FILED
Court of Appeals
Division II
State of Washington
8/15/2019 3:37 PM

52952-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE, COMMUNITY ASSOCIATION FOR RESTORATION OF THE ENVIRONMENT, FRIENDS OF TOPPENISH CREEK, SIERRA CLUB, WATERKEEPER ALLIANCE, and CENTER FOR FOOD SAFETY,
and
WASHINGTON STATE DAIRY FEDERATION and WASHINGTON FARM BUREAU

Petitioners,

v.

STATE OF WASHINGTON DEPARTMENT OF ECOLOGY, and STATE OF WASHINGTON POLLUTION CONTROL HEARINGS BOARD,

Respondents.

BRIEF OF PETITIONERS PUGET SOUNDKEEPER ALLIANCE, COMMUNITY ASSOCIATION FOR RESTORATION OF THE ENVIRONMENT, FRIENDS OF TOPPENISH CREEK, SIERRA CLUB, WATERKEEPER ALLIANCE, AND CENTER FOR FOOD SAFETY

ANDREW M. HAWLEY, WSBA # 53052
Western Environmental Law Center
1402 3rd Ave., Suite 1022
Seattle, WA 98101
(206) 487-7250

CHARLES M. TEBBUTT, WSBA # 47255
Law Offices of Charles M. Tebbutt, P.C.
941 Lawrence St.
Eugene, OR 97401
Tel: (541) 344-3505

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 2

III. STATEMENT OF THE CASE..3

A. CAFOs Cause Significant Environmental Harm 3

B. Legal Background: The Clean Water Act and Washington Water Law 8

1. Technology-Based Effluent Limits and All Know Available and Reasonable Treatment Technology 9

2. Water Quality-Based Effluent Limits 10

3. Monitoring and Reporting Requirements 11

4. Regulation of CAFOs 12

C. The Permits 13

IV. STANDARD OF REVIEW 14

V. ARGUMENT 15

A. PCHB misinterpreted and misapplied federal and state law when Establishing Technology Based Effluent Limits 15

1. The Permits Fail to Require AKART for Existing Lagoons 15

2. PCHB failed to require AKART for composting areas, animal pens, and corrals..18

B. Ecology Failed to Establish Effluent Limits Necessary to Ensure Compliance with the State's Water Quality Standards 20

1. Ecology Provides No Explanation of How the Permit Will Ensure Compliance with Water Quality Standards 23

2. The Permits Do Not Ensure Compliance with State's Water Quality Standards for Groundwater 28

C. Ecology Violated State and Federal Law by Failing to Require Adequate Monitoring 35

1. The State Permit's Groundwater Quality Effluent Limitation Is Unenforceable Without Groundwater Monitoring and Violates Washington's Anti-Degradation Principle 36

2. The Permits fail to Require Monitoring to Ensure Compliance with Effluent Limits Regarding Surface Water 38

D. 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 41

E. Ecology Failed to Ensure the Permits Accounted for the Impacts of Climate Change 45

VI. CONCLUSION 50

TABLE OF AUTHORITIES

CASES

Am. Paper Inst., Inc. v. EPA,
996 F.2d 346 (D.C. Cir. 1993) 28

City of Pasco v. Ecology,
PCHB No. 84-339 (Order) (Sept. 23, 1985) 9

*Cmty. Ass'n for Restoration of the Env't (CARE) v.
Cow Palace, LLC*, 80 F. Supp. 3d 1180 (E.D. Wash. 2015) .... *passim*

Cmty. Ass'n for Restoration of the Env't v. DeRuyter Bros. Dairy,
54 F. Supp. 2d 974 (E.D. Wash. 1999) 8

Cmty. Ass'n for Restoration of the Env't v. George & Margaret, LLC,
954 F. Supp. 2d 1151 (E.D. Wash. 2013) 8

Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy,
65 F. Supp. 2d 1129 (E.D. Wash. 2001) 8

*Cmty. Ass'n for Restoration of the Env't v.
Nelson Faria Dairy, Inc.*, No. CV-04-3060-LRS,
2011 WL 6934707 (E.D. Wash. Dec. 30, 2011) 4

Cmty. Ass'n for Restoration of the Env't v. R & M Haak, LLC,
No. 13-CV-3026-TOR, 2013 WL 3188855
(E.D. Wash. June 21, 2013) 8

Cmty. Ass'n for Restoration of the Env't v. Sid Koopman Dairy,
54 F. Supp. 2d 976 (E.D. Wash 1999) 8

Cmty. Ass'n for Restoration of the Env't v. Snipes Mountain Dairy,
No. 1:17-CV-03067, (E.D. Wash. 2017) 8

Cmty. Ass'n for Restoration of the Env't v. State. Dep't of Ecology,
149 Wn. App. 830, 205 P.2d 950 (2009) 5, 6, 7, 15

Cmty. Ass'n for Restoration of the Env't v. Wash. Dairy Holdings,
No. 1:19-CV-03110-TOR, (E.D. Wash. 2019) 8

Crown Cascade, Inc. v. O'Neal,
100 Wn.2d 256, 668 P.2d 585 (1983*)*..18

Davidson Serles & Assoc. v.
Cent. Puget Sound Growth Mgmt. Hr'gs Bd.,
159 Wn. App. 148, 244 P.3d 1003 (2010)..49

Defs. of Wildlife v. Browner,
191 F.3d 21 1159 (9th Cir. 1999) 20

Friends of Columbia Gorge, Inc. v. Wash. St. Forest Prac. Bd.,
129 Wn. App. *45*, 118 P.3d 354 (2005)...18

Jefferson Cty. v. Wash. Dep't of Ecology,
511 U.S. 700, 114 S. Ct. 1900, 128 L. Ed. 2d 716 (1994)............24, 27

Massachusetts v. EPA, 549 U.S. 497,
127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007)..17

Nat. Res. Def. Council (NRDC) v. Cty. of Los Angeles,
725 F.3d 1194 (9th Cir. 2013) .... *passim*

Nat. Res. Def. Council v. EPA,
859 F.2d 156 (D.C. Cir.1988)...11, 22

Nat. Res. Def. Council v. U.S. EPA,
822 F.2d 104, (D.C. Cir. 1988)..10

Riverkeeper, Inc. v. Seggos, RJI No. 01-17- ST8618,
Index No. 902103-17,
(N.Y. Supreme Court, April 24, 2018) 44

Or. Nat. Desert Ass'n v. BLM,
625 F.3d 1092 (9th Cir. 2010) 27

Polygon Corp. v. City of Seattle,
90 Wn.2d 59, P.2d 1309 (1978)..49

Port of Seattle v. Pollution Control Hr'gs Bd.,
151 Wn.2d 568, 90 P.3d 659 (2004)..14, 21

Puget Sound Harvesters Ass'n v. Wash. Dep't of Fish & Wildlife,
157 Wn. App. 830, 205 P.3d 950 (2009)..35

Trs. for Alaska v. EPA,
749 F.2d 549 (9th Cir. 1984) 22

Waterkeeper All., Inc. v. U.S. EPA,
399 F.3d 486 (2d Cir. 2005)..8, 9, 28, 40

STATUTES

33 U.S.C. § 1251...8

33 U.S.C. § 1311...9, 12, 20, 41

33 U.S.C. § 1313..11

33 U.S.C. § 1342...*passim*

33 U.S.C. § 1362...9, 12, 39

33 U.S.C. § 1365...7

33 U.S.C. § 1370 9

42 U.S.C. § 6972...8

RCW 34.05 14

RCW 43.21C.020..49, 50

RCW 43.21C.030..49

RCW 43.21C.040..49

RCW 43.21C.060..49

RCW 43.21M.010...47

RCW 70.235.020 47

RCW 90.48.010 ....28, 50

RCW 90.48.020 28

RCW 90.48.260 ....9, 41

RCW 90.48.520 15

RCW 90.52.040 15

RCW 90.54.020 ....10, 17

RCW 90.58.010 10

FEDERAL REGULATIONS

40 C.F.R. § 122.4 ....21, 41

40 C.F.R. § 122.21 ....42, 44

40 C.F.R. § 122.23 ....12, 13, 41, 42

40 C.F.R. § 122.41 ....25, 40

40 C.F.R. § 122.42 ....13, 41, 43, 44

40 C.F.R. § 122.44 .... *passim*

40 C.F.R. § 122.48 40

40 C.F.R. § 123.25 41

40 C.F.R. § 123.36 41

40 C.F.R. § 131.10 11

40 C.F.R. § 131.12 11

40 C.F.R. § 412.4 ....25, 41

40 C.F.R. § 412.31 13

WASHINGTON ADMINISTRATIVE CODE

WAC 173-200-020..........29, 30

WAC 173-200-030..........10, 29, 36

WAC 173-200-040..........29, 30, 32

WAC 173-200-050..........29, 30, 33

WAC 173-200-060..........30

WAC 173-200-100..........9, 30, 34

WAC 173-201A-020..........10, 15

WAC 173-201A-200..........27

WAC 173-201A-240..........27

WAC 173-201A-260..........24

WAC 173-201A-501..........22

WAC 173-220-030..........12

WAC 173-226-010..........15

WAC 173-226-020..........39

WAC 173-226-070..........15, 20, 21, 24

WAC 173-226-090..........12, 35, 36, 38

WAC 173-226-110..........23

I. INTRODUCTION

Puget Soundkeeper Alliance, Community Association for Restoration of the Environment, Friends of Toppenish Creek, Sierra Club, Waterkeeper Alliance, and Center for Food Safety ("Petitioners") respectfully seek reversal of the Pollution Control Hearings Board's ("PCHB") approval of the "State-only" Concentrated Animal Feeding Operation ("CAFO") Waste Discharge General Permit ("State Permit") and "Combined" National Pollutant Discharge Elimination System General CAFO Permit ("Combined Permit") (collectively, the "Permits").

