

Some farmers say they can't afford litigation or more regulation

DAIRY from Page 1

'Not if, but when'

Oregon-based environmental lawyer Charlie Tebbutt, the lead attorney for the suing groups, said the ruling foreshadows higher environmental standards for dairies. "The question is, 'When is the industry going to comply? Not if,'" he said.

Seven months after the Cow Palace ruling, the Washington Department of Ecology proposed regulating dairies under the assumption that all manure lagoons discharge pollutants into groundwater.

The implication was that nearly all dairies would have to obtain a confined animal feeding operation permit. Under current Washington law, a CAFO permit is mandatory only if a livestock operation has discharged pollutants into surface water.

Having a permit, theoretically, can be a defense against lawsuits. But it would mean additional expenses, record-keeping and restrictions on spreading manure on farmland.

Farmers statewide responded to DOE's proposal with plaintive comments. "I have read and re-read the verbiage," wrote a dairywoman in Eastern Washington. "I have to say, the first time, I just started crying."

Some farmers say they can't afford litigation or more regulation. The uncertainty and expense would drive them out of business, or they would have to move from Washington.

The stakes are high. Washington has 425 dairies with 277,000 cows that in 2014 produced \$1.6 billion worth of milk, according to the U.S. Department of Agriculture. After apples, milk is the state's most valuable farm commodity.

"It's not that we want to cry 'wolf.' But you can't continue to erode the economic viability of an industry and expect it will stick around. It will eventually die," Appel said.

Bottom line on lagoons

DOE's proposal wasn't a direct response to the Cow Palace case, but it all tied together, and dairy farmers say it felt like a noose.

Many dairy farmers observed that lagoons were pushed on the industry by regulators in the 1990s. Now lagoons were being called leaky sources of pollutants.

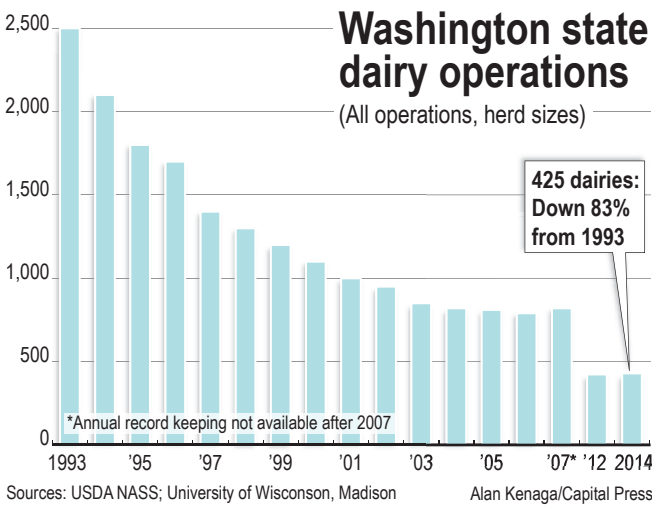
"Is it too hard to understand then that we are not fans of ideas that come out of these government agencies?" a Whatcom County dairyman wrote DOE.

DOE stressed that its proposal was a "tentative draft." It plans to issue a formal proposal sometime next year.



Don Jenkins/Capital Press

Mitch Moorlag, general manager of Edaleen Dairy in Whatcom County, Wash., stands in one of the dairy's barns. Lining manure lagoons with synthetic material wouldn't help the environment or the dairy industry's finances, Moorlag says.



Sources: USDA NASS; University of Wisconsin, Madison

Alan Kenaga/Capital Press

The DOE's tentative proposal was simple: If you have a lagoon, you will need a permit. Dairy farmers saw the proposal as overkill because of insufficient proof that all lagoons leak.

Since then, matters have become more complicated.

DOE still holds to the position that all lagoons discharge pollutants. But it now concedes that in "rare" cases, the pollutants don't reach groundwater.

Where pollutants are likely to reach groundwater, however, dairy farmers probably will be required to obtain a CAFO permit, according to the department's latest thinking.

It may not matter whether the water is actually being polluted.

The discharge of pollutants into groundwater — no matter its impact on water quality — would be enough to trigger the need for a permit.

