

Dairies' discharge at issue in court: Lower Valley group argues for state-required monitoring of groundwater for contamination.



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Jan. 14--TACOMA -- If the state doesn't look for groundwater contamination by dairies and other large-scale animal farms, it won't find any. But studies show it's there. That's how attorney Charlie Tebbutt summed up his arguments Tuesday before the state Court of Appeals. His client, the Grandview-based Community Association for the Restoration of the Environment, or CARE, wants the court to overturn a state permit that allows the largest dairies and feedlots to discharge waste without monitoring groundwater for contamination. The idea is opposed by the state Department of Ecology and the Northwest Dairy Federation.

CARE wants the state Department of Ecology to test groundwater at Concentrated Animal Feeding Operations, or CAFOs, as part of the permit required by state and federal law. The affected operations generally consist of large numbers of livestock -- dairy cows, beef cattle, pigs or poultry -- that are removed from pasture and fed in confined areas.

Currently, there are approximately 161 CAFOs in the state. So far, only 35 have determined they are required to apply for the new permit.

Groundwater testing would reveal contamination, which would force more CAFOs to seek the permit, CARE argued. But the Ecology Department and the dairy industry say other conditions in the permit are more than adequate to protect the state's waters.

"This permit has been lauded as one of the most rigorous in the nation," said JohnRay Nelson, the Seattle attorney representing the Northwest Dairy Federation.

The state previously upheld the Pollution Control Hearings Board's permit system. The decision was then appealed to the court. At the heart of the case is a longstanding battle over whether large dairies directly discharge into the state's underground aquifers, and whether they can be held liable for that pollution under the federal Clean Water Act. If so, they could be subject to court orders, fines and other penalties. So far, the state law doesn't identify most dairies as so-called "point source" polluters of groundwater. If they don't plan to discharge, then they don't need the new permit. Instead, most dairies are labeled "nonpoint source" because they recycle their discharges -- namely manure -- by spraying it on crops through irrigation systems. Applied at rates the plants can use, the contaminants in the manure, mostly nitrates, theoretically don't have a chance to reach groundwater. But at least one study carried out in 2002 showed that 20 percent of the wells in unincorporated areas of the Lower Valley contained nitrates in excess of the federal safety limit. With 72 dairies, the Lower Valley has the densest concentration in the state. Tebbutt argued that if groundwater was tested at dairies, the Ecology Department could trace the resulting contamination back up to the source -- thousands of manure-producing cows. "Please send this case back to Ecology and require them to hold this industry accountable for the pollution of the state's waters," Tebbutt concluded in his argument. If their questions were any indication of their opinions of CARE's case, the judges didn't sound convinced that dairies are polluting groundwater. They appeared comfortable that the permit requires periodic soil testing, lagoon inspections and on-site record-keeping to show how manure is being handled. "We don't have anything that says this permit is not going to work," said Judge Marywave Van Deren. Nelson and Ecology Department attorney Sonia Wolfman said soil testing will find contamination before it enters the groundwater, or "before the cat is out of the bag," as Nelson put it. Wolfman also noted that the Ecology Department has the power to order groundwater monitoring, so requiring it in the permit wasn't necessary. But without such testing, Ecology is using a version of the military's "don't ask, don't tell" policy toward homosexuals, Tebbutt said. "This is, 'don't

look, don't find." CARE also wants Ecology to keep records of dairy manure-management plans so the public can determine if those plans are working. At present, the plans are kept on the farms. The public can request the plans through the Open Records Act, but state law requires Ecology to blacken out confidential business information, such as the size of the lagoons and how much manure is produced. Being able to see the "guts" of the plans is necessary for meaningful public participation, Tebbutt argued. But Van Deren saw it another way. "Surely Congress didn't intend for the public to be traipsing out to the farms demanding records," she said. A ruling could come in the next 60 to 90 days.

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