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Clean Air Report

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HEADLINE: ACTIVISTS RAMP UP AIR TOXICS CLAIMS AGAINST DAIRIES TO BYPASS DECREE

BODY:

Environmentalists are ramping up their legal effort to force dairies to install emission controls in an effort to circumvent a controversial consent decree between EPA and the agriculture industry, after successfully fighting a California dairy's motion to dismiss their first-time air toxics citizen suit addressing a pollutant that is not part of the decree.

At issue is a legal strategy by several environmental groups that are filing air toxics suits targeting methanol emissions to force concentrated animal feedlot operations (CAFOs) to obtain Clean Air Act permits for pollutants not covered under the EPA-industry decree, which exempted participating CAFOs from Clean Air Act enforcement and Superfund reporting requirements in exchange for an industry-funded emissions monitoring study.

In the latest development, environmentalists filed a new suit last month against a second dairy, less than a month after the U.S. District Court for the Eastern District of California denied industry's motion to dismiss their original suit alleging that a San Joaquin, CA, dairy failed to obtain a maximum achievable control technology (MACT) permit under section 112 of the air act. MACT applies to major sources of hazardous air pollutants -- defined as those that release more than 10 tons of an air toxic annually -- and requires industry to install stringent controls to reduce the pollution.

Industry in its motion to dismiss the case argued that the environmentalists' lawsuit should have targeted EPA or the California air district, rather than the dairy, and that the dairy did not have fair notice for how to calculate or reduce methanol emissions. But in a March 28 ruling in *Association of Irrigated Residents v. Fred Schakel Dairy, et al.*, Judge Oliver Wanger rejected the industry's motion to dismiss and a trial is slated for March 2009.

The victory spawned environmentalists to lodge a nearly identical suit against a Washington dairy, filing an April 23 complaint in *Community Association for the Restoration of the Environment v. Deruyter Brothers Dairy, Inc.*, in the U.S. District Court for the Eastern District of Washington, that alleges the dairy needs a MACT permit to control methanol, which "can cause deleterious effects to human health."

And the groups raised the issue of CAFO methanol emissions in April 15 comments opposing expansion of another San Joaquin dairy. "Because the total methanol emissions from the proposed expansion will be well over 10 tons/yr, the district must require the Bar 20 Dairy to comply with MACT," the comments say.

Relevant documents are available on [InsideEPA.com](http://InsideEPA.com).

Groups involved in the effort include the Sierra Club, Earthjustice, the Center for Biological Diversity, the Western Environmental Law Center and the Center for Race, Poverty & Environment.

However, the strategy is prompting criticism from EPA sources and the dairy industry who note that the environmentalists' claims about methanol emissions are based on scant studies.

Yet industry sources acknowledge that the activists' legal strategy may prompt expansion of the consent decree monitoring provisions to include methanol and other emissions such as greenhouse gases (GHGs) in an effort to stave off the lawsuits.

One industry source says the environmentalists' suits targeting non-consent decree pollutants reflects a sense that they would not fare well filing challenges to pollutants under the decree, particularly because they lost their underlying challenge to the consent decree, which EPA



finalized in 2005. Under it, CAFOs agreed to monitor hydrogen sulfide, ammonia, particulate matter and volatile organic compounds in exchange for enforcement relief.

A second industry source notes, however, that environmentalists' effort to require air toxics controls appears to have failed in Idaho after that state's environmental agency accepted an industry-funded study that showed a large dairy emitted less than 1 ton of methanol, rather than the more than 10 tons environmentalists claimed.

An EPA official says that when EPA designed the enforcement agreement, "methanol was not a real issue and probably still isn't," noting that not only is data on methanol at dairies limited, but because the emissions come from both feed and waste, "I am not sure how you control it."

However, the source says EPA cannot design a consent agreement to protect against citizen suits and that the environmentalists' strategy represents "discontent by a number of groups on large CAFOs. They are looking for any angle they can find to discourage them or shut them down. . . . I don't hear a lot of alternatives" of what might be acceptable from environmentalists.

Additionally, a source with the National Milk Producers Federation says the environmentalists' legal strategy is "to find other compounds by which they can sue people" despite the consent decree.

EPA chose the pollutants to be monitored because it believed "they are the most likely to be emitted," a second agency source says.

EPA says it will release preliminary monitoring data soon, and plans to review the completed data to determine what if any regulations are needed at CAFOs under the Clean Air Act, Comprehensive Environmental Response, Compensation & Liability Act (CERCLA) and the Emergency Planning & Community Right-to-Know Act.

Another industry source notes that industry did not push for changes to the list of pollutants EPA chose to monitor. "We didn't argue much about it. We took the attitude that whatever they wanted to monitor was fine, and they chose the ones most likely to create requirements for [air act] permits or CERCLA reporting."

The milk producer source says that industry now recognizes it may need to conduct add-on studies, including those to monitor methanol and GHGs, to counter environmental groups' claims.

In the meantime, the source says the suits will play out. "Unfortunately, environmental policy is driven by lawsuits as opposed to science at times. I imagine at some point we will need numbers from methanol and GHGs."

But an environmentalist defends the legal strategy, noting that the California judge's ruling allowing the challenge to proceed in the first case alleging a CAFO is a major source of a hazardous air pollutant is significant. The source calls the ruling "persuasive" and hints that other similar cases are likely to be filed.

A second environmentalist adds that state regulators and EPA have known for years that dairies emit methanol above the Clean Air Act threshold. "So there is no excuse for the agencies. All they're trying to do is give more time and cover to the industry." -- Dawn Reeves

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