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# EPCRA Citizen Suit Enforcement/Concentrated Animal Feeding Operation: Federal Court addresses Whether Prior EPA Consent Order Constitutes "Diligent Prosecution"

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The Federal District Court for the Eastern District of North Carolina ("Court") denied a concentrated animal feeding operation's ("CAFO") motion to dismiss allegations made by the Humane Society of the United States ("Plaintiffs") that the company violated certain federal statutory notification requirements regarding ammonia emissions. See *The Humane Society of the United States v. The Hanover Company of Wisconsin, LLC*, 2016 WL 3435192 (June 17, 2016).

On August 1, 2015, plaintiffs filed suit against the Hanover Company of Wisconsin's ("Hanover") North Carolina CAFO facility, Shellbank, alleging that the company failed to comply with the notification requirements of the Emergency Planning and Community Right-to-Know Act ("EPCRA").

Hanover filed a motion to dismiss.

The motion to dismiss referenced a July 2005 consent agreement the company entered into with the Environmental Protection Agency ("EPA"). The consent agreement provided for a covenant not to sue for "certain potential violations of . . . EPCRA." The covenant included "civil violation of EPCRA § 304 resulting from an emission of ammonia. The covenant not to sue was conditioned on the Shellbank facility providing a notice of continuous release of any ammonia emissions to the EPA within 120 days of the execution of the agreement.

Evidence was presented to the court that the Shellbank facility released more than 100 pounds of ammonia per day. It was also determined that the plaintiffs sent notification to the Shellbank facility of the continuous ammonia emissions on two separate occasions between 2012 and 2015. However, the facility never submitted any notification of the releases as stipulated by the July 2005 EPA agreement.

Hanover argued that the suit was barred by the EPCRA's diligent prosecution limitation on citizen suits. The company argued that the July 2005 EPA agreement constituted "a diligent prosecution".

The Court disagreed citing the “realistic prospect” test of the Second and Eighth Courts of Appeals, which states “if a citizen suit plaintiff demonstrates that there is a realistic prospect that the violations will continue notwithstanding the government-backed consent decree, then a less-than-diligent prosecution might have been shown.” See *Environmental Conservation Org. v. City of Dallas*, 529 F.3d 519, 528-529 (5th Cir. 2008); *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127 (2d Cir. 1991); *Comfort Lake Ass’n v. Dresel Contracting, Inc.*, 138 F.3d 351, 355 (8th Cir. 1998). The court held that evidence presented by the plaintiffs showed that emission notification violations occurred years after the 2005 EPA consent agreement and therefore, the violations would likely continue. Therefore, the Court denied Hanover’s motion to dismiss.

[A copy of the opinion can be downloaded here.](#)