

Law Offices of Charles M. Tebbutt, P.C.
941 Lawrence Street
Eugene, OR 97401
Ph: 541-344-3505 | Fax: 541-344-3516

March 3, 2020

**THIS IS AN URGENT LEGAL MATTER REQUIRING YOUR
IMMEDIATE ATTENTION**

Via Registered Mail, Return Receipt Requested:

Site Manager
William DeRuyter
Mary Lisa DeRuyter
dba View Point Dairy
1400 Lewandowski Rd.
Sunnyside, WA 98944

William DeRuyter
Mary Lisa DeRuyter
Owners of Yakima County Parcel Numbers 23100441002, 23100921002, 23100912001,
23100911002, & 23100911001

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, William DeRuyter, and Mary Lisa DeRuyter:

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), Community Association for Restoration of the Environment, Inc. (“CARE”), a Washington non-profit corporation, Friends of Toppenish Creek, a Washington non-profit corporation, and Center for Food Safety, a Washington, D.C. non-profit corporation (collectively referred to hereinafter as the “Notifying Parties”), hereby notify¹ you that on or after the 90th day from the date of your receipt of this notice, Notifying Parties intend to initiate a citizen suit in Washington Federal District Court against William DeRuyter and Mary Lisa DeRuyter, d/b/a View Point Dairy, concerning the operations of the dairy concentrated animal feeding operation located at or near 1400 Lewandowski Rd., Sunnyside, WA 98944 (hereinafter collectively referred to as “View Point Dairy” or the “Dairy”).

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

The lawsuit will allege that View Point Dairy 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 View Point Dairy is operating an “open dump” in violation of the prohibitions of RCRA.

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

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

Additionally, Notifying Parties will allege that William DeRuyter and Mary Lisa DeRuyter are past and present owners and/or operators of treatment, storage, and/or disposal facilities, and have contributed and are contributing to the handling, storage, treatment, transportation, and disposal of liquid and solid manure. In particular, the DeRuyters are owners of record of real property upon which the dairy facility is located, as well as owners of record of real property upon which manure is applied. Upon information and belief, this real property is identified as Yakima County Parcel Numbers 23100441002, 23100921002, 23100912001, 23100911002, and 23100911001. The DeRuyters are also the operators of the View Point Dairy facility, exercising control over manure management and storage decisions, including when, where, and how much manure is stored and applied. As explained in detail below, the DeRuyters’ manure management and storage practices may, and do, cause an imminent and substantial endangerment to health and the environment.

In particular, View Point Dairy, including the DeRuyters individually, as well as their collective 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 violate View Point Dairy’s Nutrient Management Plan (“NMP”). Applications of manure beyond which the current crop can effectively utilize as fertilizer cause nitrates, phosphorus, and other manure pollutants such as coliform bacteria to leach through soil and into groundwater. Once these nitrates, phosphorus, and other manure pollutants enter the local water table, they migrate away from View Point Dairy and into groundwater and, consequently, the wells of nearby and downgradient residents. Upon information and belief, the DeRuyters, as owners and operators of View Point Dairy, and as owners of record of the real property parcels identified *supra*, exercise control over when, where, and how much manure is applied to View Point Dairy’s application fields.

Soil tests submitted to the Washington State Department of Agriculture have documented elevated nitrate and phosphorus levels in soils receiving manure generated at View Point Dairy, strong evidence that View Point Dairy has applied manure in excess of agronomic rates or crop needs, in violation of the requirements of its NMP. The table below represents residual post-harvest nitrate levels, in parts per million or “ppm,” in fields receiving View Point Dairy’s manure:

//
//
//
//
//

Field Name	2018	2017	2016	2015	2014	2013	2012
1 – East	71.14 ppm	No Test	47 ppm	90 ppm	No Test	107 ppm	No Test
2 – Center	68.2 ppm	No Test	68 ppm	132 ppm	No Test	102 ppm	No Test
3 – West	65.4 ppm	No Test	60 ppm	153 ppm	No Test	82 ppm	No Test
Dairy – North	47 ppm	73 ppm	37 ppm	87 ppm	16 ppm	No Test	15 ppm
Dairy – SE	62 ppm	75 ppm	56 ppm	109 ppm	19 ppm	No Test	11 ppm
Dairy – SW	42 ppm	59 ppm	48 ppm	94 ppm	13 ppm	No Test	9 ppm

These records demonstrate that View Point Dairy has grossly elevated nitrate levels in fields to which the Dairy applies manure, a clear indication that the Dairy has applied manure in quantities far greater than the crop can effectively utilize as fertilizer. Additionally, the lack of soil tests for many years demonstrates that the Dairy was violating its NMP and failing to acquire the information necessary to calculate agronomic rates of manure application. Furthermore, the DeRuyters are owners of record of real property upon which manure is applied and, as owners and operators of the dairy facility itself, know or should know that excessive levels of nitrate are being applied and have been allowed to accumulate in the soils on their property.

