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OLIVERA EGG RANCH, LLC

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GLORIA AVILA, et al.,

Plaintiffs,

v.

OLIVERA EGG RANCH, LLC,

Defendant.
_____/

Case No. 2:08-CV-02488-JAM-KJN

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

The Court, having considered Defendant's Motion for Summary Judgment or, In the Alternative, Summary Adjudication, IT IS HEREBY ORDERED that the motion is DENIED.

Dated: August 27, 2010

/s/ John A. Mendez
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

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BEFORE THE HONORABLE JOHN A. MENDEZ, JUDGE

---oOo---

GLORIA AVILA, et al.,

Plaintiffs,

vs. No. Civ. S-08-2488

OLIVERA EGG RANCH, LLC,

Defendant.

_____/

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REPORTER'S TRANSCRIPT

MOTION TO DISMISS

AND CROSS-MOTIONS FOR SUMMARY JUDGMENT

WEDNESDAY, AUGUST 11, 2010

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Reported by: KELLY O'HALLORAN, CSR #6660

APPEARANCES

For the Plaintiff:

ORRICK, HERRINGTON & SUTCLIFFE, LLP
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For the Defendant:

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SACRAMENTO, CALIFORNIA

WEDNESDAY, AUGUST 11, 2010, 9:30 A.M.

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THE CLERK: Civil S-08-2488; Avila, et al. versus Olivera Egg Ranch, LLC.

Counsel approach and state their appearances, please.

MS. ROTH: My name is Nicole Roth. I'm an attorney at Orrick, Herrington & Sutcliffe representing plaintiff. And with me is Peter Brandt from The Humane Society of the United States.

THE COURT: Okay.

MR. WUNDERLI: Good morning. Russ Wunderli from Porter Scott. We represent defendant Olivera Egg Ranch. With me today is Jared Mueller, also from Porter Scott.

THE COURT: Okay. There's a number of motions. There's four motions before the Court today. We'll get right into them.

I want to start with the defendant's motions to dismiss for lack of subject matter jurisdiction, a 12(b)(1) motion to dismiss and also a 12(b)(6) motion to dismiss. The plaintiffs have asked me to strike these, objecting to them as a backdoor attempt by the defendants to get around the Court's page limitations since I also have before me motions for summary judgment filed by both plaintiff and the defendant. I've read the response to the objection. I'm not

going to strike the motions. But what jumps out obviously, Mr. Wunderli, is you guys have a pretrial conference in four weeks, and I'm getting a motion to dismiss four weeks before a pretrial conference. Your firm's been in this case. I know you didn't file the original answer, but you filed an amended answer. And the motions to dismiss are based on a complaint that was filed almost two years ago. So explain to me why it took -- I think you guys came into the case about a year ago -- why it took 12 months to figure out that you think you might have a basis for dismissing the complaint, and why you waited until this time, at this point in this case, to file these motions. You can tell from the tone of my voice that I don't find this to be an efficient or an effective way to handle litigation. If, in fact, there was merit to these motions to dismiss, I think I would have seen them a long time ago.

So what happened and explain to me why it took so long to file these.

MR. WUNDERLI: The length of time's relative, your Honor.

THE COURT: The length of time is what?

MR. WUNDERLI: Relative. We have gotten educated on the CERCLA and EPCRA provisions. We have been addressing the issues in this case, and there are many. We did get -- you know, we weren't originally in the case. There were other

issues that we had to develop. But we did eventually look at it from the standpoint of what is required in a CERCLA and EPCRA filing, lawsuit. And there are some unique issues that we've addressed in the motion that didn't jump out at us when we initially got going on this case. There was obviously discovery that was quickly propounded, and we were off and running.

THE COURT: Why did you do it now in conjunction with a motion for summary judgment that does contain and incorporates by reference some of the same arguments raised in the motions to dismiss? I think that's what gives rise to the plaintiffs' frustration and my frustration that you did this in a way to maybe avoid the page limits. I'm not convinced of that. I understand that you brought these in good faith. And in one sense, it does help separate the issues somewhat by doing it this way. It just makes little sense to me, for example, to raise at this point, again, four weeks before a pretrial conference, that you don't think the claim was properly pled. You know, it didn't specifically say that you have to have knowledge that the emissions exceeded the reportable quantity. And because the complaint doesn't specifically say that, I should dismiss it. You and I both know, and everybody in this courtroom knows, all you have to do is pick up the phone and say we think there's a problem with your complaint, why don't you just amend it,

instead of wasting, frankly, time and money filing a motion to dismiss that even if I thought it had merit, I'd just grant them leave to amend. What's the point in that? You can tell I'm incredibly frustrated. One, because of our workload; and two, because it's the motions for summary judgment that we should be focusing on.

MR. WUNDERLI: Your Honor, we separated the motions because some of the issues can be resolved without evidence, and we wanted to break them down for the Court. On the 12(b)(6) and 12(b)(1) motions, they're not really appropriate for a motion for summary judgment. They can be. But they can also be brought based on the allegations of the complaint.

Now, I recognize that --

THE COURT: You've had a whole year to figure that out. Why didn't I see these in 2009? I mean why am I seeing them in August of 2010?

MR. WUNDERLI: It's only because we have been addressing other issues. As your Honor is quite familiar with this case, plaintiffs and defendants have not basically agreed on anything in this case. Obviously, the plaintiffs knew that we were taking the position that knowledge is a required element in their cause of action. And still, you know, we would have agreed to amend, allow them to amend. But their position is no, no, we've alleged it properly. And

we just haven't agreed on anything in this case.

THE COURT: As an aside, which isn't really before me, but I did see Judge Newman's order. I am curious as to why your client hasn't paid that sanction yet.

MR. WUNDERLI: We are going to address that. And there's good reason why we haven't and law that supports our reasoning. So we intend to address it.

THE COURT: Give me a preview since it was my order that imposed the sanction.

MR. WUNDERLI: It does not indicate when payment should be made, and it is an order that is not effective until there's a final judgment in the case, according to the case law.

THE COURT: Okay. The first could be taken care of by my amending my order and adding the word "immediately." But you're saying there's case law that says that they don't have to pay that sanction.

MR. WUNDERLI: Until there's a judgment.

THE COURT: Okay. That will be interesting to see.

All right. Setting that aside, I'm staying on the motions to dismiss. I'm prepared to rule on those. It's no secret. You can tell where I'm headed with respect to the motions to dismiss.

Anything further either side wants to add that isn't already in these briefs? Because there's a lot of paper

here, folks, and I've read everything. You killed a lot of trees.

MR. WUNDERLI: Well, I don't -- you know, your Honor has read all the papers, and I'm prepared to answer any questions. I think our primary thrust of our motion to dismiss is on the ripeness issue and this NAEMS study. That's where we're concentrating our efforts this morning, your Honor. There's no doubt about that.

THE COURT: Okay.

MR. WUNDERLI: If we can address that in the context of the motion for summary judgment, we'll be happy to do that.

THE COURT: Okay. Ms. Roth, anything further you want to add?

MS. ROTH: Not if you're willing to rule in our favor, your Honor. The only thing I'd like to point out is they did submit two reply briefs that exceeded the page limit as well.

