

1 Charles M. Tebbutt, WSBA #47255
Law Offices of Charles M. Tebbutt, P.C.
2 941 Lawrence St.
Eugene, OR 97405
3 Charlie@tebbuttlaw.com
Tel: (541) 344-3505

4 *Additional Counsel Identified on Signature Page*

5
6 IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

7
8 COMMUNITY ASSOCIATION FOR
RESTORATION OF THE
9 ENVIRONMENT, INC., a Washington
non-profit corporation; FRIENDS OF
10 TOPPENISH CREEK, a Washington non-
profit corporation; *and* CENTER FOR
FOOD SAFETY, a Washington, D.C. non-
profit corporation,

11 Plaintiffs,

12 v.

13 WASHINGTON DAIRY HOLDINGS,
LLC, a Washington limited liability
14 company; WASHINGTON AGRI
INVESTMENTS, LLC, a Washington
15 limited liability company; DBD
WASHINGTON, LLC, a Washington
16 limited liability company; *and* SMD, LLC, a
Washington limited liability company,

17 Defendants.

Case No. _____

COMPLAINT

1 **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

2 **INTRODUCTION**

3 **1.** This is a civil action for declaratory and injunctive relief against Washington
4 Dairy Holdings, LLC, Washington Agri Investments, LLC, DBD Washington,
5 LCC d/b/a DeRuyter Brothers Dairy (“DBD”), and SMD, LLC (“SMD”)
6 (collectively hereinafter “the Dairies” or “Defendants”) for violations of the Solid
7 Waste Disposal Act, also known as the Resource Conservation and Recovery Act,
8 42 U.S.C. § 6901 *et seq.* (“RCRA”) at their dairy facilities located at or near 5111
9 Van Belle Road, Outlook, WA 98938 and 211 Nichols Road, Outlook, WA 98938.

10 **2.** This action is brought pursuant to the citizen suit provision of RCRA, 42
11 U.S.C. § 6972(a)(1)(A) and (B).

12 **3.** As detailed below, Plaintiffs allege that Defendants have violated and
13 continue to violate Section 7002(a) of RCRA by causing and contributing to the
14 past and present handling, storage, treatment, transportation, and/or disposal of
15 solid waste in such a manner that may, and indeed does, present an imminent and
16 substantial endangerment to health and the environment. 42 U.S.C. § 6972(a).

17 **4.** Plaintiffs further allege that Defendants employ improper manure
18 management practices that constitute the “open dumping” of solid waste in
19 violation of Section 4005(a) of RCRA. 42 U.S.C. § 6945(a).

1 5. Plaintiffs seek declaratory relief establishing that Defendants have violated
2 RCRA. Plaintiffs also seek injunctive relief directing Defendants to modify their
3 handling, storage, treatment, transportation, and disposal of solid waste such that
4 these practices no longer present an imminent and substantial endangerment to
5 health and the environment. Additionally, Plaintiffs seek injunctive relief
6 obligating Defendants to remediate the environmental contamination they have
7 caused and/or contributed to, including widespread soil and groundwater
8 contamination. Finally, Plaintiffs request the Court award Plaintiffs' reasonable
9 attorneys' and expert witnesses' fees, and costs, incurred in bringing this action.

10 JURISDICTION

11 6. This Court has subject matter jurisdiction over this citizen suit pursuant to
12 Section 7002 of RCRA, 42 U.S.C. § 6972(a).

13 7. The Court also has federal question jurisdiction pursuant to 28 U.S.C. §
14 1331 because this action arises under RCRA and the Declaratory Judgment Act, 28
15 U.S.C. § 2201, *et seq.*

16 8. On February 11, 2019, Plaintiffs gave notice of the violations and of their
17 intent to file suit to Washington Dairy Holdings, LLC, DBD Washington, LLC,
18 their registered agents, the United States Attorney General, United States
19 Environmental Protection Agency ("EPA"), EPA Region X, Washington State
20 Office of Governor, Washington State Office of the Attorney General, and

1 Washington State Department of Ecology as required by Section 7002 (a) of
2 RCRA, 42 U.S.C. § 6972(b). A copy of notice letters is attached hereto as Exhibit
3 A and is incorporated by reference.

4 **9.** On February 11, 2019, Plaintiffs gave notice of the violations and of their
5 intent to file suit to SMD, LLC, its registered agent, the United States Attorney
6 General, United States Environmental Protection Agency (“EPA”), EPA Region X,
7 Washington State Office of Governor, Washington State Office of the Attorney
8 General, and Washington State Department of Ecology as required by Section
9 7002 (a) of RCRA, 42 U.S.C. § 6972(b). A copy of notice letters is attached hereto
10 as Exhibit B and is incorporated by reference.

11 **10.** On April 17, 2019, 2019, Plaintiffs gave supplemental notice of the
12 violations and of their intent to file suit to Washington Agri Investments, LLC,
13 Washington Agri Investments, LLC’s registered agent, the United States Attorney
14 General, United States Environmental Protection Agency (“EPA”), EPA Region X,
15 Washington State Office of Governor, Washington State Office of the Attorney
16 General, and Washington State Department of Ecology as required by Section
17 7002 (a) of RCRA, 42 U.S.C. § 6972(b). A copy of notice letter is attached hereto
18 as Exhibit C and is incorporated by reference.