Records from 2011 also show the Dairy’s over-application of manure has been a consistent theme for years. One field, identified as “DL1,” was recorded as having 596 lbs./ac nitrate – a figure that far exceeds any type of agronomic manure application. Records from 2009 confirm this theme, stating that “All fields are moving upward with nitrogen levels. The current double cropping is not enough. More of the liquid needs to move off-site or to neighboring cropland. Phosphorus levels remain steady but elevated.”

Public records obtained from the Washington Department of Agriculture also show that View Point Dairy has excessive levels of phosphorus in its application fields. The table below represents phosphorus data, expressed in parts per million or “ppm,” as reflected in public records:

//
//
//
//
//
//
//
//
//

Field Name	2018	2017	2016	2015	2014	2013	2012
1 – East	268 ppm	No Test	329 ppm	122 ppm	No Test	118 ppm	No Test
2 – Center	266 ppm	No Test	226 ppm	135 ppm	No Test	232 ppm	No Test
3 – West	186 ppm	No Test	225 ppm	183 ppm	No Test	116 ppm	No Test
Dairy – North	129 ppm	No Test	149 ppm	198 ppm	173 ppm	No Test	236 ppm
Dairy – SE	179 ppm	No Test	202 ppm	188 ppm	261 ppm	No Test	192 ppm
Dairy – SW	134 ppm	No Test	152 ppm	237 ppm	162 ppm	No Test	188 ppm

These records demonstrate that View Point Dairy has grossly elevated phosphorus levels in fields to which the Dairy applies manure, a clear indication that the Dairy has applied manure in quantities far greater than the crop can effectively utilize as fertilizer. Additionally, the lack of soil tests for many years demonstrates that the Dairy was violating its NMP and failing to acquire the information necessary to calculate agronomic rates of manure application. Furthermore, the DeRuyters are owners of record of real property upon which manure is applied and, as owners and operators of the dairy facility itself, know or should know that excessive levels of phosphorus are being applied and have been allowed to accumulate in the soils on their property. This is especially true because View Point Dairy has been on notice since at least 2009 that all of its fields had excessive phosphorus levels, per public records obtained from the Department of Agriculture.

Notifying Parties will also allege that View Point Dairy has failed to consistently take and use sufficient soil samples (including spring and fall post-harvest samples where double-cropping, and second-foot samples), sampled soils at incorrect times, failed to take and use sufficient manure samples, applied manure at times when the crop is unlikely to use the manure nutrients as fertilizer, applied manure to fields which needed no additional fertilizer, and failed to create and maintain adequate soil sampling, manure application, irrigation, and exportation records, all in violation of View Point Dairy's NMP. These violations demonstrate that View Point Dairy was not applying manure to its fields to fertilize crops, but rather to dispose of and discard it, in violation of RCRA.

As described above, when manure is applied in quantities greater than the crop can effectively utilize as fertilizer (and hence discarded), excess nitrate and other manure pollutants leach downward deeper into the soil with subsequent applications, precipitation, and irrigation. These nitrates and other manure pollutants move past the root zone of the crop, where they are lost to the environment and unable to be used as fertilizer. Excess nitrates continue to migrate through the soil until they reach groundwater.

Beyond excessive manure applications in violation or disregard of View Point Dairy's NMP, View Point Dairy's storage of solid and/or liquid manure in unlined and inadequately maintained lagoons and pits has also caused, and is continuing to cause, the discharge, leaking, and discarding of manure and its constituents into groundwater. Upon information and belief, and based upon public records, Notifying Parties will allege in the lawsuit that the lagoons at View Point Dairy were designed and built such that they have a seepage rate that allows manure to leak out of the lagoons and into groundwater. Upon information and belief, the lagoons at View Point Dairy were not designed or built in accordance with NRCS 313 guidelines, and even if they were, those guidelines are designed such that seepage of manure into groundwater occurs at rates and in quantities that are dangerous to human health and the environment. Furthermore, Notifying Parties will allege that View Point Dairy's lagoons are not properly operated or maintained in such a manner that would reduce the amount of seepage through the lagoons and into groundwater. For instance, public records from the Department of Agriculture show that the lagoons at View Point Dairy have had numerous problems with erosion, solids build-up, animal holes, and maintaining adequate freeboard levels.

The lawsuit will also allege that the DeRuyters, as owners of record of real property upon which the dairy and its manure storage facilities are located, and as operators of the dairy itself, know or should know that the lagoons at View Point Dairy are improperly maintained and are operated in a manner that allows for the discharge, leaking, and discarding of manure and its constituents into groundwater. The lawsuit will also allege that the DeRuyters exercise control over when, where, and how manure is stored at View Point Dairy. 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 under View Point Dairy's ownership and the DeRuyters' control.

In addition to leaky lagoons and excessive manure applications, View Point Dairy also discards manure and manure nutrients by storing and composting manure on unlined surfaces and soils, which allows nutrients to leach into the soil 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 View Point Dairy 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 soil and groundwater, where they, too, cannot be used as fertilizer. The DeRuyters, as operators of View Point Dairy and as owners of record of real property upon which the dairy facility is located, exercise control over when, where, and how manure is composted at View Point Dairy. No crops are grown in the pens, and there is no evidence that View Point Dairy removes accumulated manure for land application.

