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COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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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,

vs.

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

Respondents.

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**WSDF'S RESPONSE TO PUGET SOUNDKEEPER, ET AL.'S  
OPENING BRIEF**

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## I. INTRODUCTION

Washington state's dairy community is not opposed to regulation by the Department of Ecology's ("Ecology") Concentrated Animal Feeding Operation ("CAFO") National Pollutant Discharge Elimination System ("NPDES") and State Combined and State Only Waste Discharge General Permits (collectively, "CAFO Permits"), provided that the permits are reasonable, with attainable permit terms, for the average Washington dairy farmer. The additional costs that individual dairy farmers must endure due to increased regulation must be tied to proven, tangible, and necessary improvements in water quality backed by technology and science, especially in these continued times of financial insecurity for Washington's dairies. In other words, the CAFO Permits' terms must comply with AKART, which stands for "all known, available, and reasonable methods of pollution control, prevention and treatment." AR 00007094<sup>1</sup>.

Appellants Washington State Dairy Federation and Washington Farm Bureau (collectively, "WSDF") submit this response to Puget Soundkeeper et. al.'s (collectively, "PSK") Opening Brief to correct inaccuracies underlying PSK's arguments for CAFO Permit terms that are unreasonable and do not comply with AKART. Except for the assignment of error and related issues that were raised in WSDF's Opening Brief (i.e., imposing a T-SUM 200 restriction for Eastern Washington), the ruling

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<sup>1</sup> For consistency, we will continue to refer to the Administrative Record, which includes the hearing transcript, with the prefix "AR."

below should otherwise be affirmed.

## II. BACKGROUND

Like most of the citizens in the state, Washington dairy farmers care deeply about water quality. Washington's dairy community has taken its own steps to use resources responsibly and protect ground and surface waters. AR 004883:25–004884:3. In 1998, the dairy community requested passage of the Washington Dairy Nutrient Management Act (“the Act”). *Id.* The Act requires that all dairy farmers, even if they only have a single cow, must have a nutrient management plan that must be approved by the conservation district, adhere to National Resources Conservation Service (“NRCS”) standards, and include soil and manure testing for nitrates. AR 004884:4–13; AR 005081:20–25; AR 004978:4–004979:24. These plans require the farmer to collect manure produced by dairy cows, store that manure, and apply it in an agronomic rate to fields where they are growing crops and pasture; this is also known by the slogan “Right Amount, Right Time, and Right Place.” *Id.*; AR 005932. According to the Department of Agriculture, 94%–96% of the dairies in this state comply with the Dairy Nutrient Management Act. AR 005083:21–25; AR 005921–33.

As of the time of the hearing in this matter, there were 377 dairies in the State of Washington (the number has decreased since the hearing). AR 005081:7–25. In 1993, there were 2,500 dairies in this state; there has been close to an 85% reduction in the number of dairies in the last 25 years. AR 005081:7–25. As the financial pressure on dairy farming increases, there are economies of scale to be gained by growing larger for the bigger

dairies, but the opportunities for mid- to small-sized dairies remain limited. AR 004861:14–004863:10. For small farms, the financial pressure to sell for development purposes increases. *Id.* Because dairies do not control the price of their product and cannot improve their revenue, in times of negative profitability their only option is to cut costs, but there is little flexibility there. AR 004812:8–004813:19. This makes the dairy industry very high risk with high financial stress *Id.* The trend of dairies going out of business is, unfortunately, continuing. *Id.* The fragile nature of the dairy business underscores why the AKART standard includes a requirement for reasonableness.

### III. ARGUMENT

This Court reviews the Pollution Control Hearing Board’s (“PCHB”) decision by applying the standards of review in RCW 34.05.570 directly to the agency record. *Foster v. Dep’t of Ecology*, 184 Wn.2d 465, 471, 362 P.3d 959 (2015). Agency action should be upheld unless the agency has erroneously interpreted or applied the law, the agency’s order is not supported by substantial evidence, or the agency’s decision is arbitrary and capricious. RCW 34.05.570(3)(d), (e), and (i). Appellant Puget Soundkeeper Alliance (“PSK”) has the burden to prove that the agency action should be overturned. In this case, PSK has failed to meet that burden.

