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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BERNADETTE BLACKWOOD, individually and as guardian ad litem for K.B. and E.B., et al.,

Plaintiffs,

v.

MARY DE VRIES, individually and dba N&M DAIRY (aka N&M DAIRY # 1 and N&M DAIRY # 2) and as trustee of the NEIL AND MARY DE VRIES FAMILY TRUST; et al.,

Defendants.

Case No.: ED CV 14-00395 JGB SPx

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Hearing date: April 18, 2016
Time: 9:00 a.m.
Courtroom: 1; Hon. Jesus Bernal
3470 Twelfth Street
Riverside, CA 92501
Action filed: March 5, 2014
Trial date: May 24, 2016

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I. INTRODUCTION

There is no evidence that can controvert N&M Dairy's contribution to groundwater contamination: Defendants ignored permits, requirements, and management practices for manure disposal on permeable soils above a drinking water aquifer. It also cannot be controverted that N&M Dairy abandoned a site still containing manure and massive amounts of nitrates in the soil, where they may continue to leak into groundwater. For this Court to deny RCRA liability in this action, it would have to go against findings by the U.S. Geological Survey ("USGS") (the agency primarily responsible for the hydraulic mapping of the area), the California Regional Water Quality Control Boards ("Water Board") (the agency primarily responsible for regulating the site), and Plaintiffs' experts (the only parties to gather comprehensive soil mapping and community well elevation data). All these bodies agree: The groundwater from N&M Dairy flows directly to the Plaintiffs' – and downgradient community's – drinking water wells.

Defendants did not only abandon a health hazard, they walked away from a community they destroyed from years with flies and odors. Their nuisance cannot be controverted: The State and San Bernardino County deemed N&M Dairy's activities to be a nuisance under State law and local ordinances. Moreover, Defendants admit openly that they do not believe they had responsibility or do not care – not about environmental compliance, not about groundwater pollution, and not about the community. Plaintiffs' Statement of Undisputed Facts and Conclusions of Law ("PSFs") 117, 136-138, 143-145, 166, 233 ("do you believe you had any obligation to make sure it was taken care of?... A. No. Q. Why not? A. Because I didn't care.")

II. SUMMARY OF UNCONTROVERTED FACTS

A. Nitrates in Manure

Manure contains two primary forms of nitrogen: ammonium and organic nitrogen. PSF 78. Nitrate becomes highly mobile, and available to crops as

fertilizer, through a natural process by which soil microbes decompose manure and convert ammonium into nitrate. *Id*. 78-80. Plants can only use limited amounts of nitrate; excess remains in the soil when it is applied at levels greater than what a crop can uptake. *Id*. 81-82. Nitrate's high mobility means it readily moves with water through the soil, where it is destined to reach groundwater. *Id*. 83.

Nitrates in groundwater used for domestic drinking purposes present risks to human health. *See* 56 Fed. Reg. 3526; *see also* Declaration of Robert Lawrence, M.D. ("Lawrence Decl.") at ¶¶ 20-27, 31-47. The U.S. Environmental Protection Agency (EPA) has set 10 mg/L as the Maximum Contaminant Level ("MCL") of nitrate in groundwater used for drinking water. 40 C.F.R. § 141.62. N&M Dairy's Waste Discharge Requirements ("WDRs") and management plans were designed to prevent, among other things, nitrate contamination of the aquifer below. PSFs 100(a)-(b), 101(e).

B. Environmental Setting

There were two other agricultural sources within a close proximity of the Dairy; one is shut down, both are far smaller operations with vastly different manure management styles, and both are surrounded by N&M Dairy's manure discards. PSFs 234-245.

Plaintiffs and N&M Dairy are located in the Centro subarea of the Middle Mojave River Basin, downgradient of the Helendale Fault. PSFs 59, 61-62. There are two main aquifers in the Basin: the floodplain aquifer and the wider underlying regional aquifer. *Id*. 60. After 69 years of modeling this groundwater basin, the USGS data "indicate that ground water moves downward from the floodplain aquifer to the regional aquifer downgradient of the Helendale Fault" in the Centro subarea. PSFs 63-64. Both aquifers are located in highly permeable soils composed of weathered sand and gravel, meaning they allow mobile contaminants like nitrate to pass through quickly. *Id*. 68; *see also* Declaration of David H. Erickson ("Erickson Decl.") ¶¶ 30-31. The regional aquifer, on which Plaintiffs' homes are

located, is used for residential drinking water supply and is the sole source of drinking water for the nearby community. *Id.* 12, 65.

Groundwater generally flows from areas of higher groundwater elevation to areas of lower groundwater elevation. PSF 213. In the area downgradient of the Helendale Fault, groundwater flow is away from the Mojave River. *Id*. 67. In 2012, USGS reported average groundwater levels at the well at N&M Dairy to be 2,321 feet, which conforms to Defendants' consultants' monitoring well data and the data gathered by Plaintiffs' experts. *See* PSFs 215-218 (latitude and longitude mapping show well "12Q1" as being directly on the Dairy site); *see also id.* 218 (Alta Em Groundwater Elevation Data) at DEFENDANTS0017615; Erickson Decl. ¶¶ 72-74, 81-83. Plaintiffs' expert mapped Plaintiffs' wells between 2,310-2,312 ft., or at lower groundwater elevations than the Dairy. PSF 19; Erickson Decl. ¶ 72.

The floodplain aquifer has had historically high quality water, but is vulnerable to dairy waste. PSFs 73, 76. In 2003, the USGS determined that background levels of nitrate in the floodplain aquifer, that is, the levels without the introduction of anthropogenic sources, of the Mojave River Basin were consistently less than 2 mg/L and typically under 0.6 mg/L nitrate. *Id*. 75.

C. N&M Dairy

N&M Dairy 1 and N&M Dairy 2 (collectively referred to as "N&M Dairy" or "the Dairy") are two adjacent unincorporated Concentrated Animal Feeding Operations ("CAFOs") that operated from the early 1980s until July 2013, and were located on 904 acres at 36001 and 18200 Lords Road in Helendale, California. 40 C.F.R. § 412.2; Cal. Code Regs. tit. 17, § 86500; PSFs 27-28, 33, 102(a). The Dairy had common ownership and control throughout, including shared management, operation, and finances. PSF 29. While N&M Dairy is closed, Neil and Mary DeVries are subject to a Cleanup and Abatement Order from the Water Board for contaminating area groundwater. PSF 246. The Order requires well sampling in a limited area and replacement water provisions to residents in the

area with levels above those listed in the Order, unless the well samples below threshold levels for two consecutive samplings. *Id*.

According to N&M Dairy's 1994 WDRs, the site was designed to accommodate a maximum of 2,300 cows. PSF 99(b). N&M Dairy's herd grew over time, from 1500 cows in 1985 to 4,200 cows in 1998 to 6,018 in 2007, until the herd started to decrease in 2011. PSF 32. N&M Dairy's manure production grew as well, from 3,250 tons to 91,121 tons of manure per year and from 18.25 million gallons to 37.77 million gallons of liquid manure per year. PSFs 35-36; *see also* Shaw Decl. ¶ 62 (wet and dry manure exceeded WDRs by nearly 50 times). Plaintiffs' experts estimate that N&M Dairy produced approximately 2.3 million tons of manure and over 28 million pounds of nitrogen during its operation. Erickson Decl. ¶ 61; Shaw Decl. ¶ 62.