19 **11.** More than ninety days have passed since the first notice was served, and the
20 violations complained of in the notice are continuing at this time, or Defendants

1 are reasonably likely to continue to remain in violation of RCRA. Neither the EPA
2 nor State of Washington has commenced or is diligently prosecuting a civil or
3 criminal action to redress the violations.

4 **VENUE**

5 **12.** Venue properly vests in this Court pursuant to Section 7002(a) of RCRA, 42
6 U.S.C. § 6972(a), because the alleged violations of the aforementioned statute
7 occurred and continue to occur within the Eastern District of Washington.

8 **PARTIES**

9 **13.** Upon information and belief, Washington Dairy Holdings, LLC,
10 Washington Agri Investments, LLC, and DBD Washington, LLC (collectively
11 referred to herein as “DBD”) are Washington limited liability companies that own
12 and operate the dairy previously known as DeRuyter Brothers Dairy. The dairy is
13 located at or near 5111 Van Belle Road, Outlook, WA 98938.

14 **14.** Upon information and belief, SMD, LLC is a Washington limited liability
15 company that owns and operates the dairy previously known as Snipes Mountain
16 Dairy. The dairy is located at or near 211 Nichols Road, Outlook, WA 98938.

17 **15.** Each of the named Defendants are a “person” within the meaning of Section
18 1004(15) of RCRA. 42 U.S.C. § 6903(15).

1 **16.** Plaintiffs are non-profit organizations comprised of members who live,
2 work, and recreate in the State of Washington. Plaintiffs share similar interests in
3 improving, protecting, and preserving regional water bodies and groundwater.

4 **17.** Plaintiff CARE is a non-profit corporation organized under the laws of the
5 State of Washington. CARE's principal office is located in Outlook, Washington.

6 **18.** CARE is a grassroots organization composed of concerned community
7 members. Its mission is to inform Washington residents about activities that
8 endanger the health, welfare, and quality of life for current and future
9 Washingtonians through education and citizen empowerment. CARE also acts as
10 an advocate to protect and restore the economic, social, and environmental
11 resources of the region. In carrying out its mission, CARE has appeared in
12 numerous local, state, and federal proceedings.

13 **19.** CARE's organizational purposes are adversely affected by DBD's and
14 SMD's violations of RCRA. These violations have caused significant
15 environmental contamination of the soil and groundwater. Furthermore, but for
16 DBD's and SMD's unlawful actions, CARE would not have to spend as much of
17 its resources on the environmental problems created by illegal contamination from
18 individual, large-scale industrial farming operations and could direct these
19 resources to other priorities.

1 **20.** CARE has individual members who reside in Yakima County and in close
2 proximity to DBD and SMD. The environmental, health, aesthetic, economic, and
3 recreational interests of CARE's members have been and will continue to be
4 adversely affected by DBD's and SMD's violations of RCRA. For instance:

5 a. Members of CARE obtain their drinking water from aquifers that have
6 been contaminated with nitrates, phosphorus, and other pollutants,
7 including hormones and antibiotics, by DBD's and SMD's improper
8 handling, storage, treatment, transportation, and disposal of solid
9 waste. As a result, drinking water that CARE's members rely upon
10 has been rendered unsafe for human consumption. Consequently,
11 CARE's members have been forced to obtain, or should be obtaining
12 but may not be able to afford, alternative sources of drinking water.
13 CARE's members are concerned that consuming this water is harming
14 or could harm them and their families' health.

15 b. Members of CARE also make domestic and agricultural use of
16 groundwater that has been contaminated with nitrates, phosphorus,
17 and other pollutants as a result of DBD's and SMD's improper
18 handling, storage, treatment, transportation, and disposal of solid and
19 hazardous waste. As a result, water that CARE's members rely upon
20 has been rendered unsafe for domestic and agricultural use.

1 Consequently, CARE’s members have been forced to obtain, or
2 should be obtaining but may not be able to afford, alternative sources
3 of water for these uses. CARE’s members are concerned that the
4 water used in their homes is harming them and their families’ health.
5 CARE’s members are concerned that the food they produce and rely
6 upon for sustenance using this water may not be safe to consume.

7 c. Members of CARE also live, work, and recreate in the environment
8 that has been negatively impacted by DBD’s and SMD’s improper
9 handling, storage, treatment, transportation, and disposal of solid
10 waste. This has lessened CARE’s members’ enjoyment of their
11 environment. CARE’s members are concerned that their environment
12 has been irreparably injured by DBD’s and SMD’s improper
13 practices.

14 **21.** Plaintiff Friends of Toppenish Creek is a non-profit corporation organized
15 under the laws of the State of Washington.

16 **22.** Friends of Toppenish Creek is an organization composed of concerned
17 community members and is dedicated to protecting the rights of rural communities
18 and improving oversight of industrial agriculture. Friends of Toppenish Creek
19 works through public education, citizen investigations, research, legislation,
20 special events, and direct action. Friends of Toppenish Creek devotes itself to

1 enhancing, preserving, protecting, and monitoring the groundwater in the Yakima
2 area.

3 **23.** Friends of Toppenish Creek’s organizational goals are adversely affected by
4 DBD’s and SMD’s RCRA violations. Friends of Toppenish Creek works tirelessly
5 to protect the rights of communities against groundwater contamination caused by
6 industrial agriculture.

