

FILED
Court of Appeals
Division II
State of Washington
11/13/2019 1:13 PM

No. 52952-1-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE, COMMUNITY ASSOCIATION
FOR RESTORATION OF THE ENVIRONMENT (CARE), FRIENDS
OF TOPPENISH CREEK, SIERRA CLUB, WATERKEEPER
ALLIANCE, CENTER FOR FOOD SAFETY, and RE SOURCES FOR
SUSTAINABLE COMMUNITIES, and WASHINGTON STATE DAIRY
FEDERATION and WASHINGTON FARM BUREAU,

Petitioners/Appellants,

vs.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, and
STATE OF WASHINGTON POLLUTION CONTROL HEARINGS
BOARD,

Respondents/Appellees.

WASHINGTON STATE DAIRY FEDERATION AND WASHINGTON
FARM BUREAU'S REPLY IN SUPPORT OF THEIR OPENING BRIEF

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I. ARGUMENT IN REPLY

It was error for the PCHB to affirm Ecology's application of the T-SUM 200 restriction on spring time land applications in Eastern Washington. There was simply no basis for applying T-SUM 200 as a restriction in Eastern Washington because there is no evidence that T-SUM 200 is workable in Eastern Washington. To the contrary, the evidence presented at the hearing was that T-SUM 200 is unhelpful and, even worse, counterproductive to the CAFO Permits' purposes when applied in Eastern Washington. T-SUM 200 is not designed to be used in cold, dry climates, so restricting land applications until T-SUM 200 serves to prevent farmers from applying nutrients to crops at times when crops can readily absorb the nutrients and "treat" liquids that otherwise accumulate in a dairy's lagoon. Imposing T-SUM 200 as a limitation in Eastern Washington limits early crop growth and thereby restricts crop yield, resulting in a reduced uptake of nutrients by the crops, providing less protection to groundwater. This Court should, therefore, reverse and remand for further proceedings on the limited issue of requiring the use of T-SUM 200 in Eastern Washington.

A. The PCHB erred in finding that WSDF requested T-SUM 200.

T-SUM 200 is untested and thus unproven in the Eastern Washington climate. Therefore, it is not AKART. The PCHB erred in upholding the use of that particular CAFO Permit term. Ecology has pointed

to no evidence that the Permit term is AKART. Instead, it argues that WSDF *asked for* T-SUM 200 in comments regarding the draft CAFO Permits.¹ That is incorrect.

Permit holders are held to strict compliance with each permit term. A vague, undefinable or unknowable term presents a significant risk of violation and failure to each permit-holding farm.

Testimony from WSDF witnesses was clear that T-SUM 200 was not a requested Permit term. Rather, in objecting to the vague term “spring green up” as used in the draft CAFO Permits to define the start time for application of nutrients, WSDF pointed to T-SUM 200 as an example of a more specific (less vague) standard. AR 007874; AR 005766.

Dan Wood testified in reference to WSDF’s comments on the draft CAFO Permits as they pertained to T-SUM 200: “The concern was that spring green up was a *very fuzzy phrase* and that there are other options out there that are more specific, and T-SUM was an example of that, but is certainly not the only example.” AR 005127:12–20 (emphasis added). Further, when explaining that “T-Sum 200 is one standard timing guideline” that is understandable and clear, Mr. Wood also referenced (at the same time), article EM8852, which disclaims any benefit from T-SUM 200’s

¹ Ecology’s Response at 44.

application to colder, drier climates. *Id.*; AR 005469. Therefore, DOE has no basis to assert that WSDF was proposing T-SUM 200 as a Permit term or as a term that would be AKART when applied statewide. It was providing it as an example of a less vague, more specific term than “spring green up.”

Dr. Joe Harrison’s comments on the draft CAFO Permits were similar, and Ecology’s characterization in its response is not entirely accurate. In his comments, Dr. Harrison stated: “[T]he term ‘spring green up’ leaves a lot of room for interpretation – suggest changing to use of T-SUM 200 *concept* of applying manure when sufficient heating has occurred in early part of the year -” AR 005766 (emphasis added). Dr. Harrison suggested T-SUM 200 as an example of the concept of determining when sufficient heating has occurred; he did not make a full-throated recommendation for T-SUM 200 across the state as Ecology implies. *Id.*

It was reversible error for PCHB to find that WSDF requested that the T-SUM 200 standard be used in the CAFO Permits (Finding of Fact No. 51). Further, to the extent that the PCHB’s Conclusion of Law No. 20 (stating, inter alia, that “[c]ondition S4.J.4 of the Permits addresses double cropping, winter cover crops, and perennial crops”) relied upon the erroneous aspects of Finding of Fact No. 51, it was contrary to law and arbitrary and capricious.

