POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

WASHINGTON STATE DAIRY FEDERATION, the WASHINGTON FARM BUREAU, PUGET SOUNDKEEPER ALLIANCE, COMMUNITY ASSOCIATION FOR RESTORATION OF THE ENVIRONMENT (CARE), FRIENDS OF TOPPENISH CREEK, SIERRA CLUB, WATERKEEPER ALLIANCE, CENTER FOR FOOD SAFETY, and RESOURCES FOR SUSTAINABLE COMMUNITIES,	) PCHB No. 17-016(c)
Appellants,	)
vs.	)
STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,	)
Respondent.	)

HEARING
VOLUME VIII
June 7, 2018
Olympia, Washington
Pages 1513 through 1610

Taken Before:

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BE IT REMEMBERED that on Thursday, June 7, 2018, at 1111 Israel Road SW, Olympia, Washington, at 9:00 a.m., before ANDREA L. CLEVENGER, CCR, RPR, the following proceedings were had, to wit:

<<<<<< >>>>>>

JUDGE FRANCKS: Good morning. Have a seat. Let's go on the record. We are here, Day 8 of PCHB 17-016C, and I've got a couple of preliminary matters.

I've been asked to reconsider my decision about allowing videography of the closing arguments, and I've considered the argument, and my decision remains the same.

So what I have done is, I've allowed the one video camera, and I've also allowed two still photographers to take pictures during the argument in a nondisruptive and low-key way.

As I read our rules, my jurisdiction doesn't extend to controlling the dissemination of the video and the photos, and I'm just not going to get involved in that at all because I don't think I have -- I don't think I have the jurisdiction to that.

So that's something for someone else to decide.

Okay. So that is that.

MS. HOWARD: Your Honor, if I may, are you going to be issuing a written order that describes the parameters under which the video can be taken and are you going to address at all the issues that you asked us about yesterday as far as sharing the video and confirming how the video can be used?

JUDGE FRANCKS: I'm not because I've determined that that's outside of my jurisdiction.

The conditions that I've imposed are that the camera stays where it is. It focuses on the attorneys during closing arguments. It can pan the board once.

So those are the conditions that I've imposed.

MS. HOWARD: Okay.

JUDGE FRANCKS: Turning to Mr. Tebbutt's renewed motion on the question of AKART for existing lagoons, the board has considered that and denies the motion, consistent with its prior ruling.

So with that, are we ready to proceed with closing arguments?

MR. TEBBUTT: We are.

JUDGE FRANCKS: Okay.

MR. TEBBUTT: Good morning, board members. On behalf of the tens of thousands of people that I represent, environmental appellants in this case,

this board has a chance to right the wrongs that have been created by three Ecology directors, Jay Manning, Ted Sturdevant, and now Maia Bellon, and the prior iteration of this board that decided the 2006 permit appeal.

Ecology scientists have recognized the problems since at least 2004, but they're politically appointed bosses have overridden them.

All failed to protect the people of Washington, despite overwhelming evidence of continuing threats to the health and welfare of the people of Washington.

Ecology has fiddled while Washington burns with manure contamination. As I said in my opening, common sense, logic, science, and the proper application of law are all that is needed.

Justice demands a decision that compels Ecology to stop the known discharges of contaminants that continue to devastate the Lower Yakima Valley and Whatcom County aquifers, those that are depicted right here on I-10, Figure 5, including the closed shellfish beds in Portage Bay and the larger Salish Sea that I confirmed this morning, still 895 acres of closed shellfish beds due to bacteria contamination, the predominant source of which is the dairies.

And these shellfish bed closures prevent the first nations from practicing their millennials long practices.

These areas, not coincidentally, have the highest concentration of dairy CAFOs in the state.

As I-10, Figure 5, Page 6, shows -- the industry's own picture -- again, the highest concentrations of dairies are up in that left corner Whatcom County.

You can't see them all, but if you were to expand on those, you would see that there's a huge number of CAFOs in that cluster in the upper left-hand corner, and all those big dots to the right are the big CAFOs over in the Yakima Valley area.

And those are the areas that we know about because they've been extensively documented and recognized by Ecology EPA and further supported by the most extensive set of data of CAFO contamination ever compiled in the United States.

And that's the data on the cluster dairies, Cow Palace, Bosma, and DeRuyter.

Some 40 square miles of groundwater around the cluster dairies have been contaminated by dairy manure. That documentation has not been rebutted whatsoever in this case.

This is common sense. The largest sources of manure produce the worst pollution. Common sense, logic, and basic principles of science that we learned in first grade, Newton's law of gravity dictate that water runs

downhill and down into groundwater.

Ecology's permit fails to address lagoons known to leak allows application -- overapplication of manure to fields and ignores compost areas in animal pens that all are known sources of contamination to groundwater.

Environmental appellants' trial brief lays out the law, but here's a summary of the points by issue: Issue No. 2, whether the permits violate the Federal Clean Water Act, Washington water pollution control laws, including but not limited to RCW 90.48 and 90.64, and implementing regulations by failing to require adequate surface water monitoring by permittees.

Let's start with the tile drains. John Jennings admitted the tile drains are point sources and that the permit fails to monitor them. These are demonstrated by Exhibits A-50, which was a picture of a tile drain and a representative one and then actively discharging tile drain, A-29, whose data about what was contained in that tile drain was not admitted in this case.

We also have hydrologically connected groundwater to surface water. All of the -- these hydrological connections call for surface water monitoring, and I'll get to that more in a minute.

We have emergency applications. Those are a problem. They're excessive. They happen when fields are

saturated. You heard somebody try to say that we want them to apply to dry fields, you know, in emergency situations.

There's no such thing as a dry field in those situations. It's because of the rain that we have those problems.

So saturated fields will then flow to surface waters and percolate to groundwater. And A-33 and A-43 are examples of that.

We also have RFA 47 where they admit that phosphorous loadings are not covered by the permit, so excessive phosphorous and nitrogen applications will cause surface water contamination.

The law: Ecology's permitting regulations require the imposition of reasonable monitoring requirements whenever a general permit authorizes the discharge of pollutants to waters of the State, and that's WAC 173-226-090, parentheses, 1.

As Ecology has stated, monitoring is truly the cornerstone of the NPDES program. It is the primary means of ensuring that the permit limitations are met. It is also the basis for enforcement actions against permittees who are in violation of their permit limits. This comes directly from Ecology's permit writer's manual.

Without surface water monitoring, Ecology will not be able to enforce the permits effluent limitation, which do not cause or contribute -- those are very important words, cause or contribute -- to water quality violations.

Ecology readily admits tile drains are point source discharges, but fails to control or monitor them in any way in the permits. The same is true for emergency winter field applications and excessive manure applications.

Point 3 -- Issue 3, rather: whether the permits fail to control discharges to groundwater in violation of the Federal Clean Water Act and Washington water pollution control laws including, but not limited to, RCW 90.48 and 90.64 in implementing regulations.

Lagoons are known to leak and discharge to groundwater. Board doesn't have to rely upon environmental appellant's words, but can rely on those of Ecology itself.

Melanie Redding's testimony, R-4, Page 26 through 28. The research collected by Melanie Redding shows that virtually all lagoons leak and discharge to groundwater.

R-4, Page 36, and I quote, Numerous studies have documented leakage from manure lagoons, and some have documented impacts to groundwater from nitrate ammonium,

veterinary pharmaceuticals, chloride, TDS, and bacteria.

The EPA report did that in the Yakima Valley. Mr. Erickson's reports that he talked about extensively that the dairies are doing on the cluster dairies supports that in spades.

A-11, Page 5, the preliminary draft permit -- and, again, this is Ms. Redding's words -- "A lagoon without a double geomembrane liner with leak detection is discharging to groundwater." Ms. Redding agreed with that.

Throughout the documents admitted, there are statements made even by industry witnesses that testified here that you can't tell how groundwater quality is impacted without groundwater monitoring. Simple principles. Even Dr. Harrison admitted that.

This is a general permit. And John Jennings testified that it covers, quote, similar activities.

That is why all of the Cow Palace, Bosma, DeRuyter -- A-24 not admitted and many other documents not admitted -- why all that data, all that discharge data and noncompliance information from other facilities is critically relevant to this case.

It's quality assured data ignored by Ecology in writing the permit.

Ecology admits that the permit authorizes discharges

to groundwater, and John Jennings admitted that there is, quote, some seepage from manure lagoons. This admission alone triggers the need for groundwater monitoring.

And as Mr. Moore testified yesterday, and I quote, Earthen-lined lagoons do leak or seep, and in the vast majority of cases, that seepage will end up getting to groundwater.

End of case. That should be enough. Issue over.

But if that's not enough, let's take a look at R-4, Page 125, the second to last paragraph, quote, There is no requirement to monitor groundwater in the expired general permit, even when there are indications of groundwater impacts. Therefore, determining a discharge to groundwater, which is a water of the State, has been problematic.

If a CAFO is not managing its manure properly, if manure is overapplied, if manure is applied at the wrong time, or if manure is stored in the lagoon not constructed to a recognized standard, then groundwater quality is likely impacted.

Up to this point, CAFOs generally have not had to demonstrate compliance with groundwater quality standards. That's Ecology in 2006.

And they still don't. They still do nothing. And this is the Redding testimony. Even the Lindsey

testimony and the Erickson testimony all support these propositions.

Ecology admits that soil applications above certain limits will result in discharges, Redding testimony, Keeney testimony, Erickson testimony.

So from a scientific perspective -- and this was a question to Ms. Redding on 5/23, and I quote, So from a scientific perspective, it's far more likely than not that the water that is in the vadose zone is going to reach groundwater at some point; right?

Answer: If it moves below the root zone, yes.

Cow Palace, Bosma, and DeRuyter composting numbers, all of that information about the compost areas, unrebutted. Compost areas are not accounted for at all in the permit for their discharges to groundwater.

Animal pens are a contributing source, unrebutted. Ms. Redding didn't take issue with Mr. Erickson's findings. She just ignored them.

Piping infrastructure is another of the five areas where contamination comes from. Piping infrastructure is not required to be properly inspected. Mr. Erickson discussed that.

There's no requirement to test the underground piping that moves liquid slurry around CAFOs. You can't simply look on the surface to test underground.

And the law. The permits authorize unmonitored discharges of manure pollutants to groundwater of unknown quality, meaning Ecology will never know whether such discharges are violating WAC 173-200. And I point you to our trial brief at Pages 3 through 5 for further legal issues.

In practice, this means that the groundwater effluent limitation is unenforceable. Ecology will never know if any permittee is exceeding the groundwater quality standards without having real information about existing groundwater quality and about the effluent concentrations being discharged from a permittee's facility. These permits fail to meet the legal requirements.

Issue 4, whether the permit soil monitoring requirements and standards are invalid under the Federal Clean Water Act and Washington water pollution control laws, including, but not limited to, RCW 90.48 and 90.64 in implementing regulations.

Ecology admitted that application levels may continue despite known impacts to groundwater. That's R-4, Page 88, and the Redding testimony and the Erickson testimony backs that up.

