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STATE OF WASHINGTON
BY 

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

COMMUNITY ASSOCIATION FOR RESTORATION OF THE
ENVIRONMENT,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondent.

NORTHWEST DAIRY ASSOCIATION,

Intervenor,

WASHINGTON STATE DAIRY FEDERATION; et al.,

Intervenors.

DEPARTMENT OF ECOLOGY'S RESPONSE BRIEF

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I. INTRODUCTION

The Community Association For Restoration of the Environment (“CARE”) seeks review of the Pollution Control Hearings Board’s (“Board”) decision affirming a decision by the Washington State Department of Ecology (“Ecology”) to issue a general waste discharge permit for Concentrated Animal Feeding Operations (“CAFOs”). The Permit is protective of water quality, represents a reasonable exercise of Ecology’s permitting discretion, and complies with public access requirements in state and federal water quality laws. Consequently, Ecology requests that the Court affirm the Board’s decision.

II. COUNTERSTATEMENT OF ISSUES

Did the Board err in finding that CARE failed to demonstrate that Ecology’s decision to require soil monitoring rather than groundwater monitoring in the CAFO Permit was neither unreasonable nor unlawful?

Did the Board err in finding that CARE failed to demonstrate that the CAFO Permit violates the public access requirements in the federal Clean Water Act and the Washington Water Pollution Control Act?

III. COUNTERSTATEMENT OF THE CASE

A. Regulatory Framework

This case involves the Concentrated Animal Feeding Operation National Pollution Discharge Elimination and State Waste Discharge

General Permit (“CAFO General Permit” or “Permit”) that Ecology issued under the federal and state Water Pollution Control Acts. The state Water Pollution Control Act, chapter 90.48 RCW, prohibits the discharge of any material into waters of the state that causes or tends to cause pollution of such waters. RCW 90.48.080. The federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1251, *et seq.*, establishes the National Pollutant Discharge Elimination System (“NPDES”) for permitting discharges of pollutants to navigable waters of the United States. 33 U.S.C. § 1342(a). The discharge of pollutants from point sources, including CAFOs, to navigable waters of the United States is unlawful except in accordance with an NPDES permit. 33 U.S.C. § 1311(a).¹ EPA promulgated its Final CAFO rule in 2003, *see* 40 C.F.R. § 122.23 and *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 494-95 (2d Cir. 2005).

EPA may delegate the NPDES program to any state that requests delegation and meets the requirements in 33 U.S.C. § 1342(b). Pursuant to EPA’s delegation and RCW 90.48.260, Ecology administers the NPDES program in Washington. Pursuant to WAC 173-226-050(3), Ecology is authorized to issue general NPDES permits to cover similar types of operations with similar waste discharges. Ecology has developed

¹ The state Water Pollution Control Act also requires a permit for the discharge of waste material into waters of the state. RCW 90.48.160. Waters of the state include groundwater. RCW 90.48.020.

several general NPDES permits, including the CAFO General Permit that is the subject of this appeal. Report of Proceedings (“RP”) (May 2, 2007) at 496:9–15.

B. The CAFO Permit

Ecology developed the Permit with input from two committees: (1) an external advisory committee that included representatives from industry, environmental groups, and governmental entities; and (2) a committee created by the legislature comprised of representatives from various stakeholder groups appointed by the Governor.² Ecology first released the Permit for public comment in December 2004. Ecology redrafted and released the Permit for a second round of public comment in response to the decision of the U.S. Court of Appeals for the Second Circuit in *Waterkeeper*.³ Ex. E-3 at 2.⁴ Ecology held seven public workshops across the state in conjunction with the public comment periods and issued the CAFO General Permit on June 21, 2006. Ex. E-1. This process is typical of the process that Ecology uses when developing a

² As compared to the external advisory committee which was convened for the sole purpose of the CAFO Permit, this committee was created in 2003 to assist Agriculture with the anticipated transition of the CAFO program from Ecology to Agriculture. RP (May 3, 2007) at 871:19–25; 872:1–18.

³ The *Waterkeeper* case involved a challenge to the Environmental Protection Agency’s 2003 CAFO Rule. Among other things, the ruling narrowed the types of CAFOs required to obtain a NPDES permit; required nutrient management plans to be reviewed prior to permit issuance and to be included as part of the NPDES permit; and upheld the agricultural stormwater exemption, which carves out an exception for stormwater discharge from land areas of a CAFO when manure, litter, and wastewater has been applied at agronomic rates. *Waterkeeper Alliance*, 399 F.3d at 507, 524.

⁴ Exhibits referenced in this brief are to the Administrative Record below.

general permit. RP (April 30, 2007) at 178:18–23. The Permit applies statewide and covers any CAFO that is discharging or proposing to discharge to waters of the state. The Permit requires that CAFOs manage manure wastes, litter, and process wastewater to avoid polluting state waters. The Permit replaced and expanded upon the state’s previous Dairy General Permit, which expired in 2005.

The CAFO Permit expands on the old permit in several significant respects. First, the Permit requires the submission of a nutrient management plan for Ecology’s review and approval that becomes an enforceable part of the permit. Ex. E-1, Condition S3 at 12–16; RP (May 2, 2007) at 513:21–25, 514:1–25, 515:1. Second, the Permit requires annual soil monitoring and reporting. Ex. E-1, Condition S4.C at 20. Third, the Permit requires CAFO lagoons to be equipped with a leak detection mechanism. Ex. E-1, Condition S4-5 at 16–21; RP (May 2, 2007) at 513:21–25; 514:1–25; 515:1. Finally, the Permit includes additional inspection requirements, a requirement that all clean water be routed away from the production area, and an express prohibition on discharges to groundwater. RP (May 2, 2007) at 513:21–25; 514:1-25; 515:1. Based on these more stringent requirements, Ecology determined that the CAFO Permit will result in an improvement to groundwater conditions. RP (April 30, 2007) at 197:2–17, 20–22.

The CAFO Permit currently covers approximately five animal feedlots and approximately 35 of the 507 licensed dairies in the state. Board's Findings of Fact, Conclusions of Law, and Order ("Order") at 13, Finding of Fact ("FF") 20. While the Permit is a general permit, Ecology may require any applicant or permittee to apply for and obtain coverage under an individual permit rather than the general permit. WAC 173-226-080(1)(f). The Permit is a zero discharge permit and prohibits all discharges to surface waters of the state, except those resulting from extreme storm events. RP (April 30, 2007) at 183:1-23; Ex. E-1, Condition S1.A-B at 8-9. For groundwater discharges, the Permit requires that CAFOs determine the level of wastewater that can be agronomically applied so that the nutrients in the wastewater are taken up by the crop rather than being discharged to groundwater. Ex. E-1, Condition S3.2-3 at 13-14. Discharges in excess of agronomic rates are prohibited. Ex. E-1, Condition S1.3 at 8. No discharge, regardless of circumstance, may cause or contribute to a violation of the water quality standards in the receiving water. Ex. E-1, Condition S1.A at 8; Condition S1.B at 9.

