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.	PCHB No. 23-002 **APPELLANTS FRIENDS OF TOPPENISH CREEK ET AL.'S MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Appellants Friends of Toppenish Creek *et al*. (collectively, "FOTC") respectfully move for summary judgment on Issues 1 – 11.

The Pollution Control Hearings Board ("PCHB") should vacate and remand the Department of Ecology's ("Ecology") Combined National Pollutant Discharge Elimination System ("NPDES") Concentrated Animal Feeding Operation ("CAFO") General Permit and associated State Discharge Permit (collectively, "CAFO GP" or "Permits") because the CAFO GP is inconsistent with state and federal law. As explained herein, the CAFO GP is unlawful because it: 1) violates binding federal regulations by failing to require permittees to conduct a "field-specific assessment of the potential for nitrogen and phosphorus transport from each field" before permit issuance (Issues 1, 2, 3, 4, & 11); 2) fails to require the necessary monitoring to establish and enforce compliance with the CAFO GP's effluent limitations (Issues 1, 9, & 10); 3) fails to ensure the permittees will not cause or contribute to a violation of the state's toxic narrative criteria

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

(Issues 1, 4, 6 & 8); 4) does not apply "technology-based treatment requirements and standards" reflecting the modern pollution control measures for solid waste storage and composting areas mandated by state law (Issues 1, 2, 3, 5 & 6); and 5) authorizes discharges to surface and groundwater that violate the State's anti-degradation principles for surface and groundwater (Issue 1, 3, 6 & 7); and 6) continues to deprive the public of the opportunity to meaningfully engage in the development of the Permits' effluent limitations (Issues 1 & 11). Resolution of any of these issues in FOTC's favor renders the Permits invalid and subject to remand. WAC 371-08-540(2).

STATEMENT OF THE CASE

A. Concentrated Animal Feeding Operations Can Significantly Harm the Environment and Communities

CAFOs are industrial-scale factory farms that closely confine animals, feed, manure and urine, dead animals, and production operations on a small land area. According to the Washington Department of Agriculture, in 2022, there were 265 licensed dairies in Washington, across 31 of the 39 Washington counties, housing nearly 260,000 cows,[1] which collectively produce between 16 and 40 million pounds of manure daily. Many of these facilities operate as CAFOs.

As discussed in detail below, Ecology has failed to require CAFOs to implement basic, scientifically proven, affordable best practices to prevent damaging water pollution from CAFOs statewide. As a result of Ecology's failure, the direct and indirect impacts of CAFOs on the environment are making our communities unhealthy, unsafe, and less prosperous. These avoidable impacts are all too predictable. For example, animal waste contains nitrogen, which moves through different phases to ammonia, nitrite, and nitrate. Nitrates are difficult for residents to detect because they are odorless, colorless, and flavorless. They can cause multiple adverse health outcomes such as methemoglobinemia ("blue baby syndrome"), cardiovascular harm, strokes, reproductive problems such as miscarriages, thyroid problems, and some cancers.[2] Ecology and

[1] Kyrre Flege, Washington Licensed Cow Milk Dairy Farms, Washington Geospatial Open Data Portal (May 21, 2024), https://geo.wa.gov/datasets/26add7da921d4aa68ccb50ce191c6182_0/explore?showTable=true (last visited May 29, 2024).

[2] *See* Anne Schechinger and Craig Cox, American's Nitrate Habit is Costly and Dangerous,

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

the United States Geological Survey report that 29 percent of sampled wells in the Sumas Blaine aquifer in Whatcom County and over 20 percent of wells in the Yakima Valley exceed the nitrate maximum contaminant level. Declaration of Daniel C. Snyder, filed herewith ("Snyder Decl."), Ex. 1 at 23 (Ecology, Manure and Groundwater Quality Literature Review Publication No. 16-03-026) ("Manure Literature Review"). Courts have found that CAFOs in Washington have contaminated the waters of the state with nitrate and other pollutants, causing an "imminent and substantial endangerment to health [and] the environment." *Cmty. Ass'n for Restoration of the Env't, Inc. (CARE) v. Cow Palace, LLC*, 80 F. Supp. 3d 1180, 1228 (E.D. Wash. 2015) ("*Cow Palace*"); *see also Cmty. Ass'n for the Restoration of the Env't v. Nelson Faria Dairy, Inc.,* No. CV-04-3060-LRS, 2011 WL 6934707, at *10 (E.D. Wash. Dec. 30, 2011) ("Faria's manure management practices have caused or significantly contributed to the excessive nitrate contamination of the local groundwater. ...").

In addition to the impact on drinking water, the discharge of pollutants from CAFOs significantly impacts the water quality of the state's rivers, streams, and marine waters. For example, the discharge of nutrients, pathogens, and toxic pollution from facilities such as CAFOs into Puget Sound and its tributaries is creating a water quality crisis.[3] Perhaps the most immediate and pressing problem with the Sound's water quality is dangerously low dissolved oxygen levels caused by excessive nutrients from various sources, including wastewater treatment plants and the overapplication of manure and fertilizers. As Ecology stated nearly two decades ago, "[f]ish need oxygen," yet "[t]here are many areas in Puget Sound with very low levels of dissolved oxygen." Snyder Decl. Ex. 2 (Ecology, Public Notice South Puget Sound Dissolved Oxygen Study (2006)).

Environmental Working Group (Oct. 2, 2018), https://www.ewg.org/research/nitratecost/ (last visited May 29, 2024); D. Lee Miller and Gregory Muren, CAFOS: What We Don't Know is Hurting Us, National Resources Defense Council (Sept. 2019), https://www.nrdc.org/sites/default/files/cafos-dont-know-hurting-us-report.pdf (last visited May 29, 2024); Nitrate, National Institute of Health: Cancer Trends Progress Report (updated Mar. 2024), https://progressreport.cancer.gov/prevention/nitrate (last visited May 24, 2024); and Toxicological Profile for Nitrate and Nitrite, Agency for Toxic Substances and Disease Registry, https://www.atsdr.cdc.gov/ToxProfiles/tp204-c1.pdf (last visited May 29, 2024).

[3] *See generally* Ecology, Nitrogen in Puget Sound - A story map https://waecy.maps.arcgis.com/apps/MapSeries/index.html?appid=907dd54271f44aa0b1f08efd7efc4e30 (last visited May 30, 2024).

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

Ecology itself reports that excess nutrients in the water—i.e., nitrogen and phosphorous—are causing dissolved oxygen levels to drop to these critically low levels in some parts of Puget Sound. Snyder Decl. Ex. 3 at 98–101 (Ecology, Puget Sound and the Straits Dissolved Oxygen Assessment Impacts of Current and Future Human Nitrogen Sources and Climate Change through 2070) (2014). Ecology knows that low oxygen levels in Puget Sound are "bad news for aquatic life," such as shellfish, salmon, Southern Resident orcas, and other species.[4]

B. Washington and Federal Law Require Ecology to Protect the Environment and Communities from CAFOs

In Washington, state law and the federal Clean Water Act ("CWA") work in tandem to establish the regulatory framework for controlling and eliminating pollution discharged into the state's waters. The Washington Water Pollution Control Act ("WPCA") declares the "public policy of the state of Washington to maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of wildlife, birds, game, fish and other aquatic life, and the industrial development of the state." RCW 90.48.010. Thus, "[c]onsistent with this policy, the state of Washington will exercise its powers, as fully and as effectively as possible, to retain and secure high quality for all waters of the state…[and] work[] cooperatively with the federal government in a joint effort to extinguish the sources of water quality degradation[.]" *Id*. The Clean Water Act, in turn, is designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), with the goal of not just reducing, but eliminating, all water pollution. *Waterkeeper All., Inc. v. U.S. Env't. Prot. Agency*, 399 F.3d 486, 490 (2d Cir. 2005) (citing 33 U.S.C. § 1251(a)(1)).

To achieve these objectives, both state and federal law make it unlawful for any person to discharge pollutants from a point source—any discernible, confined, and discrete conveyance—into the state's surface waters without a permit. RCW 90.48.080; WAC 173-220-020; *see also* 33 U.S.C. §§ 1311(a), 1362(12). Such permits, known as National Pollutant Discharge Elimination System ("NPDES") permits, must include "effluent limitations" for the pollutants being discharged.

[4] Kelly Ferron, Nutrient Pollution Modeling Shows Different Futures for Puget Sound, Department of Ecology (Sept. 14, 2021) (https://ecology.wa.gov/Blog/Posts/September-2021/Latest-Salish-Sea-modeling-results-bring-us-closer (last visited May 29, 2024)).

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

Waterkeeper All., 399 F.3d at 491. The permit's effluent limits must ensure compliance with the laws' two independent requirements: (1) technology-based effluent limitations; and (2) water quality-based effluent limitations. *See Am. Mining Cong. v. U.S. Env't. Prot. Agency,* 965 F.2d 759, 762 n.3 (9th Cir. 1992) (citing 33 U.S.C. §§ 1311–1317, 1362(11)).[5] These two types of permit effluent limits—and the rules for how they must be established—are at the heart of the framework for curbing and eliminating the discharge of pollution to our waters.

The primary tool for controlling and eliminating the discharge of pollutants is the requirement that every discharge permit must include effluent limitations based on "a series of increasingly stringent *technology-based standards*." *Nat. Res. Def. Council, Inc. v. U.S. Env't. Prot. Agency*, 822 F.2d 104, 123 (D.C. Cir. 1987) (emphasis added). These technology-based standards set the minimum level of pollution treatment technology for all similar facilities—and the maximum levels of pollution that may be discharged—*regardless of a discharge's potential impact on water quality*. The technology-based limits include the national effluent guidelines for CAFOs, which include a "no discharge" requirement. 40 C.F.R. § 412.31(a) & (b).

