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February 11, 2019

THIS IS AN URGENT LEGAL MATTER REQUIRING YOUR
IMMEDIATE ATTENTION

Via Registered Mail, Return Receipt Requested:

Site Manager
Wayne Cummings
Travis Love
Lynne Geddis
SMD, LLC
211 Nichols Rd.
Outlook, WA 98938

SMD, LLC
Austin Jack DeCoster
211 Nichols Rd.
Outlook, WA 98938

Tupper Mack Wells, PLLC,
Registered Agent for SMD, LLC
2025 1st Ave. Ste. 1100
Seattle, WA 98121

Other recipients identified on last page

**NOTICE OF INTENT TO SUE PURSUANT TO THE RESOURCE
CONSERVATION AND RECOVERY ACT, 42 U.S.C. § 6972(a)(1)(B).**

Dear Site Manager, Ms. Geddis, Messrs. Cummings, Love, and DeCoster, and SMD, LLC:

Pursuant to the citizen suit provision of the 1976 Amendments to the Solid Waste Disposal Act (hereinafter referred to as the “Resource Conservation and Recovery Act” or “RCRA”), 42 U.S.C. § 6972(a)(1)(B), the Community Association for Restoration of the Environment, Inc. (“CARE”), a Washington non-profit corporation, Friends of Toppenish Creek, also a Washington non-profit corporation, and Center for Food Safety, a Washington, D.C. non-profit corporation (collectively referred to hereinafter as the

“Notifying Parties”), hereby notify¹ you that on or after the 90th day from the date of this notice, Notifying Parties intend to initiate a citizen suit in Washington Federal District Court against SMD, LLC, located at or near 211 Nichols Rd., Outlook, WA 98938, and against Austin “Jack” DeCoster (hereinafter collectively referred to as “SMD” or the “Dairy”).

The lawsuit will allege that the operation formerly known as Snipes Mountain Dairy and taken over by SMD has violated and remains in violation of RCRA by causing or contributing to the past and present handling, storage, treatment, transportation, and/or disposal of solid waste in such a manner that may, and indeed does, present an imminent and substantial endangerment to human health and the environment, and that SMD is operating an “open dump” in violation of the prohibitions of RCRA.

The lawsuit will seek mandatory injunctive relief requiring SMD to comply with RCRA and to abate and/or remediate the source(s) of the endangerment to human health and the environment. As authorized by RCRA, the lawsuit will also seek an order from the Court requiring SMD to pay Notifying Parties’ attorneys’ and expert witnesses’ fees and costs incurred in bringing this enforcement action.

**VIOLATIONS OF THE RESOURCE CONSERVATION AND RECOVERY ACT:
IMMINENT AND SUBSTANTIAL ENDANGERMENT TO HUMAN HEALTH
AND THE ENVIRONMENT**

Notifying Parties will allege that SMD has violated, and continues to violate, the statutory prohibitions of the Resource Conservation and Recovery Act, and will file a lawsuit against SMD on or after the 90th day of your receipt of this notice unless SMD abates the endangerment.

Specifically, Notifying Parties will allege in the lawsuit that SMD has caused or contributed to (and continues to cause or contribute to) the past and present handling, storage, treatment, transportation, and/or disposal of solid waste in such a manner that may, and indeed does, present an imminent and substantial endangerment to health and the environment. 42 U.S.C. § 6972(a)(1)(B). The lawsuit will also allege that SMD is operating an “open dump” in violation of the prohibitions of RCRA. 42 U.S.C. § 6945(a). Notifying Parties will seek mandatory injunctive relief requiring SMD to abate and/or remediate the source(s) of the endangerment to health and the environment and an order from the Court requiring SMD to pay Notifying Parties’ attorneys’ and expert witnesses’ fees and costs incurred in bringing this enforcement action.