7 **24.** Friends of Toppenish Creek’s members live in Yakima County and in close
8 proximity to DBD and SMD. Friends of Toppenish Creek’s members have been
9 and continue to be injured, and their interests adversely affected, by DBD’s and
10 SMD’s RCRA violations. For instance:

11 a. Friends of Toppenish Creek’s members’ aesthetic interests have been,
12 and will continue to be, adversely affected by DBD’s and SMD’s
13 improper manure storage and disposal. Friends of Toppenish Creek’s
14 members have aesthetic interests in not seeing cow manure where it
15 shouldn’t be. DBD’s and SMD’s compost piles, over-topping lagoons,
16 and other manure mismanagement harm Friends of Toppenish Creek’s
17 members’ aesthetic and environmental interests.

18 b. Friends of Toppenish Creek’s members have suffered actual and
19 threatened injuries to their health and safety caused by DBD’s and
20 SMD’s violations of RCRA, including provisions prohibiting manure

1 stored in lagoons from contaminating the underlying aquifer. Manure-
2 contaminated water has impacted and threatens to impact the safety of
3 members' drinking water wells and may cause detrimental health
4 effects if consumed.

5 **25.** Plaintiff Center for Food Safety ("CFS") is a public interest non-profit
6 membership organization that works to protect human health and the environment
7 by curbing the proliferation of harmful food production technologies and by
8 promoting organic and other forms of sustainable agriculture. CFS's organizational
9 purposes are adversely affected by DBD's and SMD's violations of RCRA. These
10 violations have caused significant environmental contamination of the soil and
11 groundwater. Furthermore, but for DBD's and SMD's unlawful actions, CFS
12 would not have to spend as much of its resources on the problems created by
13 unlawful and dangerous contamination from individual, large-scale industrial
14 farming operations and could direct these resources to other priorities.

15 **26.** CFS represents nearly 245,000 members throughout the country that support
16 safe, sustainable, and organic agriculture and regularly purchase organic products.
17 CFS has approximately 10,000 members in the state of Washington. CFS members
18 live, work, recreate, and grow food in, and consume food and water from, the
19 Yakima Valley. The environmental, health, aesthetic, economic, and recreational
20 interests of CFS's members have been and will continue to be adversely affected

1 by DBD's and SMD's violations of RCRA. CFS's members support the public's
2 right to choose food and crops not sourced from or by industrial farming practices,
3 such as CAFOs. CFS's members are impacted by CAFOs through destructive
4 leakage and leaching of CAFO pollution into groundwater, which affects the
5 suitability of drinking water for consumption.

6 **27.** At all relevant times, Plaintiffs were and are "persons" within the meaning
7 of Section 1004(15) of RCRA, 42 U.S.C. § 6903(15).

8 **STATUTORY AND REGULATORY FRAMEWORK**

9 **28.** Section 7002(a)(1)(B) of RCRA provides that citizens may commence a
10 citizen suit against "any person," "including any past or present generator, past or
11 present transporter, or past or present owner or operator of a treatment, storage, or
12 disposal facility who has contributed or who is contributing to the past or present
13 handling, storage, treatment, or transportation, or disposal of any solid or
14 hazardous waste which may present and imminent and substantial endangerment to
15 health or the environment." 42 U.S.C. § 6972(a)(1)(B).

16 **29.** Section 1002(b) of RCRA states that "disposal of solid waste...in or on the
17 land without careful planning and management can present a danger to human
18 health and the environment;" and that "open dumping is particularly harmful to
19 health, contaminates drinking water from underground and surface supplies, and
20 pollutes the air and the land..." 42 U.S.C. § 6901(b).

1 **30.** As required by statute, EPA has promulgated criteria under RCRA §
2 6907(a)(3) defining solid waste management practices that constitute open
3 dumping. *See* 42 U.S.C. § 6944(a); 40 C.F.R. Parts 257 and 258. These regulations
4 outline certain solid waste disposal practices which, if violated, pose a reasonable
5 probability of adverse effects on health or the environment. 40 C.F.R. § 257.3.

6 **31.** The purpose of RCRA is “to promote the protection of health and the
7 environment.” RCRA seeks to accomplish this by “prohibiting future open
8 dumping on the land and requiring the conversion of existing open dumps to
9 facilities which do not pose a danger to the environment or to health....” 42 U.S.C.
10 § 6902(a).

11 **32.** Section 4005(a) of RCRA prohibits “any solid waste management practice
12 or disposal of solid waste... which constitutes the open dumping of solid waste....”
13 42 U.S.C. § 6945(a).

14 **33.** Under Section 1004(3), “The term ‘disposal’ means the discharge, deposit,
15 injection, dumping, spilling, leaking, or placing of any solid waste...into or on any
16 land or water so that such solid waste or hazardous waste or any constituent thereof
17 may enter the environment or be emitted into the air or discharged into any waters,
18 including ground-waters.” 42 U.S.C. § 6903(3).

19 **34.** RCRA defines “solid waste” as “any garbage, refuse, sludge from a waste
20 treatment plant... and other discarded material, including solid, liquid, semisolid,

1 or contained gaseous material resulting from... *agricultural operations*....” 42

2 U.S.C. § 6903(27) (emphasis added).

3 **35.** EPA criteria for solid waste disposal practices prohibit the contamination of
4 any underground drinking water source beyond the solid waste boundary of a
5 disposal site. 40 C.F.R. § 257.3-4(a).

