

**IN THE STATE OF OREGON
BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY & DEPARTMENT
OF AGRICULTURE**

FARMERS AGAINST FOSTER FARMS;
WILLAMETTE RIVERKEEPER;
FRIENDS OF FAMILY FARMERS;
HUMANE VOTERS OREGON; CENTER
FOR FOOD SAFETY; FOOD & WATER
WATCH; ANIMAL LEGAL DEFENSE
FUND; AND CENTER FOR BIOLOGICAL
DIVERSITY,

Petitioners,

v.

OREGON DEPARTMENT OF
ENVIRONMENTAL QUALITY; AND
OREGON DEPARTMENT OF
AGRICULTURE,

Respondents.

**Registration to the Water Pollution
Control Facilities (WPCF) General
Permit No. 01-2015 for ATR#995343**

**PETITION FOR
RECONSIDERATION**

Farmers Against Foster Farms, Willamette Riverkeeper, Friends of Family Farmers, Humane Voters Oregon, Center for Food Safety, Food & Water Watch, Animal Legal Defense Fund, and Center for Biological Diversity (collectively, Petitioners) hereby petition the Oregon Department of Environmental Quality (DEQ) and the Oregon Department of Agriculture (ODA) (collectively, the Agencies) to review and reconsider the issuance, requirements, and conditions of the Registration to the Water Pollution Control Facilities (WPCF) General Permit No. 01-2015 for ATR#995343 (J-S Ranch Permit), a final agency order in other than a contested case. This Petition for Reconsideration is brought pursuant to ORS 183.480, ORS 183.484, and OAR 137-004-0080 (“A person entitled to judicial review under ORS 183.484 of a final order in other than a contested case may file a petition for reconsideration of a final order in other than a contested case with the agency within 60 calendar days after the date of the order.”). *See also* ORS 183.341; OAR 340-011-0009.

**PETITION FOR RECONSIDERATION
GENERAL PERMIT NO. 01-2015 FOR ATR#995343**

The Agencies issued the J-S Ranch Permit to Eric Simon on May 26, 2022, and it will become effective when several conditions are met.¹ The permit authorizes J-S Ranch to operate a concentrated animal feeding operation (CAFO) to raise nearly 3.5 million broiler chickens per year in the highly sensitive and special area of the Wiseman Island reach in the North Santiam River. The permit further authorizes J-S Ranch to collect, store, and export massive quantities of livestock waste in the form of chicken litter.

Petitioners request reconsideration and a stay because the J-S Ranch Permit is inconsistent with state and federal laws, regulations, and standards designed to protect water quality and beneficial uses. Petitioners retain the right to request judicial review pursuant to ORS 183.484.

Petitioners allege as follows:

PARTIES

1. Petitioner Farmers Against Foster Farms is an organization of farmers and ranchers that has formed to protect their community against the negative impact that Foster Farms mega chicken operations will have on the local water, air, and livability of their rural area.

2. Petitioner Willamette Riverkeeper (WR) is an Oregon 501(c)(3) non-profit organization with thousands of members in Oregon and the Pacific Northwest. WR focuses on protecting and restoring the water quality and habitat of the Willamette River and its tributaries. WR works on programs and projects ranging from Clean Water Act compliance and river education to Superfund and basin-wide cleanup and habitat restoration. Since its founding, WR has been a strong advocate for public access to the Willamette River, and for its waters to be clean, safe, and healthy for drinking water supply, wildlife, and recreation.

3. Petitioner Friends of Family Farmers is an Oregon 501(c)(3) non-profit organization that advocates for policies, programs, and regulations that protect and expand the ability of Oregon's family farmers to run successful land-based enterprises while providing safe and nutritious food. Friends of Family Farmers supports socially and

¹ All permit documents are posted at: <https://www.oregon.gov/oda/programs/NaturalResources/Pages/PoultryCAFOs.aspx>. Cited documents are also provided as Exhibits. *See* Appendix.

environmentally responsible family-scale agriculture and works with both farmers and consumers to shape healthy rural and urban communities.

4. Petitioner Humane Voters Oregon is a non-profit Oregon corporation formed in 2014 to help advocate for animal welfare in Oregon. Humane Oregon has participated in commenting on the proposed chicken CAFO.

5. Petitioner Center for Food Safety (CFS) is national, non-profit 501(c)(3) organization with nearly one million members and supporters nationally and tens of thousands in Oregon. CFS's mission is to empower people, support farmers, and protect the environment from industrial agriculture. CFS promotes truly sustainable and regenerative agriculture, like organic and ecological farming. For 25 years, CFS has furthered this mission through legal actions, groundbreaking scientific and policy reports, books and other educational materials, and market pressure and grassroots campaigns through our True Food Network. CFS has an office in Oregon and has worked for years on Pacific Northwest issues, including factory farming, genetically engineered crops, and organic integrity, among other issues. CFS members in Oregon live, farm, and recreate in the Willamette Valley and in and around the area that will be impacted by the J-S Ranch.

