POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

COMMUNITY ASSOCIATION FOR RESTORATION OF THE ENVIRONMENT (CARE), Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent,	PCHB No. 06-057 **ORDER ON MOTIONS** **Intervenor NDA's Second Motion for Partial Summary Judgment (Issues No. 2, 3, 5, 7, 16), and** **Appellant's Motion for Partial Summary Judgment (Issues No. 8, 9, 13, 14, 17, 18, 19)**
NORTHWEST DAIRY ASSOCIATION, WASHINGTON STATE DAIRY FEDERATION, WASHINGTON CATTLEMEN'S ASSOCIATION, WASHINGTON CATTLE FEEDERS ASSOCIATION, NORTHWEST POULTRY INDUSTRIES COUNCIL, Intervenors.	

This matter comes before the Pollution Control Hearings Board (Board) as part of the above-captioned appeal of the Concentrated Animal Feeding Operation National Pollution Discharge Elimination and State Waste Discharge General Permit (CAFO General Permit). This order addresses Intervenor Northwest Dairy Association's (NDA) Second Motion for Partial Summary Judgment on Legal Issues No. 2, 3, 5, 7, and 16; and Appellant Community

Association For Restoration of the Environment's (CARE) Motion for Partial Summary Judgment on Legal Issues No. 8, 9, 13, 14, 17, 18, and 19.[1]

The parties submitted these motions to the Board for its consideration on the written record without oral argument. Attorneys Charles M. Tebbutt and Daniel M. Galpern of Western Environmental Law Center, represented Appellant CARE. Ronald L. Lavigne, Assistant Attorney General, represented Respondent Department of Ecology (Ecology). Attorneys Lori A. Terry and John Ray Nelson of Foster Pepper LLC, represented Intervenor NDA. Attorney James A. Tupper, Jr. of Mentor Law Group, PLLC, represented Intervenors Washington State Dairy Federation, Washington Cattlemen's Association, Washington Cattle Feeders Association, and Northwest Poultry Industries Council (Dairy Federation, *et. al*.).

Board members Andrea McNamara Doyle, Presiding, William H. Lynch, Chair, and Kathleen D. Mix, Member, reviewed and considered the pleadings and record pertinent to the motions in this case, including the following:

1. Intervenor NDA's Motion for Partial Summary Judgment on Legal Issues No. 2, 3, 5, 7, and 16, dated March 8, 2007, including Appendix 1.
2. Declaration of Lori A. Terry in Support of Intervenor NDA's Motion for Partial Summary Judgment on Legal Issues No. 2, 3, 5, 7, and 16, dated March 8, 2007, including Exhibits A through I (hereinafter First Terry Declaration).
3. Appellant's Motion for Partial Summary Judgment [on Legal Issues No. 8, 9, 13, 14, 17, 18, and 19], dated March 8, 2007. [2]
4. Declaration of Charles M. Tebbutt in Support of Appellant's Motion for Partial Summary Judgment, dated March 8, 2007, including Exhibits A through I.
5. CARE's Response in Opposition to Intervenor Northwest Dairy Association's Motion for Partial Summary Judgment on Legal Issues No. 2, 3, 5, 7, and 16, dated March 22, 2007.

[1] Intervenor NDA's First Motion for Partial Summary Judgment addressing Legal Issue No. 1 was previously filed, and the Board's decision on that motion is contained in a separate Order.

[2] By Order dated April 6, 2007, the Declarations of Helen Reddout and Larry Fendell dated March 7, 2007, in Support of CARE's Motion for Summary Judgment were striken and therefore not considered in ruling on these motions.

6. Declaration of Danial M. Galpern in Support of Appellant's Response to Intervenor NDA's Motion for Partial Summary Judgment, dated March 22, 2007, including Exhibit A.
7. Respondent Ecology's Response in Opposition to Intervenor NDA's Motion for Partial Summary Judgment on Legal Issues No. 2, 3, 5, 7, and 16, dated March 22, 2007.
8. Respondent Ecology's Response in Opposition to Appellant's Motion for Partial Summary Judgment, dated March 22, 2007.
9. Declaration of John Storman [in support of Ecology's Response in Opposition to Appellant's Motion for Partial Summary Judgment], dated March 21, 2007.
10. Memorandum of Intervenors NDA, Dairy Federation, *et. al*., in Opposition to Appellant's Motion for Partial Summary Judgment, dated March 22, 2007.
11. Declaration of Joseph H. Harrison in Opposition to Appellant's Motion for Partial Summary Judgment, dated March 22, 2007, including Exhibits 1 through 6.
12. Declaration of James A. Tupper, Jr. in Support of Washington Dairy Federation, et. al.'s Response to CARE's Motion for Partial Summary Judgment, dated March 22, 2007, including Exhibit 1.
13. Declaration of David Secrist in Opposition to Appellant's Motion for Partial Summary Judgment, dated March 22, 2007.
14. Declaration of Kevin Freeman, P.G. [in opposition to Appellant's Motion], dated March 21, 2007.
15. Declaration of Lori A. Terry in Support of Intervenors' Memorandum in Opposition to Appellant's Motion for Partial Summary Judgment, dated March 22, 2007, including Exhibits A through I (hereinafter Second Declaration of Terry).
16. Intervenor NDA's Reply in Support of Motion for Partial Summary Judgment on Legal Issues No. 2, 3, 5, 7, and 16, dated March 31, 2007.
17. Reply of Appellant CARE to Ecology's Response and Intervenors' Opposition to Motion for Partial Summary Judgment, dated April 2, 2007.
18. Declaration of John Monks in Support of Appellant's Motion for Partial Summary Judgment, dated April 2, 2007.
19. Declaration of Bruce A. Bell, Ph.D., P.E., BCEE, in Support of CARE's Motion for Summary Judgment, dated April 2, 2007.
20. Supplemental Declaration of Charles M. Tebbutt in Support of Appellant's Motion for Partial Summary Judgment, dated April 2, 2007, including attachments J through M.
21. Supplemental Declaration of Helen Reddout in Support of CARE's Motion for Summary Judgment, dated April 1, 2007, including attached Exhibits A through I.[3]