6 **36.** An “underground drinking water source” includes (1) an aquifer supplying
7 drinking water for human consumption or (2) any aquifer in which the ground-
8 water contains less than 10,000 milligrams per liter of total dissolved solids. 40
9 C.F.R. § 257.3-4(c)(4).

10 **37.** “Contaminate” an underground drinking water source means to cause the
11 groundwater concentration of a listed substance to exceed its corresponding
12 maximum contaminant level specified in Appendix I to 40 C.F.R. Part 257, or
13 cause an increase in the concentration of that substance where the existing
14 concentration already exceeds the maximum contaminant level in Appendix I.

15 **FACTS**

16 **38.** All preceding paragraphs are incorporated herein.

17 **39.** Washington Dairy Holdings, LLC, Washington Agri Investments, LLC, and
18 DBD Washington, LLC all formed and commenced operations on September 1,
19 2016. Upon Information and belief, Austin “Jack” DeCoster is an owner and
20 member of Washington Dairy Holdings, LLC, Washington Agri Investments, LLC,

1 and DBD Washington, LLC. Upon information and belief, Wayne Cummings is an
2 owner and member of Washington Dairy Holdings, LLC, Washington Agri
3 Investments, LLC, and DBD Washington, LLC.

4 **40.** SMD, LLC formed and commenced operations on March 1, 2018. Upon
5 information and belief, Jack DeCoster is an owner and member of SMD, LLC.
6 Upon information and belief, Wayne Cummings is an owner and member of SMD,
7 LLC.

8 **41.** Upon information and belief, Washington Dairy Holdings, LLC,
9 Washington Agri Investments, LLC, and/or DBD Washington, LLC purchased
10 SMD, LLC in 2018.

11 **42.** DBD and SMD are currently managed by Wayne Cummings and/or Lynne
12 Geddis.

13 **43.** Washington Dairy Holdings owns approximately 175 acres of land located
14 at or near 5111 Van Belle Road, Outlook, 98938. DBD uses this land for its dairy
15 operations, such as animal confinement and milking.

16 **44.** Washington Agri Investments, LLC owns approximately 748 acres of land
17 located at or near 5111 Van Belle Road, Outlook, WA 98938. DBD uses this land
18 for its dairy operations, such as crop production and manure management.

1 **45.** SMD owns and/or controls 147 acres of land located at or near 211 Nichols
2 Road, Outlook, WA 98938. SMD uses this land for its dairy operations. DBD also
3 uses this land for its dairy operations and wastewater applications.

4 **46.** DBD and SMD are large dairy CAFOs under federal and state law. 40
5 C.F.R. § 412.2; WAC 173-224-030.

6 **47.** As of July 24, 2018, DBD had a herd size of at least 6912 animals, including
7 5544 milking cows, 765 dry cows, 514 heifers, and 89 calves. These animals are
8 confined 365 days per year.

9 **48.** As of January 2, 2019, SMD had a herd size of at least 1947 animals,
10 including 1475 milking cows, 397 heifers, and 75 calves.

11 **49.** Upon information and belief, there are two main aquifers underlying the
12 Dairies and the surrounding area. These aquifers include a surficial unconfined to
13 semi-confined alluvial aquifer and an extensive basalt aquifer of great thickness
14 underlying sedimentary deposits. Groundwater flows through the surficial aquifer
15 in a manner that generally follows surface topography. Groundwater flows through
16 the upper portion of the underlying basalt aquifer in a manner that also generally
17 follows surface topography.

18 **50.** Plaintiffs' members obtain groundwater from one or both of these aquifers.

19 *Manure Storage Practices*

1 **51.** It is estimated that DBD produces approximately 54,020,062 gallons of
2 liquid waste and 36,864 tons of solid waste annually. It is estimated that SMD
3 produces approximately 8,390,000 gallons of liquid waste and 17,619 tons of solid
4 waste annually.

5 **52.** DBD and SMD flush their alleys, free stall barns, and milking parlors of
6 liquid manure and wastewater into collection pits. The Dairies then pipe the liquid
7 manure, litter, and wastewater to solids separators.

8 **53.** Solid manure, litter (i.e., bedding from pens), and other waste is ultimately
9 stored and/or composted at the Dairies on permeable surfaces.

10 **54.** DBD stores the liquid manure wastes generated by its herd in one of its five
11 manure storage lagoons. SMD stores the liquid manure wastes generated by its
12 herd in one of its four manure storage lagoons. Wastes are placed in these lagoons
13 until such time they are applied to fields through various land-application
14 techniques, including dry spreaders, spreaders, and sprinklers/irrigation.

15 **55.** Upon information and belief, DBD's five manure storage lagoons are
16 unlined or inadequately lined, and are without an appropriate leak detection system
17 to prevent the downward migration and seepage of wastewater into groundwater.
18 Upon information and belief, SMD's four manure storage lagoons are unlined or
19 inadequately lined, and are without an appropriate leak detection system to prevent
20 the downward migration and seepage of wastewater into groundwater.

1 **56.** DBD's five lagoons have an estimated holding capacity of approximately
2 35,447,485 gallons. SMD's four lagoons have an estimated holding capacity of
3 approximately 9,290,240 gallons.