6. Petitioner Food & Water Watch (FWW) is a national 501(c)(3) non-profit organization with thousands of members and several staff in Oregon. FWW uses research, organizing, policy advocacy, communication, and litigation to fight for safe food, clean water, and a livable climate. Banning factory farms is one of FWW's primary campaigns. FWW has significant expertise on the CAFO industry and CAFO regulation, both nationally and in Oregon, and routinely comments on NPDES and other water discharge permits for CAFOs and other sources of water pollution.

7. Petitioner Animal Legal Defense Fund (ALDF) is a national non-profit organization headquartered in Cotati, California, with more than 200,000 members and supporters, 2,784 of whom live in Oregon. ALDF pursues its purpose of safeguarding animal welfare by persistently advocating for the protection of animals used and sold in commercial enterprises, including agriculture and agribusiness. ALDF frequently focuses on pollution to the environment caused by the inhumane confinement of farmed animals and has expended significant organizational resources on advocacy and public education

**PETITION FOR RECONSIDERATION
GENERAL PERMIT NO. 01-2015 FOR ATR#995343**

efforts to improve environmental and animal welfare conditions for animals confined in CAFOs like the facility at issue here. ALDF has an organizational interest in ensuring that the Agencies' implementation of state water protection laws and the Clean Water Act (CWA) thoroughly accounts for the environmental, animal welfare, and human health risks posed by J-S Ranch. Moreover, ALDF's members have an aesthetic interest in keeping the areas where they live and farm free from water pollution, antibiotic contamination, and unnecessary animal suffering.

8. Petitioner Center for Biological Diversity (CBD) is a national, non-profit organization with more than 1.7 million members and supporters, including over 30,000 in Oregon, dedicated to the protection of native species and their habitats through science, policy, and environmental law. Maintaining a large office in Oregon, CBD is concerned about the fate of imperiled species and the increasing rate of extinction and loss of biological diversity in the United States, including the rich diversity of the North Santiam River system that includes sensitive species like the willow flycatcher, northern red-legged frog, rainbow trout, cutthroat trout, and federally threatened Chinook salmon, steelhead, and northern spotted owls. To further this objective, CBD has designed programs and campaigns to address the plight of imperiled species in this country, including from the impacts of agriculture—and animal agriculture in particular—on biodiversity, public health, and sustainable food systems. Through its efforts, CBD has developed outreach, education, and policy materials on the negative effects of industrial agricultural systems on our environment, including because of pesticide use, greenhouse gas emissions, pollution from animal waste, and overuse of water resources.

9. Petitioners are adversely affected and aggrieved by the Agencies' issuance of the J-S Ranch Permit because the permit violates state and federal statutes and regulations, including requirements designed to protect clean water for community and wildlife uses. For the reasons explained below, the J-S Ranch Permit will negatively affect the Petitioners' interests because the permit fails to protect ground and surface water quality.

10. The J-S Ranch Permit will cause numerous adverse effects to Petitioners, who are comprised of non-profit organizations that are organized for the purpose of

**PETITION FOR RECONSIDERATION
GENERAL PERMIT NO. 01-2015 FOR ATR#995343**

protecting vital rural communities, sustainable agriculture, water quality, healthy ecosystems, species diversity, public health, food safety, and animal welfare. Petitioners' members live, farm, work, and recreate in the Scio, Linn County, and greater Willamette Valley area, and in the North Santiam River and Willamette River Basin. All Petitioners share the goal of ensuring that any permit issued to a CAFO facility in Oregon complies with state and federal laws, and protects water quality, environmental health, communities, and native species, all of which rely on a safe and livable environment. In failing to comply with state and federal water protection laws, the J-S Ranch Permit adversely affects the ability of Petitioners to achieve these goals.

BACKGROUND FACTS

11. J-S Ranch, Inc. proposes producing nearly 3.5 million broiler chickens a year for mega poultry company Foster Farms. Foster Farms distributes poultry products throughout the U.S. and internationally. The proposed CAFO is located at 37225 Jefferson-Scio Dr. in Scio, Oregon, 97374. Eric Simon, owner/operator, plans to house up to 580,000 broiler chickens per flock, and produce approximately 4,500 tons of manure/litter per year. J-S Ranch ATR, Exhibit F at 5.

