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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

PUGET SOUNDKEEPER ALLIANCE, COMMUNITY ASSOCIATION FOR
RESTORATION OF THE ENVIRONMENT, FRIENDS OF TOPPENISH CREEK,
SIERRA CLUB, WATERKEEPER ALLIANCE, and CENTER FOR FOOD SAFETY,
and
WASHINGTON STATE DAIRY FEDERATION and WASHINGTON FARM
BUREAU

Petitioners,

v.

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

Respondents.

**CORRECTED COMBINED REPLY BRIEF OF PETITIONERS PUGET
SOUNDKEEPER ALLIANCE, COMMUNITY ASSOCIATION FOR
RESTORATION OF THE ENVIRONMENT, FRIENDS OF TOPPENISH CREEK,
SIERRA CLUB, WATERKEEPER ALLIANCE, AND CENTER FOR FOOD
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I. INTRODUCTION

Puget Soundkeeper Alliance, Community Association for Restoration of the Environment, Inc., Friends of Toppenish Creek, Sierra Club, Waterkeeper Alliance, and Center for Food Safety (collectively, “PSA” or “Petitioners”) respectfully submit the following Combined Reply in response to the briefs filed by Respondent Washington Department of Ecology (“Ecology”) and by Petitioners Washington State Dairy Federation and Washington Farm Bureau (“Industry”).

The positions advanced by Ecology and Industry seek to distract the Court from the fundamental question at issue: do the proposed Permits adequately regulate the discharge of pollutants from Concentrated Animal Feeding Operations (“CAFOs”) in compliance with State and Federal law? Instead, Ecology and Industry bog the Court down by asking it to ignore irrefutable and compelling evidence demonstrating the dire need for protective and enforceable Permits that will halt the environmental harm caused by these facilities.

For example, Ecology and Industry acknowledge that manure storage lagoons used at CAFOs leak pollution to groundwater. Ecy. Br. at 13, Industry Br. at 6 (lagoons constructed to NRCS standards leak 1,000 gallons of manure per acre, per day). Yet, those Parties simultaneously make the implausible claim that these manure storage lagoons –which are

designed to leak – will not contaminate groundwater with nitrate contamination. *Id.* Such a claim is untenable given the scientific admissions in the record from Ecology’s own witnesses. *See, e.g.*, AR4145:8-23 (all studies reviewed by Ecology showed leakage from manure storage lagoons, and a preponderance of the evidence demonstrates such leakage impacts groundwater); AR5170:8-19 (Ecology witness Mr. Moore testifies that manure storage lagoons “do leak or seep. In the vast majority of cases, that seepage will probably end up getting to groundwater[.]”); AR5189:17-24 (“Ecology certainly was – is aware when we’re writing the permit that the lagoons leak or seep.”); AR4785:12-4786:24 (Industry expert Dr. Lindsey admits that an NRCS-compliant lagoon leaks, per his calculations, 4.5 million gallons of manure, per year).

Similarly, Ecology and Industry also malign PSA’s reliance on evidence collected from the “dairy cluster” as part of the *Cow Palace, LLC* litigation. Ecy. Br. at 1; Industry Br. at 7-8. Both parties suggest these facilities are not representative of CAFOs that will be covered under the Permits, and the Court should ignore this information. Such an attack is misplaced for two reasons.

First, Ecology chose to use general permits to cover *all* CAFOs in Washington, including the dairy cluster facilities, and has therefore determined that CAFOs “[i]nvolve the same or substantially similar types

of operations” and thus “[r]equire the same or substantially similar effluent limitations or operating conditions, and require similar monitoring” to ensure compliance with the law. WAC 173-226-050(3)(b)(i) and (iii). Thus, the information gathered at the dairy clusters can *and should* “be extrapolated to the terms of general permits intended to cover multiple facilities state wide.” Ecy. Br. at 1.

Second, this information is vital to the analysis of whether the proposed Permits will ensure compliance with water quality standards, because there is no other location in the State that has had more rigorous scientific investigation of CAFO manure management and its environmental impact. *See* AR4678:24-AR4679:20. Contrary to Ecology and Industry’s assertions, the dairy cluster facilities claimed their lagoons were compliant with Natural Resource Conservation Service (“NRCS”) standards, AR4487:19-22, and U.S. District Judge Rice held that lagoons built to such standards *are designed to leak* and, as such, pollute groundwater.¹ *Cnty. Ass’n for Restoration of the Env’t, Inc. v. Cow Palace, LLC*, 80 F. Supp. 3d 1180, 1223-24 (E.D. Wash. 2015) (“*Cow Palace, LLC*”) (describing “indisputable evidence that such leaking is

¹ Industry makes the bold claim that Judge Rice only said NRCS lagoons leak, not that they cause groundwater pollution. Industry Br. at 8 (claiming the *Cow Palace* decision “does not mention pollutants or impacts to groundwater.”). But Judge Rice held that “a reasonable trier-of-fact...could come to no other conclusion than the Dairy’s operations are contributing the high levels of nitrate that are currently contaminating...the underlying groundwater.” *Cow Palace, LLC*, 80 F. Supp. 3d at 1226.

leading to dangerous accumulations of nitrates in the deep soil between the lagoons that eventually will reach the underlying aquifer.”); *see also* AR4639:4-9 (*Cow Palace, LLC* leakage calculations presumed compliance with NRCS standards). It is against this backdrop of well-established, significant environmental harm that the Court must weigh whether these Permits effectively carry out the state and federal mandates to reduce and eliminate the discharge of pollution to our waters.

PSA respectfully requests that this Court reverse the Pollution Control Hearings Board’s (“PCHB”) Order affirming that the Combined Permits comply with Washington and federal law, because the Permits: (A) do not incorporate an AKART requirement for existing manure storage lagoons; (B) do not implement AKART requirements for composting and confinement pens and corrals; (C) do not ensure compliance with the State’s surface or groundwater quality standards; (D) do not require the necessary surface and groundwater monitoring to ensure discharges do not cause or contribute to a violation of applicable water quality standards; (E) violate controlling federal regulations, which require site-specific compliance information to be provided to the public and the agency prior to permit issuance; and (F) fail to address climate change impacts.

II. REPLY ARGUMENTS

A. There is No AKART Requirement for Existing Lagoons in the Combined Permits

The evidence in this appeal unanimously points to one conclusion: the Combined Permits *do not* contain an AKART requirement for existing manure storage lagoons. Reaching any other conclusion would require the Court to ignore Ecology's testimony before the PCHB and the written Order issued by the Board.

When asked about AKART requirements for existing lagoons, Ecology's witness testified: "Oh, wait. No, no, no. For existing lagoons, we have not stated what AKART is." AR4206:3-4. When questioned by the PCHB, Ecology's witness reaffirmed her testimony:

MS. BROWN: I just have a couple. I think you said sometime in the last day that there isn't AKART for existing lagoons. Did you say that?

THE WITNESS: Yes, I did say that.

