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IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

Community Association for)	Court of Appeals No. 36974-5-II
Restoration of the Environment)	
)	
Petitioner-Appellant,)	
v.)	PETITIONER-APPELLANT'S
)	OPENING BRIEF
Washington State Department of)	
Ecology,)	
)	
Respondent-Appellee,)	
_____)	
and)	
)	
Northwest Dairy Association,)	
)	
and)	
)	
Washington Dairy Federation, et al.,)	
)	
Respondent- Intervenors-)	
Appellees.)	
_____)	

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JURISDICTION

This Court has authority to hear this case pursuant to RCW 34.05.518(1)(b), under which this Court granted the parties' joint motion for discretionary review of the ruling of the Washington State Pollution Control Hearings Board (referred to as the "PCHB").

ASSIGNMENTS OF ERROR

1. The PCHB erred in holding (Conclusion of Law 25), in part based upon an incorrect finding of fact (# 56), that the Permit's¹ failure to require groundwater monitoring is reasonable. The failure to require groundwater monitoring does not protect the waters of the State in violation of RCW 90.48 and its implementing regulations.

2. The PCHB erred in holding (Conclusions of Law 6-10) that the Permit provides citizens with access to all documents necessary to meaningfully participate in permitting and compliance oversight proceedings consistent with the requirements of the Federal Clean Water Act and the Washington Water Pollution Control Act.

¹ The Permit, as it is referred to herein, is the "Concentrated Animal Feeding Operation (CAFO) National Pollutant Discharge Elimination System (NPDES) and State Waste Discharge General Permit." E-1.

STATEMENT OF THE CASE

After two rounds of public comment, the second one to correct a failure to comply with federal law based on the failure to require Nutrient Management Plans (NMPs) as part of the permit process, E-2 at 4,² the Department of Ecology (“Ecology”) released the Permit at issue on June 21, 2006. E-1. Three large dairy CAFOs and the Community Association for Restoration of the Environment (CARE) each timely appealed the Permit. The three dairies, whose NMPs are part of the record, later withdrew their appeal after the dairy CAFO trade association intervened. Cross-motions for summary judgment on some issues were filed. Industry’s claims were denied. Order on Motion for Summary Judgment, August 1, 2007. CARE’s claims for which it sought summary judgment were denied, although with some clarification sought by CARE. Some claims, including those for which CARE did not seek summary judgment due to factual disputes, were held over for hearing. This matter was decided after a hearing before the PCHB in Olympia from April 30- May 4, 2007. On August 1, 2007, the PCHB issued its Findings of Fact and Conclusions of Law. CARE timely appealed.

² All citations to the Record of Proceedings before the Pollution Control Hearings Board appear as “RP [page number]:[line number]. All citations to exhibits appear with the letter of the introducing party followed by the number: E= Ecology; A= Appellant CARE; and I= Industry Intervenors.

A joint motion for discretionary review was granted by this Court on December 10, 2007.

Relevant Facts

Since the early 1990's, Ecology has known that contamination from concentrated animal feeding operations (CAFOs) adversely impacts the groundwater in Washington. *See, e.g.*, A-6; PCHB Finding of Fact 15. Ecology recognizes the serious health risks associated with nitrate groundwater contamination. E-2 at 9. Both Ecology and outside studies link various CAFO practices, such as lagoon leakage and land application of manure, to this contamination. *See, e.g.*, A-6 at i (elevated nitrate and fecal coliform in groundwater down gradient from lagoon in Whatcom County); A-9 at 19 (lagoon leakage and application of dairy wastes to the land were contaminating the groundwater); A-10 at 45 (three out of the four dairy waste lagoons studied contributed to groundwater contamination); A-28 at 5-2; A-33 at 46 (in three out of four fields monitored, the average level of nitrates was above the maximum contaminant level for drinking water, both before and after use of the lagoon).

Ecology staff identified groundwater monitoring as an essential element of the Permit. *See* A-49 at 1; RP 92:6-12; A-127; A-130. Shortcomings of soil monitoring, the requirement eventually included in the permit, are

consistently cited in internal documents. *See, e.g.*, A-61; A-66; RP 272:2-6, 18-23.³

Groundwater monitoring was identified in Ecology's 1994 study as, "a viable tool for measuring the effects of pond leakage on ground water." A-10 at 46(9). Despite cost concerns, one conclusion of the study was that, "ground water monitoring provides measured concentrations of contaminants in ground water and...provides a means to assess cause and effect relationships between site activities and contaminant loading." *Id.*

Ecology studies have consistently shown "that dairies have a significant impact on the state's water quality in selected areas." A-96 at 116; A-11 at 11; I-12 at 1 ("proportions of dairies might help explain why some constituents typically were higher..."); I-14 at i ("the chances of finding bovine isolates in any given sample are higher than any other source. This suggests that, even with the significant past Best Management Practices (BMPs), implementation efforts and subsequent improvements in water quality, there is still a long ways to go with current efforts.").

A study of crop uptake of nitrogen, commissioned by Ecology, found

³ Counsel for Ecology conceded in his opening statement that "...poor practices at agricultural facilities have caused groundwater contamination. Ecology does not dispute that fact. There is groundwater contamination in the Lower Yakima Valley area in particular." *See* RP 15:1-9.

that even with applications under well-managed conditions at agronomic rates, nitrogen leaching can occur, A-28 at 5-2, 5-3; RP 274:1-21, and that excess water in the soil moves nitrates through the root zone into the groundwater. A-28 at 5-1.

The nitrate form of nitrogen poses the greatest risk to groundwater. RP 314:3-20. A U.S. Geological Survey study found nitrogen seepage of almost 2,000 pounds per year from an average earthen dairy manure lagoon in Washington. A-96 at 102; RP 113:14-23. Lagoon leakage and manure application to cropland made up 46% of all sources, not just CAFOs, releasing nitrogen and nitrate into the groundwater in Whatcom County. A-96 at 103. Nitrates come from many different sources but dairy practices are the largest single source of the contaminant. *See* A-96 at 103.

The general permit is intended to cover all CAFOs that currently discharge or propose to discharge into waters of the state. E-2 at 6. There are 161 large CAFOs in Washington, 94 of which are dairies. *Id.* Only 35 large CAFOs (21%) are under permit. RP 878:12-17. There are 507 licensed dairies in Washington overall. PCHB Finding of Fact 20.

Health

As Ecology's 2006 CAFO Fact Sheet points out, concentrations of nitrate above EPA's 10 mg/l Maximum Contaminant Level in water pose a

significant health risk, including anemia, death to infants, and methemoglobinemia (blue-baby syndrome). *See* E-2 at 9. Ecology's permit writer, Mr. Kolosseus, acknowledged the link between spontaneous abortion and high levels of nitrate, a fact undisputed at trial. RP 104:6-25; 105:1-8. Intervenor's witness, Dr. Harrison, acknowledged health risks associated with nitrate exposure, particularly in groundwater. RP 1047:4-9.

During 2001-2002, the Valley Institute for Research and Education (VIRE) conducted a study of domestic wells in two regions in the lower Yakima Valley. A-35 at 5. In the region where nearly all the large CAFOs in the area are located, 71 in total, RP 589:22-24, 21% of the wells studied exceeded the maximum contaminant level of nitrates for drinking water – a “significant impairment of groundwater quality.” *Id.*

Based on the VIRE report, which he helped design, Ecology's regional hydrologist, Bob Raforth, pointed out, A-80 at 2, the “widespread ground water quality problem in the lower [Yakima] valley” to various Ecology staff:

On average across the state, groundwater provides 60% of the drinking water and in some areas 100%. Doesn't it seem possible that with an ambient groundwater monitoring program we could detect [well contamination] in advance and take action implemented to head off further degradation of groundwater?

