COW PIE POLICY: THE REASONING OF *CARE V. COW PALACE* UNDER THE RESOURCE CONSERVATION AND RECOVERY ACT AND ITS IMPLICATIONS FOR AGRICULTURAL MANURE MANAGEMENT

I. INTRODUCTION

Farmers have always significantly shaped American politics. Thomas Jefferson centered his political theory on the farmer, believing him to be the ideal citizen.[1] Modern Super Bowl commercials still reflect this sentiment.[2] The family farmer: up early doing chores and up late doing his civic duty at the school board meeting. One of the events to which Congress sets its clock is a billion-dollar omnibus bill passed every six years with a significant amount of mandatory funding for farmers.[3] Though the majority of farms are still family owned, they are becoming industrialized.[4] As farms become larger and more concentrated, the environmental effects are multiplied. However, agriculture has consistently been exempt from environmental regulation.[5]

Agriculture enjoys some kind of exemption under each of the major environmental statutes. Congress responded to a court ruling, that the Clean Water Act applied to return flows from agricultural fields, by amending the statute to exempt farmers from acquiring a permit for

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[1] *See* Thomas Jefferson, *Query XIX, Manufactures*, *in* NOTES ON THE STATE OF VIRGINIA (1787), *available at* http://xroads.virginia.edu/~hyper/hns/yoeman/qxix.html.

[2] Commercial: Farmer (The Richards Group 2013) YOUTUBE, https://www.youtube.com/watch?v=H7yZdOl_e_c).

[3] *See* Agricultural Act of 2014, Pub. L. No. 113–79 (codified as amended in scatter sections of 7 U.S.C.); *see also* Brad Plummer, *The $956 Billion Farm Bill in One Graph*, THE WASHINGTON POST (Jan. 28, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/01/28/the-950-billion-farm-bill-in-one-chart/.

[4] James MacDonald, *Family Farming in the United States*, USDA (Mar. 4, 2014), http://www.ers.usda.gov/amber-waves/2014-march/family-farming-in-the-united-states.aspx (stating that family dairy farms account for 75 percent of production).

[5] *See generally* J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263, 293-327 (2000).

return flows from irrigated agriculture.[6] Under the Clean Air Act the Environmental Protection Agency ("EPA") may exempt from regulation any substance "that is a nutrient used in agriculture."[7] While treating agriculture differently is justified for security and economic reasons, broad exemptions from environmental regulation have taken a toll on the environment and public health.

Environmental advocacy groups have been unsatisfied with the progress of environmental enforcement on the agricultural sector.[8] With legislatures and administrative agencies slow to move against farmers' interests, environmental advocacy groups have shifted their focus to using nuanced legal arguments to bring agriculture under the regulation of existing statutes.[9] As one example, Community Association for Restoration of the Environment, Inc. ("CARE") filed a suit in the Federal District Court for the Eastern District of Washington against a large dairy farm in Washington called Cow Palace.[10] Its claim attempted to bring cow manure under the regulation of the Resource Conservation and Recovery Act ("RCRA"). The EPA has traditionally exempted cow manure applied to soil as fertilizer under RCRA.[11] CARE claimed that Cow Palace over-applies manure to the point that it is no longer being used as a fertilizer and should be considered a dumping of a solid waste.[12] This argument is compelling and has policy implications beyond the dairy industry.

Manure was once considered a natural and essential part of the agricultural process.[13] It is a cheap fertilizer that is returned to the ground to grow the next crop.[14] Now as agricultural facilities grow and regulation has increased, it has become more of a regulatory liability, and a potential nuisance law suit.[15] The number of dairy farms in the United States is rapidly dropping while the average herd size per dairy

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[6] Clean Water Act of 1977, Pub. L. No. 95-217, § 33(b), (codified at 33 U.S.C. § 1362 (14) (2012).
[7] 42 U.S.C. § 7412(r)(5) (2012).
[8] *See generally* Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC, 2013 WL 3179575, at *1 (E.D. Wash. June 21, 2013).
[9] *See id.*
[10] *Id.*
[11] 40 C.F.R. § 261.4 (2017).
[12] *Cmty. Ass'n*, 2013 WL 3179575, at *1.
[13] Video: Clean Plate Club, VT. J. ENVTL. L., at 1:13 (Cradle to Cradle Symposium, 2014), YOUTUBE, https://www.youtube.com/watch?v=uef-_-8QvCc.
[14] Oklahoma v. Tyson Foods, Inc., 2010 WL 653032, at *10 (N.D. Okla. Feb. 17, 2010).
[15] Video: Clean Plate Club, *supra* note 13.

farm is growing.[16] This means larger concentrations of manure in more concentrated areas. A 200 cow dairy farm produces about the same amount of nitrogen from its manure as a community of 5,000–10,000 people.[17] It is becoming more common to find farms having over 1,000 cows with some farms caring for herds that are in the tens of thousands.[18] Nitrogen and phosphorous are the components of manure that are valuable to farmers. Farmers spread manure on their fields to replenish the soil with the nitrogen and phosphorous that was taken out by last year's crop so that the next year's crop can grow.[19] However nutrient loading of water is a major pollution problem in the United States.[20]

The environmental concern of spreading manure on fields has been the runoff into streams and rivers causing nitrogen loading and eutrophication in bays, lakes and the mouths of rivers.[21] Eutrophication is when the high levels of nutrients increase the growth of algae, which blocks the sunlight from reaching the underwater plants, decreasing the oxygen in the water causing the fish and marine life to die or become harmful for humans to consume.[22] The growing concentration of manure stored in unlined lagoons has caused concern of manure leaking into ground water and increasing nitrate loads to unsafe levels.[23] Nitrates can be harmful for humans to consume even at low levels.[24] Infants are especially vulnerable becoming sick from drinking nitrates.[25]

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[16] USDA, *Changes in the Size and Location of U.S. Dairy Farms*, *in* PROFITS, COSTS, AND THE CHANGING STRUCTURE OF DAIRY FARMING / ERR-47 2, *available at* http://www.ers.usda.gov/media/430528/err47b_1_.pdf (statistics as of 2006).

[17] *Animal Manure Management, RCA Issue Brief #7*, USDA, NATURAL RESOURCES CONSERVATION SERVICE (1995), http://www.nrcs.usda.gov/wps/portal/nrcs/detail//?cid=nrcs143_014211#table1.

[18] *See* USDA, *supra* note 16, at 1.

[19] *Commercial Fruit and Vegetable Production*, UNIV. OF MINN. EXTENSION (2005), http://www.extension.umn.edu/garden/fruit-vegetable/nutrient-cycling-and-fertility/.

[20] *See Nutrient Pollution – The Problem*, EPA, http://www2.epa.gov/nutrientpollution/problem (last updated Feb. 3, 2013). ("Nutrient pollution is one of America's most widespread, costly and challenging environmental problems, and is caused by excess nitrogen and phosphorus in the air and water").

[21] *Id*.

[22] *Animal Manure Management*, *supra* note 17.

