From:	Evan Sheffels
To:	Jennings, Jonathan (ECY)
Cc:	John Stuhlmiller; Davis, Tom
Subject:	Washington Farm Bureau Comments to Draft CAFO Permit Proposal
Date:	Friday, October 02, 2015 10:52:55 AM
Attachments:	image001.jpg WFB COMMENTS ON ECOLOGY"S PRELIMINARY CAFO PERMIT PROPOSAL final.pdf

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Jonathan,

Please find attached Washington Farm Bureau's comments, to Director Bellon and Water Quality Program Manager Bartlett, on Ecology's preliminary draft CAFO permit proposal. WFB looks forward to working with you and the Water Quality Program moving forward.

Thank you,

Evan

Evan Sheffels | Washington Farm Bureau | 360.870.4165

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Washington State Department of Ecology
Maia Bellon, Ecology Director
Heather Bartlett, Water Quality Program Manager
c/o Jon Jennings (via email)
PO. Box 47600
Olympia, WA 98504-47600

October 1, 2015

Re: Washington Farm Bureau Comments on Ecology's Preliminary Draft CAFO NPDES Permit

Dear Director Bellon, and Water Quality Program Manager Bartlett:

Washington Farm Bureau (WFB) appreciates this opportunity to comment on Ecology's preliminary draft CAFO permit proposal. We understand Ecology is requesting comments to make the proposed permit more workable for producers.

As Washington's largest general farm organization, WFB advocates for producers so they have the resources needed to remain economically viable. WFB is also committed to supporting Washington's dairy and livestock businesses. These family farms and ranches need a predictable business climate so they can to continue to contribute to the state economy and the rural way of life. As you are also well aware, designing appropriate permit conditions is a complex matter that involves many disciplines, including science, regulatory policy, and economics.

While we support Ecology's primary objective of protecting the quality of Washington's waters, we believe the department must take the time necessary to develop a permit that is based on credible science, is technically and legally defensible and is not overly burdensome for producers. This proposal has a long way to go to meet those objectives.

As drafted the current CAFO permit proposal creates too much uncertainty. For instance, it is not clear who the permit will actually affect, what compliance will cost for operations that need CAFO National Pollutant Discharge Elimination System (NPDES) permits, and who can be sued for what under federal Clean Water Act citizen suit provisions.

Based on the best information available to us at this time, we believe the department's initial proposal, as drafted, would impose new permit requirements on hundreds of dairies statewide. This could compel unreasonably expensive investments in lagoon liners and other engineered projects without demonstrable environmental benefits.

Washington had around 2,000 dairies in the 1990s. There are currently around 450 dairies in the state. This dramatic loss of dairies was in large part due to water quality regulations that were too expensive for small family dairies to comply with. WFB is deeply concerned that additional

costs imposed by the proposed CAFO permit, if adopted as drafted, will put the remainder of the state's small family dairy farms out of business. That is not acceptable.

Who Will Need a Permit? Clarity is needed to determine the impacts of the proposed permit. We have several initial questions. The proposed draft says that Ecology has "determined that if the CAFO has a lagoon that does not have a double geomembrane liner with a leak detection system between the liner layers that it is discharging to groundwater."

That leads us toward a troubling conclusion that hundreds of operations with manure lagoons will now need to get CAFO permit coverage just to shield themselves from citizen suit risks. Yet another Ecology comment in the draft permit proposal seems to indicate a potentially smaller universe of permittees: **"Commented [j4]:** … In areas where there are *known groundwater impacts from nitrate*, or where the groundwater is *susceptible to impacts from nitrate*, Ecology has determined that the leakage from lagoons that are not double lined with leak detection requires a permit."

Will NPDES permits be required for all operations with unlined lagoons, only for operations in areas with groundwater nitrate concerns, or only for operations in areas where actual scientific evidence indicates that a particular lagoon in such area is contributing to nitrate concerns? Will permitted operations with lagoons constructed to NRCS standards be protected from risks associated with third party citizen suits under the federal Clean Water Act?

