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Via Electronic Mail

January 26, 2015

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Re: Ecology Must Issue a New CAFO General/State Discharge Permit That Covers All Medium and Large CAFOs in the State of Washington

Dear Kelly, Bill, Ron and Jon,

We are writing to ask the Washington State Department of Ecology (“Ecology”) to draft and issue a new Concentrated Animal Feeding Operation (“CAFO”) General Permit that requires universal permit coverage for all Medium and Large CAFOs that are operating in the state of Washington. It is well-documented that all Medium and Large CAFOs are actively discharging into the surface and ground waters of the state and thus should be subject to the National Pollutant Discharge Elimination System (“NPDES”) permit or state discharge permit requirement.

Presently only ten Animal Feeding Operations (“AFOs”) in the state are subject to the CAFO General NPDES/State Discharge Permit.¹ This is completely unacceptable and illustrates that Ecology has abdicated its responsibility to protect the surface and ground waters of this state. This

¹ See Email from Jon Jennings to Andrea Rodgers Harris (Oct. 9, 2014).

regulatory failure has jeopardized the public health and vitality of humans and wildlife that depend upon Washington's critical water resources. Importantly, Ecology's failure to act to issue a new CAFO General Permit defies the Legislature's specific finding that "federal regulations require a permit program for dairies with over seven hundred head of mature cows and, other specified dairy farms that directly discharge into waters or are otherwise significant contributors of pollution."²

The significance of requiring permit coverage for large and medium industrial agricultural facilities cannot be overstated. As the Second Circuit Court of Appeals has recognized, "the NPDES permit is critical to the successful implementation of the [Clean Water] Act because – by setting forth technology-based effluent limitations and, in certain cases, additional water quality based effluent limitations – the NPDES permit 'defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations under the [Act].'"³ The vast amount of data illustrating that Medium and Large CAFOs are actively discharging and are significant contributors of pollution to waters of the state (discussed below) confirms the urgent need for Ecology to act now to issue a new draft of the CAFO General/State Discharge permit that expired in 2011. The unregulated discharge of pollutants from CAFOs into waters of the state has created an environmental and public health crisis of the first order. The public should not have to wait over four years, and potentially five years in light of Ecology's recent announcement

² RCW 90.64.005.

³ *Waterkeeper Alliance, Inc. v. U.S. Env'tl Protection Agency*, 399 F.3d 486, 492 (2d. Cir. 2005) (quoting *California, ex rel. State Water Res. Control Bd v. California, ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976)).

regarding the permit issuance timeline, for Ecology to implement its existing legal authority to prevent the discharges of pollutants from these industrial agricultural operations. The time to act is now.

A. Origins of Regulating Discharges into Navigable Waters by CAFOs

To underscore the immediate need for a permit, it is important to reflect on the legal history underlying the development of the waste discharge permit because we seem to be repeating the errors of the past. The United States has long recognized the need to prevent what is dumped into the waters of this nation. Congress initially addressed this need in 1899 with the Refuse Act, which states that it is against the law to “throw, discharge, or deposit . . . any refuse matter of any kind . . . into any navigable water of the United States, or into any tributary of any navigable water”⁴ The Refuse Act, still valid law today, also creates liability for discharge of refuse onto the banks of navigable waters where the refuse could wash into that water by storm or flood.⁵

In 1948, Congress enacted the first Federal Water Pollution Control Act, which authorized federal agencies to help local entities and industry eliminate or reduce water pollution to improve the conditions of surface and groundwater. This Act was subsequently amended five times prior to the adoption in 1972 of the Federal Water Pollution Control Act, today’s well-known Clean

⁴ 33 U.S.C. §407 (2013).

⁵ *Id.*

Water Act (“CWA”).⁶ The CWA created the NPDES permit program and established that CAFOs are point sources.⁷

The 1977 amendments to the CWA, while important for the general scope of water pollution regulation, did not change the fact that Congress considers CAFOs point sources that should be regulated by NPDES permits.⁸ The amendments gave greater power to the Administrator of the U.S. Environmental Protection Agency (“EPA”) “to deal with complex water pollution problems” and were focused on ensuring that industry use the “best available technology to control pollution.”⁹ One distinguished commentator has concluded “the Clean Water Act of 1977 is filled with mid-course corrections that can be explained as constituent group reactions against objectionable policies emerging in the wake of the 1972 Amendments.”¹⁰ There have been subsequent amendments to the CWA, none of which are particularly relevant to the issues discussed herein.

B. CAFOs as Point Sources under the CWA.

The CWA is designed, in part, to regulate and ultimately prevent the discharge of pollutants from point sources into waters of the United States. Specifically, Congress declared “it is the national goal that the discharge of pollutants into the navigable waters be eliminated by

⁶ Rodgers, *Environmental Law* § 4.1.

⁷ 33 U.S.C. §§ 1342, 1362(14) (2013).

⁸ Pub. L. No. 95-217, 91 Stat. 1566 (1977).

⁹ Senator Edmund S. Muskie, *The Meaning of the 1977 Clean Water Act*, EPA JOURNAL, <http://www2.epa.gov/aboutepa/meaning-1977-clean-water-act>.

¹⁰ Rodgers, 2 *Environmental Law* § 4.2(C).

1985.”¹¹ It is also Congress’ intent under the CWA that “a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters”¹² The 1972 amendments to the Federal Water Pollution Control Act created technology based standards for effluent limitations of point sources, and the NPDES program serves as the means to implement and enforce these limitations.¹³ The very purpose and success of the NPDES permitting scheme and the achievement of the CWA’s goals revolves around the forcing the use of best technology to achieve the goal of ultimately preventing the need to discharge of pollutants into navigable waters:

Section 301(a)(1) articulates the no discharge policy carried over from the Rivers and Harbors Act of 1899 (“the discharge of any pollutant by any person shall be unlawful”), and articulates the various formulations of the “best technology” principle to be met on a scheduled basis by industry and municipal sources moving towards the 1983 fishable/swimmable water and the 1985 no discharge goals The most important of these [permit programs] is Section 402 establishing the [NPDES] as a comprehensive regulatory scheme replacing and supplementing the Refuse Act Permit Program.¹⁴

The concept of “technology-forcing” also serves as a foundation of the Clean Air Act and can be described as follows:

The idea, briefly put, is that the government can order into being technological achievements not now enjoyed by a particular industry. A policy of technology-forcing assumes that existing market forces fail to produce an appropriate level of pollution control, either because of explicit collusion among the

¹¹ 33 U.S.C. § 1251(a)(1).

¹² *Id.* at § 1251(a)(6).

¹³ 33 U.S.C. § 1311(b)(1)(a) (1976).

¹⁴ Rodgers, 2 Environmental Law at § 4.2.

manufacturers¹⁵ or because of the inability of spillover victims to communicate and enforce their needs within the market. A policy of technology-forcing presupposes also that intervention by law will bring a response, either from the manufacturers themselves or equipment suppliers, and that these new forces can be loosed to create a technology that is “superior” to the ones it replaces. The metaphors of this movement are of reluctance overcome, of fires being lit, of perceived limits quickly surpassed, of wills and ways.¹⁶

The linchpin to the notion of technology-forcing under the CWA is the permit program.

The CWA unequivocally states that “agricultural waste discharged into water” is a pollutant.¹⁷ A “point source” is “any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, *concentrated animal feeding operation*, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged.”¹⁸ EPA regulations make it clear that “[o]nce an animal feeding operation is defined or designated as a CAFO for at least one type

¹⁵ See, e.g., *Comm’y Ass’n for Restoration of the Environment et al. v. Cow Palace, LLC et al.*, No. 2:13-cv-03016-TOR (E.D. Wash.) (Proposed Amicus Curiae Brief of *Amici* National Cattlemen’s Beef Association, American Farm Bureau Federation, Washington Cattlemen’s Association and Washington Cattle Feeders Association) (filed Dec. 2, 2014) (illustrating the agricultural industry’s collusive efforts to ensure that CAFO manure managed in a way that pollutes the groundwater is not subject to regulation under the Resource Conservation and Recovery Act and falsely claiming that “*Amici’s* members operate livestock feeding operations that manage manure and wastewater under nutrient management plans developed under the auspices of the Clean Water Act.”). Notably, on January 14, 2015 the Eastern District of Washington rejected Industry’s amicus brief that advocated Industry-wide evasion of environmental law on the grounds that the amicus brief “offers no additional legal or other substantive information or perspective that has not already been presented to, or previously decided by, the Court in this litigation or that is particularly helpful to this Court’s pending determination.” *Id.* (Order Denying Amicus Curiae Brief) (Jan. 14, 2015).

¹⁶ Rodgers, 1 Environmental Law at § 3.25(A).

¹⁷ *Id.* at §1362(6).

¹⁸ 33 U.S.C. § 1362(14) (2013) (emphasis added).

of animal, the NPDES requirements for CAFOs apply with respect to all animals in confinement at the operation and all manure, litter, and process wastewater generated by those animals or the production of those animals, regardless of the type of animal.”¹⁹ Therefore, in order to trigger the permit requirement, the operation must first qualify as a CAFO facility. A facility is “any NPDES ‘point source’ or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program.”²⁰

The EPA currently defines a CAFO as “an [animal feeding operation] AFO that is defined as a Large CAFO or as a Medium CAFO by the terms of this paragraph [based upon the type and number of animals confined], or that is designated as a CAFO in accordance with paragraph (c) of this section.”²¹ Ecology, as the state agency with delegated authority from the EPA to issue NPDES permits to CAFOs, has the authority to “designate any AFO as a CAFO upon determining that it is a significant contributor of pollutants to waters of the United States.”²² Even though Ecology has delegated authority, the Regional Administrator of the EPA retains its authority to make CAFO designations, but only if he/she determines “that one or more pollutants in the AFO’s discharge contributes to an impairment in a downstream or adjacent State or Indian country water that is impaired for that pollutant.”²³

In making a CAFO designation, after an on-site inspection is conducted, Ecology or the Regional Administrator considers the following factors:

¹⁹ 40 C.F.R. § 122.23 (b).

²⁰ 40 C.F.R. § 122.2 (2014).

²¹ 40 C.F.R. § 122.23(b)(2).

²² 40 C.F.R. § 122.23(c); RCW 90.64.020 (same).

²³ 40 C.F.R. § 122.23(c)(1)(i).