Unlike most NPDES permits which regulate a continuous discharge from a point source, i.e. end of the pipe discharges, the CAFO Permit is a zero discharge permit with conditions designed to prevent any discharges to surface and groundwater. RP (April 30, 2007) at 182:14-18.

For discharges that do occur, the Permit prohibits such discharges, including seepage from waste storage lagoons, from reducing groundwater quality unless a permittee can demonstrate that an overriding consideration of the public interest will be served and all contaminants proposed for a groundwater discharge have been provided with all known, available, and reasonable methods of prevention, control, and treatment. Ex. E-1, Condition S1.B at 8–9. This requirement is consistent with the anti-degradation language at RCW 90.54.020(3)(b) (discharges to waters of the state must be provided with all known, available, and reasonable methods of treatment; and discharges shall not reduce existing water quality except in those situations where it is clear that overriding considerations of the public interest will be served).

Pollutants most commonly associated with animal waste include nutrients (such as nitrogen and phosphorous), organic matter, solids, pathogens, and odorous compounds. Ex. E-2 at 8. Of particular concern is nitrogen. There are three forms of nitrogen: ammonia, organic nitrogen, and nitrate nitrogen (nitrate). RP (May 1, 2007) at 314:3–20. Relative to a given amount of total nitrogen, nitrate comprises only a small amount. RP (May 4, 2007) at 1046:17–22. However, because nitrate is the most soluble form and moves easily in water through soil, nitrate poses a

greater risk to groundwater than the other forms of nitrogen. RP (May 1, 2007) at 314:17–20.

While it is undisputed that historic agricultural practices have contributed to groundwater impacts, the impacts caused by regulated CAFOs is less clear. A 1995 literature review conducted by Ecology concluded that dairies have had a significant impact on water quality in areas with high concentrations of dairies. The review also concluded that in areas where dairies are not highly concentrated it cannot be assumed that individual dairies cause significant water quality impacts. Ex. A-11 at 11. Another investigation conducted in the Sunnyside area by Heritage College in 2001–02 concluded that elevated concentrations of nitrate and fecal coliform were most likely from the 89 feedlots and dairies in the area. Ex. A-38 at 1–2. The Heritage College study did not include a determination of how many of the facilities were regulated CAFO facilities. Another 2002 study in the Granger area analyzed the DNA of fecal coliform found in the watershed in order to determine its source. The study concluded that human sources (including livestock) of contaminants were in roughly equal proportion to the “unmanageable” sources, such as wildlife. Ex. I-14 at 7. A 2002 report written by the Valley Institute for Research and Education found groundwater quality impairment in the lower Yakima Valley where approximately 60 dairies

are located. Ex. A-35 at 29. The Valley Institute report expressly disavowed identification of the sources of impairment, noting that excessive use of fertilizer is the most common cause of nitrate contamination in groundwater, in addition to improperly constructed and maintained septic systems. *Id.* at 30.

John Stormon, a licensed hydrogeologist and a member of Ecology's permit writing team, testified that he has read many published studies on the sources of nitrate contamination in Washington groundwater, and the common theme throughout is that dairies are not the only sources of nitrate in groundwater. RP (May 1, 2007) at 301:23–25; 302:1–8. For example, in the Central Columbia Basin, even though there are CAFOs present, the primary sources of contamination are agricultural fertilizer applications and over-irrigation of agricultural lands. RP (May 1, 2007) at 302:18–24.

There are no studies in the record that analyze the environmental impacts from CAFOs regulated by, and in compliance with, the current CAFO Permit. Mr. Stormon testified that a number of studies cited by CARE reviewed “operations that were not in compliance with the standards at that time.” RP (May 1, 2007) at 306:12–19. Some of the studies relied on by CARE were outside Washington and involved facilities that were not operating in compliance with the CAFO Permit, or

involved facilities that would not be subject to the CAFO Permit. RP (May 1, 2007) at 302:25; 303:1–25; 304:1–11; 306:20–25; 307:1–12.

A major component of the Permit is the nutrient management plan (“NMP”). A NMP is a suite of best management practices (“BMPs”) that prevent or reduce pollution of state waters and is specific to each CAFO. CAFOs are required to submit a NMP to Ecology in conjunction with a request for coverage under the Permit. Ex. E-1, Condition S2.B at 11. Once Ecology approves a NMP it becomes an enforceable part of the Permit. RP (May 1, 2007) at 411:6–10. A NMP “must conform to the United States Department of Agriculture Natural Resources Conservation Service (NRCS) Field Office Technical Guide (FOTG) or equivalent best management practices (BMP).” Ex. E-1, Condition S3.A at 12. The NRCS standards are a series of BMPs that have been developed nationally for agricultural practices and include BMPs tailored to the state level. Order at 20, FF 38. In order to receive federal funding, a CAFO’s NMP must be certified by the NRCS. RP 885:22–25; 886:1–7. Additionally, NMPs for dairy CAFOs must also be certified by local conservation districts as meeting the minimum requirements established by the Washington Conservation Commission. RCW 90.64.026; Ex. E-1, Condition S3.A.4 at 15.

NMPs must include a number of minimum elements listed in the Permit. Ex. E-1, Condition S3.A.2 at 12–13. For CAFOs that apply manure and wastewater to land, the NMP must include a field-specific assessment of the form, source, amount, timing, and method of application of nutrients on each field to achieve realistic production goals, while minimizing to the lowest achievable level nitrogen and phosphorus movement to surface and groundwater. Ex. E-1, Condition S3.A.3 at 13-15. The NMP must “ensure appropriate agricultural utilization of the nutrient in the manure, litter, or wastewater.” Ex. E-1, Condition S3.A.2.h at 13. Ultimately, the application rates are dictated by the nutrient demands of the crop. RP (May 1, 2007) at 302:6–11. Discharge of field runoff is prohibited when field applications exceed the rates in the NMP. Ex. E-1, Condition S1.3 at 8.

A CAFO’s field application rates are double-checked through the Permit’s soil monitoring requirements. The Permit requires annual soil sampling and monitoring to identify those sites where nutrient management practices represent a risk to groundwater quality. Large CAFOs⁵ must collect annual soil samples of land application areas and must analyze the samples for nitrate concentrations. Ex. E-1,

⁵ The definition of a large CAFO depends on the number and type of animals confined. For example, the confinement of 700 or more mature dairy cattle constitutes a large CAFO. Ex. E-1, App. 2 at 31.

Condition S3.A.3.c at 14; Condition S4.C.1.b at 20. The soil samples are taken in the fall in order to measure the residual nitrate left in the soil at the end of the growing season. RP (May 1, 2007) at 311:17–23. The soil monitoring allows Ecology and permittees to determine whether manure, litter, and wastewater are being properly applied to land areas. If soil monitoring indicates that manure, litter, or wastewater are being inappropriately applied to land application areas, the NMP must be revised to reflect necessary changes in management practices to protect groundwater. Ex. E-1, Condition S3.D.3 at 15–16. Additionally, the Board’s Order clarified that if the soil sampling indicates a potential risk to water quality, no further land applications can be made until after the nutrient management plan has been revised and approved by Ecology. Order at 48, Conclusion of Law (“CL”) 18.