How did Ecology "determine" that all lagoons - other than double lined lagoons – leak pollutants into waters of the state in violation of state law? This appears to be a legally and scientifically questionable presumption that is not based on sound science or evidence. Please provide the specific evidence Ecology used to determine that lagoons of dairies or livestock feeding operations are discharging pollutants to state or federal waters.

CAFO definitional conditions include an *actual* discharge of pollution to surface or ground waters (other than exempt agricultural stormwater); a confinement area where 45 or more days of confinement occur; and where vegetation, forage or post-harvest residue is not sustained during the growing season for some portion of the confinement area. Will a permit only be required for those who meet these CAFO definitional conditions? Also, the proposed permit does not appear to provide permit thresholds in terms of animal numbers. Are there any? Will every 4H kid with a few animals in a pen need a permit?

Given the questions above, how many operations that do not currently have CAFO/NPDES permit coverage would be required to obtain CAFO/NPDES coverage under the proposed general permit? Please provide maps showing groundwater nitrate areas of concern and/or areas where federal CAFO permits will likely be required. Please also provide a map or maps showing areas and dairy numbers Ecology expects to be affected by the proposed permit requirements.

Conflicting Standards. Why are the goal posts being moved? In the past Ecology has agreed that NRCS 313 Lagoon standards were sufficient for compliance. Many lagoons were constructed in good faith, trusting that these "good practices" would "be protected from government over-regulation," consistent with legislative intent for RCW 90.48.450 (see below). Why are these same operations and standards now being questioned?

NRCS standards should determine what is reasonable and needed in this CAFO permit. Further, a presumption of compliance should apply to activities that are consistent with a current conservation plan, so long as such plan has been approved by a conservation district, is consistent with NRCS standards, and is being implemented and maintained as approved.

Similarly, the Washington State Department of Agriculture's (WSDA's) Dairy Nutrient Management Program already has a strong track record of regulating dairies while avoiding over-regulation, consistent with state legislative intent. WSDA already has the technical and enforcement capacity to perform many functions that would be duplicated by Ecology under the proposed permit. The state Conservation Commission and local conservation districts also have a good track record of designing and implementing reasonable, science-based conservation plans that protect water quality while also helping dairy and livestock operations remain profitable. At the very least, Ecology should coordinate with WSDA and other affected agencies to avoid duplication of permit functions and requirements, and to protect agricultural viability.

Right of Entry. WFB is very concerned about the permit enforcement provisions proposing new right of entry authority for Ecology. We are especially concerned about impacts on the potentially hundreds of operations that may now be required to obtain federal CAFO permit coverage. These operations are not currently subject to an Ecology right of entry.

Citizen Suits. The proposal would appear to allow third parties to bring citizen suits under the federal Clean Water Act to enforce state-only requirements (for instance potential discharge to state groundwater from a lagoon built to NRCS standards). If so, we request that the permit be revised so that violations (or perceived violations) do not inappropriately result in a broadening of potential federal citizen suit risks. Washington operations should not face any federal citizen suit liabilities that are not faced by dairies or animal feeding operations in all other states.

Buffers. Where there is no permanent vegetative cover, the proposed draft would require 100 foot "no spread" buffers on wetlands and other state waters. Where there is permanent vegetative cover (grass, alfalfa, etc…), the proposed draft would require 35 foot buffers. WFB is very concerned that the proposed buffers will result in a tremendous loss of production and added costs to the state's producers. Please explore less burdensome alternatives.

WFB is also very concerned about impacts associated with the draft proposal's language which proposes to exclude animals within 35 feet of state waters. We are again very concerned that this may extend federal citizen suit liability to permittees based on state-only requirements. This exclusion requirement even appears to preclude grazing on prior converted croplands (PCC). Former wetland areas legally converted to Ag uses prior to December 23, 1985 are not considered Waters of the United States. Grazing can continue in PCC areas under the federal Clean Water Act. The same should be true under the proposed permit.

Soil Testing. The draft proposal calls for soil testing to a depth of 3 feet twice per year. This would add significant cost burdens, up to $500 per field tested. WFB believes the costs for the level of testing proposed will greatly exceed the benefits of such testing (which are far from clear). This is especially concerning for small family operations.

