When Animal Manure is Regulated Like Municipal Dumps – Imposing RCRA Liability on Agricultural Operations

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Overview

- Background
  - Yakima Valley
- EPA Consent Order
  - History
  - Dairies at issue
- What is RCRA?
  - Legislative history
- Yakima lawsuits
- Judge Rice’s SJ decision
- What can be done to minimize risk of RCRA lawsuit?
Background – Yakima Valley
Long history of agriculture

Welcome to YAKIMA
The Palm Springs
OF WASHINGTON

WINE YAKIMA VALLEY
An Association of Growers and Wineries

YAKIMA VALLEY
Hops
BREW SOMETHING ALREADY.

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Animal agriculture since late 1800s
LYNO390 represents data collected between 1990 and 2000, results are presented as mg/L Nitrate or Total Nitrate.
LYNO308 represents data collected between 2001 and present, results are presented as mg/L Nitrate or Total Nitrate.
EPA Consent Order

• History
  – 2008 articles in *Yakima Herald*
  – 2009 EPA designated YV as “Environmental Justice Showcase Community” (rec’d $$$)
  – EPA used money to conduct study of nitrates in YV; issued report in March 2013 pointing finger at dairies
  – During study period, EPA negotiated with 5 dairies under threat of SDWA enforcement action
• Yakima dairies targeted by EPA:
  – Cow Palace, LLC
  – Henry Bosma Dairy
  – Liberty Dairy, LLC
  – George & Margaret, LLC, George DeRuyter & Son Dairy, LLC and D & A Dairy, LLC
  – Haak Dairy (smaller, physically separate from other dairies)

• All dairies already subject to DNMP requirements and regular inspections by WSDA

• 4 of 5 dairies entered to Consent Order (not Haak Dairy) – March 2013

• EPA’s Consent Order predicated on emergency provisions of Safe Drinking Water Act
Yakima dairies
• Consent Order – Requirements
  – Provide alternative drinking water source to all users 1 mile downgradient with nitrates above safe drinking water standard of 10 mg/L (“MCL”).
  – Install extensive series of groundwater monitoring wells.
  – Conduct quarterly groundwater and soil testing.
  – Assess all lagoons for compliance with NRCS Standard 313; if not compliant, must line lagoons at rate of one per year.
  – Implement detailed Irrigation Water Management Plan and Field Application Plan (including installing soil moisture sensors) regarding crop applications.
  – Follow specific procedures, as dictated by professional agronomist, so as to achieve no greater than 45 ppm of nitrates at the two foot level in soil.
  – Implement series of other actions around farm to minimize risk of nitrate escapement.
  – 8 year timeline; can be expanded if goals not achieved.
What is RCRA?

Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901, et seq. is a comprehensive environmental statute intended to address nation’s industrial wastes. RCRA regulates the disposal of two types of waste:

(1) Hazardous waste (e.g., hazardous chemicals from industrial processes)

(2) Solid waste (e.g., municipal landfills)

“Solid waste” defined as “any garbage, refuse . . . and other discarded material, including solid, liquid, semisolid or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations.”

“Discarded material” not defined by RCRA; courts have held that a substance is “discarded” where it is “disposed of, thrown away or abandoned.”
Legislative history of RCRA

• When enacted in 1976, legislative history made clear that agricultural wastes that are “returned to the soil as fertilizers or soil conditioners” are not considered “discarded” under RCRA.

• For almost 40 years, EPA never brought a RCRA action against an agricultural operation alleging that its manure constitutes a “solid waste” under RCRA.

• Recent attempts by environmental groups to expand RCRA application to manure failed at motion to dismiss stage (e.g., Tyson Foods).
Yakima Lawsuits

- Environmental groups filed NOI against five dairies in October 2012 (as EPA study being finalized).
- February 2013, filed five separate (but identical) RCRA “citizen suit” actions in the E.D. Washington (all assigned to new district court Judge Thomas Rice).
  - Alleged that the manner in which the dairies use, handle and store manure (under state approved NMP) violates RCRA’s bar against “open dumping” and poses an “imminent and substantial” endangerment to health and the environment
Specific allegations:

- Liquid manure stored in NRCS compliant lagoons “leak” and, therefore, constitute a “discard” under RCRA.
- Dairies “over-apply” manure to crops such that residual nitrates exist in soil after harvest. This “over-application” amounts to a “discard” under RCRA.
Litigation

• Defendants brought Motion to Dismiss - denied
  – Duplicative & Inconsistent with EPA Consent Order
  – Animal manure not a “solid waste” under RCRA when used as fertilizer
• Haak case settled early
• Extensive discovery:
  – Ongoing data generated under Consent Order
  – Plaintiffs onsite soil and water testing – Rule 34
  – Deposed state/local agency personnel
• Bosma/Liberty cases consolidated
• Plaintiffs added third parties that were current or former landowners of land used by dairies to grow copses.
Judge Rice’s Summary Judgment Decision in *Cow Palace*

- First court in country to find that animal manure is a “solid waste” under RCRA
- Specific holdings:
  - Manure “over-applied” to crops is “discarded” under RCRA.
  - Manure which escapes from NRCS compliant lagoons is a “discard” under RCRA (such lagoons are “designed to leak”).
  - Manure composted on native, unlined soil constitutes “discard” under RCRA.
  - Third party landowners liable.
- Issue of fact for trial
  - Manure in cow pens = discard under RCRA?
  - Surface water impacts
  - Remediation efforts

RESULT: consolidated trial set for May 11, 2015
What can be done to minimize and/or avoid RCRA liability?
Questions?

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