THE COURT: I didn't notice that.

MS. ROTH: We replied in one opposition, and they submitted two replies, the total page limit --

THE COURT: I see what you're saying. I'm not going to get into that. I understand your frustration. I'm frustrated as well.

All right. In terms of the motions to dismiss, the Court's prepared to rule as follows. The 12(b)(6) motion to

dismiss for failure to state a claim argues that CERCLA and EPCRA do not apply to industrialized animal feeding operations, AFOs. And the defendant also asserts that even where the notification requirements of CERCLA and EPCRA are appropriate, knowledge of a release of a reportable quantity is a condition precedent of a duty to report. And the defendant has argued that plaintiffs' complaint failed to allege knowledge of a reportable quantity of ammonia releases, and therefore plaintiffs have failed to state a claim upon which relief can be granted.

The Court finds as follows. That the plain language of CERCLA and EPCRA is clear. Both statutes impose reporting requirements for hazardous releases from any source not specifically exempted. 42 USC Section 9603(a); 42 USC Section 11004. Nowhere in the statutes' language did Congress exclude industrial animal feeding operations.

It's an interesting legal argument, but one that seemed to have little or absolutely no support in the law. It's creative. I'll give you points for that. But in terms of as a matter of law, this Court isn't prepared to be that creative or imaginative when the statutes are so clear.

The definition of "facility" in CERCLA and EPCRA unambiguously encompasses AFO manure lagoons as well as other locations where application and storage of animal waste may cause the release of hazardous pollutants. In using the word

"any" to describe those releases in excess of the reportable threshold, Congress made it clear its intention for that provision to be read broadly to cover all such releases. See, for example, United States vs. Gonzales, 520 U.S. 1, a 1997 Supreme Court case. Congress's broad choice of words, "any emitting," "all buildings," and "any site," show that Congress intended for emitters of a hazardous substance not specifically exempted in the statute to be subject to reporting requirements. As such, CERCLA and EPCRA's plain language applies to defendant's facility. And this Court denies defendant's motion to dismiss for failure to state a claim on that theory.

Furthermore, defendant's argument that plaintiffs have failed to adequately allege in their complaint that defendant knew or should have known its facility released a reportable quantity of ammonia also fails. Plaintiffs' complaint does meet the pleading burden under Federal Rule of Civil Procedure 8(a). The complaint alleges the defendant released more than the daily reportable quantity. That's in paragraph 54. Defendant knew of the ammonia releases from its facility. That's alleged in paragraphs 61 and 66. And defendant had reason to believe those releases were well beyond a reportable quantity. That's at paragraphs 50 and 53. These allegations are sufficient to apprise defendant of the claims against it and, thus, satisfy the pleading

requirements of Rule 8(a). That's Tellabs, Inc. vs. Makor Issues & Rights, Ltd., 551 U.S. 308, a 2007 U.S. Supreme Court case which stated that for non-fraud claims, plaintiff need only "say enough to give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."

Even if I had found the defendant's argument to be meritorious, I still would have allowed the plaintiffs to amend, and which they could have done easily.

On the 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the defendants have argued that plaintiffs' claims are not ripe because of this ongoing study of emissions from animal feeding operations that is going on I think for five years now. That's known as the National Air Emissions Monitory Study, or NAEMS as we'll refer to it, N-A-E-M-S. And also the argument that defendants make is that that study might improve upon ammonia measurement techniques, and therefore plaintiffs' claims aren't ripe. And, second, that plaintiffs will allegedly not suffer any hardship if I delay review.

Defendant claims that the EPCRA and CERCLA claims are not ripe because of this NAEMS study initiated in 2005 by EPA and is still under development. That is a study which is intended to obtain data to be able to model emissions from concentrated animal feeding operations.

Despite the NAEMS study, this Court finds that defendant is still required to report its ammonia emissions under CERCLA and EPCRA. Even if it is assumed that the NAEMS study produces conclusive estimating methodologies, which are so accurate that they are more reliable than emissions experts conducting tests on site, this doesn't change the fact that defendant is still currently required to report its emissions under CERCLA and EPCRA.

This Court does not need any additional facts to adjudicate this case at this time. The alleged knowing release of a reportable quantity of a hazardous substance from a facility is sufficient. Defendants have cited no authority whatsoever that supports the claim that this case will not be ripe until the NAEMS initiative is complete.

Defendant's contention that plaintiffs will not suffer hardship if the Court delays review is also without merit. Defendant claims that plaintiffs have suffered no legal hardship, as no plaintiff has inquired into defendant's ammonia emissions. This argument is a reiteration of defendant's argument alleging that plaintiffs have suffered no injury.

Defendants argue that defendant has no knowledge of how much ammonia its facility emits, and it will not have such knowledge until the NAEMS study is complete. This is also a reiteration of an argument raised in the summary

judgment motions that plaintiffs' claims are not redressable and unripe. And I'll talk about those in the context of the summary judgment motions.

The only novel argument the defendant makes in this area is that the EPA does not intend to respond to CAFO, C-A-F-O. That's the acronym for concentrated --

MS. ROTH: Animal feeding operations.

THE COURT: -- animal feeding operations. So we refer to that as CAFO, C-A-F-O. That the EPA does not intend to respond to CAFO release reports and has never responded. The Court finds that the actions and intentions of the EPA are totally irrelevant to this citizen suit, which is premised on the idea, as provided by Congress, that the enforcing agency has not carried out its enforcement obligations.

As such, I do find that a significant and immediate hardship will result to the plaintiffs if the Court delays or withholds review of this case, and defendant has not met its burden to show why this Court should not apply federal law to a concrete dispute between private parties.

There's also this argument contained in the motions about supplemental jurisdiction and that defendants have argued that with respect to the nuisance claim, which really isn't at issue in the motion for summary judgment but is discussed in the motion to dismiss context, although, again, if I grant summary judgment on defendant's summary judgment,

their argument is I should dismiss the nuisance claim as well. But defendants have argued that the nuisance and federal statutory environmental claims are not part of the same case or controversy. Defendants have cited United States ex rel Hill vs. Teledyne, Inc., which held that a state claim should be dismissed for lack of supplemental jurisdiction when there is "no evidentiary overlap whatsoever" with the federal claim.

When a district court has original jurisdiction over a claim, it "shall have supplemental jurisdiction over all other claims that form part of the same case or controversy." That's 28 USC Section 1367(a). In this case before this Court, the Court finds that there is evidentiary overlap, substantial evidentiary overlap, between the state law nuisance claim and the federal CERCLA and EPCRA claims. The source of the pollution, owner of the facility, identities of the victims, amount of ammonia released, and conditions at the facility are among the facts relevant in both the federal and state law claims, such that plaintiffs would be expected to try them together. United States Mine Workers vs. Gibbs, 383 U.S. 715, a 1966 U.S. Supreme Court case. Accordingly, all the claims form part of the same case or controversy.

