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## Western Environmental Law Center

*Via Electronic Mail*

March 31, 2014 & April 14, 2014

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**Re: Revised Comments on WSDA's Rulemaking to Re-examine Numeric Ranges in WAC 16-16-210(29)**

Dear Ms. Prest,

I am submitting a revised version of the following comments that were previously submitted to you on March 31, 2014. The comments are substantively identical to the version of the comments that we submitted on March 31, but the comments are being submitted on behalf of one more organization, Socially Responsible Agriculture Project.

Puget Soundkeeper Alliance (Soundkeeper), the Center for Environmental Law & Policy (CELP), Community Association for the Restoration of the Environment (CARE), Orca Conservancy, Concerned Citizens of the Yakama Reservation (CCYR), Friends of Toppenish Creek, the Water & Salmon Committee of the Washington State Chapter of the Sierra Club, and the Socially Responsible Agriculture Project (SRAP) (collectively the Commenters) appreciate the opportunity to review and provide comment on the Washington Department of Agriculture's ("DOAs") rulemaking to revise the numeric ranges set forth in WAC 16-16-210(29). 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.

The Commenters believe DOA has an opportunity to correct the deficiencies in the existing regulation to bring it into compliance with the language and spirit of the law. In order to fulfill the purposes of the Washington Public Records Act, it is imperative that DOA provide information regarding unpermitted dairies, AFOs and CAFOs that is meaningful to the public. The existing numeric ranges in the regulation are so broad as to be useless and therefore violate the law.

#### **I. INTRODUCTION TO THE COMMENTERS**

Puget Soundkeeper Alliance (Soundkeeper) is a 501(c)(3) non-profit environmental organization with a mission of protecting and preserving Puget Sound by monitoring, cleaning up and preventing pollutants from entering its waters. Founded in 1984, Soundkeeper was a founding member of the international Waterkeeper Alliance and today has approximately 3000 members, supporters and volunteers who use and enjoy Puget Sound's marine waters and freshwater tributaries, for commercial, general recreational and aesthetic purposes. To accomplish its mission, Soundkeeper actively monitors Puget Sound through weekly on-water patrols, engages with government agencies and businesses working to regulate pollution discharges, monitors Clean Water Act compliance and enforces the Clean Water Act. Soundkeeper also engages in pollution prevention, including public outreach, cleanup events, citizen advocacy, and technical assistance including the statewide Clean Marina Washington program. With a focus on water quality, Soundkeeper is actively engaged in the public dialogue currently underway relating to discharges from agricultural operations.

The Center for Environmental Law and Policy (CELP) is a 501(c)(3) non-profit whose mission is to dedicated to protect and restore clean, flowing rivers and drinking water aquifers in Washington State through science-based management. CELP is Washington's Water Watchdog. CELP brings its water law expertise and passion to help citizen groups and tribes throughout

Washington to protect their rivers, streams and aquifers. Since 1993, CELP has advocated for science based, sustainable water management in the legislature, in the courts and with government agencies. CELP's recent accomplishments include establishing that the state law requires protecting a river's aesthetics; convincing the state to issue guidance to counties on how to make land use decisions that impact scarce water resources; and bringing together Columbia River Tribes and leading environmental groups to successfully urge the federal government to revise the Columbia River Treaty to restore the river's beleaguered ecosystem.

The Community Association for the Restoration of the Environment (CARE) is a 501(c)(3) non-profit grassroots organization based in Washington State that is composed of concerned community members. Its mission is to inform Washington State residents about activities that endanger the health, welfare, and quality of life for current and future Washingtonians through education and citizen empowerment.

Orca Conservancy is an all-volunteer, non-profit organization working on behalf of Orcinus species, the killer whales, and protecting the wild places on which they depend. Orca Conservancy collaborates with some of the world's top research institutions and environmental groups to address the most critical issues now facing wild killer whales.

The Concerned Citizens of the Yakima Reservation (CCYR) is an organization made up of life-long residents in the little town of Harrah, WA, (600 people) on the Yakama Indian Reservation, located partially in Yakima County, Washington State. Ten years ago, the community started noticing large amounts of flies in and near their homes, not only in the summer but into the winter months as well. The stench from CAFOs entered their homes, destroying their hope of enjoying a healthy life. Contaminated wells were found along with people having frequent, diarrhea, head colds, sinus problems, and in some cases asthma. Bovine e-coli was found in an air filter of a house. The CCYR was formed to educate the public about the dangers of CAFOs not only in Yakima County and on the Yakama Indian Reservation, but across the nation.

The Friends of Toppenish Creek (FOTC) is a 501(c)(3) nonprofit organization dedicated to protecting the rights of rural communities and improving oversight of industrial agriculture. FOTC operates under the simple principle that all people deserve clean air, clean water and protection from abuse that results when profit is favored over people. FOTC works through public education, citizen investigations, research, legislation, special events, and direct action.

The Water & Salmon Committee, Washington State Chapter of the Sierra Club is a part of the national environmental organization whose mission is to explore, enjoy and protect the planet; to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives.

Socially Responsible Agricultural Project ("SRAP") is a grassroots organization that educates the public about the devastating effects of CAFOs, while working directly with the communities most heavily impacted by these animal factories. Through education, advocacy, and community organizing, SRAP empowers rural communities to protect themselves from CAFOs and provides guidance and assistance to communities seeking to develop healthy, sustainable alternatives to industrialized livestock production.

## **II. LEGAL BACKGROUND**

### **A. The WA Public Records Act Guarantees Citizen Rights To Public Information**

WAC 16-16-210(29) is DOA's failed attempt to implement two separate, but nearly identical statutory sections, RCW 42.56.610 and RCW 90.64.190.<sup>1</sup> The first, RCW 42.56.610 is

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<sup>1</sup> RCW 90.64.190 is within Washington's Dairy Nutrient Management Act and is in all material respects identical to RCW 42.56.610:

This section applies to dairies, AFOs, and CAFOs, not required to apply for a permit. Information in plans, records, and reports obtained by state and local agencies from livestock producers under chapter 510, Laws of 2005 regarding (1) number of animals; (2) volume of livestock nutrients generated; (3) number

within Washington's Public Records Act. As a starting point, it is important to recognize the breadth of the public's right to information guaranteed by the Public Records Act:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

RCW 42.56.030. In fulfilling this objective, state agencies are "to provide full public access to public records" and "to protect public records from damage or disorganization." *See Sanders v. State*, 169 Wn.2d 827, 846, 240 P.2d P.3d 120 (2010) (stating that "we have consistently enforced the PRA's disclosure requirements to advance its policy of public access."); *Neighborhood Alliance of Spokane Cnty. v. Cnty. of Spokane*, 172 Wash.2d 702, 714, 261 P.3d 119 (2011) ("The PRA is a strongly worded mandate for broad disclosure of public records.").

The Public Records Act, however, does create certain, narrow exemptions to the disclosure of public records. The case law is clear that these exemptions are to be narrowly construed. *Gale v. City of Seattle*, 2014 WL 545844 \*6 (Wash. Ct. App. Feb. 10, 2014) (unpublished decision) ("We liberally construe the PRA in favor of disclosure and narrowly construe its exemptions.") (citing RCW 42.56.030). In addition, "a court may enjoin production of requested records if an exemption applies and *examination would clearly not be in the public*

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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 shall be disclosable in response to a request for public records under chapter [42.56](#) RCW only in ranges that provide meaningful information to the public while ensuring confidentiality of business information. The department of agriculture shall adopt rules to implement this section in consultation with affected state and local agencies.

*interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions.” Robbins, Geller, Rudman & Dowd, LLP v. State, \_\_\_ P.3d \_\_\_, 2014 WL 839895 \*2 (Wash. Ct. App.) (March 4, 2014) (emphasis added).*

There are categorical exemptions designed to protect an individual’s right to privacy or any vital government function, but both of these exemptions are also narrowly applied on a case-specific basis. RCW 42.56.050; RCW 42.56.210(1) (“the exemptions of [the Public Records Act] are inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, can be deleted from the specific records sought. No exemption may be construed to permit the nondisclosure of statistical information not descriptive of any readily identifiable person or persons.”). There are a number of fact-specific exemptions regarding, for example, archaeological sites (RCW 42.56.300); crime victim information (RCW 42.56.240); or educational information (RCW 42.56.320).

The legislature has created exemptions specifically related to agriculture and livestock, none of which are applicable to DOA’s proposed rulemaking that is the subject of these comments. RCW 42.56.380. The agency invoking the exemption to disclose public records has the burden to establish that a specific exemption applies. *Neighborhood Alliance of Spokane Cnty.*, 172 Wn.2d at 715. RCW 42.56.610, the statutory source of authority for WAC 16.16.210(29), creates another exemption for the agricultural industry in Washington’s Public Records Act and states as follows:

The following information in plans, records, and reports obtained by state and local agencies from dairies, animal feeding operations, and concentrated animal feeding operations, not required to apply for a national pollutant discharge elimination system permit is disclosable only in ranges that provide meaningful information to the public while ensuring confidentiality of business information regarding: (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 department of agriculture shall adopt rules to implement this section in consultation with affected state and local agencies.