In issuing the Permits, the Washington Department of Ecology ("Ecology") ignored unambiguous legal requirements and the conclusions of its own scientists about the impacts of CAFOs on the State's invaluable surface water and groundwater resources. The PCHB compounded these errors by rubber-stamping Ecology's unlawful actions, allowing Ecology to issue general permits that authorize discharges without first requiring permittees to apply methods of preventing, controlling, and treating those discharges prior to their entry into State waters. The evidence of the impacts of CAFOs on surface waters and groundwater is overwhelming and uncontroverted. Ecology ignores this evidence to the continuing detriment of those living downstream from these operations, including

tens of thousands of people who rely upon groundwater as their sole source of drinking water.

This Court should reverse and remand the permit to Ecology.

II. ASSIGNMENTS OF ERROR

Petitioners assign error to the Orders of the PCHB as follows:

1. The PCHB misinterpreted and/or misapplied state law in evaluating and determining all known, available, and reasonable methods of prevention, control and treatment ("AKART") applicable to the discharges from CAFOs. The PCHB also issued an Order on this point that was unsupported by substantial evidence and otherwise arbitrary and capricious.

2. The PCHB misinterpreted and/or misapplied state and/or federal law in evaluating whether discharges from CAFOs will comply with each of the applicable water quality standards of Washington. The PCHB's Order is also unsupported by substantial evidence and otherwise arbitrary and capricious.

3. The PCHB misinterpreted and/or misapplied state and/or federal law by approving permits with conditions that fail to require compliance (or even allow for measuring compliance) with applicable requirements of the federal Clean Water Act, the federal implementing regulations, and Ecology's own regulations, including, *inter alia*, adequate surface and groundwater monitoring requirements. The PCHB's Order in this regard is also unsupported by substantial evidence and otherwise arbitrary and capricious.

4. The PCHB misinterpreted and/or misapplied state and/or federal law by approving an NPDES permit that does not require the development of, and opportunity for public review and comment on, a site-specific Nutrient Management Plan, and for otherwise deciding the permits are compliant with all aspects of the federal CAFO Rule. The PCHB's Order in this regard is also unsupported by substantial evidence and otherwise arbitrary and capricious.

5. The PCHB misinterpreted and/or misapplied state and/or federal law by approving the issuance of a permit where Ecology admittedly failed to consider the effects of climate change when developing and issuing such permits. The PCHB's Order in this regard is also arbitrary and capricious.

III. STATEMENT OF THE CASE

A. CAFOs Cause Significant Environmental Harm

Washington is home to approximately 400 dairies, across 28 of the 39 Washington counties, which keep approximately 250,000 cows. CP007147.[1] Adult dairy cows in Washington collectively produce between 16 and 40 million pounds of manure each day. CP007031-32. Each facility commonly stores millions of gallons of liquid waste in earthen cesspits or "lagoons," while solid waste is often stored in piles. CP007033. These lagoons leak, releasing pollutants into the environment. *Cmty. Ass'n for Restoration of the Env't, Inc. (CARE) v. Cow Palace, LLC*, 80 F. Supp. 3d 1180, 1196 (E.D. Wash. 2015) ("[T]he fact that the lagoons leak is not genuinely in dispute.").

Animal waste contains numerous pollutants and pathogens, among them nitrogen, which through the nitrogen cycle transforms into ammonia, nitrite, and nitrate. *See id.* at 1188-90 (explaining nitrogen cycle); *see also* CP004492-98. Nitrates and nitrites in drinking water are hazardous to human health, especially to infants. CP003406. Courts have found that

---

[1] Pursuant to RAP 10.4(f), Petitioners' citations are referencing the Clerk's Papers and are abbreviated "CP" as such.

CAFOs in Washington are contaminating groundwater, waters of the state, with nitrate and other pollutants, causing an "imminent and substantial endangerment to health [and] the environment." *CARE v. Cow Palace, LLC*, 80 F. Supp. 3d at 1228; *see also CARE v. Nelson Faria Dairy, Inc.*, No. CV-04-3060-LRS, 2011 WL 6934707, at *10 (E.D. Wash. Dec. 30, 2011) (manure management caused or contributed to nitrate pollution).

Whatcom County and the Lower Yakima Valley – the two areas of the State with the largest concentrations of dairy CAFOs – have high levels of nitrates in drinking water. In the Lower Yakima Valley, over 20 percent of the private wells exceed the allowable limits for nitrate in drinking water. CP007153. The EPA concluded that discharges from CAFOs are linked to nitrate contamination in the region, estimating that livestock, primarily dairy cattle, account for 65 percent of nitrate contamination in groundwater. *Id*. CARE, as part of its decades-long efforts to protect the people of the Lower Yakima Valley, has established a clean drinking water program that, at the time of the PCHB hearing, has provided over 60 homes with free alternative drinking water systems. CP003202-03; CP000802. Dozens more have been installed since.

As the PCHB noted, Whatcom County "is [also] an area of high-intensity agricultural production" and "Whatcom County has the second highest number of dairy cows in the state." CP003408. "'[T]his area has

had one of the highest percentages of water supply wells in the state failing to meet the drinking water standard for nitrate (29% of wells tested had concentrations greater than 10 mg/L [milligrams per liter] as nitrogen).'" CP003408-09 (citations omitted). In 2010, the Sumas-Blaine aquifer in Whatcom County provided drinking water for 18,000 to 27,000 people. *Id*.

The PCHB also noted that the "[i]ncreased levels of nitrates and phosphorus in surface water bodies can lead to algae and macrophyte growth," the death and decomposition of which "reduces dissolved oxygen in the water body," which in turn "can cause harm or death to aquatic organisms, including fish, and lead to the loss of the water body through eutrophication." CP003406.

In 2004, Ecology issued a draft general combined NPDES permit for CAFOs. *CARE v. State Dep't of Ecology*, 149 Wn. App. 830, 835, 205 P.3d 950 (2009). That permit took effect on July 21, 2006, and expired in 2011. *Id.* at 836. Of the more than 400 CAFOs in the state, only 10 obtained the 2006 permit. CP003896. After a four-year delay, Ecology released a "preliminary draft" of a new permit on August 11, 2015. After accepting comments on the preliminary draft permit, including extensive, detailed comments submitted by Petitioners, CP006331-89. Ecology issued two separate draft CAFO Permits on June 15, 2016: one combined

permit and one state waste discharge permit. The NPDES and State Waste Discharge General Permit ("Combined Permit") apply to CAFOs with both surface water and groundwater discharges. The State Waste Discharge General Permit ("State Permit"), in turn, is for CAFOs that discharge to groundwater only.

On January 18, 2017, following a public comment period, Ecology issued final versions of the two separate CAFO discharge permits. On February 3, 2017, Ecology announced the reissuance of the CAFO permits effective on March 3, 2017, expiring on March 22, 2022. As of the PCHB hearing that ended in June 2018, only 23 CAFOs had either of the permits. CP003897.

On February 17, 2017, Petitioners appealed those decisions to the PCHB, alleging, *inter alia*, that the challenged permits are unlawful because they illegally authorize discharges to surface and groundwaters in the state of Washington, and fail to ensure that such discharges will not cause or contribute to violations of water quality standards and fail to protect public health.