In 2003, Neil and Mary DeVries—the owners and operators of the Dairy—placed the Dairy business and its property and assets in the Neil & Mary DeVries Family Trust ("the Trust"). PSF 20. Neil and Mary DeVries are the sole Trustees. *Id*. 21. On a day-to-day basis, the Dairy was managed by Neil and Mary DeVries' sons, Jim and Randy DeVries, until 2004 when Randy left to run a third dairy owned by the family and Jim managed the Dairy himself, which he did until it closed. *Id*. 17, 25-26.

During the entirety of its operation, N&M Dairy operated as a scraped drylot dairy, meaning that manure generated in the cow pens was scraped out and stored in stacks throughout the property, directly on native soils, until it was either applied to one of the Dairy's fields without regard to agronomic needs, or eventually removed from the site, though often removal took years. PSFs 34, 37.

The Dairy stored liquid manure, which was created from "wash water" from the milking pens mixed with cow manure and urine, in five earthen impoundments, built to no engineering standards on native soil with no synthetic liners. *Id*. 38-40, 146. N&M Dairy did not apply liquid manure to crops, despite its WDRs and

operational plans stating otherwise. PSFs 39, 42. N&M Dairy instead added liquid manure to an earthen impoundment until it was filled, waited for the liquid manure to evaporate or percolate into the soil beneath, then scraped out the solid manure, stacking it directly on bare ground. *Id*. 41.

III. LEGAL FRAMEWORK

A. The Resource Conservation and Recovery Act ("RCRA")

RCRA "is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." *Meghrig v. KFC W., Inc*., 516 U.S. 479, 483 (1996). Congress enacted RCRA to close "the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes" and "to minimize the present and future threat to human health and the environment." H.R. Rep. No. 1491, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S.C.C.A.N. 6238, 6241. RCRA was therefore intended, in part, to ensure that waste is "treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment." 42 U.S.C. § 6902(b). While EPA is primarily responsible for enforcing RCRA, "the statute provides for 'citizen suits' against persons who allegedly violate its requirements." *Id*. § 6972.

RCRA provides that a civil action may be commenced 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." *Id*. § 6972(a)(1)(B) ("imminent and substantial endangerment provision"). The "expansive" language of this provision authorizes affirmative equitable relief "to the extent necessary to eliminate *any risk posed* by toxic wastes." *Davis v. Sun Oil Co*., 148 F.3d 606, 609 (6th Cir. 1998) (internal quotation marks omitted; emphasis in original); *see also Price v. U.S. Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994).

B. Nuisance and Right to Farm

California Water Code § 13050(m) defines nuisance as a condition that: (1) is "injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property;" (2) "[a]ffects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal;" and (3) "[o]ccurs during, or as a result of, the treatment or disposal of wastes."

California's Agricultural Protection Act, Cal. Civ. Code § 3482.5, operates as a defense to nuisance and trespass claims where the defendant can prove the elements of this statutory defense. *Rancho Viejo, L.L.C. v Tres Amigos Viejos, L.L.C.*, 100 Cal.App.4th 550, 558-59 (Cal. App. 2002). Section 3482.5(a)(1) provides: "No agricultural activity, operation, or facility … conducted or maintained … in a manner consistent with proper and accepted customs and standards, as established and followed by similar agricultural operations in the same locality, shall be or become a nuisance… due to any changed condition in or about the locality, after it has been in operation for more than three years if it was not a nuisance at the time it began."

IV. ARGUMENT

A. This Court Has Jurisdiction over Plaintiffs' RCRA Claims.

Plaintiffs have satisfied the jurisdictional prerequisites to bring a RCRA citizen suit. Plaintiffs gave the required notice more than ninety days prior to suit, detailing the specific nature and time of the violations, the parties responsible and the endangerment created. PSFs 14-15; 42 U.S.C. § 6972(b)(2)(A); *see also* 40 C.F.R. § 254.2. This Court has already determined that this suit is not precluded by any other governmental action. *See* ECF No. 46 at 10.

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B. Plaintiffs Have Standing to Bring this RCRA Citizen Suit.

To establish Article III standing, a plaintiff must show a cognizable "injury" that is "fairly traceable" to the defendants' conduct and that would likely be "redressed" by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 180-81 (2000). Plaintiffs' declarations submitted herewith show that Plaintiffs have standing to maintain this action.

1. The Piña Household

The current members of the Piña household live approximately one mile downgradient from N&M Dairy. Declaration of Jose de Jesus Piña filed hereto (hereinafter "Piña Decl.") at ¶ 8; Erickson Decl. Ex. 11. They have an injury-in-fact because their sole source of drinking water is groundwater, which is contaminated with levels of nitrate that exceed the 10 mg/L MCL and therefore threaten their health. Piña Decl. at ¶¶ 15-17; Piña Supp. Decl. ¶¶ 2-7; PSF 225; *Tri-Realty Co. v. Ursinus Coll.*, No. CV 11-5885, 2015 WL 5013729, at *11 (E.D. Pa. Aug. 24, 2015) ("The presence of unwanted pollution at [plaintiff's property] is an injury in fact capable of supporting standing for a RCRA claim.").

Because the Piñas live near and downgradient from N&M Dairy, their water contamination and concern for their health is fairly traceable to the Dairy's illegal practices. *See Covington v. Jefferson Cty*., 358 F.3d 626, 638 (9th Cir. 2004) ("risks from improper operation…are in no way speculative when the [operation] is your next-door neighbor"). Finally, the requested injunctive relief would redress the Piñas' injuries by reducing or eliminating the Dairy's contamination of their drinking water or providing them with sampling and water replacement solutions that are more protective of their health. Piña Decl. at ¶ 23.

2. The Romero Households

The Romero Households live less than 1/8 mile from N&M Dairy. Declaration of Wanda Romero (hereinafter "Romero Decl.") at ¶ 9; Declaration of Jose Magaña (hereinafter "Magaña Decl.") ¶ 2. The level of nitrates in their

drinking water has frequently exceeded the 10 mg/L MCL, and it currently exceeds the background nitrate levels in the area. Romero Decl. at ¶ 18; Magaña Decl. ¶ 6; PSF 225; PSF 75 (discussing background levels of nitrate in the aquifer). Although the most recent nitrate measurements near them have been below the MCL, they are reasonably concerned that nitrate levels may again exceed the MCL because the Water Board has stated that the nitrate levels can fluctuate and because the soil above the aquifer is still contaminated with nitrate. Romero Decl. at ¶ 28; Romero Supp. Decl. ¶¶ 3-9 PSF 194; Shaw Decl. ¶ 83(a); Erickson ¶¶ 65, 79, 85-86; *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 255 (3d Cir. 2005) (injury-in-fact found where individual alleged that they lived near disposal site and were concerned about health risks). Groundwater sampling shows that the Romeros' well water exceeds the Secondary Maximum Contaminant Level the threshold for Total Dissolved Solids ("TDS"), but the Water Board's Settlement with the Dairy allows the Defendants to cease replacement water after only two nine-month sampling periods. PSF 246. If their levels were to rise again, it would be months before they were aware. In light of the variability of nitrate levels and the pace of groundwater migration, this period of time does not protect the Romeros' health. Lawrence Decl. ¶¶ 101-103; Shaw Decl. ¶¶ 131, 134-135.