[3] Intervenors' April 12, 2007, motion to strike this curative Supplemental Reddout Declaration is denied.

BACKGROUND

This permit covers discharges of wastewater from Combined Animal Feeding Operations (CAFOs) to waters of Washington State. Under federal and state water quality laws, the federal Clean Water Act (CWA) and state Water Pollution Control Act, a permit is required for the discharge of wastewater. This permit addresses these legal requirements and controls the discharge of pollutants to protect surface and groundwater quality in Washington State.

The CAFO General Permit replaces and expands upon the previous Dairy General Permit, which expired in 2005. Ecology issued this permit in 2006, which incorporates changes from the U.S. Environmental Protection Agency (EPA) 2003 Federal CAFO Rule, court decisions, and two public comment periods. Appeallant CARE and Intervenors each challenge numerous provisions of the permit, several of which are addressed by these motions for summary judgment.

ANALYSIS

Summary judgment is a procedure available to avoid unnecessary trials on formal issues that cannot be factually supported and could not lead to, or result in, a favorable outcome to the opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 569 Wn.2d 1152 (1977). The summary judgment procedure is designed to eliminate trial if only questions of law remain for resolution. The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182; 930 P.2d 307 (1997). A material fact in a summary judgment proceeding is one that will affect the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). In a summary judgment, all facts and reasonable

inferences must be construed in favor of the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment may also be granted to the non-moving party when the facts are not in dispute. *Impecoven v. Department of Revenue*, 120 Wn.2d 357, 365, 842 P.2d 470 (1992).

Issue No. 2
Did Ecology err by requiring, in Special Condition S3.D.2, an updated nutrient management plan if the permittee changes the field acres in the plan?

Condition S3.D.2 requires CAFOs to develop and implement an updated nutrient management plan (NMP) if "the CAFO reduces *or changes the field areas* specified in the nutrient management plan used for land applications." (emphasis added).

Intervenor NDA argues that the requirement to update NMPs for *any* "changes in field areas" is unreasonable, is not supported by relevant authority, and should be modified to reflect Ecology's intent to address only material changes in the land base used for applications.[4] NDA alleges that Ecology intended only changes involving ten percent or more of the land application area should require an updated plan. *NDA's Motion for Summary Judgment, at p. 8* (citing Ecology's Response to Comments at p. 120). NDA reasons that small, routine changes are anticipated and accommodated by NMPs and do not materially impact a farmer's ability to apply nutrients at an agronomic rate. NDA further contends that enlargement of field acreage only improves application rates.

[4] The CAFO General Permit defines "Land application areas" as "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 by the CAFO owner or operator or an agent of the CAFO owner or operator."

Ecology counters that adding any new land application areas involves a change significant enough to justify updating an NMP. Ecology points to the EPA's proposed federal CAFO rule that defines "substantial changes to an NMP" as those involving "the addition of land application areas not previously included in the nutrient management plan." *71 Fed. Reg. 37756*. Even small additions of acreage or changes in locations, Ecology contends, can impact applicable set-back requirements.

Appellant CARE responds that the permit addresses changes in "areas" not "acreage." CARE argues that any changes in the specific locations where wastes are applied likely affect the maximum amount of wastes that can be applied at an agronomic rate and that new, field-specific assessments are necessary in order for the NMP to continue to serve as a relevant and enforceable effluent limitation.

We are not convinced that it is unreasonable as a matter of law for permittees to update their NMPs whenever they change the field areas to which agricultural wastewater will be applied. We find this requirement consistent with EPA's approach and agree with Ecology and CARE that it ensures proper protocols and effluent limitations are followed when wastes are applied to field areas not previously identified or analyzed in an NMP.

Changes in field areas that have not been previously analyzed—whether they result from the relocation of the current number of field acres or increases in field acreage—create, at a minimum, potential uncertainty regarding whether the NMP's site-specific land application protocols and calculations will continue to ensure appropriate agricultural utilization of the applied nutrients. They may impact appropriate setback requirements or relevant variables used

to calculate agronomic rates (*e.g.*, soil characteristics, slopes, drainage), and we conclude Ecology did not err in requiring permittees to analyze such changes in an updated NMP. Because we find Condition S3.D.2 reasonable, summary judgment on Legal Issue No. 2 should be denied to Intervenor NDA and granted to Ecology and CARE.

