

## CLIENT ALERT

### Citizen Suit Watch: District Court Allows RCRA Endangerment Suit to Proceed Against Farms That Apply Manure to Fields

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Last month, a federal district court denied a motion to dismiss filed by a group of dairies that had been sued under the citizen suit provisions of the Resource Conservation and Recovery Act (RCRA). In their complaint, the plaintiffs alleged that manure generated by the dairies was a 'solid waste' under RCRA to the extent it was not used as fertilizer. In denying the dairies' motion to dismiss, the court found that whether animal manure was a 'solid waste' under RCRA was a question of fact where the plaintiffs had alleged that the dairies applied manure to fields in quantities greater than could be used as fertilizer. The court further ruled that a U.S. EPA administrative order under the Safe Drinking Water Act (SDWA) that addressed the same contamination as the RCRA suit did not preclude the citizen suit where the citizen-suit plaintiffs could be entitled to relief that goes beyond the EPA order.<sup>1</sup>

#### Background

In February 2013, a group of plaintiffs filed suit under RCRA's citizen-suit provision against four dairies located in the Yakima Valley of Washington State. The plaintiffs alleged that manure from the dairies had contaminated aquifers with nitrates above the federal maximum contaminant level (MCL). These aquifers were used for drinking water. The plaintiffs alleged that manure generated by the dairies was a 'solid waste' when applied to agricultural fields at levels greater than can be used by crops (agronomic rates) and when leaked from lagoons that store liquid manure. Plaintiffs further alleged that the dairies' handling of manure (1) caused an "imminent and substantial endangerment" under RCRA by contaminating the underground aquifers and (2) constituted illegal open dumping under RCRA.

In March 2013, EPA issued an administrative compliance order under the SDWA that required the dairies to address the same nitrates contamination at issue in the citizen suit. The purpose of EPA's order was to require the dairies to achieve drinking water quality that meets the MCL for nitrates in the aquifers beneath and down-gradient of the dairies.

#### The Parties' Arguments

The dairies moved to dismiss and advanced three arguments. First, they argued that manure is not subject to RCRA regulation because the Act does not regulate useful products such as manure. Because manure is used as fertilizer, the dairies argued, it is not "discarded material" within RCRA's definition of "solid waste" and therefore it is not subject to regulation under RCRA. In addition, the dairies argued that a finding that manure is a solid waste within the meaning of RCRA would lead to the illogical result that all dairies nationwide should be treated essentially as sanitary landfills under RCRA.

Second, citing RCRA's so-called anti-duplication provision, the dairies argued that RCRA does not apply to activities or substances subject to regulation under another environmental statute. Because EPA had already issued an administrative order under the SDWA that addressed the same groundwater problem, the dairies argued that the RCRA citizen suit was precluded.

Third, the dairies argued that the RCRA suit was precluded because the EPA administrative order already provides all the relief that the plaintiffs were seeking and therefore there was no further injunctive relief that the district court could provide. As a corollary of this argument, the dairies argued that the notice of intent to sue (NOI) addressed endangerment to groundwater only and therefore plaintiffs could not rely on harms to surface water and soils to show non-duplication of remedies with the EPA order.

In opposition to the motion to dismiss, plaintiffs argued that manure is a solid waste under RCRA when leaked from lagoons and when over-applied to fields. (The plaintiffs conceded that manure that is in fact used to support crop growth is not a waste under RCRA.) Plaintiffs noted that RCRA's definition of 'disposal' includes the term 'leaking.' Plaintiffs further argued that nutrients can only be absorbed by plants when applied at agronomic rates and alleged that the dairies over-apply manure. Plaintiffs cited a district-court decision that they argued supports their position that manure applied above agronomic rates is 'discarded waste' under RCRA (*Waterkeeper Alliance v. Smithfield Foods*, 2001 WL 1715730, 4:01-cv-27 (E.D.N.C. Sept. 20, 2011)). Plaintiffs argued that whether manure is discarded or applied as a fertilizer is a question of fact.

