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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' COMBINED REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (ECF No. 211)

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CASES

Plaintiffs respectfully submit this Combined Reply to both Cow Palace and The Dolsen Companies' Opposition Briefs, ECF Nos. 256 & 279, respectively. The Court previously found that manure could be a discarded "solid waste" if over-applied to fields in ways that negate or exceed its potential "beneficial" use or leaked from lagoons. ECF No. 72 at 11. The undisputed facts show that Cow Palace violated its DNMP and applied manure without regard to crop fertilization needs. The facts also show that Cow Palace's lagoons and compost area leak manure into the ground, where it cannot be used beneficially. Cow Palace thus "disposed of, th[rew] away, or abandoned" its manure. Defendants' experts have admitted that the Dairy contributes nitrate to the aquifer. There is no genuine dispute that the current nitrate contamination, no matter who is responsible for it, presents an imminent and substantial endangerment, at least to human health.

In their various briefing, Defendants do nothing more than rehash arguments that this Court already decided in denying the motion to dismiss. Recently added Defendants, The Dolsen Companies and Three D Properties, grossly misstate the statutory language of RCRA as it applies to agricultural wastes. No genuine issues of material fact exist concerning the issues on which Plaintiffs have moved. And while Defendants have sought to keep the DNMP, and hundreds of other documents, confidential, nowhere is the *Kamakana* "compelling reasons" standard discussed in their briefs. *See* ECF No. 82 at 12. Confidentiality is thus waived.

ARGUMENT

I. THE UNDISPUTED FACTS SHOW THAT MANURE WAS NOT PUT TO BENEFICIAL USE BY COW PALACE.

Cow Palace's DNMP describes exactly how to put the Dairy's manure to beneficial use as a crop fertilizer. ECF No. 211-1, Plaintiffs' Statement of Material Facts ("PSF") ¶ 65.[1] Mr. Boivin testified that he was in charge of compliance with the DNMP and understood the DNMP's requirements. PSF ¶¶ 65-67 (undisputed). Nonetheless, Cow Palace applied manure in direct violation of the DNMP by, *inter alia*, failing to base applications on current lagoon nutrient sampling, failing to take into account existing residual soil nitrate levels, and failing to calculate application rates based on actual crop yields. PSF ¶ 68. These points are undisputed. *See* ECF No. 256-01 at ¶ 68(a) (Cow Palace Response to Plaintiffs' PSF) (no dispute of failure to use lagoon nutrient sampling); ¶ 68(b) (incorrectly

[1] Cow Palace submitted a 93-page "response" to the PSF, in which it rehashes the arguments in its briefs instead of citing where the identified factual statement is actually disputed. ECF No. 256-1. In most instances, Cow Palace only points back to its expert reports and new declarations. *See, e.g., id*. at ¶¶ 29, 32-36, 77, 93, 97, 99, 101-102, 106, 110. Plaintiffs' factual statements, however, are based on the deposition testimony that was actually given *by those experts and witnesses*. Plaintiffs dispute Cow Palace's responses, standing by the PSF.

labeled 59(b)) (asserting applications on a "N basis," but not disputing failure to base applications on residual nitrate in the soil); ¶ 68(c) (incorrectly labeled 59(c)) (no dispute of failure to base applications on three-to-five year average crop yields).

Cow Palace's response to ¶ 68(d) provides a good illustration: the soil sample for Field 1 showed 280 lbs./ac nitrate in the top foot and 245 lbs./ac in the second foot of the soil column (525 lbs./ac total), already *more* than the 480 lbs./ac nitrate the DNMP indicates an alfalfa crop can use. *Id*. at ¶ 59(d) (incorrectly labeled). If Cow Palace had followed its DNMP, no more manure would have been applied. Instead, the Dairy applied ***7,680,000 gallons*** of manure onto Field 1 after receiving this soil sample, wasting, by Defendants' (incorrect) estimate, 153.6 lbs./ac nitrogen. *Id*. This is not a "beneficial" application of manure, for the soil already had *more* nitrogen than the crop could possibly use. In fact, as Dr. Shaw extensively describes in his expert report, Cow Palace *consistently* made such non-agronomic manure applications. *See, e.g.,* ECF No. 237-2 at ¶¶ 76-78 (February 27, 2007 soil sample for Field 1 showed 480 lbs./ac nitrogen available; alfalfa crop had capacity to use 480 lbs./ac per initial DNMP estimate, yet manure applied on May 15-26, June 19, June 27, and November 5); ¶¶ 83-84 (September 5, 2008 soil sample for Field 1 showed 269 lbs./ac nitrogen available; triticale crop had capacity to use 250 lbs./ac per initial DNMP estimate, yet manure applied

