

*Friends of Toppenish Creek*



October 24, 2021

Dear WA Dept. of Ecology,

Please consider these comments from the Friends of Toppenish Creek (FOTC) as you prepare a new National Pollutant Discharge Elimination System (NPDES) permit for Concentrated Animal Feeding Operations (CAFOs).

Sincerely,

Jean Mendoza

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### **NPDES Fees Must Be Proportional to Potential to Pollute**

**WAC 173-224 does not comply with the intent of the legislature, *to maintain the highest possible standards to insure the purity of all waters of the state*, as stated in RCW 90.48, because WAC 173-244 does not require CAFO dairies to pay their fair share to prevent pollution.**

RCW 90.48.260 authorizes Ecology to administer the federal Clean Water Act in Washington state, relying upon issuance of NPDES permits in great part. A heavy responsibility. But Ecology cannot fulfill this mandate without adequate funding.

Under WAC 173-244 fees for permits for dairies do not cover the cost of administering the program. RCW 90.48.465 (1) requires fees to cover permit implementation, but WAC 173-244 fails to impose commensurate fees for dairies.

WAC 173-244 gives large CAFO dairies an unfair economic advantage over other CAFOs.

Ecology incorrectly interprets RCW 90.48.465 (5) to prohibit increases of NPDES fees for dairies. This is an incorrect interpretation.

WAC 173-224-030 makes no sense. A 200 pound calf does not pollute as much as a 2,000 pound horse, even though the WAC says that both a calf and a horse equal 2 animal units.

\* \* \* \* \*

**1. RCW 90.48.260 authorizes Ecology to administer the federal Clean Water Act in Washington state, relying upon issuance of NPDES permits in great part.**

CAFOs are point sources of discharge. When an NPDES permitting program charges fees that are so low as to make pollution affordable and diminish resources for enforcement, then the program is no longer a deterrent to pollution. NPDES permit fees for dairies have not increased since 1999.

Ecology states in *Final Regulatory Analysis for Chapter 173-224 WAC Water Quality Permit Fees, 2019<sup>1</sup>*, on page 9:

*. . . we also forecast fees based on assumed three-percent annual increases in program costs.*

Over a 20 year period costs for administering the NPDES program on Washington dairies have increased over 60%, but fees are unchanged, except for the upper limit threshold. Only 3 out of the 17 Washington CAFO dairies with current NPDES permits are large enough to trigger the upper limit threshold of \$2,076. A dairy with < 4,000 cows pays the same fee today as it did in 1999.

**2. WAC 173-244 gives large CAFO dairies an unfair economic advantage over other CAFOs.**

An 800 head beef feedlot pays \$3,094 for an NPDES permit. An 800 head dairy pays \$280. Nothing in RCW 90.48 authorizes Ecology to interfere with the marketplace to this degree.

The Washington State Constitution states in Article 1, Section 12:

*No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.*

It is not the intent of RCW90.48 to encourage some businesses while imposing burdens on their competitors.

**3. RCW 90.48.465 (1) requires fees to cover permit implementation, but WAC 173-244 fails to impose commensurate fees for dairies:**

*... All fees charged shall be based on factors relating to the complexity of permit issuance and compliance and may be based on pollutant loading and toxicity and be designed to encourage recycling and the reduction of the quantity of pollutants. Fees shall be established in amounts to fully recover and not to exceed expenses incurred by the department in processing permit applications and modifications, monitoring and evaluating compliance with permits, conducting inspections, securing laboratory analysis of samples taken during inspections, reviewing plans and documents directly related to operations of permittees, overseeing performance of delegated pretreatment programs, and supporting the overhead expenses that are directly related to these activities.*

RCW 90.48.465

Ecology states in *Final Regulatory Analysis for Chapter 173-224 WAC Water Quality Permit Fees, 2019*<sup>l</sup>, on page x in the Executive Summary:

*Without fee increases, Ecology would likely need to reduce staff or program services, which would result in more time needed to process applications, revisions, and renewals. This would increase the likelihood of a facility being out of compliance with other rules, resulting in potential penalties and increased risk to human health and the environment.*

Nevertheless, Ecology did not increase fees for dairy CAFOs and 17 out of 25 currently permitted CAFOs are dairies.

Ecology has not demonstrated that monitoring, evaluating, and inspecting dairy CAFOs is any less complex than conducting those activities on CAFOs for horses, beef cattle, calves, sheep, hogs, or chickens.

**4. Ecology incorrectly interprets RCW 90.48.465 (5). There is no cap on fees for dairies:**

*The fee for an individual permit issued for a dairy farm as defined under chapter [90.64](#) RCW shall be fifty cents per animal unit up to one thousand two hundred fourteen dollars for fiscal year 1999. The fee for a general permit issued for a dairy farm as defined under chapter [90.64](#) RCW shall be fifty cents per animal unit up to eight hundred fifty dollars for fiscal year 1999. Thereafter, these fees may rise in accordance with the fiscal growth factor as provided in chapter [43.135](#) RCW. (Emphasis added)*

RCW 90.48.465 (5)

This statute clearly allows increases in fees per animal in accordance with the fiscal growth factor, yet Ecology states that there is a cap on fees for dairies. Consequently, fees per animal for dairy CAFOs have stayed the same for over 20 years. Ecology's *Final Regulatory Analysis for Chapter 173-224 WAC Water Quality Permit Fees, 2019*, states on page 5:

*The rule amendments set new fees for discharger categories that have been underpaying compared to their administrative burden, increasing fees overall, but not increasing fees*

*uniformly, as compared to the baseline. The difference in fee increases is intended to reduce the degree to which there are facilities that over-pay (in excess of what is needed for permit administration) and facilities that underpay (below what is needed for permit administration)*

Currently there are 25 permitted CAFOs in Washington State and 17 are CAFO dairies. Ecology did not increase fees for dairies. Ecology's statement above is, at the very least, disingenuous.

Ecology's *Final Regulatory Analysis for Chapter 173-224 WAC Water Quality Permit Fees, 2019*, states on page 17:

*The primary goal and objective of the authorizing statute is to collect enough fees in total to fully fund the water quality permitting programs.*

Ecology cannot accomplish this goal if the agency does not increase fees to cover increasing costs.

**5. WAC 173-224-030 makes no sense. A 200 pound calf does not pollute as much as a 2,000 pound horse.**

The number of animals per Animal Unit for calves is 0.500. The number of animals per Animal Unit for horses is 0.500 – the same. This definition equates a 200 # calf to a 2,000 # horse. How can Ecology tell us that the calf excretes the same amount of urine and feces as the horse; that the calf eats the same amount of feed as the horse; that the calf emits the same amount of greenhouse gasses as the horse? It is insanity to pretend that the two animals have the same impact, and it is bad management to ask Ecology employees to pretend that this is the case.

References:

1. WA Ecology (2019) *Final Regulatory Analyses: Chapter 173-224 WAC Water Quality Permit Fees*. Available at <https://apps.ecology.wa.gov/publications/documents/1910025.pdf>
2. RCW 90.48 Water Pollution Control Act at <https://app.leg.wa.gov/rcw/default.aspx?cite=90.48&full=true#90.48.010>
3. RCW 34.05 Administrative Procedures Act at <https://app.leg.wa.gov/rcw/default.aspx?cite=34.05&full=true#34.05.320>
4. WAC 173-224 Water Quality Permit Fees at <https://apps.leg.wa.gov/wac/default.aspx?cite=173-224&full=true>