The Permit requires soil sampling at one-foot depths west of the Cascades, and at two-foot depths east of the Cascades. Ex. E-1, Condition S4.C.1.c at 20; RP (May 1, 2007) at 312:5–9. These depths correlate with the typical root zones of crops grown in both areas of the state and are derived in part from an Oregon State University Extension post-harvest soil nitrate study. RP (May 1, 2007) at 312:5–16. The two-foot depth for Eastern Washington reflects the fact that plants in the more arid environment generally have deeper root systems. RP (May 1, 2007) at

312:17–22. Agriculture’s lead inspector for the livestock nutrient management program, Virginia Prest, testified regarding CAFO manure injection procedures.⁶ Prior to working for Agriculture, Ms. Prest worked for 17 years as an agronomist for Washington State University (“WSU”). RP (May 3, 2007) at 914:10–11, 19–24; 915:20–21. Ms. Prest explained that the typical process for manure soil injection utilizes a two foot long shank to fracture the soil, followed by shorter tubes of four to eight inches long that inject the manure into the soil. RP (May 3, 2007) at 939:23–35; 940:1–25; 941:1–5. Ms. Prest’s testimony on manure injection practices was corroborated by Dr. Joe Harrison, WSU professor and dairy specialist, who testified that an operator would have no reason to inject manure any deeper because it could not be taken up by crops, and would result in higher fuel costs. RP (May 4, 2007) at 1052:1; 1053:1–25; 1054:1–6. Any attempt by an operator to use land application of manure as a means of waste disposal would not be in compliance with the application rates in the NMP and would be in violation of the Permit. RP (May 1, 2007) at 300:17–24.

The Permit’s soil monitoring requirement exceeds the requirements in the Environmental Protection Agency’s (“EPA”) CAFO

⁶ Agriculture plays a regulatory role as the primary administrator of the Livestock and Nutrient Management Program under RCW 90.64. This includes inspecting CAFO operations and providing technical assistance with nutrient waste management activities. RP (May 3, 2007) at 870:24–25; 871:1–18.

rule. RP (April 30, 2007) at 230:8–16. In drafting the Permit, Ecology reviewed the practices in other states and found that the CAFO Permit “exceeded most of everything” that Ecology looked at. RP (May 1, 2007) at 351:1–12. Only a couple of East Coast states were doing groundwater monitoring, but the monitoring was being done by the states, rather than the permittees. *Id.* CARE’s witness, Dr. Bruce Bell, testified that he knew of only two states that require soil monitoring. RP (May 2, 2007) at 740:2–6.

Soil monitoring of land application areas will demonstrate whether a NMP is protecting water quality. Additionally, the data generated from soil monitoring is important information that will help Ecology develop the next CAFO permit. Ex. E-2 at 19.⁷

The CAFO Permit requires production areas⁸ to be constructed, operated, and maintained to contain all manure, litter, and process wastewater including the runoff and direct precipitation from a 25-year, 24-hour rainfall event. Ex. E-1, Condition S1.A.1 at 8. For new source swine, poultry, and veal large CAFOs, the Permit requires production areas to be constructed, operated, and maintained to contain all manure, litter, and process wastewater including the runoff and direct precipitation

⁷ The current Permit expires on July 21, 2011. Ex. E-1.

⁸ A CAFO’s production area includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas. Ex. E-1 at 6. The production area is a relatively small area as compared to the total area used by a CAFO. RP (May 4, 2007) at 1089:20–25.

from a 100-year, 24-hour rainfall event. Ex. E-1, Condition S1.A.2 at 8. These requirements protect state waters in two ways: (1) by diverting “clean” water away from the production area so it does not get contaminated; and (2) by requiring contaminated water in the production area to be diverted to a storage lagoon, rather than soaking into the ground. RP (May 1, 2007) at 442:15–18. These requirements come from the EPA’s CAFO rule. RP (April 30, 2007) at 183:24–25; 184:1–5. Keeping water out of the production area eliminates the risk of groundwater contamination. RP (May 1, 2007) at 316:25; 317:1–10. Therefore, soil monitoring is not required in the production areas.

The Permit requires that all new and expanded storage lagoons or other storage facilities be designed and constructed consistent with NRCS standards for waste storage facilities. RP (May 1, 2007) at 359:4–16. These standards require two feet of vertical separation between the bottom of the lagoon and the top of the highest seasonal groundwater table. *Id.*; RP (May 1, 2007) at 307:16–23. The NRCS standards also include a permeability standard to minimize lagoon leakage. RP (May 1, 2007) at 327:18–24. All lagoons are required to have a depth marker in conjunction with a leak detection method to ensure that lagoon leakage can be detected. Ecology did not require a specific leak detection method in the Permit due to its concern that a one-size-fits-all approach would

create inadvertent loopholes. RP (May 1, 2007) at 412:5–14. Engineers testifying for both Ecology and CARE agreed that determining proper lagoon levels involves standard engineering practices, taking into account such site-specific factors as amount of waste and rainfall in the lagoon, and comparing that with the amount of material leaving the lagoon through evaporation and field application. RP (May 1, 2007) at 315:19–25; 316:1–12; RP (May 2, 2007) at 688:10–25; 689:1–21.

A facility's leak detection method must be submitted to and approved by Ecology. RP (May 1, 2007) at 309:22–25; 310:1–7. If a CAFO discovers a leak, the permittee must notify Ecology within 24 hours and take immediate action to stop the leak. Ex. E-1, Condition S5 at 20; RP (May 1, 2007) at 315:19–25; 316:1–16. The Permit does not require soil monitoring under the lagoon because it would be impossible to obtain a sample and would compromise the integrity of the liner. RP (May 1, 2007) at 356:16–25; 357:1–8.

CARE's expert, Dr. Bell, provided testimony at the hearing regarding seepage rates of lagoons. He referred to a 2001 California study that estimated seepage rates at 0.8 meters per year from ponds that were 10 to 30 years old. RP (May 2, 2007) at 707:25; 708:1–25; 709:1–11; Ex. A-144 at 311. Both Dr. Bell and Dr. Harrison, the dairy specialist and WSU professor, agreed that there is no data available on lagoon seepage

for lagoons built under the current NRCS standards. RP (May 2, 2007) at 722:7–23; 724:10–16, 23–35; 725:1–3; RP (May 3, 2007) at 974:22–25; 975:1–25; 976:1–5. Elsewhere in his testimony, in calculating seepage rates of lagoons, Dr. Bell used the wrong NRCS standard. RP (May 4, 2007) at 1094:5–23; 1095:1–13. The current NRCS standard, which applies under the Permit, is a minimum of 10 to the minus 6 centimeters per second. RP (May 3, 2007) at 854:23–25; 855:1–25; 856:1–3. With the effect of manure sealing taken into account, the permeability decreases to 10 to the minus 7. *Id.* This is considered to be a relatively impervious standard. RP (May 1, 2007) at 328:4–15. Significantly, Dr. Bell was not able to say that the current leak detection requirement under the Permit would not be able to detect lagoon seepage. RP (May 2, 2007) at 695:12–21.