The manure produces nitrates that naturally occur in surface water and groundwater, though at high levels nitrates can be hazardous to human health, especially for infants and pregnant women, according to the federal Centers for Disease Control and Prevention. Under certain circumstances, nitrates are converted to nitrogen gas through a process known as denitrification.

The dairy industry contends that because of these natural processes the manure seeping from clay-lined lagoons large-

ly do not pose a threat to water quality.

That position is supported by the King County Department of Natural Resources.

"To date, King County's regular water quality testing has not identified significant water quality problems associated with dairies," the department wrote to DOE.

King County officials disagreed with the assumption that lagoons pollute groundwater. "Such unproven assumptions could lead to expensive fixes or retrofits for dairies that may be neither necessary nor effective."

Environmental groups are pushing in the opposite direction, calling for clay-lined lagoons to be replaced by lagoons lined with two synthetic layers with a leak detector between the layers.

The linings are used by municipal landfills, but are unknown to the agricultural industry.

Expensive proposal

In the wake of the Cow Palace ruling, Washington State University professor Joe Harrison, of the school's livestock nutrient management program, was asked to make a presentation on synthetic liners at a regional conference hosted by the EPA.

He sent an email to colleagues nationwide asking about double-lined lagoons and didn't get a single response.

Based on talking with ge-

otextile companies and a few dairies with single-lined lagoons, Harrison estimated double-lining lagoons would cost \$339 a cow for materials and installation. Getting the lagoon ready — engineering, manure removal, dirt work — could add another \$300 per cow, based on the experience of one dairy.

Dairy farmers recoil at the expense, especially since they won't be able to show lenders how the liners will increase revenue.

"It's just coming right off the bottom line," said Mitch Moorlag, general manager of Edaleen Dairy in Whatcom County.

The Natural Resources Conservation Service, which sets lagoon standards, favors clay-lined lagoons.

The Cow Palace has agreed to install synthetic liners, but, in comments sent to DOE, NRCS said the court ruling didn't change its advice to farmers. NRCS warned that synthetic liners can be worn or torn, leading to manure releases worse than any seepage through clay liners.

Fertilizer to waste

It's unclear how far-reaching the Cow Palace case will be, which puts dairy farmers on edge.

U.S. District Judge Thomas O. Rice based his ruling on the conditions at an 11,000-cow dairy, which produces 100 million gallons of manure a year. Rice found the dairy had become "untethered" from its state-approved dairy nutrient management plan. In one instance, the dairy spread 7.6 million gallons of manure on an already sufficiently fertilized alfalfa field, according to Rice's written decision.

Rice reasoned that once excess manure nutrients sank below plant roots, they are no longer a useful product, fertilizer. At that point, the nutrients become a discarded solid waste and subject to the Resource Conservation and Recovery Act. For the first time, the nation's fundamental law against dumping hazardous

garbage was applied to uncontained cow manure.

The ruling was not a sweeping condemnation of spreading manure on fields or storing it in lagoons. But it was a warning that dairies may have to account for where every bit of manure ends up.

The Cow Palace case makes dairy farmers nervous, particularly in Whatcom County, which has about a quarter of the state's dairies and has drawn Tebbutt's attention.

The Washington State Department of Agriculture levied a total of eight fines against dairies for discharging pollution in 2013 and 2014. Seven violations were in Whatcom County.

"The farmers in Whatcom County area have had a lot of problems for a lot of years," Tebbutt said. "We don't want to litigate. But the only way action happens is when we have a seat at the table."

In Yakima County, Tebbutt represented a local group, the Community Association for the Restoration of the Environment, and the Washington, D.C.-based Center for Food Safety. The suit originally named five dairies. One closed and two consolidated ownership, leaving Cow Palace, Bosma-Liberty Dairy, and George DeRuyter and Son Dairy.

Rice issued his ruling to address several pre-trial motions. The ruling tilted the case in favor of the suing groups, and the dairies agreed to operational changes in an out-of-court settlement.