CARE also challenged the terms of the 2006 NPDES Permit in *CARE v. State, Dep't of Ecology* and raised two primary issues: (1) Ecology was required to include groundwater monitoring as part of the permit; and (2) the permit violated the federal Clean Water Act's

requirement for public participation. 149 Wn. App. At 839. This Court ruled that groundwater monitoring was not required based on deference to the expertise of Ecology's permit-writers, namely that soil monitoring would provide an appropriate tool for ensuring that groundwater was protected. *Id*. at 846. In addition, the Court held that the Clean Water Act did not prohibit Ecology from redacting "operational or other information tangential to the enforcement of the permit from nutrient management plans." *Id.* at 852. As discussed below, Ecology has not only repeated, but exacerbated, the previous errors. The current science does not support Ecology's failure to require groundwater monitoring and the Permits at issue here further reduce the public's ability to participate in the permitting process and access the information necessary to assess CAFOs' environmental impacts.

Ecology knew it was "kick[ing] the can down the road" when it failed to protect the people and environment in the 2006 permit. CP006879. Eleven years later it seeks to kick the can into oblivion.

Because of Ecology's abject failure to implement its mandatory statutory duties, Washington citizens have for decades been forced to turn to the courts to protect themselves from CAFO pollution using the citizen suit provisions of the Federal Water Pollution Control Act (the Clean Water Act), 33 U.S.C. §1365, which provides causes of action for surface

water discharges, and the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B), which protects against discharges that "may present an imminent and substantial endangerment to health or the environment." More than a dozen such cases, some cited above, have been brought successfully in federal courts in the Eastern District. *See also, e.g.*, *CARE v. Sid Koopman Dairy*, 54 F. Supp. 2d 976 (E.D. Wash. 1999); *CARE v. Henry Bosma Dairy*, 65 F.Supp. 2d 1129 (E.D. Wash. 2001), *aff'd* 305 F.3d 943 (9th Cir. 2002); *CARE v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974 (E.D. Wash. 1999); *CARE v. George & Margaret, LLC,* 954 F.Supp.2d 1151 (E.D. Wash. 2013); *CARE v. R & M Haak, LLC*, No. 13-CV-3026-TOR, 2013 WL 3188855 (E.D. Wash. June 2013); *CARE v. Snipes Mountain Dairy,* No. 1:17-CV-03067 (E.D. Wash. 2017); *CARE v. Washington Dairy Holdings*, No. 1:19-CV-03110, (E.D. Wash. 2019).

B. Legal Background: The Clean Water Act and Washington Water Law

The Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq*., "is a cornerstone of the federal effort to protect the environment." *Waterkeeper All., Inc. v. U.S. EPA*, 399 F.3d 486, 490 (2d Cir. 2005). Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," with the goal of eliminating discharges by 1985. 33 U.S.C. § 1251(a). The CWA prohibits the "discharge of any

pollutant" from a point source — "any discernible, confined and discrete conveyance" — to navigable waters "except in compliance with law." 33 U.S.C. §§ 1311, 1362.

Ecology implements both the CWA's requirements in Washington and Washington's analogue to the CWA, the Water Pollution Control Act, RCW 90.48.260(1). Water pollution control regulations issued by Ecology must be at least as strict as those required by the U.S. EPA under the CWA. 33 U.S.C. § 1370. However, Washington may impose more stringent pollution control measures. *See, e.g.*, *City of Pasco v. Ecology*, PCHB No. 84-339 (Order) (Sept. 23, 1985). Ecology has separate state legal requirements to protect all waters of the State, including groundwater. WAC 173-200-100 *et seq*.

1. Technology-Based Effluent Limits and All Known Available and Reasonable Treatment Technology

Compliance with the CWA's general pollutant discharge prohibition is primarily achieved by obtaining a National Pollutant Discharge Elimination System ("NPDES") permit. 33 U.S.C. §§ 1311(a), 1342. Every NPDES permit must establish "effluent limitations" for the pollutants be ing discharged. *Waterkeeper All.*, 399 F.3d at 491. Technology-based effluent limitations ("TBELs") are based on "a series of increasingly stringent technology-based standards," depending on the type

of pollutant being discharged. *Nat. Res. Def. Council (NRDC) v. U.S. EPA*, 822 F.2d 104, 123-24 (D.C. Cir. 1987). These standards are designed to be "technology-forcing" to obtain the CWA's goal of eliminating discharges. *See id.* at 123.

Washington law similarly requires the application of all "known, available, and reasonable methods of preventing, controlling and treating" pollutants before they are discharged into the State's surface or ground waters. This bedrock requirement, known as "AKART," is found in multiple statutes and regulations. *See generally* RCW 90.58.010. AKART "shall" be applied to wastes "prior to entry," regardless of pre-existing water quality. RCW 90.54.020(3)(b). Similarly, the State's groundwater anti-degradation policy requires that "all contaminants proposed for entry into said groundwaters shall be provided" with AKART prior to entry. WAC 173-200-030(2)(c)(ii). AKART represents current methodologies that can be reasonably required for "preventing, controlling, or abating" discharged pollutants. WAC 173-201A-020.

2. Water Quality-Based Effluent Limits

The CWA also requires states to establish water quality standards intended to restore and maintain the chemical, physical, and biological health of the state's waters. These water quality standards are comprised of: (1) one or more "designated uses" (i.e., public water supply,

agriculture, recreation) for each water body or water body segment in the state; (2) water quality "criteria" expressed in numerical concentration levels for short ("acute") or longer ("chronic," "human health") exposure times and/or narrative statements specifying the amounts of various pollutants that may be present in the water without impairing designated uses; and (3) an antidegradation provision. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.10, 12.

If the TBELs in an NPDES permit are insufficient to meet established water quality standards, permits must also contain water quality-based effluent limitations ("WQBELs") to ensure compliance with those standards. *See* 33 U.S.C. §§ 1311(b)(1)(C), 1342(a)(2). Such WQBELs are necessary when Ecology determines that any point source discharge "causes, has the reasonable potential to cause, or contributes to" an exceedance of the narrative or numeric criteria for various pollutants. 40 C.F.R. § 122.44(d)(1)(ii); *see also Nat. Res. Def. Council (NRDC) v. EPA*, 859 F.2d 156, 208 (D.C. Cir. 1988).

3. Monitoring and Reporting Requirements

To evaluate compliance with effluent limitations, NPDES permits must contain conditions requiring both monitoring and reporting of monitoring results. 33 U.S.C. § 1342(a)(2); 40 C.F.R. § 122.44(i)(1), (2). EPA's regulations specify that permits shall include conditions requiring

monitoring "[t]o assure compliance with permit limitations." 40 C.F.R. § 122.44(i)(1). More specifically, a permit must include "requirements to monitor . . . each pollutant limited in the permit" to ascertain whether the pollutants in any discharge stay within the limitations the permit prescribes. *Id*. § 122.44(i)(1)(i). Monitoring is central to compliance with effluent limitations and permit enforcement. *NRDC v. Cty. of Los Angeles*, 725 F.3d 1194, 1208 (9th Cir. 2013). Ecology's regulations are similar: "[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).

4. Regulation of CAFOs

EPA and Ecology explicitly classify CAFOs as point sources subject to the NPDES permit requirement. 33 U.S.C. § 1362(14); WAC 173-220-030(18). CAFOs are therefore prohibited from discharging pollutants without a valid NPDES permit. *See* 33 U.S.C. §§ 1311(a), 1342(a); 40 C.F.R. § 122.23(a). The NPDES permit regulations for CAFOs sets the specific minimum standards for these operations, which must be followed by the delegated state authority (in this case, Ecology). *See id.* § 122.23. In addition, effluent limits must be established in NPDES permits to prevent discharges resulting from the application of manure,

litter, or process wastewater to land by CAFOs. *Id*. This requirement is met through the implementation of a Nutrient Management Plan ("NMP") that establishes the site-specific plan for, *inter alia*, the use of manure as fertilizer. *Id*. § 122.42(e)(1). NMPs must contain site-specific requirements to be compliant with EPA regulations, 40 C.F.R. § 122.42(e)(1), and must also be subject to public scrutiny before approval by the regulatory agency and after amendment. 40 C.F.R. § 122.23(h)(1). The only discharges allowed to surface waters from CAFO production areas are when a facility has an NPDES permit and is designed, constructed, operated, and maintained to contain a 25-year/24-hour storm event. 40 C.F.R. § 412.31(a)(1)(i).