Moreover, under Washington law, state technology-based effluent limits must also include "all known, available and reasonable methods of prevent[ing], control[ling] and treat[ing]" pollutants—namely, Washington's "AKART" standard. WAC 173-201A-020; RCW 90.48.010. This fundamental requirement seeks to ensure that public waters are protected to the maximum extent possible by requiring dischargers to keep pace with improvements in treatment technology. That is, AKART "shall represent the most current methodology that can be reasonably required for preventing, controlling, or abating the pollutants associated with a discharge." WAC 173-201A-020. Thus, the AKART requirement is "'clearly meant to foster the use of new emission control technology' in the hopes of someday 'extinguish[ing] sources of water quality degradation.'" *Waste Action Project v. Draper Valley Holdings LLC*, 49 F. Supp. 3d 799, 813 (W.D. Wash. 2014) (quoting *Puget Soundkeeper All. v. Wash. Dep't of Ecology,* 102 Wn. App.

[5] Washington law must meet the federal minimum requirements. 33 U.S.C. § 1370; *City of Pasco v. Ecology*, PCHB No. 84-339 (Final Findings of Fact, Conclusions of Law & Order) (Sept. 23, 1985) 1985 WL 21907, *4 ("Notwithstanding the existence of a federal statute, the state continues to have power to impose more stringent requirements than federally demanded.").

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

783, 789 & 792, 9 P.3d 892 (2000)); *see also* Snyder Decl. Ex. 8 at 93 (Ecology's "Permit Writer's Manual") ("The permit writer may determine that for some permits AKART is zero discharge. Although there is no explicit statement in RCW 90.48 equivalent to the 'zero discharge' goal of the Clean Water Act, both of these laws have a technology-based principle which, when followed to the logical conclusion lead to zero discharge, when achievable and reasonable.").[6]

Once Ecology establishes what pollution removal treatment qualifies as AKART for a particular discharge, it must translate that technology into permit limitations. WAC 173-220-130(1)(A). As the D.C. Circuit aptly observed, "the rubber hits the road when the state-created standards are used as the basis for specific effluent limitations in NPDES permits." *American Paper Inst., Inc. v. U.S. Env't. Prot. Agency*, 996 F.2d 346, 350 (D.C. Cir. 1993).

While technology-based effluent limits aim to ensure that permit limits keep pace with advances in available treatment technology, the second type of permit limit aims to achieve minimum standards for water quality pending the cessation of all polluting discharges. *See* 33 U.S.C. §§ 1311(b)(1)(C), 1342(a)(2). These water quality-based effluent limits are derived from state water quality standards, which define the minimum water quality that must be attained—without exception—in the receiving waterbody to protect human health and aquatic life. *See* 33 U.S.C. § 1313(a)(3), (c)(2)(a); *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't. of Ecology*, 511 U.S. 700, 704 (1994) ("state water quality standards provide a supplementary basis…so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." (citation omitted)).

Water quality-based effluent limits are necessary when Ecology determines that even after imposing the required technology-based effluent limits, the discharge will still "cause [or have] the reasonable potential to cause" an exceedance of applicable water quality standards. 40 C.F.R. § 122.44(d)(1)(i); Permit Writer's Manual at 126 ("When reviewing a permit application or

[6] While AKART fits easily into the NPDES technology-based limit framework, it is a separate and distinct requirement from the mandates of the federal Clean Water Act. *ITT Rayonier, Inc. v. DOE,* PCHB No. 85-218, at 7 (Final Findings of Fact, Conclusions of Law, and Order) (Jan. 5, 1989) (AKART as a more stringent state requirement is "not…the equivalent of any federal formulation, but rather…an independent criterion.").

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

renewal, the permit writer must first determine the proper technology-based limits. Then the writer must decide if these limits are stringent enough to ensure that water quality standards are not violated in the receiving water. If they are not, then water quality-based limits must be developed."). In other words, sometimes keeping pace with available technology is not enough to ensure that minimum water quality standards are attained, and a discharger must innovate to do even better than the generally best technology.

In addition to the "no discharge" requirements for CAFOs, permits must also include adequate effluent limitations to ensure compliance with the water quality standards in the receiving water. *Defenders of Wildlife v. Browner,* 191 F.3d 1159, 1163 (9th Cir. 1999); *Upper Blackstone Water Pollution Abatement Dist. v. U.S. Env't Prot. Agency,* 690 F.3d 9, 28 (1st Cir. 2012); 33 U.S.C. § 1311(b)(l)(C) (a permittee "shall…achieve…any more stringent limitation, including those necessary to meet water quality standards"). Specifically, every NPDES permit must include effluent limits that "control *all* pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the [permitting authority] determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality." 40 C.F.R. § 122.4(d)(1)(i) (emphasis added). Accordingly, Ecology may not issue an NPDES permit that allows violations of water quality standards or does not provide a means to detect compliance with such standards. 40 C.F.R. § 122.4(d); WAC 173-226-070(2).

In addition to binding federal CWA principles, Washington has adopted an antidegradation policy for the state's waters. The antidegradation policy states,

> Waters of the state shall be of high quality. Regardless of the quality of the waters of the state, all wastes and other materials and substances proposed for entry into said waters shall be provided with all known, available, and reasonable methods of treatment prior to entry. Notwithstanding that standards of quality established for the waters of the state would not be violated, wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except in those situations where it is clear that overriding considerations of the public interest will be served.

RCW 90.54.020(3)(b). Ecology regulations provide for the implementation of the antidegradation policy for groundwater. In particular, the policy protects groundwaters' "existing and future

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

beneficial uses." WAC 173-200-030(2)(a). Accordingly, Ecology established numeric criteria that specify the maximum concentration of various contaminants in groundwater. WAC 173-200-040(1). Most groundwater criteria will be set at the standard for drinking water unless the groundwater is designated as requiring a more stringent level of protection than would be afforded based on human health criteria. *Id*. The criteria for a given contaminant must not be exceeded unless the natural groundwater quality already exceeds the criteria, in which case the natural groundwater quality will represent the criteria in that location. WAC 173-200- 050(3)(b).

The enforcement limit is a distinct type of numeric criteria applicable to groundwater contaminants. WAC 173-200-050. An enforcement limit is not necessarily equivalent to the maximum concentration of a given contaminant, but it instead reflects the "value assigned to any contaminant for the purposes of regulating that contaminant to protect existing groundwater quality and to prevent groundwater pollution." WAC 173-200-050(1). In determining the enforcement limit for a contaminant, Ecology applies the AKART standard and considers antidegradation, the "[o]verall protection of human health and the environment," the natural qualities of the groundwater, and several other factors. WAC 173-200-050(3)(a).

Finally, the NPDES permitting program relies upon permittee self-monitoring to establish and enforce compliance with the terms of an NPDES permit. As such, every NPDES permittee must "monitor its discharges into the navigable waters of the United States in a manner sufficient to determine whether it is in compliance with the relevant NPDES permit." *Nat. Res. Def. Council v. Cnty. of Los Angeles*, 725 F.3d 1194, 1207 (9th Cir. 2013) (citing 33 U.S.C. § 1342(a)(2) & 40 C.F.R. § 122.44(i)(1)). The "[i]ssuance of an NPDES permit is thus arbitrary, capricious, and contrary to law if the permit fails to include monitoring provisions that ensure compliance with the permit's effluent limitations." *Food & Water Watch v. U.S. Env't. Prot. Agency*, 20 F.4th 506, 516 (9th Cir. 2021). As the Second Circuit stated, "permits authorizing the discharge of pollutants may issue only where such permits *ensure* that every discharge of pollutants will comply with all applicable effluent limitations and standards." *Waterkeeper All.*, 399 F.3d at 498 (emphasis in

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

original). Adequate monitoring requirements are essential to ensuring this fundamental requirement is met.

C. Ecology Continues to Issue Unlawful CAFO Permits

This is the third time many of these Appellants have challenged Ecology's attempt to regulate CAFOs in Washington. Most recently, in June of 2021, the Washington State Court of Appeals invalidated the previous iteration of Ecology's CAFO general permits because they failed to comply with the law in several important ways. *Wash. State Dairy Fed'n v. Dep't of Ecology*, 18 Wn. App. 2d 259, 490 P.3d 290 (2021). First, the court held that Ecology did not follow the state statute requiring that it determine what modern pollution controls were reasonable to control the discharge of nutrients, bacteria, and other pollutants before issuing the permit. *Id*. at 288. Second, the court found that the permit did not adequately limit the discharge of pollutants to protect nearby waterways' health, as required under state and federal law. *Id*. at 297-99. Third, the court found the permit did not include sufficient monitoring of surface waters and groundwater to determine whether the permit was working and whether the permittees were complying with their obligations. *Id*. at 301-03. Fourth, Ecology failed to require site-specific Nutrient Management Plans that met federal standards to ensure meaningful evaluation of, and public participation in, the development of the measures meant to protect local water bodies and communities. *Id*. at 307. Finally, the court held that under state law, Ecology must consider the impacts of climate change when developing the permit. *Id*. at 309. The current CAFO GP suffers from many of the same fatal legal failings.