As explained below, and in Ecology’s responsive brief, PSK’s arguments for different and additional general CAFO Permit terms fail for lack of a technological or scientific basis, and, in addition, are not

reasonable. PSK argues for CAFO Permit terms that do not comply with the principles of AKART. PSK's evidence offered in support of its arguments is also not relevant to Ecology's permit terms; it is based entirely on litigation related to non-CAFO Permit holding dairies. The PCHB correctly found such evidence irrelevant to the issues in this appeal regarding the CAFO Permit terms and those findings were not challenged here. *See, e.g.*, AR 003992:9–25; 004516:22–004518:23; 004542:3–004543:1; 004543:6–17. For the reasons stated herein, and the reasons articulated in Ecology's response brief, PSK's appeal should be dismissed and PCHB's decision upheld.

- A. The PCHB correctly held that the CAFO Permits satisfy the AKART requirement for manure storage lagoons as modified; PSK's arguments incorporate an incorrect assumption, unsupported by science and evidence, that all dairy lagoons leak and release pollutants into groundwater.

Many dairy farms utilize liquid manure lagoons. Agronomic application of nutrients, or manure, is integral to a successful dairy farm. AR 004985:23–25. Crops grown on the farm are fed to the cows, the cows produce nutrient-rich manure (and milk), and the manure fertilizes the crops, which are harvested and fed to the cows. AR 004986:1–3. Liquid manure must be stored for use as fertilizer until the time when crops are ready to utilize its nutrients, usually starting in the spring. AR 006958. Dairies store this liquid fertilizer in a lagoon. *Id.*

The CAFO Permits incorporate NRCS standards for liquid manure lagoons, which are protective of ground water. Utilizing decades of experience and research, the NRCS has developed national Conservation

Practice Standards for manure lagoons (among other farm facilities and practices) that are economically feasible and protective of natural resources, i.e., that are a reasonable method of pollution control. AR 005484 at 23:7–24:22. The conservation practice standards are used by NRCS staff, technical service providers providing assistance to dairy and other farm operators, and state engineers in developing state regulations regarding lagoons (which must be equal to or more restrictive than the NRCS practice standards). *Id.*

NRCS Conservation Practice Standard 313 is the primary design standard in the United States (and internationally) for liquid manure lagoons. *Id.*; AR 005485 at 26:25–27:20. Appendix 10D to the *NRCS Agricultural Waste Management Field Handbook*, titled “Design and Construction Guideline for Waste Impoundments Lined with Clay or Amendment-Treated Soil,” is an instruction book on how to implement NRCS Conservation Practice Standard 313. AR 005485 at 28:21–29:25. Another NRCS Conservation Practice Standard related to the CAFO Permit terms is No. 520, for compacted soil treatment—compacted soils are a key component for a properly constructed lagoon. AR 005486 at 30:12–16.

Using these standards and the handbook, the NRCS instructs land owners how to construct waste storage structures that are protective of ground and surface water, and more broadly, protective of natural resources and the environment. AR 005487 at 35:8–23. Among other features of an NRCS lagoon, the liner is designed and constructed specifically to protect

groundwater, and “[NRCS] has been using liners for long enough to know that they work as intended.” *Id.*

Not all dairy lagoons leak, nor do all dairy lagoons that seep (as they are designed to do) pollute. Under the NRCS Conservation Practice Standards, earthen lagoon liners are compacted and designed for a maximum seepage rate of 1,000 gallons/acre per day. AR 005487 at 37:8–005488 at 38:25. While 1,000 gallons/acre per day may sound like a large amount of water, in reality it equates to a depth of 1 millimeter of water spread over an acre. AR 005599 at ¶ 14. This is a single one-thousandth of a meter, or less than 4/100ths of an inch. *Id.* For perspective, a millimeter is narrower than most letters on this page as viewed when printed; about the width of the letter “l.” *Id.* At this rate of seepage, nutrients in the lagoon water that could pass through a saturated liner are slowed to the point that they are unable to reach groundwater. AR 005487 at 33:17–35:1.

