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Via Electronic Mail

June 17, 2014

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Re: Recommendations For Amendment of WAC 16-06-201(29)

Dear Ms. Prest,

In response to your request of April 14, 2014, we are submitting additional recommendations as to how WAC 16-06-210(29) needs to be amended to come into conformance with all applicable law. These recommendations are in addition to, and do not supplant, the comments that we submitted on March 31 and April 14, 2014. We appreciate this additional opportunity to provide recommendations on the Washington Department of Agriculture's ("DOAs") rulemaking to revise the numeric ranges set forth in WAC 16-16-210(29). As we made clear in our initial comments, the Commenters are committed to ensuring that the waters of this state (ground and surface waters) are swimmable, fishable, and sufficiently clean for public consumption. In addition, the Commenters believe that the public has a right to the information they need to protect their interests in a clean and healthy environment for present and future generations and to ensure that government is fulfilling their obligations to protect the public interest, an obligation that has been woefully performed to date.

As we explained in our original comments, the existing ranges provided for in WAC 16.06.210(29) effectively create an exemption for five categories of information, all of which

are crucial pieces of information to ascertain (1) the extent of pollution coming from these operations; (2) whether the government is fulfilling its statutory obligations to protect public health and the environment; and (3) the extent to which these facilities are discharging pollutants into waters of the state without a permit. The five categories of information are (1) Number of animals; (2) volume of livestock nutrients generated; (3) number of acres covered by the plan or used for land application of livestock nutrients; (4) livestock nutrients transferred to other persons; and (5) crop yields. The Legislature has recognized the significance of these categories of information by directing that “meaningful information” about each category be provided to the public. RCW 42.56.610; 90.64.190.

In order to constitute “meaningful information,” the Department of Agriculture must release the *actual* number of animals, the *actual* volume of livestock nutrients generated, the *actual* number of acres covered by the plan or used for land application of livestock nutrients, the *actual* amount of livestock nutrients transferred to other person, and the *actual* crop yields. Otherwise, only the CAFOs and the agencies have the information needed to know what is going on and whether these facilities are operating within the bounds of the law. Because CAFOs are point sources under the federal Clean Water Act,¹ all of this information constitutes effluent data² that is required to be disclosed under section 308 of the federal Clean Water Act:

¹ Because all CAFOs are point sources and are discharging to waters of the state either by using lagoons that leak to contain their manure or by over-applying manure to fields, all should be required to be covered under the CAFO General Permit.

² “The term ‘effluent limitation’ means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.” 33 U.S.C. § 1362(11); *see also RSR Corp. v. Browner*, 924 F. Supp. 504, 508 (S.D. N.Y. 1996) (citing 40 C.F.R. § 2.302(a)(2)(i)(B)) (noting that EPA Regional Counsel defined “effluent data” as “information necessary to determine the amount, frequency, concentration, temperature, or other characteristics (to the extent related to water quality) of the pollutants which, under an

Any records, reports, or information obtained under this section (1) shall, in the case of effluent data, be related to any applicable effluent limitations, toxic, pretreatment, or new source performance standards, and (2) *shall be available to the public*, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof (*other than effluent data*), to which the Administrator has access under this section, if made public would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information, or particular portion thereof confidential in accordance with the purposes of section 1905 of Title 18.

33 U.S.C. § 1318(b) (emphasis added). As you can see from the plain language of the statute, there is no exemption for information claimed to be trade secret or confidential business information. Furthermore, WSDA has presented no justification, nor could it, to show that information contained within the five categories could possibly constitute confidential business information. 40 C.F.R. 2.302(e) (“[I]nformation which is effluent data . . . is not eligible for confidential treatment” under 40 C.F.R. § 2.208).

As we stated in our original comments, not only is this information crucial for purposes of the public interest (understanding how these operations affect inherent rights to a clean and healthy environment),³ but it is also imperative to ascertain whether the agencies are fulfilling their statutory responsibilities to protect public health and the environment from the pollution caused by dairies, AFOs and CAFOs. For example, under the Dairy Nutrient Management Act, Ecology has the authority and obligation to designate a dairy or AFO as a CAFO that discharges

applicable standard or limitation, the source was authorized to discharge (including, to the extent necessary for such purpose, a description of the manner or rate of operation of the source.”).

³ “The legislature recognizes and declares it to be the policy of this state, that it is a fundamental and inalienable right of the people of the state of Washington to live in a healthful and pleasant environment and to benefit from the proper development and use of its natural resources.” RCW 43.21A.010.

to waters of the state (and thus would be required to have a discharge permit) considering the following factors: (a) size of AFO and amount of wastes reaching waters; (b) location of the AFO relative to waters of the state; and (c) means of conveyance of pollutants to waters of the state. RCW 90.64.020. In essence, this is the same information that is excluded from public review pursuant to WAC 16.06.210(29), but is legally required to be disclosed under the Clean Water Act. Therefore, without that information, the public has no way to ascertain whether Ecology is fulfilling its responsibilities under RCW 90.64.020. *See RSR Corp.*, 925 F. Supp. At 508 (upholding EPA's determination that "the Wallkill Plant's monthly production rate constitute effluent data which is not entitled to confidential treatment . . .").

Similarly, the actual data for each of the five categories is critical to citizen participation in enforcement activities regarding how dairies, AFOs, and CAFOs are managed and operated. Without the actual and verifiable information on the number of animals, quantity of nutrients produced and acreage available for land application, citizens will not be able to understand whether the facility has waste storage available to contain the vast amount of waste generated. Nor will they be able to determine the degree to which an expansion of waste loads is feasible, including sufficiency of holding volumes during anticipated precipitation events, without likely environmental contamination or threat to public health. Citizens will also be without information in regards to how the animals are cared for given the size and nature of the operation. Access to all of this information is important for citizens and government as is made clear in the federal Clean Water Act.

Again, we appreciate the opportunity to comment on the proposed rulemaking regarding the DOA's Numeric Range Rule. We strongly urge DOA to revise WAC 16-16-210(29) to bring it into compliance with the law and so that it provides meaningful information to the public regarding agricultural sources of pollution that affect public health, the environment, animal welfare, and that contribute to climate change. Claims of trade secret in this context just don't hold water. Please do not hesitate to contact the undersigned if you have any

questions about these comments, or if you would like to discuss any of the issues raised herein further.

Sincerely,

A handwritten signature in black ink, reading "Andrea K. Rodgers Harris". The signature is written in a cursive style and is underlined.

Andrea K. Rodgers Harris
Of Counsel
Western Environmental Law Center
Charlie Tebbutt
Law Offices of Charles M. Tebbutt

On Behalf Of: Puget Soundkeeper Alliance, Center for Environmental Law & Policy, Community Association for the Restoration of the Environment, Concerned Citizens of the Yakama Reservation, the Friends of Toppenish Creek; Water & Salmon Committee Sierra Club WA State Chapter, Socially Responsible Agriculture Project

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