Under 42 U.S.C. § 6972(a)(1)(B), citizens are authorized to bring suit against any “person” who is the “past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an

¹ The notice provisions of RCRA can be located at 42 U.S.C. § 6972(b).

imminent and substantial endangerment to health or the environment.” In this case, SMD is a generator, transporter, and owner and/or operator of a treatment, storage, and disposal facility that is contributing to the past and present storage, treatment, transportation and/or disposal of solid wastes, namely liquid and solid manure. SMD’s liquid and solid manure constitute “solid wastes” under RCRA because they are “any...discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations...” 42 U.S.C. § 6903(27). SMD’s practices in storing, treating, transporting, applying, and disposing of liquid and solid manure may, and do, present an imminent and substantial endangerment to the health of nearby residents and to the environment.

In particular, SMD and/or its agents have applied, continue to apply, and are reasonably likely to continue to apply liquid and solid manure wastes to agricultural fields in amounts that exceed agronomic rates and in violation of SMD’s Nutrient Management Plan and/or Manure Pollution Prevent Plan (“MPPP”). Applications of manure beyond which the current crop can effectively utilize as fertilizer cause nitrates to leach through soil and into groundwater. Once these nitrates enter the local water table, they migrate away from SMD’s dairy facility and into groundwater and, consequently, the wells of nearby residents. The over-application of liquid manure has also resulted and will continue to result in the ponding of liquid manure, which creates a direct pathway for manure and manure constituents to runoff into surface water and discharge into groundwater.

Soil tests submitted to the Washington State Department of Ecology and Washington Department of Agriculture have documented elevated nitrate and phosphorus levels in soils receiving manure generated at SMD, a strong indication that SMD has applied manure in excess of agronomic rates or crop needs, in violation of the requirements of the NMP and MPPP. For instance:

- Soil sampling in Fall, 2010 in the “Pivot” field showed there to be 611 lbs./acre of residual nitrate, ammonium, and organic matter in the top two feet of the soil column, vastly more nutrients than the triticale crop could uptake as fertilizer.
- Samples in Fall, 2011 from that same field showed there to be 436 lbs./ac of residual nitrate, ammonium, and organic matter in the top two feet of the soil column, again vastly more nutrients than the triticale crop could uptake as fertilizer.
- The same is true for the Fall samples collected in 2012, 2013, and 2014 from the Pivot field, with 447, 554, and 588 lbs./acre residual nitrate, ammonium, and organic matter, respectively, in the top two feet of the soil column, also vastly more nutrients than the winter triticale crop could uptake as fertilizer.

Other fields to which SMD applies manure have similarly tested high in nitrate over the past decades, further evidence that SMD is applying manure as a means of disposal, not to optimally fertilize crops. For instance, top-foot Fall soil sampling for the Pivot field in 2007 showed 991 lbs./ac nitrate; in 2008 there was 920 lbs./ac nitrate; and

in 2009 there was 584 lbs./ac nitrate. Field Grant #2 had 261 lbs./ac nitrate in 2007; 285 lbs./ac in 2008, and 208 lbs./ac in 2009. Field Fernando had 249 lbs./ac nitrate in 2007; 137 lbs./ac in 2008, and 163 lbs./ac in 2009. Spring sampling from 2009 in the Canal field showed results as high as 1300 lbs./ac nitrate in the top foot and 1400 lbs./ac in the second foot, and the “lagoon” field showed 800 lbs./ac nitrate in the top foot and 525 lbs./ac in the second foot. This list is meant to be illustrative, not exhaustive.

These high nitrate levels have been noted by regulators over the past decades, with some levels high enough to trigger Notices of Correction, but no corrective action has been taken by SMD to eliminate the discarding of manure. Indeed, the conclusion that SMD is discarding manure becomes inescapable when combined with SMD’s documented violations of its NMP and/or MPPP, the purposes of which are to inform SMD how to use its liquid and solid manure to fertilize crops. Notifying Parties will allege that SMD has failed to consistently take and use sufficient soil samples (including spring and fall post-harvest samples where double-cropping, and second-foot samples), failed to take and use sufficient manure samples, applied manure at times when the crop is extremely unlikely to use the manure nutrients as fertilizer, and failed to create and maintain adequate manure application and exportation records, all in violation of SMD’s NMP and/or MPPP. Furthermore, the operation taken over by SMD has previously applied manure to fields in winter, where the crop (if any) is extremely unlikely to use manure nutrients as fertilizer, and has even applied manure to fields where no crop was growing or planned to be grown. Such applications are not meant for fertilization purposes, but rather to discard the manure generated by SMD’s herd.