- (i) The size of the AFO and the amount of wastes reaching waters of the United States;
- (ii) The location of the AFO relative to waters of the United States;
- (iii) The means of conveyance of animal wastes and process waste waters into waters of the United States;
- (iv) The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes manure and process waste waters into waters of the United States; and
- (v) Other relevant factors.²⁴

In order to trigger EPA’s or Ecology’s authority to designate an AFO as a CAFO, there must be an actual discharge of pollutants into waters of the state *or* the facility must be an “otherwise significant contributor[] of pollution.”²⁵ The Clean Water Act defines “discharge of pollutants” as “any addition of any pollutant to navigable waters by any point source.”²⁶ The EPA’s definition of a “discharge” includes “surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works.”²⁷ EPA has specified what kind of CAFO-specific discharges are subject to the NPDES permit requirement:

The discharge of manure, litter or process wastewater²⁸ to waters of the United States from a CAFO as a result of the application of that

²⁴ 40 C.F.R. § 122.23 (c); RCW 90.64.020 (emphasis added) (mirroring the language of the federal rule, except Ecology may also designate a CAFO “that is a significant contributor of pollution to the surface *or ground waters* of the state.”).

²⁵ RCW 90.64.005.

²⁶ 33 U.S.C. § 1362(12) (2013).

²⁷ 40 C.F.R. § 122.2 (2013).

²⁸ “Process wastewater means water directly or indirectly used in the operation of the CAFO for any or all of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning or flushing pens, barns, manure pits, or other CAFO facilities; direct contact swimming, washing, cleaning, or flushing pens, barns, manure pits, or other CAFO facilities;

manure, litter or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements, except where it is an agricultural storm water discharge as provided in 33 U.S.C. § 1362(14).²⁹

The CWA’s definition of the term “point source” specifically excludes “agricultural stormwater discharges and return flows from irrigated agriculture.”³⁰ The agricultural stormwater discharge exemption has been defined by EPA as follows: “where the manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, as specified in § 122.42(e)(1)(vi)-(ix) [which describes the requirements of a nutrient management plan (“NMP”)],³¹ a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of the CAFO is an agricultural storm water discharge.”³²

Therefore, the agricultural stormwater exemption is actually quite narrow and does not swallow that portion of the law that defines CAFOs as point sources. The exemption does not

direct contact swimming, washing, or spray cooling of animals; or dust control. Process wastewater also includes any water which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs, or bedding.” 40 C.F.R. § 412.2(d).

²⁹ 40 C.F.R. § 122.23(e).

³⁰ 33 U.S.C. § 1362(14).

³¹ Dairy CAFOs are required to develop and implement an NMP under both state and federal law. RCW 90.64 (WA State Dairy Nutrient Management Act); 40 C.F.R. §412.4(c)(1). The NMP is intended to address the production, collection, storage, transfer, treatment and use of nutrients with the desired end result of preventing contaminants from entering waters of the U.S. and the underlying aquifer. RCW 90.64.180; 40 C.F.R. §412.4(c)(2)-(5); 68 Fed. Reg. at 7213. Eastern District of Washington Judge Rice has characterized NMPs as “[t]he recipe for the proper handling, storage, and agronomical application of manure” *CARE, et al. v. Cow Palace, LLC, et al.*, No. 2:13-CV-03016-TOR (Order Unsealing Records) (Jan. 14, 2015).

³² 40 C.F.R. § 122.23(e).

apply to all discharges from CAFOs that may be precipitation-induced. Rather, the exemption only arises when: (1) the discharge comes from land areas under the control of the CAFO;³³ (2) the discharge is precipitation-related; *and* (3) the manure, litter or process wastewater has been applied in accordance with the facility's site-specific nutrient management plan. All other discharges of manure, litter or process wastewater to waters of the United States from land areas under the control of the CAFO, including discharges that originate from manure storage lagoons or the over-application of manure, are unquestionably subject to the CAFO permit requirements.³⁴ The case law supports this interpretation.

Swales, pipes, and ditches leading from a CAFOs' manure-applied fields into waters of the U.S. are point sources subject to the NPDES permit requirement. In *Concerned Area Residents for the Env't*, the Second Circuit held that liquid manure that collected in a swale after land application and *naturally flowed* through a pipe into a ditch on state park property and eventually a river was a point source discharge.³⁵ The CAFO's manure spreading vehicles were also point sources because the vehicles discharged on fields "from which the manure directly flows into navigable waters."³⁶ Though the CAFO attempted to invoke the agricultural stormwater exemption and argued that the manure had "simply and quite naturally" flowed to the low part of the field and eventually into the river "in too diffuse a manner to create a point source

³³ The CAFO "land application area means land under the control of an AFO owner or operator, whether it is owned, rented, or leased, to which manure, litter, or process wastewater from the production area is or may be applied." 40 C.F.R. § 412.2(e).

³⁴ 40 C.F.R. § 122.23(e).

³⁵ 34 F.3d at 118 (emphasis added).

³⁶ *Id.* at 119.

discharge,” the Court did not agree.³⁷ The farm also argued that it was not a CAFO because it grew crops on a portion of the farm, but the Court found this irrelevant for purposes of CWA liability.³⁸ Rather, the Second Circuit held that even though the manure was applied onto crop fields outside of the area in which the cows were confined, the “[CAFO] operation in and of itself is a point source within the Clean Water Act and not subject to any agricultural exemption thereto.”³⁹ Dicta within *Concerned Area Residents for the Env’t* notes that “all discharges eventually mix with precipitation run-off in ditches or streams or navigable waters” and that mix cannot be decisive as to whether or not the discharge is exempt agricultural stormwater.⁴⁰ The exempt stormwater must be the result of rain, not just occur while it was raining.⁴¹

The Ninth Circuit held that fields where the manure is stored and the ditches related to that storage are point sources.⁴² In *Bosma*, there was significant evidence demonstrating the poor operation and management of Bosma’s dairies and the CAFO had a long history of CWA violations with respect to discharging pollutants from its CAFO operations into waters of the United States.⁴³ The Ninth Circuit affirmed that the facility is a CAFO and that Bosma did not provide any evidence that it met any “agricultural point source exceptions.”⁴⁴ Specifically, “[d]efining a CAFO to include any manure spreading vehicles, as well as manure storing fields,

³⁷ *Id.* at 118.

³⁸ *Id.* at 118, 123.

³⁹ *Id.* at 123.

⁴⁰ *Id.* at 120-21.

⁴¹ *Id.* at 121.

⁴² *Comm’y Ass’n for Restoration of the Environment v. Henry Bosma Dairy*, 305 F.3d 943, 955 (9th Cir. 2002).

⁴³ *Id.* at 954-55.

⁴⁴ *Id.* at 955-56.

and ditches used to store or transfer the waste serves the purpose of the CWA to control the disposal of pollutants in order to restore and maintain the waters of the United States.”⁴⁵

The Ninth Circuit has previously recognized the difference between a discharge from a point source and runoff from a nonpoint source⁴⁶ (such as agricultural stormwater) that supports the conclusion that the agricultural stormwater exemption is to be very narrowly applied in the CAFO context:

Nonpoint source pollution is not specifically defined in the Act, but is pollution that does not result from the ‘discharge’ or ‘addition’ of pollutants from a point source. Examples of nonpoint source pollution include runoff from irrigated agriculture and silvicultural activities.⁴⁷

The reason for this distinction is that “Congress had classified nonpoint source pollution as runoff caused primarily by rainfall around activities that employ or create pollutants. Such runoff could not be traced to any identifiable point source.”⁴⁸ You clearly do not have this problem when the pollution is coming from a CAFO, a known point source.

The Eastern District of Washington has provided additional guidance as to when discharges from CAFOs are considered point sources versus agricultural stormwater.⁴⁹ The Court noted that “Congress and the EPA were concerned with the amount of animal wastes generated by

⁴⁵ *Id.* at 955.

⁴⁶ “Nonpoint source pollution is not specifically defined in the Act, but is pollution that does not result from the ‘discharge’ or ‘addition’ of pollutants from a point source.” *Or. Natural Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 849 n.9 (9th Cir. 1987).

⁴⁷ *Oregon Natural Resources Council v. Forest Service*, 834 F.2d 842, 849 (9th Cir. 1987).

⁴⁸ *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984).

⁴⁹ *Comm’y Ass’n for Restoration of the Env’t. v. Sid Koopman Dairy*, 54 F.Supp.2d 976, 981 (E.D. Wa. 1999).

a CAFO and the threat those wastes pose to the waters of the United States.” The court concluded that:

The agricultural stormwater discharge and return flows from irrigated agriculture exception in 33 U.S.C, § 1362(14) does not act to relieve CAFO farmers from responsibility for over applications and misapplications of CAFO animal wastes to fields in amounts or locations which will then discharge into the waters of the United States. The instruments or machinery used to apply those animal wastes will be considered “point sources” under the CWA. For example, trucks filled with animal wastes at the animal confinement area which apply those animal wastes to crop production fields in mounds close to the “waters of the United States” would be considered “point sources” and discharges to the waters of the United States from those mounds due to that misapplication would be discharge violations subject to the CWA. Enforcement of the CWA does not stop at the edge of the animal confinement area.⁵⁰

The court held that “Defendant CAFOs include not only the ground where the animals are confined but also the lagoons and systems used to transfer the animal wastes to the lagoons as well as equipment which distributes and/or applies the animal wastes produced at the confinement area to fields outside the animal confinement area.”⁵¹

There has been more recent case law outside of the Ninth Circuit interpreting the scope of the CWA’s agricultural stormwater exemption in an illegal fashion. In 2013, the United States District Court for the Northern District of West Virginia found that precipitation-related runoff from the grassy and weedy areas between poultry houses was an agricultural stormwater

⁵⁰ *Id.* at 981.

⁵¹ *Id.*

discharge and exempt from the NPDES permit requirement.⁵² While the EPA argued that the agricultural stormwater exemption could only be applied in the context of runoff from land application areas, the Court found that the lack of congressional or regulatory definition and case law on the exemption rendered it without concrete parameters.⁵³ “Common sense and plain English lead to the inescapable conclusion that [the plaintiff’s] poultry operation is ‘agricultural’ in nature and that the precipitation-caused runoff from her farmyard is ‘stormwater.’”⁵⁴ The “farmyard” at issue was the “areas of grass and weeds between the poultry houses.”⁵⁵ Plaintiff Alt’s farmyard contained particles of manure and litter from her nearby poultry confinement areas.⁵⁶ The ventilation fans of the confinement houses had blown manure, litter, dander, and feathers out onto the farmyard.⁵⁷ Due to rainfall, those materials had entered into a nearby water of the United States.⁵⁸ The Court found that the farmyard was a part of the CAFO’s production facility, not its production area.⁵⁹

The EPA argued that the agricultural stormwater exemption was inapplicable to discharges from the production area and only applied to discharges from land application areas.⁶⁰

The Court did not address that argument because it found that Alt’s farmyard was not a part of the

⁵² *Alt v. EPA*, 979 F.Supp.2d 701, 715 (N.D.W.Va. 2013).

