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COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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COMMUNITY ASSOCIATION FOR RESTORATION OF THE  
ENVIRONMENT, PETITIONER-APPELLANT,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,  
RESPONDENT/APPELLEE,

and

NORTHWEST DAIRY ASSOCIATION, AND WASHINGTON DAIRY  
FEDERATION, WASHINGTON CATTLEMEN'S ASSOCIATION,  
WASHINGTON CATTLE FEEDERS ASSOCIATION, AND  
NORTHWEST POULTRY INDUSTRIES COUNCIL,  
RESPONDENT/INTERVENORS/APPELLEES.

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RESPONSE BRIEF OF WASHINGTON DAIRY FEDERATION,  
WASHINGTON CATTLEMEN'S ASSOCIATION, WASHINGTON  
CATTLE FEEDERS ASSOCIATION, AND NORTHWEST POULTRY  
INDUSTRIES COUNCIL

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## **A. Statement of the Case**

### **1. Counter Statement To Appellant's "Statement of the Case."**

RAP 10.3(a)(4) defines the statement of the case as follows: "A fair statement of the facts and procedures relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement." While Appellant's Opening Brief includes numerous cites to the record in this case, much of its Statement of the Case is in fact a re-argument of undisputed factual findings made by the Pollution Control Hearings Board (PCHB). For example, the PCHB made Conclusion of Law #2: "The Board concludes that the permit development process was lawful and reasonable." Even though the Appellant did not raise in this appeal the PCHB's factual findings or legal conclusion that Ecology's permit process was proper and lawful on appeal, over five pages of the Statement of the Case are devoted to this topic.

This is an appeal of the Findings of Fact and Conclusions of Law entered by the PCHB. Unchallenged findings of fact are verities on appeal. *Willoughby v. Department of Labor and Industries*, 147 Wn.2d 725, 733 (2002). The only Finding of Fact challenged by Appellants was Finding of Fact 56, relating to the methodology used to estimate lagoon leakage. Otherwise, many of the "facts" in the Statement of the Case

provided by the Appellant are contrary to the unchallenged Findings of Fact entered by the PCHB.

The “facts and procedures relevant to the issues presented” as envisioned by RAP 10.3(a)(4) are not the identical issues raised by Appellant before the PCHB regarding Appellant’s opinions of Ecology’s permit development process, or historical water quality issues at agricultural facilities under a different regulatory structure that predate the issuance of the general permit at issue. Rather, the “facts and procedures relevant to the issues presented” relate to the PCHB’s decision, and whether the PCHB’s decision is lawful under the standard of review under the RCW 34.05, the Administrative Procedures Act.

## **2. Statement of the Case**

### **a. Issuance of CAFO General Permit**

Ecology issued its Concentrated Animal Feeding Operation General Permit (“CAFO General Permit”) in June 2006. *E-1*. The CAFO General Permit is a joint permit under the federal Clean Water Act National Pollution Discharge Elimination System program (“NPDES”), and the Washington State’s Water Protection Control Act, Chapter 90.48 RCW. *E-2, at 27*. The federal NPDES program requires states like Washington that have been delegated federal Clean Water Act authority to issue NPDES permit to all CAFOs that discharge to surface waters.

Ecology's State Waste Discharge Program requires a permit for the discharge to waters of the state, which include groundwater. *E-2, at 27*. Issuance of a general permit allows a regulatory agency to efficiently administer a permit program covering a large number of similar facilities with similar operations and discharges. *PCHB Finding of Fact 24*. Because the CAFO General Permit applies statewide, differences in site conditions, operations, and climatic variation are addressed through site specific Nutrient Management Plans ("NMP"). *Ex. E-2 at 5*. NMPs are a "written plan containing the minimum elements for nutrient management planning requires under state and federal regulations . . . ." *Ex. E-1 at 5 (permit definitions)*.

Ecology developed the CAFO General Permit based on the U.S. Environmental Protection Agency's federal CAFO rules ("EPA CAFO Rule"), a 2005 federal Court of Appeals decision, *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2<sup>nd</sup> Cir. 2005), and on state water quality laws and regulations. *PCHB Finding of Fact 7*. Ecology developed the CAFO General Permit with the input of a Permit Advisory Committee, and the Livestock Development Oversight Committee ("LDOC"), a stakeholder group established by the Washington Legislature in 2005. *Former RCW 90.64.813 (expired 2006); PCHB Findings of Fact 7, 8, 9, 10*. Both of these groups providing input to Ecology included a variety of interests and

perspectives, and Appellants' own members were invited to participate in the permit development process. *PCHB Finding of Fact 9*. In addition to the Permit Advisory Committee and LDOC, public comment was sought and accepted on the draft CAFO General Permit in 2004 and 2005. *PCHB Finding of Fact 11*. The federal *Waterkeeper* decision construing the EPA CAFO Rules was issued in February of 2005, and so Ecology's draft CAFO General Permit was revised to reflect the *Waterkeeper* decision, and reissued for public comment at the end of 2005. *PCHB Finding of Fact 11*. Ecology's staff and its director met throughout the permit development process with both representatives of Appellant, and from agricultural groups. *PCHB Finding of Fact 13*.

While much of Appellant's PCHB presentation and Opening Brief were devoted to characterizing the CAFO industry based on water quality issues in Yakima County that predate the CAFO General Permit, the PCHB made a number of unchallenged factual findings regarding ongoing inspection, compliance, and enforcement of the CAFO General Permit. The PCHB found that the Department of Agricultural has 3.5 FTEs inspecting CAFOs for compliance with nutrient management plans, recordkeeping, and actual or potential discharges. *PCHB Finding of Fact 21*. Agriculture inspects on-site records, the previous three years soil monitoring records, land application rates, fertilizer inputs, and crop

yields, and conducts visual inspections of fields, production areas, and waste lagoons. *PCHB Finding of Fact 21*. When non-compliance exists, Agriculture will issue enforcement orders and penalties. *PCHB Finding of Fact 23*. Agriculture is meeting its program goal of inspecting each facility every 22 months, and found that 85% of CAFOs are in full compliance with the CAFO General Permit. *PCHB Finding of Fact 22; See Ex. I-56 to I-60*.

The NMP process used in the CAFO General Permit has demonstrated success – from 1999 to 2003, NMPs were developed for 99.5% of Whatcom County dairy operations which resulted in improved water quality and the reopening of shellfish beds. *PCHB Finding of Fact 44*. Ecology has documented improvements in water quality attributable to the use of agronomic application rates using the NRCS standards and expects better results from the new CAFO General Permit. *PCHB Findings of Fact 42 & 45; See Ex. I-9; I-18; I-16; I-A; A-109*.