A-20 says, "Soil should be tested all the way through the soil column." That's Ms. Redding's own

document, but it's not present in the permit.

Dr. Keeney said three-foot soil samples should be universally required at a minimum to monitor the degree to which excess nitrate is moving past crop root zones.

Once nitrate moves past a crop's root zone, as Melanie Redding testified and agreed, it is destined to reach groundwater.

R-17, land treatment on Page 3, "Soil nitrogen that moves below the root zone will eventually leach to the groundwater as nitrate."

Yet again. Even more important, when the permittee's soil levels are in the high or very high range, both levels are not protective of groundwater quality.

Permittee should always be applying manure at times and rates when uptake is maximized to minimize the environmental harm.

Issue 7, whether the permits fail to require permittees to install and implement all known available and reasonable methods of preventing, controlling, and treating pollutants prior to discharge as required under the Washington water pollution control laws with respect to, A, composting; B, land application manure; C, manure storage; D, animal pens and corrals.

Everyone here agrees that AKART is a requirement

that cannot be ignored in the permits. AKART must be applied to contaminants and waste prior to entry.

For instance, RCW 90.52.040, the Pollution Disclosure Act, except as provided in RCW 90.54.0203B, in the administration of the provisions of this chapter, 90.48 RCW, the director of the Department of Ecology shall, regardless of the quality of water of the State to which wastes are discharged or proposed for discharge and regardless of the minimum water quality standards established by the director for said waste, require wastes to be provided with all known available and reasonable methods of treatment prior to their discharge or entry into waters of the State.

RCW 90.54.0203B -- that's the Water Pollution Control Act of 1971 here in this state -- "Waters of the State shall be of high quality. Regardless of the quality of the waters of the State, all wastes and other materials and substances proposed for entry into said waters shall be provided with all known available and reasonable methods of treatment prior to entry."

Lagoons are leaking by design and contaminating the drinking water of tens of thousands of people as we speak with no relief in sight. Ecology fiddles while Rome burns.

WAC 173-200-0302C ii, the State groundwater quality

standard regulations, antidegradation policy, "All contaminants proposed for entry into said groundwaters shall be provided with AKART prior to entry."

Exhibit R-5, Page 27, Section 4.2.1.5, is also supportive.

The law under which Ecology operates requires the department to apply AKART to all wastes prior to entry. Here we have undisputed testimony that the permits, A, do not apply AKART to perhaps the greatest source of groundwater contamination, the hundreds if not thousands of manure lagoons that discharge waste to the groundwater and are doing so, as we speak.

No prevention. No treatment. No control. No AKART. Melanie Redding admitted there's no AKART for existing lagoons, and Ecology did not try to change her testimony.

The permits are unlawful. This is not a close question. Lagoon assessment that is in the permits is like assessing a broken glass to determine that it's broken when you already know that it's broken.

Ecology permits allow discharges for at least another permit cycle when lagoons built to NRCS standards are known dischargers impacting groundwater quality in violation of the law.

R-10, Tech Note 23, all the NRCS guidance are --

guidance, remember, not regulations or rules -- are outdated, bad science, and, therefore, they are irrelevant in this proceeding.

The NRCS guidance done by an agency charged with helping agriculture, not protecting the environment, as Board Member Marchioro pointed out, have been determined by a federal court after two years of litigation and extensive discovery in the Cow Palace case to be leaking more than 3 million gallons of polluted water per year.

That constitutes contribution to groundwater contamination above safe drinking water standards. And that was assuming that the lagoons are operating at a one time ten to the minus seven permeability, which, in a perfect world, is the best that they can achieve. When in reality, they're not even close to attaining those standards as Mr. Erickson testified unrebutted.

According to Ecology, AKART for new or expanded lagoons and other liquid storage structures requires a liner with a permeability of one times ten to the minus six centimeters per second and two feet of vertical separation between the bottom of the lagoon and the water table.

Both have been proven to cause or contribute to water quality standard violations. The -- even that two feet of separation only deals with pathogens -- and even

Ecology admits -- ineffectively. But it doesn't deal with nitrate at all.

Mounding will cause virtually every lagoon with two feet of built separation to violate that standard under normal operating conditions.

As Mr. Moore said, the reasonableness of AKART is only as applied to the permittee. Nowhere in the law does it say that. Nowhere.

Synthetic liner technology has been around and used by all other industries for decades. California, Washington, Wisconsin, and other states have dairies that use synthetic liners.

This information was provided to Ecology by us, the environmental appellants, in the most extensive set of comments submitted with actual scientific backup, not just simple rhetoric, and was ignored by Ecology.

Beyond lagoons, other areas where AKART is not present or insufficient, B, it does not limit applications properly because it allows too much application of both nitrate and phosphorous.

For instance, it allows winter applications in emergency situations without regard to surface and groundwater impacts and doesn't even deal with the federal requirements for storage capacity for those emergency situations that Mr. Moore discussed yesterday.

Facilities have to be designed to handle that, and if they're not, they're in violation of the law. No AKART for composting areas. Just a general provision about keeping stormwater away.

The mountain of compost at Cow Palace as compared to a full-size pickup truck and the windrows of compost that went off into the horizon with the numbers of ammonia and nitrate reaching down 18 feet and that's -- because that's as far as we could go under that compost pile under court order.

AKART for composting was not even evaluated by Ecology, and the board should direct the permits to be rewritten to account for compost discharges.

D, no AKART for pens. Mr. Erickson agreed that the black organic seal was present in the pens, but through his subsurface investigations -- and, again, this is the only evidence in the record about what occurs under pens -- discovered there to be significant pollution contributions from animal pens.

As he testified, part of this is because manure and urine accumulates in pens faster than it can be removed.

And, E, no AKART for application fields. The levels are too high. Melanie Redding agreed that high levels lead to groundwater discharges as corroborated by Dr. Keeney.

And the table that we discussed shows that even at small levels of excessive nitrogen, that nitrate will reach groundwater at levels that exceed the maximum contaminant level and contaminate people.

Issue 8, whether the permits fail to establish technology-based effluent limitations and standards as required under the Federal Clean Water Act with respect to A, composting; B, land application of manure; C, manure storage; D, animal pens and corrals.

We just heard a whole bunch about that, but just like the AKART analysis, there are no technology-based effluent limitations for existing manure storage lagoons, compost areas, and pens.

Issue 9, whether Ecology illegally relied upon an adaptive management approach that authorizes residual nitrate and phosphorous levels in the soil that are known to result in discharges to waters of the state and fails to sanction permittees for violating the permit terms of the permit by applying manure in excess of agronomic rates for nitrogen and phosphorous. These are all the same as Issue 4 as we laid out previously.

Issue 10, whether the permits authorize discharges of pollutants to surface and groundwaters in the state of Washington in violation of the Federal Clean Water Act, Washington water pollution control laws including, but

not limited to, RCW 90.48 and RCW 90.64 in the applicable implementing regulations.

Recent case from the 9th Circuit, which is cited in our briefs, Hawaii Wildlife Fund versus County of Maui, found that there was liability under the Clean Water Act because it encompasses discharges to surface water through hydrologically connected groundwater.

That's what we have here. Discharges from point sources to groundwater hydrologically connected to surface water are unlawful under the Federal Clean Water Act and under Washington laws.

And the Postema versus PCHB case from 2000 cited in our briefs also supports that where the Washington legislature has recognized the scientific fact of, quote, hydraulic continuity between ground and surface waters, end quote, and the groundwater code and the Water Resources Act of 1971.

And, again, I quote, Existing and beneficial uses shall be maintained and protected, and degradation of groundwater quality that would interfere with or become injurious to beneficial uses shall not be allowed.

And that's WAC 173-200-030, and it doesn't say we have an exception for CAFOs.

The enforcement limit is a value assigned to any contaminant for the purposes of regulating that

contaminant to protect existing groundwater quality and to protect groundwater pollution. And that's WAC 173-200-050.

And also WAC 173-200-0503 A, establishing the criteria that Ecology must consider when setting enforcement limits.

The starting point for any enforcement limit for a particular contaminant, such as nitrate, is the water quality standard criteria found in Appendix A of WAC 173-200-040.

I would also point you to R-5, and that's PDF Page 40. The actual page is 28. However, when the background groundwater quality exceeds criterion, the enforcement limit at the point of compliance shall not exceed the groundwater quality criteria. The groundwater quality for that criterion -- pardon me -- that's WAC 173-200-0503B2.

And importantly and, again, I quote from law, Enforcement limits based on elevated background groundwater quality shall in no way be construed to allow continued pollution of the receiving groundwater.

Enforcement limits are intended to be at the point of compliance. Compliance with the enforcement limits shall be maintained throughout the site from the uppermost level of the saturated zone extending

vertically to the lowest depth that could potentially be affected by an activity. And that's WAC 173-200-060(1)(b).

Ecology cannot claim that the permits are in compliance with the antidegradation requirement without knowing, A, what groundwater quality is under a facility, and, B, what the effluent concentrations of the discharges are from the facility.

Unrebutted admissions that groundwater monitoring is the only way to know are pervasive throughout this hearing.

Issue 16, whether the permits violate the Federal Clean Water Act, Washington water pollution control laws including, but not limited to, RCW 90.48 and RCW 90.64 and applicable implementing regulations for nutrient management plans, the Manure Pollution Prevention Plan in the permit.

Again, we start with a proposition everyone agrees on. The code of regulations sets the minimum requirements that permits must comply with the Clean Water Act.

The CFR has three main requirements relevant to these permits. That's 40 CFR 122.23(h)(1) and CFR 122.21(i)(1)(X). Both require a nutrient management plan to be submitted with a notice of intent for coverage

under a general Clean Water Act CAFO permit.

40 CFR 122.23(h)(1) makes clear that the MMP must be publicly available for comment and approved by the agency prior to permit issuance.

If the director makes a preliminary determination -- this is, again, a quote -- that the notice of intent meets the requirements of 122.21(i)(1) -- IL -- (i)(1), rather, and 122.42(e), the director must notify the public of the director's proposal to grant coverage under the permit to the CAFO and make available for public review and comment the notice of intent submitted by the CAFO including the CAFO's nutrient management plan and the draft terms of the nutrient management plan to be incorporated into the permit.

Bill Moore admitted on the stand yesterday that doesn't happen here. 40 CFR 122.22(e)(1) and (e)(5) spell out the federal requirements for an MMP.

And I'm not going to go into two pages of citations to the CFR because it's so obvious, but, just to summarize, that's 42 E16, identify appropriate site-specific conservation practices to be implemented; E18, establish protocols to land applied manure, litter, or process wastewater in accordance with site-specific nutrient management practices.

And E5 has many of the same things. Then says,

"must include the fields available for land application, field specific rates of application properly developed" and a whole lot more.

And finally 122.42(e)(6) also requires these MMPs, which Ecology is calling MPPPs, to be made publicly available if substantial changes are made such that the public can comment again.

