Cow Palace Deal A Harbinger Of Increased Waste Scrutiny

By Juan Carlos Rodriguez

Law360, New York (May 12, 2015, 9:21 PM ET) -- Environmentalists' success in convincing a federal judge in Washington state that the Resource Conservation and Recovery Act can be used to regulate the application of manure on the land at a dairy portends further citizen litigation and increased government regulation, experts say.

As three dairies and various environmental groups on Monday resolved litigation over groundwater contamination from mismanaged manure in a consent decree, attorneys said U.S. District Judge Thomas O. Rice's earlier rulings in the case will have lingering effects. In January, in a somewhat unusual ruling, he found that Cow Palace LLC and other related defendants were responsible parties under the RCRA.

"This was the initial case that tried to balance regulation under the Clean Water Act, which is the act under which land application of materials had been regulated, versus regulation under the solid waste law, the Resource Conservation and Recovery Act," said Thomas McElligott, a partner at Quarles & Brady LLP.

He said companies or industries that apply waste, such as manure, on their land need to be very careful now because overapplication at a particular site can make the company subject to regulation under not only the CWA but also the RCRA.

In Wisconsin, where he practices, several environmental groups have petitioned the Environmental Protection Agency to address effects on groundwater that those groups attribute to the land application of waste materials, McElligott said.

"That could be the opening salvo to a similar case," he said. "I think the [Cow Palace] case kind of opened the door to additional scrutiny of land application of waste, and I don't think this settlement is going to end that. I think we're going to see continued scrutiny of land application operations, and unfortunately this may not be the last lawsuit of this type that we'll see."

Jessica Culpepper, an attorney at Public Justice who represented the Cow Palace plaintiffs, said similar cases are in the works, and she said Judge Rice's summary judgment rulings constitute a precedent that her group and others will use in the future.

"It's 111 pages; it's extremely well-reasoned; and it will create an incredibly helpful model for any other impacted communities trying to bring a case like this," Culpepper said. "One way or another, the door is open on viewing mismanaged manure as a solid waste under RCRA."

She said Public Justice is working on another case in the Central District of California with similar facts.

Such efforts to apply the RCRA's imminent and substantial endangerment provisions to similar

situations are not new, according to David A. Crass, a partner at Michael Best & Friedrich LLP.

“This is the first one where it survived a summary judgment motion successfully," Crass said. "And certainly the settlement is significant."

He pointed out that under the consent decree, the EPA will be watching over Cow Palace and the others to ensure compliance, in addition to monitoring previously finalized administrative orders of consent, or AOCs, over similar issues.

“Having this settlement be tacked onto an AOC that EPA would monitor makes a lot of sense, because EPA had previously been involved," Crass said. "In fact it’s protective to the producer because, so long as they comply with this order, they will be insulated from further suits. So that was a benefit to the defendants in this case."

But he said the EPA has been more active recently in its focus on agricultural operations by conducting flyovers and sending out information requests under Section 308 of the Clean Water Act to gather information about what facilities are doing to manage their waste.

The Cow Palace case’s outcome wasn’t that surprising, because farmers often have to weigh whether it’s better to fight a lawsuit or work out terms that allow them to stay in business, said Dale G. Mullen, a partner at McGuireWoods LLP.

But he said the consent order goes further than what the current law and the AOCs require.

“I don’t think it would be going too far to say that this could potentially make it more difficult for anyone working in the agricultural industry, whether you work in animal agriculture or traditional row crop agriculture, that it has the potential to make farming unnecessarily difficult and expensive,” Mullen said.

He said the Ninth Circuit and other courts consistently have rejected attempts to impose RCRA liability based on the contention that materials like manure that are put to some useful purpose, like fertilization, are “discarded.”

“I don’t think that it was what Congress intended,” he said.

Crass said while the Cow Palace case certainly got a lot of attention, companies may draw some comfort from its limited application and from the fact that these types of cases are fact-intensive.

He said companies need to pay attention to nutrient management practices in order to avoid getting into a situation like Cow Palace's, where overapplication is an issue.

“They need to make sure they are following their nutrient management plans, and that those plans aren’t just sitting on the shelf,” Crass said. “Companies need to actually manage pursuant to and consistent with, not only the agronomic standards of the nutrient management plan, but also the environmental protection standards.”

The case is Community Association for Restoration of the Environment Inc. et al. v. Cow Palace LLC, case number 2:13-cv-03016, in the U.S. District Court for the Eastern District of Washington.

--Additional reporting by Caroline Simson. Editing by Jeremy Barker and Brian Baresch.