[23] JOSHUA H. VIERS ET AL., NITROGEN SOURCES AND LOADING TO GROUNDWATER, 6–7 (U.C. Davis, 2012).

[24] 40 C.F.R. § 261.4 (2017); *see also Well Testing*, CENTERS FOR DISEASE CONTROL AND PREVENTION,

The overall goal of this article is to show that the *Cow Palace* case was not an extreme change in the status quo. If a farmer reads the facts of the case, they will come to find out that this farm was nowhere near compliance with their nutrient management plan and that the nitrates in the surrounding area were beyond safe levels. This should reassure farmers who are in compliance with their nutrient management plan and have surrounding groundwater nutrients at safe levels. If an environmental activist were to read the facts and the prior legal precedent they would learn that this was actually the law before hand, it was just the first case where the over-application was so obvious that the court had no problem finding that the farm was over-applying manure to the point where the farmer was discarding the manure. Both farmers and environmentalists should also recognize that this case still leaves many questions unanswered. In the following pages, I will try to suggest workable answers to those legal questions and recognize their practical implications.

This article will do a step-by-step legal analysis of the major disputed issues of this case. Each major issue will conclude with a suggestion of what the law and policy should be. Part II will give an overview of the procedural history of the case. Part III will analyze the disputed issues. Subpart A of Part III will describe how manure can become a solid waste and that there should be some practical limits to classifying manure as a solid waste. Subpart B of Part III will analyze the Anti-duplication provision in RCRA. It will conclude by suggesting that the courts adopt an analysis similar to a federal pre-emption, to resolve disputes of when RCRA is pre-empted by other federal statutes. Subpart C of Part III will analyze what remedies are

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http://www.cdc.gov/healthywater/drinking/private/wells/testing.html (last updated May 3, 2010).

[25] U.S. EPA, NITRATES AND NITRITES, TOXICITY AND EXPOSURE ASSESSMENT FOR CHILDREN'S HEALTH, *available at* http://www.epa.gov/teach/chem_summ/Nitrates_summary.pdf ("The health effect of most concern to the U.S. EPA for children is the 'blue baby syndrome' (methemoglobinemia) seen most often in infants exposed to nitrate from drinking water used to make formula. Infants of ages 0-3 months are at highest risk for blue baby syndrome because their normal intestinal flora contribute to the generation of methemoglobin; older children and adults can experience this syndrome, but at higher concentrations of nitrates. The blue baby syndrome is named for the blue coloration of the skin of babies who have high nitrate concentrations in their blood. The nitrate binds to hemoglobin (the compound which carries oxygen in blood to tissues in the body), and results in chemically-altered hemoglobin (methemoglobin) that impairs oxygen delivery to tissues, resulting in the blue color of the skin").

feasible. Finally, Subpart D of Part III provides a conclusion of the analysis. Part IV takes the conclusions from the analysis and outlines steps farmers should take to avoid litigation and agency enforcement action.

II. PROCEDURAL HISTORY

Under RCRA, Congress authorized "citizen suits." This means that a citizen can sue anyone who is in violation of the statute, provided that certain circumstances are present and the citizen follows the notification process correctly.[26] Citizen suits have played a major role in the enforcement of environmental statutes and regulation since their conception in the early 1970s.[27] In order to file a citizen suit under RCRA the plaintiff must allege that:

> [A] past or present owner or operator of a treatment, storage, or disposal facility . . . has contributed or . . . is contributing to the 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.[28]

CARE formally notified Cow Palace[29] and the EPA of its intention to sue Cow Palace in October 2012. CARE supplied facts from a draft September 2012 EPA study that named Cow Palace as a likely source of the high nitrate levels in 20% of private wells in the Lower Yakima Valley.[30] The farmers dismissed CARE's claims as "baseless."[31] After

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[26] 42 U.S.C. § 6972(a)(1)(B) (2016).
[27] *See* James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 Widener L. Rev. 1 (2003).
[28] 42 U.S.C. § 6972(a)(1)(B).
[29] The notices were separate but identical. The other suits were Cmty. Ass'n for Restoration of the Env't, Inc. v. George & Margaret LLC, 954 F. Supp. 2d 1151 (E.D. Wash. 2013); Cmty. Ass'n for Restoration of the Env't, Inc. v. D & A Dairy, No. 13-CV-3018-TOR, 2013 WL 3188846 (E.D. Wash. June 21, 2013); and Cmty. Ass'n for Restoration of the Env't, Inc. v. Henry Bosma Diary, No. 13-CV-3019-TOR, 2013 WL 3188851 (E.D. Wash. June 21, 2013). Two of the farms sold out, leaving only Cow Palace, LLC and George & Margaret LLC. The opinions court opinions of these cases were also identical so for convenience this note only refers to the cases collectively as *Cow Palace.*
[30] EPA, LOWER YAKIMA VALLEY GROUNDWATER QUALITY 12 (Feb. 2010).
[31] Ross Courtney, *Environmental groups sue 4 Lower Valley dairies in federal court,* YAKIMA HERALD REPUBLIC, (Feb. 15, 2013), http://charlietebbutt.com/files/YH%202%2015%2013.pdf.

the ninety day period to allow the farms to change practices, or the EPA to enforce was up, CARE filed suit in the Federal District Court on February 14, 2013. Cow Palace filed a motion to dismiss which the district court denied. After discovery, On January 14, 2014, Judge Thomas Rice handed down a partial summary judgment in favor of CARE. The order allowed the issues of surface water contamination and appropriate remedies to go to trial; however, the parties settled and the trial did not take place.[32]

III. DISPUTED ISSUES

A. Solid Waste

1. Manure applied to fields

CARE had to show that cow manure fits the definition of a solid waste under RCRA. Then it had to prove that the manure applied to fields and leaked from storage lagoons posed an "imminent and substantial danger to health or the environment."[33] The summary judgment ruling found that manure that leaked from the storage lagoons was a solid waste that posed an imminent and substantial danger to the health of the surrounding community.[34] The judgment found the way Cow Palace over-applied the manure to the fields constituted a solid waste,[35] and that it may be contributing high levels of nitrate in the drinking water.[36]

RCRA defines a solid waste as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility and other discarded material, including solid, liquid, semisolid or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations. . . ."[37] At first glance, this statute seems to cover manure spread on fields; however, courts have not interpreted "discarded" to include manure used as fertilizer on agricultural fields.[38] The EPA has also exempted operations that

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[32] Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC, 80 F. Supp. 3d 1180, 1222–24 (E.D. Wash. 2015).
[33] 42 U.S.C. § 6972(a)(1)(B).
[34] *Cmty. Ass'n*, 80 F. Supp. 3d at 1222-24.
[35] *Id.*
[36] *Id.* at 1227.
[37] 42 U.S.C § 6903 (2016).
[38] *See id.*

apply manure to agricultural fields as fertilizer from the definition of a solid waste facility: "The criteria do not apply to agricultural wastes, including manures and crop residues, *returned to the soil as fertilizers or soil conditioners*."[39] CARE agreed that manure returned to the ground as fertilizers is exempt from the definition of a solid waste, however they argued that Cow Palace over-applied manure to its fields to the point that the manure was no longer useful as fertilizer but simply discarded material.[40]