Elevations of nitrate were similarly found in a 2003 Heritage College study of domestic wells in the area from Zillah to Sunnyside. A-38 at 1.

Fecal coliform bacteria were also present in a significant number of the same wells. *Id.* at 2. The study singled out animal feces as the only possible source of the bacteria. *Id.*

Initial Permit Development

Ecology included a groundwater monitoring requirement in the initial March 2004 draft permit, A-131 at 10, and solicited comments on the permit from Ecology and Department of Agriculture staff. A-45 at 2. The groundwater requirement was universally supported by responding staff. *See, e.g.*, RP 92:6-12; A-127 at 1 (Water Quality Inspector, Andrew Craig: “the ground water monitoring requirement is a good one.”); A-130 at 1 (Ag Inspector, Tania Reynolds: “I’m glad the general permit addresses this issue, it gives us a lot more power when trying to evaluate a site for pollution, puts it in the hands of the producer from the start, I like it!”); A-43 (Raforth: “[I’m] curious why the GW monitoring is restricted to Large CAFOs. The potential for GW impacts would be independent of the size of the operation. The magnitude of the impact is a function of the size of the operation.”)(emphasis in original); A-45 at 2 (water quality staff Betsy Dicke: “**quarterly** reporting may miss the critical timing for gw contamination; the rainy season should be targeted for the west side and the east side needs to deal with contamination from irrigation.”)(emphasis in

original).

In April 2004, Ecology produced a document of frequently asked questions (FAQs) regarding groundwater monitoring in the draft Permit. A-46. In A-46, among other things, Ecology: pointed to RCW 90.48 as requiring the Department to protect the water quality of the state (#s 2, 3); stated that studies identified CAFOs as having an impact on groundwater quality (# 2); and noted the importance of protecting private wells and groundwater generally (#s 4, 10 (“Ground water is the only available water supply for many homes, especially in a rural area.”)).

The April 2004 FAQs document also noted the cost of groundwater monitoring was dependant on location and the more shallow wells would be “relatively inexpensive.” A-46 at # 6. Ecology affirmed the importance of groundwater monitoring even when CAFOs are using best-management practices and applying animal wastes to their fields at agronomic rates, pointing out that monitoring serves to determine if these practices are in fact protecting groundwater. A-46, # 7; *see also* RP 274:12-18. At least one Ecology-commissioned study found that nitrogen losses occur even when manure is applied at agronomic rates. A-28 at 5-2, 5-3.

Although noting the possibility of soil monitoring, Ecology’s change in policy to require groundwater monitoring was explained, “[a]s information

becomes available, it is the responsibility of Ecology to update our rules and regulations to respond appropriately. CAFOs represent a source of groundwater contaminationEcology is responding to the available information by developing a monitoring program in the CAFO general permit.” A-89; A-134; RP 82:23-25; 83:1-25; 84:1-23.

The Permit After Industry Comment

Counsel for Ecology stated in his closing, “[i]t’s undisputed that industry was opposed to having groundwater monitoring in the permit.” RP 1163:7-8. Comments from the Washington State Dairy Federation (WSDF) on the April 2004 permit stated, “This draft contains several points that are well *beyond anything we will accept in a permit...*” A-47 at 1; A-105 at 2 (emphasis added). In response to the nutrient management plans in the permit, WSDF emphasized “[t]his is NOT acceptable...” A-47 at 11 (emphasis in original). The groundwater monitoring requirement was opposed Beef NW, WSDF, Agri Beef, and the Washington Cattle Feeders Association, all intervenors in this case. A-47 at 14; A-106 at 4.

After it received industry comments on the March 2004 draft, Ecology put together a document assessing the “pros” and “cons” of various proposals related to groundwater monitoring. A-49; RP 79:2-25; 80:1-15. The “pros” for retaining the groundwater monitoring requirement included: “The most

comprehensive ground water monitoring program of the four options; Greatest likelihood of discovering problems; Treats CAFOs like other point sources where monitoring would be required given history of pollution.” A-49 at 1. The “cons” were “cost to facilities” and “Requires action on part of facility and Ag/Ecology if problems are found.” A-49 at 1. When questioned about this con, Mr. Kolosseus testified that additional workload for Ecology was a concern that was considered in developing the permit. RP 80:16-25; 81:1-16.

One of the proposed alternatives to groundwater monitoring assessed after the comments from the industry was soil monitoring. A-49 at 2. Although the “pros” contemplated groundwater protection, the “cons” pointed out that “[a] facility may be able to ‘pass’ the soil monitoring and other triggers but still be polluting ground water.” A-49 at 3. To the option of compliance-based monitoring requirements the “cons” noted: “[a] facility may not be violating the permit or their nutrient management plan but may still be polluting groundwater.” A-49 at 3 RP 82: 1-5.

The final option assessed after the advisory committee comment period was to delete all requirements of groundwater monitoring. A-49 at 3. The first “pro” cited by Ecology was “Industry stakeholder support.” A-49 at 3. The countervailing “con” was “[s]tudies have shown that CAFOs do impact

groundwater, and without monitoring there would be no way to track or prevent the problem.” A-49 at 3.

By June 15, 2004, Ecology had committed to remove the groundwater monitoring requirement from the Permit based on “[f]eedback from the regulated community.” A-54. By July of 2004 there was a new draft permit, now with only a soil monitoring requirement developed with “an agronomist the regulated community recommended.” A-59 at 1. Ecology staff acknowledged that the agronomist was biased toward the CAFO industry. RP 343:8-15.

Ecology again reassessed its options for the Permit. As of October 2004, large CAFOs were not required to submit an environmental monitoring report if they met one of three criteria. A-66 at 2, option 4. Option 3, even less restrictive than Option 4, became the requirement in the final Permit. A-66 at 2; RP 87:1-24; 88:1-22. The first “con” about Option 3 noted by Ecology reiterates an earlier cited concern, A-49, that “[a] facility may be able to ‘pass’ the soil monitoring and other triggers but still be polluting groundwater.” A-66 at 2. The next two “cons” are that it “creates work” and “requires action” on the part of CAFOs and the Department of Agriculture, *id.*, without any explanation why action by CAFOs or work or action by Agriculture is a con. The document also noted that the option’s lack of

numeric limits makes it more difficult for the industry and Ecology to administer and enforce the permit. *Id.* The document stated that “compliance decision may be arbitrary” since an operator will not know at what threshold they will be out of compliance. *Id.*

In addition to the October 2004 “pros” and “cons,” Mr. Kolosseus prepared responses to some of the issues raised by industry. A-66 at 3; RP 89:23-25; 90:1-7. To the question of the need for groundwater monitoring, he cited seven Ecology studies which “indicate there is a problem that we need to avoid with lagoon operation and land application.” A-66 at 3.

In October 2004, there was still a guidance number in the Permit that would trigger groundwater monitoring. RP 87:14-25; 88:1. When one industry commentor stated on October 6, 2004 that “science doesn’t support the use of a guidance number” and suggested that the trigger should be an inspector’s review rather than a threshold figure, Ecology manager Melodie Selby noted that “[Ecology has] gotten beat up pretty badly trying to implement that approach in our other general permits.” A-154 at 1. Mr. Kolosseus testified that when the guidance number was in the permit he believed it was a valid option. RP 120:1-25; 121:1-13. Nevertheless, the numerical trigger was eliminated. RP 331:5-9.