In addition to the lagoon leak detection requirement, the Permit requires daily and weekly facility inspections. Ex. E-1, Condition S1.D at 9–10. These requirements include regular inspections of water lines, diversion channels, and waste storage lagoons. *Id.* These required inspections ensure that the operator of the CAFO facility regularly monitors the systems that have been put in place to protect surface and groundwater. RP (May 1, 2007) at 317:11–23.

In developing the Permit, Ecology considered requiring groundwater monitoring in the Permit, but ultimately rejected it in favor of the protective measures described above. RP (April 30, 2007) at 185:23–25; 186:1–2; RP (May 1, 2007) at 297:20–25. Ecology’s hydrogeologist, John Stormon, testified that the soil monitoring would be as protective as ground monitoring because it would allow an operator to take action in response to elevated nitrate levels before the contaminant reaches groundwater. RP (May 1, 2007) at 310:8–20. As compared to soil monitoring, groundwater monitoring only identifies contamination that has already occurred. RP (May 1, 2007) at 310:21–24. Groundwater monitoring does not prevent water quality degradation. RP (April 30, 2007) at 218:17–22. The EPA’s CAFO rule does not require groundwater monitoring. RP (April 30, 2007) at 186:3-5. The CAFO industry was not in favor of either soil or groundwater monitoring. RP (May 1, 2007) at 314:23–25; 315:1–6, 10–15.⁹

For those areas of a facility not covered by soil monitoring, there are other protections in place, such as the lagoon leak detection and stormwater runoff diversion systems. RP (May 1, 2007) at 359:18–25; 360:1–8. This suite of protective measures ensures that the entire facility

⁹ Larry Fendell, one of CARE’s lay witnesses, attended a public hearing on the Permit, and CAFO operators at the hearing expressed their opposition to soil monitoring so vehemently that Mr. Fendell was too intimidated to testify. RP (May 2, 2007) at 525:2–19.

is operated in a manner that is protective of surface and groundwater. Additionally, the Permit does not preclude Ecology from requiring a facility to conduct groundwater monitoring. RP (May 1, 2007) at 316:13–17. For those individual facilities that warrant groundwater monitoring, Ecology retains the authority to require an individual permit or to issue an administrative order requiring groundwater monitoring. RP (May 1, 2007) at 366:1–16.

There is no state or federal requirement that all records kept under the Permit be submitted to Ecology. Nonetheless, the Permit requires that a number of records be submitted by the permittee to Ecology, including the facility's NMP and an annual report that includes a summary of all discharges, monitoring results, total acres of land used for land application of manure, litter, and process wastewater and an estimate of the total amount of manure, litter, and process wastewater generated by the CAFO. Ex. E-1, Condition S2B at 11–12; Condition S3.E at 16; Condition S4.B.3 at 19. Additionally, a permittee must submit a written report to Ecology within five days of any noncompliance with the Permit, including any unauthorized discharges. Ex. E-1, Condition S4.B.1 at 18–19. These documents are publicly available, subject to provisions in state and federal law that exempt confidential business records from disclosure. As CARE acknowledges, the Permit allows certain operational records to be

maintained on-site at the CAFO. CARE's Opening Brief ("CARE's Br.") at 47. These records are also publicly available through a request to Ecology. When Ecology receives such a request, Ecology's procedure is to request the information from the permittee. Order at 42, CL 7. The Permit requires the CAFO to make the records available upon request by the agency. *Id.*; Ex. E-1, Condition S4.A at 16. The applicability of the confidential business record exemption to such records is made by Ecology on a case-by-case basis. Order at 40–41, CL 4.

CARE appealed the Permit to the Board, and a number of industry trade associations intervened.¹⁰ On cross motions for summary judgment, the Board ruled against CARE and the Intervenors on 7 of the 12 issues raised. The Board reserved for hearing the remaining five issues raised by CARE. After a five day evidentiary hearing, the Board unanimously affirmed the Permit, with a clarification that whenever environmental monitoring shows that water quality may be at risk, no further land applications are allowed until after Ecology has approved an update to a permittee's nutrient management plan. Order at 53. CARE filed a petition for judicial review challenging the Board's Order on two of the issues

¹⁰ These include the Northwest Dairy Association, the Washington State Dairy Federation, the Washington Cattlemen's Association, the Washington Cattle Feeders Association, and the Northwest Poultry Industries Council.

presented for hearing.¹¹ On a joint motion for discretionary review pursuant to RCW 34.05.518, this Court accepted direct review.

IV. STANDARD OF REVIEW

At the hearing before the Board, CARE had the burden of proof pursuant to WAC 371-08-485(3). This Court reviews the Board's decision under the Washington Administrative Procedure Act ("APA"). *Pub. Util. Dist. No. 1 of Pend Oreille County v. Dep't of Ecology*, 146 Wn.2d 778, 789-90, 51 P.3d 744 (2002); *see also* RCW 34.05.518(1), (3)(a). The Court's review of the facts is confined to the record before the Board. RCW 34.05.558. "The burden of demonstrating the invalidity of agency action is on the party asserting invalidity." RCW 34.05.570(1)(a).

The Court may grant relief if it determines that the Board has "erroneously interpreted or applied the law." RCW 34.05.570(3)(d). Where statutory construction is necessary, a court will interpret statutes *de novo*. *Pub. Util. Dist. No. 1*, 146 Wn.2d at 790. However, if an ambiguous statute falls within the agency's expertise, the agency's

¹¹ Legal Issue No. 8 stated: "Does the permit unlawfully fail to provide public access to facility inspection, discharge, or records in violation of federal and state law?" The Board concluded that the Permit satisfies the public participation requirements of the Clean Water Act and that "the Permit's case-by-case approach to public disclosure of information contained in records required to be kept under this permit is reasonable and required by state law. Order at 41-44, Conclusions of Law 6-10.

Legal Issue No. 18 stated: "Does the final Permit fail to require groundwater monitoring and thereby fail to protect the waters of the State in violation of RCW 90.48 and its implementing regulations?" The Board concluded 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." Order at 52, Conclusion of Law 25.

interpretation of the statute is “accorded great weight, provided it does not conflict with the statute.” *Id.* In addition, this Court may grant relief if the Board’s Order is “not supported by evidence that is substantial when viewed in light of the whole record before the court.” RCW 34.05.570(3)(e). The substantial evidence test is “highly deferential.” *ARCO Prods. Co. v. Utils. & Wash. Transp. Comm’n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). The test is not whether the evidence is sufficient to persuade the reviewing court of the truth or correctness of the order; rather, the test is whether any fair-minded person could have ruled as the Board did after considering all of the evidence. *Callecod v. State Patrol*, 84 Wn. App. 663, 676 n.9, 929 P.2d 510 (1997). Evidence may be “substantial” even if it is in conflict with other evidence in the record. *Id.* at 676. A reviewing court does not weigh the credibility of witnesses or substitute its judgment for the Board’s with regard to findings of fact. *Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App. 587, 596, 13 P.3d 1076 (2000). Additionally, any of the Board’s findings left unchallenged by the petitioner are verities on review. *Patterson v. Superintendent of Pub. Instruction*, 76 Wn. App. 666, 674, 887 P.2d 411 (1994). The only finding of fact challenged by CARE in the current case is finding of fact 56. CARE’s Br. at 1. Consequently, the remaining 75 findings of fact are verities in this appeal.