For example, as with the prior permits, the CAFO GP authorizes discharges from CAFOs to both surface waters and groundwater. Snyder Decl. Ex. 4 (Combined CAFO Permits). Specifically, Condition S3 states that "[d]ischarges conditionally authorized by this permit must not cause or contribute to a violation of *water quality standards*." *Id*.[7] The CAFO GP defines CAFOs as having two general parts: the "Land Application Area" and the "Production Area." CAFO GP Appx. A.

[7] In the CAFO GP, "Water quality standards" is a defined term that includes both the State's surface and groundwater quality standards. CAFO GP, Appx. A.

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

For the Land Application Areas, no discharges are authorized except when the discharge is "agricultural stormwater runoff," a defined term. CAFO GP Cond. S3.D. Specifically, "[d]ischarges to surface water from land application fields generated only by precipitation provided that the following are true:

1. The discharge was not from the production area,
2. The discharge was not caused by human activities even if the activity took place during precipitation, and
3. Permittee is in compliance with their CAFO permit (including use of best management practices), where the manure, litter, process wastewater, or other organic by-products have been applied in accordance with site specific yearly field nutrient budget and other relevant permit requirements."

CAFO GP Appx. A. Moreover, Ecology has again relied on an "adaptive management" approach that purports to ensure that pollutants, specifically nutrients, will be utilized as fertilizer and not transported off the fields or through the soils to groundwater. CAFO GP, Cond. S4.L.

Unfortunately, the same fundamental flaws that plagued the prior iteration of the Permits' handling of the potential discharges from land application areas remain. First, Ecology has failed to ensure that permittees will conduct the mandatory assessments of the risks of applying manure and other wastes to each field and incorporate that information into its annual plan. The controlling federal regulations require permittees to undertake this analysis before receiving permit coverage; Ecology's CAFO GP does not require this analysis at all. Second, in direct contravention of the Court of Appeals' clear holding, Ecology continues to allow permittees to apply manure to fields with excessive nutrient levels that will cause the discharge of nutrients to groundwater. Finally, the CAFO GP lacks the necessary monitoring requirements to ensure permittees are checking for and tracking the impacts of authorized and unauthorized discharges to ensure that they are complying with the CAFO GP's effluent limitations.

Similarly, for the Production Area, the CAFO GP states that no discharges are authorized except when two conditions are met:

1. Precipitation events cause an overflow of manure, litter, feed, process wastewater, or other organic by-product management and storage facilities which are designed, constructed, operated, and maintained to contain all manure, litter, feed, process wastewater, and other organic by-products including the contaminated runoff and

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

direct precipitation from a *25-year, 24-hour storm event* for the location of the facility and still have waste storage pond design *freeboard*; and

2. The production area is operated in accordance with the applicable inspection, maintenance, recordkeeping, and reporting requirements of this permit.

CAFO GP Cond. S3.C (emphasis in original). However, while the CAFO GP prohibits discharges from the Production Area in most circumstances, it explicitly authorizes manure storage lagoons to discharge to groundwater. Under condition S4.C.1., liquid waste storage structures "must be designed, constructed, and maintained to have a maximum water *specific discharge* of $1x10^{-6}cm^3/cm^2/s$ without consideration for manure sealing[.]" (emphasis added). Put differently, the CAFO GP does not require impervious liquid storage structures but rather authorizes CAFO operators to utilize manure storage structures that leak—"specific discharge"—and, indeed, are designed to leak. *Cow Palace*, 80 F. Supp. 3d at 1223 ("even assuming the lagoons were constructed pursuant to NRCS standards, these standards specifically allow for permeability and, thus, the lagoons are designed to leak"); *Food & Water Watch*, 20 F.4th at 509 (same); *see also* Snyder Decl. Ex. 5 (Chelsea Morris Deposition Transcript) ("Morris Tr.") at 33:23-25 ("It is my understanding, from the literature that I've reviewed, that waste storage ponds, all waste storage ponds do seep."); 127:6-7 (designed to seep).

Notwithstanding this known, authorized discharge, Ecology has again failed to impose the necessary monitoring requirements to ensure that the permittees comply with the Permits' limits and that Ecology meets its duty to prevent discharges that cause or contribute to violations of water quality standards. Rather, in partial recognition of the Court of Appeals' instruction that groundwater monitoring is necessary to ensure compliance with the CAFO GP's groundwater effluent limitation, the CAFO GP does contain limited groundwater monitoring requirements for some facilities. Specifically, for medium and large CAFOs located in so-called "nitrate priority areas," some groundwater monitoring is required. Small CAFOs and all CAFOs located outside of nitrate priority areas (*i.e.*, where nitrate pollution in groundwater has not already occurred or had not been documented), however, are not required to conduct groundwater monitoring. CAFO GP S5.D. The sole exception pertains to land application areas where application fields are already extremely high in nitrates, or where a waste storage structural assessment indicates the structure is

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

somehow defective. *Id*. All other CAFOs are authorized to discharge from their lagoons and production areas to groundwater without ever monitoring their compliance with the groundwater effluent limitation—an authorization the Court of Appeals has already deemed unlawful. *Wash. State Dairy Fed'n*, 18 Wn. App. 2d at 297-98.

Another significant gap in the Permits is Ecology's failure to impose the necessary permit requirements to ensure permitted CAFOs will not violate the state's narrative toxic water quality criteria. As discussed below, Ecology analysis demonstrates that CAFOs may discharge a host of pollutants that may cause or contribute to a violation of the state's narrative toxic water quality standards. Specifically, CAFOs may discharge metals, chemicals, cleaning agents, pesticides, petroleum products, and other potentially toxic materials. These pollutants alone and in combination may cause acute or chronic toxicity to the fish and wildlife that use nearby receiving waters or may adversely affect public health if they reach surface waters or groundwater, thus violating the state's prohibition on the introduction of "toxic substances…above natural background levels in waters of the state" in toxic amounts. WAC 173–201A–240(1). Yet, Ecology has failed to impose the mandatory effluent limits to meet this regulatory standard.

In addition, Ecology has failed to ensure that the permittees will use modern treatment control measures to limit, or eliminate, the discharge of pollutants into the state's waters. Nowhere is this omission more evident in the lack of meaningful effluent limitations controlling the construction and operation of solid waste storage areas and composting sites. There, Ecology's permit writer admits that Ecology has failed to impose the restrictions necessary in the CAFO GP to ensure that permittees use measures necessary to protect groundwater from contaminates that will leach from those areas.

Finally, Ecology continues to exclude the public from reviewing and commenting on the site-specific nutrient management plans at the heart of the CAFO regulatory scheme. Nutrient management plans are a critical component of NPDES waste discharge permits that must be subject to public comment before the terms contained in a plan are incorporated into enforceable permit conditions. Specifically, the CWA "unequivocally and broadly declares" that "'[p]ublic

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States.'" *Waterkeeper All*., 399 F.3d at 503 (quoting 33 U.S.C. § 1251(e)). Accordingly, the public must have an opportunity to be heard before any NPDES permit is issued. *Id*. Because a nutrient management plan is a type of effluent limitation, the CWA requires that Ecology ensure the public can participate in its development. *Cmty. Ass'n for Restoration of Env't v. Dep't of Ecology*, 149 Wn. App. 830, 849-50, 205 P.3d 950 (2009). Yet, Ecology has again written a permit that fails to allow for this crucial step in the permitting process for all CAFOs permitted under the prior CAFO permit, despite the Court of Appeals' decision. This exclusion undermines the principles of transparency and accountability and denies the public their right to participate in decisions that directly affect their environment.

STANDARD OF REVIEW

The scope and standard of review is *de novo*. *Port of Seattle v. Pollution Ctrl. Hearings Bd*., 151 Wn.2d 568, 592, 90 P.3d 659 (2004); WAC 371-08-485(1). Under this standard of review, "[i]n cases of statutory interpretation, the court's primary objective is to ascertain and carry out legislative intent." *Advocates for a Cleaner Tacoma v. Puget Sound Clean Air Agency*, 29 Wn. App. 2d 89, 95, 540 P.3d 821, 825 (2023). "If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Id*. (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). While the Board should typically defer to Ecology's interpretation of ambiguous language, *Port of Seattle*, 151 Wn.2d at 594, such deference is not warranted where the agency's actions are "arbitrary, capricious, and contrary to law." *Skokomish Indian Tribe v. Fitzsimmons*, 97 Wn. App. 84, 93, 982 P.2d 1179 (1999) (refusing to defer to Ecology's statutory interpretation where it failed to object to a hydroelectric project after concluding the project was inconsistent with state law).

The summary judgment procedure works to eliminate trial when the only controversy involves the meaning of statutes, and the facts relevant to a legal determination are uncontested.

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

Rainier Nat'l Bank v. Sec. State Bank, 59 Wn. App. 161, 164, 796 P.2d 443 (1990). The party moving for summary judgment must show there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a summary judgment proceeding is one that will affect the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). In a summary judgment, all facts and reasonable inferences must be construed in favor of the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

ARGUMENT

There are no disputed issues of material fact as they pertain to the Issues on which FOTC moves for partial summary judgment. The record consists of the CAFO GP, its accompanying fact sheet, records that Ecology explicitly relied upon, and the permit writer's testimony. As explained below, FOTC respectfully requests the Board grant summary judgment in favor of FOTC on Issues 1 - 11.