In November of 2004, Mr. Kolosseus told commentor David Secrist of

El Oro Cattle Feeders that “[w]hile we haven’t made all of the changes you have recommended, I think you would agree that the permit has changed considerably from its initial version from earlier this year (especially the removal of groundwater monitoring).” A-159. In contrast to the concerns of environmental groups, industry groups were thanking Ecology for being “responsive” to their concerns. A-161 at 1. Ms. Selby referred to the regulated community as “clients.” *Id.*

By the final draft of the permit a number of elements designed to protect groundwater were left out. The removed provisions included groundwater monitoring, a groundwater monitoring trigger, application of the permit to the production area, nitrate thresholds for post harvest soil samples, soil samples from production areas, and finally, highest seasonal ground waters more than 10 feet below the surface. *See* A-53; RP 102:1-12; 213:18-25; 332:1-16. The Permit changed significantly from the initial groundwater monitoring to limited soil monitoring. *See* A-54; A-161; A-47; compare E-1 § S4 with A-131 § S5.

Soil Monitoring in Place of Groundwater Monitoring

Ecology pointed out the shortcomings of soil monitoring throughout the Permit development process and ultimately used it as the primary tool to protect the waters of the state. *See* A-66 at 2, Option 3; RP 88:10-11 . One

permit writer, Mr. Stormon, recognized that groundwater monitoring, unlike soil monitoring, could inform Ecology about the entire facility. RP 340:9-19. He also admitted that groundwater monitoring and soil monitoring are not equal; they are testing two different things. RP 339:23-25; 340:1-8. Ms. Selby noted that groundwater monitoring was important in determining whether a CAFO was contaminating groundwater and without it an important piece of information was missing. RP 417:15-24.

In 2005, Ecology published a set of implementation guidelines for groundwater quality standards which stated: “antidegradation is implemented for permitted activities by establishing limits and early warning values.” I-53 at 17, 19. A table showing which types of monitoring cover particular producer activities identified groundwater monitoring as the only option that monitored all relevant areas including lined and unlined impoundments, drainfields, subsurface injection, infiltration basins, and land application. *Id.* at 35.

The production area includes “the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment area.” E-1 at 6. More specifically, the sites for which soil monitoring is not required in the final permit include, among other things, feedlots, barns, milkrooms, stables, lagoons, runoff ponds, pit storages, composting piles and silos. E-1

at 6; *see* RP 90:5-7; 272:5, 18-23; 360:9-25; 339:12-17. Expert hydrogeologist John Monks testified that soil monitoring misses potential sources of nitrate and the one source that it does cover isn't covered very well. RP 781:10-25; 782:1-2.

Ecology staff member John Stormon testified at trial that he was concerned that by missing the production areas and lagoons the final Permit was not as protective of groundwater. RP 360:9-25. He balanced this concern with his perception that Ecology must protect the viability of businesses in the state. RP 360:19-25; 361:1-3; 375:11-20. In the FAQs, however, Ecology pointed out that "compliance monitoring is the responsibility of the discharger." A-46, #8. The financial viability of the CAFOs remained an Ecology concern despite there being no documentation on the actual cost to CAFOs. *See* RP 404:19-25; 405:1. There was also no information produced as to whether, given their profit margins, large CAFOs would have any difficulty bearing the cost of compliance with groundwater monitoring requirements. RP 404:23-25; 405:1.

Ecology also factored into the permit process the burden to its own agency, RP 81:12-16, despite the fact that no statutory language authorized consideration of this factor in protecting the waters of the state. RP 215:11-25.

Lagoons

There is no doubt that lagoons leak and cause groundwater contamination. PCHB Finding of Fact 53. Soil monitoring fails to account for lagoon leakage. *See* RP 339:12-17; 272:7-12. Ecology pointed to its own studies showing the problem of lagoon leakage as justification for the groundwater monitoring requirement in the initial draft Permit. A-66; RP 89:23-25; 90:1-7. With the groundwater monitoring requirement eliminated, concern about lagoon leakage contaminating water remained. RP 339:12-17; 700:22-25; 701:1-12. Uncontradicted expert testimony indicated that, “[i]f there is a shallow water groundwater aquifer present, it's fairly certain that the seepage from a lagoon will reach that aquifer.” RP 787:15-21. Expert testimony established that there was a shallow aquifer in the lower Yakima Valley. RP 773:12-24; PCHB Finding of Fact 54. Intervenors’ expert, Mr. Freeman, also admitted that lagoons did leak and that the leakage from those lagoons would end up in groundwater. RP 1109:14-24.

Environmental engineer, Dr. Bell, testified that using NRCS lagoon leakage standards, a 10 million gallon lagoon with a start elevation of 10 feet would leak about 2.7 million gallons per year. RP 712:1-11. The PCHB took issue with the numbers Dr. Bell used to make his calculation. PCHB Finding of Fact 56. The PCHB based their objection on a mistaken understanding of

the difference in standards for waste storage facilities in comparison with those for waste treatment lagoons. *Id.* Even the calculation suggested by the Intervenors, RP 851:18-20, would result in well over 690,000 gallons of seepage per year from a 3 million gallon lagoon. I-81.

Real World CAFO Practices

CARE sought to get into evidence, primarily through President Helen Reddout, documents of CAFO practices, some of which occurred just weeks before the hearing. See A-17; A-18; A-72; A-86 (8 specified clips admitted: RP 657:1-9); A-96; A-99. The PCHB admitted some exhibits and allowed certain pictures in one exhibit only for illustrative purposes. A-96 (slides 8, 9, 11, 18-23, **26 (see A-99), 27, 30-36, 41, 43-47, 51-55, 62, 63, 73-75, 77-86**) (slide numbers in bold deserve special attention); RP 593-637:18 (testimony about slides). Review of these pictures will enable the Court to see the real world CAFO practices that cause groundwater contamination.

CARE witness Larry Fendell testified about the practices of the dairy CAFO adjacent to his property. A-100; A-101; RP 525:20-25; 526:1-2. He witnessed manure application following aeration by 3 to 4 foot shanks, RP 529:5-25; 530:1-5, and liquid manure being injected under pressure approximately two feet into the soil. RP 530:8-24. Dr. Bell testified that this practice of manure injection would render the Permit's soil sampling

requirement insufficient to protect groundwater because the manure is injected at and below the level of the required soil monitoring. RP 701:3-7; 739:11-19; E-1 at S4.C.1.c. (2 foot sampling depth).

Other CARE members or Ecology recorded CAFO practices which threatened groundwater quality. A-18; A-83; A-100; A-101; A-184; A-185; PCHB Finding of Fact 18. CARE member, Gene Martin, documented waste being applied to saturated soil in the winter. RP 555:5-18; 560:14-25; 561:1-4; *see also* RP 991:16-22; A-28 at 5-19.

It is undisputed that application of manure above agronomic rates⁴ or in saturated soils can lead to groundwater contamination. *See* A-34 at viii; RP 274:6-21. The Permit leaves the calculation of agronomic rates to the CAFO. E-1 at 13, S3.A.2.h; RP 335:25 - 336:1-6. Application of manure even at agronomic rates can still lead to groundwater contamination. A-28 at 5-2, 5-3; *see also* A-46 at 2, #7(“[groundwater] monitoring is the method of determining if these measures are actually being followed and working as planned.”).

Final Permit Coverage

CAFOs have a long and significant history of non-compliance with

⁴“Agronomic rates” refer to the ability of a crop to take up nitrogen, in order to minimize adverse environmental effects. A- 28 at ES-2.

environmental regulations, RP 226:15-18, a history the original permit writer found irrelevant in new permit development. RP 226:19-25.

The soil monitoring requirement adopted in the final Permit makes enforcement difficult because “[w]ithout numeric limits, it may be more difficult for WSDA (and Ecology) to implement and enforce this provision.” A-66 at 2. In addition, “operators will have no way to know whether they are in or out of compliance until notified by regulator.” *Id.* And finally, “compliance decisions may be arbitrary since the allowed numeric limit will be defined by the regulator individually for each operator.” *Id.*

In the Permit, producers are not required to respond in any particular way to the results of their soil monitoring. RP 364:19-25; 365:1-2. One of Ecology’s original concerns about soil monitoring was that “[i]t relies on all CAFOs to protect water quality with no accountability.” A-66, con #1.

