

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

**BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

FIVE CORNERS FAMILY
FARMERS,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF ECOLOGY; and
EASTERDAY RANCHES, INC.

Respondents.

PCHB No. 09-106

**FIVE CORNERS FAMILY
FARMERS' REPLY TO
RESPONDENTS' OPPOSITION TO
MOTION FOR STAY**

INTRODUCTION

Appellant, Five Corners Family Farmers, submits this Reply to Respondents' Opposition to Motion for Stay of the Notice of Construction Approval Order No. 09AQ-E314 issued to Easterday Ranches, Inc. on August 25, 2009. In its Opposition to the Motion for Stay, Respondent Ecology argues that this Board should give deference to its decision to allow Easterday to utilize a weaker acceptable source impact level (ASIL) for ammonia. Respondents Easterday Ranches argue that the injuries it will suffer if a stay is granted will outweigh the harm to Appellants if the stay is not granted. In sum, neither of Respondents has

1 provided a legal or factual basis as to why this Board should not grant a stay pending a final
2 adjudication of this matter.

3 In addition to the facts and arguments submitted by Appellants in their Motion for a
4 Stay, dated December 7, 2009, Appellants now submit additional information as to why the
5 Easterday Feedlot permit should be stayed: the project implementation is in violation of the
6 terms of the permit itself. Specifically, Appellants submit evidence that the Easterday Feedlot
7 is violating the terms of its air-quality permit by failing to limit ground disturbance to fourteen
8 (14) acres at any given time, and by failing to cover the disturbed earth with straw mulch. *See*
9 Notice of Construction Permit at page 2; *see also* Exhibit 10 (Declaration of Randy Jones and
10 Exhibit photos 1-3).

11 Appellants have also submitted evidence that Easterday is violating the terms of its
12 Fugitive Dust Control Plan, which was a condition of the air-quality permit. Pursuant to the
13 Fugitive Dust Control Plan, Easterday Ranches agreed to haul water from an off-site source for
14 purposes of controlling dust while constructing the facility. *See* Exhibit 11 (Fugitive Dust
15 Control Plan). Mr. Randy Thompson, a resident of Franklin County, has driven by the
16 Easterday Feedlot on numerous occasions since the beginning of construction, and has never
17 seen a water truck hauling water from a canal off-site as required by the Dust Control Plan.
18 *See* Exhibit 12 (Declaration of Randy Thompson).

19 In addition, Mr. Blaine Dougherty, a long-time resident and dryland wheat farmer from
20 Connell, WA, has flown in an airplane over the Easterday Feedlot construction site and
21 observed an in-ground well feeding an above-ground water-storage tank on the property. Mr.
22 Dougherty also observed water mainlines running from the water tanks directly to a series of
23
24
25
26

1 irrigation hand-lines on the Easterday Feedlot. *See* Exhibit 13 (Declaration of Blaine
2 Dougherty).

3 **ARGUMENT**

4 **A. Ecology’s Decision to Apply the ASIL for Ammonia at 100**
5 **mg/m³ over 24 Hours is Not Entitled to Deference.**

6 Respondent Ecology is correct that if an ambiguous statute falls within the
7 agency’s expertise, the agency’s interpretation of the statute is accorded great weight.
8 Ecology Respondent’s Brief at 4. However, Ecology fails to acknowledge that its
9 expertise is accorded great weight **provided it does not conflict with the underlying**
10 **statute.** *Port of Seattle v. PCHB*, 151 Wash. 2d 568, 587, 90 P.3d 659 (2004)(*quoting*
11 *Pub. Util. Dist. No. 1 of Pend Oreille Cty. v. Depart. of Ecology*, 146 Wash.2d 778,
12 789-790, 51 P.3d 744 (2002)).
13

14 Here, the Washington State Clean Air Act, RCW 70.94, et seq., is the
15 statute at issue. The declared policy of the Clean Air Act states:

16 It is the intent of this chapter to secure and maintain levels of air quality that
17 protect human health and safety, including the most sensitive members of
18 the population, to comply with the requirements of the federal clean air act,
19 to prevent injury to plant, animal life, and property, to foster the comfort
20 and convenience of Washington’s inhabitants, to promote the economic and
21 social development of the state, and to facilitate the enjoyment of the natural
22 attractions of the state.

