

1
2
3
4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF WASHINGTON

6 THE DOLSEN COMPANIES, a
7 Washington Corporation, et al.,

8 Plaintiffs,

9 v.

10 BEDIVERE INSURANCE
11 COMPANY,
12 f/k/a ONEBEACON, et al.,

13 Defendants.

NO. 1:16-CV-3141-TOR

ORDER GRANTING DEFENDANTS'
MOTIONS FOR PARTIAL
SUMMARY JUDGMENT; DENYING
PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT

14 BEFORE THE COURT is Defendants QBE Insurance Corporation and
15 Unigard Insurance Company's Motion for Partial Summary Judgment (ECF No.
16 35); Defendants Bedivere Insurance Company and Armour Risk Management,
17 Inc.'s Motion for Partial Summary Judgment (ECF No. 38); and Plaintiffs The
18 Dolsen Companies, Cow Palace, LLC, and Three D Properties, LLC's Motion for
19 Partial Summary Judgment (ECF No. 48). The Court heard oral argument from the
20 parties on September 6, 2017. The Court has reviewed the completed record and

ORDER GRANTING DEFENDANTS' MOTIONS FOR
PARTIAL SUMMARY JUDGMENT; DENYING PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY JUDGMENT ~ 1

1 files herein, and is fully informed. For the reasons discussed below Defendants’
2 Motions for Partial Summary Judgment (ECF No. 35; 38) are **GRANTED** and
3 Plaintiffs’ Motion for Partial Summary Judgment (ECF No. 48) is **DENIED**.

4 **BACKGROUND**

5 The instant action involves pollution and an attempt to get the insurance
6 companies to pay for the associated costs. Plaintiffs, the Dolsen Companies, Cow
7 Palace, and Three D Properties, operated (and still operate) a concentrated animal
8 farm operation. As a byproduct of Plaintiffs’ operation, Plaintiffs had to process
9 millions of gallons of liquid manure. Plaintiffs stored the manure in holding ponds
10 and spread it on their crops as fertilizer. Unfortunately, the holding ponds
11 leaked—allowing the seepage of over 1.6 million gallons of untreated manure into
12 the groundwater annually. ECF No. 37-14. Further, the Plaintiffs put far too much
13 manure on the land—a state investigator documented that manure applied to frozen
14 fields was at least 12 inches deep. ECF No. 43 at 2. As a result, the manure
15 soaked the soil and entered the ground water table, contaminating the local water.

16 On or about February 14, 2013, Community Association for Restoration of
17 the Environment, Inc., a Washington non-profit corporation, (“CARE”), and
18 Center for Food Safety, Inc., a Washington D.C. non-profit corporation, filed a
19 complaint in the United States District Court for the Eastern District of
20 Washington against a number of dairies, including Plaintiffs. ECF No. 1-2 at ¶

1 10.¹ CARE alleged Plaintiffs over-applied manure and allowed the holding ponds
2 to leak, causing “significant environmental contamination of the soil and
3 groundwater.”² ECF No. 1-2 at 11-13. CARE alleged this violated the Resource
4 Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* (“RCRA”), the
5 Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11001 *et*
6 *seq.* (“EPCRA”), and the Comprehensive Environmental Response Compensation
7 and Liability Act, 42 U.S.C. § 9601 *et seq.* (“CERCLA”). ECF No. 1-2 at ¶¶ 11-
8 13.

9 Plaintiffs submitted a tender for defense and indemnity to its insurers, but
10 Defendants Bedivere Insurance Company, Armour Risk Management, QBE
11 Insurance Corporation, and Unigard Insurance Company denied coverage and did
12 not provide for Plaintiffs’ defense. Among other things, Defendants asserted the
13 duty to defend and indemnify had not been triggered because the absolute pollution
14
15

16 ¹ *Community Association for Restoration of the Environment et al. v. Cow*
17 *Palace, LLC*, Case No. 2:13-CV-3016-TOR (the “CARE Litigation”).

18 ² Specifically, CARE alleged that the manure contained nitrates that entered
19 the water table and migrated away from Plaintiffs’ land and into the wells of
20 nearby residents and nearby surface waters. ECF No. 1-2 at ¶ 14.

1 exclusions contained in the respective policies exclude the asserted loss from
2 coverage.