Public Participation

The Permit allows operational records to be left on-site with the CAFO, available to the public only upon its request and subsequent release by Ecology. PCHB Finding of Fact 27; E-3 at 62; RP 498:6-501:6. These operational records include records of waste discharges, waste lagoon depth measurements, mortalities management, overflows, manure land applications, and soil sampling methods and results. E-1 at 16, S4.A; RP 498:6-25. Such

records show trends and historic problems at CAFOs, and are relied upon by inspectors to protect water quality. PCHB Finding of Fact 32; E-3 at 59. The Permit does not specify which types of information are subject to disclosure. PCHB Finding of Fact 30; A-29; A-36.

Ecology has taken up to five months to respond to past citizen requests for particular CAFO nutrient management plans, in order to evaluate confidential business information claims by CAFOs. RP 445:17-21. At the time of trial, Ecology had not completed a process to expedite the processing of such claims and citizen requests. RP 445:22-446:11; PCHB Finding of Fact 29. It remains possible that Ecology would deny public requests for information outright, or else the request would (1) undergo evaluation for confidentiality, with (2) the ensuing Ecology decision subject to review, and (3) overturned pursuant to review. RP 497:8-25.

Information that Ecology has redacted from NMPs as confidential business information prior to public release includes capacity in gallons of particular waste lagoons, locations of farms, descriptions of soils on which wastes will be applied, soil sampling guidelines, soil interpretation information, schedules of best management practices, letters of intent to receive manure, waste production worksheets, nutrient management worksheets, irrigation water management and sprinkler application rates,

irrigation dilution charts, manure application calibrations and rates, information about potassium loading, aspects about dead animal disposal guidelines and fly control. A-29 at 8 and Appendices A, B; A-36 at 7 and Appendices A, B; RP 463:6-466:19; *also compare* A-30 (unredacted version of DeRuyter Brothers Dairy NMP, received by CARE in response to a public records request and preserved for purposes of appeal) with A-187 (redacted version of same).

Dr. Bell testified that the type of information redacted in three exhibits, A-29, A36, and A-187, constitute the type of information necessary to assess whether a CAFO can meet the requirements necessary to obtain and comply with the Permit. RP 675:13-682:22; *see also* PCHB Findings of Fact 33, 34. More generally, without access to details that may be contained in redacted provisions, citizens will not be able to determine whether best management practices that are merely described in a NMP are appropriate. RP 465:11-13 (redacted appendix “includes the calculations that were used to determine those best management practices, which is based on confidential business information”).

SUMMARY OF THE ARGUMENT

Ecology has violated its statutory obligation to protect the groundwaters of the state of Washington by failing to require groundwater monitoring in

the CAFO General Permit. Groundwater monitoring is the most complete form of monitoring, and tells both Ecology and CAFO operators about the entire facility and possible sources of groundwater contamination. The soil monitoring requirement in the Permit is not sufficiently protective of groundwater because it misses likely sources of contamination, including lagoon leakage.

Ecology acknowledges its legal obligation to maintain the highest quality of the waters of the state. However, improper considerations -- including whether effective regulation would unduly burden the agency and incite negative feedback from the regulated community -- diverted Ecology from that legal obligation. Despite an acknowledged history of pollution and noncompliance by the CAFO industry, Ecology's Permit allows CAFOs to police themselves in an incomplete manner at the expense of the health of area residents who rely on clean groundwater. The PCHB erred in affirming the Permit. Ecology should be afforded no deference because its Permit violates the unambiguous statutory requirement to protect groundwater.

The Permit also violates federal and state water pollution control laws by allowing redacted NMPs to be used to fulfill permit application requirements thus denying citizens access to critical information that would allow meaningful public participation in the permit review process.

Furthermore, the Permit allows the state agencies to have access to documents that inspectors use for compliance determinations but fails to guarantee citizens the right to access the same information in a timely manner, if at all.

ARGUMENT

I. Standard of Review

Under RCW 34.05.570(4)(c):

“Relief for persons aggrieved by the performance of an agency action, including the exercise of discretion or an action under (b) of this subsection [A person whose rights are violated by an agency’s failure to perform a duty that is required by law to be performed] can be granted only if the court determines that the action is: (i) Unconstitutional; (ii) Outside the statutory authority of the agency or the authority conferred by a provision of law; (iii) Arbitrary or capricious; or (iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action.”

The Administrative Procedure Act governs judicial review of the PCHB. *Fort v. State Dept. of Ecology*, 133 Wash. App. 90, 95 (2006). The Court of Appeals sits in the same position as the superior court in reviewing decisions of the PCHB and directly reviews the agency record before the Board. *Id.* This Court reviews the legal decisions of the PCHB *de novo*. *Id.*

While deference is given to the agency’s determination, “an agency’s view of the statute will not be accorded deference if it conflicts with the statute [at issue].” *Postema v. Pollution Control Hearings Bd.*, 142 Wash.

2d 68, 77 (2000). In addition, when the statute is unambiguous, the court need not rely on the agency's expertise. *Waste Mgmt. of Seattle, Inc. v. Util. and Transp. Comm'n*, 123 Wash. 2d 621, 628 (1994).

II. Ecology's CAFO General Permit fails to protect groundwater as required by state law.

A. Ecology acknowledges that contamination from CAFOs implicates its legal duty to protect groundwater.

1. Ecology's legal obligation is to protect the waters of the state and its final permit decision is entitled no deference to the extent that it violates that obligation.

The Water Pollution Control Act requires Ecology to protect the waters of the state. RCW 90.48.260. The Act's primary goal is to "maintain the highest possible standards to insure the purity of all waters of the state." RCW 90.48.010. "Waters of the state" include "underground waters." RCW 90.48.020. In addition, "pollution" is defined as "contamination, or other alteration of the physical, chemical or biological properties, of any waters of the state...or such discharge of any...substance into any waters of the state as will or is likely to...render such waters harmful, detrimental or injurious to the public health...or other legitimate beneficial uses..." *Id.*

The Act's regulations require Ecology to "maintain the highest quality of the state's ground waters and protect existing and future beneficial uses of the ground water through the reduction or elimination of the discharge of

contaminants.” WAC 173-200-010(4). Moreover, under its anti-degradation policy, the state is committed to “ensure the purity of the state’s ground waters and to protect the natural environment.” WAC 173-200-030.

With regard to Ecology’s responsibilities to regulate CAFOs, the Act provides that, “[a]doption or issuance and implementation shall be accomplished so that compliance with such animal feeding operation and concentrated animal feeding operation rules, permits, programs, and directives will achieve compliance with all federal and state water pollution control laws.” RCW 90.48.260. Because part of the anti-degradation policy of state water law requires that “...degradation of ground water quality that would interfere with or become injurious to beneficial uses shall not be allowed,” Ecology’s Permit violates its legal responsibility by failing to account for the admitted pollution coming from CAFOs. Ecology concedes that CAFOs contaminate groundwater. RP 5:1-9; PCHB Finding of Fact 53. In February 2006, a few months before the Permit came out, Ecology Director Jay Manning told industry in a private meeting that “state and local government agencies have not been proactive or reactive in protecting groundwater quality.” I-74 at 1; RP 395:12-21.