Additionally, the Court's consideration of economy, convenience, fairness, and comity weigh heavily against dismissal of the nuisance claim. This Court has accepted

jurisdiction of the nuisance claim for two years, and a discretionary dismissal would unnecessarily create a duplicative proceeding in state court as well as a highly prejudicial duplication of efforts. The proper time to move for dismissal of the nuisance claim was at the onset of the litigation. As such, to conserve judicial economy and promote fairness to the parties, the Court will retain supplemental jurisdiction over the state law nuisance claim, and I hereby deny defendant's motion to dismiss.

All right. Let's turn to the motions for summary judgment. The defendant's motion for summary judgment argues that the plaintiffs lack standing to sue on the basis of federal statutory claims because there's no injury-in-fact, and that even if they suffered an injury, the plaintiffs' alleged injury can't be redressed. Defendants also argue that the CERCLA claim is moot because EPA has provided an exemption for air releases from animal waste on farms, and the EPCRA claim is moot because the defendant, through Mr. Olivera, has begun reporting. Defendants have also included the same supplemental jurisdiction arguments in its motion for summary judgment as they did in the motion to dismiss, and the Court has discussed those already.

In terms of the standing issue, I'm not going to spend a lot of time on that. It's briefed by both sides. I don't find much merit in the standing argument. I found the

plaintiffs' response to that argument to be persuasive and that, in fact, both the individual plaintiffs and the Humane Society do, in fact, have standing in this case. That there is a causal connection between the injury and the defendant's conduct. And in terms of the issue of redressability, I'm going to come back to that because I do have some questions about that.

I want to do this by sort of talking about both motions and focusing on the first and second causes of action. And really the question here is: Is there some genuine issue of material fact that needs to be tried in this case? Okay. Both sides agree that this is what plaintiffs have to show under both their CERCLA and EPCRA claims. One, that defendant is a person in charge pursuant to CERCLA and/or is an owner or operator under the EPCRA claims. Given that I didn't accept the argument that was raised in the motion to dismiss that these two statutes don't apply to industrial animal feeding operations, is there really anything left with respect to that element?

Is there any dispute, Mr. Wunderli?

MR. WUNDERLI: No.

THE COURT: Okay. Second, that the egg ranch is a facility under both statutes. Is that in dispute at all?

MR. WUNDERLI: No.

THE COURT: Okay. The next element is that defendant

emitted more than the reportable quantity, the RQ of ammonia per day as defined by both statutes. There's a lot of argument on that. So that's where I want to focus. You have an expert. I'm not sure if I can pronounce his name. But he's been deposed. He's submitted declarations. What's his name, Mr. Wunderli?

MR. WUNDERLI: Mitloehner? Are you talking about Dr. Mitloehner?

THE COURT: Dr. Mitloehner. And part of your response, your client's response to that, that plaintiffs have not or cannot, or there's at least a genuine issue of material fact as to whether your client, in fact, emitted more than the reportable quantity of ammonia, is that whatever was done out there, the results are inaccurate, uncertain, unreliable, whatever adjective you want to attach to it.

Is that sort of a fair summary?

MR. WUNDERLI: Yes, it is.

THE COURT: And that's what your expert says, that they're just not reliable. And therefore, even though I have both a plaintiffs' expert and a defense expert that came up with numbers exceeding the -- what was it, 100 -- how much per day?

MR. WUNDERLI: A hundred pounds.

THE COURT: A hundred pounds. That I still can't rely

on that. That at least that's an issue that needs to be tried or should be tried. That there is a genuine issue of material fact. Because if I don't accept these reports, then there really is no other evidence that your client emitted more than the reportable quantity.

And here's the problem I'm having. It's that defense report, Mr. Hicks's report, which came up with somewhere around 740 pounds per day. And I look at the deposition testimony because, frankly, as the plaintiffs have pointed out, declarations or affidavits in support of summary judgment motions when someone has been deposed is, in my view, almost an admission of weakness. I don't know why lawyers still insist on submitting affidavits of someone that has been deposed, because the deposition testimony is what I look at because it's been subject to cross-examination. So, frankly, I don't put much weight into a declaration by Mr. Mitloehner when he's been deposed.

Putting that aside, I want to focus on Mr. Hicks's report. And there's a series of questions in his deposition in which he's asked the following questions and gives the following answers.

"You just mentioned Mr. Hicks's ammonia readings at the site of the lagoon. Do you think those readings are reliable?

"ANSWER: These are actual readings. He actually

measured right by the lagoon and also near the plaintiffs' residences. So these are the only measurements we have.

"QUESTION: -- which is what a good lawyer does. He goes back to the question that wasn't answered -- "Do you think they are reliable?

"ANSWER: Well, I stated initially in my testimony today that I have reservations with respect to any kind of grab samples and whether they represent annual emissions or concentrations or exposures. So that aside, these are the only ammonia numbers there are in this case, and so that's probably the best available numbers you'll have in this case.

"QUESTION: So do you think Mr. Hicks's ammonia tests right next to the site of the lagoon were accurate at the time that they were taken?

"ANSWER: I have no -- I have no data or evidence to suggest anything other than that."

So what's at issue? If Mr. Hicks is accurate and Mr. Hicks is reliable and his number is 740 pounds per day, what do I have left to try? What am I going to see at a trial?

MR. WUNDERLI: Well, you're going to hear a lot of evidence about how you determine. Even though that was a reading, and what Dr. Mitloehner says is he did get that reading, but he'll explain. And why we submitted a declaration in addition to his deposition is it wasn't

addressed in his deposition the extent to which these grab samples are unreliable and how it really can't tell you what is being emitted from an egg ranch. Just because you take one isolated area and measure it at this isolated area, it doesn't tell you whether the emissions of ammonia from this egg ranch are that figure.

THE COURT: Here's what's missing from both the affidavit and -- again, I know you didn't get a chance to ask questions, but he was subject to cross-examination. I don't see him saying -- and it's always interesting to me what experts say and don't say. I don't see him saying that there's no evidence that this egg ranch did not emit the reportable quantity. He attacks and he tries to attack at least plaintiffs' expert, and then although he says Hicks's report is accurate, he doesn't say that it's so inaccurate or it's so unreliable that you can't say as a matter of fact that your client didn't emit more than the reportable quantity.

And so the question is plaintiffs have put forth evidence that shows that the egg ranch did emit more than the reportable quantity. That evidence is there. Your job in summary judgment is to come forth with evidence that shows that that's not true; that there is a genuine issue of material fact.

Where is the expert that says he didn't do it? That

your client didn't emit? I'm not to the knowledge part yet, but just that fact alone.

MR. WUNDERLI: Well --

THE COURT: I don't know how your client is going to be able to in any way dispute or, in fact, that I'm going to find that that fact is in dispute at all.

MR. WUNDERLI: Well --

THE COURT: Where is the dispute?

MR. WUNDERLI: The dispute is the manner in which you get that reading in the first place. There's no doubt that he got that reading. But according to Dr. Mitloehner, look, it's 271 percent different than the plaintiffs' reading. And they took readings at similar, if not identical, locations.

THE COURT: The only question is: Is it over a hundred pounds? He doesn't say --

MR. WUNDERLI: He can't say. He doesn't know. He doesn't know. And no one knows. If we did the Liang study, that's been in evidence, the Laing study --

THE COURT: L-i-a-n-g, which is based on the number of --

MR. WUNDERLI: Number of hens.