MS. BROWN: Can you tell me a little bit more about that?

THE WITNESS: So my understanding, from previous permits, is we don't -- because we don't have a good -- we didn't have a lot of facility to cover the permit, we don't really know what the state of those lagoons are. We've heard anecdotal information from different sources saying it's either good or it's bad, but we really don't know.

And so what this Tech Note 23 in this assessment is trying to do is get a handle on how are these lagoons constructed, and then also to try and prioritize, like, which ones are the worst ones? And then maybe work with them to -- you know, in the future, work with them to try and make improvements.

But trying to get a handle on it -- if we don't know that information, it's -- it's kind of a challenge. We might know it from one specific facility, but that -- this is a general permit, and it's designed to apply to all the facilities statewide. So it's tough to make real prescriptive requirements that apply to everybody. So we want to be cautious about what we're putting in the general permit.

MS. BROWN: Does that mean, then, that there aren't -- I think you also said there aren't seepage limits on the existing lagoons.

Is that right?

THE WITNESS: Correct.

AR4300:14-AR4301:21. Ecology's witness later stated that it was "correct" that "there is no AKART for existing lagoons" even though the Permits "authorize[] discharges from existing lagoons[.]" AR4310:2-5.

The PCHB held that:

Because of the lack of information regarding existing lagoons, *the Permits do not provide a specific AKART requirement*. Rather, the lagoon assessment required by Condition S7.B will provide information on the range of impacts from existing lagoons and assist Ecology in future permit development.

AR3423:1-4 (emphasis added).

In its brief, Ecology does not discuss this testimony or the PCHB's statement that the Permits "do not provide a specific AKART requirement" for existing lagoons. Instead, Ecology argues that the "lagoon assessment" called for by the Permits "is AKART" for existing lagoons. Ecy. Br. at 14. Ecology is incorrect for three reasons.

First, Ecology admits that it did not do *any* investigation into the status of existing lagoons in the State when evaluating AKART. Instead, Ecology “had heard during discussions that – and those were discussions with industry – that lagoons were in good shape.” AR3973:1-9; *see also* AR3973:10-AR3974:5 (Ecology admits it did not assess all lagoons in the State, instead relying upon Industry’s representation that lagoons were “in good shape.”). Because it did no investigation into the technologies being used for manure storage by CAFOs in the State, Ecology cannot by any measure claim to have required AKART for existing lagoons.

Indeed, Ecology has effectively admitted as much by opting to incorporate Tech Note 23, described in detail *supra*, as an information gathering tool “to help Ecology get the lay of the land in terms of there’s lots of lagoons out there.” AR3866:22-25; *see also* AR3423:2-4. Put differently, Ecology is using Tech Note 23 to “basically triage the lagoons out there to see, you know, which ones are at high risk of causing environmental problems versus which ones aren’t.” AR3867:3-6.

Triaging the types of lagoons used throughout the State is the work Ecology should have done as part of determining an AKART requirement for existing lagoons *prior* to issuing the Permits. As stated in law, AKART is required to be applied to all wastes “prior to entry” to the State’s

groundwater.² RCW 90.54.020(3)(b), WAC 173-200-030(2)(c)(ii). The Washington Administrative Code under which the Combined Permits were issued makes it clear that AKART is “[t]echnology-based treatment requirements and standards reflecting all known, available, and reasonable methods of prevention, treatment, and control.” WAC 173-226-070(1) (emphasis added); *see also* AR3440 (PCHB Order) (describing that technology-based effluent limitations are imposed through AKART); *Puget Soundkeeper All.*, 102 Wn. App. at 792 (AKART requirement in RCW 90.48 “similarly construed” as AKART requirement in air pollution emission statute, which is “clearly meant to foster the use of new emission control technology”). Here, Ecology’s circular logic is that Tech Note 23 is needed to gather information about the types of existing lagoons across the state (the type of information necessary for an AKART determination), while simultaneously asserting that such an “information-gathering” assessment, which imposes no “technology-based” requirements, *is* AKART in the first place. Ecy. Br. at 14 (“The lagoon assessment is required because Ecology needs to collect information on the design and

² Ecology claims that AKART also includes “operational protocols, requirements for evaluations of systems, and identification, planning, and implementation of pollution prevention plans that are technically and economically achievable.” Ecy. Br. at 11. Ecology cites AR3435-36 for this proposition, but no such language exists in the record at those pages or in the Court of Appeals decision in *Puget Soundkeeper All. v. Dep’t of Ecology*, 102 Wn App. 783, 792-93 (2000). PSA has searched for cases or authority containing that language, and has found none.

condition of existing lagoons across the state.”). Ecology cannot plausibly say that Tech Note 23 is both AKART for existing lagoons *and* needed by Ecology to gather information about the types of lagoons used by industry so it can set AKART in the future. Most lagoons have been in existence for decades, so this analysis should already have been completed. *See* AR3970:4-6; AR4543:3-7.

Second, conducting a visual inspection of a preexisting manure storage lagoon – all that is called for by Tech Note 23 – does not achieve compliance with the technology-forcing concept of AKART. WAC 173-226-070(1) (requiring “technology-based treatment requirements and standards”); *see also* Department of Ecology, “Water Quality Program Permit Writer’s Manual,” Publication No. 92-109 at p. 84 (“AKART has been interpreted as a technology-based approach to limiting pollutants from wastewater discharges which requires an engineering judgment and an economic judgment.”).³ Simply put, a visual inspection does not require a permittee to apply technologies to prevent, control, or treat manure pollution prior to its entry into the State’s groundwater.

Third, there are significant shortcomings with Tech Note 23 that vitiate any attempt to shoehorn it within the technology-forcing definition

³ Available at: <https://fortress.wa.gov/ecy/publications/documents/92109.pdf> (last visited November 4, 2019). The Permit Writer’s Manual has been cited and relied upon by this Court. *See, e.g., Puget Soundkeeper All. v. Washington*, 197 Wn. App. 1078, 2017 Wash. App. LEXIS 448, at *19-20 (Feb. 22, 2017).

of “AKART.” By its own terms, Tech Note 23 is intended to be completed by NRCS-trained personnel. AR7519 (“Through this procedure, NRCS personnel will establish an overall assessment category of a [Waste Storage Pond] according to observed factors.”); *see also* AR3969:13-23 (testimony of Ecology witness Mr. Jennings, admitting that “NRCS personnel” are intended to do the inspection contemplated by Tech Note 23). Emphasizing this point, Ecology admits it did not evaluate whether farmers would be able to complete the inspection on their own, or whether farmers possess the requisite lagoon structural and engineering records to complete a Tech Note 23 inspection. AR3969:24-AR3970:6.