C. The Permits

In 2016, Ecology published its Manure and Groundwater Literature Review, which is the scientific basis for the Permits. That review found that "[t]here are documented impacts to groundwater quality in Washington State from CAFO manure management practices" and "[g]roundwater monitoring is identified *as the only way to measure impacts to groundwater quality*." CP007142 (emphasis added). As to the efficacy of soil monitoring to protect groundwater quality (the method selected in the Permits), Ecology concluded that soil sampling "cannot provide information on what has already moved through the soils to

groundwater, what has moved below the sampling depth, or how much organic nitrogen will be converted to nitrate throughout the year and leach to groundwater . . . [it] cannot provide assurance that groundwater quality has been protected." CP007230.

The terms and effluent limitations of the Permits ignore this admitted science. Despite acknowledging that CAFOs cause surface and groundwater contamination, the Permits allow discharges from existing manure storage lagoons and other structures without ever applying AKART. The Permits authorize discharges to surface water and groundwater, but never require a permittee to determine the quality of those waters prior to discharge, or to monitor its discharges to determine the scope of the authorized pollution. Indeed, the levels of residual soil nitrate authorized by the Permits are *nowhere* supported by the science. Finally, the Permits are unlawful under the prevailing EPA CAFO regulations, and Ecology admittedly failed to consider climate change in creating the terms of the Permits.

IV. STANDARD OF REVIEW

The appeal of this decision is controlled by the Washington Administrative Procedure Act (APA), RCW 34.05. Review of the facts is confined to the record before the PCHB. *Port of Seattle v. Pollution Control Hr'gs Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004). To prevail

under the APA's standard of review, Petitioners will show that the PCHB's order is contrary to the law, unsupported by substantial evidence, or otherwise arbitrary and capricious. *CARE v. State Dep't of Ecology*, 149 Wn. App. at 840-4.

V. ARGUMENT

A. PCHB misinterpreted and misapplied federal and state law when Establishing Technology Based Effluent Limits.

The Water Pollution Control Act mandates that permits issued by Ecology incorporate conditions applying AKART. RCW 90.48.520; *see also* RCW 90.52.040. This includes the statewide general permits at issue in this appeal. WAC 173-226-010; *see also* WAC 173-226-070(1). Ecology defines AKART as "the most current methodology that can be reasonably required for preventing, controlling, or abating the pollutants associated with a discharge." WAC 173-201A-020.

Here, the PCHB incorrectly held that the Combined Permit satisfies the AKART requirement for (1) manure storage lagoons; (2) land application fields; (3) composting; and (4) animal pens and corrals.

1. The Permits Fail to Require AKART for Existing Lagoons.

Ecology admits that manure storage lagoons leak, and that such pollution degrades groundwater quality. CP004145; *see also* CP006299

("the preponderance of literature that was reviewed indicates that manure storage lagoons leak").

In light of these admissions, Ecology was required to undertake a detailed AKART analysis to determine which type of treatment or control technology was feasible for existing manure storage lagoons. Instead, Ecology ignored state law, did not include an AKART requirement for existing lagoons, and incorporated an "information gathering" provision into the Permits. That information-gathering provision is contained in Permit Condition S7.B, and is known as "Tech Note 23." *See* CP006946.

At the hearing, Ecology's chief scientific witness, Melanie Redding, admitted that AKART was not applied to existing CAFO manure storage lagoons. CP004300 ("Ms. Brown: . . . I think you said sometime in the last day that there isn't AKART for existing lagoons. Did you say that? Ms. Redding: Yes, I did say that."); *see also* CP004206 ("For existing lagoons, we have not stated what AKART is.").

The PCHB found that "[b]ecause of the lack of information regarding existing lagoons," the Permits need not provide a specific AKART requirement. CP004206. Instead, the PCHB allowed Ecology to merely gather "information on the range of impacts from existing lagoons and assist Ecology in future permit development." *Id*.

The PCHB's conclusion amounts to clear legal error. State law requires the application of AKART to wastes "prior to entry" into waters of the State (which includes groundwater). RCW 90.54.020(3)(B). Permit Condition S7.B and its reliance on Tech Note 23 do not amount to AKART, as Ecology admits, and the supposed lack of information is not a valid reason for failing to include the required limits. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 534, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007) (agencies cannot avoid statutory obligations by noting uncertainty and concluding that it would be better not to regulate). That Permit condition does not require permittees to apply any known form or method of "preventing, controlling and treating" manure pollutants prior to their discharge to groundwater. Instead, it is meant to "gather information" about existing sources of water pollution so that Ecology can determine *what methods are currently used* at the regulated operations. Ecology has been aware that lagoons leak for over two decades. CP007567; *see also* CP007156. Ecology failed to address this problem in the 2006 permit, CP001519; *see also* CP001784-87, and despite vast amounts of new, corroborating evidence since that time, continues to shirk its duties to protect groundwater from known pollution.

That Ecology and the PCHB admit the Permits do not contain AKART for existing lagoons should end this Court's inquiry, for state law

unambiguously requires that such measures "shall be" applied to pollution prior to its entry into State waters. *See Crown Cascade, Inc. v. O'Neal*, 100 Wn.2d 256, 261, 668 P.2d 585 (1983) (*citing Kanekoa v. Dep't of Social & Health Servs.*, 95 Wn.2d 445, 448, 626 P.2d 6 (1981)): *see also Friends of Columbia Gorge v. Wash. St. Forest Prac. Bd.*, 129 Wn. App. 35, 55-56, 118 P.3d 354 (2005) (absent any ambiguity, a court does not defer to agency interpretation of a statute).

There is no dispute that double-synthetic liners with leak detection systems are known and available. CP003408; CP007054 (lagoons that have two layer synthetic liners with a leak detection and capture system between the layers as well as steel and concrete above ground storage structures, synthetic liner over clay (GCL) and concrete lined lagoons); CP004575 ("currently at Cow Palace we're doing double-lined lagoons with leak detection"). Ecology was fully aware of all of this technology during the permit comment rounds. CP000716.

2. PCHB failed to require AKART for composting areas, animal pens, and corrals.

At the hearing, Ecology claimed that AKART for composting operations amounted to Permit Conditions S4.A, S4.B, S4.C, and S4.D. CP003875. Those conditions are merely general requirements that permittees prevent discharges from their entire CAFO production area to

surface waters or onto public roadways. CP006922-23. None of these general requirements amount to a method of preventing, controlling, or treating manure pollutants that seep into the soil where they will migrate to groundwater. *See* CP005989; CP005990 ("These results demonstrated that the composting areas were a source of nitrate contamination of the aquifer."). Ecology's Jon Jennings testified that there were comment letters in the record highlighting the impacts from composting operations on groundwater (including records from the Washington State Department of Agriculture). He also testified that Ecology did not consider those comments in failing to apply AKART for composting operations. CP003890-94. Ms. Redding specifically testified during the hearing that she did not even consider composting operations when conducting her manure and groundwater literature review, despite knowing they are a potential source of pollution. CP004107; CP004138-39. Nonetheless, there are no permit terms dealing with infiltration of composting area pollutants to groundwater. CP004409. Uncontroverted evidence in the record shows that composting operations contribute to groundwater pollution. CP005989-90; CP006166-71. Chief Judge Thomas Rice found that compost operations caused or contributed to groundwater contamination. *CARE v. Cow Palace, LLC*, 80 F. Supp. 3d at 1224-26.

The same is true for animal pens and corrals. Ecology claimed that Conditions S4.A, S4.D, and S4.E amounted to AKART, which the PCHB accepted without discussion. CP003440-41. None of these terms present a method of preventing, controlling, or treating manure pollution in the pens and corrals, which Ecology acknowledges is a source of groundwater contamination. *See* CP004108. Indeed, the only Washington-specific data Ecology had in its possession showed below-surface contamination from pens and corrals. CP004136-37; *see also CARE v. Cow Palace,* 80 F. Supp. 3d at 1198-99.

For each of these sources of contamination, the PCHB failed to require Ecology to include permit terms that meet AKART and technology-based effluent limitations.

B. Ecology Failed to Establish Effluent Limits and Monitoring Requirements Necessary to Ensure Compliance with the State's Water Quality Standards

NPDES permits must include effluent limitations to ensure compliance with water quality standards in the receiving water. *Defs. of Wildlife v. Browner*, 191 F.3d 1159, 1163 (9th Cir. 1999); 33 U.S.C. § 1311 (b)(l)(C) (a permittee "shall . . . achieve . . . any more stringent limitation, including those necessary to meet water quality standards . . . ."); 40 C.F.R. § 122.44 (d); WAC 173-226-070(2)(b). 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); 122.44(d)(1)(vii)(A) (WQBELs must be "derived from" and comply with all applicable water quality standards). Thus, "[n]o permit may be issued: . . . [w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States." 40 C.F.R. § 122.4(d); *Port of Seattle*, 151 Wn.2d at 603. Ecology's rules mandate that every general NPDES permit must "[e]nsure compliance" with water quality-based effluent limits. WAC 173-226-070(2)(b).