Finally, View Point Dairy'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 the practices identified above, and possibly others, are responsible for causing or contributing to groundwater contamination

at levels near and beyond the Maximum Contaminant Level (“MCL”) for specific chemicals. The MCLs are health-based standards that specify contaminants known to have an adverse effect on human health at levels beyond the parameters set forth by regulations. Upon information and belief, local drinking water wells in the vicinity of View Point Dairy have tested above the MCL for nitrate (10 mg/L). Nearby residents report that their wells have also tested in excess of 10 mg/L nitrate. In addition, other well results in the area show elevated levels of nitrate that indicate human-caused influences. Besides nitrate, other “tracer” chemicals associated with cow manure are also present in the groundwater, such as potassium, magnesium, calcium, sodium, chloride, sulfate, barium, zinc, and industry-standard bovine pharmaceuticals and hormones. Minor trace and inorganic elements may include arsenic, barium, bromide, cadmium, chromium, copper, lead, manganese, mercury, selenium, and silver. The presence of these chemicals, which are associated with industrialized dairy practices, further demonstrates that View Point Dairy is discarding solid and liquid manure in violation of its NMP, and RCRA, and that such discarding is causing or contributing to a violation of the nitrate MCL in groundwater. Various bacteria, protozoa, and other pathogens are present and more likely to cause harm to humans as a result of the significant presence of these pathogens, all of which are associated with manure waste.

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 View Point Dairy’s improper practices of storing, treating, transporting, and disposing (through application or otherwise) of liquid and solid manure wastes. As such, these practices may, and indeed do, present an imminent and substantial endangerment to both human health and the environment.

42 U.S.C. § 6972(a) states that the District Courts of the United States shall have jurisdiction to order any person who “has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste” that presents an imminent and substantial endangerment to health or the environment to take such action as may be necessary to cease and correct the pollution and to apply any appropriate civil penalties under 42 U.S.C. § 6928(g). Notifying Parties intend to seek legal and equitable relief in their lawsuit, including but not limited to an assessment of past, present, and future response, remediation, removal, and/or clean-up costs against View Point Dairy, 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, View Point Dairy’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 downgradient of View Point Dairy is contaminated at levels exceeding 10 mg/L nitrate. The lawsuit will allege that View Point Dairy’s past and present waste disposal practices (inclusive of the DeRuyters’ ownership and control) 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 and phosphorus levels in soil receiving View Point Dairy’s manure, a strong indication that manure is applied in excess of agronomic rates. Applications beyond that which the current crop can effectively utilize cause nitrate to leach through soil and into groundwater, which in turn cause nitrate levels in the groundwater to exceed the MCLs. The lawsuit will further allege that View Point Dairy’s storage of liquid and solid manure in unlined earthen lagoons or inadequately lined lagoons, as well as View Point Dairy’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 View Point Dairy’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, Inc.
3142 Signal Peak Road
White Swan, WA 98952
Tel: (509) 874-2798

Center for Food Safety
2009 NE Alberta St., Suite 207
Portland, OR 97211

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

Charles M. Tebbutt
Daniel C. Snyder
B. Parker Jones
Law Offices of Charles M. Tebbutt, P.C.
941 Lawrence St.
Eugene, OR 97401
Tel: (541) 344-3505
Fax: (541) 344-3516
charlie@tebbuttlaw.com
dan@tebbuttlaw.com
parker@tebbuttlaw.com

Amy van Saun
Center for Food Safety
2009 NE Alberta St. Suite 207
Portland, OR 97211
(971) 271-7372

Andrea K. Rodgers
Law Offices of Andrea K. Rodgers
3026 NW Esplanade
Seattle, WA 98117
Tel: (206) 696-2851

Toby Marshall
Beth Terrell
Terrell Marshall Law Group PLLC
936 N 34th St. Suite 300
Seattle, WA 98103
Tel: (206) 816-6603

CONCLUSION

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

Sincerely,



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

Via U.S. Mail to the following:

Jay Inslee, Governor
Washington State Office of the Governor
416 Sid Snyder Ave. SW, Ste. 200
P.O. Box 40002
Olympia, WA 98504

Laura Watson, Director
Washington State Dept. of Ecology
P.O. Box 47600
Olympia, WA 98504

William Barr, Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530
*Certified Mail, Return Receipt
Requested*

Bob Ferguson, Attorney General
Washington State Office of the Attorney
General
1125 Washington St. SE
P.O. Box 40100
Olympia, WA 98504

Andrew Wheeler, Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
200 Pennsylvania Ave.,
NW Washington, D.C. 20460

Christopher Hladick, Regional
Administrator
U.S. Environmental Protection Agency,
Region 10
1200 6th Ave. Ste. 900 Seattle, WA 98101