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

COMMUNITY ASSOCIATION FOR RESTORATION OF THE ENVIRONMENT, INC., a Washington Non-Profit Corporation
and
CENTER FOR FOOD SAFETY, INC., a Washington, D.C. Non-Profit Corporation
Plaintiffs,
v.

GEORGE & MARGARET, LLC, a Washington Limited Liability Company, GEORGE DERUYTER & SON DAIRY, LLC, a Washington Limited Liability Company, D&A DAIRY, a Washington partnership, and D&A DAIRY, LLC, a Washington Limited Liability Company,
Defendants.

Case No. 2:13-CV-3017-TOR

MOTION FOR ORDER TO SHOW CAUSE FOR FAILURE TO COMPLY WITH CONSENT DECREE

Judge: Hon. Thomas O. Rice
Date: 1/14/2020
With Oral Argument: 9:00 a.m.
Place: Thomas S. Foley United States Courthouse
920 West Riverside Ave.
Spokane, WA 99201

Plaintiffs Community Association for Restoration of the Environment ("CARE") and Center for Food Safety ("CFS"), collectively referred to as "CARE", hereby move this Court for an order directing Defendants George & Margaret, LLC, George DeRuyter & Son Dairy, LLC, D&A Dairy, and D&A Dairy, LLC (hereinafter collectively referred to as "DeRuyter") to show cause why an order should not be entered directing DeRuyter, upon penalty of contempt, to comply with the Consent Decree entered by this Court on May 19, 2015. ECF No. 169. As explained below, DeRuyter is in violation of the mandatory injunctive relief provisions of the Consent Decree, including requirements related to lagoon lining and manure applications. CARE therefore requests that the Court enjoin DeRuyter's dairy and milking operations until strict compliance with the Consent Decree is achieved, impose an appropriate contempt penalty, and require remedial relief addressing DeRuyter's violations of the Decree. Finally, CARE requests the Court award CARE's attorneys' and expert witnesses' fees, and costs, incurred in overseeing and enforcing the Consent Decree to date and for the time involved in bringing this motion.

CARE brings this Motion after spending years trying to resolve DeRuyter's violations of the Consent Decree without involving the Court. The Parties have been in near-continuous dispute resolution since the Consent Decree was entered, with little achieved. Most troubling, while DeRuyter promised to Plaintiffs and this

Court that it would synthetically line all of its manure storage lagoons by December 31, 2018, as of the date of this Motion DeRuyter has failed to make any efforts to line seven of its lagoons and has unilaterally delayed plans for further lining. Further, DeRuyter continues to apply manure and wastewater in excess of agronomic rates to its application fields, which have been previously identified as a major source of nitrate contamination in residential water wells. The endangerment that the Decree was intended to rectify, particularly groundwater contamination, has continued largely unabated due to DeRuyter's abject failure to abide by the terms and requirements of the Decree.

LEGAL STANDARD

A consent decree is "an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable of other judgments and decrees." *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 378 (1992). Further, "a consent decree is a judgment . . . and it may be enforced by judicial sanctions, including citations for contempt." *SEC v. Randolph*, 736 F.2d 525, 528 (9th Cir. 1984).

When construing the terms of a consent decree, courts must look within the decree's four corners, so that "the instrument [is] construed as it is written." *U.S. v. Armour & Co.*, 402 U.S. 673, 681-82 (1971). But in enforcing the Consent Decree, this Court has broad equitable power under the All Writs Act, 28 U.S.C. § 1651.

See Yonkers Racing Corp. v. City of Yonkers, 858 F. 2d 855, 863-64 (2d Cir. 1988), *cert. denied* 489 U.S. 1077 (1989). The Supreme Court "has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained [.]" *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977). Additionally, "an award of attorney's fees and costs for civil contempt is within the discretion of the court." *Cmty. Ass'n for Restoration of the Env't v. Nelson Faria Dairy, Inc.*, 2011 U.S. Dist. LEXIS 149868 at *31 (E.D. Wash. Dec. 10, 2011) (quoting *Harcourt Brace v. Multistate Legal Studies*, 26 F.3d 948, 953 (9th Cir. 1994)).

In support of this Motion for an Order to Show Cause, CARE avers as follows:

1. On February 14, 2013, CARE and CFS brought an action against George and Margaret, LLC, George DeRuyter & Son Dairy, and D & A Dairy and D&A Dairy, LLC alleging violations of the Solid Waste Disposal Act, also known as the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* ("RCRA"). ECF No. 1.

2. The matter was settled by Consent Decree entered by this Court on May 19, 2015. ECF No. 169. In the Consent Decree, DeRuyter agreed, among

other things, to strictly comply with explicit operational, infrastructure alteration, and reporting provisions.

3. This Court retained jurisdiction for the purpose of issuing any order necessary to enforce the terms of this Decree. ECF No. 169 at ¶ 1.

LAGOON LINING AND MAINTENANCE
(ECF No. 169 at ¶¶ 18-22)

4. DeRuyter has failed to comply with the lagoon lining provisions of the Consent Decree. According to the schedule set forth in ¶ 18 of the Decree:

> Defendants hereby agree to double line all lagoons with GCL liners and a 40-mil synthetic liner as set forth in the April 20, 2015 Dairy Lagoon Work Plan, attached hereto as Exhibit 1, or as may reasonably be modified through the discussions of Plaintiffs, Defendants, and the EPA. The lining shall occur at a rate of at least two per year, according to the schedule set forth in the Lagoon Work Plan and any modification required by EPA….The Parties acknowledge that the above time-commitments are subject to the availability of materials, unanticipated weather or site conditions, and the EPA's ability to review and approve the lagoon installation plans in a timely manner. Should the EPA fail to timely review and approve the lagoon installation plans, and/or should unanticipated weather or site conditions or the unavailability of materials cause delay, the Parties agree to reconvene their discussions and agree to new date(s) or to otherwise submit this matter to the dispute resolution process set forth in Paragraph 55. Notwithstanding the foregoing, Defendants hereby covenant to use their best efforts and to hire such consultants and contracts as may be reasonably necessary to accomplish the installations on the dates set for above.