We note that permittees can minimize the need to update or modify their NMPs by thoughtfully anticipating a range of operational scenarios and contingencies (*i.e.*, all likely crop rotations, cropping patterns, and field application areas expected during the term of the permit) when initially developing their NMPs for this permit.

<u>Legal Issue No. 3</u>

Did Ecology err by requiring, in Special Condition S4.B.1, permittees to report "as soon as possible" instead of within 24 hours?

Condition S4.B.1 provides as follows:

> If any discharge to waters of the state occurs, or if a CAFO for any reason does not comply with *any of the requirements of the permit*, the CAFO must notify the Department *as soon as possible, but no later than 24 hours* after the discharge or noncompliance. The CAFO must submit a written report within five (5) days to the Department. (emphasis added).

Intervenor NDA challenges this provision as unreasonable on two grounds. First, NDA argues that the reporting requirement should not apply to every instance of non-compliance, only those impacting water quality or posing harm to the environment. Second, NDA contends the "as soon as possible but no later than 24 hours" timeframe invites disputes as to what is "possible" and imposes an unreasonable requirement that may be impossible to achieve if a

permittee does not discover a non-compliance situation within 24 hours. Ecology included the phrase "as soon as possible" in the final permit, according to NDA, to "encourage CAFOs to report spills to WSDA as soon as possible." *NDA's Motion for Summary Judgment*, at pp. 4, 9-11 (citing Ecology's Response to Comments at pp. 141 and 62). NDA suggests the CAFO General Permit reporting requirement should be consistent with the federal regulation that requires reporting of "any noncompliance which may endanger health or environment… within 24 hours from the time the permittee becomes aware of the circumstances." 40 CFR 122.41(l)(6).

Ecology initially objects to NDA challenging the scope of the noncompliance reporting requirement since it was not included as a legal issue in the pre-hearing order. Ecology then argues that the permit's scope of noncompliance reporting is consistent with federal reporting regulations, which require permittees to report "all instances of noncompliance" at the time monitoring reports are submitted, in addition to reporting within 24 hours those instances endangering health or the environment. 40 CFR 122.41(l)(7). Ecology also relies on state regulations for waste discharge permits that provide:

> In the event the permittee is unable to comply with *any of the permit terms and conditions due to any cause*, the permittee shall:
> (a) Immediately take action to stop, contain, and cleanup unauthorized discharges or otherwise stop the violation, and correct the problem;
> (b) *Immediately notify the department of the failure to comply*; and
> (c) Submit a detailed written report to the department within thirty days, unless requested earlier by the department, describing the nature of the violation, corrective action taken and/or planned, steps to be taken to prevent a recurrence, and any other pertinent information. WAC 173-216-110(6) (emphasis added).

CARE argues that the federal CWA and its implementing regulations authorize Ecology to use more stringent reporting requirements than contained in federal law and that the CAFO

General Permit reporting requirement is preferable because it allows Ecology to decide which instances of noncompliance pose a threat to the environment or public health. CARE reasons that the burden of establishing when it was "possible" to report a noncompliance situation should rest with the permittee and that it is proper for Ecology to use its enforcement discretion in response to such circumstances.

States may adopt and enforce "any standard or limitation respecting discharges of pollutants…or any requirement respecting control or abatement of pollution." 33 U.S.C. §1370. This includes implementing regulations that are more stringent than the federal counterpart. EPA's implementing regulations require NPDES permits to meet any additional standards and state requirements necessary to achieve water quality standards. 40 CFR 122.44(d). This includes state water quality guidelines or standards other than those promulgated under the CWA. 40 CFR 122.44(d)(1).

Contrary to NDA's contention, the language NDA requests would not eliminate the potential for disputes, but would simply substitute disagreements about what is "as soon as possible" with disputes about *which* noncompliance situations endanger health or the environment and *when* a permittee became aware of a violation. In any event, these are the kinds of disagreements that cannot be resolved in advance, and the fact that disputes over these concepts may occur does not render the permit impermissibly vague or ambiguous.

Intervenors have failed to demonstrate Ecology lacks the legal authority for either the scope or timing of the permit's noncompliance reporting requirement, or that the standard is

impermissibly vague or ambiguous. We conclude Ecology did not err by including it. Summary judgment should be denied to NDA on Issue No. 3 and granted to Ecology and CARE.

<u>Legal Issue No. 5</u>
Is the requirement in Special Condition S7 that a permittee demonstrate no remaining potential for discharge unlawful under the federal Clean Water Act or Chapter 90.48 RCW?

Condition S7 (Termination of Coverage) allows CAFOs to request termination of coverage when:

> 1. There are no outstanding fees or penalties; and
> a. The permittee 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; or
> b. The facility has ceased operation and passed an (sic) closeout inspection; or
> c. A facility that did not have a discharge or was not designated a CAFO. (S7.A) (emphasis added).

Intervenor NDA relies on the *Waterkeeper* decision to argue that the because the federal CWA regulates only actual (rather than "potential") discharges, the CAFO General Permit's requirement that a permittee demonstrate "no remaining potential for a discharge" before terminating coverage goes beyond the jurisdiction of the CWA.[5] NDA contends this standard is also unreasonable because it is impossible to meet—since some discharge is always potentially

[5] *Waterkeeper Alliance v. EPA*, 399 F.3d 486, 504-505 (2nd Cir. 2005) (invalidating the former federal CAFO rule's requirement that a potential discharger must apply for a permit or otherwise demonstrate that it has no potential to discharge).

possible. It suggests the more appropriate standard is to certify that discharges have ceased, similar to a termination condition contained in the Industrial Stormwater General Permit. The availability of alternative termination provisions, according to NDA, does not cure the invalidity of this one.

