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VIA EMAIL TO: tnorman@agr.wa.gov and others

RE: Petition to amend WAC 16-06-210(29) so as to comply with RCW 42.56.610 and RCW 90.64.190

Dear Ms. Norman,

This letter is submitted in support of the "Petition for Amendment of a State Administrative Rule" (attached), filed on behalf of Citizens for Sustainable Development (Citizens) pursuant to RCW 34.05.330. The petition asks WSDA to fulfill its duties under RCW 42.56.610 and RCW 90.64.190 by amending WAC 16-06-210(29) in the manner described below. This letter lays out some of the many reasons the amendment must be made, and explains what a court is likely to do if YRCAA fails to amend the rule as requested and Citizens is consequently forced to seek relief through litigation.

I. INTRODUCTION / OVERVIEW

The legislature enacted RCW 42.56.610 and RCW 90.64.190 in 2005.¹ Using nearly identical language, each of these statutes require state and local agencies that obtain information regarding any of the five matters enumerated therein to disclose such information, upon request, in "ranges that provide meaningful information to the public."² The statutes read as follows:

¹ RCW 42.56.610 and RCW 90.64.190 were enacted by Substitute Senate Bill 5602 (Ch. 510, Laws of 2005). See Exhibit 1 (at §4 and §5), attached. Initially codified as RCW 42.17.31923, RCW 42.56.610 was recodified by Chapter 209 §16, Laws 2006.

² Both statutes pertain to the Public Records Act (PRA), Ch. 42.56 RCW. RCW 42.56.610 is codified in the PRA itself, and RCW 90.64.190 is located in the "Dairy Nutrient [sic] Management" act (formerly titled "Dairy Waste Management") (despite the change in terminology from "Dairy Waste" to "Dairy Nutrient," there was no change in the physical characteristics of this material: it remains toxic, infectious, untreated sewage rife with antibiotics, hormones, contagious pathogens, and myriad other hazardous materials).

RCW 42.56.610 [emphasis added]: Certain information from dairies and feedlots limited — Rules. The following information in plans, records, and reports *obtained by state and local agencies* from dairies, animal feeding operations, and concentrated animal feeding operations, not required to apply for a national pollutant discharge elimination system permit *is disclosable* only in ranges that *provide meaningful information to the public* while ensuring confidentiality of business information regarding: **(1)** Number of animals; **(2)** volume of livestock nutrients generated; **(3)** number of acres covered by the plan or used for land application of livestock nutrients; **(4)** livestock nutrients transferred to other persons; and **(5)** crop yields. *The department of agriculture shall adopt rules to implement this section in consultation with affected state and local agencies.*

RCW 90.64.190 [Emphasis added]: Information subject to public records disclosure — Rules. This section applies to dairies, AFOs, and CAFOs, not required to apply for a permit. Information in plans, records, and reports *obtained by state and local agencies* from livestock producers under chapter 510, Laws of 2005 regarding **(1)** number of animals; **(2)** volume of livestock nutrients generated; **(3)** number of acres covered by the plan or used for land application of livestock nutrients; **(4)** livestock nutrients transferred to other persons; and **(5)** crop yields *shall be disclosable* in response to a request for public records under chapter 42.56 RCW only in ranges that *provide meaningful information to the public* while ensuring confidentiality of business information. *The department of agriculture shall adopt rules to implement this section in consultation with affected state and local agencies.*

By their plain language, both statutes govern the conduct of state and local agencies (each applies to information “obtained by state and local agencies”), and both require the affected state and local agencies to disclose the specified information upon request (it “is disclosable” and “shall be disclosable”). In addition, both statutes require the disclosable information to be meaningful (it must be disclosed in “ranges that provide meaningful information”). And both order the Washington State Department of Agriculture (WSDA) to “implement [these provisions] in consultation with affected state and local agencies.”

In compliance with the legislature’s mandate, WSDA initiated a rulemaking process and consulted with affected state and local agencies. But the rule it ultimately adopted (WAC 16-06-210(29)), violates the statutes in two ways.

First, as confirmed by the rulemaking file, WAC 16-06-210(29) applies only to WSDA, even though RCW 42.56.610 and RCW 90.64.190 specify that it will apply to “state and local agencies.”³ WSDA has informed other agencies - in writing - that the rule does not apply to them.⁴

³ WSDA’s decision to codify the rule at Ch. 16-06 WAC, which is exclusively dedicated to WSDA’s internal public records policies (see WAC 16-06-150: “The purpose of this chapter is to establish the procedures the Washington

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Second, even though both statutes specify that the information at issue shall be disclosed by state and local agencies in “ranges that provide meaningful information to the public,” the ranges selected by WSDA are so broad that they fail to convey meaningful information.

In its present form, **WAC 16-06-210(29)** states:

Under RCW 42.56.610 and 90.64.190, information identifying the number of animals; volume of livestock nutrients generated; number of acres covered by the plan or used for land application of livestock nutrients; livestock nutrients transferred to other persons; and crop yields in plans, records, and reports obtained by state and local agencies from dairies, animal feeding operations, and concentrated animal feeding operations not required to apply for a National Pollutant Discharge Elimination System permit is disclosable in the following ranges...⁵

Because it does not conform to the legislature’s intent, WAC 16-06-210(29) must be amended such that it: (1) applies to all state and local agencies, and (2) utilizes ranges that provide meaningful information to the public.

elsewhere in Title 16, which contains well over 100 chapters. For example, it could have codified it in Ch. 16-611 WAC, which deals with Ch. 90.64 RCW (in which RCW 90.64.190 is found). Or it could have created an entirely new chapter.

⁴ Citizens does not agree that WSDA can successfully avoid its statutory duty by ignoring the legislature’s directive and announcing that its rule does not do what the legislature says it must. The legislature intended for the rule to provide access to meaningful information, and for it to apply to state and local agencies. WSDA’s contrary intent cannot trump the legislature’s intent.

⁵ See Exhibit 2 (WAC 16-06-210) for the complete ranges, which are too lengthy to reproduce here. To explain the rule by way of example -- with respect to mature dairy cattle, their numbers must be disclosed in the following ranges: (WAC 16-06-210(29)(b)):

1 to 37	2,700 to 3,699
38 to 199	3,700 to 4,699
200 to 699	4,700 to 5,699
700 to 1,699	5,700 to 6,839
1,700 to 2,699	6,840 and above

Accordingly, if WSDA receives a request for a record that includes the number of mature dairy cattle at a CAFO that is not required to have a NPDES permit, WSDA will redact the actual number and substitute the applicable range (e.g. if the record states that the facility has 124 mature dairy cattle, that number will be redacted and replaced with the applicable range, which is 38 to 199; if the record states that the facility has 843 mature dairy cattle, WSDA will replace that number with the applicable range, which is 700 to 1,699, and so forth).

II. SUMMARY OF POINTS SUPPORTING THE PETITION

- 1) The legislature intended for WSDA to adopt a rule that applies to state and local agencies, but WSDA flouted the legislature's intent by adopting a rule that applies only to WSDA.
 - a) By their plain, unambiguous terms, RCW 42.56.610 and RCW 90.64.190 apply to state and local agencies. The legislature ordered WSDA to implement these statutes as to state and local agencies, but WSDA failed to do so.
 - b) The legislature did not intend for WSDA to adopt an advisory rule – if it had, it would have said so, just as it has in other contexts.
 - c) The rulemaking file for WAC 16-06-210(29) documents WSDA's evasion of its duty to adopt a rule that complies with the legislature's decree.
 - d) WSDA has undermined the PRA by informing state and local agencies affected by RCW 42.56.610 and RCW 90.64.190 that WAC 16-06-210(29) does not apply to them, even though the statutes say it must and the legislature ordered WSDA to implement the statutes.
 - e) It is common practice for state agencies to adopt rules that govern acts of other state and local agencies – indeed, WSDA itself has done so – and thus WSDA cannot excuse its failure to comply with the legislature's order by arguing that it lacks the ability to adopt the required rule.
 - f) Because the statutes are not ambiguous, there is no need to review their legislative history. Nonetheless, doing so confirms that the legislature intended for the information at issue to be disclosable in ranges that provide meaningful information to the public, and intended for WSDA to implement the statutes as to state and local agencies. As of yet, WSDA has not accomplished its tasks.
 - g) Any conflicts between competing policy objectives must be resolved by the legislature. Here, the legislature's resolution of such conflicts is embodied in the statutes themselves. It is not WSDA's prerogative to disregard the legislature's policy.
- 2) Per the plain language of the statutes, the ranges utilized by the rule must provide “meaningful information” to the public, but the ranges selected by WSDA are so broad that the public is deprived of the opportunity to obtain meaningful information. The ranges must therefore be revised.
- 3) Suggested language for the amended rule is included below, in accordance with the instructions of the Office of Financial Management.