The Romeros cannot afford to pay for bottled water or well sampling themselves, and so are reasonably concerned about future exposures to nitrate at unknown levels. Romero Supp. Decl. at ¶ 8; Magaña Decl. ¶ 7; Lawrence Decl. ¶¶ 42-47. This too is sufficient to establish injury traceable to the Dairy's practices, which would be redressed through a judgment in the Romeros' favor, which would provide for a reduction in contamination, or provide them with sampling and water replacement solutions that are more protective of their health. *See Forest Park Nat'l Bank & Trust v. Ditchfield*, 881 F. Supp. 2d 949, 963 (N.D. Ill. 2012) ("Even a small amount of perc on [plaintiff]'s property establishes the required injury for standing purposes.").

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C. Defendants Have Violated RCRA.

1. Defendants Manure is a "Solid Waste" Under RCRA.

The imminent and substantial endangerment provision of RCRA applies to "the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste." 42 U.S.C. § 6972(a)(1)(B). RCRA defines "solid waste" to include "any garbage, refuse... and other discarded material, including solid, liquid, semisolid or contained gaseous material resulting from ... agricultural operations...." *Id.* § 6903(27). The Ninth Circuit has interpreted "discarded material" according to its ordinary meaning, as "to cast aside; reject; abandon; give up." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1041 (9th Cir. 2004).

EPA regulations state that RCRA's provisions do not apply to agricultural wastes, *but only* to the extent the wastes are "returned to the soil as fertilizers or soil conditioners." 40 C.F.R. § 257.1(c)(1). "[T]he determination of whether defendants 'return' animal waste to the soil as [fertilizer] is a functional inquiry focusing on defendants' use of the animal waste products rather than the agricultural waste definition." *Water Keeper Alliance, Inc. v. Smithfield Foods, Inc.*, No. 4:01-CV-27-H, 2001 WL 1715730, at *4–5 (E.D.N.C. Sept. 20, 2001); *see also Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC*, 80 F. Supp. 3d 1180, 1220 (E.D. Wash. 2015) *motion to certify appeal denied*, No. 2:13-CV-3016-TOR, 2015 WL 403178 (E.D. Wash. Jan. 28, 2015) (stating that "if Congress intended to exclude *all* agricultural wastes from RCRA's provisions," it would not have allowed for the possibility that "solid waste" originate from "agricultural operations" (emphasis in original)).

The manure at N&M Dairy was applied to fields regardless of crop or crop needs, sat in unlined lagoons until it evaporated and leached into the ground, or in enormous piles that the Dairy had to *pay* to have hauled away or give away for

free. PSF 167. Because the manure was a discarded byproduct of its dairy business, it is a RCRA solid waste.

a. Defendants Discarded Manure by Applying it to Agricultural Fields Without Regard to Crop Fertilization Needs.

Manure is a solid waste "when it is over-applied to fields and managed and stored in ways that allow it to leak into the soil because at that point, the manure is no longer 'useful' or 'beneficial' as a fertilizer." *Cow Palace*, 80 F. Supp. 3d at 1220. Even though Defendants have had WDRs and management plans that could have guided their manure applications, N&M Dairy routinely ignored them, and placed more manure on permeable soils than could be utilized by the Dairy's crops or on bare fields with no crops, rendering the excess manure without beneficial use and therefore a "discarded material." PSFs 69, 183-185; Shaw Decl. ¶ 28, 59, 80-91 (benefits to crops decreased to the point that further field applications were waste). Plaintiffs and Defendants have documented excessively high levels of nitrate in N&M Dairy's fields, including below the root zone, further indicating that manure was not used by the crops as fertilizer and was discarded. PSFs 187-193; Erickson Decl. ¶¶ 65-69; Shaw Decl. ¶¶ 25-26, 39, 53, 83. Such evidence leaves no genuine issue that the Dairy applied manure simply to dispose of it. *See Cow Palace*, 80 F. Supp. at 1221 (finding "no triable issue [where] Defendants excessively over-apply manure to their agricultural fields—application that is untethered to the [nutrient management plan] 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"). Moreover, Defendants admit, and Plaintiffs' sampling in this case confirms, that there is still manure present in the soil. PSF 194; Erickson Decl. ¶¶ 84-86. That manure and nitrate will continue to contaminate groundwater for years to come. Erickson Decl. ¶¶ 68-69.

1) <u>Defendants Discarded Manure by Failing to Implement Their WDRs and Management Plans.</u>

Defendants' WDRs are the basic operational requirements set by the Water Board since the operation began. PSFs 93-102. Defendants admitted that they did not follow them. *Id*. 116-119; *see Cow Palace*, 80 F. Supp. at 1221 ("Defendants' failure to adhere to the [management plan]… provides strong evidence that the Dairy's application of manure was not 'useful' or 'beneficial' but rather constituted discard"). All of N&M Dairy's WDRs have limited the amount of manure that could be applied to the crop land, which was a maximum estimate of "3.60 tons of dry manure per acre annually." PSF 99, 101 (2001 WDR states "amount of manure that can be disposed on site is limited to the agronomic rate"); *id.* 100 (1994 WDR states "applications must be 'reasonable for the crop, soil, climate, special local situations, management system, and type of manure'"). The 2001 WDR similarly required the Dairy to develop a Waste Management Plan (WMP)[1] to reduce pollution and later enforcement actions required the Dairy to develop a Comprehensive Nutrient Management Plan ("CNMP") for the same reason. *Id*. 101, 103, 111.

The 2010 CNMP provided a blueprint for Defendants to assess the Dairy's conditions and determine ostensibly agronomic nutrient applications. *Id*. 111-115. Defendants admitted that while they were in charge of compliance with the plans, they did not follow either WMP or CNMP with regards to making manure applications. *Id.* 113, 129, 173-174. Despite the CNMP outlining the steps to do so, *see* PSF 115, the Defendants never used manure, lagoon, irrigation water, soil, crop yield, or crop tissue analyses to govern the amounts of manure applied. *Id*. 175-179. Besides the Defendants' own admissions, Water Board records indicate, and inspector Ghasem Pour-Ghasemi testified that the management plans were never

[1] Defendants created plans that were referred to in various years as "Engineered Waste Management Plans" and "Waste Management Plans" to comply with their WDRs. For the purpose of this brief, Plaintiffs refer to all such plans as "Waste Management Plans" or "WMPs."

implemented with respect to applying manure agronomically. *Id*. 128, 185. Moreover, both Neil and Jim DeVries admitted that they never even attempted to measure the tons of manure being applied to comply with even the basic the 3.6 annual tons per acre limits in their WDRs and WMPs. *Id*. 142, 180-182.

2) Defendants' Manure Application Practices Resulted in the "Discarding" of Solid Waste.