ECF No. 169. That paragraph also contains a schedule for lagoon lining. *Id*. at ¶ 18, subparagraphs a.-j.

5. At no time since the Consent Decree was entered by this Court has "any modification" of the Lagoon Work Plan been "required by EPA." That work plan is contained at ECF No. 169, Exhibit 1. At no time since the Consent Decree was entered have Plaintiffs, Defendants, and EPA had mutual discussions concerning extensions of the lagoon lining schedule or changes to the lining requirements. Instead, as described below, DeRuyter has unilaterally requested numerous extensions of the lagoon lining schedule from EPA (but not Plaintiffs) and instituted an experimental "NDN" system in lieu of lining certain lagoons that was never approved, and was actually opposed, by Plaintiffs.

6. DeRuyter's lagoon lining should have occurred at a rate of at least two lagoons per year. When entered by the Court, Plaintiffs understood that all lagoons at the DeRuyter facilities would be lined in accordance with the Consent Decree by December 31, 2018. However, DeRuyter has ***only*** completed the Consolidated Lagoon 3 lining project (Lagoons 3 and 4) and the Stormwater Catch Basin as of December 31, 2018. Declaration of Charles M. Tebbutt, Exhibits 1 & 2, filed herewith ("Tebbutt Decl."). All other seven lagoons remain in the same state they were over five years ago, when the Court ordered DeRuyter to line its lagoons.

7. DeRuyter has consistently refused to comply with both the lagoon lining terms of the Consent Decree and the lagoon design requirements of the EPA. On November 11, 2015, only six months after entering the Consent Decree,

Plaintiffs notified DeRuyter that Defendants were behind schedule with the lagoon lining projects. Tebbutt Decl. Ex. 3. Further, EPA's review of DeRuyter's first work plan commented that DeRuyter's "proposed design poses potential risks that must be addressed." Tebbutt Decl. Ex. 4. Ten months later, addressing DeRuyter's revised design submittals and missing information, EPA sent another letter commenting that since 2015, DeRuyter had "submitted five drafts of [its] Lagoon Work Plans, none of which were approvable by EPA," and "was already roughly two years behind the lagoon lining schedule to which [it] agreed in the [Consent Decree]." *Id*. Despite all of these previously flawed designs and delays, on January 6, 2017, EPA approved DeRuyter's Modified Work Plan which proposed the following lagoon lining schedule: two lagoons in 2017, three lagoons in 2018, four lagoons in 2019, and three lagoons in 2020. Tebbutt Decl. Ex. 5. At no point did Plaintiffs agree to this delay in the lining schedule.

8. DeRuyter failed to comply with that Modified Work Plan. While DeRuyter submitted the Completion Report for D&A Consolidated Lagoons No. 3 and 4 on February 1, 2018, Tebbutt Decl. Ex. 1, on June 21, 2018, DeRuyter sent EPA a letter requesting delays that would push the lining of D&A Dairy Lagoons 1 and 2, which were scheduled for lining in 2018, back to 2020. Tebbutt Decl. Ex. 6. DeRuyter requested these extensions to accommodate an experimental, taxpayer-

funded "NDN system"[1] that Plaintiffs opposed from the onset. *Id.* Further, these delays would result in DeRuyter lining ***zero*** lagoons in 2019, and not lining the final three lagoons until, at best, 2022, almost four years after the deadlines established by the Consent Decree. *Id.* Again, Plaintiffs were not consulted about this requested extension and have continuously objected to it. Tebbutt Decl. Exs. 9, 10, and 12.

9. EPA did not initially approve DeRuyter's requests because DeRuyter again failed to include sufficient lagoon design details. Tebbutt Decl. Ex. 7. However, on August 1, 2018, EPA granted a conditional approval based on an October 1, 2018 completion date for the NDN system. Tebbutt Decl. Ex.8. The

[1] "NDN System" stands for "Nitrification-Denitrification System," an experimental technology that attempts to remove nitrate by creating an aerobic environment and an anaerobic environment within a lagoon. *See* Tebbutt Decl. Ex. 9. The lagoon in which the NDN System was installed was not lined in accordance with the Consent Decree. Plaintiffs raised numerous and significant concerns about the efficacy of the NDN System, as well as DeRuyter's competency in operating a complex experimental system. *Id*. The technical specifications of the system have been claimed as Confidential Business Information by DeRuyter, *id*. at Ex. 8, pp.3-4, and Plaintiffs have not been provided with that information.

condition stated, "If the NDN system due dates are not met (construction completion, fully operational, nitrogen removal target), the DeRuyter Dairy shall line D&A Lagoons 1 and 2 during the summer of 2019, in addition to the other lagoons that must be lined in 2019." *Id.* EPA reasoned that:

> Delaying the lining of D&A Lagoons 1 and 2 will result in these earthen lagoons continuing to discharge large quantities of nitrogen to the drinking water aquifer for two additional years. Some residents near the Dairies would bear an increased risk to their health in exchange for potential benefits that may never materialize, in the form of an unproven NDN configuration whose construction and operation would be outside the scope of the Consent Order, and the design of which is not available for public review.

Id. Indeed, DeRuyter failed to meet the NDN construction deadlines on multiple occasions and continues to discharge large quantities of nitrogen to the drinking water aquifer and endanger the health of residents near the Dairies.

10. Following up on the DeRuyter's failure to timely complete the NDN project, EPA sent a letter to DeRuyter on December 19, 2018 stating that it "must identify and line or abandon four lagoons" in 2019, and the remaining five lagoons in 2020. Tebbutt Decl. Ex. 2. Plaintiffs never agreed with the lagoon lining delays.

11. DeRuyter chose to ignore EPA and the lagoon lining schedule the Agency provided. Instead, a letter to EPA dated December 19, 2018 indicates that DeRuyter resubmitted its previously-rejected plan to line ***zero*** lagoons in 2019 (the

"Modified BODR"), and demonstrating that DeRuyter would not finish the lagoon lining project until 2022. Tebbutt Decl Ex. 10.

