



**Citizen Lawsuit Abuse and EPA Fraud
Request for Assistance
April 29, 2019**

Background:

Washington state has about 375 family dairy farms remaining. Dairy products are the state's second largest agricultural commodity after apples. But the dairy community is under a sustained legal, lobbying and regulatory assault resulting in the acceleration of the loss of farms and consolidation to ever larger farms.

There are two distinct but closely related aspects of this assault:

- The use of citizen lawsuits under the Clean Water Act (CWA) and the Resource Conservation Recovery Act (RCRA) by Charlie Tebbutt, an Oregon-based attorney. These lawsuits not only greatly harm or destroy farms but are used to enrich not just the attorneys filing the litigation, but the so-called citizen groups serving as plaintiffs using "environmental mitigation" grants through the Rose Foundation.
- The EPA Region 10 office has worked closely with the litigation industry. The 2012-2013 Yakima Nitrate Report is a key element of EPA's heavy-handed enforcement and citizen lawsuit victories. However, the science is deeply flawed, EPA staff violated EPA policy in failing to conduct a peer review necessary for "influential science information" (ISI) and when confronted with this failure, attempted to cover up this failure by changing the categorization from "ISI" to "Other" giving them far more latitude in the peer review.

Facts related to abusive citizen lawsuits by Charlie Tebbutt

- Since 2005 approximately 20 lawsuits have been filed or threatened to be filed against Washington state's family dairy farmers generating several million dollars in legal fees for Charlie Tebbutt, the Eugene, Oregon-based environmental attorney behind these suits.

- The high cost of defending themselves in federal court forces most farmers to settle. Settlements always include payment of Tebbutt’s exorbitant legal fees. In this light, this litigation is a form of quasi-legal extortion.
- Costs related to this litigation for farmers go far beyond payment of legal fees and settlements. Many farmers purchased expensive litigation insurance and others have incurred attorney’s fees in consultations when threatened with potential lawsuits. In Whatcom County farmers paid a Tebbutt client \$450,000 to prevent them from proceeding with lawsuits against several dairy farms. These farms were told that they were selected not because of pollution but because they were leaders in the farming community.
- The approximately 375 remaining Washington family dairy farmers have paid in excess of \$50 million in settlements, litigation costs, and activities responding to Tebbutt’s pressure to impose massive new state regulations. This expense comes at a time of global price pressure causing most dairy farms to lose money since about 2014.
- In 2018 the Department of Justice took action against the abuse of the citizen lawsuit provisions in federal law in California. They noted there is little to no environmental benefit derived from these settlements and that the legal fees generated by the citizen lawsuits were not justified.

Facts related to use of the citizen lawsuits as a fundraising mechanism by environmental groups aligned with Tebbutt

- Congress prohibited citizens filing these lawsuits from profiting from the outcome. Penalties arising from this litigation are directed to the federal government, however the law allows payments from settlements to be directed to environmental mitigation.
- The citizen lawsuits pursued by Charlie Tebbutt and the law firm of Smith & Loney of Seattle typically require defendants in a settlement to pay into an “environmental mitigation fund” often administered by the Rose Foundation of California. This foundation then distributes those funds in some cases to legitimate environmental projects, but in many other cases back to “citizens,” which are actually environmental non-profits pursuing these lawsuits. These funds are distributed to them in the form of “environmental grants.”
- Organizations actively involved in pursuing litigation, lobbying, and advocacy against dairy farmers such as Western Environmental Law Center, RE Sources for Sustainable Communities, and Friends of Toppenish Creek have secured substantial funds from the Rose Foundation. In some cases those funds have been for overt advocacy efforts including donor appeal support and the creation of the “Agricultural Pollution in Puget Sound” white paper developed by WELC to serve as the basis for litigation and policy advocacy. This document uses outdated science and distortions to support false

conclusions about dairy farm pollution and related policy. Funds provided to Friends of Toppenish Creek support the on-going activism of a local anti-dairy activist well known for numerous false accusations against dairies.