Part of the Tech Note 23 inspection process is to measure the vertical distance from the top of a manure storage lagoon liner to the top of the water table, to ensure there is at least two vertical feet of separation between those two measurement points. AR7538; *see also* AR6946. Not one of Ecology’s witnesses could explain how a farmer is expected to complete that process or verify the results, especially in light of the lack of information regarding existing manure storage lagoons. *See, e.g.*, AR3971:6-8 (Ecology’s witness “couldn’t answer” how a farmer will measure the vertical separation); AR4304:23-AR4306:13 (Ecology witness testifying, *inter alia*, that that farmers could “dig a hole” to assess depth to groundwater and that determining thickness of a lagoon’s liner

would require reviewing “the as-built” engineering designs for the lagoon, but acknowledging that Ecology “does not know how many facilities have these records.”). If Ecology does not know whether permittees have the necessary records to complete the Tech Note 23 inspection process, then Tech Note 23 cannot amount to even a minimal form of AKART.

Another goal of Tech Note 23 is to place a risk classification on existing manure storage lagoons, although by its terms “[t]he assessments in this technical note are qualitative in nature and are not intended to quantify seepage amounts occurring from existing [Waste Storage Ponds].” AR7519. Presuming a farmer can accurately complete the inspection process – a highly doubtful assumption, based on Ecology’s testimony – then the farmer is required to place one of four classification rankings on his or her lagoon. “If the lagoon assessment results in a risk category of 3A, 3B, 3C, or 4,” or if the assessment determines “that there [is] less than two feet of vertical separation from the bottom of the lagoon liner” and the water table, then the permittee must invent a plan to either bring the lagoon into a lower risk category or to ensure that there is two feet of vertical separation. AR6946-47 (Condition S7.B).⁴

Despite these requirements, a permittee may operate a defective lagoon and still comply with the Permits. Under the Permits, a permittee

⁴ Per the PCHB’s Order, permittees are required to measure from the *top* of their lagoon liner, not the bottom. AR3443:10-AR3444:8.

has two years to complete the Tech Note 23 inspection process. *Id.* If a permittee identifies a problem with a lagoon, it has six months to develop a plan to address that issue and 18 months to implement that plan. *Id.* Ecology admits this means a permittee may operate a defective lagoon for 3.5 years before taking *any* required actions to abate the discharge. AR3927:3-11. Wastes discharged to state waters during this timeframe are plainly *not* subject to AKART “prior to entry,” *see* RCW 90.54.020(3)(b), WAC 173-200-030(2)(c)(ii), for the Permits do not prohibit operating a deficient lagoon, as Ecology admits. AR5168:16-AR5169:7.

Finally, and most troubling, the Permits authorize a CAFO to utilize a manure storage lagoon that NRCS itself states in Tech Note 23 should be discontinued for risk to the environment. The Permits only require action by the permittee following a lagoon inspection if a lagoon falls into Categories 3A, 3B, 3C, or 4 of Tech Note 23. AR6946. Tech Note 23 states, however, that any lagoon which falls into Categories 2B or 2C should be discontinued from service until modifications are made. AR7544. Ecology admits that NRCS would not allow the use of lagoons falling into Categories 2B or 2C for concerns about environmental contamination. Nonetheless, Ecology states that such lagoons, despite their threat to the State’s groundwater, would be compliant with the

Permits. AR3971:23-AR3972:15. Lagoons which NRCS says should not be used for storage cannot satisfy the State's AKART requirement.

In sum, Ecology testified at the hearing that it did not set an AKART requirement for existing lagoons. The PCHB agreed, finding that "the Permits do not provide a specific AKART requirement" for existing manure storage lagoons. AR3423:1-4. A general discharge permit that lacks AKART for an acknowledged source of groundwater pollution violates State law, which unambiguously requires the application of AKART to all wastes "prior to entry." RCW 90.54.020(3)(b), WAC 173-200-030(2)(c)(ii). As such, the PCHB's approval of the Permits is arbitrary, capricious, and contrary to established law.

B. There are No AKART Requirements for Composting Areas or Animals Pens and Corrals

Ecology claims that general permit requirements are the equivalent of technology-based methods for controlling, treating, or preventing pollution before it enters the State's waters. Ecy. Br. at 19. In particular, Ecology asserts that a handful of provisions within the Permits specifically require permittees to implement technology-based AKART requirements for composting areas and pens and corrals.⁵ *Id.* at 19. But even a cursory

⁵ The PCHB held Permit Conditions S4.A, S4.B, S4.C, and S4.D were AKART for composting areas, and Permit Conditions S4.A, S4.D, and S4.E were AKART for animal pens and corrals. AR3440:20-AR3441:6. Ecology also claims that Permit Conditions S4.F and S4.G are AKART for composting areas and pens and corrals. Ecy. Br. at 19.

review of those provisions shows they do not require the implementation of any type of technology-based effluent limitation.⁶ Ecology cannot satisfy the requirements for AKART by pointing to general provisions that obligate permittees to implement no technologies.⁷

While Ecology asserts the aforementioned general permit provisions are AKART, Ecology's witnesses testified that the Agency ignored available information on technologies being used in the State on composting operations and animal pens and corrals. Ms. Redding testified that she "was not asked" to evaluate composting operations as part of the permit development process. AR4108:23-25. Ms. Redding acknowledged, however, that composting operations "are a potential source" of groundwater pollution. AR4139:6-8. Mr. Jennings similarly testified that

Condition S4.F only pertains to chemical management and spills, and Condition S4.G only pertains to animal mortalities. PSA submits neither of these provisions relate to AKART for manure composting areas or animal confinement areas.

⁶ AR6923 (Permit Condition S4.A) (obligating permittees to prevent discharges to surface water, which is already required by the Condition S3.C); AR6925 (Permit Condition S4.B.2) (generally requiring permittees to prevent runoff discharges from composting and manure storage areas, but imposing no technology-based requirements); AR6926 (Permit Condition S4.C) (generally requiring permittees to maintain their infrastructure, but imposing no technological requirements as effluent limitations); *id.* (Permit Condition S4.D) (merely allowing permittees to divert clean water away from manure storage facilities); *id.* (Condition S4.E) (prohibiting animals from coming into contact with surface waters, exempting the "production area" where animals are confined).

⁷ Ecology argues that Mr. Erickson "had not come up with an answer on how to address the risk to groundwater from the compost areas." Ecy. Br. at 20. That is incorrect. Mr. Erickson discussed composting on lined surfaces, using concrete aerated cells, lining stormwater ditches and drains from the compost area, and selecting composting areas with sufficient slope to prevent infiltration. AR4572:6-AR4573:12.

compost areas are a “potential source” of groundwater pollution.

AR3892:20-24. He also stated that he had no reason to doubt records from Ecology’s sister agency, the Washington State Department of Agriculture (“WSDA”), which “estimated that 155 tons of nitrate leached to groundwater per year” from each of the 24 compost operations it investigated as part of the Lower Yakima Ground Water Management Area. AR3891:9-23 (Jennings testimony); AR6361 (discussing WSDA data). Mr. Jennings could not recall whether Ecology considered this information, or information about the use of lined surfaces for composting, during the permit development process. AR3890:25-AR3892:19.

