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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Don't Waste Arizona, Inc., a 501(c)(3) not-for-profit company organized under the laws of the State of Arizona Plaintiffs, v. Hickman's Egg Ranch, Inc., Defendants.	**Case No.:** **COMPLAINT** **(Violations of the Emergency Planning and Community Right to Know Act)**

Plaintiff, by its undersigned attorneys, alleges upon personal knowledge, and upon information and belief, as for its Complaint as follows:

NATURE OF THE ACTION

1. Plaintiff is seeking civil penalties and reasonable attorney's fees based on Defendant's ongoing failure to report ammonia emissions from its facilities in Tonopah, Arizona and Arlington, Arizona in violation of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. §§ 11001-11050. Such emissions are ongoing and likely to continue into the future;

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JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (Federal Question); and 42 U.S.C. § 11046(c), EPCRA § 326(c);

3. Venue in this Court is proper under 42 U.S.C. § 1 1046(b)(1), EPCRA § 326(b);

4. EPCRA mandates that a putative plaintiff must provide a 60- day notice prior to filing suit. 42 U.S.C. § 11046(d); EPCRA § 326(d). Plaintiff provided the requisite 60-day notice on or about May 2, 2016 (Attached as Ex. 1 hereto);

PARTIES

5. Plaintiff Don't Waste Arizona, Inc. ("DWA") is a 501(c)(3), not -for-profit organization organized under the laws of the State of Arizona. Its offices are located at 2934 W. Northview Avenue, Phoenix Arizona 85051. DWA is a membership organization whose organizational purpose is to protect the Arizona environment and to educate communit y members and members of DWA about environmental stressors that could potentially impact their health and use and enjoyment of their properties . DWA's interests in a safe environment and an informed public are germane to the purposes of the organization and this suit;

6. Members of DWA live in close proximity to each of the two Hickman facilities at issue herein and are directly impacted by, *inter alia* , the unreported releases of large amounts of ammonia . These same DWA members are also denied access to important

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information about the nature and extent of Defendant's emissions that would inform their decisions on, for example, whether to go outside, to entertain, and/or where to live or work;

7. Members of DWA: (a) would otherwise have standing to sue in their own right; (b) the interests DWA seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *See*, attached Declarations (Ex. 2).

8. Defendant Hickman's Egg Ranch, Inc. is an Arizona corporation with its headquarters at 6515 South Jackrabbit Trail, in Buckeye, Arizona ("Hickman"). Hickman owns and operates both the Arlington and the Tonopah facilities, respectively;

ALLEGATIONS COMMON TO ALL COUNTS

9. Plaintiff re-alleges and incorporates the preceding paragraphs as if fully set forth herein.

10. The U.S. EPA defines a large concentrated animal feed operation ("CAFO") as 82,000 laying hens if a dry manure handling system is used and 30,000 laying hens if a wet system is used. 40 C.F.R. § 122.23(b)(4)(ix) and (xi);

11. Hickman owns and operates Desert Pride Farms, which is located at or about 41625 W. Indian School Road in Tonopah, Arizona (hereinafter the "Tonopah Facility").

12. According to the Tonopah Nutrient Management Plan, submitted by Hickman to the State on October 31, 2014, the Tonopah Facility houses over 3,072,000 laying hens and is in the process of expanding its operations to significantly increase the number of birds on site;

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13. Hickman also owns and operates the Arlington Facility that is located at or about 32425 West Salome Highway, Arlington, Arizona;

14. According to the Arlington Nutrient Management Plan, submitted by Hickman to the State on December 9, 2015, the Arlington Facility houses over 5,876,261 chickens (approximately 3,718,244 and 2,157,917 pullets). The Arlington Facility is also in the process of expanding its operations to significantly increase the number of birds on site;

15. Section 304 of EPCRA, 42 U.S.C. §11004, requires, *inter alia*, that ammonia (NH3) emissions that exceed the reportable quantity threshold of 100 lbs/day be reported. *See*, 40 C.F.R. 302.4 and 40 C.F.R. Part 355, Appendix A;

16. The EPA released a report on emissions data from two manure belt layer houses in Indiana on July 31, 2010 as part of the National Air Emissions Monitoring Study ("NAEMS"); [1]

17. According to the NAEMS IN2B study, any manure belt layer operation, such as Hickman's, with over 157,000 birds would likely be exceeding the 100 lbs/day reportable quantity threshold for ammonia emissions and should be reporting ammonia emissions;

18. Hickman's Tonopah Facility, which conservatively houses approximately 3,072,000 birds, has estimated daily ammonia emissions of over 4,014.08 lbs;

19. Hickman's Arlington Facility, which conservatively houses approximately 5,876,261 birds, has estimated daily ammonia emissions of over 7,678.3 lbs;

[1] Heber, Albert J., "Emissions Data from Two Manure-Belt Layer Houses in Indiana: Final Report for Site IN2B of the National Air Emissions Monitoring Study," July 31, 2010, available at: http://www.epa.gov/airquality/agmonitoring/pdfs/IN2BSSummary Report.pdf.

