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The Aftermath of CARE v. Cow Palace and the Future of RCRA in CAFO Cases

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By Lauren Tavar

The industrialization of agricultural practices in the United States has led to significant negative environmental impacts affecting individuals' use of natural resources such as groundwater. A main contributor to this environmental degradation includes Animal Feeding Operations ("AFOs") that cluster animals, feed, manure and wastewater, dead animals, and production operations onto a small parcel of land for dairy, cattle, and poultry production operations.1 This common farming practice can also take place on a larger scale; a Concentrated Animal Feeding Operating ("CAFO") is an AFO with more than 1000 animals units confined on a facility for more than 45 days during a year.[2] While these operations are considered vital to the nation's economy, they also entail waste mismanagement and drinking water impacts.[3] While a permitting system exists to monitor the waste of CAFOs as a point source under the Clean Water Act,[4] problems continue to arise as a result of day-to-day CAFO operations.

Consequently, where the government either does not or cannot address these environmental issues, citizens step in to fill the void leveraging citizen suit provisions to take action.[5] One such example is a recent citizen suit invoked in Washington after drinking water was contaminated by dairy CAFOs.[6] Instead of using the Clean Water Act, which typically regulates discharge from CAFOS,[7] the plaintiffs in *Community Association for Restoration of the Environment, Inc. et al.* (*CARE*) *v. Cow Palace, LLC et al* used the Resource Conservation and Recovery Act ("RCRA") which dictates the proper control of hazardous and non-hazardous solid waste.[8] A successful citizen suit under RCRA must prove "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."[9] As a result, a judge found that the "dairy's operations involving use of manure may present an imminent and substantial endangerment to the public in violation of RCRA; and three past and present owners of the land on which dairy operated could be held liable for 'contributing to' the disposal of hazardous waste under RCRA."[10]

Because CAFOs are generally regulated by the Clean Water Act[11], it is beneficial to understand how and why the plaintiffs in *Cow Palace* were able to use RCRA as the regulatory mechanism in this case. The simple answer is manure. Large CAFOs may generate 1.6 million tons of waste a year amounting to more than some United States cities.[12] Operators of these CAFOs are then charged with finding cost effective ways to manage the waste generated which usually results in ground application of untreated manure to land.[13]

As a result, unintended consequences arise during the storage and application process of CAFO waste such as pollution to rivers and underground drinking supplies.[14] This is oftentimes due to inadequately and poorly-lined ponds or other storage structures that allow manure to escape into the surrounding environment; lack of necessary storm water controls, which leads to waste being deposited into streams; frequent over-application of animal waste which causes streams or ground water pollution before it is completely absorbed by the land.[15] These mismanagement consequences have the potential to contribute pollutants such as nitrate and phosphorous nutrients, organic matter, sediments, heavy metals, hormones, antibiotics and ammonia to waters used for drinking and recreational activities.[16]

In the case of *Cow Palace*, plaintiffs claimed that the excessive land application of animal waste led to unusually high levels of nitrogen in drinking water.[17] Explicit examples of waste mismanagement by the dairy CAFO through the use of land application were eluded to in pre-trial evidence. One piece of evidence was a soil sample taken in 2012, which showed that despite excess nitrate levels already being applied to alfalfa crops, the dairy CAFO proceeded to apply 7,680,000 additional gallons of manure onto the already sufficiently fertilized field.[18] Because the plaintiffs were able to successfully characterize animal waste as a hazardous material,[19] they were successful in convincing the court that the improper over-application was a substantial endangerment to the public under RCRA.[20]

Recommendation

This case can be leveraged as a blueprint for future plaintiffs attempting to mitigate the adverse effects of CAFOs on natural resources such as groundwater, so long as new legislation is not implemented, limiting the scope of RCRA. Dairy farmers obviously see this case and the anticipation of copycat cases as a threat to their operations because citizens now have a new litigation tool at their disposal. In recent response at a panel discussing the repercussions of the *Cow Palace* case, a lobbyist representing the Idaho Dairymen's Association stated, "The industry needs to work toward getting Congress to provide regulatory certainty by clarifying the intent of RCRA."[21] Until then, citizens should continue to utilize the RCRA language to bring litigation action when other regulatory mechanisms fail them.