A. The CAFO General Permit Violates Binding Federal Regulations By Failing To Require Permittees To Conduct a Field-Specific Assessment of the Potential For Nitrogen And Phosphorus Transport From Each Land Application Field Before Permit Issuance (Issues 1, 2, 3, 4, & 11)

Inadequately managed and controlled CAFOs significantly impact the environment and nearby communities. To ensure that permittees are implementing the measures necessary to avoid these adverse impacts, the federal regulations controlling Ecology's issuance of NPDES permits to CAFOs require that all permittees develop and implement a site-specific "nutrient management plan" ("NMP"). 40 C.F.R. § 122.42(e)(5). Each permittee must develop and submit their NMP *before* obtaining permit coverage. 40 C.F.R. § 122.23(h)(1).[8] Among the many details the permittee must include in the NMP is how the permittee will "ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater," along with terms that "address rates of application." 40 C.F.R. § 122.42(e)(5). Ecology requires permittees to apply the

[8] Ecology must review the NMP, submitted with its Notice of Intent ("NOI") to obtain permit coverage, to ensure that it includes the required information and put the NMP out for public comment before issuing permit coverage. 40 C.F.R. § 122.23(h)(1). As discussed in detail below, Ecology continues to fail to meet this obligation.

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

so-called "narrative" method to implement this requirement. *Id*. § 122.42(e)(5)(ii); *see* Snyder Decl. Ex. 6 at 18, CAFO GP Fact Sheet ("Fact Sheet") ("Ecology chose the narrative approach to develop a plan."). The "narrative" approach expresses rates of application "as a narrative rate of application that results in the amount, in tons or gallons, of manure, litter, and process wastewater to be land applied[.]" 40 C.F.R. § 122.42(e)(5)(ii)(A). The site-specific "terms" of the narrative approach require permittees seeking coverage to include "the outcome of the field-specific assessment of the potential for nitrogen and phosphorus transport from each field" in their NMP. *Id*. This required assessment is a central component of the calculation that serves as the effluent limitation to implement "appropriate site specific conservation practices…, including as appropriate buffers or equivalent practices, to control runoff of pollutants to waters" and "ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater." *Id*. § 122.42(e)(1)(vi) & (viii). Despite this clear, mandatory requirement, the CAFO GP does not require permittees to conduct this vitally important assessment.

In the CAFO GP, Ecology chose to require permittees to develop a "Manure Pollution Prevention Plan" ("MPPP") instead of an NMP. Fact Sheet at 18 ("facilities seeking coverage under the CAFO general permits must prepare a Manure Pollution Prevention Plan that meets the requirements for a Nutrient Management Plan"). Condition S4.A of the CAFO GP controls the permittees' development of the MPPP. CAFO GP, Cond. S4.A.1. There, Ecology enumerates the elements and terms that must be included in the MPPP. CAFO GP, Cond. S4.A-Q. The list of required elements is detailed and specific. However, the federally required "field-specific assessment of the potential for nitrogen and phosphorus transport from each field" is absent from the list of MPPP elements. 40 C.F.R. § 122.42(e)(5)(ii)(A). While the MPPP is supposed to mimic the requirements of a nutrient management plan, nowhere in the MPPP provisions of the CAFO GP is there a requirement that prospective permittees submit the outcome of field-specific assessments of the potential for nitrogen and phosphorus transport for each application field before a permit is issued.

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

Permit writer Chelsea Morris confirmed the absence of this requirement. In her deposition, Ms. Morris could not identify any location where the CAFO GP requires the necessary field-specific assessment before permit coverage is issued. When reviewing CAFO GP Cond. S4.A, on the MPPP, Ms. Morris initially thought that the "field discharge management practice" provision under S.4.A.3.b may contain the required assessment. Morris Tr. 215:20-216:17. But when Ms. Morris reviewed the field discharge management practice condition in S4.N, she concluded that nowhere in that provision was there a requirement that permittees submit the outcome of a field-specific assessment. *Id*. at 216:25-217:5.

Ecology may attempt to wave away this fatal flaw by relying not on the permit's terms but rather on a passing statement in the permit fact sheet. The fact sheet states that:

> Determination of application rates must include a field specific assessment for the potential for nitrogen and phosphorus transport from the field. The permit yearly field nutrient budget form address [*sic*] these requirements which are also listed as permit condition S4.J.1

Fact Sheet at 56 (para. c.).[9] Even a cursory review of the CAFO GP shows that the fact sheet is wrong. The yearly field nutrient budget form (Snyder Decl. Ex. 7) is merely a record-keeping tool Ecology provides for permittees to demonstrate compliance with their nutrient budget *after* permit coverage is issued. The one-page Excel spreadsheet contains no provisions related to the outcome of a field-specific assessment for nitrogen and phosphorus transport for each field, which must be submitted with an MPPP *before* a permit issues. 40 C.F.R. § 122.42(e)(5)(ii)(A).

This lack of the required risk assessment is particularly troubling given Ecology's history of failing to adequately regulate phosphorous application to fields, for example. According to Ecology, excess phosphorous (and nitrogen) in both fresh and marine surface waters "act like fertilizer to trigger algal and aquatic plant growth. Excessive algae and aquatic plants can disrupt boating and swimming recreation, increase harmful algae blooms, and degrade habitat for other aquatic life." Fact Sheet at 11. Some of that algal growth can be toxic blue-green algae (cyanobacteria), which "can cause serious illness" in people and animals. *Id*. In addition, "when

[9] Ecology most likely was referring to S4.K.1 in its Fact Sheet, the Annual Field-Specific Crop Nutrient Budget requirements, because CAFO GP S4.J.1 pertains to soil sampling depths, not a field-specific assessment for nitrogen and phosphorus transport.

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

algae and aquatic plants die, their decomposition decreases the dissolved oxygen in a surface water," which in turn may negatively impact fish and wildlife. *Id*. Despite these known impacts, as Ecology confirmed in the Fact Sheet, while permittees are required to address phosphorous in their annual nutrient budget, "time constraints" and lack of "permittee soil phosphorus data from the 2017 permit cycle" "prevented Ecology from developing phosphorus limits in this permit." *Id.* at 56. However, Ecology also notes that "[i]t is highly likely that if Ecology were to require phosphorus based nutrient budgets that many land application fields would no longer be available to use for manures due to the current phosphorus levels from many years of receiving manure." *Id*. at 59. This is precisely the type of field-specific issue that should be addressed in the risk assessment that Ecology has failed to require. This fatal flaw, in turn, effectively renders meaningless the Permits' effluent limits for phosphorous, CAFO GP, Cond. S4.k.1, because the permittee will lack the critical information to make a reasoned decision about appropriate application rates. 40 C.F.R. § 122.42(e)(1).

NPDES permits issued by Ecology must adhere to the floor set by the federal regulations. 33 U.S.C. § 1370. Here, the CAFO GP omits a critical element of nutrient management plans from the requirements for MPPPs. The outcome of field-specific assessments for the transportation of nitrogen and phosphorus is essential to the overall permitting structure because it provides crucial information for defining the potential risk of discharge from particular fields. These assessments are thus a key component of a permittee's method for ensuring it complies with permit terms, and does not adversely impact nearby surface and groundwater. Field-specific assessments are also of paramount importance to communities living near CAFOs and their land application fields. This key information must, therefore, be part of the nutrient management plans that the public can review and comment on before permit coverage issues. In *Waterkeeper*, the court held that nutrient management plans must be subject to public review because the public has a "'right to assist in the '*development*, revision, and enforcement of…[an] effluent limitation.'" 399 F.3d at 503 (emphasis added) (quoting 33 U.S.C. § 1251(e)). The CAFO GP fails to adhere to the requirements of the binding federal regulations, and summary judgment should issue in FOTC's favor.

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

B. The CAFO General Permit Does Not Include Adequate Monitoring To Ensure Compliance With Its Effluent Limitations (Issues 1, 9 & 10)

The Washington Court of Appeals struck down the prior CAFO permits for, *inter alia*, having insufficient monitoring requirements. *See Wash. State Dairy Fed'n*, 18 Wn. App. 2d at 299-304. In particular, the Court of Appeals found that despite the prior permits' effluent limitation prohibiting discharges that cause or contribute to a violation of water quality standards, the permits authorized discharges from lagoons to groundwater without having the requisite groundwater monitoring to "ensure compliance" with the groundwater-based effluent limitation. *Id.* at 303. Similarly, where the permits authorized discharges to surface waters, they, too, lacked appropriate monitoring to verify compliance with the effluent limitations. *Id*. at 301. While Ecology tweaked the current CAFO GP by requiring *some* monitoring, it ignores the balance of the Court of Appeals' decision requiring monitoring whenever the CAFO GP established effluent limits. Monitoring is necessary to ensure compliance with the CAFO GP's effluent limitations.

According to Ecology, "[m]onitoring is truly the cornerstone of the NPDES program." Permit Writer's Manual at 386. As such, "[a]ll permits must require monitoring of effluent in order to determine if the facility is in compliance with the permit." *Id*. at 389. "The main purpose of self monitoring requirements is to determine compliance with effluent limits and other permit conditions." *Id*. To these ends, NPDES permits must contain conditions requiring monitoring and reporting. WAC 173-226-090(1)(A) ("[a]ny discharge authorized by a general permit may be subject to such monitoring requirements as may be reasonably required by the department, including the installation, use, and maintenance of monitoring equipment or methods[.]"); *see also* 33 U.S.C. § 1342(a)(2); 40 C.F.R. § 122.44(i)(1)(i) ("To assure compliance with permit limitations, requirements to monitor…[t]he mass (or other measurement specified in the permit) for each pollutant limited in the permit[.]"). "Effective self-monitoring reveals permit violations, thereby promoting enforcement of the CWA." *Food & Water Watch*, 20 F.4th at 516; *see also Cnty. of Los Angeles*, 725 F.3d at 1208 ("The [Act] is viewed by many as the easiest of the federal environmental statutes to enforce. This is because persons regulated under the act normally must report their own compliance and noncompliance to the regulating agency." (quotation marks and

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

citation omitted)). Critically, even "no discharge" permits require sufficient monitoring to ensure a permittee is not violating that effluent limitation. *Food & Water Watch*, 20 F.4th at 517 ("Without a requirement that CAFOs monitor waste containment structures for underground discharges, there is no way to ensure that production areas comply with the Permit's zero-discharge requirement.").