#### **b. Basic Provisions of CAFO General Permit**

The CAFO General Permit requires certain animal feeding operations (AFOs - dairies, feedlots, and poultry producers, etc.) to manage manure wastes to avoid polluting surface and groundwater. *PCHB Finding of Fact 3*. Whether a CAFO General Permit is required of a particular agricultural operation depends on the number of animals at the

facility, whether there is a discharge to waters of the state, or whether Ecology has determined that the facility is a significant contributor of pollutants to waters of the state. *PCHB Finding of Fact 3*. The CAFO General Permit is a “no discharge” permit, under which all discharges of wastewater or manure are prohibited except in the event of extreme precipitation. *PCHB Finding of Fact 3; Ex. E-1 at 8*. Two different areas of CAFOs are subject to regulation under the CAFO General Permit: the “production area,” where animals are confined, fed, and/or milked and where waste is generated, and the “land application area,” the field areas where manure is applied as a fertilizer to grow crops. *Ex. E-1 at 17, and at 5-6 (permit definitions)*.

Under the CAFO General Permit, each facility must adopt and Ecology must approve a Nutrient Management Plan (“NMP”) which determines how the nutrients and materials from animal manure, bedding and un-used feed will be managed to comply with the water quality requirements. *PCHB Finding of Fact 35; Ex. E-1 at 12*. NMPs must conform to the Field Office Technical Guide (“FOTG”) issued by the National Resources Conservation Service (NRCS). *Finding of Fact 36; Ex. E-1 at 12*. The NRCS’s Field Office Technical Guide provides the Best Management Practices (BMPs) for a variety of agricultural operations. *PCHB Findings of Fact 36, 38, 39, 40; Ex. E-1 at 12*. CAFOs

that are dairies must also have their NMPs certified by local conservation districts as meeting the minimum elements established by the Washington Conservation Commission, as required by RCW Chapter 90.64, the Dairy Nutrient Management Act. *PCHB Finding of Fact 36; Ex. E-1 at 15.*

Every NMP must include certain mandatory elements, and CAFOs that land apply manure and feed wastage or wastewater must include additional practices on the nutrient application rates, manure and soil sampling. *PCHB Finding of Fact 37; Exhibit E-1 at 12 – 16.* The NRCS FOTGs are relied on throughout the agricultural industry, and can be tailored to fit circumstance at individual facilities. *PCHB Findings of Fact 38 & 39.* Most relevant in this appeal are two Conservation Practice documents (“CP”) issued by NRCS, CP 590 (Ex. A-77), the primary technical reference providing requirements for all nutrient management purposes in Washington State, and CP 313 (Ex. A-70), which governs engineering and construction of waste storage facilities. *PCHB Finding of Fact 41.*

The NRCS FOTGs are the best available standards to protect water quality at agricultural facilities. *PCHB Findings of Fact 42.* Under the CAFO General Permit, an applicant submits an NMP for the specific facility along with the application for coverage. *PCHB Findings of Fact 26 & 39.* Ecology then reviews the NMP to determine whether it

complies with the requirements of the CAFO General Permit and NRCS FOTGs. *Ex. E-1 at 11.* Ecology will not approve an NMP that does not meet these requirements. *Ex. E-2 at 7.* Once the NMP is approved, a facility must remain in compliance with the terms of the NMP. *Ex. E-1 at 15.* Instead of granting coverage under the CAFO General Permit, Ecology can require a facility to obtain coverage under an individual permit. *Ex. E-1 at 12.*

The CAFO General Permit requires that all new or expanded waste storage facilities be sited, designed, and constructed based on CP 313. *PCHB Finding of Fact 50; Ex. A-70.* These types of storage facilities are designed to prevent infiltration or leakage of liquids, must have post-construction engineer approval, and must be operated consistent with the NMP, including having a method for leak detection. *PCHB Finding of Fact 50, Ex. E-1 at 13, 20.* The proper construction of waste storage lagoons will also depend on a number of site-specific factors, including soil conductivity, distance from a lagoon to the groundwater table, and the distance from a lagoon to groundwater wells. *PCHB Finding of Fact 53.*

### **c. Monitoring Provisions in CAFO General Permit**

After a facility receives coverage under the CAFO General Permit, it must comply with a number of monitoring requirements. *PCHB Findings of Fact 60; Ex. E-1 at 16-20.* Of relevance to the issues raised in this appeal, is the requirement in the CAFO General Permit for soil monitoring, rather than groundwater monitoring. The CAFO General Permit requires Large CAFOs to use soil monitoring to demonstrate whether the NMPs are in fact effectively utilizing nutrients through crop uptake from the soil of land application areas. *PCHB Finding of Fact 60.* Soil monitoring is used to determine whether excess nitrates or other pollutants exist in soil at a level which could cause pollution of surface or groundwater. *Ex. E-1 at 20.* The soil sampling and analysis plan must be based on NRCS Conservation Practices. *PCHB Finding of Fact 69; Ex. E-1 at 20; Ex. I-55.* The results of soil monitoring must be reported annually. *PCHB Finding of Fact 60.* Groundwater monitoring is not required by Ecology in any of its other NDPES General Permits, nor is it required by the EPA CAFO Permit. *Finding of Fact 73.* While groundwater monitoring is not required in the permit, large CAFOs may choose to use groundwater monitoring rather than soil monitoring, and Ecology can require a facility to implement groundwater monitoring if

necessary. *PCHB Finding of Fact 61; Conclusion of Law 24.* Groundwater monitoring requires investigation into a number of site-specific factors, including types of soils, groundwater flow rates and directions, locations of any known releases to site upgradient and down gradient wells. *Finding of Fact 71.*

Wastewater impoundments must be inspected weekly, and if storage levels are below the expected level, the facility must investigate and taken immediate action if there is a leak. *PCHB Finding of Fact 57.*

**d. PCHB Affirms Provisions of CAFO General Permit Requiring Soil Monitoring, Rather Than Groundwater Monitoring.**

The CAFO General Permit included provisions relating to soil monitoring, but not groundwater monitoring. During the permit development process, agricultural groups did not support groundwater monitoring, as it is was inferior to implementing best management practices that which would protect groundwater before it was contaminated, and because groundwater monitoring programs are often imprecise and costly, and therefore not appropriate for a general permit that applied to numerous facilities.. *PCHB Findings of Fact 71, 72, 73, 74, 75, 76, Conclusion of Law 24, 25, 26.* The PCHB also determined that it was appropriate for Ecology to reserve the authority to require groundwater monitoring on a case-by-case basis, or to require a facility to

obtain coverage under an individual permit. *PCHB Conclusion of Law 24, 25.*

**e. PCHB Affirms Ecology's Methods to Ensure Public Availability of Documents Relating to CAFO General Permit Coverage and Compliance.**

