



FOSTER PEPPER PLLC

FACSIMILE TRANSMITTAL SHEET

Date Faxed: **Thursday, July 20, 2006 3:26:08 PM**

TO:	FAX NUMBER:	VOICE CONTACT:
Maylee Collier	360-407-6989	

From: **Alexandria Gust**

Direct Dial: **206-447-5354**

Direct Return Fax:

Number of Pages (Including cover page): **08**

Message: Please see attached.

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Direct Phone (206) 447-8902
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July 20, 2006

VIA FACSIMILE

Ms. Judy Greear
Hearings Coordinator and Clerk
Environmental Hearings Office
Pollution Control Hearings Board
4224 - 6th Avenue S.E., Bldg. 2
P.O. Box 40903
Lacey, Washington 98504-0903

Re: The Cow Palace, et al., v. State of Washington, Department of Ecology

Dear Ms. Greear:

Enclosed please find Notice of Appeal, absent exhibits, for fax filing today. The original and one copy of the Notice of Appeal will be delivered to you, with exhibits, tomorrow (July 21, 2006). Thank you for your assistance.

Very truly yours,


Lori A. Terry

Enclosures

cc: Maylee Collier, Agency Appeals Coordinator
Kevin Hancock, Water Quality Program

cc: Enl. Database Coord.
 Raw/Rec - Cost Recovery No

orig: File - Fax to ATG (e)
 ATG Docket Clerk
 Kevin Hancock
initial: Val 07-20-2006

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POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

THE COW PALACE; DERUYTER
BROTHERS DAIRY, INC.;
SPRING CANYON RANCH, LLC; and
SKYRIDGE FARMS,

Appellants,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondents.

No. 06-
NOTICE OF APPEAL

The Cow Palace, DeRuyter Brothers Dairy, Inc., Spring Canyon Ranch, LLC, and Skyridge Farms (hereafter collectively "Appellants") appeal the Concentrated Animal Feeding Operation (CAFO) National Pollutant Discharge Elimination System (NPDES) and State Waste Discharge Permit ("the permit") issued by the Washington State Department of Ecology ("Ecology") on June 21, 2006.

I. Appealing Parties and Representative

1.1 Appealing Parties:

The Cow Palace
The Dolsen Companies
301 North 3rd Street, Suite 7
P.O. Box 1726
Yakima, WA 98907
Telephone: (509) 248-2831 Fax: (509) 248-3969

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1 DeRuyter Brothers Dairy, Inc.
 2 5111 Van Belle Road
 3 P.O. Box 338
 Outlook, WA 98938
 Telephone: (509) 837-2678 Fax: (509) 839-2678

4 Spring Canyon Ranch, LLC
 5 1291 Kellum Road
 Outlook, WA 98938
 Telephone: (509) 839-2750 Fax: (509) 837-8277

6 Skyridge Farms
 7 4701 Scoon Road
 Sunnyside, WA 98944
 Telephone: (509) 836-5616 Fax: (509) 839-0235

9 1.2 Representative:

10 Lori A. Terry
 Kathryn L. Gerla
 11 Foster Pepper PLLC
 1111 Third Avenue, Suite 3400
 Seattle, WA 98101
 Phone: (206) 447-4400
 13 Email: terrl@foster.com Fax: (206) 749-2002
 Email: gerlk@foster.com Fax: (206) 749-2092

15 **II. Parties**

16 2.1 Appellants, The Cow Palace, DeRuyter Brothers Dairy, Inc., Spring Canyon
 17 Ranch, LLC, and Skyridge Farms.

18 2.2 Respondent, State of Washington, Department of Ecology.

19 **III. Copy of Permit**

20 3.1 See attached copy of the permit and amended fact sheet, attached as Exhibits "A"
 21 and "B," respectively.

22 **IV. Grounds for Appeal**

23 4.1 The permit, as issued, exceeds the authority of Ecology and is otherwise contrary
 24 to law, is inconsistent with applicable provisions in federal and state water quality laws and
 25 regulations, and imposes terms that are unreasonable and/or unjust.

26 NOTICE OF APPEAL - 2

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2 **V. Statement of Facts**

3 5.1 Appellants are dairies in the State of Washington. Appellants are currently
4 permitted under the previous CAFO General Permit and have complied with requirements to be
5 covered under this permit, which is effective on July 21, 2006. The permit includes conditions
6 that are unreasonable, arbitrary and capricious, exceed the authority of Ecology, and/or are
7 otherwise contrary to law. These conditions include, but are not limited to the following:

8 5.1.1 The permit is a combined NPDES and State Waste Discharge Permit. The
9 combined permit does not specify which portions of the permit are NPDES permit conditions
10 imposed pursuant to the federal Clean Water Act ("CWA") and which are State Waste Discharge
11 conditions imposed pursuant to Washington's Water Pollution Control Act, RCW 90.48, or
12 Washington's Dairy Nutrient Management Act, RCW 90.64. This is important because only the
13 CWA contains statutory authority for citizen-suit enforcement actions. Washington's Water
14 Pollution Control Act and Washington's Dairy Nutrient Management Act do not authorize
15 citizen-suit actions. Absent clear permit language that specifies which portions of the combined
16 permit are NPDES conditions and which are not, permittees are unintentionally and unfairly
17 exposed to citizen-suit actions that may be brought to enforce the State Waste Discharge
18 conditions in the permit.