Though RCRA does not define "discarded material" the Ninth Circuit defined "discarded material" as "to cast aside; reject; abandon; give up."[41] The court in *Safe Air for Everyone v. Meyer*, 373 F.3d 1035 (9th Cir.2004) also laid out three factors to consider when determining if a material has met this definition of "discarded":

> (1) whether the material is 'destined for beneficial reuse or recycling in a continuous process by the generating industry itself;' (2) whether the materials are being actively reused, or whether they merely have the potential of being reused; (3) whether the materials are reused by its original owner, as opposed to use by a salvager or reclaimer [sic].[42]

Safe Air was a citizen suit brought against bluegrass farmers who burned the grass residue after harvesting the seeds for sale.[43] The citizen group who brought the case claimed that the grass residue was a solid waste under RCRA because the farmers "discarded" the grass residue when they performed open field burning.[44] The court determined that Congress enacted RCRA because it was concerned with the amount of industrial material going into landfills.[45] It concluded that the burning of grass residue "was not the evil against which Congress took aim."[46] It cited legislative history that reinforced this conclusion:

> "Much industrial and agricultural waste is reclaimed or put to new use and is therefore not a part of the discarded materials disposal problem the

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[39] 40 C.F.R. § 257.1(c)(1) (2017) (emphasis added).
[40] *See* Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC, 80 F. Supp. 3d 1180, 1222–24 (E.D. Wash. 2015).
[41] Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1041 (9th Cir.2004).
[42] *Id.* at 1043 (internal citations omitted).
[43] *Id.* at 1037.
[44] *Id.* at 1038.
[45] *Id.*
[46] *Id.*

> committee addresses.... Agricultural wastes which are returned to the soil as fertilizers or soil conditions are not considered discarded materials in the sense of this legislation."[47]

The court ruled that by burning the grass, the residue returned to the soil as a fertilizer and was not discarded.[48]

The Ninth Circuit latter simplified its analysis when it determined that "[t]he key to whether a manufactured product is a 'solid waste' . . . is whether that product 'has served its intended purpose and is no longer wanted by the consumer.'"[49] In *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502 (9th Cir. 2013) (hereinafter "*Pacific Gas*"), the Ninth Circuit ruled that a wood preservative that contains pentachlorophenol ("PCP"), a general biocide, and other chemicals, was not a solid waste because the preservative was serving its intended use and was not "discarded."[50] Though the court speculated about the possibility, it did not answer "whether or under what circumstances . . . material becomes a RCRA 'solid waste' when it accumulates in the environment as a natural, expected consequence of the material's intended use."[51] In that case, an environmental organization filed a citizen's suit against utility companies and alleged that their utility poles were releasing PCP to the environment.[52] The utility poles were treated with a wood preservative that contained PCP and the weathering of the poles released some of the wood preservative to the air and ground.[53] The court compared wood preservative escaping into the environment from utility poles to pesticides released into the air that drift beyond the intended target of killing mosquitos.[54] The wood preservative being washed or blown away was considered (like pesticides) to be an expected consequence of its intended use.[55] The Utility company did nothing to discard of the PCP.[56] It used PCP for the chemical's intended use and the natural

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[47] *Id.* at 1046 (citing H.R.Rep. No. 94–1491, at 3 (1976)).
[48] *Id.*
[49] Ecological Rights Found. v. Pac. Gas & Elec. Co., 713 F.3d 502, 518 (9th Cir. 2013).
[50] *Id.* at 516.
[51] *Id.* at 518.
[52] *Id.* at 504.
[53] *Id.*
[54] *Id.* at 516.
[55] *Id.*
[56] *See id.*

wear and tear caused an escape of the chemical, not a discarding.[57] So long as the utility poles were in use, any PCP-based preservative that escaped through normal wear of the poles was "not automatically a RCRA 'solid waste'."[58]

In *Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC*, No. 13-CV-3016-TOR, 2013 WL 3179575 (E.D. Wash. June 21, 2013) (hereinafter "*Cow Palace*"), CARE did not dispute any of this precedent.[59] CARE argued that the Cow Palace's alleged over-application of manure to fields would be comparable to applying an unnecessary layer of preservative to utility poles or spraying more pesticides than is necessary to kill the mosquitos.[60] It claimed that Cow Palace's application of manure to fields goes beyond the agronomical amount that would fertilize the fields and that manure leakage from the lagoons is not serving the purpose of fertilizer at all.[61] In its ruling on Cow Palace's motion to dismiss, the district court concluded that it is possible to apply manure beyond its beneficial use and transform it into a solid waste.[62] The court accepted CARE's argument that the facts of this case can be distinguished from the Ninth Circuit's previous cases. In those cases, the material at issue was used in "amounts necessary to serve its intended purpose."[63] CARE argued that if Cow Palace applies manure to its fields beyond what is necessary to serve its intended purpose as fertilizer, applying the manure loses its agronomic benefits and essentially the farm is discarding the manure as a solid waste.[64] This logic followed precedent and carried enough weight to sway the court.

The discovery process found that the manure application on the fields was grossly disproportionate to the agronomical amount.[65]

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[57] *Id.* at 515–16 (citing No Spray Coal., Inc. v. City of New York, 252 F.3d 148, 150 (2d Cir.2001)) (holding pesticides are not a RCRA solid waste if "they are applied to the land and that is their ordinary manner of use").
[58] *Id.* at 515 (emphasis added).
[59] *See* Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC, No. 13-CV-3016-TOR, 2013 WL 3179575, at *4 (E.D. Wash. June 21, 2013).
[60] *See id.*
[61] *Id.*
[62] Oklahoma v. Tyson Foods Inc., 2010 WL 653032, at *10 (N.D. Okla. Feb. 17, 2010) took a different approach and ruled that poultry manure applied as fertilizer does not become a solid waste simply because "some aspect of the product is not fully utilized."
[63] *Cmty. Ass'n*, 2013 WL 3179575, at *4.
[64] *Id.*
[65] *Id.*

Though Cow Palace did take manure samples from the main lagoon, it did not consider the results of the samples while creating their Dairy Nutrient Management Plan ("DNMP").[66] Instead of applying manure according to nitrate levels in individual fields, they applied manure only referencing the DNMP estimates.[67] The most damning evidence was that Cow Palace took soil samples that showed a field already beyond the agronomic level of nitrates for the growth of alfalfa, and then proceeded to spread 7,680,000 gallons of manure on that field.[68] The court easily concluded that the manure, as applied by Cow Palace, constituted a solid waste. When Cow Palace applied manure "untethered to DNMP's Best Management Practices" and "with disregard to crop fertilization needs," it did so in an effort to discard the manure. Cow Palace's practice eliminated the otherwise beneficial purpose of manure as fertilizer.[69] The court concluded that when a person uses and handles manure in such a manner that eliminates its usefulness as a fertilizer, the manure becomes a solid waste.[70] Cow Palace's failure to adhere to a DNMP and implement Best Management Practices are factors that indicate that Cow Palace "discarded" the manure on its fields.[71]