Ecology also ignored the best available science about the impacts of composting on bare ground. PSA expert Mr. Erickson testified about the *Cow Palace, LLC* litigation and the results of testing underneath composting areas at five dairy facilities in Eastern Washington. AR4400:20-AR4402:5 (discussing composting operations); AR4402:21-AR4403:6 (testing beneath compost area “showed some of the highest nitrates in soil that we’d seen[.]”); AR4568:2-AR4572:5 (discussing sampling results). The sampling results mirror the findings of WSDA discussed *supra*, and Judge Rice concluded that composting operations on bare ground, as is allowed by the Combined Permits, causes or contributes

to groundwater contamination. *Cow Palace, LLC*, 80 F. Supp. 3d at 1224-26.

Ecology also asserts that compost is relatively dry and therefore lacks the hydraulic head necessary to push excess nitrate into the aquifer. *See Ecy. Br.* at 20. But Ecology's scientific witness did not know the moisture content of composting manure, AR4138:9-25, and the only witness to conduct actual soil testing within a composting operation, Mr. Erickson, described such composted manure as "slop." AR4397:9-20; *see also* AR4568:2-10 (composting area was "saturated with liquid").⁸ Mr. Erickson's testing at the dairies involved in the *Cow Palace, LLC* litigation found ammonia and nitrate deep in the ground under composting operations, where it has only one destination: groundwater. AR4398:1-15; *see also* AR4400:20-AR4403:3 (discussing how composting operations on bare ground drive nitrate into groundwater); AR4122:16-AR4123:23 (Ecology witness agrees that nitrate moves with water in the subsurface, and water that is found below crop root zones will reach groundwater).

⁸ Ecology relies upon testimony from Mr. Jennings that he didn't personally observe a "driver" for nitrate in the few composting areas he visited. *Ecy. Br.* at 20 (citing AR3893). But Mr. Jennings is not a scientist and was not the expert witness Ecology proffered to support the scientific underpinnings of the Permits. AR3796:9-11; AR4059:24-AR4062:25 (describing Ms. Redding's role in summarizing the current science surrounding CAFOs). Mr. Jennings admitted that composting areas are a potential source of pollution discharges. AR3893:18-23.

Concerning pens and corrals, Industry and Ecology argue that these areas of a CAFO lack the necessary hydraulic head to drive nitrate down into groundwater. Industry Br. at 10-11; Ecy. Br. at 19. But Ms. Redding testified that pens and corrals are a potential source of nitrate contamination. AR4108:8-9. PSA's comment letter to Ecology specifically referenced information from an employee with Ecology's sister agency, WSDA, which estimated that 95 CAFO operations' animal pens leached 824 tons of nitrate to groundwater every year. AR6362. And Mr. Erickson testified to the sampling conducted in the *Cow Palace, LLC* litigation – the only known subsurface testing from an active dairy confinement area in the State – which showed nitrate contamination throughout the soil column. AR4387:20-AR4388:4; AR4395:18-AR4397:8 (discussing pen sampling and conceptual model); AR4397:23-AR4400:13 (discussing drivers of nitrate in animal pens); AR6159-AR6163 (Expert Report containing sampling results). Ecology witness Ms. Redding does not dispute Mr. Erickson's conclusion that confinement pens were a source of groundwater contamination, AR4136:15-22, and admits that Mr. Erickson's testing was the only data on animal pens she had seen in the entire State. AR4137:8-12.

Ecology does not dispute that composting areas and pens and corrals are sources of contamination from a CAFO. Nonetheless, rather

than engaging in an AKART analysis to evaluate what technologies are being used by CAFOs to address this pollution, Ecology opts to do nothing. The Permits require no technologies to be implemented for CAFOs composting areas and pens and corrals. This Court should overturn the PCHB's holding that Conditions S4.A, S4.B, S4.C, S4.D, S4.E, and S4.F are AKART for composting areas and corrals and pens. That holding is arbitrary, capricious, and contrary to established law.

C. The CAFO NPDES Permit is Invalid Because it Fails to Ensure Compliance with Water Quality Standards and thus is Inconsistent with the Law, Unsupported by Substantial Evidence, and Arbitrary or Capricious

Under Washington law, “the primary means to be used for controlling ... waste discharges shall be through the issuance of waste discharge permits ... [which] must be conditioned so the discharges authorized will meet the water quality standards.” WAC 173-201A-510(1). As a result, when the required technology-based limits are insufficient, all NPDES permits must include effluent limitations adequate to ensure compliance with water quality standards in the receiving water. WAC 173-226-070(2); accord *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163 (9th Cir. 1999); 33 U.S.C. § 1311 (b)(1)(C) (a permittee “shall . . . achieve . . . any more stringent limitation, including those necessary to

meet water quality standards. . . .”); 40 C.F.R. § 122.44 (d)(1). As Ecology has explained:

Permit writers must consider the impact of every proposed discharge to surface waters on the quality of the receiving water and specifically consider how the discharge may affect the use of the receiving water. *In some cases, this consideration may reveal that permit limits based on a treatment technology are not sufficiently stringent to protect water quality even with a mixing allowance. In these cases, additional permit limits must be developed, or alternative disposal methods or locations must be found.*

Permit Writer’s Manual at 163 (emphasis added). That is, every NPDES permit must include effluent limits that “control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the [permitting authority] determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.” 40 C.F.R. § 122.4(d)(1)(i); *id.* § 122.44(d)(1)(vii)(A) (WQBELs must be “derived from” and comply with applicable water quality standards).⁹

Here, Ecology has determined that the discharges authorized under the CAFO NPDES permit have the potential to cause or contribute to a

⁹ Thus, “[n]o permit may be issued: . . . [w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States.” 40 C.F.R. § 122.4(d); *Port of Seattle v. Pollution Control*, 90 P. 3d 659, 677 (Wash. 2004). Accordingly, Ecology may not issue an NPDES permit that allows violations of water quality standards. 40 C.F.R. § 122.4(d); WAC 173-226-070(2).

violation of water quality standards. AR6320. As a result, the Permit must include effluent limits that will ensure compliance with those standards. *See Trustees for Alaska v. U.S. E.P.A.*, 749 F.2d 549, 556–57 (9th Cir. 1984). “The rubber hits the road when the state-created standards are used as the basis for specific effluent limitations in NPDES permits.” *American Paper Inst., Inc. v. U.S. E.P.A.*, 996 F.2d 346, 350 (D.C. Cir. 1993).

Despite this clear mandate, at no time has Ecology explained how the Permit will ensure compliance with numeric and narrative water quality criteria, protect designated uses of the receiving waters, and ensure compliance with the state’s anti-degradation policy. PSA Br. at 23-26. Instead, Ecology asserts, without support, that “[c]onsistent with the federal regulations, the Permits’ effluent limitations prevent discharges that would violate water quality standards from a CAFO.” Ecy. Br. at 22. What is missing is any support for that conclusion.