SMD’s 2018 Annual Report shows that the Dairy continues to discard its manure by applying more nutrients than its crops can effectively uptake as fertilizer. Field 1 showed post-harvest nitrate results of 151.9, 166.4, and 181.6 lbs./ac in each of the top three feet of the soil column, for a total of nearly 500 lbs./ac nitrate, an excessively high result. The records also indicate SMD is applying manure to its fields from a different operator, DBD, Inc.’s, lagoons. SMD’s agronomist, Agrimanagement & Mr. Scott Stephen, recommended the Dairy apply only 196 lbs./ac N to Field 1 for fertilization. Instead, SMD made two applications totaling 2,000,000 gallons of manure to Field 1, ignoring Mr. Stephen’s recommendation and adding far more nitrate and phosphorus than its corn silage crop could be expected to uptake as fertilizer.

SMD made similar over-applications in contravention to its agronomists’ recommendations on Field 3 (approx. 640,000 gallons) and Field 5 (approx. 1,000,000 gallons), resulting in nearly 500 lbs./ac excess nitrate in the top three feet of the soil column for Field 3, and over 800 lbs./ac excess nitrate for Field 5. These results demonstrate the Dairy discarded manure and applied far more than the recommendations made by its own agronomist.

Further evidence of SMD’s history of discarding manure can be found in the consistently elevated phosphorus sampling obtained from SMD’s agricultural fields. Based on 2018 sampling, all five of SMD’s now-numbered fields had greater than 100 PPM Phosphorus, and SMD’s own records indicate the Dairy has applied manure to its

fields without regard for current phosphorus levels in the soil or the amount of Phosphorus the Dairy's crop is expected to use as fertilizer. Phosphorus leads to nutrient blooms in surface waters that starve fish and aquatic organisms of oxygen. Phosphorus reaches surface waters both through overland runoff as well as loadings from contaminated groundwater.

Moreover, additional evidence of the discarding of manure includes: the "stockpiling" of manure on an agricultural fields for "drying" and "composting," which caused manure nutrients to leach into soil where no crop was growing; allowing silage bags and silage to seep into the ground; applications of manure in quantities so large that ponding occurred; and the spreading of manure solids on a field to a depth of nearly 12 inches.

As described above, when manure is applied in quantities greater than the crop can effectively utilize as fertilizer, excess nitrate leaches downward deeper into the soil with subsequent applications, precipitation, and irrigation. These nitrates move past the root zone of the crop, where they will be lost to the environment and unable to be used as fertilizer. Excess nitrates continue to migrate through the soil until they reach groundwater – which in some instances is as shallow as 48 inches below the soil in SMD's fields.

Beyond excessive manure applications that were done in violation or disregard of SMD's NMP, SMD's storage of solid and/or liquid manure in inadequately lined and maintained lagoons has also caused, and is continuing to cause, the discharge, leaking, and/or discarding of manure and its constituents directly into groundwater. Upon information and belief, and based upon public records, Notifying Parties will allege in the lawsuit that at least one of the lagoons at SMD was designed and built such that it has a seepage rate that allows manure to leak out of the lagoons and into groundwater. The lagoon in question was apparently constructed with only a 1-foot compacted earthen liner, the material for which was shown to have a permeability of between 1.2×10^{-4} and 2×10^{-5} cm/sec, and a half-foot of soil overburden. This lagoon's permeability and inadequate liner means it poses a distinct threat to human health and the environment. Storing manure in such a leaky lagoon amounts to the discarding of manure, because nutrients which leach below the lagoon liner cannot be used by SMD for fertilization.