Despite monitoring being the cornerstone of federal and state law, Ecology failed to include monitoring of groundwater and surface water discharges in the CAFO GP; monitoring that is necessary to demonstrate compliance with a "no-discharge" effluent limitation.

1. The CAFO GP fails to require monitoring from each facility that discharges to groundwater (Issue 10)

It is undisputed that groundwater monitoring is the only way to know whether discharges cause or contribute to a violation of the State's groundwater quality standard. The Court of Appeals held as much, finding that "[a]ccording to Ecology's literature review, groundwater monitoring, unlike soil monitoring, is the single method available to ascertain a CAFO's direct impact on groundwater quality." *Wash. State Dairy Fed'n*, 18 Wn. App. 2d at 302. The same literature review forms the primary scientific basis of the current CAFO GP, Snyder Decl. Ex. 9 at 12-15 (Ecology Discovery Responses), and permit writer Chelsea Morris testified in agreement that "the only way to know what's going into groundwater is to measure groundwater[.]" Morris Tr. 222:20-223:6; *see also id*. at 223:6-14 (the only way Ecology will know if manure storage lagoon is causing or contributing to a water quality violation would be to monitor the groundwater around that lagoon; "A: To know definitively if they're causing a violation, yes.").

The CAFO GP's effluent limitation prohibits authorized discharges from causing or contributing to a violation of the State's groundwater quality standards. CAFO GP S3. Nevertheless, and despite the Court of Appeal's clear mandate, the CAFO GP does not require all permittees to monitor groundwater. Instead, Ecology chose to require monitoring for *only* medium and large CAFOs located in a "nitrate priority area."[10] CAFO GP, Cond. S4.A.4.d & Cond. S5.D. Small CAFOs and all other facilities outside these "nitrate priority areas" have no automatic

[10] The CAFO GP defines a Nitrate Priority Area as "[an] [a]rea prioritized by Ecology where conditions are vulnerable to nitrate transport to groundwater and wells sampled for nitrate exceed or approach the drinking water maximum contaminant limit of 10 mg/L." CAFO GP, Appx. A

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

monitoring requirement. Instead, under the Permit, Ecology has *the option* of requiring monitoring in a few, limited circumstances. *Id*., Cond. S5.D.2.

Ecology's regulations provide that "[a]ny discharge authorized by a general permit may be subject to such monitoring requirements as may be reasonably required by the department, including the installation, use, and maintenance of monitoring equipment or methods[.]" WAC 173-226-090(1)(A). More specifically, these monitoring requirements should apply to "[a]ll pollutants" subject to effluent limitations and are otherwise "subject to reduction or elimination under the terms and conditions of the permit" *Id*. 173-226-090(1)(A)(ii)-(iii). While that regulation provides Ecology with discretion on imposing monitoring requirements, that discretion is limited. *Cf. Food & Water Watch*, 20 F.4th at 515 ("This statutory and regulatory framework gives discretion to the EPA in crafting appropriate monitoring requirements for each NPDES permit. However, the EPA's discretion is not unlimited.").

First, Ecology's monitoring requirements in NPDES permits must be consistent with, and no less stringent than, the Environmental Protection Agency's ("EPA") NPDES permit regulations. *Washington State Dairy Fed'n*, 18 Wn. App. 2d at 299 n. 13 (while noting the discretion afforded Ecology's monitoring regulations, stating that "the CWA provides that a state may not adopt a standard of performance less stringent than that required under the CWA." (citing 33 U.S.C. § 1370)). EPA regulations governing monitoring, in turn, require permits to include "[r]equired monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity." 40 C.F.R. § 122.48(b). Moreover, each permit must "assure compliance with [the] permit limitations" by including requirements to monitor the "mass (or other measurement specified in the permit) *for each pollutant limited in the permit*; *the volume of effluent discharged from each outfall; other measurements as appropriate*." 40 C.F.R. § 122.44(i)(1)(i)–(iii) (emphasis added). To comply with these requirements, EPA and thus Ecology must include sufficient monitoring requirements to both "yield [representative] data" and ensure compliance with the terms of a permit. *See Cnty. of Los Angeles*, 725 F.3d at 1207 (an NPDES permit is "unlawful if a permittee is not required to effectively monitor its permit compliance.").

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

This mandate requires Ecology to apply monitoring requirements for *each facility* because the CAFO GP has established effluent limitations that must be met. Because it has failed to do so, the CAFO GP is inconsistent with the federal minimum requirements.

Second, as described herein, Ecology's own scientists have explained that groundwater monitoring is the only means of evaluating compliance with the Permits' groundwater effluent limitation. It is unreasonable for Ecology to pick and choose where monitoring is required when the facts and science both say that groundwater monitoring is necessary to enforce the Permits' effluent limitations at *all* permitted CAFOs. *Cf. Rios v. Wash. Dep't of Labor & Indus.*, 145 Wn.2d 483, 508, 39 P.3d 961 (2002) (finding that the Department's denial of a petition for rulemaking was unreasonable when "its own team of technical experts had, in light of the most current research, deemed a monitoring program both necessary and doable....").

Third, Ecology's NPDES permitting regulations, requiring monitoring of all pollutants subject to effluent limitations, must be read in conjunction with the State's Groundwater Quality Standards and anti-degradation requirement, which unambiguously mandate that "[p]ermits issued or reissued by the department shall be conditioned in such a manner as to authorize only activities that will not cause violations of this chapter." WAC 173-200-100(4). As written, the CAFO GP authorizes unmonitored discharges of manure pollutants to groundwater of unknown quality, meaning Ecology will never know whether such discharges are violating WAC 173-200. *See, e.g.*, CAFO GP, Cond. S4.C.1 (establishing a "maximum specific discharge" rate for liquid storage facilities). This factor too played into the Court of Appeals' prior decision on monitoring. *See Wash. State Dairy Fed'n*, 18 Wn. App. 2d at 303 ("Given that CAFOs are forbidden from engaging in any activity that would "cause or contribute to a violation of water quality standards," []soil monitoring on its own is inadequate to ensure compliance with this condition.").

Moreover, Ecology's minimal attempt to address the Court of Appeals' mandate on groundwater monitoring is fraught with shortcomings. The designation of "nitrate priority areas" where monitoring is required for medium and large CAFOs is based on incomplete, draft guidance that is nearly a decade old. The Ecology website where the draft is found states that the data for

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

the nitrate priority areas is from 2016,[11] and that the priority areas are still in draft form – "a point of confusion" for permit writer Chelsea Morris. Morris Tr. 225:2-7. When Ms. Morris was questioned how a CAFO "located outside of a nitrate priority" will know "whether discharges from my lagoon are causing or contributing to a violation of the state's groundwater quality standards," Ms. Morris replied: "We would not be able to know[.]" *Id*. 222:8-14. Indeed, Ms. Morris candidly admitted that the Permits "authorize CAFOs located outside nitrate priority areas to discharge to groundwater without monitoring those discharges[.]" *Id*. 226:5-8. Under Washington law and the Court of Appeal's decision, it is unlawful to authorize such unmonitored discharges, as neither Ecology nor the permittee will know if discharges comply with the Permits' effluent limitation.

The pitfalls of Ecology's lack of required groundwater monitoring are amplified when one examines Ecology's decisions regarding liquid manure storage facilities. During this permit cycle, Ecology incorporated a "maximum specific discharge" requirement, requiring permittees to demonstrate their lagoons will discharge less than $1x10^{-6}cm^3/cm^2/s$ without consideration for manure sealing. CAFO GP, Cond. S4.C.1. According to Ecology, "[t]his performance standard allows seepage from manure storage lagoons[.]" Morris Tr. 126:5-7. To verify a permittee's compliance with this seepage performance standard, Ecology relies on the federal Natural Resources Conservation Service ("NRCS") Tech Note 23, which, by its terms, "cannot quantify seepage amounts occurring from existing waste storage ponds." *Id*. 130:15-18. Ms. Morris confirmed this reality with Don Hanson, an engineer with Washington's NRCS office, who told Ms. Morris that Tech Note 23 "could not be used to quantify seepage." *Id*. 131:1-5. Indeed, a permittee may complete a Tech Note 23 worksheet but have a lagoon that still "has a maximum specific discharge that's greater than the performance standard in this permit[.]" *Id*. 140:5-9. In that circumstance, the permittee "wouldn't be in compliance with the permit…[w]e just wouldn't have a tool to know whether they're in compliance." *Id*. 154:19-23. As a final blow, Ms. Morris also acknowledged that the Washington State Department of Agriculture ("WSDA") has explicitly cautioned *against* using Tech Note 23 to determine lagoon seepage rates or compliance with the

[11] https://waecy.maps.arcgis.com/apps/MapSeries/index.html?appid=95af1d23b76a45e48abcb891b1791ba2 (last visited May 31, 2024).

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

law. *See id*. 152:11-153:15; Snyder Decl. Ex. 10 at 2 (Letter from WSDA to FOTC concerning Tech Note 23).

