

**P O R T E R | S C O T T**

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

GLORIA AVILA, et al.,

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

Plaintiffs,

**[PROPOSED] ORDER DENYING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT OR, IN THE  
ALTERNATIVE, SUMMARY  
ADJUDICATION**

v.

OLIVERA EGG RANCH, LLC,

Defendant.

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. A copy of the transcript from the hearing on the matter is attached as Exhibit A.

Dated: \_\_\_\_\_

UNITED STATES DISTRICT JUDGE

# **Exhibit A**

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  
THE ORRICK BUILDING  
405 Howard Street  
San Francisco, CA 94105  
BY: NICOLE A. ROTH

THE HUMANE SOCIETY OF THE UNITED STATES  
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BY: PETER BRANDT

For the Defendant:

PORTER SCOTT  
350 University Avenue, Suite 200  
Sacramento, CA 95825  
BY: RUSS J. WUNDERLI  
JARED S. MUELLER

1 SACRAMENTO, CALIFORNIA

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

3 ---oOo---

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

6 Counsel approach and state their appearances, please.

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

11 THE COURT: Okay.

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

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

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

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

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

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

21 THE COURT: The length of time is what?

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

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

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

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

7 MR. WUNDERLI: Your Honor, we separated the motions  
8 because some of the issues can be resolved without evidence,  
9 and we wanted to break them down for the Court. On the  
10 12(b)(6) and 12(b)(1) motions, they're not really appropriate  
11 for a motion for summary judgment. They can be. But they  
12 can also be brought based on the allegations of the  
13 complaint.

14 Now, I recognize that --

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

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

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

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

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

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

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

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

18 MR. WUNDERLI: Until there's a judgment.

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

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

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

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

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

9 THE COURT: Okay.

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

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

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

18 THE COURT: I didn't notice that.

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

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

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

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

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

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

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

1 "any" to describe those releases in excess of the reportable  
2 threshold, Congress made it clear its intention for that  
3 provision to be read broadly to cover all such releases.  
4 See, for example, United States vs. Gonzales, 520 U.S. 1, a  
5 1997 Supreme Court case. Congress's broad choice of words,  
6 "any emitting," "all buildings," and "any site," show that  
7 Congress intended for emitters of a hazardous substance not  
8 specifically exempted in the statute to be subject to  
9 reporting requirements. As such, CERCLA and EPCRA's plain  
10 language applies to defendant's facility. And this Court  
11 denies defendant's motion to dismiss for failure to state a  
12 claim on that theory.

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

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

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

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

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

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

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

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

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

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

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

7 MS. ROTH: Animal feeding operations.

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

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

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

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

9 When a district court has original jurisdiction over a  
10 claim, it "shall have supplemental jurisdiction over all  
11 other claims that form part of the same case or controversy."  
12 That's 28 USC Section 1367(a). In this case before this  
13 Court, the Court finds that there is evidentiary overlap,  
14 substantial evidentiary overlap, between the state law  
15 nuisance claim and the federal CERCLA and EPCRA claims. The  
16 source of the pollution, owner of the facility, identities of  
17 the victims, amount of ammonia released, and conditions at  
18 the facility are among the facts relevant in both the federal  
19 and state law claims, such that plaintiffs would be expected  
20 to try them together. United States Mine Workers vs. Gibbs,  
21 383 U.S. 715, a 1966 U.S. Supreme Court case. Accordingly,  
22 all the claims form part of the same case or controversy.

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

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

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

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

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

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

20 Is there any dispute, Mr. Wunderli?

21 MR. WUNDERLI: No.

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

24 MR. WUNDERLI: No.

25 THE COURT: Okay. The next element is that defendant

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

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

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

17 Is that sort of a fair summary?

18 MR. WUNDERLI: Yes, it is.

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

24 MR. WUNDERLI: A hundred pounds.

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

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

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

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

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

25 "ANSWER: These are actual readings. He actually

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

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

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

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

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

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

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

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

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

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

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

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

3 MR. WUNDERLI: Well --

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

7 MR. WUNDERLI: Well --

8 THE COURT: Where is the dispute?

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

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

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

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

21 MR. WUNDERLI: Number of hens.

22 THE COURT: Right.

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

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

3 THE COURT: But he's got a 740.

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

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

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

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

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

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

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

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

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

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

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

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

19 What do you think I'm missing?

20 MR. WUNDERLI: Well, I think that maybe it's  
21 semantics. I don't disagree with you that they said that  
22 number is what they got that day. I don't disagree. But you  
23 could get another number on another day. And you could get  
24 84, and you could get under a hundred. And what we're  
25 looking at here is when did Mr. Olivera, when did the

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

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

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

11 THE COURT: It's not they. I'm not focusing on the  
12 240.

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

15 THE COURT: Yeah.

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

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

24 MR. WUNDERLI: No.

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

1 that.