⁵³ *See id.* at 710. Apparently the court neglected to read the case that serves as precedent in Washington state, *Comm’y Ass’n for Restoration of the Env’t. v. Sid Koopman Dairy*, 54 F.Supp.2d 976, 981 (E.D. Wa. 1999), and clearly contradicts the *Alt* court’s reasoning.

⁵⁴ *Id.* at 711.

⁵⁵ *Id.* at 713.

⁵⁶ *Id.* at 704.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 713.

⁶⁰ *Id.*

production area.⁶¹ Even though the pollutants in the farmyard came from the production area, under *Waterkeeper*, “even when those discharges came from what would otherwise be point sources” the agricultural stormwater discharge is exempt from regulation.⁶² The Court held that the agricultural stormwater exemption applied to the farmyard. *Id.* The EPA appealed the district court’s decision to the Fourth Circuit Court of Appeals, but recently decided not to pursue the appeal.

It is important to recognize the limits and flaws of the *Alt* decision and its limited applicability in the Ninth Circuit. Guidance letters from the EPA leading into the *Alt* litigation suggested that it is the EPA’s intent that “litter released through confinement house ventilation fans” be regulated by a NPDES permit.⁶³ When the 5th Circuit addressed the stormwater exemption in *National Pork Producers* (discussed below), it wasn’t concerned with the exemption in the context of the production area, but rather only the land application area, where precipitation will undoubtedly fall and cause nutrient runoff into waters of the U.S.⁶⁴ The EPA is correct to argue that the exemption does not apply to the production area, as the *Alt* court alludes when it says, “it is for this reason that Lois Alt and thousands of farmers like her not only keep their animals under roof, but also maintain covered structures for manure storage, composting, and similar

⁶¹ *Id.*

⁶² *Id.* at 714 (quoting *Waterkeeper v. EPA*, 399 F.3d at 507).

⁶³ In *National Pork Producers Council, et al. v. EPA*, the 5th Circuit found that these letters did not constitute a final agency action and that the Court did not have jurisdiction to consider the letters. 635 F.3d 738, 755-56 (5th Cir. 2011).

⁶⁴ *Id.* at 710.

activities.”⁶⁵ The farmyard, as a part of the production facility, is just as likely to contain pollutants as the production area and should be covered by a permit. The very definition of facility, which the *Alt* court applied, includes “(land appurtenances thereto) that [are] *subject to regulation under the NPDES program*.”⁶⁶ Even though the farmyard may not be a part of the production area, the court recognized that it is a part of the CAFO facility.⁶⁷

In *Alt*, there was no question that the farmyard was under the control of the owner/operator and simply by being a part of the CAFO facility confirms that this was a discharge from a point source. Furthermore, the *Alt* court misinterprets the plain language of the CWA. In giving the term “agricultural stormwater” its ordinary meaning, the court completely ignores the fact that CAFOs are designated as point sources. This violates the textual integrity principle of statutory construction that requires a court not to interpret a statute in a way that renders another part superfluous.⁶⁸ While “agricultural stormwater discharges” may be exempt, discharges from CAFOs are not. Therefore, since the discharge came from a CAFO facility, as that term is defined under common sense and federal law, it should be considered a discharge from a point source.

The practical ramifications of the court’s decision in *Alt* is that it is perfectly legal if an owner/operator of a point source facility dumps its pollutants, or allows its pollutants to get onto, adjoining land and the pollutants are washed by precipitation into waters of the United States.

⁶⁵ *Id.* at 714.

⁶⁶ 40 C.F.R. § 122.2 (2014) (emphasis added).

⁶⁷ 979 F.Supp.2d at 713 (finding that the term “facility” “thus includes any CAFO and the land appurtenant thereto – which includes the ‘farmyard.’”).

⁶⁸ “The Court will avoid an interpretation of a statute that ‘renders some words altogether redundant.’” *U.S. v. Alaska*, 521 U.S. 1, 59 (1997) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995)).

Such a notion is preposterous and clearly not permitted under state law which requires a permit not only for actual point source discharges, but also for dairy CAFOs that are “otherwise significant contributors of pollution.”⁶⁹ The *Alt* decision is a West Virginia district court decision that is of limited persuasive authority in the Ninth Circuit as it contradicts existing precedent. Therefore, the *Alt* decision does not support the theory that Washington CAFOs are somehow exempt from the NPDES permit requirement. Significantly, there is no “agricultural stormwater” exemption under Washington state law⁷⁰ and thus *Alt* similarly cannot be used to excuse Ecology’s failure to require state discharge permit for all discharging CAFOs in the state.

C. The 2003 EPA Final CAFO Rule and the *Waterkeeper* Decision

In 2001, as the federal agency charged with implementing the CWA, the EPA proposed to revise its existing 1976 rule regulating discharges from CAFOs,⁷¹ updating the NPDES requirements and addressing the environmental concerns of nutrient pollution damaging the nation’s navigable waters.⁷² The rule stemmed from recognition of “both ecological and human health effects” and the needed improvement of environmental protection due to discharges from CAFOs.⁷³ The EPA acknowledged that “manure in stockpiles, lagoons, or excessive land

⁶⁹ RCW 90.64.005.

⁷⁰ WAC 173-220-030(18) (exempting “return flows from irrigated agriculture” from the definition of “point source,” but not agricultural stormwater); *see also* WAC 173-226-050(3)(a) (“General permits may be written to cover . . . storm water sources.”).

⁷¹ The 1976 regulations required all Large CAFOs to have NPDES permits and required Medium CAFOs to have a permit if they emitted certain discharges. *Nat’l Pork Producers Council*, 635 F.3d at 743.

⁷² 66 Fed. Reg. 2960 (proposed Jan.12, 2001) (to be codified at 40 C.F.R. pts. 122, 412).

⁷³ *Id.* at 2960.

application can reach waterways through runoff, erosion, spills, or via groundwater.”⁷⁴ “This pollution can kill fish and shellfish, cause excess algae growth . . . and contaminate drinking water.”⁷⁵

In 2003, the EPA published its Final Rule designed to regulate point source discharges to navigable waters from CAFOs.⁷⁶ The 2003 Final Rule (“’03 Rule”) required that all Medium and Large CAFOs⁷⁷ apply for an individual NPDES permit or submit a notice of intent for coverage under a general permit.⁷⁸ Large CAFOs, however, could escape the NPDES permit requirement if they could show they had “no potential to discharge.”⁷⁹ While the ’03 Rule required all permitted CAFOs to have nutrient management plans (“NMPs”) and that they be included as conditions in the permit, the NMPs were not subject to review by any NPDES permitting authority and thus were not publicly available.⁸⁰ Under the ’03 Rule, as proposed by the EPA, a CAFO could receive its discharge permit without any oversight of its actual nutrient management practices or whether those practices were done in compliance with its NMP.⁸¹

Land application discharges that were subject to the permit requirement in the ’03 Rule included any discharges to waters of the United States caused by the application and/or

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176 (Feb. 12, 2003) (codified at 40 C.F.R. pts. 9, 122, 123, 412).

⁷⁷ An AFO is designated as a Medium or Large CAFO based upon the number of animals confined at the facility. 40 C.F.R. §122.23(4) (2013); 40 C.F.R. §122.23(6) (2013).

⁷⁸ 68 Fed. Reg. at 7267.

⁷⁹ *Id.*

⁸⁰ *See infra* note 31.

⁸¹ *Id.*

management of manure, litter, and process wastewater that had been applied to the land under the CAFO's control.⁸² Agricultural stormwater discharges were not subject to the permit requirement as they were explicitly exempt from the congressional definition of point source.⁸³ In the '03 Rule, the EPA defined "agricultural stormwater" as any "precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO" if the "manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization."⁸⁴

Finally, the '03 Rule established technology-based effluent limitation guidelines ("ELGs") for Large CAFOs.⁸⁵ The CWA contemplates the use of these technology-based effluent limitations.⁸⁶ CAFOs comply with the ELGs through the use of five best management practices ("BMPs") for the land application of manure, litter, or process wastewater.⁸⁷ The most significant BMP is the Nutrient Management Plan, which implements the other four BMPs.⁸⁸ Specifically as part of the NMP, the CAFO must generate a "field-specific assessment of the potential for nitrogen and phosphorus transport from the field . . . that addresses the form, source, amount, timing, and method of application."⁸⁹ The goal of the assessment is to identify nutrient application

⁸² *Id.*

⁸³ 33 U.S.C. § 1362(14).

⁸⁴ 40 C.F.R. § 122.23(e).

⁸⁵ 68 Fed. Reg. at 7179; 68 Fed. Reg. at 7182.

⁸⁶ *See* 33 U.S.C. §§1311(b)(2)(A); 1314(b)(2)(A); 1314(b)(1)(A) (2013).

⁸⁷ Large CAFOs could also create their own site-specific standards and technology-based best management practices as long as the aggregate amount of permitted discharge remained the same or decreased. 40 C.F.R. §412.31(a)(2) (2003); 40 C.F.R. § 412.4(2004).

⁸⁸ *See id.* at § 412.4(c)(1).

⁸⁹ *Id.*

levels that “achieve realistic production goals while minimizing nitrogen and phosphorus movement to surface waters.”⁹⁰ While the Director of the EPA sets technical standards for the rate of application of manure, litter, and process wastewater, those technical standards rely on the CAFO’s field-specific assessment.⁹¹

Under the ’03 Rule, CAFOs are responsible for the application of nutrients to *all land* under their “ownership or operational control” and must comply with any technical standards established by the EPA.⁹² Technical standards must include assessing the potential for nitrogen and phosphorus to move to surface waters and consider “appropriate flexibilities” for CAFOs to implement their NMPs.⁹³ For permitted CAFOs, manure must be analyzed annually for its nitrogen and phosphorus content and soil tested for its phosphorus content every five years.⁹⁴ A CAFO’s land application equipment must also be periodically inspected.⁹⁵ Finally, a CAFO cannot apply manure, litter, or process wastewater within 100 feet of down gradient surface water or conduits of surface water unless there is a 35-foot wide vegetated buffer or other conservation practice in place that yields “pollutant reductions equivalent or better” than that of the 100-foot setback.⁹⁶

⁹⁰ *Id.*

⁹¹ *Id.* at § 412.4(c)(2).

⁹² *Id.*

⁹³ *Id.* at § 412.4(c)(2)(ii).

⁹⁴ *Id.* at § 412.4(c)(3).

⁹⁵ *Id.* at § 412.4(c)(4).

⁹⁶ *Id.* at § 412.4(c)(5).

