



Legal Rulings in Animal Agriculture: An Environmental Law Update

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By Land



Community Association for Restoration of the Environment, Inc. & Center for Food Safety, Inc. v. Cow Palace, LLC (“Cow Palace”)



Photo credit: Ross Courtney, AgWeb

Cow Palace: Background

- Dairy in Granger, WA – Lower Yakima Valley
- Total herd size \approx 11,000
 - 7,372 milking cows
 - 897 dry cows
 - 243 springers
 - 89 breeding bulls
 - 3,095 calves
- Open lot pen setup
- Overlies aquifer used for residential drinking water (30 – 190 feet below grade)



EPA Administrative Order on Consent (AOC)

Study conducted starting 2010; AOC entered thereafter and updated in 2014

1. Provide a permanent, safe alternative drinking water supply to residents with wells that exceed MCLs a one-mile radius (MCLs),
2. Take specific actions to further control potential sources of nitrogen at the dairy,
3. Establish a network of monitoring wells to measure the effectiveness of the nitrogen source reduction actions, and
4. Ensure effective nutrient management at the dairy to reduce the introduction of nitrate to an underground source of drinking water.

Cow Palace: Case Status

- E.D. Wash., case 13-CV-3016-TOR
- Order on cross-motions for summary judgment issued Jan. 15, 2015
- Consent decree entered May 19, 2015

Cow Palace:

Issues addressed in court order

1. Plaintiffs' standing
2. Admissibility of evidence
3. “Whether animal waste, when over-applied onto soil and leaked into groundwater, is a ‘solid waste’...”

Cow Palace:

Issues addressed in court order

4. Whether dairy's manure management practices constitute open dumping
5. Whether manure management practices may cause or contribute to an imminent and substantial endangerment to public health and the environment
6. Whether the dairies are responsible parties

Issue 3:

“Whether animal waste, when over-applied onto soil and leaked into groundwater, is a ‘solid waste’...”

- 42 U.S.C. § 6972 (a)(1)(B) citizen suits
“against any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.”

Issue 3:

“Whether animal waste, when over-applied onto soil and leaked into groundwater, is a ‘solid waste’...”

Definition of solid waste: 42 U.S.C § 6903(27):

[A]ny garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other **discarded material**, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and ***agricultural operations***, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended [42 U.S.C. 2011 et seq.].

Issue 3:

“Whether animal waste, when over-applied onto soil and leaked into groundwater, is a ‘solid waste’...”

- Pretty much anything disposed of, unless an exclusion or exemption applies.
 - Disposed of: “has served its intended purpose and is no longer wanted by the consumer”
Ecological Rights 713 F.3d 502, 515 (9th Cir. 2013)
- And speaking of exemptions:
 - 40 C.F.R. § 257.1(c)(1): “agricultural wastes, including manures and crop residues, returned to the soil as fertilizer or soil conditioners.”

Issue 3:

“Whether animal waste, when over-applied onto soil and leaked into groundwater, is a ‘solid waste’...”

This Court finds there is no triable issue that when Defendants excessively over-apply manure to their agricultural fields -- application that is untethered to the DNMP and made without regard to the fertilization needs of their crops -- they are discarding the manure and thus transforming it to a solid waste under RCRA. Because the excess manure is not "returned to the soil as fertilizers," it is not exempt from RCRA's provisions.

- Also found material leaked from lagoons and infiltrating from composting on bare soils could constitute solid waste

Issue 4:

“Whether animal waste, when over-applied onto soil and leaked into groundwater, is a ‘solid waste’...”

- 42 U.S.C. § 6945(a): any solid waste management practice or disposal of solid waste or hazardous waste which constitutes the open dumping of solid waste or hazardous waste is prohibited
- 42 U.S.C. § 6903(14): The term “open dump” means **any facility or site where solid waste is disposed of which is not a sanitary landfill** which meets the criteria promulgated under section 6944 of this title and which is not a facility for disposal of hazardous waste.

Issue 4:

“Whether animal waste, when over-applied onto soil and leaked into groundwater, is a ‘solid waste’...”

- 40 C.F.R. §§ 257.3, 257.3-4:
 - Solid waste disposal facilities or practices which violate any of the following criteria pose a reasonable probability of adverse effects on health or the environment:
 - A facility or practice shall not contaminate an underground drinking water source beyond the solid waste boundary
- Court found criteria for open dumping to be satisfied

Issue 5: Whether manure management practices may cause or contribute to an imminent and substantial endangerment to public health and the environment

- 42 U.S.C. § 6972 (a)(1)(B): Citizen suits permitted “against any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.”