RCW 42.56.610.<sup>2</sup> This section creates a limited statutory exception to the presumption that all information in plans, records and reports held by the state regarding dairies, animal feeding operations, and concentrated animal feeding operations is subject to public disclosure. RCW 42.56.070(1) (“Each agency . . . *shall* make available for public inspection and copying *all public records*, unless the record falls within the specific exemptions . . . .”) (emphasis added). In interpreting and applying this statutory exemption, DOA is required, to define “ranges that provide meaningful information to the public while ensuring confidentiality of business information” for each specified category of information. In doing so, DOA is legally obligated to interpret and apply this exemption narrowly. By adopting the existing WAC 16.16.210(29), DOA has failed to comply with the Public Records Act and case law interpreting this statute.

## **B. THE CURRENT REGULATION VIOLATES THE LAW**

### **a. The Current Regulation Does Not Provide Meaningful Information**

WAC 16-16-210(29) does not provide a definition of what constitutes “meaningful information to the public.” Rather, it simply creates wide numerical ranges for each specified category of information. The lack of a definition of “meaningful information” is a fatal flaw that is exacerbated by the fact that the ranges set forth in WAC 16-16-210(29) demonstrably not provide “meaningful information” as discussed in detail below.

Under the Public Records Act, information is “meaningful” if it has the potential to affect the public interest or if it constitutes information relevant to the people’s ability to monitor

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<sup>2</sup> It is important to note that this regulation only applies to dairies, AFOs and CAFOs “not required to apply for a national pollutant discharge elimination system [NPDES] permit . . . .” RCW 42.56.610. However, because all CAFOs are point sources under the plain language of the Clean Water Act, and because all CAFOs discharge to waters of the state either by surface water discharges or directly to groundwater, all CAFOs should be required to have NPDES permits. Clean Water Act, Section 502(14).

agency compliance with the law. RCW 42.56.030 (“The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know.”); *Harley H. Hoppe & Assoc., Inc. v. King County*, 162 Wash.App. 40, 54-55, 255 P.3d 819 (2011) (“The Public Records Act shall be liberally construed and its exemptions narrowly construed to promote this public policy and *to assure that the public interest will be fully protected.*”) (emphasis added). The Legislature has made it very clear that the Public Records Act is designed to protect the public’s right to information that has the potential to affect their legally-secured rights.

[T]he legislature finds that public health and safety is promoted when the public has knowledge that enables them to make informed choices about their health and safety. Therefore, the legislature declares, as a matter of public policy, that the public has a right to information necessary to protect members of the public from harm caused by alleged hazards or threats to the public.

RCW 42.56.210. In 1972, the citizens of this state enacted the Public Disclosure Act, which was later partially re-codified as the existing Public Records Act. *NW Gas Ass’n v. WA Utilities & Transp. Comm’n*, 141 Wash.App. 98, 106-07, 168 P.23d 443 (2007). The stated policy of the Public Disclosure Act was “to promote . . . full access to public records so as to assure continuing public confidence of fairness of elections and governmental processes, and *so as to assure that the public interest will be fully protected.*” *Id.* (quoting RCW 42.17.010) (emphasis added). The Public Records Act clearly and concisely dictates a public policy of ensuring that the public “remain[] informed so that they may maintain control over the instruments that they have created.” RCW 42.56.030; see *Tobin v. Warden*, 156 Wash.App. 507, 513 n.3, 233 P.3d 906 (2010) (“In construing the PRA, courts look at the act in its entirety to enforce the law’s overall purpose.”). The information that is automatically exempted from disclosure under DOA’s interpretation of RCW 42.56.610 impedes the public’s ability to ascertain how unpermitted dairies, AFOs and CAFOs are affecting their rights as citizens of this state. In addition, it impedes the public’s ability to ascertain whether state agencies such as Agriculture,



Ecology and Health, are doing what they are legally obligated to do to protect the public from the pollution caused by these facilities.

**i. The Public Has An Interest in a Clean & Healthy Environment**

Several sources of Washington state law confirm and protect citizens' inherent rights to a clean and healthy environment. Citizen rights in this regard are relevant to this rulemaking proceeding because the existing regulation impedes citizens from exercising their rights to the fullest extent of the law by denying them crucial information. The Washington legislature adopted the State Environmental Policy Act ("SEPA"), recognizing that:

(2) It is the continuing responsibility of the state of Washington and all agencies of the state to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate plans, functions, programs, and resources to the end that the state and its citizens may: (a) *Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations . . .* (3) *The legislature recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.*

RCW 43.21C.020(2), (3) (emphasis added). The Shoreline Management Act provides that state shoreline management policy "contemplates protecting against adverse effects to the *public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life*, while protecting generally public rights of navigation and corollary rights incidental thereto." RCW 90.58.020 (emphasis added). In regards to wildlife, the Washington legislature has asserted dominion, and even ownership, over wildlife found within the state, on behalf of state citizens:

Wildlife, fish, and shellfish are the property of the state. The commission, director, and the department shall preserve, protect, perpetuate, and manage the wildlife and food fish, game fish, and shellfish in state waters and offshore waters. The department shall conserve the wildlife and food fish, game fish, and shellfish resources in a manner that does not impair the resource.

RCW 77.04.012. This exercise of dominion/control carries with it a corollary obligation to ensure that the wildlife, fish and shellfish of this state exist for present and future generations. *See Nelson Alaska Seafoods, Inc. v. Dep't of Revenue*, 143 Wash. App. 455, 462, 177 P.3d 1161 (2008) ("DNR regulates the commercial geoduck harvest for the public good . . ."); *Lake Union Drydock Co., Inc. v. State Dept. of Natural Resources*, 143 Wash. App. 644, 658, 179 P.3d 844 (2008) (quoting former RCW 79.90.450) ("To implement this public trust, the Legislature expressly delegated authority to the DNR to manage state-owned aquatic lands for "the benefit of the public . . ."); *Wash. Geoduck Harvest Ass'n v. Dep't of Natural Res.*, 124 Wash. App. at 449.

The State has unequivocally asserted its sovereign dominion and control over the air resources of this state:

It is declared to be the public policy to preserve, protect, and enhance the air quality for current and future generations. *Air is an essential resource that must be protected from harmful levels of pollution. Improving air quality is a matter of statewide concern and is in the public interest.* It is the intent of this chapter to secure and maintain levels of air quality that protect human health and safety, including the most sensitive members of the population, to comply with the requirements of the federal clean air act, to prevent injury to plant, animal life, and property, to foster the comfort and convenience of Washington's inhabitants, to promote the economic and social development of the state, and to facilitate the enjoyment of the natural attractions of the state. It is further the intent of this chapter to protect the public welfare, to preserve visibility, to protect scenic, aesthetic, historic, and cultural values, and to prevent air pollution problems that interfere with the enjoyment of life, property, or natural attractions.

RCW 70.94.011 (emphasis added). These statutory provisions demonstrate and affirm the public's inherent right to a clean and healthy environment in the state of Washington. It necessarily follows that the public, then, has a right to information that has the potential to affect that right.

The public's interest in clean water is explicitly clear in this state. 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.

RCW 90.03.005. The Legislature has prioritized the maintenance of instream flows in waters of the state "for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same." RCW 90.22.010. This statute gives Ecology broad authority to protect instream flows for purposes of both water quality and water quantity. *Id.* 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 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.

RCW 90.48.010. 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 situations where it is clear that overriding considerations of the public interest will be served.

RCW 90.54.020(3). 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 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.*

RCW 90.54.140 (emphasis added). Finally, the Dairy Nutrient Management Act also declares a policy of addressing “the discharge of pollution to surface and ground waters of the state that will lead to water quality compliance by the industry.” RCW 90.64.005. Therefore, it is quite clear that the public has a strong interest, protected by the plethora of state laws discussed above, in a clean environment in general, and clean water is particular. The public also has a right to ensure that industries that generate pollution are complying with the law. The public

has a clear legal right to access information that has the potential to affect the public interest in any way, RCW 42.56.030, and that right must be safeguarded by WAC 16.06.210(29).

## **2. The Public Has A Right To Protect Public Health**

The Legislature has specifically recognized that people in the state have a right to ensure that state water resources are utilized in a way that promotes, and not harms, public health.

The Legislature as found:

*(a) Proper utilization of the water resources of this state is necessary to the promotion of public health and the economic well-being of the state and the preservation of its natural resources and aesthetic values. Although water is a renewable resource, its supply and availability are becoming increasingly limited, particularly during summer and fall months and dry years when demand is greatest. Growth and prosperity have significantly increased the competition for this limited resource. Adequate water supplies are essential to meet the needs of the state's growing population and economy. At the same time instream resources and values must be preserved and protected so that future generations can continue to enjoy them.*

*(b) All citizens of Washington share an interest in the proper stewardship of our invaluable water resources. To ensure that available water supplies are managed to best meet both instream and offstream needs, a comprehensive planning process is essential. The people of the state have the unique opportunity to work together to plan and manage our water. Through a comprehensive planning process that includes the state, Indian tribes, local governments, and interested parties, it is possible to make better use of available water supplies and achieve better management of water resources. Through comprehensive planning, conflicts among water users and interests can be reduced or resolved. It is in the best interests of the state that comprehensive water resource planning be given a high priority so that water resources and associated values can be utilized and enjoyed today and protected for tomorrow.*

RCW 90.54.010(a), (b) (emphasis added). The Washington legislature has explicitly directed the Washington State Board of Health to regulate the storage of animal waste from dairies, AFOs or CAFOs 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 of health hazards and nuisances related to the disposal of human and animal excreta and animal remains.

RCW § 43.20.050(2)(c) (2013). The Board's statutory obligation to protect public health from pollutants created by dairies, AFOs and CAFOs is an affirmative delegation of state police power to protect the public's interest in good 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 paramount duty of protecting the health of Washingtonians. RCW§ 43.20.050(5).

