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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. COW PALACE, LLC, a Washington Limited Liability Company, THE DOLSEN COMPANIES, a Washington Corporation, and THREE D PROPERTIES, LLC, a Washington Limited Liability Company, Defendants.	NO. CV-13-3016-TOR PLAINTIFFS' OPPOSITION TO DEFENDANTS THE DOLSEN COMPANIES' AND THREE D PROPERTIES' MOTION FOR SUMMARY JUDGMENT (ECF No. 191) THIS DOCUMENT IS BEING FILED UNDER SEAL

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INTRODUCTION

The Dolsen Companies ("Dolsen Co.") and Three D Properties, LLC ("Three D") (collectively "Defendants") contest their liability as contributors, arguing there is no solid waste at issue and that they are not actively involved in waste disposal that they know is occurring on their own property, or the property they owned at the time the lawsuit was filed. Plaintiffs note that Defendants do not move on Plaintiffs' open dumping claims. These arguments fail both factually and legally. As a factual matter, Defendants premise their claims on unsupported assumptions: that the Dairy's crop yield is evidence of agronomic applications, and that Defendants were merely passive landowners. There is no factual basis for their claims based on crop yields, and even if there are questions of fact on this point, other failures to follow Cow Palace's DNMP negate its significance. Their landowner claims are supported by a single declaration that is contradicted by the declarant's own admissions at his deposition.

As a matter of law, Defendants' arguments fail because "active involvement" is not a condition precedent to Resource Conservation and Recovery Act ("RCRA") contributor liability and Defendants fail to recognize that their liability stems from the responsibility of their agents and officers for approving the costs of, and delegating responsibility for, any relief sought by Plaintiffs.

FACTUAL BACKGROUND

Plaintiffs' motion for summary judgment and supporting Statement of Material Facts, along with Plaintiffs' Opposition to Cow Palace's Motion for Summary Judgment filed simultaneously herewith, set out the factual and legal background responsive to Defendants' RCRA "solid waste" claim. Pls.' Mot. for Summ. J. ("Pls.' MSJ"), ECF No. 221 at 3-7; Pls.' Statement of Material Facts ("PSF") ECF No 211-1. Some additional facts are necessary to respond to Defendants' contributor liability claims.[1]

Ownership of the Land and Corporate Entities

The Defendants in this case are closely associated entities that are ultimately controlled by one person, R. William Dolsen ("Bill Dolsen"). PSF ¶¶ 1, 3-4. Cow Palace, LLC owns and operates the Dairy. *Id*. at ¶ 2. Cow Palace, LLC is a "wholly owned subsidiary" of Dolsen Co., and Dolsen Co. is the sole member of

[1] Plaintiffs will reference to the PSF rather than repeat those facts here. Plaintiffs are unable to dispute factual assertions made by Defendants in this motion due to their failure to provide a Statement of Material Facts as required by the rules. They instead adopt Cow Palace, LLC's Statement of Material Facts even though it made no reference to Dolsen Co. or Three D. Plaintiffs' opposition is therefore also supported by its accompanying Statement of Material Facts ("PSFII").

the LLC. *Id*. at ¶ 1; PSFII ¶ 1. Bill Dolsen is a principal of Dolsen Co. and acts as its President/Chairman. PSF ¶ 3. Dolsen Co. owned sixteen parcels of land on which the Dairy operated until after this litigation commenced, when it transferred the property to Cow Palace, LLC for no exchange of money or taxes paid. PSF ¶ 12; PSFII ¶ 2. That land included the Dairy's cow pens, milking barns, composting areas, the majority of lagoons, and almost half of its fields. PSFII ¶ 7.

Bill Dolsen is a principal of Three D and acts as its manager. PSF ¶¶ 4, 12; PSFII ¶ 3. Fifty percent of the property utilized by the Dairy is now owned by Three D, including the rest of its agricultural fields, several lagoons, and residential properties maintained for Cow Palace employees. *Id.* at ¶¶ 3, 4, 12; PSF ¶ 12. Bill Dolsen, in his capacity as president of Cow Palace, LLC's sole member, Dolsen Co., and manager of Three D, determined to purchase these homes to provide housing for favored employees of the Dairy. PSFII ¶ 5; *see also* Pls.' MSJ at 36-37 (citing legal support). Bill Dolsen has primary authority for decisions pertaining to acquisitions of real property for all three Defendants, and also has authority for decisions about whether to increase the size of the Dairy. PSF ¶ 13; PSFII ¶ 4.