At the very least, the Cow Palace case has created uncertainty, Washington State Dairy Federation policy director Jay Gordon said. "There's a whole new federal statute that's been applied to dairies. Everybody is going, 'What if this gets applied to my farm? What are the rules?'"

Farmers in 'crisis mode'

Gerald Baron's background in public relations includes representing businesses faced with "organization-threatening events." He's written a book about emergency communications in the age of instant news and social media.

He's now the executive director of Whatcom Family Farms, an offshoot of the county's dairy federation formed this year with irrigation districts and other farmers. The group's message is that farmers are responsible land stewards in perilous times.

"I would say 'crisis mode' is an accurate description," Baron said.

In Yakima, groundwater pollution was a problem. In Whatcom County, the Nooksack River flushes fecal coliform bacteria onto Lummi Nation shellfish beds in Portage Bay. Fecal coliform lives in the

digestive tracts of warm-blooded creatures, including humans, and is excreted in feces.

A report by a county-level advisory group last year said the water flowing past upstream farms is cleaner than in the 1990s. There are fewer dairies, and the state's 1998 Dairy Nutrient Management Act improved how farmers handle manure, according to the report.

However, pollution from many sources continues to contaminate shellfish beds. Baron said the county's dairy farmers are braced for a lawsuit.

In a recent newspaper commentary, the chairman of the Lummi Indian Business Council, Tim Ballew II, said agricultural producers should not seek to defeat or weaken DOE's proposal. Efforts to obtain further comment from the tribe were not successful.

In an interview, Tebbutt was noncommittal about whether farmers can expect a lawsuit. But he said the dairy industry has been "all talk and no action."

"Is it fair they pollute in order to profit?" he asked. "Are you allowed to pollute at the expense of your neighbor? The answer is 'no.'"

Whatcom Family Farmers contend that water running past their farms is already tainted by a fast-growing area across the border in Canada.

The water passes dairies and picks up more pollution in urban areas, according to the group. Whatcom Family Farmers warn that targeting dairies will lead to farms being converted into subdivisions. That will lead to more septic tanks and hobby farms and to greater use of lawn fertilizers.

"The point is, it's a complex picture," Baron said. "All the fingers have been pointing at them (farmers). ... What we're saying is, 'We're not the primary contributor.'"

DOE has not identified the pollution's main source, agency spokeswoman Krista Kenner said. "We are looking at all of them."

Dairies in Yakima County also argued they shouldn't be singled out for the region's groundwater troubles. Judge Rice ruled that wasn't the issue. Dairies were a "meaningful" contributor to pollution, but plaintiffs didn't have to prove they were the primary polluters. The plaintiffs could pick their target.

Rice also ruled that while experts may disagree about how much manure seeps from lagoons, the important point is that fluids move through permeable substances. The judge reasoned that the pollution will reach groundwater.

The dairy argued that it might take decades, if ever, for that to happen. Rice said he wasn't going to wait for people to get sick.

Bill receives cool reaction from proponents of Klamath agreements

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Congress' inaction

Bills to authorize removal of the dams have languished in Congress since 2011. Rep. Greg Walden, R-Ore., a longtime opponent of dam removal, unveiled an eleventh-hour draft bill on Dec. 3 to move forward on other aspects of the agreements while putting approval of dam removal in the lap of the Federal Energy Regulatory Commission.

Walden's bill won praise from Rep. Rob Bishop, R-Utah, chairman of the House Natural Resources Committee, who said proposed federal land transfers to the Klamath Tribes in exchange for waiving senior water rights "are ideas I could strongly support in order to move forward."

However, the bill received a cool reaction from proponents of the Klamath agreements, who have warned that water-sharing components of the pacts could crumble if Congress doesn't authorize the package — including dam removal — before the end of the year.

So far, no efforts have been made to merge Walden's bill with one by Sen. Ron Wyden, D-Ore., which includes dam removal but has failed to advance beyond the upper chamber's Energy and Natural Resources Committee. And lawmakers don't appear to be in any hurry to get a bill passed.

"We had hoped people would agree to remain at the table" into

2016, Walden spokesman Andrew Malcolm said. "We're hoping that what will work for people on Dec. 31 will still work on Jan. 1 or Jan. 2."