While there appears to be no Washington state court decision directly construing the scope of Ecology’s duty to protect groundwater, other courts

have acknowledged the critical role that citizens play in both enforcing environmental laws and holding government agencies to their statutory duties. *See, e.g., Sierra Club v. Tri-State Generation and Transmission Ass'n, Inc.*, 173 F.R.D. 275, 284 (D.Colo. 1997) (role of citizen suits is “to facilitate broad enforcement of environmental-protections [sic] laws and regulations.”). Indeed, some cases have dealt specifically with the Clean Water Act, which Washington’s Water Pollution Control Act seeks in part to effectuate. *See, e.g., Louisiana Env'tl. Action Network v. LWC Mgmt. Co., Inc.*, 2007 WL 2491360, 6-7 (W.D. La.) (finding numerous courts have taken cognizance of citizen suits under statutes such as the CWA, despite administrative agency efforts to secure compliance with environmental laws); *see also* RCW 90.48.260 (“The department of ecology is hereby designated as the State Water Pollution Control Agency for all purposes of the federal clean water act...”). In these cases courts have declined to defer to the regulating agency. *See, e.g., Wilson v. Amoco Corp.*, 989 F. Supp. 1159, 1170 (D. Wyo. 1997)(“...questions posed by RCRA and the CWA are not so esoteric or complex as to foreclose their consideration by the judiciary.”); *Ass'n of Irrigated Residents v. Fred Schakel Dairy*, 2008 WL 850136, 12-13 (E.D. Cal. Mar. 28, 2008) (discussing broad enforcement power of citizens granted by Congress in the context of environmental laws and duty of courts

to evaluate technical questions in order to give effect to this power).

These decisions encourage independent court oversight to ensure that Ecology has not ignored its statutory duties. CARE requests that this Court take a hard look at the extensive record before it and the unambiguous requirements of state law to protect groundwater. Ecology's permit determination is entitled no deference where questions of compliance with state and federal law are at issue. The PCHB decision upholding the permit⁵ must be overturned in order to effectuate the environmental protection aims of the relevant statutes.

A formal opinion of former Washington Attorney General Slade Gorton stated that a "rule of statutory construction which is applicable to chapter 90.48 RCW provides that conservation statutes relating to the protection and regulation of the uses of natural resources should be given extended interpretation to accomplish the objectives the legislature intended." Wash. AGO 1969 NO. 4, 1969 WL 98521 (Wash. A.G.).⁶ The Attorney General

⁵ The PCHB erred by taking into account the costs of groundwater monitoring even though no such analysis was done. *See* PCHB Conclusion of Law 25 ("[w]e [] conclude that Ecology's decision not to require groundwater monitoring in the CAFO General Permit is reasonable in light of the complexity, site-specific nature, and limited environmental benefit to be gained *relative to the likely costs* of such a monitoring regime.")

⁶ *See also* Eric C. Surrette, et al., 73 Am. Jur. 2d Statutes § 186 (2008) ("A liberal construction is generally given to statutes [. . .] affecting the general welfare or public policy of a state [. . .]") (citations omitted).

opinion reinforces this Court's role in giving effect to the Legislature's broad intent to protect precious groundwater resources.

2. Ecology knew about the adverse impacts of CAFOs on groundwater, including the health risks associated with nitrate contamination.

Ecology studies have confirmed significant contamination from CAFOs, a fact which Ecology acknowledges triggers its mandate to protect the waters of the state, including underground waters. A-46 at 1, #2. Contamination from dairies in particular, including contamination of private wells, has been known by Ecology since at least 1990. *See, e.g.*, PCHB Finding of Fact 15.

It is further undisputed that nitrate exposure poses serious health risks. E-2 at 9; *see also* RP 104:6-25; 105:1-8; 1047:4-9. The 2002 VIRE and Heritage College studies both found that 21% of the wells of lower income residents tested in the same lower Yakima Valley area where scores of large dairy CAFOs are present, identified as Region 2, had levels of nitrate that exceeded the 10mg/l maximum contaminant level federal standard. A-35 at 29. Nitrate levels came in as high as 55.2 mg/l. *Id.* at 14. In contrast, the control area, Region 1, where no dairy CAFOs are present, had no wells over 10 mg/l. *Id.* at 29. The Heritage College study concluded that the presence of coliform bacteria coupled with high nitrate levels in wells "suggest[ed] that sources of contaminants are feedlots and or [sic] dairy operations." A-

38 at 2. Ecology's Mr. Raforth, pointed out the findings of the VIRE report to his superiors in January 2006, months before the release of the Permit, and suggested a groundwater monitoring program to prevent further degradation. A-80 at 2. Given the existence of this public health threat, it is outrageous that the state has taken no action to address it, not even requiring the largest known responsible parties to account for their pollution.

Early in the permit development process, Ecology recognized groundwater monitoring as the legally mandated avenue to determine the nitrate contamination problem coming from CAFOs. A-46, # 2. Because many rural homes derive their drinking water from groundwater, the degradation of groundwater quality by CAFOs put people directly in harm's way.⁷ *Id.* In addition, Ecology violated its anti-degradation responsibility by not including permit provisions to detect contamination and protect this water supply from further contamination.

B. Groundwater monitoring is an essential protection for groundwater.

1. Groundwater monitoring tells regulators about the entire facility and is important for effective groundwater quality enforcement.

When assessing its options based upon the March 4, 2004 draft permit,

⁷ This concept is legally referred to as injuring a "beneficial use." A-46, #2.

internal Ecology documents identified actual groundwater monitoring as the best option to comply with its obligations to protect groundwater. A-49 at 1 (“[t]he most comprehensive ground water monitoring program of the four options).

As one of the conclusions of an Ecology study points out, “ground water monitoring provides measured concentrations of contaminants in ground water and...provides a means to assess cause and effect relationships between site activities and contaminant loading.” A-10 at 46. This point was reinforced by Mr. Stormon’s testimony that proper compliance monitoring will reveal whether the *entire* facility is causing contamination. RP 340:9-19. In contrast, soil monitoring, ultimately adopted as the primary compliance monitoring requirement, had numerous shortcomings, including that, “[a] facility may be able to ‘pass’ the soil monitoring and other triggers but still be polluting ground water.” A-49, Option 2 at 3; RP 360:9-25. A facility may still be polluting groundwater because soil monitoring also misses the lagoons and production areas, both areas which have great potential to be a source of contamination. *See, e.g.*, RP 90:5-7 (discussing A-66); 272:5-23; 339:12-17; 360:9-25; 781:10-25-782:2 (soil monitoring misses numerous other potential sources).

Ecology’s own implementation guidelines for groundwater quality

protection identifies groundwater monitoring as the only monitoring option that covers *all* of the potential pollution sources. I-56 at 35; *see also, e.g.*, A-10 at 46 (“[g]roundwater monitoring for particular analytes is a viable tool for measuring the effects of pond leakage on groundwater.”) The Permit thus violates Ecology’s own guidelines as well.

The plan ultimately adopted by Ecology makes implementation and enforcement of the Permit’s protections of groundwater virtually impossible. One authoritative treatise discussing mechanisms to protect groundwater asserts that “groundwater quality standards are not self-implementing. To become effective, a state must implement them by other means, such as through permits that establish effluent limitations on discharges or through the imposition of groundwater monitoring requirements.” 2 Kenneth A. Manaster & Daniel P. Selmi, *State Environmental L.* § 20:14 (2007). The Permit has, at best, incomplete effluent limitations and no vadose zone⁸ or groundwater monitoring requirements. Instead of requiring groundwater monitoring, Ecology moved to an incomplete surrogate, namely limited soil monitoring. E-1 at 20, S4.C.1. Even the earlier drafts which discussed soil monitoring were stricter than what Ecology ended up with. A-66, Option 3;

⁸ The “vadose zone” is the area below the root zone of crops and above groundwater. See RP 212:17-20.