The reasoning of this case is still in line with *Safe Air* line of cases. Those cases were closer because the amount of escaped substance was incidental to the intended use of a substance. Cow Palace failed both the *Safe Air* factors and the *Pacific Gas* 'intended use' test.[72] Though, under *Safe Air* factor one, the manure was arguably intended to be destined for reuse in a continuous process by the farm, under factor two, the manure was not actively being reused and merely had the potential to be used as fertilizer.[73] Because the manure was over-applied to the point where it had no chance to fulfill its intended use as fertilizer the over-applied manure failed the 'intended use' test of *Pacific Gas*.[74]

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[66] Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC, 80 F. Supp. 3d 1180, 1191-94 (E.D. Wash. 2015).
[67] *Id.*
[68] *Id.*
[69] *Id.*; *compare with* Oklahoma v. Tyson Foods Inc., 2010 WL 653032, at *10 (N.D. Okla. Feb. 17, 2010).
[70] *Cmty. Ass'n,* 80 F. Supp. 3d at 1191-94.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*

However, the *Cow Palace* decision does not explicitly outline a rule of what standard should apply to determine the amount of manure "necessary" to fertilize fields so they yield a sufficient crop. If a strict, "zero-waste" standard is one end of the spectrum and ordinary industry practice is the other extreme, the court seems to take up a middle view leaning towards a "reasonable substance use standard" or—what this note calls—the "paintbrush standard." If a painter is frugal with his paint, leaving some paint in the brush is unavoidable. It is obviously unreasonably wasteful to end with a dripping paintbrush. When the paintbrush is not dripping, it becomes difficult to determine if the painter was wasteful. So long as the farmer applies manure to the fields in accordance with best practices and reasonable attainment of agronomical amounts, the manure should not constitute a solid waste. The reasonable amount lost to runoff and seepage would change as new technology and best practices improve and become practically available.

This standard is reasonable. Growing crops is a financially risky business. The quality of the growing season is unpredictable and farmers will load fields with nutrients to be sure that they profit from a bumper crop year.[75] Because some nutrients will inevitably be lost to runoff and seepage, farmers should be allowed to account for the runoff in their application. The previous cases regarding this issue followed the "paint brush standard" and accepted that there would be unintended, inevitable loss to the environment.[76] After the process of discovery, Cow Palace was caught holding a dripping paintbrush.

2. Manure that leaks from storage lagoons

CARE also alleged that Cow Palace stores manure in lagoons that leak into the ground water. According to the summary judgment opinion, it is likely that when any manure leaks into ground water from the storage lagoons it will be considered a solid waste. In the

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[75] ANGIE FLETCHER & SUSAN DAVIS, WATER UTILITY/AGRICULTURAL ALLIANCES: WORKING TOGETHER FOR CLEANER WATER 43 (2005).

[76] *See* Water Keeper Alliance, Inc. v. Smithfield Foods, Inc., 2001 WL 1715730, at *4–5 (E.D.N.C. Sept. 20, 2001); Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1041 (9th Cir. 2004) (citing H.R.Rep. No. 94–1491, at 3 (1976)); Ecological Rights Found. v. Pac. Gas & Elec. Co., 713 F.3d 502, 518 (9th Cir. 2013); No Spray Coal., Inc. v. City of New York, 252 F.3d 148, 150 (2d Cir.2001) (holding pesticides are not a RCRA solid waste if "they are applied to the land and that is their ordinary manner of use").

summary judgment argument the court cited *Zands v. Nelson*, 779 F.Supp. 1254 (1991), which found gasoline that leaked from underground storage tanks was a RCRA "solid waste."[77] RCRA is a strict liability statute and does not consider whether the disposal was intentional or not.[78] This case distinguishes from cases like *Pacific Gas* in that the leak of gasoline was not an expected consequence of the intended use.[79] When the gasoline leaks from tanks into the ground it is not an expected consequence of its intended use of fueling vehicle engines. It is expected that the storage period does not leak any of the useful product. When the court applied this principle to the cow manure leaking from lagoons it concluded that the leaked manure was not an aspect of its intended use.[80] The lagoon is meant to store the manure for its intended use of applying it to the fields as fertilizer. When manure leaks from storage lagoons it is not fertilizing fields. The crops will have no way of utilizing the nutrients from this leaked manure. The leakage is an avoidable part of the intended use of manure. Therefore, any amount of leaked manure constitutes a solid waste.

B. Anti-duplication

Section 6905(a) makes RCRA subservient to certain other statutes including the Safe Drinking Water Act ("SDWA").[81] The section of the statute reads:

> Nothing in this chapter shall be construed to apply to (or to authorize any State, interstate, or local authority to regulate) any activity or substance which is subject to . . . Safe Drinking Water Act[82] . . . except to the extent that such application (or regulation) is not inconsistent with the requirements of such Acts.[83]

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[77] *See* Zands v. Nelson, 779 F.Supp. 1254, 1262 (1991) (holding that though gasoline that allegedly leaked into groundwater was intended for a useful purpose, its useful purpose lapsed when it leaked from the storage tank and was disposed of according to RCRA and was therefore a solid waste).
[78] *See generally id*.
[79] *Compare Ecological Rights Foundation*, 713 F.3d at 515 *and No Spray Coal.*, 252 F.3d at 150, *with Zands*, 779 F.Supp. at 1262.
[80] Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC, 80 F. Supp. 3d 1180, 1191-94 (E.D. Wash. 2015).
[81] 42 U.S.C. § 6905(a) (2016).
[82] *Id.* § 300f.
[83] *Id.* § 6905(a).

Cow Palace argues that logically this case should have been brought under the SDWA and CARE's citizen suit under RCRA was not viable because it is inconsistent with the SDWA regulation of the binding consent order Cow Palace signed with the EPA under the SDWA.[84] The goal of the consent order was to reduce the nitrate levels of ground water of land surrounding Cow Palace to the EPA maximum contaminant levels for nitrate (ten mg/L).[85] Relying on *Coon v. Willett Dairy, LP*, 536 F.3d 171 (2d Cir. 2008) and *Jones v. E.R. Snell Contractor, Inc*., 333 F.Supp.2d 1344 (N.D. Ga. 2004), Cow Palace claimed that CARE was attempting to enforce inconsistent regulation under RCRA regarding the same activities and material; namely the application and storage of manure, and nitrate levels, in a way inconsistent with SDWA.[86]

In *Coon* a citizen brought a RCRA suit against a dairy farmer who had just received a CWA permit renewal for his Concentrated Animal Feeding Operation ("CAFO").[87] The court found that the anti-duplication provision blocked the citizen's claim because the suit was attempting to regulate the same substances and activities regulated under the CWA and a RCRA citizen suit would be inconsistent with the CWA's permit shield.[88]

In *Jones* a citizen brought a RCRA citizen suit alleging open dumping of a solid waste, in an attempt to get a local municipal entity to clean up her Lake from an alleged discharge of storm water from a highway construction site.[89] The municipal entity did not have a CWA permit but had approval by the State Department of Transportation.[90] After dismissing her CWA claims The Northern District Court of Georgia found that the alleged storm water discharge is exempt as a

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[84] Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC, No. 13-CV-3016-TOR, 2013 WL 3179575, at *5 (E.D. Wash. June 21, 2013); Administrative Order on Consent, Yakima Valley Dairies, Docket No. SDWA–10–2013–0080 (2013), *available at* https://www3.epa.gov/region10/pdf/sites/yakimagw/consent_order_yakima_valley_dairies_march2013.pdf [hereinafter Administrative Order].