**III. THE LEGISLATURE INTENDED FOR WSDA TO ADOPT A
RULE THAT APPLIES TO STATE AND LOCAL AGENCIES, BUT
WSDA FLOUTED THE LEGISLATURE'S INTENT BY ADOPTING
A RULE THAT APPLIES ONLY TO ITSELF**

A. These Statutes, By Their Plain, Unambiguous Terms, Apply To State And Local Agencies And Direct WSDA To Implement Their Provisions As To State And Local Agencies - The Courts Will Construe These Statutes In Accord With Their Plain Meaning, And Will Require WSDA To Fulfill The Legislature's Intent

In interpreting a statute, a court's fundamental objective is to fulfill the legislature's intent. As the Supreme Court has explained with regards to the Public Records Act (PRA): "Our primary duty in interpreting a statute is to ascertain and give effect to the intent and purpose of the Legislature." *Limstrom v. Ladenburg*, 136 Wn.2d 595, 607 (1998).

When the legislature's intent is plain from the language of the statute, the courts must enforce the law as written. "Our purpose when interpreting a statute is to determine and enforce the intent of the legislature. Where the meaning of statutory language is plain on its face, we must give effect to that plain meaning as an expression of legislative intent. *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 536 (2009) (citations omitted). "We will not strain to find ambiguity where the language of the statute is clear." *Edelman v. State ex rel. Public Disclosure Com'n*, 152 Wn.2d 584, 591 (2004).

These statutes are plain on their faces. They unambiguously apply to information "obtained by state and local agencies." RCW 42.56.610, RCW 90.64.190. They respectively specify that such information "is disclosable" and "shall be disclosable" in ranges that provide "meaningful information" to the public. *Id.* And they order WSDA to implement their provisions (WSDA "shall adopt rules to implement this section in consultation with affected state and local agencies"). *Id.* Significantly, the term "shall" imposes a mandatory duty.⁶

But instead of fulfilling the legislature's intent, WSDA disregarded the plain meaning of these statutes and interpreted them to mean the opposite of what they say. For example, WSDA interpreted the phrase "information in plans, records, and reports *obtained by state and local*

⁶ In construing the PRA, the Supreme Court has held that "[m]ay" is a discretionary term in contrast to the mandatory "shall".... *Amren v. City of Kalama*, 131 Wn.2d 25, 35 (1997). See also *Singleton v. Frost*, 108 Wn.2d 723, 728 (1987) ("The form of the verb used in a statute, i.e., something "may," "shall" or "must" be done, is the single most important textual consideration determining whether a statute is mandatory or directory.... Ordinarily, the use of the word 'shall' in a statute carries with it the presumption that it is used in the imperative rather than in the directory sense....") (citations omitted); *Washington State Coalition for the Homeless v. DSHS*, 133 Wn.2d 894, 907-08 (1997) ("the word 'shall' ... imposes a mandatory duty") (citations omitted). *Singleton* is cited for the same proposition by a leading PRA case, *Progressive Animal Welfare Soc. v. UW*, 114 Wn.2d 677 (1990) at N. 9.

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agencies” (which appears in both statutes), as applying only to information in plans, records, and reports *obtained by WSDA*.

Similarly, WSDA interpreted the phrase “in consultation with *affected* state and local agencies” to mean “in consultation with *unaffected* state and local agencies.” Inconsistently, WSDA has acknowledged that the state and local agencies it consulted with *are indeed affected* by these statutes. As its rulemaking file explains, the rule was developed “through a coordinated outreach plan with *the affected state and local agencies*. This includes the Conservation Commission and Districts, Department of Ecology and local governments such as Health and Planning.” Exhibit 4 at p. 3 (emphasis added).⁷ Having admitted that state and local agencies are affected by the statutes, and having consulted with the affected agencies in developing the rule, WSDA’s subsequent insistence that these agencies are not actually affected and that the rule does not apply to them is inexplicable unless one accepts that WSDA’s intent was and is to evade the legislature’s decree.

Unlike WSDA, a court will interpret RCW 42.56.610 and RCW 90.64.190 to mean what they say - and will compel WSDA to do exactly that. “If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 242 (2004), citing *Dept. of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 9-10 (2002).

Another fatal problem with WSDA’s rule is that it fails to give effect to all the statutory language utilized by the legislature. “[S]tatutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546 (1996), citing *Stone v. Chelan County Sheriff's Dep't*, 110 Wn.2d 806, 810 (1988). “The legislature is presumed not to include unnecessary language when it enacts legislation.” *McGinnis v. State*, 152 Wn.2d 639, 645 (2004).

By disregarding the plain language of the statutes and doing the opposite of what that language objectively requires, WSDA has rendered the statutes’ references to “state and local agencies” unnecessary, meaningless and superfluous. Such conduct will be rejected by the courts, especially when construing the PRA. “We will not interpret statutes in a manner that renders portions of the statute superfluous.” *Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, 260 (1994) (*PAWS II*).

In evaluating WSDA’s rule, the courts will also take into account the overall objectives of the PRA. “In construing the PRA, [the courts] look at the Act in its entirety in order to enforce the

⁷ See also Exhibit 6 at p. 2 (attached) (“Local and state agencies that may have the plans and records intended to be subject to disclosure in ranges include WSDA, Ecology, each Conservation District, each County”); and Exhibit 3 at p. 2 (attached) (the affected state and local agencies consulted by WSDA included the Department of Ecology, the state Conservation Commission, the local Conservation Districts, and local health departments).

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law's overall purpose.” *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 536 (2009) (citations omitted). The courts consider “all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” *Dept. of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 11 (2002).

The fundamental purpose of the PRA is to preserve and promote an informed citizenry:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

RCW 42.56.030

Particularly important in the context of this petition is the PRA’s emphasis on ensuring public access to information that serves to protect public health:

The legislature finds that public health and safety is promoted when the public has knowledge that enables them to make informed choices about their health and safety. Therefore, the legislature declares, as a matter of public policy, that the public has a right to information necessary to protect members of the public from harm caused by alleged hazards or threats to the public.

RCW 42.56.210, Finding 2001 c 98.⁸

As shown by contaminated wells in Yakima County and elsewhere around the state, dairy and CAFO sewage poses a serious threat to public health. *See* § III, *infra*. Yet instead of facilitating access to information necessary to protect the public from harm, WSDA has decided to protect the hazardous secrets of the agribusiness industry. This decision provides further support for the widespread contention that WSDA is institutionally incapable of responsibly regulating dairies and CAFOs.⁹

⁸ Legislative findings and policy statements are to be considered in construing, interpreting, and administering statutes. *Judd v. American Tel. and Tel. Co.*, 152 Wn.2d 195, 204-05 (2004).

⁹ This situation exemplifies why WSDA’s purported authority to administer NPDES permits as to dairies and CAFOs must be revoked. The Department of Ecology (Ecology) is the sole EPA-approved delatee of CWA authority in Washington. Though it did not fulfill its responsibilities perfectly, Ecology was too thorough for the dairy-and-CAFO industry, which successfully pressured the legislature to pass a law purporting to transfer Ecology’s NPDES CAFO authority to industry-friendly WSDA. *See, e.g.*, RCW 90.48.260, RCW 90.64.901, and RCW 90.64.120(2). This de facto “sub-delegation” (pragmatically effectuated by de-funding Ecology and

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Significantly, the Supreme Court has warned that when special interest groups are able to restrict access to public records, the very foundations of democracy are threatened: “Without tools such as the Public Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, *for the special interests.*” *PAWS II, supra*, 125 Wn.2d at 251, emphasis added. Here, just as the Supreme Court warned, a powerful special interest group (the dairy/CAFO agribusiness industry) appears to have successfully persuaded WSDA to adopt a rule that defeats the fundamental purpose of the PRA.¹⁰

Another major defect of the current WAC 16-06-210(29) is that it enables a non-exemption to masquerade as an exemption. As things now stand, state and local agencies can cite WSDA’s assertion that WAC 16-06-210(29) does not apply to them as justification for refusing to provide information in the ranges specified by the rule. By doing so, they may be better positioned to escape penalties under the PRA.¹¹ This undermines the well-settled rule that exemptions under the PRA are strictly limited to specific statutory grounds. *See PAWS II, supra*, 125 Wn.2d at 258 (“the act establishes an affirmative duty to disclose public records unless the records fall within specific statutory exemptions or prohibitions”); *Prison Legal News, Inc. v. Department of Corrections*, 154 Wn.2d 628, 635 (2005) (the act “requires every governmental agency to disclose any public record upon request, unless the record falls within certain specific exemptions”); *Kitsap County Prosecuting Attorney’s Guild v. Kitsap County*, 156 Wn.App. 110, 118 (2010) (“The PRA begins with a mandate of full disclosure of public records. That mandate

transferring those funds to WSDA) is unlawful because it has never received the required federal approval. *See* RCW 90.64.901(2). *See also* the Memorandum of Understanding (regarding CAFOs) between Ecology and WSDA (most recent version signed Nov. 2011), which, in unsuccessfully attempting to explain how the purported transfer works, merely highlights its fundamental illegality. *See also* “Ideas to Improve Management of Washington’s Natural Resources” (Sept. 2009), submitted to Governor Gregoire by the Natural Resources Subcabinet (at pp. 131-133, “Idea 3-4: Consolidate Regulation of Manure Waste,” excerpted and attached as Exhibit 29).