12. Simon applied for a WPCF permit in 2020. The Agencies held a public comment period, ending on October 25, 2021, and held a public hearing on October 20, 2021. Petitioners submitted comments (Exhibit A) and attended the public hearing. The Agencies conditionally granted the permit on May 26, 2022. *See* ODA Notice of Permit Registration Modification #2231032 (Exhibit D). Before construction, the following conditions must be met:

- a. Follow ODA approved AWMP#21002 and the additional monitoring, reporting and recordkeeping listed in order on Notice of Permit Registration Modification #2231032.
- b. Prior to starting construction, permittee must obtain a DEQ 1200-C Construction Stormwater Permit and provide a copy to ODA.
- c. Prior to starting construction, permittee must obtain a Linn County Road Access Permit and provide a copy to ODA.

**PETITION FOR RECONSIDERATION
GENERAL PERMIT NO. 01-2015 FOR ATR#995343**

- d. Prior to starting construction permittee must submit a copy of the site plan that was submitted to DEQ for the 1200-C Construction Stormwater Permit. ODA will include that site plan in the AWMP # 21002. Permittee must update his copy of the AWMP #21002 with the DEQ approved site plan.

13. A WPCF Permit only covers discharges to groundwater of the state, despite Petitioners' comments urging the Agencies to consider this as a surface and groundwater discharge permit or National Pollutant Discharge Elimination System (NPDES) permit under the Clean Water Act (CWA). While the general WPCF permit prohibits J-S Ranch from discharging litter, compost, or process wastewater to any surface waters in violation of S2.A1, there is grave concern for J-S Ranch's ability to comply with this condition based on the climate, weather, and topography of the area, as well as the proximity to the North Santiam River. Ex. A at 3, 5-8, 15-21. This includes aerial deposition of ammonia from chicken barn fans into the river, and runoff of contaminated stormwater.

14. The Agencies did not issue an individual permit (as Petitioners' urged, Ex. A at 3, 23, 29), but did condition the general permit authorization as follows:

- a. All poultry barn floors must meet a soil compaction standard of at least 1.0×10^{-5} cm/sec permeability with in-place compaction tests, to be recertified every ten years;
- b. Conduct semi-annual drinking water well surveillance monitoring for nitrate-nitrogen for each drinking water well on the property;
- c. Install at least two static ground water monitoring level wells with monthly monitoring for 2-foot separation from high water level and compacted floor of chicken buildings.

REQUEST FOR STAY

15. Pursuant to OAR 137-004-0080(3), Petitioners request the Agencies stay the final order pending the determination on this petition for reconsideration. The petition satisfies the criteria for a stay, as set out in OAR 137-004-0090(2):

**PETITION FOR RECONSIDERATION
GENERAL PERMIT NO. 01-2015 FOR ATR#995343**

- (a) The names, addresses and telephone numbers of the persons filing the request are provided at the end of this petition for reconsideration;
- (b) The agency decision is in writing, titled “Registration to the Water Pollution Control Facilities (WPCF) General Permit No. 01-2015 for ATR#995343,” issued May 25, 2022 (Exhibit C), and “Notice of Permit Registration Modification #2231032” issued May 26, 2022 (Exhibit D);
- (c) The Agencies’ final order authorizes J-S Ranch, a Tier II Large broiler chicken CAFO, to discharge pollutants to waters of the state in accordance with the terms of its final registration to the WPCF, CAFO General Permit No. 01-2015;
- (d) The name, address, and telephone number of each party to the agency proceeding are provided herein:
 - a. Eric Simon, dba J-S Ranch, 34905 Ranch Dr. Brownsville, OR 97327;
- (e) All persons listed in (d) may participate in the stay proceeding before the Agencies if they file a response in accordance with OAR 137-004-0095 within ten calendar days from delivery or mailing of the stay request to the agency;
- (f) The Agencies should grant the stay request for the following reasons:
 - a. Petitioners will suffer irreparable injury if the order is not stayed. As described in paragraphs 1 through 9 and throughout this petition, Petitioners have invested significant resources in ensuring that Oregon properly administers its CAFO permit program and that CAFOs do not discharge pollution into ground or surface water, harm public health, damage habitat or imperil wildlife, or otherwise run afoul of state or federal law. Petitioners have thousands of members in Oregon who are concerned about J-S Ranch’s potential to harm water quality if the Agencies do not reconsider the order and instead allow the facility to begin feeding and storing and disposing of the waste generated by 3.5 million chickens per year. Particularly, Petitioner FAFF has members who farm and live next to the proposed facility, whose property, livelihoods, and enjoyment of the North Santiam River will be irreparably harmed should the CAFO be built and operated. Because the Agencies

