

1 Charles M. Tebbutt (OSB# 96579)  
tebbutt@westernlaw.org  
2 Western Environmental Law Center  
1216 Lincoln Street  
3 Eugene, Oregon 97401- 3467  
Tel: (541) 485-2471  
4 Fax: (541) 485-2457

5 Richard C. Eymann (WSB #7470)  
eymann@eahjlaw.com  
6 Eymann Allison Hunter Jones, P.S.  
208 West 2nd Avenue  
7 Spokane, WA 99201  
Tel: (509)747-0101  
8 Fax: (509) 458-5977

9 Attorneys for Plaintiff

10  
11 IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON

12 COMMUNITY ASSOCIATION FOR ) Civil No.: \_\_\_\_\_  
13 RESTORATION OF THE )  
ENVIRONMENT, ) COMPLAINT  
14 Plaintiff, )  
15 v. )  
16 DERUYTER BROTHERS DAIRY, )  
17 INC., )  
18 Defendant. )

19 STATEMENT OF THE CASE

20 1. This is a civil action brought pursuant to the citizen suit provision of the  
21 Clean Air Act, (“CAA”), 42 U.S.C. § 7604(a)(1), (f)(3) & (f)(4) against  
22 Defendant, DeRuyter Brothers Dairy (“DeRuyter Brothers”).

23 2. As a dairy of more than 4300 animals, DeRuyter Brothers’ dairy facility  
24 is a “major source” of methanol<sup>1</sup> under Section 112 of the CAA, and is required  
25 to obtain both a Title V permit and a determination by the U.S. Environmental  
26

27 <sup>1</sup> Also known as methyl alcohol or wood alcohol.

1 Protection Agency (“EPA”) (or the state of Washington) that it is using the  
2 “maximum achievable control technology” (“MACT”). 42 U.S.C. §  
3 7661(2)(A); 42 U.S.C. § 7412(g)(2)(A); 42 U.S.C. § 7412(g)(2)(B). By failing  
4 to obtain a determination from the State of Washington or the EPA that  
5 DeRuyter Brothers’ Dairy would meet the MACT, DeRuyter Brothers violated  
6 Section 112(g)(2)(A) and (B) of the CAA. By failing to obtain a Title V permit  
7 for the dairy, DeRuyter Brothers violated 42 U.S.C. § 7661a(a).

8 3. The EPA has adopted regulations implementing section 112(g)(2)(B) of  
9 the Act. 40 C.F.R. §§ 63.40-63.44. By failing to obtain a determination that  
10 the dairy’s expansion would meet the MACT for a new major source set forth  
11 in 40 C.F.R. § 63.43, the dairy’s expansion violated, and continues to violate,  
12 40 C.F.R. § 63.42.

13 4. Washington’s Title V State Implementation Plan (SIP) requires the Dairy  
14 to obtain an Air Operating Permit and Air Quality Notice of Construction  
15 Permit. By not obtaining either permit DeRuyter Brothers violated and  
16 continues to violate RCW 70.94.161, WAC173-401-300, and WAC 173-400-  
17 110(2)(a), and thus also the federally approved SIP.

18 5. Plaintiffs seek a declaratory judgment, injunctive relief, the imposition of  
19 civil penalties, and the award of costs, including attorney and expert witness  
20 fees, against DeRuyter Brothers for violations of the CAA.

21 6. This action concerns DeRuyter Brothers’ facilities located at 5111 Van  
22 Belle Road, Outlook, Washington, approximately 4.7 miles northwest of the  
23 City of Sunnyside, Yakima County, Washington.

#### 24 JURISDICTION AND VENUE

25 7. This Court has subject matter jurisdiction over claims specified in this  
26 Complaint pursuant to 42 U.S.C. § 7604(a)(1), (f)(3), and (f)(4) (CAA citizen  
27 suit provision) and 28 U.S.C. § 1331 (federal question).

1 8. The relief requested is authorized pursuant to 42 U.S.C. §§ 7604(a), 28  
2 U.S.C. §§ 2201 (injunctive relief) and 2202 (declaratory relief).

3 9. Venue is proper in the Eastern District of Washington, pursuant to 42  
4 U.S.C. § 7604(c)(1), and 28 U.S.C. §§ 1391(b) and 1395(a) because it is the  
5 judicial district in which all violations of the CAA occurred, and it is the  
6 judicial district in which the Defendant's principal place of business is located.