¹⁰ The industry behemoths who participated in WSDA’s rulemaking process included representatives from the Dairy Farmers of Washington, the Washington Dairy Products Commission, the Washington State Dairy Federation, the Cattle Feeders Association of Washington, the Washington Cattlemen’s Association, the Fryer Commission, and licensed dairies. *See, e.g.*, Exhibit 4 at p. 4 (attached).

¹¹ The most important factor in setting a penalty amount under the PRA is the presence or absence of bad faith on the part of the agency. “When determining the amount of the penalty to be imposed [for violating the PRA] ‘the existence or absence of [an] agency’s bad faith is the principal factor which the trial court must consider.’” *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 460 (2010) (quoting *Amren v. City of Kalama*, 131 Wn.2d 25, 37-38 (1997)). WSDA’s refusal to comply with the legislature’s order, coupled with its repeated pronouncements that the rule applies only to itself (*see below*), allows state and local agencies to argue that their violation of the PRA (*i.e.* their refusal to disclose information in the ranges specified by WSDA’s rule) is undertaken in good faith because they reasonably relied upon WSDA’s assurance that the rule does not apply to any agency other than WSDA. This may enable them to avoid liability for penalties, which undermines the purpose of the PRA penalty provision (the penalty provision is “intended to encourage broad disclosure and deter improper denial of access to public records.” *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 140 (1978); *Yacobellis v. City of Bellingham*, 64 Wn.App. 295, 300-01 (1992)). Frustratingly, it appears that WSDA could not be held responsible for encouraging other agencies to evade their obligation to provide “meaningful information,” because – at least so far – there is no vicarious liability under the PRA.

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is limited only by the precise, specific, and limited exemptions the PRA describes”) (citations omitted).

RCW 42.56.610 is a partial and conditional exemption that must be narrowly construed, while the PRA as a whole must be liberally construed to fulfill its purpose: “The [PRA] is to be liberally construed to promote full access to public records, and its exemptions are to be narrowly construed.” RCW 42.56.030; *Newman v. King County*, 133 Wn.2d 565, 571 (1997) (citing *Amren v. City of Kalama*, 131 Wn.2d 25, 31 (1997)). “The Legislature takes the trouble to repeat three times that exemptions under the Public Records Act should be construed narrowly.” *PAWS II, supra*, 125 Wn.2d at 260. “The public disclosure act mandates disclosure of all public records not falling under specific exemptions delineated in the act. In keeping with the act's policy, we construe exemptions from mandatory disclosure narrowly.” *Brouillet v. Cowles Publ'g Co.*, 114 Wash.2d 788, 793 (1990). WSDA’s interpretation of RCW 42.56.610 is incompatible with these precepts.

Moreover, WSDA’s implicit contention that affected state and local agencies may elect to disclose the relevant information in ranges that are *even less informative than those selected by WSDA* cannot be reconciled with either the overarching intent of the PRA or the legislature’s specific intent in enacting RCW 42.56.610 and RCW 90.64.190.

B. The Legislature Did Not Intend For WSDA To Adopt An Advisory Rule - If It Had, It Would Have Said So, Just As It Has In Other Contexts

“[W]here the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent.” *State v. Roberts*, 117 Wn.2d 576, 586 (1991), citations omitted. *See also Evergreen Freedom Foundation v. Washington Educ. Ass'n*, 140 Wn.2d 615, 631 (2000) (“It is an elementary rule that where certain language is used in one instance, and different language in another, there is a difference in legislative intent”).

In the context of public records, the legislature has used specific statutory language to direct a state agency (the Attorney General’s Office) to adopt an advisory rule: “The attorney general... shall adopt by rule *an advisory model rule* for state and local agencies...” RCW 42.56.570(2), emphasis added.

In accord with the legislature’s explicit directive, the Attorney General promulgated the PRA Model Rules, which are “advisory only and do not bind any agency.” WAC 44-14-00003.

Here, there is no indication that the legislature intended WSDA’s rule to be merely “advisory.” To the contrary, the legislature instructed WSDA to ensure that information from “state and local agencies” would be “disclosable in ranges that provide meaningful information.” And it

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specified that WSDA “*shall* adopt rules to *implement [these statutes]* in consultation with *affected state and local agencies.*”¹² RCW 42.56.610 and RCW 90.64.190, emphasis added.

If the legislature had intended for WSDA to adopt an advisory rule, it would have said so, just as it did with respect to the PRA’s Model Rules. It did not, and accordingly WSDA cannot successfully contend that it has discretion to adopt an advisory rule in lieu of the binding rule required by the legislature. *State v. Roberts, supra.*

Along the same lines, where the legislature has demonstrated that it knows how to accomplish an objective, an alleged, unstated intent to achieve such an objective will not be presumed by the courts. As the Supreme Court explained in ascertaining the scope of a legislative delegation of administrative authority, “[The language of another statute] indicates the Legislature knows how to permit equitable relief if needed. The Legislature could confer statutory authority on the Department to grant relief in cases like Mrs. Kingery’s. It has not done so. Thus the Department did not have authority...” *Kingery v. Department of Labor and Industries*, 132 Wn.2d 162, 171 (1997). As shown by RCW 42.56.570, the legislature clearly knows how to delegate authority for the adoption of advisory rules. It did not do so here, and thus no intent to do so can be inferred.

C. WSDA’s Rulemaking File Shows That It Breached Its Duty To Adopt A Rule That Complies With The Legislature’s Decree

Under the PRA, Citizens obtained WSDA’s rulemaking file for WAC 16-06-210(29). The file is replete with records documenting WSDA’s aversion to obeying the legislature’s directive.¹³ From the very first draft of its CR-102, WSDA expressed doubt as to whether state and local agencies would need to follow the pending rule:

[T]he statute establishes that disclosure in ranges will be done by local and state agencies where the [sic] hold the affected records and documents and directs the department of Agriculture to develop and adopt the ranges. It appears that by adopting these ranges for use of Agriculture, that other local and state agencies may also make use of them. *It is not so clear whether other agencies need to adopt the ranges themselves or rely on the ranges as adopted by Agriculture.*

Exhibit 5 (Draft CR-102 at p. 2).

WSDA’s reluctance to abide by the legislature’s directive is reiterated throughout the rulemaking file. For example, the following document explains that there was an internal “difference of

¹² The word “shall” imposes a mandatory duty. *See* FN 6.

¹³ Indeed, WSDA was so reluctant to follow the legislature’s directive that it dragged its heels for nearly five years before finally adopting a rule that didn’t comply with the legislature’s directive. WAC 16-06-210(29) wasn’t adopted by WSDA until 2009, but RCW 42.56.610 and RCW 90.64.190 were passed in 2005.

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interpretation” as to whether the rule would be applied to state and local agencies. Its author rhetorically asks whether “further legislative word-smithing” would be necessary before the rule would apply to state and local agencies (*see* Exhibit 6 at p. 2, emphasis added):

No other agency is directed to adopt rules, however, the statute doesn't include that all affected agencies will use the ranges/rules that WSDA adopts. That may mean that *each affected agency should adopt their own rules so that they can release the information in ranges as intended. There is a difference of interpretation on this point.* ***

Having more than one agency adopt rules leaves the possibility that different rules would be adopted in different jurisdictions (*Is further legislative word-smithing needed to allow one set of rules to apply to all local and state agencies?*).

However, given the clarity of the legislature’s directive, WSDA was left with little choice but to acknowledge that its rule would apply to state and local agencies as well as WSDA. The draft CR-102 reluctantly recited:

*The proposed rule sets out the ranges to be used by state and local agencies when the numeric information is contained in documents requested through the public disclosure process. *** Local Conservation Districts, several programs with the department of Agriculture, the department of Ecology and some County agencies will have the type of information affected.*

Draft CR-102, authored by Nora Mena, WSDA Program Manager, “Dairy Nutrient [sic] Management Program;” attached to an email dated April 1, 2007 from Mena to assistant attorney general Kristen Mitchell, emphasis added. *See* Exhibit 5 at p. 1.

Despite acknowledging that the rule would apply to state and local agencies, WSDA’s opposition to the legislature’s directive solidified during the process of revising the draft CR-102. Mena emailed the draft CR-102 to WSDA’s assistant attorney general (AAG) Kristen Mitchell, who reviewed and returned it. Citizens obtained their correspondence under the PRA; it includes a heavily-redacted email from the AAG Mitchell to Mena enclosing the heavily-redacted draft CR-102 reviewed by the AAG. *See* Exhibit 7.

In the unredacted portion of her email, AAG Mitchell writes, “Here are the comments I made to the [draft] CR-102...”