4 **57.** DBD and SMD's manure lagoons are constructed above an aquifer that
5 serves as a domestic water supply. Upon information and belief, the DBD and
6 SMD manure storage lagoons do not meet NRCS standards. Under any
7 circumstances, the DBD and SMD manure storage lagoons leak to groundwater.

8 **58.** The NRCS standards for manure storage lagoons are not designed to protect,
9 nor are capable of protecting, human health or the environment. These standards
10 are not scientifically established to protect groundwater and specifically allow for
11 lagoons to seep and/or leak manure wastes into the environment.

12 **59.** Upon information and belief, the NRCS standards for municipal wastewater
13 treatment plant lagoons are more protective of groundwater than those for manure
14 lagoons. Municipal lagoons are required to be lined with, at the very least,
15 synthetic, geomembrane liners. This is true even though municipal waste contains
16 far less concentrated effluent than the effluent generated by dairies such as DBD
17 and SMD.

18 **60.** Upon information and belief, seepage from the manure waste storage areas
19 has been ongoing since the date these storage areas were brought into operation.
20

1 **61.** Public records indicate that the groundwater underlying the Dairies exceeds
2 the Federal and State Ground Water Quality Standards for nitrate (10 mg/L), and
3 show that wells tested in the area, including at the nearby Outlook School, have
4 tested in excess of 10 mg/L nitrate.

5 **62.** The seepage of manure waste from the lagoons has contributed and is
6 contributing to the excessive contamination of groundwater, which is posing, or
7 may pose, an imminent and substantial endangerment to human health or the
8 environment.

9 **63.** DBD and SMD do not, and cannot, use manure nutrients that seep and/or
10 leak from their manure storage lagoons into the environment as crop fertilizers.

11 **64.** DBD and SMD's storage and/or composting of solid manure on permeable
12 surfaces causes leachate from the solid manure to enter groundwater, further
13 contributing to the contamination of groundwater.

14 **65.** DBD and SMD do not, and cannot, use manure nutrients that seep and/or
15 leach through storage and/or composting areas into the environment as crop
16 fertilizers.

17 **66.** DBD and SMD do not remove animal wastes, including manure and urine,
18 from their animal confinement pens. These wastes are allowed to accumulate
19 within the pens, where they seep and/or leach through the soil and into the
20 underlying aquifer.

1 **67.** DBD and SMD do not, and cannot, use manure nutrients that seep and/or
2 leach through animal confinement pens and into the environment as crop
3 fertilizers.

4 **68.** Upon information and belief, DBD and SMD store silage on permeable
5 surfaces, where the nutrients contained there also migrate through the soil and into
6 the underlying aquifer, further exacerbating the contamination of the soil and
7 aquifer.

8 **69.** Manure that has been permitted to leach, leak, or otherwise contaminate the
9 groundwater, such as from a leaking lagoon, solid manure storage area, animal
10 confinement pen, agricultural field, compost storage area, or other permeable
11 surface, is a “discarded material” from an “agricultural operation” and is therefore
12 a “solid waste” under Section 1004(27) of RCRA. 42 U.S.C. § 6903(27).

13 **70.** DBD and SMD’s improper manure storage practices have caused irreparable
14 injury to the environment, contaminating soils and groundwater with excessively
15 high levels of nitrates, phosphorus, and other pollutants, including but not limited
16 to pharmaceutical products.

17 *Manure Application Practices*

18 **71.** Upon information and belief, the Dairies and/or their agents have applied,
19 continue to apply, and are reasonably likely to continue to apply liquid and solid
20

1 manure wastes to nearby agricultural fields in amounts that exceed agronomic
2 rates.

3 **72.** Elevated nutrient levels found in soils receiving manure are evidence of
4 manure applications in excess of agronomic rates.

5 **73.** Soil tests submitted to the Washington State Department of Ecology and
6 Washington Department of Agriculture show elevated nutrient levels of both
7 nitrate and phosphorous at DBD. For Fall 2017 sampling results, 11 of the fields to
8 which DBD applies nutrients showed nitrate levels greater than 400 lbs./acre in the
9 top three feet of the soil column, with four fields exhibiting nitrate levels
10 exceeding 600 lbs./acre in the top three feet of the soil column. Additionally, in
11 Fall 2017, all but four of DBD's fields recorded greater than 100 ppm
12 phosphorous.

13 **74.** Soil tests submitted to the Washington Department of Ecology from Fall
14 2018 showed an even greater increase in elevated nutrients in the top three feet of
15 the soil column of DBD. In fact, at least two of DBD's fields to which it applies
16 manure showed nitrate levels exceeding 1,600 lbs./acre in the top three feet of the
17 soil column. In total, for Fall 2018, the number of DBD's fields exhibiting at least
18 600 lbs./acre of nitrate or in the top three feet of soil more than doubled.

1 **75.** According to DBD's 2018 Annual Report, DBD applied manure and
2 nutrients beyond agronomic rates to at least twelve fields for which its own
3 agronomist recommended zero or minimal nutrient applications.

4 **76.** Soil tests submitted by SMD in 2018 show excessively high levels of nitrate
5 in the top three feet of the soil column. Fields 1, 3, and 5 showed elevated nitrate
6 levels ranging from 500 lbs./acre increasing to values as high as 800 lbs./acre in
7 the top three feet.