In addition to Defendants' refusal to follow their WDRs and management plans, they applied far more manure nutrients than the crops could use as fertilizer from at least 2009 until they ceased operations in 2013. PSF 120-133, 173-180; Shaw Decl. ¶¶ 59, 80-91. First, Defendants admit that they applied manure to bare fields, which is a per se discard because there were no crops to use the nutrients. PSF 184. Mr. Pour-Ghasemi observed applications of manure on bare ground, and Water Board and San Bernardino County inspection reports from 2009-2013 include written and photographic documentation of manure applications to bare ground, with manure sometimes several feet deep and covering over an acre. *Id*. 185, 195(f).

Defendants also discarded manure by making applications without determining how much their crops needed. *Id*. 173-174 (testifying that "I really didn't need an application rate to know how much the fields needed"). Even though consultants performed the necessary sampling to create an agronomic rate, the only way Defendants recognized that over-applications had occurred was by seeing post-application crop damage or lack of crop growth. *Id*. 176, 182 ("you could tell when something is getting too much. The plants start turning yellow and they will not grow"). Mr. Pour-Ghasemi and Defendants' expert Mr. Schaap both testified such over-application results in excess nitrates leaching through the soil and impacting groundwater. PSF 186.

3) Excessively High Soil Sampling Results Establish that Manure has been Discarded.

Defendants' and Plaintiffs' soil sampling confirm that manure was discarded. *See* PSF 187-188, 193; Erickson Decl. Ex. 13; Shaw Decl. ¶ 83. While Defendants did not take regular soil sampling, despite the requirements of their management plans, Defendants produced two soil sampling results – both of which indicate over-application. PSF 187. In 2011, N&M Dairy's consultant confirmed high nitrate levels in the field soils, and "in cases where there is adequate irrigation water applied, these elements will leach through the soil profile and eventually be removed from the root zone of the plant." *Id*. 193 (also admitting that the Dairy used "adequate irrigation"). The letter and a follow up email also stated that the high phosphate levels found in the 2-3 foot depths were an indication of excessive manure applications. *Id*. 187. The letter recommended that N&M Dairy "stop the application of manure and process water for the time…until we can clean up the soil profile and get a producing crop to a viable stage." *Id*. 189.

Further, on June 2015, when Plaintiffs' experts inspected the site and sampled the deep soil, they found excess levels of nitrate well below the crop rooting zone – as deep as 8 feet below the ground surface, showing that excess manure had been applied over a long period of time. Erickson Decl. ¶¶ 65-69, Ex. 10 (field results). Nitrate found in this level is below where crops can utilize the nutrients as fertilizer and therefore has no beneficial purpose. *Id*.; Shaw Decl. ¶¶ 80, 83. Lastly, Defendants conducted two rounds of sampling in October and November 2015. Shaw Decl. ¶ 83, Ex. V. Both sample results confirm excessively high levels of organic matter, which becomes nitrate, in the Dairy's soils, even though it has been *two years* since operations ceased. Shaw Decl. ¶ 83(a).

b. Defendants Discarded Manure by Storing it in Lagoons that Leaked.

The liquid manure stored in the lagoons at N&M Dairy had no beneficial purpose because it never even had the potential to be utilized as fertilizer. There are no crops to take up the nitrate in or nearby the lagoons and the soil is not conducive to denitrification. PSFs 84-86; Erickson Decl. ¶ 45. Defendants refused

to use their stored liquid manure as fertilizer despite being told for decades that this use was critical to ensuring adequate storage and protecting groundwater. PSF 39, 42, 105. Instead, Defendants left it in unlined lagoons dug into permeable soils in hopes that, as Jim DeVries testified, "it would just, you know, disappear." PSF 39. Instead, the liquid manure leaked from the lagoons into the soil where it migrated to groundwater. Erickson Decl. ¶¶ 41-45; 42 U.S.C. § 6903(3) ("disposal" means "leaking"); *see, e.g.*, *Zands v. Nelson*, 779 F. Supp. 1254, 1262 (S.D. Cal. 1991) (gasoline leaking from underground storage tanks solid waste); *U.S. v. Power Engineering Co.*, 191 F.3d 1224, 1231 (10th Cir. 1999) (condensate leaking from air ducts a solid waste).

The court in *Cow Palace* found that where "the soils underlying the Dairy are not conducive to denitrification, the nitrate that accumulates as a result of the leaking lagoons will continue to leach into the soil and migrate toward the underlying aquifer. Accordingly, because the manure stored in the Dairy's lagoons is accumulating in the environment—possibly at accumulation rates of millions of gallons per year—as a consequence of the lagoons' storage design, it is properly characterized as a discarded material and thus a 'solid waste' under RCRA." 80 F. Supp. 3d at 1224. At least a portion of this leakage was due to Defendants' failure to follow industry standards or their management plans on lagoon design, construction, or proper maintenance. *See* Erickson Decl. ¶¶ 20, 22.

N&M Dairy's WDRs and WMPs required that new and existing lagoons and catch basins be built or reconstructed to engineering standards and management plans required the Dairy to line all lagoons to California State standards and keep up basic maintenance. PSFs 99(d), 104, 106-108, 121. These requirements exist to protect groundwater. *Id*. 111. The Water Board documented that N&M Dairy dug new lagoons and deconstructed and rebuilt lagoons a number of times. *Id*. 152. Defendants admit, and the Water Board documents, that they constructed their lagoons in permeable soil without using engineering standards or even a blueprint.

Id. 134(h), 146-148; Erickson Decl. ¶ 31. The lagoons were built by Jim DeVries or Dairy staff digging out a large depression in the earth and creating berms with manure mixed with native soil against management plans. *Id*. 108 (fill materials must be "completely free from manure"), 147, 150; *see also* Erickson Decl. ¶¶ 56, 62. Defendants admitted that none of their lagoons were lined, despite Water Board requirements and enforcement actions. PSFs 40, 135, 141, 148-149.

Defendants also failed to perform even basic maintenance on their lagoons, as required by their management plans, such as allowing the seals on the bottom and sides of their impoundments to dry, crack and breach, and allowing vegetation to grow into the banks, creating paths for seepage. *Id.* 110 (listing basic maintenance), 151, 153-156 (failure to perform maintenance); *see also* Erickson Decl. ¶ 24 (impact on "sealing"). While Defendants claim that the impoundments "self-sealed" with manure, they admitted that they dug up the liner to dirt each time they cleaned the lagoons, though their consultants recommended otherwise, resulting in destruction of any manure seals. PSF 41 (Alta Em does "not recommend all solids be removed from the pond bottoms, as they greatly assist with sealing against water infiltration"); *see also* Erickson Decl. ¶¶ 17-18. As such, each time they started to "refill" their lagoons, there was direct infiltration of nitrate into the permeable soil. Erickson Decl. ¶ 17.

Defendants knew refusing to follow these basic requirements could contaminate groundwater. PSFs 121, 137, 158, 199-202. Plaintiffs' expert's conservative estimate, based on an average population of approximately 4,500 cows, was that N&M Dairy's five permitted lagoons *alone* discharged over 12 million gallons of contaminated water per year of operation into the soil below. Erickson Decl. ¶¶ 25-29, 33-39. But after factoring in his field observations and the data he reviewed about the lack of standards and maintenance, Plaintiffs' expert concluded that the lagoons likely leaked substantially more than that. *Id*. ¶ 39. In *Zands*, though a containment system leaked a useful product nevertheless rendered

it discarded. 779 F. Supp. at 1262. Here, the facts are worse: It would be as if the service station owner in *Zands chose* (or did not care enough otherwise) to install a tank that was *designed* to leak. *Id*.