This means that they had to be publicly available to start with, which John Jennings and Bill Moore both admitted they are not.

So applied here, the Ecology testimony and discovery makes clear that MPPPs contain the site-specific information contemplated by 40 CFR 122.42(e). Ecology admits that the MPPPs contain field-specific information, including how the permittee will actually in practice satisfy the requirements of the permit.

Exhibit R-1 -- the permits make this clear -- Section S4Q requires the MPPP must include a description of how the permittee is meeting each of the performance objectives and specific conditions and special conditions, S4A through S4Q on-site.

The description provided by the permittee must include a narrative and, if applicable, drawings or diagrams. The narrative must clearly describe the basis the pollution prevention decisions the permittee has

made.

R-1, the permits and Ecology testimony show that updates do not go through public comment.

Thus the MPPP runs afoul of the CFR, as we discussed, because CFRs dictate that info is reviewed by the department and the public prior to issuance. That doesn't happen here.

So what does this all mean? If the industry is losing money, then do you just allow them to keep polluting as they've been doing for decades?

No. Law doesn't allow that. The law doesn't have an exception for CAFOs. It doesn't say thou may discharge to groundwater and contaminate the waters of the state. It says "thou shalt not."

Industry and Ecology are focused on cost to the dairy farmers, but what about the cost to the public for having to deal with the cleanup and getting alternative water? A lot of that evidence wasn't allowed in here.

These costs were never assessed by Ecology or industry, yet Ecology admits and Mr. Erickson testified unrebutted the costs of remediation are orders of magnitude higher than requiring measures for prevention.

Where is the reasonableness there? Industry externalizes its costs at the back end of the production process on the people of this great state.

Public employees sit here for two weeks on the taxpayer dime, defending the dairy industry while ignoring the impacts to people in the environment.

Where are the public employees supporting the public?

Forty square miles of known contamination in the Yakima Valley. That's depicted in Mr. Erickson's map and as he testified to. And tens or hundreds of other square miles in the Yakima Valley are contaminated, but the full extent of the problem has not been close to fully documented.

The people, CARE in this case, has done the lion's share of the work, while Ecology takes years beyond the expiration of the prior ineffective permit that only about a dozen of more than 400 CAFOs in Washington were covered by. It fiddles while Rome burns.

While environmental appellants have not been allowed to put on their full case, we have put on Ecology's own words, and those are the most experienced person with CAFO contamination in the state of Washington and I would argue in the United States, that of Mr. Erickson.

Don't trust our words. Use those of Ecology's own Melanie Redding, Exhibit R-4, Page 95. Research in both the Lower Yakima Valley and the Sumas-Blaine Aquifer identify manure as a predominant source of nitrogen

loading in these areas.

I'll propose to you that, if you look at all the studies carefully, they say that the predominant source is from manure lagoons.

CARE has been the leader in trying to protect the people of Washington for more than two decades. CARE has provided 100 homes with clean water. Thousands more homes need help. Where is Ecology? They haven't provided a single home with clean water.

Time and time again, CARE has enforced our nation's laws and shown that the so-called industry leaders are, in fact, community polluters.

Two federal judges have made these findings based on extensive uncontroverted facts. This is the Faria dairy in Grant County and the cluster dairies that you've heard a whole lot about in the Yakima County.

Ecology has utterly failed the people of Washington. Maia Bellon hid behind the motion to quash her testimony granted by this board. She had a big enough stick to stop this injustice and she dropped it. She didn't have the guts to testify.

As I said in my opening remarks, if this board allowed my clients to present their case and we did not convince you that this permit is not protective of human health of the environment, then shame on us.

Despite numerous rulings against us, we have shown Ecology's own words, the essence of which has not been rebutted, and we accomplished our job.

Shame on Ecology for not protecting the people of this state as is their trust obligation and legal obligation to do.

This board now has the chance to rectify decades of gross injustice and remand this permit to Ecology to get on the right track, rather than continuing to allow Ecology to, quote, kick the can down the road further as Ecology's Tom Tebb stated in 2009 after the last permit.

Flint, Michigan; Love Canal in New York; Selma, Alabama, to name just a few, are examples of travesties of social injustice. Don't let this situation continue to heap social injustice on the poor people of the Yakima Valley, on the people of Whatcom County, on the first nations who suffer from this damage.

It's your job to stop it now, and you have the opportunity to do it, and we ask you to do it forcefully.

Thank you.

And I saved three minutes for rebuttal.

JUDGE FRANCKS: Okay. Thank you.

Ms. Howard.

MS. HOWARD: Good morning. Elizabeth Howard, again, on behalf of the Washington State Dairy

Federation and the Washington Farm Bureau. And myself and my co-counsel, Ms. Nicholson, thank you for your time over the past seven days.

This is a complex case with a lot of testimony, and I'm going to do -- take some time this morning to try to summarize the issues that we presented to the board.

Before I do that, I want to talk a little bit about our clients and what you've heard about dairy farmers over the past seven days.

First, you have heard about dairy farmers being proactive. You heard about the Dairy Nutrient Management Act and how the dairy industry went to the State legislature and looked for an opportunity to work with the State legislature and the State agencies to regulate the industry, to address some of the concerns that have been raised during this proceeding.

You've also heard about dairy farmers being proactive. We talked about some of the new technologies they're working on even now and that are being implemented within this state, specifically some of the technologies we heard about related specifically to lagoons and being able to determine whether they are technically sound or not. And even today those technologies are being implemented here in Washington.

You also heard testimony about a new methodology

that's being implemented called the ARM, Applied Resource Management. It's a methodology that we have seen is very protective of both groundwater and surface water.

And it's a methodology that the dairy industry is coming to this board and talking about because it actually thinks it will be more protective than the terms that are currently in the permit.

So we've heard that dairies are proactive. We've also heard that dairies are highly regulated. There are federal and state water quality laws that apply to dairies and CAFOs.

We've talked about, again, the Dairy Nutrient Management Act, which is a comprehensive statute that applies to dairies, applies to their activities, and addresses their compliance with water quality laws.

We have heard about, again, the state and water -- state and federal water quality standards. Those are enforced.

We heard from Puget Soundkeeper and about community activists that are regularly scrutinizing dairies, reporting, and we saw in evidence that both the Department of Ecology and Department of Agriculture are responding to and reviewing those reports.

We also heard testimony that many of those reports didn't demonstrate that there was a violation, but we did

hear testimony that there's a great deal of scrutiny and also heard about the responses to those.

So, again, it's a very highly regulated industry. We also heard that this industry has been under decades-long litigation. That was testified to by Puget Soundkeepers and their witnesses, and that there has been extensive litigation against this industry for a long period of time and that they have been dealing with that for a long period of time.

One of the other things we heard about dairies is that they are recyclers. They're recyclers of nutrients. We talked about how a dairy operates and that a dairy has livestock.

Those livestock do produce manure. That manure is separated into different types of products. Some of it goes into the lagoon. It's pulled out of the lagoon. It is applied to the fields where it is -- those nutrients are recycled as the crops are grown. Those crops are then fed to livestock. Some of the manure is also used for other useful products, like bedding and compost.

So in a state where we value recycling, dairy farmers are an example of living, breathing recycling cycle. They recycle nutrients. They use and reuse them.

We also heard that dairy farmers are under immense economic pressures, and that is a fact. That is

something that they don't have a lot of control over.

Many dairy farmers are operating at no profit margin or, in today's prices for milk, a negative profit margin. That has real consequences for dairy farmers.

One of the things we heard about is that they are unable to finance large projects as a result. They just aren't able to go to the banks to find financing for projects like lagoon retrofitting.

And there are limited federal and other funds available. Even though there are some grants available, those grants are capped by year, and they are capped by dairy farmer.

And all of these things taken together are part of the reason why we see such a significant reduction in the number of dairies in this state and also desire to ensure that that industry does not -- does not leave this state.

So for those dairies that are left, as we spoke about in our opening comments, this permit or these permits are seen as an important tool.

And the dairy industry came to this state to work alongside them to try to develop a permit that's workable on the ground but that also provides the protections to both surface and groundwater.

And while there are many aspects of the permit that accomplish that, there are a few that do not, and those

are the issues that we have raised in our appeal and that we've put testimony on about before this board.

Before I talk about those issues, I do want to just take a brief moment to talk again about the legal standards.

We did brief this extensively in our opening brief -- or excuse me -- in our trial brief, but let me just touch on a few highlights.

So, first, this board's review obviously is de novo, and the agency, while it does receive some deference under the review, there are a few areas where they may not.

One is if their interpretation of the statute is in conflict with the plain wording of the statute and the regulation.

And another -- the board can defer to Ecology's technical judgments but only when the board finds that the agency has specialized knowledge and expertise that supports those technical judgments.

And here, as I'll talk about further, that's missing in a few key places. We've talked a lot about AKART over the last seven days.

Ecology must require the use of all known available and reasonable methods by industries and others to prevent and control the pollution of waters of the state

of Washington.

As we've talked about each of those known available and reasonable components have some -- sort of subfactors within them, and the reasonableness, in particular, has an economic component to it.

That's critical here. For understanding whether or not the methods that were chosen by Ecology as terms in the permit actually meet the reasonableness standard, we have to look at the economics of those methods as well.

And state law also requires that if there is -- while we can -- while we are looking at the protection of water, we also need to be looking at protecting industries, and that has to be a component in how Ecology looks at and evaluates the terms in its permit.

So I spoke just for a moment about the reasonableness element of AKART. We pointed out some case law in our trial brief that speaks to this in a little bit more detail.

The reasonableness element requires that any Ecology imposed standard be both economically and technologically feasible, and Ecology cannot require a system or a method that would impose an unreasonable financial burden on the applicant, either because of excessive initial outlay of costs or because of annual operating costs.

And that's the Weyerhaeuser case that we cited to in

our trial brief.

There's also as a component of the known subfactor of AKART. Ecology cannot experiment in permits. They are required to use methodologies and conditions that have been tested and found to control pollution effectively and efficiently.

It cannot require as yet untried control technologies under AKART. This is also the Weyerhaeuser case.

And in all things that they do under AKART, their analysis has to be conditioned by a judgment of reasonableness, as I spoke about before.

There's one other key legal standard that I want to just point out before I dive in a little deeper into the issues, and that is, by law, Ecology is required to give notice and a meaningful opportunity for the public to participate in its general permit decisions.

And here, as we've pointed out specifically with regards to the lagoon standard, that did not occur.

That requirement also spans from the Clean Water Act and the federal APA, Administrative Procedures Act, and state Administrative Procedures Act as well.

So before I dive into the three issues, Issue 5, 6, and 19 that are our three issues on appeal -- that remain on appeal, I want to talk just a little bit about the

witnesses that were presented in this case.

First about Puget Soundkeepers' witnesses, and I just want to focus on Mr. Erickson and Mr. Keeney.

Mr. Erickson, as we heard, is not licensed in Washington, and while he has had some limited experience in Washington, it is just that. It is limited.

As we demonstrated through both our cross-examination of Mr. Erickson and our own witnesses, the modeling that he used was used in a way that is not normally used.