After the publication of the '03 Rule, environmental organizations and the agricultural industry sued the EPA, challenging the validity of the Rule.⁹⁷ In *Waterkeeper*, the U.S. Court of Appeals for the Second Circuit found that the EPA could not require all CAFOs with the mere “potential to discharge” to apply for a permit. In essence, the court held that the EPA could not impose upon CAFOs the burden to show they have no “potential to discharge.”⁹⁸ Since the CWA only regulates the actual point source discharge of pollutants, the EPA cannot regulate a potential discharge of pollutants.⁹⁹

In addition, the Court found that a NPDES permitting authority cannot issue a permit without first reviewing and approving the CAFO’s NMP.¹⁰⁰ The lack of NMP review allowed the possibility “‘from misunderstanding or misrepresenting’ [the CAFO’s] specific situation and adopting improper or inappropriate nutrient management plans.”¹⁰¹ Since the '03 Rule established non-numeric effluent limitations requirements in the form of technology-based BMPs, the Court found that the terms of the NMP constituted effluent limitations in and of themselves and thus, under the CWA, needed to be included in the CAFOs’ NPDES permits.¹⁰²

The Court also held that “any discharge from a land area under the control of a CAFO is a point source discharge subject to regulation because it is a discharge from a CAFO.”¹⁰³ The

⁹⁷ *Waterkeeper Alliance Inc. v. EPA*, 399 F.3d 486, 494-95 (2d. Cir. 2005).

⁹⁸ *Id.* at 505-06.

⁹⁹ *See id.* at 504.

¹⁰⁰ *Id.* at 499.

¹⁰¹ *Id.* at 500 (quoting *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832, 855 (9th Cir. 2003)).

¹⁰² *Id.* at 502.

¹⁰³ *Id.* at 510-11.

environmental plaintiffs in *Waterkeeper* argued that because the CWA requires all point source discharges to be regulated and since CAFOs are identified as point sources under the plain language of the CWA, the EPA cannot exempt any form of discharge from a CAFO.¹⁰⁴ The Court disagreed, finding the Act’s definition of point source ambiguous because it included CAFOs as point sources while at the same time excluding agricultural stormwater as a point source.¹⁰⁵ In the 1994 decision of *Concerned Area Residents for Environment v. Southview Farm* (discussed above), the Second Circuit held that the issue of whether the agricultural stormwater exemption applies does not depend on whether or not the discharge occurred while it was raining, but whether the discharge would not have occurred had it not rained.¹⁰⁶

In *Waterkeeper*, the Court confirmed its analysis from *Southview Farm* and found the EPA’s interpretation of the agricultural storm water discharge exemption (“precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO” if the “manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization”) permissible and within Congress’ intent under the Clean Water Act.¹⁰⁷ The Court remanded the rule back to the EPA for further clarification consistent with the opinion.¹⁰⁸

D. The 2008 Final Rule and the *National Pork Producers Council* Decision

¹⁰⁴ *Id.* at 507.

¹⁰⁵ *Id.*

¹⁰⁶ 34 F.3d 114, 121 (2d. Cir. 1994).

¹⁰⁷ 399 F.3d at 508.

¹⁰⁸ *Id.* at 524.

In 2008, the EPA revised the CAFO Rule in light of the *Waterkeeper* decision and published a new Final Rule for NPDES permitting of CAFOs (the '08 Rule).¹⁰⁹ Industry organizations filed petitions for review of the '08 Rule and environmentalists intervened to defend the rule in support of the EPA. The Fifth Circuit Court of Appeals issued its final decision in 2011.¹¹⁰

The '08 Rule drafted by the EPA clarified the “duty to apply” requirement by directing CAFOs to apply for a NPDES permit only if the CAFO “discharges or proposes to discharge.”¹¹¹ The '08 Rule eliminated the “potential to discharge” language that the Second Circuit held violated the CWA in *Waterkeeper*. The existence of a “proposed discharge” is determined by an objective assessment of the design, construction, operation, and maintenance of the CAFO.¹¹² In addition to the integrity of the CAFO operation, the assessment also considers local environmental conditions such as hydrology, topology, and the nearby man-made aspects of the CAFO.¹¹³

Under the '08 Rule, if the permitting agency concludes that a discharge is not possible or that the CAFO does not propose to discharge into waters of the United States (taking into account

¹⁰⁹ See Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the *Waterkeeper* Decision, 73 Fed. Reg. 70418, 70418 (Nov. 20, 2008) (codified at 40 C.F.R. pts. 9, 122, 412).

¹¹⁰ *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 741 (5th Cir. 2011).

¹¹¹ 73 Fed. Reg. at 70423.

¹¹² *Id.*

¹¹³ “Such an objective assessment would take into account not only the characteristics of the manmade aspects of the CAFO itself, but climatic, hydrological, topographical, and other characteristics beyond the operator’s control that impact whether the CAFO will discharge, given the design, construction, operation and maintenance of the CAFO.” 73 Fed. Reg. at 70424.

the factors set forth above), the CAFO does not have to apply for a permit, but it can voluntarily do so.¹¹⁴ If the CAFO does not voluntarily apply and discharges without permit coverage, the '08 Rule provides that the CAFO is liable for discharging without a permit in violation of the CWA.¹¹⁵

The United States Court of Appeals for the Fifth Circuit found that requiring permits for merely a proposed discharge is not within the EPA's authority.¹¹⁶ Looking to the dictionary, the Court found "propose" to encompass the concept of intent, while the EPA's definition in the Rule has nothing to do with the mindset of the CAFO and everything to do with the design, structure, and environmental setting of the CAFO.¹¹⁷ In 2009, the Eighth Circuit held that "[b]efore any discharge, there is no point source."¹¹⁸ Because only "actual discharges" can be regulated under the NPDES, the Fifth Circuit held that the "propose to discharge" permit requirement of the '08 Rule is beyond the CWA's delegation of authority to the EPA and therefore invalid.¹¹⁹

The Court confirmed "a discharging CAFO has a duty to apply for a permit," holding "that the EPA cannot impose a duty to apply for a permit on a CAFO that 'proposes to discharge' or any CAFO before there is an *actual* discharge. However it is within the EPA's province, as contemplated by the CWA, to impose a duty to apply on CAFOs that are discharging."¹²⁰ The

¹¹⁴ 73 Fed. Reg. at 70426.

¹¹⁵ *Id.*

¹¹⁶ 635 F.3d at 751.

¹¹⁷ *Id.* at 750.

¹¹⁸ *Service Oil, Inc. v. United States Environmental Protection Agency*, 590 F.3d 545, 550 (8th Cir. 2009).

¹¹⁹ 635 F.3d at 750-51.

¹²⁰ *Id.* at 751.

Court found that the EPA could not impose liability for the failure to obtain a permit in and of itself, although the CAFO will always be potentially liable for any actual discharges in violation of the CWA.¹²¹ Although claims were brought in *National Pork* contesting the inclusion of the NMP terms in the permit, those claims were time barred and the Court found it was without jurisdiction to address those arguments.¹²² Therefore, the portion of the rule that required NMPs to be included as effluent limitations in the CAFO NPDES permit (in accordance with the Second Circuit *Waterkeeper* decision) was upheld as compliant with the CWA.

D. The Existing Federal CAFO Rule

In 2012, following the Fifth Circuit's decision in *National Pork Producers Council*, the EPA published a Final Rule on the NPDES requirements for CAFOs ('12 Rule), the rule which remains in effect today.¹²³ Under the existing rule, a "CAFO must not discharge unless the discharge is authorized by an NPDES permit."¹²⁴ The regulation clearly states that all Medium and Large CAFOs must have a permit before actively discharging and cannot discharge without a permit.¹²⁵ Therefore, heeding the direction of the Second and Fifth Circuit Courts of Appeals, the EPA requires CAFOs that are actually discharging to be covered by an NPDES Permit. There is no requirement for CAFOs who have the potential to discharge or that propose to discharge be covered by an NPDES permit if they are not actively discharging into navigable waters. The '12

¹²¹ *Id.* at 753.

¹²² *Id.* at 754.

¹²³ National Pollutant Discharge Elimination System Permit Regulation for Concentrated Animal Feeding Operations: Removal of Vacated Elements in Response to 2011 Court Decision, 77 Fed. Reg. 44494, 44494 (July 30, 2012) (codified at 40 C.F.R. pt. 122).

¹²⁴ See 40 C.F.R. § 122.23(d)(1) (2013).

¹²⁵ *Id.* at § 122.23(d)(1); § 122.23(h)(1).

Rule maintains the original requirement that all CAFOs subject to the NPDES permit requirement for the land application of manure, litter or process wastewater must do so in accordance with the terms of an approved Nutrient Management Plan.¹²⁶ In addition, permitted CAFOs¹²⁷ must implement a panoply of Best Management Practices.¹²⁸

E. Ecology’s Authority to Issue the CAFO General Permit & Prevent the Discharges of Pollutants to Surface and Ground Waters in Washington

Washington has a long legal history of prohibiting the discharge of pollutants into waters of the state. The public’s interest in clean water is explicitly clear. “[A]ll waters within the state belong to the public”¹²⁹ The state’s water code, RCW 90.03, declares that:

It is the policy of the state to promote the use of the public waters in a fashion which provides for obtaining maximum net benefits arising from both diversionary uses of the state's public waters and the retention of waters within streams and lakes in sufficient quantity and quality to protect instream and natural values and rights.¹³⁰

The state’s Water Pollution Control Act, RCW 90.48 declares the following public policy:

It is declared to be the public policy of the state of Washington to maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of wild life, birds, game, fish and other aquatic life, and the industrial development of the state, and to that end require the use of all known available and reasonable methods by industries and others

¹²⁶ 40 C.F.R. § 412.4(c)(1).

¹²⁷ This section applies to CAFOs with Dairy and Beef Cattle other than Veal Calves, Swine, Poultry, and Veal Calves), but not horse, sheep or duck CAFOs. 40 C.F.R. Subpart A, B.

¹²⁸ Best Management Practices (“BMPs”) have not changed since the ’03 Rule. *See* 40 C.F.R. § 412(c)(2)-(5) (2003); 40 C.F.R. § 412(c)(2)-(5) (2012).

¹²⁹ RCW 90.03.010.

¹³⁰ RCW 90.03.005.

to prevent and control the pollution of the waters of the state of Washington. Consistent with this policy, the state of Washington will exercise its powers, as fully and as effectively as possible, to retain and secure high quality for all waters of the state. The state of Washington in recognition of the federal government's interest in the quality of the navigable waters of the United States, of which certain portions thereof are within the jurisdictional limits of this state, proclaims a public policy of working cooperatively with the federal government in a joint effort to extinguish the sources of water quality degradation, while at the same time preserving and vigorously exercising state powers to insure that present and future standards of water quality within the state shall be determined by the citizenry, through and by the efforts of state government, of the state of Washington.¹³¹

In 1984, the Washington Supreme Court recognized that “[t]he provisions of [RCW 90.48] have for many years required permits for the discharge of pollutants into waters of the state.”¹³² The

Water Resources Act of 1971 declares:

(3) The quality of the natural environment shall be protected and, where possible, enhanced as follows: (a) Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served. (b) Waters of the state shall be of high quality. Regardless of the quality of the waters of the state, all wastes and other materials and substances proposed for entry into said waters shall be provided with all known, available, and reasonable methods of treatment prior to entry. Notwithstanding that standards of quality established for the waters of the state would not be violated, wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except in those

¹³¹ RCW 90.48.010.

