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

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

NO. CV-13-3016-TOR

PLAINTIFFS' OPPOSITION TO
DEFENDANT COW PALACE,
LLC'S MOTION FOR SUMMARY
JUDGMENT

THIS DOCUMENT IS BEING
FILED UNDER SEAL

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

Defendants.

19

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2 42 U.S.C. § 6903(3) 17

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1 INTRODUCTION

2 The parties agree about one thing: the central question under RCRA is
3 whether Cow Palace Dairy “discards” its manure. But the larger question is this: if
4 Cow Palace Dairy truly valued its manure as a beneficial resource, then why did it
5 ignore the detailed instructions contained in its DNMP—the “blueprint” of the
6 Dairy—and apply its manure to agricultural fields in amounts that vastly exceeded
7 what its crops could use as fertilizer? And why does Cow Palace both store
8 manure in lagoons that it knows leak and compost on surfaces that it knows are
9 permeable? The overarching answer to these questions is that Cow Palace’s
10 manure is hardly the “valued resource” Defendants make it out to be. Cow Palace
11 is in the business of selling milk. Manure is the unwanted byproduct of the process
12 and has never been given the attention required to prevent pollution. The
13 undisputed facts demonstrate that as a matter of law, the manure constitutes a
14 “solid waste” under RCRA. Defendants’ motion for summary judgment should be
15 denied and Plaintiffs’ motion granted.

16 ARGUMENT

17 I. COW PALACE DISCARDED MANURE BY FAILING TO 18 IMPLEMENT THE REQUIREMENTS OF ITS DNMP AND 19 APPLYING MANURE WITHOUT REGARD TO CROP 20 FERTILIZATION NEEDS.

1 Distilled into its simplest form, the key issue is whether an entity discards a
2 substance under RCRA when it has detailed operational instructions on how to
3 make beneficial use of the substance but abjectly fails to follow those instructions,
4 instead dumping the substance onto land in amounts far exceeding the substance's
5 beneficial use. Here, the following facts are undisputed:

- 6 • Cow Palace has a Dairy Nutrient Management Plan ("DNMP"), formerly
7 called a Dairy *Waste* Management Plan until the industry prevailed on a
8 name change about a decade ago. The stated goals of the DNMP are to
9 provide Best Management Practices that will agronomically use manure and
10 prevent the contamination of surface waters and the underlying aquifer. The
11 DNMP is the "blueprint" for how the Dairy is operated. ECF No. 211-1,
12 Plaintiffs' Statement of Material Facts, ¶ 65 ("PSF").
- 13 • To accomplish these goals, the DNMP provides specific, detailed
14 instructions on how the Dairy should calculate the rate and amount of
15 manure to apply for a given crop. *Id.* at ¶¶ 51-59.
- 16 • Succinctly, these instructions, also in the appendices, require Cow Palace
17 Dairy to (1) sample its manure *before* applying manure to crops; (2) sample
18 soil from fields *before* applying manure to crops; (3) determine crop
19 fertilization needs based on the past three-to-five year average yields for a
20 given crop; and (4) apply manure based on crop needs *after* taking into

1 account the amount of residual nutrients present in the soil, including nitrate.

2 *Id.* These requirements are not new: they have been present in all known
3 prior versions of Cow Palace's DNMP. *Id.* at ¶¶ 60-62.

- 4 • Cow Palace Dairy has *never* followed the manure application instructions of
5 its DNMP. While the Dairy usually took soil samples, it ignored the results
6 of those samples (which frequently showed no need for additional crop
7 fertilization) when determining application needs. The Dairy never used
8 actual manure nutrient analyses in applying manure; never took into account
9 the manure nutrients already present in the soil when applying more manure;
10 and never based its manure applications on the past three-to-five year
11 average crop yields. *Id.* at ¶¶ 68-70, 77.
- 12 • The Dairy has also made numerous applications to fields where no crop was
13 growing and applied manure until lagoons were “empty.” *Id.* at ¶¶ 71-72.
- 14 • The Dairy’s own experts concede that Cow Palace failed to make agronomic
15 applications of manure and should have followed the requirements of its
16 DNMP to minimize the application of manure onto land; indeed, applying
17 more than necessary is, in the words of Defendants’ own expert, “wasteful.”
18 *Id.* at ¶¶ 80-82.