The Department of Health's Office of Drinking Water is the regulatory body charged with ensuring the safety of public drinking water systems in accordance with the Safe Drinking Water Act (SDWA). Pub. L. 93-523. The SDWA mandates the prevention of pollution of public drinking water from any source, including dairies, AFOs and CAFOs.

To ensure that drinking water is safe, SDWA sets up multiple barriers against pollution. These barriers include: source water protection, treatment, distribution system integrity, and public information. Public water systems are responsible for ensuring that contaminants in tap water do not exceed the standards. Water systems treat the water, and must test their water frequently for specified contaminants and report the results to states. If a water system is not meeting these standards, it is the water supplier's responsibility to notify its customers. Many water suppliers now are also required to prepare annual reports for their customers. The public is responsible for helping local water suppliers to set priorities, make decisions on funding and system improvements, and establish programs to protect drinking water sources. Water systems across the nation rely on citizen advisory committees, rate boards, volunteers, and civic leaders to actively protect this resource in every community in America.<sup>3</sup>

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<sup>3</sup> U.S. EPA, *Understanding the Safe Drinking Water Act*, available at [http://water.epa.gov/lawsregs/guidance/sdwa/upload/2009\\_08\\_28\\_sdwa\\_fs\\_30ann\\_sdwa\\_web.pdf](http://water.epa.gov/lawsregs/guidance/sdwa/upload/2009_08_28_sdwa_fs_30ann_sdwa_web.pdf) (last visited December 3, 2013).

Therefore, the public has a strong interest, protected by the law and moral necessity,<sup>4</sup> in knowing what pollutants that have the potential to affect public health are entering our commonly-shared water and air resources.

### **3. The Public Has A Right To Know How Farm Animals Are Treated**

Disclosure of accurate stocking numbers at dairies, AFOs and CAFOs is crucial to monitoring consumer safety and animal welfare in the beef and dairy industry. Cows suffer generally from crowded conditions, exhibiting, for example, more competitive behavior and shorter lying times, both associated with increased stocking density.<sup>5</sup> Crowding also contributes to the spread of disease, including bovine paratuberculosis, or Johne's disease—an untreatable wasting disease that lacks a vaccine. Inspection manuals for Johne's disease specifically identify stocking density as a risk factor.<sup>6</sup> Bovine respiratory disease is also caused or exacerbated by crowding.<sup>7</sup> The risk of disease is not limited to cattle. Crowded conditions also increase the risk of the spread of bacterial diseases to consumers, including *Escherichia coli* (*E. coli*).<sup>8</sup> Because

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<sup>4</sup> The moral justification to act to protect our drinking water sources from nitrate pollution is especially strong given the fact that young infants are more susceptible to nitrate contamination than adults. See Minnesota Department of Health, "Nitrate in Well Water," available at <http://www.health.state.mn.us/divs/eh/wells/waterquality/nitrate.html#Whyare> (last visited March 31, 2014). If we as adults do not act to protect the young infants in this state, who will? Furthermore, parents of young infants should be able to access the information that they need to fully protect their infant children.

<sup>5</sup> See A. Talebi, et al., Reduced stocking density mitigates the negative effects of regrouping in dairy cattle, *Journal of Dairy Science*, Vol. 97, 1358 (Mar. 2014). Abstract available at <http://www.journalofdairyscience.org/article/S0022-0302%2814%2900014-9/abstract>.

<sup>6</sup> See Handbook for Vets & Beef Producers, available for download at <http://www.johnesdisease.org/>.

<sup>7</sup> See <http://www.bovillus.com/diseases/brdc/etiology.asp>.

<sup>8</sup> The largest *E. coli* outbreak in Washington state was in 1993, when 477 people were sickened by contaminated beef. See <http://www.doh.wa.gov/YouandYourFamily/IllnessandDisease/Ecoli.aspx>. *E. coli* is carried in

the public ostensibly consumes the meat and dairy products produced at non-permitted dairies, AFOs and CAFOs in the state, they have a right to accurate stocking numbers.

In regards to chicken AFOs and CAFOs, population densities in factory egg production facilities bear directly on animal welfare in the egg industry. Accurate information on the number of animals within chicken AFOs and CAFOs is meaningful to the public, and thus should be subject to disclosure, because population densities can affect sanitary conditions in these operations and lack of adequate sanitation can directly affect the safety of the egg product produced there.

#### **4. Dairies, AFOs and CAFOs Affect the Public Interest By Polluting Ground & Surface Water**

The current state of ground water contamination by agricultural sources in Washington, and the attendant public health risks, is well documented. In a 2001-02 study conducted in the Lower Yakima Valley, “21% of the wells sampled in Region 2 exceeded [the U.S. EPA’s MCL for nitrate + nitrite of 10 mg/L]. Mean values for ammonia, chloride, and specific conductivity were also significantly higher in Region 2 . . . . [O]ther studies have shown that overuse of nitrogen fertilizers [including manure] is the primary cause of nitrate contamination of groundwater in agricultural areas.”<sup>9</sup> Another study conducted in 2004 determined that “[t]he locations of wells that test positive for total coliforms are in areas of high groundwater [nitrate] concentrations. The source of these bacteria can only be animal feces. Consequently, these results suggest that sources of contaminants are feedlots and/or dairy operations.”<sup>10</sup>

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diarrhea, which is spread by overcrowding. See, e.g., [veterinaryextension.colostate.edu/menu2/Cattle/Calf%20Scours%20101.pdf](http://veterinaryextension.colostate.edu/menu2/Cattle/Calf%20Scours%20101.pdf) at 1 (“Overcrowding is a major contributing factor to calf [diarrhea].”).

<sup>9</sup> *Quality of Ground Water in Private Wells in the Lower Yakima Valley*, Valley Institute for Research & Education (2001-02).

<sup>10</sup> *Sunnyside Groundwater Study Final Report* (Heritage College, 2003).



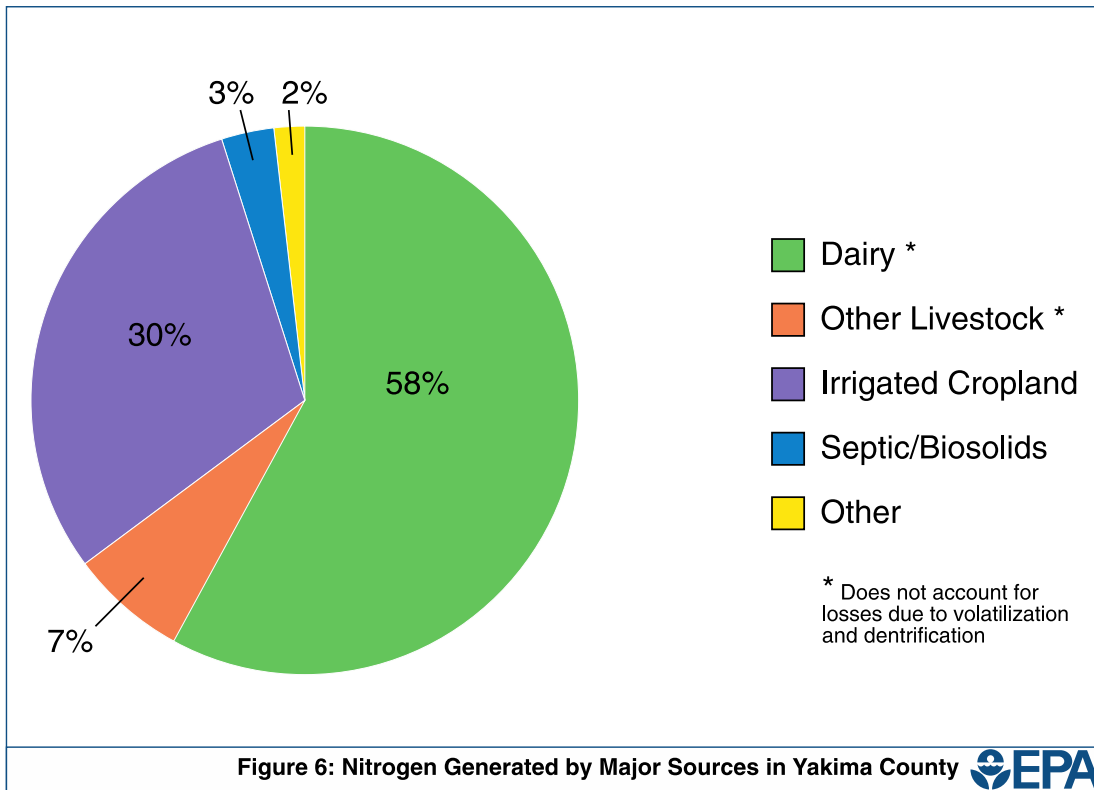
In 2011, the EPA conducted extensive groundwater monitoring in the Lower Yakima Valley in accordance with the Safe Drinking Water Act. EPA noted that “[n]itrate levels above EPA’s drinking water standard in residential drinking wells in the Lower Yakima Valley are well documented.”<sup>11</sup> The EPA went on to identify the likely source of the extensive contamination:

Given the historic and current volumes of wastes generated and stored by dairies, and the application of nitrogen-rich fertilizers including dairy waste in the Lower Yakima Valley, it is expected that dairies are a likely source of of high nitrate levels in downgradient drinking water wells. *The [data] provide strong evidence that the dairies evaluated in this study are likely sources of the high nitrate levels in the drinking water wells downgradient of the dairies.* Additional information that supports this conclusion includes: there are few potential sources of nitrogen located upgradient of the dairies; the dairy lagoons are likely leaking large quantities of nitrogen-rich liquid into the subsurface; and Washington State Department of Agriculture inspectors have reported elevated levels of nitrogen in application fields of the dairies in the study.