3 The parties to the CARE Litigation settled in May 2015. ECF No. 1-2 at ¶
4 23. As a result of the litigation and settlement, Plaintiffs incurred extensive
5 expenses. Plaintiffs now seek a declaratory judgment that Defendants had a duty
6 to defend Plaintiffs in the Care Litigation and must indemnify Plaintiffs for the
7 losses arising from the CARE Litigation. ECF No. 1-2 at ¶¶ 30-33. Plaintiffs also
8 allege breach of contract, ECF No. 1-2 at ¶¶ 34-36, bad faith, ECF No. 1-2 at ¶¶
9 37-39, and violations of the Washington Insurance Fair Conduct Act and
10 Consumer Protection Act, ECF No. 1-2 at ¶¶ 40-49.

11 Defendants moved for Partial Summary Judgment on the duty to defend and
12 indemnify (ECF Nos. 35; 38). Plaintiffs moved for Partial Summary Judgment
13 (ECF No. 48) on the duty to defend. These issues are now before the Court.

14 STANDARD FOR SUMMARY JUDGMENT

15 A movant is entitled to summary judgment if “there is no genuine dispute as
16 to any material fact and that the movant is entitled to judgment as a matter of law.”
17 Fed. R. Civ. P. 56(a). A fact is “material” if it might affect the outcome of the suit
18 under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
19 (1986). An issue is “genuine” where the evidence is such that a reasonable jury
20 could find in favor of the non-moving party. *Id.* The moving party bears the

1 “burden of establishing the nonexistence of a ‘genuine issue.’” *Celotex Corp. v.*
2 *Catrett*, 477 U.S. 317, 330 (1986). “This burden has two distinct components: an
3 initial burden of production, which shifts to the nonmoving party if satisfied by the
4 moving party; and an ultimate burden of persuasion, which always remains on the
5 moving party.” *Id.*

6 GOVERNING LAW

7 A federal court sitting in diversity looks to the forum state’s choice of law
8 rules to determine the controlling substantive law. *Patton v. Cox*, 276 F.3d 493,
9 495 (9th Cir. 2002). All events transpired in Washington and the Plaintiffs-
10 insureds are located in Washington, so Washington law governs the interpretation
11 of the insurance policies at issue. *See Mulcahy v. Farmers Ins. Co. of Wash.*, 152
12 Wash.2d 92, 100 (2004).

13 STANDARD FOR REVIEW OF INSURANCE CONTRACT

14 Interpretation of an insurance contract is a question of law. *Quadrant Corp.*
15 *v. Am. States Ins. Co.*, 154 Wash.2d 165, 171 (2005). In Washington, insurance
16 policies are construed as contracts. *Id.* Courts consider the policy as a whole and
17 give it a “fair, reasonable, and sensible construction as would be given to the
18 contract by the average person purchasing insurance.” *Id.* (internal quotation
19 marks omitted; citations omitted). The court applies the “plain, ordinary, and
20 popular meaning” of undefined terms. *Xia v. ProBuilders Specialty Ins. Co.*, 2017

1 WL 3711907, at *4 (Wash. Apr. 27, 2017) *originally published at* 188 Wash.2d
2 171 (2017), *as modified* (Aug. 16, 2017), *reconsideration denied* (Aug. 17, 2017).

3 “The contract will be given a practical and reasonable interpretation that fulfills the
4 object and purpose of the contract rather than a strained or forced construction that
5 leads to an absurd conclusion, or that renders the contract nonsensical or
6 ineffective.” *Washington Public Utility Districts’ Utilities System v. Public Utility*
7 *Dist. No. 1 of Clallam County*, 112 Wash.2d 1, 11 (1989) (citation omitted).

8 Importantly – *unless it does not comport with Washington law* – the court
9 must enforce clear and unambiguous policy language as written; the court may not
10 modify the policy or create ambiguity where none exists. *Quadrant*, 154 Wash.2d
11 at 171 (citation omitted); *Xia*, 2017 WL 3711907, at *4. The expectations of the
12 insured cannot override the plain language of the contract. *Quadrant*, 154
13 Wash.2d at 171 (citation omitted). Any ambiguities are construed in favor of the
14 insured; but a clause is ambiguous only “when, on its face, it is fairly susceptible to
15 two different interpretations, both of which are reasonable.” *Id.* (citation omitted).