The data that he relied on wasn't sufficient to demonstrate an actual connection between the methodologies that are being applied at those dairies and groundwater contamination.

We also explained, both in cross and direct, that -- that -- that the -- and actually, this was in cross -- that while there are claims that these lagoons and the cluster dairy were NRCS-designed lagoons, they, in fact, were not. Mr. Erickson could not testify to that.

So we cannot hold out the cluster dairies, if you will, as an example of an NRCS-designed lagoon. As I'm sure Ecology will address as well, we cannot hold out the cluster dairies as being an example of the types of methods that are required under the permit.

And so while we had a lot of testimony through

Mr. Erickson, what we didn't get is testimony and evidence as it directly relates to the terms of this permit and as it directly relates to whether or not those permit terms are protective or not.

We also heard from Mr. Keeney -- Dr. Keeney, who is from the Midwest, similarly has no experience in Washington.

Let me turn now to the Ecology witnesses who are public servants and I understand put an immense amount of time into this permit.

But what we didn't hear is, they have this specialized knowledge and expertise to inform the terms of this permit in some key aspects, not all, but in some key aspects.

We heard from Ms. Redding that she is not an agronomist. We also heard she is not a microbiologist. While she did a literature review, that literature review was not solely focused on what occurs in the Pacific Northwest.

It was a nationally based literature review, so it wasn't really fine-tuned and very specific to what happens in Washington.

And beyond that, we didn't hear that she had this sort of on-the-ground specialized expertise that the witnesses that I will speak about next do have.

And, again, Mr. Moore and Mr. Jennings, also obviously long-term Ecology staff, but just didn't have the technical expertise and specialized experience and knowledge for the permit terms that are at issue here.

In contrast, we've presented testimony from Dr. Lindsey, who is a hydrogeologist certified in Washington with extensive experience in Washington.

He went into in-depth technological -- or technical -- excuse me -- testimony regarding seepage rates, regarding the vadose zone, what happens there, how different factors affect seepage rate, what actually impacts loading, and whether you do have contaminants of groundwater or not.

He provided testimony about the fact that lagoons actually, while they seep, because of the way that the vadose zone works, you can actually have that seepage retract back into the lagoon liner.

So extensive technical testimony from a doctor who is a hydrogeologist certified to do work and has done extensive work in Washington.

We also presented the deposition testimony of Bill Reck, who is the national technical expert on manure lagoon design.

He, above any other witness in this case, has that expertise, and that's based upon 30 years of experience,

working with NRCS, and it's based upon extensive research done by NRCS, literature, lagoon failures, experimentation, and implementation of the manure lagoon standards across the U.S. and in other nations.

So that testimony is really critical for understanding what type of standard needs to be imposed in order to be protective of groundwater.

Dr. Joseph Harrison, also 30 years of experience. He's done extensive research, focusing on dairy nutrients and management of manure.

He's been involved in research and studies that were discussed in front of this board and presented as evidence in front of this board, including the Karen Harrison report, and then also he spoke about his involvement in the soil nitrate Sullivan and Cogger bulletin, which was heavily relied upon by Ecology in this case.

He's also had experience working with producers and the agency in implementing CAFO permit terms. So, again, highly experienced, extensive research, in-depth knowledge about the specific issues that are presented with regards to the permit and the terms.

David Haggith, also decades of experience on the ground, and I would submit to you that there was no other witness that came before this board who had the type of

on-the-ground experience on dairies and working with dairies as David Haggith.

Maybe Dr. Harrison would be equivalent, but clearly good boots on the ground, practical experience, observing dairies and how they work, and also an expert agronomist.

He's been working on field nutrient budgets, working with dairies on implementing those in compliance with the Dairy Nutrient Management Act, but also just working with dairies to ensure that they are able to grow their crops and also able to comply with state statutes as well.

And then finally, Dr. Shannon Neibergs, who is a professor, an expert in agronomist economics and specifically as it relates to dairies.

And not only does he have that expertise, but he also worked for farm credit services, so he has insider knowledge of how banks view dairies and the ability to loan on dairies.

So when we're talking about specialized knowledge and expertise, I would submit to the board that each of the individuals that we presented as witnesses do, without question, have the type of specialized knowledge and expertise that is very relevant to the CAFO permit terms, how they work on the ground, but also how they are protective of ground and surface water.

And I do think that that stands in stark contrast to

the other witnesses that were presented to the board.

So our three issues are Issues 5, 6, and 9. Those are the three remaining issues that were heard by the board.

Issue No. 5 relates to soil sampling, and the permit term is S41. It's the same in both of the permits.

We talked first about the spring soil sampling requirement, and the concern there is that the spring soil sampling is looking solely at mineralization.

And as you heard in testimony, mineralization is already accounted for in the field nutrient budgets. And, again, these field nutrient budgets are based upon information about the field, information about the crops, longstanding understanding of how crops grow, the types of nutrients that they need, and, again, specific information about each field as applied to that.

So these field nutrient budgets, which were developed usually in the fall, already account for the mineralization that's going to occur throughout the year.

So in other words, this is not new -- this is not information that's not already accounted for in the field budget. Ecology is asking nonetheless that spring samples be collected.

We saw evidence and we presented the chart and some information also from the Carey and Harrison report as

well as information from the soil samples by David Haggith and his extensive experience for decades on this, that spring soil samples are pretty predictable.

We know what we're going to get on a pretty consistent basis, and, again, that's because we understand that mineralization is occurring.

And on a consistent basis, we're seeing spring soil samples in the 15 parts per million, maybe as high as 20 parts per million, sometimes less, but just right in that sort of normalized window.

So we're not getting new information when we take spring soil samples. We're getting the same information over and over again and information that's already been accounted for in the field nutrient budgets, so information that's already being accounted for when we're looking at land applications to ensure that they are protective of ground and surface water.

All the spring soil samples are under this scenario is an added expense. They're not giving us new information.

And so, by definition, spring soil samples, at least as construed under the current permit terms, do not meet the AKART standard. They're not a reasonable term.

And we saw that there's maybe some confusion from Ecology between what is a spring soil test and the PSNT.

If you'll recall, the Pre-Sidedress Nitrate Test, which can be a useful tool, but it is taken later in the year in June, and it is used specifically for corn, but that is not the sample that's being required by this permit. It is the spring soil sample that's being required.

So for all the reasons that I just explained, the spring soil samples don't meet the reasonableness threshold. They're simply an extra expense that's not either generating useful information to the permittee or to Ecology.

The other issue we raised with regard to samples is the fall soil sample. We talked a lot about the Sullivan and Cogger bulletin from the universities, and let me just read -- well, I'll paraphrase for you what that says with regards to fall soil samples.

It says, "Sample zero to 12 inch depth for the post harvest test." So the first foot. "This sampling depth is a good predictor of nitrate in the rest of the soil profile when in season irrigation is not excessive" -- that's an issue that's addressed in the permit -- "and samples are taken prior to heavy rains in the fall."

We agree that it is important to have a fall soil nitrate test. The concern that we've raised is with the October 1st date, which is an arbitrary date.

The October 1st date is not tied directly to heavy rains, and it certainly does not reflect a post harvest test, and the reason for that is because there is great variability in when heavy rains occur.

Again, if you look at Sullivan and Cogger, which was Exhibit R-12, Table 1, and then also in the paragraph below that, it's clear that you can have heavy rains in September. You can have them in November. You can have them in beginning of October, middle of October, the end of October. So there's variability as to when heavy rains occur.

The October 1st date is referenced in Sullivan and Cogger, but it says use that whenever possible. And, again, the concern is that, by using that specific date, we're not actually accounting for when heavy rains are going to occur.

They might occur prior to October 1st, but oftentimes, as we demonstrated, they occur after October 1st. And the concern is, if you still have a crop in the field -- if you're trying to hit that October 1st date, you still have a crop in the field, you're not actually getting an accurate test because you're not getting a test that reflects the end of harvest, what has occurred throughout that time frame. So you're not gathering the information that actually

reflects the nitrates that would be left post harvest.

We also talked about the challenge of trying to get into, for example, a corn field, which is full of corn, which is quite tall, and trying to make your way through a field in order to take a test prior to October 1st when you still have a crop in the field. Not only will you get inaccurate or unhelpful information, but it's just physically difficult to do.

And so the proposal that we made and continue to make is not that we don't have fall soil nitrate tests, but that we have a fall soil nitrate test that follows this guidance, that follows the Sullivan and Cogger guidance, that guidance that Ecology is relying upon and that producers and universities have relied on for more than a decade and tie the fall soil nitrate test to the date when you do have heavy rain, not a set date in the permit, but require that the tests be taken prior to heavy rains.

This is not difficult to do, as we heard testimony. You can watch the weather. You'll know when that occurs, and most of the time, for producers, their crop will be off by that heavy rainfall. They want it off because after that heavy rainfall, it's difficult to remove the crop.

For those farmers that miss that date, you heard

testimony from David Haggith that we don't disagree that at that point, if you do have heavy rain, it does make sense to go deeper than a foot.

But prior to that heavy rain, as Sullivan and Cogger explains, that first foot sample is sufficient to give the information about predicting nitrate that's in the soil profile.

So, again, the concern here is with reasonableness and with following a known method. So Sullivan and Cogger is an established well-known method. It, in fact, is the document that was relied upon by Ecology most heavily in order to establish the fall soil nitrate test.

And we agree with Ecology that it is important to have that fall soil nitrate test. We just need to have it be based upon reality, what's going on in the field, upon when heavy rains actually do hit.

And until we get to that point, we don't have a permit term that's reasonable, nor do we have a permit term that's actually accomplishing the goals that Ecology is setting out to accomplish under the permit terms.

And I won't go into the details here, but I just wanted to point out that we also did provide testimony about the challenges of taking those deeper soil samples when you are still in a drier period.

And we had testimony from John Jennings, confirming

that if you do take the sample in the first foot and that gives you the information that you need, that is sufficient to be protective, and we agree with that.

And that is indeed what Sullivan and Cogger say, so requiring the deeper soil samples also does not meet the AKART standard.

Then the last thing we referenced with regards to this particular permit provision and soil samples related to T-sum 200, and, as I said in my opening comments, this is a place where we talked about ARM, the Applied Resource Management, approach.

And I would submit to you that it's probably not very usual for an industry to come to the board and ask for a more protective standard, but, here, that is exactly what we are asking for, particularly with regard to Western Washington.

And one of the reasons for that is that we've seen it borne out in data and testing by both Ecology and by Whatcom County Public Works, that ARM works.

We are seeing improvements in both surface and groundwater in Whatcom County and in regards to the aquifer and surface water as a result of the application of ARM.

The reason for that, as David Haggith testified to, is that it's a much more thoughtful, if you will,

approach. It doesn't just look at temperature, which is what T-sum 200 does. It also looks at slopes. It looks at soil type. It looks at soil saturation. It does look at weather. It looks at potential for rainfall. All of those things are taken into account when we look at whether or not to land apply under ARM.