At the hearing, expert testimony also established that lagoons do not seep constantly. AR 005488 at 39:5–40:15; AR 004766:24–004768:20. The calculations by NRCS and Ecology related to seepage rates are worst-case scenario; if the lagoon is full (head pressure) *and* the liner is saturated, then the seepage rate from the lagoon might be at the 1,000 gallons/acre level (less than 4/100ths of an inch over an acre). *Id.* But lagoon levels constantly change as the liquid manure is added and removed for land application, and this changes the head or downward pressure on the lagoon liquids, resulting in conditions where the liner does not remain saturated and, therefore, does

not seep. *Id.*

Where there is seepage, it must traverse the vadose zone beneath the lagoon before it would reach groundwater. AR 004476:25–004477:12; AR 004478:12–15. A vadose zone, by definition, is unsaturated; therefore, for movement of any seepage, the vadose zone must also become saturated. AR 004761:5–004764:5. Movement through the vadose zone is determined by the field capacity of the soils in that zone. AR 004476:25–004477:12; AR 004478:12–15. Utilizing these known factors, NRCS designed manure lagoons to be protective of groundwater by, among other things, requiring that the bottom of a liner be placed above the water table so that the vadose zone remains unsaturated. AR 005488 at 39:5–40:15; AR 004766:24–004768:20. The CAFO Permit terms, as amended by the PCHB, require compliance with and comport with these NRCS Conservation Practice Standards. The lagoon terms in the CAFO Permits, as amended by the PCHB, require implementation of known, reasonable technology that protects groundwater and the environment: They are AKART. AR 003878:4–13; AR 003882:3–22.

PSK has not presented evidence to the contrary. PSK asserts that “all lagoons leak, releasing pollutants into the environment,”<sup>2</sup> but this assertion is based on evidence presented in one court case regarding a single, very large, dairy that did not have a CAFO Permit and could not establish that its numerous lagoons were constructed to NRCS standards.

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<sup>2</sup> *See, e.g.*, PSK Opening Brief at 3.

*Cnty. Ass'n for Restoration of the Env't v. Cow Palace, Ltd. Liab. Co.*, 80 F. Supp. 3d 1180, 1195–96 (E.D. Wash. 2015) (“*Cow Palace*”). That case is not applicable to the CAFO Permit terms or whether they are AKART. Furthermore, the passage PSK cites from *Cow Palace* does not mention pollutants or impacts to groundwater; it merely states the fact that lagoons *can* leak: “That being said, although the parties dispute the magnitude of leakage, the fact that the lagoons leak is not genuinely in dispute.” *Id.* at 1196. This singular statement, no matter how many times PSK repeats it in one form or another, is not a basis to find that the CAFO Permits—which incorporate NRCS’s protective standards—are not AKART.

The foundation, and fatal flaw, for each of PSK’s arguments is the premise that all lagoons pollute. This premise is belied by the record before the PCHB and this Court. As explained by Ecology’s Ms. Redding, seepage or leakage is not the same as discharging or polluting:

A: Okay. “All liners leak to some extent.”

Q: Does that mean that all liners cause pollution of groundwater?

A: That’s not what that sentence says.

Q: What’s the distinction?

A: You can have seepage out of a lagoon. You can have a discharge. But that’s different than an impact to groundwater, and then that’s also different from pollution of groundwater.

Q: So just saying that a lagoon leaks doesn’t necessarily mean that a lagoon pollutes. Is that a fair summary of what you just said?

A: Correct.

AR 004262:14–004263:1. PSK’s arguments are therefore unsupported by the record and are insufficient to overturn PCHB’s finding that the CAFO Permit terms, as amended, are AKART.

Moreover, the CAFO Permits provide an additional assessment

process for existing lagoons to assure protection of the environment. Although Ecology was informed at the time of issuing the CAFO Permits that existing lagoons are in good shape, the CAFO Permits require lagoon assessments in accordance with NRCS Tech Note 23. AR 003865:15–003869:9. Tech Note 23 is a known, available method for assessing and addressing concerns in order to avoid impacts to the environment from a lagoon. AR 007517. Because the CAFO Permits are general permits that apply to all permitted facilities statewide, Ecology must understand current lagoon status—an understanding gained as a result of the assessment—and then may, depending on that assessment, impose requirements (as required under the “reasonableness” prong of AKART) to protect water quality. AR 004301:3–16. The NRCS Tech Note 23 assessment is designed to prioritize lagoons and understand how they are constructed. AR 004106:3–6. The CAFO Permits’ use of this note is to ensure protection of ground and surface water after confirming additional work is necessary to provide that protection. Implementing Tech Note 23 for existing lagoons is therefore an available and reasonable method of “pollution control, prevention and treatment”—it is AKART. The PCHB’s findings and conclusions to this effect are consistent with the record and the law, and they should not be reversed.

