

CONCENTRATED ANIMAL FEEDING OPERATION (CAFO)

AMENDED FACT SHEET APPENDIX A – RESPONSE TO COMMENTS

National Pollutant Discharge Elimination System (NPDES)
and State Waste Discharge General Permit

June 21, 2006

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The following people and organizations sent comments to Ecology during the public comment period:

1. Anonymous
 2. Agri Beef Company (Agri B)
 3. George Boggs (Boggs)
 4. Lynn Bahrych (Bahrych)
 5. Chris Clark (Clark)
 6. Courtney Farms
 7. Chris Crimmins (Crimmins)
 8. Robert L. Crocker (Crocker)
 9. Dan DeGroat (DeGroat)
 10. Steve DeRuyter (DeRuyter)
 11. Draper Valley Farms, Inc (Draper Valley Farms)
 12. Davis Wright Tremaine LLP (DWT)
 13. United States Environmental Protection Agency (EPA)
 14. Franklin Conservation District (Franklin CD)
 15. Jay Gordon (Gordon)
 16. Craig Grub (Grub)
 17. Charlie Gruhl (Gruhl)
 18. Chuck Hayes (Hayes)
 19. James Heeringer (Heeringer)
 20. Ernest Hopp (Hopp)
 21. J & J Bosma Dairy
 22. Victor Jensen (Jensen)
 23. Kip Dunlap (K. Dunlap)
 24. Mike Kaysen (Kaysen)
 25. Vic Khvoroff (Khvoroff)
 26. King County, Department of Natural Resources and Parks, Water and Land Resources Division, Hazardous Waste Management Program (King County)
 27. Wes King (King)
 28. LaDon Linde (Linde)
 29. Marilyn Dunlap (M. Dunlap)
 30. McBride Hereford Ranches, Inc. (McBride Hereford Ranches)
 31. Sandy McPhee (McPhee)
 32. Rick Mercer (Mercer)
 33. Mr. and Jolene Moeller (Moeller)
 34. John Moose (Moose)
 35. N3 Consulting
 36. Mike Neilson (Neilson)*
 37. North Sound Baykeeper RE Sources for Sustainable Communities (North Sound Baykeeper)
 38. Okanogan Conservation District (Okanogan CD)
 39. Dennis and Carolyn Peltier (Peltier)
 40. Dwight Pritchett (Pritchett)
 41. Snohomish County Agricultural Advisory Board (SCAAB)
 42. Skagit County Cattlemen's Association (SCCA)
 43. Bill Scheenstra (Scheenstra)
 44. Sheri Schefstrom (Schefstrom)
 45. Bill J. Shaw (Shaw)
 46. Corde Siegel (Siegel)
 47. J.R. Simplot Company (Simplot)
 48. People for Puget Sound, Puget Soundkeeper Alliance, and Waste Action Project (Smith & Lowney PLLC)
 49. Stuart A. Turner, CPAg (Turner)
 50. Stuart Turner (Turner)
 51. Tony Veiga (Veiga)
 52. Washington Cattlemen's Association (WCA)
 53. Washington Cattle Feeders (WCF)
 54. Washington Farm Bureau
 55. Western Environmental Law Center, CARE, Sierra Club, Cascade Chapter of the Sierra Club, Linda & James Dyjak, Northwest Environmental Defense Center, Waterkeeper Alliance, Larry Fendell (WELC, et al)
 56. David Welsh (Welsh)
 57. Jim Werkhoven (Werkhoven)
 58. Ron Wesen (Wesen)
 59. Washington State Department of Agriculture (WSDA)
 60. Washington State University (WSU)
 61. Larry and Harriet Yaeger (Yaeger)
 62. Dick Ziehnert (Ziehnert)
 63. Beef Feeders NW (Beef NW)
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64. WashPirg/PfPS (WashPirg/PfPS)

65. Mike Hepp Ecology (Hepp)

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Introduction

The CAFO Permit was released for public comment on December 1, 2004. The Permit is officially called the “Concentrated Animal Feeding Operation (CAFO) National Pollutant Discharge Elimination System (NPDES) And State Waste Discharge General Permit.” The first public comment period ended January 28, 2005.

In February 2005 the Federal 2nd Circuit Court made a series of rulings that had significant impacts to sections of the draft CAFO permit. The draft permit was redrafted to reflect the 2nd Circuit Court’s decisions and a 2nd public comment period was conducted. The public comment period ran from October 19 to December 5, 2005. This document contains a summary of the comments that the Department of Ecology (Ecology) received during both of the public hearing sessions. It also has Ecology’s responses to the comments and a summary of the changes made to the permit.

This document separates the two public comment periods.

- If a comment was submitted during the first comment period, it was not included in the 2nd.
- If a new comment was submitted during the 2nd comment period but an appropriate response was in the 1st comment period, there will be a reference to the 1st comment period response.
- For both comment period, the final permit changes are explained in the Explanation of the Changes to the Final General Permit table at the end of the document.

Ecology used the following tools to announce the release of the CAFO permit:

- News release (sent on December 1, 2004) via ECONNEWS (1,500 subscribers) for media distribution.
- Washington State Register (WSR) notice (published on December 1, 2004). It was filed on November 17, 2004, # 04.23.096. This notice was also circulated via ECOWACTRACK (1,954 subscribers).
- Announcement Flyers (sent on November 30, 2004) to 4,096 animal owners. A hardcopy four-page flyer was sent to potential CAFOs based on the number and types of animals that they own. Ecology used United States Department of Agriculture (USDA) Ag Statistics to mail out the flyers.
- Announcement Flyers (sent on November 30, 2004) to 903 potentially interested stakeholders. The two-page Ecology Publication Focus Sheet # 04-10-077 was mailed to 903 potentially interested stakeholders. This group included CDs, tribes, local government, etc.
- E-mail announcements were sent to: The Department of Ecology Permit Advisory Committee and the Washington State Dept. of Agriculture (WSDA) Livestock Development Oversight Committee (LDOC)
- Webpage (updated on November 3, 2004 at 5:00 pm). The Ecology webpage (www.ecy.wa.gov/programs/wq/permits/cafo) contained meeting announcements, focus sheets, the draft permit, draft fact sheet, application, economic impact analysis, and other documents.
- Display Ads. The ads were placed in late December 2004 or early January 2005. The Department of Ecology paid for display ads in the following newspapers: The Olympian, Tri-City Herald, Yakima Herald, Spokesman Review (Spokane), Longview Daily News, Skagit Valley Herald, and Capital Press.

- Copies of the permit or related information were given to the Washington State Dairy Federation, Washington Cattleman's Association, and Washington Fryer Commission for them to distribute to their members.
- Newspaper articles were published in the Capital Press and Yakima Herald.

Ecology conducted public workshops and hearings for the proposed CAFO Permit on the following dates and locations:

- Yakima: Wednesday, January 5, 2005, 6-9 p.m., Yakima Area Arboretum
- Spokane: Thursday, January 6, 2005, 6-9 p.m., Spokane Falls Community College
- Mt. Vernon: Monday, January 10, 2005, 6-9 p.m., Skagit County PUD
- Longview: Wednesday, January 12, 2005, 6-9 p.m., Cowlitz County PUD
- A 2nd WSR notice was published and filed on October 5, 2005 #05-20-109 that announced the 2nd round of public hearings after the 2nd Circuit Court Ruling. 2500 copies of the WSR notice were mailed through the USDA's mailing list.
- 1,077 public hearings notice announcements were mailed October 9, 2005 from the Department of Ecology job #C313126.
- A news release was distributed on October 19, 2005 to 32 daily newspapers, 112 weekly or monthly newspapers, 43 environmental reporters, 23 television stations, and 80 radio stations.
- Webpage (www.ecy.wa.gov/programs/wq/permits/cafo) contained meeting announcements, and focus sheets, was updated October 19, 2005.

Ecology conducted public workshops and hearings for the proposed CAFO Permit on the following dates and locations:

- Mount Vernon: Monday November 21, 2005, 6-9 p.m. Skagit PUD #1
- Longview: Tuesday November 22, 2005, 6-9 p.m. Cowlitz County PUD
- Yakima: Thursday December 1, 2005, 6-9 p.m. Terrace Heights Civic Center

For more information on this permit, please contact the Department of Ecology at:

Mail: Kevin P. Hancock
Department of Ecology
PO Box 47600
Olympia, WA 98504-7600
E-mail: khan461@ecy.wa.gov
Phone: 360-407-6283
Fax: 360-407-6426

Type of facilities subject to the general permit:

All discharging concentrated animal feeding operations (CAFO) or CAFOs that propose to discharge (i.e.: 25 year, 24 hour storm event or larger, upsets) need to apply for a permit. The definition of a “concentrated animal feeding operation” is in the permit. It includes some cattle feedlots, dairies, and poultry, or pig producers and other types of animal feeding operations.

Geographic area for which the general permit is valid:

This general permit applies statewide.

Application process:

An application for the CAFO permit is available by contacting the Department of Ecology. An application is also available on-line at www.ecy.wa.gov/programs/wq/permits/cafo.

Appeals:

The terms and conditions of this general permit may be appealed only by filing an appeal with the pollution control hearings board and by serving it upon the Department of Ecology within thirty days. The process for doing so is contained in RCW 43.21B.310.

Effective Date of the Permit:

This permit will be effective on June 21, 2006.

S1. Effluent Limitations

In general, the Draft Permit is invalid because it does not require CAFOs to apply all known, available and reasonable methods to prevent, control, and treat pollutants before they are discharged into surface waters. RCW 90.54.020(3)(b); see also, RCW 90.48.520, RCW 90.52.040. As Ecology's Permit Writer's Manual explains, "This law explicitly states that AKART is required even if it results in more stringent treatment than required to meet water quality standards." See, Ecology's Permit Writer's Manual at IV.30. However, the Draft Permit does not require AKART -- either for discharges from "production areas", or for discharges from land application areas. Instead, it erects a series of largely illusory and unenforceable requirements that do not meet the legal standards of state and federal law. (Smith & Lowney PLLC)

Response: The permit requires at least the Best Available Technology (BAT) as defined by EPA. Ecology has determined that no additional requirements, other than the ones already in the permit, are needed to meet the state AKART requirement. BAT is designed to eliminate discharges from the production areas, except under extreme rainfall events. BAT also requires that any manure that is land applied is applied at agronomic rates to reduce any agricultural stormwater discharges. Further, the permit requires NRCS Field Office Technical Guide (FOTG) standards (or other best management practices with equivalent water quality protection). BAT for CAFOs was adopted in 2003 by the EPA. The Permit Writer's Manual recommends that those effluent guidelines less than 5 years old will always be AKART for the pollutants described in the development document. Ecology has determined that the EPA effluent guidelines (specifically the BAT) are AKART for CAFOs. We added water quality-based requirements in the permit beyond the federal technology requirements in some areas, such as ground water protection.

I am asking you to include some "effluent-application regulations" into the CAFO General Permit. From my viewpoint, these regulations parallel the intent of the entire CAFO document, without causing any negative consequences to the CAFOs. (Schefstrom) (Moeller) (McPhee) (Peltier) (Yaeger)

AND

I believe if the CAFO permit is drafted responsibly, both farmer and neighbor can "win." If even "common sense" regulations regarding effluent application are adopted, the farmer will still enjoy vibrant crops, without significantly impacting the neighborhood environment. This draft is a step in the right direction, but please, could it include some regulation, not guidelines, to effluent application? This is a problem that will only intensify as the population grows. What a perfect time to address this issue! (Shaw)

Response: The effluent application is regulated through the permit by requiring that applications be at agronomic rates and can not cause a discharge to waters. Most of the "effluent-application regulations" will be contained in the nutrient management plan. They are

not spelled out in the permit. Each facility has to determine which best management practices it must use, and write it into their nutrient management plan. That nutrient management plan is then reviewed by the Department. The permit, which applies to all CAFOs across the state, cannot list the site-specific practices that would need to be done to protect water quality. The site-specific nutrient management plan must do that. This approach is consistent with the federal rules on CAFOs. Please see comments and responses in section S3 for more discussion on this issue.

It would be illogical to exclude sprayfield runoff because the spray fields are an integral part of the waste management system. The spray fields serve both treatment functions (by removing nutrients and sediment from the waste stream through crop uptake and atmospheric deposition) and disposal functions. Consequently, any runoff from the spray fields constitutes a discharge of pollutants from a point source and must be subject to the no discharge effluent limitation. (WELC, et al)

Response: The EPA defined runoff from the land application to be a non-point source of agricultural stormwater if the manure is applied at agronomic rates. Field applications that produce runoff when no precipitation occurs would not be agronomic rates. See preamble to federal CAFO rule, available on Ecology’s website for their detailed explanation. Therefore, the EPA did not include land application run-off in the effluent limitation guidelines that appear in S1.A1 of this permit. Land application is addressed elsewhere in the permit, and elsewhere in S1. For example, the requirement that discharges to waters of the state may not cause or contribute to a violation of the water quality standards in the receiving water applies to both discharges from the production area and land application area. FOTG 590 has additional requirements, stating that “nutrients shall not be applied to frozen, snow-covered ground or saturated soil if a potential risk of discharge to ground or surface waters exist.”

It is not clear why containment for manure, process, and litter wastewater should be sufficient for a 25 year, 24 hour rainfall event for old CAFOs and for a 100 year event in newly regulated CAFOs. Most likely, both types of facilities already exist, and thus the requirement for larger containment should not be differently burdensome to either category. To be protective of water quality, the larger retention capacity should be used. (North Sound Baykeeper)

Response: The “100-year” standard in S1.A2 applies to “new source” swine, poultry, and veal Large CAFOs, not newly regulated CAFOs. A “new source” CAFO, as defined in S2.E is a facility that began construction after April 14, 2003. EPA included a more stringent effluent limitation for new sources knowing that retrofitting existing facilities is more expensive.

Although the permit facially sets a “no discharge” effluent standard, the monitoring and reporting requirements are so weak that there is no possible way to ensure that this standard is being met and there is nothing in the permit that encourages these facilities to come into compliance. Based on the demonstrable history of discharges from these facilities, a permitting structure needs to be put in place that can force these facilities to come into compliance with the CWA. (WELC, et al)

Response: Ecology believes that, in combination with regular inspections, there's enough monitoring and reporting. A more specific response to the monitoring and reporting requirements is included in S4 of this responsiveness summary.

Sewage treatment technology is another available technology to treat CAFO waste. For decades, scientists have worked to develop the safest and most cost effective manner to treat the massive quantities of sewage generated by human populations in urban areas before it can be released to the environment. Animal waste generated by CAFOs is considerably more hazardous and prolific than human waste. DOE should require sewage treatment technology for CAFOs within the state of Washington. EPA has already recognized that sewage treatment for CAFOs is both necessary and reasonable, as evidenced by its consent decree in *Citizens Legal Environmental Action Network, Inc. v. Premium Standard Farms, Inc.*, To resolve complaints of pollution to air and water, EPA is requiring a hog CAFO to construct a wastewater treatment system. In the consent decree, the system is described as one that will require the following:

- permeable covers on each lagoon for odor control and gas emissions reduction;
- transfer of the daily inflow (on average) from each existing lagoon to a central nitrification and denitrification system;
- covered anoxic basin (with synthetic liner) for nitrate and biochemical oxygen demand reduction;
- covered aeration basin (with synthetic liner) designed for ammonia conversion to nitrate through nitrification (with recycle to anoxic basin);
- open biosolids storage basin (with clay liner) for settling and further dinitrification;
- open irrigation storage basin (with clay liner) for storage of treated effluent prior to land application.
- Washington should require sewage treatment for CAFOs as well. (WELC, et al)

Response: The permit does not require these additional measures. Sewage treatment for all CAFOs is not required by the EPA's effluent limitation guidelines. As long as CAFOs can meet the performance measures in the CAFO permit, sewage treatment is not necessary. Unlike sewage, CAFO manure is not regularly discharged to waters.

In land application fields with drainage tiles, all drainage tiles should be prohibited. Failure to prohibit drainage tiles means that the tiles are point source discharges. Such point source discharges are prohibited by the terms of the CWA and must be by permit as well. (WELC, et al)

Response: The presence of tile drains within a field is part of the evaluation in the nutrient management plan to determine the amount and timing of applications. The permit does not authorize the application of manure to fields with tile drains if it causes violations of water quality standards in the receiving waters.

S1.A. Surface Water Effluent Limitations

An exemption for many CAFO requirements exists for horse, sheep, and duck operations. Although, there are less stringent federal regulations, it is not apparent that the waste from these facilities is less polluting. The state can enact stronger regulations than the federal government. Please explain why the State has chosen not to enact stronger regulations, from the perspective of water quality. (North Sound Baykeeper)

Response: As the commenter noted, there are less stringent federal regulations for horse, sheep and duck operations. For the horse, sheep and duck operations, we focused our attention on the most significant requirements in the permit. With the exception of the one paragraph in S1.A, the rest of S1.A and all of S1.B apply to all facilities. If the exceptions in the permit for horse, sheep and duck operations would lead to environmental degradation, we can cover these facilities under a stricter individual permit. There are very few horse, sheep and duck CAFOs in Washington.

The one-sentence paragraph immediately following section S1.A.2. is a gaping loophole to the prohibition on discharges to surface waters just discussed. That paragraph effectively eliminates the prohibition for any CAFO (not counting horse, sheep, and duck operations) that satisfies the inspection and record keeping requirements in Sections S1.D and S4.A.2.a. In other words, under the Draft Permit language, any CAFO that complies with those modest requirements can freely discharge untreated manure, litter, and process wastewaters into waters of the state -- unless, evidently, those discharges cause or contribute to a violation of water quality standards in the receiving waters. This provision is unacceptable for two reasons. First, it is flatly illegal under state law, which explicitly requires the application of AKART to all discharges regardless of the quality of the receiving waters. See, RCW 90.54.020(3)(b), RCW 90.48.520, RCW 90.52.040. Second, complying with the Draft Permit's modest inspection and record keeping requirements can by no means entitle permittees to discharge untreated wastes into state waters -- particularly since the Draft Permit contains no substantive discharge monitoring or reporting requirements. (Smith & Lowney PLLC)

Response: The reference paragraph following S1.A2 was meant to be an additional requirement, not a loophole. The paragraph was modified so the intent is clearer.

Section S1 of the Permit states that: “Discharges to waters of the state may not cause or contribute to a violation of the water quality standards in the receiving water. The CAFO must minimize all discharges to the extent possible.” Requiring CAFOs merely to “minimize” discharges to waters of the United States violates the strict liability standard of the CWA. The CWA imposes strict liability for NPDES violations and courts have held that a defendant's intent and good faith are irrelevant for purposes of whether they violated the CWA. Therefore, Ecology is legally obligated to remove the language that a “CAFO must minimize all discharges to the extent possible.” CAFOs have the strict responsibility to ensure that no discharges occur. If there is a discharge, a CAFO must be fully responsible for cleaning it up and paying for any necessary mitigation measures. (WELC, et al)

AND

Second paragraph, second sentence – states, “The CAFO must minimize all discharges to the extent possible.” This sentence contradicts previous sentences. The language should be amended to be in agreement. (Okanogan CD)

Response: Our intent behind the phrase “the CAFO must minimize all discharges to the extent possible” was different than your interpretation. We intended the phrase to require CAFOs to do everything in their power to limit the magnitude of the discharge (whether legal or illegal) once it occurred. It was intended to be an additional requirement, not a loophole. In order to make our intent more clear, this sentence was modified in the permit. As with any other permitted operations, if unauthorized discharges occur for any reason, the operator must make every effort to stop the discharge and minimize the amount and impact of the discharge.

This language is covered in the appropriate section of this permit and should be deleted here: “The CAFO must minimize all discharges to the extent possible.” (Simplot)

Response: This sentence was modified as per the previous comment. S1.E does address minimizing adverse impact to waters of the state and address specific requirements. Other sections of the permit address specific measures intended to fulfill this requirement. However, Ecology finds that it is helpful for the cited requirement to be in the permit, and in the first section of the permit, so the expectations are clear to everyone.

S1.A1

Because of poor drafting, Section S1.A.1 does not effectively prohibit discharges to surface waters from CAFO production areas. The section contains a broad exception for any CAFO that designs, constructs, operates and maintains a production area capable of containing all manure, litter, and process wastewater including the runoff and the direct precipitation from a 25-year, 24-hour rainfall event. As written, however, the exception does not require that the "precipitation caus[ing] an overflow of manure, litter, or process wastewater" actually result from a storm qualifying as a 25-year, 24-hour (or greater) rainfall event. Section S1.A.1 should be clarified to prohibit all discharges to surface waters that are not caused by precipitation from a storm qualifying as or exceeding the design storm. The same problem occurs in S1.A2. (Smith & Lowney PLLC)

Response: That was the intent of both the federal rule and the state permit. The CAFO is required to design, construct, operate and maintain to a 25-year, 24-hour rainfall event. However, a discharge may legally occur when other events occur. For example, a number of smaller, consecutive storms that produce more rain than a 25-year 24-hour event may lead to a discharge. Any discharge, however, must not violate water quality standards.

We emphatically urge Washington to eliminate the 25-year, 24-hour storm exemption from the prohibition on discharges to surface waters. Allowing such an exemption will result in

environmental devastation when the inevitable event occurs. CAFOs produce far too much concentrated wastes to be allowed to discharge at any time, especially when there is the technology available to eliminate the need for such an exemption. Eliminating the exemption would promote compliance with and give meaning to the no-discharge effluent limitation by simply requiring better engineered facilities. This was the original intent behind the passing of the CWA—that the technology would be developed to eventually eliminate the need to discharge into our nation’s waters. The only way to achieve this goal is by forcing the regulated industries to install the necessary technology because history has shown that the dischargers are not willing to move towards not discharging on their own. A discharge at any time should be subject to the strict liability standard of the CWA. The existing penalty factors allow courts to consider the mitigation of a penalty based upon the specific facts surrounding a discharge, such as an inordinate storm event. It is the job of DOE to ensure that discharges do not occur and it is the job of the courts to determine how a discharger should be penalized. Moreover, allowing a 25-year, 24-hour storm exemption allows DOE to disregard the strict liability standard of the CWA, because it exempts a discharger from liability simply due to a large storm, which is impermissible. As EPA explains in the preamble to its January 2001 proposed CAFO rules, the 25-year, 24-hour storm discharge exemption is an engineering standard for storm water detention devices. It is not appropriate to automatically carry over this exemption to another form of waste technology, especially given the fact that there are alternatives available to contain the waste under these circumstances. EPA also acknowledges that “[s]ection 101(a) of the Clean Water Act states that elimination of discharges down to zero is to be achieved where possible.” *Id.* There are numerous technology evaluations currently underway to contain the manure of all animal types that strive to achieve a zero discharge standard. The proposed 25-year, 24-hour storm exemption would undercut these efforts by encouraging less ambitious waste treatment technologies that allow discharges in certain circumstances. (WELC, et al)

Response: The 25-year, 24 hour storm exemption is a federal technology standard, based on the “best available technology” (BAT). The water quality based standard in S1 is designed to prevent violations of the water quality standards even when a discharge occurs.

The CAFO general permit should require that existing operations synthetically line and cover their lagoons to prevent further contamination and should also require the construction of berms around existing lagoons in order to retain waste from bursting lagoons. Other industries that store hazardous substances are required to have secondary containment. So too should CAFO lagoons, especially given the CAFO industry’s history of water pollution problems. One simple BAT requirement in all permits should be that all lagoons be synthetically lined and covered. Some facilities around the country have employed these practices and it has shown to significantly reduce water pollution. Because it is technologically feasible, it is Ecology’s duty to ensure that these practices be utilized in order to protect the human health and environment of Washingtonians. (WELC, et al)

Response: The lagoon liner requirements are part of the NRCS FOTGs, see S3.A1. FOTG #313 addresses lagoon liner requirements (and other lagoon requirements) for Washington. EPA establishes BAT on a national level, and they did not include lagoon covers. Synthetic liners are not always necessary to protect water quality. In many cases, a properly constructed and compacted soil liner is sufficient. The permit requires at least the Best Available Technology (BAT) as defined by EPA. We also require the

use of NRCS FOTGs, or equivalent best management practices. Ecology has determined that no additional requirements, other than the ones already in the permit, are needed to meet the state AKART requirement. The courts have held that AKART includes an economic component. The fact that a technology is possible does not automatically make it AKART.

S1.B. Ground Water Effluent Limitations

The Permit states that chemicals and nutrients that have been applied at agronomic rates are exempt from the requirements of this State's groundwater quality regulations, if those chemicals and nutrients do not cause pollution of groundwaters below the root zone: "Contaminant concentrations of chemicals and nutrients found in saturated soils that have been applied at agronomic rates for agricultural purposes are exempt from all requirements of Chapter 173-200 WAC, if those contaminants will not cause pollution of any ground waters below the root zone." The reasoning in this section appears circular. The application of chemicals and nutrients at agronomic rates assumes an application rate that is protective of surface and groundwater. Ecology regulations define agronomic rates as the rate of application that "will not result in the violation of applicable standards or requirements for the protection of ground or surface water . . ." WAC 173-350-100. The last clause in the paragraph above—"if those contaminants will not cause pollution of any ground waters below the root zone"—is therefore duplicative and can be deleted without changing the paragraph's meaning. We request that this change be made. (DWT)

Response: We agree that this section of the permit has some duplicative language, but we feel it is necessary in order to explain the situation. The phrase that the commenter suggests that we delete ("if those contaminants will not cause pollution of any ground waters below the root zone") is the essence of the root zone exemption. According to the ground water quality standards for Washington State, WAC 173-200-010(3) "This chapter shall not apply to: (a) Contaminant concentrations found in saturated soils where those contaminants are chemicals or nutrients that have been applied at agronomic rates for agricultural purpose if those contaminants will not cause pollution of any ground waters below the root zone." We agree that this statement duplicates the definition in WAC 173-350-100 for "agronomic rates." However, not everyone uses this definition of "agronomic rates" so it is important that the last clause not be deleted.

It is stated that "Contaminant concentrations of chemicals and nutrients found in saturated soils that have been applied at agronomic rates for agricultural purposes are exempt from all requirements of Chapter 173-200 WAC, if those contaminants will not cause pollution of any ground waters below the root zone." Writing an exemption into a permit does not appear legal. Please explain how this exemption was determined to be legal. (North Sound Baykeeper)

Response: This exemption is from WAC 173-200-010(3). See response to previous comment. This exemption is included because crops will take up the nutrients in the root zone.

The paragraph exempting saturated soils (chemicals and nutrients contained therein) is a key provision, as in many cases either the actual application or the weather following can cause this temporary condition. Setting the standard at not causing ground water pollution is correct. (Turner)

Response: Comment noted. We agree that ground water pollution below the root zone is the important factor.

“The permittee shall apply manure, litter, and process wastewater as specified in its nutrient management plan.” Deleted: “must only” Deleted: “to lands” Comment: Language change. The nutrient management plan will determine how waste is handled. (Simplot)

Response: We believe that the phrase “must only” is more descriptive. We included the phrase “to lands” so the reader (especially a reader unfamiliar with current CAFO practices) understands what happens to most manure.

S1.B1

Two groundwater studies that were recently completed in the Lower Yakima Valley provide strong evidence that CAFOs are contributing to the groundwater contamination. These studies, conducted by the Valley Institute for Research and Education and Heritage College provide documented evidence of a geographic correlation between dairies and groundwater contamination, including nitrates and fecal bacteria. DOE, and other state and federal agencies responsible for protecting human health have thus far ignored the significant public health threats documented by these studies. Over 20% of residential wells sampled near large dairy CAFOs have levels of nitrates in excess of 10 mg/l. Ecology must take this information into account when drafting the final permit. The evidence in these reports and others shows that it is improper for Ecology to allow an exemption for CAFOs to contaminate the groundwater. It is hard to fathom that there ever could be an instance that groundwater contamination would serve “an overriding consideration of the public interest.” The only interest that is served by allowing a CAFO to contaminate groundwater would be the financial interests of the CAFO owner. How can Ecology put a price tag on the protection of public health? The undersigned applaud DOE’s attempt to regulate discharges to groundwater through the adoption of a groundwater effluent limitation in this general permit. However, given the history of groundwater contamination caused by these facilities, DOE should remove the “public interest” exemption and should require a zero discharge effluent limitation for discharges to groundwater. (WELC, et al)

Response: The ground water standards for Washington, WAC 173-200-030(2)(c) is the basis for the “overriding consideration of the public interest.” We agree that this is a very difficult issue. However, we believe that following the processes and requirements outlined in state regulations is the most defensible position for the permit. For the land application area, Ecology stresses application of manure at agronomic rates instead of ground water monitoring. By applying manure at agronomic rate, the goal is to prevent ground water pollution before it occurs, and before it would be identified by ground water monitoring. Regular soil monitoring identifies potential risks to ground water quickly and management can be adjusted accordingly. We strengthened the leak detection requirements by requiring producers to use the already required depth markers to determine if there's a leak. If there is evidence of a possible leak, they are required to investigate and report to the Department. This was implied before, but we have made it more explicit.

An evaluation of Liberty and Hank Bosma Dairies in the Yakima Valley revealed that unlined lagoons, which were approved by Ecology, allowed staggering amounts of leakage into the groundwater. With respect to the lagoons at Liberty Dairy, “[m]odeling indicates that the permeability is actually between 0.001 and 0.01 inches per hour. This is equivalent to an annual volume of between 2.0 million gallons and 17 million gallons of seepage from the Liberty Dairy Lagoons alone.” See CARE v. Henry Bosma Dairy, Civ. No. CY-98-3011-EFS E.D. Wa.) (Expert Report of Alan Gay) (Feb. 24, 1999) at 8 (Exhibit 5). Similarly, at the Hank Bosma Dairy in the Yakima Valley, unlined lagoons, again approved by Ecology, demonstrated an exfiltration rate which was “equivalent to an annual volume of between 2.1 million gallons and 18 million gallons.” Id. at 9. This data provides unquestionable evidence that CAFOs, especially those with unlined lagoons, are currently contaminating the groundwater of Washington state. It is now up to Ecology to take this information into account and come up with an NPDES permit that addresses the problem. (WELC, et al)

Response: We agree that lagoon liners are a difficult issue and that improperly designed, located and maintained lagoons pose a threat to groundwater. Since the dairy program was implemented in the 1990’s, a greater emphasis has been put on proper lagoon design and construction. The permit relies on the NRCS conservation practice standard No. 313 for Washington entitled “Waste Storage Facility” to address lining requirements. Any practice that does not follow this FOTG must be equivalent in protection of water quality and approved by the Washington State Department of Agriculture. For new or expanded waste storage facilities, there are additional requirements in S5 of the permit. It states: “All new or expanded waste storage facilities constructed after the issuance date of this permit must be sited, designed and constructed consistent with NRCS conservation practice standard 313 for Washington titled ‘Waste Storage Facility.’ New lagoon liners must also have ‘as-built’ post construction documents signed and stamped by a licensed professional engineer, who made on-site construction inspections, verifying that liners were constructed as designed.” To locate potential sources of groundwater contamination from the production area, there is a requirement to develop a system to anticipate the level of the manure lagoon. The facility must investigate the discrepancy immediately and if there is a leak, they must report it to the Department (see S5).

The language in the general permit must be clarified and strengthened to demonstrate that preventing leakage to groundwater is an enforceable requirement under the permit. DOE should also clarify that the no-discharge effluent limitation applied to surface waters also applies to discharges to ground water that is hydrologically connected to surface water. Such an approach is consistent with case law interpreting the applicability of the CWA. Numerous scientific studies have documented groundwater contamination caused by wastewater seepage from both lined and unlined lagoons. For example, researchers in Kansas found that the four clay-lined swine lagoons they studied leaked between 0.05 and 0.08 inches a day, which translates to between 0.99 million and 4.35 million gallons per year, or 19.8 to 87.1 million gallons of waste over the twenty-year life of the lagoons. Thus, in essence, waste storage lagoons themselves are point sources of water pollution. Groundwater quality can be enhanced by imposing a zero-discharge groundwater effluent standard or by phasing out the use of lagoons altogether. Groundwater protection must be a high priority in

the design, operation, and maintenance of all CAFOs. The general permit should specify that waste and wastewater not be placed directly in or allowed to come into contact with groundwater. In order to effectuate this purpose, large CAFOs must be required to prove, as part of an NPDES application, that there are no impoundments hydrologically connected to any surface waters. Any discharge to groundwater should constitute a violation of the general NPDES permit. (WELC, et al)

Response: We believe that the permit is clear, and follows the state ground water regulations. The permit states that “Process wastewater discharges, including seepage from waste storage facilities, may not reduce existing ground water quality except in those instances where the operator can demonstrate to the satisfaction of the Department, prior to a discharge, that: (1) An overriding consideration of the public interest will be served; and (2) All contaminants proposed for entry into said ground waters must be provided with all known, available, and reasonable methods of prevention, control and treatment prior to entry.” As alternatives to lagoons become more widely used and less expensive, they may fall under the definition of AKART. Any discharge to ground water that does not meet requirements of (1) and (2) above is a violation of the permit. The permit is designed to protect all ground water equally, whether or not it is hydrologically connected to surface water. Ground water monitoring can be required of a facility if high levels of nitrates are found in near by wells or if soil tests show unacceptable nitrate levels. As mentioned before, to locate potential sources of groundwater contamination from the manure storage lagoons, a leak detection requirement have been added (see S5).

S1.C. Transfer of Manure

Maintaining records for a period of 5 years is excessive. 3 years should be sufficient based on a complete breakdown by that point in time, and our ability to sample and analyze the ground and ground water for nutrients. (Turner)

Response: The EPA regulations require that records are maintained for five years. Maintaining records is not an overly burdensome responsibility, and longer term records can show trends and track historic problems that short term records cannot.

There are provisions in here that are really detrimental, such as the recordkeeping of manure that’s transported off-site. In many cases, we don’t know who these people are, we don’t know what they’re doing with the manure – it’s going for gardens or pastures. We also transport to farmers that who spread it at some other time of the year we have no control over that. And as it was spoken about earlier, we are not liable for that. Currently, we’re not liable for that. But if something was in the manure that five years from now was determined to be hazardous waste, who knows what would become of that because we deposited it there, are we going to be liable for it? I think that there needs to be some special provisions made to separate out dairy versus poultry because there are some inherent differences between industries, both with dry and liquid manure. (Crimmins)

Response: The permit requires CAFOs that transfer manure to other person to provide the recipient of the manure with the most current nutrient analysis. The CAFO must also keep records of (1) the date of transfer, (2) the recipient name and address, and (4) the

approximate amount of manure transferred. These are federal requirements. The CAFO does not need to keep records of what the other party is going to do with the manure. Legally, the permit cannot provide other liability protections. Other than the differences in nutrient content (which is factored into the nutrient analysis given to the recipient of the manure), we see no reason to differentiate the transfer of dairy versus poultry manure.

Ecology must ensure that waste transferred off-site does not foul our waterways or jeopardize the health of Washingtonians. Ecology must manage animal waste from cradle to grave, which in this case is from the CAFO to the place where the waste is ultimately applied. The draft permit, as written, only requires that the person to whom the waste is transferred receives the most current nutrient analysis. This practice is akin to a chemical plant putting its waste in drums and giving it to its neighbors to dump into the river, free from regulation! To ensure that the off-site transfer of CAFO wastes does not create a loophole for CAFOs to evade land application requirements based on soil uptake, the recipient of the waste must be a part of the CAFO's NMP. This is the only way to ensure that the recipients of the waste apply them in accordance with proper agricultural practices. In the certification that the recipients provide to the CAFO supplying the waste, the recipient should acknowledge that its waste application activities are subject to both the CAFO general permit and the supplier-CAFO's NMP. The recipient's failure to comply with the terms and conditions in the CAFO general permit and the supplier's NMP must remain the responsibility of the CAFO permit holder because the CWA is a strict liability statute. Furthermore, it is essential for the CAFO to maintain export information, transport records, and to provide the manure hauler or manure recipient with site-specific management information. These provisions must be included to prevent the CAFOs from exempting themselves from CWA liability by simply transporting their wastes off site. It is imperative that DOE recognize that the off-site transfer of manure has become the norm for CAFOs in Washington state. This is the case because the CAFOs have become so large that the amount of land that is available is typically only large enough to contain the animals. Indeed, there are specific dairies in the Yakima Valley that dispose of nearly all of their waste off-site. The result of this system has been the creation of a "manure super highway." There has been so much manure on the roads from a dairy in Sunnyside that residents have reported they have not been able to get their mail from a roadside mailbox without getting their boots soiled with manure. One resident reported that a paved road that was used to transfer dairy manure off-site became a packed manure road for nearly 3/8 of a mile. This road-application of manure not only creates a health hazard, but there is a high likelihood that it will run-off into roadside ditches and canals in violation of the CWA. Furthermore, it creates a safety hazard. In Sunnyside, there was a spill of liquid manure on the road which turned the road into an ice rink the next morning. For these reasons, DOE needs to craft provisions in the General Permit that prevent these kinds of problems associated with the off-site transfer of manure. The general permit sets forth general guidelines to be followed should a CAFO land apply manure, litter or process wastewater. In these guidelines, we strongly urge DOE to clarify that the NMP includes all land application areas, even those off-site of the CAFO. Failing to include all land application areas in the NMP, including off-site disposal areas, will cause confusion and undermine efforts to encourage the use of superior waste treatment systems in order to protect and enhance existing water quality. (WELC, et al)

Response: It is true that third party applicators are not covered by this permit, but they are not "free from regulation." Just like commercial fertilizer users, third party applicators

must protect water quality, must meet water quality standards, and are under the requirements of RCW 90.48 (Washington's Water Pollution Control Law). The CAFO must maintain the records outlined in section S1.C of the permit. We understand that a third party applicator of manure does not have to meet the same bar in its land application as the CAFO would if it applied the manure to its own land. We have determined that covering these third party applicators under this general permit would not be workable. However, if problems with third party applicators continue, they can be covered under an individual permit. If systemic or statewide problems with third party applicators occur, a separate general permit is a possibility. Off site land areas are included if they are owned, leased, or rented by the CAFO.