Management of the Dairy

Both Defendants have performed and continue to perform operational and managerial functions at the Dairy. *Id*. at ¶ 11. Dolsen Co. receives and maintains

the Dairy's records, including records on finances, personnel, waste management, and environmental compliance. *Id*. at ¶ 8-10. While Jeff Boivin is the general manager at Cow Palace, Bill Dolsen delegates authority to Mr. Boivin to run operations at the Dairy, including the manure management, and Mr. Boivin "ultimately reports" to him. PSFII ¶ 9. In fact, Bill Dolsen hired Mr. Boivin to work for Cow Palace, LLC and Mr. Boivin meets at Dolsen Co.'s office monthly. *Id*. at ¶¶ 8-9.

Other employees at the Dairy view Mr. Boivin and other managers as supervisors, and consider *Bill Dolsen* to be their "boss." *Id*. at ¶ 11. Bill Dolsen has provided instructions to the Dairy's managers when there have been problems with manure operations. *Id*. at ¶ 10. Bill and Adam Dolsen have, at various times, represented the Dairy in meetings with federal and state environmental enforcement agencies. *Id*. at ¶¶ 14-15. Moreover, Bill and Adam Dolsen gave the Dairy's attorneys permission to accept the settlement offer from the Environmental Protection Agency ("EPA") embodied in the Administrative Order on Consent ("AOC") that relates to manure management practices at the Dairy to try to address Safe Drinking Water Act violations. *Id*. at ¶¶ 16, 22.

Adam Dolsen is the Vice President of Dolsen Co. and is a principal of Three D. PSF ¶ 6; PSFII ¶ 18. In this capacity, he visits the Dairy monthly to meet with the Dairy managers, including those managing the Dairy's manure. PSF at ¶ 11(e).

He has the authority to fire these managers. PSFII ¶ 18. He also reviews Cow Palace's monthly financial statements and makes personnel decisions at the Dairy. PSF ¶ 11(d).

The Dairy managers report to Adam Dolsen when there have been problems with manure management operations, and he has represented the Dairy in correspondence with AOC officials about problems with manure management. PSFII ¶ 21. He has also represented the Dairy in meetings with federal and state environmental enforcement agencies, and was the person to allow the EPA access to the Dairy for monitoring and inspection. *Id.* at ¶¶ 15, 22. Adam Dolsen has followed up with EPA requirements on behalf of Cow Palace and has represented the Dairy in meetings with area dairies to meet AOC requirements. *Id*. at ¶ 22.

Kenneth Willms is the Treasurer and Chief Financial Officer for Dolsen Co. PSF at ¶ 7. Mr. Willms does financial and certain compliance work for Cow Palace, LLC, and Three D. PSF ¶ 11(b), PSFII at ¶ 23. Mr. Willms and Bill Dolsen make all decisions regarding the Dairy's annual insurance policy. PSF ¶ 11(c).

Vern Carson, former Safety Director for Dolsen Co., was also in charge of safety-related issues at the Dairy. PSFII ¶ 24. Part of Mr. Carson's duties included performing safety walk-throughs to ensure that there were no hazards on the Dairy's manure spreaders. *Id*. at ¶ 25. Mr. Carson was also in charge of employee

safety training at Cow Palace, LLC. PSF ¶ 11(a). Part of that training included how to safely clean and repair certain manure management equipment. PSFII ¶ 25.

ARGUMENT

I. Defendants' Liability is a Factual, Case-Specific Inquiry.

Defendants argue that holding them liable for RCRA violations would expose every dairy in the nation to liability and "potentially take millions of acres of agricultural lands out of production." Defs.' Br. 5-7. These arguments should not be considered because they are pure conjecture. *See In re Feature Realty Litig.*, No. CV-05-0333-WFN, 2007 WL 1412761, at *5 (E.D. Wash. May 10, 2007) ("summary judgment is not about hypothetical facts not in the record"). Moreover, Defendants' claims fail legally because they ignore this Court's ruling *in this case* that RCRA liability for manure applications is a factual, case-specific determination. ECF No. 72 at 11. Given this Court's fact-specific inquiry, Defendants' contention is a gross exaggeration.

