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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

COMMUNITY ASSOCIATION FOR
RESTORATION OF THE
ENVIRONMENT, INC., a Washington
Non-Profit Corporation
and
CENTER FOR FOOD SAFETY, INC.,
a Washington, D.C. Non-Profit
Corporation,

Plaintiffs,

v.

COW PALACE, LLC, a Washington
Limited Liability Company, THE
DOLSEN COMPANIES, a Washington
Corporation, and THREE D
PROPERTIES, LLC, a Washington
Limited Liability Company,

Defendants.

NO. CV-13-3016-TOR

PLAINTIFFS' MOTION FOR,
AND MEMORANDUM IN
SUPPORT OF, SUMMARY
JUDGMENT

Note on motion calendar: 1/6/15

Time: 1:00 p.m.

Oral Argument Requested

INTRODUCTION

1
2 Defendants' primary expert on field applications admitted during deposition
3 that it is "more likely than not that Cow Palace could be contributing to the nitrate
4 contamination in the groundwater[.]" Plaintiffs' Statement of Material Fact
5 ("PSF") at ¶ 131. Defendants' expert on lagoon leakage admitted that a one-acre
6 lagoon built to the NRCS standard leaks at least 924 gallons per day; nine acres of
7 lagoons therefore leak more than 8,300 gallons per day, or over 3,000,000 gallons
8 per year. *Id.* at ¶ 97(d). These admissions, in addition to the voluminous and
9 virtually uncontroverted evidence discussed *infra*, enable the Court to enter
10 summary judgment for the Plaintiffs on the key legal issues in this case.

11 The aquifer underlying and downgradient from the Cow Palace Dairy ("Cow
12 Palace" or "the Dairy") contains dangerous levels of nitrate. Plaintiffs' members,
13 along with thousands of other residents living in the Lower Yakima Valley south
14 of Cow Palace, rely on wells screened within the contaminated aquifer to supply
15 their drinking water. PSF ¶¶ 131-32; *see also* Snyder Decl. Ex. 4 at p. 8 (EPA
16 Report). The EPA Report, the Arcadis data collected under the Administrative
17 Order on Consent ("AOC") between the Cluster Dairies and EPA, the Rule 34 data
18 collected by Plaintiffs, the testimony of Plaintiffs' experts, the admissions of Cow
19 Palace managers and experts, and the documents and testimony of numerous other
20 witnesses all prove that Cow Palace is causing or contributing to the nitrate

1 contamination of the aquifer. The evidence is also uncontroverted that the
2 documented nitrate contamination presents a serious and present threat to human
3 health and the environment.

4 Cow Palace produces over 61,000,000 gallons of wastewater annually. PSF
5 ¶ 43. Defendants’ own testimony about their waste management practices shows
6 that they dispose of solid waste on their land and their lagoons leak. *See, e.g.*, PSF
7 ¶¶ 68-72; 81 (disposal on land); 89-90, 97-99, 102, 106 (lagoons). Defendants
8 ignored their Dairy Nutrient Management Plan (“DNMP”), applying manure in
9 amounts that far exceeded what crops could use as fertilizer. PSF ¶¶ 67-75, 81.
10 Such actions constitute the discarding of manure. PSF ¶ 83.

11 The impacts of overapplication and lagoon leakage are confirmed by
12 Defendants,’ EPA’s, and Plaintiffs’ soil and groundwater samples. The data
13 consistently show that manure has been applied in amounts beyond crop
14 fertilization rates and leaked from lagoons and compost areas. As a result, excess
15 nitrate and phosphorus have migrated to the aquifer below. PSF ¶¶ 77, 124, 131.

16 Plaintiffs Community Association for Restoration of the Environment
17 (“CARE”) and Center for Food Safety (“CFS”) filed suit under the Resource
18 Conservation and Recovery Act (“RCRA”) to abate the contamination caused by
19 past and present manure practices. The contamination constitutes open dumping
20 and “may present an imminent and substantial endangerment to health or the

1 environment.” 42 U.S.C. § 6972(a)(1)(A)-(B). While the statute only requires a
2 showing that contamination *may* present a threat to human health *or* the
3 environment, the evidence shows that the threat to both is serious and immediate.

4 Plaintiffs now move for summary judgment on five issues: Plaintiffs’
5 standing, whether animal waste that is overapplied onto soil and leaked into
6 groundwater below the facility is a solid waste, the existence of conditions that
7 violate RCRA’s ban on open dumping, the existence of conditions that may cause
8 or contribute to an imminent and substantial endangerment, and the liability of
9 Cow Palace, LLC, The Dolsen Companies, and Three D Properties, LLC.¹

10 **SUMMARY OF UNDISPUTED FACTS**

11 **Nitrates in Manure**

12 Manure contains two primary forms of nitrogen: ammonium and organic
13 nitrogen. PSF ¶ 38. The organic form of nitrogen is nearly immobile. It becomes
14 mobile, and available to crops as fertilizer, through processes by which soil
15 microbes decompose organic nitrogen and release ammonium. *Id.* After the
16 nitrogen becomes ammonium, microorganisms within the soil convert ammonium
17 into nitrate, a process called nitrification. *Id.* at ¶ 39. Both nitrate and ammonium
18 are available to plants as fertilizer. *See id.* at ¶¶ 38, 48. Plants can only uptake

19
20 ¹ All other issues are reserved for trial, including appropriate remedies.

1 limited amounts of nitrate and phosphorus as fertilizer; excess remains in the soil
2 when applied at levels greater than a crop's fertilization needs. *Id.* at ¶¶ 33, 79.

3 Nitrate is highly mobile and susceptible to leaching to groundwater. *Id.* at ¶ 39.

4 Phosphorus is less mobile but subject to runoff and leaching. *See, id.* at ¶¶ 111.

5 Nitrates found in groundwater present risks to human health. *Id.* at ¶¶ 133-
6 136, 138. Most consumption of nitrate occurs by consuming contaminated
7 drinking water. *Id.* at ¶ 137. Once ingested, nitrate is converted to nitrite and can
8 cause adverse health effects. *Id.* at ¶¶ 136, 138. Because of these harmful effects,
9 Cow Palace's DNMP was designed to limit manure applications to prevent
10 contamination of the aquifer. *Id.* at ¶ 42.

11 **Yakima Valley Aquifers**

12 There are two main aquifers: a surficial unconfined to semi-confined alluvial
13 aquifer and an extensive basalt aquifer of great thickness underlying the
14 sedimentary deposits. *Id.* at ¶ 28. The deep portion of the basalt aquifer is
15 believed to be semi-isolated from the surficial aquifer and local stream systems and
16 eventually discharges to the Columbia River. *Id.* The shallower aquifer feeds the
17 Yakima River. *Id.* Precipitation is the main source of natural groundwater
18 recharge in this area. *Id.* at ¶ 29. Irrigation and manure applications impact the
19 natural groundwater recharge whenever precipitation plus irrigation or application
20 exceed the water holding capacity of the soil. *Id.*

1 Groundwater flow within the shallower, surficial aquifer generally follows
2 topography, from northeast to southwest. *Id.* at ¶ 28. This surficial aquifer serves
3 as a domestic water supply, and most residences downgradient of Cow Palace draw
4 water from this aquifer. *See* Snyder Decl. Ex. 4 at 48, 80; Snyder Decl. at Ex. 18,
5 p. 9 (Defendants' Resp. to Request for Admission #11.)