**PETITION FOR RECONSIDERATION
GENERAL PERMIT NO. 01-2015 FOR ATR#995343**

assume no discharge to the North Santiam River, they failed to consider this permit as a NPDES permit, or to issue an individual permit. However, based on the regional climate, topography, and hydrology of the site, as well as its proximity to the North Santiam River and Willamette River Basin, it is extremely likely that there will be discharges of biological and other pollutants from livestock waste production to waters of the United States. The stretch of the North Santiam at issue is a special and nearly pristine area, which provides crucial habitat to numerous sensitive species, including federally-listed Chinook salmon and steelhead, and is enjoyed by Petitioners' members. Once the facility begins operating pursuant to its WPCF permit, it will have authority to engage in practices that Petitioners allege will lead to violations of state and federal law and threaten to contaminate ground and surface waters. Such pollution would constitute irreparable harm.

- b. Petitioners have made a colorable claim of error in the order. As explained herein, there are several grounds for reconsideration of the permit, based in state and federal law. The issuance of the order, which finalizes a permit that petitioners allege does not comply with state and federal law, was in error.
- c. Granting the stay will not result in substantial public harm. To the contrary, it will not result in any public harm, and may result in public benefit by preventing the operation of a Tier II Large CAFO that will generate and dispose of incredible amounts of waste containing pathogens, pharmaceuticals, heavy metals, and nitrates, all of which threaten public health and welfare. This threat includes the spread of zoonotic diseases, like avian flu, which has already spread to humans and can spread to wild birds, like owls.²

² Rina Torchinsky, *The first human case of avian flu in the U.S. is reported in Colorado*, NPR (Apr. 29, 2022), <https://www.npr.org/2022/04/29/1095474268/first-us-avian-flu-human-colorado#:~:text=The%20first%20human%20case%20of,U.S.%20is%20reported%20in%20Co>

- d. While Mr. Simon is not entitled to immediately begin construction due to the conditions imposed on the permit registration, those additional requirements could be met any day and without a stay pending the Agencies' reconsideration, Petitioners are left unprotected if the additional conditions are met quickly.
- (g) If the stay is granted, Eric Simon, the operator of the facility and permit applicant, may suffer economic injury due to a delay in receipt of the WPCF permit for J-S Ranch. However, given the additional permits required by the conditional registration, he is not immediately entitled to begin construction. Petitioners are not aware of any other persons who may suffer injury if the stay is granted.
- (h) Petitioners are not aware of other procedures the Agencies should follow in evaluating this petition for reconsideration.
- (i) Petitioners attach to this petition for reconsideration “[a]n appendix containing evidence relied upon in support of the statement required under subsections (2)(f) and (g)” of OAR 137-004-0090.

GROUNDS FOR RECONSIDERATION

16. Pursuant to state and federal laws, the State of Oregon is legally required to protect water quality by preventing the discharge of animal waste to waters of the State, including groundwater. ORS 468B.200; OAR 340-051-0010(8); 33 U.S.C. § 1311(a). The WPCF General Permit covers only groundwaters of the state. CAFO WPCF General Permit #01-2015 (Exp. Date Sept. 30, 2025).

17. The Clean Water Act prohibits the discharge of pollutants into waters of the United States, except when in compliance with a NPDES permit. 33 U.S.C. § 1251 et seq.

lorado&text=Charlie%20Neibergall%2FAP-
,A%20Colorado%20inmate%20involved%20in%20the%20culling%20of%20poultry%20at,flu
%20in%20the%20United%20States.

**PETITION FOR RECONSIDERATION
GENERAL PERMIT NO. 01-2015 FOR ATR#995343**

“Discharge of a pollutant” is defined as any addition of any pollutant to navigable waters from any point source. 33 U.S.C. § 1362(12). There is no question that this facility qualifies as a point source, as CAFOs fall squarely within the definition of point source. Or. Admin. R. 340-045-0005(17). The Santiam River, the body of water adjacent to this proposed facility, is a navigable water. See Or. Admin. R. 340-045-0005(14).

18. In compliance with these limitations, the state may also issue a permit to a CAFO if the operation can establish that it will not discharge or propose to discharge pollutants to waters of the state and U.S., except in very limited circumstances. ORS 468B.050; OAR 340-051-0010; OAR 603-074-0010; *see also* 33 U.S.C. § 1342(a)(1); 40 C.F.R. §§ 122.23, 122.42, 412.

19. Indeed, Congress specifically included “concentrated animal feeding operations” in the CWA’s definition of “point source,” demonstrating an unambiguous intent to control and continuously reduce discharges of pollution from CAFOs through the NPDES program. 33 U.S.C. § 1362(14). The importance of strong and consistent implementation of the NPDES permitting program to water quality, both within the state and nationally, cannot be overstated. *Northwest Env’tl. Def. Ctr. v. Grabhorn, Inc.*, 2009 U.S. Dist. LEXIS 101359, *9 (D. Or. 2009) (“The NPDES permitting scheme is the primary means by which discharges of pollutants are controlled.”).