The CAFO General Permit requires that an NMP, consistent with NRCS conservation practices, be submitted with the permit application to obtain coverage. *Finding of Fact 26; Ex E-1 at 11; Ex E-2 at 7.* The CAFO General Permit also has provisions for monitoring, record retention, and reporting, under which CAFOs must create, retain, and file several types of records and reports. *PCHB Finding of Fact 26, Ex. E-1 at 16 – 20.* A facility must also report within any discharge or noncompliance with the CAFO General Permit within 24 hours, including a written report with information including a description and cause of the discharge, the time and duration of the discharge, the volume of the discharge, the impact of the discharge, and actions taken to reduce or eliminate the discharge from occurring in the future. *Finding of Fact 26; Ex E-1 at 18 – 20.* The annual report requires reporting of information such as the number and type of animals, the quantity of liquid and manure wastes generated and transferred, the acreage used for land application

under the NMP, and a description of all discharges that have occurred within the prior 12 months. *Finding of Fact 26, Ex. E-1 at 19.*

Overall, most information about a facility's operation will be reported to Ecology through either the NMP, or through the annual report required in the CAFO General Permit. *PCHB Finding of Fact 26, 27, 28.* In addition to the information that must be reported to Ecology, all CAFOs (except horse, sheep, and duck operations) must maintain additional operational records on-site and provide the information to Ecology or Agriculture upon request. *Finding of Fact 27, Ex. E-1 at 17.* These additional records include information on daily, weekly, and periodic inspections of production areas and land application areas, soil and wastewater sampling, weather information, application rate calculations, and methods used to apply manure or process wastewater. *PCHB Finding of Fact 27.*

The provisions in the CAFO General Permit regarding which records would be provided directly to Ecology, and which would be maintained at the facility was based on EPA's CAFO Rule. *PCHB Finding of Fact 28.* The operational records kept on-site by the CAFO are not the kinds of records required to be submitted to an agency under EPA CAFO rules. *PCHB Finding of Fact 28.*

Ecology will respond to requests for public records relating to CAFOs, both for documents maintained by Ecology and for documents that Ecology must first request from the CAFO. *PCHB Findings of Fact 29 & 30*. Ecology will redact confidential business information prior to making documents available to the public as authorized by specific state laws and regulations that govern Ecology’s public records authority. *PCHB Finding of Fact 30*. Ecology has developed a process to determine which parts of an NMP should be redacted prior to disclosure, so that it can respond to public records requests more quickly, and will do so on a “case by case” basis. *Finding of Fact 31; Conclusion of Law 10*. The PCHB affirmed Ecology’s “case by case” approach used to respond to specific requests for public records regarding CAFOs.

## **B. Argument**

### **1. Standard of Review**

Appellate courts review PCHB orders under the Washington Administrative Procedures Act, Chapter 34.05 RCW. *Port of Seattle v. PCHB*, 151 Wn.2d 568, 587 (2004). The court’s review is limited to the record before the PCHB. *Id.*; *RCW 34.05.558*. The burden of demonstrating invalidity of the PCHB’s action is on the party asserting the

invalidity, in this case, the Appellant. *Id.*; *RCW 34.05.570(1)(a)*. Appellant cites *RCW 34.05.570(4)(c)* as providing the standard of review in this case. *Appellant's Opening Brief at 23*. This standard of review, however, is for agency action not reviewable under other provisions of the APA, or for an agency's failure to act. The correct standard of review is provided in *RCW 34.04.570(3)*, which is for "review of agency orders in adjudicative proceedings."

The court may grant relief if it finds that the PCHB order "is outside the statutory authority or jurisdiction of the PCHB" or if the PCHB has "erroneously interpreted or applied the law." *Id.*, *RCW 34.05.570(3)(b)*. The Court may also grant relief if the PCHB's decision is "not supported by evidence that is substantial when viewed in light of the whole record before the court." *Id at 588*; *RCW 34.05.570(3)(e)*. The "substantial evidence test" is whether the record contains "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *Id.*; [other cites omitted]. The court may also grant relief if the PCHB's order is "arbitrary or capricious." *Id.*; citing *RCW 34.05.570(3)(i)*. ". . . Arbitrary or capricious agency action is action that "is willful and unreasoning and taken without regard to the attending facts or circumstances." *Id at 589*, citing *Wash. Indep. Tel. Ass'n v. WUTC*, 149 Wn.2d 17, 26 (2003) (other cites omitted).

Agency findings of fact may be overturned “only if they are clearly erroneous,” *Id.*, citing *Schuh v. Ecology*, 100 Wn.2d 180, 183 (1983), and the court is “definitely and firmly convinced that a mistake has been made.” *Id.*, citing *Buechel v. Ecology*, 125 Wn.2d 196, 202 (1994). “Where there is room for two opinions, and the agency acted honestly and upon due consideration, this court should not find that an action was arbitrary and capricious, even though the Court may have reached the opposite conclusion.” *Id.* at 589, citing *Buechel*, 125 Wn.2d at 202. Appellate courts “should not ‘undertake to exercise the discretion that the legislature has placed in the agency.’” *Id.*, citing *RCW 34.05.574(1)*. Appellate courts “do not weigh the credibility of witnesses or substitute our judgment for the PCHB’s with regard to findings of fact. *Id.*, citing *Bowers v. PCHB*, 103 Wn.App. 587 (2000).

Where statutory construction is necessary, the Court will interpret statutes de novo. *Id.* at 587, citing *Pend Oreille PUD No. 1 v. Ecology*, 146 Wn.2d 778, 790 (2002). However, if an ambiguous statute falls within the agency’s expertise, the agency’s interpretation of the statute is “accorded great weight, provided it does not conflict with the statute.” *Id.*

## **2. Agency Deference**

### **a. Statutes and Regulations.**

Ecology's interpretation of water quality statutes and rules is entitled to "great weight," as Ecology is the agency entrusted by the Legislature to administer the state's water quality programs. *Id. at 594.*

### **b. Technical Judgments.**

". . . [T]he standard of review for factual findings inherently assigns deference to the PCHB's factual conclusions. This system respects both the PCHB's statutory role as independent reviewer of Ecology actions and the trial-like nature of the PCHB hearings." *Id. at 594, citing State ex rel. v. Woodward, 84 Wn.2d at 333 (1974).* "While a PCHB factual finding will not be overturned unless it is clearly erroneous, deference will be given to Ecology on technical issues based on Ecology's specialized expertise." *Id. at 595.*

## **3. Groundwater Monitoring**

This issue is based on Issue 18 before the PCHB: "Does the final Permit fail to require groundwater monitoring and thereby fail to protect waters of the State in violation of RCW 90.48 and its implementing regulations?" Appellant frames this issue as whether the PCHB erred in holding that "the Permit's failure to require groundwater monitoring is

reasonable' and that "the failure to require groundwater monitoring does not protect the waters of the State in violation of RCW 90.48 and its implementing regulations." *Appellant's Assignment of Error 1*.