6 **Cow Palace Dairy**

7 The Cow Palace Dairy is a large concentrated animal feeding operation
8 located near 1631 North Liberty Road, Granger, WA, 98932. PSF ¶¶ 2, 20. As of
9 2012, Cow Palace had 7,372 milking cows, 897 dry cows, 243 springers, and 3095
10 calves housed at the facility, for a total herd size of 11,607 animals. *Id.* at ¶ 24.
11 Cow Palace is located in the northern end of the Lower Yakima Valley, and is
12 bounded to the north by basalt hills known as the "Rattlesnake Hills." *Id.* at ¶ 26.
13 Cow Palace, LLC owns and operates the Cow Palace Dairy. *Id.* at ¶ 2. The Dolsen
14 Companies is the only member of Cow Palace, LLC. *Id.* at ¶ 1. Fifty percent of
15 the property utilized by Cow Palace is now owned by Three D Properties, which is
16 managed by Bill Dolsen. *Id.* at ¶¶ 5, 12.

17 Cow Palace stores and composts its solid animal waste on native soils and its
18 liquid manure in nine earthen impoundments, totaling more than nine acres, built
19 with no synthetic liners. *Id.* at ¶¶ 45, 85, 108. The manure impoundments store
20 liquid manure before it is applied to the 533 acres of fields owned by Defendants.

1 *Id.* at ¶ 46. The impoundments, using conservative, admitted estimates, leak over
2 8,300 gallons of manure in total each day. *See id.* at ¶ 98.

3 LEGAL FRAMEWORK

4 I. Summary Judgment Standard

5 Summary judgment is proper when “there is no genuine issue as to any
6 material fact and that the moving party is entitled to a judgment as a matter of
7 law.” Fed. R. Civ. P. 56(c). The moving party carries the initial burden to show
8 that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S.
9 317, 323 (1986). The burden then shifts to the non-moving party to respond with
10 affirmative evidence supporting its claim or defense and establishing the existence
11 of a specific, genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 324-25; *see*
12 *also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). There is also no
13 issue of fact if, on the record as a whole, a rational trier of fact could not find in
14 favor of the non-moving party. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

15 II. The Resource Conservation and Recovery Act (“RCRA”)

16 RCRA “is a comprehensive environmental statute that governs the
17 treatment, storage, and disposal of solid and hazardous waste.” *Meghrig v. KFC*
18 *Western, Inc.*, 516 U.S. 479, 483 (1996). Congress enacted RCRA in 1976 to close
19 “the last remaining loophole in environmental law, that of unregulated land
20 disposal of discarded materials and hazardous wastes” and “to minimize the

1 present and future threat to human health and the environment.” H.R.Rep No.
2 1491, 94th Cong., 2d Sess. 4, reprinted in 1976 U.S.C.C.A.N. 6238, 6241; 42
3 U.S.C. § 6902(b). Subtitle D of RCRA outlaws the disposal of solid waste in a
4 manner that constitutes “open dumping.” 42 U.S.C. § 6945(a). RCRA also
5 prohibits any person from causing or contributing to the creation of an imminent
6 and substantial endangerment to human health or the environment. 42 U.S.C. §
7 6972(a)(1)(b).

8 ARGUMENT

9 I. Plaintiffs Have Standing

10 To establish Article III standing, a plaintiff must show a cognizable “injury”
11 that is “fairly traceable” to the defendants’ conduct and that would likely be
12 “redressed” by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envntl.*
13 *Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). An organization has standing if
14 one of its “members would otherwise have standing to sue in their own right, the
15 interests at stake are germane to the organization’s purpose, and neither the claim
16 asserted nor the relief requested requires the participation of individual members in
17 the lawsuit.” *Laidlaw*, 528 U.S. at 180-81 (citation omitted). Here, Plaintiffs’
18 declarations show that Plaintiffs have standing to maintain this action, and
19
20

1 therefore the Court has jurisdiction.²

2 **A. CARE Has Standing.**

3 Defendants cannot dispute that the interests at stake in this lawsuit are
4 germane to CARE's organizational purpose, and that neither the claim asserted nor
5 the relief requested requires the participation of individual CARE members. *See*,
6 *e.g.*, ECF No. 52 at ¶¶ 6, 9-12 ("Reddout Decl.") (describing CARE's activities
7 and how Defendants' actions injure those activities). The only remaining issue is
8 whether CARE's members have standing to sue in their own right.

9 CARE member Helen Reddout lives approximately 1.5 miles downgradient
10 from Cow Palace Dairy. *Id.* at ¶ 2. Mrs. Reddout obtains her drinking water from
11 groundwater, *id.* at ¶¶ 16, 20, which is contaminated with levels of nitrate that
12 exceed the 10 mg/L Maximum Contaminant Level ("MCL"). *Id.*; *see also*
13 Lawrence Decl. at ¶ 16 (discussing Reddout nitrate results). Mrs. Reddout believes
14 that this contamination originates from, *inter alia*, Cow Palace's improper handling
15 of manure. Reddout Decl. at ¶¶ 16, 22-25. Mrs. Reddout has also had other

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17 ² It is uncontested that Plaintiffs provided adequate pre-suit notice of their intent to
18 sue. 42 U.S.C. § 6972(b)(2)(A). It is also uncontested that no state or federal
19 RCRA proceeding exists that would preclude Plaintiffs' action under 42 U.S.C.
20 § 6972(b)(1)(B) or 42 U.S.C. § 6972(b)(2)(B) & (C).

1 constitutionally-protected interests injured, or threatened to be injured, by
2 Defendants' contamination. *See id.* at ¶ 13 (no longer recreates in Yakima River);
3 ¶ 14 (no longer gathers edible plants from Yakima River area); ¶ 15 (no longer bird
4 watches); ¶ 17 (purchases bottled water); ¶¶ 22, 25 (concerned about health
5 impacts from nitrate consumption). Under RCRA, these allegations establish an
6 injury-in-fact. *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 255 (3d
7 Cir. 2005) (injury-in-fact found where individual alleged that they lived near
8 hazardous waste manufacturing site and were concerned about health risks).

9 Because she lives near and down gradient from Cow Palace, Mrs. Reddout's
10 water contamination and concern for her health is fairly traceable to Cow Palace's
11 illegal practices. *See* PSF ¶¶ 131-32; *Interfaith Cmty. Org.*, 399 F.3d at 257
12 ("fairly traceable" requirement does not require showing that defendant's action
13 alone caused precise harm suffered by plaintiff).

14 Finally, the relief requested by the Plaintiffs would redress the injuries
15 suffered by CARE members, including Mrs. Reddout, because it will end the
16 endangerments arising from Cow Palace and will reduce concerns about those
17 endangerments. Reddout Decl. at ¶ 23; *Interfaith*, 399 F.3d at 257.

18 The above analysis applies with equal force to CARE's other members. *See*,
19 *e.g.*, Declaration of Steven Butler (filed herewith) (Mr. Butler lives a half-mile
20 from Cow Palace Dairy, his well is contaminated with nitrate that exceeds the

1 MCL by over six times, he is concerned that the contamination, odors, and dust
2 from Cow Palace could harm his and others' health, and he believes if Defendants
3 changed their practices, the contamination would be lessened and his enjoyment of
4 home and property restored); Declaration of Debbie Stark (filed herewith) (Ms.
5 Stark's well is contaminated with nitrates that exceed the MCL, purchases bottled
6 water at a significant cost and inconvenience, refrains from swimming and fishing
7 in local rivers because of contamination, asserts that odor and contaminated wells
8 impact her ability to enjoy her home, and believes that a change in Defendants'
9 practices would address these issues); Declaration of Doug Moore; Declaration of
10 Jean Mendoza; ECF No. 53 (Fendell Decl.). CARE has standing.

