

Wash. Court Finds Water Permits For Dairy Farms Inadequate

By Morgan Conley, Law360, June 30, 2021

Conservation groups secured a victory in their challenge against waste discharge permits used by dairy farms in Washington after a state appeals court found the approvals don't provide adequate protections to ensure excessive manure runoff doesn't pollute nearby water sources.

The appeals panel found Tuesday that both a state-specific permit and approvals that ensure compliance with the federal National Pollution Discharge Elimination System permit requirements aren't sufficient under the federal Clean Water Act nor the state's Water Pollution Control Act. The ruling largely invalidates the general permits issued by Washington's Department of Ecology that govern wastewater practices at concentrated animal feeding operations, or CAFOs.

"The courts of the state of Washington have finally recognized the devastation that industrial dairies have wrought upon the people of this great state," Charlie Tebbutt, lead counsel for the conservation groups, said in a statement Wednesday. "It is long past time for Ecology and the governor to take responsibility for protecting the people from this rampant pollution, which two federal judges in Washington have previously found to be taking place based on actual site information."

Puget Soundkeeper Alliance, Community Association for Restoration of the Environment, Friends of Toppenish Creek, Sierra Club, Waterkeeper Alliance, and Center for Food Safety challenged the CAFO permits issued in January 2017 in an administrative appeal before the Pollution Control Hearing Board, which reviews orders and decisions made by the Department of Ecology. The PCHB largely approved the permits as written, which prompted the environmental groups to file an appeal in state court.

One aspect of the permits that was contested by groups advocating for dairy farms in the state was affirmed by the appeals court.

The Washington State Dairy Federation and the Washington Farm Bureau challenged standards governing when field manure can be applied in the spring. The dairy farm advocates argued the method, known as T-Sum 200, isn't the best course of action in eastern Washington, and the environmental regulators should have accounted for that difference when issuing the permit.

Dan Wood, the executive director of the Washington State Dairy Federation, said in a statement sent to Law360 Wednesday that the group is "disappointed with the court's determination that T-Sum 200 could be applied across the state and without regard to climate differences on each side of the Cascades." He said that the climate in eastern Washington is not wet like that of western Washington and British Columbia.

"We'll continue to work with Ecology to help them understand that there are two distinct climate areas in our state and that standards must be developed for each climate in our state," Wood said.

The panel found that the permits at issue failed to impose adequate standards on existing manure lagoons and composting areas. They also didn't do enough to address surface water discharges from certain field maintenance techniques, according to the opinion.

The court additionally found the monitoring methods used to ensure compliance with the permits were inadequate.

"We agree with Soundkeeper that the permits do not impose sufficient surface or groundwater monitoring requirements on CAFOs," the panel said. "Without water quality monitoring, the permits, as written, contain inherent contradictions that would render them unenforceable."

The panel additionally noted that Washington environmental regulators are required to consider how their decisions will impact climate change and failed to do so when issuing the CAFO permits. The Ecology Department was ordered to rewrite the permits, which expire in March 2022, consistent with the court's opinion.

Over-application and mishandling of manure can result in excessive levels of nitrogen and phosphorus in the soil, which can then pollute streams and other waterways with excessive nutrients that can harm the environment and human health, according to the opinion.

A representative for Washington's Department of Ecology didn't immediately respond to a request for comment.

The Washington State Dairy Federation and the Washington Farm Bureau are represented by Virginia Nicholson, Elizabeth E. Howard and Colin Folawn from Schwabe Williamson & Wyatt PC.

Washington's Department of Ecology is represented by Phyllis Jean Barney of the state attorney general's office.

The environmental groups are represented by Charlie Tebbutt of the Law Offices of Charles M. Tebbutt and Andrew Hawley of the Western Environmental Law Center.

The consolidated suits are Washington State Dairy Federation et al. v. State Of Washington, Department Of Ecology, case numbers 52952-1-II, and Puget Soundkeeper Alliance et al. v. State Of Washington, Department Of Ecology, case number 53144-5-II, in the Court of Appeals of the State of Washington, Division II.

--Editing by Jay Jackson Jr.