12. Furthermore, although the October 31, 2018 construction completion deadline for the NDN project was approaching two months past due, DeRuyter requested an extension which would push the NDN construction deadline to March 31, 2019. *Id.* Then, on March 31, 2019, DeRuyter sent a letter requesting another extension which would push the NDN construction deadline to June 1, 2019. Tebbutt Decl. Ex. 11. Again, on May 31, 2019, DeRuyter sent a letter requesting yet another extension which would push the NDN construction deadline to July 1, 2019. *Id.* Finally, DeRuyter sent the most recent letter requesting another extension to push the NDN construction deadline to August 1, 2019. *Id.* While Plaintiffs sent multiple letters to DeRuyter objecting to the proposed NDN project and notifying DeRuyter that the NDN project is irrelevant to compliance with the Consent Decree, Tebbutt Decl. Exs. 9, 10, and 12, DeRuyter ignored those letters, and therefore failed to complete any lagoon lining in 2019 in contravention of the Consent Decree.

13. Pursuant to the Consent Decree, Plaintiffs have twice sent DeRuyter Notices of Violations, in both 2017 and 2019, invoking the dispute resolution process of ¶ 55 and seeking accelerated lagoon lining schedules in an effort to resolve further delays and to prevent further endangerment to the public

health and environment. Tebbutt Decl. Ex. 13. DeRuyter has shown no willingness to comply with the Consent Decree by accelerating its lagoon lining schedule. The Consent Decree required DeRuyter to line all *ten* of its lagoons by December 31, 2018. ECF No. 169 at ¶ 18. DeRuyter is at least three years behind schedule and, consequently, in gross violation of the Consent Decree. The Decree contemplated only two scenarios where the lagoon lining schedule could be delayed beyond the times set forth in the 2015 Lagoon Work Plan:[2] (1) "any modification required by EPA[,]" and (2) delays caused by "EPA fail[ure] to timely review and approve the lagoon installation plans." ECF. No. at 169 ¶ 18. If delays were caused by a failure for EPA to timely review lagoon plans, then the parties were to "reconvene their discussion and agree to new date(s)[.]" *Id*. Here, the delays in DeRuyter's lagoon lining are not the result of EPA untimeliness. They are not the result of modifications "required by EPA." They are not the result of Plaintiffs' consent to modify the Lagoon Work Plan or to change the dates. They are, instead, caused entirely by DeRuyter's unilateral attempts at modifying the agreements it has already consented to, in contravention of DeRuyter's covenant to "use their best

[2] The Consent Decree, ¶ 18, also contemplates delays due to material unavailability and unanticipated weather or site conditions. However, DeRuyter has not raised either of those issues since entry of the Consent Decree.

efforts and to hire such consultants and contracts as may be reasonably necessary to accomplish the installations on the dates set for above." *Id.* To be clear, there has been no modification required by EPA of the original lagoon lining schedule that was attached to the Consent Decree – there have only been requests ***by DeRuyter*** to forestall the lining process. DeRuyter's requests to EPA for delays are not based on any lagoon design problems or agreed-to extensions. Rather, they are requests based on experimental technology that was never discussed or approved with Plaintiffs, combined with an apparent failure of DeRuyter to have sufficient capital to meet its Consent Decree obligations. DeRuyter's requests, and EPA's acquiescence to those requests, are therefore immaterial to the issue of compliance with the lagoon lining schedule in the Consent Decree. These unilateral changes by DeRuyter, which Plaintiffs have continuously challenged, Tebbutt Decl. Exs. 9, 10, and 12, violate the lagoon lining provisions of the Consent Decree.

14. While DeRuyter has refused to comply with lining its lagoons, it has used its energy to further violate the Consent Decree ¶¶ 18 and 19 by creating *new* unlined lagoons without notifying Plaintiffs, EPA, or the Court. Tebbutt Decl. Ex 14. Through aerial imagery, Plaintiffs identified multiple newly constructed unlined lagoons located near DeRuyter's compost area. *Id*. These lagoons did not exist at the time the Parties entered the Consent Decree, nor did DeRuyter identify them to the Court or Plaintiffs in Exhibit 2 to the Consent Decree. Tebbutt Decl.

Ex. 14; *see also* ECF No. 169-1. Plaintiffs first notified DeRuyter of their concerns through email correspondence, and later invoked the dispute resolution under ¶ 55, in both 2017 and 2019. Tebbutt Decl. Exs. 13 and 14. DeRuyter failed to address what would be done with these multiple unlined lagoons, or "catch basins," until October 2, 2019, when DeRuyter's counsel finally relayed that the lagoons would be addressed in 2023. Tebbutt Decl. Ex. 14. These lagoons contain manure-contaminated leachate from the compost area as well as runoff from heifer pens in the adjacent area. Declaration of David Erickson, Exhibit 4, filed herewith ("Erickson Decl."); *see also* Declaration of Parker Jones, Exhibits 1 and 2, filed herewith ("Jones Decl.").

15. Additionally, manure contaminated water from the heifer pens has traveled down the access road to yet another unlined holding pit, again outside the lagoon lining terms of the Consent Decree. Erickson Decl. Exs. 3 and 4

MANURE APPLICATION & FIELD MANAGEMENT
(ECF No. 169 at ¶¶ 38-44).

16. DeRuyter has exceeded the nitrate and phosphorus manure application restrictions of the Consent Decree, ¶¶ 38-39, for each of the last four years at multiple fields. Tebbutt Decl. Ex. 13. The Consent Decree requires DeRuyter to take post-harvest soil samples for nitrate plus ammonium and phosphorus in its fields and follow specific application restrictions based on the results. ECF No.

