590 requires, among other things, that:

Nutrient planning must be based on current soil, manure, and (where used as supplemental information) tissue test results developed in accordance with land-grant university guidance, or industry practice, if recognized by the university.

Nutrient values of manure, organic by-products and biosolids must be determined prior to land application.

Manure analyses must include, at minimum, total nitrogen (N), ammonium N, total phosphorus (P) or P₂₀₅, total potassium (K) or K_{2O}, and percent solids, or follow land-grant university guidance regarding required analyses.

Manure, organic by-products, and biosolids samples must be collected and analyzed at least annually, or more frequently if needed to account for operational changes (feed management, animal type, manure handling strategy, etc.) impacting manure nutrient concentrations. If no operational changes occur, less frequent manure testing is allowable where operations can document a stable level of nutrient concentrations for the preceding three consecutive years, unless federal, State, or local regulations require more frequent testing.

Planned nutrient application rates for nitrogen, phosphorus, and potassium must not exceed land-grant university guidelines or industry practice when recognized by the university.

At a minimum, determination of rate must be based on crop/cropping sequence, current soil test results, realistic yield goals, and NRCS- approved nutrient risk assessments.

If the land-grant university does not provide specific guidance that meets these criteria, application rates must be based on plans that consider realistic yield goals and associated plant nutrient uptake rates.

Realistic yield goals must be established based on historical yield data, soil productivity information, climatic conditions, nutrient test results, level of management, and local research results considering comparable production conditions.

Estimates of yield response must consider factors such as poor soil quality, drainage, pH, salinity, etc., prior to assuming that nitrogen and/or phosphorus are deficient.

Nutrient sources utilized must be compatible with the application timing, tillage and planting system, soil properties, crop, crop rotation, soil organic content, and local climate to minimize risk to the environment.

Timing and placement of all nutrients must correspond as closely as practical with plant nutrient uptake (utilization by crops), and consider nutrient source, cropping system limitations, soil properties, weather conditions, drainage system, soil biology, and nutrient risk assessment results.

Nutrients must not be surface-applied if nutrient losses offsite are likely. This precludes spreading on:

- frozen and/or snow-covered soils, and
- when the top 2 inches of soil are saturated from rainfall or snow melt.

When there is a high risk of transport of nutrients, conservation practices must be coordinated to avoid, control, or trap manure and nutrients before they can leave the field by surface or subsurface drainage (e.g., tile). The number of applications and the application rates must also be considered to limit the transport of nutrients to tile.

Nutrients must be applied with the right placement, in the right amount, at the right time, and from the right source to minimize nutrient losses to surface and groundwater.

Planned nutrient application rates for nitrogen, phosphorus, and potassium must not exceed land-grant university guidelines or industry practice when recognized by the university.

At a minimum, determination of rate must be based on crop/cropping sequence, current soil test results, realistic yield goals, and NRCS- approved nutrient risk assessments.

Realistic yield goals must be established based on historical yield data, soil productivity information, climatic conditions, nutrient test results, level of

management, and local research results considering comparable production conditions.

Estimates of yield response must consider factors such as poor soil quality, drainage, pH, salinity, etc., prior to assuming that nitrogen and/or phosphorus are deficient.

For new crops or varieties, industry- demonstrated yield, and nutrient utilization information may be used until land-grant university information is available.

Lower-than-recommended nutrient application rates are permissible if the grower's objectives are met.

Applications of biosolids, starter fertilizers, or pop-up fertilizers must be accounted for in the nutrient budget.

The total single application of liquid manure:

- must not exceed the soil's infiltration or water holding capacity
- be based on crop rooting depth
- must be adjusted to avoid runoff or loss to subsurface tile drains.

Crop production activities and nutrient use efficiency technologies must be coordinated to take advantage of mineralized plant-available nitrogen to minimize the potential for nitrogen losses due to denitrification or ammonia volatilization.

Use nutrient management strategies such as cover crops, crop rotations, and crop rotations with perennials to improve nutrient cycling and reduce energy inputs.

Use variable-rate nitrogen application based on expected crop yields, soil variability, soil nitrate or organic N supply levels, or chlorophyll concentration.

Use variable-rate nitrogen, phosphorus, and potassium application rates based on site-specific variability in crop yield, soil characteristics, soil test values, and other soil productivity factors.