The redacted CR-102 provided to Citizens (Exhibit 7) appears to be essentially the same draft CR-102 authored by Mena (Exhibit 5). Under the PRA, WSDA was required to cite and explain the statutory grounds for redacting Exhibit 7; it cited the attorney-client privilege, which pertains to legal advice. *See* Exhibit 8. Accordingly, it appears that the legal advice given by WSDA’s AAG was to delete all language indicating that the proposed rule might apply to any agency

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other than WSDA (since, on the grounds of attorney-client privilege, all such language was redacted from Exhibit 7).

Accepting Mitchell's apparent advice, WSDA deleted all such language and filed a final CR-102 (Exhibit 9) which contains no indication that the proposed rule would apply to state and local agencies. The final CR-102 makes clear that the rule applies *only* to "records held by the department [of Agriculture]:"

Purpose of the proposal and its anticipated effects, including any changes in existing rules: In accordance with the Public Records Act, the Department of Agriculture maintains a procedural rule describing its organizational structure and outlines the process to follow when persons are interested in accessing public records *held by the Department*. The existing rule requires updating, which is what the proposed rule represents. *** The proposed rule benefits individuals who desire *access to the Department of Agriculture's records...*

Final CR-102 (emphasis added), attached as Exhibit 9.

WSDA's repudiation of the legislature's directive was finalized by its CR-103 rule-making order, which reiterates that the rule applies only to records held by WSDA:

Purpose: In accordance with the Public Records Act, the Department of Agriculture maintains a procedural rule that describes its organizational structure and outlines the process to follow when persons are interested in accessing public records *held by the Department*.

Final CR-103 (emphasis added), attached as Exhibit 10.

Other documents in the rulemaking file confirm that the rule applies only to WSDA. For example, a document titled "Public Disclosure in Numeric Ranges of Certain Information Held by Agencies for Specified Livestock Operations" explains that the affected state and local agencies are not obliged to follow WSDA's rule:

The statute states that WSDA will establish the rules for information held by local and state agencies. *WSDA can typically adopt rules that affect WSDA only. How other agencies choose to make use of the ranges will be up to them.*

See Exhibit 3 at p. 2 (attached); from WSDA's rulemaking file. Emphasis added.

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D. WSDA Has Undermined The PRA By Informing State And Local Agencies Affected By RCW 42.56.610 And RCW 90.64.190 That WAC 16-06-210(29) Does Not Apply To Them Even Though The Statutes Say It Must And The Legislature Ordered WSDA To Implement The Statues

Shortly after adopting its rule, WSDA sent a letter to the Conservation Commission and the individual Conservation Districts (all 48 of which are local public agencies subject to the PRA) informing them that the newly-adopted WAC 16-06-210(29) applied *only* to WSDA:

The purpose of this letter is to inform the Conservation Districts about adoption of the rule by Department of Agriculture (WSDA) regarding the public disclosure of certain information about livestock operations in ranges. *This rule is applicable to WSDA only.*
See Exhibit 11 at p. 1 (attached). Emphasis added.

As explained above, WSDA's letter contradicts RCW 42.56.610 and RCW 90.64.190, which the legislature directed WSDA to implement as to *state and local agencies*, and which, by their unambiguous terms, apply to records held by "*state and local agencies.*"

In addition, WSDA's letter undermines the PRA by giving the Conservation Districts cover for refusing to comply with WAC 16-06-210(29), which could enable these local agencies to evade appropriate penalties for depriving the public of "meaningful information." See FN 11, *supra*.

The detrimental impact of WSDA's refusal to comply with its statutory duty is illustrated by a PRA case filed by Citizens against the Yakima Regional Clean Air Agency (YRCAA), a local government agency. One of the issues in that case was YRCAA's refusal to provide information in the ranges specified by WAC 16-06-210(29). Citizens sought a declaration from WSDA affirming that WAC 16-06-210(29) applies to state and local agencies, but WSDA's AAG refused to provide one. Instead, in correspondence with Citizen's counsel, she asserted not only that WAC 16-06-210(29) does not apply to state and local agencies, *but that RCW 42.56.610 does not impose any general obligation on state and local agencies to disclose meaningful information:*

WSDA has no authority to make any determination that records held by other agencies... fall within the scope of records covered by a specific exemption in the Act.

Email from AAG Mitchell to Citizens' counsel dated 12-12-26, attached as Exhibit 12 at p. 1.

I believe the phrase "ranges that provide meaningful information to the public while ensuring confidentiality of business information" in RCW 42.56.610 was intended to provide direction to WSDA in development of ranges in rule and *does not create any general obligation to responding agencies to provide "meaningful information."*

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Email from WSDA AAG Mitchell to Citizens' counsel dated 12-12-31, attached as Exhibit 12 at p. 2. Emphasis added.

Mitchell's assertion that agencies are not required to disclose meaningful information is indefensible, given that the statutes expressly command that the relevant information "is" and "shall be" disclosable in ranges "*that provide meaningful information.*"¹⁴ RCW 42.56.610, 90.64.190. It is axiomatic that the duty to provide access to meaningful information requires that the accessible information be meaningful.

The inherent irrationality of WSDA's position is highlighted by the fact that Maryann Connell, a WSDA staffer assigned to answer PRA requests stated, in correspondence with Citizens, that the rule *does* apply to state and local agencies:

You are correct in your understanding that if a facility is not required to apply for a NPDES permit, then, in response to a PRA request for any of those 5 matters listed in RCW 42.56.610 (as they pertain to any specific AFO/CAFO/dairy), *state and local agencies are required to disclose the requested information only in the applicable range specified by WAC 16-06-210(29).*

Email from WSDA Division Coordinator Maryann Connell to Citizens, December 19, 2012, emphasis added. Attached as Exhibit 26.

Following up on this admission, Citizens asked whether Ms. Connell's response had been reviewed by Nora Mena, WSDA's "Dairy Nutrient [sic] Program Manager." Ms. Connell then contradicted her initial affirmation that the rule applied to state and local agencies, writing,

Nora Mena reviewed the response. The exemption as established in RCW 42.56.610 and RCW 90.64.190 does apply to all agencies and directs WSDA to set the ranges. However, *rules adopted by WSDA only apply specifically to WSDA.* Other agencies may defer to the WSDA rules through policy or their own rule adoption.

Email from Connell to Citizens, December 21, 2012. Attached as Exhibit __ (at p. 2). Emphasis added.

Ms. Connell's abrupt reversal of her initial answer can reasonably be interpreted to mean that, absent ideological axe-grinding apparently imposed from above, WSDA staffers read the statutes to mean what they say.

As a result of WSDA's insistence that WAC 16-06-210(29) applies solely to WSDA, YRCAA was better positioned to partially avoid appropriate repercussions for its refusal to provide

¹⁴ AAG Mitchell's contention that these statutes "do not create any general obligation... to provide 'meaningful information'" may help explain why WSDA adopted ranges that do not provide meaningful information. *See* § III, *infra*.

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“meaningful information to the public” under RCW 42.56.610. This confirms that WSDA’s evasion of its statutory duty is undermining the PRA and impeding public access to “meaningful information.”¹⁵

Indeed, WSDA’s wrong-headed position is very likely responsible for driving up the costs incurred by state and local agencies under the PRA. By adopting a rule that flouts the legislature’s intent and contradicts the enabling statutes, WSDA has probably precipitated otherwise unnecessary PRA litigation against state and local agencies who – relying on WSDA’s erroneous interpretation of the statutes – refuse to provide any of the information at issue, or condescend to disclose it only in ranges that are even less informative than the uninformative ranges adopted by WSDA. No such state or local agency should be surprised if it is then sued under the PRA, nor should it be accorded any credence if it complains to the legislature about the purportedly unreasonable burdens imposed upon it by the PRA, since those burdens are entirely of their and WSDA’s manufacture.

E. It Is Common Practice For State Agencies To Adopt Rules That Govern Acts Of Other State And Local Agencies - In Fact, WSDA Itself Has Done So

During conversations with Citizen’s counsel, WSDA’s AAG attempted to justify WSDA’s stance by claiming that WSDA could not adopt a rule implementing RCW 42.56.210 and RCW 90.64.190 as to state and local agencies because a state agency cannot (or so she asserted) adopt a rule that applies to other agencies. But nothing could be further from the truth.