September 17-26); ¶ 101 (similar); ¶ 107 (applied 612,000 gallons after soil test showed no more fertilizer needed); ¶ 109 (2.562 million gallons applied after soil test showed no more fertilizer needed); ¶ 133 (similar); ¶ 138 (2.160 million gallons); ¶ 144 (2.4 million gallons); ¶ 147 (1.236 million gallons); ¶ 149 (3.0465 million gallons); ¶ 155(k) (5.994 million gallons); ¶ 155(m) (3.6 million gallons); ¶ 156(e) (2.016 million gallons); 156(f) (4.224 million gallons); ¶ 156(k) (780,000 gallons); ¶ 157(b) (1.260 million gallons); ¶ 157(h) (3.258 million gallons). Based on just these examples (there are countless more), the Dairy applied an astounding ***33,148,500 gallons*** of manure after receiving soil samples that showed no need for additional fertilization. None of Cow Palace's experts contested these opinions, discussed at pages 31-151 of Dr. Shaw's expert report, and both Dr. Melvin and Mr. Stephen admitted that Cow Palace's past manure applications were not agronomic. PSF ¶ 80. Defendants' experts also testified that applying manure in these situations was wasteful. *See id*. at ¶¶ 79; 81(c)-(d).

Cow Palace studiously ignores Mr. Boivin's admissions concerning DNMP violations in its Response Brief (ECF No. 256) ("Br."), instead claiming that Mr. Boivin "always calculated manure applications with reference to the amount of nitrogen the crop would need, as listed in the DNMP[]" and that he "always applied *less* manure than he calculated the crop would need[.]" Br. at 11-12. But Mr. Boivin's "method," if that is even an appropriate moniker, is not compliant

with the DNMP and did not result in the beneficial application of manure, for Cow Palace *never* adjusted its manure application rate based on the amount of nitrate already present in the soil *or* its past three-to-five year average crop yields. *See* ECF No. 286-3, Sec. Snyder Decl. Ex. 1 at 137:18-143:7 (Stephen admitting that his tables, which Cow Palace relies on to argue that it applied less manure than crop needs, did not take into account residual soil nitrogen; taking that into consideration, Dairy applied more manure than crop could beneficially use); PSF ¶ 68(c) (undisputed failure to vary applications based on crop yields). And while Mr. Boivin may believe that he "did the best he could do," such post-hoc rationalization is irrelevant to liability. What matters is what Cow Palace *actually did*: dump manure onto fields in amounts that exceeded crop fertilization needs.

Cow Palace admits that the excessively high nitrogen levels in its fields show "that Cow Palace might have achieved its crop production while calculating its manure applications differently," but nonetheless argues that soil sampling is not proof of a "discard." Br. at 13-14. First, this argument ignores directly relevant case law from this district. *CARE v. Nelson Faria Dairy, LLC*, 2011 WL 6934707 at *6 (E.D. Wash. 2011) (elevated soil nitrate and phosphorus levels evidence of over-application of manure). Second, neither Cow Palace nor its experts dispute Dr. Shaw's detailed analysis of Cow Palace's soil sampling or his opinions that excessively high levels of soil nitrate, phosphorus, and potassium are

direct evidence that manure applications were not agronomic. ECF No. 237-2 at pp. 31-151; PSF ¶ 77; ECF No. 256-1 at ¶ 77.

