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Dan Wood, Director of Government Affairs  
Washington State Dairy Federation  
P.O. Box 1768  
Elma, WA 98541

**Re: Yakima Regional Air Agency Rulemaking for Manure Spreading or Spraying by Dairy Farms During Burn Ban Conditions**

Dear Dan:

Pursuant to your request, we are providing this legal opinion to the Washington State Dairy Federation regarding the Yakima Regional Clean Air Agency's rulemaking process to consider a prohibition against spreading or spraying of manure from confined animal feeding operations during any burn ban. Our conclusion is that State law precludes the proposed rule. Therefore, the Yakima Regional Clean Air Agency should terminate further consideration of any such rule.

### **Background**

The Yakima Regional Clean Air Agency (YRCAA) is a special purpose local agency with limited powers as set forth in the Washington Clean Air Act, chapter 70.94 RCW (the Act or Clean Air Act). The Act authorizes the establishment of county based "air pollution control agency" with specified powers. RCW 70.94.053 (agency created); 70.94.141 (Powers and Duties of Activated Authority). The statute specifically states that YRCAA has the authority to: "Adopt, amend and repeal its own rules and regulations, *implementing this chapter and consistent with it . . .*" RCW 70.94.141(1) (emphasis added). Thus, the Board's powers are strictly limited to adopting rules that are consistent with the Act, and shall not adopt any rules that go beyond the limited authority granted to YRCAA by the Act.

The Act further contains numerous requirements including, for example, provisions for classification of air contaminant sources (RCW 70.94.151), a permit system (RCW 70.94.161), and enforcement powers (RCW 70.94.211). It must be noted that the YRCAA recently finalized an important multi-year initiative in adopting the Air Quality Management Policy and Best Management Practices for Dairy Operations (effective July 1, 2013). Those Dairy Operation BMPs were adopted after a careful, three-year effort including a Pilot Research Project and dozens of workgroup meetings since 2010.

The YRCAA received a Petition to Ban Manure Spraying under Wind Conditions and a letter from attorney George Fearing expanding that petition to include banning manure spreading and



spraying under burn ban conditions. The petition is directed at the odors emitted by the application of the manure. Unfortunately, the Fearing legal analysis is deficient for many reasons, but in particular because the analysis never even mentions the exemption for agricultural activities written into the Clean Air Act. It is simply disingenuous to discuss this issue without considering the broad agricultural exemption afforded by the Legislature.

### **The Proposed Rule is Precluded by the Agricultural Exemption**

In 1981, the Legislature passed a series of measures designed to regulate *and protect* the agricultural industry, specifically including the dairy industry. The Legislature clearly stated that *protection of the agricultural industry* was the overall policy that applies in implementing the various measures. The Legislature's precise words were as follows:

The legislature finds that agricultural land is essential to providing citizens with food and fiber and to insuring aesthetic values through the preservation of open spaces in our state. The legislature further finds that government regulations can cause agricultural land to be converted to nonagricultural uses. The legislature intends that agricultural activity consistent with good practices be protected from government over-regulation.

Laws 1981, ch. 297, § 29. In the very next Section of that 1981 law, the Legislature established an important exemption in the Clean Air Act for odors caused by agricultural activity. Laws 1981, ch. 297, § 30 (codified at RCW 70.94.640). Then, in 2005, the Legislature reaffirmed the importance of this Clean Air Act exemption by expanding the exemption to fugitive dust caused by agricultural activities. The current law states as follows:

Odors or fugitive dust caused by agricultural activity consistent with good agricultural practices on agricultural land are exempt from the requirements of this chapter [the Clean Air Act] unless they have a substantial adverse effect on public health. In determining whether agricultural activity is consistent with good agricultural practices, the department of ecology or board of any authority shall consult with a recognized third-party expert in the activity prior to issuing any notice of violation.

RCW 70.94.640(1). The statute goes on to define agricultural activities to specifically include dairy farms within the reach of the exception: "'Agricultural activity' means the growing, raising, or production of horticultural or viticultural crops, berries, poultry, livestock, shellfish, grain, mint, hay, *and dairy products*." RCW 70.94.640(5)(a) (emphasis added). "Good agricultural practices" is defined to mean, "economically feasible practices which are customary among or appropriate to farms and ranches of a similar nature in the local area." RCW 70.94.640(5)(b).



The agricultural exemption prohibits the proposed rule because the proposed rule relates to odors and fugitive dust emissions from agricultural activities. The agricultural exemption applies to all customary economically feasible practices—these typical agricultural activities are *entirely exempt* from the Act. Spreading and spraying of manure is a customary and necessary agricultural practice for dairy farming that is also economically feasible. Therefore, the statute clearly exempts spreading and spraying of manure from the provisions of the Act including the rulemaking authority.