169 at ¶¶ 38-39. As agreed to and designated by DeRuyter, half of the fields are subject to ¶ 38 thresholds, and the other half are subject to the more lenient thresholds of ¶ 39.[3]

Nitrate Restrictions

17. The Consent Decree prohibited DeRuyter from applying manure to fields in 2016 that exhibited a 2015 post-harvest average of greater than 45 ppm nitrate plus ammonium in the top two feet of soil until subsequent testing showed otherwise. ECF No. 169 at ¶ 39(a). Post-harvest soil sampling results in 2015 showed Field GDS-SU04 to have an average of 86.5 ppm, and the resulting 2016 pre-plant soil samples showed an average of 58.1 ppm. Tebbutt Decl. Table 1. In violation of the Consent Decree, DeRuyter applied 9,000 gallons of manure to Field GDS-SU04 in 2016. *Id.* Additionally, 2015 post-harvest soil samples showed Field GDS-SU08 to have an average of 93.5 ppm, and the resulting pre-plant soil sampling showed an average of 81 ppm. *Id.* In violation of the Consent Decree, DeRuyter applied 1,507,236 gallons of manure to field GDS-SU08 in 2016. *Id.* Thus, DeRuyter violated ¶ 39(a) of the Consent Decree.

18. The Consent Decree prohibited DeRuyter from applying manure to

[3] Fields 1, 2, 10, 11, 12, 13, and 14 are subject to ¶ 38 nutrient thresholds. Fields 3, 4, 5, 6, 7, 8, and 9 are subject to ¶ 39 nutrient thresholds. Tebbutt Decl. Ex. 11.

fields in 2017 that exhibited a 2016 post-harvest average of greater than 45 ppm nitrate plus ammonium in the top two feet of soil until subsequent testing showed otherwise. ECF No. 169 at ¶ 39(b). Again, Fields GDS-SU04 and GDS-SU08 exceeded the 45-ppm threshold for 2016 post-harvest sampling, 80.2 ppm and 76.1 ppm, respectively, and the resulting 2017 pre-plant sampling, 50.8 ppm and 46.4 ppm, respectively. Table 1. Again, in violation of the Consent Decree, DeRuyter applied 2,676,707 gallons of manure to Field GDS-SU04 and 829,683 gallons of manure to Field GDS-SU08 in 2017. *Id.* Additionally, in 2017, DeRuyter applied 227,000 gallons of manure to Field GDS-SU05, which exhibited a 2016 post-harvest average of 89.5 ppm, and 3,962,603 gallons of manure to Field GDS-SU07, which exhibited a 2016 post-harvest average of 64.2 ppm, *id,* thus, violating ¶ 39(b) of the Consent Decree. ECF No. 169 at ¶ 39(b).

19. The Consent Decree prohibited DeRuyter from applying manure to certain fields in 2018 that exhibited a 2017 post-harvest average of greater than 40 ppm nitrate plus ammonium in the top two feet of soil until subsequent testing showed otherwise. ECF No. 169 at ¶ 39(c). For 2017 post-harvest sampling results, Field GDS-SU05 had an average of 47.4 ppm, and Field GDS-SU08 had an average of 63.1 ppm. Tebbutt Decl. Table 1. In March of 2018, before taking pre-planting soil samples, DeRuyter applied 627,380 gallons of manure to Field GDS-

SU05.[4] *Id.* Further, the 2018 Annual Report shows that DeRuyter applied 152,000 gallons to Field GDS-SU08 when the soil had not exhibited levels below 40 ppm. Thus, DeRuyter violated ¶ 39(c) of the Consent Decree. ECF No. 169 at ¶ 39(c).

20. Again, in 2019, DeRuyter violated the manure application terms of ¶ 39(d) of the Consent Decree. The 2018 post-harvest soil sampling reports show Fields GDS-SU06, GDS-SU07, and GDS-SU08 all exceeding the 40-ppm nitrate threshold. However, according to application records DeRuyter submitted to EPA, DeRuyter, at a minimum, applied 6,327,000 gallons of manure wastewater to Field GDS-SU08 and 848,750 gallons of manure wastewater to Fields GDS-SU06 and GDS-SU07 in the spring of 2019. Tebbutt Decl. Ex. 24.

Table 1:

[4] As explained *supra*, DeRuyter has provided Plaintiffs with manure application records for 2018 that drastically differ from those provided to the State of Washington Department of Ecology. Plaintiffs are using the 2018 manure application volumes provided to the Department of Ecology.

George DeRuyter & Sons Application Field Soil Sampling Results:										
Average Nitrate + plus Ammonium (ppm) in the top two feet of the soil column w/ Liquid Manure Applications (gallons)										
Application Field	2015 PH	2016 App.	2016 PP	2016 PH	2017 App.	2017 PP	2017 PH	2018 App.	2018 PP	2018 PH
GDS-SU01	18.9	121,500	18	10.1	804,000	21.2	8.5	462,000	14	13.1
GDS-SU02	19.5	2,308,500	16.7	12.9	3,091,000	16.6	11.5	1,966,500	13	9.2
GDS-SU03	42	567,000	11.6	6.2	0	18.8	5.5	0	10.4	9.3
GDS-SU04	86.5	9,000	58.1	80.2	2,676,707	50.8	30.2	1,533,507	21.5	27.4
GDS-SU05	188.5	0	88.7	89.5	227,000	25	47.4	627,380	28.6	35.5
GDS-SU06	48.9	1,384,866	13.4	43.8	3,962,603	20	26.9	806,613	14.2	66.7
GDS-SU07	12.5	1,384,866	7	64.2	3,962,603	33.5	29.3	806,613	28.9	55.3
GDS-SU08	93.5	1,507,236	81	76.1	829,683	46.4	63.1	152,000	44.9	59
GDS-SU09	26.9	0	13.4	25.6	123,500	61.5	14.8	616,300	12.9	9.7
GDS-SU010	9.1	574,256	7.9	12.1	85,500	19.2	9.1	1,053,500	12.2	34.7
GDS-SU011	11.3	76,500	31.6	15.5	290,000	19.1	15.6	290,000	14	11
GDS-SU012	8.7	2,632,500	11.8	11.8	1,611,337	16.7	8.7	801,973	17.9	10.2
GDS-SU013	9.5	0	23	12.4	1,273,946	29.5	11.7	986,733	16	9.4
GDS-SU014	10.1	1,624,500	26.1	7.8	4,693,500	16.6	10.7	3,321,000	14.1	8
CD Thresholds										
¶ 38	40 ppm		35 ppm			30 ppm			25 ppm	
¶ 39	45 ppm		45 ppm			40 ppm			40 ppm	