20. Concerned members of the public, including but not limited to Petitioners, filed comments on the J-S Ranch permit. ODA received a total of 130 comments, the vast majority of which were opposed to the permit. ODA Resp. to Comments at 1. Many Petitioners submitted joint written comments on the permit to the Agencies on October 25, 2021 (Exhibit A) and participated in the Public Hearing on October 20, 2021. While ODA provided a written response to public comment at the time the permit was issued, the terms of the final J-S Ranch Permit—and the Agencies’ decision to issue a general WPCF registration and not an individual NPDES permit—do not address many of the issues raised by Petitioners. In general, Petitioners allege that the Agencies have not adequately addressed many of the legal deficiencies detailed in their public comments.

21. Specifically, the J-S Ranch Permit fails to meet the following requirements of state and federal water quality laws:

**PETITION FOR RECONSIDERATION
GENERAL PERMIT NO. 01-2015 FOR ATR#995343**

I. The J-S Ranch Permit Fails to Prevent Pollution to Waters of the State.

A. Groundwater Contamination

The Agencies acknowledge the potential for groundwater contamination by this Large CAFO and thus added enhanced conditions to the general permit. However, these conditions do not go far enough to protect groundwater given the hydrology of the area.

First, the permit imposes no groundwater monitoring for pollutant discharge to ensure compliance with the effluent limitations set in the Permit. As Petitioners commented, the J-S Ranch seeks to (1) be located in a floodplain, (2) extremely close to wetlands, (3) operate 11 barns with only 4 inches of compacted native soil as a base (as opposed to any kind of impermeable protection) and will scrape and clean out the barns regularly, (4) operate a stockpile, (5) operate more than one manure shed where all waste and mortalities will be composted, (6) construct a storm water detention pond, (7) generate significant storm water, and (8) to locate its operation all on top of established accumulation flow lines. Ex. A at 3. It is highly likely that under these circumstances there will be some discharge to groundwater. Under the groundwater rules, at a minimum a groundwater monitoring plan must be in place and there must be concentration limits. OAR 340-040-0030(2)(a)-(3). ODA requires only drinking water wells (if there *are* any wells on the property) to be tested for nitrate and E.coli, and only annually. While this type of testing is beneficial for those drinking water on the site (*i.e.*, workers), it does not indicate whether the groundwater—a mere 1-2 feet below the chicken barns—is being contaminated past the effluent limitations. Monitoring is essential for compliance and without monitoring there is no way to ensure that this facility is in fact complying with the effluent limitations.

Second, Petitioners commented that unlined, compacted native soil earthen floors were not sufficient to ensure that pollutants from the chicken waste do not reach groundwaters, given the overall wetness of the area and high groundwater levels. Ex. A at 22-23. ODA only required 4 inches of compacted soil and no impermeable floor covering, while other states require at least 12 inches of compacted soil in similar situations. *Id.* Further, while ODA claims that the elevation of the finished compacted floors will “always be above the existing ground level outside of the barns,” ODA Response to Comments at 11,

Exhibit B, ODA provides no reference to any enforceable permit condition that requires this, or any analysis of how much higher than the ground level floors must be in that area to avoid stormwater contact that could then impact both surface and groundwaters.

Third, while ODA added the enhanced condition of groundwater monitoring for the *level* of groundwater, it required only two monitors: one up and one down gradient of the location. Permit Modification #2231032, Exhibit D. ODA does not explain how two wells are sufficient to ensure that groundwater, measured as close to the surface as 1-2 feet, is not impacted by 11 barns holding over half a million birds at a time. Ex. A at 3 (1200-C permit application discloses that groundwater depth is 12.2-25 inches). ODA claims that groundwater will stay at least 2 feet below the earthen floors covered in chicken litter but fails to explain how this is possible at this site.

Finally, the Permit does not properly account for stormwater. While J-S Ranch applied for (and has yet to receive) a 1200-C permit for stormwater during construction, the Agencies must ensure that stormwater during *operation* is properly accounted for to prevent contamination of surface and groundwater. Ex. A at 18-21. Channeling stormwater to an unlined retention pond, or worse, directly towards the Santiam River, is not acceptable.