For example, in an analogous context of public records, the state archivist has adopted many rules that control the conduct of other state and local agencies:

¹⁵ Apparently as a result of Citizen’s concerns, WSDA has doubled down on its erroneous contention that WAC 16-06-210(29) does not apply to any agency other than WSDA. In the summer of 2013, it drafted a “2014 Legislative Policy & Budget Request Proposal” stating that RCW 42.56.610 and RCW 90.64.190 should be amended because “it is not clear whether the exemptions [sic] apply when agencies other than WSDA hold the records.” Seeking whatever evidence WSDA relied upon to support this self-serving contention, Citizen’s counsel submitted a PRA request to WSDA, which shockingly responded by claiming that “EPA voiced concerns that they may not redact information under RCW 42.56.610 and WAC 16-06-210(29) before records are released.” However, it is obvious and self-evident that the EPA is not subject to Washington public records laws. That a federal agency is not bound by Washington public records laws is irrelevant to the question of whether state and local agencies are bound by those laws, and it is irrational and/or disingenuous for WSDA would imply otherwise. Parenthetically, WSDA’s continued mischaracterization of “ranges” as an “exemption” reflects its institutional perspective favoring secrecy over disclosure. Moreover, its use of the term “exemptions” is additional evidence that the ranges are so broad and reveal so little “meaningful information” that they are, in fact, effectively “exemptions” rather than – as intended by the legislature – a means to convey meaningful information to the public.

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All state and local government agencies¹⁶ must retain all web content in accordance with the approved retention schedules. *** All state and local government agencies shall use the following best management practices in the maintenance of their web sites: *** ...the agency must copy and preserve all code for the web site.

WAC 434-662-140

The agency must maintain chain of custody of the record, including employing sufficient security procedures to prevent additions, modifications, or deletion of a record by unauthorized parties.

WAC 434-662-060

If encryption is employed on public records, the agency must maintain the means to decrypt the record for the life of the record as designated by the approved required minimum retention period for that record.

WAC 434-662-070

Agency duties and responsibilities. Electronic records must be retained in electronic format and remain usable, searchable, retrievable and authentic for the length of the designated retention period.

WAC 434-662-040

The authority delegated by the legislature for the enactment of these rules is virtually identical in scope to that delegated to WSDA for the rule that became WAC 16-06-210(29). The former delegation covers “public records *maintained by state and local agencies*,” (RCW 40.14.020), while the latter covers “records... *obtained by state and local agencies*” (RCW 42.56.610, RCW 90.64.190).

Additional examples of rules enacted by one agency governing the conduct of other agencies are found in various WACs adopted by the Secretary of State:

All public records shall be and remain the property of the state or local agency. They shall be delivered by outgoing officials and employees to their successors and shall be preserved, stored, transferred, destroyed, and otherwise managed, only in accordance with the provisions of chapter 40.14 RCW or as otherwise provided for by law and by these regulations.

WAC 434-615-010

¹⁶ For the purposes of all these rules, the terms “agency” and “agencies” includes all state and local agencies (“any department, office, commission, board, or division of state government; and any county, city, district, or other political subdivision or municipal corporation or any department, office, commission, court, or board or any other state or local government unit, however designated”). WAC 434-662-020.

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Unless otherwise provided by law, public records must remain in the legal custody of the office in which they were originally filed, which shall be considered the office of record, or shall be destroyed or transferred pursuant to instructions from the state or local records committee as required by chapter 40.14 RCW. They shall not be placed in the legal or physical custody of any other person or agency, public or private, or released to individuals, except for disposition pursuant to law or unless otherwise expressly provided by law or by these regulations.

WAC 434-615-020

All state agency records not required in the current operation of the office where they are made or kept, and all records of every state agency, commission, committee, or any other activity of state or local government which may be abolished or discontinued, shall be transferred to the state archives in accord with approved records retention schedules. ***

WAC 434-615-030

The Secretary of State has also adopted many other rules which govern the conduct of state and local agencies with respect to public records. *See, e.g.*, WAC 434-635-010 *et seq.* (Local records disposition authorization) and WAC 434-661-010 *et seq.* (Real Property Electronic Recording).

Other examples of administrative rules enacted by one agency being applied on a mandatory basis to other state and local agencies are found in the rules adopted by the Public Disclosure Commission (PDC) under Ch. 42.17A RCW. *See, e.g.*, *Evergreen Freedom Foundation v. Washington Educ. Ass'n*, 140 Wn.2d 615, 618-19 (2000), where the defendants, which included many local public school districts,¹⁷ were found not to have violated RCW 42.17.680(3) (subsequently recodified as RCW 42.17A.495) because they had complied with administrative rules promulgated by the PDC to implement that statute. The relevant rulemaking authority was granted to the PDC by RCW 42.17.370 (since recodified as RCW 42.17A.110). It too is almost identical in scope to the authority granted to WSDA here: the PDC's authority extends to the adoption of rules governing "state agencies, counties, cities, and other municipalities and political subdivisions" (RCW 42.17A.110(9)), while WSDA is granted authority to implement RCW 42.56.610 and RCW 90.64.190 as to "state and local" agencies. There is no substantive difference between the scope of these two grants.

¹⁷ School districts are local public agencies under the PRA. *See* RCW 42.56.010(1) and, *e.g.*, *Ollie v. Highland School Dist. No. 203*, 50 Wn.App. 639 (1988), *Bellevue John Does 1-11 v. Bellevue School Dist.*, 164 Wn.2d 199 (2008).

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Still other agency rules that apply to state and local agencies include many adopted by the Department of Ecology. For example, Ecology recently levied fines against King County and the state Department of Transportation for violating Ecology's stormwater rules.¹⁸

Finally, in many other contexts, WSDA itself has adopted and enforced rules that apply to other state and/or local agencies. In response to a recent public records request filed on behalf of Citizen's, WSDA staffer Elizabeth McNagny confirmed that WSDA has enforced its rules against state and local agencies, writing:¹⁹

We identified enforcement activities by WSDA against state or local agencies under the rule chapters listed below. Copies of the rules related to those enforcement activities are located at the following links:

Chapter 16-233 WAC ["Worker Protection Standards"]

<http://apps.leg.wa.gov/wac/default.aspx?cite=16-233>

Chapter 16-228 WAC ["General Pesticide Rules"]

<http://apps.leg.wa.gov/wac/default.aspx?cite=16-228>

Chapter 16-752 WAC ["Noxious Weed Control"]

<http://apps.leg.wa.gov/wac/default.aspx?cite=16-752>

Chapter 16-101 WAC ["Washington State Milk and Milk Products Standards"]

<http://apps.leg.wa.gov/wac/default.aspx?cite=16-101>

Chapter 16-101X WAC ["Degrades, License Suspensions and Revocations for Dairy Producers and Processors"]

<http://apps.leg.wa.gov/wac/default.aspx?cite=16-101X>

Email from WSDA Public Records Officer McNagny to Citizen's counsel, dated August 13, 2013. Attached as Exhibit 27.

Given the legislature's explicit delegation of authority, it is untenable for WSDA to assert that it lacks authority to adopt and enforce a rule implementing RCW 42.56.610 and RCW 90.64.190 as to state and local agencies.

¹⁸ See, e.g., "Ecology issues fines for county water-pollution cases," by Noah Haglund, Everett Herald, Sept. 6, 2013 (last retrieved Sept. 6, 2013 from <http://www.heraldnet.com/article/20130906/NEWS01/709069889/Ecology-issues-fines-for-county-water-pollution-cases>).

¹⁹ McNagny is WSDA's Public Records Officer, as well as its Administrative Regulations Manager. See <http://www.leg.wa.gov/CodeReviser/Documents/PROlist.htm>, last retrieved August 14, 2013. In describing her job duties, WSDA explains that she: "Coordinates the development of the agency's policies and procedures; provides public disclosure assistances; partners with program staff on developing the agency's regulations (WAC's); performs the agency-wide forms and records management responsibilities." See <http://agr.wa.gov/StratGov/>, last retrieved August 15, 2013.

F. The Legislative History Of RCW 42.56.610 And RCW 90.64.190 Shows That The Legislature Intended For The Relevant Information To Be Disclosable In Ranges That Provide Meaningful Information To The Public, And Intended For WSDA To Implement The Statutes As To State And Local Agencies, But WSDA Has Failed To Fulfill The Legislature's Intent

If a statute is ambiguous, a court will look to its legislative history to determine legislative intent. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305-06, (2011). A statute is ambiguous if it is “susceptible to two or more reasonable interpretations.” *Id.* at 305. A statute is not ambiguous merely because different interpretations are conceivable. *McGinnis v. State*, 152 Wn.2d 639, 645 (2004), citing *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of FOE*, 148 Wn.2d 224, 239-40 (2002). Nor is a statute ambiguous “merely because it states a duty in general terms and provides an agency discretion to determine the ways in which the duty may be met.” *Washington State Coalition for the Homeless v. DSHS*, 133 Wn.2d 894, 907 (1997).

Though RCW 42.56.610 and RCW 90.64.190 are not objectively ambiguous, and resort to their legislative history is therefore unnecessary, it is nonetheless instructive to examine that history because doing so confirms that the legislature intended for WSDA to implement their provisions with respect to state and local agencies, and to develop ranges that provide “meaningful information to the public.”