21. DeRuyter has also violated the Consent Decree's requirement to always apply at agronomic rates and consistent with an application field's nutrient budget. ECF No. 169 at ¶ 37. Thus, DeRuyter continues to endanger public health and the environment by discarding its manure and wastewater on application fields that have been previously identified as one of the largest sources of nitrate contamination in the underlying aquifer. In the 2018 Annual Report submitted to the EPA as part of its AOC, DeRuyter certified that manure applications for nitrate were not within the acceptable recommendation range for fields GDS-SU02, GDS-SU-04, GDS-SU011, and GDS-SU014. Tebbutt Decl. Ex. 17 at p. 42. Therefore, not only is DeRuyter violating the main provisions of the Consent Decree, DeRuyter is also violating its Dairy Nutrient Management Plans and the Resource Conservation and Recovery Act, compliance with which was required by the Decree. ECF No. 169 at ¶ 12.

Phosphorus Restrictions

22. Consent Decree ¶¶ 38 & 39 prohibited DeRuyter from applying manure to fields that exhibit more than 40 ppm phosphorus in the top foot of soil for the year 2016-2017, unless, based on a nutrient budget, the application "seeks to reduce phosphorus application to less than 66.66 percent of crop removal." ECF No. 169 at ¶¶ 38-39. DeRuyter has violated these restrictions numerous times in the past years. A summary is provided below as **Table 2**:

George DeRuyter & Sons Application Field Soil Sampling Results:										
Phosphorous (ppm) in top foot of soil w/ Liquid Manure Applications (gallons)										
Application Field	2015 PH	2016 App.	2016 PP	2016 PH	2017 App.	2017 PP	2017 PH	2018 App.	2018 PP	2018 PH
GDS-SU01A	141	121,500	137	147	804,000	176	114	462,000	131	91
GDS-SU02A	112	2,308,500	168	220	3,091,000	173	151	1,966,500	131	104
GDS-SU03A	113	567,000	132	168	0	172	111	0	115	92
GDS-SU04A	294	9,000	262	398	2,676,707	325	262	1,533,507	294	355
GDS-SU05A	352	0	369	233	227,000	441	324	627,380	340	339
GDS-SU06A	132	1,384,866	143	151	3,962,603	192	112	806,613	124	110
GDS-SU07A	75	1,384,866	58	70	3,962,603	65	59	806,613	76	66
GDS-SU08A	223	1,507,236	249	144	829,683	225	227	152,000	259	162
GDS-SU09A	142	0	139	134	123,500	154	163	616,300	127	77
GDS-SU010A	37	574,256	45	41	85,500	44	23	1,053,500	45	30
GDS-SU011A	135	76,500	165	147	290,000	192	162	290,000	151	150
GDS-SU012A	101	2,632,500	99	125	1,611,337	120	156	801,973	86	70
GDS-SU013A	125	0	203	155	1,273,946	142	94	986,733	57	128
GDS-SU014A	88	1,624,500	129	103	4,693,500	107	112	3,321,000	75	102
A=0-12" Sample										
CD Application Threshold = 40 ppm in top foot; PP=Pre-Plant Sample; PH=Post-Harvest Sample										

23. For 2016, DeRuyter violated the phosphorus application restrictions on the following fields:

a. Field GDS-SU01 exhibited a 2016 pre-plant level of 137 ppm phosphorus. DeRuyter applied 121,500 gallons of manure to this field in 2016. The resulting 2016 post-harvest samples showed 147 ppm phosphorus. (Table 2).

b. Field GDS-SU02 exhibited a 2016 pre-plant level of 168 ppm phosphorus. DeRuyter applied 2,308,500 gallons of manure to this field in 2016. The resulting 2016 post-harvest samples showed 220 ppm phosphorus. *Id.*

c. Field GDS-SU04 exhibited a 2016 pre-plant level of 262 ppm phosphorus. DeRuyter reported applying 9,000 gallons of manure to this field in 2016. However, the resulting 2016 post-harvest samples showed a remarkable increase to 398 ppm.[5]

d. Field GDS-SU06 exhibited a 2016 pre-plant level of 143 ppm phosphorus. DeRuyter applied 1,384,866 gallons of manure to this field in 2016. The resulting 2016 post-harvest soil samples showed an increase to 151 ppm phosphorus.

24. Again in 2017, DeRuyter applied manure to multiple fields in violation of the Consent Decree. In the case of Field GDS-SU014, as much as 4,693,500 gallons were applied to a field with phosphorus levels beyond the 40

[5] Discovery may be necessary to discern the veracity of the application records, including the inconsistencies between reports to Plaintiffs and Ecology. Regardless of which record is used, however, the results still show DeRuyter in violation of the Decree.

ppm threshold, causing the following year's post-harvest phosphorus levels to increase. (See Table 2). Additionally, 2017 AgriManagment nutrient documents provided to Plaintiffs show direct evidence of DeRuyter exceeding recommended applications and violating the Consent Decree for Fields SU01, SU02, SU07, SU08, SU012, SU13, and SU014. Tebbutt Decl. Ex. 16. Thus, DeRuyter violated the Consent Decree's manure application restrictions of ¶¶ 38-39 in 2016 and 2017.

25. The Consent Decree also provides the same restrictions on applications to fields exhibiting phosphorus levels beyond 40 ppm for the 2018 year. Again, DeRuyter violated the terms of ¶ 38-39 for 2018 by applying manure to fields in volumes that were well beyond the recommendations seeking to reduce phosphorus levels. Disturbingly, the 2018 pre-plant soil sampling results showed *all* of DeRuyter's fields were beyond the 40-ppm threshold, and 12 of the 14 show phosphorus levels at least twice the 40-ppm threshold. (Table 2). Nevertheless, DeRuyter continued to apply manure above the recommended rates for phosphorus contained in the 2018 nutrient budget. Tebbutt Decl. Ex. 16. For example:

a. Field GDS-SU01 showed a 2018 pre-plant phosphorus level of 131 ppm. The 2018 nutrient budget recommended applying a total of 74,760 gallons of liquid manure. DeRuyter applied 462,000 gallons of liquid manure to Field GDS-SU01 in 2018.

b. Field GDS-SU02 showed a 2018 pre-plant phosphorus level of 131 ppm. The 2018 nutrient budget recommended applying a total of 416,220 gallons of liquid manure. DeRuyter applied 1,966,500 gallons of liquid manure to this field in 2018.

c. Field GDS-SU04 showed a 2018 pre-plant phosphorus level of 294 ppm. The 2018 nutrient budget recommended applying a total of 678,000 gallons of liquid manure. DeRuyter applied 1,533,507 gallons of liquid manure to this field in 2018.