T-sum 200 doesn't account for most of those factors. The only thing it takes into account is weather.

So, again, as we testified to, ARM, A-R-M, is a much better technology and is much more protective of surface and groundwater, and particularly it's been shown to be very effective in Western Washington.

And AKART requires, again, that Ecology does use all known reasonable and available methods, and here again we think this is a method that is more reasonable, given the way that it's performing on the ground.

Next, Issue 6. Let me move on to Issue 6. So this -- this issue focuses in particular on Table 3. And you heard testimony from us again related to the concerns with Table 3 relating to how the nitrate ranges and the categorization of nitrates actually relates or does not relate to what's going on on the ground with regards to crops and how they're using nitrates.

So Table 3, as we heard from Ecology, is based primarily on the Sullivan and Cogger. Again, this is

Exhibit R-12.

And Sullivan and Cogger actually breaks out nitrate ranges and adaptive managements that should occur based upon nitrate ranges based upon perennial crops and annual crops.

So perennial crop, again, is a crop that's in the ground year-round, and annual crop is just grown for a particular season and then it's harvested.

And that's really critical because, as we heard in testimony, annual crops like corn, which is a predominant annual grown by the dairy industry, has different nutrient needs. It has different times as to when it requires nutrients.

And so, as a result, you can see different levels of nutrients that will be uptaken by that crop than, say, for example, a grass crop, which is growing at a different rate throughout the year and will uptake nitrogen differently as a result, and that's accounted for in the field budgets.

But it's not accounted for in Table 3, and the reason for that is because Ecology took the two different tables in Sullivan and Cogger that are specific to annual and perennial crops and mushed them together into Table 3.

So it doesn't actually comport with how crops grow

and how they use nitrogen and how they are if land applications are properly made do protect groundwater.

Table 3 also doesn't account for the benefits of double cropping. So we heard that many dairy farmers will plant corn during the summer and then they will plant triticale or grain crop during the winter. That's called a cover crop or a double crop.

And when they do that, that triticale or that grain will also suck up nitrogen starting in the fall and going throughout the winter. And, unfortunately, Table 3, which isn't up today, but Table 3 doesn't account for that.

So as we heard testimony, you can have fall soil nitrate tests that can be in the high category or even the very high category, and if you're bringing on a crop right after that, it can use the nitrates that are remaining in the soil and use those nitrates up throughout the winter.

We talked about in our opening papers filed with this board and the doom loop, and this is the concern, that Table 3 does create a doom loop in the sense that it doesn't allow crops to be grown at their productive level because of the constraints on the nitrate ranges.

And the result of that is that you have a crop that's not actually able to perform what we would like to

see it performing here, what Ecology would like to see it performing, which is to be healthy enough to take up the maximum amount of nitrogen.

And Table, 3 unfortunately, creates that effect. So, again, the dairy industry -- dairy farmers are not against nutrient budgets or against agronomic application.

In fact, we support that because that is protective of soil, and that is protective of surface and groundwater, but we need to have a tool in the permit that actually comports with that goal.

And, as developed, Table 3 and the adaptive management requirements that fall from those specific nitrate ranges doesn't accomplish that.

So -- and it does create economic effects as well, right. I mean, that is part of one of the considerations that Ecology has to take into account as it's developing the permit terms.

And when you have a table and restriction that, on one hand, doesn't provide the best protection for surface and groundwater because it's not comporting with how crops actually perform that function by uptaking nitrates and nitrogen, it also puts constraints on the ability of a farmer to grow the crops they need in order to feed their livestock.

And so there are a myriad of negative impact. And, again, Table 3 that's constructed that makes sense with what's happening on the ground with regards to annual and perennial crops and double cropping will be protective of groundwater and surface water and the industry supports that.

But unfortunately, as Table 3 was constructed, because it was sort of compiled in the way that it was and didn't account for double cropping, doesn't meet that goal.

So last issue, 19. Issue 19 relates to the lagoon -- what I'm going to call the lagoon standard, and the concern raised by the industry related to sort of the surprise addition of the parenthetical in the permit at the last moment related to where you measure vertical separation from, from the outside of the earthen liner.

And you heard the testimony from the executive director of the dairy federation that indeed it was such a surprise that the industry thought it was a mistake at first.

So while we heard testimony about it being, on one hand, a longstanding policy, I would submit to you that a longstanding policy shouldn't come -- is not the same as a surprise in the final draft.

Part of the concern that you also heard is that that

terminology was not presented at any of the draft permits, and industry and the public did not have the opportunity to actually comment on that.

And I submit to you that, if they would have, we might have ended up with a very different permit term because of the concerns raised.

So on one hand, with regards to the lagoon standard, we have an existing standard. We have NRCS standard, and there's been debate about whether it's a guideline or a standard or a regulation, and I understand that.

But it is an existing standard. It's a standard that was used by Ecology in the 2006 CAFO permit. It's a standard that is currently being used by Washington State Department of Agriculture in the implementation of the Dairy Nutrient Management Act, and it is a standard that has been used by NRCS not only in this state, but also in states across the U.S.

It's a standard that has been proven based upon decades of research, based upon experimentation, if you will, with lagoons that haven't worked, and an evaluation of why they haven't worked, an incorporation of changes as a result of that failure into the standard.

And there's also been sort of a negative connotation, if you will, cast upon NRCS, and I think if Mr. Reck had been able to be here, he would have been

quite concerned with that.

But what he testified to in his deposition -- and it's obvious by the name of NRCS is that it is the Natural Resource Conservation Service.

And the standards that NRCS design are conservation practice standards. And as Mr. Reck testified to, their practices are designed intentionally to be protective of natural resources.

So, yes, they're not the EPA, but that does not mean that their goal is to pollute. Their goal is to design standards that are workable for folks on the ground but also are protective of natural resources.

And, in fact, based upon, again, decades of experience and research, they have demonstrated repeatedly -- and you can see this in Appendix 10 D; it's talked about there -- the limitations on seepage and what they do, what the liner does.

And you can also see this in the deposition transcript from Mr. Reck, that a lagoon that is designed to NRCS standards is protective of groundwater, not just with regards or the nitrates, but also with regards to both viruses and pathogens.

And as is explained -- and we sort of were starting to touch on this a bit yesterday as well -- it's not the vertical separation beneath the lagoon or wherever you

measure it from that performs that, it is the liner that performs that function.

I'll talk about that more in just a minute, but the concern here is that, rather than using a tested and tried and known standard here, Ecology departed from that NRCS standard. They departed from what Washington State Department of Ag is doing, and they had departed from what they had done previously.

And they did it without providing notice and opportunity for the public to comment on that departure. The basis that we've heard for that departure is -- has been narrowed down to concern about viruses.

We heard testimony from Ms. Redding that that is the -- that is the concern. We -- we've confirmed that at least Ecology agrees that the liner can be addressing nitrates and addresses bacteria.

But the one issue that Ecology raised during testimony is viruses, but we also heard the testimony from Ecology that viruses -- Ecology, specifically Ms. Redding, wasn't sure whether viruses in the lagoon would actually pose a risk to humans.

So I would propose to you that the basis for this additional two-foot -- or this additional vertical separation that's required in the permit is based upon assumption but not actual knowledge about a risk.

And if you look at the literature review, we can see that this additional vertical separation requirement is based upon information and literature related to human septic systems.

Well, there, you would probably have a concern about risk of viruses that would be transferable to humans, but this is not a human system. This is a manure lagoon.

And as we heard from Dr. Harrison, the -- if there are viruses in the manure lagoons, they do not pose a risk to humans because, again, if there are viruses in the manure lagoon, they are not the types of viruses that would be transferable to humans.

So, again, the sole basis for Ecology adding this additional vertical separation is viruses, but it's without foundation because the very concern about viruses is based upon a lack of understanding or a lack of knowledge about whether those viruses would actually pose, even pose a risk to humans.

Then there's also some confusion around -- around the two-foot vertical separation and wouldn't that put us into groundwater, and just may be a misunderstanding of what the NRCS standard actually does.

As you can see in the NRCS standard itself and in the testimony from Bill Reck and even in the testimony from Ms. Redding, you cannot build an NRCS lagoon into

groundwater. That is prohibited. That is not allowed by the standard.

So whether you have a one-foot liner or you have a two-foot liner, what's happening within that liner is the treatment of the nitrates prevention of viruses and bacteria, and you have a -- again, a proven technology to provide those benefits.

And, again, I think part of the concern here stems from the fact that, if we go back to the specialized knowledge and expertise of Ecology, Ms. Redding was basing, again, this vertical separation on -- primarily on a literature review.

She has not had on-the-ground experience or the type of experience that NRCS has had with manure lagoons, how they operate, and the type of protection that they provide.

And as Mr. Reck testified, indeed manure lagoons are proven to provide protection to groundwater to provide -- to prevent contamination of groundwater from any of those sources.

And that testimony was further supported by the testimony of Dr. Lindsey who talked about the vadose zone, about how the vadose zone works, about the fact that manure lagoons don't always leak.

And Mr. Reck's testimony was similar, that there is

variation in how -- in the seepage and the seepage rates based upon what's going on with the head. And, again, these liners are designed to be protective.

And Dr. Lindsey also pointed out another sort of foundational issue with regards to Ecology's assumptions about lagoons.

When we talked about the equation that was used by Ecology to evaluate the extent of seepage and Ecology did admit on the record that they had -- had not used the correct equation to evaluate that.

So, again, back to the public comment concern, sort of have to take on faith, if you will, Ecology's position that this is sort of a longstanding view because we heard from Mr. Moore that it's never been implemented in another permit. It hasn't been enforced, and we haven't seen it show up in any documentation prior to the final permit.

And, again, that is why --I think you heard from the industry that it was believed to be a mistake when they saw the final document.

And the concern is that, without having that public comment on notice, that's a procedural error, opportunity for public comment and notice, but it also created a substantive issue here because Ecology did not have the opportunity to hear and understand either the economic

impact of that requirement, which, as we heard, will require reconstruction, redesign, at very expense -- high expense to the industry.

And Ecology also didn't have the opportunity, if you will, to go back and have the follow-up conversations with NRCS to understand how its lagoon design works and what it does.

And we didn't hear testimony that Ecology even discussed that with Washington State Department of Agriculture, which is implementing the same standard.

So while this was a procedural error, it also resulted in a significant substantive issue as well. So I would submit to you that all of these issues equate to a non-AKART standard.

The lagoon standard that was submitted that is part of the permit does not at least meet the reasonableness requirement for AKART both because Ecology couldn't account for the economics because it didn't put this out for public review, but it also doesn't meet the known methodology requirements.

Here we have a permit term that is showing up for the first time in this permit. It's never been imposed before. We don't have any research demonstrating that it is a more protective standard than the NRCS standard because it's a newly constructed standard.

MR. TEBBUTT: Ms. Francks, I have to interrupt. I mean, you told us we only had 40 minutes.

MS. HOWARD: I have two more minutes.

MR. TEBBUTT: She's eight minutes over, nine minutes over.