Endnotes: The Aftermath of *CARE v. Cow Palace* and the Future of RCRA in CAFO Cases

[1] *See What's the Problem?*, EPA, http://www3.epa.gov/region9/animalwaste/problem.html (last updated Oct.13, 2015).

[2] *See Animal Feeding Operations,* USDA Natural Res. Conservation Serv., http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/plantsanimals/livestock/afo/ (last visited Dec. 18, 2015) ("[A]n animal unit is defined as an animal equivalent of 1000 pounds live weight and equates to 1000 head of beef cattle, 700 dairy cows, 2500 swine weighing more than 55 lbs, 125 thousand broiler chickens, or 82 thousand laying hens or pullets.").

[3] *See What's the problem?*, *supra* note 1.

[4] *See* Fed. Water Pollution Control Act (hereinafter Clean Water Act) 33 U.S.C. § 1251 [As Amended Through P.L. 107–303, Nov. 27, 2002] 214; *see also Animal Feeding Operations*, *supra* note 2 ("Any size AFO that discharges manure or wastewater into a natural or man-made ditch, stream or other waterway is defined as a CAFO, regardless of size.").

[5] *See* Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection,* Duke Envtl. Law & Policy Forum 39, 46 (Mar. 2000).

[6] *See Cmty. Ass'n for Restoration of the Env't, Inc. (CARE) v. Cow Palace, LLC*, 80 F. Supp. 3d 1180, 1181 (E.D. Wash. 2015).

[7] *See* 33 U.S.C. § 1251.

[8] *See* Res. Conservation and Recovery Act 42 U.S.C. § 82 [As Amended Through P.L. 107–377, Dec. 31, 2002] 7.

[9] *See id. at 107.*

[10] *See Cow Palace*, 80 F. Supp. 3d at 1180.

[11] *See* 33 U.S.C. § 1251.

[12] *See* Carrie Hribar, *Understanding Concentrated Animal Feeding Operations and Their Impact on Communities,* Nat'l Ass'n of Local Bds. of Health 2, *available at* http://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf ("Annually, it is estimated that livestock animals in the U.S. produce each year somewhere between 3 and 20 times more manure than people in the U.S. produce, or as much as 1.2–1.37 billion tons of waste. Though sewage treatment plants are required for human waste, no such treatment facility exists for livestock waste").

[13] *See id.*

[14] *See What's the Problem?*, *supra* note 1.

[15] *See id.*

[16] *See id.*

[17] *See Cmty. Ass'n for Restoration of the Env't, Inc. (CARE) v. Cow Palace, LLC*, 80 F. Supp. 3d, 1180, 1181 (E.D. Wash. 2015).

[18] *See id.* at 1193.

[19] *See id.* at 1221.

[20] *See id.* at 1180.

[21] *See* Carol Ryan Dumas, *Yakima dairy challenge has broad implications, experts say,* Capital Press (Aug. 18, 2015), http://www.capitalpress.com/Dairy/20150818/yakima-dairy-challenge-has-broad-implications-experts-say.

Endnotes: You Probably Shouldn't Build There: Watershed-Based Land Use Strategies for Mitigating Global Climate Change in New Jersey's Freshwater Systems

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[19] *See* William Gillette, Professor of History, Rutgers University, Lecture in course on New Jersey History (Spring, 2009) (1875 was a milestone year for New Jersey; it was the first year when its population reached one million and it was the first year when more people lived in cities than in the surrounding countryside).