Thus, DeRuyter violated its own agronomist's recommendations as well as the manure application restrictions for phosphorus clearly defined in ¶¶ 38-39 of the Consent Decree, continuing to endanger public health and the environment in the surrounding community.

26. *Incorrect Records.* Notwithstanding the fact that Paragraph 44 of the Consent Decree requires DeRuyter to "make available to Plaintiffs copies of all manure management documents created by the Dairy Facility," ECF No. 169 at ¶ 44, DeRuyter provided Plaintiffs with false and misleading manure application records for, at a minimum, the 2018 season. For example, the manure application records DeRuyter provided Plaintiffs show no manure applications in 2018 for fields GDS-SU06, GDS-SU07, and GDS-SU08. Tebbutt Decl. Ex. 20. Attempting

to resolve this matter, Plaintiffs sought clarification in their Notice of Violation dated January 11, 2019:

> The manure application records indicate that GDS did not apply any manure to fields SU06, SU07, and SU08 during 2018. Despite no record of application, the average nitrate level from the top two feet of soil for those fields increased from 2018 pre-plant levels by a range of 33% to 401%...GDS must provide Plaintiffs with complete and accurate records for 2018.

Tebbutt Decl. Ex. 13. In response, DeRuyter replied:

> [W]hile SU06 and SU07 did observe an increase in residual nitrogen in the fall of 2018, it is difficult to define this increase at this point in time. According to records, there was no application within 2018.

Tebbutt Decl. Ex. 18. However, according to DeRuyter's very own signed 2018 Annual Report submitted to the State of Washington Department of Ecology, DeRuyter applied over 800,000 gallons of liquid manure to field GDS-SU06 and SU07. Tebbutt Decl. Ex. 19. In fact, for 13 of the 14 fields, DeRuyter misrepresented the 2018 manure applications in the records DeRuyter provided to Plaintiffs. *See* Tebbutt Decl. Exs. 19, 20, 21, and 23. In total, the 2018 Annual Report shows that DeRuyter applied 13,424,119 gallons of liquid manure to its fields when records provided to Plaintiffs show less than half of that manure application total – 5,757,387 gallons. *Id.* This is a violation of the Consent Decree ¶ 44 and suggests that DeRuyter is, at best, grossly negligent in its dairying

operations and, at worst, deliberately manipulating and falsifying material documents and records.

UPDATED NUTRIENT MANAGEMENT PLAN
(ECF No. 169 at ¶ 13)

27. DeRuyter is operating without an updated Nutrient Management Plan ("NMP"). Pursuant to ¶ 13 of the Consent Decree, "Defendants shall update their NMP to reflect the requirements set forth herein within 45 days of the Consent Decree and provide a copy to Plaintiffs for review and comment." ECF No. 169 at ¶ 13. DeRuyter failed to produce its updated NMP within the 45-day limit established by the Consent Decree. Plaintiffs notified DeRuyter of its obligation through email on July 3, 2015 and requested that DeRuyter produce the updated NMP by the following Monday to avoid violating the Consent Decree. Tebbutt Decl. Ex. 25. In response, DeRuyter offered nothing substantive, but instead admitted it did not "properly account for the amount of time the process might take," and insisted it was "now appropriately focused on the gravity of future deadlines." Tebbutt Decl. Ex. 25.

28. One month after expiration of the 45-day time period, DeRuyter sent Plaintiffs an NMP, but, as highlighted by Plaintiffs' comment letter in response, dated August 18, 2015, this NMP was woefully inadequate and in violation of the Consent Decree for multiple reasons. Tebbutt Decl. Ex. 26. First, DeRuyter's

"updated" NMP did not include the actual body of the NMP containing the substantial and material information describing the Dairy's operations, only appendices. *Id.* Second, the NMP did not reflect the requirements set forth in the Consent Decree, ¶ 13, such as application requirements, lagoon lining, and nutrient and soil testing. Finally, the NMP was not provided to Plaintiffs for review and comment before recertification as required by the Consent Decree, ¶ 13. *Id.* In the August 18, 2015 letter, Plaintiffs requested that DeRuyter provide an updated NMP reflecting the requirements of, and complying with, the Consent Decree within 21 days of the letter. *Id.*

29. DeRuyter failed to offer any response within the requested 21-day period. Therefore, Plaintiffs again contacted DeRuyter via email and requested a response and/or the revised NMP. *Id*. However, rather than providing a revised NMP or responding to Plaintiffs' concerns, DeRuyter refused to redraft the NMP and instead attempted to shift the burden to the Southern Yakima Conservation District ("SYCD"), an entity neither a party to nor responsible for the Consent Decree. *Id.* In response, Plaintiffs again stated their position that DeRuyter failed to comply with the terms of the Consent Decree and explained that it was, in fact, DeRuyter who is responsible for accurately reflecting the terms of the Consent Decree in the NMP, not the SCYD. Tebbutt Decl. Ex. 27.

30. Plaintiffs served notice upon DeRuyter that they were invoking the

Dispute Resolution clause of ¶ 55 of the Consent Decree on October 29, 2015 after the Parties were unable to informally resolve this dispute. *Id*. DeRuyter again failed to respond. Therefore, on November 11, 2015, Plaintiffs sent DeRuyter another letter highlighting the deficiencies of the August 3, 2015 NMP and reminding DeRuyter that it had failed to respond to the October 29, 2015 Dispute Resolution notification. *Id*. Finally, on November 25, 2015, DeRuyter responded and notified Plaintiffs that it would indeed revise its NMP to reflect the terms of the Consent Decree. Tebbutt Decl. Ex. 28.