- Puget Soundkeeper Alliance reports it has litigated over 150 citizen lawsuits resulting in over \$6 million in “mitigation fees.” It’s website states that these funds have been directed to local environmental groups to fund environmental benefit projects and help repair damage done to the Sound. It also states that Soundkeeper does not financially benefit from these settlements. It does not mention that its staff includes lawyers who most likely participate in the legal fees paid as part of every settlement. Nor does it mention that while Soundkeeper may not benefit directly, the various environmental groups it partners with do directly benefit from these grants. With money flowing between these groups it is reasonable to conclude that the Rose Foundation “launders” this money for Soundkeeper and its litigation partners.
- One other example of this “shakedown-laundering-fundraising” process at work. Charlie Tebbutt filed a citizen lawsuit against a Yakima-area dairy farm which resulted in a settlement. Newspaper accounts based on Tebbutt’s press release claimed the farm agreed to pay \$20,000 into a clean water fund. The accounts did not mention the settlement was for \$75,000 with \$55,000 paid to Tebbutt and the “fund” is managed by Tebbutt through his citizen “client”, CARE.
- In a news article relating information about the Department of Justice action against the abuse of the citizen lawsuits, Karl Coplan, director of the environmental litigation clinic at Pace University's Elisabeth Haub School of Law, stated: "Plaintiffs should not be enriching themselves through citizen suits," Koplan said. "The idea is that the citizen suit is brought to enforce environmental values should be settled where any payments that don't go back to the Treasury should go toward environmental projects." The Rose Foundation grants show that this is not happening in Washington state.

Facts related to Region 10 EPA staff and leadership working with the litigation industry and producing a fraudulent science report that has devastated dairy farms

- In 2005, an attorney with the Region 10 office of the EPA presented a workshop to environmental attorneys advising how they could use the citizen lawsuit provision of the federal municipal waste law (Resource Conservation and Recovery Act (RCRA)), to file lawsuits against suitable targets (ie., deep pockets). Tebbutt’s supervisor at the time was the wife of that same EPA attorney, and Tebbutt was in attendance at the same meeting. Although RCRA specifically states animal manure is not considered municipal waste, Tebbutt has successfully used the citizen lawsuit provision using RCRA against several dairy farms. Following the workshop, the wife of the EPA attorney, also an attorney, sued one of the large Yakima dairy farms, which subsequently was also sued by Charlie

Tebbutt.

- In 2010, following a sensational and inaccurate newspaper series linking dairies to nitrate pollution, the EPA Region 10 staff determined to develop a “science” study. The study was clearly intended to provide the proof of dairy pollution the EPA office needed to take strong enforcement action against dairy farmers. Every science expert who reviewed the report condemned it based on improper data collection, failure to investigate other sources including legacy nitrate and septic systems, and false conclusions.
- The Washington State Department of Agriculture and the Department of Ecology stated it should not be used for enforcement.
- A tribal natural resources expert stated use of research findings in the report was “borderline reckless.”
- A retired Natural Resources Conservation Service senior agronomist provided a detailed analysis demonstrating the serious errors in data collection, faulty analysis and misunderstanding of nutrient management including the nitrogen cycle.
- The EPA staff did not conduct a peer review necessary for “influential science information” which this report was designated. The four initial reviewers were provided only a portion of the study with relevant information missing as detailed in the next item. Only reviewers internal to the EPA approved it. The USGS reviewer provided the same criticism as the other experts. And the USDA reviewer asked to have his name removed after discovering the published report was substantially changed from the documents he was provided.
- The report given to the four peer reviewers in 2012 was missing the entire introduction, it had a one page conclusion versus the four pages conclusion in the final report. Those conclusions bore little resemblance to the ones provided to the reviewers. Additionally, the entire sections on lagoon size, leakage and environmental processes under lagoons was missing for the original report. None of EPA’s calculations or conclusions were peer reviewed by any peer reviewers.
- In a meeting on November 1, 2018 with a delegation from the dairy community, the EPA staff person in charge of the study and enforcement answered a direct question from the new EPA Region 10 Administrator concerning the peer review, stating it was “thorough and complete.”
- Following challenges from the dairy community regarding the failure to follow EPA and federal policy, EPA staff said the report had not been categorized as “influential” but instead as “Other” which provided them far greater latitude in the peer review. On April 2, 2019 the head of compliance and enforcement for Region 10, in a meeting with the Administrator, was presented documents that showed from the beginning the study was

categorized as “influential.” He denied ever having seen that information, despite this designation being repeated in the 2013 EPA responsiveness document developed by EPA staff as a reply to the more than 17 experts who disputed the report.