*Id.* (emphasis added). The EPA has identified dairies/CAFOs as the primary source of nitrogen contamination in the Lower Yakima Valley.

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<sup>11</sup> *Relation Between Nitrate in Water Wells and Potential Sources in the Lower Yakima Valley, Washington* (EPA-910-R-12-003).



Turning to northwestern Whatcom County, Ecology has documented ground water contamination in the Sumas-Blaine Aquifer in northwestern Whatcom County in the *Sumas-Blaine Aquifer Nitrate Contamination Summary*.<sup>12</sup> That study documents widespread nitrate contamination in ground water of the Sumas-Blaine aquifer for over forty years. *Id.* at 7. The study pointed out that Washington State, and the Sumas-Blaine aquifer in particular, is

<sup>12</sup> See Barbara Carey, Washington State Department of Ecology, *Sumas-Blaine Aquifer Nitrate Contamination Summary* (2012), available at <https://fortress.wa.gov/ecy/publications/publications/1203026.pdf>.

especially susceptible to ground water contamination by the keeping of animals due to several factors. *Id.*

A study recently released in March 2014 quantified the mass of nitrogen added to [a manured grass field overlying the Sumas-Blaine Aquifer] in the form of manure, inorganic fertilizer, and irrigation water; the mass of nitrogen removed in the crop; the mass of nitrate in the soil found during the post-harvest period; and the nitrate contamination of groundwater beneath the field.<sup>13</sup> The study noted that the shallow groundwater depth “enabled rapid responses to nitrate transport, especially during the high rainfall period.” *Id.* Given the extent of the contamination detected, the study concluded that “[d]irect monitoring of water quality at the water table was the only accurate and reliable method for tracking efforts of manure management on groundwater nitrate.” *Id.*

Shallow water tables, like those found on the West of the Cascades, result in greater contamination levels because compounds do not need to travel through the soil as far to reach the water table. This is especially true for water tables that can reach the bottom of manure lagoons during the seasonal high level of the groundwater table, resulting in direct leakage of nitrates from lagoon to the groundwater.<sup>14</sup> Across most of the Sumas-Blaine aquifer, the depth to ground water is less than ten feet, making it highly susceptible to contamination from agricultural activities. Carey, *supra* note 12.

In addition to a shallow water table, the seasonal high rainfall of the region further exacerbates the rate at which nitrates contaminate the groundwater.<sup>15</sup> When manure is

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<sup>13</sup> Barbara Carey, Ecology Nitrogen Dynamics at a Manured Grass Field Overlying the Sumas-Blaine Aquifer in Whatcom County, Ecology Publication No. 14-03-001 (March 2014).

<sup>14</sup> Melanie Kimsey, Wash. State Dep’t of Ecology, *Constr. of Dairy Lagoons Below the Seasonal High Ground Water Table*, 4 (2002).

<sup>15</sup> J.M. Ham et al., Kansas State University, *Animal Waste Lagoon Water Quality Study*, 2.4 (1999), available at <http://www.ksre.ksu.edu/bookstore/pubs/LAGOON.pdf>.

applied to fields the nitrates need to be utilized by the crops or the nitrates will easily be washed away by rain into waterways or into the soil through over-application eventually reaching the water table.<sup>16</sup> Washington has a high level of precipitation during the non-growing season, carrying nitrates left over in the soil to the water table. *Id.* at 30.

Nitrate contamination is so severe in the Sumas-Blaine aquifer that several public supply wells near the City of Lynden were shut-down, leaving 1,200 people without a potable water supply. *Id.* at 9. In 2008, a study reported that sampled wells displayed an increasing trend in groundwater nitrate levels, while another study reported that seventy-one percent of thirty-five private wells sampled were over the drinking water MCL.<sup>17</sup> Whatcom County has over 40,000 cows [an accurate number of cows is not possible given the information withheld pursuant to WAC 16.06.210(29)], a shallow water table, and heavy rainfall during the non-growing season, resulting in some of the highest nitrate ground water levels in the state. See generally Barbara Carey, Washington State.<sup>18</sup>

Washington's Sumas-Blaine aquifer illustrates the dangers of nitrate leaching into ground water. Above the Sumas-Blaine aquifer, soil nitrate concentrations at one site ranged up to 240 percent higher than the "very high" criterion suggested by one study. Carey, *supra*, at 69. The condition of the Sumas-Blaine aquifer exemplifies the overall effect of these elevated nitrate concentrations on the quality of the public's drinking water. In forty years of research, the Department of Ecology found that twenty-nine percent of the 515 sampled wells exceeded

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<sup>16</sup> Barbara M. Carey, Wash. State Dep't of Ecology, *Effects of Land Application of Manure on at Two Dairies over the Sumas-Blaine Surficial Aquifer*, viii (2002).

<sup>17</sup> Melanie Redding, Washington State Department of Ecology, *Nitrate Trends in the Central Sumas-Blaine Surficial Aquifer* 23 (2008), available at <https://fortress.wa.gov/ecy/publications/publications/0803018.pdf> at 43.

<sup>18</sup> Department of Ecology, *Sumas-Blaine Aquifer Nitrate Contamination Summary* (2012).

acceptable nitrate concentrations for drinking water in the Sumas-Blaine aquifer—the primary drinking water source for between 18,000 and 27,000 people.<sup>19</sup>

The contamination of drinking water and ground water is sufficiently pervasive to have reached the attention of state courts. The Eastern District of Washington, after hearing evidence regarding contamination of ground water due to the keeping of animals at a CAFO found that “excessively high levels of nitrate and phosphorus are consistent with over-applications of manure” at the Nelson Faria Dairy in Royal City, Washington. *CARE v. Nelson Faria Dairy*, Case No. CV-04-3060-LRS (Memorandum of Decision) (December 30, 2011) (Exhibit A). The court further concluded that “Faria’s manure management practices are the predominant source of the nitrate contamination found in the monitoring wells and, correspondingly, local groundwater. These practices include consistent over-application of manure to fields located adjacent to, and nearby, the Dairy.” *Id.*

A conservative estimate of the number of cows in Whatcom County in 2010 is 40,834. *Carey, supra*, at 19. Again, it is impossible to verify this number given the data that is withheld pursuant to WAC 16.06.210(29). Between ten and twelve million pounds of manure-derived nitrate is applied to land over the Sumas-Blaine aquifer annually. *Id.* In 1990, a study sampled twenty-seven wells of the Sumas-Blaine aquifer and reported that twenty-six percent of the wells exceeded the nitrate MCL of ten mg/l-N. *Id.* A similar study in 2012 found that thirty-six percent of shallow wells exceeded the MCL and the highest nitrate concentration in a domestic drinking well was seventy-three mg/l-N. *Carey, supra*, at 7.

Similarly, in the Lower Yakima Valley in Washington State, about twenty percent of sixty-seven wells sampled in 2012 exceeded the MCL of ten mg/l-N.<sup>20</sup> Dairy CAFOs, like those

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<sup>19</sup> Wash. State Dep’t of Ecology, *Report Summarizes 30 Years of Nitrate Studies in the Sumas-Blaine Aquifer* (2012), available at <https://fortress.wa.gov/ecy/publications/publications/1203026.pdf>.

investigated by EPA in the Lower Yakima Valley study, are a known contributor of nitrate contamination to ground water through two mainstream agricultural processes: land application of manure and dairy lagoons.

**a. LAND APPLICATION OF ANIMAL MANURE**

A major source of anthropogenic nitrate contamination to ground water is cropland over-application of manure as fertilizer. Over-application is due to using manure as fertilizer above the suggested agronomic rate for uptake of manure's component compounds by the soil, or applying to frozen or saturated soils when uptake is impeded. Many studies document that over-application of manure, which results in excessive nitrate concentrations in the soil, is a widespread problem with deleterious impacts on surface and ground water quality and its effects on ground water quality.<sup>21</sup>

Elevated nitrate concentrations in the soil can harm ground water quality, "because organic nitrogen from manure that accumulates in soil gradually mineralizes to nitrate. If not biologically taken up, nitrate from mineralized organic nitrogen is available for leaching" into ground water. Carey, *id.*, at viii. Excessive manure application has been found to adversely affect ground water quality and result in nitrate concentrations above the MCL,<sup>22</sup> and the data

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<sup>20</sup> U.S. EPA Region ten, *Relation Between Nitrate in Water Wells and Potential Sources in the Lower Yakima Valley*, ES-3 (2013).

<sup>21</sup> See generally Carey, *supra* at viii; Denis Erickson & Wym Matthews, Wash. State Dep't of Ecology, *Effects of Land Application of Dairy Manure and Wastewater on Groundwater Quality* (2002), available at <https://fortress.wa.gov/ecy/publications/publications/0203002.pdf>; Barbara M. Carey, Wash. State Dep't of Ecology, *Effects of Land Application of Manure on Groundwater at Two Dairies over the Sumas-Blaine Surficial Aquifer* (2002), available at <https://fortress.wa.gov/ecy/publications/publications/0203002.pdf>; Redding, *supra*; Jorge A. Delgado et al., *Advances in Nitrogen Mgmt. for Water Quality*, 379 (2010).