Under Ecology's regulations, "[WQBELS] shall be incorporated into a general permit if such limitations are necessary to" meet water quality standards. WAC 173-226-070(2)(a). When necessary, such limits "must control all pollutants or pollutant parameters which the department determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion of state ground or surface water quality standards." WAC 173-226-070(2)(b). Such water quality-based effluent limits are the most concrete means of realizing the

goals of the CWA because "[e]ffluent limitations are a means of *achieving* water quality standards." *Trs. for Alaska v. EPA*, 749 F.2d 549, 557 (9th Cir. 1984); WAC 173-201A-510(1). Put differently, water quality based permit limits begin "with the premise that a certain level of water quality will be maintained," and "places upon the permittee the responsibility for realizing that goal." *NRDC v. EPA*, 859 F.2d at 208.

Here, Ecology determined that the discharges authorized under the Combined Permit have the potential to cause or contribute to a violation of water quality standards for surface and groundwater. CP006842; CP003941. And while Ecology will argue that the Combined Permit has a "no discharge to surface waters" effluent limitation (and therefore no potential to cause a water quality violation), in practice the Permit authorizes discharges to surface waters in multiple ways all in violation of the federal minimum requirements discussed *supra*. Ecology failed to include effluent limits to ensure compliance in receiving waters. Neither the record on which the permit was based, nor the evidence submitted at the hearing support the conclusion that the Combined Permit contains any effluent limits, which must include monitoring, designed to ensure compliance with water quality standards.

Ecology both failed to demonstrate how its water-quality based effluent limits will protect surface waters and admits that it does not know

whether the Permit's water quality based effluent limits will ensure compliance with the state's water quality standards for groundwater. Finally, Ecology's generic, narrative water quality based effluent limits are not sufficient to ensure the permit will protect water quality.

1. Ecology Provides No Explanation of How the Permit Will Ensure Compliance with Water Quality Standards

The record is devoid of any analysis of what effluent limitation, above and beyond those used to ensure each facility is meeting the minimum technology-based requirements, are necessary to protect water quality. Simply put, Ecology failed to gather the requisite information and to conduct a reasonable analysis of what effluent limits would be necessary to ensure compliance with water quality standards. Indeed, Ecology's Fact Sheet, which is required to provide "[a]n explanation of how the [permit] conditions meet the water quality standards," WAC 173-226-110(j)(ii), includes no such explanation. When pressed to explain how it conducted its reasonable potential analysis, which again was not included in the Fact Sheet, Ecology offered no more explanation than to say that it was "qualitative." CP006854. When asked to explain which effluent limits were included in the Permit to ensure compliance with water quality standards, Ecology responded generally that "[e]ffluent limitations are contained in permit special conditions S1, S3, S4, and S5."

CP006856-57. Special Conditions S1, S3, S4, and S5 are essentially the entire permit. At the hearing, Ecology refined its answer suggesting that Conditions S3, S4.J, and S4.K of the Permits are the water quality-based limits. CP003873-74. At no point, however, did Ecology provide any explanation of how these provisions would ensure compliance with any specific standard.

Nowhere is this failure more apparent than with the Permit's prohibition against discharges in violation of the state's narrative criteria. Those criteria state:

> (a) Toxic, radioactive, or deleterious material concentrations must be below those which have the potential, either singularly or cumulatively, to adversely affect characteristic water uses, cause acute or chronic conditions to the most sensitive biota dependent upon those waters, or adversely affect public health [.]
>
> (b) Aesthetic values must not be impaired by the presence of materials or their effects, excluding those of natural origin, which offend the senses of sight, smell, touch, or taste [.]

WAC 173-201A-260(2). Such narrative criteria must be enforced through specific effluent limits in the permit at issue. *Cf. Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 714-15, 114 S. Ct. 1900, 128 L. Ed. 2d 716 (1994); 40 C.F.R. § 122.44(d)(1), (d)(1)(i); WAC 173-226-070(2).

The need for such specific effluent limitations is clear when considering the multiple areas where discharges from CAFOs can occur under this supposed "no-discharge" permit scheme. CP003935 (Ecology's

permit writer acknowledging that surface water discharges from CAFOs result in water quality problems). For instance, Ecology acknowledges that applications to fields containing tile drains may result in direct discharges to surface water. CP003816-17 (tile drains are a series of underground pipes intended to lower the water table, "they will discharge into surface waters or some other drainage ditch that's a conduit to a surface water."); CP003941 (acknowledging tile drains "could be a source of discharge"); CP006494. Despite recognizing that tile drains are a part of many CAFOs that will cause direct discharges to surface waters, no effluent limitation is imposed and no monitoring is required. *See* CP003963-65 (Jennings admits tile drain discharges would be a Permit violation, but no monitoring is required and Ecology wouldn't know whether such discharges are violating surface water quality standards); CP006212-13; CP004426-28; *see also* 40 C.F.R. § 412.4(b)(1) (tile drain is a conduit to surface water); 40 C.F.R. § 122.41(j)(1), 122.48(b) (permits must include monitoring requirements for these types of discharges).

Similarly, the Permit's "emergency winter application" provision allows permittees to apply manure to application fields regardless of nutrient need during the winter months, primarily to avoid lagoon over-topping. CP006932. Such applications are very

likely to result in surface water discharges but have no means to know the amount of the discharge. CP006208-09; *see also* CP004428-33 (expert testimony of Dr. Keeney).

Moreover, as Mr. Jennings testified, shellfish beds in Washington have been regularly closed due to fecal coliform, which has been attributed to animal manure. CP003998; *see also* CP007160 (Ecology has noted that "[t]he risk of fecal coliform bacteria runoff to surface waters increases when manure application occurs during high precipitation periods."). Ecology has concluded that "in the Lower Yakima Valley surface water is impacted by nutrient loading to the land surface." CP007153.

Despite these known discharge areas and well-established impacts from manure pollutants, Ecology failed to include specific effluent limits and monitoring requirements to ensure compliance with these critical standards.[2] This abdication of duty effectively leaves the permittee to its own devices to determine what is, or is not, a violation of the numeric water quality criteria, the designated uses,[3] and narrative criteria. This

---

[2] As discussed below, Ecology will find no safe harbor in its generic provision requiring compliance with water quality standards. There, Ecology's supposed narrative effluent limit applies only to those "pollutant(s) for which the waterbody is listed as impaired." As a result, it categorically fails to ensure compliance with the state's narrative criteria (which are not addressed as specific pollutants in the way numeric criteria are).

[3] For example, Washington's water quality standards include the designated use of "aquatic life" for which "[i]t is required that *all indigenous fish and non-fish aquatic*

leaves a significant gap in protections. Not only do narrative criteria and designated uses serve as a "complementary requirement that . . . enables the States to ensure that each activity — even if not foreseen by the [numeric] criteria — will be consistent with the specific uses and attributes of a particular body of water," *Jefferson Cty.*, 511 U.S. at 717, but Washington's narrative toxics criterion prohibits toxic substances "either singularly *or cumulatively* to adversely affect characteristic water uses[.]" WAC 173-201A-240(1) (emphasis added).

Despite this lack of meaningful analysis, the PCHB summarily concluded that "in this instance, it will defer to Ecology's expertise in administering water quality laws and its technical judgments in NPDES permit development." The PCHB, however, cannot be allowed to "defer to a void." *Or. Nat. Desert Ass'n v. BLM*, 625 F.3d 1092, 1121 (9th Cir. 2010).

The Combined Permit's narrative WQBEL cannot ensure compliance with water quality standards because it is too vague to be interpreted or practically applied by permittees. The narrative WQBEL states only, "Discharges conditionally authorized by this permit must not cause or contribute to a violation of water quality standards." CP006922-

---

species be protected . . . in addition to the key species [e.g., salmonids and shellfish]." WAC 173-201A-200(1) (emphasis added).

23. Ecology has included this provision as a “backstop, if you will,” CP003874. However, given the lack of monitoring that is required under the permit, the precise contents of the discharge and the water quality of the receiving water body, information essential to determining whether a discharge has caused or contributed to violations of water quality standards, will be unknown.

While courts have acknowledged that deriving effluent limitations from narrative criteria is “difficult,” permit writers cannot just “[throw] their hands up, and contrary to the Act, simply ignore[] water quality standards including narrative criteria altogether when deciding upon permit limitations.” *Am. Paper Inst. v. EPA*, 996 F.2d 345, 350 (D.C. Cir. 1993). The CWA “demands regulation in fact, not only in principle.” *Waterkeeper All.*, 399 F.3d at 498. The permit’s narrative WQBEL is not a regulation in fact; it is Ecology’s abdication of its responsibility to ensure compliance with water quality standards.