Upon information and belief, the other lagoons at SMD were not designed in accordance with NRCS 313 guidelines, and even if they were, those guidelines are designed such that seepage of manure into groundwater occurs. Again, manure which seeps into the groundwater is discarded by SMD, because it cannot beneficially recycle that manure as fertilizer.

Furthermore, Notifying Parties will allege that SMD's lagoons are not properly operated or maintained in such a manner that would reduce the amount of seepage through the lagoons and into groundwater. For instance, public records show that the operation taken over by SMD operated its lagoons at, near, and in some instances above capacity, causing lagoons to overflow and increasing the seepage rates of the lagoons.

Records further show that SMD has failed to maintain its lagoons in accordance with its NMP and/or MPPP, further evidencing the discarding of manure at the SMD. Upon information and belief, the discarding of manure through seepage from the lagoons has been ongoing since the date the lagoons were brought into operation, and continues to this day.

In addition to leaky lagoons and excessively high manure applications, SMD also discards manure and manure nutrients by storing and composting manure on unlined surfaces, which allows nutrients to leach into the ground and groundwater, where they cannot be used as fertilizer. Liquid and solid manure that is left in unlined cow confinement pens is discarded as well, for SMD makes no attempt to use that manure as fertilizer (no crops grow in the pens), and even if they could, the manure is allowed to accumulate in the pens, where manure nutrients leach into the ground and groundwater, where they, too, cannot be used as fertilizer. Finally, SMD's storage of silage on unlined surfaces allows silage contaminants, including nutrients, to be discarded into the soil and groundwater.

Notifying Parties will allege in the lawsuit that practices identified above, and possibly others, are responsible for causing or contributing to groundwater contamination at levels beyond the Maximum Contaminant Level ("MCL") for specific chemicals. The MCLs are health-based standards that specify contaminants known to have an adverse effect on human health at levels beyond the parameters set forth by regulations. Upon information and belief, local drinking water wells in the vicinity of SMD have tested above the MCL for nitrate (10 mg/L). This includes the well at the Outlook School, which is located near one of the fields to which manure is excessively applied. Other nearby residents report that their wells have also tested in excess of 10 mg/L nitrate. Besides nitrate, other "tracer" chemicals associated with cow manure are also present in the groundwater, such as potassium, magnesium, calcium, sodium, chloride, sulfate, barium, zinc, and industry-standard bovine pharmaceuticals. Minor trace and inorganic elements may include arsenic, barium, bromide, cadmium, chromium, copper, lead, manganese, mercury, selenium, and silver. The presence of these chemicals, which are associated with industrialized dairy practices, further demonstrates that SMD is discarding solid and liquid manure in violation of their NMP and RCRA, and that such discarding is causing or contributing to a violation of the nitrate MCL in groundwater.

Human consumption of water containing more than the 10 mg/L MCL for nitrate causes a variety of severe health problems, including but not limited to methemoglobinemia ("blue baby syndrome," a potentially fatal condition that affects infants), some forms of cancer, and autoimmune system dysfunction. The excessive nitrates and other contaminants documented in the area are attributable to SMD's improper practices of storing, treating, transporting, and disposing (through application or otherwise) of liquid and solid manure wastes. As such, these practices may, and indeed do, present an imminent and substantial endangerment to both human health and the environment.

42 U.S.C. § 6972(a) states that the District Courts of the United States shall have jurisdiction to order any person who “has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste” that presents an imminent and substantial endangerment to health or the environment to take such action as may be necessary to cease and correct the pollution and to apply any appropriate civil penalties under 42 U.S.C. § 6928(g). Notifying Parties intend to seek legal and equitable relief in their lawsuit, including but not limited to an assessment of past, present, and future response, remediation, removal, and/or clean-up costs against SMD, temporary and/or permanent injunctive relief, as well as attorneys’ and expert witnesses’ fees and costs associated with the suit.