¹³² *Miotke v. City of Spokane*, 101 Wn.2d 307, 321, 678 P.2d 803 (1984).

situations where it is clear that overriding considerations of the public interest will be served.¹³³

Specifically in regards to groundwater,

The legislature hereby declares that *the protection of groundwater aquifers* which are the sole drinking water source for a given jurisdiction *shall be of the uppermost priority* of the state department of ecology, department of social and health services, and all local government agencies with jurisdiction over such areas. In administration of programs related to the disposal of wastes and other practices which may impact water quality, the department of ecology, department of social and health services, and such affected local agencies *shall explore all possible measures for the protection of the aquifer, including any appropriate incentives, penalties, or other measures designed to bring about practices which provide for the least impact on the quality of the groundwater.*¹³⁴

Ecology is obligated to “maintain the highest quality of the state’s ground waters and protect existing and future beneficial uses of the ground water through the reduction or elimination of the discharge of contaminants to the state’s ground waters.”¹³⁵

EPA delegated the NPDES permit program to Washington in 1973.¹³⁶ “Once authority is transferred, then state officials—not the federal EPA—have the primary responsibility for reviewing and approving NPDES discharge permits, albeit with continuing EPA oversight.”¹³⁷

¹³³ RCW 90.54.020(3).

¹³⁴ RCW 90.54.140 (emphasis added).

¹³⁵ WAC 172-200-010(4).

¹³⁶ 39 Fed. Reg. 26,061 (July 16, 1974).

¹³⁷ *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 650 (2007).

The state must advise the EPA of each permit it proposes to issue, and the EPA may object to any permit.¹³⁸

If the state does not adequately address EPA's concerns, authority over the permit reverts to the EPA.¹³⁹ Under Washington law

The department of ecology is hereby designated as the state water pollution control agency for all purposes of the federal clean water act as it exists on February 4, 1987, and is hereby authorized to participate fully in the programs of the act as well as to take all action necessary to secure to the state the benefits and to meet the requirements of that act The department of ecology may delegate its authority under this chapter, including its national pollutant discharge elimination permit system authority and duties regarding animal feeding operations and concentrated animal feeding operations, to the department of agriculture through a memorandum of understanding. *Until any such delegation receives federal approval, the department of agriculture's adoption or issuance of animal feeding operation and concentrated animal feeding operation rules, permits, programs, and directives pertaining to water quality shall be accomplished after reaching agreement with the director of the department of ecology.* Adoption or issuance and implementation shall be accomplished so that compliance with such animal feeding operation and concentrated animal feeding operation rules, permits, programs, and directives will achieve compliance with all federal and state water pollution control laws.¹⁴⁰

Washington has other laws on the books specifically prohibiting the discharge of human and animal waste into waters of the state due to the deleterious public health effects of such waste. For example, with respect to cities and their drinking water:

Any city not located on tidewater, having a population of one

¹³⁸ 33 U.S.C. §§ 1342(d)(1), (2).

¹³⁹ *Id.* § 1342(d)(4); *Hawaii Wildlife Fund v. Cty. of Maui*, ___ F. Supp.2d ___ (May 30, 2014).

¹⁴⁰ RCW 90.48.260(1) (emphasis added).

hundred thousand or more, is hereby prohibited from discharging, draining or depositing, or causing to be discharged, drained or deposited, any . . . feculent matter . . . refuse, filth, or any animal, mineral, or vegetable matter or substance, offensive, injurious or dangerous to health, into any springs, streams, rivers, lakes, tributaries thereof, wells, or into any subterranean or other waters used or intended to be used for human or animal consumption or for domestic purposes.¹⁴¹

Notably, "[h]ighly concentrated manure, such as swine waste slurries, exhibit a [biological oxygen demand] of 20,000 to 30,000 mg per liter, which is about 75 times more concentrated than raw human sewage and more than 500 times more concentrated than the treated effluent from the average municipal wastewater treatment facility."¹⁴² Indeed,

Large farms can produce more waste than some U.S. cities— a feeding operation with 800,000 pigs could produce over 1.6 million tons of waste a year. That amount is one and a half times more than the annual sanitary waste produced by the city of Philadelphia, Pennsylvania. Annually, it is estimated that livestock animals in the U.S. produce each year somewhere between 3 and 20 times more manure than people in the U.S. produce, or as much as 1.2 to 1.37 billion tons of waste. Though sewage treatment plants are required for human waste, no such treatment facility exists for livestock waste.¹⁴³

Furthermore, the Washington legislature has explicitly directed the Washington State Board of Health to regulate the storage of animal waste to protect human health:

In order to protect public health, the state board of health shall:
Adopt rules and standards for prevention, control, and abatement

¹⁴¹ RCW 35.88.080.

¹⁴² Pew Commission, *Putting Meat on the Table: Industrial Farm Animal Production in America*, available at http://www.ncifap.org/_images/PCIFAPFin.pdf (last visited November 17, 2014).

¹⁴³ Hribar, *Understanding Concentrated Animal Feeding Operations and Their Impact on Communities*, available at http://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf (last visited November 17, 2014).

of health hazards and nuisances related to the disposal of human and animal excreta and animal remains.¹⁴⁴

The Board's statutory obligation to protect public health from pollutants caused by the keeping of animals is an affirmative delegation of state police power to the Board to protect public health.

The legislature has directed all local boards of health and health officers, among other state and local officials, to enforce the regulations promulgated by the Board of Health to carry out this duty.¹⁴⁵ There are numerous other county ordinances regulating the keeping of both animal and human wastes.¹⁴⁶ While there are clearly statutory obligations to protect human health and the environment from water pollution caused by CAFO manure, only Ecology has the authority and obligation to ensure that such pollution is not discharged into waters of the state, absent a permit.

Under Washington's permit program for discharges to the surface waters of the state:

“[n]o pollutants shall be discharged to any surface water of the state from a point source, except as authorized by an individual permit . . . or . . . by a general permit.¹⁴⁷ Anyone “presently discharging pollutants to surface waters of the state must file [a permit application].”¹⁴⁸ Anyone that proposes to start discharging pollutants to surface waters has to file a permit application within 180 days of the discharge commencement or with enough time to allow Ecology to ensure

¹⁴⁴ RCW § 43.20.050(2)(c) (2013).

¹⁴⁵ RCW 43.20.050(5).

¹⁴⁶ *See, e.g.*, KCBOH Ordinance 2010-1 §305(1) (Kitsap County); SCC 14.34.100(2)(f), SCC 14.24.120(1), SCC 14.04.020 (Skagit County); WCC 16.28, WCC 2.34 (Whatcom County).

¹⁴⁷ WAC 173-220-020; WAC 173-226-240(2) (stating that Ecology “may require any discharger to apply for and obtain an individual permit, or to apply for and obtain coverage under another more specific general permit.”).

¹⁴⁸ WAC 173-220-040(1).

compliance.¹⁴⁹ “No discharge of pollutants into the surface waters of the state is authorized until such time as a permit has been issued.”¹⁵⁰

The definition of “surface waters of the state” is the same as the EPA’s definition for purposes of the NPDES permit program, and “includes lakes, rivers, ponds, streams, inland waters, wetlands, ocean, bays, estuaries, sounds, and inlets.”¹⁵¹ A CAFO is considered a point source under the state NPDES regulations.¹⁵² “Discharge of pollutants” is defined as “any addition of any pollutant or combination of pollutants to surface waters of the state from any point source [or] any addition of [pollutants] to the waters of the contiguous zone or the ocean from any point source.”¹⁵³ Ecology defers to the EPA’s definition of a CAFO, stating that a CAFO is “an animal feeding operation that meets the criteria in Appendix B of 40 C.F.R. 122 as presently enacted and any subsequent modifications thereto.”¹⁵⁴ Under the Dairy Nutrient Management Act, the Ecology Director “may designate any dairy animal feeding operation as a concentrated dairy animal feeding operation upon determining that it is a significant contributor of pollution to the surface or ground waters of the state,” considering the same factors set forth under federal law.¹⁵⁵

¹⁴⁹ WAC 173-220-040(2).

¹⁵⁰ WAC 173-220-040(7).

¹⁵¹ WAC 173-220-030(21).

¹⁵² WAC 173-220-030(18).

¹⁵³ WAC 173-220-030(5).

¹⁵⁴ Appendix B of 40 C.F.R. 122 is currently reserved by the EPA and has been since 2002. Appendix B refers to 40 C.F.R. §122.23, which states that the Director of the EPA can designate any animal feeding operation as a CAFO if he/she determines it to be a significant polluter, taking into account the size and location of the CAFO, the slope, vegetation, or rainfall in the area, and other relevant factors. 40 C.F.R. §122.23(c) (2002); WAC 173-224-030.

¹⁵⁵ RCW 90.64.020(1).

State law also requires CAFOs to be covered by the state Waste Discharge General Permit Program, which requires that any point source that discharges into waters of the state be covered under this general permit or an individual permit.¹⁵⁶ This general permit program is “designed to satisfy the requirements for discharge permits under [402(b)] of the [CWA].”¹⁵⁷ Section 402(b) of the CWA authorizes the states to oversee the NPDES permitting program.¹⁵⁸ Under the state Waste Discharge General Permit Program, “waters of the state” includes groundwater.¹⁵⁹

In addition to, or in lieu of, coverage under the CAFO General NPDES/State Discharge Permit, CAFOs that are directly discharging to groundwater should be covered by an individual state waste discharge permit. Ecology has the authority to do this for point sources already covered by the General Permit Program.¹⁶⁰ CAFOs, as industrial operations and known dischargers into ground waters of the state, must be covered by individual state waste discharge permits.¹⁶¹ “Industrial wastewater” is defined under the state discharge permit program as “water or liquid-carried waste from industrial processes . . . [that may result] from animal operations such as feed lots, poultry houses, or dairies.”¹⁶² Most importantly, contaminated stormwater is

¹⁵⁶ WAC 173-226-020.

¹⁵⁷ WAC 173-226-010.

¹⁵⁸ 33 U.S.C. § 1342(b).

¹⁵⁹ RCW 90.48.020; WAC 173-226-030(27).

¹⁶⁰ WAC 173-226-240(2) (“[Ecology] may require *any discharger* to apply for an individual permit” (Emphasis added)).