To determine whether a discharge has a reasonable potential to violate water quality standards “the permit manager must know the criteria, the background concentration, the point of compliance, design flows for the receiving water and effluent flow, how to deal with multiple pollutants and effluent variability and the process of developing an effluent limit.” *Spokane Cty. v. Sierra Club*, 195 Wash. App. 1042, 2016 Wash. App. LEXIS 1941, at *20-21 (Ct. App. Aug. 16, 2016) (quoting

Permit Writer's Manual). Here, this analysis did not occur. This is clear legal error given Ecology's admission that the discharges authorized under the CAFO NPDES permit have the potential to cause or contribute to a violation of water quality standards.¹⁰

Ecology attempts to defend its failure to establish water quality based effluent limits by suggesting the Manure Pollution Prevention Plans ("MPPP") will act to fill in the gaps. Ecy. Br. at 23. Ecology claims that each facility's MPPP "is intended to be a living document setting out specifically how a facility is implementing the conditions of the Permits." *Id.* This approach is inconsistent with the CWA and its implementing regulations. The whole point of establishing effluent limitations in NPDES permits is to establish legally-binding controls, and requirements to meet them, which avoids guesswork and uncertainty for permittees, enforcement agencies, and the public. Instead, Ecology has relieved permittees of their compliance burden and hopes that they will figure it out. This is precisely the dynamic Congress was trying to avoid when it developed the CWA's permitting scheme. *Cf.* H. Rep. No. 92-911, at 167

¹⁰ Notably, Ecology has not attempted to defend the narrative condition in S3 of the Permit as an applicable component of the Permit's supposed water quality-based effluent limits. *See* Ecy. Br. at 22-23 (cataloging what Ecology believes are the Permit's effluent limitations that will "prevent discharges that would violate water quality standards from a CAFO."). As PSA demonstrated in its opening brief, this provision is too vague to be interpreted or practically applied by permittees and thus can play no meaningful role in ensuring compliance with water quality standards. PSA Br. at 27-28.

(1972) (“[The NPDES program] provides an effective mechanism whereby effluent limitations can be applied in a clear, direct and orderly way to . . . dischargers.”); see *Trustees for Alaska*, 749 F.2d at 556–57.

Finally, in an attempt to distract from this fatal flaw, Ecology raises a strawman argument, namely that PSA is seeking only numeric effluent limits. Ecy. Br. at 23. This is not the case, although Ecology is correct that the law requires that permits include numeric effluent limits, unless it is infeasible to boil the requirements down to specific, numeric limits. 40 C.F.R. § 122.44(k)(3). Being unable to derive numeric effluent limits does not alleviate Ecology of the duty to establish water quality-based effluent limits of some kind. *American Paper Inst.*, 996 F.2d at 350. Ecology ignores the statutory directive issue permits that actually achieve compliance water quality standards, making the PCHB Order affirming the Permits arbitrary, capricious, unsupported by substantial evidence, and contrary to established law.

D. Groundwater and Surface Water Monitoring Must Be Required by the Permits to Comply with State and Federal Law

Both Ecology and Industry focus on the perceived difficulties of environmental monitoring as the justification for why the Combined Permits do not require surface or groundwater monitoring. Neither addresses the need for such monitoring to evaluate and enforce the

Permits' effluent limitations, which are couched in terms of causing or contributing to an applicable water quality standard.

First, as to surface water monitoring, Ecology contends that if a permittee discharges into a surface water, it is a violation of the Permits and Ecology may take enforcement action. Ecy. Br. at 30. In that same vein, Ecology asserts that monitoring by taking a sample to confirm a discharge occurred is unnecessary "when the fact of the discharge itself is a violation in the first instance." *Id.* at 31.

This is another example of Ecology's circular logic. The Permits' effluent limitation for surface water is **both** a flat prohibition against discharges (except in very limited circumstance),¹¹ **and also**:

Discharges conditionally authorized by this permit **must not cause or contribute to a violation of water quality standards**. Discharges not in compliance with these standards are not authorized.

AR6922 (Condition S3, Page 12) (emphasis added).

The record on appeal demonstrates that Ecology will be unable to enforce this effluent limitation absent water quality monitoring. The law is clear that "[a]n NPDES permit is unlawful if a permittee is not required to

¹¹ Ecology witness Mr. Moore testified to this point: "These permits, I guess, are pretty close to being a zero surface water discharge permits. Certainly the State-only permit does not authorize any discharges to surface waters at all. **And the combined permit has very limited times when a surface water discharge could occur.**" AR5159:8-12 (emphasis added). Ecology's counsel also asserted that the Combined Permits do authorize a discharge in certain circumstances, AR5334:17-19, but asserted that requiring monitoring of that discharge would be unreasonable. AR5334:20-23.

effectively monitor its permit compliance.” *Nat. Res. Def. Council (NRDC) v. Cty. of Los Angeles*, 725 F.3d 1194, 1207 (9th Cir. 2013). PSA is aware of no other method to determine whether a discharge from a permitted facility violates an applicable water quality standard *other* than analytical water quality sampling. Visual monitoring of a discharge, which Ecology relies upon, can only reveal if a *surface water* discharge is occurring, not the content of that discharge or whether it is causing or contributing to a violation of a water quality standard.¹² And no CAFO operator can visually monitor a groundwater discharge. AR3931:10-12 (Mr. Jennings’ testimony).

PSA Expert Dr. Keeney testified about his experience with surface water monitoring at CAFOs, describing the importance of such monitoring and the ease in which automatic sampling devices can be implemented, including in tile drains. AR4425:10-AR4428:16. Dr. Keeney also explained that the Permits’ “emergency winter field application” provisions should require surface water monitoring, as there is a very high risk of discharges occurring when manure applications are tied to lowering lagoon levels and not fertilization of crops. AR4428:17-AR4433:16; *see also* AR4434:7-20 (describing importance of temporal proximity of

¹² This issue is further compounded by the Permits’ requirement that discharges from CAFOs not violate an applicable Total Maximum Daily Load or TMDL. AR6922.

sampling to discharge event).¹³ Ecology witness Mr. Jennings agreed that such applications present “a higher risk of surface water discharges due to field conditions.” AR3938:20-AR3939:2.

Ecology asserts Dr. Keeney’s proposed sampling regime is unreasonable because “[t]his type of receiving water monitoring is not the monitoring of pollutants located in a discharge.” Ecy. Br. at 31.¹⁴ Ecology provides no record citation or other authority supporting this assertion, because there is none. Indeed, it is controverted by the very effluent limitations of the Permits themselves, which prohibit discharges that cause or contribute to violations of water quality standards *in the waters receiving a discharge*. AR6922. To know whether a discharge has caused an exceedance of a water quality standard in a receiving water necessarily requires sampling that receiving water.