CAFOs are required to provide nutrient analyses to the recipients of their manure, litter, or process wastewater: "Prior to transferring manure, litter or process wastewater to other persons, all CAFOs must provide the recipient of the manure, litter or process wastewater with the most current nutrient analysis. The analysis provided must be consistent with the requirements of 40 CFR part 412." We request that Ecology explain exactly what CAFOs must do to comply with this section. For example, how often does the CAFO need to provide a nutrient analysis to the recipients of its manure, litter, or process wastewater, if the CAFO routinely provides the recipients with such materials? (DWT)

Response: The nutrient analysis should be given to the recipient every time manure is transferred to another party. The manure analysis is explained in 40 CFR 412 and in the permit S3.A3(c).

CAFOs are required to retain records of the date, name and address, and approximate amount of manure, litter, and process wastewater transferred to another person: "CAFOs must retain for five years the records of the date, recipient name and address, and approximate amount of manure, litter and process wastewater transferred to another person." We request that Ecology explain what it means by the words "records of the date"? Is the permittee required to record the date it provides the nutrient analysis to the recipients of its manure, litter, or process wastewater, or the date(s) it transfers its manure, litter and process wastewater? Or both? (DWT)

Response: The CAFO must record the date(s) that the manure, litter, or process wastewater is actually transferred.

This section should include a new paragraph clarifying the respective responsibilities of the CAFO and the recipient of manure, litter, or process wastewater. The paragraph should expressly state that a CAFO has no responsibility under the Permit for any manure, litter, or process wastewater once the manure, litter, or process wastewater has been transferred to others. (DWT)

Response: We believe it is unwise to specify items in the permit where the CAFO has "no responsibility." If the permit began specifying those items, it would be a very long list. Unintentionally omitting items from the list could then imply that the CAFO does have responsibility for those items. Instead, the permit just addresses those items where the CAFO does have responsibility. For example, the requirements for the land application area only apply to those lands "owned, rented, leased or used by

the CAFO owner or operator”. We have added a definition that defines a “transfer of manure”. But, like the previous example, that definition only states what the CAFO must do for a transfer of manure.

S1.D1

Section S1.D is also inadequate because visual inspections should be conducted daily during the rainy season. Inspecting runoff diversion structures (S1.D.1.a.) and process wastewater impoundments (S1.D.1.c.) once a week during the rainy season is not sufficiently protective. (Smith & Lowney PLLC)

Response: The inspection frequency is from EPA’s determination of BAT. We believe the inspection frequency is sufficient to protect water quality. If a facility has compliance problems, a companion order or individual permit can require additional inspections.

S1.D2

These problems are compounded by a glaring omission in Section S1.D. Among other things, that Section requires all waste lagoons to have a depth marker clearly indicating the minimum capacity necessary to contain the runoff and precipitation from the applicable design storm. (S1.D.2.) However, Section S1.D does not require the permittee to maintain sufficient capacity, at all times, to contain a storm up to the design storm without overflowing. Perhaps Ecology is willing to assume all CAFO operators will identify a nearly full lagoon as a "deficiency" requiring immediate correction. (S1.D.3.) We are not. The Draft Permit must be strengthened to make all such requirements explicit and enforceable. (Smith & Lowney PLLC)

Response: We agree that section S1.D did not specifically require the CAFO to maintain sufficient capacity. We added language to S1.D to address the concerns. Also, section S1.A requires that the production area be properly operated and maintained. This includes waste storage facilities. Maintaining sufficient capacity in the storage facilities is part of properly maintaining the production area. NRCS conservation practice standard 313 for Washington titled “Waste Storage Facility” also briefly addresses this issue.

Please be more explicit about what actions a CAFO manager should take if he/she finds that their depth marker of their impoundments is near capacity. It might be useful to publish non-binding guidelines as to what might be the prudent thing to do under a few different scenarios. (North Sound Baykeeper)

Response: Please see the response to the previous comment. First and foremost, all CAFOs need to design, construct, operate, and maintain their lagoons to contain all process wastewater and precipitation for a 25-year, 24-hour rainfall event. This will prevent lagoons from reaching capacity prematurely. If a CAFO is reaching capacity, there are a number of options that are available. Depending on the situation, pumping manure to other storage structures, trucking manure off-site, or adding storage

capacity might be appropriate. These situations will be handled on a case-by-case basis.

I understand that this a tool that could be used for measuring the liquid manure in a lagoon. We believe that marker needs to indicate the depth level also – in the description here just talks about the 25 year, 24 hour rainfall event. Also the free board is something's that's important. The issue with the depth marker though is we have storage units are above ground tanks or in ground concrete tanks, and having that depth marker may be impossible to install. (Chris Clark)

Response: All “open surface liquid impoundments” must have a depth marker according to EPA regulations. If there is a facility with an “open surface liquid impoundment” where it is impossible to have a depth marker, another alternative technology that accomplishes the same goal will need to be devised. For those facilities, they may either be covered under the general permit with a companion order or under an individual permit, depending on the situation. We encourage that depth markers show the depth level, but it is not a requirements. (Currently, only the level “indicating the minimum capacity necessary to contain the runoff...” is required on the depth marker). As mentioned before, to locate potential sources of groundwater contamination from the production area, this is now a requirement that the facility anticipate manure lagoon levels (see S5). The lagoon depth marker is a required tool for making calculations.

If you read there where it has to be monitored weekly, plus we have to have monitor installed. Probably it's a little bit over redundant. We've got other things to be doing other than going out and monitoring our lagoons or tanks all the time. (Heeringer)

AND

The depth marker should not be enforced, although it may be a useful management tool to some, it is no prevention against lagoon overtopping. Management experience of the farmstead and structures is the only true prevention. Inspectors currently make their own determinations of manure levels in structures, this should continue. (N3 Consulting)

Response: Monitoring and inspecting lagoons or tanks are essential pieces of nutrient management, and essential pieces of preventing overflows and accidents. The monitoring and inspecting pieces of the permit, including the depth marker, are required by EPA's regulations. We agree that management experience is the only true prevention, but a depth marker is a useful warning or risk evaluation tool for the CAFO operator and the inspector.

S1.E. Unauthorized Discharges

“CAFOs must take reasonable and appropriate corrective action to stop and contain any unauthorized discharges.” Deleted: “immediate” Comment: Suggested language change. (Simplot)

Response: We disagree with the commenter’s suggestion to remove “immediate.” Unauthorized discharges are a violation of the permit and the Clean Water Act. If an unauthorized discharge is occurring, the CAFO should be responsible for immediately stopping and containing the unauthorized discharge.

S2. Permit Coverage

S2.B4

“This permit applies to the process wastewater collection, confinement, storage, handling, and application areas of the permitted facility, including land application areas under the ownership or operational control of the permittee.” Deleted: “transfer facilities and” Deleted: “activities”
Comment: The use of the term “transfer facilities” is not appropriate for this permit, also is not defined in the permit or fact sheet. The term is used in the Solid Waste and Hazardous Waste WAC’s but would not be applicable for CAFO’s. (Simplot)

Response: We agree with this comment. The entire paragraph has been rewritten to simply refer to the “land application areas” and “production areas.”

We need the control, define control, because we have a number of custom applicators that apply manure outside of the control of the landowner or the operator; so there’s third parties or fourth parties involved. (Chris Clark)

Response: The requested clarification is in the definition of “land application area” and in “transfer of manure” in definitions of the permit.

S2.B5

The legal notice to be placed in local paper is a waste of time and money, not to mention B.S. If you insist on this being done – I would hope it is not to be done each time the permit is to be renewed. Someone can pay for the legal notice and the permit fee that believes they are necessary. I don’t believe they are. (Courtney Farms)

Response: The legal notice in the local paper is designed to allow for public participation under the Clean Water Act. It is only done by the facility only once. It is required by state and federal law. The state permitting agency will publish advertisements announcing any renewals of the permit.

Point (a) it should be clarified that current regs which cover this will not be duplicated. We talked about the public notice in the permitting part of this hearing. And it’s sort of double jeopardy for a lot of these people. If you are building or modifying any part of your facility such that it triggers the SEPA, State Environmental Policy Act requirements, there’s already a full publication that occurs under that Act by whoever the agency is – usually it’s a county planning agency. So what we’re doing is for every one of these operations that makes any change or builds a new facility, they’re in

double jeopardy. They're going to have to publish twice. They're going to have to bear the expense twice. They're going to fact the public comments twice. It's just duplicitous. (Turner)

Response: Any public notice done for other purposes can satisfy the requirements in S2.B5(a), as long as it meets the requirements in WAC 173-226-130(5). S2.B5(a) does not necessarily require a duplicative public notice.

The Permit requires CAFOs that change the character of their effluent to certify that they are meeting SEPA requirements. SEPA requirements under the Permit, if any, should be governed by the local land use regulations that apply to the CAFO. Proof of SEPA compliance should not be required under the Permit unless the change in character of effluent triggers an independent SEPA review by local governmental agencies. Requiring a proof of SEPA certification under the Permit, when it would not otherwise be required under local land use regulations, unnecessarily burdens the CAFO. If Ecology is unwilling to remove the SEPA requirement from the Permit, it should modify the requirement so that certification of SEPA compliance is required only when the CAFO has made a substantially negative change to the character of its effluent in terms of potential impact on the environment. As presently written, the Permit would require a CAFO to submit certification of SEPA compliance even when it makes changes that improve the character of its effluent. (DWT)

AND

This is duplicate regulations. Already covered completely by SEPA, and usually regulated very tightly at the county level. Delete this entire section, or at least point b (Turner)

AND

Is this required and consistent with the WAC? Deleted: "b. A certification by the applicant that the applicable SEPA requirements under chapter 197-11 WAC have been met." (Simplot)

AND

I see a reason why in this permit that we have, we're including some information that should be taken in by the county when a person gets a permit and it has to do with the SEPA. It's kind of redundant to have it in this permit also, and also have to go to the county and do the same thing. (Hayes)

AND

Looks like it quite unnecessary to have to get a SEPA requirement and then the public notice requirement for minor changes in a farm plan. SEPA requirements are probably something you get for building barns or putting destructors up and so on, and not a – I don't feel any how general changes in a farm plans when it goes to application rates or stuff like that. (Heeringer)

AND

This is a new section that was not in the previous versions that I've seen. It defines a CAFO's increase in volume of waste or changing character of effluent would require a SEPA review. And that's something that is a little bit obscene in my mind, but we understand that there is new buildings being built with the SEPA, as part of that SEPA review. I guess the definition of changing of character of effluent is the issue. And if a producer were to change from a liquid to a solid or any other small, this would require a SEPA which is a \$300 permit. And it happens often within a farm so we think that's a little bit too much for needing to be in the permit. (Chris Clark)

AND

Re: "increase in volume of wastes or change in character of effluent" manure effluent can vary greatly depending on water amount added to effluent, whether through a rainfall event or water added for irrigation purposes. However, total nutrient amounts in the waste should not change greatly from year to year, so wording should be changed to "increase in volume of nutrient wastes or change in character of effluent" (ie increase in cow numbers, increase in concrete slab area collected, change from scrape to flush waste handling system, putting in methane digester, etc.). This would exclude water that producers may add to manure for irrigation during the growing season. (N3 Consulting)

Response: The permit requirements in S2.B5 come directly from state regulations. WAC 173-226-200(3)(f) states: "For new operations, or for operations for which an increase in volume of wastes or change in character of effluent is requested over that previously authorized, applications for coverage shall also contain: (i) A certification by the applicant that the public notice requirements of WAC 173-226-130(5) have been met; and (ii) A certification by the applicant that the applicable SEPA requirements under chapter 197-11 WAC have been met." One commenter suggested that this language meant that an improvement in process wastewater quality could trigger a SEPA review. The language states that only when the CAFO changes the character of the effluent "over that previously authorized" is a SEPA review required. Any change in the character of the effluent that improves its quality, or does not change its overall quality, does not require a SEPA review. The requirements in S2.B5 do not require SEPA review when it is not already required. A CAFO simply needs to certify that the *applicable* SEPA requirements have been met. If there are no applicable SEPA requirements for the CAFO, then nothing additional is required by the permit. This section does not require SEPA for general changes in the farm plan, such as application rates.

S2.D [now #3]. Definition of a "Concentrated Animal Feeding Operation"

My biggest question is I've already filled out this application and I raise calves. The only distinction from the, the only deviation from the thousand head feedlot criteria is veal calves. To the best of my knowledge in this state, there are no veal calves raised under the criteria that the EPA has given. Under my nutrient management plan, 250 pounds is my average weight. That based upon a

thousand head, I will produce 1/7 the amount of waste that a thousand head feedlot at one thousand pounds will produce. Why, my question is why haven't there been more deviations designed for that? If you look under what's downloaded from Internet, they make many more deviations from -- on hogs and feeder pigs because of size. And that's the one thing that jumped out at me. (Pritchett)

AND

I'm going to echo the [previous comment] about calves. Clearly, particularly from the dairy industry where you pull them off essentially the day they're born. They're very small. A large portion of your calves in your calf operation are quite small. That needs to be modified to reflect nutrient output. If this is about water quality, let's get down to some science. We raise dairy calves from day of birth...and off they go at 300-400# to a replacement heifer farm or feedlot. According to NRCS, the best multiplier here would be 4.5 calves = 1 mature milk cow. Please adjust the numbers accordingly to accurately reflect the generation of waste in relation to body size. Remember, science and the facts rule here! (Turner)

Response: We agree that not all large CAFOs will produce the same amount of manure. We understand that a large CAFO with smaller animals may only produce a fraction of the manure as a large CAFO with larger animals, even if the two facilities have the same number of animals. EPA wrote the definitions of a large CAFO and a medium CAFO in their federal rules, and we used the same animal numbers in the permit. Since the animal numbers are federal requirements, we are not able to change them. Those numbers were based on averages across the entire nation, and both we and the EPA understand that they are not perfect. A calf operation can avoid needing a permit by not having a discharge.

I found it of no surprise that the Department of Ecology is proposing to the agricultural industry the implementation of National Pollutant Discharge Elimination System and State Waste Discharge Permit. I do not see the need or the equity in the implementation of this permit for facilities that are not discharging any pollutants into the Waters of the State, when the Department will exempt its own agents for these requirements. For example, a City with a population of less than 50,000 can discharge their contaminated untreated storm-water directly into the Waters of the State and onto private property without a permit regardless of the significance of the pollution. They are also allowed to do this pollution with direct discharge through manmade piping. They are not required to do any testing or monitoring. Perhaps someone could explain the rationale in this practice. Why it is alright for the government to discharge pollutants into the Waters of the State but farmers are required to have a discharge permit when they are not discharging pollutants into the Waters of the State. You want to hold the agricultural industry accountable for the Government's Pollution, its no wonder the livestock producers in this state are moving out in such large numbers. (M. Dunlap)

AND

I have never had a discharge nor a complaint against me. I have always followed the rules and regulations. Yet, despite all this, you wish to increase the burden of rules, regulations, & requirements. Do you not believe the WSDA inspectors are competent or doing their jobs? Do you

not believe the NRCS did their job in developing our farm plans? Why must I be 'punished' when I have supposedly done everything right? Instead of a blanket policy regulating all and then 'protecting' private business information on a "case by case basis"; why don't you leave those of us who are doing things right alone. Go ahead and inspect us and keep us honest. Those who break the rules should be made to follow the additional requirements and reporting. Yes, we need regulations to govern our industry; like speed limits on the roads. But if one person is caught speeding, the police don't pull everyone over. (Scheenstra)

AND

Some of the dairy industry has already been regulated by the NPDES General permit, which is being replaced with this permit. It is been my experience that the State of Washington and the DOE have been over zealous in their efforts to regulate the agricultural industry. I do appreciate the diligent efforts and misguided emphases the Department has put into this task of protecting the waters of the State. The farms that would be regulated by this permit would not be allowed to discharging pollutants so I fail to see a need for this CAFO permit when there are already laws in place to protect the waters of the State. The state of Washington is a right-to-farm state. The legislation recognized the importance of agricultural and the need to protect agricultural operations and conserve them. The legislation has passed laws like the GMA and right-to-farm laws to protect agricultural. Right-to-farm laws were originally designed to defend against nuisance lawsuits and they need to be reformed. I am not suggesting a provision for farmers to hide behind if they are causing water pollution or erosion. These are serious issues and farmers need to be held accountable for their activities if their operations or being conducted in a negligent manner. However if farmers are conducting their operations in a reasonable manner, utilizing Best Management Practices, are not contributing to pollution or erosion, and are compliant with local laws and regulations relevant to those issues, why would there be a further need to regulate them? I think we have now evolved to a time to reform these laws to include provisions to include protection from nuisance regulations. (K. Dunlap)

AND

This market concentration of which I spoke in the above paragraph is only one of the obstacles to our business. On the other hand, we are pressed by bureaucratic regulations from the state which make doing business harder and harder. I don't think that you realize how much negative impact you have on our family operated businesses when you set up regulations that require permitting processes. In the first place, it seems ludicrous to me that you would require a permit for anyone to operate a legitimate business; a business which provides an honest living for the operator and his family, which creates economic activity in the community, and which produces products which contribute to the overall quality of life for the American public. (Mercer)

AND

As a dry manure operation, we don't have a discharge. Though I realize there is a potential for a discharge if someone misapplies it, whether that is the producer, themselves, or whoever they say they'll give this fodder to. But that's [like] if your car has a V-8 in it, then they should give you a

speeding a ticket because you can go over the speed limit. This looks like we're being accused of being guilty before we do anything. (Kaysen)

Response: There has been a change to the Federal CAFO Rules because of the 2nd Circuit Court ruling in February 2005, The ruling decision is only CAFOs that have an actual discharge, or are proposing to discharge (i.e.: during a 25 year, 24 hours storm event or greater, or and upset) can be required to submit an application for the CAFO General Permit. The CAFO General Permit has been rewritten to reflect the Federal 2Nd Circuit Court's decision. The number definitions of a Large, Medium or Small CAFO are still in effect. Size definitions are important when determining liability and application requirements.

This permit does not allow farms to discharge pollutants into the water like other industries that are regulated by NPDES permits that are allowed to discharge regulated amounts of pollutants into the waters. (K. Dunlap)

Response: This permit does allow discharge during certain storm events. This allowance, while infrequent, will authorize certain discharges. As stated in the permit, no discharge may violate water quality standards. Other industries are required to apply treatment before being allowed to discharge. If a CAFO wants to treat their effluent so they can discharge, they have that option and can apply for an NPDES/State Waste Industrial Discharge Permit.

The numbers of animals do not appear equivalent in terms of how much they excrete. For example, given the numbers in the fact sheet, a dairy cow CAFO produces a minimum of 4400 tons of manure in one year, whereas a finishing pig CAFO produces 1725, and a laying hen CAFO produces 423 or 115 tons per year depending on the manure management system. How are numbers of animals in small, medium and large CAFOs determined so that their potential pollution impact is equivalent? (North Sound Baykeeper)

Response: The thresholds for a large CAFO were developed by EPA and are based on the amount of nutrients in the manure, not the amount of manure. As explained in an earlier response, not all thresholds will be exactly equal; it depends on the size of the animal, the type of feeding, etc.

Small CAFOs are not regulated, yet they can have as many as 199 dairy cows, 299 veal calves, 2999 sheep, 16,499 turkeys, etc. The potential for small CAFOs to pollute seems fairly high. Please include some guidelines for small CAFOs. Granted, there should be a small number of animals that no longer need to be formally regulated. The numbers given here, however, appear too high. (North Sound Baykeeper)

Response: The threshold numbers for medium and large CAFOs were developed by the EPA. As the commenter indicated, each animal type is counted separately. There are few facilities that will have a significant number of multiple animal types. If such a facility is causing a pollution problem, they can be designated as a CAFO. A violation of the water quality standards would be considered a significant pollution

problem. The CAFO permit is designed to stop discharges and provide a legal pathway for facilities that have a potential to discharge.

It appears that the condition 2d for medium CAFOs should be applied to small CAFOs and be removed from medium CAFOs. If not, please include the water quality risk assessment that was made to justify the inclusion of condition 2d for medium CAFOs. It is not included for large CAFOs. (North Sound Baykeeper)

Response: The 2nd Circuit Court ruled only facilities that have a discharge can be required to get a permit. This ruling effected the definition of a large CAFO. To incorporate this ruling, the latest version of the draft CAFO Permit has deleted section 2d and added a new CAFO definition on page 3 under Definitions..

Is there a number of goats that would qualify for a CAFO? (North Sound Baykeeper)

Response: A facility confining goats (or any other animal not listed in the permit) is subject to the permit only if it meets the definition of a “Designated CAFO” in S2.D3 [now definition 4]. Only if there is an actual discharge will a goat facility be required to apply for the CAFO General Permit.

Shouldn't the vegetation be maintained over at least a substantial portion of the confinement area? Should weed species be excluded from definition of vegetation? (Boggs)

Response: The language concerning vegetation is from EPA’s rule. The basic premises is that pasture-based operations are not CAFOs, and do not need a permit. In order to distinguish pastures-based operations from CAFOs, EPA used “vegetation” in their definition. Some common sense needs to be used here. For example, incidental weeds or an island of vegetation fenced off from the animals would not count as vegetation. The basic test is there needs to be vegetation that can take up the nutrients from the manure and filter any runoff from the confinement area. EPA addressed this issue in their permit writers’ manual where they stated: “Confinement areas may have some growth along the edges while animals are present or during months when animals are kept elsewhere. If a facility maintains animals in an area without vegetation, including dirt lots, the facility meets the [definition of a CAFO]. For example, the following types of confinement areas meet the vegetation criteria of the [CAFO] definition (the definition is not limited to these situations): (a) Facilities with confinement houses with constructed floors or metal slots; (b) Operations with animals confined in an area without vegetation, including dirt lots; and (c) Facilities that have dirt lots with incidental vegetative growth while animals are present or during months when animals are kept elsewhere. True pasture and rangeland operations are not considered [CAFOs] because animals at these operations are generally maintained in areas that sustain crops or forage growth during the normal growing season. In some pasture-based operations, animals may freely wander in and out of particular areas for food or shelter; this is not considered confinement. However, pasture and grazing-based operations may also have confinement areas (e.g., feedlots, barns, milking parlors, pens) that meet the definition of an [CAFO].

Incidental vegetation [i.e. weeds or an occasional tree] in a clear area of confinement would not exclude an operation from meeting the definition of an [CAFO].”

Ecology and WSDA staff indicated at the January 10th public information meeting (prior to the hearing the same night) that operations that meet the numbers and time requirements of Large or Medium CAFOs would not be a CAFO by definition if the majority of the confinement area is vegetated with beneficial vegetation. The definition found in this section of the permit requires total lot coverage. The definition in the permit should stipulate that after manure and waste is removed to a storage area or spread on crops and fields the facility is not a CAFO (by definition) if the existing vegetation can process the remaining nutrients in the confinement area. (Okanogan CD)

Response: The facility still needs a permit if it has a discharge. See S7 of the permit on the requirement to cancel the permit. If the facility confines its animals every year in such a manner as it meets the definition of an AFO or a CAFO, then it is that year-round, not just during the times of the year that animals are confined. If, in accordance with the nutrient management plan, the area used to confine the animals becomes a “land application area” instead a “production area” during parts of the year, then only the land application requirements of the permit would apply to that area during those times. If enough manure accumulated that it must be removed in order for vegetation to be able to grow, then the facility has to manage the storage and use of the manure to protect water quality.

Definitions “Medium CAFO” [Definition #3 and Appendix 2]

To be consistent with the federal regulations at 40 CFR 122.23(b), the definition of medium CAFO in Part S2.D.1 [now #3 definition and appendix 2] must be revised to include the following language: (d) Either one of the following conditions are met: (i) Pollutants are discharged into waters of the state through a man-made ditch, flushing system or similar man-made device;... (EPA)

Response: Because of the 2nd Circuit Court ruling section S2.D has been deleted. An updated CAFO definition has been added starting on page 3 under” Definitions”.

Definitions “Meduim CAFO” [Definition #3 and Appendix 2]

As we read this definition and the definition for Medium CAFOs, it appears that the permit has dropped the federal definition for Designated Medium facilities. This would result in a conflict with the federal rule. Our understanding is that a medium sized facility may be designated as a CAFO due to being a significant contributor even if it does not have a direct discharge as defined for designated Small CAFOs or defined Medium CAFOs. (WSDA)

AND

Federal regulations at 40 CFR 122.23(b)(6) include provisions for the permitting authority to designate medium-sized animal feeding operations as CAFOs if the facility does not meet either of the two specific discharge criteria required for a facility to be defined as a medium-sized CAFO.

The permit must be revised to include medium-sized CAFOs that are designated by the permitting authority. The following revision to Part 2D.3(a) [now definition #3] will address the designation of medium CAFOs:

- (a) A lot or facility may be designated as a CAFO by the Department if:
 - (i) It has animals (other than aquatic animals) that have been, are or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period;
 - (ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in normal growing season over any portion of the lot or facility where animals are confined;and
 - (iii) It is determined to be a significant contributor of pollutants to waters of the state. A “significant contributor of pollutants” includes, but is not limited to,...
- (b) In addition, no lot or facility with numbers of animals below those established in Part S2.D2(c) shall be designated as a CAFO unless either one of the following conditions are met:
 - (i) Pollutants are discharged into waters of the state through a man-made ditch, flushing system or other similar man-made device; or
 - (ii) Pollutants are discharged directly into waters of the state which originate outside of and pass over, across or through the facility or otherwise come into direct contact with the animals confined in the operation. (EPA)

Response: We have made the necessary changes to the permit to match the 2nd Circuit Court rulings. The definition of a Medium CAFO is now in the “Definitions” section and appendix 2.

S2.d3(a)(iv). Not applicable, delete: “or RCW 90.48 (Water Pollution Control).” (Simplot)

Response: We believe the reference to the Water Pollution Control law is appropriate and should not be deleted. For example, Ecology may determine that a violation of 90.48.080 may represent a significant contribution of pollution, without having to establish a violation of surface or groundwater quality standards.

S2.D3(a)(iv) – Insert “by department staff following department standard operation procedures for water quality monitoring” after the word “determined”. (Okanogan CD)

Response: Water quality monitoring will often be used to make the determination, but it will not always be required. For example, visual documentation of large quantities of raw manure discharging directly into a creek may make water quality monitoring unnecessary. We do strongly encourage water quality monitoring whenever possible.

S2.D3(a)(iv) – Any violations that “causes or contributes” must be referenced against background water quality conditions. State water quality law stipulates that individual segments of streams may exceed state standards due to natural background conditions. In those cases there is specific language on determining if a source of pollution is contributing to the degradation of the water body. (Okanogan CD)

Response: We agree. In order to know if a facility's discharge is "contributing to a water quality violation," the background water quality needs to be determined. State water quality regulations, WAC 173-201A, do address natural conditions.

Please include the mechanism by which CAFOs to be designated by the Department will be assessed. It would be preferable to have a systematic mechanism, and assessments on a regular basis. (North Sound Baykeeper)

Response: Facilities that are smaller than the thresholds in the medium CAFO category only become CAFOs if they are designated as CAFOs. Similarly, some medium-sized animal feeding operations can also be designated as CAFOs if they are significant contributors of pollution. The definition is listed in S2.D2 and S2.D3 [now definition #3]. Currently, there is no process for a systematic evaluation of smaller facilities to determine which facilities are CAFOs. It is the state's goal that all smaller facilities will immediately make the necessary improvements to prevent discharging pollution, which would make them not a CAFO. If Ecology or WSDA receives a complaint that a smaller facility is discharging pollution, an inspection will be done at the facility to determine if it meets the definition of a designated CAFO. These operations are then referred to a conservation district or other technical resources. WSDA then follows up to make sure they are implementing best management practices to prevent all pollution discharges. Uncooperative facilities will be designated as CAFOs.

If the permit is going to be implanted it should only apply to a large operation. There is no need to have the three types of CAFOs. The most recent statistics from Washington Agricultural Statistics Service 2002 Census show that large farms are getting larger and small farms are continuing to decline. On small operations the additional burden of the requirements of the CAFO permit would be a conflict with the legislations intentions of preserving the agricultural industry. There needs to be a clear exemption for smaller operations based on a definite number of animals. The small producers do not have the resources or the budget to even comply with basic testing, engineering, record keeping, monitoring and reporting that is required of the permit. If this permit were applicable to a small operation, you would essentially be signing their death certificate. This permit should only apply to a large operation and/or a problem operation. A problem operation should be defined as any operation that has been found liable for violations of the Clean Water Act on three separate occasions. If you allow the definitions the Department has drafted with their designated classification, any rural homeowner with a cow or a horse has the potential to be classified into this category. Also the definition of Designated CAFO in the draft does not specify that an operation needs to meet all (4) conditions like the other types of CAFOs. (K. Dunlap)

Response: Since the 2nd Circuit Court decision the permit does only apply to discharging CAFOs, CAFOs that propose to discharge (i.e.: during a 25 year, 24 hour storm event or greater, during an upset) or those smaller operations that create water quality problems. We define "a problem operation" differently than this commenter suggests. In the permit, a problem operation is a facility where "pollutants are discharged into waters of the state through a man-made ditch, flushing system, or other similar man-made device; or pollutants are discharged directly into waters of

the state which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.” A facility that is determined to be a significant contributor of pollution can be designated as a CAFO (see S2.D3) [now definition #3]. It is the goal of the state to encourage the smaller facilities to correct the problem, not to designate such facilities as a CAFO. Giving every operation three separate violations of the Clean Water Act is problematic. It is not consistent with the requirements of the Clean Water Act, it is not consistent with state law, and could seriously hurt the businesses and people downstream that rely on clean water (such as the shellfish industry).

The Department's definition of a Significant Contributor of pollution is most threatening to the agricultural industry. The department has a history of an unreasonable definition. It is well understood in the agricultural industry that the DOE has no interest in preserving the agricultural industry, with many documented cases. I have had the opportunity to observe and experience the Department and their agent's actions and I have listed the following examples: Whatcom County vs. Bajema, City of Nooksack vs. Dunlap, Dunlap v. City of Nooksack, PMC v. Department of Ecology. Being a farmer in North Whatcom County and familiar with our 80 mph northeast winds, I know how easy sawdust could be blown into the water. When the Department and their agents come forward with these types of cases they lose their credibility with the public. There are many people that I have spoken to that have similar stories regarding the Department's actions. Obviously these would be some such cases that the Department may require the operator to obtain a CAFO permit. (K. Dunlap)

Response: We agree the exact definition of a “significant” contributor of pollution is difficult to pinpoint. The federal rules use that terminology, and we also used it in the permit. Some examples of what Ecology considers to be “significant” are listed in S2.D3 [now definition #3] of the permit. When designating a CAFO, the state must also consider: (1) the size of the operation and the amount of wastes reaching waters of the state; (2) the location of the operation relative to waters of the state; (3) the means of conveyance of animal wastes and process waste waters into waters of the state; (4) the slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes, manure and process waste waters into waters of the state; and (5) other relevant factors. It is our goal, as well as the goal of the WSDA and agriculture community in general, that the state work with smaller facilities to fix the pollution problem rather than designate the facility as a CAFO.

S2.D4 [now definition #3]

I'd like to understand whether the combined facilities include satellite operations. They may not be connected to the manure application site, but once a farm has put in their permit – say even in distant counties is that permit follow that owner? (Chris Clark)

Response: There are three separate issues here. (1) For the purpose of counting the number of animals to determine if a facility is a medium or large CAFO, satellite operations are not counted. Only facilities that adjoin each other (or use a common area or system for the disposal of waste) are counted together. (2) The only production area covered by the permit is the location identified in the permit application. (3) If a CAFO land

applies manure to a satellite location that it owns, rents, leases, or the CAFO is in control then that location is covered under the CAFO permit. We understand that this issue can be confusing, and we are willing to help individuals determine what areas would be covered under the permit.

S2.E. Other Definitions [now definition #15]

The permit must include the following definition of “overflow” which is specified in 40 CFR 412.2: “Overflow means the discharge of manure or process wastewater resulting from the filling of wastewater or manure storage structures beyond the point at which no more manure, process wastewater or storm water can be contained by the structure.” (EPA)

Response: We have added this definition of “overflow” to the permit.

S2.E1[now definition #2]

We are uncertain that this can really be applied to dairy operations. If not, it should be removed as it can be construed to allow diversion resulting in a discharge. We don't believe it fits these operations. (WSDA)

Response: After further discussion, WSDA and Ecology agree that bypasses can apply to CAFOs as explained in the permit.

S2.E4 [now definition #10]

Please consider a better groundwater definition. Rill irrigated fields may have saturated water all season at the tail end of the rows...from the surface on down. What you need to do is separate irrigation/rainfall created temporary saturation in the soils within the root zone as different from the actual basic groundwater zone. NRCS can provide you with some good data on root zones - vary from 6' for wheat, 5' corn, 8-10' for alfalfa, etc. It says “ground water” in quotes and “under ground water” in quotes means water in a saturated zone or stratum beneath a surface of land or below a surface body. This is troublesome to me. I'm an agronomist. I work raising crops. One of the things we do is irrigate. When we irrigate, we saturate the soil intentionally. But is that ground water? I think most people on a practical will tell you “no.” We irrigate with the intent of being put and take. We don't want to drive anything out of the root zone. Moisture, it costs us money. We pay for the water. We pay to pump it. We pay for the equipment to distribute it. So I just think in the definitional section here, this is way too loose, way too loose. And, you know, if you want to talk about – we're moving, we're tightening this – may be what we ought to do is take the crop that typically has the deepest rooting section that's grown here which would be alfalfa. Alfalfa under dry land conditions has roots that reach 18 to 20 feet; under irrigated conditions typically six to twelve feet. And if we take and remove that from the definitional section in this temporary thing that happens, the saturation that happens with irrigation that might be one of cleaning that up. But you can see the jeopardy that you might be putting in with a permit. Because, you know, you can go out to any one their fields where they've applied nutrients and say “Aha, we can do this test and take a

soil sample and we can weigh it wet and we can oven dry and we can determine that it was saturated through science, and that's a bad practice. That's a violation." So I think that needs to be certainly tightened up, cleaned up, or better defined. (Turner)

Response: The definition for "ground water" comes directly from WAC 173-200-050(12) which states that "'ground water' means water in a saturated zone or stratum beneath the surface of land or below a surface water body." The issue of the root zone is addressed in S1.B. The root zone is exempt from the ground water quality standards. WAC 173-200-010(3) states, and the permit reflects, that "This chapter shall not apply to: (a) Contaminant concentrations found in saturated soils where those contaminants are chemicals or nutrients that have been applied at agronomic rates for agricultural purpose if those contaminants will not cause pollution of any ground waters below the root zone."

S2.E5 [now definition #11]

The Permit covers land application activities "under the control of the permittee": "This permit applies to the process wastewater collection, confinement, storage, handling, and application areas of the permitted facility, including transfer facilities and land application activities under the control of the permittee." The Permit needs to clearly define the term "under the control." We request that Ecology adopt the following definitions: (1) When used in reference to land, "under the control" shall mean land that the CAFO owns, rents, or leases. (2) When used in reference to activities, "under the control" shall mean activities that take place on land that the CAFO owns, rents, or leases. (3) When used in reference to facilities, "under the control" shall mean facilities that the CAFO owns, rents, or leases. The Permit should separately define the term "under the control." If this change is made, the words "whether it is owned, rented, or leased," can be deleted from the definition of "land application area". If the Permit does not separately define the term "under the control," the definition of "land application area" should be revised as follows: "Land application area" means land that the CAFO owner or operator owns, rents, or leases and to which manure, litter or process wastewater from the production area is or may be applied. (DWT)

Response: The definition of "land application area" comes from the federal regulation, 40 CFR 122.23(b)(3). It states that "The term land application area means land under the control of an [CAFO] owner or operator, whether it is owned, rented, or leased, to which manure, litter or process wastewater from the production area is or may be applied." We use this definition, since it is a federal definition. We believe that this definition means the same as the commenter's suggestion.

S2.E6 [now definition #11]

The Permit defines "manure" to include materials commingled with manure or set aside for disposal. Ecology needs to explain what is meant by the phrase "or set aside for disposal." It is not clear whether the phrase modifies "manure, bedding, compost, and raw materials"; or whether it modifies "other materials." (DWT)

Response: The definition of “manure” is from the federal regulations. It can be found in 40 CFR 122.23(b)(5). We agree that the definition is confusing and poorly punctuated. The phrase “or set aside for disposal” was intended to modify “other materials”. We made punctuation changes to the permit in an attempt to clarify the definition.

S2.E7 [now definition #13]

How do we define "applied" phosphorus? Do we know what the baseline is? This suggests that no P could be added though levels in soil are less than needed for crop. Should focus, instead, be upon P levels in soil relative to availability to crop? In which case wouldn't apply unless in deficient state and amount of application doesn't exceed crop needs from soil/application? (Boggs)

AND

The use of the phosphorous index as a planning tool is something that we use in writing plans, but the references to it earlier were taken out. But this multi-year phosphorous application was left in, including the definition that the applied phosphorous needs to be removed before you can apply additional manure. And that's something that needs to come out of this permit, as far as the applied phosphorous may never be removed as it is accumulated or assimilated into the soil. Other parts of phosphorous may be taken up or the applied amount of phosphorous may be taken up by removal of crops. But the actual applied, was applied may never be removed. Also with that, if it's to be left in there, we need to be able to use the management practices within the phosphorous index to change the score and may be able to apply additional phosphorous during that multi-year period. (Chris Clark)

Response: The definition of “multi-year phosphorus application” was from the federal rules. The language means that the field would not receive additional phosphorus application until the amount applied in the single year had been removed. See the CAFO Federal Register preamble at Vol. 68 No. 29 February 12, 2003 on page 7210 for more information. Multi-year phosphorus applications are an option, not a requirement.

Applied phosphorous. It's been stated before it is a fire management tool. Your inventory uptake will probably never show and your soil test will never show what you actually apply, so it should basically I'd say stricken out of this document. And left up to your basic farm plan for each individual. (Heeringer)

Response: Elevated phosphorus levels are addressed both in this definition in S2.E7 [now definition #13]and in S3.A3(b). They are federal requirements. It cannot be taken out of the permit. As a nutrient that can deleteriously affect water quality if over-applied, the proper application of phosphorus is essential to protecting water quality.