Cow Palace introduces yet another declaration to try to misdirect this Court from its manure applications to bare fields and applications that ended only when lagoons were empty. Br. 12-13; Second Boivin Decl. First, as to bare fields, Cow Palace misrepresents both the content of the DNMP and the science behind mineralization. Br. at 13. The DNMP states that "some nutrients are available immediately" after a manure application but notes, through mineralization, additional nutrients will also become available over time. ECF No. 226-1, Snyder Decl. at Ex. 5, COWPAL000477. The DNMP further explains this point:

> **Through mineralization, nitrogen from previous applications becomes available independent of additional application. Caution should be taken when applying manure to fields with long histories of manure application.**

Id. at COWPAL000480 (emphasis in original). The DNMP also instructs that the Dairy should "[a]void applying manure to bare ground…[t]his may cause nitrogen to leach into the ground water." *Id*. at COWPAL000482; *see also id.* at COWPAL000577. Mr. Boivin's testimony that "[a]pplication before a crop is planted ensures that nutrients are available for the crop to use when needed for growth" is thus contrary to the DNMP and should be stricken, given that Mr. Boivin has never been identified as an expert witness in this case. ECF No. 256-16

at ¶ 20:10-12. Cow Palace's choice to use a "big gun" does not excuse applying manure in a way that violates the DNMP, negating the manure's beneficial use; the Dairy could have applied manure *at the right time* using any one of other manure application methods, such as a honey wagon, wheel line, or truck.

Second, Cow Palace does not dispute that certain manure applications ended when a lagoon was empty, ECF No. 256-1 at ¶ 71, only that the supposed "calculations" for how much manure to apply were not included on the referenced logbook. But Defendants produce *no documentation* that these calculations ever occurred, and even if they did, they were plainly in violation of the DNMP and resulted in applications that were not agronomic or beneficial. *See* ECF No. 286 at 10-14 (explaining how Mr. Boivin's "method" violated DNMP, agronomic principles, and did not put manure to beneficial use). For instance, Mr. Boivin claims one of these applications put down less nitrogen than the crop needed. ECF No. 256-16 at ¶¶ 17-18. But again, Mr. Boivin ignores the residual soil nitrate levels in the field, which showed no need for more manure. ECF No. 237-2 at ¶ 88 (352 lbs./ac nitrogen available for fertilization; crop needed 250 lbs./ac per initial DNMP estimate, yet Dairy applied 243 lbs./ac more nitrogen).

Concerning the lagoons, Cow Palace finally admits, as it must (although its recent answers to RFAs ordered by the Court continue to evade the request), that the lagoons leak and are *designed* to leak. Br. at 13-14. The Dairy then argues that

Plaintiffs are asking the Court "to transform this case into a CERCLA enforcement action." This argument is meritless. Plaintiffs ask the Court to find, as a matter of law, that manure which is placed in lagoons that were designed *by Cow Palace* to leak, and which actually leaks into the environment where it cannot be beneficially used, constitutes a discarded and disposed solid waste. The same is true for leakage from the compost areas. Such a finding is in accordance with RCRA's plain language. 42 U.S.C. § 6903(3) ("disposal" includes "leaking" of a solid waste "so that such solid waste…or any constituent thereof may enter the environment or be…discharged into any waters, including ground waters."). Cow Palace cannot use manure that leaks from lagoons or compost areas for any beneficial use, and it is therefore discarded. *Zands v. Nelson*, 779 F. Supp. 1254, 1262 (S.D. Cal. 1991). Whether or not Cow Palace's lagoons meet NRCS guidelines – and they are guidelines only, not regulations that have gone through rulemaking scrutiny – the lagoons leak; Plaintiffs have only taken discovery about *this* Dairy and its lagoons, and seek a ruling that *these* lagoons leak. Additionally, Plaintiffs have adduced undisputed evidence that Cow Palace's lagoons were not properly maintained, PSF ¶¶ 90-91, as required by the DNMP. *Id.*; ECF No. 226-1 at COWPAL000488 (remove solids from lagoon "taking care not to break the existing manure[] seal"); COWPAL000490-91 (NRCS maintenance

recommendations for lagoons include, *inter alia*, repairing areas where erosion has occurred and repairing lagoon walls that have settled or cracked).

Finally, Cow Palace re-argues the same cases that this Court dealt with in deciding Defendants' Motion to Dismiss. Br. at 3-9; ECF No. 72 at 10-13. Plaintiffs have again responded to the characterization of these cases in their Response to Cow Palace's Motion for Summary Judgment, ECF No. 286 at 4-9, despite that the law of the case prevails. *See Guadiana v. State Farm Fire & Cas. Co.*, 2009 WL 3763693 at *6 (D. Ariz. 2009) (law of case prevails where party makes same rejected arguments at motion to dismiss stage at summary judgment). The Court now has before it the "argument" and "evidence" concerning "whether the manure was put to its intended use and/or used for beneficial purposes by Defendants under the circumstances unique to this case." ECF No. 72 at 13. Cow Palace's legal arguments need not be reconsidered in light of the undisputed facts.

