

**Puget Soundkeeper Alliance • Friends of Toppenish Creek •
Sierra Club • Waterkeeper Alliance • Center for Food Safety •
Western Environmental Law Center**

October 24, 2021

Via Electronic Mail and Form Submission only

Chelsea Morris

Permit Writer

Washington State Department of Ecology

Via email to: chelsea.morris@ecy.wa.gov

And submitted online at: <http://wq.ecology.commentinput.com/?id=AmHth>

Dear Ms Morris:

Puget Soundkeeper Alliance, Friends of Toppenish Creek, Sierra Club, Waterkeeper Alliance, Center for Food Safety, and Western Environmental Law Center, and their tens of thousands of members, supporters, and volunteers throughout the State of Washington, submit these preliminary comments on the reissuance of the Washington State Concentrated Animal Feeding Operation (CAFO) Permits.

We are committed to protecting communities across Washington State from the impacts caused by CAFOs that are currently allowed to pollute surface waters and groundwater. It is past time for Ecology to do its job to restore these waters. Until the agency has done so, it will continue to deny Washingtonians the fundamental right to a safe and healthy environment, clean drinking water, and swimmable, fishable waterways.

Further, we are dedicated to recognizing and working to remedy the historic and ongoing structural racism that has led to cumulative environmental burdens, from toxic drinking water to threats from climate change, as well as the resulting disproportionate health outcomes experienced by people of color, Indigenous people, Tribal members and other marginalized communities across the state. To make real progress toward environmental justice, Ecology must take this opportunity to curb the discharges of pollutants from CAFOs as required under the law.

It is Ecology's job to ensure that safeguards are in place to protect our waters from constant pollution threats. Yet, for almost a decade Ecology has ignored our repeated calls to improve the oversight and regulation of the state's CAFOs. The urgency of our calls arises directly out of the significant, ongoing public health and environmental impacts from these facilities.

Throughout this time, we have made clear that Ecology's CAFO Permits fall short of federal and state regulatory requirements to protect public health and the environment from these impacts. By failing to require the use of modern pollution control measures, protect water quality, impose sufficient monitoring requirement, allow for meaningful public participation, cover all applicable facilities, protect overburdened communities, and account for a changing climate,

Ecology's failure to comply with federal and state law to properly regulate CAFOs places communities at risk.

We believe sustainable agriculture is a vital part of Washington's economy and way of life. We also believe farmers can be good stewards of our water resources if they follow responsible practices for reducing pollution from manure and fertilizer. That said, no one, including large-scale CAFOs should get a pass on polluting our waterways. We all have a responsibility to keep our waters clean for people, and wildlife such as shellfish, orcas, and salmon.

CAFOs Are Harming Our Communities

For far too long, Ecology has failed to require CAFOs to implement basic scientifically-proven and affordable best practices to prevent damaging water pollution from CAFOs statewide. These requirements, like those for other industry operations discharging waste to public waters, protect the environment and public health from dangerous pollutants. As a result of Ecology's failure, the direct and indirect impacts of CAFOs on the environment are making our communities unhealthy, unsafe, and less prosperous.

These avoidable impacts are all too predictable. For example, nitrate contamination threatens drinking water in communities with high concentrations of CAFOs. Ecology and the United States Geological Survey report that 29 percent of sampled wells in the Sumas Blaine aquifer in Whatcom County and over 20 percent of wells in the Yakima Valley exceed the nitrate maximum contaminant level. Nitrates are difficult for residents to detect because they are odorless, colorless, and flavorless, and they can cause multiple adverse health outcomes such as methemoglobinemia ("blue baby syndrome"), cardiovascular harm, strokes, reproductive problems such as miscarriages, thyroid problems, and some cancers.¹ Boiling water just makes the problem worse, and for many environmentally overburdened communities, such as those in Yakima County, the costs of remedial measures such as filtration or bottled water are too high, forcing Washington residents—disproportionately Indigenous and people of color—to sacrifice health for private profit.

In addition to the impact on drinking water, the discharge of pollutants from CAFOs significantly impacts the water quality of the state's rivers, streams, and marine waters. For example, the discharge of nutrients and toxic pollution from facilities such as CAFOs into Puget Sound and its tributaries is creating a water quality crisis. Perhaps the most immediate and pressing problem with the Sound's water quality is dangerously low levels of dissolved oxygen caused by excessive nutrients from over-application of manure and fertilizers. As Ecology itself

¹ See, e.g., Environmental Working Group, *America's Nitrate Habit Is Costly and Dangerous. Prevention Is the Solution, But Voluntary Actions Fall Short*, Oct. 2, 2018 (available at <https://www.ewg.org/research/nitratecost/>); NRDC, *CAFOs: What We Don't Know Is Hurting Us*, Sept. 2019 (available at <https://www.nrdc.org/sites/default/files/cafos-dont-know-hurting-us-report.pdf>); National Cancer Institute, *Cancer Trends Progress Report, Nitrates* (available at <https://progressreport.cancer.gov/prevention/nitrate>); Agency for Toxic Substances and Disease Registry, *Public Health Statement for Nitrate and Nitrite* (available at <https://www.atsdr.cdc.gov/ToxProfiles/tp204-c1.pdf>).