Finally, this Court may grant relief if the agency's order is "arbitrary or capricious." RCW 34.05.570(3)(i). Arbitrary or capricious agency action has been defined as action that "is willful and unreasoning and taken without regard to the attending facts or circumstances." *Wash. Indep. Tel. Ass'n v. Wash. Utils. Transp. Comm'n*, 149 Wn.2d 17, 26, 65 P.3d 319 (2003) (quoting *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997)). Where there is room for two opinions, a court should not find that an action was arbitrary and capricious, even though the court may reach an opposite conclusion. *See Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910 (1994). A court should not "undertake to exercise the discretion that the legislature has placed in the agency." RCW 34.05.574(1).

V. ARGUMENT

The issues in this case are whether CARE met its burden of proof to demonstrate (1) that CAFO operations in compliance with the Permit will fail to adequately protect waters of the state, and (2) that the Permit fails to meet the public participation requirements of the Clean Water Act.

CARE's evidence of groundwater impacts from historic agricultural practices fails to demonstrate that the CAFO Permit must include groundwater monitoring in order to protect state waters. There is no evidence that CAFOs in compliance with the Permit will contaminate

groundwater. Not only is the CAFO Permit more stringent than the permit it replaces, it is also more stringent than what is required by EPA's CAFO rule. RP (April 30, 2007) at 230:8-16.

In arguing that the Permit violates the state's anti-degradation policy, CARE ignores the fact that the Permit specifically prohibits the types of discharges that would violate the anti-degradation policy. Ex. E-1, Condition S1.B at 8-9. CARE has failed to prove that soil monitoring, in conjunction with the required lagoon leak detection mechanism and production area stormwater requirements, is not protective of surface and groundwater quality. To the contrary, soil monitoring allows identification of excess levels of nitrate before it gets to groundwater. RP (May 1, 2007) at 310:8-20. The Permit requires the permittee to make adjustments to the CAFO's land application practices in response to the information provided by the soil monitoring, so as to prevent nitrate contamination of groundwater. Order at 48, CL 18.

Moreover, CARE fails to recognize that the Permit reserves Ecology's right to require any CAFO to obtain an individual permit and require groundwater monitoring if the facility poses a heightened risk of groundwater contamination. Ex. E-1, Condition S2.C at 12; RP (May 1, 2007) at 316:13-17. Ecology's determination that groundwater monitoring requirements are more effectively evaluated and implemented

on a facility-specific basis is entitled to deference. *See Waterkeeper Alliance*, 399 F.3d at 515.

The information available to the public under the CAFO Permit meets the federal requirements for public access in the Clean Water Act. All records required under the Permit, whether they are kept at a facility or by Ecology, are subject to state public disclosure laws. Order at 41, CL 6. Both state and federal law exempt confidential business records from disclosure. Order at 43, CL 9. The fact that some documents created by some CAFOs may contain confidential information that is exempt from disclosure under both state law and the Clean Water Act does not impermissibly interfere with the public's right to have access to appropriate facility documents under either the Clean Water Act or state law.

The CAFO Permit is protective of water quality, represents a reasonable exercise of Ecology's permitting discretion, and complies with public access requirements in state and federal water quality laws. The Board's Order should be affirmed.

A. CARE's Evidence Of Groundwater Impacts From Historic Agricultural Practices Fails To Demonstrate That The CAFO Permit Must Include Groundwater Monitoring In Order To Protect Waters Of The State

While Ecology recognizes that past agricultural practices may have contributed to groundwater impacts, the issue in this appeal is not whether past practices have impacted waters of the state. Rather, the issue is whether CAFO operations in compliance with the CAFO Permit will protect waters of the state. Impacts from agricultural operations that were not subject to the June 2006 CAFO Permit, including the impacts allegedly documented in the pre-Permit studies relied upon by CARE, are not relevant to this inquiry. None of the studies relied on by CARE include any information on the environmental impacts from CAFOs that are in compliance with the CAFO Permit. Demonstrating that past practices have caused groundwater contamination does not prove that the current Permit will not protect groundwater quality. RP (May 1, 2007) at 306:4–11.

CARE argues that the Permit violates the state's anti-degradation policy. CARE's Br. at 25. In making this argument, CARE fails to recognize that the Permit expressly prohibits all surface water discharges unless such discharge is caused by an extreme storm event. Ex. E-1, Condition S1.A. at 8. For discharges caused by an extreme storm event, it

is a violation of the Permit if such a discharge causes or contributes to a violation of the water quality standards in the receiving water. *Id.* There is no evidence in the record that suggests a discharge from an extreme storm event would reduce existing water quality in a given situation. CARE's reliance on examples of historic agricultural practices does not prove that any discharge authorized under the CAFO Permit would violate state or federal water quality laws.

With respect to groundwater, the Permit expressly prohibits groundwater discharges from reducing existing groundwater quality unless the facility can demonstrate to Ecology's satisfaction that the requirements of the state's antidegradation policy have been met prior to the discharge.¹² Ex. E-1, Condition S1.B at 8-9. In other words, the Permit prohibits the types of discharges that would violate the anti-degradation policy. To the extent that such discharges occur, it is a violation of the Permit.

B. The Permit Requirements That Protect Water Quality Cover The Entire CAFO Facility

CARE's main argument regarding soil monitoring has nothing to do with the adequacy of soil monitoring per se. Rather, CARE alleges that

¹² The state's antidegradation policy is codified at RCW 90.54.020(3)(b). The statute requires that materials discharged to waters of the state be provided with all known, available, and reasonable methods of treatment prior to entry; and that discharges not reduce the existing quality of waters of the state unless it is clear that overriding considerations of the public interest will be served.

soil monitoring provides an incomplete picture of the potential risk of groundwater pollution from a particular facility. CARE argues that soil sampling is inadequate to assure against violations of water quality by CAFOs because only groundwater monitoring can reveal whether the entire facility is causing contamination. CARE's Br. at 30. CARE's allegation that the Permit does not adequately regulate the entire facility is belied by the requirements in the Permit pertaining to the lagoons and production areas.