B. The PCHB erred in ruling that use of T-SUM 200 was AKART for Eastern Washington.

Even if, for the sake of argument, Ecology could support its view that WSDF recommended the application of T-SUM 200, the term is not AKART when applied statewide. At hearing, there was no evidence, let alone substantial evidence, to find that T-SUM 200 was a reasonable permit term to protect water quality in Eastern Washington. There was no studied or established relationship between spring plant growth (which is needed to absorb nutrients) and the accumulated mean temperature in Eastern Washington; T-SUM 200 is not a reasonable methodology for protecting groundwater in Eastern Washington. The PCHB lacked an evidentiary or legal basis upon which to affirm the imposition of the T-SUM 200 term as applied (across the entire state) in the CAFO Permits.

Ecology is required to craft permit terms that are AKART. WAC 173-226-070(1)(d). This means that CAFO Permit terms must reflect all known, available, and reasonable methods. CAFO Permit Section S4.J.3.d.vi's undifferentiated application of T-SUM 200 as a threshold for spring nutrient application is not AKART, and Ecology did not provide any evidence to the contrary—at hearing or in its response brief.

Ecology witness Ms. Redding speculated that because T-SUM 200 involved temperature units, it would allow for the variances that you would

find in temperature on the East versus West side of the State and therefore still be applicable. AR 004270:4–22. But there are no studies produced on this topic, there is no documentation confirming Ms. Redding’s speculation, and there was no expert testimony supporting the supposition that it is appropriate to use T-SUM 200 in the Eastern Washington climate. AR 004002:6–19; AR 004070:4–6. To the contrary, testimony at the hearing was that it is not an appropriate method for Eastern Washington because plants grow differently in the cold, dry climate of that region than they do in the warm, wet climate of Western Washington. AR 004896:24-004897:19; AR 004982:14-004983:15. Ecology did not produce any evidence that T-SUM 200 is a known, tested, or reasonable method for the Eastern Washington climate.

Ecology attempts to rely on Puget Soundkeeper Alliance et al.’s witness, citing to Dr. Kenny’s testimony regarding T-SUM 200. But Dr. Kenny, who testified he has not spent very much time in Washington,² did not provide any testimony regarding T-SUM 200 at the hearing. In his expert report, he noted that T-SUM 200 was a better choice than an arbitrary calendar date, but he did not recommend its use throughout the State of

² AR 004466.

Washington (again, a state where he has spent little time in the field). *Id.*

His full quote (from his report) is as follows:

Because T-SUM 200 calculates a start date based on recorded temperature units in a precise location, as opposed to, for example, an arbitrary calendar date, it helps to ensure that the timing of applications is more closely matched to the crop needs.

AR 006244. Dr. Kenny did not have the knowledge, nor did he attempt, to assert that T-SUM 200 should be applied statewide. Ecology's strained interpretation of his report goes too far.

In contrast, as was explained in WSDF's Opening Brief, WSDF's expert Mr. Haggith clearly outlined at the hearing why T-SUM 200 was not appropriate (or needed) in Eastern Washington. AR 5008:13–09:22; AR 005020:5–14; AR 005469. No other expert or witness disagreed, or otherwise supported Ecology's *ad hoc* use of T-SUM 200 for Eastern Washington nutrient applications.

In a last-ditch attempt to bolster its argument, Ecology purports that WSDF provides only speculation that the use of T-SUM 200 would be problematic.³ This assertion—which is unquestionably incorrect, as explained throughout WSDF's briefing—serves merely to highlight the problem with Ecology's position; Ecology can only speculate whether T-

³ Ecology response at 45.

SUM 200 is workable in Eastern Washington because it the method is both untried and untested in that climate. It was meant for use in warmer, wetter climates. AR005020. Use of T-SUM 200 in Eastern Washington cannot possibly meet the “reasonable” or “known” requirements of AKART.

It was contrary to law to affirm the requirement of T-SUM 200 in Eastern Washington in the CAFO Permits because doing so violated the all known, available, and reasonable methods of prevention, treatment, and control or “AKART” standard applicable to the CAFO Permits. The PCHB erred in affirming the portions of the CAFO Permits that imposed a T-SUM 200 requirement in Eastern Washington and in issuing Finding of Fact No. 51, Conclusions of Law 20 and 21, and the Order. The legal conclusions were contrary to law, arbitrary, and capricious.