16 “Exclusions of coverage will not be extended beyond their ‘clear and
17 unequivocal’ meaning.” *American Star Ins. Co. v. Grice*, 121 Wash.2d 869, 875
18 (1993) (quoting *McDonald Indus., Inc. v. Rollins Leasing Corp.*, 95 Wash.2d 909,
19 915 (1981). “When an insured establishes a prima facie case giving rise to
20 coverage under the insuring provisions of a policy, the burden is then on the

1 insurer to prove that a loss is not covered because of an exclusionary provision in
2 the policy.” *Id.* (citation omitted). While exclusions are strictly construed against
3 the drafter, a strict application should not trump the plain, clear language of an
4 exclusion. *Quadrant*, 154 Wash.2d at 172 (citation omitted).

5 DISCUSSION

6 At issue in the Motions for Summary Judgment is whether Defendants have
7 a duty to indemnify and defend Plaintiffs in the underlying action.

8 I. Duty to Indemnify

9 A duty to indemnify the insured arises when the insurance policy *actually*
10 provides coverage for the loss. *Xia*, 2017 WL 3711907, at *4 (citation omitted).

11 The parties do not dispute that the losses – barring application of the
12 absolute pollution exclusion – would be covered under the relevant insurance
13 policies, which provides coverage for losses the insureds are legally obligated to
14 pay. However, the parties dispute: (1) whether the losses are excluded from
15 coverage under the policies’ absolute pollution exclusion and (2) whether, even if
16 the exclusion is triggered, coverage still lies because another covered occurrence
17 was the “efficient cause” of the polluting event. These disputes are determinative:
18 if the absolute pollution exclusion does not apply, the claim is covered; if the
19 exclusion does apply, the policy may still cover the loss if an otherwise covered
20

1 occurrence was the efficient cause of the excluded harm. *Xia*, 2017 WL 3711907,
2 at *4 (citation omitted). The issues are addressed in turn.

3 a. The absolute pollution exclusion applies

4 Absolute pollution exclusions generally purport to exclude from coverage all
5 losses related to pollution. In Washington, absolute pollution exclusions are
6 enforceable and apply to losses arising from (1) a pollutant (2) *acting as a*
7 *pollutant*. *Quadrant*, 154 Wash.2d at 178.

8 The absolute pollution exclusion arose “in the wake of expanded
9 environmental liability under the Comprehensive Environmental Response,
10 Compensation, and Liability Act of 1980[.]” *Kent Farms, Inc. v. Zurich Ins. Co.*,
11 140 Wash.2d 396, 400 (2000). “These clauses were clearly intended to exculpate
12 insurance companies from liability for massive environmental cleanups required by
13 CERCLA and similar legislation.” *Id.* at 401 (citation omitted); *see also Xia* 2017
14 WL 3711907, at *3 (absolute pollution exclusions “specifically address those
15 situations in which the injury was caused by environmental damage.”) (citing *Kent*
16 *Farms*, 140 Wash.2d at 401)).

17 Absolute pollution exclusions have been found unambiguous in the context
18 of noxious and toxic fumes from a sewage plant, *City of Bremerton v. Harbor Ins.*
19 *Co.*, 92 Wash. App. 17, 19-23 (1998); hazardous fumes from sealant, *Cook v.*
20 *Evanson*, 83 Wash. App. 149, 154 (1996) and *Quadrant*, 154 Wash.2d at 173; and

1 poisoning from carbon monoxide, *Xia*, 2017 WL 3711907, at *6. In *Xia*, the
2 Washington Supreme Court noted that the “broad language of the pollution
3 exclusion could easily lead to ambiguity in the case of such defined pollutants as
4 noise and light[,]” but did not make any further comment as to when the clause
5 would be ambiguous. *Id.* at *7.

6 The absolute pollution exclusions at issue here are unambiguous in the
7 present context. Among other things, the policies exclude from coverage any
8 liability arising out of: (a) the actual, alleged, or threatened discharge, dispersal,
9 seepage, migration, release or escape of pollutants: (i) at or from the premises; and
10 (ii) at or from any site or location used for the handling, storage, disposal,
11 processing or treatment of waste.³ The terms unambiguously apply to the
12 dispersal, seepage, release and escape of pollutants, leaving the issue of whether
13 the manure is a pollutant and whether it was acting as a pollutant (discussed
14 below). Notably, the absolute pollution exclusion arose to mitigate the very type
15 of losses at issue: contamination of land and water resulting in massive liability for
16 clean-up and related costs pursuant to CERCLA and other legislation.