B. Surface Water Contamination

1. Aerial Deposition.

J-S Ranch will discharge nitrogen pollution to surface waters via deposition from its substantial ammonia emissions. Indeed, it may discharge between about 850 and 1,190 pounds of ammonia *per day* from its 566,400-bird flock, or at least 357,000 pounds per year with six flocks each held for 50 days. *See Ammonia Emissions Estimator (Daily Version)*, Exhibit J.³ In its response to comments, ODA waves away this concern as outside the scope

³ J-S Ranch plans to house 566,400 birds (for 2021) according to its AWMP (Ex. E), with 6 flocks per year (ATR, Ex. F). The AWMP says flocks will be on site for 50 days at a time, meaning birds will be there 300 days out of the year. 1,190 lbs/day times 300 is 357,000 pounds per year, and this number is likely conservative because it does not count any emissions from waste litter when there are no birds on site.

because it is “air pollution” and not related to discharges to ground or surface waters (ODA Response to Comments at 2-3, 20). This completely ignores the very real phenomenon of atmospheric or aerial deposition of ammonia from the fans of chicken barns to surface water, in this case the North Santiam River. Ex. A at 26-28. Because these discharges *are* covered by the federal CWA, the Agencies *must* consider this operation under the NPDES program if they are going to permit it at all. *See* Ex. A at 4-18 (site wholly inappropriate for industrial-scale Large Tier II chicken CAFO).

Indeed, the problem of ammonia nitrogen deposition from CAFO facilities like J-S Ranch to nearby surface waters is well established. Ammonia can travel distances of ½ mile to 6 miles away from the source, and if it converts to PM 2.5 it can travel 100 times further than gaseous ammonia. *See generally* W.H. Asman, *et al.*, Ammonia: emission, atmospheric transport and deposition, 139 *New Phytol.* 27 (1998) (Exhibit G); D. Fowler, *et al.*, The mass budget of atmospheric ammonia in woodland within 1 km of livestock buildings, 102 (S1) *Environ. Pollution* 343-348, 346-47 (1998) (Exhibit H). While ammonia fate and transport is variable, some studies have found that as much as 20 percent of ammonia emitted by CAFOs will deposit nearby. *Id.*; *see also* J.K. Costanza *et al.*, Potential geographic distribution of atmospheric deposition from intensive livestock production in North Carolina, USA, 398 *Science of the Total Env't* 76 (2008) (Exhibit I).

The Agencies do not refute the possibility of water quality degradation due to ammonia deposition. Instead, they merely assert that this waste stream is outside the scope of the permit because the facility is “not located adjacent to surface water and cannot land apply any litter, compost, or mortality compost to any crop field at CAFO site,” ODA Response to Comments at 8, and “there are no state or federal air quality permit requirements for poultry production system farms to control or regulate air emissions of nitrogen,” *Id.* at 20. ODA further claims that there is no issue with surface water impacts here because the “Santiam River is over 1,400 feet to the north of the facility at its closest point. Due to the distance of the facility from surface water sources and the intervening topography, if a direct discharge from the proposed CAFO production area occurred, it is not likely to reach these surface waters.” *Id.* at 9. This cursory explanation ignores pertinent facts (including how far aerial ammonia can travel) and misstates relevant law.

**PETITION FOR RECONSIDERATION
GENERAL PERMIT NO. 01-2015 FOR ATR#995343**

Nitrogen in J-S Ranch's ammonia releases is a pollutant that will be discharged into surface waters from a statutorily defined point source. Specifically, "[d]ischarge of a pollutant" is defined as "[1] any addition of [2] any pollutant [3] to navigable waters [4] from any point source." 33 U.S.C. § 1362(12). The term "pollutant" is defined to include "biological materials," "chemical wastes," and "agricultural waste." *Id.* § 1362(6). Navigable waters are "waters of the United States," *id.* § 1362(7), which includes the North Santiam River and other surface waters around the operation. CAFOs are specifically defined as CWA "point sources," so there is no question that J-S Ranch facility is a point source. *See id.* § 1362(14). Therefore, all four elements that comprise a discharge subject to the NPDES program—(1) the addition of (2) a pollutant (3) to navigable waters (4) from a point source—are present here. As a result, these discharges are subject to regulation under the CWA NPDES permitting program.