THE COURT: Right.

MR. WUNDERLI: It could be 84. Now, there's a fact that's before this Court. And that's under the reportable limits. According to the Liang study, which the plaintiffs

say is one way of measuring, we've got 84, so that's under a hundred.

THE COURT: But he's got a 740.

MR. WUNDERLI: Well, on that particular day at that location --

THE COURT: But he doesn't like the 740, so he doesn't report. He likes the 84. But again --

MR. WUNDERLI: And that report was after the complaint was filed while we're doing discovery in this case. That doesn't have anything to do with his knowledge of a reportable quantity prior to the complaint being filed.

It's discovery by experts. And one of the primary reasons we had Dr. Hicks go out and measure is not because we wanted to get it under a hundred pounds or we wanted to see what it was, because we know it's unreliable. We wanted to prove how unreliable it was. And it's 271 percent. I bet if we went out there today, it could go the other way.

THE COURT: Does Dr. Hicks say it's unreliable?

MR. WUNDERLI: Dr. Hicks says this is the only way I know how to measure it.

THE COURT: So in his view, it's reliable.

MR. WUNDERLI: No, not in measuring the reliable emissions.

THE COURT: Hang on. How do you get around then this testimony at deposition by your expert that says it is

reliable? By submitting an affidavit that now says I didn't mean what I said in my deposition?

MR. WUNDERLI: He says it's reliable. He says with this testing, this is the number that I got. And it's a reliable number. That's why they commissioned a $14 million NAEMS study.

THE COURT: I have no data or evidence to suggest anything other than that, that it's reliable. How are you going to get around that? You can't. Again, it's somewhat of a question that's impossible for you to answer. But I mean he can't back off that statement. It's made under oath in deposition. He can try to dance and slide around and finesse it, but it's there. It's undisputed. He thinks that Hicks's number is reliable. Hicks's number is 740. You're stuck with that. I don't see, again, this genuine issue of material fact at all that throws into question that element of this claim that your client emitted more than the reportable quantity.

What do you think I'm missing?

MR. WUNDERLI: Well, I think that maybe it's semantics. I don't disagree with you that they said that number is what they got that day. I don't disagree. But you could get another number on another day. And you could get 84, and you could get under a hundred. And what we're looking at here is when did Mr. Olivera, when did the

defendant know that they were emitting ammonia over a reportable quantity?

THE COURT: We'll get to that. I'm not to knowledge yet. I'm just focusing on that one fact, and can your client in any way throw into question the fact that ammonia over and above the reportable quantity has been emitted from this ranch.

MR. WUNDERLI: The manner in which they obtained that number, the way they tested it gives you an unreliable number for the farm.

THE COURT: It's not they. I'm not focusing on the 240.

MR. WUNDERLI: It's my expert. I agree. It's my expert.

THE COURT: Yeah.

MR. WUNDERLI: It's my expert. And the reason it's important for us is to show how unreliable it is based upon the plaintiffs' experts.

THE COURT: Well, then I come back to my question. So you're going to put Hicks on the stand at trial, and he's going to say this is what I found, and then you're going to have him say, well, but it's unreliable. I can't stand by that number.

MR. WUNDERLI: No.

THE COURT: You and I both know he's not going to do

that.

MR. WUNDERLI: That's not what I'm going to ask him.

THE COURT: Well, they'll ask him.

MR. WUNDERLI: He'll say that's the number that I've gotten. That's the number that I got that day.

THE COURT: Right.

MR. WUNDERLI: Doing the testing that we did. And then we'll have somebody explain why that testing just cannot give you a reliable number for ammonia emissions from a farming operation.

THE COURT: So stay on that for a second. When was the test done? In 2008?

MR. WUNDERLI: October of '09.

THE COURT: Before this EPA rule. Okay.

MR. WUNDERLI: Wait a minute. October of '09 is when we did the testing. No, not October. June of '09.

THE COURT: When was the 740?

MR. MUELLER: It was October.

MR. WUNDERLI: October.

THE COURT: Of '09.

MR. WUNDERLI: '09.

THE COURT: Okay. So it was after the EPA rule was passed. Okay. I understand his position. Because the obvious question is now your client's told we've possibly emitted 740 pounds of ammonia. And under CERCLA, you would

be required to report that. And I understand your client's position is, well, but there's this rule that says I don't have to report it under CERCLA. And his other position is: And I did report it under EPCRA.

MR. WUNDERLI: We had already reported it by the time that testing was done using the Liang study, which the plaintiffs say is one method of measuring.

THE COURT: Reported under CERCLA?

MR. WUNDERLI: Reported it to the agency that we are supposed to report it to.

THE COURT: Under EPCRA. Your client's never filed any report under CERCLA that I could see.

MR. WUNDERLI: That's true.

THE COURT: Okay. Go ahead, Ms. Roth.

MS. ROTH: If I may point out, your Honor, the defendant filed two EPCRA reports. One was in February of 2009.

THE COURT: He made a phone call in January.

MS. ROTH: Yes.

THE COURT: And then he files a report in February. Then he's supposed to do a follow-up report.

MS. ROTH: Yes. And so they used the Liang study to estimate emissions for that first report. Then the experts took their tests before he filed the next report. So his report that was filed in February of 2010 includes the same

information from this Liang study, and it does not include the actual emissions that his expert took on the facility.

THE COURT: Why not?

MR. WUNDERLI: Well, it does, because it falls within the range. We reported a range under the Liang study.

THE COURT: Hang on. It's one report. Either it does or it doesn't. Does it mention Hicks's report?

MS. ROTH: No, your Honor.

THE COURT: Do you agree with that?

MR. WUNDERLI: No.

THE COURT: It doesn't specifically mention Hicks's.

MR. WUNDERLI: We filed it before the Hicks testing. So it mentions 84 to 1,000 pounds.

THE COURT: The question is the February -- did he file a report in February of 2010?

MS. ROTH: Yes.

THE COURT: And it doesn't mention the Hicks report.

MS. ROTH: Correct.

THE COURT: Why not?

MR. WUNDERLI: Because we had previously. All we have to do in filing the follow-up report is if it exceeds the upper bounds of the report that we had previously filed, then we have to file it. The prior report showed a range of 84 to I think a thousand pounds a day. And the Hicks report fell within that range, so we don't have to report it.

THE COURT: Wow.

MR. WUNDERLI: And the range is another example of why this NAEMS study is so important, because --

THE COURT: You really interpret the law that way, and you advise your client that way? Let's not tell anybody about this 740 because you did this other study. I mean, you really think the law was intended to be interpreted that way? You really think a court enforcing the environmental laws of the United States should say to your client: It's okay, I know you paid for a study, and the result wasn't good, so let's not report it because, you know, that came after your earlier reporting? That, in effect, concerns me, that that's really your interpretation or your client's interpretation of the environmental laws.

I mean it comes along with this next argument, which is your client sticks his head in the sand and ignores his obligations under the environmental laws and then says, well, I don't know if I'm releasing more than a hundred pounds per day, how am I supposed to know that, when he doesn't do anything to try to find that out. It's the head-in-the-sand argument that they've raised over and over again.