[85] *Cmty. Ass'n*, 2013 WL 3179575, at *5; Administrative Order, *supra* note 84.

[86] *Id.*; Coon v. Willett Dairy, LP, 536 F.3d 171, 174 (2d Cir.2008); Jones v. E.R. Snell Contractor, Inc., 333 F.Supp.2d 1344, 1350–51 (N.D.Ga.2004).

[87] *Coon*, 536 F.3d at 172–73.

[88] *Id.* at 174.

[89] *Jones*, 333 F.Supp.2d at 1350–51.

[90] *Id.* at 1347.

solid waste under 42 U.S.C. § 6903(27).[91] The court should have ended its analysis there but it went on to state that because the RCRA suit was trying to regulate a substance regulated by the CWA the anti-duplication provision also bared the suit.[92] The court relied on EPA regulations which expressly removed potential double liability for open dumping and placed the regulation under the authority of the CWA.[93] The *Cow Palace* court did not analyze or seem persuaded by this district court case's reasoning.

CARE argued during the summary judgment hearing that the anti-duplication provision of RCRA does not apply to citizen suits.[94] They confusingly reasoned that because the anti-duplication does not refer to enforcement action, and cited how the purpose of citizen suits is to supplement agency enforcement the provision would not bar their suit.[95] The court dismissed this argument, saying that "courts have routinely relied on the anti-duplication provision to analyze the viability of a citizen suit."[96]

CARE's secondary argument relied on a Connecticut District Court case, *Vernon Village, Inc. v. Gottier*, 755 F.Supp. 1142, 1154 (D.Conn.1990)[97] to avoid summary judgment on the anti-duplication provision.[98] In *Vernon Village*, the Connecticut District Court ruled on a summary judgment motion that RCRA and the SDWA were not inherently inconsistent: "While SDWA applies to the safety of the drinking water, RCRA is concerned with the safe treatment and disposal of hazardous substances—hazardous substances that could be contained within the drinking water."[99] Though the statutes themselves are not inherently inconsistent, there is a possibility that the regulations under the statutes could be.[100]

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[91] *Id.* at 1350.
[92] *Id.*
[93] *Id*.
[94] Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC, No. 13-CV-3016-TOR, 2013 WL 3179575, at *6 (E.D. Wash. June 21, 2013).
[95] *Id.*
[96] *Id.*
[97] Vernon Village, Inc. v. Gottier, 755 F.Supp. 1142, 1154 (D.Conn.1990).
[98] *Id.*
[99] *Id.*
[100] *See* 42 § 6905(a) (2016) ("Nothing in this chapter shall be construed to . . . authorize any State, interstate, or local authority to regulate) any activity or substance which is subject to . . . the [SDWA] . . . except to the extent that such application (*or regulation*) is not inconsistent with the requirments of such Acts.") (emphasis added).

The court put off answering whether the requirements under the consent order was not inconsistent with the amended complaint while rejecting Cow Palace's motion to dismiss.[101] The summary judgment ruling granted partial summary judgment. The court all but ignored this unsettled area of the law. The court stated, "the relief sought by CARE differs from the requirements of the Consent Order in Multiple areas."[102] The problem with this area of the opinion is that it does not define what "not inconsistent" means. Does inconsistent mean "differing" or does it mean "conflicting"? In its opinion ruling against Cow Palace's motion to dismiss, the court ruled that it was too soon to dismiss based on the anti-duplication provision without allowing discovery to find if the activities and substances addressed in the consent form and amended complaint are inconsistent.[103] It also cited Supreme Court precedent that states, "When two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."[104] Then in its summary judgment ruling, the court found it clear that there are remedies that can be implemented without violating the anti-duplication provision of 42 U.S.C. § 6905.[105]

Both *Coon* and *Jones* can be distinguished from *Vernon Village* and the facts in *Cow Palace*. In *Coon* the defendant had a permit to emit the substances that the plaintiff was attempting to regulate under RCRA.[106] In *Jones* the plaintiff was only bringing a suit alleging open dumping under 6972(a)(1)(A), not an imminent and substantial endangerment claim under 42 U.S.C. § 6972(a)(1)(B).[107] Therefore the court in *Jones* was looking at entirely different law, facts and circumstances when it found the plaintiffs claim inconsistent with the CWA. The case more analogous to *Cow Palace* is *Vernon Village*. In *Vernon Village*, the defendant did not have a permit and the plaintiff brought claims under both the SDWA and RCRA.[108] Similarly, in *Cow Palace*, the defendant did not have a permit, but a consent decree and

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[101] *Cmty. Ass'n*, 2013 WL 3179575, at *6.
[102] *Id.* at *7. However, I question whether a consent decree should always be considered "regulating" pursuant to a statute.
[103] *Id.*
[104] *Id.* (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)).
[105] *See* 42 U.S.C. § 6905.
[106] Coon v. Willet Dairy, LP, 536 F.3d 171, 172 (2d Cir. 2008).
[107] Jones v. E.R. Snell Contractor, Inc., 333 F. Supp. 2d 1344, 1350 (N.D. Ga.).
[108] Vernon Village, Inc. v. Gottier, 755 F.Supp. 1142, 1154–55 (D.Conn. 1990) (noting that the court did not apply RCRA to the defendants on other grounds).

was seeking different relief, that this article will explain, was not inconsistent with the consent decree made pursuant to the SDWA.[109] The reasoning of these cases and a close reading of the statute favors interpreting "not inconsistent" to mean "not conflicting."

Congress instructed the Administrator to integrate RCRA with other environmental statutes "only to the extent that it can be done in a manner consistent with the goals and policies expressed in this chapter and in the other acts referred to in this subsection."[110] These words indicate that Congress intended RCRA to regulate in conjunction with other statutes. The Supreme Court ruled that when two federal laws are in "capable of co-existing" and Congress has not expressly repealed of one of the laws, the courts should try to give effect to both laws.[111] The Court has also stated that where two federal laws are in irreconcilable conflict and Congress has not expressly stated the contrary, the new law will implicitly repeal the former.[112] In this case, RCRA is the new statute but Congress expressly stated that RCRA does not repeal the SDWA where they are "inconsistent." Congress desired the SDWA to preempt RCRA.[113] If "inconsistent" is read to mean "conflicting," the Supreme Court has offered jurisprudence on how to deal with conflicting statutes where one preempts the other in its federal preemption jurisprudence.[114]

Under federal preemption analysis, the SDWA would be treated as federal law while RCRA would be treated as state law. In federal preemption analysis, the court first assumes that both the state law and

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[109] *See Cmty. Ass'n*, 2013 WL 3179575, at *1.