S2.E8 [now definition #14]

"For non-dairy CAFO's, the Washington State Department of Agriculture and the local conservation district,....., must approve and certify the nutrient management plan." Conservation Districts are currently working with CAFO's to incorporate nutrient management plans into their operations. In addition, conservation district already have procedures in place to write, review and approve plans ensuring compliance with NRCS standards and specification. It is therefore logical that the two agencies work together to educate CAFO's about the nutrient management requirement and assist them with certification. (Franklin CD)

AND

It is a duplication of service to have the Department of Agriculture certify plans for non-dairy CAFOs. I recommend that conservation districts also have authority to approve and certify the plan, thereby giving the producer an option. Another alternative is for WSDA to sign agreements with individual conservation districts that will identify area by area the approving and certification agent. This second alternative could be similar to the existing agreements between conservation districts and Ecology for ag related water quality complaints. (Okanogan CD)

AND

I believe that was an issue of change within the last or the next legislation. We would like to speak for the record that the Conservation Districts do have the experience for approving and certifying nutrient management plans, where Department of Ecology and Department of Agriculture do not have that experience. And it will take much time out of their enforcement role if they're tasked with that. (Chris Clark)

AND

Delete: "'Certification' occurs when the nutrient management plan has been fully implemented."
This language is not appropriate. The approval process covers this issue. (Simplot)

Response: Determining if the WSDA or the local CD should approve and certify the nutrient management plans was a very difficult decision (the certification process only involved the Dairy NMPs as per 90.64-026). We understand that local conservation districts are currently approving dairy nutrient management plans and that many CDs are working with CAFOs. We also understand that many CDs already have the personnel and procedures in place to review nutrient management plans. There are, however, equally compelling reasons why the WSDA should be the entity to review the nutrient management plans. WSDA is the agency that is inspecting the CAFOs (including its compliance with the NMPs), so it makes sense to have the regulatory agency also review the nutrient management plans. In the end, Ecology determined that the "permitting authority" that is delegated by the USEPA as the choice for being the approval authority of the plans. That said, we recognize that the CDs play an

extremely important role in educational efforts, writing plans, and working with WSDA and the CAFO to produce and implement a workable plan. The permitting authority may, as they determine appropriate, request technical assistance from CDs and WSDA (until EPA delegation) in their review of nutrient management plans. Individual CAFOs may also work directly with CDs to obtain technical assistance.

In the first bullet, it says for dairy CAFOs, it reads that “The Conservation Districts or other agency designated by the Legislature must approve and certify nutrient management plans.” Because up to the next paragraph, just says Washington Department of Agriculture and I think that’s sufficient to have Washington Department of Agriculture in both positions. (Hayes)

Response: Current state law requires the conservation districts to approve and certify all dairy nutrient management plans. Until state law changes, the permit must reflect this requirement for dairies in state law.

In addition, for an NMP to be effective, it must be drafted by a certified specialist and the general permit must include a provision mandating such a requirement. (WELC, et al)

Response: The permit does not require that the nutrient management plan be drafted by a “certified nutrient management planner.” EPA’s proposal included this element, but their final rule deleted it. In Washington the plans must meet the NRCS technical standards (or equivalent best management practices) in order to be approved. We believe that this is just as protective, if not more protective, than to have a certified specialist write the plan.

The permit's definition of "Nutrient Management Plan" (S2.E.9.) [now definition #14] includes an ambiguous reference to "the producer". This term should be defined or replaced, as appropriate, with "owner", "operator", or "facility manager." (Smith & Lowney PLLC)

Response: We agree that “producer” is ambiguous and have changed the permit.

S2.E16 [now definition #24]

Again asking for either removal or tight definition of "water courses". Some people interpret every low spot, ditch, gully, etc. to be at least a potential water course..Let's go with something more specific, say type I, II and III streams. What exactly is a watercourse? Is it a natural depression, a manmade depression? What is a watercourse? Most of the people I’ve asked, don’t know. May be that should be removed or clarified in some way (Turner)

Response: The definition for “waters of state”, which includes the term “water courses” is from state regulations, WAC 173-201A. The definition in the WAC comes from state law, RCW 90.48.020. The law states: “Wherever the words "waters of the state" shall be used in this chapter, they shall be construed to include lakes, rivers, ponds, streams, inland waters, underground waters, salt waters and all other surface waters and watercourses within the jurisdiction of the state of Washington.” The courts have defined “waters of the state” to be very broad. The permit uses the current state

regulations, and is attempting to avoid any sort of redefinition of the term “waters of the state.”

There’s a lot of priorly converted wetlands that are farmed. And don’t want to have to be in the restraints of this permit for farming them. And in relation to waters of the state, it talks about 25 year, 24 hour rainfall event, people are having problems now days with Fisheries and Ecology not allowing streams to be cleaned. These streams are going over people’s farmlands, through their buildings, and taking nutrients with them. It’s not the producers fault, it’s the Fisheries and Ecology for not letting the streams get cleaned up. And some of this gets to be erroneous because it not, I mean there’s other agencies that are fouling us up. And I think that something should be beared in mind here that sometimes you do have an event that is beyond your control because of things that are not being maintained on the public sector. (Heeringer)

AND

The definition of waters of the state includes wetlands. This is a very large issue in Whatcom County. We have over 20,000 acres of wetlands that are apparently farmed whether they’re prior converted or pastured wetlands. When we were applying are manure to those prior converted wetlands, it would be under this definition a violation. And as we know from earlier discussion, a violation is a \$10,000 fine. (Chris Clark)

AND

“Waters of the State” is defined too vaguely, certain employees of DOE have abused this definition in the past so that it carries bad connotations around many farmers. It seems to mean different things to different people. NRCS has designations for certain wetlands that allow for farming practices to occur. “Prior Farmed Wetlands” should be excluded from this definition. Many Nutrient Management plans already allow manure application on farmed wetlands, in-fact some plans require application to these fields in order to balance. (N3 Consulting)

Response: We agree that wetlands are a very large issue, not only in Whatcom County, but across the state. State water quality standards apply to any waters, including wetlands, which meet the definition of waters of the state. The water quality standards in WAC 173-201A-020 say “‘Surface waters of the state’ includes lakes, rivers, ponds, streams, inland waters, saltwaters, wetlands and all other surface waters and water courses within the jurisdiction of the state of Washington.” According the state’s surface water quality standards, WAC 173-201A-020, “‘Wetlands’ means areas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. Wetlands do not include those artificial wetlands intentionally created from nonwetland sites, including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment facilities, farm ponds, and landscape amenities, or those wetlands created after July 1, 1990, that were unintentionally created as a result of the construction of a road, street, or highway. Wetlands may

include those artificial wetlands intentionally created from nonwetland areas to mitigate the conversion of wetlands. (Waterbodies not included in the definition of wetlands as well as those mentioned in the definition are still waters of the state.)” The permit uses the current state regulations, and is attempting to avoid any sort of redefinition of the term “waters of the state” or “wetlands.”

S3. Nutrient Management Plans

Manure application on ice, snow, frozen or saturated soil must be prohibited. Manure should not be applied during any precipitation event or when precipitation is expected in the next 24 hours. Additionally, land with a slope of more than 10% must not be used for land application of waste, and for more moderately sloped land, measures should be required to control erosion. Land application must not be allowed on karst topography, sandy soils, playa lake areas, wetlands, prior converted croplands, areas with intermittent or ephemeral streams, or those areas with excessive erosion. (WELC, et al)

Response: Land application practices are addressed by United States Department of Agriculture Natural Resources Conservation Service (NRCS) Field Office Technical Guides (FOTGs). The practices are not spelled out in the permit. As the comments suggests, there are a large number of factors that need to be considered when applying manure. The permit requires all CAFOs to comply with NRCS FOTGs, or other practices that offer equivalent protection and are approved by the WSDA. The NRCS FOTGs are available from NRCS at <http://www.nrcs.usda.gov/technical/efotg/> or directly from <http://efotg.nrcs.usda.gov/treemenuFS.aspx?Fips=53067&MenuName=menuWA.zip>.

S3.A. Plan Elements

S3.A1(b)

What about those developed by land grant colleges? What about those identified in scientific journals and prescribed by a qualified professional or engineer? (Boggs)

Response: Best management practices can be developed by anyone, but practices must be approved by the permitting authority. During the transition, Ecology intends to consult with WSDA and other experts during the transition of authority. For example, a best management practice that was developed by a land grant college in a desert state may not be appropriate for Western Washington. The WSDA is responsible determining that any proposed equivalent best management practice will result in equal or better protection of surface and ground water quality in Washington.

At this time, the Washington State Department of Agriculture (“DOA”) has not similarly been granted the authority to implement and enforce the state’s NPDES program. Therefore, any part of the general permit that leaves the implementation or enforcement of the CWA in the hands of the DOA is necessarily an illegal attempt to delegate CWA authority without the approval of EPA. This

provision improperly delegates an important CWA compliance tool, best management practices, to the DOA. Compliance with best management practices is often deemed to be compliance with the CWA. Therefore, it is imperative that these best management practices are the most stringent available to ensure the protection of the public health and environment. Ecology, the agency to whom CWA authority has been designated, must be the agency that approves the best management practices. Because DOE has decided to authorize general, instead of individual, NPDES permits, for CAFOs, NMPs are the only place where site-specific considerations are taken into account. Only DOE, not DOA, has the information and knowledge about discharges or other environmental concerns that are occurring within a particular watershed. Therefore, to ensure that waterbodies are protected on a watershed basis, DOE must have a role in approving an NMP for a particular CAFO. (WELC, et al)

AND

Ecology should not delegate authority to Agriculture to approve "equivalent" BMPs. It is Ecology's duty to protect water quality in Washington State -- not Agriculture's. (Smith & Lowney PLLC)

Response: In 2003, the Washington State Legislature began transferring the CAFO program to the WSDA. However, Ecology is still the agency with the “delegated authority” from the EPA to write permits. Under a Memorandum of Understanding between WSDA and Ecology, WSDA assumed some responsibilities for implementing the CAFO program. WSDA is in charge of inspections, complaint tracking, technical assistance, and some NPDES Permit compliance issues. (The MOU is available on our website at <http://www.ecy.wa.gov/programs/wq/permits/cafo/ag-mou.pdf>.) While Ecology is the permitting authority and must approve the NMPs as part of the permit issuance, we are requesting WSDA and other experts to assist us in reviewing the plans.

The permit condition specifies that the permittee may use “equivalent best management practices” in lieu of NRCS Field Office Technical Guide (FOTG). If a facility is proposing to use management practices that are not in accordance than the FOTG, then the permittee should request an individual NPDES permit rather than coverage under the general permit. The development of an individual NPDES permit will provide site specific conditions to ensure that any innovative management practices are consistent with all applicable federal and state regulations. (EPA)

Response: We disagree that an individual permit will always be necessary. Writing individual permits for any facility that uses an approved, non-NRCS FOTG best management practices is unnecessary. It will also consume state agency staff resources that could be better used elsewhere. As long as the process for approving equivalent standards is technically sound and transparent, it will protect the environment just as well as an individual permit would.

We would like to affirm, despite testimony to the contrary, that all approval authority regarding nutrient management planning should rest with one agency. This will ensure that planning standards are consistent between counties following different planning styles. (N3 Consulting)

Response: We agree and Ecology will be the agency that approves the NMPs. Ecology will seek the assistance from WSDA and other experts with the reviews.

The proponent of BMPs other than those identified in the NCRS's FOTG must have the burden of proving "equivalence" with approved BMPs. Moreover, any proof of "equal or better protection of surface and ground water quality" (S3.A.1.a.) should be determined through the use of water quality monitoring. (Smith & Lowney PLLC)

Response: We agree that the proponent of BMPs will have the burden of showing equivalence. Small changes were made to the permit to reflect this. Water quality monitoring may be used in some situations, but it would not necessarily be required in all situations.

S3.A2

The Draft Permit authorizes an illegal compliance schedule by giving permitted CAFOs until December 31, 2006 to develop and implement Nutrient Management Plans. This 23-month delay is unwarranted. Further, it is illegal under state and federal regulations governing compliance schedules, as the time allowed exceeds one year and the compliance schedule contains no interim date or reporting requirements. (Smith & Lowney PLLC)

Response: The federal regulations state in 40 CFR 122.42(e)(1) that CAFOs have until December 31, 2006. However, the USEPA has delayed this requirement until March 30, 2007 (see Federal Register dated December 21, 2005 Volume 70, Number 244). Presently USEPA is rewriting the CAFO Federal Rule to meet the 2nd Circuit Court decision. Since it takes time to update then implement a NMP, the delay is appropriate. For a new facility to receive a CAFO permit, they must submit an approved plan with their application.

S3.A2(b) I haven't read the draft so I'm not sure exactly what it says there, but it does say in this paper it says "dead animals and chemicals." There's some concerns about, that people have in my area – we're a long ways from any where. I don't know may be some of you folks are a long ways from any where too. But right now I believe that probably most farmers are probably trying to bury their dead animals, I would assume. Now I believe that's okay right now. Now this may change in the future and there may be some requirements for a rendering service or something like that. I don't think that beef farmers are going to be able to accrue that extra expense if a rendering service has to come a long ways and they have to pay a hundred dollars to get rid of a cow, that's going to be problem. I don't know about you folks in Yakima, but where I'm at that would be a problem if we can't bury our cows any more after, when they die. So just think, I just want to make sure that we're not opening the door for that to happen here. And if we can put some safeguards in place to make that a little more clear, I would appreciate it. (Khvoroff)

Response: The permit merely states that the nutrient management plan must meet EPA, state and local standards to "Ensure proper management of mortalities (i.e., dead animals) to ensure that they are not disposed of in a liquid manure, storm water, or process wastewater storage or treatment system that is not specifically designed to treat animal mortalities." All it is saying is, if your liquid manure system is not designed

to treat dead animals, do not put dead animals into the system. State agencies and the NRCS are working on this issue.

S3.A2(d) Okay, another issue would be keeping their animals out of the surface water. And there's a big problem in Randle. We have floods regularly, probably every three to five years. The water level in that area can go any where – clear up to 20 feet in depth along the river. It's impossible to put fences along the river. We're below the National Forest, and there's old growth logs that roots and root rods that stick up as high as this ceiling. And they float right through the field and go right through the field, and back in to the river. And when they go if there's fences, it's going to take them with them. And so there's virtually no way you can fence those areas off. Some people suggested “Well gee whiz use poly line and trend end posts.” Well yeh, go ahead if you've got – like on my place for example, if I was doing confinement feeding, I've got two miles of river front. Well how I'm going – in the first place it's going to take awhile to put poly line up and accrue the cost and the time to do that. And in the second place, when a flood comes, you know how many minutes you have to get your cows out of that area? Probably about hour and half and that's it. If you don't get your cows out, they're going to die. So you've got to get your cows out first. Phooey with the fences, you don't have time to do anything like that. There's no way you can take up two miles of poly line fence in that amount of time. I mean you'd lose all your fence. It would be wrapped up with grass and debris and so on and so forth. So you can't even do that kind of fencing. So it's impossible. If I was doing confined animal feeding, it would be impossible for me to continue on my ranch because of the water situation. I have two miles of river front. I've 3/8 of a mile of a creek which has to have, that floods also. I have 400 acres there, 420 acres. 400 acres floods. So you get the picture. The cows all have to go up to that 14 acres until you can get them back out on pasture, back onto the pasture again. And they'll going to be confined there for a little bit of time – but not very long probably. If, depending on the silting conditions and the length, the duration of the water staying, you know, it may be a problem getting the cows back out there. They may be there 30 days. I don't know. But you know you don't want to put your cows back out on something that's really saturated, on saturated grounds. I mean you'll tear fields up. And so there – I believe we haven't looked at everything, especially for the west side. (Khvoroff)

AND

S3.A2(d) Prevention of direct contact to surface water seems unreasonable. Proper management with limited hardened access points would provide some producers with a more cost-effective watering solution that would still provide adequate protection of the water resource. (Okanogan CD)

Response: Ecology reminds everyone that a pasture-based operation, such as the one described in the first comment, is not a CAFO and is not subject to this permit. The federal rules, and the permit, require that the nutrient management plan prevent direct contact of concentrated animals with surface waters within the confinement area. This requirement will help prevent pollution of waters. The EPA recognized that where animals have direct contact with surface water, the nutrients in the manure are not taken up by plants, but are discharged directly into the stream. Hardened access points may be reasonable in some pasture-based operations, but are not allowed for CAFOs.

S3.A2(e) Most of the animal operators use very small amounts of certain chemicals -- some for cleaning purposes, sanitation purposes, veterinary medical purposes – but they occur in extremely trace, trace levels. What I'm concerned about here is with the technology we have today, where we have the ability in the lab to find fractions of a part per trillion, incredibly small amounts because by definition it's a chemical, and by definition it might be something that you're applying. I'd like to see some type of wording added, or clarification added here that normal residue amounts, whether they're measurable or not, from approved products are exempt. They should be exempted. It needs to be made clear, in this era of litigation and analytical ability to find certain chemicals at levels approaching Parts Per Trillion...that normal, transient or trace levels of materials used in the industry are not considered actionable pollutants, as distinguished from illegal use or disposal of chemicals. (Turner)

Response: The requirement in S3.A2(e) is from the federal regulations. To meet the requirements of the permit, chemicals should not be added to manure, litter, or process wastewater (unless the system is specifically designed to treat such chemicals). These chemicals should be disposed of using other methods. This clause does not apply to the normal “chemicals” (nitrogen, phosphorus, etc) of manure. Disposal of other chemicals such as pesticides should follow the requirements listed on the label.

S3.A2(g) The animal waste must be monitored, at a minimum, annually and when there is any change in the feed additives of hormones, antibiotics, or heavy metals as well as any significant change in nutrient content of the feed. The waste must be analyzed for at least the following parameters: pH, nitrogen, ammonium, phosphorous, BOD, percent solids, hormones, antibiotics, pathogens, heavy metals, and any other pollutant of concern. Constituents that must be monitored include antibiotics and anti-biotic resistant strains of bacteria. The waste generated by CAFOs is often laden with antibiotics and antibiotic resistant bacteria that are then released into the environment. The presence and persistence of antibiotic and multiple antibiotic resistant bacteria in soils, sediment, sewage, surface and groundwater, and municipal drinking water is a continuing public health concern. Many bacteria, viruses, and protozoa, some of which are pathogenic to humans, live in the intestinal tract of livestock. The intestinal tract of livestock can also contain antibiotics and antibiotic resistant bacteria, much of which pass directly out of the animals and into the environment where animal waste is stored, sprayed, or applied. The recent incidences of mad cow disease only highlight the importance of monitoring the waste that is generated by CAFOs. (WELC, et al)

AND

Antibiotics and hormones in streams are increasingly a concern in our environment. According to a U.S. Geological Survey reconnaissance published in *Environmental Science and Technology*, seventeen different antibiotics were found in streams located downstream from areas of livestock production and densely populated urban areas (Vol. 36, No. 6, 2002, p. 1202). The medical community has been concerned for years that overuse of antibiotics is creating a crisis of antibiotic resistance (*Science*. 1992 Aug 21; 257 (5073): 1064-73). The Union of Concerned Scientists estimates that 70 percent of antibiotics used in CAFOs is for growth promotion (Press release, Jan. 8, 2001 Cambridge MA). These antibiotic-resistant bacteria remain in the animal waste, which is

spread over the land and often washed into streams by rainwater or passed through the soil to groundwater. (Kummerer, K., Chemosphere 45 (2001) 957-969). We should do what we can to keep these potentially dangerous pharmaceuticals out of streams and groundwater. Antibiotics are mentioned in your fact sheet but not in the permit. Given the potential for antibiotic use at CAFOs to exacerbate the antibiotic resistance problem, it seems that they should be at least addressed in the permit. Additionally, in order to create an incentive to eliminate or reduce the use of antibiotics, perhaps you should discount the permit fee for CAFOs that do not use antibiotics. This small gesture may draw attention to this problem and, hopefully, positively impact Washington's livestock producers. (King County)

Response: While we understand that manure contains many contaminants, the emphasis in the permit is on nitrogen and phosphorus. By analyzing for nitrogen and phosphorus, the CAFO can determine the agronomic rate. By applying manure at agronomic rate, the crops can take up the nutrients before they contaminate surface or ground water. If facilities were allowed to regularly discharge manure directly to a stream (either with or without treatment), then we would agree that the discharge should be analyzed for more parameters than just nitrogen and phosphorus.

S3.A2(i) The following language should be revised in Part S3.A.2.i.: "Identify specific records that will be maintained to document the implementation and management of the minimum elements described in S3.A. and ..." (EPA)

Response: We agree, and made the change in the permit.

S3.A3(a)

The paragraph mentions surface water, what about ground water? (Boggs)

Response: We agree and added ground water to the requirement.

CAFO operators and contractors must be prohibited from applying waste to land when the soil already contains high levels of nitrogen or phosphorous. It can take years to bring down phosphorous levels in soils with high phosphorous concentrations, a process that will take much longer if phosphorous application continues to be applied in the same manner on these soils. CAFOs should be allowed to continue to apply waste onto land only if the soil phosphorus test is below the phosphorous threshold level. (WELC, et al)

Response: Nutrient management plans take nutrient levels in the soil into account. The exact level of nitrogen and phosphorus that poses a threat greatly varies depending on soil types and crops, so there is no single numeric limit.

Should the referenced section be S.3.A.2? It currently references itself. (Okanogan CD)

Response: The reference was intended to cite the rest of section S3.A3. The permit has been changed to make this clear.

S3.A3(b)

S3.A3(b) The Draft Permit contains no enforceable standards governing the requirement to "minimize" discharges of phosphorus and nitrogen to surface waters. (Smith & Lowney PLLC)

Response: Correct, the permit does not have a direct requirement to "minimize phosphorus and nitrogen transport." However, this section of the permit does require that the nutrient management plan minimize phosphorus and nitrogen transport. If the nutrient management plan does not do this, the permitting authority cannot approve it, and without an approved nutrient management plan, the CAFO cannot be granted a permit.

S3.A3(b) It is imperative that DOE replace its general guidance concerning land application rates with specific criteria defining improper land application. The language used in Section S3 is far too discretionary. Given the permitting structure selected by DOE, appropriate land application practices are a key component to the success of permits in protecting our waterways. The permit must include language that land application practices must not degrade water quality or place public health at risk. Rates of land application must be based on the most limiting factor for the site: phosphorus, nitrogen, salts, and/or heavy metals and other pollutants of concern. Rates of land application must be calculated using all sources of nutrient inputs for the site, crops grown on the site, and realistic crop yields. Soil and waste tests must be conducted regularly to ensure that application rates are appropriate. (WELC, et al)

Response: Most the items requested in this comment are a required part of the nutrient management plan. They are not spelled out in the permit, but they are contained in the NRCS FOTGs. The nutrient management plans must match NRCS FOTGs, or equivalent best management practices. The determinations referenced by the commenter must be made on a site-specific basis. In this general permit, Ecology cannot set specific criteria defining improper land application. There are too many variables in soil conditions and application practices. The permit relies on the site-specific nutrient management plans to address these issues. The nutrient management plans are based on the nutrient of concern (either nitrogen or phosphorus) for specific fields.

S3.A3(b) Another thing was brought up with phosphorous area. I know western Washington, the phosphorous is shown in the soil samples isn't always available or plants. We want to make sure if we're doing this phosphorous test, it's something that we can use as managing for our farms. Thank you. (Wesen)

Response: Phosphorus testing is a requirement from EPA's federal rules. They determined that a nitrogen test alone will not protect water quality. There are a number of different phosphorus tests, and producers can get assistance from conservation districts or private soil consultants if they want more assistance.

S3.A3(b)(i) Talking about the timing method of application -- it's something that we write into the farm plan, but it's not constrained to be exact or even attempted to be exact. We put some

sideboards on an application bulk method, timing and amounts to balance the farm for nutrients, and the producers have to operate within the weather and financial constraints that they have. (Chris Clark)

Response: This is a very difficult issue, but we disagree with the premise of the comments. The permit requires that all CAFOs have nutrient management plans and requires that all plans are followed. What one person describes as “on-farm discretion” will be viewed by others as “completely ignoring the plan.” Not following the nutrient management plan can be a violation of the permit (and in some cases can result in state regulatory action), and makes the CAFO more susceptible to third party lawsuits under the Clean Water Act. Nutrient management plans must be flexible, dynamic documents that address weather, soil, and crop conditions. Normal fluctuations in weather, soil and crop conditions should be addressed in the nutrient management plan so the CAFO can follow the plan. Unusual fluctuations in weather, soil and crop conditions can either be addressed in the plan up front, or the nutrient management plan can be revised when the unusual events occur. The permit requires very few specific best management practices – those activities that are actually responsible for keeping the water clean. The permit relies on nutrient management plans to describe the best management practices that are used on the CAFO. The permit also relies on those plans being followed. In order to assure protection of water quality, the permit has no choice but to require that the plans be followed, and Ecology recommends that the plans be flexible enough and dynamic enough that they can be followed by the CAFO.

S3.A3(b)(i) re: “a field specific assessment of the potential for nitrogen and phosphorus transport” Currently there is no method of determining the effects of phosphorus on the environment in Washington that can definitively prove that phosphorus is a problem. More research needs to be done before this link can be made. There is also a lot of discussion amongst agronomists and soil scientists about the irrelevance of the NRCS designated BRAY test for Phosphorus in many soils and regions in the state. Therefore phosphorus should not be held to the same standard as nitrogen at this time. (N3 Consulting)

Response: Phosphorus testing is a requirement from EPA’s federal rules. They determined that a nitrogen test alone will not protect water quality. Phosphorus is a nutrient that can cause algae problems and low dissolved oxygen problems in waters.

S3.A3(c)

Soil sampling is mentioned both here and in S4C2 and may lead to confusion with slightly difference references. Some clarification between phosphorus and nitrogen may be needed each time sampling is mentioned and both sections should be consistent with each other. I think this should include, at a minimum, a reference to the additional testing required by the annual reporting requirements in Section S4. C. 2. a. ...and soil analyzed annually for NO₃-N and a minimum of once every five years for phos.... (WSDA)

AND

“Manure and soil sampling. Manure must be analyzed a minimum of once annually for nitrogen and phosphorus content, and soil analyzed annually for nitrate-N concentrations and a minimum of once every five years for phosphorus content. The result of these analyses are to be used in determining application rates for manure, litter, and other process wastewater.” (WSDA)

Response: We agree that there may be confusion, and we modified S3.A3(c). However, since medium and designated CAFOs do not have to do the testing required in S4.C, we did not use the commenters proposed language.

The requirement for manure and soil sampling (once annually and once every five years, respectively) is so lax as to be outrageous. The Draft Permit does not even require submission to Ecology of sampling results. (Smith & Lowney PLLC)

Response: The frequency of the manure testing is from EPA regulations. The state is also requiring annual soil tests for nitrate-N. The results of these tests do have to be submitted to the state as part of the annual report. The permit now references this monitoring requirement in this section. The NRCS FOTG #590 requires more frequent nitrogen and phosphorus monitoring in some circumstances than what is contained in the permit. Please see next comment.

Delete: “and soil analyzed a minimum of once every five years for phosphorus content”. Per the Natural Resource Conservation Service Nutrient Management Standard (590): "As a minimum, soil testing frequency for nitrogen, phosphorus, and potassium is three years for perennial crops and one year for annual crops." We recommend this test to be taken in the Spring prior to waste application. The 590 Standard also recommends an end of the season soil nitrate-N sample to be taken and for the values to be evaluated using the Agronomy Technical Note 35. We concur with this practice and recommend its use. (Franklin CD)

Response: We agree that the 590 standard requires more frequent phosphorus monitoring. All CAFOs will have to perform this more frequent soil monitoring, unless they use an “equivalent best management practice” as described in S3.A1. However, since that possibility of an “equivalent best management practice” exists, we did not put the requirements of the 590 standards into the permit. What we do have in the permit is EPA’s minimum federal standard. The once every five year phosphorus testing is a minimum backstop, no matter what best management practice is used.

S3.A3(d)

The Draft Permit doesn't even bother to state a minimum frequency for the inspection of land application equipment. "Periodically" is so vague as to be meaningless. (Smith & Lowney PLLC)

Response: The permit language matches the federal requirements. Each CAFO’s nutrient management plan would contain more specifics on this issue. If there is a discharge to waters of the state from leaking land application equipment, it would be a violation of the permit.

S3.A3(e)

In geographic areas of very low rainfall like Yakima County, 100-foot setbacks are excessive. Science will document 30-foot setbacks in a 6 to 10 inch rainfall area like we are dealing with. I suggest the mandated buffer width be removed or made to change with the best management practices of the geographical area. (WSU)

Response: The 100 foot setback is a federal requirement. S3.A3(e)(ii) clearly states that an alternative can be used if it will provide pollutant reductions that are equivalent to, or better than, the 100 foot setback.

S3.A3(e)(ii) We assume this means that NRCS standards would qualify as an alternative setback requirement however, setbacks have been widened since the initial state nutrient management plans were written. The initial plans also stated that manure could be applied to within 25% of buffer width from April 15 through September 1. This standard has met TMDL levels in Whatcom County. Does that demonstrate the effectiveness of the buffer width or would some other evidence be required? (N3 Consulting)

Response: For these situations, a site-by-site evaluation would be needed to determine if it meets the requirements of the permit.

S3.A3(e) The Draft Permit would allow CAFOs to excuse themselves from the Setback Requirements by using a "vegetated buffer" -- without requiring any monitoring to demonstrate the effectiveness of the vegetation. (Smith & Lowney PLLC)

Response: The 100 foot setback and the 35 foot vegetated buffer are from the federal regulations. These requirements meet BAT. We do not believe that additional monitoring is required for the vegetated buffers to protect water quality. Vegetated buffers are more effective at trapping pollutants, so a 35 foot vegetated buffer should be as effective as a 100 foot setback.

A facility that requests alternative practices in lieu of the 100-foot setback or 35-foot wide vegetated buffer should be regulated under an individual NPDES permit which will provide site specific conditions. (EPA)

Response: It would depend on the situation. In some cases, such a facility may be able to be covered under the general permit with a companion order. In other cases, an individual permit may be required.

S3.A3(e) We applaud DOE's decision to require a 100-foot setback, but urge DOE to require as much as a 500-foot setback in certain situations. For example, more protection is needed between spray fields or land applications sites and surface waters, wetlands, drainage ditches, tile inlets and drinking water wells. Setbacks from surface waters are essential to protect water quality. Buffer strips and berms *and/or tailwater recovery ponds* [Note: comment after 2nd Circuit Court] along ecologically sensitive areas, such as wetlands, waterways, or special habitat should be required.

Wastes or waste waters should not be land applied within 500 feet of houses, schools, offices, religious and community centers, and other habitable structures. Wastes or waste waters should not be land applied within 100 feet of a property line or a drain tile intake; within 300 feet of a water of the United States; within 500 feet of public or private wells or in such places with a direct hydrological connection to such wells; within .25 mile of any outstanding water, wild & scenic river or water quality limited water. (WELC, et al)

Response: The 100 foot setback is from the federal regulations. These requirements meet BAT. We believe that these requirements will protect water quality. If there is a compliance problem, larger setbacks or vegetated buffers can be required in a companion order or individual permit.

S3.A3e I don't like the arbitrary number of 100 feet as given in the primary definition. It would be much better in my opinion to just have items i and ii - we use an alternative method - sizable, NRCS compliant field and storage area berms to prevent both run off and run on where nutrients are applied or stored. I know that you can't a hundred feet any more you can defend 99 feet or 101 feet or any other feet. The fact that you've added, probably as a response to the comments of the first draft, the subpoints i. and ii where you have alternative practices appropriate. Most of the people I deal with do use alternative practices in the form of berm. We go to Laurie Crow from the South Yakima Conservation District where Mark Wazmiller, the district engineer, and we say "What's the requirement here? What would be a standard for how to do this?" And he will come out, do the site inspection, write us a letter and say "Here's how you construct it." Okay in some cases a berm that's ten or twelve inches high and it's compacted that may be a foot and half or two feet wide is adequate. That's a long, long way from a hundred feet. I think you ought to just get rid of the hundred feet and just go to something that's a vegetative buffer or the alternative practices. Just delete the whole first paragraph and there and move on to the next stuff because that's really the good stuff. (Turner)

Response: The 100 foot setback is from the federal regulations. It is true that determining the difference in effectiveness between a 100 foot buffer and a 99 foot buffer or 101 foot buffer would be statistically impossible. However, the EPA found that the 100 foot buffer, along with the other options outlined in S3.A3e, are required to protect water quality. Deleting the 100 foot buffer option does not make sense from a CAFOs perspective, since deleting the paragraph would prevent everyone from using a 100 foot buffer.

This may be too narrow for some soil/slope conditions. Also, is the producer limited to a vegetated buffer? What if she installs a Riparian Forest Buffer? (Boggs)

Response: If additional measures are required for a CAFO to protect water quality, they can be incorporated into a companion order or an individual permit. The effectiveness of a riparian forest buffer depends on the vegetative components and how well established it is. In most cases, riparian forest buffers are not as effective as grass at filtering nutrients. Most forest buffers lack good vegetative under growth. For these situations, a site-by-site evaluation would be needed to determine if it meets the requirements of the permit.

S3.A4

Coming back to the cost factor, rather than create new regulations, why not in even more places simply refer to compliance with NRCS standards..this is something producers are very familiar with; the NRCS folks have a lot of expertise and experience; a single standard is easier to implement and maintain. (Turner)

Response: The language in S3.A4 is from current state law, and is a requirement under current state law.

State law requires this. What is the significance of putting this in the general permit? (Boggs)

Response: Since is in current state law, we believed it was appropriate to mention it here. As much as possible, we attempted to bring all of the CAFO/water quality regulations into this permit, rather than requiring CAFOs to hunt down multiple regulations.

S3.C. Plan Compliance

Nutrient Management plans in Washington State are written to NRCS standards. They are broad guidelines and while interpreted in this way are useful. They are not precise management tools. Their flaws are multitude if we try to apply them exactly without a degree of on farm discretion based on the existing climatic, soil and crop conditions. (N3 Consulting)

AND

Nutrient Management Plans spell out specifically how much manure, down to the gallon, can be applied. However, real conditions can lead to unforeseen variations since the NRCS standard for Nutrient Management Plans does not model seasonal fluctuations in nutrient concentration of the manure (for instance: there is currently no distinction made between the manure applied in March and that applied in August despite the vast difference in rainwater dilution between those two months). Also, these plans do not account for year to year variations in total rainfall and rainfall patterns (for instance: A June manure application recommended in a farmers plan may have to be postponed due to wet or windy weather in a particular year) For that reason the second sentence should read “The land application and/or discharge of any process wastewater outside the application period in the nutrient management plan or above agronomic rates shall constitute a violation of the terms and conditions of this permit. (N3 Consulting)

AND

As currently written, a CAFO violates its Permit if it land applies more frequently than, at a concentration in excess of, or at times not specified in, its nutrient management plan. The Permit should allow some leniency for CAFOs that inadvertently apply at a time or in a manner that deviates from the requirements set out in their NMPs. Even under the best of conditions, there may

be times when a CAFO cannot apply in exact accordance with its NMP, simply because of changing weather patterns or imprecise soil testing. Ecology should modify section S3(B) to make a violation of the Permit discretionary and only applicable after repeated offenses or where there is evidence of intentional deviations from the NMP. (DWT)

AND

This won't work. Weather gets in the way. Also, the plan cannot anticipate and memorialize every permutation. Nutrient levels in soil, manure will affect. Should make a distinction between application and non-application periods. Must have some flexibility for former but not latter. (Boggs)

AND

Nutrient management plan compliance – there's weather related events. This is very important. For instance if you get two inches of rainfall, it's not advisable to apply nutrients at that time, so may be you'd skip one cutting where your farm plan says you must apply after every cutting or crop uptake. And so you skip one and put a little extra on the next cutting. If I read this correctly, you constitute a violation and you could be subject to a \$10,000 fine. And I think that's very erroneous that that would be thrown on an individual. (Heeringer)

AND

This is where it talks about if you do have a farm plan, and your land application or discharge of any process water is more frequently than the plan that you could be in violation or this would constitute a violation. Again, we disagree with this very strict definition. We know that changes are made during the growing season and plans can't be updated fast enough. (Chris Clark)

Response: This reply is under S3.A3(b)(i) on page 32)

Delete: "The land application and/or discharge of any process wastewater more frequently than, at a concentration in excess of, or at times not specified in the nutrient management plan shall constitute a violation of the terms and conditions of this permit." This is already covered under the general enforcement section. (Simplot)

Response: It is only covered generally in other sections of the permit. We believe that being very clear in this section will help CAFOs understand exactly what is expected of them. We believe it is better to be upfront and duplicative, rather than attempt to simplify and cause a misunderstanding.

S3.D2. Plan Updates

What is the point of requiring a facility to update its Nutrient Management Plan if the certification agency does not have to approve and certify the change. If the landowners is required to update the plan the agency must reciprocate by approve and certifying the change. (Okanogan CD)

Response: We agree with the commenter and approval the NMP plans is a requirement of the permit. The 2nd Circuit Court requires NMP oversight by a regulatory agency “in fact”. The review verifies the plans effectively prevent water pollution, and a submittal of the updates satisfies the courts decision that they be available for public review.