8 **77.** According to SMD's Annual Report, SMD applied manure and nutrients
9 beyond agronomic rates to least three fields for which its own agronomist
10 recommended zero or minimal applications.

11 **78.** Upon information and belief, the elevated nutrients found in both DBD and
12 SMD's fields are the result of application of manure in excess of agronomic rates.

13 **79.** Applications of manure nutrients above and beyond what a specific crop can
14 uptake as fertilizer causes excess nutrients to move past the crop's root zones,
15 where they will migrate into the groundwater. Such nutrients, including but not
16 limited to nitrate and phosphorus, are lost to the environment and, consequently,
17 cannot be used by DBD and SMD for fertilization purposes.

18 **80.** Upon information and belief, the over-application of liquid manure above
19 agronomic rates has been ongoing since the date DBD and SMD commenced
20 operations.

1 **81.** Applications of manure waste above agronomic rates cause manure
2 nutrients, including, but not limited to, nitrates, and sometimes phosphorous, to
3 leach through the soil and into groundwater. Other pollutants such as
4 pharmaceutical products may also be present in soil and groundwater as a result of
5 over-applications.

6 **82.** The surface soils to which DBD applies, Warden, Senlac, and Esquatzel soil
7 series, have a high saturated hydraulic conductivity. All three of these soils are
8 classified as “well drained” and have a saturated hydraulic conductivity in the
9 range of 1.1 to 4.0 feet per day, exhibiting a “moderately high to high” capacity to
10 transmit water.

11 **83.** The surface soils to which SMD applies, the Esquatzel, Outlook, Sinloc, and
12 Warden soil series, have a saturated hydraulic conductivity in the range of 1.1 to
13 4.0 feet per day, which is characterized as “moderately high to high.”

14 **84.** The well-drained nature of these soils along with the high hydraulic
15 conductivity make for highly susceptible soil conditions for groundwater
16 contamination and very low potential for denitrification to decrease nitrate
17 contamination of groundwater.

18 **85.** Dairy effluent concentrations of ammonia and nitrate can be considerable, as
19 ammonia is produced by hydrolysis of waste fluids. Ammonia is rapidly converted
20

1 to nitrate when the manure encounters aerobic soils or groundwater. Due to their
2 high solubility, ammonia and nitrate can readily leach into groundwater.

3 **86.** Plants can uptake nitrate and nitrite only in limited quantities. Quantities of
4 nitrate and nitrite in the soil in excess of concentrations which can be used by the
5 currently active crop migrate into the vadose zone and the water table, where they
6 adversely impact groundwater quality and its use as a drinking water source.

7 Migration to the vadose zone and water table may also occur where well-drained
8 soils cannot hold the nitrate and nitrite in the root zone for a sufficient amount of
9 time to allow for the crops' natural uptake process.

10 **87.** Once nitrates enter the vadose zone, the area below the soil surface from the
11 end of the vegetative root zone to the beginning of the groundwater table, they
12 migrate down to the nearest groundwater.

13 **88.** Once nitrates enter the water table, they migrate away from DBD and
14 SMD's property and into the wells of nearby residents depending on the depth and
15 flow direction of the initial receiving groundwater.

16 **89.** DBD and SMD know or should know that application of manure above
17 agronomic rates – that is, application above which the current or planned crop can
18 effectively utilize – will cause manure nutrients, including, but not limited to,
19 nitrate and phosphorous, to pass through soils before they can be utilized by the
20 planned or active crops into groundwater. This renders the manure incapable of

1 serving its intended purpose as a fertilizer. Phosphorous also runs off the surface
2 during storm events and into surface waters, causing eutrophication and other
3 adverse effects to surface waters, plants, and wildlife.

4 **90.** Manure that has been over-applied on fields and permitted to leach, leak, or
5 otherwise contaminate the groundwater is a “discarded material” from an
6 “agricultural operations,” and is therefore a “solid waste” under Section 1004(27)
7 of RCRA. 42 U.S.C. § 6903(27).

8 **91.** DBD and SMD’s improper manure application practices have caused
9 irreparable injury to the environment, contaminating soils and groundwater with
10 excessively high levels of nitrate and other pollutants, including but not limited to
11 pharmaceutical products.

12 ***Contamination of Groundwater in Excess of MCL***

13 **92.** The practices mentioned in the preceding paragraphs, which are hereby
14 incorporated herein, are causing or contributing to groundwater contamination
15 beyond the federal MCL for nitrate.

16 **93.** The EPA has determined that nitrates pose an acute health concern at certain
17 levels of exposure. Nitrates contained in drinking water are colorless and odorless.
18 Ingestion of nitrates, converted to nitrite in the body, interferes with the oxygen
19 carrying capacity of blood, potentially resulting cyanosis and, at higher levels,
20 asphyxia.

1 **94.** High levels of nitrate in water can also cause a blood disorder in infants
2 known as methemoglobinemia (“blue baby syndrome”) that can be fatal if left
3 untreated.

4 **95.** Methemoglobinemia is a blood disorder in which an abnormal amount of
5 methemoglobin – a form of hemoglobin – is produced. Hemoglobin is the
6 molecule in red blood cells that distributes oxygen to the body. Methemoglobin
7 cannot release oxygen. In methemoglobinemia, the hemoglobin is unable to release
8 oxygen effectively to body tissues.