**a. Monitoring Requirements Under Federal and State Water Quality Laws and Regulations.**

Neither the federal NPDES program within the Clean Water Act, nor the federal CAFO Rule require groundwater monitoring. Like Ecology's CAFO General Permit, EPA's CAFO Rule requires soil monitoring. *40 CFR 412.4(c)(3)*. Also like Ecology's CAFO General Permit, EPA's CAFO Rule requires periodic inspection of wastewater impoundments and depth markers to indicate waste volumes. *40 CFR § 412.37*. The EPA considered including groundwater monitoring in the CAFO Rule, but like Ecology, ultimately required soil monitoring, rather than groundwater monitoring. EPA's decision was affirmed in the *Waterkeeper* decision:

" . . . the EPA initially proposed that various groundwater-related requirements be uniformly imposed on CAFOs, but ultimately decided that groundwater-related requirements be implemented, as necessary, on a case-by-case basis." *Waterkeeper*, 399 F.3d 486, at 514.

Washington's water quality laws and regulation also do not require groundwater monitoring. Washington's groundwater quality rules identify the evaluation of best management practices, soil monitoring, and

groundwater monitoring as some of the tools that Ecology has the discretion to use to determine the impact of an activity on groundwater quality. *WAC 173-200-080*. However, there is no statutory or regulatory requirement for groundwater monitoring. The PCHB found that Ecology does not require groundwater monitoring in any of its other NDPES general permits. *PCHB Finding of Fact 73*.

**b. Appellant Has Not Met Burden of Proof That CAFO General Permit Must Include Groundwater Monitoring**

**1. Substantial Evidence Exists That CAFO General Permit Protects Groundwater**

Appellant asks this Court for “independent court oversight to ensure that Ecology has not ignored its statutory duties” but fails to point to where this statutory duty to require groundwater monitoring exists. *Appellant’s Opening Brief at 27*. This is because there is no state or federal statute or regulation that requires groundwater monitoring. Even though there is no statutory obligation in dispute, Appellant argues “Ecology’s permit determination is entitled to no deference where questions of compliance with state and federal law are at issue.” *Appellant’s Opening Brief at 27*.

The issue for this Court is whether there was “substantial evidence” in the record before the PCHB that the monitoring in the CAFO General Permit is lawful. The record before the PCHB contains more than

substantial evidence to support the PCHB's decision. The PCHB's factual findings may only be overturned under the deferential clearly erroneous standard, and to the extent "reasonableness" of monitoring is a legal determination, the Court must give Ecology "great weight" in its interpretation of the law.

The PCHB concluded that

"[Ecology] considered the costs along with environmental risks and benefits in reaching its conclusion to require soil monitoring and other conditions protective of groundwater in lieu of groundwater and/or surface water monitoring. Ecology's decision not to require groundwater monitoring in the CAFO General Permit is reasonable in light of the complexity, site-specific nature, and limited environmental benefit to be gained relative to the likely costs of such a monitoring regime."

*PCHB Conclusion of Law 25.*

This conclusion is supported by detailed findings of fact, and the exhibits and testimony in the record. As previously noted, findings of fact not challenged on appeal are verities. *Willoughby v. Department of Labor and Industries*, 147 Wn.2d 725, 733 (2002). Only Finding of Fact 56 has been raised as an error, thus the PCHB's other 75 Findings of Fact must be taken by this Court as true.

Ecology determined that "soil monitoring is no less protective of groundwater quality than groundwater monitoring, and that it has the potential to be more protective because it allows for preventative measures to be taken in response to sample results before contamination reaches

groundwater.” *PCHB Finding of Fact 65*. This finding by the PCHB was based on substantial evidence from a variety of witnesses and exhibits that soil monitoring is at least as protective of groundwater as groundwater monitoring, because of the role in soil monitoring in changing CAFO management practices relating to water quality before groundwater is impacted. Numerous witnesses provided testimony to the PCHB that the soil monitoring requirements in the CAFO General Permit will protect groundwater. For example, see the testimony of Ecology’s water quality program witnesses Melody Selby (RP 405:8–19; 440:1-12), John Stormon (RP 310:8-22; 363:12-25), and Andrew Kolosseus (RP 218:17-22; 219:18-21); and Department of Agriculture witness Virginia Prest, RP 926:9-21. Hydrogeologist Kevin Freeman’s testimony was characteristic of the testimony of both Ecology and Agriculture witnesses:

Q: Well, isn’t groundwater monitoring necessary in order to detect contamination from leaking lagoons or from improper application to farm fields?

A: It’s not necessary for detecting leaking lagoons. You can detect leaking lagoons through a water balance. You can detect application to the fields through soil sampling. That a much better application of resources. It’s more proactive than groundwater monitoring. Groundwater monitoring is reactive.

*RP 1089: 7-24.*

While early drafts of the CAFO General Permit included groundwater monitoring instead of soil monitoring, Ecology’s decision to

include soil monitoring in the final permit was based on its conclusion that soil monitoring would effectively monitor nitrogen uptake. *Testimony of Andrew Kolosseus, RP 200:1-202:21.* Even the testimony from Appellant's own witnesses provided the PCHB with substantial evidence that Ecology's decision to include soil monitoring, rather than groundwater monitoring, was proper. For example, Appellant's witness Bruce Bell testified that CAFO permit programs in other states use soil monitoring, not groundwater monitoring. *RP 740:2-11.* Testimony from Appellant's witness John Monks was also enlightening. He testified about a CAFO in Idaho that attempted to implement a groundwater monitoring program. The CAFO drilled monitoring well after monitoring well in hopes of obtaining conclusive groundwater information, but after installing a network of 14 different wells had still not obtained sufficient information. *RP 810:23-818:11.*