Develop site-specific yield maps using a yield monitoring system. Use the data to further diagnose low- and high- yield areas, or zones, and make the necessary management changes. See Title 190, Agronomy Technical Note (TN) 190.AGR.3, Precision Nutrient Management Planning.

Use manure management conservation practices to manage manure nutrients to limit losses prior to nutrient utilization.

Apply manure at a rate that will result in an "improving" Soil Conditioning Index (SCI) without exceeding acceptable risk of nitrogen or phosphorus loss.

Use legume crops and cover crops to provide nitrogen through biological fixation and nutrient recycling.

Modify animal feed diets to reduce the nutrient content of manure following guidance contained in Conservation Practice Standard (CPS) Code 592, Feed Management.

Soil test information should be no older than 1 year when developing new plans.

Use soil tests, plant tissue analyses, and field observations to check for secondary plant nutrient deficiencies or toxicity that may impact plant growth or availability of the primary nutrients.

Use conservation practices that slow runoff, reduce erosion, and increase infiltration, e.g., filter strip, contour farming, or contour buffer strips. These practices can also reduce the loss of nitrates or soluble phosphorus.

Use application methods and timing strategies that reduce the risk of nutrient transport by ground and surface waters, such as:

- split applications of nitrogen to deliver nutrients during periods of maximum crop utilization,
- banded applications of nitrogen and/or phosphorus to improve nutrient availability,
- drainage water management to reduce nutrient discharge through drainage systems, and
- incorporation of surface-applied manures or organic by-products if precipitation capable of producing runoff or erosion is forecast within the time of planned application.

Ch. 90.64 RCW provides no consequence or penalty for failure to utilize the procedures recommended by the Code 590. Nutrient management plans are required to be maintained on the farm for review by inspectors. The DNMA requires that all dairies be inspected for implementation of their nutrient management plans and to ensure protection of waters of the state. Most dairies keep their NMPs and associated sampling data on location.

Although “farm plans” are not subject to disclosure under Washington’s public records law, (RCW 42.56.270) (17)), plans, records, and reports obtained by state and local agencies from dairies, animal feeding operations, and concentrated animal feeding operations not required to apply for a national pollutant discharge elimination system permit are disclosable under Washington’s public records law (Ch. 42.56 RCW), but only in ranges that provide meaningful information to the public while ensuring confidentiality of business information regarding: (1) number of animals; (2) volume of livestock nutrients generated; (3) number of acres covered by the plan or used for land application of livestock nutrients; (4) livestock nutrients transferred to other persons; and (5) crop yields. The ranges of the information required to be disclosed by the public disclosure law (Ch. 42.56 RCW) are set forth in the Washington Department of Agriculture’s rules implementing that law and Ch. 90.64 RCW. WAC 16-06-210 (29).

The Ecology/WSDA MOU requires that both agencies provide the other all livestock related records that either may possess as necessary to fulfill state and federal requirements for livestock under the Clean Water Act (MOU ¶ C.2), and that the two agencies will coordinate in response to public disclosure requests for AFOs, CAFOs and dairies (MOU ¶ C.4)

The Department of Agriculture's regulations implementing the DNMA are published at chapter 16-611 WAC.

WAC 16-611-010

"Agronomic rate" means the application of nutrients to supply crop or plant nutrient needs to achieve realistic yields and minimize the movements of nutrients to surface and ground waters.

"Dairy nutrient management plan" means a plan meeting the requirements established under RCW 90.64.026.

"Dairy producer" means a person who owns or operates a licensed dairy farm.

"Department" means the Washington state department of agriculture.

"Nutrient," for purposes of this rule, means any product or combination of products used to supply crops with plant nutrients including, but not limited to, manure or commercial fertilizer.

"Transfer of manure" means the transfer of manure, litter or process waste water to other persons when the receiving facility is in direct control of:

- (a) Application acreage;
- (b) Application rate;
- (c) Application times; and
- (d) Transfer rate and time.

WAC 16-611-020

(1) In accordance with RCW 90.64.010 (17)(c) and 90.64.102, dairy producers must maintain records to demonstrate that applications of nutrients to crop land are within acceptable agronomic rates.