As a factual matter, Defendants' argument is belied by the text of the Dairy Nutrient Management Plan ("DNMP"). It cannot be that any use of manure as a fertilizer would subject a dairy to RCRA liability where the DNMP's stated primary purpose is to "provide the dairy manager with Best Management Practices (BMPs) for the production, collection, storage, transfer, treatment, and agronomic utilization of the solid and liquid components of dairy nutrients in such a manner

that will *prevent the pollution or degradation of state ground waters and surface waters*." PSF ¶ 42 (emphasis added). As Plaintiffs' land application claims rely in part on facts that Defendants' disregarded their DNMP, a ruling in Plaintiffs' favor would not impact "every dairyman and farmer in America" or "have severe, negative impacts on the agricultural economy," as Defendants so hyperbolically put it, but rather only those actors who ignore best practices for their geographical location, and instead create an endangerment by discarding excess waste into the environment. *See* Defs.' Br. at 6, 8.

II. Animal Waste Created at Cow Palace is "Solid Waste" under RCRA.

Plaintiffs previously addressed and refuted Defendants' challenges to regulating manure as a RCRA solid waste in their motion for summary judgment, ECF No. 211 at 15-25, and in their concurrently filed opposition to Cow Palace LLC's motion for summary judgment, and so incorporates those arguments by reference here. Rather, Plaintiffs will address what has not yet been raised: Defendants' argument that alleged "good" crop yields are evidence that all manure was put to beneficial use. Defs.' Br. at 3. Defendants cite no support for that assertion, and there is none. On the contrary, Defendants' own experts admitted that high crop yields are *not* evidence of agronomic applications of manure. *See* PSF ¶ 79. Indeed, Defendants' experts admitted that exceeding fertilizer recommendations is wasteful, but does not necessarily result in a poor crop yields.

Id.; *see also* Pls.' MSJ at 16.

III. Defendants "Contributed to" Nitrate Contamination from the Dairy.

A. The Phrase "Contributed to" Should be Broadly Construed.

RCRA imposes liability on any "past or present owner" who "has contributed or who is contributing to" the disposal of solid waste that may present an imminent and substantial endangerment. 42 U.S.C. § 6972(a)(1)(B). While neither RCRA nor its regulations define "contribute to," Congress intended that term to be "liberally construed." Pls.' MSJ at 14.

The EPA, which administers RCRA, has addressed this issue in its Section 7003 enforcement actions guidance document, which uses the same standard of liability as Section 7002(a)(1)(B), and therefore is "similarly interpreted." *Cox v. City of Dallas,* 256 F.3d 281, 294 n. 22 (5th Cir. 2001). In that guidance, EPA explained that "the phrase 'has contributed to or is contributing to' [is to] be broadly construed."[2] EPA stated that the "plain meaning of 'contributing to' is 'to have a share in any act or effect.'" *Id*. at 17. EPA recognized that "contributors" include "a person who *owned the land* on which a facility was located *during the time that solid waste leaked* from the facility." *Id.* at 18 (emphasis added).

[2] Environmental Protection Agency, Guidance On The Use Of Section 7003, at 17, available at http://www2.epa.gov/enforcement/guidance-use-administrative-orders-under-rcra-section-7003 (last accessed Nov. 26, 2014).

Accordingly, several courts have found liability based on this interpretation of section 7002(a)(1)(B). *See, e.g., Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1318 (2d Cir. 1993).[3]

B. Defendants Meet the *Hinds* Test for RCRA Contribution.

The governing case in the Ninth Circuit on the meaning of "contributing" is *Hinds Investments, L.P. v. Angioli*, 654 F.3d 846 (9th Cir. 2011). In *Hinds*, the Ninth Circuit followed a similar interpretation as the EPA Guidance and held that, to establish contribution, a plaintiff may show *either* that the defendant had "*a measure of control* over the waste at the time of its disposal" *or* that the defendant "was otherwise actively involved in the waste disposal process." *Id.* at 851-52 (emphasis added). As Plaintiffs show that Defendants exercised a "measure of control" over dairy manure management, they have met the *Hinds* test.

In *Hinds,* the Ninth Circuit held that equipment manufacturers were not liable under RCRA on the basis that their products were used in waste disposal activities because they were wholly disconnected from those activities. *Id.*

[3] EPA's interpretation of "contributor" is persuasive authority, given that EPA is the agency empowered with administering the statute. *See Ashoff v. City of Ukiah,* 130 F.3d 409, 410 (9th Cir. 1997) ("Were we to find RCRA ambiguous, we would defer to the EPA's interpretation so long as it is reasonable and supported by the language of the statute.").