Issue 5: Whether manure management practices may cause or contribute to an imminent and substantial endangerment to public health and the environment

- [I]mminent "does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present."
 - Price v. U.S. Navy, 39 F.3d 1011, 1019 (9th Cir. 1994).
- Endangerment is "substantial" when it is "serious."
 - Burlington N. & Santa Fe Ry. Co. v. Grant, 505 F.3d 1013, 1021 (10th Cir. 2007).
- A substantial endangerment does not require proof of actual harm but rather "a threatened or potential harm."
 - Price v. U.S. Navy, 39 F.3d at 1019

Issue 5: Whether manure management practices may cause or contribute to an imminent and substantial endangerment to public health and the environment

The undisputed facts are that residential wells downgradient of the Dairy exceed the maximum contaminant level, as established by the EPA, and even if the Dairy's AOC obligations are helping to "reduce" the risk of the adverse health effects of the nitrate-contaminated water to nearby residents, the risk still remains to these residents..."

Issue 6: Whether the dairies are responsible parties

- “[T]o state a claim predicated on RCRA liability for ‘contributing to’ the disposal of hazardous waste, a plaintiff must allege that the defendant had a measure of control over the waste at the time of its disposal or was otherwise actively involved in the waste disposal process.”
 - *Hinds Invs., L.P. v. Angioli*, 654 F.3d 846, 852 (9th Cir. 2011).
- Congress intended that the term “contribution” be “liberally construed,” and such term includes “a share in any act or effect” giving rise to disposal of the wastes that may present an endangerment.
 - *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1383-84 (2d Cir. 1989).

Cow Palace:

Issues addressed in court order

1. Plaintiffs' standing
THEY HAD IT
2. Admissibility of evidence
IT GOT IN
3. "Whether animal waste, when over-applied onto soil and leaked into groundwater, is a 'solid waste'..."
IT WAS

Cow Palace:

Issues addressed in court order

4. Whether dairy's manure management practices constitute open dumping
5. Whether manure management practices may cause or contribute to an imminent and substantial endangerment to public health and the environment
6. Whether the dairies are responsible parties

THEY DID
THEY DID
THEY WERE

Cow Palace: Epilogue

- Consent decree entered May 19, 2015
- EPA inspections and nutrient application recordkeeping
- Lagoon redesign incl. synthetic liners
- Monitoring wells (overlap w/ previous AOC)
- Drinking water w/in defined area
- Centrifuge manure separator, aerated composting

Cow Palace takeaways: Nutrient management plans

Defendants contend [Cow Palace's general manager] "engaged in a series of calculations" when applying manure to the Dairy's agricultural fields... Considering [the manager's] declaration, as well as his deposition testimony, it is clear that characterizing his practices as 'engag[ing] in a series of calculations' is a stretch.

- Used estimates for application rates rather than actual testing data
- Tested from central lagoon rather than specific lagoon withdrawn
- Failed to test for soil residuals
- Applied waste when soils had sufficient nutrients

Cow Palace takeaways:

Lagoon design and “as-built” specifications

- *Save for one lagoon, Defendants do not have complete documentation for each lagoon. However, Defendants admit that none of the Dairy's lagoons have a synthetic liner. Although Cow Palace asserts ... that Laurie Crowe of the SYCD inspected the lagoons and opined that they "appeared" to meet NRCS standards, and the DNMP states the lagoons meet NRCS standards, these assertions cannot be affirmatively established. For instance, although Lagoon 1 documentation suggests that the lagoon was "designed to have a bentonite clay liner," it cannot be established that it was actually built with a clay liner or that the clay liner was reinstalled when this lagoon was deepened in the 1990s.*
 - Dispute as to amount of estimated leakage from lagoons, but “[t]hat being said, although the parties dispute the magnitude of leakage, the fact that the lagoons leak is not genuinely in dispute.
 - “Although Defendants dispute the rate of seepage and nitrate accumulation around and beneath the lagoons, the parties do not genuinely dispute that both events are occurring.”