NDA's reliance on *Waterkeeper* is misplaced. The *Waterkeeper* decision addressed when it was permissible to require an operation to obtain coverage under a permit, but it did not address termination of permit coverage. We read Condition S7.A.1(a) as requiring a CAFO already covered under the permit to demonstrate it has properly addressed the wastes generated while the operation was a CAFO. We find this provision analogous to the Industrial Stormwater General Permit which requires, in addition to certifying that discharges have ceased, permittees to certify that "no significant materials or industrial pollutants remain exposed to stormwater." *First Terry Declaration*, Exhibit H (ISGP at p. 50).

We find nothing unlawful or unreasonable with requiring an existing permittee to demonstrate that their previously generated wastes have no remaining potential for a discharge before being allowed to terminate coverage. Summary judgment should be denied to Intervenor NDA and granted to Ecology and CARE on Legal Issue No. 5.

<u>Legal Issue No. 7</u>
Did Ecology err, under the federal Clean Water Act or Chapter 90.48 RCW, in applying General Condition G3 to dairy operations?

Condition G3 (Maintaining Compliance if System Fails) provides:

> The Permittee, in order to maintain compliance with its permit, shall control all applications and discharges upon reduction, loss or failure of the waste storage

> or utilization facilities and equipment. This requirement also applies where the primary source of power is reduced, lost or fails.

Intervenor NDA appeals Condition G3 on the grounds that it is ambiguous and could be construed to prohibit discharges that are otherwise authorized by the permit. NDA is concerned that this provision goes beyond Ecology's intent to require CAFOs to prevent discharges during power outages and could be interpreted as eliminating the upset defense provided under federal regulations (40 CFR 122.41 and 122.42) and authorized in Condition G7, and field runoff discharges authorized under Condition S1.A.3. NDA asks the Board to order Ecology to modify the permit to clarify that it does not eliminate these other authorizations.

Ecology responds that Condition G3 does not *prohibit* discharges but rather directs permittees to "*control* all applications and discharges" when facilities and equipment are compromised. When the permit is read as a whole, Ecology argues, Condition G3 can be harmonized with other permit conditions explicitly recognizing upset defenses (G7) and authorizing certain agricultural stormwater discharges (S1.A). CARE agrees that Condition G3 does not conflict with Condition S1.A and urges the Board to harmonize the provisions.

We find Intervenor NDA's fears unfounded and conclude the permit is not impermissibly ambiguous. In construing the terms of a general permit, the Board reads the provisions as a whole to harmonize their meaning and render an interpretation consistent with the total regulatory scheme. *Puget Soundkeeper Alliance, et. al., v. Ecology and Association of Washington Business*, PCHB No. 00-173 (Order Denying AWB's Motion to Dismiss, Aug. 29, 2001). Summary judgment on Legal Issue No. 7 should be denied because the Board concludes,

as a matter of law, that Condition G3 does not: (a) eliminate the upset defense incorporated by reference in Condition G7 and/or provided pursuant to Condition S1.A (in accordance with applicable requirements in 40 CFR 122.41); or (b) prevent agricultural stormwater discharges authorized pursuant to Condition S1.A.3.

Legal Issue No. 8
Does the permit unlawfully fail to provide public access to facility inspection, discharge, or records in violation of federal and state law?

The CAFO General Permit establishes a record-keeping and reporting regime that requires permittees to create, retain, and file several types of records and reports. CARE alleges that this regime fails to ensure citizens public access to critical facility records they need to evaluate a CAFO's compliance with its effluent limitations.

Condition S4.A requires all CAFOs to create, maintain for five years, and make available to Ecology and the Washington State Department of Agriculture (Agriculture) upon request, all records required by the permit. Condition S2.B requires CAFOs to file an initial NMP with Ecology as part of the permit application process, and Condition S3.E requires them to submit to Ecology all updates of their NMPs. The permit also requires CAFOs to submit to Ecology written discharge reports for any unauthorized discharges covering specified information (S4.B.1), and annual reports covering eight topics including the results of required environmental monitoring (S4.B.3).

Condition S4.A.2 requires all CAFOs (except horse, sheep, and duck operations) to keep certain additional operational records on-site and available upon request by Ecology and

Agriculture, but the permit does not require this information to be filed with Ecology. Operational records include certain specified daily, weekly, and periodic inspection and activity records related to production areas[6] and other records related to land application areas such as periodic soil and wastewater sampling, weather information, application rate calculations, and equipment inspections. (S4.A.2.a-b).