The progressive modification of SSB 5602 in the run-up to its adoption shows that it is a compromise between the interests of the dairy/CAFO industry on one side and environmentalists, the media, and the public on the other. The House Bill Report for SSB 5602 discusses the compromise: “We may have a confidentiality agreement involving the listing of ‘ranges’ of animals or nutrients instead of exact figures. We received the striking amendment this morning from People for Puget Sound and want to have conversations as to the intent of the changes. We may not be far apart.” Exhibit 16 at p. 4, attached. The Final Bill Report shows that the compromise was reached: “Information obtained from dairies, animal feeding operations, and concentrated animal feeding operations that are not required to obtain a federal permit are to be disclosable to the public only in ranges that provide meaningful information to the public while ensuring confidentiality of business information. The [Department of Agriculture] is to adopt rules in consultation with affected state and local agencies.” Exhibit 17 at p. 2 (attached).

WSDA itself recognized that the statute constituted a compromise between the dairy industry and the public. As it explained to interested parties during the rulemaking process:

[T]he concept of providing information in ranges was agreed upon by the stakeholders in 2005. However, there will be tension between the need to provide meaningful information while adequately protecting confidentiality of the producers. This tension can be addressed by working with all the stakeholders to find the common ground, and bringing the stakeholders together during the process to better understand each other's interests.

See Exhibit 4 at p. 4 (WSDA Rule Project Worksheet; from rulemaking file).

During the Legislative session in 2005, discussions regarding broader livestock nutrient management program issues led to the adoption of Substitute Senate Bill No. 5602 which directed WSDA to develop the subject rule on numeric ranges. Representatives of industry, the environmental community and the press negotiated language on what type of information would be covered and agreed that the ranges needed to meet needs of the industry for confidentiality and for the public to access 'meaningful' information.

See Exhibit 3 at p. 1 (record from rulemaking file).

The initial versions of the bill would have shielded the relevant information from disclosure to the same extent as under federal regulations, resulting in an enormous degree of confidentiality. *See, e.g.*, the initial version of SSB 5602 (Exhibit 18 at p. 37, attached) (information need only be disclosed “to the extent required by 40 C.F.R. §122.7(b) and (c);” Senate Bill Report SSB 5602 (Exhibit 19 at p. 3, attached) (“Public disclosure requirements of information held by the agencies is the same as required of states by federal rule”); Bill Analysis of SSB 5602, Economic Development, Ag. & Trade Committee (Exhibit 20 at p. 5, attached) (“CAFOs must maintain certain records and reports as mandated by federal rule. Dairies that are not CAFOs must maintain certain records and reports as specified by the WSDA. Information from CAFOs and dairies is subject to public disclosure only to the extent required by specified federal rules”).²⁰

During the give and take of the legislative process, the “range” concept came to the fore as a compromise between environmental interests (which wanted more transparency) and agricultural interests (which wanted no transparency). *See, e.g.*, 5602-S AMH, adopted 4-14-05 (Exhibit 21 at pp. 39-40, attached) (“The committee shall evaluate the use of ranges as a means for state and local agencies to respond to public records requests made under chapter 42.17 RCW for information obtained from dairies and AFOs not required to apply for a permit. The ranges must provide meaningful information while ensuring confidentiality of business information regarding the following characteristics of livestock operations: (a) Number of animals; (b) volume of livestock nutrients generated; (c) number of acres covered by the plan or used for land application of livestock nutrients; (d) livestock nutrients transferred to other persons; and (e)

²⁰ *See also* SSB 5602-S, adopted 4/23/05 (“Makes certain information in plans, records, and reports obtained from CAFOs, dairies, and AFOs, not required to apply for a permit, disclosable only in ranges that provide meaningful information to the public while ensuring confidentiality of business information”) and Senate Bill Report, SSB 56502 (“Ranges are to be developed by rule for reporting of information”).

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crop yields. The committee shall make recommendations and provide draft legislation regarding the use of ranges to the appropriate committees of the legislature by December 1, 2005”); 5602-S AMH PETT H3204.1, adopted 4-23-05 (Exhibit 22 at pp. 6-7, attached) (“A new section is added to chapter 42.17 RCW 32 to read as follows: The following information in plans, records, and reports obtained by state and local agencies from dairies, animal feeding operations, and concentrated animal feeding operations, not required to apply for a national pollutant discharge elimination system permit is disclosable only in ranges that provide meaningful information to the public while ensuring confidentiality of business information regarding: (1) Number of animals; (2) volume of livestock nutrients generated; (3) number of acres covered by the plan or used for land application of livestock nutrients; (4) livestock nutrients transferred to other persons; and (5) crop yields. The department of agriculture shall adopt rules to implement this section in consultation with affected state and local agencies”).

After continued negotiations, the “range” compromise was accepted. *See, e.g.*, “House Bill Report, SSB 5602 – As passed House – Amended: 4-23-05” (Exhibit 16 at pp. 1, 4, attached) (“Makes certain information obtained from specified livestock operations disclosable only in ranges” “Summary of Amended Bill: *** Certain information in plans, records, and reports obtained from CAFOs, dairies, and AFOs, not required to apply for a permit are disclosable only in ranges that provide meaningful information to the public while ensuring confidentiality of business information”); SSB 5602 Final Bill Report (Exhibit 17 at p. 2, attached) (“Information obtained from dairies, animal feeding operations, and concentrated animal feeding operations that are not required to obtain a federal permit are to be disclosable to the public only in ranges that provide meaningful information to the public while ensuring confidentiality of business information. The [WSDA] is to adopt rules in consultation with affected state and local agencies”).

The bill’s present language was ultimately accepted. *See* “Veto Message from Governor Gregoire, approving the bill as it relates to 42.56.610” (Exhibit 23, pp. 1-2, attached) (“The bill also calls for rules that will allow disclosure of farm plan information to provide meaningful information to the public while protecting confidential business information. *** With the exception of Section 2, Substitute Senate Bill No. 5602 is approved”); “Certification of Enrollment SSB 5602, Session Law, Ch. 510, Laws of 2005, Effective 7-24-05” (Exhibit 24 at pp. 6-7, attached) (containing the final language now codified at RCW 42.56.610 and RCW 90.64.190, requiring disclosure in “ranges that provide meaningful information to the public”).

G. Any Conflicts Between Competing Policy Objectives Are Properly Resolved By The Legislature; Here, The Legislature Has Already Devised A “Workable Formula” To Address Competing Objectives And Has Instructed WSDA To Implement It, But WSDA Has Not Done So

Significantly, the Supreme Court has previously addressed the type of compromise represented by RCW 42.56.610. The Court concluded that tensions between competing interests under the

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PRA (*i.e.* confidentiality versus disclosure) must be resolved by “placing emphasis on responsible disclosure... with disclosure as the primary objective:”

Achieving an informed citizenry is a goal sometimes counterpoised against other important societal aims. Indeed, as the [PRA] recognizes, *society's interest in an open government can conflict with its interest in protecting personal privacy rights* and with the public need for preserving the confidentiality of criminal investigatory matters, among other concerns. Though tensions among these competing interests are characteristic of a democratic society, *their resolution lies in providing a workable formula which encompasses, balances and appropriately protects all interests, while placing emphasis on responsible disclosure.* It is this task of accommodating opposing concerns, *with disclosure as the primary objective*, that the state freedom of information act seeks to accomplish.

Spokane Police Guild v. Liquor Control Bd., 112 Wn.2d 30, 33-34 (1989).²¹
Emphasis added.

RCW 42.56.610 represents a “workable formula” which “balances and appropriately protects all interests.” *Spokane Police Guild, supra*. And in accordance with the Supreme Court’s guidance, it must be interpreted “with disclosure as the primary objective.” *Id.*

WSDA’s implicit assertion that the legislature’s “workable formula” does not work with regards to records held by state and local agencies (but somehow does work with regards to records held by itself) is not an argument that the courts will accept. Such an argument is “more properly presented to the legislature, which is the entity charged with balancing... policy decisions.” *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 753 (2007).

Here, the legislature has already made its decision: the records held by state and local agencies must be disclosed in ranges that “provide meaningful information to the public.” The courts “cannot ignore the plain language or the legislative history” of a PRA provision (*Id.*), and thus they would compel WSDA to implement the statutes’ plain language.

IV. THE RANGES UTILIZED BY THE RULE MUST PROVIDE “MEANINGFUL INFORMATION” TO THE PUBLIC, BUT THE RANGES SELECTED BY WSDA DO NOT, THUS THEY MUST BE REVISED

In its rulemaking file for WAC 16-06-210(29), WSDA explained that providing “unlimited confidentiality” through the use of too-large ranges would violate the statutory requirement that the ranges provide “meaningful information” to the public:

²¹ See also *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 137 (1978) (citations omitted) (“[T]he privacy-related exemptions involve a balancing test, weighing the general public interest in access to governmental information against the specific privacy interests asserted. This balance is to be tilted in favor of disclosure”).