9 **96.** High nitrate levels may also affect pregnant women and adults with
10 hereditary cytochrome b5 reductase deficiency.

11 **97.** In addition, nitrate and nitrite ingestion in humans has been linked to
12 goitrogenic (anti-thyroid) actions on the thyroid gland (similar to perchlorate),
13 fatigue and reduced cognitive functioning due to chronic hypoxia, and maternal
14 reproductive complications including spontaneous abortion.

15 **98.** Ingestion of nitrates in excess of the MCL is also suspected of causing
16 various forms of cancer in the general exposed population, including a variety of
17 carcinogenic outcomes deriving from N-nitrosamines formed via gastric nitrate
18 conversion in the presence of amines, and compromises the health of immune-
19 compromised individuals and the elderly.

1 **99.** The MCLs are health-based standards that specify contaminants known to
2 have an adverse effect on human health at levels beyond the parameters set forth
3 by regulations.

4 **100.** Water samples taken from residential wells surrounding the Dairies show
5 elevated levels of nitrate in the groundwater.

6 **101.** Upon information and belief, the highest levels of nitrate generally occur in
7 the shallow alluvial aquifer. Plaintiffs' members and other residents have installed
8 domestic wells for drinking water that intersect the shallow aquifer.

9 **102.** DBD and SMD's storage and application of manure has caused nitrate
10 contamination of these residential wells, forcing Plaintiffs' members and other
11 residents to either consume unsafe drinking water or to obtain alternative sources
12 of drinking water.

13 **CAUSES OF ACTION**

14 **Count I: RCRA Imminent and Substantial Endangerment**

15 **103.** Plaintiffs incorporate by reference the allegations of the preceding
16 paragraphs of this Complaint.

17 **104.** Since at least November 16, 2017, DBD has been discarding manure, and
18 pharmaceutical products in the manure, which are "solid wastes" under Section
19 1004 of RCRA, 42 U.S.C. § 6903(27), because the manure is, either when over-

1 applied or leaked through holding areas, a discarded solid, liquid, and/or semi-solid
2 material resulting from an agricultural operation.

3 **105.** Since at least March 1, 2018, SMD has been discarding manure, and
4 pharmaceutical products in the manure, which are “solid wastes” under Section
5 1004 of RCRA, 42 U.S.C. § 6903(27), because the manure is, either when over-
6 applied or leaked through holding areas, a discarded solid, liquid, and/or semi-solid
7 material resulting from an agricultural operation.

8 **106.** SMD purchased and assumed control over the operation formerly known as
9 “Snipes Mountain Dairy.” SMD knew, or should have known through proper due
10 diligence, that Snipes Mountain Dairy had poor manure management practices for
11 many years.

12 **107.** DBD and SMD are the past and present owners or operators of a solid waste
13 storage or disposal facility. As indicated above, manure is stored and disposed of in
14 massive earthen pits and other holding structures. As a result, DBD and SMD
15 contribute to the past or present handling, storage, and disposal of a solid waste.
16 RCRA, 42 U.S.C. § 6972(a)(1)(B).

17 **108.** DBD and SMD are past and present generators of manure and other by-
18 product wastes. Manure is “handled” and “transported” by the Defendants, as well
19 as disposed of on land owned or leased by Defendants. *Id.*

1 **109.** DBD and SMD’s handling, transportation, storage, and disposal of manure
2 may present an imminent and substantial endangerment to public health and/or the
3 environment.

4 **110.** Specifically, as alleged above, groundwater contamination levels under
5 DBD and SMD’s land, and down-gradient from DBD and SMD’s land and
6 facilities, have contamination levels that exceed the maximum safe consumption
7 limits established under state and federal law, establishing a case of imminent and
8 substantial endangerment to public health and/or the environment.

9 **111.** The National Primary Drinking Water Standards (“NPDWS”) are
10 established under the Safe Drinking Water Act (“SDWA”). 42 U.S.C. § 300f, *et*
11 *seq.* The NPDWS are health-based standards that specify contaminants known to
12 have an adverse effect on the health of person at levels beyond the parameters set
13 forth in the regulations. 42 U.S.C. § 300f(1)(B).

14 **112.** The Washington Water Quality Standards were promulgated to protect
15 groundwater and human health pursuant to Washington Water Pollution Control
16 Act. RCW 90.48.

17 **113.** Promulgated pursuant to this statute, WAC 173-200-040(2)(a) provides
18 “Groundwater concentrations shall not exceed the criteria listed in Table 1, except
19 as described in WAC 173-200-050(3)(b).” The groundwater protection standard
20 for nitrate is the same as the federal MCL of 10 mg/l.

1 **114.** Federal regulations prohibit a facility or practice from contaminating an
2 underground drinking water source. 40 C.F.R. § 257.3-4(a). “Contamination”
3 occurs when a facility or practice introduces a toxic substance that causes the
4 concentration of that substance in groundwater to exceed certain parameters listed
5 in Appendix I to 40 C.F.R. § 257.3-4(a).