19 Defendants do not and cannot contest these facts, as they were admitted by
20 Dairy Manager Jeff Boivin and Defendants' experts and are also obvious from the

1 face of the documents cited. Instead, Cow Palace's primary argument is that, even
2 in light of these failures, some portion of the manure that was applied to its fields
3 got used by the crop, and as a result, there can be no discarding of manure.
4 Defendants then admit that some leaching may occur from beneficial use, and so
5 the Court would be in an impossible position determining what manure in the
6 groundwater was from beneficial versus excessive usage. But Plaintiffs are not
7 asking the Court to engage in bean counting, determining what portion of manure
8 nutrients were or were not used by a crop. Instead, Plaintiffs ask the Court to find
9 that Cow Palace abandoned its manure when it failed to abide by its operational
10 plan—which specifically describes *how* to put the waste byproduct to use as a
11 beneficial crop fertilizer while protecting the environment—and applied manure to
12 fields in quantities vastly exceeding crop fertilization rates.¹

13 Cow Palace's motion fails as a legal matter because its position is untenable
14 and cannot be supported by the cases on which it relies. Defendants rely upon a
15 flawed precept that there is no discard of manure because portions of manure may
16 be used by the crop as fertilizer. This reliance is misplaced because, as found by
17

18 ¹ Given the facts of this case, the Court need not decide whether the DNMP
19 requirements, with the exception of any lagoon construction standards, are
20 protective of the environment.

1 the Court over a year ago, the cases cited by Defendants analyzed whether a
2 material was discarded “in the course of its ordinary use in amounts necessary to
3 serve its intended purpose.” ECF No. 72 at 12. Plaintiffs’ claims are factually
4 distinguishable from each authority cited to by Cow Palace because, here, Cow
5 Palace discarded manure by applying amounts well *beyond* those necessary to
6 serve its intended purpose as a fertilizer in contravention of its DNMP.

7 For instance, Cow Palace again relies on *No Spray Coal. v. City of New York*
8 to argue that its manure is not a solid waste. There, the Second Circuit found that
9 insecticide sprayed into the air with the “design of...reaching and killing
10 mosquitoes” was not “discarded” under RCRA because it was being put to its
11 beneficial use. 252 F.3d 148, 150 (2d Cir. 2001). There was no claim that
12 insecticide was being sprayed in amounts beyond that necessary to serve its
13 beneficial use or that the spray operators possessed, but ignored, detailed
14 instructions on how to make insecticide applications, as is the case here with
15 manure. See *No Spray Coal., Inc. v. City of New York*, 2000 WL 1401458 at *2
16 (S.D. N.Y. 2000) (discussing how insecticide application instructions, approved by
17 EPA, stated that the insecticide was designed to drift into vegetation, woodlands,
18 swamps, and marshes). Had the spray operators ignored specific instructions for
19 how to apply the insecticide and instead sprayed vast quantities of it within New
20 York City, then the result of that case would have been similar to the result in

1 *Headwaters v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001). There, the
2 Ninth Circuit held that pesticide residuals which no longer served a beneficial use
3 constituted “pollutants” under the Clean Water Act. *Id.* at 533.² Similarly, the
4 Ninth Circuit has accepted the American Heritage Dictionary's definition of waste
5 as “any useless or worthless byproduct of a process or the like; refuse or excess
6 material.” *See N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d
7 1155, 1161 (9th Cir. 2003). In the present case, the pollutants from manure that is
8 excessively over-applied constitute “waste.”

9 *Safe Air for Everyone v. Meyer*, another case relied on by Cow Palace, is
10 distinguishable. There the claim was that Kentucky bluegrass residue left in
11 agricultural fields post-harvest was a solid waste because it was burned in the
12 fields by farmers. 373 F.3d 1035, 1037-38 (9th Cir. 2004). The farmers presented
13 evidence that the burning of the residue returned nutrients to the soil, extended the
14 life of the fields, worked as a type of pest management, and maximized sunlight
15 absorption. *Id.* at 1043-44. This evidence was uncontested and, as a result, the

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² The holding in *No Spray Coal.* is also of limited value after the subsequent
18 decision that pesticides and their residuals are a “chemical waste,” consolidated
19 from eleven circuits, including the Second Circuit, in *Nat'l Cotton Council v. EPA*,
20 553 F.3d 927, 936 (6th Cir. 2009).