Soil sampling by Plaintiffs two years after the Dairy ceased operations confirmed that the nitrate from the permanent lagoons were still leaking into the soil and groundwater below, and will continue to leak. Erickson Decl. ¶¶ 41-46; *see also* PSF 157 (showing high nitrate levels in liquid manure nutrient sampling). Samples were taken by boring through each lagoon down to a depth of twelve feet, and all of the samples showed high nitrate concentrations consistent with migration toward the ground water. *Id*. ¶¶ 40-41. One boring showed nitrate levels at 195 ppm at the 10-12 foot depth, far above the background level of 1 mg/L or less. PSF 77; Erickson Decl. Ex. 13. Other borings displayed "staining" that showed that the liquid manure was leaking down toward groundwater. *Id*. ¶¶ 44, 69.

c. Defendants Discarded Manure by Leaving it in Corrals and Stockpiling it on Bare Ground for Years.

Even in the earliest days of operation, Defendants could use only a tiny fraction of their manure as fertilizer. PSF 95 (Dairy could use only 25% of the manure produced). The Dairy stockpiled the excess manure in corrals and throughout the property on bare ground over highly permeable soil in violation of their WDRs. *Id*. 37, 41, 162. Jim DeVries testified that he "had no idea" how long stockpiles were on site and that he removed them only when the Water Board forced them to. *Id*. 166 (testifying that he didn't know if manure piles were 3-4 years old); 163 (stockpiles had been at property for eight years), 162 (Water Board inspection noting "manure left from years ago all over the place"). Defendants cannot show that excess abandoned manure had a beneficial use where they faced several enforcement actions for failing to remove manure, paid money to have the manure removed, and were cited by the Water Board for failing to show that the manure was being hauled to a place where it was being agronomically applied. *Id*.

134, 139. It was not kept with intention to provide it as a fertilizer. *Id*. 168 (main benefit of exporting manure was because it was "taking up room"). They also left the manure sitting in the corrals and stockpiled in the corrals, which were not cleaned with the frequency required by the management plans. PSF 160 (documenting corrals "covered in manure" "often 12 to 14 inches thick" and in a "soupy mixture mixed with urine").

Even if the manure itself was beneficial, the leaking nitrate from the piles and corrals is a solid waste. When N&M Dairy placed manure into large piles on unlined dirt, or used it as construction material, the pile compressed the manure and caused liquid to seep from the pile into underlying soil and groundwater. PSF 169; Erickson Decl. ¶ 55. This leaking is a solid waste under RCRA. PSF 172; *Cow Palace*, 80 F. Supp. 3d at 1224 ("By purposefully composting wet manure on open, native soil which causes manure constituents to leach into and accumulate in the soil, Defendants have discarded those constituents as a solid waste under RCRA").

Additional leachate is generated when rainfall falls on and infiltrates into the pile. Erickson Decl. ¶ 55; PSF 170 (Jim DeVries admitting stockpiles were in a stormflow drain path for 18 months and admitting stockpiles came into contact with rainfall). Because Defendants failed to follow their WDRs and management plans to grade the corrals, *see* PSF 110, they were commonly wet with standing water, creating a direct path for nitrate infiltration. Erickson Decl. ¶ 50; PSFs 124, 133; 139, 161 (admitting no grading occurred and ponding leaked into the soil).

Sampling in this case confirms that nitrate from stockpiles leaked into the soil below. Defendants' consultants only sampled the stockpiles twice during their operation, and were "shock[ed]" that the nitrogen level was higher in the stockpiles than in the fresh manure. PSF 171. Plaintiffs' sampling in the corrals and stockpiling areas demonstrated that manure nutrients had leached deep into the soil, where they are destined to reach groundwater. Erickson Decl. ¶¶ 52-54, 63-64.

In fact, the measured nitrogen in the corrals was even higher than the application fields, and showed high nitrate levels to 5 feet and then rapid migration at lower depths. *Id*. The nitrate leaked into the soil cannot be used as fertilizer because there are no crops grown in the corrals or under the stockpiles. *Id*. ¶¶63, 87. As such, the manure leaked from stockpiled manure and filthy corrals were discarded, making the manure a "solid waste." *See Clems Ye Olde Homestead Farms LTD v. Briscoe*, No. 4:07CV285, 2008 WL 5146964, at *3-4 (E.D. Tex. Dec. 8, 2008) (N.D. Tex. 2009) (leaching from composted wood chip mulch in a flood plain was a "solid waste"). Since manure is still present on the property, nitrate will continue to contaminate the soil and groundwater. Erickson Decl. ¶¶ 56, 87, 89-90.

D. Defendants' Handling, Storage, and Disposal of Solid Waste Contributes to a Substantial and Imminent Endangerment to Health or the Environment

"[T]he statutory standard does not require that Plaintiffs quantify Defendants' contribution or demonstrate that Defendants are the sole cause of the contamination; rather, Plaintiffs need only show that the Dairy's operations "contributed" or are "contributing" to disposal of solid waste which "may" be posing a serious threat to public health." *Cow Palace*, 80 F. Supp. 3d at 1226. In determining whether there is an imminent and substantial endangerment, courts have construed "may present" as requiring plaintiffs to show only the potential for an imminent and substantial endangerment, not actual harm. *Interfaith Comty.*, 399 F.3d at 258; *Me. People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 288 (1st Cir. 2006); *see also Dague v. City of Burlington*, 935 F.2d 1343, 1356 (2d Cir. 1991). Moreover, a finding that harm is "imminent" "does not require a showing that harm will occur immediately so long as the risk of threatened harm is present." *Price*, 39 F.3d at 1019; *see also Me. People's Alliance*, 471 F.3d at 287-88. Finally, an endangerment is "substantial" "if there is some reasonable cause for concern that someone or something may be exposed to risk or harm ... if remedial

action is not taken." *Raymond K. Hoxsie Real Estate Trust v. Exxon Educ. Fdn.*, 81 F. Supp. 2d 359, 366 (D.R.I. 2000); *see also Interfaith Comty.*, 399 F.3d at 259. Plaintiffs need not quantify the risk of harm in order to establish an endangerment. *Me. People's Alliance v. Holtrachem Mfg. Co., LLC.*, 211 F. Supp. 2d 237, 247 (D. Me. 2002).

1. Defendants' Solid Waste Is Reaching Groundwater that Flows to Downgradient Residential Wells.

The Water Board has already determined, based in part on Defendants' own sampling data, that the Dairy's operations had contaminated the downgradient community's groundwater to the point that it was no longer usable. PSF 204. In fact, Defendants have known as far back as 1997 that their operations contributed to groundwater contamination. *Id*. 199-200. Defendants' experts and their consultants agreed that N&M Dairy operations were contributors to nitrate contamination. *Id*. 202-203 ("obviously the dairy is a prime suspect"); 238 (admitting that the decreasing nitrate levels in one of the monitoring wells is due to the cessation of irrigation, showing a direct correlation and discussing that the applications to agricultural fields "are likely the most significant contributor to nitrate in the groundwater compared to" the corrals, lagoons, or stockpiles). Defendants' experts also agreed that the nitrates present in the soil below the root zone will eventually reach groundwater. *Id*. 83. As there is little chance for denitrification in the aquifer, once nitrate has entered groundwater, it will remain stable as it travels to downgradient wells. *Id*. 87.