Second, as to groundwater monitoring, Ecology and Industry fail to respond to PSA’s arguments concerning the State’s anti-degradation provisions for groundwater and the unenforceability of the Permits’ groundwater effluent limitation. The Permits conditionally authorize discharges from a CAFO to groundwater so long as those discharges do

¹³ Industry Expert Mr. Haggith testified it was “correct” that winter emergency field applications “create risks of runoff” because such applications occur “on saturated or frozen fields[.]” AR5069:18-24.

¹⁴ Dr. Keeney testified about both receiving water sampling *and* sampling locations where direct discharges to surface waters occur, such as tile drains. AR4427:10-28:16.

not cause or contribute to a violation of the State’s groundwater quality standards. AR6922. *Everyone* in this appeal – Ecology, PSA, and Industry – unanimously agree that the only way to know whether a violation of those standards has occurred is to sample the groundwater underlying a permittee’s facility. At the outset, the Manure and Groundwater Quality Literature Review – the scientific underpinnings of the Permits, *see* AR6796-97, AR6801, AR6804, AR3836:12-23 – concluded that:

The majority of researchers agree that groundwater monitoring is the only way to definitively determine impacts to groundwater quality from residual soil nitrate. Monitoring other media, such as soils, can indicate whether manure management practices need to be adjusted, but it cannot conclusively determine the extent of the impacts to groundwater quality...Groundwater monitoring provides a direct assessment of impacts to groundwater quality from land uses and is an important tool for determining how effective manure management practices are being implemented and thus minimizing impacts to groundwater.

AR7212.¹⁵ The Review also concluded that groundwater monitoring is “the most reliable and direct means of measuring impacts to groundwater from manure applications,” and soil sampling is “not a direct or reliable indicator of impacts to groundwater quality.” AR7233.

¹⁵ Ecology’s argument that “soil monitoring” will somehow be “protective of groundwater” is explicitly undermined by this conclusion and the testimony of Ecology’s witnesses. *See* Ecy. Br. at 29; *see also* AR6796 (written discovery) (“Ecology is not using soil monitoring to determine if discharges are occurring.”); AR4207:12-21 (Ms. Redding admits only way to know whether permittee’s application fields are causing or contributing to a water quality violation is groundwater monitoring).

The testimony presented by all Parties at the hearing confirms that groundwater monitoring is the only way to evaluate whether discharges from a permittee's facility are violating applicable groundwater quality standards. AR5336:1-3 (Ecology's counsel states: "yes, in order to know what's in the groundwater, you have to sample it and have it analyzed."); AR3920:20-21 (Ecology witness Mr. Jennings testifies, in the context of whether a leaking manure storage lagoon is impacting groundwater: "To actually know what's in the groundwater, yes, you would need groundwater monitoring."); AR4207:6-14 (Ecology witness Ms. Redding testifies, in context of whether a leaking lagoon will impact groundwater, that it is "correct" that "the only way to know whether they're impacting groundwater is to do groundwater monitoring."); AR4207:15-21 (Ms. Redding testifies again that it is "correct" that "groundwater monitoring is the only way to know for sure" whether a permittee's application fields are causing or contributing to a groundwater quality standard violation); AR4212:13-15 (similar); AR5178:14-AR5179:4 (Ecology witness Mr. Moore testifies that "If you want information on what is the groundwater quality, you would need to monitor the groundwater."); AR4442:2-8 (PSA expert Dr. Keeney testifies "the final proof is in the groundwater sample."); AR4787:12-AR4788:4 (Industry Expert Dr. Lindsey testifies that "[i]f you want to know what's in the groundwater, you have to

measure it.”); AR4927:20-AR4928:2, AR4934:11-13 (Industry Expert Dr. Harrison’s study concluded that “[g]roundwater monitoring was the only reliable way to assess nitrate impacts” to groundwater); AR4965:9-12 (Dr. Harrison agrees that groundwater monitoring is the only way to accurately know whether nitrates are in groundwater).

Given these admissions, Ecology cannot plausibly contend that the Permits’ groundwater effluent limitation is enforceable. Absent groundwater quality monitoring, Ecology will have no means of evaluating whether the conditionally-authorized groundwater discharges from a CAFO are, or are not, causing or contributing to a water quality violation, and Ecology will have no means of ascertaining existing groundwater quality. That effluent limitation is simply unenforceable under these circumstances, because Ecology will never have the requisite information to know if a violation of that limitation occurs.

Furthermore, these admissions demonstrate why the Combined Permits’ authorization to discharge to groundwater violates the State’s anti-degradation policy for groundwater. The law plainly requires that any permit issued by Ecology “shall be conditioned in such a manner as to authorize only activities that will not cause violations” of the groundwater quality standards. WAC 173-200-100(4). Ecology admits in written discovery that the Combined Permits authorize discharges to groundwater

even if that groundwater already exceeds the Maximum Contaminant Level (“MCL”) for nitrate, and that Permits would be issued to CAFOs operating in areas where groundwater already exceeds the MCL for nitrate. AR6842-43.¹⁶ If the State’s anti-degradation policy for groundwater is to mean *anything*, then surely it must stand for the proposition that permitting a CAFO to discharge pollution into groundwater that is *already* polluted above the maximum contaminant level must be prohibited. WAC 173-200-030(2)(a).¹⁷

Instead of dealing with these legal issues, Ecology and Industry focus on the perceived shortcomings and cost of groundwater monitoring. Ecy. Br. at 31-32; Industry Br. at 12-13. In doing so, Ecology misrepresents the testimony of Mr. Erickson. Ecology asserts that Mr. Erickson testified that “where either multiple practices or multiple facilities are upgradient, it may not be possible to pinpoint the exact

¹⁶ Ecology also noted that if groundwater already exceeds the MCL, then the “background water quality” becomes the permit limit. AR6843 (“For example, the groundwater criterion for nitrate is 10 mg/L. This would generally be the permit limit for a groundwater discharge of nitrate. However, in a situation where the background level of nitrate is already at 30 mg/L nitrate, that higher concentration, 30 mg/L, becomes the permit limit for discharges to groundwater.”). As described above, Ecology cannot know what that background water quality is without groundwater monitoring. If that information is unknown, then there is no permit limit, and the groundwater effluent limitation is, again, unenforceable.

¹⁷ Ecology suggests that compliance with the Permits’ terms will result in absolutely no groundwater discharges that violate water quality standards. *See, e.g.*, Ecy. Br. at 6-7, 28 (citing PCHB Order). As PSA described in its Opening Brief, a permittee may be in technical compliance with the Combined Permits while discharging substantial amounts of manure pollution into groundwater. PSA Br. at 31-32 (citing Ecology testimony). Neither Ecology nor Industry address this issue in their briefing.

practice, or even facility, responsible for the nitrate found in a downgradient well.” Ecy. Br. at 33 (citing AR4616-17). But Mr. Erickson testified to the exact opposite. When asked if it was possible to “go back and pinpoint a particular practice at a dairy that is affecting” groundwater, Mr. Erickson testified that you could indeed do just that, based on monitoring well data. AR4617:17-20 (“And maybe this is your question. Based on what you find in the drinking water well, you can’t tell where it came from, ***but you can tell if you have a monitoring system in place.***”) (emphasis added).