Isn't that exactly what your client's doing?

MR. WUNDERLI: First of all, and the law is clear that you have to have circumstances that give rise to some knowledge that you may be over the reportable quantity

limits. There's no evidence in this case that he knew or should have known at any time prior.

THE COURT: You have no evidence?

MR. WUNDERLI: That he was over the reportable quantity.

THE COURT: That's your argument, there was no evidence? He's cited in July of 2004 for exceeding 500,000 hens. He knows his property holds more than 600,000 hens from 2006 to the present. He does his own report on July 3rd of 1996 that determines if the ranch was ever at maximum capacity of 600,000 layers, the ponds may theoretically be only marginally efficient. He didn't make any changes to the lagoon until 2009. Let's see. A representative of the San Joaquin Environmental Health Department observed floating solids during their inspection of his manure ponds. Since 1997, he's received multiple complaints regarding odors at the property. He didn't take any action and did not measure ammonia emissions in response to the complaints.

That's the evidence they're going to put on. That's the evidence before this Court. So I kind of take exception to your statement that there's no evidence whatsoever.

So where is, again, the genuine issue of material fact that he did nothing, and by doing nothing, he's now saying I didn't know? We're now sliding over into the knowledge issue, but I found a lot of problems with that argument, as

you can tell. And I could see a lot of problems for your client, if I did allow this to go to trial, him sitting there and trying to say I didn't know in light of all this evidence.

MR. WUNDERLI: First of all, we're dealing on the plaintiffs' motion for summary judgment, which really takes into account the knowledge issue. And this is what we've been discussing, is mostly the plaintiffs' motion for summary judgment. And all we have to come up with is any issue of fact. We don't have to prove conclusively that he didn't have knowledge. There just has to be an issue as to whether or not he had knowledge or not.

THE COURT: So what's the issue?

MR. WUNDERLI: All of the complaints that he was given were: One, they're hearsay. They're unsubstantiated. None of them were substantiated. And none of them had anything to do with ammonia smells or odors. They don't even address ammonia. Secondly, that according to the Liang study, when he addressed 700,000 hens, the reportable quantity could be under a hundred. It could be 84. So that's evidence that it could be under a hundred.

But where does he have knowledge? Just because somebody's complained about odors doesn't give him knowledge that all of a sudden he's emitting more than a hundred pounds of ammonia. That's a question for the jury to decide.

THE COURT: Here's the argument. Defendant has admitted, and he can't deny it, that he knows his facility has released ammonia. I mean he knows that. And that's, again, the issue is reportable quantity. And the plaintiffs have argued that as a matter of law, as soon as he knew that his facilities emit ammonia -- I keep saying he, that it, the egg ranch is the defendant -- that it should have investigated whether it emitted a reportable quantity. Yet it's also undisputed that prior to this lawsuit being filed, the defendant took no action to determine whether its facility emitted more than 100 pounds of ammonia per day. And as a matter of law, you can't rely on that defense. You can't be willfully ignorant. Cases are clear on that.

And I know you focused on the language that says you can't obviously require someone as a matter of law to monitor every day and check every day. But those cases also make it clear that you can't do what your client is alleged to have done in this case. And that is stick your head in the sand and say I don't know, I know I have ammonia out there, but I'm not going to test. And it took a lawsuit for him to finally come around and say maybe I should look into it. And lo and behold he looks into it, and guess what, you've got a report that says 740 pounds. His own expert.

Those are the facts. You can try to twist them or turn them any way to create a genuine issue, but where is the

dispute as to those specific facts?

MR. WUNDERLI: I think the Court is jumping, and it's an improper recitation of the law. Just because you smell ammonia doesn't mean you have a duty to investigate whether or not you have an amount that's above the reportable quantity. Smelling ammonia, and we have evidence of this, you can smell ammonia, and it can be much less than the reportable quantity. That doesn't tell you anything. There has to be circumstances. And this is a question that is for the jury.

THE COURT: Where am I wrong? Again, I'm reading from plaintiffs' reply brief, and I want you to respond to that. "A party cannot be willfully ignorant in order to avoid liability. See United States vs. Buckley. See also In re Mobile Oil Corp. A regulated entity cannot evade its duty to report by shielding itself from gaining knowledge of a reportable release. A defendant may even be criminally convicted for not reporting under CERCLA when he 'avoided knowledge by deliberately closing his eyes to what would otherwise be obvious or by failing to investigate if he is in possession of facts which cry out for investigation.' Under defendant's legally unsupported view of the law, any facility which deals with a hazardous substance can stick its head in the sand and ignore facts which indicate that it might be releasing an amount which Congress deemed unsafe. This is

not the law and would undermine the statutes' purposes."

That's wrong?

MR. WUNDERLI: No, but that's not the issue that we were just addressing. Smelling ammonia doesn't give rise to an obligation to investigate to see if you're over the -- where is the evidence that the plaintiffs have put on that he had knowledge or should have known that the ammonia levels were above a hundred pounds a day? Don't tell me just because it's an odor.

THE COURT: It can be constructive knowledge. And I'll let Ms. Roth answer that because, again, I'm looking at this statement of undisputed facts, and I see a lot of facts. Do you want to answer that question? Where is the evidence of constructive knowledge?

MS. ROTH: Well, your Honor, our position is that as soon as a facility knows it's dealing with a hazardous substance, it has a duty to investigate. So for us, the only two facts that we need to prove is that, one, he knew he was dealing with ammonia. And he's admitted it in his deposition testimony and in the statement of facts. And that he did absolutely nothing to investigate. And they've admitted that too. That's all we need. It's that as soon as a facility knows it's dealing with a hazardous substance, it has to take some action to look into it. And he took none. Otherwise, you could have facilities dealing with hazardous substances

sticking their heads in the sand all the time. They would just exclude experts from their facility. They wouldn't do anything. And they wouldn't be liable under statutes.

THE COURT: On top of that, at least I saw additional evidence of what you believe was constructive knowledge.

MS. ROTH: So that we believe that what I just said is all we need to prove. But in addition, even though there's complaints against him which are not hearsay because they go towards notice.

THE COURT: Right.

MS. ROTH: That even though there are complaints against him, even though he has this 1996 report that your Honor mentioned talking about hens in the facility and the manure lagoon would be marginally inefficient, he didn't investigate anything. He did absolutely nothing. And we weren't even able to find cases on that. Every case that we found, the defendant did something, and the courts deemed that inadequate. Here, there's absolutely nothing. So even the defendant talking about the smelling ammonia, that's completely irrelevant. His client has admitted that he knows ammonia is on the facility.

THE COURT: Okay.

MR. WUNDERLI: Your Honor, if you were to take that position, every animal farm, every poultry, cattle, would have to investigate, because they all know -- despite

whatever evidence there may be, you'd have to investigate because you know that ammonia is a byproduct of the breakdown of manure. And that's not the law. For instance, in the Tyson Foods case, the court found that there was a question of fact for the jury to decide. Even though the equation that was used there, I don't know if it was the Liang study, but they used some study, showed that there could be more than 200 pounds per day of ammonia emitted from a chicken farm. You have to have some evidence beyond well, I just smell odors, or the lagoon is not efficient.

