

November 10, 2020

Cole Provence
Washington State Department of Ecology-Central Regional Office
1250 Alder Street
Union Gap, WA 99203

RE: Proposed Mid-Yakima River Basin Bacteria Total Maximum Daily Load - Water Quality Improvement Report

Mr. Provence:

On behalf of the Washington Dairy Federation, I thank you for the opportunity to comment on the proposed Water Quality Improvement Report for the Mid-Yakima River Basin TMDL. While we appreciate the desire to improve water quality within the TMDL project area, we have identified several areas of concern.

First and foremost, we are deeply concerned with the overall tone of the report as a broad-brush effort to characterize agriculture as a pollution source, particularly livestock production. To the best of our knowledge, no DNA testing of FCB has occurred within the Mid-Yakima River Basin and repeatedly referencing “livestock” as a primary source is problematic. We remain deeply concerned the report makes rather bold statements with regard to livestock, especially in light of well documented efforts by EPA Region 10 targeting of dairy operations in the nitrate study for lower Yakima County without proper and complete peer review.

The report suggests unlined manure lagoons can lead to contamination of ground water down-gradient and cites Winters et al, 1998 as the scientific basis for the statement. We believe the statement that unlined lagoons increase fecal loading is a generalized statement from the single study referenced and amounts to “cherry picking” of science. There are other studies which show ground water contamination does not occur when using properly built lagoons (for example see <https://fortress.wa.gov/ecy/publications/documents/92e24.pdf>).

The stated goal of the Mid-Yakima River Basin Bacteria TMDL project is to bring all water bodies in the project area into compliance with current water quality standards to protect current primary contact recreation. The report indicates high bacteria pollution within the various surface waters and does not allow for safe primary contact recreation by the general public. We have to question the amount of recreation that actually occurs within these water bodies. For example, most of the Moxee Drain is deeply entrenched in many areas and flows through private property making access to the drain difficult. Figure 17 (page 27) doesn’t fully depict the extent of the drain’s entrenchment for the majority of the water body. The proposed background site on the Moxee Drain (37-FM-10) may be the only publically accessible upstream location samples may be collected (Beane Road Bridge), which demonstrates the lack of public access on the majority of the drain. We also question the seasonal FCB statistics for this site (Table 31) given the significant reduction in GMV and STV at the next three sample sites. This suggests there may be inaccurate data or other unknown influences at this site.

The report cites the greatest bacteria pollution occurs during the agricultural irrigation season of April 15 through October 15. What the report doesn't provide is the background data for each sample location, such as sample frequency, dates, and known storm events which may influence the data. Bacteria levels on April 30 may be the same or significantly different than October 1, but the public has no way of knowing that. Variations in bacteria levels month to month may provide valuable information to establish proper best management practices.

The report indicates “the specific level of illness rates caused by animal versus human sources **has never been quantified**, it has been scientifically established that warm-blooded animals (particularly livestock) as a common source of serious waterborne zoonotic illness for humans.” (Emphasis added) Unfortunately, the report fails to provide any citation supporting the statement that it's been “scientifically proven.” In addition, the use of “warm-blooded animals” with a specific reference to livestock appears to an attempt to focus the reader's attention specifically to livestock as the source for potential zoonotic illness. While the report goes on the list multiple potential sources (i.e. wildlife, failing septic systems, illicit sanitary sewer discharges, etc.) later in the document, the specific reference to livestock is inflammatory and unnecessary.

The report suggests during storm events a large dairy located in the upper dry reach of the Moxee Drain Sub-basin is a “potential source of bacteria pollution.” The report continues, “during construction of the dairy, the ephemeral Moxee Creek was permanently channeled around the immediate south side of the livestock holding pens” and “passes through the dairy's downstream manure application sites and is, therefore, potentially susceptible to receiving bacteria and other pollution when it is flowing.” We find these statements to be highly inflammatory. What the report fails to mention is during the permitting of the dairy, review under the State Environmental Policy Act (SEPA) was conducted. Potential impacts associated with permanently channeling Moxee Creek south of the holding pens and manure application was considered and fully mitigated. As an agency with expertise and permit authority the Department of Ecology participated in the environmental review process. Suggesting now, years later, operation of the dairy may have significant environmental impact shows a prejudice against the dairy and dairy operations in general.

While the report does not explicitly state it, the above-mentioned statement could be interpreted by readers to suggest the dairy is not following manure application protocols, is operating inconsistent with the current CAFO regulations, and is failing to meet operational BMPs which could lead to pollution discharge into Moxee Creek. The nuanced language of the report is, again, highly inflammatory and prejudicial.

The report states private landowners will be responsible for “direct discharges, OSSS, and stormwater discharges” and specifies “landowners who operate animal feeding operations or manure application sites should be especially aware of preventing irrigation and stormwater drainage from manure-contaminated areas. We would note, dairies are already highly regulated with regards to manure containment and application. Adding new or additional requirements outside of the normal regulatory process eliminates the certainty and predictability compliance with existing regulations provides. Any new requirements deemed necessary through adaptive

management must be fully vetted, properly peer reviewed, adopted through formal rule-writing, and only implemented at the time of permitting.