[110] 42 U.S.C. § 6905(b).

[111] Morton v. Mancari, 417 U.S. 535, 551 (1974).

[112] Posadas v. Nat'l Bank of New York, 296 U.S. 497 (1936). ("There are two well-settled categories of repeals by implication: (1) Where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act").

[113] *See* 42 U.S.C. § 6905(a).

[114] *See* Gibbons v. Ogden, 22 U.S. 1, 19 (1824). ("when Congress and the States have power to legislate over the same subject, the power of Congress, when exercised, controls or extinguishes the State power."); *see also* Jones v. Rath Packing Co., 430 U.S. 519 (1977) ("The criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. Our task is to determine whether under the circumstances of this particular case, (the State's) law stands as an obstacle to the accomplishment and the execution of the full purposes and objectives of Congress.") (internal quotation omitted).

federal law can be given effect.[115] If both laws cannot be given effect then the federal law prevails and the state law is ruled void.[116] Usually, if the state law is stricter than the federal law in requiring something, they can both be given effect.[117] In other words, in this case, by complying with RCRA Cow Palace can also comply with the consent order made pursuant to the SDWA so long as the RCRA requirements are stricter than the SDWA requirements. The two exceptions to the general rule of federal law and regulation being a floor from which states can regulate more strictly.[118] If (1) the federal regulation (or law) in a field of law is so pervasive that it leaves no room for state law to supplement it or (2) if the state law obstructs the goal of Congress in enacting the federal law.[119] Therefore Congress intended that its goals in enacting the SDWA not be obstructed by regulations under RCRA. So if the consent decree affirmatively allowed Cow Palace to do something, RCRA could not disallow it. If courts adopt this preemption analysis, it should consider whether the remedies requested by CARE under RCRA obstructs the goals of Congress in enacting the SDWA or any of the other relevant statutes under the authority of the EPA. In this situation, state law is preempted even if it is stricter than the federal law.[120] The wording in RCRA supports this action in U.S.C. § 6905(b):

> The Administrator shall integrate all provisions of this chapter for purposes of administration and enforcement and shall avoid duplication, to the maximum extent practicable, with the appropriate provisions of . . . the Safe Drinking Water Act . . . and such other Acts of Congress as grant regulatory authority to the Administrator. Such integration shall be effected only to the extent that it can be done in a manner *consistent with the goals and policies*

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[115] *See* Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005). (displaying that when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily "accept the reading that disfavors pre-emption"); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress").

[116] *Gibbons*, 22 U.S. at 19.

[117] Geier v. American Honda Co., 529 U.S. 861, 868 (2000). ("It [the federal law] thereby preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor."). Dormant commerce clause analysis has been omitted from this analysis because it does not seem to be triggered by the issues presented by this article.

[118] *Id.* at 868.

[119] Posadas v. Nat'l Bank of New York, 296 U.S. 497 (1936).

[120] *Id.*

> expressed in this chapter and in all other acts referred to in this subsection.[121]

This wording of "consistent goals and policies" goes to show that Congress intended RCRA regulations to not conflict with the ability for the SDWA to function, and that RCRA regulations not obstruct the goals and policies of both Acts.

If this rule is applied; when a defendant has an express permit which allows the defendant to emit or handle a substance under a certain statute, a citizen cannot challenge that permit.[122] That does necessarily mean that a citizen cannot ask a court to grant an injunction requiring the defendant to do something to remediate an imminent and substantial endangerment. Where RCRA and another statute conflicts, RCRA is trumped by the other statute. For example, if Cow Palace had a permit under the SDWA to store manure in their unlined lagoons, it would be exempt from RCRA's requirement that the lagoons be lined. If Cow Palace possessed a permit to emit a limited amount of manure, RCRA could not require a lower emissions limit. With this reasoning any remedy a court grants in a citizen suit under RCRA, cannot prevent an action that a permit expressly allows. This reasoning does not prevent a RCRA citizen suit from requiring stricter action that does restrict what the permit expressly allows. For example, if the permit requires a facility to sample twice a week in order to emit so much of a substance, a remedy of a RCRA citizen suit may require that sampling be done three times a week without affecting the defendant's compliance with the permit. The RCRA citizen suit just can't change the amount of substance that the permit allows the defendant to release.

Cow Palace does not have a permit; however, they do have a consent order with the EPA.[123] The consent order is an agreement only between Cow Palace and the EPA.[124] It states nothing about prohibiting citizen suits on the issues that the consent order addresses. It does allow Cow Palace to contest all statements of fact and law in any proceeding unrelated to the consent order.[125] However, the

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[121] 42 U.S.C. § 6905(b) (2016) (emphasis added).
[122] *See* Coon v. Willett Dairy, LP, 536 F.3d 171, 173 (2d Cir.2008). ("The "permit shield," embodied in 33 U.S.C. § 1342(k), protects a CWA permit holder from facing suits challenging the adequacy of its permit").
[123] Administrative Order, *supra* note 84.
[124] *Id.* at 3.
[125] *Id.* at 2.

presence of a consent order practically prevents a citizen from suing under the SDWA because the government has diligently brought an enforcement action.[126]

Unlike a permit, the consent order does not allow Cow Palace to do anything. It only requires that Cow Palace *do* certain actions. The consent order *permits* no action with which a citizen suit remedy can conflict.[127] Therefore, under this conflict theory that the Washington District Court seems to adopt, as long as the remedies are requirements instead of allowances and stricter than those of the consent order, the court may grant them.

The SDWA Consent Agreement requires Cow Palace to implement certain practices for the goal of decreasing nitrate in the ground water to EPA maximum contaminant levels.[128] The relief that CARE requests under RCRA would require Cow Palace to implement certain practices in dealing with manure.[129] Therefore the goals and policies of both the relief CARE asks for is consistent with the goals and policies of the SDWA and may be granted.

C. Likely Remedies

The Washington District Court's summary judgment ruling only granted partially for CARE. One of the major issues it left for trial was the proper remedies of the case. If the EPA's action in making Cow Palace sign a consent agreement under the SDWA has already granted CARE's requested relief, then the case is moot.[130] "Courts may base this ruling on both on standing grounds and failure to state a claim when agency efforts are already underway."[131] Therefore the remedies granted must differ from the consent order and in some way improve the situation. In the motion to dismiss opinion the court found that the remedies sought by CARE were different than the relief granted by the consent order and could improve the situation.[132]

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[126] 42 U.S.C. § 6972(a)(1)(B) (2016).
[127] Administrative Order, *supra* note 84, at 3.
[128] *Id.*
[129] Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC, No. 13-CV-3016-TOR, 2013 WL 3179575, at *6 (E.D. Wash. June 21, 2013).
[130] *Id.* at *7–9 (citing 87th St. Owners Corp. v. Carnegie Hill–87th St. Corp., 251 F.Supp.2d 1215, 1219–21 (S.D.N.Y.2002) and Clean Harbors, Inc. v. CBS Corp., 875 F.Supp.2d 1311, 1330–32 (D.Kan.2012)).
[131] *Id.* at *6.
[132] *Id.* at *9.

