

# Bloomberg BNA Daily Environment Report™

Source: Daily Environment Report: News Archive > 2013 > July > 07/17/2013 > News > Water Pollution: Case in Washington State Seen as Boosting Efforts to Use RCRA to Limit Farm Pollution

137 DEN A-3

## Water Pollution

### Case in Washington State Seen as Boosting Efforts to Use RCRA to Limit Farm Pollution



By Anthony Adragna

A decision by a federal judge to allow several lawsuits in Washington state to proceed could provide the necessary ammunition for environmental groups to attempt to use the Resource Conservation and Recovery Act to regulate water pollution by agricultural facilities, several legal observers told BNA (*Community Association for Restoration of the Environment Inc. (CARE) v. Cow Palace LLC*, E.D. Wash., No. 13-CV-3016, *joint motion to dismiss denied* 6/21/13).

The U.S. District Court for the Eastern District of Washington on June 21 denied a joint motion to dismiss cases against four dairy operations that alleged the facilities violated RCRA by endangering human health and the environment by applying cow manure at above-agronomic rates and by allowing the manure to leak from above-ground lagoons into drinking water sources.

The plaintiff in the lawsuit, Community Association for Restoration of the Environment Inc., argued the manure meets the definition of solid waste under RCRA (42 U.S.C. 6901).

While observers said future attempts to regulate water pollution from agricultural facilities using RCRA are likely to depend on the ultimate success of the lawsuit, they conceded the case could spur environmental groups and other parties to use the same strategy.

"A number of recent cases have exposed the limitations and attendant risks of using the enforcement provisions of the Clean Water Act to address pollution from agricultural operations," Brian Glass, a partner with Warren Glass LLP in Bryn Mawr, Pa., told BNA in an email. "For that reason, I would not at all be surprised if, in the wake of the Cow Palace decision, more environmental organizations, and perhaps even governmental agencies, began turning to the enforcement provisions of RCRA to assert their claims against the operators of farms that they believe are polluting surface waters or groundwater."

#### Milk Producers Closely Following Case

Jamie Jonker, vice president of scientific and regulatory affairs at the National Milk Producers Federation, said his organization is closely following the case over the "potential implications" for future litigation over water pollution.

"This certainly is a new arena that hasn't been used before," Jonker told BNA. "There certainly would be concern—if this approach is successful—of this being used as a pilot case."

Michael Formica, chief environmental counsel for the National Pork Producers Council, said it is "awfully premature" to evaluate whether the RCRA challenge could be used again in the future given that the case had not yet been decided, but he said most water pollution challenges from agricultural operations would be properly argued under the Clean Water Act.

Glass said that in order to prevail in the case, the plaintiffs will have to show the manure presented "an imminent and substantial endangerment to health or the environment" as required under RCRA.

"That high standard will be easier to meet in cases where drinking water supplies have been tainted, as was alleged in the Cow Palace case," he said. "It may be more difficult to demonstrate that the excess manure may present an 'imminent and substantial' endangerment to the environment, although I am aware of cases in which the over-application of manure has led to fish kills at nearby hatcheries."

#### Manure as Solid Waste at Issue

In the June 21 ruling, Judge Thomas Rice said the lawsuits alleging violations of RCRA through water pollution from agricultural operations could proceed.

CARE argued the manure constituted a solid waste under RCRA and that it had contaminated underground drinking water with high levels of nitrate. The dairies moved to dismiss the complaint by arguing the manure was being used as a fertilizer and thus did not meet the definition of solid waste under RCRA because it was not discarded.

In addition to the Cow Palace dairy, the other dairies involved are George & Margaret LLC, George DeRuyter & Sons Dairy LLC, D&A Dairy, and Henry Bosma Dairy.

In addition to the four cases considered in the joint motion, a similar challenge was filed in *CARE v. R&M Haak* (E.D. Wash., No. 13-cv-3026, *motion to dismiss denied 6/21/13*).

In the rulings, Rice wrote the plaintiff's complaint states "well-pleaded factual allegations that the Defendants over-applied and improperly applied manure to their fields, and allowed liquid manure to leak from lagoons, thereby 'discarding' the manure and qualifying it as 'solid waste' under RCRA."

### **For More Information**

The ruling of the U.S. District Court for the Eastern District of Washington in *CARE v. Cow Palace LLC* is available at <http://op.bna.com/env.nsf/r?Open=smiy-99jmlk>.

The court's ruling in *CARE v. R&M Haak* is available at <http://op.bna.com/env.nsf/r?Open=smiy-99jmad>.

Contact us at <http://www.bna.com/contact/index.html> or call 1-800-372-1033

ISSN 1521-9402

Copyright © 2013, The Bureau of National Affairs, Inc.. Reproduction or redistribution, in whole or in part, and in any form, without express written permission, is prohibited except as permitted by the BNA Copyright Policy. <http://www.bna.com/corp/index.html#V>