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POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE, a
Washington nonprofit corporation;
COMMUNITY ASSOCIATION FOR
RESTORATION OF THE ENVIRONMENT
(CARE), a Washington nonprofit corporation;
FRIENDS OF TOPPENISH CREEK, a
Washington nonprofit corporation; SIERRA
CLUB, a California nonprofit corporation;
WATERKEEPER ALLIANCE, a New York
nonprofit corporation,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF
ECOLOGY,

Respondents.

NO.

NOTICE OF APPEAL

1. Identity of Appealing Parties and Representatives.

The appealing parties are:

Puget Soundkeeper Alliance
139 Nickerson Street, Suite 107
Seattle, WA 98109

1 Community Association for Restoration of the Environment (CARE)
2241 Hudson Road
2 Outlook, WA 98938

3 Friends of Toppenish Creek
3142 Signal Peak Road
4 White Swan, WA 98952

5 Sierra Club
180 Nickerson Street, Suite 202
6 Seattle, WA 98109

7 Waterkeeper Alliance
180 Maiden Lane
8 Suite 603
New York, NY 10038

9
10 Center for Food Safety
917 SW Oak Street, Suite 300
Portland, Oregon 97205

11
12 RE Sources for Sustainable Communities
2309 Meridian Street
Bellingham, WA 98225

13 The representatives of the appealing parties are:

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1 2. Identity of other party.

2 The respondent in this appeal is the Washington State Department of Ecology
3 (“Ecology”).

4 3. Decisions under appeal.

5 This is an appeal of Ecology’s Concentrated Animal Feeding Operation (CAFO) “State
6 Waste Discharge General Permit” and CAFO “National Pollutant Discharge Elimination System
7 and State Waste Discharge General Permit,” both issued January 18, 2017. Copies of both
8 permits are attached as Exhibits A and B, respectively, to this Notice of Appeal.

9 4. Statement of Facts.

10 The United States Environmental Protection Agency (“EPA”) has delegated to Ecology
11 authority over federal and state water pollution control under the Federal Water Pollution
12 Control Act, otherwise known as the “Clean Water Act.” 33 U.S.C. § 1342(b); 40 C.F.R. §
13 122.23(c); RCW 90.48.260. This delegation includes the duty to administer the National
14 Pollution Discharge Elimination System (“NPDES”) permit program regulating point sources of
15 pollution into waters of the United States. RCW 90.48.260(1). Congressional intent for the
16 NPDES permit requirements was “that the discharge of pollutants into the navigable waters be
17 *eliminated* by 1985” in order to achieve the national goal of fishable and swimmable waters. 33
18 U.S.C. § 1251 (emphasis added). Similarly, under Washington law, the discharge of pollutants
19 into waters of the state without a permit from Ecology authorizing the discharge is strictly
20 prohibited. RCW 90.48.080; RCW 90.48.160.

21 The EPA and Ecology explicitly classify CAFOs as point sources subject to the NPDES
22 permit requirement. 33 U.S.C. § 1362(14); WAC 173-220-030(18). The extensive water
23 pollution caused by CAFOs is undeniable and well-documented in the state of Washington. *See,*

1 e.g., *CARE, et al. v. Cow Palace*, 80 F. Supp.3d 1180 (E.D. Wash. 2015); *CARE v. Nelson Faria*
2 *Dairy*, 2011 WL 6934707 (E.D. Wash. Dec. 30, 2011); *CARE v. Henry Bosma Dairy*, 65 F.
3 Supp. 2d 1129 (E.D. Wash. 1999), *aff'd* 305 F.3 943 (9th Cir. 2002); *CARE v. Sid Koopmans*
4 *Dairy*, 54 F. Supp. 2d 976, 981-82 (E.D. Wash. 1999). Specifically, CAFOs are known to
5 discharge manure¹ and manure-related constituents, such as nitrates, phosphorous, bacteria, and
6 pharmaceuticals, as well as other pollutants into surface and groundwater resources.