- The report was used as the primary basis for the EPA to coerce farmers into a highly punitive Administrative Order on Consent (AOC). Two of the three farms currently subjected to this have been reduced to near bankruptcy and a subsequent citizen lawsuit based on it. The other farm, working to fully comply with the punitive requirements, has spent \$11.5 million to date with an additional \$3 to \$5 million anticipated. Only because this family farm has other substantial business interests has this dairy operation been able to stay in business.
- The farms were induced or coerced into signing the Order based on the study and the threats to take the farmers to the Ninth Circuit Court with the attendant costs and risks. Further, Administrator McLerran committed to defend the farmers against possible citizen lawsuits following the Order.
- When Charlie Tebbutt filed a citizen action against the three farmers, McLerran refused to keep his commitment. The court, using the falsified study as a basis and without the promised support from EPA, found against the farmers.
- The EPA study and report was used as the basis for the Pollution Control Hearings Board review of the Ecology Concentrated Animal Feeding Operation and NPDES permit. However, the panel of three attorneys appointed by Governor Inslee rejected the arguments of the litigation industry and upheld the permit further substantiating the false science and conclusions of the report.
- The EPA report continues as the basis of the citizen lawsuits filed against dairy farmers in Washington state.
- In addition to developing the “science” used for litigation and punitive enforcement actions, the EPA Region 10 office and leadership under then Administrator Dennis McLerran supported or pursued numerous actions harmful to farmers. The most egregious example beyond the science report was the approval of \$500,000 of taxpayer money to fund a public relations campaign against farmers called “What’s Upstream.” The advertising in the campaign falsely claimed “unregulated agriculture” was harming Washington waterways, using images of cows in streams from Pennsylvania and the UK to “prove” pollution claims. This campaign drew the ire of Congress resulting in 135 members of Congress on both sides of the aisle condemning it and forced EPA Director Gina McCarthy to denounce the campaign and the use of funds. This was an illegal use of taxpayer money as it involved overt lobbying of the Washington state legislature for mandatory stream buffers. The Office of Inspector General of the EPA noted it constituted state lobbying but not federal lobbying.

Summary

The litigation industry involving environmental NGOs and led by Charlie Tebbutt has been conducting a sustained attack against Washington's family dairy farms. They are abusing the citizen lawsuit provisions of federal laws by pressuring settlements with defendants that ensure very large legal fees without significant environmental benefit. Lawyers involved have earned millions in fees while their targets have moved their dairy operations to other states, sold their multi-generation family farms, or are continuing to try to maintain the family farm in very difficult global market conditions. These lawsuits not only violate the intent of Congress and the US Supreme Court (Gwaltney), but they are also used as a form of fundraising with the "laundered" money passing back to the litigants in the form of "environmental grants" through the Rose Foundation.

Further, this has been done with the direct or indirect support of the staff and former leadership of the Region 10 EPA office. Not only have they advised attorneys on how to use or abuse the citizen lawsuit provisions, they have provided these attorneys with their most important tool: a so-called science report that falsely places blame on dairy farmers for nitrate in groundwater. When confronted with failure to meet federal and EPA policies for peer review, this staff then attempted to cover up this very significant failure by trying to change the categorization of the study from "influential" to "other." This is a further direct violation of EPA policy which states these categories cannot be changed once a study has been submitted to reviewers.

Dairy farmers in Washington state, supported by dairy leaders in Oregon and Idaho are committed to seeing justice done and the end of this abuse of our laws and legal systems.

RESOURCES

Rose Foundation Grants Database

Listing of organizations receiving grants including "environmental mitigation" grants

<https://rosefdn.org/grants>

Nauen, Charles N. (1989) "Citizen Environmental Lawsuits after Gwaltney: The Thrill of Victory or the Agony of Defeat?," William Mitchell Law Review: Vol. 15: Iss. 2, Article 2. Available at:

<http://open.mitchellhamline.edu/wmlr/vol15/iss2/2>

Discusses implications of US Supreme Court decision in Gwaltney affecting citizen lawsuits.

Practitioner Insights: Citizen Suit Enforcement—What to Expect and How to Prepare BY
KIRSTEN L. NATHANSON, DAVID CHUNG AND DANIEL LEFF

<https://www.crowell.com/files/20170315-Practitioner-Insights-Citizen-Suit-Enforcement-What-to-Expect-and-How-to-Prepare-Nathanson-Chung-Leff.pdf>

The Clean Water Act Citizen Suit Shakedown

By Blair W. Will

<https://www.hmslawgroup.com/clean-water-act-citizen-suit-shakedown>

Forbes: Environmental Ambulance Chasing

<https://www.forbes.com/sites/wlf/2018/06/26/environmental-ambulance-chasing-doj-urges-court-to-scrutinize-clean-water-citizen-suit-settlements/#29cdd7c530c9>

This article explores how the Department of Justice is working to counter abusive citizen lawsuits in California.

Clean Water Act 'ambulance chasers'? Firm raises eyebrows

Amanda Reilly, E&E News reporter

<https://www.eenews.net/stories/1060082651>

Reports on DOJ warnings about abusive citizen suits and raises issue of plaintiff's profiting from the litigation.

2005 Public Interest Environmental Law Conference Brochure

Region 10 EPA attorney presentation on how citizen lawsuits under Clean Water Act and Resource Conservation and Recovery Act can be used "with an eye towards expanding the public interest use of these laws." (See page 15)

<http://www.pielc.org/Brochures/2005.pdf>