B. PSK’s arguments that the PCHB erred regarding composting, animal pens, and corrals fail for a lack of scientific basis and reliance on faulty assumptions.

PSK’s arguments regarding compost areas, animal pens, and corrals are based upon the same faulty approach used in arguments regarding

manure lagoons—they rely on information gathered from what are referred to as the Cow Palace “cluster dairies,” none of which had implemented the practices or conditions required by the CAFO Permits. *See* PCHB Findings of Fact and Conclusions of Law, AR 003544 at ¶ 10; AR 003515 at ¶ 8 (PSK unable to demonstrate that the cluster dairies were operating under the terms of this or the previous CAFO Permit); AR 004620:17–004621:13.

Contrary to PSK’s assertion that its evidence concerning compost areas, pens, and corrals was uncontroverted,<sup>3</sup> both Ecology and the Dairy Federation experts testified that the CAFO Permits specifically apply to these areas and that the terms applicable to them are AKART—i.e., they are reasonable pollution control methods that are protective of the environment. Regarding applicable CAFO Permit terms, Ecology’s Mr. Jennings noted that composting areas are part of the production area of a CAFO, and that CAFO Permit terms S4.A, S4.D, and S4.G apply to these areas. AR 003872:2–12. Technology-based effluent limitations for compost areas, animal pens, and corrals are located in CAFO Permit terms S4.A, S4.B, S4.C, S4.D, S4.E, S4.F, and S4.G, and require the permit holder to take actions necessary to protect water quality. AR 003872:25–13.

Regarding the potential for pollution and methods for controlling pollution, Ecology’s Ms. Redding testified that, due to the compaction of manure in a pen area, pens have an extremely low permeability rate of  $1 \times 10^{-7}$

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<sup>3</sup> *See* PSK’s Opening brief at 19 (“Uncontroverted evidence in the record shows that composting operations contribute to groundwater pollution.”).

<sup>9</sup>. AR 004106:20–004108:19. The manure also creates an organic barrier, and there is no hydraulic head pressure (liquid) pushing it down. *Id.* The literature does not suggest that pens are a significant source of nitrate from dairies. *Id.* Mr. Harrison further testified about a research study he was involved in that found that 100% of the dairies were using some sort of liquid solid separation and, therefore, were not composting unseparated manure, which would be more prone to leach into the ground. AR 004970:12–004971:24.

PSK’s assertion that “Ecology acknowledges [pens and corrals are] a source of groundwater contamination,” PSK Opening Brief at 20, is an overstatement of the testimony it cites in support. Ecology’s Ms. Redding merely acknowledged pens and corrals to be a *potential* source of contaminants, and in fact ranks pens and corrals as the lowest risk (as compared, for example, with lagoons and land applications):

A: ... So the literature I saw wasn’t suggesting that this was a significant source of nitrate from dairies.

Q: Do you consider that a risk area at a CAFO?

A: I consider it to be a potential source of contaminants.

Q: Would it be greater or less than the land application area?

A: If I had to rate them, I would say land application area provides the greatest risk. There’s the highest amount of loading there. Next would be the lagoon.

And then I know people have talked about some other areas, but I think those are less of an issue because you don’t have hydraulic head, and you don’t have the loading to the land surface like you do with the lagoons or land application.

AR 004108:6–19.

PSK’s arguments are overstated and lack actual evidence supporting their claims that the CAFO Permits are not AKART. PSK has not

established that the PCHB erred and that the CAFO Permit terms regarding compost, pens, and corrals are not AKART.

C. The PCHB did not err in upholding the CAFO Permit terms regarding groundwater monitoring, because it is not AKART for these permits.