7 In 2004, Ecology issued a draft general combined NPDES permit for CAFOs. *CARE v.*
8 *Ecology*, 149 Wn. App. 830, 835, 205, P.3d 950 (2009). That permit was finalized and took
9 effect on July 21, 2006 and expired in 2011. *Id.* at 836. After a four year delay, Ecology
10 released a “preliminary draft” of a new permit on August 11, 2015. In that preliminary draft of
11 the permit, Ecology stated:

12 The Water Quality Program has determined that a lagoon with two layers of
13 synthetic geomembrane liner with a leak detection and capture system between
14 the layers (if installed, maintained, and operated properly) does not have a
15 discharge that requires a permit. Other lagoon designs are known to leak, which
16 in certain areas is a discharge. In areas where there are known groundwater
impacts from nitrate, or where the groundwater is susceptible to impacts from
nitrate, Ecology has determined that the leakage from lagoons that are not double
lined with leak detection requires a permit.

17 Ecology, Preliminary Draft, CAFO General Permit (issued August 11, 2015).

18 After accepting comments on the preliminary draft of the permit, including comments
19 submitted by Appellants, the CAFO industry persuaded legislators to introduce legislation that
20 required Ecology to deviate from its prior practice of issuing one combined federal NPDES and
21 state waste discharge general permit. Specifically, H.B. 2840 directed Ecology, in consultation
22 with the Washington State Department of Agriculture, to establish a separate general state

23 ¹ This includes both wet and dry manure, as well as “greenwater” and irrigation water that may
24 be mixed with liquid manure.

1 discharge permit (in addition to the combined federal-state permit Ecology had traditionally
2 required) for any CAFO “that discharges to groundwater but that does not discharge to surface
3 waters.” H.B. 2840, 64th Leg., Reg. Sess. (Wash. 2016). This legislation failed to pass the
4 Washington state legislature.

5 Notwithstanding the fact that H.B. 2840 failed to become law, Ecology opted to pursue
6 the CAFO industry’s approach and issued two separate draft CAFO Permits on June 15, 2016:
7 one combined permit and one state waste discharge permit. The NPDES and State Waste
8 Discharge General Permit (“Combined Permit”) applies to CAFOs with both surface water and
9 groundwater discharges. The State Waste Discharge General Permit (“State Permit”), however,
10 applies to CAFOs that have a discharge to groundwater only, which is a scientific fiction.

11 Indeed, Ecology has explicitly acknowledged that nitrates discharged to groundwater can have
12 direct surface water impacts due to hydraulic connectivity of Washington’s surface and
13 groundwaters: “Besides human health effects of nitrate, nitrate in groundwater can adversely
14 affect surface water by increasing primary productivity in streams, rivers, and lakes hydraulically
15 connected to the aquifer system. When algal and plant material that depend on nitrogen
16 decompose, oxygen depletion can adversely affect fish and other aquatic life.”² The scientific
17 reality of hydrologic connectivity is also recognized under Washington law. *Postema v.*
18 *Pollution Control Hearings Bd.*, 142 Wn.2d 68, 80, 11 P.3d 726 (2000) (stating that “[t]he
19 groundwater code recognizes that surface and groundwater may be in hydraulic continuity . . .
20 .”).

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22
23 ² Ecology, Nitrogen Dynamics at a Manured Grass Field Overlying the Sumas-Blaine Aquifer in
24 Whatcom County, Ecology Publication No. 14-03-001, Ecology Publication No. 14-03-001
(March 2014) at 4.

1 A number of organizations and thousands of individuals submitted comments on the two
2 draft CAFO discharge permits on August 29, 2016. On January 18, 2017, Ecology issued final
3 versions of the two separate CAFO discharge permits. On February 3, 2017, Ecology announced
4 reissuance of the CAFO permits and stated that the permits become effective on March 3, 2017,
5 expiring on March 22, 2022.

6 5. Short and plain statement of grounds for appeal.

7 The challenged permits are unlawful because they illegally authorize discharges to
8 surface and groundwaters in the state of Washington, and fail to ensure that such discharges will
9 not cause or contribute to violations of water quality standards or protect public health.