The Permit's soil monitoring requirement captures the largest part of the CAFO facility, which is the land application area. RP (May 4, 2007) at 1089:24–25. CARE's primary objection to soil monitoring is due to the fact that some areas of a CAFO are not included in the soil monitoring requirement, namely the production and lagoon storage areas. This is demonstrated through CARE's reliance on the testimony of John Monks. CARE's Br. at 30. In giving his opinion on the adequacy of the soil monitoring requirements, Mr. Monks stated that "soil monitoring requirements *by themselves* are not protective of water quality" because "there are other potential sources of nitrogen and nitrate contamination from lagoons, and seepage from lagoons, seepage from water infiltrating down through cattle pen holding areas, and seepage from manure storage areas." RP (May 3, 2007) at 781:10–23 (emphasis added). The Permit

includes more than just soil monitoring requirements, and Mr. Monks was never asked by CARE about the adequacy of the Permit requirements that address the potential sources he refers to.

In fact, the Permit contains requirements in addition to soil monitoring that address areas of the CAFO not covered by soil monitoring. For example, the Permit requires a CAFO's production area to be designed, constructed, and maintained so as to contain all manure, litter, and process wastewater including the runoff and direct precipitation from a 25-year, 24-hour rainfall event (in the case of existing facilities), or a 100-year, 24-hour rainfall event (in the case of new source swine, poultry, and veal large CAFOs). Ex. E-1, Condition S1.A at 8. These requirements come straight from the EPA's CAFO rule for the protection of surface water. RP (April 30, 2007) at 183:24-25; 184:1-8. By keeping clean water out of the production area, which includes manure storage areas and holding pens, and by requiring contaminated water to be contained in a lagoon, there is no discharge to state waters. If a discharge does occur as the result of an extreme storm event, such discharges are prohibited from causing or contributing to a violation of water quality standards. Ex. E-1, Condition S1.A at 8.

The only other areas of a CAFO not covered by soil monitoring are the storage lagoons. It would be impossible to sample under a lagoon

without compromising the integrity of the lagoon. RP (May 1, 2007) at 356:16–25; 357:1-8. Instead, the Permit requires that all new and expanded storage lagoons or other storage facilities be designed and constructed consistent with NRCS standards for waste storage facilities which require two feet of vertical separation between the bottom of the lagoon liner and the highest seasonal groundwater table. RP (May 1, 2007) at 307:16–23. The NRCS standards also require a lagoon to be built in conformity with a protective permeability standard. RP (May 1, 2007) at 327:18–24. Finally, the Permit requires a mechanism to ensure that a lagoon is not leaking, including a lagoon depth marker requirement. Ex. E-1, Condition S1.D at 9–10. This allows CAFO operators and inspectors to readily determine if lagoons are leaking by ensuring that the level in the lagoon is where it should be.

In arguing that the measures pertaining to storage lagoons are inadequate, CARE relies on the inflated seepage rates of CARE's expert Dr. Bell, whom the Board deemed to be less credible than both Ecology's and industry's expert witnesses. Order at 28, CL 56. The Board correctly determined that Dr. Bell's testimony regarding seepage rates was relevant only to waste treatment facilities that treat wastewater through filtration. *Id.* CAFO storage lagoons serve a different function and are not designed for filtration but for storage. RP (May 4, 2007) at 1094:13–23.

Additionally, there is no research available that addresses whether lagoons built to the current NRCS standards have leaked beyond the allowable seepage rate included in the design criteria. Order at 28, FF 55. Nor has nitrate contamination been documented at facilities where properly constructed lagoons liners have been installed. *Id.* CARE failed to prove that the facilities regulated under the Permit, when operated in compliance with the Permit, pose a risk to water quality.¹³

The lagoon and production area requirements mirror the requirements in EPA's CAFO Rule. Ecology's reliance on those measures is lawful and appropriate. In conjunction with soil monitoring in the land application area, the protective measures in the Permit that pertain to the production area and lagoons allow CAFO operators and regulators to determine whether a CAFO poses a pollution risk and take appropriate action. The permit is protective of waters of the state and the Board properly affirmed the Permit.

¹³ CARE's assertion that a 3 million gallon lagoon would have a seepage rate of over 690,000 gallons per year is completely unfounded. CARE's Br. at 17. CARE relies on Exhibit I-81, yet there was no testimony regarding this exhibit other than the fact that it was a product of a lagoon liner work group. RP (May 3, 2007) at 973:3-7. There is no evidence in the record that Exhibit I-81 reflects NRCS standards, nor does the exhibit even refer to a 3 million gallon lagoon. The Court should disregard counsel's attempt to supplement the record with speculative hypotheticals that were never discussed at the hearing.

C. Soil Monitoring Is Protective Of Groundwater Quality

CARE next argues that soil monitoring is inadequate to assure against violations of water quality by CAFOs, and that groundwater monitoring is the only way to protect groundwater. First, CARE argues that the lack of a numeric trigger for groundwater monitoring renders the Permit difficult to enforce. CARE's Br. at 32. Second, CARE argues that the Permit is inadequate because it does not require a facility to make operational changes when nitrate levels are elevated. *Id.* Third, CARE argues that soil monitoring may not reveal all the nitrate contamination in the soil. CARE's Br. at 17-18, 31. As discussed below, each of these arguments lack merit.

Ecology considered and ultimately rejected the notion of using a specific nitrate level as a trigger for groundwater monitoring. RP (May 1, 2007) at 298:5-16. CARE does not explain how the use of a numeric trigger would be more protective of water quality. As Dr. Harrison testified, the NRCS guidance for interpreting soil samples for Western Washington is based on a three-tiered approach in which values in each range triggers a different set of management changes at a facility. RP (May 4, 2007) at 1049:10-25. The NRCS guidance will be utilized by both operators and regulators in determining the appropriate changes to the land application practices for those CAFOs where soil monitoring

indicates that current land application practices result in elevated nitrate levels. *Id.* Having a numeric trigger could potentially preclude a CAFO that misses the trigger by a single digit from having to make any necessary adjustments to their operation that might otherwise be appropriate. Moreover, a numeric trigger would be most appropriate for an individual site, where site-specific conditions could be taken into account, rather than applied to all facilities covered under the Permit. RP (May 4, 2007) at 1118:17–25; 1119: 1–24.

Nor does the lack of a numeric trigger render the Permit unenforceable. Division I of the Washington Court of Appeals rejected a similar argument in *Puget Soundkeeper Alliance v. Dep't of Ecology*, 102 Wn. App. 783, 9 P.3d 892 (2000). In that case, the petitioner challenged Ecology's issuance of a NPDES permit issued to an oil refinery on the basis that the non-numeric limits in the permit were unenforceable. *Id.* at 786, 793. The court disagreed, holding that Ecology is not limited to the use of numeric limits but can include narrative limits as enforceable Permit conditions. *Id.*

CARE next argues that the Permit does not require any action in response to elevated soil nitrate levels. To the contrary, the Permit requires that the soil monitoring results be submitted to Ecology. Upon receipt of the monitoring reports, if the CAFO operator fails to take

remedial measures as required under the Permit's mandate to minimize the transport of nitrogen to groundwater, Ecology can require them. Moreover, CARE ignores the clarifying condition that the Board added to the Permit, which expressly prohibits any land applications once monitoring shows water quality is at risk until the NMP has been revised and approved by Ecology to reflect operational changes in response to the soil monitoring. Order at 48, CL 18. CARE is simply incorrect when it argues that the Permit fails to require action in response to elevated nitrate levels.