CARE challenges this recordkeeping and reporting regime on two grounds. First, CARE alleges that the information contained in the operational records kept on-site at CAFO facilities will be beyond the reach of the state's Public Records Act and that shielding this information from the public impermissibly compromises the public's ability to bring citizen suits. CARE further objects to Ecology's decision to withhold portions of NMPs on a case-by-case basis if it determines they contain confidential business information otherwise protected by state law. CARE's objection is based on the *Waterkeeper* decision, which found an NMP to constitute an effluent limitation and that to deny citizens a right to review the NMP "impermissibly compromise[s] the public's ability to bring citizen-suits, a proven enforcement tool." *Waterkeeper*, 399 F.3d at 503. CARE believes Ecology should have specified which types of information in an NMP it deems potentially confidential and asks the Board to remand the permit for Ecology to clarify these issues.

Ecology responds that because CAFOs are required to produce any document kept under the permit upon Ecology's request, to the extent that information is relied upon by the state, the documents will be subject to the Public Records Act regardless of whether Ecology possesses

[6] "Production areas" are defined in the CAFO General Permit as those parts of a CAFO that include "the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas."

them or they remain on-site. Ecology further contends that both state law and the federal CWA recognize the need to protect the confidentiality of certain records and that the protection of confidential information does not interfere with the public's access to appropriate documents. Intervenors argue that there is no legal authority or principle requiring Ecology to make *all* CAFO operational records maintained under the permit publicly available and that certain information is legally protected from public disclosure. They allege that most of the operational information will be reflected in either the NMP or the annual report filed with Ecology and that citizens will receive adequate information to participate in coverage decisions and enforcement actions.

The CWA protects from disclosure documents that "if made public would divulge methods or processes entitled to protection as trade secrets." 33 U.S.C. §1318(b)(2). State law provides a procedure for protecting from disclosure records and information relating to "the processes of production unique to the owner or operator…" or that "may affect adversely the competitive position of such owner or operator if released to the public or a competitor." RCW 43.21A.160.

This issue is not amenable to summary judgment. At this stage of the proceeding, there is both insufficient information and disputed factual information regarding how the permit's recordkeeping and reporting requirements will be implemented by the agency in conjunction with the public access and protective provisions of the CWA and state law. This issue should proceed to hearing for further development of the record.

<u>Legal Issue No. 9</u>
Whether the permit violates the federal Clean Water Act, or Chapters 90.48 or 90.64 RCW, or their implementing regulations, by failing to require:

a. Regular monitoring upstream and downstream of permitted facilities; or
b. Monitoring immediately during discharge events at points of known discharges.

CARE argues that the permit should include surface water and active discharge monitoring similar to what Ecology has required in other general permits. CARE contends Ecology has failed to justify treating CAFOs different from other industrial dischargers regulated under the NPDES program.

Ecology responds that the permit requires, in Condition S4.B.1, that discharges to waters of the state or any permit noncompliance must be reported to Ecology "as soon as possible, but not later than 24-hours after the discharge or non-compliance[.]" It contends that this self-reporting requirement is protective of state waters or that, alternatively, material issues of fact preclude summary judgment as to the adequacy of self-reporting versus routine monitoring requirements.

Intervenors counter that this permit is different than other NPDES stormwater permits which authorize continuous discharges in that it is a "no discharge" permit, except for under limited conditions. As such, Intervenors argue that regular surface water monitoring has little value. Intervenors contend further the surface water monitoring proposed by CARE is inappropriate in this context because the open and transient nature of surface water systems in the agricultural setting where CAFOs operate will lead to inaccurate and misleading results.

It is undisputed that the permit does not require routine or discharge event monitoring of surface waters, but it is also undisputed that no federal or state law explicitly requires this in an

NPDES or state waste discharge permit. The real question posed by this issue, then, is whether surface water monitoring on either a routine or event-triggered basis is, in fact, necessary to protect water quality. It is clear in reviewing the competing expert declarations filed with these motions that material facts remain in dispute regarding the need for surface water monitoring. Summary judgment on this issue should be denied pending further development of the record at hearing.

<u>Legal Issue No. 13</u>
Whether section S3.D.1 of the permit is unlawfully vague regarding the time allowed to implement updated nutrient management plans.

Condition S3.D (Plan Updates) requires that CAFOs must develop and implement an updated nutrient management plan if:

> 1. Facility expansions or modification, production increases, or process modifications, pursuant to Condition S6 of this permit, will (1) result in new or increased generation of animal wastes beyond the scope of the current nutrient management plan, or (2) violate the terms and conditions of this permit.

CARE argues that the permit is vague regarding the timeline and process for approving and implementing required NMP updates. CARE is concerned that confusion may result with updates because the permit could be read to allow CAFOs to expand or modify their operations before implementing updated NMPs, as long as they have "submitted" updated plans. CARE asks the Board to remand the permit for Ecology to clarify that a CAFO cannot modify

operations in a manner not contemplated in its NMP unless and until it has submitted an updated NMP and received express approval from Ecology.

Ecology concedes that "the language arguably could have been more explicit with respect to NMP updates" (*Ecology Response*, at p. 5). However, Ecology and Intervenors also respond that other provisions of the permit, when read in concert with Condition S3.D, require CAFOs to develop, receive approval for, and implement updated NMPs prior to any expansion or modification that is not contemplated in an already approved NMP.