Caslaw confirms that ammonia emissions should be considered "additions" within the context of the CWA. In *National Cotton Council of America v. United States Environmental Protection Agency*, the Sixth Circuit considered an EPA rule that established the pesticide residues and excess pesticides, discharged from point sources, as nonpoint source pollutants. 553 F.3d 927, 934 (6th Cir. 2009). Ultimately, the court rejected the rule, establishing that pesticide residues and excess pesticides are additions from a point source. *Id.* at 936-40. The court emphasized the impropriety of "temporally tying the 'addition' (or 'discharge') of the pollutant to the 'point source'["] They reiterated that "the relevant inquiry is whether—but for the point source—the pollutants would have been added to the receiving body of water." *Id.* at 940. (citing *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 103 (2004)). The court concluded "[i]t is clear that but for the application of the pesticide, the pesticide residue and excess pesticide would not be added to the water["] *Id.* Thus, "the pesticide residue and excess pesticide are from a 'point source.'" *Id.*

Additionally, in *No Spray Coal., Inc. v. City of New York*, a federal district court in New York held that the spraying of pesticides over navigable water can constitute an addition of a pollutant. No. 00 Civ. 5395 (GBD), 2005 WL 1354041, *4 (S.D.N.Y., June 8, 2005). According to the court, it did not matter that the pesticide "is initially sprayed into

**PETITION FOR RECONSIDERATION
GENERAL PERMIT NO. 01-2015 FOR ATR#995343**

the air as a fine mist” as long as “the mist descends downward into the water.” *Id.* The court further explained that it “would be unreasonable to distinguish between a sprayer releasing a fine mist pollutant into the atmosphere over the water and a pipe that released the same single flow of pollutant directly into water.” *Id.* That is because polluters would only need “to attach an airborne mist blower or hydraulic sprayer to their pipe to discharge a pollutant over the water in order to escape liability or regulation.” *Id.*

These cases demonstrate that the atmospheric deposition of ammonia from J-S Ranch’s poultry barns is an addition within the confines of the CWA. Just like the pesticides at issue in *National Cotton Council*, but for the J-S Ranch’s CAFO and its industrial fans, the ammonia residue would not be added to the Santiam River. And just like the “fine mist” of pesticides in *No Spray Coalition* that “descends downward into the water,” so too does the ammonia emitted through the J-S Ranch’s CAFO. It does not matter that the ammonia emissions discharged from the point source, the CAFO, may not immediately deposit in the Santiam River as there is no “temporal requirement” in the CWA. *Nat’l Cotton Council*, 553 F.3d at 939.

As Petitioners explained in their comments (Ex. A at 27), a recent case interpreting Maryland law found that a similar definition of pollutant to Oregon’s reaches gaseous substances like ammonia. *See In re Assateague Coastal Trust*, Case No.: 482915-V, slip op. (Md. Cir. Ct., Mar. 11, 2021). ODA minimizes the recent holding in Maryland as “applicable only in Maryland” (ODA Resp. to Comments at 14) and ignores that Oregon’s own definition of pollutant similarly includes gases like ammonia. Ex. A at 27. And as established above, federal caselaw interpreting the federal Clean Water Act have also held that aerial deposition *is* jurisdictional under the CWA, which is very much applicable here.

On reconsideration, if the Agencies still decide to issue the permit, a revised version of that permit should require regulation of ammonia deposition from J-S Ranch. ORS 468B.020 (DEQ shall “requir[e] the use of all available and reasonable methods necessary to achieve the purposes of ORS 468B.015 and to conform to the standards of water quality and purity established under ORS 468B.048”).

**PETITION FOR RECONSIDERATION
GENERAL PERMIT NO. 01-2015 FOR ATR#995343**

2. Discharge to Surface Waters from Groundwaters.

The Agencies claim there is no “nexus” to surface waters from the J-S Ranch operations. ODA Resp. to Comments at 10. However, discharges to jurisdictional surface water via direct hydrologic connection *are* jurisdictional discharges. *See* 66 Fed. Reg. 2960, 3015-18 (Jan. 12, 2001). The Agencies here have issued a WPCF permit that allows discharges to surface water and the fiction that this is a “zero” discharge permit cannot be squared with the climate, hydrology, operational specifics, and proximity of the site to the North Santiam River. *See* Exhibit A.

C. Violation of *Three Basin Rule* and Antidegradation Rule

Given the above-outlined threats to surface waters, this facility should not be permitted under the *Three Basin Rule*, OAR 340-041-0350(1)(c), the CWA antidegradation policy, 33 U.S.C. § 1342(o), or Oregon’s antidegradation policy (OAR 340-041-0004). Ex. A at 7-8.

D. 100% Waste Export Does Not Ensure Water Quality

J-S Ranch will generate approximately 4,500 tons of manure/litter per year and proposes to export 100 percent of the litter as compost, rather than land apply any of this waste. In its response to comments, ODA waves away the concern about water contamination because of the plan to export this waste.