The Permit requires CAFOs to develop and implement an updated NMP if it reduces or changes the field areas specified in the plan. CAFOs should not be required to formally update their NMP for changes to the field areas they use for application. These field areas can change each year for a variety of reasons—most of them outside the control of the CAFO. For example, as presently written, the Permit would require a CAFO to update and submit a modified plan each time it uses a slightly smaller field as a substitute for a field that may not require application. Requiring a CAFO to submit a plan for approval each time a change to a smaller field is made would be costly for the CAFO and the regulatory agencies. CAFOs are already under enormous pressure to identify fields that can be used for the land application of their nutrients. They do not need to be concerned with minor fluctuations in their overall net nutrient capacity. The Permit should therefore be modified to require CAFOs to update their Permits only when there is a “significant reduction” in overall net nutrient capacity of the land application area. (DWT)

AND

The CAFO reduces or change the field areas specified in the nutrient management plan, that again is something that changes quite frequently within the timing of a year, and we don't have enough time to re-write plans. We'd like to see that out of, defined as out of balance with dairy nutrient or CAFO nutrient management plan. (Chris Clark)

Response: We disagree. The amount of land used for land application is essential in determining agronomic rate. The application of manure at agronomic rate is the very foundation of the permit, and is vital to protecting surface and ground water quality. Reducing the amount of land used for land application may mean that manure is no longer being applied an agronomic rate. If a CAFO wants to reduce the amount of land, it must show in its nutrient management plan that it is still applying at agronomic rates. This can be accomplished by either having a flexible nutrient management plan, or by updating the nutrient management plan. A change in the fields used is very similar. If the new field has less nutrient capacity, the CAFO may be applying at non-agronomic rates. The only way to ensure a change in fields still results in agronomic applications is to have that field in the nutrient management plan. This, too, can be accomplished by either having a flexible nutrient management plan, or by updating the nutrient management plan. For example, a nutrient management plan could detail

which fields, or combination of fields will results in agronomic applications. The EPA regulations, and the permit, require a “field-specific assessment. The acreage and capacity for applications will vary depending on soil types and crops. Both elements need to be addressed in the nutrient management plan to ensure that adequate capacity exists in the operation. The rule of thumb is any changes in land base or animal numbers over 10 percent would require and update to the Nutrient Management Plan. In most cases the nutrient management plans have the flexibility to address seasonal changes in fields, crops, and applications

S3.C2 [Now S3.D2] This is confusing, please clarify. All acreage manure may potentially be applied to should be identified in the plan and appropriate field risk assessments should be completed on each field. (Franklin CD)

Response: Yes, we agree. The one addition item we have concerns WSDA review of modified plans. If the CAFO just changes the field areas in the nutrient management plan without reducing the overall net nutrient capacity of the land application area, WSDA does not have to approve the updated nutrient management plan.

S3.E Nutrient Management Plan Availability

(For clarity of this section, comments have been put in categories, and comments submitted after the 2nd Circuit Court’s decision has been marked)

Nutrient management plans should be kept confidential:

Any CAFO record should be considered as the private property of the landowner. If the Department of AG cannot keep records private the records should not be required and kept at the Department of AG. (WSU)

AND

The nutrient management plans when requested should only be reviewed on the site. The Plans should not be copied or taken off the site, in order to protect the privacy and confidential business information of the operator. (K. Dunlap)

AND

A producer’s nutrient mgmt. plan should not be a public record. This will cause 2nd party lawsuits to occur. There is no benefit of it being a public record only in the eyes of (hungry attorneys). (Veiga)

AND

The Nutrient Management plans require on farm and real time interpretation and are therefore totally unsuitable for public record. They should not be held by DOE. (N3 Consulting)

AND

Competition/Confidentiality - I know how much time and money we have put into the development of some of the elements of our dairy operation. Built in 2002, we have a state of the art facility - over \$14 million dollars invested. We created about 50 new jobs, which are above minimum scale, have some benefits, and are YEAR AROUND jobs. Every detail of our operations plan, nutrient management plan, and dairy operations are highly confidential and THIS MUST BE PROTECTED. (Turner)

AND

I believe that business information contained in a farm plan should be private and not available for public viewing. (Hopp)

AND

Here is the necessary section for slight amendement - we cannot allow public access to our very sensitive nutrient management plans for all the reasons so well stated at the hearing. If you don't want to end up in either a compliance problem industry wide, or litigation, this must be amended to insure both your agency's appropriate access to, and use of the plans, without needless public access. Real harm can and in my opinion would be done to all elements of the industry on this key point if changes are not made to INSURE privacy and competative or proprietary information in these plans. (Turner)

AND

And the last thing is the whole Public Record section, we need confidentially in this. There's people out there looking for frivolous mistakes I would say, and right away they want to throw them back at us. And must often they're not aware of what's going on. And when you put a farm plan to public record, you have people just pouring over them looking for problems. (Heeringer)

AND

You are a government agency making sure we don't contaminate our water or soil. This is fine but stay out of our personal records. If you want the personal info then you go out and operate a realistic business like ours and report back to us. See how you like it. It would then be a two-way street. (King)

AND

How do you justify requiring someone to provide business information to yourselves, which in turn would become public information, which then could be picked up by any of the activist organizations and could be used to sue the very operation which was required to provide said information by your department? What would be your role in protecting the livestock operator from harassment by activist organizations? How much of this protection burden would your department be willing to shoulder? (Mercer)

AND

We have very competent inspectors and if there's a minor discharge, it amounts to basically nothing could be termed as impact. What gives him the opportunity to take care of that and not submit somebody's farm plan as a public record? Because if they have a sufficient, significant discharge, that farm plan is or will be submitted to the Department and therefore it would be public record. The farm plan should be kept at home as much as possible. (Hayes)

AND

As I work for an integrator who is responsible for providing a safe and secure food source for the public, any information that can be made public, I believe can be a risk. We're in an age of bio-terrorism and I believe that many of these producers here need to have, we need to have some language in here to make sure that farm plans, private information is, in fact, kept private. We also have a Bio-terrorism act. I don't know if anybody's compared that language to the language required in this federal guideline, but it's a very strong concern and I just want to bring that to your attention. (Moose)

AND

Another problem we have is the Open Public Records policy. One suggestion was made to develop some kind of guidelines that can be agreed on ahead of time – what is going to be opened in public records, instead of a case-by-case basis. Another point to make is the Department has stated it would defend farmers against frivolous lawsuits. If a farmer is following the terms of the permit, then the Agency must defend the producer. We want to make sure if we have the permit, the Agency will stand behind us. (Wesen)

AND

Another area that I'm quite concerned with also which has been mentioned about the Public Information Act. It's not a, it's very difficult on the operator when all records, many of the records become open to the public. If you want our trust from the agricultural community, then we also good protection working with the entities. (SCAAB)

AND

Fundamentally farm plan should be a farmer's private plan. The Open Public Records Act should not apply. We understand that it does. The Department is boxed on this one, but it needs changed. So I'm lobbying at the microphone for the Department to support legislative changes to the Open Public Records Act to allow the farm plans whether they are salmon plan, a nutrient management plan, a critical areas plan, or any other kind of farm plan developed by a consultant, conservation district, or a farmer to solve environmental problems should be confidential. And fifth is a warning; and we've given this warning before. If the Open Public Record Act section of this permit causes frivolous lawsuits to start occurring because lawyers decide to go after producers based on network, public information that should not be public information, there aren't enough horses in the entire state government to drag our farmers into co-operating with this permit. I wanted to make sure that was on the record, because we've said it privately. And if the lawyers start suing farmers for cash not based on actual environmental problems, you can't drag us back to the table. (Gordon)

AND

It's extremely important to me to maintain confidentiality in all my records, not just my financial records – but every record that I maintain on my property, in my business. So I strongly encourage the Department to allow us to maintain all plans and any thing else that can be used to interpret our business on our farm. I don't see any particular reason for the Department to have those records and to have the plans. I don't believe anybody from the Department's going to read those plans unless a problem occurs. When a problem occurs, they'll welcome to come and take a look at them on my facility where they will remain. I think that is absolutely necessary for me to maintain a profitable, strong business. (DeGroat)

AND

It has to be required to have Attorney General opinion on the status of the records and confidentially. Because I think it's just ruthless, cruel, and irrelevant for you folks to pass something like this on your own interpretation to turn to trial attorneys. I know they're salivating at this moment. (DeRuyter)

AND

I am in general agreement with the proposed permitting process as outlined in the material I have read and heard at the hearings. I am very concerned with the one aspect of the permitting process, this is that the process should be confidential, not part of public records. My concern is on several levels. First, I believe that this could possibly give information about the location of a specific farm to groups should as A.L.F. (Animal Liberation Front). I believe that this could lead to very disastrous conclusions. Second, this could lead to legal challenges, which no one wants. Thirdly, and probably most important, I believe this is a Homeland Security Issue. As a processor of chicken, I have been advised that we need to plan for problems dealing with Homeland Security. Keeping the names and locations of our farms confidential is a vital part of our plan. (Draper Valley Farms)

AND

It does say on I believe page 14 it says there's a requirement that if you are covered under permit, the you submit a copy of your farm plan to Ecology. And I kind of wonder about that. Do I understand if it's submitted to an agency then it's part of the public record. So in the dairy record, we've had the [inaudible] people that once it becomes agency information, it's public and when they look at – for example, my farm plan and how much manure I pump here and pump there – any one can exaggerate that and make it look 'odd.' I guess I just don't understand why, by virtue of the fact, you milk 701 cows, then your plan including soil test and every thing needs to be going to an agency that is therefore is a public record. (Ziehnert)

AND

I APPOSE wording in this permit allowing any public access to my private business information. As long as I comply to regulations set forth in this drafted permit I have the right to privacy. (Welsh)

AND

I am deeply concerned about the privacy of the business information in my farm plan. 20 years ago this wouldn't have been a big deal, but in today's socio-political environment it presents great risk. Two very active and well funded terrorist groups called "Earth Liberation Front" (ELF) and "People for the Ethical Treatment of Animals" (PETA) are very active in the Pacific Northwest and allowing them access to private farm information could not only be detrimental to the health and welfare of the animals we grow, it could put our own lives in danger. Even worse, these terrorist groups have ties to the Evergreen State College where many of DOE's current employees did their undergraduate work. So even spreading this confidential information around the Department of Ecology could present grave risk to our state's farmers. (Crocker)

AND

The Permit requires Ecology to request a CAFO's NMP if it has evidence of environmental impacts. A CAFO's NMP is a management tool that is unique to its operation and processes. The disclosure of an NMP—as a public record—could adversely affect the CAFO's competitive position within its industry and expose it to unwarranted criticism from third parties. Disclosure of the NMP could also potentially expose the CAFO to many unnecessary and frivolous lawsuits by groups seeking to profit from a CAFO's mistakes. A CAFO should not be required to submit its NMP to Ecology unless the agency can confirm evidence of a significant environmental impact and identify reasons why an on-site review of the NMP would be insufficient for its purposes. We strongly urge Ecology to revise section S3(D) accordingly. (DWT)

AND

Nutrient management plans should be publicly available:

The Ninth Circuit's decision in *Environmental Defense Center v. EPA*, 319 F.3d 398, 427-28 (9th Cir. 2003), holding that public hearing on notices of intent for coverage under a general NPDES permit must be held, requires that NMPs be part of the permit application. The NMPs are undoubtedly a critical component of the proposed permits. In fact, the NMPs are the primary mechanism to ensure CWA compliance. Without them available for public review and public hearing before issuance of a permit, whether general or individual, DOE will be in violation of the Ninth Circuit's ruling. As drafted, the NMP only becomes available for public review if DOE requests a copy of the NMP on the basis of evidence of environmental impacts. The NMP would then become a public record. This process contravenes the CWA because it essentially excludes the public from commenting on an NPDES permit. Settlement of a recent challenge to the Oregon CAFO rules resulted in NMPs being subject to public review. DOE should use the Oregon settlement as a starting point, not an end point, for its general permit. (WELC, et al)

AND

Most significantly, the Draft Permit's failure to require CAFOs to submit current copies of Nutrient Management Plans to Ecology (and thus to the public) is wholly unacceptable. (S3.D, S4.A.1) The Draft Permit purports to require covered operations to comply at all time with all terms of the NMP. (S3.B) However, the Draft Permit fails to explain how Ecology or the public can determine noncompliance -- much less enforce the terms of an NMP (upon which the Permit itself is utterly reliant (see, S1.B)) -- when its terms are unknown. Submission of the NMP should be required as part of the permit application, and any violation of the NMP's terms should constitute a violation of the permit. (Smith & Lowney PLLC)

AND

Change "will" to "may":

The 2nd sentence listed above should be amended to read "the Department may request a current copy of the nutrient management plan from the CAFO". (N3 Consulting)

AND

Change "Department will request" to "Department may request." (Simplot)

AND

The word "will" in the second sentence must be changed to read "may". We want to make sure the Department has to come to us and get it and then we'll have the two weeks to come up with a plan after that. (Wesen)

AND

“If the Department has evidence of environmental impact from a CAFO, the Department will (cut the word “will”) request a current copy of the nutrient management plan from the CAFO.” I’m requesting that the “will” be changed to “may”. (Hayes)

AND

The second sentence contains the word “will”, should be changed to “may”. The entire sentence reads “If the Department has evidence of environmental impacts from a CAFO, the Department will request a copy, a current copy of the nutrient management plan from the CAFO.” That is by state law allowed to be discretionary and I believe that the word “may” is the exact same word that’s used in the Open Public Records language; and so by changing that will to “may”, you more closely match the current state law. It also allows the Department the discretion if you get what we consider and you all may consider at some point a frivolous, irrational complaint that a fly caused an environmental impact. (Gordon)

AND

The issue of greatest concern is what portion of the nutrient management plan will be publicly disclosable and not protected as proprietary information. The permit language indicates the plan will be maintained on-site and if the Department has evidence of environmental impact, the Department “will request a copy of the plan.” Clearly the language should be permissive, we would suggest inserting “may” for “will.” The Department needs the flexibility to call for a plan as necessary, but should not call all plans under all circumstances. (Washington Farm Bureau)

AND

We ask that the agency change the word “will” to “may” in the second sentence. (DWT)

AND

The permit language in Part S3.D. limits the legal authority under which the Department can request information from a facility that is regulated under the approved NPDES program. The language should be revised as follows: “A current nutrient management plan will be maintained on-site and made available upon request by the Department. The permittee must identify all confidential business information within the nutrient management plan in accordance with RCW 43.21A.160. The Department will determine if this information is confidential business information according to RCW 43.21A.160.” (EPA)

AND

I am glad the initial draft was modified to eliminate the requirement for public access to nutrient management plans and required records. Such a provision would have been very detrimental to our industry, both by forcing disclosure of proprietary information and by exposing our industry to frivolous lawsuits by those who oppose any farm practices not used by their forefathers. However, I still have concerns about the requirement that the Department will make available a copy of the plan and related records, based on a "valid" request. The draft does not adequately define what constitutes

a "valid" request. A valid request should only be based on evidence of an environmental concern which has been investigated by the department and found to be valid. The plans and records are available to the Department as well as the Department of Agriculture and it is essential that the nutrient management plans and the related records remain private, unless the Department can establish an overwhelming need by the public to know and the producer is not harmed thereby. (J & J Bosma Dairy)

Response: Ecology has struggled with this issue in the permit advisory committee and during the public comment period. However, the 2nd Circuit Court decision finalized this debate. The court ruled that to be in compliance with the public participation requirement of the CWA, all CAFOs must submit a copy of their NMP with a complete permit application. Working together with WSDA, CDs and industry we have developed an outline of NMP requirements that must be submitted with a complete application. The goal is to receive only information that is legitimately required for public review omitting any truly confidential business information.

Need to define "confidential business information":

We as dairyman need to know what is going to be part of the "Open Public Records". It is our strong position that Farm Plans and business information they contain is and should remain private. This information could be used by competitors and others that would like to do us harm. Frivolous lawsuits are the first thing that comes to mind here. (Jim Werkhoven)

AND

Under the same confidentiality business information, there needs to be some understanding on what confidential business information is. At this point there is nothing, it's up to the Department to decide that. We'd like a MOU or some information to designate that. (Hayes)

AND

This is an issue that we've worked on and it's a challenge -- but for the record, this permit implies that the Department shall conduct a case-by-case determination of what is private, confidential, or proprietary business information and that's unacceptable. We had strongly encouraged the Department to consider dialog and development of an agreement or MOU with the industry that the Department of Agriculture can concur with, concerning what types of specific business information will be protected by the agencies as proprietary, confidential, or private business information. There is precedence for MOU. Currently Department of Ecology has a MOU with the grass seed industry on burning straw stubble. I haven't studied that MOU. But that is a MOU agreement that establishes policy between the industry and the agency on an area of contention not unlike this permit, and our private, confidential business information. (Gordon)

AND

I can get a better understanding about the Departmental requirements and the law and I'm going to reiterate my suggestion which is if you feel compelled by state law to do it in this way, that we submit to you in bag and then that you either favor us or you drop the hammer on us depending on you feel that day, maybe an alternative is to go to the A.G., the attorney general, and get a ruling. Jay Gordon talked about the MOU thing with the grass seed people. Another great example of that is when you submit information to EPA on the federal to approve a pesticide or cleaning agent or another product, there's a whole bunch of stuff you have to submit that's very proprietary that's never disclosed. So there's precedent not just at the state level, but at the federal level. (Turner)

AND

With regard to the confidential business information, we request that Ecology identify what type of business information the agency is willing to protect. The determination as to which part of an NMP is confidential should not be made on a case-by-case basis, but rather applied to each CAFO on a consistent basis. (DWT)

Response: Confidential business information can be kept confidential in accordance with state law. RCW 43.21A.160 states: "Whenever any records or other information furnished under the authority of this chapter to the director, the department, or any division of the department, relate to the processes of production unique to the owner or operator thereof, or may affect adversely the competitive position of such owner or operator if released to the public or to a competitor, the owner or operator of such processes or production may so certify, and request that such information or records be made available only for the confidential use of the director, the department, or the appropriate division of the department. The director shall give consideration to the request, and if such action would not be detrimental to the public interest and is otherwise within accord with the policies and purposes of this chapter, may grant the same." Ecology will make its confidential business information decisions according to the process outlined in this law.

Other comments on this section:

Second sentence partially reads: " the Department will request a current copy of the nutrient management plan from the CAFO." Current state law does not allow the department to exclude information from plans by virtue of the Open Public Records Act. This opens up the farmer to providing potentially confidential information to the public. Even though the permit reads, later on in S3D, that the department may exclude confidential business information, current state law makes this impossible. The department should make efforts to support a change in the state law to exclude confidential business information. (N3 Consulting)

Response: We disagree. Current state law does allow the department to exclude confidential business information from documents that is releases to the public. See above comment.

S4. Record Keeping, Reporting, and Environmental Monitoring

S4.A. Record Keeping

What if there is a study by a Ground Water Management Area, USGS, University, CD or for watershed planning process? How do we adaptively manage conservation planning process without access? (Boggs)

Response: Only the WSDA and Ecology have access to the records kept under S4.A. The CAFO may share these documents on a voluntary basis to assist other entities, such as a University or CD.

The records maintained by the CAFO should only have to be available to Ecology until responsibility of the permit and its enforcement is transferred to Agriculture. (Okanogan CD)

Response: In 2003, the Legislature transferred the CAFO program from Ecology to the WSDA. Under the legislation, and an memorandum of understanding, WSDA does routine inspections and compliance while Ecology writes and administers the general permit..

Needless paperwork is a handicap to any business. More and more paperwork is added to our workload and it needs to be reduced. Much of the record keeping requested for this “Permit” is not needed in my opinion. The economic conditions at present force us to work at least 12 hours daily for the needed work. Paperwork added to this makes too many 18 hour days per week. (Courtney Farms)

Response: Most of the record keeping requirements are from the federal regulations. Records can show trends and are useful in making management decisions.

We take great exception to the record keeping provisions of the permit. First, these records become public information. We as producers feel that all the information can and will be used against us by groups that would try to eliminate cattle grazing and the livestock industry. We believe that any information be confidential. If the law does not allow for that in Washington, then eliminate the record keeping inside the permit, or report this to the legislature and ask for a law change to protect the information required by a CAFO permit before implementation of the permit. (McCart)

Response: Please see S3.E for more discussion on public disclosure since the 2nd Circuit Court Ruling . It is essential that the CAFO keep records to show trends and track historic problems. Inspectors rely on these records to do their jobs. The records are needed to protect water quality no matter what the Legislature has decided is public records or not. The Legislature is aware of this issue.

S4.A1

S4.A1(a) Again the records maintained by the CAFO should only have to be available to Ecology until responsibility of the permit and its enforcement is transferred to Agriculture. (Okanogan CD)

Response: Please see the above comment.

S4.A1(a) It says “A copy of the CAFO’s current nutrient management plan must be maintained on-site and made available on-site to the Department of Ecology and the Washington State Department of Agriculture upon request.” I would hope that that remains as it is exactly written -- only where the Department of Ecology and the Department of Agriculture. (Kaysen)

Response: Please see S3.E for more discussion on public disclosure since the 2nd Circuit Court Ruling. We did not make any changes to S4.A1(a).

S4.A1b. Wash Dept of Health needs to know immediately where there are shellfish resources at risk. (Boggs)

Response: We agree. When there is a discharge (or application outside the periods identified in the nutrient management plan) that could affect water quality, WSDA is to contact the local health department. When appropriate, WSDA will also notify the Washington State Department of Health.

S4.A2

S4.A2(a)(ii) Talking about the depth meter, again that needs to be changed to be a reasonable depth reading on something that can be measured, or the time period needs to be less frequently to make it less onerous on the producer. (Chris Clark)

Response: Please see previous response on this issue in S1.D2. The frequency is set by the EPA in the federal regulations and is the minimum standard.

S4.A2(a)(iv) If the producer has a plan for the disposal of dead animals in the Nutrient Management Plan is this sufficient? It is unclear what additional documentation will be required? Please Clarify. (Franklin CD)

Response: As long as the plan shows that the CAFO meets the requirements of S1.D4, it is sufficient for this permit. S1.D4 requires that “mortalities must not be disposed of in any liquid manure or process wastewater system, and must be handled in such a way as to prevent the discharge of pollutants....” See Ecology Guidance Publication (Section 6 of Substitute Senate Bill 5602), No. 05-07-034 issued August 1, 2005 “On-Farm Composting of Livestock Mortalities”. There are other state and local requirements for mortality handling as well

S4.A2(b)(x) Manure application equipment inspection. I see no reason for this requirement. Because all machinery used for application is relatively high powered, for safety reasons it is inspected daily prior to use. Most problems are immediately detectable to an experienced operator. Since all dates of application are required in other sections, this is in effect redundant. It is nonsense that an operator will try and use damaged or inoperable equipment - it just won't work and could be a danger to the operator. (Turner)

Response: S4.A2(b)(x) is a federal requirement set by EPA in the CAFO regulations and is a minimum standard. We agree that most experienced operators are already inspecting manure application equipment for both safety reasons and to protect water quality. This permit requires that everyone, not just the experienced and conscientious CAFO do those inspections. It also requires that these inspections be recorded so both the state inspector and the public know that this important piece of protecting water quality is being done by everyone.

S4.B. Reporting

My other concern is the sheer volume of records and reports which are required. The requirement to record and maintain records of daily and weekly inspections as well as the routine application records involving land owned or controlled by the CAFO and subject to annual required soil testing, is unnecessary and do not add to the program. Those who are unscrupulous, will manufacture the records without actual performance, while the vast majority of conscientious managers will routinely do what is required to properly manage the process without being prompted by an overzealous and untrusting government agency. I think the Department should take a hard look at the record keeping requirements of this program, which are onerous, costly and burdensome, and which will drive the dairy industry out of Washington. (J & J Bosma Dairy)

Response: We understand that the keeping and retaining the records required by the permit does take valuable time. Most of the record keeping and reporting requirements are required by the federal rule (annual soil testing, discussed in S4.C is the major exception). We disagree that keeping and retaining the records does not add to the program. We agree that most conscientious CAFOs are already doing what is required to properly manage their facilities. This permit requires that everyone, not just the conscientious CAFOs, do this record keeping. The record keeping allows both the state inspector and the public know that the CAFO is protecting water quality.

The tougher issue to address is what portion, if any, of the records should be viewable by the public. In light of very real business pressures and bio-terror/homeland security issues, we believe all of the information collected needs to be protected. Disclosure of such information required by the permit at page 15 (S4) is too much to ask from producers. The Department must modify the provisions of page 14 (D) to afford the maximum protection to producers. Industry aggregate information and non-specific information is all that should be publicly available. The regulatory agencies will have access to site specific information to provide adequate environmental protection. Additionally, in light of the reporting requirements at page 16 (B) and environmental monitoring at page 17 (C), the need to disclose farm specific information to the public is questionable. (Washington Farm Bureau)

Response: The records in S4.A are not viewable by the public. The reports submitted in S4.B, and any nutrient management plan submitted as per S3.E, are public records. Please see comments and responses for S3.E for a more detailed discussion. See Ecology Guidance Publication (Section 6 of Substitute Senate Bill 5602), No. 05-07-034 issued August 1, 2005 “On-Farm Composting of Livestock Mortalities”.

S4.B1

Most importantly, CAFOs must immediately, and in no case more than one hour from the beginning of the spill or discharge (not 24 hours as stated in the draft permit), report any waste spills or other discharges to Ecology (and DOA) in order to ensure timely corrective action and public notification in order to mitigate harm to aquatic life and threats to public health. (WELC, et al)

Response: We understand your concern. The state regulations refer to a 24-hour notification. We feel this is adequate, but we added the phrase “as soon as possible” to the permit to encourage CAFOs to call earlier.

In addition to the information required in S4.B.1, the Permit should require all CAFOs to sample and report effluent constituents and concentrations in any discharges of wastes resulting from overflows, upsets, or bypass events. (Smith & Lowney PLLC)

Response: The focus on the permit is to prevent, contain, and immediately fix discharges. Monitoring waste water in these situations seems to have little value. CAFOs are required to do annual manure testing. If a discharge occurs the nutrients that were discharged would most likely reflect the results of that yearly test.

S4.B3

As a certified professional agronomist, I produce annual reports for a number of other permitted entities working with ag nutrients, food processing waste, etc. They are EXPENSIVE to produce, especially if they contain all the requirements in the current draft. I think for dairies, for example, you ought to be able to skip down to point g alone, and if that condition is met and certified by the producer and NRCS, NO ANNUAL REPORT WILL BE REQUIRED. Point h. is a real bone of contention...this is duplicitous for dairies in our current regulatory environment...Let NRCS do their thing with the nutrient management plan. As it now stands, I will be forced to generate 3 annual reports with different formats...One for the County (large CAFO's operate under an annual renewal special use permit), One for NRCS, and now one for this set of regs...this is what I call a waste of resources... (Turner)

Response: We disagree. The annual report is an essential piece of information. It is also a requirement under EPA's federal rules. The annual report provides the state with information showing the CAFOs, both individually and as a sector, are doing their part to protect water quality. Since all of the information in the annual report is either in the nutrient management plan or in the records kept by the CAFO in S4.A, we believe the cost should not be excessive. Both the WSDA and Ecology are working

on a form for the annual report that is easy to understand. S4.B3h (soil monitoring) will be discussed more thoroughly in the S4.C of this document. The results of the soil monitoring needs to be collected by the WSDA so they can make informed decisions on management effectiveness. The data can also be used when making decisions for the next CAFO permit in five years.

S4.B3(g). There's a statement in here that I believe this needs to be taken out. It asks to record whether a producer's plan was developed by a certified nutrient management planner. That's something that I thought was taken out of the permit. (Chris Clark)

Response: The requirement that nutrient management plans be developed by a certified planner was removed from the EPA regulation. However, the federal regulations still require that the annual report indicate if the nutrient management plan was written by a certified planner. EPA wants this information so it can see how many CAFOs use a certified planner (even though it is not a requirement). In Washington's permit, a certified planner is not required, but the 'permitting authority' must approve all nutrient management plans.

S4.C. Environmental Monitoring

S4.C2(d) We question the wisdom of requiring a CAFO to annually submit its soil sampling results to the agency. These tests are variable and imprecise. They are meant to be a management tool for the CAFO, not a regulatory benchmark. Making these results part of the public domain will expose the CAFO to unwarranted scrutiny from third parties that might use them inappropriately. (DWT)

Response: These results are essential for the state to determine which facilities may pose a high risk to ground water. They can also show if best management practices are working. See responses below for more details. We agree that the tests are variable, which is exactly why we removed the regulatory benchmark from previous drafts of the permit.

The option to use ground water monitoring is included here. How well correlated are ground water and soil monitoring? Should ground water monitoring be used exclusively? Why are medium-sized CAFOs exempt from this requirement? (North Sound Baykeeper)

Response: Ground water and soil monitoring were considered for this permit. The permit states that discharges from CAFO may not reduce existing ground water quality, except under very limited circumstances (S1.B). Residual soil nitrate levels, after harvest, are related to the risk of nitrate leaching to the ground water and potentially reducing ground water quality. However, ground water monitoring does not allow you to find contamination until the ground water has been impacted. Soil monitoring was chosen, instead of ground water monitoring, as a lower cost alternative that will indicate the risk of contaminant leaching. An option to use direct ground water monitoring to demonstrate compliance has been left up to the facility operator. In order to minimize the costs to smaller businesses, medium and designated CAFOs were specifically exempted from the annual testing requirement. Under, the NRCS practice standard

for field applications of manure, regular soil testing is required in order to make good decisions from one year to the next. The frequency varies somewhat according to rainfall or irrigation levels and crop types.

All CAFOs should be required to monitor groundwater to prevent contamination of groundwater that is hydrologically connected to surface water. “Hydrologic connection” should be defined in the CAFO general permit and must be consistent with EPA Region 10's definition, which states that “hydrologic connection means the flow between surface impoundments and surface waters by means of a subsurface conveyance. EPA General Permit No. IDG010000 (May 27, 1997). Courts have found that discharging into groundwater that is hydrologically connected to a regulated surface waterway constitutes a discharge into “navigable water” for purposes of the CWA. (WELC, et al)

AND

I've worked with Jack on this for many years and I am glad to see that we do have soil testing as the means for monitoring this program. I want to make a real strong statement to the fact that we do not want ground water testing. This is already a burden to many of the poultry growers and dairy growers within the state. And I believe ground water testing would put it over the edge and make this almost an impossible plan for us. (Moose)

AND

In this last draft, you've kept ground water monitoring out. I would encourage you to keep it out. Although I'm sure you may have pressure from other people who feel differently. The science on that is very imprecise and experience has shown in dairies that have been asked to do that already, that despite the expense put into it really hasn't told them a lot. (Linde)

AND

Groundwater quality should be tested on a regular basis to ensure compliance with the groundwater effluent limit. It is illogical to impose a groundwater effluent limitation, but not require some sort of groundwater monitoring to ensure that this standard is being met. In addition, baseline ground water monitoring should be required before a new facility is constructed or granted coverage under the CAFO general permit. There may be some instances where an aquifer is so contaminated that it would be lethal to public health to allow a new CAFO facility to further degrade the ground water. Because many residents of Washington rely on groundwater to supply their domestic needs, a full scale groundwater monitoring program is needed to protect the health of these residents. Animal waste contains non-nutrient components such as bacteria, viruses, antibiotics, metals, and salts. In fact, researchers have found that the bacterial indicator levels in hog lagoon effluents are much higher than permissible levels established for municipal wastewater effluents discharged to land or water. EPA has noted that, “bacteria and viruses such as E. coli, salmonella, and giardia found in dairy waste can contaminate drinking water, cause acute gastroenteritis and fever, kidney failure, and even death.” Scientists have concluded that water contaminated by animal manure significantly contributes to human diseases, particularly from water-borne infections. Researchers in North Carolina have found high fecal coliform counts in waterways even more than 60 days after a waste

spill from a CAFO. Furthermore, manure can contain trace elements of arsenic, copper, selenium, zinc, cadmium, molybdenum, nickel, lead, iron, manganese, aluminum, and boron; many of these pollutants are added to animal feed as growth stimulants and others are found in pesticides applied to the animals as insect repellent. CAFO waste also contains substantial quantities of antibiotics. Washington's general CAFO permit needs to require a full-scale groundwater monitoring program to protect the health of Washingtonians from this litany of ill effects. (WELC, et al)

Response: The compliance standard for CAFOs is that they may not reduce ground water quality. Soil monitoring was chosen as an indicator of risk to ground water quality with a much lower monitoring cost than ground water monitoring. Soil monitoring may also identify a potential pollution problem quicker than ground water monitoring. We believe it is important, and necessary under state law, to protect all ground water, including that ground water that is hydrologically connected to surface water. However, we believe that proper management of the CAFO, and either soil or groundwater monitoring, is sufficient.

The monitoring and reporting requirements should be more stringent for CAFOs. At a minimum, the waste, soil at land application areas, groundwater near storage facilities, and surface waters that pass through or adjoin the CAFO or off-site land application areas must be monitored. This monitoring and reporting will provide a means to ensure that the CAFO is complying with all permit conditions, including the NMP. Monitoring results should be submitted to the DOE on a quarterly basis, as is commonly done in many NPDES permits. In addition, the permittee must provide all monitoring records, visual inspection logs, land application records, soil tests, animal waste analyses, and other facility information to state authorities at least quarterly. Moreover, this information must be made publicly available. The onus is on Ecology to ensure that these CAFOs are complying with their permits. A facility's compliance history should not have to be demonstrated by the litany of citizen complaints filed by neighbors who want to protect their property, health and rural ways of life. (WELC, et al)

Response: There are a number of monitoring and reporting requirements in the permit, but they are not as broad as the commenter recommends. Monitoring and reporting is submitted annually in the permit. We believe that this frequency of submitting information is sufficient for the state to track compliance without being overly burdensome on the CAFO. For example, we have written in the permit the requirement that all permitted CAFOs develop a method to estimate the levels of their manure lagoons. A volume balance requirement allows for detection of leaks before contamination rather than after. Information that the state receives, except for confidential business information as described in RCW 43.21A.160, is publicly available. If the state believes that this general permit is not protecting water quality at a site, the state can issue an individual permit with additional monitoring or reporting requirements. The purpose of the permit is to eliminate and minimize accidental discharges; we believe the reporting and soil sampling required by the permit will be sufficient to meet this purpose.

The undersigned applaud Ecology's decision to require either soil testing or groundwater monitoring, as this is a big step towards ensuring that CAFOs do not exacerbate the groundwater

contamination that has already occurred. However, all CAFOs utilizing lagoons, waste storage ponds, or manure storage tanks should be required to install at least one up-gradient and two down-gradient monitoring wells at a depth which the agency considers appropriate, based on site-specific ground water levels and lagoon depth, around the waste storage facility in order to monitor for seepage of waste from the lagoon. Monitoring parameters must include ammonia, nitrate, fecal coliform, total coliform, total chlorides, and total dissolved solids (TDS). Monitoring results must be reviewed regularly by facility staff. CAFOs in vulnerable areas must conduct additional groundwater monitoring. (WELC, et al)

AND

Similarly, CAFOs must be required to monitor the groundwater beneath the production area as well as groundwater beneath the land application area on at least a bi-monthly basis and submit these results to the permitting authority. More frequent groundwater sampling must be performed in order to ensure that groundwater, surface water, and drinking water supplies are protected. Groundwater monitoring must be a condition in a CAFO's permit, and as such, CAFOs must be required to submit the results of groundwater monitoring to the permitting authority, as is the typical requirement for NPDES permits. No CAFOs should be exempt from regular groundwater monitoring, which is necessary to provide long-term protection to our surface waters. (WELC, et al)

Response: The environmental monitoring in the CAFO general permit is designed to identify facilities that represent a high risk to the environment at as low a cost to the facility as possible. The required monitoring that is suggested in the comment would be prohibitively expensive and would require an individual permit for each facility (...monitoring wells at a depth which the agency considers appropriate...). The proposed environmental monitoring will allow the state to identify high risk facilities and require additional monitoring where appropriate. Additional monitoring, where the need is identified, will be required through a superceding order to a general permit or by requiring the facility to apply for an individual permit. As stated in S5 of the permit, all new or expanded waste storage facilities constructed after the issuance date of this permit must be sited, designed and constructed consistent with NRCS conservation practice standard 313 for Washington titled "Waste Storage Facility." New lagoon liners must also have "as-built" post construction documents signed and stamped by a licensed professional engineer, who made on-site construction inspections, verifying that liners were constructed as designed.

Water quality monitoring must be performed in drainage ditches and in any stream, river, or lake that borders the facility or application lot upstream and downstream of the facility or lot borders. Monitoring samples must be analyzed for at least the following parameters: concentrations of total nitrogen, total phosphorus, total zinc, total copper, pH, ammonia, fecal coliform, and other pollutants, depending on the type of CAFO and type of hormones and antibiotics used. Monitoring must occur within 48 hours of manure applications, 25% of the time; after major storm events that occur within 48 hours of land application; and quarterly. Monitoring results must be reviewed regularly by facility staff. CAFOs in vulnerable areas should be required to conduct additional surface water monitoring, a requirement which should be part of an individual NPDES permit. (WELC, et al)

Response: CAFOs are required to report any discharge to waters of the state within 24 hours. This will allow water sampling by the state, if appropriate.

I would like to see something in this permit about realistic testing. For example: water runoff contained and directed away from animals exceeding EPA standards due to wild bird droppings. (Welsh)

Response: While the permit does not require such testing, any CAFO may perform rainwater testing if it desires. Fecal coliform bacteria can come from many sources, such as humans, domesticated animals, and wild animals. The focus of this permit is on managing and controlling bacteria and other pollutants that are a result of the CAFO's production activity.

Additionally, please explain whether the testing outlined in S4C is sufficient to test for pollution. What is the soil nitrate level expected to cause pollution in ground water? Does this vary with soil type? Please be more explicit in section S4C about what different results mean. (North Sound Baykeeper)

Response: The environmental monitoring program is designed to help identify facilities that represent a high risk to the environment at the lowest cost possible. High risk facilities can be required to do additional environmental monitoring. The risk does vary according to nitrogen levels, soil type, depth to groundwater, and other factors. The state will take these factors into considering when determining if a facility is at high risk of contaminating ground water, and when additional environmental monitoring would be needed at the facility.

The Draft Permit is deficient because it does not require adequate effluent monitoring and reporting. While the Draft Permit purports to prohibit most discharges to surface waters from production areas, and some discharges to surface waters from application areas, there can be no certainty of compliance (and thus no effective enforcement) without regular monitoring and reporting. Ecology identifies no reason why CAFO operators should not be subject to the same standard monitoring and reporting requirements as all other NPDES permittees. Unless the Permit requires the permittee to generate and submit the information needed to determine compliance with the Permit, its requirements and protections are largely illusory. (Smith & Lowney PLLC)

Response: The monitoring program includes reporting of all discharges to waters of the state and soil sampling to identify high risk facilities. Additional monitoring may be required for high-risk facilities. Unlike most other NPDES permitted facilities, CAFOs are not allowed to have a regular discharge. For other NPDES permitted facilities, we focus on monitoring. For CAFOs, we focus on eliminating or reducing the discharge.