6 **115.** The past and continuing practices of DBD and SMD have caused
7 contamination and continue to contaminate groundwater to levels that exceed the
8 maximum limits for safety established under state and federal law. These practices
9 present an imminent and substantial endangerment to public health and/or the
10 environment. Specifically, DBD and SMD are polluting groundwater to the extent
11 that it is hazardous to health and the environment.

12 **116.** Pursuant to RCRA Section 7002, DBD and SMD are subject to an injunction
13 under RCRA ordering them to cease and abate any past or present handling,
14 storage, treatment, and/or transportation of any solid waste or hazardous waste that
15 may present an imminent and substantial endangerment to public health and/or the
16 environment.

17 **117.** Plaintiffs’ interests are harmed and will continue to be harmed by this
18 imminent and substantial endangerment and by DBD and SMD’s failure to abate
19 the endangerment unless the Court grants the relief herein sought.
20

1 **Count II: RCRA Illegal Open Dumping**

2 **118.** Plaintiffs incorporate by reference the allegations of the preceding
3 paragraphs of this Complaint.

4 **119.** DBD constitutes an “open dump” under RCRA Section 1004(14). 42 U.S.C.
5 § 6903(14). SMD constitutes an “open dump” under RCRA Section 1004(14). 42
6 U.S.C. § 6903(14).

7 **120.** DBD and SMD’s solid waste disposal practices cause groundwater
8 concentration levels of nitrates and other pollutants to exceed the limits set forth in
9 Appendix I of 40 C.F.R. Part 257, which constitutes illegal open dumping, and is
10 considered to pose a reasonable probability of causing adverse effects to health and
11 the environment.

12 **121.** DBD and SMD store and dispose of manure at their facilities. The manure
13 constitutes an agricultural waste and a “solid waste” under Section 1004 of RCRA
14 because it is over-applied and/or improperly stored, and therefore constitutes a
15 discarded material under the statute. 42 U.S.C. § 6903(27).

16 **122.** The disposal of solid waste at DBD and SMD, including the fields DBD and
17 SMD use to apply manure, are causing the contamination of groundwater beyond
18 the solid waste boundary of the disposal sites to exceed the limits set forth in
19 Appendix I to 40 C.F.R. Part 257. Concentrations of nitrate as measured in the
20

1 aquifer have repeatedly exceeded the maximum contaminant level. This practice
2 constitutes an illegal open dumping.

3 **123.** Pursuant to Section 3008, DBD and SMD are subject to an injunction under
4 RCRA ordering them to cease open dumping and remediate the environmental
5 contamination they have caused and/or contributed to, including widespread soil
6 and groundwater contamination. 42 U.S.C. § 6928.

7 **124.** Plaintiffs' interests are harmed and will continue to be harmed by DBD and
8 SMD's open dumping unless the Court grants the relief herein sought.

9 **RELIEF REQUESTED**

10 WHEREFORE, Plaintiffs CARE, Friends of Toppenish Creek, and CFS
11 respectfully request the Court enter a judgment:

- 12 a. Declaring that DBD and SMD's past and/or present generation,
13 handling, storage, treatment, transportation, and/or disposal of solid
14 waste presents, or may present, an imminent and substantial
15 endangerment to public health or to the environment.
- 16 b. Declaring DBD and SMD's storage and disposal of manure and its
17 incorporated nutrients, by-products, and pollutants constitutes illegal
18 open dumping.
- 19 c. Issuing a compliance order that requires DBD and SMD to cease and
20 desist from storing manure on any portion of DBD and/or SMD's land

1 that DBD and SMD have not first lined with synthetic liners to
2 prevent seepage of pollutants into groundwater that may, whether by
3 flow or diffusion, transmit such pollutants outside DBD and SMD's
4 property boundaries.

5 d. Issuing temporary and/or permanent injunctive relief against DBD and
6 SMD, ordering them to cease all activities constituting the imminent
7 and substantial endangerment to the public health and environment,
8 and to cease all activities constituting illegal open dumping.

9 e. Awarding Plaintiffs their reasonable attorneys' and expert witnesses'
10 fees, and costs, incurred in bringing this litigation.

11 Dated: May 23, 2019.

12 Respectfully Submitted,

13 s/ Charles M. Tebbutt
14 CHARLES M. TEBBUTT
15 WSBA #47255
16 Law Offices of Charles M. Tebbutt, P.C.
17 941 Lawrence St.
18 Eugene, OR 97401
19 charlie@tebbuttlaw.com
20 Tel: (541) 344-3505

s/ Andrea K. Rodgers
18 ANDREA K. RODGERS
19 WSBA #38683
20 Law Offices of Andrea K. Rodgers
3026 NW Esplanade
Seattle, WA 98117

1 andrearodgers42@gmail.com
Tel: (206) 696-2851

2 s/ Toby J. Marshall

3 TOBY J. MARSHALL
WSBA #32726

4 Terrell Marshall Law Group PLLC
936 North 34th Street, Suite 300
5 Seattle, Washington 98103-8869
tmarshall@terrellmarshall.com

6 Tel: (206) 816-6603

7 /s Amy van Saun

8 AMY VAN SAUN

9 OSB #155085 (*pro hac vice* application forthcoming)
CENTER FOR FOOD SAFETY

10 303 Sacramento Street, 2nd Floor
San Francisco, CA 94111

11 avansaun@centerforfoodsafety.org
Tel: (415) 826-2770

12 *Counsel for Plaintiffs*