Under BMPs for agricultural operations to achieve compliance, the language should be amended to read:

“Persons engaged in agricultural operations who implement and maintain the BMPs will be presumed to be in compliance with the Mid-Yakima River Basin Bacteria TMDL and the State Water Pollution Control Act (90.48 RCW). If an agricultural operation is applying all of the listed BMPs and a violation of water quality criteria remains, the operator may be required to modify existing practices or apply further water pollution control measures, selected or approved by Ecology, to achieve compliance with water quality criteria. An agricultural operation will be presumed to be in compliance with the Mid-Yakima River Basin Bacteria TMDL when modification of existing practices and/or application of additional water pollution control measures are deemed necessary through adaptive management.”

Adaptive Management can lead to trial and error to improve water quality. As the report notes, “Ecology will make adaptive management decisions that will be based on effectiveness monitoring data” and the adaptive management process may lead to additional implementation activities and methods. The additional language provided above will safeguard agricultural operations from enforcement actions as they modify existing practices or apply further water pollution control measures identified through adaptive management.

Table 51 identifies agricultural BMPs for preventing bacteria pollution. We believe the table should be removed in its entirety. In 1996, the Legislature passed ESHB 1724 which, in part, was specifically designed to eliminate duplicative regulatory burdens on property owners. The BMPs contained in Table 51 are unnecessary and duplicative to standards and requirements found elsewhere in statute. In addition, these BMPs may be contradictory to standard practices which could lead to confusion.

In addition, we would note, many of the BMPs contained in Table 51 are inconsistent with the Yakima County Critical Areas Ordinance requirements for stream buffers. RCW 36.70A.103 requires state agencies to comply with local comprehensive plans and development regulations. That, coupled with the consistency requirements established under the Growth Management Act, requires Ecology to implement consistent buffer requirements through this TMDL process. In addition, Yakima County is actively engaged in a Voluntary Stewardship Program designed to advance common goals for environmental protection and agricultural viability using regulation as a last resort. Ecology should be coordinating its efforts under this TMDL Report with the ongoing efforts of Yakima County through the VSP.

Table 51 also identifies BMPs for Animal Confinement and Feeding Areas. These BMPs are restrictive in nature and fail to consider site-specific conditions which could result in much less restrictive standards. These BMPs should be secondary to site-specific nutrient management plans and only considered if adaptive management demonstrates existing controls are insufficient for improving water quality.

Table 51 includes BMPs for Dry Manure Management which appears to disregard existing nutrient management plans which take climate, topography, surface water, etc. into account. The dry manure management components of site-specific nutrient management plans should be the controlling practices and these BMPs should only be considered if adaptive management demonstrates a need to change practices.

The BMPs for Liquid Manure Management in Table 51 include language which suggests Ecology is attempting to circumvent the CAFO permit requirements to now require “a single 60-mil HDPE geo-membrane liner” for manure storage lagoons. This requirement is not supported by science and demonstrates a clear prejudice against dairy operations. This BMP should be amended to read:

“Manure storage lagoons should be designed to provide adequate storage based on the volume of liquid manure generated by the operation, as well as for the local area’s 25-year, 24-hour storm event volume. The lagoon volume should also include sufficient volume for an extra 4 months of liquid manure production, as no manure application is allowed during the winter (November 1 through February 1) unless otherwise permitted under site-specific nutrient management plans. ~~Manure storage lagoons should, at a minimum, consist of a single 60 mil HDPE geo-membrane liner installed over a 12 inch thick soil bed~~ Lagoons should be designed, constructed and maintained following the guidance provided by NRCS Field Office Technical Guidance. State and local guidance may be considered based on site-specific conditions or in circumstances in which adaptive management identifies deficiencies in meeting water quality standards.”

Table 52 contains a summary of the implementation strategy. Under “Landowners with livestock” the strategy is to “implement all applicable agricultural BMPs that are listed in Table 51.” As we have previously mentioned, many of the BMPs in Table 51 are inconsistent with existing laws, rules and established practices contained in site-specific nutrient management plans. In addition, the report states the BMP activities in Table 51 “should not be considered all-inclusive.” While we understand BMPs may change based on science, new information or adaptive management, we are deeply concerned new BMPs could be established with little to no public or industry input or peer review.

The report suggests Yakima County will be obligated to perform several actions under the implementation strategy. While we appreciate Yakima County has obligations under their NPDES permits, there appear to be multiple directives which could require Yakima County to alter local land use regulations or otherwise expend funds in support of implementation. For example, Yakima County is listed under potential funding sources for BMP implementation. Have the Yakima County Commissioners agreed to these obligations?

According to the draft report, “Ecology will utilize adaptive management when water monitoring data show the TMDL targets are not being met or implementation activities are not producing the desired result.” The report includes a reference to Ecology’s enforcement authority under Chapter 90.48 RCW and indicates Ecology will consider issuing notices of noncompliance whenever it deems them necessary. This is deeply concerning. Landowners operating in compliance with approved management plans should be afforded protection from notice of

noncompliance in circumstances where BMPs are altered and implementation would be inconsistent with approved management plans. Failure to provide “safe haven” in these instances could result in costly and unnecessary lawsuits.

Again, on behalf of the Washington Dairy Federation, I thank you for the opportunity to comment on the proposed Water Quality Improvement Report for the Mid-Yakima River Basin TMDL. Please contact me should you have any questions or need additional information.

Respectfully submitted,

(Submitted electronically)

David Taylor, Yakima Dairy Federation Field Manager