S4.C1

Change it to: *“All permitted CAFOs may perform soil monitoring or other approved monitoring method to demonstrate if a nutrient management plan, and its implementation, is effectively treating*

nutrients in the soil of land application areas to protect ground water quality.” Deleted: “Large CAFOs must use environmental monitoring.” Deleted: “for Large CAFOs” Deleted: “(such as Post-harvest Soil Nitrate Testing, EM8832-E, and Monitoring Soil Nutrients Section Break (Continuous) using a Management Unit Approach, PNW570-E).” Comment: Specific standards or practices should not be in the permit, only in the site specific NMP. EM8832E is only applicable West of the Cascades, not the entire state. (Simplot)

Response: The suggested changes would not require soil sampling at all large CAFOs and would allow unlimited variations in monitoring at facilities that did have monitoring requirements in their plans. The current monitoring program requires standardized soil monitoring that will allow regulators to identify high risk facilities.

S4.C2 [now S4.C1]

You have received a number of comments on soil testing timing. The accuracy of the test is always variable but taking it at the same time each year in relation crop harvest would be helpful. The west side and east side cropping systems vary so the permit may want to require annual testing, generally at the same time of the year as determined in the nutrient management plan. (WSDA) “The CAFO must collect soil samples annually in the fall of from land application areas that receive manure annually in the fall. The samples must be analyzed for nitrate-N concentrations. The CAFO must collect samples prior to heavy rain AND before any manure applications OR at least 30 days after any manure applications as described in Post-Harvest Soil Nitrate Testing.” (WSDA)

Response: The permit has been amended to address these comments.

S4.C2a. [now S4.c1] The CAFO must collect soil samples from land application areas that receive manure annually in the fall. The samples must be analyzed for nitrate-N concentrations. The CAFO must collect samples prior to heavy rain and before any manure applications OR at least 30 days after any manure applications as described in Post-Harvest Soil Nitrate Testing. (Andrew the reference to the Report Card Test NO₃-N testing is done at different times on east and west sides. But general rule of thumb, we strongly encourage growers to take a soil sample after crop harvest and prior to any nutrient application, commercial or organic. If they have made a manure application, then they need to wait 30 days to sample the field.) (WSDA)

Response: If no manure has been applied to the crop within 30 days of harvest, soil samples may be taken at harvest. We agree that samples should be collected prior to any nutrient application, though no change to the language is necessary.

S4.C2a. [now S4.C1(a)] Not possible to do soil sampling prior to fall rains and 30 days after manure application. Should use BMPs to determine testing practice. Delete “in the fall.” (Simplot)

Response: If no manure has been applied to the crop within 30 days of harvest, soil samples may be taken at harvest. No change to the language is necessary.

S4.C2b [now S4.C1(b)] The CAFO must collect soil samples of land application areas annually *in accordance with the permit nutrient management plan*. Deleted: The samples must be analyzed for

nitrate-N concentrations. The CAFO must collect samples prior to heavy fall rains and at least 30 days after any manure applications as described in Postharvest Soil Nitrate Testing. (Simplot)

AND

S4.C2(b) [now S4.C1(b)] Sampling timing and methods should be identified in the individual nutrient management plan for the CAFO instead of a prescribed method in a statewide general permit. (Okanogan CD)

AND

S4.C2(b) [now S4.C1(b)] We'll discuss a little bit about this fall nitrate testing and the annual test in the fall for eastern Washington is not requirement. It's not part of the tech note. It's not part of an environmental evaluation. It can be done at any time during the year. The 30 days after any manure application, again, is something is part of the tools of the nitrate post-harvest nitrate test evaluation tool. And we would like to see these references to that taken out of the permit. It's something that we do as planners and it doesn't need to be as regulation. (Chris Clark)

Response: The suggested changes would not require soil sampling at all large CAFO's and would allow unlimited variations in monitoring at facilities that did have monitoring requirements in their plans. The current monitoring program requires standardized soil monitoring that will allow regulators to identify high risk facilities. It can also show if best management practices are working.

S4.C2(c) [now S4.C1(c)] Will shallower soil sampling be allowed for CAFOs that are in areas with cobby soils or have hard pan areas at shallow depths? (Okanogan CD)

Response: Sites with cobby soil or hard pan that would actually prevent soil sample collection represent a high risk of migration and/or runoff of contaminants. These facilities may need to be covered under individual permit.

There are farms in eastern Washington that double crop and the fall test conducted according to language of this section may not be relevant to those farms. We suggest the language "the CAFO must collect soil samples of land application annual." Delete the word "in the fall." And insert "by following the nutrient management plan." (Wesen)

AND

A soil sampling of land application be defined as taken annually, not necessarily it says annually in the fall in the writing, and there's different areas of the state, there's different moisture contents in the soil, and there's just a number of crops sometimes double cropping or whatever and annually is sufficient. It may not be the best interest to take it in the fall. (Hayes)

AND

I think an annual test should be sufficient. To specify that it would be done in the fall is very detrimental to my practices. We try to double crop. We have very, very narrow windows to harvest one crop, put another crop down. And I think that we should be allowed to take tests when we deem best appropriate. I agree that they probably should be done in a regular fashion, but we should be allowed to change from spring to fall to summer as necessary. But not, you know, we should maintain a relatively even reporting mechanism there. (DeGroat)

Response: The permit has been amended to address this comment.

S4.C2(b) [now S4.C1(b)] The third sentence reads “the CAFO must collect...as described in Post-harvest Soil Nitrate Testing.” The authors of this document have pointed out repeatedly that this document was developed as a tool to assist management of nitrogen inputs, not as a regulatory hammer. There are far too many variables in The Nitrogen Cycle and manure management to be able to determine, based on a fall nitrate test, that a farmers’ management is causing a high fall nitrate or even that a high fall nitrate is leading to nutrient discharge. An experienced professional with knowledge of the farm, may be able to come to a conclusion based on a variety of factors, of which the Post-Harvest Soil Nitrate Testing is only one. This environmental monitoring should be excluded from the yearly report but still be made available to the inspector. Soil nitrate levels have been shown to fluctuate so much from week to week that these numbers on their own are meaningless and could be misconstrued by the sort of people who have previously accessed DOE files for the purposes of frivolous law suits. (N3 Consulting)

Response: The current monitoring program requires standardized soil monitoring that will allow regulators to identify high risk facilities. It can also show if best management practices are working. There are no numeric thresholds in the permit. The state is not attempting to make the case that a soil test is leading to a nutrient discharge. But the soil test can identify high risk facilities where more monitoring may be appropriate. The state is not solely relying on Post-Harvest Soil Nitrate Testing.

S4.C3 [now S4.C2]

Delete: “3. A Large CAFO may choose to use ground water monitoring, instead of soil monitoring, to show that it meets the standards of chapter 173-200 WAC.” Comment: Not necessary to list if not required. (Simplot)

Response: The compliance standard for all facilities discharging to ground is the ground water quality criteria of WAC 173-200. Comments have been received questioning the relationship between soil monitoring and ground water contamination. This section allows facilities to choose to directly measure the ground water to demonstrate compliance with WAC 173-200. Deleting the section would only reduce the flexibility for CAFOs, so we do not see any reason to delete it.

S5. Waste Storage Facilities

Your language here is that all waste storage facilities are constructed with a liner. I should point out that as per DOE/NRCS regulations, they just have to meet a permeability standard, which some soils properly constructed and compacted will meet without either addition of clay (bentonite) or HDPE, Geotextile, PVC or other liner. It is important the regs don't imply such a liner is needed if the storage basin or area is properly documented by a PE and NRCS. (Turner)

Response: A properly constructed and compacted soil liner is a liner. It is especially important that a soil liner constructed from on-site material have “as-built” post construction documents signed and stamped by a licensed professional engineer, who made on-site construction inspections, verifying that the liner was constructed as designed.

Just a note that many federally employed professional engineers (i.e. most NRCS engineers) do not have state issued stamps. They operate under the stamp of the NRCS State Engineer. (Okanogan CD)

Response: An NRCS state engineer stamp is sufficient as long as the engineer holds a Washington professional engineer license. The state engineer would certainly want to follow the licensed professional engineer requirements for certifying the work of others.

The new lagoon liners must have an as-built post-construction documents by licensed professional engineer -- as our partners in NRCS and we work with the producers. We do not have a professional engineer in our office any longer. There's one in western Washington within NRCS. This would make it very difficult to have lagoons built and installed, or excuse me, designed and installed in a timely manner in Whatcom County or the rest of western Washington, unless the producer spends an extraordinary amount of money to hire a private engineer. We'd like that to be, include the use of NRCS' engineering staff, or engineering technicians. (Chris Clark)

AND

Okay, the other thing is the new lagoon liners – it's been mentioned before. With only one professional, licensed professional engineer on this side of the state, we should use the NRCS techs, and their qualifications to be able to certify these liners and lagoons as they're being built. (Heeringer)

AND

Licensed professional engineers have rarely been involved in the design of manure lagoons and other waste storage structures, the majority of which have been designed by NRCS employees. They need to be included in this section as their experience and availability is extremely valuable to the agricultural community. (N3 Consulting)

Response: It is important that a licensed professional engineer sign and stamp the post construction document. A lagoon that fails can cause severe economic and environmental problems. From a workload perspective, this requirement is only for new or expanded waste storage facilities. If additional engineers are needed within the CDs, we would encourage CDs to work with each other, us, private engineers and WSDA to figure out a solution.

Additionally, the minimum separation distance between the lowest point of the lagoon and a waste storage pond and the seasonal high point of the water table beneath the lagoon should be at least 15 feet. New and expanding CAFOs should be required to meet this standard immediately while existing CAFOs must do so within 5 years or before an NPDES permit is reissued, whichever comes first. All liquid waste storage facilities must be synthetically lined to protect ground water. In addition, existing CAFOs with manure storage facilities that may drain into an agricultural drainage well must close the wells within 2 years. No new manure storage facilities may be built in areas that drain into agricultural drainage wells. All liquid manure storage systems must be covered to prevent overflows, breaks, and spills. (WELC, et al)

Response: The technical standards for lagoons are not in the permit. The standards are in NRCS conservation practice standard 313 for Washington titled “Waste Storage Facility.” The standards are not as stringent as you recommend. The practice standard believes that less stringent standards can still protect water quality while being more flexible.

S7. Termination of Coverage

The general permit does not address the increasing problems associated with abandoned lagoons. Across the country, abandoned lagoons are being found at an alarming rate. At a minimum, Washington should require that CAFOs that cease operations must maintain permit coverage unless and until waste storage lagoons are properly closed and reclaimed. (WELC, et al)

Response: We believe that the language in S7 covers the issues the commenter is addressing. S7 states that the CAFO must remain permit until it "...has demonstrated to the satisfaction of the Department that there is no remaining potential for a discharge of manure, litter or associated process wastewater that was generated while the operation was a CAFO, other than agricultural stormwater from land application areas." This requirement will address abandoned lagoons. For more information, NRCS has a practice standard for decommissioning lagoons.

General Conditions

G1

Again, talking about the application more frequently or in a concentration in excess of what's in a plan. We know the plans aren't that good to be able to have precise of application. The constitution of violation again would be a possibility of a fine. (Chris Clark)

AND

The 2nd sentence starting with The application and/or discharge... is an identical sentence to the one in S3B. See comments on S3B and S2B5 and change sentence accordingly. (N3 Consulting)

Response: Please see the response to this issue in S3.C.

G3

The requirement would be very difficult to comply with such as pipeline breaks, it would be considered a violation of the permit and possibility of a fine. We need to have some kind of leniency on that. And not just left up to the inspector. Penalties for violating permit conditions of [inaudible] seems to be extraordinary. For every violation, this is something that is going to take the enforcement agency a lot of time to conduct and we would like to see that there would be possibilities of reduced fines, or some other – like a speeding ticket issued instead of going all out with the conviction or \$10,000. (Chris Clark)

Response: The leniency that you suggest is in S1.A. G3 is designed to prevent a facility from discharging manure into waters just because it loses power during a storm (or similar event). The CAFO should be designed so it can maintain compliance when the

system fails, with the exceptions outlined in S1.A. The state's maximum penalty is \$10,000 per day per incident. Ecology assesses the factors of each individual case in determining whether to use a penalty and how much it should be.

G4

We already have a "no knock" right of entry issue with EPA on the NPDES permit. I see no reason for such an extension to another, State agency. I would request this be amended to a minimum of 24 hour, and preferably 48 hours notice. If there is probably cause for entry on an emergency basis, it can be granted just for the asking of the landowner in most circumstances. Where there is no such permission, it's easy enough to get a court order, this can be done on site over the cell phone. Don't underestimate the value and peace of mind such a policy brings to a landowner. If you goal is compliance, signal it here with a reasonable accommodation. You will find that you catch a lot more flies with honey than vinegar.... (Turner)

Response: For routine inspections, WSDA does give advanced notice. There may not be advanced notice for an inspection following up on a complaint regarding a CAFO. However, both WSDA and Ecology need to have an immediate right of entry when there is a problem. When there is an emergency situation or enforcement issue, the state needs immediate access.

The right of Ecology under this section should be removed when permit authority is transferred to WSDA. (Okanogan CD)

Response: When WSDA becomes delegated by the EPA, WSDA can write the permit and modify who has right of entry.

G5

I have grave concerns here that normal upkeep, maintenance, and expansion are in effect going to be double or triple covered...We keep up with the SEPA requirements, NRCS updates the plan and provides technical assistance, now you are asking to be yet another agency set to review any change. I suggest the entire section be stricken. (Turner)

Response: We disagree. We believe it is important for the CAFO to notify the state of plans that might cause modification or revocation of the permit. Please note that this is a high bar. Not all plans need to be submitted to Ecology. If a CAFO is making changes that might mean it can no longer be covered under this general permit, it is in the best interest of both the CAFO and state to know about this ahead of time.

G9

The right of Ecology under this section should be removed when permit authority is transferred to WSDA. (Okanogan CD)

Response: The permit says Department, so when the delegation is transferred WSDA will automatically become the authority.

G11

Lower the 180 days to a more reasonable 90 days. (Turner)

Response: There is no 180-day requirement in G11. The 90-day requirement in G11 we believe is a reasonable amount of time for filling out an application. It matches the requirement for newly permitted facilities, as well. The 180-day requirement in G10 is from federal regulations.

G11.C See above comments about becoming yet another review agency micromanaging any on site changes...This is counter productive, you are penalizing people who are trying to maintain, upgrade or improve their nutrient handling... (Turner)

Response: This general condition only applies to actual discharges. General conditions are used in every permit, and this condition is not relevant to most CAFOs. A CAFO that is maintaining, upgrading or improving their nutrient handling system would not have their permit coverage revoked under G11.

G11.E This is a terribly subjective one...who, what, how, when, where, why would a determination be made about threat to human health...water quality, etc. Where is your plan for due process here? (Turner)

Response: Endangering human health would relate to violations of water quality standards or other similar standards or benchmarks. All decisions made by Ecology can be appealed, which provides for due process.

This again places a producer in the position of a "double" review; there is very adequate review process already in place under the SEPA process. No reason to subject the grower to additional costs, expenses and reviews. Note previous comments about the publication of notice requirements; it is already done in great detail under SEPA; in fact, there is a mailing to any interested party, and mandatory mailing of detailed physical plant and operational plans to all landowners who are in the immediate vicinity. All this does is stir up folks who have an anti-animal agenda. (Turner)

Response: The public notice requirement is mandatory under WAC 173-226-130(5). As long as another notice meets the requirements in WAC 173-226-130(5), double public notice is not required.

G17

I have concerns about the penalty section...some minor penalties could be putting a permit holder at great legal peril for a very minor condition...penalties are applicable each day...under some environmental conditions, no construction can take place to do minor fixes...this puts the producer at substantial risk... (Turner)

Response: EPA, Ecology and WSDA all take into the severity of the permit violation when deciding whether to issue a penalty and how much the penalty should be. It is not the intent of penalties to drive CAFOs out of business, nor to prevent them from fixing problems. By looking back at Ecology's history of penalties for Dairies, the commenter can see that most violations did not result in penalties and those penalties were under the maximum amount.

Are u sure that this penalty should apply to every term and condition of the GP? How is this going to affect enforcement? There are differing protections from criminal vrs administrative proceedings. Current penalty scheme takes years to complete. I would suggest that some things are made infractions. Handled like traffic tickets sanctions could be quicker. Where pattern of non-compliance. (Boggs)

AND

The penalty for violations is not in proportion to the economic size of the average operation that will be covered by the permit. Even if the Department does not start a permit violation incident with a fine, eventually getting to one may cripple the financial welfare of the operation. (Okanogan CD)

Response: We agree. The vast majority of permit violations do not end up being penalties. This section deals specifically with "willful" violations, such as faking monitoring tests. Civil penalties are addressed in RCW 90.48.144 which states: "Except as provided in RCW 43.05.060 through 43.05.080 and 43.05.150, every person who: (1) Violates the terms or conditions of a waste discharge permit issued pursuant to RCW 90.48.180 or 90.48.260 through 90.48.262, or (2) Conducts a commercial or industrial operation or other point source discharge operation without a waste discharge permit as required by RCW 90.48.160 or 90.48.260 through 90.48.262, or (3) Violates the provisions of RCW 90.48.080, or other sections of this chapter or chapter 90.56 RCW or rules or orders adopted or issued pursuant to either of those chapters, shall incur, in addition to any other penalty as provided by law, a penalty in an amount of up to ten thousand dollars a day for every such violation. Each and every such violation shall be a separate and distinct offense, and in case of a continuing violation, every day's continuance shall be and be deemed to be a separate and distinct violation. Every act of commission or omission which procures, aids or abets in the violation shall be considered a violation under the provisions of this section and subject to the penalty herein provided for. The penalty amount shall be set in consideration of the previous history of the violator and the severity of the violation's impact on public health and/or the environment in addition to other relevant factors. The penalty herein provided for shall be imposed pursuant to the procedures set forth in RCW 43.21B.300.

This should not be included in the permit. Should only refer to the appropriate sections in the WAC. Delete: “Each and every such violation shall be a separate and distinct offense, and in case of a continuing violation, every day's continuance shall be deemed to be a separate and distinct violation.” (Simplot)

Response: While we could simply refer to the state and federal rules and laws, we have determined that for the purposes of full disclosure, this section should be included in the permit.

Also, it should be noted that when practices needed to prevent such a fine cost many times what the fine is, they do not get done therefore putting a landowner in a position of choosing the lesser evil. (Okanogan CD)

Response: We know that this has occurred historically, but we think it is very infrequent. We hope that few CAFOs are willing to pollute water and pay the fines rather than bring themselves into compliance with the permit. At \$10,000 per day for the most egregious violations, the fines can add up quickly. In addition, the state can take additional legal action against persistent and recalcitrant non-compliant CAFOs.

G18

The certification language specified in Part G18.D. should be placed within quotation marks (i.e. “I certify under penalty....”). (EPA)

Response: We agree and will add the quotation marks around this section.

Appendix

Any deadline for processing & taking action on application by Departments? (Boggs)

Response: There is no deadline in the permit. Once the CAFO has submitted a completed application, it has met its statutory requirements under federal and state law and regulations, as well as meeting the requirements of the permit.

Fact Sheet

Section A

The federal regulation make no reference to this statement [concerning winter feedlots], § 122.23 (b) (1) (ii) states that if crops, vegetation, forage growth, or post-harvest residues are sustained in the normal growing season over any portion of the lot or facility, the lot is not a CAFO. (Simplot)

\

AND

A major point of confusions rests on the flow chart. The first question asks “Are there crops or plants where animals are confined?” In my mind, trees are a plant. I believe that if you were to ask a scientist, he would agree that trees are plants. Yet in your discuss in Spokane, it was clearly stated that winter feeding on timber ground, a crop of trees, in fact would lead you to answer no, and would require a permit. Many, if not all the producers in the area I talked to believe that if you are feeding inside forested ground that in fact you answer the question “yes” and you do not need a permit. (McCart)

AND

Another question is what makes a feeding operation concentrated? Are having 1000 cows on 1000 acres the same as having 1000 cows on 10,000 acres. Also, what is confined? Some producers have fences on their property, some do not. One producer I talked to had 400 cow-calf pairs on several hundred acres. None of this land is fenced and they are free to roam thousands of acres, yet he winter feeds in only a few acre area. Is this an operation needing a permit? (McCart)

Response: It is true that the regulations do not specifically refer to winter feedlots. However, the preamble of the federal rule and supporting federal documents both state that winter feedlots can be considered CAFOs if any part of the operation meets the definition of a CAFO. From a practical perspective, winter feedlots have the same environmental concerns as any facility that confines its animals for 45 days in non-vegetated areas. We believe that, from a scientific perspective, these facilities should be included under this general permit. Trees in a winter feedlot situation without undergrowth are usually insufficient to take up enough nutrients. This can be evaluated site-by-site if necessary.

Section E

Proposed Language: * Ecology shall notify the applicant in writing within 30 days of the end of the public comment period identifying the issues that must be resolved before a decision can be reached. * Ecology will send the final decision to the applicant in writing within 30 days of the end of the public comment period. (Franklin CD)

Response: The addition of the “30 days” as recommended by this commenter is not needed. The previous paragraph explicitly states that “unless the Department notifies the applicant in writing to the contrary, coverage under this general permit will begin on the later of the following: The thirty-first (31st) day after the Department receives the applicant’s completed application for coverage....” If Ecology does not notify the applicant within 30 days, coverage under the permit begins.

Section F

Table 1. Moisture content is not included in the above table, please add. (Franklin CD)

Response: The updated table was not complete when the first comment period ended. , A new table has been added to the fact sheet that has the moisture content.

In no place in the fact sheet does DOE recognize the exponential growth of these facilities or their sordid history of water pollution. The DOE merely states that “the frequency of discharge varies from facility to facility.” The DOE’s characterization does not represent the volume of complaints and reports of discharges that have been received regarding these facilities. In order to create a permit that will adequately protect the waters of Washington state and the public health of its citizens, DOE must first recognize the documented, historical pollution caused by these facilities. CAFOs contribute to water pollution when lagoons break, spill, seep, or fail, releasing wastewater into rivers, lakes, and streams. In fact, over 1,000 spills occurred at feedlots in just ten states between 1995 and 1998, resulting in the death of more than 13 million fish. In addition, liquid waste is often over-applied or inappropriately applied to land, causing runoff into surface water or seepage into groundwater. Furthermore, ammonia emissions from open-air lagoons and spray fields redeposit nitrogen on land and water bodies, adding to nutrient pollution. There have even been reports of spray guns discharging manure directly onto a neighbor’s residence. Leaking animal waste storage lagoons threaten human health by contaminating groundwater used for drinking water supplies. Nitrate levels above 10 mg/l in drinking water increase the risk of methemoglobinemia, or “blue baby syndrome,” which can cause developmental deficiencies and death in infants. High nitrate levels in drinking water near feedlots have also been linked to spontaneous abortions in humans. The undersigned urge Ecology to contemplate whether the manure application practices demonstrated in the photographs should be encouraged to occur, or whether Ecology should finally take measures to carry out its mission and protect the public health and environment of Washington by enforcing the CWA. The photos enclosed with these comments provide only a small picture of the devastation associated with the CAFO industry. The numerous comments and complaints filed by citizens who live near these facilities and have documented similar practices should also be taken into consideration. (WELC, et al)

Response: We agree that there have been serious problems. We believe that many of these problems have been solved, and we further believe that this permit can prevent even more problems. Many of the issues that the commenter mentions are specifically forbidden in the permit. Other issues will be solved by appropriate nutrient management plans and routine inspections. We are trying to focus on current

environmental issue, and ask for everyone's help in preventing any problems in the future like the ones described by the commenter.

Section J

Operations should meet U.S. Department of Agriculture Agronomy Technical Note 35 - "Guide to Report Card Soil Testing." By meeting the low to medium category ground water will be protected. (Franklin CD)

Response: See responses to comments in S4.C on this issue. Briefly, we believe the numeric limits are inappropriate for use in this version of the general permit.

On page 14 of the fact sheet, under monitoring of surface water, it is stated that monitoring can occur if even one animal is in the stream. Producers have a right under State statute to stock watering, and a riparian water right. Further, this riparian water right for stock watering is protected by RCW 90.22. DOE policy POL-1025 on off stream watering conflicts with this riparian water right. Also, the language on monitoring listed here in your fact sheet is in direct conflict with this right. How under a riparian water right is a producer going to let his cows drink from the stream, yet expect that not a single cow will enter the water to perform this task? This is another attempt to eliminate riparian stock watering. Further, cow manure is a nutrient, not a pollutant. (McCart)

Response: The fact sheet is addressing monitoring. Ecology and the WSDA can monitor streams at any time, and they usually do monitor streams if there has been a manure discharge. This monitoring, by itself, does not interfere with stock watering. The permit only deals with CAFOs, not pasture based operations. RCW 90.22.040, Stockwatering requirements, states: "It shall be the policy of the state, and the department of ecology shall be so guided in the implementation of RCW 90.22.010 and 90.22.020, to retain sufficient minimum flows or levels in streams, lakes or other public waters to provide adequate waters in such water sources to satisfy stockwatering requirements for stock on riparian grazing lands which drink directly therefrom where such retention shall not result in an unconscionable waste of public waters. The policy hereof shall not apply to stockwatering relating to feed lots and other activities which are not related to normal stockgrazing land uses." We do not feel that the permit requirements conflict with this protection in RCW 90.22. Water Resources Program Policy (POL-1025, 1994) addresses this issue and states: "Application: This policy is to provide guidance to all water resources staff when responding to inquiries or inspecting surface water diversions intended to remove livestock from streams for the purpose of protecting water quality and stream habitat. This policy does not apply to stockwatering relating to feedlots and other activities that are not related to stock grazing land at more than the lands carrying capacity.

"1. Ecology shall encourage conveyance of stockwater away from streams for the purpose of protecting water quality. The Department of Ecology recognizes that removing livestock from streams will protect water quality and improve vegetative zones associated with stream banks. The change of water right process (90.03.380

RCW) will not be required when small amounts of water consistent with historic practice are diverted (screened and piped) to nearby stockwater tanks for consumption by livestock. If a float or demand type valve is not used, the tank overflow must return to the same source, at or near the point of diversion. The stock tank must serve no greater number of stock than historically range that parcel of property. The quantity consumed from the stock tank should not exceed the quantity consumed if the stock drank directly from the stream.

“2. Systems designed to convey stockwater to a stock tank must have a minimum impact to the bypassed reach of the stream. Stockwater tanks shall be located close to the surface water source, and have as short a bypass reach as possible, not more than is necessary to provide gravity flow. The purpose in modifying an existing direct access to the stream by stock must be to afford protection to the water body, stream bank, and associated vegetative zone. Page 2 of 2 Revised: 12/2/94 The decision to divert stockwater from the stream and into a tank does not constitute an adjudication of any claim to the right to the use of the water as between the claimant and the state, or as between one or more water use claimants and another or others.”

Section K

Goal for soil nitrogen should be kept in agronomic viable levels and measurements. In irrigated pastures 300# of available nitrogen during the season. Alfalfa hay can easily use 500# of available nitrogen during the year. Difference crops will have differing agronomic levels so the 30 ppm Nitrogen should be removed from the document. (WSU)

Response: See responses to comments in S4.C on this issue. The 30 ppm Nitrogen limit is not a regulatory limit. It is part of a technical note, so was included in the fact sheet for informational purposes.

Section M

Do not restrict disposal to land application only. Allow other recognized processes, ie composting, incineration, etc.. (Simplot)

Response: It was not Ecology’s intent to restrict disposal to land application. The word “only” was meant to refer to the nutrient management plans. This section of the fact sheet was rewritten for clarity.

Section O

Estimated cost per facility is greatly understated. Development of nutrient management plan, record keeping requirements and other requirements will impose substantial additional compliance costs on the permitted facility. (Simplot)

Response: We were not clear in the fact sheet what cost was being evaluated. We apologize for this. The requirements for the Economic Impact Analysis are specified in state regulation, WAC 173-226-120. It says: “(4) The following compliance costs associated with a general permit shall not be included in the economic impact analysis: (a) The costs necessary to comply with chapters 173-200, 173-201, 173-204, and 173-224 WAC; and (b) The costs associated with requirements of the general permit which result from conformity or compliance, or both, with federal law or regulations.” Most of the costs that the commenter is referring to are exempt from the Economic Impact Analysis because it is a cost which results from compliance with federal regulations. We will add this language into the fact sheet to make it clearer. The body of the Economic Impact Analysis does have this clarifying language for the reader.

Section P

P.17 The Revised Code of Washington section 90.48.090 Deals with allowing government inspectors access to metals and mining facilities. The entry of any person on the primary property of a Concentrated Animal Feeding Operation is a very serious problem. When a large number of animals are concentrated in one location disease is a serious problem. I suggest adding: “When government inspectors need to access a concentrated feeding operation the owner/operator shall be contacted to insure proper safety and biohazard clothing, boots, and head gear shall be worn. All vehicles will be disinfected prior to entry. The owner/operator shall provide shower facilities if required.” (Gruhl)

Response: WSDA inspectors have bio-security procedures that they follow before entering any livestock operation. It is WSDA intention to make contact with the operator or agent of the CAFO operation before entering any livestock area. If an operator has specific bio-security procedures that they require, these will be followed by WSDA inspectors before entry to the livestock operation.

Economic Impact Analysis

One of the things that was listed was the number of dairy farms in Washington. The Dairy Federation thinks there're about 560, instead of 485. (Wesen)

AND

Economic impact statement accompanies this permit is full of several errors. I'll be glad to discuss this with the person or staff that developed this; and I mentioned that before -- but I'll for the record, state it again -- "has the wrong number of dairies." We suddenly lost a hundred. We're losing them fast enough without them going quite that fast. There's some terminology that's wrong, and there's a few other details that's wrong. So that Economic Impact Statement needs some review. (Gordon)

Response: The numbers used in the economic impact analysis come from the Washington Employment Security Department. The discrepancy between their dairy numbers and other dairy numbers are explained in the revised economic impact analysis.

General Comments

This is an observation please don't use this as a comment. It appears the Department of Agriculture has very few employees that have agricultural experience. It appears that the DOE has no Agricultural experience. It is extremely important that this program be operated by and administered by personnel with some knowledge of and experience in agriculture. Currently, there is a lack of common sense knowledge of agriculture in the DOE and WA Department of Agriculture. It makes the audience think that department people in Olympia think agribusiness people are unintelligent. (Anonymous)

Response: Unfortunately all comments that Ecology receives we must considered as official comments, especially ones such as this comment that was sent on an official comment form. Ecology provides grant money to other organizations, such as WSU, to provide technical and scientific support to individual CAFOs and the industry as a whole. In fact, WSU received a grant for \$50,000 under Ecology's Direct Implementation Fund for water quality education of AFOs and CAFOs. This money could have been spent within Ecology, but we feel it was more effective to give the money to WSU. By all means, if the commenter believes that such a grant is inappropriate, he should contact Ecology. The WSDA has a great deal of agricultural experience

I am totally annoyed with all the add on fees and permits requested just so I can stay in business to feed people. These fees are used to "protect us." That is nonsense! (Courtney Farms)

AND

Another concern is that State law requires that this program be supported by fees. This is an unfunded mandate by the Federal government that Washington State has accepted and passed on to the producers. This additional fee will force many producers who are already struggling out of business, as they are not able to pass this cost on to the consumer. These rules are created to benefit all of the citizens of Washington and therefore the cost of the program should fall on the general public. It is the responsibility of DOE to take this back to the legislature and ask for the change, not simply let it kill an industry by stating that you are not responsible for that the legislature passes. (McCart)

Response: The Department of Ecology is authorized by state law to adopt rules to fund the operation of the Water Quality Wastewater and Stormwater Discharge Permit Programs. Fee-eligible activities include processing permit applications and modifications; monitoring and evaluating compliance with permits; conducting inspections; securing laboratory analysis of samples taken during inspections; and supporting the overhead expenses that are directly related to these activities. Permit fees are paid by holders of federal and state wastewater and stormwater discharge permits issued by Ecology. Funding for the permit program was initially paid for by citizens through state general revenues appropriated by the Washington State Legislature and federal grants. In 1988, voters passed Initiative 97 (now codified as RCW 90.48.465) requiring holders of wastewater discharge permits to pay annual fees for discharging into waters of the state. Fees paid by holders of wastewater and stormwater discharge permits are deposited into a dedicated account. Fees range from \$145 to \$1,451. We attempt to work with businesses that are in financial difficulties. Please contact us for more information.

As a small family ranch and business owner, I find the fact that the Department of Ecology is thinking of mandating rules and regulations on our small business to be downright oppressive. These rules and regulations should be applicable to operations ten times our size. The state has raised the minimum wage to the point we cannot afford to hire employees, and now the state is proposing to tell us what to do and how to do it. Small family farms and ranches do not have the office staff nor the man power to sift through your regulations and fill out your forms. It has become more demanding to produce a product that is competitive with producers in other domestic locations and countries. Small and medium sized producers should not be subjected to these regulations as well as the liability it will bring when having to disclose private information to the general public through the Department of Ecology. Your proposed rules and regulations will have devastating consequences on the small and medium sized producers. I am very much hoping that you will take the above concerns into consideration and revise your draft. (McBride Hereford Ranches)

AND

In creating a set of regulations designed to keep “large” operations from harming the environment, you developed another level of bureaucratic interference which will, in fact, be the final straw to drive many of the smaller family-owned operations out of business. Only the large operations have the office staff to keep up on complying with the ever-more regulations we face yearly. Therefore, the result of your efforts to keep the environment clean will wipe out many of the smaller, non-polluting operations, which will force either a decline in the industry OR even further concentration of the animals into the larger operations which have the office staffing necessary to comply with your requirements. (Mercer)

Response: That is not our intent. In fact, the permit requires only CAFOs that have actual discharges or propose to discharge (i.e.: during a 25year, 24 hour storm event or greater, during an upset) must obtain a permit, while smaller operations do not need a permit as long as the do not have a direct discharge of manure to waters. The smaller,

non polluting operations are not CAFOs and do not need a permit. (See S3.D for more discussion on public availability of the nutrient management plan).

After reading the CAFO General Permit Draft, I don't believe that my concerns will be rectified. It seems that the CAFO's will be able to do what they've done in the past, albeit a little extra paperwork. This sentiment was even shared with me by head management of a CAFO! (Shaw)

Response: For some CAFOs, especially dairies and larger feedlots, the permit will not require many changes. For other CAFOs not covered under a permit now, substantial changes may be necessary. We believe that this permit will provide for additional environmental protection over what was done in the past.

A level playing field must be provided for Washington producers (nationally and internationally.) (Veiga)

Response: A statewide permit can only do so much. We are bound by federal and state rules and laws, but within those regulations, and within the geographic scope of our authority, we will do as much as we can to provide a level playing field. Other state CAFO permits vary, and some impose additional requirements not included in our permit.

As poultry producers of Washington we are aware of the potential harm that chicken litter would cause. We have built sheds to keep the litter dry where the litter can be composted as with the mortality. Many years ago I worked with the department of Ecology who helped me get started composting when I first started farming, since then I have only improved my operation and helped with my family also. We have generated markets in 3 states and very little to none is put on our fields. We feel we have been environmentally conscious and conservative with all aspects of farming. We also feel that keeping more records of who we sell our product to, is an invasion of our individual privacy and feel that the demands of record keeping, inspections and water and soil sampling is also an invasion of our right to farm and we feel it is un-American. We are busy farmers and the demands of farming are greater than before and the compensation is much less than before and we feel with the funding from the farm to keep all these records would be impossible with the budget of our farming activities. Please keep these thoughts in mind as with your decision making and the fact that more and more food from other countries (who do not have little or no environmental regulations) flood our markets with foreign food as our economic situation worsens. We realize that there have been bad farming practices in the past and those farmers who are not farming anymore have made a bad name for all farmers, even environmentally conscious farmers. The Elk and other wildlife on my property release much more waste on my property than the chickens as it's been many years since I have spread manure on the property. With the rising costs of energy, electricity etc. it makes more sense to sell it than apply it to your land. The farmers budget has been greatly decreased to do anything more than he is already doing. The farm environment is important to me and my family and always has been regardless of our financial situation. The facts of this issue is the Delmarva peninsula, many parts of Georgia and Arkansas have been very slothful with the waste of poultry manure and processing waste it has given many poultry farmers across the nation a bad name. The fact is Media does not help the situation, but tries to put every farmer in this same category. The facts are that the poultry industry is very very small in Washington compared to the rest of the country or world. In fact the last Turkey houses just

closed for financial reasons in Washington, and many other dairy farms and a few poultry farms are folding due to high energy costs and environmental pressures. The fact is Chicken Manure is a product that is in demand in the northwest, after properly composted, the little bit of manure that is produced on my farm is sold before it is cleaned out of the barn. Not for a lot of money, but in these hard times a little is better than nothing. My point is, if properly taken care of, chicken manure is a natural, organic form that is food for our earth, and is an asset to soil mixes and other mulches in composts that feed the earth. I have been to almost all of the states in the union several countries in Europe, North, Central and South America and I have found the cleanest places on earth to be in the Mid North and Northwest states, I have also found that the farmers that are the most environmentally conscious live in the Northwest. The last statement and fact I would like to make note of is that our history of the American people that came to this country, your ancestors and mine, came to America for freedom, freedom of religion, freedom from dictatorship rule, freedom to work as we see fit. Freedom to farm, freedom to live our lives in privacy as we wish and in a pursuit of happiness. As an environmentally conscious farmer, the fact is this permit process will damage that freedom, the main thing this does it violates our right of privacy which every American has and should claim, I am an American who claims that right. This permit process violates that right, (should we have to disclose our customer list and also the relationship that a farmer has with his fellow customers). There may be concerns with a conflict of interests, also, it will damage the way we live our lives and damage our future economy of our state. (Neilson)

Response: We understand your viewpoint. Please see responses in section S3.E and S4 for specifics on privacy, record keeping, and soil sampling. We attempted to reduce the costs to CAFOs while meeting the requirement of state and federal regulations and laws. Where possible, we granted exemptions for the smaller environmentally conscious farmer. Because of the 2nd Circuit Court Ruling, only operations that have a actual pollution problem need to apply for a permit.