<sup>22</sup> Erickson & Matthews, *id.*, at 42; Carey, *supra*, at vii-viii (one site exhibited average nitrate concentrations up to double the drinking water standard); Jorge A. Delgado et al., *Advances in*

demonstrates that the application methods of several CAFOs in Washington exceed the suggested agronomic rate.<sup>23</sup> A California study found that cropland was the largest nitrate source at ninety-seven percent of all nitrate leached to ground water, with manure application being one of the nitrogen sources on cropland.<sup>24</sup>

In spite of the evidence of nitrate contamination of groundwater and drinking water due to dairies, AFOs and CAFOs cited above, Washington needs to take a hard look to ascertain whether all AFOs are applying manure at agronomic rates. Ecology has attempted to get such information by requiring soil sampling as part of the WA CAFO General NPDES permit that was issued in 2006.<sup>25</sup> However, as previously mentioned, only approximately 13 of over 1200 CAFOs in the state are covered by the 2006 CAFO General Permit, a result that violates the Clean Water Act. Ecology's efforts are a tiny fraction of what is needed. Even if the Department of Agriculture gathered this much-needed information as to whether manure is being applied agronomic rates at all dairies, AFOs and CAFOs, that information would be

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*Nitrogen Management for Water Quality* (2010); Carey, Washington State Department of Ecology, *Sumas-Blaine Aquifer Nitrate Contamination Summary* (2012); Redding, *supra*, 23; Jose Delgado & W.C. Bausch, *Potential use of precision conservation techniques to reduce nitrate leaching in irrigated crops*, (2005).

<sup>23</sup> Erickson & Matthews, *supra* at 46; Carey, *supra* at vii-viii (one site's application method was double the suggested agronomic rate); Jorge A. Delgado et al., *Advances in Nitrogen Management for Water Quality* 379 (2010); Barbara Carey, Washington State Department of Ecology, *Sumas-Blaine Aquifer Nitrate Contamination Summary* (2012).

<sup>24</sup> Thomas Harter et al., State Water Resources Control Board, *Addressing Nitrate in California's Drinking Water* 17 (2012).

<sup>25</sup> Commenters do not believe that soil sampling is the best method to obtain information on agronomic rates. Only groundwater monitoring can give a full and accurate picture as to whether nitrates are leaching through the soil and into the groundwater. Groundwater monitoring must be a part of any definition of "best agricultural practices" in regards to large CAFOs.

essentially exempt from public disclosure based upon WAC 16.16.210(29), even though such information is clearly “meaningful information to the public.”

#### **b. MANURE STORAGE LAGOONS**

Studies demonstrate that manure storage lagoons contaminate ground water due to seepage of nitrates.<sup>26</sup> Indeed, any engineer will tell you that manure lagoons are designed to leak. It is a principle of geology known as Darcy’s Law.<sup>27</sup> Several factors contribute to an increased rate of nitrate seepage, including the construction method of the basin liner (if any) and the vertical separation distance to the water table (if known).<sup>28</sup>

Lagoon basins to store manure can be constructed as earthen-lined basins, concrete-lined basins, or unlined basins.<sup>29</sup> Here in Washington, it is believed that only one CAFO in the state has a synthetically-lined lagoon, but this information on dairies, AFOs and CAFOs not covered by a discharge permit would not be subject to disclosure even though this information is specifically relevant to human health and the environment. Studies show that regardless of

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<sup>26</sup> Thomas Harter et al., *Addressing Nitrate in California’s Drinking Water*, 17 (2012), available at <http://groundwaternitrate.ucdavis.edu/files/138956.pdf>; see also J.M. Ham et al., Kansas State University, *Animal Waste Lagoon Water Quality Study*, 2.4 (1999), available at <http://www.ksre.ksu.edu/bookstore/pubs/LAGOON.pdf>.

<sup>27</sup> Darcy’s law is “a law in geology describing the rate at which a fluid flows through a permeable medium. Darcy’s law states that this rate is directly proportional to the drop in vertical elevation between two places in the medium and indirectly proportional to the distance between them. The law is used to describe the flow of water from one part of an aquifer to another and the flow of petroleum through sandstone and gravel.” See <http://dictionary.reference.com/browse/darcy%27s%20law> (last visited March 26, 2014).

<sup>28</sup> See, e.g., Minnesota Pollution Control Agency, *Effects of Liquid Manure Storage Systems on Ground Water Quality 93-6* (2001), available at <http://www.pca.state.mn.us/index.php/view-document.html?gid=6336>.

<sup>29</sup> Robbin Marks, *Cesspools of Shame: How Factory Farm Lagoons and Sprayfields Threaten Environmental and Public Health*, 33 (2001), available at <http://www.nrdc.org/water/pollution/cesspools/cesspools.pdf>.



the materials used for lining basins, if you monitor the ground water, you will find evidence of ground water contamination down-gradient from manure storage areas.<sup>30</sup> Some types of liners are less effective than others; unlined basins have been shown to impact ground water monitoring wells.<sup>31</sup> Researchers generally agree that leakage rates decrease after lagoons first receive waste, but these lower leakage rates still pose a threat to ground water.<sup>32</sup> For example, one study concluded that, even after a lagoon undergoes optimum sealing, seepage of 0.1 mm/day is likely. *Id.*

In addition to the construction method of basin liners, the vertical separation distance of the lagoon to the water table is a crucial factor in determining the lagoon's contribution to contaminating ground water.<sup>33</sup> In areas with a seasonally high ground water table the contamination of ground water will occur more readily. *Id.* "A lagoon constructed below the seasonal high ground water table is essentially a direct discharge to ground water."<sup>34</sup>

One California study, measuring nitrate contamination of groundwater in two central California watersheds, established a benchmark to distinguish between low and high intensity

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<sup>30</sup> See Minnesota Pollution Control Agency, *Effects of Liquid Manure Storage Systems on Ground Water Quality*, 1 (2001), available at <http://www.pca.state.mn.us/index.php/view-document.html?gid=6336>.

<sup>31</sup> *The impact of dairy farms on groundwater quality in Israel's Coastal Aquifer*, Ben-Gurion University of the Negev, Israel, (2010).

<sup>32</sup> Denis Erickson, Wash. State Dep't of Ecology, *Edaleen Dairy Lagoon Ground Water Quality Assessment* 1 (1991), available at <https://fortress.wa.gov/ecy/publications/publications/91e11.pdf>.

<sup>33</sup> Jay M. Ham, *Seepage Rates and Nitrogen Losses from Animal Waste Lagoons: Potential Impacts on Groundwater Quality*, 1 (2000).

<sup>34</sup> Melanie Kimsey, *Washington State Dep't of Ecology, Construction of Dairy Lagoons Below the Seasonal High Ground Water Table*, 4 (2002).

nitrate leaching of thirty-five kg N/ha/yr.<sup>35</sup> “Total nitrate loading to groundwater above this benchmark indicates a high potential for regional groundwater degradation.” *Id.* This study found that, although animal corrals and manure storage lagoons combined accounted for only 0.8 percent of total nitrate leaching in the study area, the average intensity of nitrate loading to groundwater from these sources was 183 Kg N/ha/yr. *Id.* at 18. Cumulatively, not accounting for high water tables, the rates of seepage can exceed 250,000 lbs of nitrate losses to ground water from one CAFO lagoon over the course of a twenty-year operation. Ham et al., *supra*, 2.4.

**c. Dairy, AFOs & CAFOs Cause Surface Water Pollution**

The extent of surface water discharges from dairies, AFOs and CAFOs is also well documented. Just last week, a Skagit dairy farm (Beaver Marsh Dairy) was fined for applying liquid manure to a field which caused a discharge to a water of the state which raised fecal coliform levels.<sup>36</sup> One only need to view public records at Ecology or the case law to see the scope of the problem in regards to surface water discharges from dairies, AFOs and CAFOs.<sup>37</sup> Amazingly, even in the face of clear evidence of facilities discharging to waters of the state, Ecology has not required coverage under the CAFO General Permit or under individual discharge permits.

The discharges to surface water are also reflected in the rampant surface water contamination due to nutrient pollution. Ocean acidification is a game changer here in Washington State. Acidification of our marine waters has the potential to alter the marine food

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<sup>35</sup> Thomas Harter et al., State Water Resources Control Board, *Addressing Nitrate in California’s Drinking Water* 17 (2012) at 16-17.

<sup>36</sup> “Skagit County Dairy Fined \$6000 for Manure Pollution in Beaver Marsh,” *available at* <http://agr.wa.gov/News/2014/14-07.aspx> (last visited March 27, 2014).

<sup>37</sup> *See, e.g.*, “AFO/CAFO Discharge Information: 2008-2010,” obtained from WA Department of Ecology CAFO files in response to public records request (listing examples of discharges from CAFOs by Regional Office) (Exhibit D); *CARE v. Bosma Dairy* (9th Cir. 2002).

web with unimaginable environmental and economic consequences for present and future generations of Washingtonians. In November 2012, the Washington State Panel on Ocean Acidification issued its Summary Report, *Ocean Acidification From Knowledge to Action*. Appendix 8, *Washington State's Legal and Policy Options for Combating Ocean Acidification in State Waters*, and identified the nutrient pollution discharged from operations that keep animals as a major land-based contributing factor to ocean acidification:

It is likely that some coastal pollutants, such as nutrient runoff, exacerbate the effects of atmospheric-CO<sub>2</sub>-driven acidification in nearshore waters, magnifying impacts on shellfish and other marine organisms. Because these pollutants originate within Washington, the State generally has the authority to curtail them, offering a means of partially alleviating the effects of acidification in State waters.