II. COW PALACE CONTRIBUTES TO GROUNDWATER CONTAMINATION, AND THAT CONTAMINATION PRESENTS AN IMMINENT AND SUBSTANTIAL ENDANGERMENT.

Whether Cow Palace contributes to the nitrate contamination of the groundwater is undisputed: Cow Palace's own experts admitted that it was more likely than not that Cow Palace could be a cause of the contamination, and that it was "certainly possible" that Cow Palace could be a source of contamination. PSF ¶ 131. The EPA just issued an update that concludes that the data collected under

the AOC supports its prior finding that the Dairies are the chief source of nitrate contamination in the area. Third Snyder Decl., Ex. 4 at 7-9. The "70 year" theory that Cow Palace proffers, Br. at 15-16, is based not on actual data, but rather on Dr. Melvin's dissertation from 1969. Third Snyder Decl., Ex. 1 at 219:21-24. That dissertation, never scientifically validated or replicated, cautioned against using its predictive model because it could be wrong by up to an order of magnitude. *Id*. at 220:18-222:18. In fact, when faced with the actual data obtained from monitoring wells, Dr. Melvin agreed groundwater recharge was "probably" "occurring much quicker than 70 years." PSF ¶ 127. Cow Palace's theory that the sampling data shows the tail end of some "historic nitrate plume" is also unsupportable. This theory, not in any of Cow Palace's expert reports, had its genesis during the deposition of Mr. Trainor. Third Snyder Decl., Ex. 2 at 116:24-117:2. Mr. Trainor only came up with the theory after the depositions of Dr. Melvin and Plaintiffs' experts (which Trainor attended) had concluded (when Dr. Melvin testified it was more likely than not that Cow Palace could be a source of contamination), and only after he had dinner with both Adam and Bill Dolsen the night before his deposition. *Id*. at 117:3-13. Mr. Trainor apparently abandoned this theory during his later deposition in the *Bosma* matter, when he testified that Cow Palace application fields ***were a source of contamination*** observed in monitoring wells. Third Snyder Decl., Ex. 3 at 77:10-18. Based on this testimony, that of Cow

Palace's other experts, and the overwhelming evidence in the PSF, it cannot be meaningfully disputed that Cow Palace contributes nitrates to groundwater. PSF ¶¶ 126-131; *see also* Third Snyder Decl., Ex. 4 at 9 (EPA concludes that past agricultural operations are not source of contamination). Cow Palace's arguments about Plaintiffs' sampling around lagoons are not supportable in light of Defendants' experts' testimony. PSF ¶¶ 100-106.

Cow Palace faults Plaintiffs for not providing an estimate on the time it takes for nitrates to migrate from the soil and into groundwater, or the magnitude of loading from Cow Palace Dairy. Br. at 15-16. Cow Palace does not understand RCRA's relaxed causation standard. The courts have held that the "imminence" element requires only a showing that there is a *risk* of *threatened* harm. *Price v. U.S. Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994). An example from the First Circuit is useful: "if there is a reasonable prospect that a carcinogen released into the environment today may cause cancer twenty years hence, the threat is near-term even though the perceived harm will only occur in the distant future." *Maine People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 280 n.1 (1st Cir. 2006). Here, the "imminent" threat of endangerment occurs at the time that Cow Palace's manure is discarded in such a way that the nitrates contained therein cannot be used as a plant fertilizer. After that, excess nitrate *will* reach groundwater – a point on which all of Cow Palace's experts agree. PSF ¶ 37. While Cow Palace argues

that some limited denitrification could occur from truck compaction in some of its fields, it has no evidence to back that up. ECF No. 256-1 at ¶¶ 35 & 37. Dr. Shaw's opinion is that no denitrification occurs within and below root zones – an opinion validated by EPA's argon gas testing. ECF No. 237-2 at ¶ 22. Defendants' proffer no evidence to the contrary and at least one of their experts agrees with Plaintiffs. *See* Third Snyder Decl., Ex. 3 at 77:19-79:14.