JUDGE FRANCKS: According to what?

MR. TEBBUTT: According to what you said.

JUDGE FRANCKS: No. But what are you --

MR. TEBBUTT: She started at 9:40.

JUDGE FRANCKS: Where's the chess clock?

MR. TEBBUTT: She started at 9:40. It's now 10:30.

MS. NICHOLSON: She started a 9:42. I wrote it down.

MR. TEBBUTT: All right. Seven minutes over.

MS. HOWARD: I'm almost done.

MS. NICHOLSON: She is two minutes.

JUDGE FRANCKS: I didn't pay attention, so -- yes. Wrap it up. And I'll give you extra time.

MS. HOWARD: Thank you.

In conclusion, the three issues that we raised here are Issue 5, 6, and 9.

And in each of these instances, we've demonstrated through testimony and evidence that's been submitted to the board that Ecology has not met the AKART standard.

It has not met it with regards to soil samples, with regards to the nutrient ranges in Table 3 or with regard to the lagoon liner standards.

The permit terms are not economic. So, therefore, they do not meet the reasonableness standard. They're not based on tried and known methods that are protective of groundwater and surface water, and they, therefore, do not meet AKART.

By definition, because they do not meet AKART, they are not lawful, and, therefore, we ask that the board remand the permit to Ecology to address each of those terms and to produce a permit that will comport both with methods and standards that are protective of the environment but are also workable on the ground for dairy farmers.

Thank you.

JUDGE FRANCKS: Thank you.

So what's the total time that Ms. Howard used?

MS. NICHOLSON: She used three extra minutes of -- she used four extra minutes.

MR. TEBBUTT: That's just bad math. It's -- 49 minutes she was up there.

MS. NICHOLSON: No, she wasn't.

JUDGE FRANCKS: Okay. Well, Mr. Tebbutt --

MR. TEBBUTT: 18 and 31 equals 49 in my book.

JUDGE FRANCKS: Let's take a ten-minute break, and then we'll have Ms. Barney's closing.

So we're off the record. We'll be back at 10:45.

(Pause in the proceedings.)

JUDGE FRANCKS: Have a seat. Let's go back on the record. And we have Ms. Barney's closing argument.

MS. BARNEY: Good morning. Phyllis Barney, Assistant Attorney General, representing the Department of Ecology.

Department of Ecology has written CAFO permits that contain reasonable effective steps for concentrated animal feeding operations to take to protect water quality.

The permits meaningfully address the risk to water quality posed by CAFOs in a variety of ways and require operators to apply effluent limitations for the

protection of water quality of their facilities.

These effluent limitations and requirements result in permits that are more stringent than the prior 2006 CAFO permit.

Appellants here have the burden of proof in this appeal. They must show that Ecology acted unlawfully, outside its legal authority or exercises discretion arbitrarily and capriciously.

The board gives deference to Ecology's expertise in administering water quality laws, and the board also gives deference to Ecology's technical judgment, especially where that judgment involves complex scientific issues as this case involves.

Because the CAFO permits are consistent with state and federal law, contain reasonable conditions, and are protective of water quality, they're based in the sound review of relevant science, and the appellants here cannot meet their burden.

In the discussion of nutrient management plans, the Waterkeeper decision, which examined EPA's CAFO rules, states that the terms in the nutrient management plans become effluent limitations in the permit.

Ecology agrees with that. And, in fact, Ecology agrees to the extent that it decided to, in effect, stop depending on each individual producer to write their own

effluent limitations that are then sort of, in a backwards looking way, incorporated into the permit and, instead, decided to take those effluent limitations, develop effluent limitations for those requirements, and include those in the permit as permit conditions themselves.

So 40 CFR 12242(e) would have a facility identify protocols for appropriate testing of manure and soil. The permit does that. Ecology put those requirements in the permit and is not waiting for a producer or facility to write those and then submit them.

And rather than having a facility establish protocols for land application, the permits sets out not only land application requirements and limitations, but implements requirements, certain best management practices, and requires implementation of other best management practices to meet land application performance standards that are in the permits.

And so on down all the factors that are in the federal regulations, as our demonstrative exhibit showed in that same table is also in our summary judgment briefing for your reference, all of those requirements from the federal regs are in the permit as enforceable permit conditions.

Technology-based effluent limitations for CAFOs are

set in the federal regulations in 40 CFR 412. These limitations are incorporated into the CAFO permits as well as are additional limitations as determined by Ecology.

Together, these enforceable limitations are the performance standards for the permit, which is what Waterkeeper decision and federal law requires.

Equating the nutrient management plans in the -- requirements in the federal CAFO rules to the Manure Pollution Prevention Plan means you're looking in the wrong place.

The effluent limitations are in the permit. The MPPPs are where an individual facility shows their work. It's the "how" to the permit limitations, and the permit limitations are the limitations, the "what."

The manure plan must be developed and implemented. If it is not, that's a permit violation.

Additionally, the manure plan must be effective. If it's not, the performance standards are not met, and that also is a permit violation.

Ultimately, if EPA disagreed with Ecology's decision to include the effluent limitations required by the CAFO rule in the permit itself, EPA would have exercised its option and not approved the CAFO permits, but EPA did not do that.

And, again, we continue to hear a lot in our discussion about what is AKART. Again, AKART, all known available and reasonable methods of prevention, treatment, and control of pollutants.

AKART for CAFOs is the full implementation and compliance with the permits as a whole. This includes permit conditions as well -- permit conditions for composting pens and facilities as well as those addressing land application areas and lagoons.

To meet the AKART requirement, you can't pick apart and view one or another permit condition in isolation. Soil testing and lagoon standards are integrated with field budgets and must be implemented together with field application rates which also must consider land application practices as well as best management practices in the manure prevention plans.

The permit conditions are knit together, and you can't tease one separately and then try to do a separate individualized AKART analysis on those. They all work together.

Soundkeeper argues that synthetic liners are required in order for the permits to be AKART, but while synthetic liners may be used in other industries, they're not utilized across CAFOs and not across CAFOs in Washington, as Soundkeeper's expert testified.

And, in fact, Mr. Erickson testified that he does not believe the double lined with leak detection synthetic liners for CAFO lagoons are necessary at other facilities, other than the CAFO dairy cluster in Yakima.

For newly constructed or significantly refurbished lagoons, the permit requires them to meet the performance standard of the one times ten to the minus six permeability.

Ecology does not assume, as Soundkeeper does, that all lagoons in Washington are failing. This is why the permits in this cycle recall -- require an evaluation of lagoon construction which will provide data to begin to provide some insight in a systematic way that will assist assessing lagoons risk to groundwater.

If a specific lagoon ends up in a higher risk category, the facility must develop a plan to address that risk.

And also related to lagoons, the dairy federation stated that Ecology has changed its definition of what a two-foot separation means. It did not.

Ecology's interpretation of how to measure a two-foot separation between the lagoon and the water table has not changed.

The permit is merely -- merely clarify Ecology's longstanding view that the proper measurement is from the

bottom of the liner, not the top of the liner.

Specifying that measurement in the permits was Ecology's response to indications it was hearing with regard around the hearings around the CAFO permit that there was confusion on that point.

While the permits merely specify the language, that language was added to clarify Ecology's interpretation and is not a change in position.

In Mr. Reck's deposition on Page 6, after he confirms that the NRCS standards are not federal regulations, he testified that the purpose of -- that NRCS has for the two-foot vertical separation is for structural integrity of the liner, a decrease in seepage rate, and the constructability of the liner.

But Ecology imposes that two-foot vertical separation for treatment and an activation of pathogens. That's Ecology's longstanding position across waste treatment programs.

Dr. Harrison opined on research work related to the manure digesters that apparently had a component related to pathogens and reported no pathogens found in those instances.

The board should give the report of that research very little weight. That testimony was introduced to illustrate Dr. Harrison's -- the breadth of his expert

work as part as an employee of Washington State University and as part of his background experience.

The board has neither seen nor had the opportunity to evaluate any of that research and was not -- it was not addressed directly in testimony other than as the background to his experience.

The results he reported are not sufficient to support a blanket finding that treatment of pathogens should not be of concern to Ecology, particularly where this board hasn't had the chance to examine that research itself.

Dr. Harrison is not a microbiologist as Ms. Howard stated. He is a specialist in nutrient management. He's worked on the Sullivan and Cogger paper, and he works with producers.

And, granted, Melanie Redding testified she's not a microbiologist, but she has worked specifically on viruses in groundwater and provided testimony on the concerns Ecology has with regard to their infectious nature and how long they remain viable in groundwater.

Ms. Redding's testimony did discuss bacteria but did not eliminate bacteria from concern. While she agreed that it might be possible that through the lagoon liner bacteria would be filtered out of what then is discharged below the liner level, that doesn't mean that Ecology is

discounting the possibility of bacterial pathogens that would seep through a liner.

In discussing surface water monitoring, it seems that at times we have muddied exactly, what are we talking about when we talk about surface water monitoring?

As Mr. Moore testified, he considers that the permit requires monitoring for surface waters in the way that it requires visual monitoring of a facility to detect surface discharges, and such discharges would be permit violations.

If surface water monitoring refers to analytical laboratory analysis, classically in the NPDES program, that means that you are measuring pollutants that are in a water sample that is coming off of a facility either being discharged through a pipe or some other conveyance.

The combined permit only authorizes a discharge to surface waters during a 25-year 24-hour storm event, and the State-only permit does not even authorize that.

Outside of the specific event, there is not a discharge authorized to surface water from that -- that the permit authorizes, so how could monitoring of surface water discharges reasonably be required?

Soundkeeper also argued for receiving water monitoring. That is not a sample from a site discharge,

but setting up a program to sample water quality above and below a facility in order to assess whether or not a discharge to surface water has occurred.

Setting up such a program certainly can be done, but it's not necessarily simple and not necessary at every single facility that has potential to be covered by the CAFO general permit.

As Soundkeeper's expert, Dr. Keeney testified, in order to eliminate other sources other than the CAFO that is under permit, other properties would also have to be sampled, and additionally there are technical challenges to ensuring relevant and representative sample taking, given the nature of storms and stormwater and the nature of intermittent discharges.

But even more fundamentally, Soundkeeper's arguments that the permit should require surface water monitoring rely, at least in part, on documentation of practices at facilities that are not under the 2017 permits and facilities where there have been a history of practices that likely would be permit violations if those facilities were permitted.

It is the permit conditions that are under appeal here, not past practices or current practices at facilities that have not even been shown to be attempting to comply with permit terms.

As it relates to groundwater monitoring, yes, in order to know what's in the groundwater, you have to sample it and have it analyzed.

But as Mr. Erickson testified, once nitrate reaches groundwater, you can't trace that nitrate back to a particular practice at a CAFO.

You have to address areas at a CAFO based on their risk level, and risk management is exactly what the CAFO permits do.

Ms. Redding testified that land application areas at a CAFO pose the greatest risk to groundwater. The permits contain requirements for field budgets, appropriate application rates that provide for the maximum plant uptake of nitrate from the soils.