Appendix 8 p. 5. The report specified:

The sources of nutrient runoff include wastewater treatment, septic systems, residential fertilizer, stormwater, *dairy operations*, crop agriculture, *livestock*, and increased terrestrial erosion.

Appendix 8 p. 9 (emphasis added). The report specifically identified dairies, AFOs and CAFOs, and the manure that they produce as significant a significant contributing factor to the state's ocean acidification crisis:

Dairy operations and other sites of high manure concentrations are important sources of nutrient inputs into Puget Sound and other Washington State waters. There are approximately 517 dairy farms in the State, producing many thousand tons of manure annually. This manure is high in nitrogen and phosphate compounds, and can contribute to eutrophication if these nutrients are released into regional watersheds and into the coastal ocean to which those watersheds drain. This eutrophication, in turn, can cause algal blooms and contribute to coastal ocean acidification as described above.

Appendix 8 p. 23. Because of the challenges associated with drawing down greenhouse gas ("GHG") emissions in the urgent timeframe needed to address the rapid pace ocean

acidification, it is imperative that we utilize all existing legal authority to address the land-based contributing factors if we are to have any hope of maintaining the marine food web for present and future generations. Land-based activities, such as the discharge of manure from industrial animal operations are clearly within the scope of existing state regulatory control. But we cannot do that without the requisite data, including how much pollution is generated by dairies, AFOs and CAFOs.

The closure of numerous shellfish beds in the Puget Sound region have been directly linked to nutrient pollution caused by dairies, AFOs and CAFOs, especially dairy cows.<sup>38</sup> This is a serious public health threat. The shellfish industry should not suffer do to the lack of enforcement of regulations or the withholding of vital information. According to the Ecology, the sources of bacteria pollution to Samish Bay “include surface flow from areas where livestock or manure application is occurring during storm events, malfunctioning on-site septic systems, waterfowl and wildlife, stormwater runoff, pets, non-commercial farm animals, and recreational users.”<sup>39</sup> In 2011, the Department of Health downgraded 4,037 acres of intertidal shellfish growing areas in Samish Bay to “conditionally approved” for commercial shellfish harvest.<sup>40</sup> In 2012, Samish Bay commercial shellfish beds were closed to harvest for a total of 81 days. As of December 5th, Samish Bay commercial shellfish beds have been closed for a total

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<sup>38</sup> The average dairy cow produces 14.3 gallons of wet raw manure per day. See CAFO Amended Fact Sheet, June 21, 2006.

<sup>39</sup> Samish Bay Watershed Fecal Coliform Bacteria Total Maximum Daily Load Volume 1: Water Quality Findings. Publication 08-03-029, November 2008.

<sup>40</sup> 201 Annual Report: Commercial and Recreational Shellfish Areas in Washington State, Washington State Department of Health, Office of Shellfish and Water Protection, September 2012).

of 59 days so far in 2013.<sup>41</sup> “[F]ecal coliform pollution has resulted in closures for recreational shellfish harvest and swimming at Bay View State Park [in Skagit County] over the years. The park’s beach is permanently closed to shellfish harvest until pollution sources are identified, correct and water quality improves significantly . . . .”<sup>42</sup>

In 2007 Food and Water Watch estimated that Skagit County had 7,589 dairy cows capable of producing 39.6 million gallons of manure per year, excluding other heifers and other types of livestock.<sup>43</sup> It is impossible to verify this estimate due to the existing language in WAC 16.06.210(29). A study found that this manure ends up in the ground and surface waters of this region, as reflected by the “spike in fecal coliform found in the Samish watershed in 2008.”<sup>44</sup> In sum, the data that has been collected or estimated, and the resulting shellfish bed closures, demonstrates that dairies, AFOs and CAFOs are being operated in a way that endangers human health and the environment. The people have a right to information about this to protect their rights to gather, consume and enjoy the shellfish resources in thi state.

In addition to the obvious link between surface water pollution and degradation of salmon habitat, there is also a tremendous amount of scientific data confirming that the protection of the state’s ground water resources is critical to restore and protect salmon. “Agricultural non-point source water pollutants such as sediment, pesticides and nutrients have been identified as contributing to the environmental distress of salmon runs in the Pacific

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<sup>41</sup> Washington State Department of Health, Office of Shellfish and Water Protection, Personal Communication with Scott Berbells 360-236-3324).

<sup>42</sup> *See infra* note 46.

<sup>43</sup> Factory Farm Map, a project of Food & Water Watch, *available at* <http://www.factoryfarmmap.org/> (last visited December 6, 2013).

<sup>44</sup> “Mixed Results for Skagit Water Quality,” Skagit Valley Herald (Nov. 23, 2013), *available at* [http://www.goskagit.com/all\\_access/mixed-results-for-skagit-water-quality/article\\_d011e6bf-223a-5c7a-a341-b496d8a258ee.html](http://www.goskagit.com/all_access/mixed-results-for-skagit-water-quality/article_d011e6bf-223a-5c7a-a341-b496d8a258ee.html) (last visited Dec. 6, 2013).

Northwest.”<sup>45</sup> Therefore, the Board’s regulatory decisions, or lack thereof, regarding the keeping of animals has a strong potential to affect habitat for one of our state’s most critical natural resources: salmon. This is due to the hydrological connection between the surface and ground waters in this state. For example:

These circumstances make groundwater a crucial component of river habitats. Groundwater can influence the distribution, reproductive success, biomass and productivity, behaviour and movements of fishes, and is especially important in winter and summer. Winter flows are minimal and are affected by ice. In winter, the importance of groundwater increases northwards.

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Almost all of the water flowing in rivers and streams is derived from groundwater, very little is direct fallout or overland run-off. For this reason, the quantity and quality of water is determined by the sources and characteristics of groundwater, exchanges between river water and groundwater along the stream, and water conditioning in the exchange zones of the stream bed and at the stream surface.<sup>46</sup>

The protection of salmon from nutrient pollution is a public health issue.

Large quantities of finfish and shellfish are caught each year, both recreationally and commercially, and many residents eat seafood harvested from our waters. In addition, tribal populations enjoy treaty fishing rights, and

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<sup>45</sup> Whittaker, G. 2005. Application of SWAT in the evaluation of salmon habitat remediation policy. *Hydrological Processes*, 19, 839-848.

<sup>46</sup> Power, G., Brown, R.S., and Imhof, J.G. 1999. Groundwater and Fish insights from northern North America. *Hydrological Processes*, 13, 401-422 (In particular, nutrients and sediment from agricultural activities are seen as damaging to salmon and salmon habitat (Pacific Fisheries Management Council, 1999). Nitrogen fertilizer entering streams is considered to present a hazard to salmon. In particular, nutrient loading is thought to be responsible for ‘increased primary and secondary production, possible oxygen depletion during extreme algal blooms, lower survival and productivity, increased eutrophication rate of standing waters, certain nutrients (e.g., non-ionized ammonia, some metals) possibly toxic to eggs and juveniles at high concentrations’ (Pacific Fisheries Management Council, 1999)).

harvesting and eating seafood plays a significant role in their cultures. Finfish and shellfish are important parts of a healthy diet.<sup>47</sup>

The present and future generations of this state should not only be able to eat salmon and shellfish from Washington waters, but they should be able to do so without concern that the fish consumed is contaminated with pollutants caused by dairies, AFOs and CAFOs.

One of the most urgent ecological crises that Puget Sound faces today is the health of its Endangered Southern Resident killer whales. These three pods, J-Pod, K-Pod and L-Pod, were decimated by the accumulation of marine toxins and the depletion of prey resources primarily caused by the degradation of salmon spawning and nearshore habitats, the nurseries of the Salish Sea.

As discussed above, insufficiently regulated agricultural practices are degrading water quality throughout the state. Even small changes in stream temperature and water quality can impact salmon populations. Poor stream quality can also impact marine water quality by introducing nutrients that can result in algal blooms, chemical and pathogen pollution, and lowering oxygen levels in areas where these streams empty into the habitat of our resident killer whales. Since a healthy killer whale population depends upon strong salmon runs, it is imperative that the Board of Health retains and implements its existing authority to ensure that animals are not kept in a manner that further degrades the remaining salmon habitat that feeds the Salish Sea.

Therefore, the science is clear that the amount of waste generated by dairies, AFOs and CAFOs is so great that how it is managed has the potential to significantly affect human health and the environment. The only way the public can take steps to protect itself from these operations, and to ensure that the government is doing what it is supposed to do in regards to

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<sup>47</sup> Washington Department of Ecology, *Fish Consumption Rates, Technical Support Document: A Review of Data and Information about Fish Consumption in Washington* (January 2013).

protecting human health and the environment, is if it has the information needed to do so. That includes meaningful information regarding: (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. As seen in the studies discussed above, only with reliable information on each of these categories of information can a citizen ascertain the amount of pollution being discharged by the facility into our commonly-shared air and water resources. Because Washington citizens have inherent rights to ensure their public health and a clean environment, they are entitled to information that affects those rights.

#### **5. Dairies, AFOs and CAFOs Affect the Public Interest By Threatening Public Health**

The threat to public health by dairies, AFOs and CAFOs is well-documented. In 2010 the Environmental Protection Agency (EPA) conducted well water testing in the lower Yakima Valley in order to determine nitrate levels in drinking water and also to better characterize contamination of the ground water. EPA analyzed for almost 200 separate chemicals. In dairy supply wells that ranged in depth from 200 to 430 feet the EPA found the herbicide bentazone; the veterinary pharmaceuticals monensin, tetracycline and virginiamycin; and the synthetic and natural hormones 17 beta estradiol, 17 alpha estradiol, 17 beta trenbolone, alpha zearalenol, beta zearalenol and androstenedione and testosterone (EPA, 2013A). Some of these chemicals are known hormone disruptors and should not be tolerated at any level in our drinking water.