¹⁶¹ WAC 173-216-010(1) (“applicable to discharge of waste materials from industrial, commercial, and municipal operations”).

¹⁶² WAC 173-216-030(8).

considered industrial wastewater, similarly subject to the permit requirements.¹⁶³ CAFOs' manure lagoons, by leaking and discharging waste directly into the ground waters of the state are producing industrial wastewater.¹⁶⁴ The over-application of manure onto fields under the CAFOs' control is resulting in the discharge of industrial wastewater into surface and ground waters of the state. Because Ecology has been granted the authority to issue NPDES permits and/or state waste discharge permits, it is the only agency responsible for ensuring that CAFOs, as clearly identified point sources, do not discharge pollutants into the surface waters or groundwater of the state absent a permit.

In 1998, the Washington Legislature passed the Dairy Nutrient Management Act (“DNMA”):

to establish a clear and understandable process that provides for the proper and effective management of dairy nutrients that affect the quality of surface or ground waters in the state of Washington It is also the intent of this chapter to establish an inspection and technical assistance program for dairy farms to address the discharge of pollution to surface and ground waters of the state that will lead to water quality compliance by the industry.¹⁶⁵

While the DNMA retained Ecology's authority to designate any dairy AFO as a CAFO “upon determining that it is a significant contributor of pollution to the surface or ground waters of the state,”¹⁶⁶ it transferred the dairy water quality inspection program to the Washington State

¹⁶³ *Id.*

¹⁶⁴ *See Comm’y Ass’n for Restoration of the Env’t. et al. v. Cow Palace, LLC et al.*, No. 13-CV-3016-TOR (Order Re: Cross Motions for Summary Judgment) (Jan. 14, 2015) at 27-29, 93-94.

¹⁶⁵ RCW 90.64.005.

¹⁶⁶ RCW 90.64.020.

Department of Agriculture.¹⁶⁷ The inspections are intended to find evidence of violations, to “identify corrective actions for actual or imminent discharges that violate or could violate the state’s water quality standards; [m]onitor the development and implementation of dairy nutrient management plans;” and to provide “technical assistance” to dairies in need.¹⁶⁸ The Legislature directed WSDA to prioritize inspecting those dairy farms based upon its “proximity to impaired waters of the state; and proximity to all other waters of the state.”¹⁶⁹ The Act requires all dairy farms in the state to prepare a Nutrient Management Plan, which must be updated each and every time it “fails to prevent the discharge of pollutants to waters of the state.”¹⁷⁰ The Conservation Commission was directed to “develop a document clearly describing the elements that a dairy nutrient management plan must contain to gain local conservation district approval.”¹⁷¹

Even though the WA Dairy Nutrient Management Act transferred to WSDA Ecology’s inspection authority over dairy farms for water quality violations, a duty it had when EPA approved the state’s NPDES program, there has been no federal approval of any delegation of NPDES authority to the Washington Department of Agriculture.¹⁷² At this time, Ecology retains

¹⁶⁷ RCW 90.64.023.

¹⁶⁸ RCW 90.64.023(1).

¹⁶⁹ *Id.*

¹⁷⁰ RCW 90.64.026.

¹⁷¹ The Conservation Commission has created a short, one-page “Approval Checklist” that sets forth the minimum requirements for a Dairy NMP. *See* WSDA, Minimum Elements of A Dairy NMP, available at <http://agr.wa.gov/FoodAnimal/Livestock-Nutrient/DairyNutrientMgmtPlans.aspx> (last visited Dec. 11, 2014); RCW 90.64.026(2).

¹⁷² Because of the horrific water quality conditions in the Nooksack River Basin primarily due to the discharges of manure from dairy CAFOs, on October 10, 2014, the Lummi Indian Nation formally asked the EPA to rescind EPA’s delegation to Ecology of NPDES permit authority related to CAFOs. On December 9, 2014, the EPA responded by stating that “CWA Section

the exclusive state authority and obligation to issue the WA CAFO General/State Discharge Permit, but WSDA conducts the inspections and makes enforcement recommendations.¹⁷³

G. All Medium and Large CAFOs are Discharging to Ground Water and Hydrologically Connected Surface Waters Due to Leaking Manure Lagoons & Over-Application of Manure

In a letter sent to Ecology staff member Kelly Susewind on June 5, 2014, we provided the agency with a summary of the science demonstrating that all Medium and Large CAFOs are discharging into waters of the state through leaking lagoons, the over-application of manure and the use of other manure management practices. In that letter, which is incorporated by reference herein, we urged Ecology to include groundwater monitoring as a WA CAFO Permit condition given the tremendous amount of scientific data linking CAFO manure management practices to groundwater contamination. Since that time, even more data has been gathered illustrating not only the need for groundwater monitoring in the permit, but the fact that all Medium and Large CAFOs are discharging and thus should be subject to permit coverage.

402(c)(3) and (4) does not allow for the withdrawal of only the CAFO portion of a state's NPDES permit program. Instead, the entire NPDES program may be withdrawn if the Administrator determines that the state no longer complies with the requirements of the federal regulations and fails to take corrective actions." Letter from Dennis McLerran, Regional Administrator EPA Region 10 to Merle Jefferson, Executive Director of Lummi Natural Resources Department (Dec. 9, 2014).

¹⁷³ On November 15, 2011, Ecology and WSDA entered into a Memorandum of Understanding outlining how the two agencies will work together "to assure water quality compliance related to livestock activities." See Memorandum of Understanding Between the WA State Department of Agriculture and the WA State Department of Agriculture (Nov. 15, 2011), *available at* <http://www.ecy.wa.gov/programs/wq/permits/cafo/docs/11152011MouEcyWsda.pdf> (last visited Dec. 11, 2014); RCW 90.64.120; RCW 90.64.901.

Most significantly, on January 14, 2015, Judge Rice in the Eastern District of Washington issued a landmark opinion finding that a large CAFO in Eastern Washington (Cow Palace Dairy) is liable for groundwater contamination under the Resource Conservation and Recovery Act (“RCRA”), “a comprehensive statute that governs the treatment, storage, and disposal of solid and hazardous waste”¹⁷⁴ Specifically, “this Court finds no genuine issue of material fact that Defendants’ application, storage, and management of manure at Cow Palace Dairy violated RCRA’s substantial and imminent endangerment and open dumping provisions and that all Defendants are responsible under RCRA.”¹⁷⁵

The Court recognized that “although the parties dispute the magnitude of leakage, the fact that the lagoons leak is not genuinely in dispute.” *Id.* at 27; 29 (“Although Defendants dispute the rate of seepage and nitrate accumulation around and beneath the lagoons, the parties do not genuinely dispute that both events are occurring.”); 29 (Defendants’ own expert testified “that he has never seen a study showing ‘there is no seepage from a lagoon.’”); 94 (“Plaintiffs have presented indisputable evidence that such leaking is leading to dangerous accumulations of nitrates in the deep soil between the lagoons that eventually will reach the underlying aquifer there can be no dispute that the lagoons are leaking and thus allowing nitrate to accumulate in the soil at rates possibly higher than three million gallons per year.”). The Court also acknowledged that “even assuming the lagoons were constructed pursuant to NRCS standards, these standards

¹⁷⁴ *Mehrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996).

¹⁷⁵ *Comm’y Ass’n for Restoration of the Env’t. et al. v. Cow Palace, LLC et al.*, No. 13-CV-3016-TOR (Order Re: Cross Motions for Summary Judgment) (Jan. 14, 2015) at 109.

specifically allow for permeability and thus, the lagoons are designed to leak.”¹⁷⁶ Not only are the lagoons leaking, but “potentially at the rate of millions of gallons annually”¹⁷⁷

The Court unequivocally held that “[Cow Palace Dairy’s] activities are contributing to the contamination of the groundwater” and thus there was clear evidence that the Dairy was discharging to the waters of this state. The Court found “there is no triable issue that when Defendants excessively over-apply manure to their agricultural fields – application that is untethered to the DNMP and made without regard to the fertilization needs of their crops – they are discarding the manure and thus transforming it to a solid waste under RCRA,” let alone discharging pollutants into the waters of the state.¹⁷⁸ The Court went onto find that the nitrate from the manure generated by the “Dairy’s operations are contributing to the high nitrate levels in the groundwater.”¹⁷⁹ Notably, Cow Palace Dairy is not covered by the CAFO General Permit in

¹⁷⁶ *Id.* at 93. *See also* RCW 90.64.026(3) (stating that “in developing the elements that an approved dairy nutrient management plan must contain” the methods and technologies must be those developed by the NRCS, or alternative standards that “meet the standards and specifications of (a) The [NRCS]; or (b) a professional engineer with expertise in the area of dairy nutrient management.”). Here in Washington, the only standards that exist regarding dairy lagoon construction are those standards established by the NRCS and thus the fact that lagoons leak even when designed in accordance with NRCS standards is further evidence of the fact that all Medium and Large CAFOs with manure lagoons are discharging into waters of the state and thus should be covered by a discharge permit.

¹⁷⁷ *Id.* at 94.

¹⁷⁸ *Id.* at 88.

¹⁷⁹ *Id.* at 97 (“there can be no genuine dispute that the nitrates beneath the crop root zones at the Dairy will continue to migrate through the vadose zone to the underlying aquifer.”); 98 (“As such, given the highly mobile nitrates found below the crop root zones as well as the highly permeable soils underlying the Dairy, the nitrates will migrate to the aquifer with water, be it from rainfall, snowmelt, irrigation practices, or more liquid manure to help transport it.”); 100 (“Accordingly, a reasonable trier-of-fact, given the evidence presented, could come to no other

spite of the overwhelming evidence that it is actively discharging into and polluting the groundwater in the Lower Yakima Valley.

Judge Rice's ruling in the *CARE, et al v. Cow Palace, LLC, et al.* case not only confirms the widespread nature of discharges coming from CAFOs in Washington, but it also serves as an illustration of regulatory failure to address the rampant pollution caused by CAFOs. The Washington Department of Agriculture's Dairy Nutrient Management Program was charged "to address the discharge of pollution to surface and ground waters of the state [to] lead to water quality compliance by the industry."¹⁸⁰ On June 21, 2007, WSDA completed an inspection report regarding the same Cow Palace Dairy that caused and contributed to the significant groundwater contamination described in Judge Rice's decision.¹⁸¹ In that report, the WSDA inspector said: "Nice clean well run facility. Collection and storage is in great shape."¹⁸² Amazingly, the inspector went on to say: "Thanks for your attention to Nutrients!"¹⁸³ Needless to say, the citizens around the facility who have had to drink nitrate-contaminated drinking water for years are not so grateful. Had this facility been covered by a CAFO General permit that required groundwater monitoring, the pollution problem would have been detected by Ecology years ago.

conclusion than that the Dairy's operations are contributing to the high levels of nitrate that are currently contaminating – and will continue to contaminate as nitrate present below the root zone continues to migrate - the underlying groundwater.”).