10 Additionally, the federal CAFO Rule is applicable to Ecology's Combined NPDES Permit and,
11 thus, the permit must conform to these and other NPDES permitting requirements. 40 C.F.R. §
12 123.25 and 40 C.F.R. § 123.36. However, Ecology's NPDES Permit is inconsistent with, and
13 fails to meet the minimum requirements of, the federal CWA and CAFO Rule applicable to state
14 CAFO General NPDES Permits, such as the more stringent, substantive requirements for Large
15 CAFOs in Part 412 and for CAFOs located in impaired or TMDL watersheds; public
16 participation requirements; mandatory Nutrient Management Plan requirements; and minimum
17 enforceable and site specific waste management and land application standards and requirements
18 for nitrogen and phosphorus. Additionally,, the Combined Permit allows surface water
19 discharges, even though such discharges are specifically prohibited under federal law. Federal
20 law requires a "no discharge" standard for all CAFOs, which Ecology disregards by
21 conditionally authorizing discharges and by adopting a definition of agricultural stormwater that
22 conflicts with the minimum standards of the federal CAFO Rule in a manner that would
23 authorize discharges prohibited by federal law. 40 C.F.R. § 412.31.

1 The permits lack adequate surface and groundwater monitoring provisions designed to
2 evaluate and ensure compliance with all applicable permit conditions and water quality
3 standards. The Clean Water Act mandates the inclusion of monitoring requirements in permits
4 to track compliance. 33 U.S.C. § 1318(a). Washington law similarly subjects general permits to
5 both surface and groundwater monitoring requirements. WAC 173-226-090(1)(a); *see also*
6 RCW 90.64.180. Despite these requirements, both of Ecology’s permits do not require
7 groundwater monitoring. It is illegal for Ecology to issue a discharge permit limit with no
8 process in place for ascertaining compliance.

9 The permits also illegally authorize discharges to waters of the state without requiring
10 permittees to install and implement all known, available, and reasonable technology
11 (“AKART”). Federal and state discharge permits must require implementation of “[t]echnology-
12 based treatment requirements and standards reflecting all known, available, and reasonable
13 methods of prevention, treatment, and control.” WAC 173-226-070(1); *see also* 33 U.S.C. §§
14 1311(b)(2)(A) (permits “shall require application of the best available technology economically
15 achievable”). The permits violate these standards by, for example, failing to require double
16 geomembrane (synthetic) liners that are known, available, and reasonable for preventing
17 discharge from leaking manure lagoons.

18 The permits also illegally fail to identify the permittees that will be required to obtain
19 coverage under the permits. Ecology is required to list in the Fact Sheet the facilities proposed to
20 be covered or a means of identifying those facilities. WAC 173-226-110(1)(d). Considering the
21 ultimate failure of the last version of the CAFO permit to cover most facilities in spite of
22 Ecology’s promise that it would cover a significant number of facilities, it is essential that
23 Ecology identify the specific facilities that will be covered by the permits.

1 Finally, the permits illegally authorize an incomplete adaptive management approach
2 because they do not specify what happens when permittees continue to exceed soil benchmark
3 levels and allow for perpetual non-compliance of the permits. The permits establish adaptive
4 management plans in which permittees must take certain actions if a fall soil test nitrate range
5 exceeds certain thresholds. However, these adaptive management plans authorize illegal
6 discharges by authorizing residual nitrate levels in the soil that are known, even by Ecology's
7 own scientists, to result in discharges to waters of the state. Additionally, the adaptive
8 management plans fail to sanction permittees for violating the terms of the permit by applying
9 manure in excess of agronomic rates. The permits allow unlawful discharges by containing an
10 improper adaptive management plan in which there is no level of soil nitrate that results in a
11 permit violation, even though the over-application of manure is a known source of surface and
12 groundwater contamination from CAFOs. Over application of manure that results in pollution of
13 ground and surface waters also includes the permits' failure to address pollution sources such as
14 animal pens and compost areas.

15 6. Relief requested.

16 Appellants request that the Board order the Department of Ecology to modify the State
17 Permit and the Combined Permit to comply with all applicable legal requirements, as identified
18 in this appeal.

19 Respectfully submitted this 17th day of February, 2017,

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