Plaintiffs are not, as in *Hinds*, bringing endangerment claims against every dairy equipment manufacturer whose products are used at the Dairy. Rather, Plaintiffs are suing three interlocking decision-making bodies with control over the Dairy's operations and ownership of land, and are therefore following *Hinds*' holding that a defendant may be liable where it "had authority to control ... any waste disposal." *Hinds*, 654 F.3d at 851-52 (internal citations omitted).

"Active involvement" is not, as Defendants seem to argue, a condition precedent for finding liability based on having the "authority to control" waste disposal. *See id.*; *see also United States v. Iverson*, 162 F.3d 1015, 1025 (9th Cir. 1998) (person must have authority, but need not in fact exercise such authority to be liable under the Clean Water Act ("CWA")). The cases cited in *Hinds* buttress this conclusion. *See, e.g., Marathon Oil Co. v. Tex. City Terminal Ry.,* 164 F. Supp. 2d 914, 920-21 (S.D. Tex. 2001) (applying the broad standard from *Cox,* 250 F.3d at 292, that a party is liable if it had "a part or share in producing an effect").

Defendants' also attempt to avoid the outcome of the *Hinds* "measure of control" test by ignoring their broad authority over the operation of the Dairy and focusing solely on their status as landowners. Incredibly, Defendants say that they have no "involvement in, or control over, Cow Palace's farming and operational practices." Defs.' Br. at 12-13. The admitted facts, however, prove that Defendants have an effective "measure of control" that easily satisfies the test

established in *Hinds* for contributor liability. *See supra* Factual Background, PSF ¶¶ 8, 14; PSFII ¶¶ 5-6, 8-16, 18-25; Pls.' MSJ at 33 (citing legal support).

Defendants certainly exercised "some measure of control" over dairy operations when interlocking individuals used their authority to accept an AOC affecting the Dairy's operations. PSFII ¶ 16. Adam Dolsen's supporting declaration states that Defendants were merely "aware that Cow Palace entered into" an AOC with the EPA. Dolsen Decl., ECF No. 192 at ¶ 7. This statement is disingenuous, at best, given that the Dolsens admitted in deposition that they were responsible for meeting with the EPA and accepting the terms of the AOC. PSFII ¶¶ 15-16, 22; *see Stillwater of Crown Point Homeowner's Ass'n, Inc. v. Stiglich*, 999 F. Supp. 2d 1111, 1130, 1133 (N.D. Ind. 2014) (managing director had control over operations, and was therefore liable for violations of CWA, where he was companies' sole shareholder and officer at the time violation occurred and was primary contact for regulatory agencies on compliance issues).

Delegating authority to an employee to manage the manure does not absolve Defendants of liability. *See United States v. Park*, 421 U.S. 658, 668, 677-78 (1975) (a corporate president could not escape CWA liability by delegating decision-making control over the activity in question to a subordinate). The Declaration of Adam Dolsen claims that Cow Palace, LLC "made all decisions regarding" and "controlled all aspects of its dairy and farming operations." ECF

No. 192 at ¶ 4. However, Adam and Bill Dolsen admitted in deposition testimony that they delegated this authority to subordinate employees and retained authority to be the final say in management decisions. PSF ¶ 11(e); PSFII ¶ 18 (Adam Dolsen meets regularly with Dairy managers and can fire them); PSFII ¶¶ 8-11 (Bill Dolsen admits that he delegated authority to Mr. Boivin to fix a breach in one of the Dairy's manure lagoons and that Mr. Boivin "ultimately" reports to him); *see In re Bear Sterns Co. Secs., Derivative & ERISA Litig.*, 763 F. Supp. 2d 423, 547-48 (S.D.N.Y. 2011) (Defendant had effective control over the activities for ERISA liability where it had the authority to hire and fire all employees of the company); *see also SEC v. Todd,* 642 F.3d 1207, 1223-24 (9th Cir. 2011) (control found in securities case where defendant could veto any plan or strategy and was responsible for company's compliance reporting). RCRA's language should not be manipulated such that landowners and operators can dodge liability by creating shell LLCs and delegating their considerable authority over dairy operations while then claiming they had no role in the contamination.