¹⁸⁰ RCW 90.64.005.

¹⁸¹ WSDA Livestock Nutrient Management Program Inspection Report for Cow Palace Dairy (June 21, 2007).

¹⁸² *Id.* at 3.

¹⁸³ *Id.*

In December 2014 the EPA issued an Update to its Administrative Order on Consent (“AOC”) with several dairies, including Cow Palace, in the Lower Yakima Valley.¹⁸⁴ This update “provide[s] further support for th[e] conclusion” “that the Dairies are a source of the nitrate measured in downgradient monitoring wells and residential drinking water wells.”¹⁸⁵ The EPA found that “[c]omparison of the nitrate levels in the upgradient monitoring wells with those along the downgradient edge of the Dairies properties indicate that there is heavy nitrate loading of the drinking water aquifer occurring within the Dairies’ footprint.”¹⁸⁶ The EPA recognized that “[i]t is unlikely that the effect of these Dairies on the groundwater is unique in the Lower Yakima Valley. EPA suspects that there are other dairies that similarly contribute significant amounts of nitrate to groundwater.”¹⁸⁷ Again, none of these dairy CAFOs, that EPA has unequivocally found to be discharging and polluting the groundwater of this state, are covered by the CAFO General Permit.

In July 2014, Ecology issued a new report that “presents three spreadsheet computer models that can be used to quantitatively predict the impact of residual or excess farm-field soil nitrate on the concentration of nitrate in underlying shallow aquifer.”¹⁸⁸ This report similarly

¹⁸⁴ Environmental Protection Agency, Yakima Dairies Consent Order Update (December 2014), *available at* http://www.epa.gov/region10/pdf/sites/yakimagw/consent_order_progress_update_dec2014.pdf (last visited Jan. 20, 2015).

¹⁸⁵ AOC Update at 7.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 9.

¹⁸⁸ Ecology, Spreadsheet Models for Determining the Influence of Land Applications of Fertilizer on Underlying Groundwater Nitrate Concentrations, Ecology Publication No. 14-03-018 (July 2014) at 5.

recognizes that “[g]roundwater quality characterization studies have identified significant regional-scale problems with nitrate contamination across Washington State. This contamination is often found in close association with nonpoint applications of nitrogen-bearing fertilizers or *animal manure to agricultural lands*. Due to the risk that nitrate poses to state drinking water supplies, determining the proper balance between nutrient application rates, crop uptake and nitrate loss to groundwater is a growing priority in Washington.”¹⁸⁹ With these findings, Ecology needs to act now to issue a new CAFO General Permit that requires universal coverage for all Medium and Large CAFOs in the state.

H. There Have Been Numerous Documented Discharges From Medium and Large CAFOs Across the State; Ecology has Failed to Require Permit Coverage Every Time

Not only does the science and case law confirm that the manner in which Medium and Large CAFOs apply, store and manage the massive amounts of manure they produce results in numerous discharges to surface and groundwater’s, state agency documents reveal a significant number of discharges to waters of the state by individual Washington CAFOs. For example, an internal Ecology document from the WA CAFO Permit file reviewed after a public records request collects AFO/CAFO Discharge Information: 2008-2010.¹⁹⁰ This document recognizes that “[d]ischarges to surface waters from CAFOs/AFOs has [sic] proven to be a significant problem.”¹⁹¹ The document goes on to describe 18 documented discharges in Whatcom County, 6

¹⁸⁹ *Id.* (emphasis added).

¹⁹⁰ Ecology, Author Unknown, AFO/CAFO Discharge Information: 2008-2010 (Attachment A).

¹⁹¹ *Id.* at 1.

documented discharges in the Northwest Region, 2 documented discharges in the Central Region, 3 documented discharges in the Eastern Region, and 1 documented discharge in the Southwest Region.¹⁹² Notably, none of these documented discharges resulted in coverage by the WA CAFO Permit. In a document produced by the WA Department of Agriculture, that agency documented 29 discharges from CAFOs in Whatcom County within the last few years. Again, none of these discharging CAFOs were required to be covered by the CAFO General permit.¹⁹³ In an email from Ecology employee Ron Cummings to other Ecology staff, Mr. Cummings provided “a list of facilities that [he had] received information about indicating a problem and/or facilities [they] are working to get covered under the CAFO permit (Puget Sound Region).”¹⁹⁴ On this list are 16 CAFOs, all of which have documented discharges into Puget Sound, and again none of which were required to get permit coverage.¹⁹⁵

Ecology’s own CAFO files are filled with instances of documented discharges from CAFOs within the state of Washington. On April 12, 2010, Bartelheimer Brothers Dairy in Snohomish County had a lagoon failure that discharged 27 million gallons of manure into nearby farm fields and surface water ways. In April 2008, Blok Evergreen Dairy had a discharge into a tributary of the Nooksack River after a field application of manure. In April 2009, Art Vander Waal Dairy had a land application discharge into Bone Creek, which flows into the Sumas River. In August 2010, Krainick Dairy in King County had a discharge into a tributary to Newaukum

¹⁹² *Id.*

¹⁹³ (Attachment B).

¹⁹⁴ Email from Ron Cummings to Melissa Gildersleeve et al. (July 7, 2009).

¹⁹⁵ *Id.*

Creek. In February 2009, Noteboom Farms had a lagoon failure that caused a discharge into a ditch that feeds the Nooksack River. In February 2013, an inspection revealed that Noteboom Farms built a new lagoon, not in compliance with NRCS standards and with no regulatory approval, and the inspector concluded that seepage from the lagoon into groundwater was highly likely. In March 2013, Plowman Dairy in Whatcom County had a discharge into Smith Prairie Road ditch. In October 2013, the Pomeroy Farm had a discharge into California Creek that discharges into Drayton Harbor from an underground pipe used to transfer manure. In February 2011, Rhody Dairy in Whatcom County had a lagoon overflow and runoff from a calf manure waste pile that reached the Sumas River. In May 2009, Rockin' R Ranch in Skagit County had a discharge of manure and urine waste from a confinement yard through an underground pipe. The water sample that was collected showed "too many fecal coliform bacterial colonies to count." In November 2009, RTJ Dairy had a pump failure that resulted in a discharge into Drayton Harbor. From January-March 2014, Snookbrook Farms had a discharge of manure into Terrell Creek which resulted in a beach closure where the creek empties into the south end of Birch Bay. In February 2008, Robert Sterk Dairy had a discharge into Four Mile Creek in Whatcom County caused by a lagoon breach. In January 2009, Van Dyk Holsteins Dairy in Whatcom County had a discharge of manure solids into Scott Ditch that connects to the Nooksack River. In 2009, Van Ingen Dairy in Whatcom County had several discharges into a ditch that flows into Dakota Creek. In September 2009, an equipment failure at Vander Veen Dairy in Whatcom County led to a discharge into the Sumas River. In January 2009, Vander Haak Dairy had a silage leachate

discharge into Portage Bay. In November 2012, Edaleen Dairy in Whatcom County had a discharge into ditches that feed Bertrand Creek. In December 2013, Beaver Marsh Dairy applied liquid manure to a field that resulted in a discharge into Beaver Marsh Road Ditch that drains to the Skagit River. This is only a sample of the discharges that are reflected in Ecology files and do not include the numerous examples of conditions that are likely to lead to a discharge, such as NMP violations and application of manure to frozen or saturated ground. None of these discharges resulted in permit coverage.

In spite of this overwhelming evidence that CAFOs are actively discharging to waters of the state, only 1% are covered by a discharge permit. This is an unacceptable regulatory failure that can and must be corrected when Ecology issues the new WA CAFO General Permit. We are at a very significant point in time. The precious water resources in this state, and the people and wildlife that depend upon them, are in serious jeopardy due to pollution and climate change. The contamination of the ground water from dairy manure has created a public health crisis of the highest order. Our generation is presented with the same questions that we faced in the 1970s during the development and enactment of the modern Clean Water Act. Congress provided the answer by mandating that CAFOs are point sources that require discharge permits and that all discharges from point sources, including CAFOs, must be eliminated by 1985.¹⁹⁶ The question now facing Ecology is what legacy do we want to leave our children and grandchildren? We

¹⁹⁶ 33 U.S.C. § 1251(a)(1). The passage of the modern CWA in 1970 was largely spurred by “conclusions that thousands of industrial sources of water pollution were operating illegally without permits under the 1899 [Refuse] Act and that something should be done about it.” Rodgers, Environmental Law § 4.1.

cannot continue to disregard the regulatory tools prior generations put in place to solve the very same environmental problems we are faced with today. We respectfully request that when you issue a new draft of the WA CAFO General Permit, you require universal coverage for all Medium and Large CAFOs in the state of Washington.

Sincerely,

Andrea Rodgers
Attorney
Western Environmental Law Center

Charles M. Tebbutt
Attorney
Law Offices of Charles M. Tebbutt

AFO/CAFO Discharge Information: 2008 – 2010

Overview

- WSDA agreed to provide Ecology with discharge information in October 2008
 - Shortly after, Ecology began receiving notifications of discharges from WSDA
 - In early 2009, Ecology HQ worked to educate regional offices of the status of the state's "split program"
 - Roles and responsibilities that remained at Ecology
 - CAFO permit requirements
 - Ecology HQ took actions on selected discharges based on:
 - Resources
 - Scale and nature of discharge
- **Proceeded with caution until we understood how widespread the problem was and how much resources it would take
- Discharges to surface waters from CAFO/AFOs has proven to be a significant problem
- Over time, Ecology regional offices have increased their involvement with complaint responses, inspections and enforcement actions.
 - Positives:
 - Greater awareness of the problems
 - Water quality problems that previously went unaddressed where investigated
 - Negatives:
 - Inconsistent involvement
 - Inconsistent policies, actions and requirements e.g:
 - Decisions to require CAFO general permit or not
 - Misinterpretation of CAFO permit
 - Decision to issue administrative order with required BMPs or refer to CDs
 - Failure to consider existing statewide policies, state requirements and federal rules when making policy decisions
 - Lack of a programmatic plan to address workloads

Discharges by Regional Office

BFO - Whatcom County

1. Blok Evergreen (dairy) - 4/4/08 & 4/7/08
 - Field application – discharge
2. Edaleen Dairy 5/12/08
 - Land application – discharge
3. Eaglemill Farms (dairy) - 12/12/08
 - Silage leachate discharge
 - Risky application of manure solids