Paperwork and Bureaucracy. The proposal includes a troubling amount of paperwork and

complex engineering plan approval requirements for many modifications required for compliance. It is important that such operational burdens are understood by Ecology and avoided where possible to protect agricultural viability.

Conversion and Protection from Over-Regulation. RCW 90.48.450 requires the department to consider whether (and minimize the possibility that) it's actions would contribute to the conversion of agricultural lands to nonagricultural uses, and to ensure that the agency's regulation and enforcement actions are consistent with the legislature's intent (from chapter 297, laws of 1981) as it relates to RCW 90.48.450, as follows:

> *"The legislature finds that agricultural land is essential to providing citizens with food and fiber and to insuring aesthetic values through the preservation of open spaces in our state. The legislature further finds that government regulations can cause agricultural land to be converted to nonagricultural uses. The legislature intends that agricultural activity consistent with good practices be protected from government over-regulation."*

How does the department intend to assure that operations will be protected from over-regulation, consistent with the legislature's intent for RCW 90.48.450? What financial help or compliance tools and timelines will be provided to reduce new regulatory burdens and help affected operations come into compliance with the new permit requirements?

WFB encourages the department to engage with the Voluntary Stewardship Program (VSP) process. VSP aims to protect local food production capacity and slow the conversion of working farms and ranches to nonagricultural developments. As you know, developed land tends to be much less protective than agriculture in terms of both critical area and water quality outcomes. VSP provides the best chance to promote needed resource solutions while also preserving the economic viability of working farms and ranches.

Extension Request. For the reasons expressed above, WFB requests an additional 60-day extension of time for more detailed discussion of the current preliminary draft proposal, prior to Ecology issuing its first formal draft of a proposed CAFO permit. We also request a 60-day public comment period, and a public hearing, on the revised draft once it is released.

This will help to address perceived "process foul" concerns due to the various surprises that were not clearly presented in Ecology webinars on the proposed CAFO permit and process. This will also provide affected producers with public notice and a fair opportunity to comment. The purpose of such procedures is simply to ensure that affected operations can participate meaningfully in the development of permits and policies that will affect their livelihoods.

Economic Analyses Request. The proposed permit will clearly impact the rights and responsibilities of dairies and other animal feeding operations. This is in part because a violation of a permit requirement, or the failure to obtain a required permit, will subject operations to potential punishment. Financial penalties and sanctions will apply for those who do not comply with the new CAFO permit standards.

These permit requirements will also be used to determine subsequent regulatory outcomes for nutrient management and lagoon standards. While the department has proposed a general "permit" and not a rule, WFB is concerned that the proposed permit will be applied uniformly

and be “of general applicability.” The proposed lagoon standards, for instance, appear to be uniform standards of general applicability.

For those reasons, WFB is requesting that Ecology duplicate the economic and other analyses required prior to final agency adoption of significant rules. Before a permit is adopted, we ask that Ecology first complete and publish for comment an economic analysis to ensure the permit benefits will exceed permit costs, a least burdensome alternative assessment, and a small business economic impact analysis. This will help address fairness concerns with the permit-making process, which provides limited opportunity for the regulated community to participate.

Conclusion. Thank you for this opportunity to comment on the department’s proposed preliminary CAFO permit. Rather than significantly improving environmental outcomes, WFB believes that the combined requirements of the proposed permit would cause many dairy operations to go out of business and convert to non-agricultural land uses. WFB is also concerned that the proposed permit, as drafted, would create unnecessary duplication of existing WSDA nutrient management efforts. Working together we can and must do better.

We appreciate your thoughtful consideration of the comments and questions in this letter, and we ask the department to respond in writing to the issues raised prior to moving forward on CAFO permit issuance activities.

We look forward to working with you and your staff on these challenging issues moving forward.

Sincerely,

Evan

Evan Sheffels | Washington Farm Bureau | 360.870.4165

WASHINGTON FARM BUREAU