The evidence before the PCHB was that the cost for groundwater monitoring would range from \$12,000 to \$40,000 per agricultural facility, depending on the type of groundwater monitoring program. *PCHB Finding of Fact 76.* Other evidence before the PCHB was that groundwater monitoring at a CAFO near Wallula showed higher groundwater pollution levels upgradient of the CAFO than downgradient, and that groundwater monitoring was often not useful because it is

difficult to determine whether pollutants are attributable to onsite or offsite sources. *RP 835:1-10; 992:18-993:16.*

While Appellant's opening brief argues that Ecology's groundwater quality guidelines identify "groundwater monitoring as the only monitoring option that covers all of the potential pollution sources," (citing Ex. I-56 at 35), that exhibit actually states:

Ground water monitoring results should assist in evaluating whether treatment processes are performing properly. ***Ground water monitoring is not a substitute for adequate prevention, control and treatment measures.***

*Ex. I-56 at 35 (bold italics in original).*

Consistent with Ecology's own groundwater quality guidelines, the CAFO General Permit emphasizes the implementation of best management practices, inspections by both the facility operators and the agencies, and recordkeeping and reporting to prevent impacts to groundwater.

The PCHB also heard considerable evidence that Ecology was correct in reserving groundwater monitoring as a tool that it could use in certain situations. *Testimony of Mullen, RP 832:13-25; 9834:19-25; 835:1-10, 837:16-839:2, Testimony of Freeman, RP 1090:2 – 16.* This reflects the function of a general permit, under which numerous facilities

can obtain coverage based on site-specific NMPs. As described in the permit fact sheet:

CAFOs in different parts of the state face different challenges in protecting water quality in both the production area and the field application area. For example, in northwest Washington, ground water tends to be shallow, which can make it more difficult to protect ground water sources. Western Washington in general receives more rain water than eastern Washington, which cause some differences in management practices. These geographic differences across the state is [sic] one reason why the permit relies on site specific nutrient management plan.

*Ex. E-2 at 5.*

Under NRCS Conservation Practice 590, which provides the basis for NMPs and methods for soil sampling, soil testing protocols can in fact be conducted in a manner that will reflect site specific differences at CAFOs in Eastern vs. Western Washington. *RP 981:17-982:18.* In addition to soil sampling, the methods for measuring the depth of lagoons will also protect water quality by identifying leaks before they occur. *RP 315:16-25; 316: 1-12; 318:6-18; PCHB Findings of Fact 58 & 59.*

## **2. Wastewater Storage**

Appellee incorporates the portions of the Response Brief of Northwest Dairy Association on this issue.

**3. Ecology Has Discretion To Consider Reasonableness of Monitoring Requirements, and Ecology Receives Deference On Technical Matters Such as Monitoring.**

The record before the PCHB is clear that Ecology considered how different types of permit provisions would impact Ecology staff workload. On appeal, Appellant construes this administrative consideration as improperly considering “the burden on its own agency” and “ignore[ing] its legal duty by considering factors which are not permitted in the statute.” *Appellant’s Opening Brief at 35.* What Appellant fails to acknowledge is that there is no statutory duty to require groundwater monitoring. The EPA’s own CAFO Rules do not require groundwater monitoring, nor do other state CAFO programs. *RP 186:3-6; RP 740:2 – 11.*

While Ecology did in fact consider how permit provisions would impact Ecology’s workload, the evidence in the record is that this consideration did not affect the protection of groundwater under the CAFO General Permit. *Testimony of Andrew Kolosseus, RP 205:20-25.* Ecology’s decision to require soil monitoring was based on protecting groundwater quality in the most cost-effective way, based on Ecology’s

best professional judgment. *Testimony of John Stormon, RP 375:7-17; 376: 22-22; 377:1; 364:3-7.*

Appellant argues an “analogous situation” was addressed in *Headwaters v. Talent Irrigation District*, 243 F.3d 526 (2001), in which the 9<sup>th</sup> Circuit stated that issuing an NDPES permit is not based on cost-benefit considerations. That case, however, was about whether a discharge to navigable waters required an NDPES permit. The case had nothing to do with monitoring requirements. Appellant also concedes that while Ecology may in fact consider its own workload (“While agency workload merits some concern . . . “ Appellant’s Opening Brief at 39) that “[n]othing in the record suggests that this responsibility couldn’t easily be borne by the industry.” *Appellant’s Opening Brief at 39.* The question before this Court is not whether one or more CAFOs could implement groundwater monitoring. In fact, there is evidence in the record that CAFOs do in fact use groundwater monitoring in certain situations. *RP 834:19 – 25.* Further, the record before the PCHB provides substantial evidence that requiring groundwater monitoring can be a costly endeavor with limited or uncertain value. *Testimony of Harrison RP 992:18 – 993:16, Mullen 835:1 -10, Monks RP 810:23 – 818:11.*

Ecology’s decision to use soil monitoring requirements rather than groundwater monitoring requirements is a quintessential “technical”

judgment made by the agency based on its experience in administering the state's water quality program. Ecology's witness John Stormon testified that the decision of Ecology's water quality program to use soil monitoring rather than groundwater monitoring was based on "best professional judgment." RP 364:3-7. Under *Port of Seattle v. PCHB*, this Court must give due deference to Ecology's decisions regarding technical matters. *151 Wn.2d 568, 595 (2004)*. The deference given to Ecology is compounded by "the deference to the PCHB's factual conclusions" also required by *Port of Seattle*. *Id at 594*. Here, the PCHB's factual findings support Ecology's decision to use soil monitoring, and no factual findings on this issue were challenged on appeal. Appellant's have not shown that the PCHB's decision is not supported by substantial evidence or is arbitrary and capricious.

Finally, the Supreme Court's *Port of Seattle* decision held that "It is the prerogative of the legislature to determine the scientific procedures that will best protect water quality, and this court should not substitute its judgment for that of the legislature." *Port of Seattle*, 151 Wn.2d 568, 626 (2004), citing *Weden v. San Juan County*, 135 Wn.2d 678, 704-05, 958 P.2d 273 (1998); *State v. Brayman*, 110 Wn.2d 183, 192-93, 751 P.2d 294 (1988). In that case, the Legislature mandated that Ecology use a specific testing process to determine soil leaching that could impact water quality.