The statute goes on to provide a narrow exception from the broad exemption where the agricultural activity is determined to cause a substantial adverse effect on public health. The exception requires a notice of violation based on a demonstration of substantial adverse effect on public health or based on the conclusion of a third-party expert that the activity does not qualify as a good agricultural practice. This means that enforcement under the exception requires a notice of violation because these findings are location and practice specific, and that rulemaking cannot be utilized as a substitute for this procedure.

#### **There is No Substantial Adverse Effect on Public Health**

As explained above, there is no basis to adopt a rule regulating odors because a location and practice specific notice of violation is required to pierce the agricultural exemption. Regardless, it is beyond dispute that manure odors do not cause substantial adverse effects on public health.

As a preliminary matter, the Legislature has declared that agricultural activities *are presumed* to not adversely affect the public health. RCW 7.48.305(2). You provided to us the scientific literature review by Dr. Nichole M. Embertson of the Whatcom Conservation District. Her report is entitled, *Review: Summary of Existing Science Regarding Public Health Effects from the Spraying of Manure, With an Emphasis on Effects in Eastern Washington and the Yakima Basin*. Dr. Embertson reviewed the applicable and relevant scientific information, including data about impacts to people living near animal feeding operations. Dr. Embertson explains that these studies specifically conclude that there is: “no direct, replicable connection between farm exposure and health effects.” Embertson at page 5. Dr. Embertson’s report provides the most current, accurate, and valid assessment of this issue, and is far more credible than the vague references to harm cited by the petitioners.

In addition, the State Pollution Control Hearings Board (PCHB) is the state agency empowered to hear appeals of violations of the Clean Air Act. The PCHB has specifically considered the agricultural exemption based on complaints that manure odors were offensive and unreasonably interfered with the enjoyment of life and property—the same complaints made here. The PCHB determined that, despite those complaints, manure odors do not have a substantial adverse effect on public health. *Kummer v. Spokane County Air Pollution Control Authority* at Findings of Fact XIII (PCHB No. 84-249 et al., Oct. 10, 1985). Also, the Court of Appeals directly relied upon the agricultural exemption in rejecting a claim that odors from chicken manure caused a significant adverse environmental impact as well as air pollution under Clean Air Act. *Davis v.*



*Thurston County*, 95 Wn. App. 1058 (1999). Though an unpublished case and based on a different animal, the decision demonstrates the superseding effect of the agricultural exemption.

The Fearing letter cites to a number of cases, but none of the cases address these important issues related to the agricultural exemption. The Fearing analysis states broadly that cow manure is a regulated air pollutant citing a case in Idaho that has nothing to do with Washington's agricultural exemption. Similarly, the analysis states that air pollution is prohibited if it unreasonably interferes with the enjoyment of life or property citing *ASARCO, Inc. v. Puget Sound Air Pollution Control Agency*, 51 Wn. App. 49, 55 (1988). But, that case involved smoke plumes from a copper smelter, not dairy farms, other agriculture, or the agricultural exemption. In arguing that strict liability may be imposed, the analysis cites to special local regulations imposing strict liability for removal of asbestos without a permit. *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 409 (1996). In sum, the Fearing legal analysis fails to recognize the agricultural exemption plainly found in the Clean Air Act, and otherwise cites to case law that is irrelevant to the issues pertinent to the proposed rule.

Thus, the YRCAA has been presented with overwhelming evidence and authority that manure does not cause substantial adverse effects on public health. The presumption of no harm, the Dr. Embertson report, and other authorities all demonstrate that no adverse effect exists. On that basis, the YRCAA cannot pursue rulemaking because dairy operations are exempt according to RCW 70.94.640.

### Conclusion

The agricultural exemption at RCW 70.94.640 must be given effect, and the effect is to preclude rulemaking for these typical dairy operations. In addition, there is no basis to claim substantial adverse effect on public health, so the rulemaking is also flawed for that reason. The proposed rulemaking effort is precluded by the agricultural exemption in the Clean Air Act, and so the YRCAA should terminate the rulemaking.

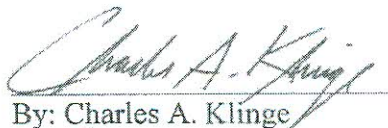
We understand that this legal opinion may be provided to the YRCAA, and we specifically approve of said submission. Thank you this opportunity to provide this legal opinion, and please contact us if you need any further advice in this regard.

Sincerely,

GROEN STEPHENS & KLINGE LLP

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By: Charles A. Klinge