Even assuming, *arguendo*, that there are technical issues to address in requiring groundwater monitoring for CAFOs, it is Ecology that opted to issue Permits that expressly authorize CAFOs to discharge pollutants into groundwater. Having done so, Ecology had no choice but to establish effluent limitation for those discharges, which must ensure that CAFOs not cause or contribute to a groundwater quality standard violation. An effluent limitation must be enforceable to be lawful. *See Cty. of Los Angeles*, 725 F.3d at 1207. The Permits’ groundwater effluent limitation is not enforceable absent groundwater monitoring, because monitoring is the only way to know what is in the groundwater. This makes the PCHB’s approval of the Permits arbitrary, capricious, and contrary to law.

Importantly, this issue is not hypothetical. There are existing imminent and substantial endangerments ongoing as a result of CAFO discharges to groundwater. *See, e.g., Cow Palace, LLC*, 80 F. Supp. 3d. at 1227-28; AR6203 (Erickson Supplemental Expert Report, discussing CARE Clean Drinking Water Program); AR6230-33 (drinking water sampling results); *see also* AR7148-52 (Ecology’s review of nitrate sources in Whatcom County and the Lower Yakima Valley, with CAFOs being predominant source). Ecology can no longer “kick the can down the road.” AR6879 (52:3-53:24) (prior deposition testimony of Ecology employee Thomas Tebb, describing need for groundwater monitoring).

E. Ecology’s Witnesses Testified that the Permits Violate the Controlling Federal Regulations Governing Public Notice and Comment Prior to Permit Issuance

Ecology again ignores the testimony of its own witnesses in arguing that the Combined Permits satisfy the controlling federal regulations concerning CAFOs under the Clean Water Act, 33 U.S.C. § 1251 *et seq.* The regulations explicitly require that *site-specific plan information* about how a permittee will comply with the terms of a NPDES permit be available for public comment and agency review *prior* to permit issuance. That *site-specific plan information* is not contained in the effluent limitations that are incorporated into the Permits.

Under the federal regulations, the type of site-specific information that must be available for public comment and review prior to permit issuance includes: “field-specific rates of application,” “field-specific land application rates for nitrogen and phosphorus,” and “site-specific conservation practices.” 40 C.F.R. § 122.42(e)(1), (e)(5); 40 C.F.R. § 122.21(i)(1)(X). Under the Combined Permits, this information is *not* provided to the public or to Ecology prior to permit issuance. Instead, it is contained within a “Manure Pollution Prevention Plan” or “MPPP” that is provided to Ecology without opportunity for prior agency review or public comment, up to six months *after* a permittee has obtained authorization to discharge. AR3981:23-AR3982:8 (Ecology witness testifies that the MPPP “describes how the permittee on each site is meeting the performance standards in effluent limitations in a permit[.]”); AR6938. In other words, a permittee does not need to demonstrate how it can comply with the Permits’ terms, including the discharge prohibitions concerning water quality standards, before it receives authorization to discharge.

Ecology’s witnesses testified that the site-specific information required by the controlling federal regulations is not provided to Ecology prior to permit issuance and is not subject to public review and comment. For instance, Mr. Jennings testified:

Q: But doesn't the MPPP contain the site-specific and field-specific information for how compliance is achieved?

A: It describes how -- yes, how the facility is meeting permit requirements on-site, but other documents describe things like the field-specific nutrient budgets, and so those are submitted to Ecology.

Q: The nutrient budgets aren't made available for public review and comment, though, are they?

A: So the nutrient budgets were -- how the nutrient budgets are developed is laid out as a permit requirement. So how those budgets are developed each year was available for review and comment prior to issuing the general permit.

Q: But each facility's site-specific and field-specific process for how they will comply with the terms is not something that's made available for public review and comment, correct, because that's part of the MPPP?

A: *So, yes, the -- the description of how the facility is meeting permit requirements is not available for public comment.*

AR3982:2-22 (emphasis added). Ecology witness Mr. Moore also testified to this point, explaining that Ecology will issue permit coverage to a facility without first reviewing its MPPP or making it public:

Q: And this second paragraph, could you read that for us, please.

A: "The permittee must have their initial MPPP prepared and submitted to Ecology special condition S7.A within six months of the date of the permittee receives permit coverage."

Q: So that means that at the time a permittee actually applies for coverage under the permit, they don't have to submit the Manure Pollution Prevention Plan; is that correct?

A: That's correct.

Q: Okay. And the Manure Pollution Prevention Plan is not itself available to the public prior to the permittee getting permit coverage; correct?

A: That's correct.

Q: And so Ecology would then just issue permit coverage to an applicant without even reviewing the MPPP; correct?

A: That's correct.

Q: Okay. And the public never actually has the opportunity to provide comments on a facility's individual MPPP; correct?

A: That's correct.

AR5193:22-AR5194:18. Mr. Jennings confirmed this testimony:

Q: But at the time that permit coverage is issued, Ecology has not received or reviewed the MPPP; correct?

A: That is correct.

Q: Okay. And, similarly, the MPPP is then not available for public comment prior to issuing permit coverage; right?

A: That is correct.

Q: Under the combined permit, the public doesn't ever actually have the opportunity to comment on the MPPP; right?

A: *Because the plan is just discussing how the -- how the permittee is meeting permit requirements, no, there is no -- not public comment on it.*

AR3979:3-14 (emphasis added).

In light of this testimony, Ecology's Permits plainly violate the controlling federal regulations. Respondents' witnesses testified that the site-specific information about how a permittee's CAFO will comply with the effluent limitations in the Combined Permits is not provided to Ecology before permit issuance and not provided to the public for review and comment. As Ecology's counsel put it in her closing argument,

The effluent limitations are in the permit. The MPPPs are where an individual facility shows their work. It's the "how" to the permit limitations, and the permit limitations are the limitations, the "what."

AR5329:12-15. PSA agrees, which is why the Court should overturn the PCHB's erroneous holding. The controlling federal regulations require the public and the regulator to have prior review and comment about "how" an individual facility will comply with the effluent limitations before permit issuance. *Waterkeeper All., Inc. v. U.S. E.P.A.*, 399 F.3d 486, 498-505 (2d Cir. 2005) (invalidating portion of original CAFO NPDES Rule because it did not afford regulating agencies and the public the ability to review nutrient management plans prior to permit issuance).