Outside of liquid waste storage lagoons, the CAFO GP continues to authorize residual nitrate levels in land application fields that Ecology has determined present a substantial risk of violating groundwater quality standards. Ms. Morris agreed that land application fields are a source of groundwater contamination from CAFOs because "land application is risky[.]" Morris Tr. 41:1-6. Ms. Morris acknowledged that the science Ecology reviewed in issuing the permit indicated that "anything over 30 soil nitrate part per million has a very high risk to groundwater[.]" *Id*. 197:1-4. Despite this science, the CAFO GP authorizes permittees to continue land applying manure to "high risk" fields that test over 30 ppm nitrate *for the entire permit cycle*. CAFO GP, Table 3 (nitrate risk levels indicating high risk is over 30); CAFO GP, Adaptive Matrix Tables 4 and 5 (no prohibition against future manure applications for high risk fields). For those facilities falling in the "very high" risk category of 45+ ppm residual nitrate, land applications that present "a very high risk for groundwater contamination" may continue for another two years. Morris Tr. 198:16-199:7. These are the exact types of unmonitored discharges that the Court of Appeals held violate the law. *Wash. State Dairy Fed'n*, 18 Wn. App. 2d at 298 ("Although the permits prohibit discharges that would violate water quality standards, they allow for operation of production areas that pose a risk of doing precisely that.").

One final area where permittees under the CAFO GP will discharge to groundwater is from solid waste storage areas or composting areas. As explained below, the CAFO GP does not contain an AKART requirement for solid waste storage areas, in contravention of the Court of Appeal's prior order. The court noted last time the permit was overturned that "[c]omposting is an example of one practice that might contribute to groundwater contamination." *Wash. State Dairy Fed'n*, 18 Wn. App. 2d at 303. Nonetheless, Ecology bungled the AKART requirement for solid waste storage areas and composting areas, meaning there is no requirement whatsoever. This, too, will allow discharges to groundwater, yet in the absence of monitoring, Ecology will never know if permittees are, or are not, in compliance with the groundwater quality standard effluent limitation.

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

The Ninth Circuit Court of Appeals addressed these types of subsurface discharges head-on in *Food & Water Watch*. 20 F.4th at 517. There, as is the case here, the permit contained an effluent limitation to not cause or contribute to a violation of Idaho's groundwater quality standards. *Id*. at 509. The Ninth Circuit held that the lack of monitoring violated the CWA and its implementing regulations, remanding the Idaho permit to the EPA. *Id*. at 508. The Court noted that while the permit claimed no discharges were authorized from the Production Area,

> the Permit has no monitoring provisions for underground discharges from production areas. The record before the EPA showed that leaky containment structures— especially lagoons—are sources of groundwater pollution and that "groundwater flow is the primary contributor of nitrate to surface water from agriculture." *See Cow Palace, LLC*, 80 F. Supp. 3d at 1223. Despite this, the Idaho Permit has no monitoring requirement for underground discharges....Without a requirement that CAFOs monitor waste containment structures for underground discharges, there is no way to ensure that production areas comply with the Permit's zero-discharge requirement."

Id. at 517.

The PCHB should reach the same conclusion here, especially given the Washington Court of Appeals already held that groundwater monitoring is necessary to ensure compliance with the Permits' effluent limitations. *Wash. State Dairy Fed'n,* 18 Wn. App. 2d at 303.

2. The CAFO GP lacks adequate surface water monitoring requirements to ensure the permittee will comply with the permit's terms and conditions and to protect water quality (Issue 9)

The CAFO GP prohibits discharges from land application fields. CAFO GP, Cond. S3.D.[12] To ensure compliance with that effluent limitation, the CAFO GP requires permittees to visually inspect their "field discharge management practices" precisely *once a month*. CAFO GP, Cond. S5.A. No other monitoring is required to ensure compliance with the "no discharge" prohibition, even if manure applications occur *every other day that month*.

The Ninth Circuit addressed this type of "no discharge to surface waters" effluent limitation in *Food & Water Watch*. 20 F.4th at 513. There, EPA issued a NPDES permit that contained the same effluent limitations in the CAFO GP: no discharges from Land Application areas unless the discharge is precipitation-caused agricultural stormwater. *Id*. That permit lacked surface water

[12] The only exception is for agricultural stormwater discharges. *Id*.

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

monitoring for land application areas. *Id*. The Court held such a lack of monitoring rendered the effluent limitation meaningless, as it could not be enforced:

> The Permit assumes that because the [Nutrient Management Plan or "NMP"] requires CAFOs to apply manure, litter, and process wastewater at the agronomic rates established by the NMP, irrigation-produced runoff of pollutants will never occur. There is little in the record to support that assumption. Without a requirement to monitor runoff from irrigated CAFO fields, there is no way to ensure that a CAFO is complying with the Permit's dry weather no discharge requirement for land-application areas.

Id. at 518.

The PCHB should similarly hold here because the CAFO GP fails to include the monitoring requirements necessary to ensure compliance with the terms and conditions of the Permits for discharges to surface water. Despite Ecology's characterizations of the State Only Permit and Combined Permit as "no discharge" and essentially a no-discharge-to-surface-water permit, respectively, facilities operating under both Permits are authorized to discharge pollutants that will pollute surface waters. Yet, no monitoring regime is required to detect such discharges. Instead, the proposed permits only require monitoring "[i]f any discharge of pollutants occurs from the production area to surface water, or a prohibited discharge occurs from land application areas to surface water." CAFO GP, Cond. S5.E.1. That is, the Permits contain no monitoring requirements to identify if and when a facility is discharging in the first place (except for one day per month); the requirements for monitoring only kick in *after* a discharge has already occurred, or might be discovered. This failure is particularly egregious given the myriad ways permitted facilities will likely discharge pollutants to nearby waterbodies beyond what is allowed under the Permit. *See Wash. State Dairy Fed'n*, 18 Wn. App. 2d at 300 ("Although the permits largely prohibit such discharges as written, in practice, activities allowed under the permits may lead to unauthorized discharges if permit conditions are not observed. Surface water monitoring is, therefore, necessary to ensure that CAFOs engaged in these practices comply with the permits.").

The CAFO GP's extremely limited visual monitoring requirements are not a reasonable substitute for regular monitoring. First, the visual monitoring requirements fall well short of the requirement that permits include "[r]equired monitoring including type, intervals, and frequency

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

sufficient to yield data which are representative of the monitored activity." *See* 40 C.F.R. § 122.48(b) (emphasis added). Second, there are no monitoring requirements in the permit to promptly detect an unpermitted discharge from any of the production areas at the facility. *See* CAFO GP, Cond. S5, Table 6 (requiring only weekly monitoring of "Storage ponds and waste handling infrastructure"). Under the current permit terms, a release could occur for days or weeks before a visual inspection is required. Similarly, the limited requirements to watch for discharges during various field applications are too limited in time and scope. CAFO GP, Cond. S4.K.2; *id*. Cond. S4.k.5.c. These provisions require visual monitoring of "land application fields for surface and tile drainage discharges when land applying manure, litter, process wastewater, or other organic by-products." *Id*. However, because the Permits do not require the permittee to identify all existing tile drains and likely points of discharge, monitor each of those points for the period during which a discharge may be likely to occur as a result of the activity (given that there may be a lag between the field application and a visible discharge), and implement a protocol for monitoring all others areas where discharges may occur, the permit does not ensure that the permittee will detect all discharges, much less monitor them.

Moreover, the surface water monitoring required by the proposed Permits is insufficient to ensure compliance with the Permits' water quality requirements. In addition to detecting when discharges occur, the permit must require adequate monitoring to understand if the permittee is complying with the effluent limits to reduce or eliminate the discharge of pollutants and the requirements to not cause or contribute to a violation of water quality standards. Again, Ecology must ensure the sampling is truly representative of the discharge. *See* 40 C.F.R. § 122.48(b). To this end, Ecology states in the Fact Sheet that "[d]ischarges that are continuous for several days must be monitored until they stop. When a discharge occurs over multiple days, Ecology expects multiple samples to be collected. At a minimum, there should be one sample per day." Fact Sheet at 75. However, these requirements are not included in the Permit. Furthermore, Ecology fails to require the permittee to sample for total nitrogen, ammonia nitrogen, phosphorus, 5-day biochemical oxygen demand (BOD5), total suspended solids, pH, temperature, pathogens

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

(including fecal coliform), and any pesticides or antibiotics that may be in the discharge, all of which are implicated in the State's water quality standards.

As a result of these shortcomings, the CAFO GP fails to include the necessary and required monitoring provisions for surface waters.

C. The CAFO GP Fails to Ensure the Permittees Will Not Discharge Toxics in Toxic Amounts (Issues 1, 4, 6 & 8)

Ecology has failed to ensure the discharges from the facilities do not violate the state's narrative water quality criteria for toxics. To this end, Ecology's failure to include a whole effluent toxicity (WET) test effluent limitation in the Permit is a patent violation of state and federal law. Washington law mandates "in no uncertain terms prohibit[s] [Ecology] from issuing permits that allow toxic discharges in violation of applicable standards: 'In no event shall the discharge of toxicants be allowed that would, violate any water quality standard, including toxicant standards, sediment criteria, and dilution zone criteria.'" *Puget Soundkeeper All. v. State, Pollution Cntrl. Hearings Bd.*, 189 Wn. App. 127, 138, 356 P.3d 753 (2015) (quoting RCW 90.48.520). To this end, "[t]he compliance test for acute toxicity shall be considered a maximum daily discharge permit limitation." WAC 173–205–070(1)(d). The state's narrative toxic water quality standard states:

> Toxic substances shall not be introduced above natural background levels in waters of the state which have the potential either singularly or cumulatively to adversely affect characteristic water uses, cause acute or chronic toxicity to the most sensitive biota dependent upon those waters, or adversely affect public health, as determined by the department.