The Plaintiffs further argued that EPA's enforcement order under the SDWA and their suit under RCRA are not entirely duplicative and therefore RCRA's anti-duplication provision did not bar their suit. According to the plaintiffs, the dairies must comply both with EPA's order and with an order issued by the district court under RCRA. Plaintiffs argued that the environmental problem at issue had not already been abated because their suit involved contamination of surface water and soil in addition to groundwater, while EPA's order addressed groundwater only. Further, they argued, EPA's order addressed nitrates only, while their RCRA suit sought to address contamination caused by phosphorous, pharmaceuticals, and heavy metals, in addition to nitrates. The plaintiffs also argued that their suit was not redundant of EPA's order because, for example, the citizen suit sought to require that a liner be installed for all lagoons, and EPA's order contained no such explicit requirement. Moreover, the RCRA suit seeks alternative water supplies within a three-mile radius of each dairy and the EPA order only addressed water supplies within a one-mile radius.

### **The Court's Decision**

The court denied the motion to dismiss. The court agreed with the plaintiffs that it was "plausible for manure to be 'solid waste' after it has ceased to be 'beneficial' or 'useful' when it is over-applied to the fields and when it has leaked away from lagoons." 2013 WL 3179575, at \*6. Thus, manure becomes waste under RCRA when applied beyond "amounts necessary to serve its intended purpose." *Id.* The court concluded that whether or not the dairies use manure as fertilizer or over-apply it can be decided only after development of a factual record.

As to RCRA's anti-duplication provision, the court found that the broader scope of RCRA's endangerment provision as opposed to the SDWA's narrower focus on drinking-water supplies did not necessitate a finding that the relief sought in the RCRA suit would duplicate EPA's order under the SDWA. The court found "it premature to dismiss on the basis of the anti-duplication provision without allowing discovery" and that it "remains to be seen what remedies could be supplemental to [EPA's order] without conflict or duplication." *Id.* at \*8.

As to the dairies' third argument, the court acknowledged, citing a long line of cases, that a citizen suit is precluded when government action has already achieved all the relief that the citizen suit seeks. *Id.* at \*9. The court further noted that the RCRA suit addressed the same substance (nitrates) and the same medium (groundwater) as EPA's order. But the court found that

there was room for injunctive relief under RCRA that went beyond EPA's administrative order and therefore that the relief from the RCRA suit was not necessarily fully encompassed by EPA's order under the SDWA.

The court agreed with the dairies that the NOI did not provide sufficient notice of harms caused to surface water or soils or to contamination caused by pharmaceuticals, phosphorus, or heavy metals. The court noted that while the "NOI did mention these substances and activities briefly, it was not enough information for Defendants to identify and correct the problem." *Id.* at \*11. The court limited its analysis to contamination of underground drinking water by nitrates.

### Implications

The court's decision provides helpful guidance for citizen-suit defendants on the scope of an NOI. Even though the NOI in this case mentioned myriad other harms in addition to nitrate pollution to groundwater, the court found that plaintiffs had not sufficiently provided notice of violations for those additional substances and media. This conclusion may prove useful for arguing against a vague or incomplete NOI.

This case is being widely watched as a precedent for asserting RCRA claims alleging excessive manure application against animal agriculture. The court's analysis may give plaintiffs support to argue for discovery and factual development. The standard for liability that the court applied here could also influence future cases. The reach of the decision may also expand into other industries to the extent other businesses are alleged to utilize useful products beyond their intended purpose.

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<sup>1</sup> The plaintiffs filed similar complaints against four different dairy operations. The four dairies filed a joint motion to dismiss. Judge Rice denied a motion to consolidate the four cases but issued nearly identical rulings in each case. Citations here are to one of those decisions: *Community Ass'n for Restoration of the Env't., Inc. v. Cow Palace, LLC*, 2013 WL 3179575, No. 13-cv-3016 (E.D. Was. June 21, 2013).

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