Cow Palace takeaways



By Air



Waterkeeper Alliance et al v. EPA

D.C. 09-1017

Background

- Most air emissions regulated by CAA; certain releases of hazardous substances trigger reporting under CERCLA/EPCRA
 - Constituents of concern for animal agriculture are ammonia (NH_3) and hydrogen sulfide (H_2S)
 - Reportable quantity: 100 lbs. in 24 hour period
- Challenges in measurement and reporting
 - Non-point sources; difficult to measure
 - Debate re: emission factors

Waterkeeper Alliance et al v. EPA

D.C. 09-1017

Background

- January, 2005: EPA issues proposed consent order to handle present & past releases and to start National Air Emissions Monitoring Study to evaluate AFO emissions
- 2008: EPA issued rule exempting farms from CERCLA/EPCRA reporting (73 Fed. Reg. 76951)
 - All farms exempt from reporting to National Response Center
 - Exempts operations smaller than the Large AFO thresholds from reporting to state and local emergency coordinators

Waterkeeper Alliance et al v. EPA

D.C. 09-1017

Background

Animal Sector	Size Thresholds (number of animals)		
	Large CAFOs	Medium CAFOs ¹	Small CAFOs ²
cattle or cow/calf pairs	1,000 or more	300 - 999	less than 300
mature dairy cattle	700 or more	200 - 699	less than 200
veal calves	1,000 or more	300 - 999	less than 300
swine (weighing over 55 pounds)	2,500 or more	750 - 2,499	less than 750
swine (weighing less than 55 pounds)	10,000 or more	3,000 - 9,999	less than 3,000
horses	500 or more	150 - 499	less than 150
sheep or lambs	10,000 or more	3,000 - 9,999	less than 3,000
turkeys	55,000 or more	16,500 - 54,999	less than 16,500
laying hens or broilers (liquid manure handling systems)	30,000 or more	9,000 - 29,999	less than 9,000
chickens other than laying hens (other than a liquid manure handling systems)	125,000 or more	37,500 - 124,999	less than 37,500
laying hens (other than a liquid manure handling systems)	82,000 or more	25,000 - 81,999	less than 25,000
ducks (other than a liquid manure handling systems)	30,000 or more	10,000 - 29,999	less than 10,000
ducks (liquid manure handling systems)	5,000 or more	1,500 - 4,999	less than 1,500

Waterkeeper Alliance et al v. EPA

D.C. 09-1017

Background

- January, 2009: Group of petitioners filed for review of farm exemption
- August, 2010: EPA files for voluntary remand to reconsider rule
- October, 2010: Court grants remand
 - EPA commences reconsideration of rule
 - National Emissions Monitoring Study to create final Emissions Estimating Methodologies

Waterkeeper Alliance et al v. EPA

D.C. 09-1017

Background

- December, 2012: Draft EEMS for some operations released, but no final action taken
- December, 2012 – April, 2015: ...
- April, 2015: Petitioners file motion to recall mandate (and proceed on merits) or writ of mandamus
- July, 2015: parties agree to briefing schedule

Takeaways from Waterkeeper

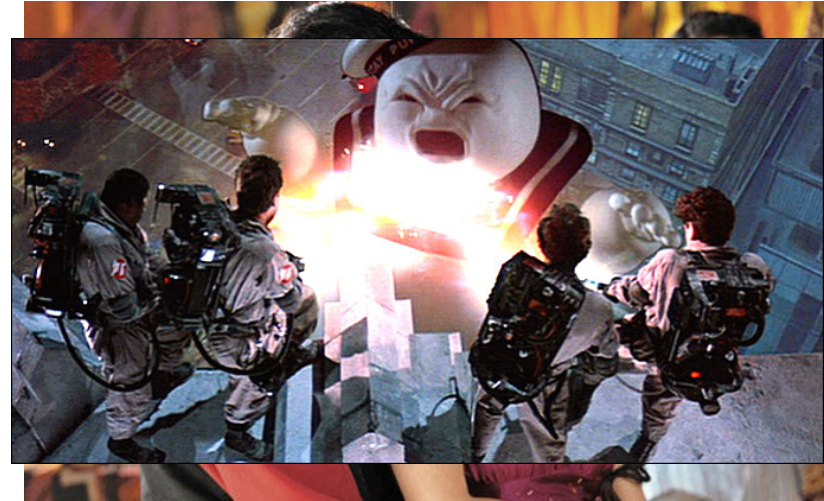
- [Nothing concrete yet]
- Measuring air emissions from point-sources is hard. Measuring them from non-point sources is waaaaaaay harder.
- Right tool, right job:
 - CERCLA/EPCRA are meant to *respond* to releases of hazardous substances.
 - The CAA is meant to *permit* and *monitor* air emissions

By Sea



WOTUS, again

- June 29, 2015: Final rule issued (80 Fed. Reg. 37054)
- July 30, 2015: House Committee on Oversight & Government Reform releases 50 pages of USACE documents critical of EPA economic analysis of rule and scope
 - Dogs and cats live together
 - Mass hysteria
- August 28, 2015: Effective date of rule





THANKS!

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