WAC 173–201A–240(1). To ensure compliance with this standard, Ecology "shall employ or require chemical testing, acute and chronic toxicity testing, and biological assessments, as appropriate, to evaluate compliance with" the standard. WAC 173–201A–240(2). Specifically, "[a] discharge is in compliance with the narrative water quality standard for acute toxicity when the most recent acute toxicity test has shown no statistically significant difference in response between the acute critical effluent concentration and a control." WAC 173–205–070(1).

Here, Ecology admits that CAFOs may discharge a host of pollutants that may cause or contribute to a violation of the state's narrative toxic water quality standards. Specifically, CAFOs

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

may discharge metals (*e.g.*, zinc, copper), salts (*e.g.*, sodium, chlorides, potassium), organic chemicals, cleaning agents, vaccines, anti-microbials, growth hormones, pesticides, petroleum products, disinfection by-products, and microplastics. Fact Sheet at 8. These pollutants alone and in combination may cause acute or chronic toxicity to the fish and wildlife that use nearby receiving waters or may adversely affect public health if they reach surface waters or groundwater. Thus, a WET test effluent limit is required. Yet, Ecology has failed to impose this mandatory requirement.

D. The CAFO General Permit Does Not Include an AKART Requirement for Solid Waste Storage Areas and Composting Areas, which Ecology Admits (Issues 1, 2, 3, 5 & 6)

In the last permit cycle, Ecology did not incorporate an "AKART" requirement for solid waste storage areas or composting areas, and the Court of Appeals held that this violated the law. *Wash. State Dairy Fed'n*, 18 Wn. App. 2d at 283. Ecology made an admitted error in this permit cycle by establishing a performance threshold for these areas but failing to place a numeric limit on that threshold, rendering the Permits invalid.

When issuing a general waste discharge permit, Ecology must include permit conditions that "apply and insure compliance" with "[t]echnology-based treatment requirements" reflecting "all known, available, and reasonable methods of prevention, treatment, and control," or "AKART," required under the WPCA, the Pollution Disclosure Act of 1971, ch. 90.52 RCW, and the Water Resources Act of 1971, ch. 90.54 RCW. WAC 173-226-070(1). AKART involves the use of "the most current methodology that can be reasonably required for preventing, controlling, or abating the pollutants associated with a discharge." WAC 173-201A-020. The Water Resources Act specifies that for "all wastes and other materials and substances proposed for entry" into waters of the state, AKART must be applied "prior to entry." RCW 90.54.020(3)(b).

AKART may be implemented through the use of effluent limitations or best management practices. WAC 173-226-070(1)(a), (1)(d). The phrase "[e]ffluent limitation" refers broadly to "any restriction established by the department or the administrator on quantities, rates, and concentrations of [discharges] from point sources into waters of the state." WAC 173-226-030(10);

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

see also 33 USC § 1362(11) (defining effluent limitation under the CWA). Best management practices are "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices" that are designed to "prevent or reduce the pollution of the waters of the state." WAC 173-226-030(3).

Here, as last time, the CAFO GP fails to incorporate an AKART standard for solid waste storage areas and composting areas. The CAFO GP requires permittees to locate solid waste storage facilities "on impervious surfaces (such as concrete) or soil pads with low permeability." CAFO GP, Cond. S4.C.2.a. Permittees must complete an assessment of the solids storage and compost piles on soil pads under Condition S7.C.4 to demonstrate compliance with the "low permeability" threshold. "If the assessment identifies deficiencies, the permittee…must develop a compliance plan to address those deficiencies." *Id*.

Unfortunately, Ecology made an "embarrass[ing]" error by failing to ascribe a numeric limit to that "low permeability" threshold. As Permit Writer Ms. Morris admits:

> Q. And here it says, 'The permittee must test for permeability of the soil pad. If the soils do not meet the permeability threshold, deficiencies must be addressed.' What is the permeability threshold?
>
> A. This is something -- an error that I'm embarrassed by. We did not set a numeric permeability threshold in the permit.

Morris Tr. 170:1-7; 15-17 ("this was a place where I was embarrassed that I did not get to establish – I did not establish a numeric limit"). Ms. Morris also agreed that "we do need to establish a numeric threshold" to satisfy the AKART requirement. *Id.* 170:1-4. The CAFO GP cannot stand, as written, without a numeric permeability threshold, which the permit writer herself acknowledges is required by AKART.

Ecology's error here is doubled because the assessment that permittees are required to undertake to establish compliance with the threshold *is completely absent from Ecology's website*. Per the CAFO GP, permittees must assess their soil pads for compliance with the unstated low permeability threshold using the "double-ring infiltrometer test (ASTM D3385-88). The infiltrometer test procedure is available on Ecology's CAFO Permit webpage." CAFO GP, Cond.

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

S7.C.4. Ecology's CAFO Permit webpage, however, has no such infiltrometer test available on it. Snyder Decl. Ex. 11 (PDF of Ecology's CAFO webpage as of May 29, 2024). Alarmingly, the absence of the assessment tool was raised in Ms. Morris' deposition on January 17, 2024, and nearly six months later, Ecology *still* has not addressed the problem.

Were a permittee to search the internet and find a comparable ASTM D3385 assessment procedure, they will find that, like Tech Note 23, the double-ring infiltrometer test explicitly disclaims that "[t]his test method cannot be used directly to determine the hydraulic conductivity for the coefficient of permeability of the soil." Snyder Decl. Ex. 12 (2003 version of ASTM D3385 used in the Chelsea Morris deposition, as the 1988 version is unavailable online). Put differently, Ecology asks permittees to establish compliance with the unstated "low permeability" threshold by using an assessment that, per its own terms, should not be used to determine the permeability of a soil pad.

Permit writer Ms. Morris also undermined the legitimacy of using this ASTM procedure regarding groundwater protection. The assessment calls for precisely *one* test to take place, but the CAFO GP does not limit the size of a "soil pad." This means that, for a 40-acre composting operation, a permittee can choose to take but one double-ring infiltrometer test and use that result to claim compliance for the entirety of the soil pad's permeability. As Ms. Morris testified:

> Q. Are soil pads anywhere in the permits limited in size?
> A. No.
> Q. So I could say my soil pad is 40 acres in size, right, if that's my composting operation?
> A. Yes.
> Q. And I would have to take one infiltrometer test to establish low permeability across all 40 of those acres?
> A. You would be required to have low permeability across all 40 of those acres. And yes, under the permit, technically, you would only be required to take one test.
> Q. As a scientist, do you expect that a soil pad will have homogeneous hydraulic conductivity across all 40 acres?
> A. No.

Morris Tr. 175:5-17. The CAFO GP must include "the most current methodology that can be reasonably required for preventing, controlling, or abating the pollutants associated with a discharge." WAC 173-201A-020. Ecology's permit writer admits the CAFO GP falls short on this

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

charge for composting and solid waste storage areas because a numeric low permeability threshold was not included. As such, the PCHB should remand the CAFO GP.

E. The CAFO General Permit Violates the State's Anti-Degradation Principle for Groundwater (Issues 1, 3, 6 & 7)

Washington law is clear: Ecology must protect groundwater. RCW 90.48.010, 020. Specifically, Washington's "anti-degradation" policy for the State's groundwater states that "[e]xisting and future beneficial uses shall be maintained and protected and degradation of groundwater quality that would interfere with or become injurious to beneficial uses shall not be allowed." WAC 173-200-030(2)(a). Ecology enacted specific groundwater quality standards "to establish maximum contaminant concentrations for the protection of a variety of beneficial uses of Washington's groundwater." *Id*. 173-200-040(1). Here, Ecology continues to allow CAFOs to operate in a manner that will result in discharges in violations of these standards.

Ecology implements the anti-degradation policy and its groundwater quality standards through "enforcement limits." *Id*. 173-200-050(6) ("The enforcement limit for a specific activity may be established through…a state waste discharge permit [or] other department permit."). [13] The enforcement limit is a value for a particular contaminant that will "protect existing groundwater quality and…prevent groundwater pollution." *Id*. 173-200-050(1). In setting "enforcement limits," Ecology accounts for the "antidegradation policy," among others, including "overall protection of human health and the environment," "protection of existing and future beneficial uses," and "[p]ollution of other media such as soils or surface waters." *Id*. 173-200-050(3)(a).

The starting point for any "enforcement limit" for a contaminant, such as nitrate, is the water quality standard criteria in Appendix A of WAC 173-200-040. *Id*. 173-200-050(3)(b). However, "[w]hen the background groundwater quality exceeds a criterion, the enforcement limit at the point of compliance shall not exceed the background groundwater quality for that criterion." *Id*. 173-200-050(3)(b)(ii). Importantly, "[e]nforcement limits based on elevated background

[13] The CAFO Permits authorize discharges to groundwater, and are therefore a "Permit" as the term is used in WAC 173-200-020(19) ("permit" includes "state waste discharge permits issued pursuant to chapter 173-216 WAC").

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

groundwater quality *shall in no way be construed to allow continued pollution of the receiving groundwater*." *Id*. (emphasis added).