19 5.1.2 Special Conditions S1.B, S1.D.4, and S3.A.3, which are groundwater
20 requirements, should be deleted from the permit if the conditions are imposed as part of the
21 NPDES permit because groundwater is not regulated by NPDES permits. NPDES permits
22 regulate discharges to surface water. Moreover, these conditions go beyond the federal CAFO
23 rule. If the conditions are imposed under state law and as part of the State Waste Discharge
24 Permit, the conditions should be reduced in scope and should include language stating that the
25 conditions are imposed pursuant to state law.
26

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1 5.1.3 Special Condition S3.A.4, which references requirements established by
2 the Washington Conservation Commission, should contain language making it clear that this
3 condition is imposed pursuant to state law and not pursuant to the federal CWA or the NPDES
4 permit.

5 5.1.4 Special Condition S3.D.2 "Plan Updates" requires an updated nutrient
6 management plan if the permittee changes the field acres in the plan. Because the permit already
7 requires the plan to be updated if field acreage is reduced, the only change that could be
8 contemplated by this language is an *increase* in the amount of land. If the permittee increases
9 the amount of land, however, this would provide an environmental benefit by increasing the land
10 that is available for land application. The permit already requires an updated plan if the facility
11 increases animal wastes beyond the scope of the current plan. Because there is no risk to water
12 quality from an increased land base, this language should be deleted from the permit.

13 5.1.5 Special Condition S4.B.1 should be revised to require 24-hour reporting,
14 which is consistent with the state regulations. The phrase "as soon as possible" is susceptible to
15 inconsistent interpretations and exceeds the regulatory requirement.

16 5.1.6 Special Conditions S4.C and S4.B.3.h, should be revised to be consistent
17 with the federal CAFO rule for NPDES permits, which only requires sampling once every five
18 years and does not require the specific sample protocols, timing, or reporting that is required by
19 these conditions. To the extent that Ecology intends to impose these conditions pursuant to state
20 law, Appellants do not believe that state law or regulations support this rigorous monitoring and
21 reporting scheme – especially when the federal CAFO rule would impose much less stringent
22 requirements. If these conditions are imposed pursuant to state law, the permit should state that
23 fact.

24 5.1.7 Special Condition S7 contains language that requires the permittee to
25 demonstrate to the satisfaction of the Department that there is no remaining potential for
26 discharge of manure, litter, or process water before the permit may be terminated. Because a

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1 potential can always exist and because the CWA does not regulate the "potential to discharge," it
2 is unreasonable to hold permittees to this standard when terminating the permit.

3 5.1.8 General Condition G1 should be deleted because it is duplicative of other
4 conditions in the permit and, therefore, serves only to expose permittees to multiple violations
5 for the same action or inaction. For example, Special Condition S1 already states that the
6 permittee is authorized to discharge only in accordance with the conditions in the permit, S2.B.3
7 states a CAFO must, at all times, comply with all conditions in the permit, and S3 already
8 requires compliance with the Nutrient Management Plan.

9 5.1.9 General Condition G3 should be deleted because it imposes unreasonable
10 requirements associated with the operation of a CAFO. This condition is not supported by the
11 federal CAFO rule or any state law or rule applicable to CAFOs.

12 5.1.10 The permit contains references to "lowest achievable level" (Special
13 Condition S3.A.3.a) and "lowest possible level" (Special Condition S3.A.3.b(i)) when describing
14 nutrient management practices. These standards are unreasonable and more stringent than either
15 federal or state regulatory requirements.

16 VI. Relief Sought

17 Appellants respectfully request that the Board issue an Order remanding the permit to
18 Ecology with direction to address the permit deficiencies set forth above and for such further
19 relief as the Board deems appropriate under the circumstances of this case.

20 DATED: July 20, 2006.

21 FOSTER PEPPER, P.L.L.C.

22
23 By 
24 Lori A. Perry, WSBA # 22006
25 Kathryn L. Gerla, WSBA # 17498
26 Attorneys for Appellants

NOTICE OF APPEAL - 5

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 20, 2006, I caused to be served upon the parties in this action in the manner noted below, a true and correct copy of the Notice of Appeal via facsimile (without Exhibits) and via U.S. Mail, postage prepaid (including Exhibits) to:

- 1. Department of Ecology
Maylee Collier, Agency Appeals Coordinator
P.O. Box 47608
Olympia, WA 98504-7608
Fax: (360) 407-6989
- 2. Department of Ecology
Kevin Hancock, Water Quality Program
P.O. Box 47600
Olympia, WA 98504-7600
Fax: (360) 407-6426

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 20th day of July, 2006, at Seattle, Washington.

FOSTER PEPPER, P.L.L.C.

By 
Alexandria C. Gust
Legal Assistant