11 **B. CFS Has Standing.**

12 Because CARE has standing, the Court need not enquire into whether CFS
13 also has standing. *See, e.g., Rumsfeld v. Forum for Academic and Institutional*
14 *Rights, Inc.*, 547 U.S. 53 n.2, 126 S. Ct. 1297 (2006). Were the Court to do so,
15 however, it would find that CFS also has standing. Again, the only issue is
16 whether CFS's individual members have standing to sue in their own right; the
17 interests at stake are plainly germane to CFS's mission, and neither the claim nor
18 the relief requires the participation of individual members in the lawsuit. ECF No.
19 49 at ¶¶ 4-15 (Kimbrell Decl.) (CFS represents approximately 12,000 members in
20 the state of Washington in its mission to protect the environment and human health

1 from harmful food production technologies, such as CAFOs, and has devoted
2 resources to these issues in the Yakima Valley). Mrs. Reddout is also a CFS
3 member, Reddout Decl. at ¶ 7, and the allegations discussed *supra* establish her
4 individual standing and, consequently, CFS's standing.

5 Besides Mrs. Reddout, CFS's other members have had their interests injured
6 or threatened to be injured by Cow Palace. *See, e.g.*, Kimbrell Decl. at ¶ 5; ECF
7 No. 50 (Whitefoot Decl.) at ¶¶ 11-13; Declaration of Eric Anderson, filed
8 herewith, at ¶¶ 8, 9, 11; Declaration of Jean Mendoza at ¶¶ 5-11, 13-18; *see*
9 *Friends of the Earth v. Gaston Copper Recycling*, 204 F.3d 149, 160 (4th Cir.
10 2000) (threatened injury satisfies injury-in-fact requirement).

11 These injuries are fairly traceable to Cow Palace, *see, e.g.*, Reddout Decl. at
12 ¶ 2, Anderson Decl. at ¶ 5, and will be redressed by the relief requested. Reddout
13 Decl. at ¶ 23; Anderson Decl. at ¶ 20; *see Interfaith*, 399 F.3d at 257.

14 **II. Defendants Have Violated RCRA.**

15 Defendants' handling, storage, and disposal of manure has violated RCRA's
16 ban on "open dumping" and contributed to an imminent and substantial
17 endangerment to human health and the environment. Establishing liability under
18 either theory requires a similar showing, as discussed below.

19 **A. RCRA's Open Dumping Prohibition.**

20 RCRA prohibits "any solid waste management practice or disposal of solid

1 waste ... which constitutes the open dumping of solid waste.” 42 U.S.C. § 6945(a).

2 To establish liability, Plaintiffs must demonstrate that (1) there is solid waste, (2)

3 managed or disposed at the Dairy, that (3) “contaminates” (4) an “underground

4 drinking water source” (5) “beyond the solid waste boundary.” *See S. Rd.*

5 *Associates v. Int’l Bus. Machines Corp.*, 216 F.3d 251, 257 (2d Cir. 2000).

6 The statute defines an “open dump” as “any facility ... where solid waste is

7 disposed of which is not a sanitary landfill which meets the criteria promulgated

8 under section 6944 of this title and which is not a facility for disposal of hazardous

9 waste.” 42 U.S.C. § 6903(14). Because the Dairy is neither a landfill under

10 Section 6944 nor a facility for the disposal of hazardous waste, *see Parker v. Scrap*

11 *Metal Processors, Inc.*, 386 F.3d 993, 1012 (11th Cir. 2004), Plaintiffs do not brief

12 this issue further. The term “disposal” is defined by statute to mean “the

13 discharge, deposit, injection, dumping, spilling, *leaking, or placing* of any solid

14 waste or hazardous waste into or on any land or water so that such solid waste or

15 hazardous waste or any constituent thereof may enter the environment or be

16 emitted into the air or discharged into any waters, *including ground waters.*” 42

17 U.S.C.A. § 6903(3) (emphases added).

18 EPA has promulgated criteria that constitute open dumping, including that a

19 facility cannot “contaminate an underground drinking water source beyond the

20 solid waste boundary...” 40 C.F.R. § 257.3-4(a). “Contaminate” means

1 introducing a substance that would either cause or contribute to an ongoing
2 violation of the MCL. *Id.* at (c)(i)-(ii). The MCL for nitrates is 10 mg/L. 40
3 C.F.R. § 141.62.

4 **B. RCRA’s Imminent and Substantial Endangerment Provision.**

5 Similar to open dumping, Plaintiffs establish liability under 42 U.S.C.
6 § 6972(a)(1)(B) by demonstrating that (1) a “person” has (2) “contributed” to (3)
7 the “past or present handling, storage, treatment, transportation, or disposal of” (4)
8 any “solid or hazardous waste,” and (5) the waste in question “may present an
9 imminent and substantial endangerment to health or the environment.” *Ecol.*
10 *Rights Found. v. Pacific Gas & Elec. Co.*, 713 F.3d 502, 514 (9th Cir. 2013)
11 (citation omitted). This “expansive” language authorizes affirmative equitable
12 relief “to the extent necessary to eliminate *any risk posed* by toxic wastes.” *Davis*
13 *v. Sun Oil Co.*, 148 F.3d 606, 609 (6th Cir. 1998) (internal quotation marks
14 omitted; emphasis in original); *see also Price v. United States Navy*, 39 F.3d 1011,
15 1019 (9th Cir. 1994).³ In fact, “[C]ourts have emphasized the preeminence of the

16
17
18 ³ All eight Circuits agree and have adopted a broad interpretation. *See, e.g.*,
19 *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1020 (10th Cir. 2007)
20 (citing cases in 2d, 3d, and 5th Circuits); *Mallinckrodt, Inc.*, 471 F.3d at 287-88,

1 word ‘may’ in defining the degree of risk needed to support RCRA §
2 7002(a)(1)(B)’s liability standard.” *Me. People’s Alliance v. Mallinckrodt, Inc.*,
3 471 F.3d 277, 288 (1st Cir. 2006). Congress’ use of the word “may” means that “a
4 plaintiff need not establish an incontrovertible ‘imminent and substantial’ harm to
5 health and the environment.” *Kara Holding Corp. v. Getty Petroleum Mktg., Inc.*,
6 67 F. Supp. 2d 302, 310 (S.D.N.Y. 1999) (internal quotations removed).

7 While neither RCRA nor its regulations define “contribute to,” Congress
8 intended that the term be liberally construed. *See* H.R.Rep. No. 96-IFC 31 at 31
9 (1979) (the Eckhardt Report); S.Rep. No. 96-172, at 5 (1980), reprinted in 1980
10 U.S.C.C.A.N. 5019, 5023; *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d
11 1373, 1383-84 (2d Cir. 1989) (contribution should be “liberally construed” and
12 includes conduct that gave a defendant “a share in any act or effect” giving rise to
13 disposal of the wastes that may present an endangerment).