C. Ecology’s argument that land application of nutrients is for the purpose of treatment is an empty distinction.

In its response, Ecology also argues that WSDF has the wrong focus; namely, that the purpose of land application of nutrients is for treatment, not for crops.⁴ Notably, this argument does not address the issue before this Court: is T-SUM 200 AKART in Eastern Washington? Furthermore, if one were to characterize WSDF’s focus, it would be better described as a being

⁴ Response at 46.

on crop production *and* treatment, because productive crops better utilize (treat) land applications. The purposes of crop optimization and land treatment are in harmony and do not conflict. Nutrients should be land applied for treatment (i.e., use) when they will be used by productive crops, and crops can only be productive with properly timed nutrient applications. Ecology's argument loses sight of this important synergy on which many of the CAFO Permit's terms are based.

At the hearing, Dr. Harrison testified a productive stand is more protective of groundwater because it utilizes nutrients. AR 004905:4–13. By “productive stand,” Dr. Harrison is referring to a healthy, growing crop. AR 004903:19–004905:13. The reason for his testimony is simple; if you have a healthy growing crop, it results in greater uptake of nutrients. *Id.* If you do not apply enough nitrogen (nutrients) to grow a productive stand, the land has bare spots, encroaching weeds, and a shorter crop length, which takes up fewer nutrients. *Id.* Further, an unproductive crop is likely to be removed, re-plowed, and re-seeded, creating a time where the land is completely unproductive, which has a greater chance for nitrate losses. *Id.* To optimize crop production, one must apply nutrients at the right time and in the right amounts. Waiting until T-SUM 200 in Eastern Washington prevents the application of nutrients when crops start growing, thereby

limiting the ability to grow a productive crop that optimizes the use (and treatment) of nutrients.

Even Ecology testified that land treatment of nutrients is related to growth of a crop. AR 004065:18-004066:6. “There’s nutrients in that waste. And it can be used to beneficially grow a crop. So you’re treating that waste. You’re using those nutrients, and you’re also getting a crop out of it. So it’s kind of a nice win-win situation.” *Id.*

The T-SUM 200 issue is about the application of nutrients at the appropriate time for plant uptake so that they can fully utilize nutrients and protect water quality. This is one of the primary points of nutrient management planning as required under the Dairy Nutrient Management Act (“DNMA”). AR 004978:4-004982:14; AR 004883:20-004885:5. As Mr. Haggith testified, the required DNMA field nutrient budgets require soil testing, manure testing, forage testing, examination of crop grown, examination of soil type, and weather to determine the agronomic rate for a particular field in a particular cropping year. *Id.* As part of this state-mandated program, there is significant effort expended by Washington dairy farmers to apply nutrients at the right time to most effectively treat and use the nutrients. Imposing T-SUM 200 in Eastern Washington undermines that effort. WSDF does not have the wrong focus here: Ecology must apply a term that is AKART, and reversal on that issue is warranted.

II. CONCLUSION

Ecology selected T-SUM 200 as a statewide standard not because it is more protective of groundwater in Eastern Washington, but merely because it is deemed to be as good a place as any to start. AR 003834:3–16. That is not AKART. That is not good enough to establish a CAFO Permit term or assure protection of water quality.

Ecology did not present evidence that its selection of T-SUM 200 as applied to Eastern Washington is a known, reasonable, or feasible technical solution to preventing groundwater pollution in Eastern Washington, either at the hearing before the PCHB or in its Response.

The PCHB's affirmation of Ecology's application of T-SUM 200 in Eastern Washington was in error. All of the evidence at hearing was that T-SUM 200 was useful for Western Washington, but inappropriate if applied to Eastern Washington. As a result, the PCHB's affirmance of that aspect of the CAFO Permits was contrary to law because it did not follow AKART. Moreover, it was unsupported by substantial evidence and, therefore, arbitrary and capricious.

This Court should reverse and remand for further proceedings on the limited issue of requiring the use of T-SUM 200 in Eastern Washington.

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Dated this 13th day of November, 2019.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the 13th day of November, 2019, I arranged for service of the foregoing WASHINGTON STATE DAIRY FEDERATION AND WASHINGTON FARM BUREAU'S REPLY IN SUPPORT OF THEIR OPENING BRIEF on the following parties and/or counsel of record via *Electronic Court E-Service* as follows:

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November 13, 2019 - 1:13 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52952-1
Appellate Court Case Title: WA State Dairy Federation et al, Petitioner v WA State Pollution Control Hearings, Respondents
Superior Court Case Number: 18-2-05933-7

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WSDF and WFB's Reply in Support of their Brief

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