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

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 1,000 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 Act11, 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.

2. See Animal Feeding Operations, USDA NATURAL RES. CONSERVATION SERV., http://www.ircs.usda.gov/wps/portal/ircs/main/national/plantsanimals/livestock/afos (last visited Dec. 18, 2015) (“An 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 water-way is defined as a CAFO, regardless of size.”).

5. See Jonathan H. Adler, Stand or Deliver: Citizen Suits, Standing, and Environmental Protection, DUE ENVTL. LAW & POLICY FORUM 39, 46 (Mar. 2000).


9. See id. at 107.

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


12. See Carrie Hribar, Understanding Concentrated Animal Feeding Operations and Their Impact on Communities, Nat’l Ass’n of Local Bd. 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.


18. See id. at 1193.

19. See id. at 1221.

20. See id. at 1180.