14 In line with the liberal treatment Congress intended, a finding that an activity
15 may present an imminent and substantial endangerment does not require proof of
16 actual harm. *Dague v. City of Burlington*, 935 F.2d 1343, 1356 (2d Cir. 1991).

17 The term “‘endangerment’...mean[s] a threatened or potential harm.” *Burlington*

18

19 296 (1st Cir.); *Parker*, 386 F.3d at 1015 (11th Cir.); *United States v. Ne. Pharm. &*
20 *Chem. Co.*, 810 F.2d 726, 740, n.5 (8th Cir. 1986) (citing case in 4th Cir.).

1 *N.*, 505 F.3d at 1020 (citing cases). Thus, “actual harm” need not be shown at all.
2 *Davis*, 148 F.3d at 610; *see also Burlington N.*, 505 F.3d at 1020 (RCRA's “may
3 present ... endangerment” language only requires that “there may be a risk”).

4 Moreover, a finding that a harm is “imminent” “does not require a showing
5 that actual harm will occur immediately so long as the risk of threatened harm is
6 present.” *Price v. U.S. Navy*, 39 F.3d at 1019. Imminence refers “to the nature of
7 the threat rather than identification of the time when the endangerment initially
8 arose.” *Id.* (quoting *United States v. Price*, 688 F.2d 204, 213 (3d Cir.1982)
9 (quoting H.R. Committee Print No. 96–IFC 31, 96th Cong., 1st Sess. at 32 (1979)).

10 Finally, an endangerment is “substantial” “if there is some reasonable cause
11 for concern that someone or something may be exposed to risk or harm ... if
12 remedial action is not taken.” *Raymond K. Hoxsie Real Estate Trust v. Exxon*
13 *Educ. Fdn.*, 81 F.Supp.2d 359, 366 (D.R.I. 2000). Therefore, Plaintiffs need not
14 quantify the risk of harm in order to establish an endangerment. *Me. People’s*
15 *Alliance v. Holtrachem Mfg. Co., LLC.*, 211 F.Supp.2d 237, 247 (D. Me. 2002).
16 Read together, Plaintiffs need only establish that the Dairy released waste “of a
17 type that could contribute to” an endangerment that may exist. *Id.* at 255.

18 **C. Defendants’ Manure is a “Solid Waste” Because It Is Applied to**
19 **Fields Without Regard to Crop Fertilization Needs, Stored in**
20 **Lagoons that Leak, and Composted on Bare Ground.**

For Defendants to be liable under RCRA, Plaintiffs must first establish that

1 the manure at Cow Palace Dairy constitutes a “solid waste.” 42 U.S.C. § 6945(a)
2 (open dumping); 42 U.S.C. § 6972(a)(1)(B) (endangerment). The definition of
3 “solid waste” is defined “very broadly” and includes “any discarded material” from
4 “agricultural operations.” 42 U.S.C. § 6903(27); *Zands v. Nelson*, 779 F. Supp.
5 1254, 262 (S.D. Cal. 1991). In its Order Denying Defendant’s Motion to Dismiss,
6 the Court held that the issue of whether manure was “discarded” hinged on
7 whether it was handled and applied in such a manner that its usefulness as a
8 fertilizer was eliminated. ECF No. 72 at 10-12. The facts before this Court can
9 leave no remaining dispute that Cow Palace discarded manure.

10 *1. Defendants Discard Manure by Applying it to Agricultural Fields*
11 *Without Regard to Crop Fertilization Needs.*

12 As a factual and legal matter, excess manure wastes applied onto Cow
13 Palace’s land is “discarded material” because such manure wastes cannot
14 effectively be used by crops as fertilizer, and therefore have no beneficial use. PSF
15 ¶ 79 (discussing how nitrogen use efficiency decreases after a certain point, and
16 that further applications after sufficient nutrients are in the soil are, as Defendants’
17 expert put it, “wasteful of funds, wasteful of your money”). In other words, when
18 the animal waste is applied at rates beyond which the crop can effectively utilize as
19 fertilizer, it is not “used as it was intended to be used.” *See Otay Land Co. v. U.E.*
20 *Ltd., L.P.*, 440 F.Supp.2d 1152, 1179–80 (S.D. Cal. 2006) (“EPA’s interpretation

1 focuses on whether a product was used as it was intended to be used, not on
2 whether the purpose of the product is to perform some function” afterward), *aff’d*
3 *in part and vac. and remanded in part*, 338 F. App’x 689 (9th Cir. 2009).

4 Here, the undisputed facts show that Defendants’ (a) failed to follow or
5 implement the Best Management Practices (“BMPs”) of their DNMP, (b) applied
6 manure to fields with no crops, and applied manure until lagoons were emptied
7 irrespective of crop needs. Excessively high levels of nitrate and phosphorus (c)
8 have been documented in Cow Palace’s fields, further indicating that manure has
9 been discarded. Such evidence leaves no genuine issue that the Dairy applied
10 manure simply “to get rid of” it. PSF ¶ 81(c); *see U.S. v. Marine Shale Processors*,
11 81 F.3d 1361, 1366 (5th Cir. 1996) (material discarded where it was reused in a
12 way that provided no benefit).

13 a. Defendants’ Discarded Manure by Failing to Implement Their
14 DNMP.

15 Defendants’ DNMP, the “blueprint” of how Cow Palace is operated, PSF ¶
16 65, contains BMPs that are specifically designed to “agronomically recycle”
17 manure while preventing “the chance of contaminant migration from the dairy
18 facility to the underlying aquifer.” *Id.* at ¶ 42. To accomplish these goals, the
19 DNMP provides detailed instructions and guidance on how to calculate an
20 agronomic rate of manure application so that the nutrients in the manure are put to

1 beneficial use. *Id.* at ¶¶ 51-52. To apply agronomically, the DNMP requires Cow
2 Palace to determine the (1) nutrient value of the manure being applied, (2) the
3 nutrients present in the soil after the harvest of the previous crop, (3) the average
4 crop yields for a specific field and crop for the past 3-5 years to know how much
5 nutrients the crop will uptake, (4) the infiltration rates of manure into the soil, and
6 (5) the weather conditions leading up to application. *Id.* at ¶¶ 53-58. The DNMP
7 provides explicit guidance and explanation of these requirements. *Id.* at ¶ 59; *see*
8 *in particular* ¶ 59(e) (discussing spreadsheets that explain how to determine
9 agronomic rates). These provisions have been present in all prior versions of the
10 DNMP. *Id.* at ¶¶ 60-62. Cow Palace also received guidance from Laurie Crowe,
11 South Yakima Conversation District, on how to implement the DNMP's process
12 for calculating agronomic rates. *Id.* at ¶ 64.

13 Cow Palace manager Jeff Boivin testified that he was in charge of
14 compliance with the DNMP and understood its requirements for applying manure
15 at agronomic rates. PSF at ¶¶ 65-67. Nonetheless, Mr. Boivin admitted during his
16 deposition that Cow Palace has never followed these requirements in making its
17 manure applications. *Id.* ¶ 68(d); *see also, e.g., id.* at ¶ 68(a)-(d) (listing ways the
18 Dairy ignored the requirements of their DNMP that resulted in overapplications of
19 manure). This near-total failure to abide by the DNMP began in at least 2004;
20 before 2003, the Dairy has no records about its manure applications. *Id.* at ¶ 69.

1 Mr. Boivin admitted that a consequence of over-application was excess nutrients
2 leaching through the soil. *Id.* at ¶ 74.