RP 87:14-25; 88:1-11; cf. E-1 at 20, S4.C.1 with A-161, S5. In the second draft of the Permit, after removal of groundwater monitoring, a soil level guidance number for nitrate was to be used that if exceeded would then trigger a groundwater monitoring requirement. RP 101:8-25; 102:1-12. This groundwater monitoring trigger was also abandoned after industry objections. *Id.* The lack of numeric limits, Ecology documents concede, makes it more difficult for Ecology to administer and enforce the permit. A-66 at 2, Option 2, “Con” bullet 4. Ecology documents concede that “compliance decision may be arbitrary” since an operator will not know at what threshold they will be out of compliance. *Id.*, “Con” bullets 5-6.

In the Permit, even if an operator’s soil test reveals nitrate contamination, it is *not required* to alert Ecology or necessarily make any changes. RP 364:19-25-365:1-2. In fact, one of Ecology’s original concerns about soil monitoring was that, “[i]t relies on all CAFOs to protect water quality with no accountability.” A-66; RP 89:19-22. Ecology appears to have assumed that soil monitoring results will compel producers to adjust their practices, but the evidence in the record of CAFO pollution and noncompliance establishes that independently verifiable state regulation of these facilities is required. Ecology has also argued that it already knows that areas have been contaminated and now they want to work on how to solve it; however,

allowing CAFOs to continue to pollute without adequate monitoring and being responsible for clean up will certainly not solve the problem. Ultimately, Ecology and the people of the state, and perhaps the producers themselves, will be able to save time and money by having complete information on the scope and magnitude of the problem. *See* 2 Kenneth A. Manaster & Daniel P. Selmi, *State Environmental L.* § 20:2 (2007) (“experience has shown that preventing groundwater contamination in the first instance is far less expensive than cleaning it up after contamination occurs.”).⁹

2. Only groundwater monitoring can adequately assess the groundwater quality impact of lagoon leakage.

One of the primary concerns about the weaknesses of requiring only limited soil monitoring is that it cannot reflect the effect of lagoon leakage on groundwater. *See* RP 272:7-12; 339:12-17. As Mr. Monks pointed out, “If there is a shallow water groundwater aquifer present, [which there is] it’s fairly certain that the seepage from a lagoon will reach that aquifer.” RP 787:15-21; 773:12-24. Industry witness Freeman agreed with this statement.

⁹ Ecology and Industry-Intervenors will argue that groundwater monitoring does not by itself prevent groundwater contamination. While this may be true, if groundwater quality monitoring is not undertaken, no one will know whether existing and continuing practices will protect groundwater. The only way to know is to undertake actual monitoring. Ecology’s Permit is akin the military’s policy of “don’t ask, don’t tell.” In this case it amounts to the policy of “don’t look, don’t find.”

RP 1109:14-23. Ecology was aware of the problem of lagoon leakage from its own studies and used this knowledge to justify the groundwater monitoring requirement that was in the original permit. *See, e.g.*, A-66; RP 89:23-25; 90:1-7.

Testifying to the scope of the leakage problem, environmental engineer Dr. Bell estimated that, using NRCS allowable lagoon leakage, a 10 million gallon lagoon would leak about 2.7 million gallons per year. RP 712: 1-11. The PCHB erred in finding that Dr. Bell's calculations resulted in an "unrealistically high estimate of leakage." PCHB Finding of Fact 56. This finding was based on erroneous conceptions about the design differences between waste storage facilities and waste treatment lagoons; the PCHB was under the mistaken impression that waste treatment standards were designed for infiltration while waste storage standards were not. *Id.* In both standards, however, the priority is to avoid infiltration of the waste into the underlying aquifer.¹⁰ In any case, the PCHB missed the overall point raised by Dr. Bell

¹⁰ To determine the applicable NRCS guidance, the lagoons used by CAFOs must be identified as either waste storage or waste treatment facilities. Lagoons can operate in either a storage or treatment capacity, or both. NRCS standards, while slightly different for the two types of facilities, have identical language in relation to lagoon seepage: "[t]he lagoon shall be located in soils with an acceptable permeability that meets all applicable regulations, or the lagoon shall be lined. Information and guidance on controlling seepage from waste impoundments can be found in the Agricultural Waste Management Field Handbook (AWMFH), Appendix 10D." Natural Resources Conservation Service Conservation Practice Standard, "Waste Storage Facility," Code 313 (2003) at 313-2; Natural Resources Conservation Service Conservation Practice Standard, "Waste Treatment Lagoon," Code 359 (2003) at 359-1.

and not contradicted by either Ecology or Intervenors. The critical point is that whether you use Dr. Bell's calculations or those submitted by Industry, the annual leakage is in the range of hundreds of thousands to millions of gallons. See I-79; I-81.¹¹

While there may be dispute as to the precise coefficients used to calculate lagoon leakage, even Industry expert Mr. Freeman conceded that lagoon leakage is inevitable. RP 1109:14-24. Even the most modest estimates reveal that significant leakage which will go undiscovered without groundwater monitoring detection. The lagoon level narrative requirement, which industry once again was put in charge of developing, was added as a sop to the public.

C. In practice Ecology ignores its legal duty by considering factors which are not permitted by the statute.

1. Ecology considered the burden to its own agency in administering the proper regulations.

One of the main "cons" envisioned by Ecology in retaining the groundwater monitoring requirement was that it "[r]equires action on part of

¹¹ Reference to the AWMFH reveals "no soil or artificial liner, even concrete or a geomembrane liner, can be considered impermeable....A criterion often used for clay liners is that the soils at grade in the structure, or the clay liner if one is used, must have a permeability of 1×10^{-7} centimeters per second or less." Agricultural Waste Management Field Handbook, Appendix 10D, "Geotechnical, Design, and Construction Guidelines." P 10D-6. Testimony established that Dr. Bell indeed used this measure of permeability in his calculations and that it was a conservative estimate. RP 806:12-16.

facility and Ag/Ecology if problems are found.” A-49 at 1. Ecology, however, has not found groundwater monitoring to be too cumbersome in other instances of solid waste regulation. WAC 173-304-490 (requiring groundwater monitoring for solid waste handling facilities). In this case, workload for Ecology was improperly considered in developing the Permit. RP 80:16-25; 81:1-16. Mr. Kolosseus admitted that no statutory language authorizes this consideration when implementing its mandate to protect the waters of the state. RP 215:11-25. One analogous situation involving water quality protections under the Clean Water Act was addressed by the Ninth Circuit.¹² In *Headwaters v. Talent Irrigation District*, the court held that “the granting of a NPDES permit under the CWA is not based on a cost-benefit analysis, but rather on a determination that the discharge of a pollutant satisfies the EPA’s effluent limitations, imposed to protect water quality. 243 F.3d 526, 532 (9th Cir. 2001)(citation omitted). In this case, Ecology incorrectly made an undocumented, arbitrary cost-benefit analysis in determining how to monitor compliance with groundwater standards. It also used an incomplete surrogate for groundwater quality protection rather than using the best option available.

¹² Because the Permit being challenged herein is based both on compliance with the federal Clean Water Act requirements and state water protection laws, interpretation of the Clean Water Act should be accorded significant weight.

The fact that Ecology did not use the best available standards to monitor groundwater to assure or determine groundwater quality is prevalent throughout the record in this case. For instance, Mr. Stormon admitted that he continued to be concerned that the Permit was not as protective of groundwater as the draft that included the groundwater monitoring requirement. RP 360:9-25. He felt, however, that protecting the viability of the CAFO industry was paramount. RP 360:19-25; 361:1-3; 375:11-20. Yet, even though not legally relevant, Ecology never conducted an economic analysis of the financial impacts on CAFOs should groundwater monitoring be required. RP 404:15-25. There is no information that suggests CAFOs could not easily bear the cost. RP 404:23-25 – 405:1.¹³

Groundwater in Washington has long been recognized as requiring special protection. An attorney general opinion from the 1950's considered the balance between industrial development and pollution control. It noted that the value of that water, "depends in large measure upon its purity" and that "it would see[m] unconscionable to permit unrestricted pollution by industry simply because of the payroll it provides." Wash. AGO 1953-55 NO. 247, 1954 WL 43452 (Wash. A.G.). The record in this case shows that

¹³ See also Erika Hartliep, Comment, *Federal and Pacific Northwest State Water Laws Pertaining to Dairies*, 37 Idaho L. Rev. 681, 683 n.12 (2001) ("stating that milk production was Washington's second-leading agricultural commodity in 1999 bringing in \$825 million to the state.")