(2) Dairy producers must maintain the following records to demonstrate that applications of nutrients to the land were within acceptable agronomic rates:

- (a) Soil analysis.
 - (i) Annual postharvest soil nitrate nitrogen analysis;
 - (ii) Every three years, a current soil analysis that includes:
 - (A) Organic matter;
 - (B) pH;
 - (C) Ammonium nitrogen;
 - (D) Phosphorus (the Bray-1 method must be used to determine soil phosphorus for soils below pH 7 and the Olsen bicarbonate method must be used for soils at or above pH 7);
 - (E) Potassium; and
 - (F) A measure of electrical conductivity.
- (b) Nutrient analysis for all sources of organic and inorganic nutrients including, but not limited to, manure and commercial fertilizer supplied for crop uptake. Manure and other organic sources of nutrients must be analyzed annually for organic nitrogen, ammonia nitrogen, and phosphorus.
- (c) Application records must include:
 - (i) Field identification and year of application;
 - (ii) Crop grown in each field where the application occurred;
 - (iii) Crop nutrient needs based on expected crop yield;
 - (iv) Nutrient sources available from residual soil nitrogen including contributions from soil organic matter, previous legume crop, and previous organic nutrients applied;
 - (v) Date of applications, method of application, nutrient sources, nutrient analysis, amount of nitrogen and phosphorus applied and available for each source;
 - (vi) Total amount of nitrogen and phosphorus applied to each field each year; and
 - (vii) Weather conditions twenty-four hours prior to and at time of application.

(d) Manure transfer records, including imports or exports. Records must include:

- (i) Date of manure transfer;
- (ii) Amount of nutrients transferred;
- (iii) The name of the person supplying and receiving the nutrients; and
- (iv) Nutrient analysis of manure transferred.

(e) Irrigation water management records. Records must include:

- (i) Field identification;
- (ii) Total amount of irrigation water applied to each field each year.

WAC 16-611-100

The department may assess civil penalties.

(1) Nothing in this chapter shall prevent the department from:

- (a) Choosing not to pursue a civil penalty;
- (b) Issuing a notice of correction in lieu of pursuing a civil penalty;
- (c) Negotiating a settlement of cases of such terms and for reasons as it deems necessary; or
- (d) Referring a violation to any federal or state agency with jurisdiction over the activities in question.

(2) Prior violations may be used by the department for the purpose of determining the appropriate penalty for current violations.

(3) Responses and mitigating actions taken by the dairy and responsible party may be used by the department for the purpose of determining the appropriate penalty for current violations.

(4) Civil penalties under this rule are imposed pursuant to the procedures set forth in RCW 43.21B.300 and may be appealed to the pollution control hearings board in accordance with chapter 43.21B RCW.

WAC 16-611-200

(1) In accordance with RCW 90.64.010 (17)(c) and 90.64.102, failure to maintain all records necessary to show that applications of nutrient to the land were within acceptable agronomic rates may be subject to a civil penalty. The aggregate amount of civil penalties issued to a dairy producer under this section shall not exceed five thousand dollars per calendar year. Each violation is a separate and distinct offense.

(2) The median penalty shall be assessed unless an adjustment is warranted due to the presence of aggravating or mitigating factors.

(3) **Aggravating factors.** The department may consider aggravating circumstances and enhance the penalty based on the seriousness of the violation. When the department determines that one or more aggravating factors are present, the department may assess the maximum penalty as listed within the penalty schedule table in subsection (5) of this section or may, in its discretion, assess a civil penalty in an amount between the median and maximum amount or increase the penalty above the maximum penalty listed for the violation in subsection (5) of this section.

Aggravating factors include, but are not limited to, the following:

- (a) The gravity and magnitude of the violation;
- (b) Whether the violation was repeated or is continuous;
- (c) Whether the cause of the violation was due to negligence, or an intentional act; and
- (d) The immediacy and extent to which the violation threatens the public health or safety or harms the environment.

(4) **Mitigating factors.** The department may consider mitigating circumstances and reduce the penalty. When the department determines that one or more mitigating factors are present, the department may assess the minimum penalty for the violation within the penalty schedule table in subsection (5) of this section or may, in its discretion, assess a civil penalty in an amount between

the minimum and median amount listed for the violation in WAC [16-611-300](#)(5). Mitigating factors include, but are not limited to, the following:

- (a) Whether the cause of the violation was an unavoidable accident;
- (b) The violator's efforts to correct the violation.
- (5) Penalty schedule for recordkeeping violations.