3 Besides Mr. Boivin's own admissions, Defendants' experts do not dispute
4 that Cow Palace's manure applications were not "agronomic." *Id.* at ¶ 80. In fact,
5 Defendants' expert, Dr. Melvin, testified that Cow Palace should have followed the
6 BMPs contained in the DNMP in order to minimize the amount of manure applied
7 to fields. *Id.* at ¶ 81 (listing reasonable steps Defendants should have taken, based
8 on their DNMP, to ensure agronomic application). By ignoring the DNMP Best
9 Management Practices, Defendants deposited far more manure nutrients than the
10 crops could ever use as fertilizer.

11 b. Manure Application Practices Constitute "Discard."

12 In addition to Defendants' refusal to follow its BMPs, other handling
13 practices show that manure was not used beneficially. First, any application of
14 manure to a bare field is a *per se* discard because there were no crops to use the
15 nutrients. Mr. Boivin admitted during his deposition that the Dairy had made
16 numerous manure applications to fields where no crop was growing or planned to
17 be planted until the next season. PSF ¶ 72 (applied manure in September 2009,
18 where no crop was planted until May 2010); *see also id.* at ¶ 73 (10 other examples
19 of bare ground applications). Such applications do not provide nutrients to crops
20 for fertilization. *Id.* at ¶ 72.

1 Defendants also discarded manure by making applications until the lagoons
2 were empty. In at least two examples recorded on hand-written field application
3 logbooks, manure applications to fields were only stopped when lagoons had been
4 emptied. PSF ¶ 71. Such applications cannot be considered agronomic or meant
5 for crop fertilization needs, but rather, to clear out the manure. *See id.*

6 c. Excessively High Soil Sampling Results Establish that Manure
7 has been Discarded.

8 The soil samples produced by Cow Palace and those obtained by Plaintiffs
9 further demonstrate that manure has been discarded. Defendants' post-harvest soil
10 sampling shows consistently high results for nitrate, phosphorus, and potassium.
11 PSF ¶ 77(a). These high post-harvest results – collected over many years – provide
12 direct evidence that Defendants' applications supplied far more manure nutrients
13 than the crops could use as fertilizer. *Id.*

14 Defendants' own deep soil sampling further confirms they discarded
15 manure. That sampling, conducted at one of Cow Palace's fields in August 2012,
16 found excess levels of nitrate well below the crop rooting zone – as deep as twenty
17 feet below ground surface. *Id.* at ¶ 77(c). Plaintiffs' deep soil sampling in Fields 1
18 and 2 also showed very high levels of nitrate and phosphorus, especially in the 3-5
19 foot range below ground surface. *Id.* at ¶ 77(b). Nutrients found in this range are
20 below the "crop root zones," and therefore cannot be used as fertilizer. *Id.*

1 In summary, if Defendants valued their manure as a beneficial product, then
2 they would have followed the BMPs in their DNMP to ensure it was
3 “agronomically recycled.” The high amount of residual nutrients already present
4 in the soil would have provided the crops with all their fertilization needs, without
5 any additional manure applications. Because they admitted that they ignored these
6 facts, and applied manure in quantities beyond which the crop could use as
7 fertilizer or when no crop was present, the Court should find that Defendants
8 discarded their manure, and therefore the manure is a “solid waste” under RCRA.

9 2. *Defendants Discard Manure By Storing it in Lagoons that Leak.*

10 The animal waste that leaks from the Defendants’ impoundments into the
11 ground plainly constitutes the “disposal” of solid waste because it is a discarded
12 material. 42 U.S.C. § 6903(3) (“disposal” means “leaking”). A majority of courts
13 have found that when a useful material leaks from its containment into the
14 environment, it loses all beneficial purpose and becomes abandoned “solid waste.”
15 *See, e.g., Zands*, 779 F. Supp. at 1262 (gasoline leaked from underground storage
16 tanks constitutes RCRA solid waste as “gasoline is no longer a useful product after
17 it leaks into and contaminates, the soil” and such a change in usefulness is within
18 the RCRA definition of disposal); *U.S. v. Power Engineering Co.* 191 F.3d 1224,
19 1231 (10th Cir. 1999) (unintentional leaking of condensate out of a building’s air
20 ducts that contaminated soil and water constitutes RCRA solid waste disposal).

1 Animal waste also becomes a “solid waste” when it accumulates in the
2 environment as an expected consequence of storing manure in unlined containment
3 areas. *See Ecological Rights*, 713 F.3d at 518 (citing *Conn. Coastal Fishermen’s*
4 *Ass’n v. Remington Arms Co.*, 989 F.2d 1305, 1316 (2d Cir. 1993) (holding that
5 lead shot “left to accumulate long after they ha[d] served their intended purpose”
6 met RCRA’s statutory definition of “solid waste” (quotation marks omitted))).

7 Cow Palace does not possess any information demonstrating that its lagoons
8 comply with the Natural Resource Conservation Service (“NRCS”) “313” practice
9 standard for manure storage impoundments, with the exception of Lagoon 4. PSF
10 ¶¶ 86-87. Importantly, however, even if the lagoons were constructed to meet the
11 NRCS standards of the time, *those standards specifically allow* for lagoons that
12 leak. *Id.* at ¶¶ 86-87, 93-98 (NRCS standard is a permeability of 1×10^{-6} cm/sec
13 for earthen impoundments); Erickson Decl., filed herewith, at ¶¶ 9-12 (discussing
14 NRCS standard and conservative seepage rate from earthen impoundments to be
15 thousands of gallons of manure); PSF ¶¶ 97(a), (d), 99, 106 (Defendants’ experts
16 confirmed and agreed with key assumptions to calculate leakage rate and do not
17 dispute the validity of the calculations, i.e., the “math is the math”). Based on his
18 observations and the data reviewed, Plaintiffs’ expert Mr. Erickson concludes that
19 the Cow Palace lagoons likely leak substantially more than his estimates indicate.
20 *Id.* at ¶ 99.

1 Defendants therefore knew, or should have known in the exercise of
2 reasonable diligence, that manure would be leaked from their earthen
3 impoundments into the soil and groundwater below, where it cannot be used as a
4 crop fertilizer. In *Zands*, the simple fact that a containment system leaked a useful
5 product was enough to qualify that material as discarded. 779 F. Supp. at 1262.
6 Here, the facts go a step further: it would be as if the service station owner in
7 *Zands* chose to install a gasoline tank that was *designed* to leak. *Id.*

8 The lagoon leakage is not simply due to the intended permeability of the
9 lagoons, however, but also the failure to once again follow BMPs and maintain the
10 lagoons to prevent “cracks” to the seal or other leaks. PSF ¶¶ 89-91 (admissions
11 where management practices allowed erosion, drying, and cracking of the manure
12 “seal,” and vegetation growth on lagoon banks created flow paths to allow
13 seepage); PSF ¶ 100 (Defendants’ expert admitting that water “will follow its
14 path” down “when there’s a hole in the lagoon.”). In fact, the soil liner in the
15 lagoon “Catch Basin NW” was breached by the use of an air rotary drill some 50
16 feet away, showing just how permeable the lagoons are as constructed. *Id.*

17 The sampling done by Plaintiffs confirms that the Dairy’s practices resulted
18 in discarded animal waste leaking into the environment beneath the lagoon. *Id.* at
19 ¶ 101. Plaintiffs’ sampling into the dike between two impoundments showed
20 elevated nitrate concentrations at depths of up to 18 feet, indicating contamination

1 from animal waste in the subsurface soil. *Id.* at ¶ 101.⁴ Dr. Melvin admitted that
2 the presence of ammonium at depths of 12-18 feet indicated horizontal seepage
3 between the two impoundments and that the source of the ammonium at depths of
4 45.5-47 feet “could be” from the lagoons. *Id.* at ¶ 102.