7  
8 NOTICE

9 10. In compliance with 42 U.S.C. § 7604(b)(1)(A) (CAA) and 40 C.F.R. §  
10 54.2-3 (EPA regulations), on May 30, 2007, Plaintiff gave notice of the  
11 violations specified in this complaint and of its intent to file suit to the  
12 Defendant, Administrator of the EPA, Region 10 Administrator of the EPA,  
13 Governor of Washington, and the Washington Department of Ecology (DOE).  
14 A copy of the notice letter is attached hereto.

15 11. More than sixty days have passed since notice was served, and the  
16 violations complained of in this notice are continuing at this time, are  
17 reasonably likely to continue, or have not been adequately corrected. Neither  
18 the EPA, the DOE or any other potentially responsible agency has commenced  
19 or is diligently prosecuting a civil or criminal action to redress the violations.  
20 Any enforcement related activities undertaken by EPA, DOE or any other  
21 agency do not constitute diligent prosecution under the CAA.

22 PLAINTIFF

23 12. Plaintiff, Community Association for Restoration of the Environment,  
24 Inc. ("CARE"), is a nonprofit corporation organized under the laws of the state  
25 of Washington. CARE's principal office is located in Outlook, Washington.

26 13. CARE's members reside in and around Outlook, Yakima County,  
27 Washington, in which DeRuyter Brothers' Dairy is located. The

1 environmental, health, aesthetic, recreational, and economic interests of  
2 CARE's members have been, are being, and will be adversely affected by  
3 DeRuyter Brothers' illegal and unpermitted discharges.

4 14. CARE's members live, work, and recreate in close proximity to  
5 DeRuyter Brothers' Dairy. Air pollution from industrial operations such as the  
6 dairy has become a serious health hazard in the Lower Yakima Valley. CARE's  
7 members, and particularly their children, are put at risk by DeRuyter Brothers'  
8 emissions of methanol.

9 15. CARE's members breathe the air into which DeRuyter Brothers' facility  
10 releases hazardous substances. Such hazardous substances can cause  
11 deleterious effects to human health and cause noxious odors which are often  
12 offensive and interfere with members' use and enjoyment of property.

13 16. CARE is a grassroots organization made up of concerned community  
14 members. CARE works to protect the public from this threat by, among other  
15 things, monitoring air pollutants and providing educational information to  
16 those who are directly affected by air pollutants released by industrial-sized  
17 dairies. Plaintiff CARE has standing in this suit to protect its own interests and  
18 those of its individual members in a representative capacity.

19 DEFENDANT

20 17. Defendant DeRuyter Brothers Dairy, LLC is located principally at 5111  
21 Van Belle Road in Outlook, Washington approximately 4.7 miles northwest of  
22 the City of Sunnyside, Yakima County, Washington. DeRuyter Brothers also  
23 has heifer replacement operations located in proximity to the principal dairy.

24 18. DeRuyter Brothers' facility is classified as a Concentrated Animal  
25 Feeding Operation ("CAFO") and thus is considered an industrial operation.  
26 As a CAFO that emits large quantities of air pollutants, DeRuyter Brothers'

1 facility is a “major source”, 42 U.S.C. § 7661(2)(A) subject to the emissions  
2 limitations of the Clean Air Act.

3 19. Defendant is a “person,” as that term is defined at Section 302(e) of the  
4 CAA, 42 U.S.C. § 7602(e) and 40 C.F.R. § 82.152.

### 5 FACTS

6 20. Methanol, also known as methyl alcohol, is on the list of hazardous air  
7 pollutants in Section 112(b) of the CAA, 42 U.S.C. § 7412(b). The EPA has  
8 cited numerous potential human health risks from methanol exposure,  
9 including premature births, an increase in the number of required caesarian-  
10 section births, and, in prenatally exposed offspring, instances of a severe  
11 wasting syndrome, concentration-related delay in sensorimotor development  
12 and lower performance on an infant intelligence test. American Forest and  
13 Paper Association v. EPA, 294 F.3d 113 (D.C. Cir. 2002) (upholding EPA’s  
14 denial of petition to remove methanol from the list of hazardous air pollutants).