THE COURT: So you disagree with Ms. Roth's position though. That your client, knowing that he's involved and dealing with ammonia, that by doing absolutely nothing, it's okay for him to do absolutely nothing, knowing he's dealing with ammonia.

MR. WUNDERLI: Unless and until there is some circumstances, some evidence that says hey, now he should know that he could be over a hundred pounds per day. Where is the evidence? It's not that there were odors. It's not that the lagoon was inefficient. If they had some evidence that said okay, odors like this should have shown him that he was over a hundred pounds a day, or if the lagoon is inefficient, then you should have some evidence.

THE COURT: Where is the evidence of that? That he knew that there was a reportable quantity? I mean he knew he

was dealing with ammonia.

MS. ROTH: There is no evidence that he knew that there was a reportable quantity.

THE COURT: Or that he had constructive knowledge.

MS. ROTH: That's exactly what we're saying, your Honor, is that there's this duty to investigate. The defendant actually is mis-citing the law. The law is that as soon as he has some facts to know that he's emitting more than a reportable quantity, he has a duty to investigate. So once he knows that his facility's dealing with a hazardous substance, he has to look into it in some respect. We're not asking for an expert to come out to each farm. We're asking for some sort of investigation. It could be looking at one of these Liang studies.

THE COURT: The Thoro Products case, which both parties cite, says that the owner or operator of the facility should possess knowledge of such circumstances as would ordinarily lead upon investigation, in the exercise of reasonable diligence which a prudent person ought to exercise, to a knowledge of a release of an RQ. And so I think what the defendants are arguing is that's at least at issue in this case. That has to be tried. That there has to be evidence that the defendant possessed knowledge of such circumstances as would ordinarily lead upon investigation, in the exercise of reasonable diligence. That at least is at

issue.

MS. ROTH: Well, I disagree, your Honor. The facts that he should have investigated, the first one was in 1996, was the study that we discussed that said that if he was housing more than 500,000 hens, that his manure lagoon, which is the mechanism to process the manure that creates ammonia, that would be marginally inefficient. So as soon as he knew that he was housing that many hens, that by itself is constructive knowledge that he's going to be emitting too much ammonia.

THE COURT: Okay.

MR. WUNDERLI: First of all, she's misstated the report. Secondly, she's put the cart before the horse. You have to show some circumstance. There's got to be some evidence of some circumstances that you can tell the Court okay, under these circumstances, he should have known that this was over a reportable quantity. That isn't before you. And we have evidence in a declaration of Dr. Mitloehner that merely smelling ammonia doesn't give rise to some suspicion that you could be over a reportable quantity.

THE COURT: Okay. I understand the argument. I also want to focus on this latest EPA regulation that was issued. And it's interesting to me that, Ms. Roth, you dealt with it in a footnote rather than in the body of your brief. As a judge that hates footnotes, it again seems to me to speak

volumes when someone deals with something in a footnote rather than in the body of the brief. Be that as it may, your argument is, in effect, that this EPA regulation, which clearly does say at this point that Olivera Egg Ranch doesn't have to report, is as a matter of law improper, that a court should declare it illegal, and right now it's actually being litigated. But as we sit here today, no court has decided that.

MS. ROTH: Correct.

THE COURT: And it may end up being an issue in this case; correct?

MS. ROTH: Correct.

THE COURT: So how can I grant summary judgment with that issue still out there? Don't I have to at least make that decision? And you didn't ask me in your summary judgment motion to rule on that issue. But isn't that something that has to be decided? Because it comes back to this issue of redressability. How can I issue an injunction that says the egg ranch has to comply with CERCLA if right now the law is you don't have to comply with CERCLA?

MS. ROTH: Well, your Honor, first, I agree it should not have been in a footnote. It is a very important point. But the issue is, and I think the Court does need to make a decision on it, is that it's just so completely against the powers of government, the checks and balances. You have an

executive power, the EPA, which is completely changing a federal statute. They don't have authority to do that. That's very clear. And when we initially brought this lawsuit, it was a couple months before this EPA decision.

THE COURT: Okay. But the defendants haven't had a chance to brief that. Their position is the law is the law right now as it stands. I understand you're challenging that. But I really don't have that issue in front of me in these summary judgment motions. Would you agree with that?

MS. ROTH: Well, they did have the opportunity to respond. It wasn't just in our reply.

THE COURT: That's true. It was in your opposition. I can't remember. Did you respond to their footnote in your reply? I've read so many things.

MR. WUNDERLI: I think we said that the statutes provide that EPA can set forth regulations, and they have, and it's the law, and we don't agree that the plaintiffs can blankly state in summary fashion that it shouldn't be the law.

THE COURT: Well, I don't think they're blankly stating. I think they're saying that while EPA can pass regulations, the regulations have to make sure that it carries out the language and intent of the statute and that this regulation clearly doesn't do that.

MR. WUNDERLI: But we've set forth the rule, final

rule, as an exhibit. It goes into detail as to why they've done that.

MS. ROTH: Well, the statute's also very clear about what authority it gives to the EPA, and that is not the authority. There's no authority to make exemptions from the federal statute. And it is plaintiffs' position that this is an awkward position that we're in because this did come up after the lawsuit was brought. We're happy if this Court would like to stay the decision pending the resolution of this action, but it's our position that it's so clearly against federal law and --

THE COURT: Well, I don't see why it's not an issue that I couldn't decide.

MS. ROTH: We agree.

THE COURT: Okay. Do you disagree or do you agree? Is that an issue that the Court could decide? It's in district court in D.C.; right? Why do I have to wait for them?

MS. ROTH: I'm sorry. It's in the D.C. Circuit.

THE COURT: Oh, it is. What did the district court in D.C. do?

MR. BRANDT: Your Honor, it's a special procedure, and I'm honestly not that up to speed on it. But when you challenge the regulation, you go straight into the appellate court in D.C.

THE COURT: Okay.

MR. BRANDT: So it's pending there.

THE COURT: It's been fully briefed and argued?

MR. BRANDT: It has been briefed. The parties actually went into mediation with EPA over this, which is highly unusual, I'm told.

THE COURT: The last question I had was this position, Mr. Wunderli, that your client seems to take that -- and I saw it in declarations -- that it's impossible to, at least at this point in time, I think you used the word impossible in both declarations and in argument, that it's impossible to measure reportable quantities or quantities of ammonia. And it comes back to your argument that I should wait for the NAEMS findings to decide anything. And then I go back to your expert's deposition, Mr. Mitloehner's deposition, where he's asked:

"You say it's impossible for a livestock or poultry producer to assess accurate emissions?" That's the question.

"ANSWER: Yes."

I'm sorry. It starts out, the question is: "Since we're on the topic, I think this is your opinion number 2. Let's talk about that. It's on page 4 of your report. You say that it's impossible for a livestock or poultry producer to assess accurate emissions?

"ANSWER: Yes.

"QUESTION: Is it impossible for anyone to assess accurate emissions?

"ANSWER: It is not impossible, but it's extremely challenging and very involved."