5 Perhaps most importantly, Defendants’ own lagoon expert, Mr. Trainor,
6 agrees that the lagoons at Cow Palace leak and that the leakage is, to some extent,
7 reaching groundwater. *Id.* at ¶ 106 (lagoons are “potentially” contributing “some
8 amount of nitrate” to the groundwater). Defendants’ other expert, Mr. Backe,
9 testified that the lagoons have at least some flow through them. *Id.* Because there
10 is no question that leaked waste has accumulated in the environment from these
11 lagoons with no beneficial use, the leaked manure is a solid waste under RCRA.

12 *3. Defendants Discard Manure by Composting it on Bare Ground.*

13 The Dairy composts manure on unlined areas of native soils – soils known
14

15 ⁴ While Plaintiffs were unable to sample directly through or under any active
16 lagoon at Cow Palace, they were able to sample through the Haak Dairy lagoon,
17 which had been emptied and was constructed using the same standards and soil
18 types. Plaintiffs’ samples found concentrations of nitrate, phosphorus, and
19 ammonium in the soil along with water underlying the Haak lagoon, both
20 indicative of liquid manure seeping through the bottom. PSF ¶¶ 103-105.

1 for high permeability and no conditions to allow denitrification – resulting in the
2 accumulation of nitrates and phosphorus below the surface. *Id.* at ¶¶ 108, 35.
3 Plaintiffs’ sampling in the compost area demonstrated that manure nutrients had
4 leached deep into the soil, where they are destined to reach groundwater. *Id.* at ¶¶
5 110-111. These manure nutrients cannot be used as a crop fertilizer because there
6 are no crops grown in the compost area. *Id.* at ¶ 109. As such, the manure
7 nutrients leaching out of the composting manure are discarded, making the manure
8 a “solid waste.” *See Clems Ye Olde Homestead Farms LTD v. Briscoe*, No.
9 4:07CV285, 2008 WL 5146964, at *3-4 (E.D. Tex. Dec. 8, 2008) (N.D. Tex. 2009)
10 (leaching from composted wood chip mulch in a flood plain was a “solid waste”).

11 **D. Defendants’ Handling, Storage, and Disposal of Solid Waste is**
12 **Contributing to Contamination of the Environment.**

13 There is no genuine issue as to whether Defendants’ improper handling,
14 storage, and disposal of manure, a “solid waste,” introduced excessive amounts of
15 nitrate into the environment. There is also no genuine issue that these practices
16 have contributed to nitrate contamination of the aquifer. The extensive
17 groundwater sampling results all indicate that the contamination has already
18 reached, and will continue to cause pollution of, the aquifer from which people
19 drink, which extends well off-site of the Cow Palace facility. *See* 40 C.F.R. 257.3-
20 4(c)(i)-(ii). Defendants are therefore liable for violations of RCRA.

1 1. *Defendants' Solid Waste is Reaching Groundwater.*

2 Cow Palace's overapplications of manure and storage of manure in leaking
3 impoundments, combined with the fact that the soils beneath the Dairy are not
4 suitable for denitrification, means that excess nitrate found below crop root zones
5 will reach groundwater. PSF at ¶¶ 34-37. It is uncontested that the groundwater
6 under the Dairy is an "underground drinking water source." 40 C.F.R § 257.3-
7 4(c)(4); Snyder Decl., Ex. 18, p. 9. The MCL for nitrate is 10 mg/L. 40 C.F.R. §
8 141.62.

9 Defendants' experts agree that the nitrates present in the soil below the root
10 zone will eventually reach groundwater. PSF ¶¶ 37, 114. Plaintiffs,' Defendants,'
11 and EPA's sampling leaves no factual doubt that the nitrates in the solid waste are
12 entering the groundwater. PSF ¶¶ 113-125 (discussing sampling results and
13 conclusions). Plaintiffs' soil tests down to the 4-5 foot depth in the fields prove
14 that nitrates have migrated, and will continue to migrate, below root zones, where
15 they are destined for groundwater. *Id.* at ¶ 77; *see also id.* at ¶ 84 (recent
16 communication between EPA and Cow Palace, stating that there was
17 "approximately 312 to 367 tons of nitrate...at the 3-foot depth" in the application
18 fields of all the "Cluster Dairies'" fields). Plaintiffs' testing near the catch basins
19 and compost piles show nitrates present as deep as 18 feet, meaning that the solid
20 waste is entering the soil and moving toward groundwater. *Id.* at ¶¶ 101, 110.

1 Groundwater sampling from Defendants and the EPA leaves little doubt that
2 the Dairy's practices are contributing to the nitrate contamination of the
3 groundwater. Sampling conducted hydrologically upgradient from the Dairy
4 shows low overall nitrate concentrations, while groundwater testing on and
5 downgradient from Cow Palace Dairy and its application fields shows rising nitrate
6 levels in wells far above the 10 mg/L MCL. *Id.* at ¶¶ 119-124, 131. Moreover, the
7 presence of "tracer chemicals" associated with cow manure in the groundwater
8 establishes that the nitrates in the groundwater are from cow manure. *Id.* at ¶¶ 116-
9 118, 124. Dairy pharmaceuticals that Cow Palace uses on its herd have also been
10 detected at the facility and in groundwater downgradient from the Dairy. *Id.* at ¶¶
11 117, 121, 131. Large groundwater temperature fluctuations between sampling
12 events, combined with a highly variable water table, provide further proof that
13 groundwater recharge is happening fairly rapidly in the area. *Id.* at ¶¶ 127-128.
14 Defendants' own expert, Dr. Melvin, agreed that, based on this information, "it
15 was more likely than not that Cow Palace could be a cause of" the contamination
16 of the groundwater. *Id.* at ¶ 131. The presence of dairy pharmaceuticals and
17 EPA's own age-dating also corroborate that surface activities rapidly impact
18 groundwater. *Id.* at ¶¶ 125-130.

19 2. *Defendants' Solid Waste Has Caused Contamination that Extends*
20 *Beyond the "Solid Waste Boundary."*

1 The open dumping criteria prohibit contamination outside of the “solid
2 waste boundary,” defined as the “outermost perimeter” of where waste is disposed.
3 40 C.F.R. § 257.3-4(c)(5). It is uncontested that the groundwater beneath the
4 Dairy generally flows to the south and southwest and that Cow Palace is located on
5 the northern end of Lower Yakima Valley. PSF ¶ 115. Any nitrates that leak into
6 the groundwater will remain there until groundwater is discharged to surface water
7 or extracted from a well. *Id.* at ¶¶ 34-35 (oxygen present in all AOC monitoring
8 wells means nitrate is stable and there is little chance of denitrification).