stated a dozen years ago, “[f]ish need oxygen” yet “[t]here are many areas in Puget Sound with very low levels of dissolved oxygen.”²

Ecology itself reports that the presence of excess nutrients in the water—i.e., nitrogen and phosphorus—is causing dissolved oxygen levels to drop to these critically low levels in some parts of Puget Sound.³ Ecology knows that low oxygen levels in Puget Sound are “bad news for aquatic life” such as shellfish, salmon, Southern Resident orcas and other species.⁴ Yet Ecology’s approach to CAFO management ignores the clear connection between ongoing pollution from these operations, the Sound’s failure to meet water quality standards, and the threats to these species.

In addition to these direct threats, CAFOs are a significant contributor to the climate crisis. Dairies, especially those that confine cows and use manure lagoons, drive climate change by emitting greenhouse gases such as nitrous oxide and methane. These pollutants are less abundant than the well-known greenhouse gas, carbon dioxide (CO₂), but they are much more potent: methane has a Global Warming Potential (GWP) 84-87 times that of CO₂ over 20 years, and nitrous oxide has a GWP of 265–298 times that of CO₂ over 100 years.⁵ Livestock production is the dominant source of methane in the United States,⁶ and manure management is the fastest growing major source of methane, with emissions from dairies increasing by 117 percent between 1990 and 2019.⁷

Washington is already experiencing the catastrophic effects of climate change through dwindling snowpack and freshwater resources, unprecedented and deadly heatwaves, and increased wildfire. Those most vulnerable to climate change are people of color, Indigenous people, Tribes, and others subject to disproportionate impacts from historic and ongoing systemic and structural racism. Importantly, impacts to water quality caused by and exacerbated by a changing climate, such as increased temperature, lower dissolved oxygen, and nuisance algal growth, are the same impacts caused by discharges from CAFOs. As a result, CAFO pollution both causes water pollution and makes it significantly worse by driving the climate crisis.

² See Ecology, *Public Notice South Puget Sound Dissolved Oxygen Study* (2006).

³ See Ecology, *Puget Sound and the Straits Dissolved Oxygen Assessment Impacts of Current and Future Human Nitrogen Sources and Climate Change through 2070*, at 98–101 (2014).

⁴ See Ecology, *Nutrient pollution modeling shows different futures for Puget Sound*, Blog, <https://ecology.wa.gov/Blog/Posts/September-2021/Latest-Salish-Sea-modeling-results-bring-us-closer> (last visited Oct. 20, 2021).

⁵ <https://www.epa.gov/ghgemissions/understanding-global-warming-potentials> (last visited Oct. 24, 2021).

⁶ <https://www.epa.gov/ghgemissions/overview-greenhouse-gases> (last visited Oct. 24, 2021).

⁷ Environmental Protection Agency, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2019*, 5-12 (April 14, 2021).

The Washington Court of Appeals Ordered Ecology to Remedy Failures to Comply with the Law

It was for these reasons, and many others, that several organizations challenged the previous iterations of Ecology's general permits for CAFOs. The organizations challenged Ecology's repeated failures to follow state and federal law regarding the minimum steps CAFOs must take to prevent the release of pollutants and protect water quality, and Ecology's failure to impose adequate monitoring requirements, allow for public oversight, and address climate change.

In June of 2021, the Washington State Court of Appeals agreed and invalidated Ecology's permit because it failed to comply with the law in several important ways. First, the court held that Ecology did not follow the state statute requiring a determination of what modern pollution controls were reasonable to control the discharge of nutrients, bacteria, and other pollutants before issuing the permit. Second, the court found that the permit did not limit the discharge of pollutants adequately to protect the health of nearby waterways, as required under state and federal law. Third, the court found the permit did not include sufficient monitoring of both surface waters and groundwater to determine both whether the permit was working and whether the permittees were complying with their obligations. Fourth, Ecology failed to require site-specific Nutrient Management Plans that meet federal standards as required to ensure meaningful evaluation of, and public participation in, the development of the measures meant to protect local waterbodies and communities. Finally, the Court held that under state law Ecology must consider the impacts of climate change when developing the permit.

In reissuing the CAFO Permits, Ecology must, at a minimum, strengthen the Permit to redress the deficiencies identified by the Appellate Court in its opinion.⁸ These include but are not limited to:

- Determine the most current methodology that can be reasonably required for preventing, controlling, or abating the pollutants associated with a discharge from each part of the facilities, including but not limited to, existing manure lagoons and compost areas.
- Impose effluent limits to ensure that each facility implements such adequate discharge controls for their facility based on its size and environmental impact.
- Impose the effluent limits necessary to ensure that each facility does not cause or contribute to a violation of state surface water and groundwater quality standards. Specifically, Ecology must develop water quality based effluent limitations that protect all waters of the state from production area and land application area discharges, including but not limited to discharges from lagoons, compost areas, land application fields, and tile drains.
- Protect groundwater from pollutant discharges and leaching from manure storage lagoons, compost areas, and land application fields.
- Require surface water monitoring that is sufficient to ensure the permit terms are adequate to comply with the requirements of state and federal law regarding the implementation of the required pollution control technology and the protection of water quality, and that the permittees are complying with the permit's terms and conditions.