So I look at that answer and then I look at the declarations, and I think, well, I know declarations are written by lawyers, and I'm sure he reviewed it and signed it, but --

MS. ROTH: He did not sign it, your Honor.

THE COURT: Oh, he didn't sign it. He never signed it?

MS. ROTH: No.

THE COURT: Did he ever sign his declaration?

MR. WUNDERLI: Yes.

THE COURT: Do I have a signed copy of it?

MR. WUNDERLI: You should.

MS. ROTH: No, your Honor.

THE COURT: But I guess if he's on the witness stand, I'd ask him the same thing. You know, which side of your mouth are you talking out of? How can you say one thing in a declaration and another thing in a deposition?

MR. WUNDERLI: I'll look forward to that day, I hope, where you get to hear him testify. He is one of the principal investigators in this NAEMS study.

THE COURT: I know who he is.

MR. WUNDERLI: And that's why he says it's very difficult. They've been going at it.

THE COURT: But you submitted a declaration where you have him say it's impossible.

MR. WUNDERLI: For a farmer. For a farmer. Mr. Olivera cannot do it. He will testify to that. I don't know of any farmer who could.

THE COURT: Yeah, but you just hire an expert. I mean that's part of the cost of doing business. So you're kind of splitting hairs through that declaration and the deposition testimony. My response is it's not impossible.

Do you have someone who is going to say it is impossible for anyone to assess accurate emissions? He's going to say it's not impossible?

MR. WUNDERLI: They're involved in it right now. It's a two-year-plus study to determine accurate emissions. We're dealing with science here. And right now, there is no scientific methodology to accurately determine emissions from farm animals. That's what the NAEMS study is all about. And they're spending lots of money to do this.

THE COURT: So we should just ignore the law. I mean is that where we're headed? I should just dismiss the lawsuit and not allow people who are being affected by these emissions not to have their day in court. That it's okay for people to ignore the laws of the United States because, in

their opinion or view, even though there's some question as to that opinion or view, there's no way to accurately measure the emissions.

MR. WUNDERLI: It's the reason why they've done what they've done over the last five years.

THE COURT: Shouldn't this battle be with the EPA though? I mean the law is the law. You've got to comply with it. Here's the point. You have to do your best to comply with it. And the argument in this case is your client hasn't even attempted to do his best. What he's done is completely ignored, and he now comes into court after being called to the carpet and says I don't know how I can do it. I didn't know. I know there's ammonia out there. I don't like the law. So, judge, don't enforce it against me.

It's an unfair question. But, again, I read all that in his response to a law that's on the books, that these people are trying to get the EPA to enforce, which the EPA isn't enforcing, and they now have to bring their own lawsuit and are asking a judge to do what the EPA should be doing.

MR. WUNDERLI: Is there 271 pounds or 243 pounds a day? Is there 700 pounds a day? Is there 84 pounds a day?

THE COURT: There's 700 pounds a day. That's the evidence before the Court.

MR. WUNDERLI: Dr. Hicks will say on that day, there was 700 pounds. Their expert on their day will say there's

200 pounds. On another day, it will be 84 pounds. And the testimony will be we really don't know. We really can't know reliably.

How can two experts spending all that money be so far apart in their testing? And it's scientific. See, when you're not dealing with scientific methodology that is reliable, that's what you get. You get voodoo science. And so you get 700 and 200 and 84. So the reason the EPA, which is charged with promulgating regulations for this and governing this, said we understand there's a problem with these farms, we don't know how to measure reliably the emissions, so we're going to find out how. And we're going to do this study, and then we're going to tell you how, farms, we're going to tell you how, and then you're going to be charged with it. And all we're saying is then charge us with it. But until then, there's no way to know. And we didn't know. There's no evidence that we knew before this complaint was filed.

MS. ROTH: Your Honor, a lot of what the defendant is saying is not in evidence. The evidence is that these were the emissions levels on those days. There's no evidence that it would be different the next day. There's no evidence that any of the experts have stated that. You know, the defendant just said that one day it could be 700 pounds and one day it could be 84. There's no evidence like that.

THE COURT: The question is how are you going to prove that in October of 2005 that the egg ranch emitted a reportable quantity and failed to report that?

MS. ROTH: The courts have actually dealt with this situation.

THE COURT: My question is how are you going to prove that? I don't want to know what other courts have done. My question is real specific. You're now at trial. You're going to argue to the jury that they've been in violation, I guess you're going to argue every day since 2004, if not before. That's your argument. How are you going to prove it?

MS. ROTH: That's why we're talking about these studies based on hen emissions and the facilities, the way the manure is processed at the facilities. That's the only way they can do it. And that's how courts have done it in the past.

THE COURT: And then he wants an opportunity for his client to put on evidence saying that's pure speculation, that's unreliable. So you see that at least that issue probably has to be tried.

MS. ROTH: He's citing those reports as reliable. He cited the same reports in statements to the federal government that he certified are accurate, in the EPCRA reports.

THE COURT: He being?

MS. ROTH: The defendant through Mr. Olivera.

THE COURT: Okay.

MS. ROTH: He cited this Liang study in his EPCRA report, and he certified that that was correct. So that's one way to do it. This is really a damage issue, and we'll be prepared to deal with that on damages. But for summary judgment, the clear evidence states that he was emitting more than over the reportable quantity. There's no other evidence before the Court.

THE COURT: I mean you agree, even if I granted summary judgment, we're still going to go to trial on obviously the nuisance claim.

MS. ROTH: That's possible if we don't settle.

THE COURT: And also on the issue of what the form of the injunctive relief should look like and/or whether I should issue civil penalties. You're still going to have to go to trial on those issues; right?

MS. ROTH: Well, the damages under CERCLA is --

THE COURT: Civil penalties.

MS. ROTH: Yes.

THE COURT: Isn't it 32,500 a day or something like that?

MS. ROTH: That's possible.

THE COURT: Okay. And so your argument's going to be

the evidence shows that they violated every day for the past four to six years at $32,500 a day.

MS. ROTH: I'm sorry, your Honor. I wasn't completely prepared to discuss damages today.

THE COURT: Okay.

MS. ROTH: But that is a damage issue. The issue today is that he was emitting more than 100 pounds. The extent, you know, how much this Court wants to impose in civil penalties I think would depend on a lot of factors.

THE COURT: That's for another day though.

MS. ROTH: Yes.

THE COURT: Go ahead.

MR. WUNDERLI: You hit the nail right on the head. This is how the evidence will go. They won't even use the 720 pounds because that's after we've already reported. They have to show what did you know and how much was there before the complaint was filed. So they're not going to use this report because it's 271 percent different than their own expert's report, and it's so unreliable. So they're going to use some Liang study, that we'll have lots of evidence about, that when we used the Liang study, it shows that it could be 84 pounds, which is under the reportable limit. That is why this case cannot be decided on motion for summary judgment at this point. There's just way too many facts involved.

THE COURT: Go ahead.

MS. ROTH: I was going to say, your Honor, that using the Liang study actually I believe would be a detriment to us, but something like that is all we could do. The 740 pounds that Mr. Hicks found was after this dredging operation that took place in May and June where they removed massive amounts of manure from the facility. All the experts say that once the manure was removed and dried, it would have reduced the ammonia emissions.