[20] *See id.*

[21] *See generally*, Adam Rome, The Bulldozer in the Countryside: Suburban Sprawl and the Rise of American Environmentalism 36-45 (2001) (describing the post-World War II suburban expansion as the model for late-twentieth century American life, as developers bought farms in eastern states, subdivided those farms into lots, built houses on each lot, and sold those lots to returning veterans eager to start new families); Kenneth T. Jackson, Crabgrass Frontier: The Suburbanization of the United States 283-84 (1985) ("Between 1950 and 1970, the [United States'] suburban population doubled from 36 to 74 million, and 83 percent of the nation's total growth took place in suburbs…. In 1970, for the first time in the history of the world, a nation-state counted more suburbanites than city dwellers or farmers.").

[22] *See* James W. Hughes & Joseph J. Seneca, *The Economy*, *in* Mapping New Jersey: An Evolving Landscape 152, 154 (Maxine N. Lurie & Peter O. Wacker ed., 2009) (explaining that the middle part of New Jersey between New York City and Philadelphia has a long history of being a supplier of human capital to those two cities, and is fundamentally tied to their growth in its development patterns).

[23] *Origins of the Nickname*, The State of New Jersey, http://www.state.nj.us/nj/about/facts/nickname/Statement (last visited Nov. 18, 2015); *see also* Hughes & Seneca, *supra* note 23 at 154 (mentioning that "New Jersey was described as a 'barrel tapped at both ends'" to explain that it acted as an economic function of New York City and Philadelphia and that New Jersey's economy rested on that of the two cities at its borders).

[24] See *Exurb*, Dictionary.com, http://www.thefreedictionary.com/exurban (last visited Nov. 18, 2015).

[25] *See* Richard Lathrop & John Hasse, *Tracking New Jersey's Changing Landscape*, in New Jersey's Environments: Past, Present, and Future 121-22 (Neil M. Maher, ed., 2006). *But see* Eric Sundquist, *Exurban Development Continues to Decline, While Cities Return to Pre-Recession Growth*, Smart State Transportation Initiative, (Apr. 16, 2012), http://www.ssti.us/2012/04/exurban-development-continues-to-decline-while-cities-return-to-pre-recession-growth/ (detailing decline in exurban development in favor of urban population growth).

[26] *See* Lathrop, *supra* note 26, at 121 (stating that "[t]he rate of forest conversion to development…has increased slightly from approximately 8,630 acres/year during the 1986 to 1995 time period to approximately 9,590 acres/year between 1995 and 2000.").

[27] *See Statistical Abstract of the United States Section 1. Population Table 14* 20, United States Census Bureau (2012), http://www.census.gov/compendia/statab/2012/tables/12s0014.pdf.

[28] *See* Mansnerus, *supra* note 12.

[29] *See* Lathrop, *supra* note 26, at 125-26 (explaining that "build-out" means when developers have built on all developable land).

[30] *See Population Density*, Dictionary.com, http://dictionary.reference.com/browse/population+density (last visited Sept. 19, 2015).

[31] *See generally* Lathrop, *supra* note 26, at 123-26.

[32] *See* Sampson, *infra* note 52.

[33] *See generally* Ian Sample, *Scientists Offered Cash to Dispute Climate Study*, The Guardian (Feb. 2, 2007, 10:11, AM), http://www.theguardian.com/environment/2007/feb/02/frontpagenews.climatechange (demonstrating the importance of global climate change in that certain interest groups are willing to pay vast sums of money to scientists for a favorable assessment of global climate change). *But see* Union of Concerned Scientists *supra* note 10 (asserting the various effects of global climate change).

[34] Joseph F.C. DiMento & Pamela Doughman, *Introduction: Making Climate Change Understandable*, *in* Climate Change: What It Means for Us, Our Children, and Our Grandchildren 1, 1 (2007).

[35] *See Causes of Climate Change*, EPA, http://www.epa.gov/climatechange/science/causes.html (last visited Nov. 18, 2015) (stating that since the industrial era, and especially in the mid-twentieth century, humans have notably increased the amount of greenhouse gases emitted into the atmosphere. *See generally Overview of Greenhouse Gases,* EPA, http://www.epa.gov/climatechange/ghgemissions/gases.html (last visited Nov. 18, 2015) (showing that greenhouse