Defendants' conduct clearly meets the threshold of the *Hinds* test because they had a "measure of control" over the practices generating the waste (herd size), the employees handling and transporting the waste (supervisory authority and housing ownership and maintenance), and the disposal of the waste (agreeing to waste management practices to comply with AOC). *See Marathon Oil Co.*,164 F.

Supp. 2d at 920-21 (court allowed RCRA claims to proceed where defendants had control over some of the practices at the facility, performed construction on the property, and had familiarity with the activities of the facility).

C. Defendants Misapply Other Case Law.

Defendants improperly rely on several cases in which the landowners had no connection to the operations on the land or had no knowledge or control over contamination that occurred prior to or after their ownership. These cases are distinguishable because of Defendants' longstanding and close connections to the Dairy. *See ABB Indus. Sys. v. Prime Techs. Inc*., 120 F.3d 351, 355, 359 (2d Cir. 1997), cited by Defs.' Br. at 11 (court dismissed all claims against two of the three previous owners/controllers where they had owned/controlled the facility for only a very short time and had no control over the prior owner's disposal activities); *Aurora Nat'l Bank v. Tri Star Mktg.*, 990 F. Supp. 1020, 1033-34 (N.D. Ill. 1998), cited by Defs.' Br. at 11 (court's ruling was based on the *complete lack of connection* between the land owners and the operations on the land that led to the contamination); *Delany v. Town of Carmel*, 55 F. Supp. 2d 237, 254-55 (S.D.N.Y. 1999), cited by Defs.' Br. at 9 (developers who purchased land long after disposals had ceased and had no knowledge of prior contamination were not liable); *In re Voluntary Purchasing Grps., Inc. Litig.*, 2002 WL 31431652, at *6 (N.D. Tex. Oct. 22, 2002), cited by Defs.' Br. at 9 (railroad company not liable under RCRA where

arsenic spill occurred after it relinquished control over its transportation); *Nat'l Exchange Bank & Trust v. Petro-Chem. Sys., Inc.*, No. 11–CV–134, 2012 WL 6020023, *3 (E.D. Wisc. Dec. 3, 2012), cited by Defs.' Br. at 11 (no liability against "tangential" inspection company where they had no knowledge of subcontractor's negligent conduct responsible for the leak); *Town & Country Co-Op v. Akron Products Co.*, No. 1:11 CV 2578, 2012 WL 1668154, *1, *3-*4 (N.D. Ohio May 11, 2012), cited by Defs.' Br. at 12 (no liability against landowner where disposal happened before it purchased the land, and it had no control over previous landowners).

Unlike these cases, where there is, at best, a tangential connection to the party responsible for the disposal, it is almost impossible to factually separate the three Defendants here because of their interlocking officers and interchanging land ownership. *See In re Spiegel, Inc. Secs. Litig.*, 382 F. Supp. 2d 989, 1022 (N.D. Ill. 2004) (holding that there was control for purposes of liability under the Securities Exchange Act where family ensured that defendant company's Board of Directors was comprised of "interlocking directorships tied to other entities controlled by the [family]"). The entities are all run by the same family. PSF ¶¶ 1-5. The cases

cited by Defendants are therefore inapposite.[4]

D. RCRA Liability is Proper Against Dolsen Co. as a Corporate Officer.

Defendant Dolsen Co. can also be properly found liable because, in addition to being a recent landowner, it is a corporate officer who continues to control operations at the Dairy. *United States v. Reis*, 366 F. App'x 781, 782 (9th Cir. 2010) (Chairman of the Board and CEO are persons under RCRA, 42 U.S.C. § 6903(15)). Dolsen Co. is the sole member of Cow Palace, LLC and routinely supervises operations at the Dairy and represents the Dairy on the LLC's behalf to environmental agencies. *See Comite Pro Rescate de La Salud v. Prasa*, 693 F. Supp. 1324, 1334 (D.P.R. 1988), *vacated and remanded on other grounds*, 888 F.2d 180 (1st Cir. 1989) (1990) (parent corporation can be held liable for CWA violations if it assumed responsibility for environmental issues at subsidiary's