1 Court found that the bluegrass residue was not discarded because it was part of a
2 continuous farming practice. *Id.* at 1045. Importantly, the claim in that case was
3 *not* that the farmers burned excess quantities of residue or that they failed to follow
4 applicable plans or permits when burning. And the Court never held, as Cow
5 Palace suggests, that a material is not discarded where only a portion of it is
6 beneficially used. *See id.* at 1046 n. 13 (determination of whether material is
7 beneficial is “made independently of *how* the materials are handled...[d]espite the
8 fact that a portion of residue becomes airborne smoke, the residue is not thereby
9 automatically ‘discarded’”) (emphasis in original); Br. at 5.

10 The decision in *Oklahoma v. Tyson Foods, Inc.* is also distinguishable.
11 There, the State of Oklahoma alleged that poultry farmers had discarded poultry
12 litter by applying it to agricultural fields. 2010 WL 653032 at 9 (N.D. Okla. 2010).
13 The critical difference between this case and *Tyson Foods* is that no allegation was
14 made that the poultry farmers ignored their management plans or were applying
15 litter in amounts beyond what crops could effectively use as fertilizer. Instead, it
16 appears that, unlike here, the *Tyson Foods* plaintiff alleged that poultry litter
17 applied in ordinary amounts and in compliance with the farmer’s animal waste
18 management plans was still “discarded” where some aspect of the litter was not
19 fully used by a crop. *See id.* at *3, *9 (state alleged that litter discarded where crop
20 needs nitrogen, but does not need phosphorus, and phosphorus escapes into the

1 environment). That the *Tyson Foods* court relied so heavily on the crop's fertilizer
2 needs belies Cow Palace's contention that the court rejected the concept of an
3 "agronomic rate" as a basis for RCRA liability. Br. at 10 n.2.

4 The Ninth Circuit's recent decision in *Ecological Rights Found. v. Pac. Gas*
5 & Elec. Co.

6 , 713 F.3d 502 (9th Cir. 2013), provides additional support for
7 Plaintiffs' position. In that case, the court found that PCP wood preservatives
8 which leached out of telephone poles did not constitute the discarding of a solid
9 waste. *Id.* at 514. In particular, the court reasoned that wood preservative was
10 used *in amounts necessary* to accomplish its purposes, and therefore preservative
11 that leached into the environment through normal wear and tear was not a "solid
12 waste." *Id.* at 515. Here, Plaintiffs make a different claim: when manure is
13 applied in amounts beyond those necessary to fertilize crops, that manure is
14 discarded.³

15

16 ³ Alternatively, in the event the Court were to find that Cow Palace did not
17 "discard" manure when it ignored the DNMP and applied large quantities of
18 manure without regard to fertilization rates, Plaintiffs respectfully request that the
19 Court consider whether manure is a solid waste when manure nutrients—
20 specifically, nitrate—have accumulated in the environment in dangerous amounts

1 Finally, Cow Palace also cites *Ctr. For Comm. Action, et al. v. BNSF Ry.*
2 *Co.*, 764 F.3d 1019, 1030 (9th Cir. 2014), for the proposition that a substance is not
3 a solid waste “even though some residues or constituents of the materials enter the
4 environment.” Br. at 3. That case is inapposite. There, the question was whether
5 the release of particulate matter into the air from diesel engines constituted the
6 “disposal” of a solid waste, *not* whether the particulate matter itself *was a solid*
7 *waste*. *Id.* at 1020-21 (“We conclude that Defendants’ emission of diesel
8 particulate matter does not constitute ‘disposal’ of solid waste within the meaning
9 of RCRA[.]”). The case turned on the definition of “disposal” under RCRA, which
10 “includes only conduct that results in the placement of solid waste ‘into or on any
11 land or water,’” not into air. *Id.* at 1024-25 (external citation omitted).

12 Defendants’ motion also fails because they cannot show that there is no
13 genuine issue of material fact such that the Court should find in its favor. Cow
14 Palace argues that it “uses” its manure to grow crops and that even though “some
15 of the manure escapes into the environment[,]” RCRA was not meant to reach “the
16 unintended effects of fertilizer applications.” Br. at 13. Cow Palace fails to
17 acknowledge that the excessively high nitrate and phosphorus soil sample results

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19 as a natural, expected consequence of the manure’s use as a fertilizer. *See*
20 *Ecological Rights Found.* 713 F.3d at 518.