2. The Permits Do Not Ensure Compliance with State’s Water Quality Standards for Groundwater

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). There is no exception for CAFOs to pollute. Ecology enacted specific groundwater quality standards "to establish maximum contaminant concentrations for the protection of a variety of beneficial uses of Washington's groundwater." WAC 173-200-040(1). To that end, "[d]rinking water is the beneficial use generally requiring the highest quality of groundwater. . . . Providing protection to the level of drinking water standards will protect a great variety of existing and future beneficial uses." WAC 173-200-040(1)(a)-(b).

Ecology implements the anti-degradation policy and its groundwater quality standards through "enforcement limits." WAC 173-200-050(6) ("The enforcement limit for a specific activity may be established through . . . a state waste discharge permit, other department permit,[4] or administrative order."). The enforcement limit is a value assigned to a particular contaminant that will "protect existing groundwater quality and . . . prevent groundwater pollution." WAC 173-200-050(1). In setting "enforcement limits," Ecology accounts for the "antidegradation policy" and eight other matters, including "overall

[4] 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 . . . .").

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." WAC 173-200-050(3)(a).

The starting point for any "enforcement limit" for a contaminant, such as nitrate,[5] is the water quality standard criteria found in Appendix A of WAC 173-200-040. WAC 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." WAC 173-200-050(3)(b)(ii). Importantly, "[e]nforcement limits based on elevated background 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 in accordance with WAC 173-200-050, *shall be measured and shall not be exceeded*." WAC 173-200-060(1) (emphasis added). Ecology is required to establish the point of compliance for any discharge activity,[6] which

---

[5] Nitrate is the primary pollutant of concern for groundwater that originates from CAFOs. . . It has a groundwater quality standard of 10 mg/L. . . . WAC 173-200-040 (Table 1).
[6] "Activity" is defined as "any site, area, facility, structure, vehicle, installation, or discharge which may produce pollution." WAC 173-200-020(1).

"shall be established in the groundwater as near the source as technically, hydrogeologically, and geographically feasible." WAC 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." WAC 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[.]" WAC 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*." WAC 173-200-100(4) (emphasis added).

Petitioners presented uncontroverted evidence that the Permits authorize discharges to groundwater in violation of the State's anti-degradation policy because, without groundwater monitoring, Ecology cannot determine (1) the present quality of the groundwater, and (2) whether a permittee's authorized discharges exceed the groundwater quality standard for the pollutant at issue. The PCHB denied summary judgment to Petitioners on the grounds that material questions of fact remained in dispute. CP002599.

At the hearing, Ecology vaguely asserted that compliance with the Permits' general terms somehow guarantees that groundwater quality is

not impacted *anywhere in the State of Washington*. *See, e.g.*, CP004017-18. Ecology maintained this position despite testimony from its witnesses that (1) manure storage lagoons compliant with the Permits could be impacting groundwater, CP003929-31; and (2) permittees would be compliant with the Permit despite having "VERY HIGH" (45+ ppm) soil nitrate levels in their application fields – levels that Ecology admits threaten groundwater quality, CP003902-03 (compliant even if fields are in "VERY HIGH" category for four years of permit term); CP001562 (soil nitrate levels greater than 35 ppm threaten groundwater quality); *see also* CP007171 (Table 7; nowhere identifying 45 ppm nitrate as protective of groundwater quality).

The PCHB held, in totality, without citation to any evidence or the testimony on this issue, that "[t]he Board concludes that the evidence presented at hearing [sic] demonstrated that the Permits as a whole are protective of groundwater." CP003438. This Court should reverse for two reasons.

First, Ecology's assumption that permit compliance automatically equates to compliance with the State's groundwater quality standards is false on its face and incompatible with protections afforded to groundwater under State law, amounting to a misapplication of law. The strict anti-degradation policy adopted by Washington mandates that

Ecology issue state discharge permits that *protect* groundwater quality for its highest beneficial use, most commonly as a source of drinking water. WAC 173-200-040(1)(a). It also requires that permits have enforcement limits based on either the groundwater quality standards or, if the groundwater has already exceeded those standards, the present "background" quality of the water underneath a permittee's facility. WAC 173-200-050(3)(b)(ii). The Permits contain neither provision, and do not even require a permittee to determine existing "background" groundwater quality at their CAFO, let alone sample or monitor any discharges to groundwater.

Given Ecology's scientific admissions in the Manure Literature Review and at the Hearing, the agency cannot dodge the requirements for anti-degradation by *assuming* compliance with the Permits will mean no groundwater *anywhere* in the State will be impacted by discharges. This type of cognitive dissonance amounts to an arbitrary and capricious decision, illogically adopted by the PCHB, particularly when evidence in the record overwhelmingly links CAFO pollution to groundwater contamination. Indeed, on cross-examination, one of Ecology's witnesses admitted "it's possible" that discharges are "occurring from a facility . . . that Ecology wouldn't be aware of because it's not conducting direct groundwater monitoring[.]" *See* CP003922-23; *see also* CP004500-01

(Erickson stating "We know this is going to impact groundwater. We don't know how much it's going to impact groundwater, and the only way to tell is to actually monitor the groundwater"). It is just this scenario that state law is intended to prevent from happening.

Second, as discussed above, Ecology's witnesses testified to specific examples where a permittee would be in technical "compliance" with the Permits, but still threaten groundwater quality with authorized discharges from lagoons, application fields, compost areas and animal pens. Such testimony undermines any deference Ecology should receive on this matter, for it illustrates that Ecology's assumption is not just unsupported by substantial evidence, but it is an entirely absurd conclusion. It also contradicts the findings of a federal judge based on actual scientific inquiry. *CARE v. Cow Palace*, 80 F. Supp. 3d at 1224-26.

Thus, while Ecology contends compliance with the Permits will equate to compliance with the groundwater quality standards, the evidence in the record demonstrates *just the opposite*: a permittee "complying" with the Permits is very likely discharging unmonitored pollution into groundwater of unknown quality in violation of the anti-degradation policy. CP006293-94. This is inconsistent with Ecology's own regulations, which require that discharge permits "be conditioned in such a manner as to authorize only activities that will not cause violations" of the

groundwater quality standards. WAC 173-200-100(4). When an agency makes rules without regard to the attending facts or circumstances and without considering their effect on agency goals, as Ecology has here, it acts arbitrarily and capriciously. *Puget Sound Harvesters Ass'n v. Wash. Dep't of Fish & Wildlife*, 157 Wn. App. 935, 950, 239 P.3d 1140 (2010).

C. Ecology Violated State and Federal Law by Failing to Require Adequate Monitoring

The Clean Water Act "*requires* every NPDES permittee to 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." *Cty. of Los Angeles*, 725 F.3d at 1707 (emphasis in original). This universal requirement derives from Section 402 of the CWA, which requires that all NPDES permits contain conditions to "assure compliance" with NPDES permit effluent limitations, water quality standards, and other requirements of the Act. 33 U.S.C. § 1342; *see also* 40 C.F.R. § 122.44(i). To these ends, Ecology has stated:

> Monitoring is truly the cornerstone of the NPDES program. It is the primary means of ensuring that the permit limitations are met. It is also the basis for enforcement actions against permittees who are in violation of their permit limits.

CP001026.

Ecology's regulations require reasonable monitoring requirements whenever a general permit authorizes the discharge of pollutants to waters

of the State. WAC 173-226-090(1). In particular, Ecology's regulations state 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).

Despite this, Ecology has failed to include the necessary and appropriate monitoring requirements to ensure that permittees will comply with the Permits' effluent limits.

1. The Permit's Groundwater Quality Effluent Limitation Is Unenforceable Without Groundwater Monitoring and Violates Washington's Anti-Degradation Principle.

As discussed above, 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's witnesses' testimony at the hearing was unanimous: without groundwater monitoring, Ecology will not know whether a discharge from any part of a permittee's facility will be in compliance with the groundwater quality standards. CP003919-20 ("To actually know what's in the groundwater, yes, you would need groundwater monitoring."); CP004207 (Redding admits that only way to

know whether lagoons are impacting groundwater is to do groundwater monitoring); CP004207 (only way to know "for sure" whether field applications are impacting groundwater quality is through groundwater monitoring); CP004212 (without monitoring Ecology will not be able to ascertain what impacts are occurring to groundwater from that discharge). Evidence of discharges from all of the above sources was provided in the comments to Ecology, CP006734-76, and in Mr. Erickson's testimony. CP005987-91. The PCHB completely ignored all of this testimony.