4. Van Dyk Holsteins (dairy) - 1/5/09

- Manure solids leading to discharge
5. Unnamed beef operation - 1/6/09
 - Application to snow
 - High potential for runoff – referred to Ecology by WSDA
 6. Coldstream Farms LLC#2 (dairy) – 1/16/09
 - Leaking storage pond – discharge
 7. Vander Haak Dairy – 1/22/09
 - Silage leachate discharge
 8. Robert Sterk (dairy) - 2/2/08
 - Beached lagoon – discharge
 - Evidence of prior discharges to surface waters
 9. Dan Noteboom Dairy 2/12/09
 - Dike breached during Nooksack flooding
 10. Bel-Lyn Farms (dairy) – 3/3/09
 - Discharge via tile lines
 11. Non-dairy Field Application (name unknown) – 3/18/09
 - Land application discharge
 12. Van Ingen (dairy)/Pete Bruinsma – 3/18/09
 - Land application area – discharge
 13. Al-Mar (dairy) – 3/25/09
 - Silage leachate
 14. Art VanderWaal (dairy) - 4/13/09 & 4/15/09
 - Land application – discharges
 15. RTJ (dairy) - 11/17/09
 - Pump failure – discharge
 16. James Heeringa (dairy) 10/26/09
 - Field application – discharge
 17. Pete Bruinsma - 12/23/09
 - Manure solids picked up from Van Ingen Dairy
 - Field observations suggest discharge
 18. Rockin R Ranch – Buffalo Ranch – date unknown
 - Discharge from confinement area Manure solids picked up from Van Ingen Dairy

NWRO

19. Dynes Farms (Poultry) – ongoing
 - Surface water discharge from land application of manure
20. DeVries Dairy – 11/3/08
 - Surface water discharge resulting from land application of manure
21. Allan Thomas Dairy – 5/12/09 (Enumclaw)
 - Surface water discharge resulting from land application of manure
22. VanderVeen (dairy) – 9/16/09
 - Equipment failure – discharge to Samish River
23. Bartelheimer Bros. Dairy – 4/12/10
 - Lagoon failure
24. Krainick – June 2010
 - Application to broken culvert

CRO

25. Oord Dairy - 3/14/08 to 3/17/08
 - Equipment failure – discharge
26. DeRuyter Bros. – 3/26/10
 - Land application – discharge to irrigation ditch

ERO

27. Hutterian (non-dairy) – March 2009
 - Illegal impoundment – discharge to impoundment
28. English Ranch – March/ April 2009
 - Discharge from confinement area
29. Wilkenson Dairy – March/April 2009
 - Livestock access to stream

SWRO

30. Vern Anderson Dairy – 6/18/2010
 - Drainage ditch discharge

Issuing CAFO Permit

- Issuing CAFO permit coverage has been difficult because of:

- Lack of resources to review and approve NMPs
- Lack of necessary programmatic support tools to streamline the permitting process e.g.:
 - Templates
 - Fact sheets
 - Updated website with NMP guidance
 - CAFO permit policies clarified
 - Ecology has limited experience issuing coverage – as a result, limited permit interpretation has occurred and policy decisions require upper management and attorney general discussions
- Requirement to receive an “acceptable NMP” prior to issuing cover, and
- Failure of applicant to submit an “acceptable NMP” that meets the requirements of the CAFO permit
 - Frequent NMP errors and omissions include:
 - Failure to include necessary BMPs to protect surface and groundwater
 - NRCS standards not followed
 - Permit requirement not met
 - Vegetative application field buffers not included in plan or too narrow
 - Inadequate setbacks
 - Lack of leaching and runoff analysis
 - Lack of updated soil information
 - Failure to include all application acreage needed to accommodate the amount of manure produce on the farm
 - Lack of application acreage needed to achieve agronomic application rates
 - Requires facilities to develop land application agreements with landowners in the vicinity of operation – time consuming
 - Misuse or misinterpretation of “transfer” language in permit

AgID	Size/notes		Business Name	Last Name	Administrative			Docket Id	Penalty Assessed	Penalty Settlement	Penalty Paid	Incident Date	RFE Received	Year	Issue Date	Compliance Category
					Environmental	Action Type	Action Note									
2064	out of business	Sumas	AL-MAR DAIRY	Huttema	Environmental	NOC-D	Notice	09-1015				10-Oct-08	30-Jul-09	2009	3-Sep-09	CS: Collection System
8501	out of business	Sumas	DE BRUIN DAIRY	De Bruin	Environmental	NOC-D	Notice	09-1002				14-Oct-08	23-Dec-08	2009	6-Jan-09	CS: Collection System
9948	medium	Sumas	EVER-LYN FARM	Plagerman	Environmental	NOC-D	Notice	09-1003				11-Dec-08	10-Feb-09	2009	10-Mar-09	CS: Collection System
9520	large	Portage	VAN DYK S HOLSTEINS, LLC	Van Dyk	Environmental	NOC-D	Notice	09-1006				5-Jan-09	24-Feb-09	2009	15-Apr-09	L AFC: Land Application: Field Conditions
9728	medium	Portage	EAGLEMILL FARMS	DeJong	Environmental	NOC-D	Notice	09-1004				15-Jan-09	12-Feb-09	2009	10-Mar-09	LS: Lagoon Storage
2163	out of business, moved	Portage	VANDER HAAK FARM (Tim)	Vander Haak	Environmental	NOC-D	Notice	09-1008				22-Jan-09	31-Mar-09	2009	23-Apr-09	CS: Collection System
2200	small	Portage	STERK DAIRY	Sterk	Environmental	NOP-D	Penalty	09-5001	\$5,000	\$1,000	\$1,000	30-Jan-09	6-May-09	2009	30-Jul-09	EM: Equipment Malfunton
5981	medium	Portage	BEL-LYN FARMS	Plagerman	Environmental	NOC-D	Notice	09-1009				6-Mar-09	6-Apr-09	2009	4-May-09	L AFC: Land Application: Field Conditions
9962	large	Sumas	ART VANDER WAAL DAIRY	Vander Waal	Environmental	NOV-D	Notice	09-1011				13-Apr-09	5-May-09	2009	30-Jun-09	L AFC: Land Application: Field Conditions
5060	large	Sumas	JAMES HEERINGA DAIRY	Heeringa	Environmental	NOC-D	Notice	09-1018				13-Oct-09	6-Nov-09	2009	16-Dec-09	L AFC: Land Application: Field Conditions
9230	medium	Drayton	R T J FARM LLC	Tjoelker	Environmental	NOP-D	Penalty	10-5001	\$1,000	\$500	\$500	17-Nov-09	22-Dec-09	2010	30-Apr-10	EM: Equipment Malfunton
9230	medium	Drayton	R T J FARM LLC	Tjoelker	Environmental	NOC-D	Notice	11-6006				3-Mar-11	15-Mar-11	2011	25-Apr-11	L AFC: Land Application: Field Conditions
9887	small	Sumas	Breckenridge Farm	Gonser	Environmental	NOC-D	Notice	11-7001				19-Apr-11	3-May-11	2011	17-Jun-11	CS: Collection System
9005	large	Portage	EDALEEN DAIRY LLC	Moorlag	Environmental	NOP-D	Penalty	13-5001	\$9,000	\$2,500	\$2,500	30-Aug-12	5-Feb-13	2013	29-Mar-13	EM: Equipment Malfunton
9005	large	Portage	EDALEEN DAIRY LLC	Moorlag	Environmental	NOP-D	Penalty	13-5001	\$8,000	\$2,000	\$2,000	30-Aug-12	5-Feb-13	2013	29-Mar-13	CS: Collection System
74	medium	Sumas	Ed Bosscher Dairy #2	Bosscher	Environmental	NOC-D	Notice	13-6004				30-Oct-12	6-Mar-13	2013	15-Mar-13	L AFC: Land Application: Field Conditions
10002	large	Drayton	Western Waves LLC	Dougherty	Environmental	NOC-D	Notice	13-7000				10-Mar-13	15-Apr-13	2013	10-Jun-13	L AFC: Land Application: Field Conditions
9005	large	Portage	EDALEEN DAIRY LLC	Moorlag	Environmental	NOP-D	Penalty	13-5002	\$7,000	\$7,000	\$7,000	27-Mar-13	14-May-13	2013	2-Jul-13	EM: Equipment Malfunton
9726	small	Portage	Twin Brook Creamery	Stap	Environmental	NOC-D	Notice	13-7001				27-Mar-13	3-May-13	2013	19-Jun-13	LS: Lagoon Storage
4585	large	Drayton	POMEROY FARM LLC	Pomerooy	Environmental	NOP-D	Penalty	14-5001	\$6,000	\$3,000	\$3,000	16-Oct-13	15-Nov-13	2014	14-Jan-14	EM: Equipment Malfunton
2026	small	Birch Bay	Snookbrook Farms LLC	Snook	Environmental	NOP-D	Penalty	14-5004	24,000	\$3,000	Pending	31-Jan-14	28-Apr-14	2014	27-Jun-14	CS: Collection System
2026	small	Birch Bay	Snookbrook Farms LLC	Snook	Environmental	IA0	Order	14-8001				3-Feb-14		2014	28-Feb-14	LS: Lagoon Storage
9230	medium	Drayton	R T J Farm LLC	Tjoelker	Environmental	NOC-D	Notice	14-7004				12-Feb-14	5-Jun-14	2014	10-Jul-14	L AFC: Land Application: Field Conditions
4939	medium	Portage	R Bajema Farm Inc	Bajema	Environmental	NOP-D	Penalty	14-5003	\$4,000	\$2,000	\$2,000	19-Mar-14	28-Mar-14	2014	14-May-14	L AFC: Land Application: Field Conditions
5531	medium	Portage	LENSSEN DAIRY LLC	Lenssen	Environmental	NOC-D	Notice	14-7003				15-Apr-14	11-Jun-14	2014	30-Jun-14	L AFC: Land Application: Field Conditions
2026	small	Birch Bay	Snookbrook Farms LLC	Snook	Environmental	NOP-D	Penalty	14-5005	\$6,000	\$1,000	Pending	16-Apr-14	14-Jul-14	2014	13-Aug-14	CS: Collection System
2040	medium	Sumas	Vreugdenhil Farms LLC	Vreugdenhil	Environmental	NOC-D	Notice	14-7005				17-Apr-14	1-Jul-14	2014	5-Aug-14	L AFC: Land Application: Field Conditions
8114	small	Portage	Lagerwey Dairy	Lagerwey	Environmental	NOC-D	Notice	14-7002				5-May-14	20-May-14	2014	11-Jun-14	L AFC: Land Application: Field Conditions
8322	medium	Portage	RJ Blok and Sons LLC	Blok	Environmental	NOC-D	Notice	14-7006				9-May-14	6-Aug-14	2014	2-Sep-14	L AFC: Land Application: Field Conditions