1 obtained from its fields—a point that is uncontested—means *no additional manure*
2 was needed to fertilize its crops. *See, e.g.*, PSF ¶ 77, 79-82. Nonetheless, the
3 Dairy applied manure in these circumstances in direct violation of its DNMP. The
4 Dairy also regularly applied manure to fields where no crop was growing or
5 applied manure until its lagoons were emptied. *Id.* at ¶¶ 71-73. Under these
6 circumstances, Cow Palace cannot genuinely claim that it was only applying
7 manure to its fields to fertilize crops, and a rational trier of fact would not find
8 otherwise. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) (summary judgment
9 is only appropriate if “a rational trier of fact could not find in favor of the party
10 opposing the motion”) (internal citations omitted).

11 Cow Palace also asserts that its applications of manure were appropriate
12 because the Dairy purportedly used some “method” to calculate the amount of
13 manure to apply to a field. Br. at 15. But this alleged “method” is not an accepted
14 agronomic means of applying manure and is not compliant with the instructions
15 contained in the DNMP, which is why the Dairy’s own experts agree that Cow
16 Palace failed to apply manure agronomically. In particular:

- 17 • Mr. Boivin asserts that he used an assumed manure nutrient concentration of
18 1.5 lbs. of nitrogen/1000 gallon to calculate application rates. ECF No. 190-
19 3 at ¶ 41. This is in direct violation of Cow Palace’s DNMP. ECF No. 226-
20 1, (“Snyder Decl.”) at 353 (Cow Palace DNMP) (“It is required that the

1 dairy manager test the...nutrient content of the liquid in the storage
2 ponds...**before** land application") (emphases in original); *id.* ("Nutrient
3 analysis for all sources of organic and inorganic nutrients including, but not
4 limited to, manure and commercial fertilizer supplied for crop uptake")
5 (emphasis in original); *id.* at 357 ("Do's" include "Take manure nutrient
6 concentration into account before applying to crops."); *id.* at 450 (appendix
7 document providing chart tracking manure nutrient analyses).

- 8 • Mr. Boivin now declares that Cow Palace used "the NMP's estimate of crop
9 nitrogen uptake to determine the amount of nitrogen that the crop was going
10 to require for the upcoming season." ECF No. 190-3 at ¶ 41. But the
11 DNMP directly states that the estimates contained therein are *only estimates*,
12 and that Cow Palace is required to determine the actual crop removal rates.
13 Snyder Decl. at 352 ("When determining agronomic rates for manure
14 application, it is important to choose achievable yield goals...[a]verage
15 yields for the past three to five years for each field should be used."); *id.*
16 ("These are guidelines only...NRCS recognizes that farmers should vary
17 timing and amounts of application depending on particular soil, crop
18 type, and crop needs and weather conditions.") (emphasis in original); *id.*
19 at 357 ("Do's" including "Apply nutrients based on realistic yield (five-year
20 average from farmer records or professional recommendations) goals, based

1 on soils, precipitation, climate, available soil moisture, and yield history for
2 the field.”).

- 3 • Mr. Boivin states that Cow Palace “knew from soil samples that the fields
4 may still contain nitrogen from the previous year’s applications...
5 [t]herefore, we applied less manure than the current crop was expected to
6 use.” ECF No. 190-3 at ¶ 42. Mr. Boivin also cites an example, testifying
7 that “[a]fter receiving the results of the annual, post-harvest soil tests, as
8 required by the NMP, we then determined that the field required less than
9 the expected 500 pounds of nitrogen per acre.” *Id.* While there may be
10 individual instances of adjustment in response to an agency inspection, in
11 deposition, Mr. Boivin testified that Cow Palace’s usual practice was *not* to
12 vary the amount of manure applied to a field based on post-harvest soil tests
13 or take post-harvest tests into consideration. *See, e.g.,* PSF ¶ 68(b). Cow
14 Palace’s usual practice directly violates the DNMP and means that Cow
15 Palace was applying more nutrients to its fields than its crops could use.
16 Snyder Decl. at 353 *supra*; *id.* at 355 (“Total nutrient quantities must not
17 exceed the amount that can be used by the crop being grown.”); *id.* at 357
18 *supra*; *id.* at 449 (chart provided for Cow Palace to use to determine
19 application rate, instructing the Dairy to subtract soil residual nitrate levels

1 as a “Manure Nutrient Credit” from the “Fertilizer Recommendations” line,
2 and that “[a] negative value indicates no extra fertilizer is needed.”).