21 . . .

22 The legislature recognizes that the problems and effects of air pollution
23 cross political boundaries, are frequently regional or interjurisdictional in
24 nature, and are dependent upon the existence of human activity in areas
25 having common topography and weather conditions conducive to the
26 buildup of air contaminants.

26 . . .

1 The legislature further recognizes that air emissions from thousands of small
2 individual sources are major contributors to air pollution in many regions of
3 the state. As the population of a region grows, small sources may contribute
4 an increasing proportion of the region's total air emissions. It is declared to
5 be the policy of the state to achieve significant reductions in emissions from
those small sources whose aggregate emissions constitute a significant
contribution to air pollution in a particular region.

6 RCW 70.94.011

7 Viewing Ecology's permitting decision of the Easterday Feedlot in the
8 context of the goals of the Washington Clean Air Act, Ecology's decision conflicts
9 with the statute.

10 The mere fact that Ecology required Easterday to submit a notice of
11 construction and receive approval for a new source of pollution highlights Ecology's
12 recognition that the Feedlot's pollution could pose a threat to human health and the
13 environment. RCW 70.94.152 (11) states:

14 No person is required to submit a notice of construction or receive approval
15 for a new source that is deemed by the department of ecology or board to
16 have de minimis impact on air quality.

17 RCW 70.94.152 (12) states:

18 For the purposes of this section, "de minimis new sources" means new
19 sources with trivial levels of emissions that do not pose a threat to human
20 health or the environment.

21 Furthermore, Ecology has recognized the health threats associated with
22 exposure to ammonia and hydrogen sulfide. Indeed, as early as November of 2006,
23 Ecology began the rulemaking process to adopt a more stringent standard for
24 ammonia.
25
26

1 It is not credible for either of Respondents to argue that the parties did not
2 know about the standard change when Easterday Ranches approached Ecology about
3 the Feedlot in October of 2008. Nor is it credible for Easterday Ranches to argue that
4 it has been caught off-guard by Appellant’s assertions that the Feedlot is violating the
5 ASIL for ammonia.
6

7 **B. Easterday Has Violated the Terms of Its Air Quality Permit.**

8 Prior to receiving permission from Ecology to operate its Feedlot, Easterday
9 Ranches submitted a notice of construction, a technical support document, and a
10 fugitive dust control plan for construction of the facility. Pursuant to these documents,
11 Easterday agreed to

12 Appellants submit the Declarations of Randy Jones, Randy Thompson and
13 Blaine Dougherty to demonstrate that Easterday Ranches, Inc., has violated the terms
14 of its Air Quality Permit. *See* Exhibits 10, 11, 12 and 13.
15

16 **C. APPELLANTS HAVE DEMONSTRATED HARM AND A
17 LIKELIHOOD OF SUCCESS ON THE MERITS**

18 Appellants have met the requirements for a stay. The law requires that the
19 moving party need only present the Board with justifiable arguments for or against a
20 particular proposition, as Appellants have done here. *Sammamish Plateau Water and
21 Sewer District v. State*, PCHB No. 05-145, at 15 (Order on Stay)(Dec. 20, 2006). The
22 moving party need not “demonstrate it will conclusively win on the merits, but only
23 that there are questions so serious as to make them fair ground for litigation and thus
24 more deliberative investigation.” *Id.*
25

26 In addition to demonstrating likelihood of success on the merits, Appellants

1 have demonstrated that they will suffer irreparable harm if the stay is not granted. If
2 Easterday Ranches is permitted to operate this Feedlot, Appellants will be exposed to
3 high levels of ammonia, hydrogen sulfide, and other particulate matter. They will
4 likely experience strong odors, irritated eyes, headaches, and nausea. The farms and
5 homesteads that they and past generations have worked so hard to build will be
6 significantly devalued. *See* Exhibit 14 (Declaration of Scott Collin).
7

8 DATED this 4th day of January, 2010.

9 Respectfully submitted,

10 s/ Karen S. Lindholdt

11 Karen S. Lindholdt, WSBA #24103
12 Central Pointe Professional Building
13 1020 N. Washington
14 Spokane, WA 99201
15 (509) 744-1100 (tel) / (509) 326-2932 (fax)
16 justice@winning.com
17
18
19
20
21
22
23
24
25
26