15 21. As a dairy of more than 4300 animals, DeRuyter Brothers’ facility is a  
16 “major source” of methanol under Section 112 of the CAA, and is required to  
17 obtain a Title V permit and a determination by the EPA or other responsible  
18 state agency that DeRuyter Brothers is using the “maximum achievable control  
19 technology” (“MACT). 42 U.S.C. § 7661(2); 42 U.S.C. § 7412(g).

20 22. During and subsequent to 2002, DeRuyter began construction of new  
21 and expanded facilities, increasing DeRuyter’s herd size from approximately  
22 4300 dairy livestock to approximately 7700 dairy livestock.

### 23 ALLEGATIONS

#### 24 Violations of the Clean Air Act:

25 23. Section 112(g) of the CAA states:

26 After the effective date of a permit program under subchapter V of  
27 this chapter in any State, no person may construct or reconstruct a  
major source of hazardous air pollutants in such State unless the

1 Administrator (or the State) determines that the maximum  
2 achievable control technology emissions limitation under this  
3 section for new sources will be met. Such determination shall be  
made on a case-by-case basis where no applicable emissions  
limitations have been established by the Administrator.

4 42 U.S.C. § 7412(g)(2)(B).

5 24. EPA has adopted regulations implementing this provision of the CAA.

6 40 C.F.R. §§ 63.40 through 63.44. Like the CAA itself, these rules provide as  
7 follows:

8 *Prohibition.* After the effective date of section 112(g)(2)(B) (as  
9 defined in § 63.41) in a State or local jurisdiction and the effective  
10 date of the title V permit program applicable to that State or local  
jurisdiction, no person may begin actual construction or  
reconstruction of a major source of HAP in such State or local  
jurisdiction unless:

- 11 (1) The major source [is regulated by a standard issued under  
12 subsections 112(d), (h) or (j) of the Act and complies with  
such standard]; or
- 13 (2) The permitting authority has made a final and effective  
14 case-by-case determination pursuant to the provisions of §  
63.43 such that emissions from the constructed or  
15 reconstructed major source will be controlled to a level no  
less stringent than the maximum achievable control  
technology emission limitation for new sources.

16 40 C.F.R. § 63.42(c).

17 25. The latest possible effective date of Section 112(g)(2)(B) is June 29,  
18 1998. See 40 C.F.R. § 63.41. Washington’s Title V permit program became  
19 effective on September 12, 2001. See 66 Fed. Reg. 42439 (10/13/01).

20 26. The federal regulations define the term “construct a major source,”  
21 which includes both the new construction of a major source at a greenfield site  
22 and the addition of a new production unit which itself is a major source:

23 *Construct a major source* means: . . . (2) To fabricate, erect, or  
24 install at any developed site a new process or production unit  
which in and of itself emits or has the potential to emit 10 tons per  
25 year . . . unless [the process or production unit has received prior  
determinations by the pollution control authority and satisfies a  
series of pollution control requirements].

26 40 C.F.R. § 63.41.

27

1 27. DeRuyter Brothers' construction of new and expanded facilities,  
2 increasing its herd size from approximately 4300 dairy livestock to  
3 approximately 7700 dairy livestock constituted the construction of a major  
4 source within the meaning of Clean Air Act § 112(g)(2)(B) and 40 C.F.R. §  
5 63.41, because the construction is a new production unit of the DeRuyter  
6 Brothers Dairy, which in and of itself emits greater than 10 tons per year of  
7 methanol into the air.

8 28. Because neither EPA nor the state of Washington has established an  
9 applicable emission limitation for emissions of methanol from dairies under  
10 Sections 112(d), (h), or (j), DeRuyter Brothers was required to obtain a specific  
11 determination that the dairy facility would meet MACT for new major sources  
12 of methanol under Section 112 of the Act. 42 U.S.C. § 7412(g).

13 29. DeRuyter Brothers failed to obtain a determination from the  
14 Administrator of EPA or the state that DeRuyter Brothers' facility would meet  
15 the MACT for new major sources. DeRuyter Brothers' construction of the  
16 dairy facilities violated, and continues to violate, Section 112(g)(2)(B) and 40  
17 C.F.R. § 63.42(c).