- 3 • Mr. Boivin concludes that, as a result of his method, Cow Palace applied
4 less manure than what the crop was expected to uptake and, as a result,
5 successfully grew crops.⁴ ECF No. 190-3 at ¶¶ 46-47, 52. But the Dairy’s
6 crop yields have been mixed, at best, PSF ¶ 78, and high crop yields do not
7 equate to the use of manure as a beneficial product, as Defendants’ own
8 experts admit. *Id.* at ¶¶ 79-80 (for example, Mr. Stephen testified that it was
9 “wasteful of funds, wasteful of your money” to apply manure to a field
10 where there was already sufficient nutrients to fertilize a plant).

11 Defendants’ assert that “[o]n nearly every occasion, the crop actually used
12 more nitrogen than was applied in that season’s manure applications,” but this is
13 untrue. Br. at 15. Cow Palace cites an expert report from Mr. Stephen in support
14 of this statement, but Mr. Stephen acknowledged in his deposition that he failed to
15 follow the DNMP’s requirement of taking into account residual soil nitrate levels

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17 ⁴ As to the “value” of its manure, Cow Palace employee Dirk Porter admitted that
18 many farmers receive free solid manure from the Dairy, and Mr. Boivin testified
19 that solid manure is given away for free. PSF ¶ 76. Defendants also acknowledge
20 that liquid manure is given away for free. ECF No. 190-1 at ¶ 23.

1 in formulating the charts contained within his rebuttal report. *See* Defendants'
2 SOMF at ¶ 50; Second Snyder Decl. at Ex. 1 (submitted herewith) (excerpt of
3 Stephen Deposition at 138:15-139:6; 141:8-143:7). Moreover, from a logical
4 standpoint, if all of the crops grown by Cow Palace had used more nitrogen than
5 applied since 2008, then there would be no residual nitrate left in the field. Soil
6 samples of Cow Palace's fields prove that this is not the case, and Defendants have
7 not contested that Cow Palace's field have had consistently excessive soil nitrate,
8 phosphorus, and potassium results. PSF ¶ 77.

9 Cow Palace claims that inspectors from the Washington State Department of
10 Agriculture ("WSDA") had nothing but praise for Cow Palace's operations. Br. at
11 15. The Court should take such statements with great skepticism. Plaintiffs
12 deposed Dan McCarty, inspector for WSDA, in this action. Mr. McCarty testified
13 he was trained that soil nitrate levels above 130 lbs./ac in the top foot are
14 considered elevated and would require corrective actions. Second Snyder Decl.
15 Ex. 2 at 13:15-14:4, 14:19-15:10. Mr. McCarty claimed that when he inspected
16 Cow Palace, he looked at soil samples from the previous five years, and his 2013
17 inspection report indicated that all of Cow Palace's fields were within the
18 "acceptable" level of less than 130 lbs./ac residual nitrate. *Id.* at 26:20-24, 27:3-
19 12. But when presented with actual soil sample results at his deposition, Mr.
20 McCarty admitted that many of Cow Palace's samples were higher than the 130

1 lbs./ac “elevated” nitrate figure and should have triggered corrective action. *See*
2 *id.* at 27:25-30:13; 46:1-14. Mr. McCarty further testified that it was important to
3 use actual manure nutrient sampling in the calculation of application rates to
4 prevent an “overapplication” of manure, and he acknowledged that Cow Palace
5 failed to do this. *Id.* at 32:9-37:2.

6 In conclusion, it is undisputed that Cow Palace possessed a detailed
7 operational plan describing exactly how to “agronomically recycle” its manure
8 byproduct in a manner that prevented contamination of the aquifer. The Dairy
9 ignored its operational plan and dumped manure onto its fields without
10 consideration of the nitrate already present in the soil, the actual nitrate levels of
11 the manure being applied, or its actual crop yields. Such actions demonstrate that
12 Cow Palace discarded its manure.