Penalties	Recordkeeping Violations		
	Minimum	Median	Maximum
First	\$100.00	\$250.00	\$2500.00
Second	\$200.00	\$500.00	\$3000.00
Third or subsequent	\$400.00	\$1000.00	\$5000.00

WAC 16-611-300

(1) In accordance with RCW [90.64.010](#) (17)(a), 90.48.080, and 90.48.144, a discharge of pollutants into the waters of the state may be subject to a civil penalty in the amount of up to ten thousand dollars a day for each violation. Each violation is a separate and distinct offense and, in case of a continuing violation, every day's continuance is a separate and distinct violation.

(2) The median penalty shall be assessed unless an adjustment is warranted due to the presence of aggravating or mitigating factors.

(3) **Aggravating factors.** The department may consider aggravating circumstances and enhance the penalty based on the seriousness of the violation. When the department determines that one or more aggravating factors are present, the department may assess the maximum penalty as listed within the penalty schedule table in subsection (5) of this section or may, in its discretion, assess a civil penalty in an amount between the median and maximum amount. Aggravating factors include, but are not limited to, the following:

- (a) The magnitude of harm or potential harm to:
 - (i) Waters of the state;
 - (ii) Humans, animals, plants, property, the environment; or
 - (iii) Species listed as threatened or endangered caused by the violation(s).

(b) The similarity of the current alleged violation to previous history of the dairy, or the extent to which the alleged violation is part of a pattern of the same or substantially similar conduct.

(c) Economic value derived from noncompliance.

(4) **Mitigating factors.** The department may consider mitigating circumstances and reduce the penalty. When the department determines that one or more mitigating factors are present, the department may assess the minimum penalty for the violation within the penalty schedule table in subsection (5) of this section or may, in its discretion, assess a civil penalty in an amount between the minimum and median amount listed for the violation in subsection (3) of this section. Mitigating factors include, but are not limited to, the following:

- (a) Voluntary disclosure of a violation;
- (b) Speed and effectiveness of actions taken to correct the violation or stop a discharge to waters of the state;

(c) Remedial actions taken to repair or compensate for impacts or that will result in increased public protection or that will permanently result in a decreased likelihood that the violation will be repeated.

(5) Penalty schedule for discharges to waters of the state.

Violation	Discharge to Waters of the State		
	Minimum	Median	Maximum
First	\$1000.00	\$4000.00	\$10,000.00
Second	\$2000.00	\$6000.00	\$10,000.00
Third or subsequent	\$4000.00	\$8000.00	\$10,000.00 ¹

¹Statutory authority RCW [90.48.144](#).

While the Dairy Nutrient Management Act provides no authority to the Department of Agriculture to compel nutrient management consistent with dairy nutrient management plans, Washington’s Water Pollution Control Act authorizes the Department of Ecology to “bring any appropriate action, in law or equity, including action for injunctive relief . . . as may be necessary to carry out the provisions of that Act (RCW 90.48.037), including its prohibition of the discharge of organic or inorganic matter that may cause pollution of ground or surface water. (RCW 90.48.080).

The Washington Departments of Ecology and Agriculture signed a Memorandum of Understanding (MOU) in 2003 to guide coordination and cooperation between the two agencies for dairies, CAFOs and other animal feeding operations. A key element of the MOU is that WSDA inspectors must provide field inspections and technical assistance to Ecology for CAFO and other AFO related water quality activities. The two agencies continue to coordinate on livestock and manure related complaints and in implementing the CAFO permit. An updated MOU was signed in 2009.

The Department of Agriculture’s self-identified mission under the Dairy Nutrient Management Act is to “protect water quality from livestock nutrient discharges,” and to “help maintain a healthy agricultural business climate.” While the Dairy Nutrient Management Act provides no authority to the Department of Agriculture to compel nutrient management consistent with dairy nutrient management plans, Washington’s Water Pollution Control Act authorizes the Department of Ecology to “bring any appropriate action, in law or equity, including action for injunctive relief . . . as may be necessary to carry out the provisions of that Act (RCW 90.48.037), including its prohibition of the discharge of organic or inorganic matter that may cause pollution of ground or surface water. (RCW 90.48.080). Representatives of the Department of Agriculture state that most of the “enforcement” of this provisions is accomplished through the “soft enforcement” efforts of that Department through its administrative activities under the Dairy Nutrient Management Program.