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

3 THE COURT: Well, they'll ask him.

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

6 THE COURT: Right.

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

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

13 MR. WUNDERLI: October of '09.

14 THE COURT: Before this EPA rule. Okay.

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

17 THE COURT: When was the 740?

18 MR. MUELLER: It was October.

19 MR. WUNDERLI: October.

20 THE COURT: Of '09.

21 MR. WUNDERLI: '09.

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

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

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

8 THE COURT: Reported under CERCLA?

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

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

13 MR. WUNDERLI: That's true.

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

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

18 THE COURT: He made a phone call in January.

19 MS. ROTH: Yes.

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

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

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

3 THE COURT: Why not?

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

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

8 MS. ROTH: No, your Honor.

9 THE COURT: Do you agree with that?

10 MR. WUNDERLI: No.

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

12 MR. WUNDERLI: We filed it before the Hicks testing.

13 So it mentions 84 to 1,000 pounds.

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

16 MS. ROTH: Yes.

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

18 MS. ROTH: Correct.

19 THE COURT: Why not?

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

1 THE COURT: Wow.

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

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

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

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

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

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

3 THE COURT: You have no evidence?

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

6 THE COURT: That's your argument, there was no  
7 evidence? He's cited in July of 2004 for exceeding 500,000  
8 hens. He knows his property holds more than 600,000 hens  
9 from 2006 to the present. He does his own report on July 3rd  
10 of 1996 that determines if the ranch was ever at maximum  
11 capacity of 600,000 layers, the ponds may theoretically be  
12 only marginally efficient. He didn't make any changes to the  
13 lagoon until 2009. Let's see. A representative of the  
14 San Joaquin Environmental Health Department observed floating  
15 solids during their inspection of his manure ponds. Since  
16 1997, he's received multiple complaints regarding odors at  
17 the property. He didn't take any action and did not measure  
18 ammonia emissions in response to the complaints.

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

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

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

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

13 THE COURT: So what's the issue?

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

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

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

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

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

1 dispute as to those specific facts?

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

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

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

2 That's wrong?

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

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

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

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

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

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

10 THE COURT: Right.

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

22 THE COURT: Okay.

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

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

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

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

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

1 was dealing with ammonia.

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

4 THE COURT: Or that he had constructive knowledge.

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

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

1 issue.

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

11 THE COURT: Okay.

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

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

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

9 MS. ROTH: Correct.

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

12 MS. ROTH: Correct.

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

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

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

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

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

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

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

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

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

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

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

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

14 MS. ROTH: We agree.

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

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

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

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

1 THE COURT: Okay.

2 MR. BRANDT: So it's pending there.

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

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

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

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

19 "ANSWER: Yes."

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

25 "ANSWER: Yes."

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

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

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

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

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

12          MS. ROTH: No.

13          THE COURT: Did he ever sign his declaration?

14          MR. WUNDERLI: Yes.

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

16          MR. WUNDERLI: You should.

17          MS. ROTH: No, your Honor.

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

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

25          THE COURT: I know who he is.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 200 pounds. On another day, it will be 84 pounds. And the  
2 testimony will be we really don't know. We really can't know  
3 reliably.

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

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

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

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

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

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

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

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

1 THE COURT: He being?

2 MS. ROTH: The defendant through Mr. Olivera.

3 THE COURT: Okay.

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

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

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

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

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

20 THE COURT: Civil penalties.

21 MS. ROTH: Yes.

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

24 MS. ROTH: That's possible.

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

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

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

5 THE COURT: Okay.

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

10 THE COURT: That's for another day though.

11 MS. ROTH: Yes.

12 THE COURT: Go ahead.

13 MR. WUNDERLI: You hit the nail right on the head.  
14 This is how the evidence will go. They won't even use the  
15 720 pounds because that's after we've already reported. They  
16 have to show what did you know and how much was there before  
17 the complaint was filed. So they're not going to use this  
18 report because it's 271 percent different than their own  
19 expert's report, and it's so unreliable. So they're going to  
20 use some Liang study, that we'll have lots of evidence about,  
21 that when we used the Liang study, it shows that it could be  
22 84 pounds, which is under the reportable limit. That is why  
23 this case cannot be decided on motion for summary judgment at  
24 this point. There's just way too many facts involved.

25 THE COURT: Go ahead.

1 MS. ROTH: I was going to say, your Honor, that using  
2 the Liang study actually I believe would be a detriment to  
3 us, but something like that is all we could do. The  
4 740 pounds that Mr. Hicks found was after this dredging  
5 operation that took place in May and June where they removed  
6 massive amounts of manure from the facility. All the experts  
7 say that once the manure was removed and dried, it would have  
8 reduced the ammonia emissions.

9 THE COURT: And it still came up at 740.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 And then there's this knowledge, actual or

1 constructive knowledge issue. That the defendant knew,  
2 either actually or constructively, that it did emit more than  
3 100 pounds of ammonia a day. And again, defendants have  
4 shown in their papers and at argument today that that's an  
5 issue that is going to have to be tried. And so I can't  
6 grant summary judgment or summary adjudication on that as  
7 well.

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

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

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

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

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

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

10 MR. WUNDERLI: It's closed.

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

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All right, folks. See everybody next month.

MR. WUNDERLI: Thank you, your Honor.

MS. ROTH: Thank you.

(Proceedings were concluded.)

1 I certify that the foregoing is a correct transcript  
2 from the record of proceedings in the above-entitled matter.  
3  
4

5 /s/ Kelly O'Halloran

6 KELLY O'HALLORAN, CSR #6660  
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