[4] Other cases cited by Defendants are also inapplicable. *Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 852-53 (7th Cir. 2008), cited by Defs.' Br. at 9, found that RCRA liability did not apply where asbestos had never entered the environment. *Gregory Village Partners, LLP v. Chevron USA*, 805 F. Supp. 2d 888, 898-99 (N.D. Cal. 2011), cited by Defs.' Br. at 10, simply granted the defendant's 12(b)(6) motion with leave to amend because the plaintiffs' claims against the landowner failed to meet the requirements of *Twombly/Iqbal*.

plant). In the Ninth Circuit, a "corporate officer or director is, in general, personally liable" for wrongdoing "which he authorizes or directs… notwithstanding that he acted as an agent of the corporation and not on his own behalf." *Transgo, Inc. v. Ajac Transmission Parts Corp.,* 768 F.2d 1001, 1021 (9th Cir.1985). Plaintiffs' claims against Dolsen Co. as a corporate officer are justified legally because of the responsible corporate officer doctrine, and factually by the close relationship between it and the Dairy.

The test to establish liability under the "responsible corporate officer" doctrine is an even lower bar than the *Hinds* test, and so the same facts support a finding here. The Ninth Circuit imposes liability under this doctrine if a corporate officer had "authority with respect to the conditions that formed the basis of the alleged violations." *See Iverson*, 162 F.3d at 1024; *cf. Hinds*, 654 F.3d at 851-52 (a defendant may be liable where it "had authority to control ... any waste disposal." (internal citations omitted)). Because of the similar language of CWA and RCRA, the logic used in *Iverson* in the CWA context has also been applied to RCRA cases. *See United States v. Conservation Chem. Co.,* 660 F. Supp. 1236, 1245-46 (N.D. Ind. 1987) (extending doctrine such that a corporate officer is a "person" within meaning of RCRA Section 3008(a)); *but cf. United States v. White*, 766 F. Supp. 873, 895 (E.D. Wash. 1991) (holding that extending the doctrine to RCRA Section 3008(d)(2) was inappropriate in a factual scenario

where the plaintiff alleged that the officer had no requisite specific intent as required by this section of the statute – a requirement not present in Section 7002). The Ninth Circuit does not require that "the officer in fact exercise such authority or that the corporation expressly vest a duty in the officer to oversee the activity" to find liability under the responsible corporate officer doctrine. *Iverson*, 162 F.3d at 1025.[5] Simply having the authority is enough.

Bill Dolsen admits that he has that authority as president of Cow Palace, LLC's sole member over Dairy managers, including those managing manure. PSFII ¶¶8-11. Mr. Dolsen also admits that he has used that authority to approve of the AOC's manure management requirements for the Dairy. PSFII ¶¶ 8-9, 16, 18. Courts have found personal liability in almost exactly those factual scenarios. *See Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 745 (8th Cir. 1986) (corporate president and major shareholder liable for dioxin contamination where he was in charge of and directly responsible for corporate operations and had ultimate authority over those performing disposal); *see also Comite Pro Rescate de La Salud*, 693 F. Supp.

[5] Nor is the doctrine limited to criminal prosecutions; it has been extended to civil cases. *City of Newburgh v. Sarna*, 690 F. Supp. 2d 136, 161 (S.D.N.Y. 2010), *aff'd in part, appeal dismissed in part*, 406 F. App'x 557 (2d Cir. 2011) (gathering cases).

at 1334 (holding a parent corporation could be liable for CWA violations because it assumed responsibility for environmental compliance at subsidiary's plant). Plaintiffs meet the *Iverson* test.

E. Defendants Are Necessary to Provide Relief to Plaintiffs.

Defendants' third claim is based entirely on the premise that they lack the authority to provide Plaintiffs the injunctive relief they seek. Defs.' Br. at 13-14. As stated above, Defendants are far from passive landowners; they hold a duopoly over management at Cow Palace, LLC. The authority cited by Defendants is inapposite because the cases deal exclusively with money damages, which are not sought here. Moreover, as a legal matter, Defendants' claim cannot stand because Plaintiffs also seek declaratory relief against Defendants. ECF No. 180 ¶¶ 1, 5, Relief Requested A-B. At this time, the scope and nature of injunctive relief is not yet at issue.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court deny The Dolsen Companies' and Three D Properties, LLC's motion for summary judgment.

Respectfully submitted this 8th day of December, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2014 I filed a true and correct copy of the foregoing document under seal with the Clerk of Court using the CM/ECF system. Pursuant to the procedures for filing under seal, service will be accomplished by other means to the following:

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