Ecology and Intervenors point to Condition S3.C, requiring CAFO operations to comply at all times with all terms and conditions of the NMP. Intervenors also point to several other conditions they believe further clarify the update requirements of Condition S3.D: Condition S3.D.1, which sets forth the specific events that trigger the requirement to develop and implement an updated NMP; Condition S3.E, which requires updated plans to be submitted to Ecology; and Conditions S3.A and S6, which require CAFOs to have a current NMP that is adequate for the existing number of animals and prevents system overloading. Ecology also argues that, to the extent a revised NMP required modification of either the CAFO permit or an individual permittee's coverage, the amendment would occur pursuant to the amendment process specified in state and federal law. *40 CFR 122.62 and WAC 173-226-230*.

The CAFO General Permit requires "All operations covered under this permit must have a *current* nutrient management plan." Condition S3.A (emphasis added). It also requires "*Upon the Department's approval of a nutrient management plan*, any operation covered by this general permit must, *at all times*, comply with the terms and conditions of *that* nutrient management

plan" Condition S3.C (emphasis added). The permit requires "All updates to nutrient management plans must be submitted to the Department." Condition S3.E.

Condition S6 (Prevention of System Overloading) provides as follows:

> The number of animals must not exceed the capacity of the waste storage facilities for the operation. *Prior to increasing the number of animals* over the maximum number identified in the existing nutrient management plan, the permittee must update its nutrient management plan consistent with S3 of this permit *and update all system components identified as being in need of upgrading*. (emphasis added)

Taken together, these permit provisions make clear that a CAFO may only operate under a currently approved NMP. While the permit could be more explicit about Ecology's intended process and timeline for approving NMP updates, we conclude as a matter of law that the permit prohibits a CAFO from modifying operations in a manner not contemplated in its NMP unless it has submitted an updated NMP and received approval of the updated NMP from Ecology. Summary judgment on Issue No. 13 should therefore be denied.

<u>Legal Issue No. 14</u>

Whether the permit's process for appealing individual applications for coverage under the general permit violates the federal Clean Water Act.

CARE raises this issue out of concern that the CAFO General Permit's appeal provisions may not allow a citizen to challenge the adequacy of an individual CAFO's NMP, which it believes citizens are entitled to do under the CWA.

Condition G19 (Appeals) identifies two different appeal categories: "A. The permit terms and conditions as they apply to the appropriate class of dischargers… and B. The applicability of the permit terms and conditions to an individual discharger…." This same condition also specifies that "Consideration of an appeal of this general permit coverage of an individual discharger *is limited to the applicability or non-applicability of this general permit to that same discharger*." (emphasis added).

CARE asks the Board to direct Ecology to clarify that nothing in Condition G19 limits a citizen's right to appeal the substantive adequacy of a CAFO's NMP. Alternatively, CARE argues the Board should hold that Condition G19 does not limit right of citizens to appeal the substantive adequacy of a CAFO's NMP.

Ecology responds that CARE's concerns are misplaced because an appeal of the permit coverage decision under Condition G19 would allow a citizen to argue either that the NMP needs to be amended to comply with the requirements of the permit or that an individual permit should be required instead of coverage under the general permit. Intervenors also acknowledge: "Because the NMP is approved as part of the coverage decision under Condition S3.B, the NMP may be contested on appeal of a coverage decision." *Intervenors' Memorandum in Opposition to Appellant's Motion for Partial Summary Judgment*, at 25.

The appeal language in the permit mirrors the language in Ecology's rule on the same subject (WAC 173-226-190(2)), which this Board has previously interpreted to allow consideration of whether pollution associated with the activities connected with an extension of permit coverage will be controlled by the requirements of the general permit. *Cascade*

Conservation League v. Ecology, PCHB No. 98-82 (Order Granting and Denying Summary Judgment, 1998). We are persuaded that evaluating the adequacy of a CAFO's nutrient management plan involves an analogous inquiry as that ultimately undertaken by the Board in the Cascade Conservation League coverage appeal. *Cascade Conservation League*, PCHB No. 98-82 (Final Decision and Order, April 21, 1999) (affirming Ecology's decision granting coverage under the Construction Stormwater General Permit after evaluating whether the operator's construction activities had resulted, or were likely to result, in pollution that could not be adequately regulated under the general permit).

We conclude, as a matter of law, that an appeal of a coverage decision under Condition G19 of the CAFO General Permit may encompass the substantive adequacy of a CAFO's NMP. With this interpretation, the permit does not violate the federal CWA, and we conclude that summary judgment on Legal Issue No. 14 should be denied.

Legal Issue No. 16
Did Ecology err in imposing "lowest achievable" requirements in Special Condition S3.A.3a and S3.A.3b(i) under the federal Clean Water Act, RCW 90.48 or RCW 90.64 and their implementing regulations?

Conditions S3.A.3.a and S3.A.3.b(i) require CAFOs that land apply wastes to develop a nutrient management plan and determine land application rates that address:

> …the form, source, amount, timing, and method of application of nutrients on each field to achieve realistic production goals, while minimizing *to the lowest achievable level* nitrogen and phosphorous movement to surface waters and ground water. (emphasis added)

Intervenor NDA argues that the "lowest achievable" standard exceeds both the federal CAFO rule and Washington's AKART (all known available reasonable technologies) standard and is therefore unreasonable. NDA contends this standard should be removed or, alternatively, changed to "lowest reasonable" to conform to the AKART standard derived from state law.[7] Ecology concedes the language in the permit includes the concept of reasonableness, by allowing consideration of the achievement of realistic production goals, and argues that this condition implements state AKART requirements.