Sampling by Defendants, the Water Board, and Plaintiffs leaves no doubt that the nitrates in the solid waste are entering the groundwater. *Id*. 205-221; Erickson Decl. ¶¶ 76-81. Plaintiffs' soil tests to 18 feet show nitrate above the background levels, proving that nitrates have migrated, and will continue to migrate, to levels at the Dairy where groundwater is present. Erickson Decl. Ex. 8; PSF 74 (groundwater is encountered at the Dairy between 7-37 feet); *see* Shaw

Decl. ¶ 108. Sampling conducted upgradient from the Dairy shows low overall nitrate concentrations, while Defendants' and the Water Board's groundwater testing on and downgradient from N&M Dairy shows nitrate levels far above those upgradient. PSF 205, 223-225. The Water Board further did sampling of bacteria and surfactants in downgradient residents' wells that ruled out their septic systems as substantial contributors to the contamination. *Id*. 236. Defendants' own surfactants sampling mirrored the Water Board's findings. *Id*. 237. Plaintiffs' load calculations concluded that the comparative load made any septic contribution *de minimis*. *Id*. 13, 235; Erickson Decl. ¶¶ 47-48. Moreover, the presence of "tracer chemicals" associated with cow manure in the groundwater establishes that the nitrates in the groundwater are from cow manure. Erickson Decl. ¶ 81 (discussing high levels of chloride and TDS found in the soil and groundwater as associated with dairy waste and feed additives); Shaw Decl. ¶ 115, 126.

Defendants' experts posit, in the face of data from the USGS, Water Board, and Plaintiffs' mapping that states otherwise, that groundwater does not flow from the Dairy to Plaintiffs' properties. *See* PSF 222. But there is no data to support this position. *Id*. Rather, they consistently located N&M Dairy in the wrong place in USGS maps. *See, e.g. id.* (placing N&M Dairy at approximately Well 7H3 instead of Well 12Q1). The elevation levels and flow paths at N&M Dairy are, based on all groundwater elevation data available, upgradient to Plaintiffs wells in a way that contamination reaches Plaintiffs' and other downgradient residential wells. *See id*. 211-221; *see also* Erickson Decl. ¶¶ 72-74, 81; Shaw Decl. ¶¶ 105-106.

2. Contamination from N&M Dairy Operations is Contributing to Exceedances to the MCL for Nitrate.

The nitrate MCL was set at 10 mg/L because EPA determined that

dangerous health effects can occur when consuming water at or above the MCL.[2] 56 Fed. Reg. 3526; PSFs 88-92. The levels of nitrate documented in wells downgradient from N&M Dairy exceed the 10 mg/L MCL. PSF 225. Because sampling predominantly has shown that upgradient groundwater was below the nitrate MCL, but sampling on the Dairy and downgradient found results approaching or exceeding the MCL, there is no doubt that Defendants are contributing to the exceedance of the nitrate MCL, and therefore posing a risk to health. It is also undisputed that people downgradient of the Dairy could be drinking from wells contaminated with nitrates above the MCL. PSF 247 (most recent sampling event, with map and list of residences that were not sampled). N&M Dairy's most recent sampling well report showed ten wells exceeding the MCL for nitrates, with the highest at 23.6 mg/L, more than twice the MCL, and two additional wells above 9 mg/L. PSF 247.

Defendants have claimed that there is no endangerment because operations have ceased and nitrate levels are declining.[3] However, attenuation alone is insufficient to negate RCRA liability where downgradient wells are still far above the MCL for nitrate. *See LAJIM, LLC v. Gen. Elec. Co.*, No. 13 CV 50348, 2015 WL 9259918, at *12 (N.D. Ill. Dec. 18, 2015) (finding that the reliance on attenuation, even where levels do not exceed the MCL, does not relieve RCRA liability where the "the plume *may* have" migrated downgradient); *see also* PSF 206 (Water Board stating that nitrate levels fluctuate and "private drinking water supply wells having nitrate levels below the MCL during one sampling event have exhibited levels above the MCL on a subsequent sampling event").

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2 There is also evidence that exposure below the MCL may present a risk to public health as well. *See* Lawrence Decl. at ¶¶ 33-41.

3 While it does not relieve Defendants of liability, if anything, the correlation between ceased operations and decreasing nitrate levels downgradient is just further evidence that the contamination is, in fact, caused by the Dairy. Erickson Decl. ¶¶ 79, 82; Shaw Decl. ¶¶ 114-118.

Finally, there remains an endangerment because there is threat of additional infiltration through resumed irrigation and precipitation. PSF 72. Defendants are actively attempting to sell the land to agricultural interests that will reintroduce irrigation. PSF 248. Defendants violated their Settlement Agreement with the Water Board by refusing to complete a conservation easement which would have hindered their ability to sell their land to such interests. *Id.* 140; *see also Newark Grp., Inc. v. Dopaco, Inc.*, No. 2:08-CV-02623-GEB, 2011 WL 4501034, at *6 (E.D. Cal. Sept. 27, 2011) (finding an imminent endangerment where methane was trapped in the soil because plaintiffs had alleged that the future use of the property would release the contaminants). In addition, while the area has suffered a four-year historic drought that has reduced precipitation leading to infiltration, the drought will end, and the area is prone to large flood events, which recharge the aquifer. PSFs 70-71. During either resumed irrigation *or* heavy storms, the nitrates remaining in the soil column will migrate through soil and eventually to groundwater. Erickson Decl. ¶ 107; Shaw Decl. ¶ 123. As long as manure remains at the Dairy site and nitrate remains in massive quantities in the soil column, Defendants' disposal of manure and the resulting groundwater contamination certainly "may," and in fact does, present an imminent and substantial "endangerment" to the downgradient community. Erickson Decl. ¶¶ 89-90, Erickson Ex. 7 (nitrogen load left on the site from each source based on soil samples); Shaw Decl. ¶¶ 75, 83 (organic matter build up "is a 'ticking time bomb' for future groundwater contamination"), 100, 102.

3. Defendants' Disposal of Solid Waste Also Creates a Risk of Harm to the Environment.

There is no dispute that the floodplain aquifer (which N&M Dairy is contaminating) is in direct and "excellent hydraulic" contact with the Mojave River. PSF 66. The "environment" protected by RCRA includes groundwater. *Lincoln Properties, Ltd. v. Higgins*, No. CIV. S-91-760DFL/GGH, 1993 WL

217429, at *13 (E.D. Cal. Jan. 21, 1993). Groundwater can be endangered even if humans or animals are not exposed to the contaminated groundwater, because "a living population is not required" to establish environmental harm. *Interfaith Comty.*, 399 F.3d at 259; *see also Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1021 (10th Cir. 2007); *Cow Palace*, 80 F. Supp. 3d at 1225 (finding groundwater contamination environmental contamination under RCRA); *Raymond K Hoxsie*, 81 F. Supp. 2d at 361-62, 366-67 (rejecting argument that groundwater contamination not an actionable endangerment unless it was being consumed); *Fairway Shoppes Joint Venture v. Dryclean U.S.A. of Florida, Inc.*, No. 95-8521-CIV-HURLEY, 1996 WL 924705, at *8 (S.D. Fla. Mar. 7, 1996) (finding that PCE in groundwater endangered the environment, regardless of health threat).