I live in an area where this impacts my quality of life greatly. First, it is my understanding through local agencies, that there is an absence of regulation pertaining to the application of effluent onto crops (IE. Doesn't have to be turned under by plow). This seems very convenient for the farmer, while disregarding any consideration to environmental impact of surrounding neighbors. Because of this, I have encountered: (1) Horrific odors that last for months (2) An explosion of the fly population (I've had hundreds of them on screens of windows and sliders at a single time.) and (3) questions about how polluted my well water is. (Shaw)

AND

The method used to apply waste is a critical factor in determining impacts on waterways and local communities. Waste must be injected or incorporated directly into the soil in order to prevent ammonia volatilization. (WELC, et al)

AND

Currently, I live in the vicinity of a CAFO. My concern is a lack of regulations regarding effluent applications onto surrounding crop land. Some basic regulations to this matter would allow me to breathe fresh air and drink fresh water. Moreover, it would not handcuff the farmer / CAFO!! To

me, some simple mandates (IE. Plow effluent under the day it is applied and limit the amount of effluent applied) creates a “win-win” situation. The CAFO is still able to dispose effluent and fertilize crops!! The surrounding neighborhood doesn’t suffer intense odors for months at a time, and well water isn’t polluted. (Schefstrom) (Moeller) (McPhee) (Peltier) (Yaeger)

Response: The first part of this comment is address in the responses to section S1. The air quality concerns are outside the scope of this water quality permit. Washington is addressing this issue for some feedlots. For more information, please read “Fugitive Dust Control Guidelines for Beef Cattle Feedlots and Best Management Practices.” It is available on the Department of Ecology’s website at www.ecy.wa.gov/programs/wq/permits/cafo. Additionally, EPA is beginning to address this issue on a national level. Please see <http://www.epa.gov/compliance/resources/agreements/caa/cafo-agr-0501.html> for more details. Hard copies of this information are also available upon request. Many manure applications are made during the growing season where plowing would destroy the crop prematurely. In addition, plowing would reduce the vegetation that uses the applied nutrients. In some crops and fields, new technology is being used to inject manure into the soils near the root zones. Increased tillage in some cases would increase dust.

The Western Washington Growth Management Hearings Board stated in FOSC vs. Skagit County (CA 02-2-0012c) “Common sense tells us that fanners are more apt to implement protective critical area measures if they perceive those measures to be necessary, reasonable, fair, effective, and applicable to their local circumstances. If farmers perceive that the required measures are unreasonable, unfair, unnecessary, ineffective, and/ or mandated by outsiders who have never worked the land or faced the demands of making a livelihood from farming, they are unlikely to implement those changes unless an army of enforcement officers force them to do so.” I couldn’t agree more and would like to thank you for the opportunity to comment on this draft proposal regarding CAFOs. (K. Dunlap)

Response: We agree as well. To the extent that we could, we attempted to make the permit reasonable, fair, effective, and applicable. We are bound by certain federal and state laws and regulations, but we hope that the permit is still good.

Keeping this program simple by fed standards will be easier to enforce. The object is clean water. (Veiga)

AND

This permit and regulations put Washington standards higher than U.S. standards. With regulations putting many producers out of business already, why is it Washington, especially the Department of Ecology, always feel they have to exceed the federal standards? (McCart)

Response: We attempted to keep the program simple. We met minimum federal standards where we could, but also had to meet requirements in state laws and regulations. For

example, state law also requires clean ground water, where the emphasis in the federal standards is just surface water.

Overall, this new permit is greatly improved over the older dairy farm permit. I find that this permit covers more CAFOs through its inclusion of other animals. Additionally, this permit is much improved in its requirement for visual inspections, detailed requirements for nutrient management plans, annual reporting, and environmental monitoring. This permit will only be as good as the number of dedicated inspectors available to oversee, educate, and enforce, where necessary, the provisions of his permit. I hope that the number of inspectors dedicated to CAFO oversight will be adequate to the task at hand. (North Sound Baykeeper)

AND

I'm personally concerned that WSDA did not ask for enough money in the proposed governor's budget to provide enough qualified staff to ensure the General Permit will achieve the desired outcomes. Visiting the operations is only one aspect. There has not been enough of that over the last 2 years. One more inspector is not enough. Reviewing and analyzing the manure applications and soil test are another. We have two experienced planners who review only records for about 25% of the dairies. It takes them a good two months. All in all this looks like a big paper exercise. (Boggs)

Response: WSDA hired on one additional inspector for the dairy program. In addition, as more facilities are issued permits, additional funding from permit fees should be available to support 1.5 to 2 staff to do additional inspections, administer permits and compliance activities, and provide technical expertise to review permits and nutrient management plans.

The Draft Permit contains too few enforceable requirements and too many exemptions and loopholes. The law requires more, and the environment -- and the public -- deserve better. (Smith & Lowney PLLC)

Response: We believe that the exemptions will not result in impacts to water quality. If they do, we can address those issues and either modify the general permit or issue individual permits to the CAFOs that are affecting water quality.

Overall, I was pleased to see almost entirely positive improvements based on comments from the preliminary draft, and hope the final likewise incorporates some of the most important changes. (Turner)

Response: Thank you for the comment. We have worked hard to make the appropriate changes to the permit during the permit writing process.

Regulations work BEST when they are easiest to understand, scientifically defensible, and have the general consent of those regulated. We in the private industry, having just paid out our annual State B & O tax, and working on Federal Income taxes, are most concerned about the true costs of yet another layer of regulation. Specifically, as it pertains to these CAFO rules, I would propose a

dramatic exception or exemption from the new rules for Dairies which have a current, approved 1998 DNMA/RCW 90.64 nutrient plan. If you are to carefully examine your proposal, and compare it with a good nutrient plan, you will see that there is about everything you are asking for all in one neat package! Think of the cost savings to Dairy operators this mechanism would provide....Sure makes a lot of sense to me! (Turner)

Response: We agree that the current state dairy regulations are similar to the CAFO permit. That was one of our goals. CAFOs, including dairies that are CAFOs, will have to meet the new permit requirements, as they are mandated under federal rules. However, most of these dairies will not have to make significant changes to their operation to meet the new permit requirements.

Cost. We do operate in a Global Market - meat and dairy products and the technology to process and preserve them are around the world. While we are highly efficient producers, we operate at a serious cost of production disadvantage, for example, we pay our average dairy worker more in 2 weeks than a chinese worker of similar tasks would receive in an entire year. Make a true cost-benefit analysis part of your critical review of each and every element of the final regulations. (Turner)

Response: The costs that are required as part of the federal requirements are not included in the state's economic analysis. Please see the Economic Impact Analysis section of this document for more details. The costs from the federal requirements were calculated by EPA and can be found at <http://cfpub.epa.gov/npdes/afo/cafodocs.cfm>.

First, it [the permit] is well written, to the point, and appears to cover the important items. (Gruhl)

Response: Comment noted.

I know the Development and Oversight Committee spent many long hours discussing the various aspects and details of this permit. Overall, I believe they did well in letting each individuals nutrient management plan be the deciding factor on how the operation is managed. I strongly urge you to seek out those places in the permit such as the soil testing and the specification of nitrogen and phosphorus levels and modify the permit so the individuals plan will dictate specifics. This will give greater flexibility to the individual operator while providing good water quality protection. (Okanogan CD)

Response: We believe that has been done. Nearly all of the specifics, even items like the soil testing, will be in the nutrient management plan.

It is certainly a better permit than it was when we started. There are still some areas of concern. (Gordon) (Turner)

Response: Comment noted.

We have organizations in this state, this is a Dairy Federation, Cattlemen, Beef Feeders, Poultrymen. We've had meetings after meetings dealing with these issues. I think we've made a lot of progress.

It seems like we want to re-event the wheel every time, call for another hearing, or re-write. But we've had the task force advisory committee that has worked hard on this. We feel that you need to listen to the ones that we have asked to serve on these committees and lead our organizations, instead of taking up all of our time with more meetings and hearings. We have paid staff that are deeply involved in our industries statewide that are addressing these issues. We thank you for your time in seeking the input. I know a lot of people have sent in a lot of comments electronically, and hard copy, and but we ask you to listen to the people that we have working for us. Because we've had a lot of producer meetings on this issue. (Jensen)

Response: We did use the statewide organizations to review the first three versions of the draft permit. We do feel that it is essential to provide an opportunity for the general public and individual CAFO owners to comment on a draft of the permit as well.

The first thing that concerns me is the fact that we have a new draft here tonight that wasn't mailed out and the previous drafts and it's December 1st. Our October draft was mailed to the producers on November 29th. There's some great timing. (Kaysen)

AND

Why wasn't the Dec. 1, 2004 Draft presented to us before the meeting (Jan. 12) instead of the outdated draft? (Courtney Farms)

Response: We apologize. The October draft version of the permit was e-mailed to our permit advisory committee on October 25, 2004. The Washington State Dairy Federation, Washington Fryer Commission, Washington Cattleman's Association and possibly others shared this version of the draft permit with their members. The permit advisory committee also recommended that we make changes to the permit. We made those changes at their request, and produced the December 1, 2004 version of the draft. This official version was used at the public hearings, placed on our webpage, and advertised in the Washington State Register. Many members still had copies of the October 25, 2004 version. The differences between these two versions were explained at the Longview public hearing, and are available at our webpage at http://www.ecy.wa.gov/programs/wq/permits/cafo/cafo_permit-documents.html. The December 1, 2004 draft of the permit was available at the four public hearings.

We talked about commercial fertilizer a little bit. It would be nice, since in these CAFO permits, it requires you that you have a nutrient management plan, I think that anybody that's using commercial fertilizer ought to have the same for whatever reasons – because it's doing exactly the same thing. And I suggest that you add that to this as well and that you bring those people into the conversation here and bring that issue up with them. (Khvoroff)

AND

I live in Pasco -- they have high nitrate problem, yet there's been dairy cows or beef cows out there. What happened? Oh, they had natural nitrates and may be from fertilizers from fields. So to be economically viable to create a level playing field, I think all commercial fertilizer fields should be

tested and the same practice that we're required because the last I checked nitrogen is nitrogen, phosphorus is phosphorus. It might be different sources, but the same results. While we're at it, I think we should also require all golf courses. They put on tons of fertilizers. They saturate with lots of water year around. I don't think they're monitored. I think they should also be tied into our plan. That would be a level playing field I'd hope. (DeRuyter)

Response: There are many similarities between the use (and over use) of manure and commercial fertilizers. This general permit has a limited scope, and only covers CAFOs. Users of commercial fertilizers still have to meet state water quality law, and are liable for any violations of water quality standards.

We feel that the rules are too ambiguous. When asked how inspections were to take place, especially for small producers, our local Department of Agriculture inspector had doubts on which producers would need a permit. For instance, does a small cattle producer who feeds in an alfalfa field need a permit? At first look you would answer "no." The problem rests on the amount of snow. In a normal year it is not uncommon to have four or more feet of snow on the ground. When this melts in the spring, some of this water invariable ends up in the stream. Would I still need a permit? Some producers do not have a water way on their property, yet just on the neighbor's property beyond the fence is a class 5 waterway. Some of these only run into holding ponds in the woods that percolate into the ground. Would this producer need a permit? (McCart)

Response: It is difficult to make a determination without more specifics or a site visit. Melting snow contaminated with manure that ends up in streams from animals fed on pasture land does not, by itself, make the operation a CAFO. Similarly, holding pond in a pasture operation that percolates into the ground does not, by itself, make the operation a CAFO.

The only other thing that I had to say was, and we talked about that a little bit and that is that the state guarantee that they will bear the costs and handle the litigation for the operator if owner or operator if that owner or operator has been compliance. And I think that's, that's only fair to ask. I hope everybody else agrees with me. (Khvoroff)

Response: Neither the Department of Ecology, nor any other state agency, can stop or prevent against frivolous lawsuits.

I also think that we've talked enough about trying to have a level playing field, and I think it's pretty well understood that we'll never achieve that. There's too many exemptions, too many exceptions. But I'd also strongly encourage the Department to look at the fact that we need to attempt to get as close as we can to that type of situation. And in light of that, I would say that this permit not have any thing in excess of what the EPA requires, absolutely nothing – even if it's a state law that needs a permit of some sort, then we need an additional permit. Do not put that in this permit. Have only what the EPA requires so that we have the chance to compete. Like I said this business is highly competitive and I can't compete against neighboring states if I have a different level to strive for. So that's very important to me. (DeGroat)

Response: We do not believe that having two permits – one for state requirements and one for federal requirements – is the best option. Two permits would add extra red tape, and would not achieve the level playing field the commenter desires. We have worked with the regulated community in an attempt to make sure that any additional requirement stemming from state law are written in such a way as to minimize the cost while still meeting the requirements of the law. Many other states also have state requirements that are included in their permits.

I'd also like to make a comment about, there are certain organized groups out there that for various reasons do not like our industry. It has been my experience that the Department has tended to bend towards the wishes and the desires of those groups because of the threat of lawsuits. I'd encourage the Department to... You know I feel very strongly that the producers are the ones who are bearing the financial costs of this, the financial burden. And we are also falling under the regulations and the requirements of all of this. And I can't be strong enough in my emphasis that you should bend to the will of the producers because we need to maintain a strong agricultural status in this state. It's the largest business in the state, agriculture. We can't get employment already, we need to keep it here and it is our food. We need to have it. So please, please bend towards the agricultural producers when you're viewing these comments. (DeGroat)

Response: It is our responsibility not to bend one way or the other, but rather to fairly and scientifically implement state and federal laws. The commenter should decide for himself if, over the five-year life of this permit, the state has reached this goal.

I'd like to again protest like I did earlier, I think the term "level playing fields" should be eliminated from this presentation. Level playing field for everybody in the state alone would be that reservation producers, along with everyone else is on the same book. I think the comment made earlier was outstanding that we really should stick to the federal laws. Federal laws are what we're competing against. I know there aren't many economic majors in the federal government or state government here. But there are no new infrastructures for food processing being developed in this state. They're leaving as fast as they can. You know what, I can make all the milk I want, but if there's no one to process it, it ain't going to happen. I understand real estates is getting more expensive on the west side because they ran out of farms to buy up to build houses on. (DeRuyter)

Response: Please see previous responses in this section on "level playing fields" and federal vs. state minimums. We agreed with your comment the term "level playing fields" should be eliminated from this presentation. It was not used the following three public workshops.

The comment about coverage from permit, I think that person that put that in there should be hung because that's totally false. I'd like to know where Christine Gregoire and the Attorney General dictating to the Department of Ecology saying "Let the suits run, do not step in and help the farmers." That is a lie. I think the comment made the Attorney General should get the opinion before any of this thing becomes forward into law, whatever. (DeRuyter)

Response: We understand your concern. The permit will be reviewed by the attorney general's office before it is issued.

I talked about the water fowl, and the geese, and you heard me say that early in the meeting here tonight. And I would like to see the Department of Ecology monitor the Department of Fish and Wildlife and require them to have a nutrient management plan for the water fowl. And I believe this should be in this permit as well, and that they should be monitored. And show proof of their numbers of their geese and where they're at, and the pollution that they're causing in the waters. (Khvoroff)

Response: There are many similarities between manure from CAFO and wildlife. This general permit, however, has a limited scope, and only covers CAFOs. In certain circumstances, a wildlife feeding operation may be designated as a CAFO.

I hope that the inspectors will use a little common sense. You know we're inundated by many, many things in agriculture: the bull trout which I thought was kind of a fiasco deal. But we're inundated by this and a lot of other regulatory agencies. And it's getting to the point of almost being oppressive, financially as well as time wise. And probably time is the most important thing. And if all the people would use some common sense, I think we will all benefit from it. Because we can all improve our operations. There's no doubt about it. But the more regulatory agriculture gets, or the more regulations, the more it cost us. And eventually we are as one gentleman said that one dairy operation went out of business. Well I'm sure there's been a lot more than that. And unless we all want to be eating good Canadian BSE infected beef from a cattle ranchers perspective, we have to use some common sense, and try and keep businesses in business. Because that's what supports the United States. (Grub)

AND

Be consistent from one operation to another. Treat people fairly, don't threaten them. We are trying to make a living in agriculture and take care of our environment, which on the whole I think we are doing a pretty good job. Ag is struggling now due to a) low prices, b) increasing costs of doing business and c) imposed regulations which we are now having to bear the cost of. Use common sense when approaching problems. Ex: Don't make us build a 10' dike when a 5' dike will work in our area. We live here and know the extremes of the weather. (King)

Response: WSDA inspectors have a working knowledge of farming operations and take the approach of using common sense when working with livestock operations.

I was a Washington cattle owner. I've been involved in nutrient management plans in the past – fencing off creeks, waterways – for the cattle operations and a small feedlot operation. And what I've learned through different Departments is there's some Departments have flexibility and some do not. And if they can keep this to the local level, I feel the local level understands a lot better that each individual case of what their land is like and how the runoff is and how the rains effect their situations. It says right here in your proposal here for the general permit that CAFO is suppose to be flexible. And that's what I expect. I expect flexibility with the individuals. If you can work that in with the local agencies, I think it'd be great because we do work well with our local people. If there is a problem, I do not have anything bad to say about somebody from the upper echelon coming

down and overseeing if there is a problem. But as long as the local people can handle it and you let them have flexibility, we're a lot better off. (Siegel)

Response: We agree completely. We incorporated as much flexibility as we can under federal and state laws and rules.

The proposed draft to acquire permits will be burdensome and difficult and we feel it must be changed to make it easier. (SCCA)

Response: Through the four drafts of the permit, we have attempted to make the permit less burdensome and difficult while still meeting the requirements of federal and state laws and rules.

A grace period is not included in this proposed draft. A grace period is essential and should be part of the CAFO. A friendly inspector must and should be available to address all the questions that the farmers and landowners and concerns on policy that might arise from this proposed draft. (SCCA)

Response: There were two grace periods in the permit. Most facilities, other than dairies that already have a permit, were not required to apply for this permit until April 13, 2006. Also, facilities had until December 31, 2006 to have nutrient management plans. Now, the USEPA has extended both these deadlines to March 30, 2007. This is to allow facilities more time to comply while the USEPA rewrites the Federal CAFO Rule to incorporate the 2nd Circuit Court Decisions.

I'm concerned with the fact that we're talking about the CAFO permit today, but the AFO conditions follow the CAFO. And there hasn't been any public comment period put together for people that fit into the AFO areas. (SCAAB)

Response: Yes, the discussion at the hearing was only for the permit, which covers on CAFOs. There is currently a state dairy program that affects all dairies – CAFOs and AFOs. There is no proposal for specific management or record keeping requirements for AFOs that are not dairies.

In the last five or seven or eight years in Olympia, there's been a great concern about what message [inaudible] the general public versus governmental agencies on issues such as cost-sharing. And the driving force in Olympia behind keeping this open has been the [inaudible] Association for some time in the future best management practices or best available science changes, someone's going to be held liable for their past actions even if that read best management practices. We don't need to do this guilt by association and guilt is just because you have a V-8 under the hood of your car. I don't think any farmer tries to do the wrong thing, because the farmer owns their land on which they farm on. Animal agriculture where there's chickens, dairy, or feedlot is a 24/7 – 365 days a year operation. And the reason they don't do a better job than what they do is probably the limiting factor would be money. (Kaysen)

AND

We can all improve our cattle feeding operations but until the return on our investment becomes profitable, many operations can't afford additional costs. The costs imposed with the AFO-CAFO permitting process are exorbitant. These funds could and should be used for any corrective action needed for improvements to comply with the regulations. The permit costs act as a penalty and may cause operations to go out of business and preclude any corrective action being taken. A positive incentive process would speed compliance and further the goals of the AFO-CAFO regulations. (Grub)

AND

Speaking from 40 years of first-hand experience in the livestock business here in Washington State, it has been my observation that it gets tougher and tougher to run a profitable business here. I have witnessed an ongoing trend of decline in the industry. We now see fewer packing houses in the market to buy our livestock than ever before. The resulting decline in competitive environment in which they buy the livestock which we produce has caused hardship in our industry which has simply forced many producers out. I would venture to say that there are less than one-third as many viable livestock operations in the state today than there were when I entered to business some 40 years ago. (Mercer)

Response: We agree the money is a limiting factor. For that reason, we have tried to minimize the costs associated with this permit, while still meeting the requirements of federal and state laws and rules. We also support the technical assistance, education, and outreach activities of WSU, WSDA, and local conservation districts. For more information on costs, please see the Economic Impact Statement and the EPA cost analyses. Both of these documents are available on the web at http://www.ecy.wa.gov/programs/wq/permits/cafo/eia_cafo-112304.pdf. Hard copies are available from Ecology upon request. We do have positive incentive process. For medium and small AFOs, if they do not cause pollution problems, they are not CAFOs and they do not need a permit.

Because of the dry storage, the increased amount of manure being generated in the poultry industry now, we do have to store this some how more safely, ecological fashion. It is not a return on investment type thing. It's cash money that does not have a pay-back period. And so to try to implement some type of funding alternative would be beneficial to the farmers. I would like to thank the Department of Ecology and Department of Agriculture for taking a pro-active stance on this because for too many years, I think people have gotten away with shoving manure off into the back forty and having it wash away to get rid of it. So I do applaud that. (Crimmins)

Response: We understand the difficulties of managing manure, and applaud those who manage it responsibly.

Ecology should impose a state-wide moratorium on issuing NPDES permits to new CAFOs or existing CAFOs that seek to expand. Because of the amount of water pollution created by CAFOs and given Ecology's history of being unable to enforce and implement the CWA on this industry, Ecology should impose a state-wide moratorium on the issuance of NPDES permits to new CAFOs or those CAFOs that seek to expand their operations. A moratorium at this point is especially

appropriate given the fact that the legal obligation to inspect CAFOs and ensure their compliance with all relevant laws has recently been transferred, however improperly, to the DOA. Undoubtedly there are administrative hurdles associated with this transfer of authority and the public health and environment should not be impaired as a result. The moratorium should not be lifted unless and until Ecology and DOA have established and sufficient resources to inspect these industrial facilities on a regular basis, ensure compliance with all CWA provisions and be able to take appropriate enforcement actions when there is a discharge to surface or ground water. Residents in the Yakima Valley have reported that it often takes 17-23 days for an agency to respond to a reported discharge. This is unacceptable and shows that Ecology is not presently able to enforce the CWA against these dairies. Thus, a moratorium on the issuance of permits for new or existing CAFOs that seek to expand is appropriate at this time. (WELC, et al)

Response: We do not feel that a moratorium is needed. If a CAFO follows the requirements in the permit, it should be protective of water quality. WSDA responds to any written complaint within three working days (as required by law). It is also WSDA's policy to respond to all other complaints within the three working day period.

DOE has both the legal authority and public health obligation to citizens of this state to enforce stricter requirements than presently mandated under federal regulations. Washington should take the lead in the fight to protect its citizens from the devastating effects associated with the growth of the CAFO industry. (WELC, et al)

Response: We believe we have met the legal authority as mandated by state law and regulation.

At this time, DOE does not have the authority to subdelegate its authority to implement and enforce the Clean Water Act to the Washington Department of Agriculture, and thus the DOE is accountable for carrying out the purposes of the CWA. Even if Washington submitted a modified permit program for EPA review, DOA is not a proper agency for implementing and enforcing the CWA. DOA has an inherent conflict of interest with the goals and mandates of the CWA. DOA's primary mission is to support and promote agriculture in the state of Washington. This mission directly conflicts with the CWA's requirements to prevent pollution and to restore the integrity of our nation's waters. Rather than shunting off the responsibility of enforcement, DOE and the state administration should provide the proper staffing and funding to DOE to do the job required. To take the source that contributes the most amount of water pollution in Washington away from DOE's regulatory reach would entirely undermine DOE's ability to carry out its mission and work toward eliminating water pollution in order to comply with the mandate of the CWA. (WELC, et al)

Response: In 2003, the legislature transferred the program to the WSDA. That decision cannot be changed by the permit. We believe that WSDA does have and uses the authority to do those activities it is currently doing, and will be doing under this permit.

CAFOs consume significant amounts of fossil fuels. (WELC, et al)

Response: While true, this is outside the scope of this water quality permit.

CAFOs also use enormous amounts of groundwater, much more than traditional farms. DOE must require before operations commence or permits are issued, that CAFOs can demonstrate that they have valid water rights to operate at the levels proposed. One farmer near the city of Sunnyside reported that his well had gone dry because a neighboring CAFO had used up all of the groundwater. DOE's solution was to tell the farmer to drill another well or take the dairy to court and incur a tremendous amount of legal expenses. The onus should not be on the citizens of Washington to protect their allocated water rights. DOE should take the initiative to ensure that CAFOs are not usurping ground water resources. (WELC, et al)

Response: Water rights are outside the scope of this water quality permit. There are continuing legal issues over CAFOs and water rights, and those issues will need to be resolved outside of this permitting process.

It is well documented that CAFOs contaminate groundwater, surface water, and the air with nutrients, pathogens, and other pollutants. CAFO pollutants leak from lagoons and other storage structures, leach and run off from spray fields and volatilize to the air. CAFO-polluted groundwater and surface water can be dangerous to human health and the environment when people and wildlife come into contact with or consume it. Surface water pollution from CAFOs has already been seen to cause massive fish kills and the loss of other aquatic life. (WELC, et al)

Response: We agree that there have been serious problems at CAFOs in the past, but we believe this permit will protect surface and ground water quality.

In a CWA case brought against a large dairy in the Yakima Valley, in response to questioning concerning the effectiveness of Ecology's attempt to ensure that CAFOs comply with the CWA, Mr. Robert Barwin, manager of the water quality program for Central Washington, responded, "[i]t varies a lot . . . I would guess on balance I would have to say we've been weighted toward the ineffective side." Part of the problem is that DOE has historically allowed the CAFO industry to self-regulate. (WELC, et al)

Response: This permit is a case where CAFOs are no longer self-regulatory. While we recognize that there are self-monitoring aspects of this permit (as with many other permits), CAFOs must now comply with the specific requirements of the permit and face regular inspections.

One Sunnyside resident stated that he reported so many discharges that the agency did not even want to speak to him any more! The draft CAFO general permit, as written, simply allows this dynamic to continue because the permit essentially leaves compliance in the hands of the dairies, with no incentives or checks on compliance. (WELC, et al)

Response: We disagree that there are no checks on compliance. WSDA inspectors will check on compliance, and those facilities with significant or continuing problems are subject to fines and other enforcement action.

The proposed general permit does not ensure compliance with the CWA because it does not realize the need to develop and enforce site-specific pollution prevention measures. Further, individual

permits are needed to protect water quality from the growth of the CAFO industry. Allowing CAFOs to be covered under general permits eviscerates the state's ability to ensure that the major contributor of water pollution within the state is doing what it can to minimize and eventually abate the pollution that is coming from these facilities. Assuming that DOE ignores the statutory, regulatory and judicially recognized definition of CAFOs as industrial sources and considers CAFOs to be agricultural enterprises, EPA has nevertheless recognized that "the agricultural sector . . . is the leading contributor to identified water quality impairments in the nation's rivers and streams." Undoubtedly, CAFOs are a significant part of this problem. Requiring individual permits for all CAFOs would be the tool that DOE needs to carefully regulate and monitor CAFOs in order to protect the waters of Washington. The CWA demands that individual permits should be required for CAFOs because the general permit would not take into account the water quality and designated uses of the waters surrounding a particular CAFO. The proposed general permit is designed to cover all CAFOs, regardless of varying locations, soil conditions or other site-specific characteristics. Some CAFOs are located in flood plains, converted wetlands, adjacent to wetlands and surface waters, on agricultural fields with surface drainage ditches or are on land with an extremely shallow groundwater aquifer. Wet weather frequently saturates spray fields, producing large amounts of discharges of animal waste and wash water to both surface and ground water, which necessarily impairs water quality. Individual permits are site-specifically crafted to take into account these differences. Furthermore, monitoring and reporting needs will vary among CAFOs. Some operations may require more frequent in-stream monitoring in order to protect outstanding waters or salmon streams, other operations may need more frequent groundwater monitoring to ensure drinking water supplies do not become contaminated, or more contaminated, as the case may be. An individual NPDES permit obliges DOE to impose monitoring and reporting requirements necessary to protect the water quality of the surrounding waters. Individual permits allow for the imposition of meaningful monitoring requirements that both protect water quality and produce records and reports useful for gauging compliance, which is absolutely critical considering the fact that this industry is notorious for skirting its obligations to comply with the CWA. Individual permits issued to other industrial activities require the monitoring of receiving waters and the submission of periodic reports to DOE. Washington also must require individually tailored management practices specific to the unique conditions on CAFO sites. Site-specific information can be used to impose specific design or operational permit limitations. Individual permits can allow for the evaluation and accounting of the suitability of the land for the application of manure, including the soil and subsoil permeability, the presence of aquifers, the vulnerability of groundwater resources, soil slope, erodibility, the land use of proposed disposal sites and surrounding land uses, and the existence of water withdrawals downstream of the proposed disposal site. Site-specific permit terms might, for example, require the siting of a manure storage facility in the least ecologically vulnerable location on a property, despite the owner's plans to put it elsewhere. (WELC, et al)

Response: It is always difficult for Ecology to decide if individual permits or a general permit are appropriate. For CAFOs we determined that a general permit was more appropriate, and we still agree with that determination. Writing one general permit uses far fewer state resources. The nutrient management plans requires site-specific analysis that would otherwise be lacking in a state-wide general permit. The WSDA approves those nutrient management plans to ensure they are protective of water quality. WSDA will take the site-specific factors that this commenter mentions, such as flood plains, wetlands, etc., into account when determining if a nutrient

management plan is sufficient. We agree that if additional monitoring is required, then a companion order will be issued or the facility will be covered under a general permit.

Washington should refuse to issue NPDES permits, general or individual, to new CAFO operations in impaired watersheds. Given the history of water pollution associated with CAFOs, these facilities would invariably discharge pollutants that would exacerbate an already impaired watershed. Any permit for an existing CAFO that is located in an impaired watershed should not only be an individual permit, but should also require additional monitoring, large buffers (minimum 150 feet) between the facility and any surface waters, and other measures to minimize the prospects of contributing to the increased impairment of these waters. (WELC, et al)

Response: This permit is designed to prevent the “invariable discharge of pollutants” that the commenter suggests. We believe that the general permit will be protective of all water quality, including those impaired waters. If we find otherwise, the requirements for a CAFO can be changed through a companion order or by issuing an individual permit for the CAFO.

Whenever possible, all new CAFOs should be required to adopt sustainable animal production systems that protect air, surface, and water resources, such as the use of composting and the installation of covered lagoons. In addition to ensuring that the technology standards the agency requires do not harm surface water, we urge the agency to use all available mechanisms, including the Safe Drinking Water Act, Resource Conservation and Recovery Act, the Emergency Planning and Community Right to Know Act, the Comprehensive Environmental Response, Compensation and Liability Act and the Clean Air Act, to prevent contamination of groundwater and air pollution by CAFOs. (WELC, et al)

Response: We agree that all CAFOs should adopt sustainable production methods that protect air, soil, and water quality. This permit only address factors related to water quality. We attempted to craft a permit that protected water quality without shifting problems to other areas, such as air quality.

At a minimum, dry manure must be stored in covered, concrete-lined structures which prevent precipitation from entering the structure and storm water from running through it. Composting of dry manure should be encouraged in order to reduce the volume of the waste, stabilize the nutrients, and reduce the pathogen load of the waste. (WELC, et al)

Response: We do encourage alternative and innovative measures for manure management that are more protective of water quality. For example, some dairies in Snohomish Country are working with the Tulalip Tribe on an anaerobic digester to convert manure to methane, which is used for energy. The final test for Ecology, and for the permit, is the practices used on the CAFO must protect water quality.

I believe that the draft CAFO/NPDES permit presented is doable. It will not be easy and will require quite an investment in time and money. We all need to be concerned about environmental safety now and for future generations. Permitting is a viable way to ensure this. (Welsh)

Response: Thank you for the comment. We agree.

The Permit does not address how Ecology will deal with stormwater runoff from land application areas. Agricultural stormwater discharges are not considered point sources under the Clean Water Act: “The term “point source” means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.” 33 U.S.C. 1362(14). The Permit needs to clearly state that the CAFO will not be in violation of its permit if precipitation causes a discharge from land that has received manure, litter, or process wastewater in agronomic rates. (DWT)

Response: We agree that EPA’s federal CAFO rules said that stormwater dischargers are not considered point sources under the Clean Water Act. CAFOs will not be in violation of the permit simply if they have a stormwater discharge. However, the 2nd Circuit Court has upheld that certain stormwater discharges may still violate other rules or regulations. It is important to define what exactly a storm water discharge is. The preamble to the federal CAFO regulations (federal register vol. 68 no. 29 from February 12, 2003 page 7197) states: “EPA is clarifying in today’s rule that discharges of manure, litter, and process wastewaters from the land application areas of a CAFO are agricultural storm water discharges where the manure or process wastewater has been applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure or process wastewater. Such practices, as specified in 122.42(e)(1) (vi)–(ix) must be included in all CAFO permits.” Ecology is very hesitant to list the things that a CAFO can do that will “not be in violation.” Instead the permit lists the things that are violations of the permit.

Animal manure produced on our farm is too valuable for our hay and pasture land to be wasted or allowed to pollute waterways. (Courtney Farms)

Response: We agree; manure can be a valuable resource when used effectively.

I attended the work session in Mt. Vernon on January 10, 2005 where you informed the public in attendance that if an operation volunteered to be included in the permit and they would be entitled to the benefits of the permit. You defined the benefits as having protection by the Department from nuisance lawsuits. There is no mention of these provisions in the Draft or any other benefits. Were these benefits intended to be a non-written verbal agreement? The benefits need to be clearly spelled out if they truly exist. (K. Dunlap)

Response: At the Mt. Vernon meeting Ecology staff did not say the Department would protect against nuisance lawsuits. A truly nuisance lawsuit is a lawsuit brought without any merit, and there is no way for anyone to stop such a lawsuit. Permittees are afforded some protection of liability from enforcement and citizen suit by having a discharge permit. This protection comes from language in Section 402(k) of the Clean Water

Act. This section of the CWA says “Compliance with a permit issued pursuant to this section, shall be deemed compliance, for purposes of sections 309 and 505, with sections 301, 302, 306, 307, and 403, except any standard imposed under section 307 for a toxic pollutant injurious to human health.” EPA has adopted a policy in 1995 to clarify the circumstances of protection afforded by this policy. The policy states that if the pollutants in the discharge, the suspected pollutants in discharge and the manufacturing processes are fully disclosed during application, the permittee is shielded from enforcement if it’s subsequently discovered the discharge is causing a violation of water quality standards. Several courts have agreed with EPA on the legal interpretation of Section 402(k).

The Department of Agricultural predicts that in the year 2005 the United States agricultural imports will exceed our agricultural exports. This has not happened since 1959. Do we really want to become a nation that is dependent on foreign food, like we are on foreign fuel and foreign industry? HB 5889 transfers authority from DOE to WSDA for livestock and dairy farm inspections, permitting issues and violation enforcement. Hopefully the WSDA will have a better understanding of the long-term effects that these regulatory policies have on the future of the agricultural industry and will be more reasonable in the administration of them. (M. Dunlap)

Response: WSDA does have a great deal of experience in the agricultural sector.

Ecology's Permit Application Form is not adequate to permit characterization of the wastes produced by the applicant's operation. Moreover, the Application only asks whether the facility discharges "manure (or runoff contaminated with manure)[.]" There is no reference to process wastewater. The Application does not satisfy federal requirements. See, 40 CFR 122.21. At a minimum, the applicant should be required to submit sampling data, the facility's most recent Nutrient Management Plan, the applicant's certification that the NMP accurately reflects the operation as of the date of application, and an engineering report certifying the adequacy of the impoundment system to contain the runoff associated with the applicable design storm. (Smith & Lowney PLLC)

Response: We will look at the permit application form and address any deficiencies. The part of the application that asks about “manure (or runoff contaminated with manure)” is supplemental to the federal requirements in 40 CFR 122.21. We believe that the language in the application is easier to understand than the federal terminology of “process wastewater.” If the application is easier to understand, it is more likely to be filled out accurately. Please see S4.C for a discussion on monitoring and S3.D for a discussion on nutrient management plan.

It is very important that this CAFO permit does not make us even more uncompetitive with other western States. It is odd that in Washington State with its ideal climate and vast natural resources the dairy industry is in decline and in all the other western States is growing. I think that your Department deserves much of the credit for this. (Werkhoven)

Response: Ecology has attempted to craft a permit that minimizes the costs to CAFOs while meeting federal and state laws and rules.

I have a problem with undefined acronyms. I think I found most of the supporting papers except one. 40 CFR 122. What is it? It could be 40 Caliber Firing Rifle, or 40 Chicken Fryers Roasting, or 40 Chicken Farmers Roasting. I just found out what CFR is: 40 Code of Federal Regulations 122.41, basically it says that if you do not comply you can be fined up to \$2 million! Our farm isn't worth half that amount. In addition you can be put in prison for a stated amount of years. Someone really wants us out of business! (Gruhl)

Response: We reviewed the permit and defined all the acronyms used. While a maximum of \$10,000 per day fine could add up quickly for long-term violations, Ecology has never issued a fine anywhere near \$2 million to a CAFO.

My next comments are more personal. In attempting to meet the covered manure storage requirement I was encouraged to build a waste management building. An environmental inspection was made of the building site, it took 22 minutes. I received a \$350 bill for the inspection. That bill, and other permits and drawings raised the cost of the building project significantly. We would like to increase our chicken fryer operation size but with all these government requirements, government inspectors, government paper trail requirements, tests of the air, ground and water, I feel it is better to shut down my operation and work in town. Many of my neighboring dairy farmers have already sold out. Is this the objective of the state of Washington? If we can not make a living here we must leave. (Gruhl)

Response: No, that is not the objective of the state. Ecology has attempted to craft a permit that minimizes the costs to CAFOs while meeting federal and state laws and rules.