CARE contends that the "lowest achievable level" requirement is warranted under federal law allowing a stricter state water quality standard or limitation and that the condition's emphasis on what is technologically "achievable" should not be weakened by consideration of whether something is economically reasonable for a CAFO. The "lowest achievable" requirement, according to CARE, is within Ecology's regulatory authority under WAC 173-200-050 and 173-200-060 to establish enforcement limits and/or points of compliance.

State water quality standards define "enforcement limits" as follows:

> (1) An enforcement limit is a value assigned to any contaminant for the purposes of regulating that contaminant to protect existing ground water quality and to prevent ground water pollution.
> (2) Enforcement limits shall be defined on a case-by-case basis and shall be met at the point of compliance as defined in WAC 173-200-060….
> (3) All enforcement limits shall, at a minimum, be based on all known, available, and reasonable methods of prevention, control, and treatment. WAC 173-200-050.

[7] Washington law requires the use of "all known available and reasonable methods by industries and others to prevent and control the pollution of the waters of the waters of the State of Washington." RCW 90.48.010.

A point of compliance is "the location where the enforcement limit, set in accordance with WAC 173-200-050, shall be measured." WAC 173-200-060. We are not persuaded that the permit's land application requirements contained in Condition S3.A.3 are either enforcement limits or points of compliance within the meaning of these regulations. Even if they were, we do not believe this supports a reading of the permit that eliminates the concept of reasonableness from the requirement, particularly in light of the explicit requirement in WAC 173-200-050(3) that enforcement limits be based on AKART.

CARE is correct that a standard of the "lowest achievable level" is justified as the imposition of a stricter state standard. It is appropriate to maintain such a standard in the permit. Although the "lowest achievable" language in S3.A.3.a and S3.A.3.b(i) is not specifically defined in the permit, we view it as akin to the strict standards required in other environmental settings (e.g., reducing pollution to the "maximum extent practicable" (MEP) or employing "best available control technologies" (BACT)). However, we also agree with Ecology and Intervenors that Condition S3.A.3 includes the concept of reasonableness and should be interpreted consistent with the AKART standard. This too, is not unlike MEP and BACT, which, while giving primary consideration to the effectiveness of the control measures, still allow some consideration of the costs or economic feasibility of alternatives. See e.g., .999 Inc. v. Ecology, PCHB No. 00-014 (2000) (noting that economic feasibility is considered as part of ranking the remaining control technologies by control effectiveness in the BACT context). The "lowest achievable" language in S3.A.3.a and S3.A.3.b(i) must be read in context with "achiev[ing] realistic production goals." Summary judgment on Legal Issue No. 16 should be denied, but the

permit should be modified to include a definition of "lowest achievable" that is consistent with AKART requirements, as enunciated by Ecology.

<u>Legal Issue No. 17</u>
Does the Permit fail to prohibit, and monitor for, pollution of groundwater that is hydrologically connected to surface waters in violation of the federal Clean Water Act and RCW 90.48 and its implementing regulations?

CARE contends the permit should require some positive determination by the CAFO or Ecology that the receiving water is not hydrologically connected to surface water before authorizing discharges to groundwater under Condition S1.B. In the absence of such a determination, CARE argues, the permit is invalid because it fails to clearly provide that discharges into groundwater that is hydrologically connected to surface water are also subject to the Condition S1.A surface water effluent limitations required by the mandates of the federal Clean Water Act. CARE relies on the Ninth Circuit's recent decision recognizing that a discharge to groundwater that is hydrologically connected to a regulated surface water constitutes a discharge into a "navigable water" for purposes of the CWA. *Northern California River Watch v. City of Healdsburg*, 475 F.3d 1023 (9th cir. 2006).

Ecology contends that the CAFO General Permit makes this connection implicitly. It argues that the discharge prohibitions in Condition S1.A do not distinguish between discharges that flow directly to surface waters and those that flow via hydrologically connected groundwater, and that S1.A therefore prohibits both. Ecology further contends that the permit's

soil monitoring and waste storage facility monitoring requirements will adequately protect surface waters that are hydrologically connected to groundwater.

Intervenors argue that there is no basis to require CAFOs and/or Ecology to prove a lack of hydrological connection before authorizing groundwater discharges under Condition S1.B. They also contend that the level of investigation necessary to prove a lack of ground-surface water hydrological connection or monitor groundwater exceeds what is reasonable for a general permit.

CARE argues in reply that, even if Condition S1.A surface water effluent limitations implicitly apply to hydrologically connected groundwater, the permit fails to ensure that groundwater contamination will be detected and reported to Ecology. It disputes that the cost of groundwater monitoring is prohibitive, and suggests that extensive characterization of surface/groundwater interaction would only be required where groundwater testing indicated that leaks or other CAFO discharges were degrading groundwater quality that might also pollute surface waters.

We find Ecology's interpretation of the permit reasonable and conclude that the requirements of Condition S1.A prohibit both discharges that flow directly to surface waters and those that flow via hydrologically connected groundwater. However, we also find that questions regarding the need for and feasibility of hydraulic continuity investigations and groundwater monitoring, and the adequacy of soil monitoring and lagoon leak detection requirements, all involve disputed issues of material fact that preclude summary judgment on this issue. Summary

judgment on Issue No. 17 should be denied and set over for further development of the record at hearing.