Accepting Cow Palace's arguments would render the word "may" superfluous in 42 U.S.C. § 6972(a)(1)(B). Congress used the word "may" to mean that "a plaintiff need not establish an incontrovertible 'imminent and substantial' harm to health and the environment." *Kara Holding Corp. v. Getty Petroleum Mktg., Inc.,* 67 F. Supp. 2d 302, 310 (S.D.N.Y. 1999) (external citation omitted). Showing the magnitude of loading from Cow Palace is also not required, because the term "contribution" is liberally construed, including conduct that gave a defendant "a share in any act or effect" giving rise to the disposal of the wastes that may present an endangerment. *See U.S. v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1383-84 (8th Cir. 1989). Furthermore, Mr. Erickson's rebuttal report calculates that the loadings from the Dairy far exceed any possible loadings from septic systems. ECF No. 239-2, Carter Decl. Ex. 9 at 565-7. EPA's update, released on December 18, 2014, found the same. Third Snyder Decl., Ex. 4 at 8.

Cow Palace also suggests that the nitrate contamination of the aquifer at levels that exceed the MCL does not present an imminent or substantial endangerment. Br. at 17. This argument is not in accordance with RCRA case law, as discussed above and at length in Plaintiffs' Motion for Summary Judgment, ECF No. 211 at 13-15. There is absolutely no requirement that Plaintiffs establish or quantify the actual harm to a segment of the population or the environment. *Id*. *Apache Powder Co. v. U.S.*, 968 F.2d 66, 68-69 (D.C. Cir. 1992) says nothing about nitrates as a "solid waste" or whether they can be subject to a citizen suit brought under 42 U.S.C. § 6972; instead, that case discusses whether EPA can regulate nitrate as a hazardous substance under Subtitle C of RCRA, an issue not before this Court. Finally, an imminent and substantial endangerment citizen suit may be premised on both present *and past* conduct, per the plain language of the statute. 42 U.S.C. § 6972(a)(1)(B). Cow Palace's argument that it does not "today" pose a threat is not only misplaced, but is again refuted by EPA's recent update. Third Snyder Decl., Ex. 4 at 1 ("[n]itrate is an acute contaminant, which means an immediate (within hours or days) health effect may result from exposure….High nitrate levels may increase the risk of spontaneous abortion or certain birth defects.") Dr. Lawrence debunks Defendants' argument even more thoroughly. *See, e.g.*, ECF No. 213 at ¶¶ 5-9, 18 ("no doubt" about present health risks); ¶¶ 15, 17 (reverse osmosis systems not fully protective from exposure).

III. ANTI-DUPLICATION WAS NOT PROPERLY RAISED.

Cow Palace failed to raise anti-duplication as a defense in its cross-motion for summary judgment and cannot do so now. Even in its response, Cow Palace advances no substantive argument or case citation supporting its request that the Court "look at this issue in light of the regulatory context." The Court should deem this argument waived. *See Navellier v. Sletten*, 262 F.3d 923, 948-49 (9th Cir. 2001) (issue not supported by argument or citation to authorities is waived). In any event, there is authority permitting RCRA lawsuits and SDWA actions to proceed simultaneously, *Vernon Village, Inc. v. Gottier,* 755 F. Supp. 1142, 1154 (D. Conn. 1990), and Cow Palace offers no explanation for how the "substances and activities addressed in the Consent Order and the Amended Complaint are in fact inconsistent in this case." ECF No. 72 at 16. RCRA does not include state law or the NRCS non-regulatory guidelines in the anti-duplication provision, only specific federal laws, in situations not in play here. 42 U.S.C. § 6905(a).

IV. COW PALACE OFFERS NO SUBSTANTIVE RESPONSE TO PLAINTIFFS' OPEN DUMPING CLAIM.

Cow Palace does not meaningfully respond to Plaintiffs' open dumping claim. Defendants merely proffer that RCRA's "open dumping" regulations do not apply to "agricultural wastes, including manure…returned to the soil as fertilizers or soil conditioners." Br. at 20. That same argument was made in regard to

whether manure constitutes a solid waste, which the Court already decided. ECF No. 72 at 12-13. The Court now has before it the argument and evidence necessary to find that Cow Palace has handled its manure in such a manner that makes it a discarded "solid waste," and that the nitrates found in that waste have moved off the Cow Palace site boundary, thus meeting the requirements of an open dump.