Ecology was unduly concerned with the CAFO Industry's agreement with the permit terms and the potential costs associated with detecting and rectifying the extensive pollution they have caused and will continue to cause. *See infra*, section C.2.

Ecology's defense of the Permit in the PCHB proceedings contradicts findings it made concerning the need to monitor groundwater before the permit went to the CAFO industry for review. Litigation positions adopted by an agency to support a regulation, like the justifications of Ecology witnesses in this trial, are to be given far less deference by courts than the more factually reasoned decisions made *before* political interference. Unlike litigation positions in which the agency is a party, the positions and recommendations of staff pre-industry influence are "in no sense a 'post hoc rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack." *Auer v. Robbins*, 519 U.S. 452, 462 (1997). Especially where Ecology staff offered a broad policy position *of its own accord*, "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Id.*

Ecology's primary concern should be the protection of the waters of the state, including groundwater. Proper permitting would allow Ecology to put the financial and workload burden where it belongs: on the polluting industry.

Just as Ecology itself has said, “compliance monitoring is the responsibility of the discharger.” A-46 at 2, # 8. Nothing in the record suggests that this responsibility couldn’t easily be borne by the industry. While agency workload merits some concern, allowing groundwater degradation is a far more critical public concern, as is evidenced by the unequivocal direction from the legislature to protect state waters.

2. Ecology yielded to the pressure of the regulated industry in determining the final permit terms.

When the Permit was first developed it included a groundwater monitoring requirement for large CAFOs. A-131 at 10. Groundwater monitoring was universally supported by staff as a requirement to protect groundwater. *See, e.g.*, RP 92:6-12; 96:11-14; 100:2-6; A-127; A-130. As the groundwater monitoring requirement became the subject of persistent complaints by the regulated industry, however, Ecology dropped it. The groundwater protection statute makes no mention of inconvenience to CAFOs or the agency as permissible factors to weigh in permitting decisions. Ecology is bound only to “maintain the highest quality of the state’s ground waters and protect existing and future beneficial uses of the ground water through the reduction or elimination of the discharge of contaminants.” WAC 173-200-010(4).

As counsel for Ecology conceded, “[i]t’s undisputed that industry was opposed to having groundwater monitoring in the permit.” RP 1163:7-8; A-47 at 1; A-105 at 2 (“[t]his draft contains several points that are well beyond anything *we will accept* in a permit...”)(emphasis added); *see also* A-47 at 14; A-106 at 4. Comments on permit drafts reveal the CAFO industry’s disdain for regulation and its sense of entitlement to accept or decline permit terms.¹⁴

The record established that Ecology was inordinately sensitive to industry concerns. Industry was highly pleased with Ecology’s “responsive” changes to the permit. *See* A-161 at 1-3. When assessing whether to delete the groundwater monitoring requirement, Ecology gave “Industry stakeholder support” far more weight than protection of public health. A-49 at 3. Ecology has a long history of allowing the CAFO industry to determine permit terms. In a 1999 citizen enforcement trial, *CARE v. Henry Bosma Dairy*, No. CY-98-3011-EFS (E.D. Wa.), Manager Robert Barwin admitted that Ecology negotiated the terms of an earlier general CAFO permit with the CAFO industry. A-183 at 5. Permit “advisory committees” were in place in both permitting processes, with the more recent committee heavily

¹⁴ *See generally* J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 Ecology L.Q. 263, 331-332 (2000) (“Farms possess immense political power... To put it bluntly, any proposal for comprehensive environmental regulation of farming faces stiff political opposition.”).

composed of industry and agency representatives. RP 873:11-24. While a few token public representatives were added this time, they rarely attended and their comments were not given anywhere near the same consideration as those of the CAFO industry. *See* RP 874:2-15.

By the final Permit a number of elements designed to protect groundwater were left out. A-131 cf. E-1. Tracking the development of the permit, the agency's "responsiveness" to the industry translates into a weakening of the groundwater protection, *see* RP 1125:6-13, and an abdication of Ecology's statutory duties. No fewer than 38 exhibits establish that lobbying by the CAFO industry was the primary reason that permit requirements for groundwater monitoring were abandoned in favor of less effective soil monitoring requirements. RP 1125:14-20.

III. Ecology's Permit Violates the Clean Water Act's Requirement of Public Participation.

CARE assigns error to the Board's ruling that the Permit complies with the Clean Water Act's requirement that Ecology assure meaningful public participation in the development and enforcement of relevant effluent limitations.

The Board concluded that the Permit satisfies the public participation requirement "by making Nutrient Management Plans (NMPs) publicly

available for review as part of the permit application and coverage decision process,” by providing “access to CAFO discharge and annual reports filed with Ecology,” and by affording citizens “the opportunity to request any additional records kept on-site at CAFO facilities.” PCHB Conclusion of Law 6. The Board also concluded that “the permit’s case-by-case approach to public disclosure of information contained in CAFO records required to be kept under this permit is reasonable and required by state law.” *Id.* at Conclusion of Law 10. The Board declined to interpret “the scope of confidential business information under RCW 43.21A.160 as excluding some or all of the information contained in the records required by this general permit,” and noted that “adequate alternative remedies” are available to citizens aggrieved by “untimely, inadequate, or impermissible disclosures,” including appeals to the attorney general or to superior court for review of the matter. *Id.* at Conclusion of Law 11.

Public participation is “a critical means” of advancing the Clean Water Act’s goals. *Environmental Defense Center v. E.P.A.*, 344 F.3d 832, 857 (9th Cir. 2003). The Act established that “[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act *shall be provided for, encouraged, and assisted* by the

Administrator and the States. 33 U.S.C. § 1251(e)(emphasis added). As the Second Circuit noted in *Waterkeeper Alliance v. E.P.A.*, Congress clearly intended by this provision “to guarantee the public a *meaningful* role in the implementation of the Clean Water Act.” 399 F.3d 486, 503 (2d Cir. 2003)(emphasis added.) At issue here is whether Ecology has provided for, encouraged, and assisted the public to participate meaningfully in the development, revision, and enforcement of effluent limitations, including CAFO nutrient management plans.

It is Ecology’s administration of its program, rather than its inclusion of particular terms in the Permit, that led the Agency to the “case-by-case approach to public disclosure” of CAFO records approved by the Board. The Permit merely establishes a public notice requirement, E-1 at 11, S2.B.5.a, and delays coverage for 30 days after a required 30-day comment period, *Id.*, S2.B.1.b. Coverage under the Permit is not denied to an applicant CAFO during the pendency of disputes over the adequacy of that CAFO’s record disclosure. *Id.*, S2.B.

There is no question that under the Clean Water Act “the terms of nutrient management plans constitute effluent limitations” to which the public has a right of access. *Waterkeeper*, 399 F.3d at 502-03; *see also CARE v. Sid Koopmans Dairy*, 54 F. Supp.2d 976, 982 (E.D. Wa. 1999); RP 411:6-

10. The Permit itself fails to specify to which documents the public has a right of access. However, Ecology flatly stated that “[t]he records in S4.A are not viewable by the public.” E-3 at 62 (contrasting records submitted under S3.E and S4.B, that Ecology stated were public records, with operational records “not viewable by the public.”).