17
18 ³ The policies all contain nearly identical provisions. *See, e.g.*, ECF Nos. 49-1
19 at 64 (One Beacon); 49-5 at 88 (QBE); 49-10 at 166 (Unigard). The differences
20 are not material, and the parties have not suggested otherwise.

1 *i. Manure is a pollutant when introduced to water*

2 The respective policies define pollutants as “any solid, liquid, gaseous or
3 thermal irritant or contaminant, including smoke vapor, soot, fumes, acids, alkalis,
4 chemicals, and waste. Waste includes materials to be recycled, reconditioned or
5 reclaimed.” *See, e.g.*, ECF Nos. 39-8 at 44 (One Beacon); 39-5 at 59 (QBE); 39-10
6 at 93 (Unigard). Given the inclusion of contaminate, irritant, and waste, nearly
7 anything can be a pollutant in the right context—*e.g.*, anything that would be
8 undesirable to add to your drinking water. *See Pipefitters Welfare Educational*
9 *Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1043 (7th Cir. 1992) (“The
10 terms ‘irritant’ and ‘contaminant,’ when viewed in isolation, are virtually
11 boundless, for ‘there is virtually no substance or chemical in existence that would
12 not irritate or damage some person or property.’”) (quoting *Westchester Fire Ins.*
13 *Co. v. City of Pittsburg*, 768 F.Supp. 1463, 1470 (D. Kan. 1991)).

14 Manure clearly falls under the definition of a pollutant as waste. While the
15 parties quibble over whether the manure is “waste,” Plaintiffs essentially concede
16 the point—Plaintiffs state in their briefing: “[i]f the Insurers sought to exclude
17 coverage for property damage . . . arising from manure, it could have added . . .
18 agricultural waste, or some other similar term to the definition of ‘pollutant’[,]”
19 ECF No. 53 at 7; and, referencing what the insurer could have done, state “the
20 Insurers did not add ‘animal waste’ . . . to its generic and ambiguous definition,”

1 ECF No. 53 at 9. Plaintiffs’ counsel again stated at oral argument that the insurers
2 could have added “animal waste” to exclude coverage. The policy does not
3 distinguish between types of waste. Animal and agricultural waste is waste.

4 Plaintiffs argue the manure is not waste because it was going to be used as
5 fertilizer, suggesting waste only means material that cannot be used—*i.e.*, garbage.
6 Although not defined in the policy, the Merriam Webster Dictionary defines waste
7 as “refuse from places of human or animal habitations: such as (1) garbage,
8 rubbish (2) Excrement—often used in plural (3) Sewage.” [www.merriam-
10 webster.com/dictionary/waste](http://www.merriam-
9 webster.com/dictionary/waste).⁴ Clearly, the common use of waste includes
11 material that is purely garbage, but it also includes excrement and sewage.

12 Plaintiffs’ proposed definition of waste (restricting the definition to materials that
13 cannot be used) does not comport with the policy language: the policy specifically
14 includes materials to be recycled, reconditioned or reclaimed, so a broader reading
15 including both uses must follow. This means waste must include manure
16 (excrement) even if the manure will eventually be used (*i.e.*, recycled /
17 reconditioned) for fertilizer.

18 ⁴ “To determine the ordinary meaning of an undefined term, our courts look to
19 standard English language dictionaries.” *Boeing Co. v. Aetna Cas. and Sur. Co.*,
20 113 Wash.2d 869, 877 (1990).

1 Plaintiffs point to the case of *Littleton v. Whatcom County* to argue waste
2 does not include manure, but the context of that case is much different than the
3 instant action and is thus inapplicable. The court in *Littleton* was tasked with
4 reviewing Washington legislation regulating “solid waste” and the corresponding
5 statutory definition of such. 121 Wash. App. 108, 114 (2004). The court found
6 solid waste did not include manure under the statute because – although originally
7 included – subsequent legislation removed the phrase “manure, vegetable or
8 animal solid and semisolid wastes, and other discarded materials” from the
9 definition of solid waste. *Id.* The court thus presumed the legislature did not want
10 manure to be so classified. *Id.* The court noted that a contrary reading would
11 criminalize the use of manure as fertilizer without a permit and reasoned that the
12 legislature could not have intended this consequence. *Id.* at 114-115. This
13 presents a much different analytical framework than the instant case involving the
14 interpretation of an insurance contract.⁵