*Id. at 622 – 624.* In the context of this case, the Legislature established that under the Dairy Nutrient Management Act, Chapter 90.64 RCW, dairy CAFOs use the nutrient management planning process through the National Resources Conservation Service. RCW 90.64.026. To obtain coverage under the CAFO General Permit, dairy CAFOs must meet the requirements under RCW Chapter 90.64. *Kolosseus, RP 241:16-24, Mena RP 886:13-24, Prest RP:924:3-16.* The NRCS practices at issue include CP 590, which governs nutrient management planning, and recommends soil monitoring, not groundwater monitoring. *Harrison 982:19 – 984:5, 1036:4 – 1038:5; Ex. A-77.* The NRCS practices also include CP 313, which governs waste storage facilities. *PCHB Finding of Fact 50; Ex. E-1 at 10; Ex. A-70.*

Thus, like in the *Port of Seattle* case in which the Legislature established a specific procedure to protect water quality, the Legislature here has determined in RCW 90.64.026 that dairy CAFOs use the NRCS Conservation Practices to protect water quality. By following the NRCS Conservation Practices regarding the construction and inspection of waste storage facilities, and using soil monitoring, the CAFO General Permit complies with the Legislature's direction in RCW 90.64.026.

Further, there is substantial evidence in the record that these Conservation Practices will in fact protect water quality. For example,

implementing NMPs at dairy CAFOs in Whatcom County has resulted in water quality improvements resulting in the reopening of shellfish beds. *Ex. I-9; A-109.* NMPs have also resulted in improved surface water quality in the Yakima Basin and reduction in fecal coliform levels. *Ex. I-18, I-16, I-A.* Thus, the NMP-based approach is not sufficient merely because the Legislature approved it for dairy CAFOs, but also because there is substantial evidence before the PCHB that this strategy protects water quality. This legislative determination, and the on-the-ground results is supported both by Ecology's judgment on technical issues associated with protecting groundwater, and the PCHB's factual findings, and is entitled to deference by this Court.

**4. Appellant's Opinion of Permit Development Process Not Supported by Evidence, and Irrelevant to Issues on Appeal.**

Appellant devotes a significant portion of its Opening Brief arguing about the propriety of Ecology's permit development process. This appeal is not another review of Ecology's permit development process, but rather, a review of the PCHB's decision. The PCHB concluded that "the permit development process was lawful and reasonable . . . substantial evidence demonstrates that the permit development process was open to the public, that Ecology made reasonable and diligent efforts to reach out to a broad range of

stakeholders, including CARE, and was responsive to comments made by all sectors.” *Conclusion of Law 2.*

This substantial evidence of Ecology’s open permit development process is reflected in the testimony of a number of witnesses before the PCHB, including Washington State University Professor Joe Harrison (*RP 970:23 – 971:22*), Department of Agriculture witness Lora Mena (*RP 875:2 – 23*), and Ecology witness Andrew Kolosseus (*RP 175:1 – 12; 176:1 – 26; 178:2 – 16*). Each of these witnesses personally participated in the development of the CAFO General Permit, and Dr. Harrison experience dated back to 1998, when he represented the Governor’s Office on the Livestock Development Oversight Committee established by the Legislature. *Former RCW 90.64.813.*

PCHB Findings of Fact 8 through 13, all of which are unchallenged by Appellant, provide significant detail about participation and input of a variety of interests in the permit development process. PCHB Finding of Fact 13 directly contradicts Appellant’s assertion that it had no input influence in the permit process. PCHB found that Ecology’s Director Jay Manning met personally with Appellant’s representatives and added the permit condition requiring CAFOs to develop manure lagoon leak detection systems “directly in response to concerns raised by CARE with Director Manning.” *PCHB Finding of Fact 13; See Testimony of*

*Kevin Hancock, RP 396:5 – 24.* Appellant was invited to participate in the Permit Advisory Committee, though did not regularly attend the meetings. *RP 176:1-26.*

#### **4. Public Participation**

This appeal issue is based on Issue 8 before the PCHB: “Does the permit unlawfully fail to provide public access to facility inspection, discharge, or records in violation of state or federal law?” *Conclusion of Law 3, fn. 13.* Appellant frames this issue as whether the PCHB’s decision was in error because the CAFO General Permit does not provide “citizens with access to all documents necessary to meaningfully participate in permitting and compliance oversight proceedings consistent with the requirements of the federal Clean Water Act and the Washington Water Pollution Control Act.” *Appellant’s Assignment of Error 2.*

##### **a. Public Participation Requirements Under the Federal Clean Water Act Public Participation Requirements, the Waterkeeper decision, and the Federal CAFO Rules.**

The Clean Water Act provides that “public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan or program . . . shall be provided for, encouraged, and assisted by the [EPA} and states.” 33 U.S.C. § 1251(e). Under the NDPES program, which is the basis for the CAFO General

Permit, the federal Clean Water Act requires an “opportunity for public hearing” before an NPDES permit is issued, and that a “copy of each permit application and each permit issued [under the NPDES program]” be available to the public. 33 U.S.C. § 1342(a);(b)(3); 33 U.S.C. § 1342(j).

Based on these provisions, the federal 2nd Circuit invalidated parts of EPA’s 2003 CAFO Rule in the *Waterkeeper* decision. 399 F.3d 486 (2<sup>nd</sup> Cir., 2005). Specifically, the 2nd Circuit invalidated part of the 2003 CAFO Rule “because the Rule effectively shields the nutrient management plans from public scrutiny and comment.” 399 F.3d 486, 503. The 2nd Circuit stated:

Not only does the CAFO Rule fail to require that the terms of the nutrient management plans be included in the NPDES permits, it also fails to provide the public with any other means to access them. After all, the Rule provides only that a ‘copy of the CAFO’s site-specific nutrient management plan must be maintained on site and made available to the Director [of the state permitting authority] upon request.’” 40 C.F.R. § 122.42(e)(2)(ii). The Rule does not similarly require that copies of the nutrient management plans be made available to the public by the CAFOs.

399 F.3d at 503.

In response to the *Waterkeeper* decision, the EPA promulgated in a new federal CAFO Rule in 2006 requiring that the NMP be part of the application for general permit coverage, that there be an opportunity for

public comment and hearing, and that the NMP would be part of the permit.

Ecology developed the CAFO General Permit based on its review of the requirements of the *Waterkeeper* decision. *PCHB Finding of Fact 11; Ex. E-2 at 4, 18, 20; Testimony of Melodie Selby RP 434:7 – 435:2; RP 435:9-22.*

**b. Public Information Available Under CAFO General Permit.**

The revised federal CAFO Rule and Ecology's CAFO General Permit both require that operators submit NMPs with the permit application, and that NMPs are available for public review. *PCHB Finding of Fact 35, Ex. E-1 at 11.* Because the NMPs include effluent limitations, this provision alone ensures compliance with the *Waterkeeper* decision.