VIOLATIONS OF RESOURCE CONSERVATION AND RECOVERY ACT: OPEN DUMPING

In addition to presenting an imminent and substantial endangerment to health and the environment, SMD’s improper manure management practices constitute “open dumping” in violation of RCRA. 42 U.S.C. § 6945(a) prohibits the operation of “any solid waste management practice or disposal of solid waste which constitutes the open dumping of solid waste.” “Disposal” means “the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste . . . into or on any land or water[.]” 42 U.S.C. § 6903(3). Enforcement of this prohibition is available through RCRA’s citizen suit provision. *Id.* As required by statute, EPA has promulgated criteria under RCRA § 6907(a)(3) defining solid waste management practices that constitute open dumping. *See* 42 U.S.C. § 6944(a); 40 C.F.R. Parts 257 and 258. These regulations prohibit the contamination of any underground drinking water source beyond the solid waste boundary of a disposal site. 40 C.F.R. § 257.3-4(a).

The definition of “underground drinking water source” includes an aquifer supplying drinking water for human consumption or any aquifer in which the groundwater contains less than 10,000 mg/l total dissolved solids. 40 C.F.R. § 257.3-4(c)(4). “Contaminate” means to introduce a substance that would cause: (i) the concentration of that substance in the groundwater to exceed the maximum contaminant level specified in Appendix I, or (ii) an increase in the concentration of that substance in the groundwater where the existing concentration of that substance exceeds the MCLs specified in Appendix I. 40 C.F.R. § 257.3-4(c)(2).

Appendix I to 40 C.F.R. Part 257 lists the MCL for nitrate as 10 mg/l. Upon information and belief, the groundwater underlying and surrounding SMD is contaminated at levels exceeding 10 mg/L nitrate, including as tested at the Outlook School. The lawsuit will allege that SMD’s past and present waste disposal practices have caused nitrate contamination to travel beyond the facility boundaries, in violation of RCRA’s open dumping prohibitions. Soil samples, as discussed above, have documented elevated nitrate levels in soil receiving SMD’s manure, a strong indication that manure is applied in excess of agronomic rates. Applications beyond that which the current crop can effectively utilize cause nitrates to leach through soil and into groundwater, which in turn cause nitrate levels in the groundwater to exceed the MCLs. The lawsuit will further

allege that SMD's storage of liquid and solid manure in unlined earthen lagoons or inadequately lined lagoons, as well as SMD's composting and storage of manure on bare ground, has caused manure to seep, discharge, or otherwise leak into the groundwater and leave the boundaries of the dairy site, also causing nitrate contamination of groundwater in excess of the MCL.

Pursuant to 42 U.S.C. § 6972(a), Notifying Parties intend to seek legal and equitable relief to remedy SMD's practice of open dumping. The relief sought includes, but is not limited to, an assessment of past, present, and future response, remediation, removal, and/or clean-up costs, a requirement that the extent of the contamination be fully investigated and remediated, other necessary temporary and/or permanent injunctive relief, and an award of the attorneys' and expert witnesses' fees and costs incurred in bringing the enforcement action.

PARTIES GIVING NOTICE

The names, addresses, and phone numbers of the people giving this Notice of Intent to Sue are:

Community Association for Restoration of the Environment, Inc.
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Tel: (509) 854-1662

Friends of Toppenish Creek
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The names, addresses, and phone numbers of Counsel for the parties giving this Notice of Intent to Sue are:

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CONCLUSION

We will be available to discuss effective remedies and actions that will assure SMD's future compliance with the Resource Conservation and Recovery Act and all other applicable state and federal environmental laws. If you wish to avail yourself to this opportunity and avoid the need for adversarial litigation, or if you have any questions regarding this letter, please contact the undersigned. If you are or will be represented by an attorney, please have that attorney contact the undersigned instead.

Sincerely,



Charles M. Tebbutt
Daniel C. Snyder
Law Offices of Charles M. Tebbutt, P.C.

Via U.S. Mail to the following:

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