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February 28, 2019

THIS IS AN URGENT LEGAL MATTER REQUIRING YOUR
IMMEDIATE ATTENTION

Via Registered Mail, Return Receipt Requested:

Site Manager
Rosalio Brambila
Sunnyside Dairy #1 and #2
4581 Maple Grove Road
Sunnyside, WA 98944

Roberto Aquilini
Governor, Sunnyside Dairy, LLC
901 E. Franklin Ave., Suite 1
Sunnyside, WA 98944

Fran Forgette
Registered Agent, Sunnyside Dairy, LLC
6725 W. Clearwater Ave,
Kennewick, WA 99336

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, Messrs. Brambila & Aquilini, Mr. Forgette, and Sunnyside Dairy, 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. not-for-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

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

notice, Notifying Parties intend to initiate a citizen suit in Washington Federal District Court against Sunnyside Dairy, LLC, the owner of Sunnyside Dairy #1 and #2, located at or near 4851 Maple Grove Road, Sunnyside, WA (hereinafter referred to as “Sunnyside” or the “Dairy”).

The lawsuit will allege that the operation known as Sunnyside 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 Sunnyside is operating an “open dump” in violation of the prohibitions of RCRA.

The lawsuit will seek mandatory injunctive relief requiring Sunnyside 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 Sunnyside 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 Sunnyside has violated, and continues to violate, the statutory prohibitions of the Resource Conservation and Recovery Act, and will file a lawsuit against Sunnyside on or after the 90th day of your receipt of this notice unless Sunnyside abates the endangerment.

Specifically, Notifying Parties will allege in the lawsuit that Sunnyside 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). Notifying Parties will seek mandatory injunctive relief requiring Sunnyside to abate and/or remediate the source(s) of the endangerment to health and the environment and an order from the Court requiring Sunnyside 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 imminent and substantial endangerment to health or the environment.” In this case, Sunnyside 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. Sunnyside’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). Sunnyside’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, Sunnyside 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 Sunnyside’s Nutrient Management Plan. 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 Sunnyside’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.

Washington Department of Agriculture’s Inspection Reports have documented elevated nitrate and phosphorus levels in soils receiving manure generated at Sunnyside, a strong indication that Sunnyside has applied manure in excess of agronomic rates or crop needs, in violation of the requirements of the NMP. For instance:

- The 2012 post-harvest soil sample results from the top foot of soil in in the “Wades 01” field showed a nitrate level of 81 ppm, vastly more than the crops could uptake as fertilizer.
- 2014 post-harvest samples² from that same field showed a nitrate level of 120 ppm nitrate, again vastly more nutrients than the crops could uptake as fertilizer.
- The same is true for the Fall samples collected in 2015, 2016, and 2017 from the “Wades 01” field, with 77, 60, and 100 ppm nitrate in the top foot of the soil column, also vastly more nutrients than the winter triticale crop could uptake as fertilizer.

Other fields to which Sunnyside applies manure have similarly tested high in nitrate over the past decades, further evidence that Sunnyside is applying manure as a means of disposal, not to fertilize crops. For instance, top-foot post-harvest soil sampling for the “60 acre” field in 2012 showed 47 ppm nitrate; in 2014 there was 186 ppm nitrate; and in 2016 there was 165 ppm nitrate. Field “Wades 03” had 53 ppm nitrate in 2012; 137 ppm in 2014, and 128 ppm in 2015. Field “Guerra West” had 55 ppm nitrate in 2012; 91 ppm nitrate in 2014, and 143 ppm nitrate in 2015. More recently, 2016 post-harvest results from the top foot of soil showed eight fields to have nitrate levels in excess of 45 ppm, with the “60 acre” field showing results as high as 104 ppm nitrate. The 2017 post-harvest soil results increased to 19 fields showing nitrate levels above 45

² Washington Department of Agriculture noted that Sunnyside’s records were incomplete, and, in fact, did not have 2013 post-harvest soil records. Without post-harvest soil sampling, Sunnyside lacked the requisite information to make agronomic and beneficial reuse of its manure.

ppm, with “Wades 01” showing results as high as 100 ppm nitrate. This list is meant to be illustrative, not exhaustive.