Finally, CARE argues that soil monitoring may not reveal all of the nitrate contamination in the soil. CARE cites to a study that concludes that nitrate leaching may occur with land applications at agronomic rates. CARE's Br. at 5. However, CARE ignores the fact that the Permit contains an independent requirement that land applications "must minimize phosphorous and nitrogen transport from the field to surface and ground waters." Ex. E-1, Condition S3.A.3.b at 14. This requirement is in addition to the requirement that land applications be made at agronomic rates. In fact, Ecology's hydrogeologist, Mr. Stormon, testified that this independent requirement can be more protective than agronomic rates. RP (May 2, 2007) at 518:13-21.

Moreover, CARE's concerns are addressed by soil monitoring because soil monitoring is intended to measure "the nutrients that are available to leach into the vadose zone below the root zone." RP (May 1, 2007) at 321:2-8. Thus, if nitrate leaching is occurring even with applications at agronomic rates, that would suggest that the rates need to be reevaluated. If over-irrigation is leaching nitrates through the soil, that would suggest the CAFO's practices need to be evaluated. In either case, the soil monitoring will demonstrate that the CAFO's operations need to be adjusted. To the extent an operator is applying manure in excess of the Permit's soil sampling depths and beyond the root zone, this would indicate that the operator is engaged in waste disposal versus nutrient application for the benefit of crops. Such practices are prohibited under the Permit. RP (May 1, 2007) at 300:17-24.

Finally, it is worth noting that under EPA's CAFO rule, any stormwater discharges resulting from land applications at agronomic rates are exempt from regulation, reflecting the judgment of EPA that such discharges do not pose a significant risk to water quality. 40 C.F.R. § 122.23(e).

Groundwater monitoring does not prevent contamination, it only identifies it after the fact. By contrast, soil monitoring is proactive and allows the identification of excess levels of nitrate before it ever gets to

the groundwater. RP (May 1, 2007) at 310:8–25; 311:1–7. CARE’s argument that Ecology sacrificed water quality in favor of industry interests is belied by the testimony of Ecology’s witnesses and the Permit conditions themselves, which the Board properly concluded are protective of water quality.

D. Ecology’s Decision To Rely On Soil Monitoring In Conjunction With The Other CAFO Permit Conditions To Protect Water Quality Is A Reasonable Exercise Of Ecology’s Permitting Discretion

It is not enough for CARE to disagree with Ecology’s approach to the CAFO Permit; instead CARE must show that Ecology’s permitting decision is unlawful. CARE has failed to meet this burden.

CARE alleges that Ecology improperly considered the burden to the agency when Ecology was deliberating on whether to include groundwater monitoring as part of the Permit. CARE’s Br. at 35–36. To the contrary, when more than one option exists for protecting water quality, it is a lawful exercise of discretion for Ecology to choose the option that will be less of a drain on agency resources. *See Hillis*, 131 Wn.2d at 390-91 (Given the level of funding for Ecology’s water rights program, Ecology’s decision on how to prioritize pending water rights applications was not arbitrary and capricious.).

Groundwater monitoring does not prevent water quality degradation. There is no requirement in chapter 90.48 RCW or its implementing regulations that groundwater monitoring must be used as compliance monitoring at all permitted facilities. For the majority of regulated CAFO facilities, the CAFO permit will be protective of state waters. RP (April 30, 2007) at 198:22–25; 199:1. For those facilities where the Permit may not be protective, Ecology has the authority to issue an administrative order requiring groundwater monitoring. RP (May 1, 2007) at 366:1–16. Alternatively, Ecology may require any facility to obtain coverage under an individual permit which can include more site-specific requirements to protect the environment. *Id.*; WAC 173-226-080(1)(f). In the event CARE disagrees with Ecology's decision to grant coverage under the CAFO Permit to any particular facility, CARE can appeal Ecology's decision pursuant to WAC 173-226-190(2).

Ecology's approach to the CAFO Permit is similar to the approach taken by EPA in the federal CAFO rule which was upheld by the court in *Waterkeeper*. *Waterkeeper Alliance*, 399 F.3d at 515. In developing its CAFO rule, EPA initially proposed that various groundwater-related requirements be uniformly imposed on all CAFOs, but ultimately decided that groundwater-related requirements be implemented as necessary, on a case-by-case basis. *Id.* at 514. The court deferred to EPA's determination

that the option EPA chose provided better technology and would not be cost prohibitive as compared to the other option under consideration. *Id.* at 514–15.

Through the CAFO Permit, Ecology has made a concerted effort to protect groundwater through the soil monitoring requirement, which provides the information necessary to adjust CAFO operations before groundwater contamination occurs. Similar to the deference shown to EPA in *Waterkeeper*, Ecology's determination that groundwater monitoring requirements are more effectively evaluated and implemented on a facility-specific basis is entitled to deference. The fact that CARE would have made a different permitting decision does not demonstrate that Ecology's decision-making was arbitrary and capricious or otherwise unlawful.¹⁴

E. Information Available To The Public Under The CAFO Permit Meets The Public Access Requirements In The Federal Clean Water Act

In arguing that the CAFO Permit violates the public access provisions of the Clean Water Act, CARE takes issue with the fact that

¹⁴ CARE would have this Court believe that the sole reason Ecology decided not to include groundwater monitoring in the CAFO General Permit was due to pressure from the CAFO industry. CARE's Br. at 39. If that were the case, by the same logic Ecology would not have included soil monitoring either, given the industry's fierce opposition to soil monitoring. RP (May 1, 2007) at 314:23–25; 315:1–6, 10–15. In determining the appropriate monitoring requirements, Ecology took all the available information and tried to make the best decision to protect the environment in a reasonable way. RP (May 1, 2007) at 450:8–10.

there are state and federal laws that exempt certain CAFO documents from public disclosure. CARE appears to seek a ruling from this Court that the CAFO Permit must expressly require that all facility inspection and operational records required under the Permit be publicly accessible, even though such a ruling would be contrary to existing law. CARE's Br. at 45.

An applicant for coverage under the Permit must submit a nutrient management plan to Ecology with the permit application. Ex. E-1, Condition S2.B at 11. In addition, all updates to a nutrient management plan must be submitted to Ecology. Ex. E-1, Condition S3.E at 16. The nutrient management plans are public records that any member of the public can request from Ecology at any time. Order at 41, CL 6.

Facilities regulated under the Permit are required to maintain all records required by the Permit, including facility inspection and discharge records, for five years and must make the records available to Ecology upon request. Ex. E-1, Condition S4.A at 16. The public can obtain access to these records by requesting that Ecology obtain them from a particular permittee. In addition, CAFOs must submit a written report to Ecology within five days of any noncompliance with the Permit, including any unauthorized discharges. Ex. E-1, Condition S4.B.1 at 16–17. These reports are public records that any member of the public can request from Ecology. CAFOs are also required to submit an annual report to Ecology

that includes a summary of all discharges, monitoring results, total acres of land used for land application of manure, litter, and process wastewater and an estimate of the total amount of manure, litter, and process wastewater generated by the CAFO. Ex. E-1, Condition S4.B.3 at 19. The annual report is a public record that any member of the public can request from Ecology.