V. THE DOLSEN COMPANIES AND THREE D PROPERTIES ARE LIABLE UNDER RCRA.

Two key areas of common ground have emerged in the Parties' briefs – one legal and one factual – that confirm that The Dolsen Companies and Three D Properties (collectively "Dolsen Co.") are liable. First, the Parties agree that the controlling case on this issue is *Hinds Investments, L.P. v. Angioli*, 654 F.3d 846 (9th Cir. 2011), and agree on the language that forms the case's holding. *Compare* ECF 279 at 3 *with* ECF 281 at 9. Second, the Parties agree on the key facts that establish liability pursuant to *Hinds*, namely: The Dolsen Companies is the owner of Cow Palace, LLC and is listed as owner/operator in the Dairy's DNMP; Bill Dolsen is the final authority for the Dairy's employees, including Jeff Boivin; Bill and Adam Dolsen represent the Dairy in state and federal regulatory matters concerning its manure operations; and Bill and Adam Dolsen have repeatedly exercised their authority as principals of the Dolsen Companies to direct and oversee various aspects of Cow Palace. *See* ECF 220-1 Ex. 5, 279 12-14, 16.

Defendants' response attempts to qualify and rephrase other factual assertions, but Defendants either directly concede these facts or decline to dispute them.

The only true disputes separating the Parties are the correct application of the conceded facts to the *Hinds* standard and whether the facts support the two Defendants' contention that they are passive landowners. As to *Hinds*, Defendants' arguments are wrong as a matter of law because they improperly read one phrase in the holding of *Hinds* – "actively involved" – as a condition precedent for finding liability under another part of the holding – "a measure of control" – an error Plaintiffs have pointed out several times in their briefing. ECF 281 at 9-10. Defendants' attempts to evade *Hinds* liability by painting themselves as "passive" landowners are directly contrary to the facts conceded by Defendants.

A. Defendants' Grossly Mischaracterize RCRA and Related Case Law.

Dolsen Co. mischaracterizes both RCRA and related case law as requiring "ongoing" practices causing endangerment. Br. at 4-5. The statute has no such requirement. 42 U.S.C. § 6972(a)(1)(B). The cases Dolsen Co. lists – without any pinpoint citation – pertain to *Clean Water Act* case law requiring that a "discharge" of a "pollutant" be ongoing to confer federal subject matter jurisdiction. *See Connecticut Coastal Fishermen v. Remington Arms*, 989 F.2d 1305, 1312, 1314-15 (2d Cir. 1993) (no CWA jurisdiction because no allegation was made of ongoing discharge; drawing distinction between need to show ongoing Subtitle C regulatory

violations and imminent and substantial endangerment claims); *Pennenvironment v. PPG Indus., Inc.*, 964 F. Supp. 2d 429, 471-72 (W.D. Pa. 2013) (refusing to dismiss CWA claims on requirement that there be an "ongoing" violation); *Jones Creek Investors, LLC v. Columbia County, Ga.*, 2013 WL 1338238 (S.D. Ga. 2013) (similar). The Supreme Court specifically cited 42 U.S.C. § 6972(a)(1)(B) as the type of statutory provision that *does* allow for suit based on past conduct. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 57 n. 2 (1987). Defendants also ignore that "solid waste" includes materials from "agricultural operations[,]" such as Defendants' manure. 42 U.S.C. § 6903(27).

B. "Active Involvement" is not a Condition Precedent to the *Hinds* Test.

Under *Hinds*, a party is liable if they "had a measure of control over the waste at the time of its disposal ***or*** was otherwise actively involved in the waste disposal process." *Hinds*, 654 F.3d at 852 (emphasis added). The Court discussed two separate lines of RCRA case law immediately preceding this holding. In one line of cases, no liability was found when there were no allegations of "active involvement by defendants." *See Hinds*, 654 F.3d at 851 (citing *Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847 (7th Cir. 2008) and *Interfaith Cmty. Org. v. Honeywell Int'l*, 263 F. Supp.2d 796 (D.N.J. 2003)). In the second, there was "some allegation of defendants' continuing control over waste disposal." *Hinds*, 654 F.3d at 851. *U.S. v. Aceto Agr. Chems. Corp.* provides a good example.

There, the defendant was strictly liable under RCRA because it contracted with another company to manufacture pesticides and retained ownership of them throughout the manufacturing process, which resulted in the generation and disposal of waste. 872 F.2.d at 1375, 1383. The *Aceto* court was unconcerned that the liable party was not "actively involved" in the disposal. It was sufficient that it maintained ownership of the pesticides and control over the operations.