E. Defendants are Liable for Violating RCRA Section 7002.

RCRA creates joint and several liability, so each defendant who contributes to an endangerment is responsible for abating all of it. *Holtrachem*, 211 F. Supp. 2d at 255. Defendants are "persons" under RCRA. 42 U.S.C.A. § 6903(15) (defining person as including individuals and trusts). The DeVries family and the Trust are past or present owners or operators of the land and the Dairy. PSFs 16-21, 25-26; 42 U.S.C.A. § 6972(a)(1)(B). The only remaining issue is whether they "contributed to" the disposal of a waste.

The standard for liability for RCRA endangerment is the same in the federal enforcement section, Section 7003, and the citizen enforcement section, Section 7002(a)(1)(B), and therefore is "similarly interpreted." *Cox v. City of Dallas*, 256 F.3d 281, 294 n. 22 (5th Cir. 2001). In its guidance on Section 7003, EPA has explained that "the phrase 'has contributed to or is contributing to' [is to] be

broadly construed."[4] EPA stated that the "plain meaning of 'contributing to' is 'to have a share in any act or effect.'" *Id*. at 17. EPA recognized that "contributors" include "a person who *owned the land* on which a facility was located *during the time that solid waste leaked* from the facility." *Id*. at 18 (emphasis added). Accordingly, several courts have found liability based on this interpretation of section 7002(a)(1)(B). *See, e.g., Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1317 (2d Cir. 1993); *United States v. Aceto Agric. Chems. Corp*., 872 F.2d 1373, 1383-84 (2d Cir. 1989) (contribution includes conduct that gave a defendant "a share in any act or effect" giving rise to disposal).

In the Ninth Circuit, a plaintiff may establish RCRA liability by either showing that the defendant had "*a measure of control* over the waste at the time of its disposal" *or* that the defendant "was otherwise actively involved in the waste disposal process." *Hinds Investments, L.P. v. Angioli*, 654 F.3d 846, 851-52 (9th Cir. 2011). All Defendants meet the *Hinds* test.

1. Neil DeVries is Liable.

Neil DeVries was actively involved as owner/operator and in the disposal of solid waste. PSFs 43-44, 49, 56. He purchased the land underlying N&M Dairy and continued to own it until he transferred it to the Trust, of which he is one of two Trustees. *Id*. 16-20. He was the one of the two owners and operators of the Dairy when the manure at issue here was disposed. *Id*. 43. He admits that he managed and controlled the Dairy's operations, including disposal of the manure. *Id*. 47-48, 55.

2. Mary DeVries is Liable.

Mary DeVries purchased the land underlying N&M Dairy and continued to own the property until she transferred it to the Trust, of which she is one of two

[4] Environmental Protection Agency, Guidance On The Use Of Section 7003, at 17, available at http://www2.epa.gov/enforcement/guidance-use-administrative-orders-under-rcra-section-7003 (last accessed Feb. 15, 2016).

Trustees. PSFs 16-20. She was one of the two owners of N&M Dairy and maintained a partnership with regards to the Dairy. *Id*. 43-44. Mary DeVries performed operational and managerial functions at N&M Dairy. *Id*. 50, 57. Ms. DeVries maintained primary control over N&M Dairy's records and finances. *Id*. 51. She was responsible for contracting and paying for manure removal and repairs, providing access to information concerning the Dairy's manure storage and management, and decided when expenses were too great and should not be incurred. *Id*. 51-52. Ms. DeVries was also a person responsible for signing environmental compliance agreements and enforcement actions. *Id*. 46.

3. Jim DeVries is Liable.

Jim DeVries was actively involved with the disposal of solid waste at N&M Dairy. PSFs 53-54. He managed the day-to-day operations at the Dairy and was responsible for ensuring its compliance with environmental laws. *Id*. 26, 54. He constructed the earthen impoundments that stored manure, was in charge of when manure was applied to crop areas, directly supervised or performed actions surrounding cleaning out corrals and stockpiling manure, and was responsible for working directly with employees or contractors on removing stockpiles. PSF 53-54.

4. Randy DeVries is Liable.

Randy DeVries is liable as a past operator of N&M Dairy. He managed the day-to-day operations at N&M Dairy, including waste management, until 2004. PSF 25, 43, 120. He continued working with consultants on environmental compliance issues related to waste management at N&M Dairy until as recently as 2011. *Id*. 45. Finally, he continued to deal with the removal of manure at the Dairy through his management of Neil DeVries Dairy # 3, which utilized, and sometimes monopolized, N&M Dairy's manure removal equipment. *Id*. ¶ 25.

5. The Neil and Mary DeVries Trust and Trustees are Liable.

The Neil and Mary DeVries Trust and its Trustees are also liable as an

owner of the land on which N&M Dairy operated. PSF 20. The only trustees of the Trust are Neil and Mary DeVries, who had control over all aspects of the Dairy operation. *Id*. 21; *See City of Phoenix, Ariz. v. Garbage Servs. Co.*, 827 F. Supp. 600, 605 (D. Ariz. 1993) (trustee personally liable under CERCLA where "trustee had the power to control the use of trust property, and knowingly allowed the property to be used for disposal"). The Trust is simply a legal construct and its creation did not change the way the DeVries managed the Dairy or used its income and assets. PSF 58. Moreover, both the income from the Trust and its assets were used interchangeably with the N&M Dairy and their personal accounts to maintain Neil and Mary DeVries' lifestyle. *Id*. 22-23 (providing that as the trustees Neil and Mary DeVries may apply both the trusts' income and "as much of the principal" as they determine appropriate to pay for their own "proper health, support, maintenance, comfort and welfare in accordance with their accustomed manner of living at the time of this instrument"); *see also id*. 24 (when the Trust sold property, Neil and Mary DeVries placed some of that money in their "personal bank accounts" and used some to go "on vacation").

F. Defendants' Conduct In Violation of the State Water Code and San Bernardino County Code Constitutes Nuisance Per Se

A "nuisance per se arises when a legislative body … expressly declares a particular object or substance, activity, or circumstance, to be a nuisance." *Beck Dev. Co. v. S. Pac. Transp. Co.*, 44 Cal.App.4th 1160, 1206 (1996). A nuisance per se can be created by state statute or municipal ordinance. Cal. Gov't Code § 38771; *City of Monterey v. Carrnshimba* ("*Carrnshimba*"), 215 Cal.App.4th 1068, 1087-88 (2013); *City & County of San Francisco v. Padilla*, 23 Cal.App.3d 388, 401 (1972). Where such law exists, the sole considerations for the court, in determining the occurrence of nuisance per se, "are whether the statutory violation occurred and whether the statute is constitutional." *Carrnshimba*, 215 Cal.App.4th, at 1086-87

(citing to *City of Bakersfield v. Miller*, 64 Cal.2d 93, 100 (Cal. 1966)); *see also McCoy v. Gustafson*, 180 Cal.App.4th 56, 110-11 (2009).