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20. The ammonia emissions at each of these two facilities greatly exceeds the 100 lbs/day threshold, yet Hickman has failed/refused to report any of these emissions fo r years and continues to fail/refuse to report these emissions on an ongoing basis , as otherwise required by law;

COUNT 1

(Violations of EPCRA at the Tonopah Facility)

21. Plaintiff re -alleges and incorporate s the preceding paragraphs as if fully set forth herein;

22. EPCRA § 304(a) and (b) requires owners or operators of a facility to provide immediate notice , to the appropriate government entities, for any release that requires CERCLA notification and for releases of EPCRA § 302 extremely hazardous substance (such as ammonia). 42 U.S.C. § 11004(a); 40 C.F.R. § 355.40(b)(1);

23. EPCRA § 304(c), 42 U.S.C. § 11004(c), requires any owner or operator who has had a release that is reportable under EPCRA § 304(a), to provide, as soon as practicable, a follow-up written notice, updating the information required under Section 304(b);

24. Pursuant to Section 326(a) of EPCRA, 42 U.S.C. § 11046 (a), any person may commence a civil action against, *inter alia*, an ow ner or operator of a facility for failure to submit a follow up emergency notice under Section 11004(c), EPCRA§ 304(c);

25. The Tonopah Facility is a "facility" as defined at 42 U.S.C. § 11049(4), EPCRA § 329(4);

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26. Defendant is a n owner and/or operation of a facility , who had actual or constructive knowledge of a release of a hazardous substance , in an amount that exceeds the threshold reportable quantity;

27. Defendant failed to submit the requisite emergency notice under Section 304 of EPCRA, 42 U.S.C. §11004, which, in part, requires that ammonia (NH3) emissions great er than 100 lbs/day be reported. *See*, 40 C.F.R. 302.4 and 40 C.F.R. Part 355, Appendix A;

28. Ammonia emissions from the Tonopah Facility exceed 100 lbs/day;

29. Defendant has failed to comply with the follow up written notice obligations set forth in EPCRA § 304(c) for over 592 days;

30. EPCRA § 325, 42 U.S.C. § 11045(b), provides for the assessment of a penalty of n ot more than $25,000 per day for each day during which the violation continues – pursuant, in part, to the Civil Monetary Penalty Inflation Adjustment Rule, violations of Section 304 that occur after January 12, 2009 are subject to the statutory maximum ci vil penalty of $ 37,500 per day for each day a violation continues. *See*, 73 Fed. Reg. at 7345, Table 1 of § 19.4 (Dec. 11, 2008);

31. For a violation of EPCRA § 304 that has been ongoing for, at least, 592 days, Defendant is liable for a civil penalty of up to $22,200,000;

COUNT 2

(Violations of EPCRA at the Arlington Facility)

32. Plaintiff re -alleges and incorporate s the preceding paragraphs as if fully set forth herein;

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33. EPCRA § 304(c), 42 U.S.C. § 11004(c), require s any owner or operator who has had a release that is reportable under EPCRA § 304(a), to provide, as soon as practicable, a follow-up written notice, updating the information required under Section 304(b);

34. Pursuant to Section 326(a) of EPC RA, 42 U.S.C. § 11046 (a), any person may commence a civil action against, *inter alia*, an owner or operator of a facility for failure to submit a follow up emergency notice under Section 11004(c), EPCRA§ 304(c);

35. The Arlington Facility is a "facility" as defined at 42 U.S.C. § 11049(4), EPCRA § 329(4);

36. Defendant is an owner and/or operation of a facility, who had actual or constructive knowledge of a release of a hazardous substance, in an amount that exceeds the threshold reportable quantity;

37. Defendant failed to submit the requisite emergency notice under Section 304 of EPCRA, 42 U.S.C. §11004, which, in part, requires that ammonia (NH3) emissions greater than 100 lbs/day be reported. *See*, 40 C.F.R. 302.4 and 40 C.F.R. Part 355, Appendix A;

38. Ammonia emissions from the Arlington Facility exceed 100 lbs/day;

39. Defendant has failed to comply with the follow up written notice obligations set forth in EPCRA § 304(c) for over five-years;

40. EPCRA § 325, 42 U.S.C. § 11045(b), provides for the assessment of a penalty of not more than $25,000 per day for each day during which the violation continues – pursuant, in part, to the Civil Monetary Penalty Inflation Adjustment Rule, v iolations of Section 304 that occur after January 12, 2009 are subject to the statutory maximum civil

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penalty of $37,500 per day for each day a violation continues. *See*, 73 Fed. Reg. at 7345, Table 1 of § 19.4 (Dec. 11, 2008);

41. Ammonia emissions from the Arlington Facility greatly exceed 100 lbs/day;

42. Defendant has failed to report releases of ammonia in amounts that exceed the reportable quantity threshold from the Arlington Facility for over five-years;

43. For this specific violation of EPCRA, the U.S. EPA penalty policy provides for a civil penalty of up to $37,500 per day, per violation, for a total penalty – with a five (5) year statute of limitations on such emissions/penalties – of $68,437,500 (365 days x 5 years x $37,500/per day);

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

1. Find that Defendant has failed, and continues to fail, to report ammonia emissions from both its Arlington and Tonopah Facilities as required, in part, by Section 304(c) of EPCRA, 42 U.S.C. §11004(c);

2. Find that Defendant is liable for a civil penalty of up to $90,637,500 for the ongoing violations of EPCRA from its Tonopah and Arlington Facilities. *See*, 42 U.S.C. § 11046(c), EPCRA § 326(c) (authorizing the Court to impose civil penalties in a citizen's enforcement action);

5. Find that Defendant is responsible for Plaintiffs' reasonable attorneys' fees and costs of litigation, *See* 42 U.S.C. § 11046(f), EPCRA § 326(f);

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6. Grant to Plaintiffs such other and further relief as this Court may deem just, equitable or proper.

DATED this day of September 29, 2016.

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By: */s/ Howard M. Shanker*

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