Nitrate is the most prevalent contaminant found in groundwater. AR 004100:9–004101:21. It comes from many different sources, including animal or human waste and commercial fertilizer, and it can be naturally occurring. *Id.* While groundwater monitoring can provide information regarding the presence of nitrates, it does not provide the source of the nitrates, where they were released, or when they were released, which could have happened many years ago. AR 004098:11–22. In other words, groundwater monitoring cannot predict, prevent, or identify the source of a nitrate. While it is undisputed that if you want to know what is in the water, one must test the water, AR 003920:20–21, expert testimony established that groundwater monitoring cannot provide the information necessary to modify a farmer’s practices, is ambiguous in the best case, and is prohibitively expensive. AR 003863:19–003864:15; AR 004098:23–004099:5; AR 004822:10–004823:17. As such, it is not a reasonable or viable means for directing changes in practices and methods to control groundwater pollution. Groundwater monitoring is not AKART.

Ecology did not require groundwater monitoring around land application fields because such monitoring is backward-looking and, therefore, is not useful for directing contemporary field activities. AR 003863:19–003864:15. In addition, because there is a significant lag time

between what happens on the surface and what may be present in the groundwater, groundwater monitoring does not provide a fast enough feedback loop to direct reasonable changes to surface activities. *Id.*; AR 004100:9–004101:21 (results may reflect activities from years ago). Moreover, a farmer cannot drill a monitoring well and know what happened at a particular facility; a farmer must drill a network of wells up gradient and down gradient from the facility (potentially off their farms and potentially miles from their operation) and repeatedly test those wells, making monitoring prohibitively expensive. AR 004098:23–004099:5; AR 004822:10–004823:17. Thus, a general permit term to require farmers to drill a network of expensive groundwater monitoring wells that may reflect nitrates released from a multitude of sources from years in the past is unreasonable—it is expensive and provides no meaningful information to assess changes in current activities on the surface. AKART requires reasonable terms and PSK was unable to demonstrate that groundwater monitoring was AKART. The PCHB did not err in upholding the CAFO Permits’ monitoring approach as AKART.

D. The PCHB correctly upheld the CAFO Permit terms regarding emergency winter land application in S4.J.5.

Emergency winter land applications are not something that a dairy farmer chooses to implement; they are the result of catastrophic, unpredictable events that could cause a lagoon, designed to accommodate a 25-year, 24-hour storm event, to overtop and fail. AR 001598:13–001599:7. Emergency winter land applications are allowed only due to the need to

protect public health and safety, and lagoon failures can threaten both. AR 006932. Any emergency winter land application must be reported within 24 hours and the report must include the amount land-applied. *Id.*

Dairy Federation's witness Mr. Haggith addressed PSK's incorrect assertion that winter application was allowed without consequences. AR 005029:11–24. If an emergency field application occurs, all other permit terms apply and the farmer must account for that emergency application in the nutrient budget for that field. *Id.* In other words, the amount of nutrient applied must be tracked and subtracted from the total amount allocated to that field during the growing season. In addition, Mr. Haggith established that even on the western, wetter side of the state, if an emergency causes a land application in the winter, a farmer can and would choose to apply to a field that is higher or drier. *Id.* Such emergency application also triggers a requirement to reevaluate the lagoon and either increase storage or reduce the need for storage. AR 001598:13–001599:7; AR 006932. These consequences for an emergency application are contained in the CAFO Permit terms. AR 006932.

#### **IV. CONCLUSION**

All of the parties to this appeal want clean water. But PSK impermissibly argues for additional terms that are not AKART in that they are not supported by science or technology, are prohibitively expensive, and are not reasonably designed for inclusion in a general permit. In the PCHB hearing and in its opening brief, PSK attempted to establish the basis for its arguments by repetition rather than science, citing to the *Cow Palace* case

and dairies, which were unpermitted and could not establish adherence to NRCS standards. This matter is about general CAFO Permits, and PSK's evidence does not establish what general Permit terms for compliant dairies should be, let alone that the CAFO Permit terms, as amended by the PCHB, are not AKART.

For the reasons provided above, and as will be further addressed in Ecology's response, PSK's appeal should be dismissed in its entirety. PSK has failed to establish that the CAFO Permits, as amended by the PCHB, are not AKART and, therefore, has not demonstrated that the PCHB findings were in error.

Dated: October 14, 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 14<sup>th</sup> day of October, 2019, I arranged for service of the foregoing WSDF'S RESPONSE TO PUGET SOUNDKEEPER, ET AL.'S OPENING BRIEF on the following parties and/or counsel of record via *Electronic Court E-Service* as follows:

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**Transmittal Information**

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**Comments:**

WSDF's Response to PSK's Opening Brief

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