THE COURT: And it still came up at 740.

MS. ROTH: And it still came up, you know, I think four months later, that it's still at 740. And that's after the manure has dried over the entire summer. So the plaintiffs, we do understand that we do have a burden to prove these damages, but that is a damage issue. It's not an issue for summary judgment.

THE COURT: Okay. I'm prepared to rule as follows. Again, there's more than ample briefing in this case. And I'll take these motions one at a time. On the defendant's motion for summary judgment, focusing first on the standing argument, as I've indicated, I didn't find much merit in that argument. And I found the opposition to that to have merit. This is clearly a case where all plaintiffs have standing in this case.

Each individual plaintiff has submitted evidence that they were harmed when defendant failed to provide information

about its release of reportable quantities. Each of the individual plaintiffs lives within the community adjacent to the defendant's property. They specifically alleged they do not know the amount of ammonia emanating from defendant's property, they can't make an informed decision on how to protect themselves or their families, and that defendant's unlawful discharges have had and will continue to have an effect on their family's health and safety. Numerous declarations were submitted.

Plaintiffs are exactly the type of individuals that CERCLA and EPCRA's public notification provisions were designed to protect, and their injury was directly caused by defendant's failure to file the reports required by the statute.

The Court further finds that a favorable decision likely will redress plaintiffs' injuries. I can redress plaintiffs' injuries through a declaratory judgment, injunctive relief, and/or granting civil penalties as provided for in CERCLA and EPCRA.

Defendants have argued that plaintiffs must have previously requested a copy of defendants' CERCLA or EPCRA reports in order to have standing under the statutes. Defendant, however, cites no authority for this proposition. And as such, the Court does find that plaintiffs do have standing.

I don't need to address the standing of the Humane Society. Since individual plaintiffs have standing, it has standing as well.

Also in their summary adjudication motion, defendant has claimed that this case is moot because after the action was filed, defendant began making EPCRA reports and because the EPA has purported to release CAFOs such as defendant's from CERCLA reporting obligations. Just after the complaint in this action was filed, the defendant did attempt to comply with EPCRA and has filed reports since. I do find, however, that defendant's post-litigation attempts to comply with EPCRA does not moot this controversy before the Court.

The burden of demonstrating mootness is a heavy one. A moot action is one where issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. The Ninth Circuit has described moot cases as those which have lost their character as present, live controversies. That's Northwest Environment Defense Center vs. Gordon, 849 F.2d 1241, a 1988 Ninth Circuit case, and Lindquist vs. Idaho State Board of Corrections, 776 F.2d 851, a 1985 Ninth Circuit case.

The basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted. Thus, in deciding a mootness issue, the question is not whether the precise relief sought at the time

the application for an injunction was filed is still available. The question is whether there can be any effective relief.

Defendant has not met its heavy burden on this issue. Despite defendant's arguments about regulatory exemption and its post-complaint motivation to meet its legal duties, there does continue to be a live controversy from which this Court can grant effective relief. There is still a live and concrete controversy over whether defendant has, in fact, properly complied even with EPCRA and whether violations are likely to continue in the future. There's a controversy over whether the defendant was and still is required to file CERCLA reports and whether defendant's reports are sufficient.

There is this issue of this regulation that, as a matter of law, plaintiffs are challenging and which the Court will and needs to decide as part of the issues in this case. And because plaintiffs are alleging that defendant has not yet met its obligations under CERCLA and EPCRA, the issues are not moot. Given all this, defendant's motion for summary judgment is denied.

In terms of plaintiffs' motion for partial summary judgment, we've gone through what plaintiff must show, and I don't find that there's any genuine issue as to whether defendant is a person in charge pursuant to CERCLA or an

owner or operator pursuant to EPCRA. That issue has been decided. The Court does find that the defendant is such a person. Or that the egg ranch is a facility. I don't think that's at issue in this case at all either.

The issue of whether defendant, in fact, emitted more than the reportable quantity of ammonia per day as defined by both statutes, I do find that defendants have raised a genuine issue or at least met their burden to raise a genuine issue of material fact on that element of these two claims. So that is an issue that, through the discussions today, it's clear that does have to be tried. There's a lot of evidence on both sides that needs to be presented. So that would be and will be an issue at trial.

The element of whether defendant failed to immediately report its emissions as required, I think it's undisputed, but it's, again, dependent upon whether there really was a reportable quantity. I don't think defendant disputes that it failed to immediately report because the undisputed facts are it didn't report that at all. But it still is dependent on the Court finding that there was a reportable quantity that was emitted and should have been reported. That's an issue that really isn't going to require a whole lot of testimony and will be completely dependent on what the finding is with respect to element number 3.

And then there's this knowledge, actual or

constructive knowledge issue. That the defendant knew, either actually or constructively, that it did emit more than 100 pounds of ammonia a day. And again, defendants have shown in their papers and at argument today that that's an issue that is going to have to be tried. And so I can't grant summary judgment or summary adjudication on that as well.

So for those reasons, the plaintiffs' motion for partial summary judgment is also denied. There are things that will have to be tried along with the negligence claim. And then also this whole issue of if liability is established, what's the appropriate remedy in this case. And that, again, in part, is going to be dependent on this issue that we discussed, this legal issue of whether that regulation is still in effect or not. Because again, I can't think of any injunctive relief I can give you, even if I do find that there's been reporting violations under CERCLA, that would address any injuries, unless I find that the regulation wasn't appropriate as a matter of law, and therefore it doesn't have effect and shouldn't be in effect. And so we're a lot of steps away from that. So that's going to be tried as well.

Hopefully that gives you some guidance as to what I expect to see at the trial. These are all issues that we'll talk about on September 10th. Is that set for the afternoon

right now? Keep in mind I may move that to the morning, just so you know. Sometimes I move my pretrial conferences.

THE CLERK: It's at 3:00 o'clock.

THE COURT: Okay. It's set for 3:00 right now. Keep your mornings open on that day, because I usually move those up to the morning. It just depends on if I'm in trial or not.

Discovery is closed; right? Or have you informally agreed?

MR. WUNDERLI: It's closed.

THE COURT: Okay. So I'll see everybody on September 10th. In terms of preparing orders for the Court reflecting my rulings today, I'll ask the plaintiff to prepare proposed orders on the motions to dismiss and also a proposed order on your own motion for partial summary judgment. And then I'll have the defendants prepare an order with respect to your own motion for partial summary judgment. And you can do them -- it's up to you. A lot of times lawyers just submit the order saying based on the Court's findings at the hearing on this matter, the motion is denied, and you can attach a copy of the transcript. That's just probably the simplest way. Or if you want to do it more elaborately, go ahead and do it. Just make sure that both sides are okay with the form of the order, which shouldn't be too tough in this case.

All right, folks. See everybody next month.

MR. WUNDERLI: Thank you, your Honor.

MS. ROTH: Thank you.

(Proceedings were concluded.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Kelly O'Halloran

KELLY O'HALLORAN, CSR #6660