Enforcement limits are intended to be met at the "point of compliance," which is "the location where the enforcement limit, set following WAC 173-200-050, *shall be measured and shall not be exceeded*." *Id*. 173-200-060(1) (emphasis added). Ecology must establish the point of compliance for any discharge activity,[14] which "shall be established in the groundwater as near the source as technically, hydrogeologically, and geographically feasible." *Id*. 173-200-060(1)(a).

The regulations protecting the State's groundwater quality "shall be met for all groundwaters to meet the requirements of this chapter at all places and at all times." *Id.* 173- 200-100(1). "The Chapter shall be enforced through all legal, equitable, and other methods available to the department including, but not limited to: Issuance of state waste discharge permits…[and] other departmental permits." *Id*. 173-200-100(3). As such, "[p]ermits issued or reissued by the department *shall be conditioned in such a manner as to authorize only activities that will not cause violations of this chapter*." *Id*. 173-200-100(4) (emphasis added).

Here, the CAFO GP authorizes discharges to groundwater in violation of the State's anti-degradation policy because it allows for the discharge of pollutants from agricultural fields to groundwater. This is the same flaw that the Washington Court of Appeals found in the prior permits, when it held that the "combined permits allow CAFOs to discharge to groundwater in ways that risk violation of Washington's antidegradation policies… [for] example, CAFOs are permitted to land apply nutrients to fields tested as presenting a 'very high' risk to groundwater for up to three consecutive years before the CAFO is required to cease land application to those fields." *Wash. State Dairy Fed'n*, 18 Wn. App. 2d at 297. Because a CAFO could apply manure to land application fields that threaten to cause groundwater contamination and remain in compliance with the prior permits, the Court ruled they violated the anti-degradation policy. *Id*. at 297-298.

Here, Ecology modified the adaptive management matrix slightly, but in a way that remains non-compliant with the Court of Appeal's prior order and state law. As explained above, the

[14] "Activity" is defined as "any site, area, facility, structure, vehicle, installation, or discharge which may produce pollution." WAC 173-200-020(1).

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

science Ecology reviewed in issuing the CAFO GP all found that residual soil nitrate levels in excess of 30 ppm threaten groundwater quality. To be clear, it was not the length of time that the permittee would be allowed to violate the law by continuing to potentially cause or contribute to the violation of water quality standards that the court found problematic, as Ecology appears to suggest. Fact Sheet at 62 ("Ecology shortened the number of consecutive years that require additional action in response to *Wash. State Dairy Fed'n v. Dep't of Ecology* (2021)"). Rather, it is the scheme itself and the fact that the permit "allow[s] for operation[s]" that pose a risk of continuing to violate water quality standards unchecked. *Wash. State Dairy Fed'n,* 18 Wn. App. 2d at 298.[15] By failing to develop a permitting structure that sets specific, enforceable effluent limits that will ensure the application of manure, litter, or process wastewater will protect water quality, Ecology is violating the law and the Court's order "remand[ing] the permits to Ecology for rewriting consistent with this opinion." *Id*. at 315.

F. Ecology Failed to Comply with Federal Law by Requiring the Development of Site-Specific Nutrient Management Plans Subject to Public Scrutiny Prior to Permit Issuance (Issues 1 & 11)

Ecology has again failed to comply with the controlling federal regulations requiring that the public has the opportunity to review and comment on each permittee's site-specific management plan before permit coverage may be issued. The controlling federal CAFO regulations require all permit applicants to submit a Notice of Intent ("NOI") to the permitting authority. 40 C.F.R. §§ 122.23(h). The NOI must, among other things, include a site-specific NMP meeting the requirements of 40 C.F.R. § 122.42(e) and all applicable effluent limitations and standards, including those specified in 40 C.F.R. Part 412. *Id*. §§ 122.21(i)(1)(x), 122.21(i)(5), 122.23(h)(1). The permitting authority must review the NOI to ensure that it includes the required

[15] *Accord Puget Soundkeeper All., et al. v. Ecology*, PCHB Nos. 05-150, 05-151, 06-034 & 06-040 (consolidated) (Findings of Fact, Conclusions of Law and Order) (January 26, 2007) at 3 ("We further find that the adaptive management approach is incomplete because it does not require implementation of triggered responses nor does it address what happens when permittees continue to exceed benchmark levels after completing all three response levels."); *Cf. Puget Soundkeeper All. v. State, Pollution Cntrl. Hearings Bd*., 189 Wn. App. 127, 146–47, 356 P.3d 753, 762 (2015) ("Issuing a permit that allows [the permittee] to fail a WET test without violating the permit would allow the introduction of toxic substances with the potential to cause acute toxicity in contradiction of this standard. WAC 173–201A–240. Thus, the challenged permit condition allows discharges prohibited by law.").

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

information, including the site-specific elements for how a facility will comply with its permit's terms. *Id*. § 122.23(h)(1). If the NOI meets the requirements, Ecology must notify the public of the proposed permit and must "make available for public review and comment…the CAFO's nutrient management plan and the draft terms of the nutrient management plan to be incorporated into the permit." *Id*. Ecology is further required to notify the public of "[t]he process for submitting public comments and hearing requests," and "the hearing process, if a request for a hearing is granted." *Id.* If a permit is granted, "the terms of the nutrient management plan *shall* become incorporated as terms and conditions of the permit for the CAFO." *Id.*

In the last iteration of the CAFO GP, Ecology eschewed these requirements in favor of its MPPP process, whereby Ecology allowed a permittee to obtain a Combined Permit without first submitting, and Ecology approving, the type of site-specific nutrient management practices required by EPA regulation. The Court of Appeal rejected this approach, holding that "[t]he PCHB erred in approving Ecology's permitting scheme because its decision was contrary to the law" because the "federal implementing regulations of the CWA unambiguously provide that site specific information must be included in a nutrient management plan subject to public comment and review." *Wash. State Dairy Fed'n*, 18 Wn. App. 2d at 306.

Ecology's attempt to cure this error falls short of the mark. Although Ecology's new permit does require "[u]npermitted CAFOs seeking coverage under this permit" to submit an NOI and MPPP, which will be subject to public notice and comment before Ecology may issue permit coverage, that requirement does not apply to existing permittees. Thus, any facility covered under the previous iteration of the CAFO GP, wherein permit coverage was granted without public review and comment on MPPPs, is still exempt from this crucial step in the permitting process. Ms. Morris confirmed as much in her deposition. Morris Tr. 114:15-117:8 ("We did not require -- because that requirement was part of the 2017 permit, we did not go back and amend the 2017 permit requirement and did not include in the 2022 permit a request to resubmit and run through a public comment period for manure pollution prevention plan").

Public Justice
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 861-5251

Western Environmental Law Center
119 1st Avenue S, No. 330
Seattle, WA, 98104
(206) 487-7207

This is patently inconsistent with the letter and intent of the federal CAFO regulations. 40 C.F.R. 122.21(i)(1)(X) ("New and existing concentrated animal feeding operations" must submit NMPs as part of their permit applications). Public review and oversight of the site-specific manure management practices contained within an NMP is central to the EPA regulations. *Wash. State Dairy Fed'n*, 18 Wn. App. 2d at 304 (confirming that the Clean Water Act "unequivocally and broadly declares that public participation in the development…of any…effluent limitation…shall be provided for, encouraged, and assisted by…the States" and "[b]ecause a nutrient management plan is a type of effluent limitation, the CWA requires that Ecology ensure that the public has an opportunity to participate in its development.") (internal citations and quotations omitted). A current permittee that obtained coverage under the last permit has been operating for nearly a decade without any public review or oversight of its site-specific management plan. Indeed, there is no requirement in the Permit that Ecology review any of the existing permittees' MPPPs to ensure they are consistent with the changes Ecology made in this iteration of the Permits, despite the Court of Appeals' mandate. Again, this violates the CAFO rule, which requires that site-specific information about how a CAFO will meet the terms of its permit be provided for public comment *before* permit issuance. 40 C.F.R. 122.21(i)(1)(X). Ecology does not have the authority to disregard the requirements of the federal CAFO Rule.

CONCLUSION

For the reasons set forth above, FOTC respectfully requests that the Board grant summary judgment in its favor on Issues 1 - 11.

RESPECTFULLY SUBMITTED this 31st day of May, 2024.

/s/ Andrew M. Hawley
ANDREW M. HAWLEY WSBA No. 53052
Western Environmental Law Center
119 1st Avenue S, Suite 330
Seattle, WA, 98104
206-487-7207
hawley@westernlaw.org

/s/ Daniel C. Snyder
DANIEL C. SNYDER
PUBLIC JUSTICE
1620 L Street NW, Suite 630
Washington, DC 20036
202-861-5251
dsnyder@publicjustice.net

Attorneys for Appellants

CERTIFICATE OF SERVICE

I certify that on May 31, 2024, I caused to be served the foregoing Motion for Summary Judgment in the above-captioned matter upon the following:

Pollution Control Hearings Board PO Box 40903 Olympia WA 98504-0903	[ ] U.S. Mail [ ] Hand Delivered [ ] Email [X] Environmental & Land Use Hearings Office Electronic Filing System
Julian Beattie Adam L. Levitan Office of the Attorney General Ecology Division P.O. Box 40117 Olympia, WA 98504-0117	[ ] U.S. Mail [ ] Hand Delivered [X] Email: Julian.Beattie@atg.wa.gov Adam.Levitan@atg.wa.gov Rio.Oberlies-Rodrigues@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 31st day of May, 2024, in Seattle, Washington.

s/ Andrew Hawley
Andrew Hawley