9 Plaintiffs,’ Defendants,’ and EPA’s sampling results all demonstrate that the
10 Dairy has contributed to the contamination of groundwater found outside of the
11 lagoons and fields and thus beyond the solid waste boundary. *Id.* at ¶¶ 124-125
12 (citing to relevant provisions of Shaw Declaration, including relevant maps). For
13 example, well sampling just south of the Dairy’s application fields, meaning it is
14 beyond the solid waste boundary, revealed nitrate concentrations as high as 95
15 mg/L. *Id.* at ¶ 124(c). Defendants cannot genuinely dispute that any nitrate
16 contamination from their property flows southward off the bounds of the property.
17 The waste disposal practices at the Dairy therefore violate RCRA’s ban on open
18 dumping.

19 3. *Defendants’ Handling, Storage, and Disposal of Solid Waste has*
20 *Caused or Contributed to Exceedances of the Nitrate MCL.*

1 As described in Plaintiffs’ Statement of Material Facts and the
2 accompanying Shaw Declaration, the levels of nitrate documented in groundwater
3 monitoring wells downgradient from Cow Palace exceed the 10 mg/L MCL. *Id.* at
4 ¶ 124 (citing Shaw Declaration). Because sampling predominantly has shown that
5 upgradient groundwater was below the nitrate MCL, but sampling on the Dairy and
6 downgradient found results far exceeding the MCL, there is no doubt that
7 Defendants are causing or contributing to the exceedance of the nitrate MCL.

8 The nitrate MCL was set at 10 mg/L because EPA determined that
9 dangerous health effects can occur when consuming water at or above the MCL.
10 56 Fed. Reg. 3526. There is even evidence that exposure below the MCL may
11 present a risk to public health as well. *Id.* at ¶¶ 134-136. It is undisputed that there
12 is a potential that people within at least a three-mile radius of the Dairy could be
13 drinking from wells contaminated with nitrates above the MCL.⁵ *See id.* at ¶¶ 139-
14 140. These conditions not only “may,” but do, pose serious health risks that trigger
15 RCRA section 7002(a)(1)(B) liability and require remedial action.

16 In its analysis of the Lower Yakima Valley “Cluster” Dairies, which
17 includes Cow Palace, EPA sampled 67 home water supplies that showed

18
19 ⁵ The full extent of Cow Palace’s contamination must still be determined as part of
20 the remedial investigation that Plaintiffs will seek as relief at trial.

1 contamination above the MCL. PSF ¶ 140; Lawrence Decl. at ¶¶ 12-15. Under the
2 AOC, Cow Palace performed its own testing of 141 residences within one-mile of
3 the facility, 66 of which exceeded the MCL for nitrates. Lawrence Decl. at ¶ 14.
4 The Dolsen Companies also performed testing of Cow Palace employee
5 residences, finding that seven of the eight exceeded the MCL for nitrates, and the
6 one that did not had a concentration of 9.18 mg/L. *Id.* at ¶ 15. One Cow Palace
7 tenant, who had a special needs child, was still drinking from a contaminated well
8 in June 2014. *Id.* at ¶ 16. Most of the remaining properties had three or more
9 times the MCL, with the highest being 72.8 mg/L. *Id.* at ¶ 26. Recent testing of a
10 Plaintiff-member's downgradient well revealed nitrate concentrations at 64.6
11 mg/L, more than six times the MCL, and nearly three times the result obtained by
12 EPA in 2010. PSF ¶ 139.

13 Congress enacted RCRA's endangerment provisions "to eliminate any risk
14 posed by toxic wastes." *Davis*, 148 F.3d at 609 (quotation marks omitted). "[I]f
15 an error is to be made in applying the endangerment standard, the error must be
16 made in favor of protecting public health, welfare and the environment."
17 *Burlington N.*, 505 F.3d at 1021. Because downgradient contamination has been
18 detected above safe drinking water limits, the Dairy's contamination violates open
19 dumping provisions. Because people still use the contaminated groundwater, and
20 the full extent of contamination is unknown, the contamination certainly "may,"

1 and in fact does, present an imminent and substantial “endangerment” to health.

2 4. *The Solid Waste Also Creates a Risk of Harm to the Environment.*⁶

3 RCRA does not define the term “environment” for the purposes of an
4 imminent and substantial endangerment claim, but courts have interpreted it to
5 include groundwater. *Lincoln Properties, Ltd. v. Higgins*, No. CIV. S-91-
6 760DFL/GGH, 1993 WL 217429, at *13 (E.D. Cal. Jan. 21, 1993). A polluter that
7 renders an important natural resource unusable without the threat of injury cannot
8 escape RCRA section 7002(a)(1)(B) liability. This is so whether humans or
9 animals are exposed or not, for, as noted above, “a living population is not
10 required” to establish environmental harm. *Interfaith*, 399 F.3d at 259; *see also*
11 *Burlington N.*, 505 F.3d at 1021.

12 Pollution that has made large expanses of groundwater unfit for human
13 consumption presents – and surely “may” present – a substantial endangerment to
14 the “environment” as a matter of law. *See, e.g., Raymond K Hoxsie Real Estate*
15 *Trust*, 81 F. Supp. 2d at 361-62, 366-67 (rejecting argument that groundwater
16 contamination could not present an actionable endangerment unless it was being
17 consumed); *Fairway Shoppes Joint Venture v. Dryclean U.S.A. of Florida, Inc.*,

18
19 ⁶ Plaintiffs reserve the right to seek at trial a finding that phosphorus levels may
20 present a threat to the environment.

1 No. 95-8521-CIV-HURLEY, 1996 WL 924705, at *8 (S.D. Fla. Mar. 7,
2 1996) (finding that PCE in groundwater endangered the environment, regardless of
3 health threat); *Lincoln Properties*, 1993 W.L. 217429, at *13 (finding an
4 endangerment where PCE contamination had required water supply wells to be
5 removed from service). Furthermore, while the full extent of contamination and
6 the rate of migration are unknown, some of the contamination is moving toward
7 the Yakima River. *See* PSF ¶ 28; *Interfaith Cmty. Org.* at 262 (finding an
8 endangerment to the environment where the discharge of contaminated
9 groundwater was migrating into the surface waters that in turn discharge into a
10 river).

11 **III. Defendants are Liable for RCRA Section 7002 Violations.**

12 The undisputed facts establish the Defendants are liable parties. Plaintiffs
13 established, *supra*, that the manure at issue is a solid waste and that this waste has
14 migrated offsite and may present a threat to human health or the environment. It is
15 uncontested that Defendants are all “persons” under RCRA. 42 U.S.C.A. §
16 6903(15). It is undisputed that Cow Palace, LLC, The Dolsen Companies, and
17 Three D Properties are all past or present owners of the land or the Cow Palace
18
19
20

1 Dairy operations.⁷ PSF ¶ 12; 42 U.S.C.A. § 6972(a)(1)(B); *see Zands*, 779 F.
2 Supp. at 1264 (individuals who owned the land during which time the disposal
3 occurred “contributed” to the disposal of a waste). The Dolsen Companies also
4 owned parcels totaling 425 acres that have been utilized by the Dairy, but on
5 November 7, 2013, after litigation commenced, The Dolsen Companies transferred
6 those parcels to Cow Palace, LLC. PSF ¶ 12. *PennEnvironment v. PPG*
7 *Industries, Inc.*, 964 F. Supp.2d 429 (W.D. Pa. 2013) (glass manufacturer was
8 owner or operator of hazardous waste site, even though it had sold the property to
9 city, since it still maintained control over the site).⁸ Three D Properties, LLC owns

10
11 ⁷ Though the question of landowner responsibility for open dumping has not yet
12 been treated in this Circuit, courts have found a landowner liable under the open
13 dumping provision for knowingly permitting others to use his land for illegal
14 dumping activity. *See Parker*, 386 F.3d 993 at 1000, 1013 (court held the owner
15 and operator of a scrap metal facility liable even after he sold the business to a
16 company owned by his son, but retained ownership of the land because a state
17 regulation passed pursuant to RCRA made it a violation to permit open dumping
18 on one’s land). Wash. Admin. Code § 173-350-025 mirrors this regulation.