However, in addition to this information, the CAFO General Permit requires CAFOs to submit significant amounts of other information directly to Ecology, or maintain the records at the facility for production upon request. The CAFO General Permit has provisions for monitoring, record retention, and reporting, under which CAFOs must create, retain, and file several types of records and reports. *PCHB Finding of Fact 26, Ex. E-1 at 16 – 20.* A facility must also report within any discharge or noncompliance with the CAFO General Permit within 24 hours, including

a written report with information including a description and cause of the discharge, the time and duration of the discharge, the volume of the discharge, the impact of the discharge, and actions taken to reduce or eliminate the discharge from occurring in the future. *Finding of Fact 26; Ex. E-1 at 18 – 20.* The annual report requires reporting of information such as the number and type of animals, the quantity of liquid and manure wastes generated and transferred, the acreage used for land application under the NMP, and a description of all discharges that have occurred within the prior 12 months. *Finding of Fact 26, Ex. E-1 at 19.*

Ecology will respond to requests for public records relating to CAFOs, both for documents maintained by Ecology and for documents that Ecology must request from the CAFO. *PCHB Finding of Fact 29, 30.* Ecology will redact confidential business information prior to making documents available to the public as authorized by specific state laws and regulations that govern Ecology’s public records authority. *PCHB Finding of Fact 30.* Ecology has developed a process to determine which parts of an NMP should be redacted prior to disclosure, so that it can respond to public records requests more quickly, and will do so on a “case by case” basis. *Finding of Fact 31; Conclusion of Law 10.*

**c. Ecology's Public Records Authority Under State Laws and Regulations.**

RCW 43.21A.160 provides Ecology's public disclosure authority:

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.

(emphasis added).

The federal Clean Water Act includes a similar provision protecting document from public disclosure that "if made public would divulge methods or processes entitled to protection as trade secrets[.]" 33 U.S.C. § 1318(b)(2).

Based on this statutory authority, Ecology has adopted regulations specific to disclosure or protection of information relating to its NDPES permitting program. Under WAC 173-226-160, Ecology shall, pursuant to the Public Records Act, "provide, upon request, any information submitted as part of an application for coverage under a general permit." WAC 173-226-160(4).

In so doing, Ecology's regulation includes a provision based on with the statutory confidential business records exception:

Pursuant to chapters 42.17, 43.21A, 70.105, and 90.52 RCW, the department shall protect any information (other than information on the effluent) contained in applications as confidential upon a showing by any person that such information, if made public, would divulge methods or processes entitled to protection as trade secrets of such person.

*RCW 173-226-160(7).*

Importantly, Ecology's regulation makes clear that the type of information that may be protected from disclosure is information "other than information on the effluent." Ecology has adopted similar regulations at WAC Chapter 173-220. Thus, Ecology's public records statute and regulations provide exactly what the *Waterkeeper* decision requires: effluent limitations are not protected from disclosure, and will be available for the public to review.

It is notable that Appellant's Opening Brief fails to include any argument or analysis on the public information requirements in either RCW 43.21A.160, WAC Chapter 173-200, or WAC Chapters 173-220 or 173-226, which are the specific expression of Ecology public disclosure requirements under the Clean Water Act and state law.

**d. Appellant Has Not Shown That PCHB's Decision Regarding Public Participation Was In Error.**

The PCHB concluded:

The permit provides for public participation in the development, revision, and enforcement of the standards, effluent limits, and plans connected to these NDPES permits by making Nutrient Management Plans publicly available for review as part of the permit application and coverage decision process. Citizens will also have access to CAFO discharge and annual reports filed with Ecology, and have the opportunity to request additional records kept on-site at CAFO facilities. We are not persuaded that the operational records are either effluent limits or otherwise the functional equivalent of permits such that they should be treated, categorically, the same as nutrient management plans under *Waterkeeper Alliance*.

*PCHB Conclusion of Law 6.*

The PCHB's decision that the public will have access to CAFO information that constitute "effluent limitations" is supported by substantial evidence. The CAFO General Permit prescribes two types of information: (1) Information that must be provided to Ecology under the terms of the permit, or (2) Information that must be maintained by the facility and provided to Ecology upon request. The unchallenged factual findings of the PCHB are that the public can in fact, obtain information from Ecology about a CAFO, both before it is granted coverage under the CAFO General Permit, and while it is operating under the permit.

As demonstrated before the PCHB, the application, monitoring, recordkeeping, and reporting requirements under the CAFO General Permit combine to provide the public with sufficient information about a CAFO facility.

Ecology will respond to requests for public records relating to CAFOs, both for documents maintained by Ecology and for documents that Ecology must request from the CAFO. *PCHB Finding of Fact 29, 30.* Ecology will redact confidential business information prior to making documents available to the public. *PCHB Finding of Fact 30.* Ecology will respond to public records requests on a case-by-case basis, and has developed a process for this purpose. *Testimony of Melodie Selby, RP 446:1-447:7.* Under Ecology's process, claims by CAFO operators that certain information within NMPs is protected under the "confidential business information" exception will be reviewed at the time NMPs are submitted, so that public information requests can be dealt with more quickly. *RP 446:1-10.*

***e. Appellant's Real Issue Regarding Public Records Not Ripe For Review by This Court.***

This case is an appeal of the PCHB's decision upholding the CAFO General Permit. But as the PCHB noted, Appellant's real concern regarding access to public information is how Ecology will apply the

confidential business records exception (CBI) to future public records requests. This concern is not ripe for review in the context of an appeal of the CAFO General Permit, and thus the PCHB declined to “engage in the kind of declaratory ruling CARE seeks.” *Conclusion of Law 8*. The PCHB endorsed Ecology’s case-by-case process for determining what parts of NMPs or other information maintained or requested by Ecology must be produced, and which should be redacted prior to disclosure under the CBI exception. As occurred before the PCHB, Appellant seeks a declaratory ruling from this Court regarding how Ecology must respond to any particular type of request. The PCHB declined to engage in such a ruling, and this Court should refuse as well. Evidence before the PCHB regarding past experiences with public records requests does not establish a justiciable dispute, as opposed to an argument that is “merely potential, theoretical, abstract, or academic.” *Superior Asphalt v. Washington Dept. of Labor and Industries*, 121 Wn.App. 601, 606 (Div. 3, 2004).