13 **II. COW PALACE DISCARDS MANURE BY STORING IT IN
14 LAGOONS THAT THE DAIRY KNOWS, OR REASONABLY
15 SHOULD KNOW, LEAK.**

16 Cow Palace asserts that it stores manure in lagoons that allegedly meet the
17 permeability standards set forth by the Natural Resources Conservation Service
18 (“NRCS”) and, as a result, the Dairy cannot be said to be discarding manure. Br.
19 at 16. Aside from the fact that NRCS standards are based on specific siting
20 requirements, and that the permeability standard used by Cow Palace is not
appropriate for their geographical siting, there can be no doubt that Defendants

1 readily acknowledge—as they must, based on the admissions of their experts—that
2 the lagoons at Cow Palace Dairy do in fact discharge manure into the ground, even
3 if they meet the NRCS standards. *Id.* at 17; PSF ¶ 99-102.

4 But Cow Palace does not comply with NRCS standards, which require that
5 soil permeability as well as proximity and flow to drinking water sources be
6 accounted for in siting and liner decisions. Second Snyder Decl., Ex. 5 (Handbook
7 Part 651) at 2-15; 7-16. In fact, NRCS states a lagoon should not be located “in an
8 area where groundwater is [] flowing away from the site toward a well, spring, or
9 important underground water supply.” *Id.* at 7-16. When lagoons are located over
10 a drinking water source, a liner should be considered. *Id.* at 10D-9. Moreover,
11 NRCS states that if their proper standards are followed to achieve “optimal
12 combination of liner thickness and permeability,” there will be “limited seepage
13 from a properly designed site [which] should have minimal impact on ground
14 water quality. *Id.* at 10D-2. Despite Cow Palace’s lagoons proximity to a vital
15 drinking water source, geographic flow into the groundwater, and the permeability
16 of the soils, they nonetheless refuse to install a liner, thereby falling out of
17 compliance with NRCS standards.

18 That being said, it is undisputed that the NRCS standards are not legal
19 requirements in the State of Washington, and there is no law that requires dairy
20 lagoons to have any type of specific permeability rating. Thus, the real issue

1 before the Court is whether a party discards an allegedly valuable substance when
2 they store that material in a structure that they know, or reasonably should know in
3 the exercise of reasonable diligence, is designed to leak.

4 Here, even *if* the lagoons at Cow Palace meet the NRCS seepage standard,
5 that standard plainly allows for the leaking of manure. *See, e.g.*, Br. at 16-17; PSF
6 ¶¶ 87-89; 92 (a lagoon that meets the present NRCS standard leaks 5,000 gallons
7 per acre, per day, assuming typical dimensions and construction). Were
8 Defendants to truly value their manure as a beneficial resource and not a byproduct
9 waste, then they would store that substance in a vessel that would not leak and they
10 would properly maintain a “manure seal,” a failure on their part that increases the
11 amount of manure lost from the lagoons. *See* PSF ¶¶ 89-91, 99.

12 Finally, Cow Palace can hardly contend that it was acting in compliance
13 with some applicable legal or regulatory standard in constructing their lagoons to
14 allegedly meet the NRCS standard, for this is no such requirement in the State of
15 Washington. Even if there were, Defendants do not comply with the standards
16 because NRCS states that a lagoon should not be constructed over an underground
17 water supply, and if they are, that a liner should be used. The simple, undisputed
18 fact is that Cow Palace stores manure in lagoons that are *designed* to leak into the
19 environment. Leakage constitutes the discard of manure, as well as the disposal of
20 a solid waste. 42 U.S.C. § 6903(3).

When a useful material leaks from its containment into the environment, it loses all beneficial purpose and becomes abandoned “solid waste.” *See, e.g.*, *Zands v. Nelson*, 779 F. Supp. 1254, 1262 (S.D. Cal. 1991) (gasoline leaked from underground storage tanks constitutes RCRA solid waste as “gasoline is no longer a useful product after it leaks into and contaminates, the soil”); *Agric. Excess & Surplus Ins. Co. v. A.B.D. Tank & Pump Co.*, 878 F. Supp. 1091, 1095 (N.D. Ill. 1995) (same); *Paper Recycling, Inc. v. Amoco Oil Co.*, 856 F. Supp. 671, 675 (N.D. Ga. 1993) (leaking petroleum product constitutes disposal of solid waste); *U.S. v. Power Engineering Co.* 191 F. 3d 1224, 1231 (10th Cir. 1999).