The Ecology offers the encourage that medium and small work to avoid needed permits by avoiding the discharges. The Department of Ecology must and should be obligated to provide an educational program to inform the public immediately. Without an educational program, the public assumes the state is out to regulate and not to achieve the successes of having the clean water. (SCCA)

Response: We agree. An education program has been started. Washington State University received a grant for \$50,000, under the Direct Implementation Fund, for water quality education for AFO and CAFOs. Local conservation districts and the WSDA will also be doing educational programs.

Uncontradicted trial testimony of a DOE employee indicated that Mr. Bosma, a one-time director of the Washington Dairy Federation, threatened to shoot the DOE inspector if he returned to his dairy. The undersigned understand that under these circumstances it is not an easy task to enforce the CWA against an industry that is accustomed to using threats and intimidation as a means to avoid compliance with the law. In the litigation that was eventually brought against Henry Bosma for CWA violations, the plaintiffs experienced similar threats by this industry. This threatening behavior continues today as was demonstrated at the public hearing for this General Permit in Yakima, WA. Many citizens who attended the hearing were afraid to speak out against these facilities. But, these tactics should not be given validation by the DOE. Instead, the DOE should take this opportunity to regain control of enforcing the CWA against this industry. (WELC, et al)

Response: We are saddened that the behavior at the public hearing in Yakima caused citizens who attended the hearing to be afraid to speak out. This atmosphere is the exact opposite of the atmosphere that we wish to create at all public meetings. The intent of public meetings is to gather input from all citizens of the state. Such tactics are not given validation by Ecology. We write a permit based on legal requirements and scientific information, not threats and intimidation.

I was able to attend the public hearing in Spokane on January 6, 2005. First, I think the lack of available copies of the Draft Fact Sheet leads to doubts on whether the public process has been fully complete. Many people do not have access to computers, and although many copies of the permit and flow chart were circulated in the county, the lack of fact sheets left many questions unanswered. (McCart)

Response: Ecology went well beyond the minimum public process required in WAC 173-226. We apologize for running out of hardcopies of the fact sheet at the Spokane public hearing. Ecology offered to mail copies of the fact sheet to anyone who wanted one, but nobody requested one.

Because our concerns and comments are well explained in the comments being submitted by the Western Environmental Law Center we will simply incorporate those comments and concerns by reference. (Columbia Riverkeeper)

Response: Thank you for your comment.

In a brief assessment of violations caused at dairy farms, I note that more than a handful have been caused by contract manure pumpers. How are these operations regulated? Please address. (North Sound Baykeeper)

Response: It depends where the contract manure pumpers are spreading manure. If the manure is being spread on land that is owned, leased, rented or controlled by the CAFO, then the manure application is covered under the permit. In this situation, the regulations are the same if the manure is being spread by the CAFO owner or someone else. However, if manure is being spread on land that is not owned, leased, rented or controlled by the CAFO, then that application is not covered under the permit. In these situations, other water quality regulations and requirements apply. For example, these applicators would be in violation of WAC 173-201A if they violate water quality standards.

After the Federal 2nd Circuit Court Decisions

This section of comments and responses are after the 2nd Circuit Courts decisions. A Public Comment period was held from October 19, 2005 to December 1, 2005. A total of 3 workshops and hearings were held in Mount Vernon, Longview and Yakima, Washington.

Definitions

Add a definition for Certification (or drop the reference to certification later in the permit) (WSDA)

Response: Since there is no requirement by the 2nd Circuit Court to “certify” NMPs (Nutrient Management Plan), only that they be approved we have removed the certification requirement from the permit. In its place, the NMPs have to be approved by the permitting authority and, in the Fact Sheet under the NMP section it states the Department can use other agencies to assist in plan verification.

#1(b)

“any portion”: This is rather vague. Does this mean that if any portion, no matter how small, has something growing in the normal growing season, then the lot or facility is not an AFO? This question corresponds to the request from the WA Cattlemen’s Association for a clear definition of what would be sufficient vegetative cover to avoid meeting the AFO definition. (See WSDA Summary of LNMP Draft Legislative Comments, 10/27/05). (Bahrych)

AND

I would like to see a reference that would help us define crops of vegetation and forage growth. We could take a look at the current EPA reference to that as well. (WCA)

Response: The definitions are from 40 CFR 122.23. To be consistent and as clear as possible, we have decided to stay with the established definitions. A change to the definition needs to come from USEPA.

#3

Numbers are not sufficient means to regulate there must be an actual discharge to require a permit. (WCA)

Response: We agree. Since the 2nd Circuit Court decision, numbers of confined animals cannot be the only condition that forces a facility to apply for the CAFO Permit. A facility can be defined as a “CAFO” by the number of animals confined, however unless there is a discharge, they cannot be required to be a “Permitted CAFO”. We feel what the commenter is saying, is unless there is an actual discharge, a governmental agency cannot force a facility to be a “Permitted CAFO”. There is a situation where a governmental regulatory agency can require a facility apply for the CAFO permit even if they did not have a discharge. A facility can be designated a CAFO and required to be a ‘Permitted CAFO’ if they are a potential threat to waters on the state.

. . . second point, regarding AFO's and CAFO's, just to be sure we clarify throughout the permit when we are talking about a permitted CAFO that's noted that we don't interface permitted and non-permitted facilities. (WCA)

Response: Since this permit is only for permitted CAFOs, whenever the term CAFO is used, it is in reference to a permitted facility.

Numbers are not sufficient means to regulate, there must be an actual discharge to require a permit. (WCA)

AND

Response: We agree. The reference to numbers is solely to determine if an AFO that discharges will be considered a Large CAFO, Medium CAFO or a Small CAFO. The USEPA guidelines are if there is a discharge from a non-permitted Large CAFO, that facility is liable for fines and damages at the time of discharge. If a medium sized CAFO discharges, they would be required to apply for the CAFO permit while a Small CAFO would have to be determined to be a "significant contributor of pollutants" then be designated a CAFO and required to apply for a permit. Each size CAFO has different requirements, so the size ranges are still valid and the definition needs to be in the permit.

#4

Show me the criteria that is used each designation. (WCA)

AND

Also, if we could include any criteria, or list any of the tools that might be used in a potential listing for a designation of a AFO to a CAFO that would be beneficial for producers and that could be included in a fact sheet if that's not appropriate in the permit itself. I think that would handle a couple of points there. (WCA)

AND

Include the entire list of criteria that is used in a designation, producers need to know what the water quality standards that they are being used. The terms significant contributor need to have a numerical equivalent that coincides with it. (WCA)

AND

4. "Designate as a CAFO" means the appropriate authority has determined that an AFO is a significant contributor of pollutants to waters of the state and issued a format designation. Definition added for clarity (Hepp)

Response: The CAFO Federal Rule does not define what criteria will be used to designate a facility; that has been left up to the regulatory agency. The CAFO General Rule left agencies latitude to determine designation on a case-by-case basis. WSDA are developing guidance.

#6

Definition of Discharge (WSDA)

AND

Starting with the definition page, Appendix three, under the definitions, I would like to see the addition of the definition of a discharge, to give us a little clarity as we move through the permit and also references and reflects the second circuit courts recent ruling. (WCA)

Response: We agree and added the discharge definition. For consistency, we used the definition as found in 40 CFR 122.2

#10

I suggest adding the word “released” after “applied,” so that it would read as follows: “to which manure, litter or process wastewater from the production area is or may be applied or released.” I am thinking of a negligent or unintentional release. (Bahrych)

Response: The definitions are from 40 CFR § 122.23. To be consistent we have decided to stay with established definitions.

21

Include the definition of a veal large CAFO. (WCA)

AND

Do we need to define what a “Veal Large CAFO” is? More specifically, we think we need a strict definition as to what “Veal” is. (WCF)

Response: We agree and added a definition of veal in the definition section.

S1. Effluent Limitations

This should be true even if the runoff occurs when the manure, litter or wastewater is being applied at agronomic rates. If a discharge occurs when the manure, litter or wastewater is being applied at agronomic rates, then this is a clear signal that the agronomic rates need to be revisited and adjusted so that no discharges occur. (WELC, et al)

Response: See 3rd response on page 5

Section S1.A(1) Surface Water Effluent Limitations

Ecology Should Abandon The 100-Year, 24 Hour Exception To The “No Discharge” Effluent Limitation. The Second Circuit invalidated EPA’s decision to allow CAFOs to comply with a no discharge effluent limitation “by designing, operation, and maintaining a facility to contain the runoff from a 100-year, 24-hour rainfall event. . .” Waterkeeper Alliance, at 59. The court found “it obvious that *substantially preventing* discharges is not the same as prohibiting them outright.” *Id.* Therefore, Ecology must reconsider its decision to allow a 100-year, 24-hour exception to the no discharge effluent limitation for new source swine, poultry, and veal Large CAFOs. As stated, in our original comments, the technology is available and economically feasible to require that new source large CAFOs comply with a no discharge effluent limitation, with no exception. (WELC, et al)

Response: See 2nd response on page 8

S1.A.3

S1.A.3 - States that discharges may not cause or contribute to a violation of water quality standards. Does this negate the 25 yr/ 24 hr storm event clause? (WCF)

Response: No, this section does not negate the 25 year, 24 hour storm event. Any facility covered under this general permit is allowed to discharge under certain conditions. However, the actual discharge itself is regulated under WAC 173-201A. The regulation requires all general permits adhere to the Tier II requirement that a discharge above the background level is not allowed unless the department can demonstrate the lowering of water quality standards is necessary and in the overriding public interest. If this cannot be demonstrated, degrading water quality is not allowed. No discharger, weather it is a consistent or an intermittent discharge, is allowed above the natural background levels unless public interest can be demonstrated.

The approved NMP dictates application rate. Also, what is agronomic, there is no definitions. (Simplot)

Response: Agronomic refers to the science of agriculture as it relates to soil management and crop production. Since the term is used in the Federal CAFO Rule, we feel its use in the permit is consistent with Federal rule. However, for more clarity, “as defined in the nutrient management plan” has been added to the permit.

Move to the definitions “CFR” is the “Code of Federal Regulations” (Simplot)

AND

S1.B2 Move “WAC” to definitions. (Simplot)

Response: These definitions were added from another comment and it is also standard formatting practice to define an acronym the first time it is used in a sentence.

This is a zero discharge permit and this section is not necessary. This statement is out of the WAC for industrial discharges and permits and is not applicable to livestock operations. (Simplot)

Response: This section is a part of WAC 173-200 and part of the states overall ground water standards. It is not just for non-agricultural dischargers. AKART principles apply to all state waste discharge permits.

We would request additional clarification in relation to the Agricultural Storm Water Exemption. Specifically, recognizing that Agricultural Storm water is exempt from the Clean Water Act and further in relation to land application “discharges of manure, litter and process wastewaters from the land application areas of a CAFO are agricultural storm water discharges where the manure or process wastewater has been applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure or process waste water.” (Agri B)

Response: We agree and have added a clarifier on page 10 of the fact sheet.

S1.B Ground Water Effluent Limitations

Process wastewater discharges- Does this give the DOE the free rein to check ground water and the feedlot to be the source of contamination? (WCF)

Response: General condition G4 authorized Ecology and WSDA the authority to access a permitted facilities property to investigate potential or actual discharges. The discharges are to state waters which is surface and ground water. This section does state the inspections have to be at reasonable times, but the agencies do have the authority to perform inspections to insure water quality.

S1.B1

The language in the general permit must be clarified and strengthened to demonstrate that preventing leakage to groundwater is an enforceable requirement under the permit. DOE should also clarify that the no-discharge effluent limitation applied to surface waters also applies to discharges to ground water that is hydrologically connected to surface water. Such an approach is consistent with case law interpreting the applicability of the CWA. Numerous scientific studies have documented groundwater contamination caused by wastewater seepage from both lined and unlined lagoons. For example, researchers in Kansas found that the four clay-lined swine lagoons they studied leaked between 0.05 and 0.08 inches a day, which translates to between 0.99 million and 4.35 million gallons per year, or 19.8 to 87.1 million gallons of waste over the twenty-year life of the lagoons. Thus, in essence, waste storage lagoons themselves are point sources of water pollution. Groundwater quality can be enhanced by imposing a zero-discharge groundwater effluent standard or by phasing out the use of lagoons altogether. Groundwater protection must be a high priority in

the design, operation, and maintenance of all CAFOs. The general permit should specify that waste and wastewater not be placed directly in or allowed to come into contact with groundwater. In order to effectuate this purpose, large CAFOs must be required to prove, as part of an NPDES application, that there are no impoundments hydrologically connected to any surface waters. Any discharge to groundwater should constitute a violation of the general NPDES permit. (WELC, et al)

AND

Giving the CAFO the choice to use groundwater monitoring, rather than requiring such monitoring, does not solve the problem. The use of soil sampling is a good first step, but it does not adequately ensure that groundwater contamination is not occurring. Soil sampling only analyzes the top layer of the land application area and does not adequately reflect the saturation and contamination that may have occurred in the groundwater aquifer. Only groundwater monitoring can present an accurate picture of the extent of contamination that is undoubtedly occurring. (WELC, et al)

Response: See 2nd response on page 11

The Second Circuit noted that EPA repeatedly acknowledged “the presence of pathogens in animal wastes and the potential risk they pose to human health and the environment.” *Waterkeeper Alliance*, at 55. However, in the final national CAFO Rule, EPA declined to impose an effluent limitation guideline that would reduce the introduction of pathogens into the environment. The Second Circuit invalidated EPA’s failure to address the pathogen problem because “[t]he [CWA] requires that the EPA select the best pollutant control technology for reducing pathogens, and [the court] must enforce that requirement.” *Id.* at 56. Ecology has similarly recognized the dangerous pathogens found in animal waste. Washington Draft CAFO Permit Fact Sheet at 5. However, there is no indication that Ecology imposed an effluent limitation guideline that sufficiently ensures that these pathogens will not be introduced into the environment. Ecology must take further steps to ensure that the citizens of this state are adequately protected from the introduction of pathogens from CAFO operations. (WELC, et al)

Response: Pathogens are carried by the manure preventing the manure from entering wastes of the state. Also, the controls of pathogens are addressed in the Ground water standards WAC 173-200 and Surface water standards WAC 1783-201A. Their introductions to waters of the state above background levels are prohibited. Ecology feels referencing WAC is sufficient for the establishment of limits.

We also recommend amending the language to state “that results in a discharge of manure or process wastewater **into waters of the United States** from land application not in accordance with the Nutrient Management Plan.” (Agri B)

Response: This General CAFO Permit is a combination of the Federal NPDES Permit and a State Waste Discharge Permit. Under state law, ground water is protected under WAV 173-200. To be in compliance with WA, any reference to stormwater must reflect both surface and groundwater.

S1 B(2)

Operators are expected to achieve standards like “all known, available, and reasonable methods of *prevention*, control, and treatment,” which is a complex regulatory concept for which the state or the regulated community has no experience. Impossible to implement when none of the benchmarks are set. (Agri B)

Response: AKART is the policy for water pollution control defined by the legislature in RCW 90.48.010. The 2nd Circuit Court decided BMPs are effluent limits. Since NRCS FOTGs are accepted as meeting AKART, this is the standard that has to be met.

S1.C Transfer of Manure

Therefore, DOE should amend their definition of “land application area” so that it includes *all* off-site lands to which the CAFO’s manure, litter or wastewater is applied. An example of a definition that would take this into account is: “land application area means any land, whether it is owned, rented, leased or used by the CAFO owner or operator, to which manure, litter or process wastewater from the production area is or may be applied.” This definitional change will ensure that a CAFO is responsible for all waste produced at their facility. (WELC, et al)

Response: See 3rd response on page 12

S4 [sic] Manure transfer. Where in this says, “prior to transferring manure, litter or processed water to other persons, all CAFO’s must provide recipient of the manure, litter or processed water with the current nutrient analysis. The analysis provided must be consistent with the requirements of 40 CFR part 412. CAFO must retain for 5 years the records of the date, the recipient name and address, and approximant amount of manure.” I don’t think that it’s necessary to have the recipient or the address of the person that you are transferring that to. If we purchase fertilizer else where, we don’t have to do those kinds of things but I understand the fact of because of our plan we have to state what we did with that manure and who it went to is necessary. And I think this in most cases I think this thing is a very good document now from what it used to be and as far as a dairy farmer I have no complaints with it and other than the stated items. (Hayes)

AND

Reiterate the same concerns of Mr. Hayes addressed on page 7. S.1 Effluent limitations S.1.C, Transfer of Manure. Concerned that public records may be, if that information kept and retained, that may be available through a public records and recipient name and addresses is really confidential business information and it’s possible that’s covered under the OPR exemption that we got passed at the end of the last session, but just wanted to express some concerns on that. (Gordon)

Response: This is a requirement of the Federal CAFO Rule. If there is a legitimate business privacy concern, the facility must notify Ecology. The department has committed to follow the requirements provided under WAC 43.21A.160.

S1.D Inspections

Visual Inspections: Are these required inspections to be documented? If so, it might be useful to state that here, since no specific requirement for recording the inspections is here now. (I am assuming that there is such a record requirement for visual inspections; if not, then I suggest that there should be.) (WELC, et al)

Response: Record keeping requirements are stated in section S4, Record Keeping, Reporting, and Environmental Monitoring. We have made a reference to this section to help the reader understand the need for written records.

S1.D.1.(b)

What is the purpose of this? Water lines are all underground. (WCF)

Response: Inspection of water lines is a requirement of the Federal CAFO Rule. Besides that, not all the facilities water lines are underground and, usually a leak in from an underground water line will leave a sign at surface level.

S2. Permit Coverage

S2.A

Ecology should require that *all* CAFOs be covered under a valid NPDES permit. The state is allowed to enact more stringent requirements than the federal government concerning the type of activities that must be regulated under a NPDES permit. As demonstrated above, the CAFO industry has repeatedly discharged pollutants into waters of the state and thus should be required to be regulated under the NPDES program. (WELC, et al)

Response: We have decided to write the permit according to the Federal Standard except adding components for ground water. Where the permit is stricter, it has to be in line with state law. Ground water contamination is a basin wide issue in agricultural areas. We do not have the information to show all CAFOs discharge to groundwater. CAFOs and AFOs discovered that are discharging to wasters of the state must stop the discharge or required to get the CAFO permit.

The language needs to be clear that only CAFOs that have a discharge need a permit. CAFOs can not be regulated on the “potential to discharge”. The idea of regulation on potential does not hold water, I have the potential to win the Power Ball Lottery but I have not won yet. (WCA)

AND

. . . .if we could maybe take a look or attempt to clarify a little bit of the language that we are again only looking at those CAFO’s that have a discharge, being those that require permit coverage, and

do whatever we can to reference the second circuit and the fact that we're not necessarily regulating on potential. (WCA)

Response:

We agree that a facility cannot be forced to apply for a permit unless there is a discharge or potential to discharge. However, for a facility to discharge during a 25 year, 24 hour storm event a permit is required. If a facility believes it will discharge during any type of storm event, even a 25 year, 24 hour storm event or greater, they must have a permit before it discharges. This is "proposal to discharge". Now, there has been some confusion of what the "stormwater exemption" involves. The stormwater exemption is only for field application areas where manure, litter or wastewater has been applied at agronomic rates. The stormwater exemption does not include a CAFOs production area.

S2.B(1)

The EPA perspective on the Second Circuit decision was that the NMP be a condition of the permit and subject to public review and Ecology has drafted in their new permit that the NMP must be submitted with the permit application. However I believe that perspective to be unnecessary because that is not what the Court of Appeals decision stated. Their decision stated at PP 26:4 that a copy of the NPDES (National Pollutant Discharge Elimination System) application and permit be made available for public review. The decision determined at PP 26:14 that the CAFO rules failed to require that the NMP be included in the permit and at PP 27:10 that under the CAFO rule the citizens would be limited to enforcing the mere requirement to only develop a NMP. The decision found at PP 21:4-11 that the Permit did not assure that the NMP would reduce land applications discharges in a way to achieve realistic goals and would not prevent a CAFO from misunderstanding or misrepresenting their specific situation. If the NPDES permit required that NMP be prepared and approved by an independent third party like the NRCS or other professionals who have the Technical experience and are certified specialist in the proper areas to design these plans. The plan could be reviewed in the submittal application and returned to the CAFO upon compliance and approval. These plans contain the site-specific details of the operation that need not be subject to public review. The Department simply needs to ensure that the NMP plans minimize the phosphorus and nitrogen concentrations and ensure the correct application rates. (K. Dunlap)

AND

My comment is that I am very concerned with the public disclosure laws. To take on of our farm plans that may be specific, for example my farm, and then to be able to put into public record for anyone in the general public to get a copy of it, I am totally opposed to and we need to do more with you on that. (J. Allen)

Response:

We disagree.

1. As part of a NPDES permit, the 2nd Circuit Court's decision makes it clear the Clean Water Act requires effluent limits be made available for public review. Since the CAFO Rule uses BMPs (Best Business Practices) as effluent limits,

the court ordered them available for public review being required with a permit application.

2. The 2nd Circuit also ruled all NPDES Permits must be regulated in fact, not in principle. The court ruled permitting authorities must oversee NPDES Permits. NRCS or conservation districts are not the permitting authority of the CAFO Permit and they cannot “approve” the NMPs plans. This is the responsibility of the permitting authority.
3. The Consolidated Nutrient Management Plans (farm plan) are being standardized with a separate nutrient management section. The section will have what is needed for nutrient management and no true private business information.

S.2.B(1)(b)

Regarding obtaining Permit Coverage. The public comment, Washington Cattle Association feels that the public comment on the aspect of the permit coverage is a unnecessary step. We feel those agencies that are charged with issuing, regulating and dispensing the permit should be more than adequate in determining the adequacy of a permit, thus not requiring public comment. I realize that it’s an aspect of the Clean Water Act, but we want to make sure that is on the record and recognized. (WCA)

Response: Public involvement is a requirement of the Clean Water Act and the Federal 2nd Circuit Court has made it clear the Clean Water act requires agencies to provide an opportunity for public involvement.

S2.B(4)

Please add clarification that only those land application areas under the ownership or control of the permittee are applicable. (Agri B)

Response: We agree with the comment and have changed the permit.

S2.B(5)(a)

In Section S2 (5)(a), we recommend that you consider expanding public notice requirements beyond WAC 173-226-130(5) and provide electronic notice on your web-site when applications are received and consider keeping a “registry” of those interested in receiving electronic notice. (People for Puget Sound)

Response: We still believe this would be helpful to the public but lack the resources. May do in the future.

S2.C Individual Permit Coverage

The CAFOs that require a permit should be able to be covered under a general permit and not seek an individual permit coverage. If every CAFO is required to seek individual permit coverage or

have their nutrient Management Plans which contain all the site specific information open for public scrutiny it will be disastrous to the CAFO operator and the agricultural industry. It would allow the site-specific terms or conditions to be made by politicians who are untrained in these specific areas. Special interest groups also often influence them and it would open the door for corruption, discrimination, conflicts of interest, and all the other dangers of the political bureaucracy. This type of system removed the individual accountability regarding the regulators making the determinations for permitting. (K. Dunlap)

Response: This is a general permit, but an individual permit may be required if a specific operation does not fit within the bounds of this general permit.

S2.B(c) Actually S2.C

Next is actually some suggested language to clarify under S.2. Permit Coverage B sub c Individual Permit Coverage page 9, first sentence. “Individual permit coverage the department may require any CAFO to apply for and obtain individual permit or apply for and obtain coverage under another more specific general permit.” I think clarifying language in the form of something like in. “The Department may require any CAFO to apply for and obtain an individual permit, in law [sic] of this General permit,” would be a bit more clarity that what your trying to get at is the department may require an individual permit in law [sic] of this general permit that we are currently discussing today. (Gordon)

Response: The language in this section came out of WAC 173-226-240(2). For consistency, we decided to stay with the same language.

S3. Nutrient Management Plans

S3 must be amended to include a specific reference to AKART. All permittees in this state must meet the requirement of “all known available and reasonable technology,” which is not necessarily satisfied by NRCS standards or their equivalent. (People for Puget Sound)

Response: See 1st response on page 5

S3.A1

“Equivalent best management practices may be used by the CAFO if:

(a) they result in equal or better protection of surface and groundwater quality and

(b) *they are approved by the Washington State Department of Agriculture.*”

This provision improperly delegates an important CWA compliance tool, best management practices, to the DOA. Unfortunately, compliance with best management practices is often deemed to be compliance with the CWA. Therefore, it is imperative that these best management practices are the most stringent available to ensure the protection of the public health and environment. Ecology, the agency to whom CWA authority has been designated, must be the agency that approves the best management practices. (WELC, et al)+

AND

In order to comply with the CWA, NMPs must be submitted to DOE, **not** DOA because DOA has not been delegated any authority to implement and enforce the CWA. (See previous discussion concerning improper delegation of CWA authority to DOA). Because DOE has decided to authorize general, instead of individual, NPDES permits, for CAFOs, NMPs are the only place where site-specific considerations are taken into account. Only DOE, not DOA, has the information and knowledge about discharges or other environmental concerns that are occurring within a particular watershed. Therefore, to ensure that waterbodies are protected on a watershed basis, DOE must have a role in approving an NMP for a particular CAFO. In addition, for an NMP to be effective, it must be drafted by a certified specialist and the general permit must include a provision mandating such a requirement. (WELC, et al)

AND

“Equivalent best management practices” should be approved, if any, by the Conservation Districts, using their site-specific expertise. The technical expertise for this exists within the Conservation Districts which have the trained and certified specialists required by the Second Circuit decision (at p. 21, note 19). There is no reason to re-create this expertise in the WSDA, even if funding and staffing were fully available. (Bahrych)

AND

2. & 3. Requirements to develop a nutrient management plan: These two sections are based on “field-specific assessment.” This is something that the CD’s are best equipped to do. Their role should be incorporated in these sections. (Bahrych)

Response: This section has been changed so that the Department will review and approving the plans. The department can ask for assistance from WSDA and other experts with help in reviewing the plans.

S3.A1(b)

Furthermore, we do not believe that it is appropriate to delegate the determination to the Department of Agriculture as S3(A)(b) seems to do. (People for Puget Sound)

Response: We agree and removed all references to the Washington State Department of Agriculture as the approving authority and put in its place the “permitting agency” or “Department”. The Fact Sheet does give reference to agencies the permitting agency can use to assist with the approval but it is only the Department that has the authority to approve NMPs.

S3.A2

Move this statement to the FACT Sheet. It is a requirement to obtain a permit. (Simplot)

Response: We agree and moved the comment that “a complete application must include a nutrient management plan” from this part of the permit. This requirement is already addressed in section S2.B and in the Fact Sheet.

S3.A(3)(d)

“periodically inspect”: How often should these inspections be done? Some definition of what is meant by “periodically” should be included. (Bahrych)

Response: See 4th response on page 33

S3.4

Should this apply to all livestock operations, not just dairies? If not, why not? Also, I suggest adding the words, “as amended” at the end in place of “or other agency designated by the legislature. That takes care of legislated changes in the future without suggesting what those changes should be. (Bahrych)

Response: RCW 90.64-026(2) speaks specifically to dairy operations and does not address other types of animal feeding operations. Ecology cannot extend regulation beyond what was intended by the legislature. Since this is a specific requirement under RCW for dairies, it was added to the permit.

S3.A3(a)

Application which is geared toward “reasonable” production goals, while “minimizing” nitrogen and phosphorus entering ground water. These terms are too vague to provide any real guidance. The term “minimize” is used again in 3(b), again, providing little direction. (People for Puget Sound)

Response: The language for this section was taken in part from the CAFO Federal Rule (page 7209). The intent is to acknowledge the stormwater exemption from field application areas. The Clean Water Act exempts agriculture stormwater discharges if manure, litter and waste water are applied at agronomic rates. It is impossible to eliminate all possible discharges from the field application areas but, the facilities are required to minimize any discharges to their lowest possible extent. It is not allowed in this permit to add pollutants above the “point of compliance” as per WAC 173-200-060 which would be above the “maximum” and “lowest achievable level”.

S3.A.3(c)

Add after ‘five years for phosphorus content’ and annually or no less than once in three years for Nitrogen depending on location and the nutrient practice standard (590). (WSDA)

AND

In addition, you may want to reconsider testing for Phosphorus to look at increasing frequency of testing should levels be higher or to look at requiring testing for phosphorus at both one and two foot depths. (WSDA)

Response: We agree that the 590 standard requires more frequent phosphorus monitoring. All CAFOs will have to perform this more frequent soil monitoring, unless they use an “equivalent best management practice” as described in S3.A1. However, since that possibility of an “equivalent best management practice” exists, we did not put the requirements of the 590 standards into the permit. What we do have in the permit is EPA’s minimum federal standard. The once every five year phosphorus testing is a minimum backstop, no matter what best management practice is used.

S3.A(3)(b)

S3.A3(b) should refer to surface *and* ground waters. (People for Puget Sound)

Response: We agree and changed the permit here and at S3.A3(b)(i).

S3(e)(ii)

We object to the use of alternate setbacks in 3(e)(ii), primarily because we cannot envision circumstance in which it would be acceptable to apply manure safely within 100 feet, but also, again, because the Department lacks the expertise to evaluate alternative practices. (People for Puget Sound)

Response: See the 2nd response on page 35

S3.B Nutrient Management Plans

If coverage under the general permit constitutes initial approval of a plan, then it is necessary to add the DC’s [sic] to the coverage requirements. (Bahrych)

Response: In the fact sheet page 5 section E it states, “If the nutrient management plan submitted with the application does not meet the requirements of the permit, the application is not complete and will be returned.” We have added to the fact sheet the permitting authority can use the CDs to assist with NMP approval.

AND

Add a requirement that the CD's or other approved technical experts have verified or certified the plans. (Bahrych)

Response: We agree and have added to the Fact Sheet the CDs are an organization that can be used by the permitting authority to assist with NMP approval.

S3.C Nutrient Management Plan Compliance

Certification is not defined in the permit and it is unclear what the intention is in referencing this. Under the Dairy Nutrient Management Act, any CAFO Dairy will still get their plan approved and certified by the Conservation District. If the facility is to notify the agency when their plan is fully implemented (S3, B.2), then an inspector can plan to inspect the facility for full compliance. (WSDA)

AND

There is nothing in a plan to certify. Approval is all that is required. (Simplot)

Response: We agree it is not a requirement of the permit to have the plans certified by an authority and have changed the permit. They must implement and approved written nutrient management plan as required in the federal rules. Once the NMP is received by the permitting authority, the Department determines if the plan is adequate for coverage based on the permit requirements and NRCS standards. How it is determined is decided by the permitting authority.

Nutrient Management Plan Duplication. This is stated in G-1, Discharge Violations "The land application and/or discharge of any process wastewater more frequently than, at a concentration in excess of, or at times not specified in the nutrient management plan shall constitute a violation of the terms and conditions of this permit". (Simplot)

Response: We agree and removed the statement from the permit.

S3.D Nutrient Management Plan Updates

Nutrient Management Plan Updates. Wondering if we could have a little clarification on sub 2. It says, "A CAFO that reduces or changes the field area, specified in the Nutrient Management Plan, used for land application," that would require... I believe that would constitute an update. If we could clarify if we are talking about cultural practices, such as various cropping practices, or if that is actually changing the land that you would be applying or operating underneath the CAFO, maybe just a little clarification as to what we're explaining there. (WCA)

Response: See 1st response on page 37

S3.D.2

Page 12, D subsection d Nutrient Management Plan Update sub 2

“CAFO must develop and implement an updated nutrient management plan if: the CAFO reduces or changes the field area specified in the nutrient management plan used for land application.” I have some concerns about the scope of development and implemented an updated nutrient management plan. Does it mean that it’s got to be developed and updated and go through an open public process again? How extensive are those, especially for something as minor as renting a field or changing field application areas and that clarification may be in the fact sheet. I did not see where that was. . . . (Gordon)

Response: If a change of operation would increase the likely hood of a discharge, or there is a change that would require the NMP to be updated to accommodate that change (i.e.: land usage change beyond 10%), the NMP needs to be updated then submitted to the Department. Since the operation itself has not changed (i.e.: the dairy adds on a bottling plant), there is no public notice requirement.

At the Washington State Conservation Commission Meeting on December 1, 2005, the Commission discussed the CAFO General Permit and would like to provide a comment/request for your consideration. The Commission would like the permit to recognize the important role of the Conservation Commission and conservation districts in CAFO and Livestock Nutrient Management without compromising their non-regulatory position. (WSSC)

Response: We feel approval of the NMPs is the responsibility of the permitting authority, and have only mentioned the Department in the permit. However, we agree with your comment and changed the Fact Sheet to add the Departments can seek assistance from organizations that have the experience to verify NMP compliance. The Washington State Conservation districts are mentioned as one of the organizations that has the expertise to assist with verification.

First, we continue to be extremely concerned about the use of “equivalent” BMP’s. We seriously question how the Department will evaluate any equivalency. The agency lacks expertise in this area and the permit does not make clear how, in fact, your staff would make these determinations. We feel that, at a minimum, the permit should spell out an approach which would involve field testing with vigorous monitoring requirements over an extended period of time. (People for Puget Sound)

Response: The permit requires all CAFOs to comply with NRCS FOTGs, or other practices that offer equivalent protection and are reviewed by the Department. We will consult with WSDA and other experts when reviewing the plans. We feel these are the best resources for the development of BMPs, field testing the BMPs and compliance oversight. The NRCS works in conjunction with many entities, governmental and private, to develop and test their practices. The commenter is correct stating Ecology does not have the expertise needed to determine the effectiveness of these practices. However, the NRCS and WSDA do have the expertise and field experience.

The Ninth Circuit's decision in *Environmental Defense Center v. EPA*, 319 F.3d 398, 427-28 (9th Cir. 2003), holding that public hearing on notices of intent for coverage under a general NPDES permit must be held, requires that NMPs be part of the permit application. The NMPs are undoubtedly a critical component of the proposed permits. In fact, the NMPs are the primary mechanism to ensure CWA compliance. Without them available for public review and public hearing before issuance of a permit, whether general or individual, DOE will be in violation of the Ninth Circuit's ruling. As drafted, the NMP only becomes available for public review if DOE requests a copy of the NMP on the basis of evidence of environmental impacts. The NMP would then become a public record. This process contravenes the CWA because it essentially excludes the public from commenting on an NPDES permit. Settlement of a recent challenge to the Oregon CAFO rules resulted in NMPs being subject to public review. DOE should use the Oregon settlement as a starting point, not an end point, for its general permit. (WELC, et al)

Response: See 1st response on page 42

“CAFO must develop and implement an updated nutrient management plan if: the CAFO reduces or changes the field area specified in the nutrient management plan used for land application.” I have some concerns about the scope of development and implemented an updated nutrient management plan. Does it mean that it's got to be developed and updated and go through an open public process again? How extensive are those, especially for something as minor as renting a field or changing field application areas and that clarification may be in the fact sheet. I did not see where that was (Gordon)

AND

This is unclear because the field areas to apply nutrients are likely to change yearly. Does that mean the Nutrient Management Plan has to be rewritten accordingly? (WCF)

Response: See 1st response on page 37

Should contain a requirement to update an NMP when necessary to meet the requirements of a TMDL. (People for Puget Sound)

Response: This permit is a zero discharge permit and already has provisions to address any TMDL issues. Any pollutants that can be identified coming from an agricultural facility would require a facility take immediately action to stop the discharge. Then the facility must develop BMPs to eliminate any future discharges. Also, if there is an authorized discharge, i.e.: a 25year, 24 hour storm event discharge, the discharge cannot raise the pollutants in the water over back ground levels.

S4. Record Keeping, Reporting, and Environmental Monitoring

Record keeping, Reporting, and Environmental Monitoring- We don't feel this is clear as to which provisions in this section apply to CAFO's that are applying to land they own or control, and CAFO's that are exporting their nutrients. (WCF)

Response: We agree and have added a provision about manure transfer in section S4.2.b.

Under the reporting aspect, S.4 and I think throughout S.4.B. Just to be sure that when we talk about those CAFO's and facilities required for the reporting and record keeping, that we specify those are permitted facilities. And the same thing goes to section S.3, Soil Monitoring. (WCA)

Response: This permit only effects permitted facilities.

S4A.1(b)

Add a public disclosure requirement here as follows: "For any discharge, the following records are required and must be made available to the public upon request." This in information that the public has the right to have. (Bahrych)

Response: Under section S4.B of the permit, a verbal report must be called in to the Department of Agriculture within 24 hours of any discharge and a written report submitted within 5 days. Any discharge report that is submitted to a public agency is subject to public disclosure under RCW 42.17 250-320 There is an established procedure for the public access to information through the public disclosure system. A form for this purpose is available on: <http://www.ecy.wa.gov/biblio/ecy01037.html>.

S4.A1(b)(i)

Consider adding after 'discharge' within 24 hours after the discharge (See S4B.1.); The responsibility to report within 24 hours is more clearly explained in Section S4.B.1., however including the reference here may help prevent confusion in the future. (WSDA)

Response: This section is describing what records are to be maintained. However, we agree some reference to the 24 hour reporting would be helpful. To assist the facility with their record keeping of their 24 hour notification to WSDA, a reference has been added.

S4.2.b.(1) Why are records of inspections for medium CAFOs and designated CAFOs exempt?
(Bahrych)

Response: It is understood larger CAFO operations have adequate staff to record all their inspections, while smaller facilities generally do not. By not overburdening smaller operations, it is felt the records that they are required keep will be more consistent and reliable.

S4A.2(a)(b)

Production Area and 2.b. Land Application Area: For both of these lists of items, in order to protect the business interests of the producers, it should be possible to designate those that the public has a right and a need to have access to and those that do not need to be disclosed. This might be a means of addressing the Second Circuit's requirement for public access (pp. 26-28). (Bahrych)

Response: WSDA is working to standardize NMPs throughout the state. Ecology has worked with WSDA and developed an outline of the requirements of the NMP that needs to be submitted with the CAFO application and made available for public review. This comment has been acted upon.

S4.B Reporting

S4.B.1

Discharge should be reported to the CD's and notice given to affected members of the public.
(Bahrych)

Response: Like the comment on section S.B, a report must be called into the Department of Agriculture within 24 hours of any discharge and a written report submitted within 5 days. Any discharge report that is submitted to a public agency is subject to public disclosure under RCW 42.17 250-320. Ecology does not have the resources to notify all interested parties. There is already an established procedure for public access to information through the public disclosure system.