31. Plaintiffs again sent DeRuyter an email on February 2, 2016 requesting a firm date for completion of the revised NMP. *Id.* Despite the Consent Decree clearly and explicitly stating the revised NMP was due within 45-days of entry, which, at this point, was seven months past due, DeRuyter sent Plaintiffs a response letter on February 12, 2016 offering to deliver the NMP update within 15 business days of a lagoon plan approval, a timeline never contemplated or mentioned in the Consent Decree. Tebbutt Decl. Ex. 29. DeRuyter then sent another letter on June 2, 2016 proposing October 1, 2016 as the "new" deadline for the updated NMP. Tebbutt Decl. Ex. 30.

32. DeRuyter failed to meet the proposed October 1, 2016 deadline. Therefore, Plaintiffs sent DeRuyter a letter on January 12, 2017, which once again invoked the Dispute Resolution clause of ¶ 55 of the Consent Decree. Tebbutt

Decl. Ex. 13. Despite some communications and promises for "fast-tracking" the NMPs, *see e.g.,* Tebbutt Decl. Ex. 31, DeRuyter again failed to actually provide a revised NMP.

33. On January 11, 2019, two years after the last Notice of Violation invoking ¶ 55 of the Consent Decree, with no resolution or revised NMP from DeRuyter, Plaintiffs sent their most recent Notice of Violation invoking ¶ 55. Tebbutt Decl. Ex. 9. As of December 2, 2019, in fact over four years after the Court's entry of the Consent Decree, DeRuyter is still operating without an updated NMP in violation of the terms of ¶ 13 of the Consent Decree.

COMPOST AREA
(ECF No. 169 at ¶¶ 33-35)

34. DeRuyter failed to re-grade and compact its existing compost area consistent with the terms of ¶ 34 of the Consent Decree. ECF No. 169 at ¶ 34. That provision required DeRuyter to re-grade and compact its compost area in one-third increments of the area annually, starting in the year 2016. Plaintiffs' counsel and expert first conducted a site inspection of DeRuyter's compost areas on April 20, 2017 to resolve the compost area deficiencies outlined in the January 11, 2017 Notice of Violation letter. However, after being unable to informally resolve the outstanding matters identified during the site inspection, Plaintiffs notified DeRuyter of the ongoing compost area violations of the Consent Decree in 2016

and invoked the dispute resolution clause of ¶ 55 on December 5, 2017. Tebbutt Decl. Ex. 33.

35. In response, DeRuyter sent Plaintiffs a letter on December 20, 2017 not only confirming that DeRuyter failed to complete any compost activities in 2016 consistent with the Consent Decree, but also DeRuyter would not fulfill the 2017 compost area requirements of the Consent Decree. *Id*. Thus, DeRuyter violated ¶ 34 of the Consent Decree by not grading or compacting any of the compost area in 2016 and 2017. *See* Tebbutt Decl. Ex. 13.

36. In fact, Plaintiffs' expert, Dave Erickson, made multiple attempts to work with DeRuyter in an attempt to complete the grading and compaction needs the compost area by the end of 2017. However, DeRuyter intentionally avoided the communications and delayed the compost area work even further. Erickson Decl. Ex. 2. Compaction testing did not even occur until September 24, 2018. Tebbutt Decl. Ex. 35. In an email on September 25, 2018, DeRuyter claimed that the compost terms would be complete by the end of 2018. Tebbutt Decl. Ex. 32. As that date passed as well, Plaintiffs were again forced to invoke the dispute resolution clause in the 2019 Notice of Violation letter. Tebbutt Decl. Ex. 13.

37. Further, between 2016 and 2018, DeRuyter unilaterally modified its composting operations and moved compost rows to a new location that, to Plaintiffs' knowledge, consists of bare earth that had not been graded or

compacted. Erickson Decl. Ex. 6. Recent investigations into an increase of over 40 ppm nitrate in groundwater monitoring well YVD-02, previously below 1 ppm nitrate except for one anomalous result, resulted in finding aerial imagery showing the significant area of land near Fields GDS-SU02 and GDS-SU03 with rows of compost, which has been subsequently spread into the soil. *Id.* The compost field and applications likely caused further groundwater contamination. Erickson Decl. ¶ 14.

38. DeRuyter also violated Paragraph ¶ 33 of the Consent Decree, which required DeRuyter to "remove all compost from the current location at D & A facility by December 31, 2017." ECF No. 169 at ¶ 33. In fact, as recently as February 7, 2019, DeRuyter was still storing compost at the D & A facility. Jones Decl. Ex. 5.

UNDERGROUND CONVEYANCE INSPECTION
(ECF No. 169 at ¶ 28)

39. DeRuyter has failed to inspect its underground conveyances. Under the terms of ¶ 28 of the Consent Decree, DeRuyter was required to inspect all underground conveyance systems, pressure test transmission lines, document the underground structures, and provide the results of the inspections to Plaintiffs within five days of completion. ECF No. 169 at ¶ 28. The Parties attempted to resolve the issue through informal correspondence, and DeRuyter provided a letter

to Plaintiffs on February 12, 2016, informing them that the Underground Conveyance Inspection would take place between February 29, 2016 and May 31, 2016. Tebbutt Decl. Ex. 29.

40. DeRuyter failed to provide Plaintiffs with any documentation of the Underground Conveyance Inspection or resolve the dispute by December 31, 2016. Therefore, in compliance with the Consent Decree, Plaintiffs invoked ¶ 55 on January 12, 2017. Tebbutt Decl. Ex. 13.

41. Plaintiffs notified DeRuyter again on January 9, 2018 that they still had not received any documentation of the Underground Conveyance Inspection or any confirmation that it was completed. Tebbutt Decl. Ex. 33. DeRuyter failed to respond or provide any of the documentation required by the Consent Decree. Therefore, Plaintiffs again invoked ¶ 55 of the Consent Decree on January 11, 2019, but received no substantive response proving DeRuyter's compliance with this requirement of the Consent Decree. Tebbutt Decl. Ex. 13.