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[RCW 42.56.610 and RCW 90.64.190] *requires that WSDA provide meaningful information to the public* as well as confidentiality to producers. [A draft] open-ended, large CAFO range would provide the largest livestock operations with almost *unlimited confidentiality, rendering the information "meaningless."*

See Exhibit 13 at p. 1 (attached) (record from rulemaking file). Emphasis added.

Despite knowing that selecting too-large ranges would preclude the public from obtaining “meaningful information,” WSDA did exactly that. Compounding its error, it did not even attempt to calculate the extent to which public access to meaningful information was impaired by its excessively large ranges. Instead, in order to placate the dairy-and-CAFO special interest group, it simply selected a generous “floor” of confidentiality and stated that the selected ranges would provide *at least* that degree of secrecy. Specifically, it “developed ranges that assure all operations, no matter what their size, experience 20% or greater confidentiality.” *Id.*, emphasis added.

WSDA asserts that it “chose 20% confidentiality as meaningful to the public and sufficiently protective of producer information.” *Id.* But this assertion ignores WSDA’s admission that the confidentiality level is actually 20% “*or greater.*” Compounding the problem, WSDA provides no hint as to *how much* greater than 20% the actual figure is. Thus WSDA’s use of a 20% “or greater” confidentiality figure deprives the public of “meaningful information,” not only because 20% is excessive to begin with, but because the public has no way of knowing what “or greater” means in any given context.

Another problem is that the baseline 20% confidentiality figure is routinely much, much higher than 20%. In a PowerPoint presentation regarding the selected ranges, WSDA explained that “animal numbers at any given facility can be expected to fluctuate within a range of 25-30%.” *See Exhibit 14 (at p. 7) (record from rulemaking file).* Accordingly, the actual confidentiality figure approaches 50%, because the 20% baseline confidentiality figure arbitrarily selected by WSDA must be combined with 25-30% fluctuations in real animal numbers. The resulting 50% confidentiality figure does not even come close to providing meaningful information. As a WSDA staffer explained to Mena in an email:

[A]ll industries experience high confidentiality in the first five ranges (starting at 230% in range two and dropping to about 30% in range 5). In short, about 90% of facilities in the state experience at least 45-50% confidentiality.

Email from WSDA staffer Jeff Canaan to Nora Mena, June 5, 2006. Attached as Exhibit 15 (emphasis added) (record from rulemaking file).

Under these circumstances, it is essentially impossible for the public to obtain “meaningful information” about the five topics addressed by RCW 42.56.610. This is extremely troubling for many reasons. For example, absent access to “meaningful information” on these topics, the

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public is unable to determine whether any given dairy or CAFO is poisoning groundwater or surfacewater by dumping toxic sewage onto the ground at rates that are not agronomic.

Non-agronomic (*i.e.* excessive or otherwise improper) application of so-called “dairy nutrient” (*aka* toxic sewage) poses significant dangers to the public. *See, e.g.*, the American Public Health Association, Policy No. 20037, “Precautionary Moratorium on New Concentrated Animal Feeding Operations;”²² the Pew Charitable Trusts Environmental Initiative regarding Industrial Animal Agriculture;²³ New York Times, “Health Ills Abound as Farm Runoff Fouls Wells,” by Charles Duhigg, Sept. 17, 2009.²⁴

As shown by an award-winning investigative series published in the Yakima Herald-Republic WSDA has utterly failed to prevent residential wells from being poisoned by “dairy nutrient.” *See* Exhibit 25.²⁵ *See also* Yakima Herald Republic, “Environmental groups sue 4 Lower Valley dairies in federal court,” by Ross Courtney, Feb. 16, 2013:²⁶

[T]wo environmental groups have filed federal lawsuits against a cluster of Lower Yakima Valley dairies for allegedly polluting the groundwater many people rely on for drinking. *** The lawsuits refer to a September Environmental Protection Agency report that pointed a critical finger at the same dairies for causing most of the Lower Valley’s nitrate pollution. Numerous studies have determined that about 20 percent of private residential wells in the Lower Valley have nitrates in excess of federal drinking water standards.

In response to the poisoning of residential wells in the Yakima Valley, (occasioned or exacerbated by WSDA’s failure to appropriately regulate the dairy/CAFO industry), the Department of Ecology formed a Groundwater Management Area (GWMA). Commenting on the GWMA and the ongoing Yakima Valley lawsuit, WSDA spokesman Hector Castro voiced support for the bureaucratic process, but pointedly ignored WSDA’s decision to deprive citizens of access to “meaningful information” that could help redress the problem:

²² <http://www.apha.org/advocacy/policy/policysearch/default.htm?id=1243>, retrieved on July 18, 2013.

²³ <http://www.pewenvironment.org/campaigns/reforming-industrial-animal-agriculture/id/8589940398>, retrieved on July 18, 2013.

²⁴ <http://www.nytimes.com/2009/09/18/us/18dairy.html>, retrieved July 18, 2013.

²⁵ “Hidden Wells, Dirty Water,” by Leah Beth Ward, Yakima Herald-Republic, fall/winter 2008.

²⁶ <http://www.yakimaherald.com/news/yhr/saturday/841648-8/yakima-valley-dairies-sued-over-pollution>, retrieved July 15, 2013.

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WSDA continues to support the Groundwater Management Area process and the related work plan, which has involved the efforts of government at all levels, as well as tribes, agricultural producers and environmental groups. *** These are complex environmental issues and they will continue to require that all the affected parties work together in order to resolve them.

Yakima Herald, Feb. 16, 2013, *supra*.

Because WSDA has taken no effective action to either document or prevent the poisoning of residential well-water by dairy/CAFO sewage, it is vitally important that citizens have access to meaningful information that will enable them to step into the breach and protect the public health and welfare.

As to any given dairy or CAFO, calculating the “agronomic rate” for sewage-dumping requires knowing the closely approximate number of cows at the facility, the closely approximate volume of sewage they generate, the closely approximate number of acres onto which that sewage is dumped, the closely approximate amount of sewage funneled for disposal through third parties, and the closely approximate crop yields of the land on which the sewage is dumped.

Another reason it is vitally important for citizens to have access to meaningful information regarding the topics covered by RCW 42.56.610 is to accurately estimate the quantity of the hazardous gases being emitted by the cows on any given facility.

In the aggregate, the air pollutants emitted by the world’s cows “amounts to about 18 percent of the global warming effect – an even larger contribution than the transportation sector worldwide. Livestock contribute about 9 percent of total carbon dioxide emissions, but 37 percent of methane and 65 percent of nitrous oxide.” See “*Livestock’s Long Shadow*,” (at p. 272) published by the Food and Agriculture Organization of the United Nations (2006).²⁷

Each individual cow produces a huge amount of toxic gases. For example, as to methane, the mean emissions rate of lactating cows and the manure they produce has been calculated to be 11.36 grams per cow per hour.²⁸ Cows also produce hazardous volatile organic and toxic compounds: “(e.g., volatile fatty acids, ketones, aldehydes, alcohols) as a part of their normal digestive processes. There are other organic gases produced from manure and its enzymatic or microbial decomposition. Ammonia released from dairy manure is odorous and can react with NOx to form ammonium nitrate, which is classified as fine PM. Ammonia is also important because it can react with oxygen in the atmosphere and the soil to form NOx and eventually

²⁷ Last retrieved August 27, 2013 from <ftp://ftp.fao.org/docrep/fao/010/a0701e/a0701e.pdf>.

²⁸ “Direct measurements improve estimates of dairy greenhouse-gas emissions,” F. Mitloehner *et al*, California Agriculture (2009). Last retrieved August 27, 2013 from <http://ucanr.org/repository/cao/landingpage.cfm?article=ca.v063n02p79&fulltext=yes>

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nitrate.”²⁹ Livestock waste “emits a total of 30 million tonnes of ammonia. This is focused in areas of high animal concentrations, where ammonia is a factor in the occurrence of acid rain, which affects biodiversity. Livestock contribute 68 percent to total [global] ammonia emissions.” *Livestock’s Long Shadow, supra* at p. 272.

Once having ascertained the closely approximate number of cows on each facility, concerned citizens can accurately estimate the amount of toxic gases that are being emitted. Without knowing the approximate number of cows, it is extremely difficult for concerned citizens to scientifically prove that area dairies and CAFOs are directly responsible for poisoning the local airshed.

Knowing the closely approximate number of cows on any given facility could help citizens document the fact that the toxic gasses emitted by the cows pose a public health threat, which would bring the facility under the jurisdiction of the Clean Air Act. As Jay Gordon, the Executive Director of the Washington Dairy Federation argued in a recent meeting of the Federation, “current state laws say you are exempt from the Clean Air Act as long as there is not a non-attainment incident. Best Management Practices are still applicable as long as dairies are not a public health threat.”³⁰

WSDA’s decision to utilize excessively-large ranges deprives the public of access to “meaningful information,” enables the dairy industry to evade appropriate scrutiny, and potentially endangers public health and welfare. To comply with its statutory duty and enable the public to access “meaningful information,” WSDA must revise the ranges found at WAC 16-06-210(29). RCW 42.56.610, RCW 90.64.190.