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<http://agr.wa.gov/FP/Pubs/docs/MOUAgricultureEcology2011Final.pdf>

Under the MOU, Ecology is responsible to EPA for Clean Water Act compliance for AFOs and CAFOs. Ecology maintains authority under Ch. 90.48 RCW to take compliance actions on any livestock operations where human health or environmental damage has or may occur due to potential or actual discharges, for pasture or rangeland based operations, for anure spreading operations when it is determined the manure was not applied by a dairy, for non-dairy AFOs, CAFOs and permitted CAF)s, and ultimately for permitted dairies. Where compliance actions are against non-permitted dairies, Ecology recognizes WSDA as lead. Where Ecology is involved in investigations and compliance actions against non-permitted dairies, Ecology will discuss the compliance actions with WSDA to ensure that timely compliance actions are sufficient to protect human health and the environment. Ecology is responsible for the approval of best management practices used to show compliance with water quality standards. Ecology must provide available monitoring data and trends analysis for livestock related pollutants to WSDA upon request. Ecology's TMDL process must involve WSDA as a stakeholder if livestock issues are anticipated.

WSDA is responsible for implementing Ch. 90.64 RCW and is required to follow Ch. 43.05 RCW. WSDA is responsible for inspections and may initiate compliance actions on permitted dairies, but must notify Ecology and provide a Recommendation for Enforcement. Ecology must respond within 30 working days of receipt of that Recommendation. WSDA is responsible for inspections, complaint response and writing warning letters for all non-dairy permitted CAFOs. WSDA is responsible for initial complaint response for non-dairy AFOs and CAFOs as long as resources are available and may write warning letters, WSDA must coordinate with Ecology when compliance actions beyond warning letters are necessary for non-dairy AFOs and CAFOs or permitted CAFOs. WSDA must enter complaint inspections and warning letters on non-permitted AFOs and CAFOs into Ecology's PARIS database.

Statewide in 2013-2014, WSDA issued 17 notices of correction, one order, and 11 notices of penalty for discharges of pollution to surface waters and 122 warning letters and 27 notices of correction for potential to pollute. WSDA usually proceeds with informal enforcement, using warning letters and notices of correction, then proceeding to formal enforcement through civil penalty or administrative order. Most penalties include a settlement process including reduction in penalty, requirements to adopt specific management practices, to abstain from discharge and collection of entire penalty in the event of non-performance.

Resource Conservation and Recovery Act

Congress passed the Resource Conservation and Recovery Act (RCRA) in 1976 (Pub. L. No. 94-590, 90 Stat 2795, 42 U.S.C. §§6901-6987, 9001-9010). RCRA essentially rewrote the Solid Waste Disposal Act of 1965. RCRA addresses environmental problems consequent of active and inactive waste disposal sites. It contains both regulatory standards and remedial provisions to achieve goals of conservation, reducing waste disposal, and minimizing the present and future threat to human health and the environment. RCRA provides a comprehensive national regulatory structure for the management of nonhazardous solid wastes (subtitle D, 42 U.S.C. §§ 6941/y-6949a) and hazardous solid wastes (subtitle C, 42 U.S.C. §§ 6921/y-6939b). "Solid waste" is defined as "any

garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities . . .” 42 U.S.C. §6903(27)⁴

Materials are discarded if they are either abandoned or recycled or are inherently waste-like. 40 C.F.R. § 261.2. Materials are “disposed” if they are discharged, deposited, injected, dumped, spilled, leaked or otherwise placed into or on land or water such that it may enter into the environment or be emitted into the air or discharged into any waters, including ground waters. 42 U.S.C. §6903(3).

RCRA contains authorization for civil and criminal penalties, 42 U.S.C. 6928, injunctive relief, 42 U.S.C. § 6973, and authorizes citizen enforcement suits. 42 U.S.C. 6972. A recent U.S. Federal District Court case in Washington State, CARE v. Cow Palace, LLC, (E.D. WA, CV 13-cv-03016-TOR),⁵ has found that the application of bovine manure as an agricultural nutrient constitutes a disposal of solid waste if the amount applied is greater than an appropriate agronomic amount. It is not unreasonable to suppose that the application of inorganic materials as agricultural nutrients could constitute a disposal of solid waste if the amount applied is greater than the appropriate agronomic amount.

⁴ Solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under the Clean Water Act excluded from the definition.

⁵ See also, CARE v. Faria Dairy, 2011 WL 6934707 (E.D. WA, Dec. 30, 2011)