Then at the end of the growing season, the adaptive management requirements of Table 3 is the -- those are the checks and balances of how the field budgets and application rates performed.

The fall soil sampling allows for a year-to-year feedback loop with specific responses to high residual nitrates baked into the table itself.

This feedback and requirement adaptive management was not part of the 2006 CAFO permit and makes the 2017 permits far more protective of groundwater.

We have heard setting up a groundwater monitoring

plan is not a simple matter. Sink wells and sampling costs money.

EPA had installed approximately 30 to 40 monitoring wells at the Yakima cluster dairies, and yet even 12 more wells had to be installed.

Groundwater monitoring around land application areas is also complicated by the trading and swapping of fields that occur -- that we've heard occurs year to year.

Groundwater monitoring around lagoons compost areas and animal pens have similar technical challenges.

Ecology determined that the performance standards contained in the permits for these areas are protective of groundwater quality. The permits do require groundwater monitoring in specific instances that you have heard about.

Those places are the high trending portion of the Table 3 adaptive management and where there's insufficient separation of lagoon bottom from the groundwater table.

As to soil monitoring, the permits require spring and fall soil monitoring. Both are necessary because they serve a different purpose. Fall sampling is the report card that triggers adaptive management for the coming year.

The spring sampling allows a producer to know what

the level of nitrate in their soil is in order to calculate proper forward looking field-specific budgets.

Dr. Harrison and Mr. Haggith both testified that the spring sampling is not useful, but it is difficult to ignore. The presence of the small but significant amount of nitrate that their own work found present and variable -- highly variable in spring soils.

The result of ignoring that -- the presence of nitrate that is available and testable in spring soil is the danger of overapplication of nutrients to the field, and that presents the risk to groundwater.

And ultimately Dr. Neibergs testified that the cost of the soil sampling regime in the permit could be managed and incorporated by dairies.

Both Dr. Harrison and Mr. Haggith argue that the October 1st deadline for soil monitoring is unattainable, but their arguments fall into the trap of reading that single permit provision to the exclusion of other provisions in the permit.

A CAFO can collect a fall sample after October 1st. It's just that additional conditions apply. Other conditions in the permit address the idea of overwintering crops, perennial crops, and cover crops. It just means that a new fall nutrient budget has to be calculated for those cover crops.

For -- it's kind of ironic for the date of October 1st, Ecology relies on the Sullivan and Cogger reference, which everybody else relies on for absolutely everything else except for the fact that Sullivan and Cogger says, collect the sample. It's best if you can do it by October 1st, if possible. Everyone would like to ignore that, bottom of Page 2, right column.

But what's even more important is that Ecology didn't rely on one single reference here to determine that date.

The literature review reviewed scientific peer-reviewed journal papers and found that that date falls well within the range of the expected dates for correct fall sampling that appears in the literature.

The origin story that we heard for the adaptive management table here this morning is incorrect. As Mr. Jennings testified on the first day of this hearing, Ecology looked at a table that was being used by the Washington State Department of Agriculture and that had benchmarks that appeared to be used and familiar to producers in the field and then set about to truth check the nitrogen -- the nitrate level benchmarks that are in the adaptive management table with the literature review, and that work was done.

Table 3 sets out reasonable responses and is

actually responsive to two conditions in the field for CAFOs, but there are two different columns, one of which addresses the year-to-year change that we've heard can happen and be extremely dramatic, given crop failures or other climate -- climate issues that may have happened in any given year, as well as the trend column, which addresses the long-term -- longer-term management practices, how the facility is doing over a greater period of time.

Those two columns lead to actually a very sophisticated response. If you have a single year, the permit allows you to take adaptive -- adaptive measures, but also allows that it could possibly be that the next year you'll be back at compliance or back at a benchmark level that actually has you in the low or moderate level.

As the adaptive management table gets to the end toward the very high category, the response is more aggressive.

The benchmarks that define these levels are well within the ranges that are available in the literature for different cutoffs of when there is a moderate risk, a high risk, and a very high risk.

While Soundkeeper calls for numeric limits for nitrate and phosphate, the effluent limitations contained in the permit are protective of water quality.

Nitrate amounts are regulated by the performance standards in the permit. Phosphorous is also regulated. Phosphorous is required to be tested for and is a component of the required field budget.

If a CAFO reaches their calculated budget for phosphorous before they reach their limit on nitrate, they're required to stop application.

And if they need further nitrate for the field, they have to find it in fertilizer that does not contain phosphorous, and they must stop using nutrients.

Additionally, because the permits essentially prohibit discharges to surface water, Ecology determined that because phosphorous binds to the soil, it is uncommon in groundwater, and no numeric limit is necessary.

Soundkeeper relies heavily on CARE's Yakima dairy litigation, both the Eastern District's decision and on the investigative work it conducts there. But, again, that case was prosecuted under RCRA, not under the Clean Water Act, nor RCW 90.48.

The standard the Court was applying there was that the Cow Palace dairy operations contributed or are contributing to disposal of solid waste, which may be posing a serious threat to the public.

The Court was also very clear that its decision was

specific to the dairy clusters. The sampling done at the dairy demonstrated that the dairy's lagoons were leaking.

The evidence showed that the dairy had excessively overapplied manure to the agricultural fields in complete disregard of its nutrient management plan.

In fact, EPA in 2010 identified those very same dairies as a problem. So this is no surprise.

But these site-specific findings do not provide a basis on which to evaluate the 2017 CAFO permit conditions and their protectiveness of water quality.

The permit conditions were never applied at those facilities in their 40 years' worth of operations. Similarly, assuming that facilities under one of the permits will violate permit conditions is not a basis on which to challenge permit conditions.

Ecology's permits, when complied with, are protective of water quality. The result of a violation of those -- the result of the violation of those conditions is enforcement, not a change of the permit conditions.

The dairy federation asked Ecology to include in the permits a tool to provide certainty for when spring applications can begin, rather than the term "green up."

Well, now the dairy federation is asking Ecology to use "first heavy rain" as a standard as opposed to the

October 1st certainty -- date certain in the permit for collecting samples.

But what the dairy federation suggested in place of "spring green up," as it relates to land applications, was T-sum 200.

Ecology in the literature review looked at using T-sum 200 using other tools based on rainfall and looked at the application risk management system, the ARM system that we've heard about, but recently chose to use T-sum as a tool for operators.

And once again, it's important to remember that T-sum 200 doesn't operate in a vacuum. None of the permit terms do. The benefit of Mr. Haggith sees with ARM, the requirement is to go out. Look at your fields. Know where the water table is. Don't apply when rain is forecast.

And all the rest that are components of ARM are good management practices. They are applied in addition to the T-sum, which looks not necessarily at weather, per se, but actually looks at temperature. And waiting until the cumulative temperature of soil is sufficiently high that the soil is warm enough to facilitate mineralization and crop growth means that nutrients land applied will be taken up by those crops.

This protects groundwater. This is the treatment of

nutrients by land application, and this is the goal of the permit.

It is true that either sets of appellants here will likely have written the permits differently. Ecology evaluated the science, met with stakeholders and the regulated community, utilized its extensive regulatory and permitting experience, and developed permits that are protective of water quality.

Ecology respectfully requests that the board affirms the 2017 CAFO permits in full.

Thank you.

JUDGE FRANCKS: Thank you.

Mr. Tebbutt, according to my calculations, Ms. Howard went over no more than six minutes, so I'm going to give you nine minutes, but feel free to use less.

MR. TEBBUTT: I certainly will. And it does remind me of a Saturday Night Live skit with Chevy Chase, "There will be no math" in relation to the Gerald Ford debate with Jimmy Carter.

Industry's counsel misrepresented the science and the testimony in this case with regard to -- I'm not going to go into how many, but I'll just give you an example.

The lagoon liners, regardless -- I mean, we know

that NRCS is irrelevant here, but still the lagoon liners only deal with pathogens, not with nitrate. Everyone testified to that.

The record contradicts on many of those points, and I'm not going to continue here on all of those things because the record does reflect that.

And, again, I can't resist one. The doom loop isn't the problem here. It's the doo doom loop. There's way too much manure to handle here.

The laws are strong, but they're not being applied in any meaningful way to stop the known ongoing pollution. That's the main point here.

Two federal judges found that inspections done by the Washington State Department of Agriculture on the Cow Palace and Faria properties, two separate judges, were that WSDA inspection said, "Great attention to nitrates."

Those facilities, the same time those reports were going on, were polluting the groundwater of the communities around them.

I ask this panel to read carefully the judge's decisions in CARE versus Faria and CARE versus Cow Palace. I don't know how you can come to a different conclusion.

Just a couple other points. Mr. Erickson's model that Ms. Howard talked about was just to show this board

how the contamination reaches groundwater.

The 32 monitoring wells -- and, by the way, they didn't all have to be put in to show that contamination was happening, but have been put in to show the extent of the contamination and have shown it.

Again, the model was not shown to this board just to prove the discharge, but to demonstrate how it gets there. Those 32 monitoring wells prove that these communities are being manured upon at great length.

The 32 monitoring wells, the samples from, I think, around 20 fields, three compost areas and three animal pens, show the real impacts.

All of that -- and there's discussion about how Cow Palace is different. If you went to Cow Palace, you would see that Cow Palace looks better than any other dairy you'd probably ever go to in the state.

But all the rest of them are worse. DeRuyter is five times worse. Mr. Haggith, his partner, a contractor for the dairy federation, they're boys.

If allowed, Mr. Haggith worked for DeRuyter dairies. One of the five -- and he was the one there at the time that DeRuyter was causing the problems before the EPA study and during -- in early parts of the study, that show the facility is five times worse than Cow Palace, and he was the one making recommendations to DeRuyter.

MS. HOWARD: Your Honor, I'm going to object. That was not in testimony in this case.

MR. TEBBUTT: That's an offer of proof that we made.

JUDGE FRANCKS: Mr. Tebbutt, let's limit to ourselves to what's happened in our hearing and issues before the board.

MR. TEBBUTT: These are issues before the board because that's why we made our offers of proof. If we were allowed to get all our testimony in, we would have proved that too.

Remember, Judge Rice found that DeRuyter -- Cow Palace was causing or contributing to an imminent substantial threat to human health in the environment, and DeRuyter is five times worse.

No other industry would be allowed to continue to pollute at the levels that this industry has done without an actual plan to stop the discharges and to clean up the damage.

Ms. Barney talked about technical expertise. Well, you can't contravene the law. The law says, "Thou shalt not discharge to groundwater and contaminate it."

That's exactly what's happening. Ecology says, Look at the whole. Look at the whole, w-h-o-l-e, and it shows the holes, h-o-l-e-s, that allow contamination to surface

and groundwaters, putting tens of thousands of people at risk every day.

Even assuming that the lagoons meet NRCS standards -- and they talked about whether you can prove that they weren't or not -- it doesn't matter because they cause groundwater contamination. That's proven. Accepted by federal judges. Proven by very basic science.