Defendants violated California Water Code § 13050(m), which defines nuisance as the disposal of waste in a manner that creates a condition "injurious to health, or [that] is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property;" and which affects a "community or neighborhood, or any considerable number of persons." California Water Code § 13050(m). This includes waste disposal causing water pollution. Cal. Water Code § 13050(l) & (m); *Jordan v. City of Santa Barbara*, 46 Cal.App.4th 1245, 1257 (1996); *Newhall Land & Farming Co. v. Superior Court*, 19 Cal.App.4th 334, 341 (1993).

On numerous occasions between 2009 and 2014, Defendants failed to properly manage manure and animal carcasses at the Dairy and caused pollutants to enter the groundwater, in violation of Water Code § 13050. PSFs 197, 226. In fact, the Water Board repeatedly noted that Defendants violated section 13050, because the Dairy's treatment and disposal of waste caused offensive odors and flies to emanate from the Dairy, invade the properties of nearby residents, and interfere with their free use and enjoyment of their properties. PSF 228-232.

Defendants' manure management practices also violated California Health and Safety Code § 5411, which provides: "No person shall discharge sewage or other waste, or the effluent of treated sewage of other waste, in any manner which will result in contamination, pollution or a nuisance." PSF 195 (examples).

Defendants' manure and dead animal mismanagement also caused fly breeding and excessive adult fly populations, thereby creating conditions declared to be a nuisance in several ordinances set forth in the San Bernardino County Code ("SBCC"). *See, e.g.*, SBCC §§ 31.0202, 33.0302, 33.0304, 33.0901, and 33.0902.[5]

[5] Relevant excerpts of the San Bernardino County Code are attached to Plaintiffs' Request for Judicial Notice, filed herewith.

For example, Defendants were cited for creating a nuisance as defined in SBCC § 31.0202 because of how they dealt with their animal carcasses (PSF 197); they were cited for creating a nuisance as defined in SBCC § 33.0912 for accumulating material "resulting or likely to result in" fly breeding in an amount that endangers public health or unreasonably interferes with others' use and enjoyment of their lives and property (PSFs 164,195-197); and they were cited for creating a nuisance as defined in SBCC § 33.0920(a)(3) because of how they disposed of their waste water. PSF 195. Indeed, the findings of Vector Control and the Water Board, as well as Defendants' own statements, indisputably establish that Defendants repeatedly allowed flies to breed on their property. PSF 227 (Plaintiffs' testimony).

Because Defendants violated provisions of the Water Code, the Health and Safety Code, and the San Bernardino County Code, in ways that the state and county legislative bodies have declared to constitute nuisances, Defendants are per se liable under Plaintiffs' nuisance theory.

G. Defendants' Right-to-Farm-Defenses Fail Because Defendants Violated the Law

Defendants' violations of the above-described laws preclude Defendants from pursuing a "right-to-farm" defense. Under California's Agricultural Protection Act ("right-to-farm"), agricultural operations such as "dairying" (as well as "[a]gricultural processing" operations such as canneries, packing plants, and facilities that process dairy products) may defend against nuisance and trespass claims arising out of "any changed condition in or about the locality," if: they have been in operation more than three years; their operation was not a nuisance at the time it began; their activities did not constitute a nuisance, as specifically defined in the Cal. Health and Safety Code or Cal. Water Code §§ 13000 *et seq*.; and they otherwise conducted and maintained their activities and facilities "in a manner consistent with proper and accepted customs and standards, as established and followed by similar agricultural operations in the same locality." Cal. Civ. Code §§

3482.5 and 3482.6. "Proper and accepted customs and standards" is not defined in §3482.5, but it is defined in section 3482.6(e)(3) as "compliance with *all applicable state and federal statutes and regulations* governing the operation of the agricultural processing activity, operation, facility, or appurtenances thereof with respect to the condition or effect alleged to be a nuisance." Cal. Civ. Code § 3482.6(e)(3) (italics added).

Because Defendants violated Health and Safety Code § 5411 and Water Code § 13050, their conduct falls within the express exclusion set forth in section 3482.5(c), which prohibits agricultural operations whose activities have been declared a nuisance under those statutes from asserting right-to-farm as a defense. *See also* Cal. Civ. Code § 3482.6(c).

Additionally, because Defendants violated those statutes as well as numerous county ordinances, Defendants cannot establish that they operated according to proper and accepted customs and standards. For this reason also, Defendants' right-to-farm defenses fail.[6]

H. Defendants' Right-to-Farm Defenses Also Fail Because the Nuisance and Trespasses Did Not Result from a Changed Locality

Plaintiffs' nuisance and trespass claims pertain to water contamination, odors, and flies that invaded the Plaintiffs properties as a result of Defendants' failure to adequately manage excessive manure resulting from increased herd size, failure to avoid and abate fly breeding, and failure to properly manage dead

[6] Defendants assert the right-to-farm as their Twenty-Second and Thirty-Sixth Affirmative Defenses. However, the Thirty-Sixth Affirmative Defense seeks an immunity afforded to agricultural *processing* operations (Defendants' Answer, D.E. 88, at 44:18-24). Defendants' Dairy was never an agricultural processor as defined in Cal. Civ. Code § 3482.6(e)(1). *See* PSFs 30-31 (claiming that all Defendants did was produce milk, which was shipped off daily). For this reason also, Defendants will be unable to prove that they are entitled to the immunity described in their Thirty-Sixth Affirmative Defense.

animals. ECF No. 78-1. The residential community surrounding the Dairy has not materially changed since the Dairy began its operation in the early 1980s. PSFs 1-11 (Plaintiffs have been there as long as the 1960s). For this reason also, Defendants are precluded from pursuing their Twenty-Second and Thirty-Sixth Affirmative Defenses.

I. California Civil Code § 3482 Does Not Immunize Defendants from Plaintiffs' Tort Claims

California Civil Code § 3482 provides that "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance." Defendants assert this statute as their Thirty-Fifth Affirmative Defense (ECF No. 88, Defs' Answer to TAC, at 44:10-17), but Defendants cannot avail themselves of this defense because they did not adhere to the Waste Discharge Requirements that governed their operations. PSFs 116-119. Defendants cannot point to a single statute that authorized them to operate the Dairy in the unlawful and improper ways that they operated it. Therefore, Plaintiffs request that this defense also be summarily adjudicated.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask the Court to grant partial summary judgment in their favor with respect to the issues of Defendants' liability under Plaintiffs' RCRA claim and Defendants' liability for creating a nuisance per se with respect to water contamination, odors, and flies. Plaintiffs further request that the Court grant summary judgment of Defendants' Twenty-Second, Thirty-Fifth, and Thirty-Sixth Affirmative Defenses, as Defendants are unable to present evidence essential to establish these defenses.

Dated: February 16, 2016

PUBLIC JUSTICE, PC

By: Jessica Culpepper

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