The drinking water standard for nitrate is ten mg/l-nitrogen (N) for Washington State.<sup>48</sup> There is abundant evidence that nitrate levels exceeding the ten mg/l-N standard can pose a

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<sup>48</sup> Melanie Redding, Washington State Department of Ecology, *Nitrate Trends in the Central Sumas-Blaine Surficial Aquifer* 23 (2008), available at <https://fortress.wa.gov/ecy/publications/publications/0803018.pdf>.



public health threat.<sup>49</sup> Methemoglobinemia in infants (blue baby syndrome), increased risks for pregnant women and individuals with digestive problems, and increased rates of adult cancer are but a few of the health issues correlated to elevated nitrates in drinking water.<sup>50</sup> Because ground water accounts for the drinking water of more than thirty-three percent of the United States, contamination is not an issue of isolated concern.<sup>51</sup> This is especially true in Washington state where there is a high level of hydrologic connectivity between surface and ground water.<sup>52</sup>

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<sup>49</sup> *Id.*; see also Jeff Feaga et al., Oregon State University Agricultural Experiment Section, *Nitrates and Groundwater: Why Should We Be Concerned With Our Current Fertilizer Practices?* 1 (2004); Karen R. Burow et al., *Nitrate in Groundwater of the United States, 1991-2003*, 44 *Environmental Science & Technology* 4988, 4988 (2010) (“Contamination of ground water by nitrate is of concern because elevated concentrations can affect human health.”); Bernard T. Nolan & Kerie J. Hitt, *Vulnerability of Shallow Groundwater and Drinking-Water Wells to Nitrate in the United States*, 40 *Environmental Science & Technology* 7834, 7834 (2006) (“High nitrate concentration in ground water is a human health concern.”).

<sup>50</sup> Redding, *supra*, at 23.

<sup>51</sup> Karen R. Burow et al., *Nitrate in Groundwater of the United States, 1991-2003*, 44 *Environmental Science & Technology* 4988, 4988 (2010) at 4988.

<sup>52</sup> Robert M. Hirsch, Chief Hydrologist, from the forward to *Ground Water and Surface Water: A Single Resource*, U.S. Geological Survey Circular 1139 (1998) (“Nearly all surface-water features (streams, lakes, reservoirs, wetlands, and estuaries) interact with groundwater . . . . [P]ollution of surface water can cause degradation of ground-water quality and, conversely, pollution of ground water can degrade surface water.”); Vaccaro, J., *River Aquifer Exchanges in the Yakima River Basin, Washington*, U.S. Geological Survey Scientific Observations Report 2011-5026 (2011) (“Most of the year, streamflow in the Yakima River basin is largely baseflow or groundwater that has discharged to the stream channel; therefore, the quality and availability of surface water are largely influenced by groundwater. Perennial streams are supported by groundwater and constitute a groundwater-dependent ecosystem (GDE) (Hatton and Evans, 1998; Eamus and Froend, 2006). Riparian habitat, and algal, invertebrate, and fish communities therefore are, to some extent, dependent on groundwater discharge to perennial streams.”).

A general survey of publically available scientific studies illustrates that instances of high levels of nitrate can be found in several counties throughout Washington state. A study conducted in Grant, Adams, and Franklin Counties found that twenty-three percent of overall samples exceeded the ten mg/l-N level and an additional thirty-seven percent of the samples had nitrate concentrations between three and ten milligrams per liter, constituting a large group of wells with elevated concentrations of nitrate.<sup>53</sup> In Franklin County, thirty percent of the samples exceeded the maximum contaminant level (MCL), while approximately twenty percent of the samples in both Grant and Adams Counties exceeded the MCL. *Id.*

One phase of the EPA study in the Lower Yakima Valley found nitrate levels above the safe drinking water standard of 10 mg/L in 20% of domestic wells. A later sampling found one monitoring well down gradient from a dairy with nitrate levels of 190 mg/L (EPA, 2013 B, p.7). The impact for people who live in the Yakima Valley, and elsewhere in the state, is uncertainty related to risks. Concerned families incur added costs to drill new wells, or purchase well water testing, water treatments and bottled water. A poverty level family of four can easily spend 5% of their annual income just for safe drinking water. But that is not the moral or just result. Rather, by making accurate data available regarding the amount of nutrients generated by unpermitted dairies, AFOs and CAFOs throughout the state, those individuals and entities who produce the nutrients, and benefit economically therefrom, can take steps to ensure that the nutrients are being produced in a manner that does not threaten public health and the environment.

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<sup>53</sup> Sarah J. Ryker & Lonna M. Frans, Water-Resources Investigations Report 99-4288, *Summary of Nitrate Concentrations in Ground Water of Adams, Franklin, and Grant Counties, Washington, Fall 1998—A Baseline for Future Trend Analysis*, U.S. Department of the Interior 1 (2000), available at <http://pubs.usgs.gov/wri/1999/4288/report.pdf>.

In February 2013, the Washington Department of Health investigated a cluster of neural tube defects in Central Washington from 2010-2013.<sup>54</sup> The study recommended “monitoring private well nitrate concentrations because of their potential association with birth defects and other adverse health outcomes.” *Id.* In 2009, a Washington Department of Health study found that “exposure to nitrate from drinking water significantly and substantially increases the risk of an infant having physiologically elevated levels of methemoglobin.”<sup>55</sup> The National Association of Local Boards of Health stated that “[t]he most pressing public health issue associated with CAFOs stems from the amount of manure they produce. CAFO manure contains a variety of potential contaminants.”<sup>56</sup> The study noted that “[r]egular testing of household water wells for total and fecal coliform bacteria is a crucial element in monitoring groundwater quality, and can be the first step in discovering contamination issues related to CAFO discharge.” *Id.* But the onus cannot be only on the public to protect themselves from CAFO pollution. By withholding critical information pursuant to WAC 16.06.210(29), the Department of Agriculture is making it virtually impossible for members of the public to ascertain whether their health is at risk due to CAFO pollution. That result is unjust and illegal.

#### **6. Dairies, AFOs and CAFOs Affect the Public Interest By Contributing to Climate Change**

Dairies, AFOs and CAFOs are major contributors of greenhouse gas emissions (“GHG”) in the state of Washington. “Agricultural activities such as manure management, fertilizer use, and livestock (enteric fermentation) result in methane and nitrous oxide emissions that account

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<sup>54</sup> Washington Department of Health, Notes from the Field: Investigation of a Cluster of Neural Tube Defects – Central Washington, 2010-2013.

<sup>55</sup> James VanDerslice, WA State Department of Health, Well Water Quality and Infant Health Study (January 14, 2009).

<sup>56</sup> Carrie Hribar, National Association of Local Boards of Health, Understanding Concentrated Animal Feeding Operations and Their Impact on Communities (2010) at 2.

for 6% of State GHG emissions in 2005.”<sup>57</sup> Worldwide, the livestock sector generates more GHG emissions as measured in CO<sub>2</sub> equivalent (18%) than the transportation sector.<sup>58</sup> Livestock generates 65% of human-related nitrous oxide which has 296 times the global warming potential of CO<sub>2</sub>, accounts for 37% of all human-induced methane (23 times as warming as CO<sub>2</sub> and is responsible for 64% of ammonia emissions: devastating health effects. *Id.* “Global greenhouse gas emissions from the agricultural sector totaled 4.69 billion tons of carbon dioxide (CO<sub>2</sub>) equivalent in 2010 (the most recent year for which data are available), an increase of 13 percent over 1990 emissions. By comparison, global CO<sub>2</sub> emissions from transport totaled 6.76 billion tons that year, and emissions from electricity and heat production reached 12.48 billion tons, according to Worldwatch Institute’s Vital Signs Online service ([www.worldwatch.org](http://www.worldwatch.org)).”<sup>59</sup> The over-application of manure has been identified as a major contributing factor to increased GHG emissions:

Manure that is deposited and left on pastures contributes to global nitrous oxide emissions because of its high nitrogen content. When more nitrogen is added to soil than is needed, soil bacteria convert the extra nitrogen into nitrous oxide and emit it into the atmosphere—a process called nitrification. Emissions from manure on pasture were highest in Asia, Africa, and South

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<sup>57</sup> WA Department of Community, Trade & Economic Development, Washington State Greenhouse Gas Inventory and Reference Case Projections, 1990-2010 (December 2007), *available at* [http://www.ecy.wa.gov/climatechange/docs/WA\\_GHGInventoryReferenceCaseProjections\\_1990-2020.pdf](http://www.ecy.wa.gov/climatechange/docs/WA_GHGInventoryReferenceCaseProjections_1990-2020.pdf) (last visited March 31, 2014).

<sup>58</sup> Livestock’s Long Shadow – Environmental Issues and Options, United Nations Food & Agriculture Organization (Nov. 29, 2006).

<sup>59</sup> Worldwatch Institute, “Agriculture and Livestock Remain Major Sources of Greenhouse Gas Emissions,” available at <http://www.worldwatch.org/agriculture-and-livestock-remain-major-sources-greenhouse-gas-emissions-1> (last visited March 31, 2014).