Furthermore, the testimony was uncontested that the only way to determine whether an exceedance of the groundwater quality standards has occurred at a specific facility requires groundwater monitoring. CP003919-20; CP004207; CP004212. Nevertheless, Ecology issued Permits that directly authorize unmonitored discharges of *unknown quantities* of manure pollution to groundwater *of unknown quality*. CP004017-18 (Ecology assumption that compliance with the Permits will be "protective" of groundwater quality). That authorization is unlawful absent groundwater monitoring, for Ecology will never be able to establish whether a permittee is in violation of the groundwater quality standards.

The substantial evidence in the record confirms that CAFOs are impacting groundwater. CP006528-732; CP7129-64. Effluent limitations, including the narrative effluent limitation in the Combined Permits that

discharges not cause or contribute to a violation of the groundwater quality standards, must be enforceable to be lawful. *Cty. of Los Angeles*, 725 F.3d at 1207. Without groundwater monitoring, that effluent limitation is unenforceable against permittees, and the PCHB's approval should be reversed.

2. The Permits fail to Require Monitoring to Ensure Compliance with Effluent Limits Regarding Surface Water

Ecology has also failed to include the monitoring requirements necessary to ensure compliance with the terms and conditions of the Permits aimed at protecting surface water. Specifically, 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 will discharge pollutants that will affect surface waters. Ecology fails to account for the actual discharges from the permitted facilities.

In the Combined Permit, Ecology purports to have established a requirement that no discharge may violate the state's water quality standard. CP006922-23. Although reliance on this vague permit condition is not sufficient to meet Ecology's duty to ensure compliance with water quality standards, if Ecology intends to rely on this provision it must include corresponding monitoring requirements to enforce the provisions.

40 C.F.R. § 122.44(i)(1); WAC 173-226-090(1). On this score, the Combined Permit fails.

Ecology contends that the Combined Permit is essentially a no-discharge permit. As such, the principal "effluent limit" to protect water quality is the prohibition against the discharge of pollutants to surface waters unless the discharge is conditionally authorized. CP006922-23.[7] Ecology acknowledges, however, that the Permit contains no measures to ensure compliance with this limitation or to detect noncompliance. CP003964. That is, the Permit contains no monitoring requirements to identify if, and when, a facility is discharging even when it is conditionally authorized to do so.

This failure is particularly egregious given the myriad ways that permitted facilities will likely discharge pollutants to nearby waterbodies. For example, the use of tile drains,[8] which is not prohibited under the Permit, will likely result in the discharge of pollutants to surface waters. CP003963-65 (Jennings admits tile drain discharges would be a violation

---

[7] *See* 33 U.S.C. § 1362(11) (Effluent limits include "any restriction on the quantity, rate, and concentration of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters."); WAC 173-226-020(10) (effluent limits are "[a]ny restriction established by a permitting authority on quantities, rates, and concentrations of chemical, physical, biological pollutants discharged to waters of the state.").

[8] Tile drains are underground plastic pipes that are placed by agricultural operation owners to enable fields to drain more quickly. . . *See* CP003816.

of the Permit, but that no monitoring is required and that Ecology wouldn't know whether such discharges are violating surface water quality standards); s*ee also* CP006022-23 ("if tile drains are present in a field, they provide a direct conduit for manure to be discharged to surface waters."). The same is true for the emergency winter applications and the Permit's field discharge management practices, which can cause the discharge of pollutants to adjacent waterbodies. CP003941 ("we wouldn't necessarily know where the land application may take place or where a potential discharge from that application field might take place. So it creates a difficulty in figuring out where monitoring would actually occur to get good data."); s*ee* CP006021-22 (Erickson discussing the need for monitoring of discharges related to winter manure applications). To be lawful, the Permit should have included monitoring that accounts for these discharges. 40 C.F.R. §§ 122.41(j)(1), 122.48(b).

"An NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance." *Cty. of Los Angeles*, 725 F.3d at 1207. As issued, the Combined Permit provides no way for Ecology, the permittees, or the public to know how much is being discharged and whether the discharges from the permitted facilities comply with the established effluent limits. In this way, the Permits replicate the fatal flaw found in *Waterkeeper All.*, where the failure of the permit to include any

mechanism for evaluating compliance with BMPs, there was no way for the agency to ensure compliance with water quality standards. 399 F.3d at 499. Ecology's inclusion of an unenforceable limit with no mechanism to review its implementation fails to ensure that discharges under the Permit do not violate water quality standards. *See* 33 U.S.C. §§ 1311(b)(1)(C), 1342(a)(2); 40 C.F.R. §§ 122.4(d), 122.44(d)(1).

D. 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

The controlling federal regulations require that permitted CAFOs develop, and comply with, a site-specific Nutrient Management Plan ("NMP"). 40 C.F.R. § 412.4(c)(1) ("The CAFO must develop and implement a nutrient management plan . . ."); 40 C.F.R. §§ 122.23(h), 122.42(e).[9] Ecology's Combined Permit does not require CAFOs to submit a site-specific NMP (or other document) that meets the specific requirements of the federal regulations *and* is subject to public review and comment prior to permit issuance and upon amendment.

The controlling federal CAFO regulations require all permit applicants to submit a Notice of Intent ("NOI") to the permitting authority.

[9] The federal CAFO Rule is applicable to Ecology's NPDES General Permit and, thus, the Permit must, at a minimum, conform to these and other NPDES permitting requirements. RCW 90.48.260(1)(a); 40 C.F.R. §§ 123.25, 123.36.

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. 40 C.F.R. §§ 122.21(i)(1)(x), 122.21(i)(5), 122.23(h)(1). The permitting authority is required to review the NOI to ensure that it includes the required information, which includes the site-specific elements for how a facility will comply with its permit's terms. 40 C.F.R. § 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.*

With the Combined Permit, Ecology established a wholly new system under the moniker "Manure Pollution Prevention Plan," or "MPPP," that fails to follow this mandatory regulatory structure. First, whereas federal regulations mandate that an NMP be submitted and approved prior to permit issuance, here Ecology allows 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, including "field-specific rates of application," "field-specific land application rates for nitrogen and phosphorus," and "site-specific conservation practices." *Compare* CP006938-41(requiring "a description on how the Permittee is meeting each of the performance objectives" of the Permit, as well as site-specific drawings, maps, and facility information) *with* 40 C.F.R. § 122.42(e)(1), (e)(5) (requiring nutrient management plans to include similar site-specific information, including "fields available for land application; field-specific rates of application properly developed…to ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater; and any timing limitations identified in the nutrient management plan concerning land application on the fields available for land application.). Instead, the site-specific information is submitted with the MPPP *up to six months after* a permit to discharge pollutants is issued.

While Ecology will argue that the EPA CAFO regulation is "incorporated" into the Permit, the permit writer himself admitted at the hearing that the type of *site-specific information* about a permittee's operations would not be submitted to Ecology until *after* a CAFO Permit is issued. CP003979. This stands in direct contrast with the EPA

regulations, which unambiguously require that site-specific information be contained *within* an NMP and must be submitted and approved *before* an authorization to discharge is granted.

Second, public review and oversight of the site-specific manure management practices contained within an NMP is a central part of the EPA regulations. *Riverkeeper, Inc. v. Seggos*, RJI No. 01-17-ST8618, Index No. 902103-17, at pp. 19-21 (N.Y. Supreme Court, April 24, 2018) (finding New York State's general NPDES permitting process, which similarly did not allow for public oversight of NMP-like documents prior to permit issuance, was unlawful). In this case, the MPPP is required to be submitted to Ecology within six months *after* Ecology has already issued a permit. CP006938-41. The public has absolutely no oversight or comment ability on an MPPP prior to permit issuance. CP003979 (It is "correct" that an MPPP is "not available for public comment prior to issuing permit coverage"); *see also* CP003982 (the "site-specific" and "field-specific" requirements for "how the facility is meeting permit requirements is not available for public comment."). Again, this violates the CAFO rule, which clearly 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).[10]

Ecology does not have the authority to disregard the requirements of the federal CAFO Rule, and the Court should reverse the PCHB's decision as contrary to established law.

E. Ecology Failed to Ensure the Permit Accounted for the Impacts of Climate Change

Below, Ecology claimed that it need not consider climate change in writing the Permits, CP001190, while simultaneously arguing that the Permits *do* address climate change because "[p]rotection of water quality through permitting may provide a buffer against the impacts of climate change." CP000308. The PCHB accepted Ecology's position, without any citation to evidence in the record, concluding that "the purpose of the Permits is protection of water quality and that protection . . . may provide a buffer against the impacts of climate change." CP002602. The Board further stated that there is no specific statutory requirement contained within RCW 90.48 to address climate change, ignoring other applicable statutory directives and the agency's own guidance.