⁸ <https://www.courts.wa.gov/opinions/pdf/D2%2052952-1-II%20Published%20Opinion.pdf>

- Require groundwater monitoring that is sufficient to ensure the permit terms are adequate to comply with the requirements of state and federal law regarding the implementation of the required pollution control technology and the protection of water quality, and that the permittees are complying with the permit's terms and conditions.
- Require the development of a site-specific Nutrient Management Plan that demonstrates how the CAFO will comply with state law, federal law, and all of the permit terms, conduct agency review of the Nutrient Management Plan for compliance and make affirmative determinations of its adequacy, and provide the public access to review and comment on the site-specific Nutrient Management Plan and Ecology's review of that plan before plan approval and before issuance of any permit.
- Quantify the toll of the state's CAFO operations on the climate crisis and the impacts of climate change on water quality in the writing of the Permits.

Ecology Must Comply with State and Federal Law by Implementing a Protective Permit and by Requiring CAFOs Be Permitted

While these changes are essential, more must be done to fully address CAFO pollution. With this third iteration of the CAFO general permit, Ecology must move towards, at long last, eliminating once and for *all* the discharge of pollution from these facilities.

This is, of course, the true goal of both state and federal law. Indeed, the Washington Water Pollution Control Act declares the “public policy of the state of Washington to maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of wildlife, birds, game, fish and other aquatic life, and the industrial development of the state.” RCW 90.48.010. Thus, “[c]onsistent with this policy, the state of Washington will exercise its powers, as fully and as effectively as possible, to retain and secure high quality for all waters of the state [and] work[] cooperatively with the federal government in a joint effort *to extinguish the sources of water quality degradation.*” *Id.* (emphasis added). The Clean Water Act, in turn, is designed “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a), with the goal of not just reducing, but eliminating, all water pollution. *Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486, 490 (2d Cir. 2005) (citing 33 U.S.C. § 1251(a)(1)). The time has come for Ecology to put these goals into practice.

Moreover, and relatedly, Ecology must ensure universal coverage under the permits. Even the most protective general permit is of little use if all applicable facilities are not covered, which is the current situation. Ecology must use its authority and resources to ensure that all large, medium, or small CAFOs that are discharging to the state’s waters are covered under the permit. Ecology’s current approach of assuming a facility is not discharging is unsupported by the facts or science, and places communities at risk, particularly those already overburdened by environmental harms and unable to secure the basic protections afforded under the law.

Ecology Must Commit to an Open and Transparent Process for Developing the Permit

Ecology must engage the public in an open and transparent process as it works to make the necessary improvements to its permitting approach. Given the significant impacts these facilities have on surrounding communities and communities downstream of CAFOs, Ecology must actively solicit information and comments from these communities.

On this score, Ecology is not off to a particularly good start. We are concerned generally about what information Ecology is giving the public and the forums it is providing for impacted members of communities to learn about, and comment on, the CAFO permitting process. We are not reassured, at least so far, that Ecology is on a path to comply with the court's mandate that it provide the public with access during the permit writing process.

To begin with, while we appreciate Ecology's efforts in holding two listening sessions, it was apparent that the communities directly impacted by CAFOs did not feel that these sessions were a viable forum for discussing the changes that should be made to the permits. This could have been for several reasons, but the platform Ecology uses for virtual public hearings disadvantages the public because it does not provide information about who is commenting, nor does it allow participants to have a sense of the number of people in attendance. To ask people in the community to speak directly to a room with an unknown audience, where only staff members are visible, is likely to dissuade members of the communities most impacted by CAFOs from commenting.

Moreover, virtual listening sessions are only useful for those who know about the comment period, understand the process and the opportunity it presents, have access to technology to comment, and are available during the scheduled time to submit comments. Ecology has not done a particularly effective job at conveying this information nor has it provided the sort of community outreach and support necessary to ensure actual public access to this process.

Ecology must go further than it has to this point to ensure that those most impacted by CAFOs have the opportunity to be heard. Ecology must continue to use these traditional tools, such as webinars and passive comment periods, for receiving public input, but must also actively engage the community in a conversation regarding CAFOs. While this will undoubtedly be more difficult in light of the ongoing pandemic, Ecology owes it to those it is mandated to protect, the people of Washington, to make every effort to hear their story.

Conclusion

We appreciate your consideration of these preliminary comments. We look forward to working with you to develop permits that are based on science, comply with all applicable legal requirements, and that protect the communities who have been put directly in harm's way by ongoing, un- or under-regulated pollution from these facilities. Should you have any questions or concerns for Commenters, please contact Andrew Hawley at 206-487-7250, or hawley@westernlaw.org.

Sincerely,

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