Washington Cattle Feeders Association



June 3, 2025

Llyn Doremus WQP-Department of Ecology Eastern Regional Office 4601 N. Monroe St. Spokane, WA 99205

RE: State Waste Discharge Permit for Simplot Feeders LLC

Dear Ms. Doremus:

Washington Cattle Feeders Association (WCFA) provides the following comments in response to the Washington Department of Ecology's (Ecology) draft State Waste Discharge Permit for the Simplot Feeders LLC facility in Burbank, Washington.

WCFA represents 25 feed yard operators throughout Central and Eastern Washington growing and finishing approximately 500,000 head annually. WCFA and its members have a profound interest in how Ecology regulates cattle feeding operations. It is, therefore, with real concern that WCFA reviewed the draft State Waste Discharge Permit for Simplot Feeders LLC (Draft Permit). WCFA asks that Ecology consider revisions to the Draft Permit based on the following comments:

Discharge Limits

The Draft Permit sets effluent limits based upon data from an upgradient well, which is appropriate for a facility like this one, where offsite activities have contaminated groundwater to above the applicable water quality standards before the groundwater reaches the Simplot facility. However, Ecology must reconsider the use of monitoring wells and groundwater concentrations to determine permit compliance.

The Draft Permit would require new groundwater monitoring wells at a number of locations, including downgradient of agricultural fields (discussed below). Compliance with effluent limits would be determined by comparing the concentration of contaminants in groundwater to enforcement limits identified in the permit.

This approach is fatally flawed. Groundwater monitoring does not and cannot identify when a discharge occurred that caused groundwater contamination. Division II of the Washington Court of Appeals has determined that groundwater monitoring only shows what happened in the past and does not show whether current discharges are causing an exceedance of water quality standards. *Community Association for Restoration of the Environment v. State of Washington, Department of Ecology*, 205 P.3d 950, 959, 149 Wn. App. 830 (Wn. App. 2009) ("*CARE*"). Accordingly, while direct groundwater monitoring may be appropriate to determine whether groundwater has been impacted, it cannot be used to determine whether a particular discharge – which is initiated at the ground surface, not at the soil/groundwater interface – has caused an exceedance of water quality standards.

Instead, the permit should adopt an approach similar to stormwater discharge permitting. If a downgradient well shows concentrations that exceed the effluent limit, the facility should be required to submit a corrective action plan to Ecology for approval. Once approved, implementation of the plan should be enforceable under the permit.

In addition, of the Best Management Practices set out in the Draft Permit, items 1 and 3 are sufficient to assure that unauthorized discharges to surface water do not occur. The weekly equipment inspections under Item 4 may be an appropriate operation and maintenance practice, but that frequency is not necessary to prevent unauthorized discharges. The weekly monitoring of impoundments under Item 5 is excessive.

Monitoring Requirements

<u>Process Water</u>. The Draft Permit would require extensive monitoring of process water that is entering Lagoon 14, which is not a discharge of wastewater subject to regulation under the Washington Water Pollution Control Act (WPCA). Ecology does not have legal authority under the WPCA to require monitoring of water streams internal to the facility. Moreover, Ecology cannot justify requiring monthly monitoring of this water stream. This frequency implies a variability in the water stream, for which there is no evidence presented in Ecology's fact sheet.

<u>Manure</u>. The Draft Permit would require separate sampling of the manure applied to each field, each year. This volume of sampling is excessive and unreasonable. The State General Permit for Concentrated Animal Feeding Operations (CAFOs) requires only three representative samples of manure, litter and wastewater each year. Ecology has not identified any basis to believe the characteristics of manure from the facility change so rapidly that field-specific sampling is needed.

<u>Wastewater Applied to the Land</u>. The Draft Permit would require monthly constituent monitoring of process water from Lagoon 14 that is applied to farm fields. Again, the Draft Permit and Fact Sheet do not provide any justification for this monitoring frequency. The State General Permit for CAFOs requires monitoring of process wastewater (and manure and litter) only three times a year to obtain representative data regarding the discharge.

<u>Supplemental Irrigation Water</u>. The Draft Permit would require monthly monitoring of supplemental irrigation water. Ecology does not have legal authority under the WPCA to require monitoring of this water, which is no different from any other water used in irrigation in the State of Washington. The application of irrigation water to a field is not regulated under the WPCA. And once again, Ecology has failed to justify the frequency of this monitoring requirement.

<u>Groundwater Monitoring</u>. The Draft Permit would require monthly groundwater monitoring. Ecology cannot justify requiring this frequency of monitoring, particularly since its fact sheet includes an analysis demonstrating an absence of seasonal variability in groundwater quality. The requirement to monitor for metals in groundwater also cannot be justified. This facility is being regulated for the discharge of nutrients, not metals.