42. DeRuyter continues to violate the Underground Conveyance Inspection terms of the Consent Decree and has yet to make any effort to complete the required Underground Conveyance Inspection.

DISSOLVED AIR FLOTATION SYSTEM ("DAF")
(ECF No. 169 at ¶¶ 26- 27)

43. DeRuyter failed to timely and fully provide Plaintiffs with the nutrient data from the DAF consistent with the terms of the Consent Decree. Under ¶ 27 of the Consent Decree, DeRuyter was obligated to provide Plaintiffs with nutrient data within 90 days of entry of the Consent Decree and as part of the annual information to be provided to Plaintiffs. On November 11, 2015, Plaintiffs notified DeRuyter that the DAF documents were almost three months past due and requested the documents by November 16, 2015. Tebbutt Decl. Ex. 27. DeRuyter responded with a letter on November 25, 2015 acknowledging its failure to timely supply the documents and providing a statement concerning nutrient removal. Tebbutt Decl. Ex. 28. DeRuyter did not provide any supporting documents or data to support or verify the statements for 2015. *Id.*

44. After the Parties exchanged correspondence and reached an agreement, DeRuyter sent a letter on June 2, 2016 stating that it would collect and document upstream and downstream results annually in March and September and provide them to Plaintiffs. Tebbutt Decl. Ex. 30. DeRuyter failed to timely provide Plaintiffs with the 2016 DAF results and failed to provide Plaintiffs with any DAF results from 2017. *See* Tebbutt Decl. Ex. 13.

OVERSIGHT OF CONSENT DECREE IMPLEMENTATION (ECF No. 169 at ¶14).

45. DeRuyter has continually failed to simultaneously provide Plaintiffs with reports and information consistent with ¶ 14 of the Consent Decree. Plaintiffs first brought this issue to the attention of DeRuyter via email on July 3, 2015. Tebbutt Decl. Ex. 25. Although DeRuyter provided a response stating that going forward everything needs to be "open and transparent", *id.*, DeRuyter failed in this respect by not providing reports simultaneously and continuing to violate ¶ 14. As a result, on November 11, 2015, Plaintiffs sent DeRuyter a letter reminding DeRuyter that compliance with ¶ 14 often entails only the simple task of copying Plaintiffs' designated recipient on emails and further stating that the failure to do so inevitably leads Plaintiffs to question what is going on. Tebbutt Decl. Ex. 27.

46. In response, DeRuyter sent Plaintiffs a letter on February 12, 2016 claiming this issue of not simultaneously providing information and reports had been "cured." Tebbutt Decl. Ex. 29. However, Plaintiffs continued to receive reports and information late and, in some cases, not all. Therefore, over one year later, Plaintiffs again sent DeRuyter a letter on January 12, 2017, but this time providing a Notice of Violation and invoking the Dispute Resolution process of ¶ 55 over DeRuyter continued violations of ¶ 14. Tebbutt Decl. Ex. 13. In the January 12, 2017 letter, Plaintiffs expressed concerns over DeRuyter's continued insistence on not providing the required reports and information, including, but not

limited to, progress reports from January, March, and April of 2016 as well as laboratory results of groundwater sampling events from 2016. *Id.*

47. Regardless of Plaintiffs' continued efforts to simply receive reports and information simultaneously, as required by ¶ 14 of the Consent Decree, DeRuyter still continues to violate the Court's Order. For example, as recently as June 21, 2018, DeRuyter sent its requests to modify and delay its lagoon lining schedule to the EPA. Tebbutt Decl. Ex. 6. However, DeRuyter failed to simultaneously provide this critical component of Consent Decree compliance to Plaintiffs until June 27, 2018. *Id.* Even more recently, on January 10, 2019, Plaintiffs notified DeRuyter and the EPA that Plaintiffs failed to receive DeRuyter's Request for Extension for the nitrogen/denitrification ("NDN") system and lagoon lining schedule until 10 days after the EPA received it. Tebbutt Decl. Ex. 10. In sum, DeRuyter has been violating the requirements of simultaneous communication described in Consent Decree ¶ 14 for almost four years.

Ongoing Dispute Resolution

48. As previously discussed, the Parties have been unable to resolve these matters in a timely and informal manner. Plaintiffs have invoked the dispute resolution clause of ¶ 55 of the Consent Decree on at least four occasions. Tebbutt Decl. Exs. 13, 27, 33. Plaintiffs and their expert, Dave Erickson, have visited the site with Dan DeRuyter and his counsel on multiple occasions. Tebbutt Decl. ¶¶

25-30. Each time, new and disturbing activities have either been observed, or DeRuyter has lied to or misled Plaintiffs' representatives. *Id.*; *see also* Erickson Decl. ¶¶ 5-11. While some matters have been resolved, DeRuyter has failed to correct its overall non-compliance with the Consent Decree. Consequently, CARE and CFS respectfully ask this Court to compel DeRuyter's compliance with the Consent Decree and impose other relief requested below.

CONCLUSION

CARE and CFS respectfully request that DeRuyter be ordered to show cause why Defendants should not be ordered to comply with the Consent Decree and be held in contempt for violating the unambiguous requirements embodied in the Consent Decree. Additionally, CARE and CFS request that the Court enjoin DeRuyter's dairy and milking operations until DeRuyter demonstrates strict compliance with the terms of the Consent Decree, *especially* for lagoon lining. CARE and CFS further request that DeRuyter be ordered to disgorge the economic benefits it has achieved through Consent Decree non-compliance and pay CARE and CFS's attorneys' and experts' fees and costs related to CARE's efforts to achieve compliance with the Consent Decree, including its time spent on negotiations prior to, and as part of, the filing of this Motion, and to require such other equitable relief necessary to ensure compliance with the Consent Decree.

Respectfully submitted this 2nd Day of December, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2019, I presented the foregoing document to the Clerk of the Court for filing and uploading to the CM/ECF system which will send notification of such filing to the following:

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