Hinds also relied on *U.S. v. Valentine*, which arguably sets an even lower standard for liability. There the court held that a company that transported waste to a facility which improperly disposed of it could be liable because "it is not necessary that a party have control over the ultimate decisions concerning waste disposal or over the handling of materials at a site in order to be found to be a contributor within the purview of RCRA." *Valentine*, 885 F. Supp. 1506, 1512 (D. Wyo. 1995). Because the facts demonstrate that Dolsen Co. has a measure of control over Cow Palace, their argument that Plaintiffs must prove that they were "actively involved" with the waste disposal therefore fails as a matter of law.

C. Dolsen Co. and Three D are not Passive Landowners.

Defendants' frame themselves as mere "passive landowners," with no knowledge or control of what occurs at the Dairy. *See* ECF 279 at 7-9. This framing distorts reality. *See Nat'l Exch. Bank & Trust v. Petro-Chem. Sys., Inc.*, 2012 WL 6020023 at *4 (E.D. Wis. Dec. 3, 2012) ("isolated statements" made by

the defendants "might tend to support [its] view of the law, the plain text of the statute does not"). Plaintiffs have laid out the factual bases for Dolsen Co.'s liability in two briefs. *See* ECF No. 211, pp. 32-37 & ECF No. 281, pp. 2-7.

While Dolsen Co. attempts to qualify some of Plaintiffs' factual assertions, they do not address the most damaging: the Dairy's managers called Bill and Adam Dolsen for guidance when a waste management emergency arose, that Bill and Adam Dolsen approved the AOC and met with state agencies on behalf of the Dairy, that agents for Three D installed filtration systems because of nitrate pollution on their properties *for dairy employees*. *See* ECF No. 281-1 at ¶¶ 10, 16, 21-22 (Plfs.' Suppl. Statement of Facts). Nor can The Dolsen Companies dispute that it is the Dairy's owner and operator, per the DNMP. *See* ECF 226-1 Ex. 5 (COWPAL000459). Defendants were *not* ignorant or passive landowners.

Unlike the situation here, the cases cited by Defendants involve landowners that had no nexus to the alleged disposal: i.e., they either did not own the land at the time of the alleged disposals, or if they did, had no authority to control the entities allegedly causing the disposals. *See* ECF 281 (Plfs.' Opp. Brief) at 13-15, 15 n.4 (responding to cases). Dolsen Co., with interconnected management and active engagement during the time of the disposal, cannot now feign ignorance.

In the only case Dolsen Co. cites, Br. at 7, the court specifically found that the lack of any evidence of control was the factor that saved the party from RCRA

liability. *See Aurora Nat'l Bank v. Tri Star Mktg.*, 990 F. Supp. 1020, 1034 (N.D. Ill. 1998). Plaintiffs here are not seeking liability against an unsuspecting third party after the Dairy had ceased operating and sold the land. Dolsen Co. is not a passive landowner of the type that have avoided liability in other cases.

Dolsen Co. cannot hide behind their subordinates by claiming ignorance of practices that occur every day on land that they own or owned. In one case, a defendant was liable when it owned a building that was causing PCB leaks even though it never touched the ballasts that caused the disposal. *NY Commun. for Change v. NYC Dep't of Educ.*, 2012 WL 7807955 at *23-26 (E.D.N.Y. Aug. 29, 2012). The defendants' claim that "active involvement" was necessary for RCRA liability was denied. *Id*. at *24, 26.

D. Defendants' Corporate Veil Arguments are Irrelevant.

Defendants' new argument is that the corporate veil doctrine shields them from liability. These arguments are inapposite because Plaintiffs do not need to hold the officers of a corporation vicariously liable for the corporation's conduct, because the two *Defendants* are directly liable for their contributions to the solid waste disposal happening at the Dairy, as *Hinds* and the undisputed facts establish. Plaintiffs also point to the responsible corporate officer doctrine as a further basis for liability against Dolsen Co. as previously briefed. *See* ECF 281 at 15-17.

CONCLUSION

For the reasons stated herein, Plaintiffs' respectfully request that their motion for summary judgment be granted.

Respectfully submitted this 22nd Day of December, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2014 I filed a true and correct copy of the foregoing document with the Clerk of Court using the CM/ECF system, which will automatically generate service to the following:

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