18 30. In addition, Title V of the Act requires DeRuyter Brothers to obtain a  
19 Title V permit for the dairy facility because they are a "major source" as  
20 defined by Title V. 42 U.S.C. § 7661(2)(A). Title V provides that it "shall be  
21 unlawful for any person . . . to operate . . . a major source . . . except in  
22 compliance with a permit issued by a permitting authority under this  
23 subchapter." 42 U.S.C. § 7661a(a).

24 31. DeRuyter Brothers has not obtained a permit issued by the State of  
25 Washington pursuant to Title V of the Act to operate its dairies and related  
26 facilities.

1 32. Washington’s Title V State Implementation Plan (“SIP”) classifies  
2 methanol as a Class B toxic air pollutant. WAC 173-460-160.

3 33. As a major source of methanol, DeRuyter Brothers is required to obtain  
4 an Air Operating Permit. WAC 173-401-300; RCW 70.94.161.

5 34. As a new source of methanol under RCW 70.94.030, DeRuyter Brothers  
6 was required to obtain an Air Quality Notice of Construction Permit (NOC)  
7 from the Yakima County Regional Clean Air Authority prior to constructing an  
8 expansion to DeRuyter Brothers Dairy. WAC 173-400-110(2)(a).

9 35. DeRuyter has failed to obtain an Air Operating Permit or a NOC permit.

10 36. DeRuyter Brothers Dairy has violated and continues to violate the Clean  
11 Air Act in two distinct respects as set forth above, thus incurring two violations  
12 for each and every day that it fails to obtain the permit required under Section  
13 112(g)(2)(B) (and federal regulations) for the dairy expansion, and fails to  
14 obtain a Title V operating permit for the DeRuyter Brothers Dairy and related  
15 operations.

16 37. The violations of Section 112(g)(2)(B) (and federal regulations) and  
17 Title V which are the subject of this complaint occurred on the date of  
18 commencement of construction of the facility expansion, on each and every day  
19 since that date through the present day, and will continue to occur on each and  
20 every day until such violations are corrected.

21 PRAYER FOR RELIEF

22 WHEREFORE, plaintiff respectfully requests that this Court grant  
23 plaintiff the following relief:

24 A. Issue a declaratory judgment that Defendant has violated the CAA and  
25 Washington’s SIP.

26 B. Enjoin Defendant from operating its dairy in such a manner that will  
27 result in further violation of the CAA and the Washington SIP.


- 1 C. Order DeRuyter Brothers to comply with all CAA provisions.
- 2 D. Order DeRuyter Brothers to implement MACT for methanol in  
3 compliance with the CAA.
- 4 E. Order DeRuyter Brothers to pay civil penalties of \$27,500 per day of  
5 violation for each violation pursuant to 113(b) of the CAA, 42 U.S.C. §  
6 7413(b), for the period between the beginning of the dairy's expansion and  
7 March 15, 2004, including those violations listed in this complaint, any related  
8 violations revealed through discovery and any subsequent violations. In  
9 addition, order Defendant to pay civil penalties of \$32,500 per day of violation  
10 for each violation pursuant to 113(b) of the CAA, 42 U.S.C. § 7413(b), for the  
11 period after March 15, 2004 to present, including those violations listed in this  
12 complaint, any related violations revealed through discovery and any  
13 subsequent violations. 40 C.F.R § 19.4.
- 14 F. Award Plaintiff its costs, including reasonable attorney and expert  
15 witness fees, as authorized by § 304(d) of the CAA, 42 U.S.C. § 7604(d); and
- 16 G. Award such other relief as justice may require as this Court deems  
17 appropriate.

18  
19  
20

21 Dated April 23, 2008.

Respectfully submitted,

22  
23  
24  
25  
26  
27

  
Charles M. Tebbutt (OSB# 96579)  
tebbutt@westernlaw.org  
Western Environmental Law Center  
1216 Lincoln Street  
Eugene, Oregon 97401- 3467  
Phone: (541) 485-2471  
Fax: (541) 485-2457

28 COMPLAINT

Page 9

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Richard C. Eymann (WSB #7470)  
eymann@eahjlaw.com  
Eymann Allison Hunter Jones, P.S.  
208 West 2nd Avenue  
Spokane, WA 99201  
Tel: (509)747-0101  
Fax: (509) 458-5977

Attorneys for Plaintiff