The Draft Permit would require creation of an extensive groundwater monitoring network for agricultural fields where process wastewater and manure are applied, the cost of which would be prohibitive and cannot be justified, since groundwater monitoring indicates only the effect of past practices and not the effect of current land application. *CARE*, 205 P.3d at 959. While groundwater monitoring can determine whether groundwater quality has been affected, it is not the best method for determining what is causing the impact, due to its cost and its inability to provide contemporaneous evidence. The Draft Permit appropriately relies on soil monitoring as the primary indicator of whether excessive nutrients are migrating down in the soil column. The groundwater monitoring requirements should be tailored to the role of this monitoring as an indicator and not a direct method of monitoring discharges.

Ecology has begun requiring CAFOs to monitor groundwater in response to the court of appeals' decision in *Washington State Dairy Federation v. State of Washington, Dept. of Ecology*, 490 P.3d 290, 18 Wn. App.2d 259 (Wn. App. 2021) ("*Dairy Federation*"). In holding the groundwater monitoring may be required, the court relied on Ecology's statements that groundwater monitoring is the only tool for determining groundwater quality. 490 P.3d at 302. However, the court acknowledged that groundwater monitoring could not identify the cause of elevated contaminants when the well sits downgradient from multiple sources. 490 P.3d at 302-03. The court also did not hold that groundwater monitoring is required in all instances; it held only that Ecology's reliance on soil monitoring to determine whether groundwater is affected, even when land application fields had very high nitrate levels for several years, was not supported by substantial evidence. 490 P.3d at 303. In prior litigation concerning an earlier version of the CAFO permit, the court of appeals recognized that groundwater monitoring only shows what happened in the past, and not the effect of current activities. *CARE*, 205 P.3d at 959. In the same decision, the court also held that Ecology can and should consider the burden on the regulated industry, including the cost of water quality monitoring. 205 P.3d at 960.

Given that groundwater monitoring is not an indicator of the effects of current discharges, groundwater monitoring should, at most, be used as an indicator of groundwater impacts that triggers reevaluation of soil monitoring data. Groundwater monitoring cannot show the effects of changing land application practices within any reasonable time period. It also is too expensive to serve as a discharge monitoring tool, where more accurate and less expensive tools (soil monitoring) are available.

The Draft Permit's requirements that a groundwater quality evaluation be conducted in conformance with plans that Ecology approve after the permit is in place, and that monitoring begin by a date certain, also are fundamentally unfair and a violation of due process. The size of the groundwater network that Simplot would ultimately be required to install under the Draft Permit is entirely within Ecology's discretion and the permit provides no mechanism for Simplot

to contest Ecology decisions in that regard. The requirement that monitoring begin by a date certain, regardless of whether any dispute regarding the monitoring plan is resolved, compounds the unfairness.

<u>Soil Monitoring.</u> The purpose of soil monitoring of land application fields is to determine whether nutrients are being applied at greater than agronomic rates and whether nutrients are migrating down in the soil column. The Draft Permit requires more monitoring than is necessary to serve this purpose.

In dry areas, the state general permit for CAFOs only requires monitoring at two depths: the first and second foot of the soil profile. Without justification, the Draft Permit requires monitoring in a third zone, from two to five feet in depth. This will significantly increase the cost of soil sampling and is unnecessary. Ecology already has determined in the general permit it issued for the CAFO sector that sampling within the first two feet of the soil profile is sufficient to show whether nitrates are migrating down in the soil column.

Also, sampling once per year should be sufficient to track nutrient concentrations in the soil. Sampling twice per year doubles the monitoring cost, while providing only marginally greater information.

Pond Liners and Leak Rates

The Draft Permit would require Simplot to install liners on process wastewater ponds, which the permit refers to incorrectly as lagoons (a term that should be reserved for liquid manure storage, not process wastewater or stormwater). The Draft Permit would require that the liners entirely prevent infiltration of wastewater to groundwater. However, in *Dairy Federation*, the court of appeals agreed that the cost of liners was prohibitive and liners were not required to meet AKART. 490 P.3d at 304. The court held instead that a 10⁻⁶ leak rate standard for new lagoons, and an assessment and corrective action for existing lagoons, was AKART. 490 P.3d at 302-304. Ecology cannot justify requiring liners that, just a few short years ago, the court determined – based on Ecology's assessment – were prohibitively expensive. *Id*.

Conclusion

Many provisions of the Draft Permit would impose requirements that are more onerous than Ecology's general permit for CAFOs that discharge to groundwater, and as to pond liners, that the courts have already determined are not AKART. Ecology has not demonstrated the need for these more stringent conditions. Ecology also must reverse its continuing shift toward requiring extensive groundwater monitoring at CAFO facilities. While groundwater monitoring may show whether groundwater quality has been affected, it cannot show whether current practices are the cause of that impact. It is incapable of showing whether discharges that occurred on a particular day exceeded discharge limits, and so cannot be used to monitor permit compliance. Extensive groundwater monitoring networks are prohibitively expensive. If Ecology feels bound by recent court decisions to require some groundwater monitoring, that does not mean it should attempt to rely on that monitoring as the primary means of determining CAFO compliance. For land application in particular, soil monitoring should remain the primary method for evaluating current practices and preventing contamination of groundwater.

Jack Field, Executive Director Washington Cattle Feeders Association