Cow Palace asserts that *Zands* was overruled by *Safe Air*, citing the District Court’s decision in *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 803 F. Supp. 2d 1056, 1064 (N.D. Cal. 2011). *Ecol. Rights* distinguishes *Zands* from *Safe Air* on the basis that there cannot be a discard “without any action by the defendant.” *Id. Ecol. Rights* then clarifies this point, stating that “even if *Zands* stands for the proposition that a passive discharge is actionable under RCRA, its ruling would be limited to cases where the discharge of hazardous waste leaked or spilled out from a container intended to hold the waste.” Because utility poles were not containers, the District Court believed *Zands* was inapplicable. Lagoons, of course, *are containers*. Moreover, Plaintiffs’ rely upon *Zands* to show that once a material is leaked from its container, it no longer has a beneficial use. Plaintiffs

1 do not cite *Zands* to support an argument of passive conduct, and indeed do not
2 base any claim here on passive conduct, making Defendants' reliance on the
3 District Court's *Ecol. Rights* decision inapposite.

4 **III. COW PALACE DISCARDS MANURE BY COMPOSTING ON
PERMEABLE SURFACES. THE COW PEN CONTAMINATION
REMAINS FOR TRIAL.**

5 Cow Palace discards manure and manure nutrients by composting manure
6 on permeable, native soils. Defendants do not contest that fact, Br. at 18, nor
7 present any factual evidence to rebut Plaintiffs' soil sampling, which demonstrates
8 that the composting area is a source of the nitrate contamination of the
9 groundwater. PSF ¶ 110-11. A defendant discards a substance, which therefore
10 becomes a solid waste, when the defendant handles that substance in such a way
11 that it no longer serves its beneficial use. Here, Cow Palace discards at least some
12 of its composting manure, and the potential plant nutrients contained therein, by
13 knowingly composting on native soils that permit those potential nutrients to leach
14 into the soil, where the nutrients become pollutants. *Id.* at ¶¶ 108-109.

15 Plaintiffs' sampling of the cow pens, contained in the Second Snyder Decl.
16 at Ex. 3, pp. 155-157, shows that manure nutrients have leached deep into the soil,
17 where they will eventually reach groundwater. The parties dispute the extent of
18 the cow pen contamination and thus this issue should be held over for trial.

IV. PLAINTIFFS HAVE PRESENTED EVIDENCE AND EXPERT OPINION ABOUT IMPACTS TO SURFACE WATERS AND PHOSPHORUS CONTAMINATION.

Contrary to Defendants' representations, Plaintiffs have provided expert opinion and documentation on the issue of surface water contamination originating from Cow Palace, both through the interconnectedness of the contaminated shallow groundwater and nearby surface waters, including the Yakima River, and from surface runoff from excessive surface levels of phosphorus. *See, e.g.*, Second Snyder Decl., Ex. 3 (Expert Report of Dr. Byron Shaw) at ¶¶ 10, 15, 21, 23, 139, 149, 152, 156(d), 159, 164, 168, 180. In fact, Cow Palace's expert agrees that the nitrate-contaminated groundwater underlying Cow Palace will eventually reach the Yakima River. ECF No. 229-2, Snyder Decl. at 753 (133:6-14). Plaintiffs have also provided expert opinion and evidence supporting Plaintiffs' contention that the excessive phosphorus levels in Defendants' fields may present an imminent and substantial endangerment to the environment. *See, e.g.*, Second Snyder Decl., Ex. 3 at ¶¶ 10, 23, 36, 73, 77, 112-113, 123, 139, 149, 152, 156(d), 159, 168. Defendants dispute these facts and, therefore, Plaintiffs have not moved for summary judgment on these issues, reserving them for trial.

CONCLUSION

19 For the reasons stated herein, Cow Palace's motion for summary judgment
20 should be denied in its entirety and Plaintiffs' motion should be granted.

1 Respectfully submitted this 8th Day of December, 2014.

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1 CERTIFICATE OF SERVICE
2

3 I hereby certify that on December 8, 2014 I filed a true and correct copy of
4 the foregoing document under seal with the Clerk of Court using the CM/ECF
5 system. Pursuant to the procedures for filing under seal, service will be
6 accomplished by other means to the following:
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