19 ⁸ The Dolsen Companies’ transfer of the parcels does not exonerate them from the
20 imminent and substantial endangerment claim because Section 7002(a)(1)(B)

1 approximately fifty percent of the land that Cow Palace uses for its dairy
2 operations, as well as several parcels that house Cow Palace employees. See PSF ¶
3 11(f), 12.

4 It is almost impossible to factually separate the three Defendants. For
5 example, Cow Palace, LLC operates the Dairy; the sole member of Cow Palace,
6 LLC is The Dolsen Companies. PSF ¶¶ 1-2. R. William (“Bill”) Dolsen is the
7 registered agent for Cow Palace, LLC, the President/Chairman of The Dolsen
8 Companies, and the manager of Three D Properties, LLC. *Id.* at ¶ 5; *Jones Creek*
9 *Investors, LLC v. Columbia County, Ga.*, 2013 WL 1338238 (S.D. Ga. 2013)
10 (corporate officers can be held liable in citizen suits, not only the permittee).
11 Employees from each entity perform interconnected operational functions for the
12 Dairy and share common supervisory control. PSF at ¶ 11. All should be held
13 equally liable for the RCRA violations. *Holtrachem*, 211 F. Supp. 2d at 255
14 (under RCRA, there is joint and several liability; if proof against one defendant can

15
16 liability attaches not only to present but also to past conduct that has contributed to
17 a present endangerment. *Conn. Coastal Fishermen*, 989 F.2d 1305 at 1316.

18 Owners and operators may therefore be held liable for environmental
19 contamination that arises entirely from past disposal of wastes. See, e.g., *Aiello v.*
20 *Town of Brookhaven*, 136 F. Supp. 2d 81, 111-116 (E.D.N.Y. 2001).

1 establish liability, all the relief is granted).

2 Moreover, Cow Palace, LLC employs and manages the persons responsible
3 for running the Dairy, and The Dolsen Companies trains employees and makes
4 decisions about the herd size and other operational decisions, making both entities
5 “generators” of solid waste. PSF ¶¶ 9-11, 13 (The Dolsen Companies hired and
6 fired workers, provided financial oversight and safety training to employees,
7 maintains business records and employee housing); *see SEC v. Todd*, 642 F.3d
8 1207, 1223-24 (9th Cir. 2011).

9 Similarly, Cow Palace, LLC employs and manages the persons responsible
10 for storing, transporting, and discarding the waste, and The Dolsen Company’s
11 Vice President meets at least monthly with management to discuss operations at
12 the Dairy, making both responsible for the handling, storage, and transportation of
13 solid waste. *Id.* ¶¶ 9-11(e); *see Howard v. Everex Systems, Inc.*, 228 F.3d 1057,
14 1065 (9th Cir. 2000) (control found in securities fraud case where defendant had
15 participation in management). Finally, Cow Palace, LLC employs and manages,
16 and The Dolsen Companies train and manage, the persons responsible for
17 managing and disposing the Dairy’s manure, meaning they are “engaging in the act
18 of open dumping” and “contributing” to the “handling, treatment, transportation, or
19 disposal” of solid waste that may present a threat to public health or the
20 environment. PSF ¶¶ 8-11, 13, 43-46.

1 Despite proof of active involvement, courts have made clear that RCRA
2 liability under Section 7002(a)(1)(B) does not even require such involvement by
3 defendants. *See Aceto*, 872 F.2d at 1383. In the Ninth Circuit, a plaintiff must
4 simply show that the defendant had “a measure of control over the waste at the
5 time of its disposal or was otherwise actively involved in the waste disposal
6 process.” *See Hinds Investments, L.P. v. Angioli*, 654 F.3d 846, 852 (9th Cir.
7 2011); *see also United States v. Valentine*, 885 F.Supp. 1506, 1512 (D.Wyo. 1995)
8 (denying summary judgment on the basis that “it is not necessary that a party have
9 control over the *ultimate* decisions concerning waste disposal ... to be found to be a
10 contributor within the purview of RCRA”).

11 It is undeniable that Cow Palace, LLC is a liable party. The Dolsen
12 Companies, and by extension, Three D Properties, are also liable because they are
13 both controlled by the same people who own and operate Cow Palace Dairy. Bill
14 and Adam Dolsen are integrally connected to all three Defendant companies,
15 acting as the registered agent for Cow Palace, LLC, the President and Vice
16 President of The Dolsen Companies, and the manager of Three D Properties. PSF
17 ¶¶ 5-9, 11; *see, e.g., United States v. Ne. Pharm.*, 810 F.2d at 745 (holding
18 individual personally liable under RCRA because he was corporate president,
19 major shareholder, and manager of operations at plant); *see also* PSF ¶¶ 13-19;
20 *Marathon Oil Co.*, 164 F. Supp.2d at 920-21 (court allowed RCRA claims to

1 proceed where defendants had familiarity with the activities of the facility
2 constituting the endangerment). Representatives of the Defendants decided to
3 install reverse osmosis units to remove nitrates from the drinking water taken from
4 groundwater wells in dairy employee housing. PSF ¶ 14. This knowledge and
5 participation in the activities that constitute open dumping and contribute to a
6 disposal of solid waste that may cause an imminent and substantial endangerment
7 are sufficient to show that they are jointly liable for violations of § 6945(a) of
8 RCRA. *See Cox*, 1999 WL 33756552 at *16.

9 CONCLUSION

10 There is no genuine issue of material fact that Defendants both “engaged in
11 open dumping” and “contributed to the disposal” of solid waste that may
12 substantially and imminently endanger public health or the environment. 42
13 U.S.C. 6972(a)(1)(A)-(B). These Defendants are all “persons” under RCRA. PSF
14 ¶¶ 1-4; 42 U.S.C. § 6903(15). The wastes at issue are “solid or hazardous waste.”
15 42 U.S.C. § 6903(27). The solid waste contributed to an exceedance of an MCL in
16 an underground drinking water source. 40 C.F.R. § 257.3-4(a). The solid waste
17 traveled beyond the solid waste boundary. *Id.* The manure contamination “may
18 present an imminent and substantial endangerment to health or the environment” of
19 Yakima County and its residents because the contamination reached people’s wells
20 and the environment. Plaintiffs therefore respectfully request the Court to grant

1 summary judgment in their favor on standing, the existence of conditions that
2 constitute an open dump, the existence of conditions that may present an imminent
3 and substantial endangerment, and on Cow Palace, LLC's, The Dolsen
4 Companies,' and Three D Properties, LLC's liability.

5 Respectfully Submitted this 17th day of November, 2014.

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CERTIFICATE OF MAILING

I hereby certify that on November 17, 2014 I filed a true and correct copy of the foregoing document under seal with the Clerk of Court using the CM/ECF system. Pursuant to the procedures for filing under seal, service will be accomplished by other means to the following:

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