America, accounting for a combined 81 percent of global emissions from this source.<sup>60</sup>

In Washington, “[t]he manure management category [of emissions], which shows the highest rate of growth relative to the other categories, accounted for 11% [] of total agricultural emissions in 1990 and is estimated to account for about 25% [] of total agricultural emissions in 2020.”<sup>61</sup> The science is clear that livestock population is a critical component of any emissions calculation for the agricultural sector. *Id.* “For dairy cattle and heifers, the proportion of manure managed in systems that yield higher GHG emissions (e.g. anaerobic lagoons and liquid slurry) than other systems (e.g., pasture) increased from 68% for dairy cattle and 71% for dairy heifers in 1990, to 76% for dairy cattle and 77% for dairy heifers for 1997 through 2002. *Id.* The GHG emissions calculations done in Washington for the agricultural sector explicitly recognize the need for more precise data because “[e]missions from enteric fermentation and manure management are dependent on the estimates of animal populations and the various factors used to estimate emissions for each animal type and manure management system (i.e., emission factors which are derived from several variables including manure production levels, volatile solids content, and CH<sub>4</sub> formation potential).” *Id.* at F-6. Given the fact that climate change is the most pressing challenge, work to reduce GHG emissions from the agricultural sector should not be hamstrung by reliance on “estimates” instead of actual data. It is imperative that DOA amend WAC 16.06.210(29) so that meaningful information on dairies, AFOs and CAFOs is publically available.

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<sup>60</sup> *Id.*

<sup>61</sup> WA Department of Community, Trade & Economic Development, Washington State Greenhouse Gas Inventory and Reference Case Projections, 1990-2010 (December 2007), available at [http://www.ecy.wa.gov/climatechange/docs/WA\\_GHGInventoryReferenceCaseProjections\\_1990-2020.pdf](http://www.ecy.wa.gov/climatechange/docs/WA_GHGInventoryReferenceCaseProjections_1990-2020.pdf) (last visited March 31, 2014) at F-4.

**b. The Five Categories of Information Are Crucial Pieces of Information That Affect the Public Interest**

The existing WAC 16.06.210(29) effectively creates 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; and (2) whether the government is fulfilling its statutory obligations to protect public health and the environment. 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.

That makes practical sense. If you do not know how many animals a dairy, AFO or CAFO has, it is impossible to determine how much pollution is generated at the facility. The average dairy cow produces 14.3 gallons of wet raw manure per day. See Ecology CAFO Amended Fact Sheet, June 21, 2006. For mature dairy cattle, WAC 16.06.210(29) requires ranges that are so wide as to be meaningless. For comparison purposes, below is a table of the existing ranges and how much wet raw manure is produced at each end of the range on a daily and annual basis:

Dairy Cows’ Manure Produced (Average <sup>62</sup> by Category)		
Number of Mature Dairy Cattle <sup>63</sup>	Manure Produced Daily (gallons)	Manure Produced Annually (gallons)

<sup>62</sup> CAFO General Permit Amended Fact Sheet (June 21, 2006), available at [http://www.ecy.wa.gov/programs/wq/permits/cafo/cafo\\_final\\_fs.pdf](http://www.ecy.wa.gov/programs/wq/permits/cafo/cafo_final_fs.pdf), at 11 (last visited March 31, 2014).

<sup>63</sup> WAC 16-06-210(29).

1	37	14.3	529.1	5,219.5	193,121.5
38	199	543.4	2,845.7	198,341	1,038,680.5
200	699	2,860	9,995.7	1,043,900	3,648,430.5
700	1,699	10,010	24,295.7	3,653,650	8,867,930.5
1,700	2,699	24,310	38,595.7	8,873,150	14,087,430.5
2,700	3,699	38,610	52,895.7	14,092,650	19,306,930.5
3,700	4,699	52,910	67,195.7	19,312,150	24,526,430.5
4,700	5,699	67,210	81,495.7	24,531,650	29,745,930.5
5,700	6,839	81,510	97,797.7	29,751,150	35,696,160.5
6,840 +		97,812 +		35,701,380 +	

It is clear that the ranges regarding the number of animals and nutrients produced is far too wide to provide the public with any kind of meaningful information. It is scientifically inconceivable to claim that whether an operation produces, for example, 38,610 gallons of manure/day versus 52,895.7 gallons of manure/day makes no difference. The proposterousness of the ranges is made even more clear when looking at the difference in manure produced on an annual basis. Without adequate information regarding the number of acres covered by the plan or used for land application of livestock nutrients; livestock nutrients transferred to other persons; and crop yields it is impossible to ascertain whether the waste generated at dairies, AFOs and CAFOs is being contained in a way that protects public health and the environment.

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), 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 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). Therefore, without that information, the public has no way to ascertain whether Ecology is fulfilling its responsibilities under RCW 90.64.020. That is just one example of many.

Similarly, meaningful information 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 more specific information on the number of animals, quantity of nutrients produced and acreage available for land application, citizens will not be able to understand the amount of waste storage that is available. 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 regulators alike.

**c. The Current Regulation Improperly Expands & Misapplies the Confidential Business Information Exemption**

Under the Washington Public Records Act, there is no general exemption for “confidentiality of business information.”<sup>64</sup> Rather, the law provides that meaningful

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<sup>64</sup> Under the Federal Freedom of Information Act (“FOIA”), there is an exemption (4) that protects “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4). The Public Records Act does not contain a similar exemption and thus case law interpreting FOIA Exemption 4 should not be relied upon by DOA in determining what constitutes confidential business information under WAC 16.06.210(29). *Francis v. Wash. Dep’t of Corrections*, 178 Wash.App. 42, 313 P.3d 457, 465 (2013) (“Washington courts do not consider FOIA cases in interpreting PRA provisions that do not correspond to analogous FOIA provisions.”).



information from dairies, AFOs and CAFOs must be disclosed to the public “while ensuring confidentiality of business information . . . .” RCW 42.56.610. The DOA has not defined what constitutes “confidential business information,” another fatal flaw in the existing WAC 16.06.210(29).

None of the five categories of information subject to the exemption in WAC 16.06.210(29) constitute confidential business information. Rather, the five categories contain factual data that is critical for the public to access in order to protect the public interest. Even if a dairy, AFO or CAFO operator claimed this information to be confidential, that claim would be outweighed by the public’s overwhelming interest in obtaining meaningful information for each of the five categories. As an example, “RCW 43.21A.160 explicitly grants Ecology the ability to determine what constitutes confidential business information.” *Comm’y Ass’n for Restoration of the Environment v. Ecology*, 149 Wash.App. 830, 852, 205 P.3d 950 (2009). However, Ecology’s authority to grant an exemption for confidential business information is expressly limited. Ecology does not have the authority to identify public information as confidential business information if doing so would be “detrimental to the public interest.” RCW 43.21A.160. Any similar attempt by DOA to withhold meaningful information from the public would be constrained by the obligation to release information that is in the public interest.

In addition, any claim of confidentiality would be vitiated by the fact that several dairies, AFOs and CAFOs already share information contained in the five categories to other sources. For example, in regards to chicken CAFOs, egg farmers already regularly share their population information to industry organizations (e.g. the United Egg Producers), trade magazines (e.g. WattAgNet.net and Egg Industry magazine), government agencies like EPA/FDA/SEC, and the news media itself like when a producer wants to build a new farm in a community. The public’s need to accurately assess the risk of beef and dairy consumption far outweighs any interests that producers may have in concealing production capacity to protect their commercial interests. In fact, the actual number of animals on farms is far from secret. For instance,

Skyridge Farms in Sunnyside, Washington openly admits to having 3,200 cattle,<sup>65</sup> and shares with competitors production methods that contribute to their success.<sup>66</sup> Given that stocking density is just one of many factors that influences a farm's efficiency, the revelation of granular density data cannot and will not undermine a farm's competitive position. Concealing this information, however, will cripple the ability of consumers and advocates to fully appreciate the risk of beef and dairy consumption in Washington state.

Obtaining this critical information about CAFOs in a patchwork and incomplete manner contravenes the Public Records Act's mandate of free access to information that affects the public interest. Moreover, the likelihood of commercial harm to be non-existent because price competition is not affected by knowledge of competitors' production capacities. Therefore, Commenters urge DOA to revise WAC 16.06.210(29) to make it clear that there are no circumstances under which the factual information contained within the five specific categories would constitute confidential business information.

## **II. CONCLUSION**

The Commenters 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,

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<sup>65</sup> See, *i.e.*, Skyridge Farms, in Sunnyside, WA, discloses that they have 3,200 cows at <http://sites.usdairy.com/Sustainability/Awards/Pages/Skyridge-Farm.aspx>; notably, according to the U.S. Dairy Sustainability Awards report available for download at the same site, Dan DeGroot, owner of Skyridge Farms, actively shares with others the methods he uses to improve his production.

<sup>66</sup> See Jim Barmore, *Improving the Bottom-Line – More Cows or Less Crowding*, available at [gpsdairy.com/Resources\\_Docs/ImprovingTheBottom-line.pdf](http://gpsdairy.com/Resources_Docs/ImprovingTheBottom-line.pdf). (“Over-stocking and cow comfort, in many ways, should be considered one of the same.” at 3; “Determining an optimum stocking density is really about evaluating the entire housing and milking center as a system.” at 9.)

animal welfare, and that contribute to climate change. 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. The undersigned also would like to be added to the list of individuals who receive regular updates regarding this proposed rulemaking.

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, Orca Conservancy, 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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