The Supreme Court explained what types of remedies are available in citizen suits.[133] "Under a plain reading of this remedial scheme, a private citizen suing under § 6972(a)(1)(B) could seek a mandatory injunction, i.e., one that orders a responsible party to "take action" by attending to the cleanup and proper disposal of toxic waste, or a prohibitory injunction, i.e., one that "restrains" a responsible party from further violating RCRA."[134]

CARE requested the following relief in their Second Amended Complaint:

> 1. CARE asks that Defendants supply drinking water to residents within a three mile radius, as opposed to a one mile radius in the Consent Order;
> 2. CARE asks the Court to order Defendants to implement scientific studies examining the fate and transport of solid waste from the facility to the waters and soils of the surrounding area with the goal of remediating the contamination allegedly caused by Defendants, while the Consent Order only requires monitoring;
> 3. CARE wants Defendants to design a program to evaluate the actual amount of manure necessary to provide a specific crop with its anticipated nutrient needs, while the Consent Order merely requires Defendants to act in accord with NRCS Practice Standard 590 to determine if manure was over-applied;
> 4. CARE asks the Court to order that Defendants immediately line the manure lagoons; as opposed to the Consent Order's requirement that Defendants submit a report to determine if the lagoons comply with legal standards;
> 5. CARE asks that soil sampling be required down to at least a four foot level, as opposed to depths of one to three feet in the Consent Order.[135]

Considering the two types of injunctions that RCRA provides and the anti-duplication provision in RCRA, CARE's strongest claims of relief are an order to line the manure lagoons and an order that requires Cow Palace to design a program to evaluate the actual amount of manure necessary to provide a specific crop with its anticipated needs.[136]

These requests for relief are prohibitory injunctions. They restrain the handling and storing of manure in a way that causes it to become a solid waste and contaminate the ground water. The request for an order that Cow Palace do scientific studies to find out the fate of the manure

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[133] Meghrig v. KFC W., Inc., 516 U.S. 479, 484 (1996).
[134] *Id.*
[135] *Cmty. Ass'n*, 2013 WL 3179575, at *6.
[136] *Id.*

and its effect on the waters and soils is a mandatory injunction which is more difficult to obtain.[137] The request is meant to be an injunction to force a past or current producer of solid waste to remediate a polluted area, which the Supreme Court found to be a permissible remedy under RCRA.[138]

In order for a court to grant a mandatory injunction, the plaintiff must show that the injunction is necessary to the remediation of the site.[139] Courts have considered mandatory injunctions to be extraordinary remedies that courts should grant sparingly.[140] Courts have been especially cautious in granting additional relief under RCRA where an agency has taken assertive action.[141] Citizen suits are "meant to supplement, not supplant, governmental action."[142] The purpose of citizen suits is to allow citizens to fill in the regulatory gaps where an agency does not have the resources to regulate.[143] They also serve as a means to hold the agency accountable and goad them into action.[144] In *Trinity Industries, Inc. v. Chicago Bridge and Iron Co.*, 735 F.3d 131 (3d Cir. 2013), the defendant was a past owner of contaminated site and the plaintiff was a current owner seeking an injunction to require the defendants to participate in the cleanup.[145] The plaintiff had entered into a consent agreement with the state agency in which the plaintiff agreed to remediate all the contamination

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[137] Trinity Indus., Inc. v. Chicago Bridge & Iron Co., 735 F.3d 131, 139 (3d Cir. 2013).
[138] *Meghrig*, 516 U.S. at 484.
[139] *See* 42 U.S.C. § 6972(a)(2) (2016); *see also* 87th St. Owners Corp. v. Carnegie Hill-87th St. Corp., 251 F. Supp. 2d 1215, 1220–22 (S.D.N.Y. 2002) ("The Court may only "restrain" the hazardous waste handling or disposal that "may present an imminent and substantial endangerment to health or the environment," or order actions that may be "necessary" to eliminate that danger."); *see also Trinity*, 735 F.3d at 140 ("[The plaintiff] has not shown that [the defendant's] participation is "necessary" as RCRA § 7002(a)(1)(B) requires, now that the conditions of the Consent Order are in place and appear to be effective).
[140] *Trinity*, 735 F.3d at 139.
[141] *See* Kara Holding Corp. v. Getty Petroleum Mktg., Inc., No. 99 CIV. 0275 (RWS), 2004 WL 1811427, at *11 (S.D.N.Y. Aug. 12, 2004); *Trinity*, 867 F. Supp. at 139; *87th St. Owners*, 251 F. Supp. 2d at 1220–22.
[142] Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987).
[143] Margot J. Pollans, *A "Blunt Withdrawal"? Bars on Citizen Suits For Toxic Site Cleanup*, 37 HARV. ENVTL. L. REV. 441, 448-49 (2013).
[144] *Id.*
[145] *Trinity*, 735 F.3d at 133-34.

of the site.[146] The Third Circuit refused to grant a mandatory injunction requiring the defendant to participate in the remediation.[147] The court reasoned that the consent order adequately assures the cleanup of the site and removed the public threat.[148] Requiring the defendant to participate was not necessary to ensure remediation. The court ruled it would not issue a mandatory injunction where the plaintiff failed to show that the current remediation scheme was deficient or ineffective.[149]

Under this reasoning, in order for the court to issue a mandatory injunction against Cow Palace, CARE must show that the consent order is deficient in remedying the situation and that their requests are necessary to remedy or prevent the public risk. Absent compelling evidence, it will be difficult to show how an additional foot of soil testing, and scientific studies to determine the fate of the solid waste is "necessary" to remedy the situation. Care may have a stronger argument in requiring Cow Palace to supply water for households within a three-mile radius so long as there are high nitrate levels in the ground water in the additional area.

One could argue the court should only grant the relief requested that prevents manure from becoming a solid waste. Once Cow Palace ensures that it is not over-applying manure and that no manure is leaking from the lagoons, the manure would no longer be "disposed" or under the regulation of RCRA. The counter argument would be that this remedy does not sufficiently remove the imminent threat to health or the environment. The District Court adopted the rule that if evidence shows the relief requested will tend to improve the situation then it should grant the relief.[150] This rule seems to disregard the requirement that the injunction be necessary to the remediation scheme. Though the District Court cites *87th St. Owners Corp. v. Carnegie Hill–87th St. Corp.*, 251 F.Supp.2d 1215, (S.D.N.Y.2002) for support of this rule, the court in that case did not grant a mandatory injunction because the plaintiff failed to show a deficiency with the state's remediation plan, and made only speculative claims that

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[146] *Id.*
[147] *Id.* at 140.
[148] *Id.* at 139-140.
[149] *Id.* at 139-140.
[150] Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC, No. 13-CV-3016-TOR, 2013 WL 3179575, at *6 (E.D. Wash. June 21, 2013).

additional measures were necessary.[151] The District Court seems to be requiring a lower burden for CARE. They will only have the burden to show that their requests for relief will tend to improve the situation. Though this is a low bar, it may be difficult to show that all of CARE's requests will tend to improve the situation without adopting some speculation and overruling the EPA's judgment of the measures necessary for remediation.