As Petitioners noted during the October 20, 2021, public hearing and in their comments (Ex. A at 3), Petitioners remain very concerned with the 100 percent export model J-S Ranch is proposing for its waste. If Simon is unable to secure contracts for all this litter, then J-S Ranch will be forced to retain the waste or find alternative disposal methods, including land applying it in the Willamette River Basin. In the application, J-S Ranch indicates that the manure storage barn has capacity for 7,111 tons of manure, to be stored for 569 days at a time. At a rate of 4,500 tons per year, the operation will fill that barn to capacity in 1.5 years, but apparently will be holding manure for composting for 569 days at time (longer than 1.5 years). This leaves no wiggle room, as the storage capacity

will be maxed out before export. In addition, J-S Ranch plans to compost its mortalities (J-S Ranch AWMP, Ex. E at 4), which will cause this capacity to be reach even faster. And this plan fails to even estimate the quantity of mortalities, so ODA and the public lack any foundation for how many mortalities are expected and whether there is adequate storage for them.

ODA has not completed Petitioners' request more complete information regarding how the J-S Ranch will in fact export its waste. Further, there are no controls on that waste once it is exported, General WPCF Permit S2.K, leaving open the potential for over-application offsite, including in the Willamette River Basin.

E. If the Agencies Grant Any Permit, it Must be an Individual NPDES Permit

Given the uniqueness of the area, if the Agencies on reconsideration do permit this facility at all, they must take the surface water discharges into account and control them. A WPCF Permit is an inadequate permit in this case. At a minimum, the J-S Ranch must also apply for a NPDES Individual Permit to address surface water discharges to meet the goal of the Clean Water Act and Oregon water protection laws. Controls such as impermeable flooring for the chicken barns, synthetic double liners for any stormwater retention ponds, and requirements for waste management pre- and post-export could all be outlined in an individual permit.

REQUEST FOR RECONSIDERATION

Pursuant to ORS 183.480 and 183.484, Petitioners hereby request that DEQ and ODA stay and reconsider the J-S Ranch Permit as issued and (1) deny the permit in full, or (2) in the alternative, prepare a new draft permit that is consistent with state and federal laws.

DATED: June 9, 2022

/s Amy van Saun

**PETITION FOR RECONSIDERATION
GENERAL PERMIT NO. 01-2015 FOR ATR#995343**

Amy van Saun, OSB No. 155085
 Senior Attorney, Center for Food Safety

Names, Addresses, and Telephone Numbers of Persons Filing the Petition:

Farmers Against Foster Farms c/o Kendra Kimbirauskas 37309 Jefferson Scio Dr. Scio, OR 97374-9545 (503) 997-7438	Willamette Riverkeeper c/o Lindsey Hutchison 403 SE Caruthers St. Portland, OR 97214 (503) 223-6418
Friends of Family Farmers c/o Alice Morrison PO Box 751 Junction City OR 97448 (502) 640-9256	Humane Voters Oregon c/o Brian Posewitz 8598 SE 11 th Ave. Portland, OR 97202 (503) 946-1534
Center for Food Safety c/o Amy van Saun 2009 NE Alberta St. Portland, OR 97211 (971) 271-7372	Food & Water Watch c/o Tarah Heinzen 1616 P St. NW, Suite 300 Washington, D.C. 20036 (202) 683-2457
Animal Legal Defense Fund c/o Cristina Stella 525 East Cotati Ave. Cotati, CA 94931 (414) 405-0538	Center for Biological Diversity c/o Hannah Connor P.O. Box 11374 Portland, OR 97211 (202) 681-1676

APPENDIX

Exhibit	Document
A	Petitioners' Comments to ODA Opposing J-S Ranch, Inc. WPCF Permit Application (Oct. 25, 2021)
B	ODA Response to Public Comments
C	ODA Letter to Eric Simon Re: Registration to the Water Pollution Control Facilities (WPCF) General Permit No. 01-2015for ATR#995343 (May 26, 2022)

**PETITION FOR RECONSIDERATION
 GENERAL PERMIT NO. 01-2015 FOR ATR#995343**

D	ODA Notice of Permit Registration Modification #2231032 (May 26, 2022)
E	J-S Ranch Animal Waste Management Plan (July 2021)
F	J-S Ranch Application to Register to the Oregon CAFO General Permit (Aug. 5, 2020)
G	W.H. Asman, et al., Ammonia: emission, atmospheric transport and deposition, 139 New Phytol. 27 (1998)
H	D. Fowler, et al., The mass budget of atmospheric ammonia in woodland within 1 km of livestock buildings, 102 (S1) Environ. Pollution 343 (1998)
I	J.K. Costanza et al., Potential geographic distribution of atmospheric deposition from intensive livestock production in North Carolina, USA, 398 Science of the Total Env't 76 (2008)
J	Ammonia Emissions Estimator (Daily Version), Rick Stowell and Rick Koelsch, University of Nebraska

**PETITION FOR RECONSIDERATION
GENERAL PERMIT NO. 01-2015 FOR ATR#995343**