

U.S. appeals court dismisses dairy federation's challenge to EPA report

Phil Ferolito, Yakima Herald Republic, May 25, 2021

An effort by the dairy industry to free dairy operators from steep and expensive environmental safeguards imposed by an EPA study hit a major hurdle earlier this month.

The 9th U.S. Circuit Court of Appeals dismissed the Washington State Dairy Federation's petition for review of a 2012 EPA study that linked a handful of Lower Valley dairies to groundwater contamination.

The court said the federation failed to meet a 45-day deadline in which to file the petition.

"They won on a technicality," said Dan Wood, the federation's executive director.

The study prompted a handful of dairies in the Sunnyside and Granger areas — known as the dairy cluster — to enter a federal consent decree with the EPA and the local environmental group CARE, which sued those dairies over groundwater contamination, mainly high nitrate concentrations.

An attorney for the environmental group said there's been additional scientific data gathered in recent years to support the EPA study.

Nitrates naturally occur in soil, but heavy use of fertilizers, including animal manure, and leaky septic tanks can drastically increase nitrate concentrations. High nitrates can be harmful to infants, pregnant women and the elderly, according to the Centers for Disease Control and Prevention.

The decree required the dairies to install double-walled synthetic liners in manure storage ponds and to reduce the amount of manure applied to fields as fertilizer.

Impacted dairy operators and the federation claim the study didn't receive a full peer review, and that it was rewritten by policy enforcers, not scientists, when it was updated in 2013.

The federation argues the EPA "fraudulently influenced" the dairies into the decree by "misrepresenting the report as influential science."

The EPA report didn't receive a full outside peer review and therefore is not influential science, Wood said. Reports classified as influential science — meaning they can foster policy change — are required to have support from an outside peer review.

"They had EPA review (its own) work, but they didn't have that outside peer review for influential science," Wood said.

CASE DISMISSED

But on May 14, a 9th Circuit panel dismissed the matter, saying the federation waited too long to file the petition. The ruling came after the same court denied EPA's motion last year to dismiss the case on the same grounds.

The federation learned the EPA study didn't receive a full peer review in February 2019 but didn't file a petition for review until a year later, the ruling said.

Such petitions are to be filed within 45 days of obtaining facts establishing grounds for the petition, the panel wrote in its ruling.

The dairy federation said information about the EPA report not undergoing a full peer review came to light in a 2019 meeting. At that time, the federation was in discussions with EPA to submit the report for a full peer review, and filed the petition after it didn't happen, he said.

"So, the lesson here is if you hear something in a meeting, you better file a lawsuit," Wood said.

The EPA declined to comment on ongoing litigation.

Wood said the federation has no plans of appealing this ruling, but it's not giving up its legal fight in the overall matter.

"I don't think the Supreme Court would take up something decided on a technicality like this," he said. "We are not even contemplating being done fighting in the courts. It won't surprise me if we are in the U.S. Supreme Court at some point, but not this ruling."

Environmental attorney Charlie Tebbutt, who represented CARE in the lawsuit, said the EPA report is moot at this point given all the other scientific data gathered in recent years.

"The EPA report is now nearly a decade old," Tebbutt said. "The data that has been collected since then, particularly from the 32 monitoring wells at the cluster dairies, the lagoon abandonment information and the soil analysis all make it 100% clear that the dairies are polluting the community."