Both state and federal law contain nearly identical provisions regarding confidential business records in recognition of the fact that certain confidential records obtained by government officials should not be released to the public. RCW 43.21A.160 establishes a process for determining whether certain records are confidential and not subject to disclosure. In particular, the statute protects documents that “relate to the processes of production unique to the owner or operator thereof” or documents that “may affect adversely the competitive position of such owner or operator if released to the public or to a competitor” RCW 43.21A.160. The Clean Water Act protects from disclosure documents that “if made public would divulge methods or processes entitled to protection as trade secrets” 33 U.S.C. § 1318(b)(2). The Board correctly concluded that Ecology’s implementation of the confidential business records exemption on a case-by-case basis was not

only reasonable but a requirement of state law (citing *Smith v. Okanogan Cy.*, 100 Wn. App. 7, 12, 994 P.2d 857 (2000)). Order at 43, CL 10.

In requesting a remand order directing Ecology to put a condition in the permit that requires disclosure of all operational and compliance records, CARE is asking this Court to issue a declaratory ruling regarding the scope of the confidential business records exemption that ignores state and federal law and eviscerates the exemption. CARE is asking this Court to do so in the context of a permit appeal rather than a cognizable claim that Ecology has improperly withheld records related to a specific public records request. As the Board correctly concluded, determining the scope of confidential business information under RCW 43.21A.160 is beyond the Board's jurisdiction. If CARE believes Ecology's production of public records is untimely or inadequate, the Public Records Act provides the appropriate remedy. Order at 44, CL 11 (citing RCW 42.56.530, .550, .540). The Court should reject CARE's request for a declaratory ruling regarding the scope of confidential business information under RCW 43.21A.160.

CARE invites the Court to clarify for CARE which "types of records are in fact subject to public record release." CARE's Br. at 49. CARE argues that the absence of clarifying language in the Permit describing which types of records are subject to public disclosure, creates

a far “too circuitous path.” *Id.* CARE relies on a case from Michigan. *Id.*; see *Sierra Club Mackinac Chapter v. Dep’t of Env’tl. Quality*, 747 N.W.2d 321 (Mich. Ct. App. 2008). However, CARE’s reliance on this case is misplaced.

In the Michigan case, the Michigan Department of Environmental Quality (“DEQ”) issued a general CAFO permit that did not require submittal of a CAFO’s NMP as part of the application for coverage, and did not incorporate the NMP as part of a CAFO’s permit (in contradiction with the *Waterkeeper* decision). *Id.* at 333-34. Because the NMP was not available for review as part of a CAFO’s permit application, the Michigan court held that meaningful public input was precluded during the permit’s development. *Id.* at 334-45.

Contrary to Michigan, Washington’s CAFO Permit requires each CAFO seeking coverage under the Permit to submit a NMP to Ecology for review and ultimately for inclusion in the Permit. Ex. E-1, Condition S2.B at 11. When an applicant’s request for coverage under the Permit goes out for public comment, any member of the public can obtain a copy of the NMP by making a public disclosure request. Ecology is required to timely respond to public record requests. *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 100, 117 P.3d 1117 (2005). Therefore the public has sufficient opportunity to consider a pending

permit application. While CARE speculates that a facility can obtain coverage under the Permit during the pendency of a public records dispute, CARE ignores the remedies available. For instance, CARE can request that Ecology delay issuing a permit during the pendency of any public records dispute. In addition, CARE can initiate judicial review under RCW 42.56.550(2) if CARE believes Ecology has not made a reasonable estimate of the time needed to respond to a public records request. Finally, CARE can appeal Ecology's decision to grant coverage to a CAFO under WAC 173-226-190(2) and can seek a stay of the permit pursuant to RCW 43.21B.320.

In sum, the Permit provides for public participation in the development, revision, and enforcement of the Permit by making the NMPs available for review as part of the Permit application process. Order at 41, CL 6. Any revisions to the NMP are also publicly available. *Id.* In addition, the public can request any additional operational records and reports that are kept on site or submitted to Ecology. *Id.* The fact that some documents created by some CAFOs may contain confidential information protected from disclosure under both state law and the Clean Water Act does not impermissibly interfere with the public's right to have access to appropriate facility documents under either the Clean Water Act or state law. As the Board correctly concluded, if CARE believes Ecology

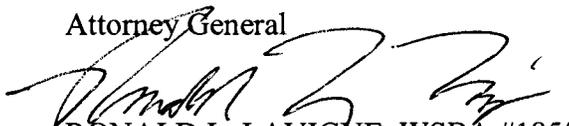
has improperly withheld public documents, the Public Records Act provides the appropriate judicial remedy. Order at 43-44, CL 10-11. Consequently, the Board properly rejected CARE's request for a declaratory ruling regarding the scope of confidential business information under RCW 43.21A.160.

VI. CONCLUSION

The Board did not err in finding that CARE failed to prove that Ecology's decision to require soil monitoring rather than groundwater monitoring in the CAFO Permit was unlawful or unreasonable. The Board did not err in concluding that CARE failed to demonstrate that the CAFO Permit violates public access requirements in the Clean Water Act and the Washington Water Pollution Control Act. Therefore, Ecology respectfully requests that the Board's Order be affirmed in its entirety.

RESPECTFULLY SUBMITTED this 23^d day of June 2008.

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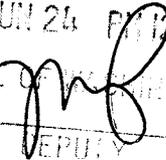
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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

COMMUNITY ASSOCIATION FOR
RESTORATION OF THE
ENVIRONMENT,

Petitioner,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

NORTHWEST DAIRY
ASSOCIATION,

Intervenor,

WASHINGTON STATE DAIRY
FEDERATION; et al.,

Intervenors.

CERTIFICATE OF
SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 23rd day of June, 2008, I caused to be served Department of Ecology's Response Brief in the above-captioned matter upon the parties herein as indicated below:

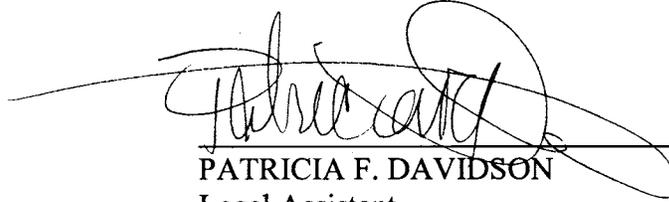
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William W. Clarke Attorneys at Law & Governmental Affairs 1110 Capitol Way South, Ste. 225 Olympia, WA 98501-2251	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Express <input type="checkbox"/> By Fax
Bruce L. Turcott Office of the Attorney General P.O. Box 40110 Olympia, WA 98504-0110	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Express <input type="checkbox"/> By Fax
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the foregoing being the last known address.

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

DATED this 23rd day of June, 2008, in Olympia, Washington.



PATRICIA F. DAVIDSON
Legal Assistant