S4, A.1.b.(i)

Consider adding after 'discharge' within 24 hours after the discharge (See S4B.1.); The responsibility to report within 24 hours is more clearly explained in Section S4.B.1., however including the reference here may help prevent confusion in the future. (WSDA)

Response: Since this section S4.A.1(b)(i) is speaking about record keeping, we felt this is not the appropriate place to speak about the 24 hour notice requirement. Also, since phone numbers are continually changing, the phone number was removed from S4.B.1 of the permit. The emergency spill response plan should have the phone list already

provided. Since those plans are continuously being updated and kept current, that is the appropriate place for spill response requirements and phone information.

S4.B(2)

Physical failures should be reported to the CD's and notice given to affected members of the public.
(Bahrych)

AND

S4.B(3)

Annual reporting. At least subsections c, f, g, and h should include public access to the information.
(Bahrych)

Response: It would be a huge burden to require facilities to notify all interested parties. There is already an established procedure for the public to access of information through the public disclosure procedures. Like the comment on section S.B, a report must be called into the Department of Agriculture within 24 hours of any discharge and a written report submitted within 5 days. Any discharge report that is submitted to a public agency is subject to public disclosure under RCW 42.17 250-320

S4.C. Environmental Monitoring

Giving the CAFO the choice to use groundwater monitoring, rather than requiring such monitoring, does not solve the problem. The use of soil sampling is a good first step, but it does not adequately ensure that groundwater contamination is not occurring. Soil sampling only analyzes the top layer of the land application area and does not adequately reflect the saturation and contamination that may have occurred in the groundwater aquifer. Only groundwater monitoring can present an accurate picture of the extent of contamination that is undoubtedly occurring. (WELC, et al)

Response: See 1st response on page 48

S4.C(1)(a)

S4C2a now S4.C1a Specific standard or practices should no be in the permit, only in the site specific NMP. EM8832-E in only applicable west of the Cascades, not the entire state. (Simplot)

Response: We agree and removed the references from the permit.

S4.C(1)(b)

S4C2a[b]. now S4.C.1b Current Federal Clean Water Regulations only require soil sampling to be conducted once every 5 years. Requiring soil sampling on an annual basis is excessive and is inconsistent with requirements imposed on others in the Agricultural community. We feel that the

soil sampling requirements in the state of Washington should be consistent with those required under the EPA's Clean Water Act. (Agri B)

AND

S4.C2b now S4.C.1b NRCS and EPA both only require sampling every 5 years This permit should be consistent with federal rules. (Simplot)

Response: These results are essential for the state to determine which facilities may pose a high risk of ground water contamination. They can also show if best management practices are working.

Also, the Federal Rule relates only to surface water. According to the EPA comments in the Federal Register for the "Revised Compliance Dates for NPDES Regulation and Effluent Limitations Guidelines for CAFOs" dated December 21, 2005 EPA states, "—Ground water controls. The court [2nd Circuit Court] upheld EPA's decision to leave groundwater discharges to be addressed at the state level or on a site specific basis." This being the case, to monitor groundwater compliance with WAC 173-201 soil sampling is being used in lieu of groundwater monitoring wells.

S4.C(1)(b)

S4. C.2.b now reads S4.1.b Change first sentence to read; Large CAFOs must collect soil samples from land application areas as prescribed in their Nutrient Management Plan. The best timing for taking samples varies and is determined in the NMP. (WSDA)

Response: We agree and changed the permit.

S4.C2

FACT Sheet states that this is not required [use ground water monitoring in stead of soil testing]. Should not be listed in permit. (Simplot)

Response: We disagree and feel inclusion here is appropriate. This is an option for the Large CAFOs who are required to soil sample yearly to check compliance with WAC 173-201 ground water quality.

Environmental Monitoring. I think Chuck brought this up but it's sub C and I don't think he clarified that. It's on page 15, starts at c Environmental Monitoring. It says "1. Large CAFO's must use environmental monitoring to demonstrate..." yadayadayada. Number 2, Soil Monitoring for large CAFO's sub 3 is under that heading is "A large CAFO may choose to use ground water monitoring." It looks to me like under that heading of C Environmental Monitoring, what's labeled as number 1 is actually a description that you must, as chuck said it, you must do something. And that you have two options and so it looks like instead of it being numbered 1, 2, 3 it should be

actually Environmental Monitoring, Description and then Soil Monitoring for large CAFO's, instead of being labeled 2 should be 1 and 3 should be 2. (Gordon)

Response: We agree, and have made the change

S5. Waste Storage Facilities

The role of the CD's should be called out specifically in this section. (Bahrych)

Response: The purpose of this section is to establish construction standards and the engineering certification requirements. It would not be appropriate limiting the facilities options to only the CDs since there are many other qualified organizations available.

S7 Termination of Coverage

The CD's role in site inspections for the termination of a permit should be called out here. (Bahrych)

Response: The CDs are not regulatory and can't be tasked with regulatory decisions.

And there is a patently obviously typo that has been pointed out to department staff but because this is an official record I will delightfully point out that, S7 Termination of Coverage A.1. "A facility that did not have a discharge or was not designated a CAFO request permit termination and, to the facility a ceased operations and three, the permittee has demonstrated to the satisfaction to the department no remaining potential to discharge and there are no outstanding fees or penalties." It looks like that should be an or and I think that was a typo and I think the staff saw that and can't officially say yes or no until they've heard all the comments, but my comments are I think they are supposed to be ors because it doesn't look like you can get out of it. Die and still stuck with the permit. And I know the department needs money, but ya know, come on. (Gordon)

Response: We agree and have changed the permit.

S7.A

Determination Coverage. We're happy to see section S.7.a where there is a definition and we do have the steps outlined as to how a facility may terminate coverage under a CAFO. We're happy to see that, for both the large and medium CAFO or designated CAFO's should they choose to no longer have permit coverage. (WCA)

Response: Thank you. We also believe permitted facilities need to understand what the requirements are so they can make informed decisions and take appropriate actions.

S7, B(iv)

Add there are no outstanding fees or penalties. This seems appropriate for any size facility. (WSDA)

Response: We agree and have changed the permit.

General Conditions

G1

Again, general conditions, G.1, the Discharge Violations, a clear definition of a discharge would certainly assist us as we read through the permit and this was one area where that being listed in the definitions might assist us. (WCA)

Response:

We agree and a definition has been added. Please note that there are several definitions added to understand what a discharge is. These definitions are from 40 CFR 122.

G4(e)

Under general conditions G.4, Right of Entry, sub e, Cattleman's Association would like to see if there's a way we could strike from that line, inspections, essentially inspecting on the potential of the discharge, realizing that we are trying to base this on the discharge of the actual event not necessarily the potential, or the watering if an event would occur. (WCA)

AND

If the government cannot regulate on potential then they should not be able to sample on potential. (WCF)

Response: This section is intended for permitted facilities, "The Permittee shall at all times There is no intent to force inspections on non-permitted facilities in this section of the permit. However, there are inspection laws not related to this permit. Under RCW 90.48-090 Ecology or WSDA can investigate a complaint or inspect for conditions relating to the pollution of any waters of the state.

G.9

Under the Additional Monitoring, we'd just like, and I believe we have clarification now, but to insure the process or practice that must be gone through prior to Ecology making special rule or action on a permit, not to leave an operator in the blue there. (WCA)

AND

Does this give us ample protection against an arbitrary requirement being put in place against a feedlot to do groundwater (or other) monitoring without due process? (WCF)

Response: Ecology has the authority under RCW 43.21B to request additional monitoring by administrative order or permit modifications to protect waters of the state. The operators are protected from unfair requirements by having the right to appeal orders, permits, and licenses under RCW 43.21B-310:

“. . . any permit, certificate, or license issued by the department may be appealed to the pollution control hearings board if the appeal is filed with the board and served on the department or authority within thirty days after the date of receipt of the order”.

G 12

General Permit Modification and Revocation. What is an example of “unacceptable pollution”? Or perhaps the better question is what is an example of “acceptable pollution”? (Bahrych)

AND

On page 20, first sentence it looks like is C, is very unclear. The general category is G12 General Permit Modification and Revocation. “Permit may be modified or revoked reissued or terminated in accordance with provisions of chapter 173/226.” Then it says C, “When water quality management plan containing requirements applicable to CAFO is approved,” and I suspect that may be like a regional water quality management plan such as a TMDL, but was very unclear to me what that means and so again don’t know if that is in the fact sheet, but it seemed very vague as to what that means. And that is the extent of my comments other than I too also believe it’s a pretty good permit, I think it’s been a long time, we’ve all worked on this until we want to puke, it’s time to move on and do something else. (Gordon)

Response: This language is from 173.226-230 WAC and intended to address TMDL (The Maximum Daily Load) requirements. We feel this section adequately addresses modification and revocation issues.

G12.D

This seems pretty open-ended. (WCF)

Response: This section is in response to the water quality standards written in WAC 173-201B-240, toxic substances section which states:

“Toxic substances shall not be introduced above natural background levels in waters of the state which have the potential either singularly or cumulatively

to adversely affect characteristic water uses, cause acute or chronic toxicity to the most sensitive biota depended upon those waters, or adversely affect public health, as determined by the department.”

G 17

Penalties for Violating Permit Conditions. It may be a good idea to consider adding postponement of penalties for first time offenders under certain circumstances in order to encourage voluntary compliance. This has been requested by the WA Cattlemen’s Association and by the WA Dairy Federation. I think we should built in incentives for voluntary compliance wherever possible. This could be an important incentive for both reporting an unpermitted discharge and for working with a producer to prevent it in the future. (Bahrych)

AND

We request striking the following sentence. “Each and every such violation shall be a separate and distinct offense and in the case of a continuing violation, every day’s continuance shall be deemed a separate and distinct violation.” (AgriB)

AND

This should not be included in the permit. Should only refer to the appropriate sections in the WAC. (Simplot)

AND

And again, clarification G.17 Penalties for Violations of the Permit, we had a section on willful and wanten violation, but it appears that we’ve omitted the other aspect of an upset that went without willful or wanten regard and would like to see that language of that included and allow comment on that prior to being including in the permit since we haven’t had the opportunity to view that. (WCA)

AND

And I would like to see if we can get some clarification on the third sentence, where it starts, “a fine up to \$10,000 per day and costs of prosecution,” to see if this is the maximum or if this is on top of the federal daily limitation, which is, I believe \$27,500 per day, to see if we can get clarity on that so we have an idea what the maximum daily penalty per violation would be. I would ask that for both willful and accidental discharge and violation. (WCA)

AND

Should there be a maximum total penalty? Is this penalty in addition to the Federal penalty? What is the fine or action for a less egregious or willful/wanton violation? (WCF)

Response: The procedures for fines are established in RCW 90.48-140 and cannot be modified by this permit.

There are three possibilities here:

1. If the Department brings action to a producer for a violation under state law, the maximum penalty is \$10,000.00 per day, per incident.
2. If the Department brings action to a producer for a violation under federal statute the maximum penalty is \$27,500.00 per day, per incident.
3. If a third party brings action to a producer there are no penalty caps.

There is guidance when WSDA or Ecology issue penalties. The agencies have discretion when deciding what the penalties are. This General Permit is to inform producers what is expected of them not to establish guidance

Fact Sheet (After Federal 2nd Circuit Court Decisions)

Section J

We appreciate DOE's decision to comply with the law by incorporating NMPs as technology-based effluent limitations guidelines within the NPDES permits. The Second Circuit's decision merely reinforces this legal principle. DOE continues to leave the door open for CAFOs to prohibit the public from reviewing NMPs if the CAFO alleges the NMP contains confidential business information. However, as the Second Circuit held, because the terms of the NMPs are effluent limitations, they *must* be disclosed as part of the NPDES permit. See 40 C.F.R. § 2.302(a)(2)(I) (any information "necessary to determine the identity, amount, frequency, concentration, temperature, or other characteristics (to the extent related to water quality) of any pollutant" constitutes "effluent data" that cannot be withheld); *RSR Corp v. Browner*, 924 F. Supp. 504, 510-12 (S.D.N.Y. 1996), *aff'd RSR Corp. v. Browner*, 27 ELR 20822 (2d Cir. 1997) (holding that when a NPDES permit describes effluent limitations in terms of allowable discharge per unit of production, information revealing rate of production is not confidential business information protected from disclosure under FOIA). The D.C. Circuit has previously upheld EPA's determination that "[i]nformation contained in NPDES permits and permit applications is not entitled to confidential treatment because Section 402(j) of the CWA mandates disclosure of this information to the public, notwithstanding the fact that it might be trade secrets or commercial or financial information." 66 Fed. Reg. 2960, 3035 (March 22, 1978) (preamble, referencing Class Determination 1-78); *Natural Resources Def. Council v. Env'tl. Prot. Agency*, 822 F.2d 104 (1987). The court concluded that a business could be required to "provide confidential information where the Government had a legitimate regulatory interest in protecting the environment and public health." *Id.* (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984)). Therefore, even assuming the information in a NMP could qualify as confidential business information, which it is not, it must be still disclosed because it is an effluent limitation in the NPDES permit. (WELC, et al)

Response: Ecology is required to make confidential business information decisions according to the process outlined in statute RCW 43.21A.160 which states:

“Whenever any records or other information furnished under the authority of this chapter to the director, the department, or any division of the department, relate to the processes of production unique to the owner or operator thereof, or may affect adversely the competitive position of such owner or operator if released to the public or to a competitor, the owner or operator of such processes or production may so certify, and request that such information or records be made available only for the confidential use of the director, the department, or the appropriate division of the department. The director shall give consideration to the request, and if such action would not be detrimental to the public interest and is otherwise within accord with the policies and purposes of this chapter, may grant the same.”

Ecology does not have the authority to release confidential business information beyond the conditions of this RCW. If a requesting party desires information beyond what is authorized by this statute, they will have to seek it from a higher authority.

Section P Frequently asked Questions

#16

The following two items are incorrect:

1. Vehicles are parked on paved or concrete
2. Vehicle traffic passing on other than paved.....will be thoroughly cleaned....

Suggest changing language in #2 to “Vehicle traffic passing on other than paved or concrete areas will be confined to area that are considered common area, i.e. driveway used by milk truck for collection of milk. When this is not possible the vehicles should be thoroughly cleaned to be...”

Most facilities do not have concrete areas to park on, or such an area adjacent to the road. Most have gravel or dirt roads and parking. The focus is to avoid driving in the facility, to park as far from the production activity traffic as possible and to avoid any areas of manure, leachate, or other waste material.

Vehicles are not generally cleaned between sites. However, care is taken not to visit more than one poultry operation in a single day to minimize potential contamination. Should a site be visited that did raise concerns for contamination, then the inspector would consider getting the vehicle cleaned immediately. (WSDA)

AND

Consider adding: Inspectors will use clean, disinfected boots for each site visit. Inspectors carry disinfectant with them and clean their boots on site prior to getting in their vehicle and treat them with the disinfectant when placed in the vehicle. This is one of the most important day to day bio-security measures for inspectors. (WSDA)

Response: We agree and added comments to the Fact Sheet.

General Comments (After Federal 2nd Circuit Court Decisions)

The proposed permit attempts to take an existing “point source surface water regulation” and apply it to groundwater without defining or developing the groundwater science, classification, measurements, standards, and points of compliance that will be employed. These issues are highly technical and have taken years to develop in the regulation of surface waters. The proposed permit seems to recognize that none of these benchmarks are in place, making most aspects of this regulatory program premature. (Agri B)

Response: We have been issuing groundwater permits for municipal and industrial facilities for many years. This permit is an evolution of previous CAFO and dairy permits. This permit uses BMPs as effluent limits as approved by the 2nd Circuit Court and refers to regulation for standards.

And I think at the end if there is kind of (?) in passing, we discussed this earlier, perhaps on the fact sheet if there be a way we could include the open paragraph from the preamble of the federal rule that outlines facilities that are not covered under the permit, such as non-point operations, range and pasture based facilities, realizing that doesn’t have any affect or bearing on the permit, but simply ads peace of mind for non-point, essentially grazing operations, to realize that they are not included under the permit. (WCA)

Response: We agree and added to the Fact Sheet on page 2 a clarification.

And secondly, we’d like to see if there’s someway we could get language or maybe on fact sheet or appendix, some reference, if there’s a way we could have the ability for first time offenders to hold penalties in advance, to try to work through the water quality issues prior to the permit, and I realize that comes with flexibility through the department and the permit. I’ll go ahead and submit this as well, and with any questions, feel free to contact. (WCA)

Response: This document is guidance to the permitted facilities as to what is expected of him, and not guidance to the agencies.

The WCA would also like to see the first paragraph from the preamble to the federal rule included. This paragraph clearly outlines the fact that non-point operations are intended to be included under this permit. (WCA)

Response: We disagree.

In the pre-amble (summary on page 7176 of the CAFO Rule) it states:

“This improved regulatory program is also designed to support and complement the array of voluntary and other programs implemented by the

United States Department of Agriculture (USDA), EPA and the States that help the vast majority of *smaller animal feeding operations not addressed by this rule*. This rule is an integral part of an overall federal strategy to support a vibrant agriculture economy while at the same time taking important steps to ensure that all animal feeding operations manage their manure properly and protect water quality.”

This statement in question is, “. . . . the vast majority of smaller animal feeding operations not addressed by this rule”. We feel this does not include facilities that do not meet the definition of an AFO. If a facility is not an AFO, it cannot be a CAFO and be covered under this general permit.

There does not seem to be any mention in this permit about Chronic or Catastrophic conditions. As you remember we had a big problem last winter in Whatcom County and our Farmers, your staff, WSDA staff and EPA staff all were stuck in a catch 22. This permit is an opportunity to have a collective dialog and establish a written understanding of when a discharge is classisified as a violation and when it is not (under the Clean Water act). I would certianly reccomend that this discussion is very important to most of the stakeholders, including the tribes, the agencies, the environemental community and our farmers. I know that this addition may be a significant change to the permit and require another round of hearings, but I think that five more years of uncertianty is also not a good thing. We have watched hurricane after hurricane hit the SE and I know today that without some resolution in Washington we are just waiting for a big rain or snow event to create a conflict. (Gordon)

Response: Clean Water Act requires all point sources of pollution must have a permit to discharge. Currently under State and Federal law, all non-permitted point-source discharges are illegal, no matter how large or often the storm event(s). On permitted facilities, only during a catastrophic storm event can a facility discharge, and then there are conditions. While the commenter feels this issue needs to be addressed, there will need to be a legislative change to address non-permitted facilities that discharge during catastrophic storm events.

My name is joe schons and I worked on a family owned dairy for about 30 years before going into the wastewater plant operation business. For the last ten years, privatr industry, conservation districts, and colleges have doing projects that involve using wastewater technology to treat dairy manure. Even I got into it using polymers to floc manure...pretty good results too.

I came to the conclusion one day that technology is what screwed up the industry. Backwash systems, freestalls, rainguns, and lagoons turned it into a non-point source nightmare. Additionally, the nutrient loading to the fields with a new emphasis on phosphorus has made this even more of a nightmare. In western washington the liquid manure problem is even worse that eastern. (We farmed on both side of the cascades). I was as hyped as anyone when wastewater technology was being used to treat manure, polymers, belt presses, digesters, aerators, etc. What few seem to be looking at is how things were done in the past. Liquid manure production was a fraction then of what it is today. The new dairy is designed to handle liquid manure, which is the real problem.

In the old days, loafing sheds piled with bedding allowed the farmer to scrape a couple times a week. The manure with the bedding for bulking was piled for the winter and land applied in the spring. Usually, the piles composted which meant at least a 20-30% reduction in volume, nutrient uptake from the biology, and stabilization of nutrient which made them less soluble.

What I'm not seeing in permit systems and projects, is a return to solid manure and its benefits. Not to mention this methodology is available to dairies of ALL sizes, not just the big ones that can afford digesters and aeration tanks. Water abatement/composting is the only way all dairies can effectively decrease volume, nutrients, and runoff. Projects of this type seem to be rare...maybe because industry has nothing to gain financially. Whatever the reason, it would be great to see some grant funds applied to these projects. I know composting has been done for a number of years at different dairies, but it seems the whole idea of eliminating freestalls, lagoons, rainguns, etc. has not been tried in recent history. Please pass these thoughts on to whom ever you think might be interested. I would be happy to do a brief on these ideas if you think it might help. (J Schons)

AND

From the early days of dairy farming until the mid 1970's, manure handling was different than today. Free stalls, flush systems, side-hill screens, dewatering conveyors, and mega million gallon slurry lagoons with pump systems and rain-guns were just pipe dreams. Underground slurry tanks were becoming more common in the 1960's to handle the wash-down water from the milking barn. The light liquid was mixed and pumped into "Honey Wagons" for application to fields. The typical vault was about 35-45,000 gallons and required emptying every couple of weeks depending on whether rain gutters were directed into them.

If a farmer was located in Eastern Washington, open pens usually housed 2-3 groups of milking cows and their replacements. Each group ran between 100-150 head. During milking, the cows waited in a concrete holding pen that was usually covered. Manure from this holding pen was scraped into the underground vault. The open pens with tall roofed covers had piles of bedding, usually sawdust or wheat straw. These piles were added to as needed and removed and land applied to the fields and tilled in during the spring planting season.

Western Washington farmers were more likely to use loafing sheds rather than open pens. The reason was precipitation. About 30" per year compared to 10" in Eastern Washington. These loafing sheds also used sawdust or wheat straw for bedding. The sawdust piles were scraped every week or as needed. It was stockpiled and land applied in the spring. The wheat straw was added to as needed and cleaned out and land applied in the spring.

As you can see, most of the manure was stored in a solid form and land applied once or twice a year. During the time the piles were stockpiled or being used as bedding mounds, they were also heating and composting causing the typical volume reduction and nutrient stabilization. The liquid portion was minimal, cheap, and easy to manage.

From the mid 1970's on, dairies incorporated free stalls as a way of enclosing more cattle in a smaller area. One of the ideas was, not all cattle eat and sleep at the same time. So, you could build 100 stalls for a herd of 150 in an area the fraction of the size of the old loafing shed and open pens.

With concrete floors, you didn't have to worry about erosion and potholing from too many cows. However, this also changed the handling format from solids to semi-solids. There would be a scrape alley, with a bay of stalls on each side. The free stalls were bedded with anything from sawdust to ground canary grass straw to chopped corn stalks. The stalls are barely long enough for a full grown cow.

The idea here is, the cow will actually defecate into the scrape alley because their tail-ends are sticking out over a curb...a little uncomfortable but functional for manure recovery. After herding the cows into the holding pens for milking, workers remove additional manure from the free stalls using a fork and drop it in the scrape alley. The manure in the alley is scraped into a pit where it is mixed with wash-water and pumped, or gravity drained, into a manure slurry lagoon. Many farms have used separators to remove the undigested grass portion of the manure and the bedding material in the free stalls. The extra benefit here is prevent the manure lagoon from filling with solids requiring expensive solids removal in order to recover valuable storage space.

With lagoons large enough to hold 5 million gallons of liquid, the days of hauling manure to the fields in 1,000 gallon "Honey Wagons" are long gone. In their place, you will find pump systems with big rain gun sprinklers (formerly used in irrigation) shooting a giant green arch. With the ability to apply 1,000 gallons per minute, these systems lack the finesse enjoyed by the old wagons. Perhaps the most objectionable aspect of these rain guns, are the odors generated as the anaerobic manure is atomized in the high pressure arch. It is difficult to understand how a composting facility generating lesser odors can be shut down and/or fined, and the dairies using rain guns are exempt from state clean air regulations. In towns like Enumclaw Washington, dairies with rain guns surround the town. At times, the smell of anaerobic manure hangs in the town for days.

In recent years dairy farmers have started using wastewater technology to handle manure. Anaerobic digesters have been built and operated to stabilize the manure and capture methane for digester heating and use in farm equipment. Aerobic digesters are used to freshen and suspend solids before being pumped over screens sitting at a 45* angle. The screen allows the solids to roll down and into a set of rollers to remove excess liquid. Most of liquid manure falls through the screen and runs off to the lagoon. One project used coagulants and polymers to flocculate the manure before running it through a belt press. The liquid was fairly clear with an excellent reduction in nutrients.

Quite a few of the manure handling projects mentioned in this paper were the result of grants provided by state and federal agencies, and conservation districts. A significant problem with advancement in manure handling technology is the enormous expense. A regular size dairy of 300-400 milking cows have little in the way of capitol for a anaerobic digester or a belt press. In fact, these advancements in manure technology have drawn attention away from technology that all dairies can afford....large and small.

The bottom line is, there is too much liquid manure produced by the modern dairy. New manure technology seems to sanction and exacerbate this problem. Perhaps the time has come to take a step back in dairy history and try some of the methods of earlier farmers. The following is a suggestion for modifying the typical free stall barn into a loafing shed for producing a more solid manure product and handling the manure solids for best benefit:

Most free stall dividers are manufactured from 2” tube iron and mounted in sleeves placed in a concrete wall. The dividers are removable to accommodate removal of sick animals. Simple remove the dividers and store.

Six inch curbs are usually installed to hold the bedding back from the scrape alley. It is recommended these curbs be removed to allow easy removal of bedding in the loafing shed.

Any type of bedding may be used in the loafing shed. Sawdust is easy to maintain as it can be scrapped to a holding area and piled. Other alternatives are straw, low quality grass hay such as canary grass, and even corn stubble. Sand could be used but limits the options for manure composting. (One farm beds their stalls with sand and recovers the sand in a shallow settling pond for reuse. Good idea, but the end result is still a lagoon full of manure slurry.) How the loafing shed is cleaned is up to the individual farmer. Continued applications of bedding like straw will require removal one to two times a year if not scraped.

*Special Note. All rain gutters must be removed from the manure handling system. Rain water can be captured and used for wash-down in the milking barn, but as a rule, should not be allowed to enter any mixing vault or lagoon.

Manure solids need to be stockpiled in an easy access area. Once the pile is established, composting will begin and requires occasional turning. This may require a substantial amount of area, but when you think of area used for the liquid handling, the space may of equal size. While composting, temperatures should be monitored and piles turned when excessive heat is observed (>160°F). As the piles mature, moisture will be lost, but can be added using liquid from the wash-water from the milking barn. Other solids may be added to the compost piles such as weathered straw and hay bales, silage waste, dairy calf raising solid wastes, and feedlot wastes.

The composting can be maintained in a fairly informal manner by any farmer. Some may simply choose to stockpile the manure solids and land apply in the spring or fall. However, composting is highly desired and can accomplish a number of important goals such as volume reduction, nutrient uptake and stabilization, and a reduction in non-point source pollution.

Milking barns liquid waste can also be cleaned up before impounding to a storage lagoon. A filter can be constructed from ecology blocks and filled partially with sawdust or other bedding material. Liquid manure from the mixing pit can be pumped to the filter where solids are captured and removed as needed to the compost piles. The filtrate can be re-circulated back to the mixing pit, used as barn wash-down water, or wasted to the lagoon. (An expanded version of this filter could be used to remove and bulk-up manure solids before filtrate is impounded to the lagoon in free stall barn applications. Composting is still the desired method for handling the solids.)

In conclusion, you can see the technology is proven, cheap, and available to all size dairy farms. Years of handling dairy manure as a slurry has caused regulating, monitoring, permitting, and a number of large fines levied against the farmer. This trend will only continue if serious changes are not made to the current management options. With local and state political climates changing to more urban values, the clean air law exemptions for dairies will be eliminated. If this happens, any

farmer with a rain gun for applying manure faces stiff retaliation from near-by communities. If this should happen, and it will eventually, all the current infrastructure for handling manure slurry will be useless.

Having spent my first thirty years in the dairy industry, I have seen firsthand the changes mentioned in this paper. When I started doing wastewater treatment, I was excited by the possible use of biosolids handling technology to help the dairy industry. But, as I did my own research using polymer to flocculate manure slurry and remove the solids it started crossing my mind that biosolids technology is also very expensive.

As I did more literature searches on manure projects, I noticed that most of them had been subsidized by local, state, and federal government. Additionally, many of these projects were replicated in other states using the same types of funding. The question came to mind about how many times you have to re-invent the wheel. Funding, as usual, is given to innovative and technologically advanced projects. This bias seems to have blinded us to the merits of how our fathers and grandfathers managed their farms with only a fraction of the equipment we enjoy today. By no means am I saying we should hitch-up the horses to the manure spreader, on the contrary.

The modern dairy has all the equipment needed to accommodate changing their liquid manure handling format to a solid format. No anaerobic digesters, flush systems, free stalls, rain guns, or separators are needed which means a substantial savings to new dairies or those who wish to upgrade to a solids system. Funding for research and pilot projects on this methodology should be generous. (J Schons)

Response: Some interesting ideas. How farmers manage manure is their choice and we can only regulate their practices.

We are pleased that Ecology has clarified the factors that demonstrate an overriding public interest, Fact Sheet at 22, but we still do not understand how financial gain by a single corporation is ever reason to allow groundwater contamination. The citizens of Washington state deserve more protection than this. (WELC, et al)

Response: All citizens deserve every opportunity to stand up and explain their ideas and projects and this allows all of us to be heard.

Explanation of the Changes to the Final General Permit

Permit

The following are the changes made to the **final general** permit with the 2nd public comment period included, the explanation of those changes, and the principal reasons for adopting the changes (other than editing changes).

<i>Permit Condition</i>	<i>Change</i>
S1.A, first paragraph after #2.	We added “in addition.” We always intended that the requirements in the four paragraphs after S1.A2 were in addition to the requirements in S1.A1 and S1.A2. We added the phrase “in addition” to make this clear. Please see the responses and comments in S1.A for more information.
S1.A, last paragraph	We moved this sentence and made editorial changes. The sentence was confusing and the requirements were unclear to many readers. The permit now reads: “In addition, if a discharge occurs, the CAFO must minimize the discharge to the extent possible.”
S1.D2	We added a sentence in the depth marker requirement. We added: “CAFOs must operate and maintain their open surface liquid impoundments to have the minimum capacity necessary to contain the runoff and direct precipitation of the 25-year, 24-hour rainfall event, or, in the case of new sources subject to the requirements in S1.A2, the runoff and direct precipitation from a 100-year, 24-hour rainfall event.” This is a repeat of the requirement in S1.A, but we felt it was helpful to state it here as well. Otherwise, the purpose of the depth marker is unknown. Please see the responses and comments in S1.D2 for more information.
S2.B4	We made editorial changes to the entire paragraph, the previous language was confusing. The permit now reads: “This permit applies to the land application areas and production areas.” After the 2 nd Circuit Court decision, we added “under control of the CAFO” to provide better clarity.
S2.D	After the 2 nd Circuit Court decision, we moved the definitions to the front of the document. This was done so it would be easier to read. There are various number and lettering changes throughout the document as items were added and taken away.
Definition 4	We added “formal” for better clarity.
Definition 6, and 7(a)(b)	There was a comment from several comments after the 2 nd Circuit Court decision to add a definition for a discharge. For consistency, we placed in the document the definition(s) that are used in 40 CFR 122.2.

<i>Permit Condition</i>	<i>Change</i>
Definition 16	We added a definition for “pollutant”.
S2.D2(d)(i) and elsewhere	We added “flushing system” to the list of man-made devices. The permit now matches the federal definition. Because of the required by the 2 nd Circuit Court decision, this section was rewritten so this change, along with the section, has been completely modified.
Definition #4 (Formerly S2.D3)	We reworked the definition of a “Designated CAFO.” The new definition now matches the federal definition. Please see the responses and EPA’s comments in S2.D3 for more information.
S2.E6 Now Definition #10	We added two commas to the definition of “manure” to make the definition clearer.
Definition 21	WCF requested after the 2 nd Circuit Court decision to add a definition for “veal”. We worked with the WSDA to develop a definition.
S1.A(3)	After the 2 nd Circuit Court decision, we added “as defined in the nutrient management plan” which made the section more clear.
S1.D	After the 2 nd Circuit Court decision we added “reference S4.1 for record keeping requirements” so the operator will know where to go for details.
S2.B	To abide by the 2 nd Circuit Court public participation decision, we changed and added to this section a requirement that all CAFOs must submit their NMP before they will be granted permit coverage.
S2.B(3)	Added “under control of the CAFO” after the 2 nd Circuit Court decision.
S2.E10	We added a new definition for “overflow.” “Overflow” is used in the permit, but it was not defined. The definition we used is from the federal regulations. It states that overflow “means the discharge of manure or process wastewater resulting from the filling of wastewater or manure storage structures beyond the point at which no more manure, process wastewater, or storm water can be contained by the structure.” The numbering of subsequent definitions was changed accordingly.
S3.A(1)(b)	We removed all references that WSDA is to “approve” or “certify” NMPs. There was a comment after the 2 nd Circuit Court decision that only the permitting authority can approve these plans. This change was made throughout the permit.
S3.A(3)(a)	To firm up our intent, we added “to the lowest achievable level”. This statement goes with the requirement that permitted operations must conform to AKART. These changes carry through the permit.
S3.A(3) (b) and (i)	We added “ground water” to the permit. This carries through the permit.

<i>Permit Condition</i>	<i>Change</i>
S3.A1(a)	We changed the wording in the “equivalent best management practices” explanation to make the burden of proof more explicit. The permit now reads: “Equivalent best management practices may be used by the CAFO if: (a) the CAFO shows the practice would result in equal or better protection of surface and ground water quality....” Please see the responses and comments in S3.A1 for more information.
S2.A(2)(k)	We added a requirement for facilities to include in their nutrient management plans a process that anticipates the depth of manure in the storage lagoon. This is to support the leak detection requirements in S5.
S3.A3(a)	We added “ground water” in addition to “surface water”. We have the responsibility under RCW 90.48 to protect both surface water and ground water. This section now reads: “The CAFO must develop a nutrient management plan that incorporates the requirements of S3.A3(b)-(e) based on a field-specific assessment of the potential for nitrogen and phosphorus transport from the field and that addresses the form, source, amount, timing, and method of application of nutrients on each field to achieve realistic production goals, while minimizing nitrogen and phosphorus movement to surface and ground waters.” After the 2ndCircuit Court ruling, “and implement” was deleted.
S3.A3(c)	We added a reference to the soil monitoring requirements in S4.C to make the permit clearer. After the 2ndCircuit Court ruling, so we added “to the lowest possible level” for greater clarity.
S4.A(1)(b)	Comment after the 2 nd Circuit Court decision to put in the time frame of, “within 24 hours after the discharge (see S3B.2)” to be consistent. We agreed and made the change.
S4.A(b)	Comment after the 2 nd Circuit Court that there needs to be an insert to make it clear that this section is only speaking about the land application of a CAFO. We added a reference as to where to find information on the transfer of manure, litter and processed waste water.
S4.B1	We added the phrase “as soon as possible” to encourage CAFOs to report spills to WSDA as soon as possible. Spills can cause problems downstream, and the sooner WSDA is aware of the problem, the quicker they can respond.
S4.B(1)	There was a comment after the 2 nd Circuit Court decision to remove the phone number where to call to report a discharge. We agree and have worked with WSDA to have facilities create a spill response plan into the Comprehensive Nutrient Management Plans. This way they will have the most current information on how to report a spill with time frames and contact phone numbers.
S4.C(1)(a)	There was a numbering formatting comment after the 2 nd Circuit Court decision in this section. Also, there was a comment that the soil sampling practices mentioned in the permit were for western Washington. Since this could be confusing for eastern Washington permitted facilities, we removed the references.

<i>Permit Condition</i>	<i>Change</i>
S4.C(1)(b)	This comment after the 2 nd Circuit Court decision is intended to add more clarity to this section, and flexibility. Since different facilities in different locations have local climate conditions, it is not possible to have a single date in the permit when these samples have to be taken.
S4.C2(b)(i)	We added a paragraph to address cropping systems which prevent fall soil sampling. The permit now reads: “b. The CAFO must collect soil samples of land application areas annually in the fall. The samples must be analyzed for nitrate-N concentrations. The CAFO must collect samples prior to heavy fall rains and at least 30 days after any manure applications as described in Post-harvest Soil Nitrate Testing. i. Facilities that use cropping systems which prevent fall soil sample collection may use an alternative annual soil sampling program described in their nutrient management plan. These facilities must collect soil samples annually, after crop harvest, as close to fall as is practical.” Please see the responses and comments in S4.C2 for more information.
S5	We strengthened the leak detection requirements by requiring producers to use the already required depth markers to determine if there's a leak. If there is evidence of a possible leak, they are required to investigate and report to the Department. This was implied before, but we have made it more explicit.
Throughout the Permit	We defined all the acronyms used in the permit in.
S7.A and B	It was brought to our attention after the 2 nd Circuit Court decision that there was that there is a typo that would not allow anyone to terminate their permit. We agreed what was written was not our intent and rewrote this section.

Explanation of the Changes to the Final Fact Sheet

Fact Sheet

The following are the changes made to the final Fact Sheet with the 2nd public comment period included, the explanation of those changes, and the principal reasons for adopting the changes (other than editing changes).

Introduction	We added after the 2 nd Circuit Court decision a reference that, “This permit affects facilities that are required to be permitted or decided to seek permit coverage” from a comment. They commented there needs to be some reference that the permit only effects permitted facilities, not non permitted facilities. We feel this will satisfy their concern.
H	This section was changed after the 2 nd Circuit Court decision because of concerns and to clarify what the court’s decision. The stormwater exemption only applies to the land application areas where the manure, litter and process waste water has been applied at agronomic rates. Also, to receive the exemption, proper records are required.
J Nutrient Management Plans	This section was modified after the 2 nd Circuit Court decision based on a comment from the Conservation Commission. There has been a change throughout the permit removing all references that WSDA will be certifying the NMPs. Now approval is up to the permitting authority, and that authority can seek assistants in their approval.
L Compliance Schedule	USEPA has changed this date to March 30, 2007 so changes have been made to the Fact Sheet to reflect the new dates.
FAQ 16	After the 2 nd Circuit Court decision that better explained what the requirement and procedures are now for biosecurity. The comments expanded on the previous version and cleared up some misunderstanding.