V. SUGGESTED LANGUAGE FOR WSDA’S AMENDED RULE

The petition form issued by the Office of Financial Management pursuant to RCW 34.05.330(1) directs petitioners to “include suggested language” for the proposed rule or amendment. Accordingly, Citizens suggests the following language for WSDA’s amendment of WAC 16-06-210(29):

Under RCW 42.56.610 and 90.64.190, state and local agencies shall disclose, upon request, in the ranges listed below, the following information in plans, records, and reports obtained from dairies, animal feeding operations, and concentrated animal feeding operations: (1) number of animals; (2) volume of livestock nutrients generated; (3)

²⁹ “Managing Dairy Manure in the Central Valley of California,” University of California Division of Agriculture and Natural Resources, June 2005. Last retrieved on Aug. 27, 2013 from <http://groundwater.ucdavis.edu/files/136450.pdf>.

³⁰ From the “unapproved” minutes of the Washington State Dairy Federation Board of Director’s Meeting, June 27, 2013. Attached as Exhibit 28.

number of acres covered by the plan or used for land application of livestock nutrients; (4) livestock nutrients transferred to other persons; and (5) crop yields. An agency's replacement of specific numbers with applicable ranges pursuant to this rule does not constitute the creation of new records under the Public Records Act.

This rule does not apply to information obtained from dairies, AFOs or CAFOs required to apply for a national pollutant discharge elimination system permit: with regards to such facilities, information regarding the five items enumerated above must be disclosed, upon request, without redaction or substitution.³¹

In addition to changing the language of the rule, WSDA must revise its ranges so that they convey "meaningful information" to the public. For example, as to any given facility, the public must be able to accurately determine, using the disclosable ranges, whether or not the toxic sewage generated by the facility is being dumped at an "agronomic rate."

Appropriate ranges should be developed during the amendment process with the participation of knowledgeable organizations such as the Sierra Club, the Center for Environmental Law and Policy, Futurewise, Waterkeepers Washington, Earthjustice, the Community Association for the Restoration of the Environment, the Western Environmental Law Center, the Concerned Citizens of the Yakama Reservation, the Friends of Toppenish Creek, *etc.*. Please be certain to notify all these organizations if rulemaking is initiated in response to the attached petition.

VI. CONCLUSION

For the reasons explained above, WSDA must amend WAC 16-06-210(29) to conform with the legislature's order. In the event that it does not do so, Citizens may be compelled to pursue other relief.

If the current rule is challenged in court, it will be invalidated, and WSDA will be ordered to fulfill the mandatory duty imposed upon it by RCW 42.56.610 and RCW 90.64.110. *See, e.g., Devine v. State, Dept. of Licensing*, 126 Wn.App. 941, 956 (2005) ("A rule that conflicts with a

³¹ This information must be available to the public under the Clean Water Act, and any state law attempting to preclude its disclosure would be preempted. *See Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486, 503 (C.A.2, 2005) (striking down prior provisions of Title 40 CFR pertaining to CAFO NPDES permits because the provisions "violate[d] the Clean Water Act's public participation requirements"). The court explained that "not only does the [stricken] CAFO Rule fail to require that the terms of the nutrient management plans be included in the NPDES permits, it also fails to provide the public with any other means of access to them." *Id.* The Washington legislature recognized the impact of the *Waterkeeper* decision in adopting SSB 5602 (RCW 42.56.610 and RCW 90.64.190). *See Ex. 16* (House Bill Report for SSB 5602) at p. 3 (discussion of 2005 Second Circuit Court of Appeals decision, which "determined the [stricken] CAFO Rule violated the Clean Water Act's public participation requirements by failing to provide public access to nutrient management plans").

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statute is beyond an agency's authority. Invalidation of the rule is the proper remedy"); *Superior Asphalt & Concrete v. Department of Labor & Industries*, 84 Wn.App. 401, 405 ("We will invalidate a regulation if it is in conflict with the intent and purpose of the legislation"); *Ward v. LaMonico*, 47 Wn.App. 373, 377, 379 (1987) (rejecting an administrative rule because it thwarted the intent of the legislature, and explaining that a court's "'paramount concern' is to ensure that the underlying policy of the statute is carried out").

Please ensure that this letter and attached exhibits are included among the comments considered in conjunction with Citizens' petition.

Sincerely,

/s/

D. Ellsworth

cc: Citizens for Sustainable Development

Attached exhibits (see next page)

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Name	Size
- APA Petition to WSDA re amending WAC 16-06-210(29).pdf	81 KB
Ex. 1 - Legislative History - SSB 5602 - 05-07-24 - SESSION LAW - Nutrient Mgmt - See Secs 4 & 5 - 10p.pdf	41 KB
Ex. 2 - WAC 16-06-210(29) - 4p.pdf	25 KB
Ex. 3 - WSDA Rulemaking File WAC 16-06-210(29) - Public Disclosure in Numeric Ranges of Certain Info - 5p .pdf	199 KB
Ex. 4 - WSDA Rulemaking File WAC 16-06-210(29) - Rule Project Worksheet - 11p.pdf	4,763 KB
Ex. 5 - WSDA Rulemaking File WAC 16-06-210(29) - 07-04-01 - EM from Mena to AAG Mitchell w first draft CR-102 - 5p.pdf	130 KB
Ex. 6 - WSDA Rulemaking File WAC 16-06-210(29) - 06-05-18 - Discussion of Draft Ranges - Meeting Notes - 4p.pdf	1,343 KB
Ex. 7 - WSDA Rulemaking File WAC 16-06-210(29) - 07-04-09 - AAG Mitchell reviews draft CR-102 REDACTED - 4p.pdf	109 KB
Ex. 8 - 12-10-22 - WSDA PRA REDACTION LOG - ref EM from Mitchell to Mena 07-04-09 - 2p.pdf	57 KB
Ex. 9 - WSDA Rulemaking File WAC 16-06-210(29) - 08-11-19 - FINAL CR-102 - WSR 08-24-062 - 2p.pdf	67 KB
Ex. 10 - WSDA Rulemaking File WAC 16-06-210(29) - 09-01-12 - CR 103 - WSR 09-03-032 - 2p.pdf	65 KB
Ex. 11 - WSDA letter to Conservation Commission & Districts re WAC 16-06-210(29) - 09-02-19 - 4p.pdf	1,122 KB
Ex. 12 - Emails from WSDA's AAG Mitchell to Citizen's counsel - 12-12-26 & 12-12-31 - 1p.pdf	79 KB
Ex. 13 - WSDA Rulemaking File WAC 16-06-210(29) - Rationale for developing ranges - 2p.pdf	699 KB
Ex. 14 - WSDA Rulemaking File WAC 16-06-210(29) - 06-06-23 - ppt slideshow Livestock Reporting Ranges - 28p.pdf	6,278 KB
Ex. 15 - WSDA Rulemaking File WAC 16-06-210(29) - 06-06-05 - Confidentiality comparisons w cover EM - 6p.pdf	1,632 KB
Ex. 16 - Legislative History - SSB 5602 - 05-04-23 - House Bill Report - 5p.pdf	266 KB
Ex. 17 - Legislative History - SSB 5602 - Final Bill Report - Synopsis as enacted - 3p.pdf	130 KB
Ex. 18 - Legislative History - SSB 5602 - 05-03-01 - 39p.pdf	4,328 KB
Ex. 19 - Legislative History - SSB 5602 - 05-03-16 - Senate Bill Report as passed senate - 4p.pdf	484 KB
Ex. 20 - Legislative History - SSB 5602 - 05-03-30 - Economic Development Bill Analysis - 6p.pdf	780 KB
Ex. 21 - Legislative History - SSB 5602 - 05-04-14 - Amendment - 44p.pdf	4,920 KB
Ex. 22 - Legislative History - SSB 5602 - 05-04-23 - Amendment - 9p.pdf	911 KB
Ex. 23 - Legislative History - SSB 5602 - 05-05-17 - Partial veto message - 2p.pdf	152 KB
Ex. 24 - Legislative History - SSB 5602 - 05-05-17 - Certification of Enrollment - 10p.pdf	1,097 KB
Ex. 25 - Hidden Wells Dirty Water - investigative articles - Yakima Herald-Republic - Fall-Winter 2008 - 50p.pdf	3,638 KB
Ex. 26 - Email exchange between Citizens and WSDA staffer Connell - 13-12-19 - 2p.pdf	56 KB
Ex. 27 - Email from WSDA PRA Officer McNagny to Citizens counsel - 13-08-13 - 1p.pdf	26 KB
Ex. 28 - WS Dairy Federation - Board Minutes - June 27, 2013 - 7p.pdf	54 KB
Ex. 29 - Ideas to Improve Mgmt. of WA's Natural Resources - Natural Resources Subcabinet - 9-2009 - Excerpts - 6p.pdf	450 KB