These high nitrate levels have been noted by regulators over the past decades, with the November 14, 2017 inspection resulting in a Warning Letter and placing Sunnyside “Out of Compliance,” but no corrective action has been taken by Sunnyside to eliminate the discarding of manure. Indeed, the conclusion that Sunnyside is discarding manure becomes inescapable when combined with Sunnyside’s documented violations of its NMP, the purpose of which is to inform Sunnyside how to use its liquid and solid manure to fertilize crops. Notifying Parties will allege that Sunnyside 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 Sunnyside’s NMP.

Further evidence of Sunnyside’s history of discarding manure can be found in the consistently elevated phosphorus sampling obtained from Sunnyside’s agricultural fields. 2017 post-harvest soil samples of the top foot of soil show numerous fields above 200 ppm phosphorus, and the 2016 post-harvest show similar results, with “Wades 01” field exhibiting a phosphorus level of 532 ppm, far exceeding any nutrient uptake of crops.

Based on publicly-available records, additional evidence of the discarding of manure includes: the “stockpiling” of manure on an agricultural field for “drying,” which caused manure nutrients to leach into soil where no crop was growing; 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 Sunnyside’s fields.

In addition, over-applications of manure can cause phosphorus to contaminate soils, surface waters, and groundwater. Sunnyside has a documented history of elevated phosphorus levels, a strong indication that the facility has applied manure in excess of agronomic rates. Washington State Department of Agriculture records document “excessive” phosphorus levels in soils receiving Sunnyside’s manure. 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.

Beyond excessive manure applications that were done in violation or disregard of Sunnyside’s NMP, Sunnyside’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 discard 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 all eight of the lagoons at Sunnyside were designed and built such that it has a seepage rate that allows manure to leak out of the lagoons and into groundwater. Even if the lagoons were designed in accordance with NRCS 313 guidelines, those guidelines are designed such that seepage of manure into groundwater occurs. Furthermore, Notifying Parties will allege that Sunnyside'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. Records further show that Sunnyside has failed to maintain its lagoons in accordance with its NMP, further evidencing the discarding of manure at the Sunnyside. 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, Sunnyside 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 Sunnyside 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, Sunnyside'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. Public records show that groundwater monitoring wells on site at Sunnyside Dairy have tested above the MCL for nitrate (10mg/l). Furthermore, public records show that concentrations in drinking water wells in close proximity to Sunnyside exceed the MCL for nitrate, with some testing as high as 45.2 ppm.³

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 Sunnyside'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.

³ See Huffman, R.L., Concentrations of Nitrate in Drinking Water in the Lower Yakima River Basin, Groundwater Management Area, Yakima County Washington, 2017: U.S. Geological Survey Data Series 1084, 18 p., <https://pubs.usgs.gov/ds/1084/ds1084.pdf>.

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 Sunnyside, 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, Sunnyside’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 Sunnyside is contaminated at levels exceeding 10 mg/L nitrate, including wells tested as part of the 2017 USGS study.⁴ The lawsuit will allege that Sunnyside’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 Sunnyside’s manure, indicating 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

⁴ *Id.*

the MCLs. The lawsuit will further allege that Sunnyside's storage of liquid and solid manure in unlined earthen lagoons or inadequately lined lagoons, as well as Sunnyside'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 Sunnyside'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.
2241 Hudson Road
Outlook, WA 98938
Tel: (509) 854-1662

Friends of Toppenish Creek
3142 Signal Peak Road
White Swan, WA 98952
Tel: (509) 874-2798

Center for Food Safety
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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 Sunnyside'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 of 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, unless otherwise specified, to the following:

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Maia Bellon, Director
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