<u>Legal Issue No. 18</u>
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?

CARE believes that Ecology should have required groundwater monitoring in this general permit for several policy reasons and argues that omitting it for economic considerations is not reasonable in light of the industry's historical contribution to groundwater contamination and the on-going potential public health risks.

CARE identifies seven reasons why it believes the permit fails to protect waters of the state. CARE alleges that: (1) soil monitoring is inadequate; (2) BMPs are not effective to *prevent* (only minimize) groundwater contamination; (3) a history of CAFO noncompliance equates to a risk of future noncompliance; (4) unlined storage lagoons are designed to leak significant quantities of contaminated wastewater; (5) the permit sets no standards for lagoon leak detection; (6) the permit fails to account for impacts from CAFO production areas; (7) inspections are not frequent enough to assure compliance with NMPs, and inspectors often do not do a thorough job.

It is undisputed that the permit does not require groundwater monitoring. But Ecology and Intervenors fervently dispute each of the allegations made by CARE in support of its belief that groundwater monitoring is necessary for this general permit to be protective of water quality. It is clear upon reviewing the volumes of competing expert testimony filed with this

motion that numerous issues of material fact are in dispute related to the need for or appropriateness of groundwater monitoring. *See e.g., Declarations of Storman, Harrison, Secrist, Freeman, Monks, and Bell*. Summary judgment on this issue should be denied pending further development of the record at hearing.

Legal Issue No. 19

Does the Permit fail to provide enforceable standards or limitations by relying on the development of nutrient management plans that themselves contain vague, ambiguous or otherwise undefined terms?

Condition S3 (Nutrient Management Plans) requires that NMPs "must conform to the United States Department of Agriculture Natural Resources Conservation Service (NRCS) Field Office Technical Guide (FOTG) or equivalent best management practices." (S3.A.1) It spells out the minimum elements that must be included and addressed in the plans (S3.A.2 and .3), and requires Dairy CAFOs to "also meet the minimum elements for nutrient management planning established by the Washington Conservation Commission under RCW 90.64.026(2) or other agency designated by the legislature." (S3.A.4).

CARE argues that reliance on the NRCS-FOTG is problematic because documents contained in the FOTG are written as "guidance" and permittees have the choice to select from any BMPs that conform to those standards, regardless of whether they degrade water quality.

Ecology and Intervenors respond that permittees are required not just to conform their NMPs with the appropriate NRCS-FOTG standards, but they must also ensure that discharge prohibitions and other permit conditions are met. Ecology contends that its review of NMPs is not limited to determining whether the plan conforms to the NRCS-FOTG, and Intervenors argue that CARE's criticisms are speculative and unsupported by credible evidence.

We conclude there is insufficient evidence in the record at this stage of the proceedings for the Board to determine whether NRCS-FOTG standards are impermissibly vague, ambiguous or ill-defined such that they would render the NMPs based on them unenforceable as a matter of law. Summary judgment on this issue should be denied pending further development of the record at hearing.

ORDER

1. NDA's motion for summary judgment on Legal Issue No. 2 is DENIED, and summary judgment is granted in favor of Ecology and CARE.

2. NDA's motion for summary judgment on Legal Issue No. 3 is DENIED, and summary judgment is granted in favor of Ecology and CARE.

3. NDA's motion for summary judgment on Legal Issue No. 5 is DENIED, and summary judgment is granted in favor of Ecology and CARE.

4. NDA's motion for summary judgment on Legal Issue No. 7 is DENIED because the Board concludes, as a matter of law, that General Condition G3 does not: (a) eliminate the upset defense incorporated by reference in General Condition G7 and/or provided pursuant Special Condition S1A.3 (in accordance with applicable requirements in 40 CFR 122.41); or (b) prevent agricultural stormwater discharges authorized pursuant to Special Condition S1.A3.

5. CARE's motion for summary judgment on Legal Issue No. 8 is DENIED.

6. CARE's motion for summary judgment on Legal Issue No. 9 is DENIED.

7. CARE's motion for summary judgment on Legal Issue No. 13 is DENIED because the Board concludes, as a matter of law, that the Permit prohibits a CAFO from modifying operations in a manner not contemplated in its Nutrient Management Plan (NMP) until it has submitted an updated NMP and received approval of that updated plan from Ecology.

8. CARE's motion for summary judgment on Legal Issue No. 14 is DENIED because the Board concludes, as a matter of law, that General Condition G19 does not limit the right of citizens to appeal the substantive adequacy of a CAFO's NMP.

9. NDA's motion for summary judgment on Legal Issue No. 16 is DENIED, but Ecology is directed to modify the Permit to include a definition of "lowest achievable" that is consistent with "AKART" requirements.

10. CARE's motion for summary judgment on Legal Issue No. 17 is DENIED.

11. CARE's motion for summary judgment on Legal Issue No. 18 is DENIED.

12. CARE's motion for summary judgment on Legal Issue No. 19 is DENIED.

DATED this 1st day of August 2007.

POLLUTION CONTROL HEARINGS BOARD

Andrea McNamara Doyle, Presiding

William H. Lynch

Kathleen D. Mix