---

[10] Similarly, the MPPP process violates the federal CAFO rule as it concerns "substantial" changes to an operation that require an update to an NMP. While the regulations require such "substantial" changes to trigger another round of public comment and review, 40 C.F.R. § 122.42(e)(6), there is no comparative mechanism in Ecology's CAFO NPDES Permit.

This Court should reverse because the PCHB committed clear legal error by ignoring multiple overlapping statutory requirements mandating that Ecology consider and address climate change in its permitting decisions and admitting that it failed to do so. Ecology directly acknowledged that it did not consider climate change in drafting the Permits. Nowhere in the Permit Fact Sheet are the words "climate change." CP007022-128. When asked in discovery to produce all records it reviewed related to climate change and/or soil carbon sequestration in developing the Permits, Ecology stated that it had no such responsive documents. CP000854. When questioned in deposition about whether Ecology had any discussion concerning climate change when drafting the Permits, permit writer Bill Moore's testimony was clear and succinct: "No." CP000859-60. Ecology ignored this issue even though Petitioners provided substantial information regarding CAFO's contribution to climate change and how "climate change is likely to greatly compound the challenge of sustainably managing state groundwater resources."[11] CP000807-09.

Ecology has emphatically admitted that the climate is changing due to greenhouse gas emissions, causing harm to the waters of the state.

[11] The Board did not allow PSA to present any evidence concerning climate change at the Hearing. CP004594.

See, e.g., CP000613 ("Climate change is not a far off risk. Globally, it is happening now and is worse than previously predicted, and it is forecasted to get worse . . . ."). Due to this existential threat, Ecology has been tasked by the legislature to address climate change. In 2008, years before these Permits were issued, the legislature ordered that the State "shall limit" its greenhouse gas emissions to 1990 levels by 2020. RCW 70.235.020(1)(a)(i). To accomplish that goal, Ecology was chosen to serve as "a central clearinghouse for relevant scientific and technical information about the impacts of climate change[.]" RCW 43.21M.010(2). In that role, Ecology developed an integrated climate change response strategy "to better enable state and local agencies . . . to prepare for, address, and adapt to the impacts of climate change." RCW 43.21M.010(1).

In the strategy, Ecology stated with respect to water management that "[p]reparing for and adapting to the impacts of climate change will require new management approaches that take into account how future conditions are likely to change." CP000596. Thus, Ecology committed to:

> Integrate climate change adaptation into ongoing efforts that address management of stormwater, wastewater, *water quality*, water reuse, and *potable water demand* – to ensure that planning decisions and investments made now are not increasing future vulnerability and causing unintended consequences. *Require consideration of the impacts of extreme weather events in*

> *planning, siting, and designing of water, wastewater, and stormwater infrastructure and related facilities.*

CP000599 (emphases added). Furthermore, Ecology has recognized that climate change will negatively impact groundwater quality, especially for nitrate pollution, the principal pollutant of concern from CAFOs in the State. For instance, Ecology determined that increased storm intensity consequent of climate change would likely increase the amount of nitrate entering the water table in the Columbia Basin and the Yakima Valley. CP000699. Ecology made a similar finding for the Sumas-Blaine aquifer, concluding that nitrate leaching losses to groundwater are likely to increase due to climate change. CP000700. Instead of taking this information into account in the permit development process, Ecology ignored it.

While RCW 90.48 does not explicitly direct the state to consider climate change in the permit development process, the State Environmental Planning Act (SEPA) does. SEPA provides, in pertinent part:

> The legislature authorizes and directs that, to the fullest extent possible: (1) The policies, regulations, and laws of the state of Washington shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all branches of government of this state, including state agencies, municipal and public corporations, and counties shall: (a) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in

> planning and in decision making which may have an impact on the environment . . . .(h) Initiate and utilize ecological information in the planning and development of natural resource-oriented projects.

RCW 43.21C.030; *see also* RCW 43.21C.040 (expressing legislative intent that agency statutory authority must be "in conformity with the intent, purposes, and the procedures set forth in this chapter."); RCW 43.21C.060 ("The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of all branches of government of this state, including state agencies . . . .").

Indeed, in the SEPA context, the Legislature unambiguously stated that "it is the continuing responsibility of the state of Washington and *all agencies of the state* to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate plans, functions, programs, and resources to the end that the state and its citizens may: (a) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations . . . ." RCW 43.21C.020(2)(a) (emphasis added). Such Legislative commands are not to be ignored by the Courts or the PCHB. "SEPA has been said to 'overlay' the requirements which existed prior to its adoption," including the state statutes Ecology is implementing to develop the Permits at issue herein. *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 65, 578 P.2d 1309 (1978);

Davidson Serles & Assoc. v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd., 159 Wn. App. 148, 160, 244 P.3d 1003 (2010) ("SEPA overlays and supplements" other state laws and "[t]hus, the Boards are constrained by SEPA's policies.").

The PCHB ignored these statutory requirements in reaching its decision. This failure demonstrates that the PCHB's Order on Summary Judgment is contrary to law and otherwise arbitrary and capricious. Ecology has the legal mandate and purported expertise to incorporate climate change planning in its permitting decisions, yet it failed to do so here. *See* RCW 90.48.010; RCW 43.21C.020(2)(a). This Court should reverse the PCHB's Decision on summary judgment that Ecology was not required to consider climate change in writing the Permits.

VI. CONCLUSION

For the forgoing reasons, Petitioners respectfully request that this Court set aside the Permits and remand this matter to the Department of Ecology for further proceedings consistent with the law.

Respectfully submitted this 15th day of August, 2019:

/s/ Charles Tebbutt
Charles M. Tebbutt
WSBA # 47255

CERTIFICATE OF SERVICE

I certify that on August 15, 2019, I caused to be served the Petitioners' Brief in the above-captioned matter upon the parties herein using the Appellate Court Portal filing system, which will send electronic notification of such filing to the following:

Phyllis J. Barney Assistant Attorney General Ecology Division P.O. Box 40117 Olympia, WA 98504-0117	[ ] U.S. Mail [ ] Hand Delivered [x] Email: phyllisb@atg.wa.gov; ECYOlyEF@atg.wa.gov
Lisa M. Petersen Assistant Attorney General Licensing & Administrative Law Division 800 5th Ave Suite 2000 Seattle WA 98104	[ ] U.S. Mail [ ] Hand Delivered [x] Email: lisap1@atg.wa.gov; lalseaef@atg.wa.gov
Virginia R. Nicholson Schwabe Williamson & Wyatt PC 1420 5th Ave., Suite 3400 Seattle WA 98101	[ ] U.S. Mail [ ] Hand Delivered [x] Email: vnicholson@schwabe.com; tlaing@schwabe.com
Elizabeth E. Howard Schwabe Williamson & Wyatt Pc 1211 SW Fifth Avenue, Suite 1900 Portland, OR 97201	[ ] U.S. Mail [ ] Hand Delivered [x] Email: ehoward@schwabe.com

the foregoing being the last known addresses.

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

DATED this 15th day of August 2019.

/s/ Charles Tebbutt
Charles M. Tebbutt

LAW OFFICES OF CHARLES M. TEBBUTT, P.C.

August 15, 2019 - 3:37 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	52952-1
Appellate Court Case Title:	WA State Dairy Federation et al, Petitioner v WA State Pollution Control Hearings, Respondents
Superior Court Case Number:	18-2-05933-7

The following documents have been uploaded:

- 529521_Briefs_20190815153338D2204983_1965.pdf
  This File Contains:
  Briefs - Petitioners
  The Original File Name was 2019.8.15 CAFO brief_final.pdf

A copy of the uploaded files will be sent to:

- AppellateAssistants@schwabe.com
- ECYOlyEF@atg.wa.gov
- Lisa.Petersen@atg.wa.gov
- andrea@ourchildrenstrust.org
- andrearodgers42@gmail.com
- cfolawn@schwabe.com
- ehoward@schwabe.com
- hawley@westernlaw.org
- lalseaef@atg.wa.gov
- parker@tebbuttlaw.com
- phyllisb@atg.wa.gov
- vnicholson@schwabe.com

Comments:

Sender Name: Charles Tebbutt - Email: Charlie@tebbuttlaw.com
Address:
941 LAWRENCE ST
EUGENE, OR, 97401-2815
Phone: 541-344-3505

Note: The Filing Id is 20190815153338D2204983