Ecology claims that the requirement for public participation within the federal regulations is satisfied "by the opportunity the public has had to comment on the Permits" during the Permits' notice and comment process. *Ecy. Br.* at 38. This argument is contradicted by the plain language of the federal regulations, which require Ecology to "notify the public of [Ecology's] proposal to grant coverage under the permit to the CAFO and make available for public review and comment the notice of intent submitted by the CAFO, including the CAFO's nutrient management plan [{"NMP"}]." 40 C.F.R. § 122.23(h)(1).¹⁸

¹⁸ The NMP must contain the *site-specific information* about how a CAFO will comply with the permit's effluent limitations. 40 C.F.R. § 122.42(e)(1) ("Any permit issued to a CAFO must include a requirement to implement a [NMP] that, at a minimum, contains best management practices necessary to meet the requirements of this paragraph and applicable effluent limitations and standards[.]"); *id.* § 122.42(e)(5) ("The terms of the [NMP], with respect to protocols for land application of manure, litter, or process

Ecology also argues that *Riverkeeper, Inc. v. Seggos*, 60 Misc. 3d 462, 75 N.Y.S. 3d 854 (2018 N.Y. Slip Op. 28141) is distinguishable from this appeal. Ecy. Br. at 38. The court in that case analyzed a hybrid nutrient management plan scheme similar Ecology's and found it:

[S]imply not consistent with the specific language of the federal regulations, which provide that [the Department of Environmental Conservation] "make available for public review and comment the notice of intent submitted by the CAFO, including the CAFO's nutrient management plan, and the draft terms of the nutrient management plan to be incorporated into the permit" (40 CFR [h][122.23[h][1] [emphasis added]). I cannot square this broad disclosure requirement with a state permit that allows a CAFO to produce what it characterizes as an "outline" of the plan, and permits it to shield the more comprehensive version of that plan — the CNMP — from public view. It necessarily follows that members of the public are deprived of the opportunity to review and comment on a CWA-compliant NMP before coverage is granted, in violation of 40 CFR § 122.23(h).

60 Misc. 3d 462, 486. The exact same is true here. The hybrid scheme Ecology adopted incorporates the general outline of an NMP into the Permits, but requires the site-specific information about how a CAFO will actually comply with those effluent limitations to be submitted *after* permit issuance (in the form of the MPPP). This scheme deprives the public of the right to review and comment on a CWA-compliant nutrient

wastewater . . . must include the fields available for land application; field-specific rates of application . . . to ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater; and any timing limitations identified in the [NMP] concerning land application on the fields available for land application.”).

management plan, which necessarily includes site-specific information per 40 C.F.R. 122.42(e)(1) and (e)(5), before permit coverage is granted.

In sum, Ecology is issuing Permits without evaluating whether permittees can comply with the Permits' requirements. As the Court stated in the *Waterkeeper* decision, "Under the Act, permits authorizing the discharge of pollutants may issue only where such permits *ensure* that every discharge of pollutants will comply with all applicable effluent limitations and standards" and "[b]y failing to require permitting authority review of nutrient management plans, the CAFO Rule thus allows permits to issue that do not assure compliance with all applicable effluent limitations." *Waterkeeper All., Inc.*, 399 F.3d at 498 and 501.

The PCHB committed legal error when it affirmed that the Permits are compliant with the federal regulations and should be reversed.

F. The Washington Legislature Has Already Directed Ecology to Address Climate Change, and Ecology Admits it Did Not Consider Climate Change in Issuing the Permits

Ecology's defense on this issue rests on the proposition that because RCW 90.48 does not expressly and affirmatively command Ecology to address climate change in its permitting decisions, the Agency had no obligation to consider climate change in issuing the Permits. Ecy. Br. at 40. This defense is untenable in light of the State's Environmental

Policy Act and the Legislature's unambiguous commands to Ecology that it consider climate change in its decision-making process.

As an initial matter, Ecology half-heartedly asserts that protection of water quality somehow equates to measures that address and mitigate climate change. *Id.* at 41. Ecology, however, cannot escape its admissions that it completely failed to consider climate change in issuing the Permits. *See* PSA Opening Br. at 46. Ecology provides support for its claims that protecting water quality “may provide a general benefit against the impacts of climate change,” or that best management practices will reduce surface water discharges, because no such support exists. *Ecy. Br.* at 41. In fact, Ecology admitted that, while water quality permits “may be related to climate change...Ecology does not have the means to assess how one will impact the other.” AR6298-99 (responses to PSA Requests for Admission). Ecology also admitted that it did not consider any documents regarding climate change when drafting the permits. AR854.

The Washington Legislature has commanded that the State reduce its greenhouse gas emissions to 1990 levels by 2020. RCW 70.235.020(1)(a)(i). The Legislature chose Ecology as the lead agency to develop the State's integrated climate change response plan. *See* RCW 70.235.020(b); *see also* RCW 43.21M.010(2). The climate change response plan was required to include, *inter alia*, “[o]pportunities to

integrate climate science and projected impacts into planning and decision-making.” RCW 43.21M.020(2)(b)(iii). State agencies, such as Ecology, “shall strive to incorporate adaptation plans of action as priority activities when planning or designing agency policies and programs.” RCW 43.21M.040. The document Ecology produced, “Preparing for a Changing Climate – Washington State’s Integrated Climate Response Strategy,” Ecology Publication 12-01-004, specifically discusses the Water Pollution Act, the Clean Water Act, and NPDES permitting as part of the “current statutory programs that can provide policymakers a solid foundation to address and reduce the impacts of climate change[.]”¹⁹ *Id.* at 28, 30. One of the strategies is using NPDES permitting to “manage stormwater to protect and restore flow characteristics in light of expected climate change impacts.” *Id.* at 72. The plan also requires Ecology to “**Integrate** climate change adaptation into ongoing efforts that address management of stormwater, wastewater, water quality, water reuse, and potable water demand – to ensure that planning decisions and investments made now are not increasing future vulnerability and causing unintended consequences.” AR599 (emphasis added).

¹⁹ Available at: <https://fortress.wa.gov/ecy/publications/publications/1201004.pdf> (last accessed November 4, 2019). PSA requests the Court take judicial notice of this document, as it bears on Ecology’s position that it need not consider climate change in issuing water quality permits. E.R. 201.

Ecology implements its climate change response strategy through SEPA, which requires Ecology to “[u]tilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on the environment.” RCW 43.21C.030(2)(a). SEPA “overlay[s]” statutory requirements that existed prior to its enactment, including RCW 90.48. *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 65, 578 P.2d 1309 (1978). Ecology would have the Court ignore SEPA, ignore its Climate Change Response Strategy, and ignore its own admissions that the Agency failed to consider and incorporate climate change into the Permits. The Court should reject this invitation and find that the Permits fail to address climate change in violation of Ecology’s legal mandates and state statute.

III. CONCLUSION

For the forgoing reasons, Petitioners respectfully request that this Court set aside the Permits and remand this matter to the Department of Ecology for further proceedings consistent with the law.

Respectfully submitted this 13th day of November, 2019:

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/s/ Andrew M. Hawley
Andrew M. Hawley, WSBA # 53052

CERTIFICATE OF SERVICE

I certify that on November 19, 2019, I caused to be served the Corrected Petitioners' Combined Reply Brief in the above-captioned matter upon the parties herein using the Appellate Court Portal filing system, which will send electronic notification of such filing to the following:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 19th day of November, 2019.

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