If citizens are able to require stricter standards without showing they are necessary, it will undermine the ability of the EPA and handlers of solid waste to enter into consent agreements that adequately provide both remediation for the community and certainty of the requirements for the regulated individual. If a citizen does not have to show that additional relief is necessary, a citizen can be granted relief that requires more than is necessary of the defendant. Every consent agreement would be an invitation for a citizen suit to increase the burden on the regulated individual outside the regulatory process, and undermine the expertise of the EPA. To prevent this, plaintiffs bringing citizen suits under RCRA should be required to show that a mandatory injunction is necessary to preventing, or remedying the harm.

D. Conclusion of Analysis

The District Court was correct in ruling that any amount of manure that leaks from unlined storage lagoon is a solid waste. The statute, case law, and EPA statements all indicate that this is a correct conclusion.[152] The facts of the case support the District Court finding that the way Cow Palace applied its manure to the fields constituted the manure a solid waste. However, the court failed to establish a practicable rule for future determinations of when manure applied to fields becomes a solid waste. The rule should be the "reasonable applicator rule." The rule would make courts consider the agronomical amount of manure, best practices including feasibly available technology, when determining when a farmer's practices turn manure from a fertilizer to a solid waste. CARE's RCRA claim does not trigger the anti-duplication provision. Courts should adopt an analysis that mirrors the Supreme Court's federal pre-emption analysis in

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[151] 87th St. Owners Corp. v. Carnegie Hill–87th St. Corp., 251 F.Supp.2d 1215, 1220 (S.D.N.Y. 2002).
[152] *See* Part III.

determining when RCRA is "not inconsistent" with other environmental statutes. The Court should grant CARE prohibitory injunctions against Cow Palace. Therefore, Cow Palace will be required to line its lagoons and it is likely Cow Palace will also have to design a program to evaluate the actual amount of manure necessary to provide a specific crop with its anticipated nutrient needs in order to stop over-application of manure. These are the only remedies requested by CARE that requires a current handler of solid waste to stop its current practice and change it in order to comply with RCRA. Whether Cow Palace will be subject to mandatory injunctions is less certain and it will depend on CARE's evidence that their suggested mandatory injunctions will improve the situation. This burden of proof is not correct and CARE should be required to show that the additional mandatory injunctions are necessary to prevent harm. Requiring plaintiffs in citizen suits to show that mandatory injunctions are necessary is good policy because it prevents courts from putting unnecessary burdens on defendants, and gives deference to agency expertise.

IV. AVOIDING LITIGATION AND AGENCY ACTION

In order to avoid RCRA liability, farmers should move toward having lined lagoons and agency approved nutrient application plans. So long as their manure application is reasonably within the agronomic limits and does not violate their Nutrient Management Plan and their storage facility does not leak, it will be difficult to classify cow manure as a solid waste under RCRA.[153] But, if a farm does over-apply manure to their fields or has manure storage facilities that leak into the environment, the EPA has shown that it has the ability to come down hard with individual mandates and sanctions.[154] These can include requiring violators to fund scientific studies, draft and implement remedial measures, and pay civil penalties valued at thousands per day for noncompliance with the administrative order.[155]

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[153] *See* Part III, however if fields are at or above agronomic amounts, fertilizer and manure should not be applied.

[154] Complaint, United States v. Seaboard Foods, LP, No. 5:06–cv–00990–HE (W.D.Okla. Sept. 14, 2006) at 8, *available at* http://www.extension.iastate.edu/agdm/articles/mceowen/SeaboardPICComplaint.pdf.

[155] *Id.* at 4. (noting that the fines that the court could have granted in this case were $5,500 dollars per day of non-compliance).

For example, the EPA's complaint against Seaboard Foods, LP, an integrated food company which raises hogs, read as follows:

> Specifically, the Order requires the Defendants to: (1) perform a Field Analysis (FA) to fully determine the nature and extent of any release(s) of solid waste at or from the Facilities; (2) perform remedial Procedures Analysis (RPA) to identify and evaluate alternatives for remedial actions(s) to prevent or mitigate any release(s) of solid waste at or from Facilities, and to collect any other information necessary to support the selection of remedial procedures at the Facilities; and (3) implement the remedial procedure or procedures (Remedial Procedures Implementation (RPI) selected by the EPA for facilities.[156]

If a farm produces more manure than can be applied to the fields as fertilizer it should look to sell it to other farmers or gardeners in need of fertilizer. This will show that the manure is valuable and it avoids having to over-apply it to fields in order to keep it from overflowing the storage facilities.[157] Farmers should do away with using unlined storage lagoons. The best actions a farmer can take are to ensure efficient and well-maintained manure storage facilities and diligently employing a manure and nutrient management plan. If the farmer can afford it, there are new styles of storage facilities and nutrient management technology that can measure soil's nutrient needs and make for efficient application. Concentrated Feeding Operations should seek a permit under the CWA and SDWA in order to reduce liability of a citizen suit. These improvements are not cheap, but they may often be cheaper than having the risk of wasting millions in a citizen suit, or having to pay thousands daily in civil fines to the EPA.

A farmer should consider the costs of compliance when deciding whether to expand the farm's herd and operation. The costs of farming have been rising and they are only increasing.[158] The farms that will survive are the ones that can bear the costs. In the realm of waste management, large farms need to start incorporating the amount of waste produced into their calculation of their marginal benefit of

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[156] *Id.* at 8.

[157] As the chicken litter was in Oklahoma v. Tyson Foods, Inc., 2010 WL 653032 at *10 (N.D. Okla. Feb. 17, 2010).

[158] *2015 Farm Sector Income Forecast*, USDA, http://www.ers.usda.gov/topics/farm-economy/farm-sector-income-finances/2015-farm-sector-income-forecast.aspx (last updated Feb. 10, 2015). (projecting a $2.4 billion increase for agricultural production expenses, while projecting a 32 percent drop in net farm income).

expanding their operation and they should keep in mind, not all growth is good.[159]

BERIAH SMITH[160]

[159] Barry Glassman, *Not All Business Growth is Good Growth*, FORBES (Mar. 26, 2012), http://www.forbes.com/sites/advisor/2012/03/26/not-all-business-growth-is-good-growth/.

[160] Juris Doctorate 2016, Vermont Law School; B.A. 2013, The Catholic University of America.