Ms. Barney also argues that Cow Palace case is irrelevant because RCRA was the case, not the Clean Water Act. Well, RCRA governs groundwater contamination.

The State has an obligation to protect groundwater, so they are similar. They're exactly the same thing. Washington law requires the protection of groundwater.

1970, the radical environmentalist Richard Milhous Nixon said in the State of the Union address, "It's the right of everyone to have clean air and clean water." 1970.

We don't have it today. We don't have a permit that's protecting the people of the state of Washington.

We know you give deference to the agency. That's what this board is set up to do, but not where the violations of the law are so clear.

State of Washington attorney general's office has an obligation to, first and foremost, protect the people of

the State of Washington, as does Ecology.

Tens of thousands of people are at risk, as we sit here today, and have been. CARE has put this in front of this board before.

You three, Mr. Wise, Ms. Brown, Ms. Marchioro, have the ability and opportunity and responsibility to require Ecology to do the right thing. You have the opportunity to be on the right side of history.

History has shown -- is showing, as we sit here today, that tens of thousands of people are at risk, and it's ongoing and it's unabated, and this permit does not address the fundamental factors that cause that contamination.

We hope you are on the right side of history and thank you for your time.

JUDGE FRANCKS: Thank you. So we have concluded the hearing, and I'm adjourning the hearing right now.

I'm going to let -- excuse the board.

And the one last procedural thing I need to do is, I want to walk through the exhibits and make sure that my records fit with your records as to what's been admitted, etc.

So with that, we'll go off the record, and then we'll go back on.

(Board members exit.)

JUDGE FRANCKS: Okay. I'm just going to go back on my -- let's go back on the record.

I'm just going to go down my charts, and if you think I'm missing something or I'm -- I've got something wrong, let me know, and then we'll figure out where we stand.

Okay. So starting with A, A-1 admitted.

A-2, A-3, A-4, A-5 all admitted.

A-6, 7, 8, 9 are all admitted.

I have nothing for A-10.

A-11 is admitted.

A-12 was not.

Then I have nothing for A-13, 14, and 15.

A-16 was admitted.

I have nothing for 17.

A-18, 19, 20, 21, and 22 were all admitted.

I have nothing for 23, 24, 25, 26, 27, and 28.

MR. TEBBUTT: Your Honor, if I may just stop for a second. When you say you have nothing, I mean, some of these were offered but not allowed.

JUDGE FRANCKS: Okay. Then tell me that.

MS. KINN: Exhibit A-24 was offered twice and not admitted.

JUDGE FRANCKS: Okay.

MS. KINN: And Exhibit A-27 was offered and also not admitted.

JUDGE FRANCKS: Okay. And does anyone have a different --

MS. ROSE-JOHNSTON: That's what my notes reflect as well.

JUDGE FRANCKS: All right. So we're up to A-29? Did I miss anything else?

MS. KINN: That's it.

JUDGE FRANCKS: Okay. That's exactly what I'm looking for.

Okay. I have nothing for 30, 31, 32.

A-33 was admitted.

Then I have nothing for 34, 35, 36, and 37.

I have A-38 was not admitted.

And A-39 as well; right?

MS. ROSE-JOHNSTON: Right.

JUDGE FRANCKS: My notes are a little messy.

A-40, I have nothing.

A-41 was not admitted.

A-42, I have nothing.

A-43 was admitted.

A-44, I have nothing.

A-45, 46, and 47 were all admitted.

A-48, 49, and 50, I have nothing.

MS. KINN: A-50 was admitted.

JUDGE FRANCKS: A-50 was admitted.

MS. NICHOLSON: We don't have that.

MS. ROSE-JOHNSTON: My note reflects for illustrative purposes only for A-50.

MS. NICHOLSON: We don't have that as admitted.

MS. KINN: I believe that's correct. I have that it was admitted at 2:03 p.m. on May 23rd, during my direct examination of Ms. Joerger.

JUDGE FRANCKS: Okay. And I don't have all my notes here, so I have a question about A-50.

So I'm going to look at that as soon as we're done with the rest of this, and we'll resolve it.

Okay. May 23, you said?

MS. KINN: Yes.

JUDGE FRANCKS: All right. Moving on.

So let's do it this way: The next one I have admitted is A-53 and then A-59.

MS. KINN: A-54 was admitted, Your Honor.

JUDGE FRANCKS: Okay. And does that --

MS. NICHOLSON: We agree.

MS. BARNEY: Yes.

JUDGE FRANCKS: Okay. A-54.

All right. The next one I have admitted is A-67.

MS. KINN: Your Honor, you said A-59 was admitted; right?

JUDGE FRANCKS: I did. Or at least I meant to.

Okay. So A-68 is not admitted.

MS. KINN: I have A-68 admitted, Your Honor.

MS. ROSE-JOHNSTON: I have originally not admitted and then admitted.

MS. KINN: And also A-67 was admitted.

JUDGE FRANCKS: Right. I think that's what I said.

Okay. Admitted, A-69 and 70.

71, 72, 73, 74, all admitted.

I don't have anything about 75.

Okay. And then A-76 is admitted.

And I don't have anything for 77, 78, 79, and 80.

MS. KINN: I have 77, 78, and 79 were admitted over objections on yesterday.

JUDGE FRANCKS: That sounds familiar. I think I wasn't up to date.

MS. BARNEY: And 80 is not admitted.

JUDGE FRANCKS: Right. 80 was not admitted.

And then we have 81, which was also not admitted. That was the one that I marked yesterday; right?

MS. KINN: Correct.

JUDGE FRANCKS: Okay.

MS. KINN: And also 82.

JUDGE FRANCKS: Oh, right.

MR. TEBBUTT: And if I just -- again, just to clarify this record, when you say "not admitted," it was offered but not admitted?

JUDGE FRANCKS: Right.

MR. TEBBUTT: Okay.

JUDGE FRANCKS: Yeah. I don't say not admitted unless somebody offers it.

Okay. So that -- so I just need to figure out A-50. And, otherwise, we're good on those exhibits.

All right. Next let's do dairy federation. So I feel like this is not up to date. All right. Let's skip that for a minute.

Let's go to R. Okay. I have R-1 through R-9 admitted, but then I don't say anything about R-10.

What do we have?

MS. KINN: I show R-10 as being

admitted.

MS. NICHOLSON: I do as well.

JUDGE FRANCKS: Okay. So R-10, R-11 admitted.

R-12, admitted.

R-13?

MS. BARNEY: Nothing.

JUDGE FRANCKS: Nothing. Okay.

R-14, admitted.

R-15, 16, 17, and 18, all admitted.

MS. BARNEY: Correct.

JUDGE FRANCKS: Okay. What about R-19? Not offered.

R-20, admitted.

And I don't have anything for R-21, 22, or 23.

Okay. Then we have R-24 admitted.

R-25, admitted.

R-26, admitted.

R-28, admitted, which was the new one which is the previous version?

MS. BARNEY: Correct.

JUDGE FRANCKS: Okay. And that was admitted. Okay. So that's good.

I do not have my up-to-date list on the dairy, so I'm wondering if we can have dairy tell us what they

think were admitted, and everybody else check them.

MS. NICHOLSON: Sure.

JUDGE FRANCKS: Okay.

MS. BARNEY: Are we still being recorded?

JUDGE FRANCKS: We shouldn't be recorded.

MS. HOWARD: Okay.

JUDGE FRANCKS: Should have been only closing arguments.

MS. NICHOLSON: Okay. So we have Exhibits I-1 through I-16 as admitted.

JUDGE FRANCKS: Does everyone agree with that?

MS. ROSE-JOHNSTON: I don't have any notes reflecting I-12 being admitted.

MS. KINN: We don't either.

MS. NICHOLSON: That was part of Bill Reck exhibits, and it was admitted.

JUDGE FRANCKS: Okay. So was it part of his deposition transcript?

MS. NICHOLSON: Yes.

MS. HOWARD: Yeah. And when we went through all those exhibits, it was one of those.

JUDGE FRANCKS: Okay. All right.

MS. NICHOLSON: I-17.

JUDGE FRANCKS: So 1 through 16.

MS. NICHOLSON: 1 through 16.

I-17, I-18, and I-19 as admitted.

JUDGE FRANCKS: Okay.

MS. NICHOLSON: I-37, I-38, I-39, admitted.

JUDGE FRANCKS: Okay. So we skipped from 19 to 37?

MS. NICHOLSON: Yes.

JUDGE FRANCKS: Okay. So 37. Keep going.

MS. NICHOLSON: I-45, I-46, I-47, I-48, I-49, I-50, and I-51 admitted.

MR. TEBBUTT: We don't have I-46 admitted.

MS. HOWARD: We did.

MS. ROSE-JOHNSTON: Ecology's notes reflected admitted for I-46.

JUDGE FRANCKS: Okay. So I'm sorry. I'm losing track here.

MS. NICHOLSON: Do you want me to give you the range again?

JUDGE FRANCKS: Yes. Give me the range.

MS. NICHOLSON: Okay. So I said the range from I-45 through I-51 admitted.

JUDGE FRANCKS: And before that, we had 37?

MS. NICHOLSON: Oh, yeah. And before that, we had 37 through 39.

JUDGE FRANCKS: Okay. And then after 51?

MS. NICHOLSON: Okay. 55, 56, and that was it.

JUDGE FRANCKS: Okay.

MS. HOWARD: We had I-60, Your Honor, was the findings of fact, conclusions of law which you indicated you would take judicial notice of.

JUDGE FRANCKS: Yeah. I don't think we need that.

MS. HOWARD: Okay.

JUDGE FRANCKS: We -- we definitely know where it is.

Okay. So I'm going to go back and I'm going to find my notes about A-50, and then I'm going to come back, so give me five minutes.

MR. TEBBUTT: I don't think there's disagreement that it's admitted for demonstrative purposes only; right?

MS. HOWARD: No. That's not what our notes are --

MS. BARNEY: That's what our notes are.

MR. TEBBUTT: So no disagreement about that, if that expedites that a little.

JUDGE FRANCKS: Okay. Great. All right. That is all I need.

Anything else? Thank you all. I appreciate the long process that this has been. I appreciate everyone's cooperation. We can go off the record.

(Proceedings concluded at 11:30 a.m.)

C E R T I F I C A T E

I, ANDREA L. CLEVENGER, a Certified Court Reporter in and for the State of Washington, residing at Olympia, authorized to administer oaths and affirmations pursuant to RCW 5.28.010, do hereby certify;

That the foregoing proceedings were taken stenographically before me and thereafter reduced to a typed format under my direction; that the transcript is a full, true and complete transcript of said proceedings consisting of Pages 1513 through 1610;

That I am not a relative, employee, attorney or counsel of any party to this action, or relative or employee of any such attorney or counsel, and I am not financially interested in the said action or the outcome thereof;

That upon completion of signature, if required, the original transcript will be securely sealed and the same served upon the appropriate party.

IN WITNESS WHEREOF, I have hereunto set my hand this 27th day of June, 2018.

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(Court Reporter, CCR No. 3041)