As the PCHB concluded, Ecology’s actions in response to public records requests are enforceable under RCW Chapter 42.56, the Public Records Act. Appellant has a clear remedy if Ecology fails to comply with RCW 43.21A.160 or relevant provisions of the Public Records Act. “[Public Records Act] show cause hearings are designed to be quick and relatively easy so the requestor – pro se or with counsel – can obtain the

records if he or she is entitled to them.” Howard and Overstreet, *Public Records Act Deskbook: Washington’s Public Disclosure and Open Public Meeting Laws*, § 16.2(1) at 16-5 (2006). Further, if Appellant believes that Ecology’s rules regarding public records disclosure of water quality permit information (in WAC Chapters 173-200 and 226) are unlawful, those rules can be challenged under Chapter 34.05 RCW, the Administrative Procedures Act.

Appellants now argue that “the Permit’s principal violation of the Clean Water Act’s public participation requirement resides in its failure to specify that records necessary to assess the adequacy of the NMP as an effluent limitation, and the CAFO’s compliance with such terms, are subject to public disclosure.” *Appellant’s Opening Brief*, at 44. Appellant cites *Waterkeeper* in support of this argument. However, the *Waterkeeper* decision invalidated the provisions of the EPA CAFO rule regarding public access to information “ . . . because the Rule effectively shields the nutrient management plans from public scrutiny and comment.” 399 F.3d 486, 503. Appellant is seeking to extend the public disclosure requirements of NMPs discussed in *Waterkeeper* to additional operational records. The PCHB expressly found that as described in *Waterkeeper*, NMPs are available to both Ecology and the public, as are annual monitoring reports and reports of noncompliance. *Finding of Fact 26*.

This is because some of the provisions of NMP constitute effluent limitations under the Clean Water Act, and are therefore subject to public disclosure under both the *Waterkeeper* decision, and the state statute and regulations application to Ecology's public records authority. Other parts of NMPs, however, are not effluent limitations and therefore may be protected from disclosure under the CBI exception. For example, proprietary information about a specific facility's operations or products are not effluent limitations. Before the PCHB, Appellant's conceded that not all parts of an NMP are effluent limitations, and that Ecology had the discretion to determine what parts of the NMP were effluent limitation that must be disclosed, and what parts may be protected from disclosure: ("At a minimum, Ecology should have specified in the Permit . . . which types of information in an NMP it deems capable of being withheld at confidential under RCW 43.21A.160."). *Appellant's Motion for Summary Judgment Court Documents Volume 2, #25, at 9.*

There is no authority for Appellant's assertion that the CAFO General Permit must specify how Ecology will respond to requests for public records that it will receive in the future. Because the NMPs prepared by facilities covered under the CAFO General Permit are site-specific, and each operator may seek to protect different types of operational information under the statutory CBI exception, Ecology has

implemented a “case-by-case” approach to address the issue of access to public information. *RP 446:1-447:7*.

Appellant argues that “access to operational records is essential to an understanding of pollution trends . . . “ *Appellant’s Opening Brief at 47*. However, Ecology’s public records statute and regulations do not require public disclosure of all operational records. Rather, the statutory scheme requires the operator of the facility for which records are requested to certify and request that certain information be made available only for Ecology if the information relates “to the processes of production unique to the owner or operator . . . or may affect adversely the competitive position of such owner or operator . . . “ RCW 43.21A160. The statute itself establishes a process where Ecology’s determination of whether the CBI exception applies is initiated by the facility owner or operator, based on circumstances “unique” to that operation. This statutory process supports Ecology’s “case-by-case” approach, where it can consider each public records request, and any CBI exception request, on its own merits. How Ecology will respond to a public records request in the future, including how it applies the provisions of RCW 43.21A.160 to both the specific records request and any request from a facility operator that information be protected, are future decisions that cannot be resolved in the context of this appeal of the CAFO General Permit.

Neither the Public Records Act, Chapter 42.56, the model Public Records Act rules adopted by the Attorney General in WAC Chapter 44-14, or Ecology's Public Records Act procedural regulations at WAC Chapter 173-03 require Ecology, in advance of a public records request, to determine how it will apply disclosure exemptions. Further, because the state statute and regulations at issue are those implemented by Ecology with regard to its general water quality responsibilities under Chapter 90.48, Ecology interpretation and application of those provisions and the resulting "case by case" response to public records requests is entitled to deference by this Court.

### **C. Conclusion**

Like its case before the PCHB, Appellant's arguments are based not on whether the CAFO General Permit is lawful and will in fact protect Washington State's ground and surface water, or on whether the PCHB's decision is supported by substantial evidence. Rather, Appellant's arguments are based on past experiences with specific facilities, from a perspective that CAFOs should simply not exist.

The evidence before the PCHB was that the implementation of NMPs, a requirement of the CAFO General Permit, will in fact protect water quality. The use of NMPs is consistent with the direction of the

Legislature, and Ecology's CAFO General Permit is more stringent than the federal EPA CAFO Rules. On the specific issue of soil monitoring, there is substantial evidence in the record that soil monitoring is preferable to groundwater monitoring because it allows facilities to adjust practices before impacts to groundwater occur. In contrast, ground water monitoring programs would find impacts only after they have occurred, and in the evidence before the PCHB, have proven to be difficult and expensive to develop while providing uncertain results. Soil monitoring is part of Conservation Practice 590 developed by the NRCS, which is the basis for NMPs. Ecology's CAFO General Permit relies on the NRCS method.

The CAFO General Permit will also provide the public with significant amounts of information about individual CAFOs in both the application process and regarding facility operations and compliance. As required under the *Waterkeeper* decision, a facility's NMP must be included with the permit application, which will be available for public review. The public will also have the ability to obtain the annual reports that are submitted to Ecology that include monitoring information, as well as additional inspection records that must be kept onsite. Ecology's statutory authority regarding public records authorizes information to be withheld from the public if the information relates to production processes

unique to the facility, or if disclosing information may affect the competitive position of the owner. This determination is based on a request by the facility, and thus must be a “case by case” determination as envisioned by Ecology. Importantly, under a regulation adopted by Ecology, the information protected from disclosure must be information “other than effluent limitations.” Ecology’s process for responding to public records requests therefore avoids the flaw identified in the *Waterkeeper* decision of protecting effluent limitations from disclosure.

Appellant has not met its burden of showing that the PCHB’s decision is not supported by substantial evidence. The PCHB’s decision should be affirmed by this Court.

Respectfully submitted on the 21st of June, 2008.

A handwritten signature in black ink, appearing to read "Bill Clarke", written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I certify that on June 21st, 2008, I served a true and correct copy of Respondent-Appellee Washington State Dairy Federation et al.'s Response Brief, on the following parties via postage paid U.S. Mail at the following addresses:

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