House Speaker Paul Ryan's office did not return a call from the Capital Press seeking comment about a timeline for moving Walden's bill forward.

The 42 signatories of the pacts that included the dam removals as well as water-sharing and numerous conservation efforts in the basin already renewed the agreements once, in late 2012. However, looming deadlines lend more of a sense of urgency this time, proponents say.

"I think this time is different," said Glen Spain, northwest regional director for the Pacific Coast Federation of Fishermen's Associations. "We're a short period of time ... from deadlines when this is all supposed to happen. We've done everything that's been required in this, including finding non-federal money for dam removal."

Contingency plans

Already, regulatory agencies are resuming the task of reviewing PacifiCorp's dam-relicensing application, which the company has estimated would cost at least \$300 million and leave the company exposed to other costs from litigation and added water quality regulations. Under the Klamath Hydroelectric Settlement Agreement, the cost to PacifiCorp's ratepayers

would be capped at \$200 million.

Trust funds from surcharges to PacifiCorp customers for dam removal have amassed more than \$100 million, which will either be refunded or used to meet relicensing conditions if the Klamath agreements die, Gravely said.

The Karuk Tribe and other proponents of removing the dams have vowed to urge the state water boards to deny PacifiCorp's relicensing applications under the Clean Water Act, which would force the dams to be removed anyway. But such a denial would be unprecedented, Gravely said.

Meanwhile, local opposition to dam removal has become more entrenched in the Klamath Basin as opponents have been elected to majorities on the Klamath County Board of Commissioners and several irrigation district boards.

"I'd like more time," said Addington, whose KWUA represents irrigation districts in the Klamath Reclamation Project. "I, for one, and my organization would say we want to salvage this thing, and we'd be ready to have a conversation about that. But the Yurok Tribe has made it clear that it wants to move in a different direction ... and the Klamath Tribes have made a similar statement."

"I just think we risk a harder-line element saying collaboration didn't work" if the parties try to keep the agreements together, he said.

Looming crises

Without the water pacts in place, growers in the Upper Klamath Basin could face another water crisis this spring like the one they encountered in 2013, when a total shutoff of irrigation water prompted landowners to begrudgingly work out their own water-sharing agreement with the tribes that was also contingent on the dams being removed.

While project irrigators have a stipulated settlement with the tribes that will remain even if the KBRA dies, the lack of an agreement could put more pressure on those growers' water supplies, too, as more water for fish is sought under the Endangered Species Act, Addington said.

As to whether any future agreement could be salvaged from the wreckage, Addington said he's unsure.

"Either ... the KBRA is going to be a footnote in the interesting history of water in the Klamath Basin, or it'll be the next step to something bigger," Addington said. "I think it's too early to say."

"I hate football analogies, but I feel like we got to the goal line and were just not able to punch it in," he said. "We've got a House bill out there and a Senate bill out there ... I just wish the folks in Congress would do what all the parties did, which is to lock themselves in a room and get it done. It's the season of miracles, so who knows?"

APHIS authorized 572 crop field trials in 2014

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Consumers in many Asian nations are leery of genetically engineered food, however, and Japan and Korea temporarily suspended wheat purchases after the GE wheat was discovered in Oregon.

The new APHIS permit requirement probably wouldn't have made a difference in the Oregon case, however, and perhaps not in Montana. Monsanto field-tested a "Roundup Ready" wheat variety in 16 states, including Oregon, from 1998 to 2005, but the Oregon field where it was found was not one of the test sites. The Montana field was approved for GE wheat testing from 2000-2003, but the glyphosate-resistant volunteers weren't identified until 2014. Monsanto withdrew its application to have the GE variety approved in 2005.

APHIS said it authorized 572 crop field trials in 2014, 21 of them for wheat. Of those, authorizations went to six companies, four universities and to USDA.

Mallory-Smith, the OSU weed scientist, said growers are undoubtedly interested in glyphosate resistance in addition to traits such as disease resistance and drought tolerance. GE wheat is likely to be deregulated "sooner or later," she said.