The record establishes that Ecology administers citizen requests for CAFO records with great sensitivity to industry claims of confidentiality but without equivalent regard for meaningful public participation in decision-making over the development, revision, and enforcement of relevant effluent limitations. In this context, the Permit’s principal violation of the Clean Water Act’s public participation requirement resides in its failure to specify that records necessary to assess the adequacy of the NMP as an effluent limitation, and the CAFO’s compliance with such terms, are subject to public disclosure. Thus, the Permit does nothing to prevent CAFOs from “misunderstanding or misrepresenting” that such records are confidential and so not subject to public disclosure. *Waterkeeper*, 399 F. 3d at 499-500 (federal CAFO Rule did “not adequately prevent Large CAFOs ‘from misunderstanding or misrepresenting’ their specific situation and adopting improper or inappropriate nutrient management plans....”).

To participate meaningfully in the permit coverage process and

subsequent enforcement, citizens need timely access to relevant records. These include the proposed NMP or NMP amendments that a CAFO submits as part of its application for coverage or expansion of operations, E-1 at 16, S3.E, annual reports to Ecology and reports of impermissible discharges, *Id.* at 19, S4.B.3, as well as operational records necessary for evaluating a CAFO's compliance with Permit terms including its NMP. E-1 at 16, S4.A.

The record establishes that Ecology has responded to particular requests for CAFO-related records only after extraordinary delay. The PCHB credited Ecology with "making efforts to expedite the production of CAFO-related records" including procedures to "front-load the analysis of CBI at the time NMPs are filed." PCHB Finding of Fact 31. However, Ecology testified that it had not yet completed its process of establishing workable procedures. RP 446:1-5. Further, operational records deemed by Ecology as necessary to show trends and historic problems at CAFOs, records that inspectors relied upon to protect water quality, are not submitted to Ecology. E-1 at 16, S4.A and E-3 at 62. Accordingly, they will not receive "front-loading" evaluations in order to expedite release.

The record also establishes that Ecology has responded to requests for such records by producing documents with essential information redacted. *Supra* at 20-21. These redactions have left citizens with mere shells of the

“*sine qua non* of the ‘regulation, standard, plan, or program’ [that the EPA] established to regulate land application discharges.” *Waterkeeper*, 399 F.3d at 504.

Testimony at trial was unequivocal that these redactions included a plethora of critical information. *See supra* at 21; RP 643:6-466:19. In the absence of such information, citizens will not be able to evaluate (1) the adequacy of the NMP and (2) the degree to which the CAFO is operating within its effluent limitations, including the theoretically detailed terms of its NMP. *Id.* Yet the record establishes that Ecology has redacted just such information from NMPs requested by citizens. *Id.*; RP 465:11-13 (redacted appendix “includes the calculations that were used to determine those best management practices, which is based on confidential business information”). Without that information, citizens cannot effectively evaluate whether the NMP calls for applications that are agronomic in nature or excessive and so likely to contaminate state waters.

Trial testimony and other evidence also established that such information is critical to citizen participation in enforcement of a covered CAFO’s effluent limitations. Without access to best management practice implementation schedules, citizens will not be able to determine whether observed CAFO activities are done pursuant to its NMP or in violation of that

NMP. Without specific lagoon engineering calculations, citizens will not be able to ascertain anticipated seepage rates, nor compare those against actual lagoon levels. Citizens will also not be able to understand the amount of waste storage that is available; accordingly, they will not be able to determine the degree to which an expansion of waste loads is feasible, including sufficiency of holding volumes during anticipated precipitation events, without likely environmental contamination. RP 676:15-679:20.

Finally, the record establishes that operational records, including records of allowable waste discharges, waste lagoon depth measurements, mortalities management, overflows, manure land applications, calculations of nitrogen and phosphorus applied to each field, and sampling methods and results of manure, litter, process waste water and soil sampling, are all maintained on-site without reporting to Ecology. E-1 at 16, S4.A; RP 498:13-25. Access to operational records is essential to an understanding of pollution trends and historic problem with respect to a CAFOs management of animal wastes, and it is for that reason that such records are relied upon by inspectors to protect water quality. E-3 at 59. However, citizens may gain access to such records, if at all, only through the public records request process described above.

In light of these facts, the PCHB's determination that the Permit does not violate the Clean Water Act's public participation requirement clearly is

erroneous. First, the Permit fails either to ensure that “Nutrient Management Plans (NMPs) [are] publicly available for review as part of the permit application and coverage decision process” or that citizens have access to operational “records kept on-site at CAFO facilities.” See PCHB Conclusion of Law 6. In fact, access to such critical records is “subject to the vagaries” of Ecology’s administration of the public records act. See *Environmental Defense Center*, 344 F.3d at 857.

Second, while CARE acknowledges the PCHB’s disinclination to “interpret the scope of confidential business information under RCW 43.21A.160,” the record clearly establishes that Ecology has withheld CAFO-related information, ostensibly pursuant to that statute, even where that type of information is essential to public participation in coverage decisions or evaluations of CAFO compliance with Permit terms (and so clearly in the public interest and not subject to withholding pursuant to RCW 43.21A.160). But reliance on a system in which requests for essential information are, in fact, routinely rejected would be “manifestly contrary to the Clean Water Act, which contemplates greater scope, greater certainty, and greater uniformity of public availability....” *Environmental Defense Center*, 344 F.3d at 857.

Third, CARE simply cannot rely on the PCHB’s confident assertion of the adequacy of “alternative remedies” to citizens aggrieved by “untimely,

inadequate, or impermissible disclosures,” including appeals to the attorney general or to superior court for review of the matter. Requiring citizens to pursue these methods of obtaining documents, without clarity in the Permit that certain types of records are in fact subject to public record act release and so available to citizens as a matter of course, is a far too “circuitous path” to comport with the Clean Water Act’s requirement that Ecology encourage and assist public participation. *Sierra Club Mackinac Ch. v. Dep’t of Env’tl. Quality*, --- N.W.2d---, 277 Mich. App. 531, 2008 WL 161188, at *11 (Mich. Ct. App. 2008) (environmental agency’s argument that citizens have adequate access to NMPs because they can make a state Freedom of Information Act request rejected as “a rather circuitous path to encouraging and assisting public participation.”). As the Second Circuit declared, “[t]he Clean Water Act demands regulation in fact, not only in principle.” *Waterkeeper*, 399 F.3d at 498.

If citizen participation is to remain a central feature of the Clean Water Act regulatory scheme, then citizens must have timely access to all terms and provisions of NMPs relevant to NMPs as effluent limitations, including detailed information and calculations contain therein, as well as all records maintained at the CAFO or submitted to Ecology relevant to decision-making over Permit coverage and enforcement of Permit terms.

Finally, the PCHB's concern that CARE seeks from it an impermissible declaratory judgment is misplaced. Appellant instead seeks a remand to Ecology directing that agency to clarify in the Permit that information CAFOs must produce to Ecology or maintain on-site pursuant to the Permit is information to which citizens have a right of access pursuant to law, unless such information is simply unrelated to (1) the establishment, derivation, or refinement of effluent limitations for a CAFO, including those within its NMP, or (2) a CAFO's efforts to document compliance with such limitations.

CONCLUSION

The responsibility to protect the waters of the state is not a matter of Ecology's discretion. In addition, the Permit fails to provide for meaningful public participation in violation of federal and state law. The decision affirming the Permit should be reversed and remanded with instructions to require groundwater monitoring to account for CAFO pollution and to require full and timely access to all documents necessary to allow citizens to participate meaningfully in permitting and compliance oversight processes.

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Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on May 6th, 2008, I served a true and correct copy of: Petitioner-Appellant's Opening Brief upon the following parties via email and U.S. Mail, postage pre-paid, addressed as follows:

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