15
16 ⁵ Notably, the court in *Littleton* references WAC 173-304-015(5), which states
17 that the regulations do not apply to solid wastes, including “[a]gricultural wastes,
18 limited to manures and crop residues, returned to the soils at agronomic rates[.]”
19 *Id.* at 115. Consequently, the statutory framework actually supports a reading that
20 solid waste includes agricultural wastes and such includes manure. Otherwise the

1 Moreover, irrespective of whether manure falls under waste, manure is
2 clearly a potential contaminate. Plaintiffs contend that including manure in the
3 definition takes the reach of irritant and contaminate to the extreme, ECF No. 53 at
4 5, and that doing so would lead to an absurd conclusion, ECF No. 53 at 6. The
5 Court does not agree. Although manure may make great fertilizer, there is no
6 disputing that it is a contaminant if it makes its way into drinking water. Manure
7 in water is clearly a contaminant—*i.e.*, it made the water unfit for use by
8 introduction of unwholesome or undesirable elements. *See* [www.merriam-](http://www.merriam-webster.com/dictionary/contaminates)
9 [webster.com/dictionary/contaminates](http://www.merriam-webster.com/dictionary/contaminates).

10 Plaintiffs argue the insured would not expect to have a large part of their
11 operation not covered, but the court in *Cook* expressly declined to adopt this line of
12 reasoning when it declined to read “routine workplace torts” out of the exclusion—
13 the Court reasoned that the exclusion does not create such a distinction for the
14 insured’s business operations while noting that it is difficult to image why an
15

16 regulation would not have to spell out this latter exclusion. Ultimately, however,
17 *Littleton* is of little to no import in the instant case—legislative definitions are
18 crafted to meet a certain end rather than to parallel the common understanding of
19 the term.
20

1 insured would take pollutants to a work site (a covered location) if it did not use it
2 in its business. 83 Wash. App. at 154. Moreover, “Washington has never adopted
3 the reasonable expectation policy.” *Id.* at 155. Rather, Washington courts
4 “consider how a reasonable person would interpret the policy’s language, but do
5 not allow an insured’s expectations to override the plain language of the contract.”
6 *Id.* at 155 (citation omitted).

7 Plaintiffs further argue that the average insured purchasing an Agri-policy
8 would not consider manure held in a storage lagoon, composted, or applied to
9 cropland an irritant or a contaminant, ECF No. 53 at 4, but this misses the point.
10 The question is whether a reasonable purchaser of insurance would label manure as
11 a contaminant in the context of the actual harm – *i.e.*, when entering water. *See*
12 *American Star*, 121 Wash.2d at 877-78 (considering whether average insurance
13 buyer might reasonable conclude there is coverage in specific context of loss). No
14 reasonable person can seriously deny manure is a pollutant in that context. At the
15 end of the day, as CARE alleged, Plaintiffs’ use and storage of the manure caused
16 “significant environmental *contamination* of the soil and groundwater[.]” ECF No.
17 1-2 at ¶ 11-13 (emphasis own). Only contaminants contaminate.

18 Plaintiffs concede the definition of pollutant is broad and argue that this
19 leads to an ambiguity. ECF No. 53 at 4. This is far from the case. A broad
20 definition only makes it clearer that the harm at issue is excluded. Although waste

1 may also refer to material not to be reused, this does not create an ambiguity. An
2 ambiguity arises when a term is subject to multiple interpretations—*i.e.*, choosing
3 between interpretation A or B; a term is not ambiguous where there is one
4 reasonable interpretation and such includes multiple uses of the term—*i.e.*, one
5 interpretation that includes A and B. For example, the policy defines pollutant as
6 an irritant and contaminant, but the existence of two subcategories does not create
7 an ambiguity merely because a pollutant includes both irritants and contaminates.

8 At oral argument Plaintiffs emphasized that manure is not a pollutant when
9 used as intended. It is unclear from case law whether this is truly a requirement for
10 the exclusion to apply.⁶ Irrespective, even if a necessary element, the manure can
11 be – and, here, clearly is – a pollutant when used as Plaintiffs intended. Plaintiffs

13 ⁶ Indeed, this may conflict with the case of *Bremerton*, where fumes from
14 sewage triggered the absolute pollution exclusion. 92 Wash. App. at 23. Notably,
15 naturally occurring materials like sewage and manure do not appear to fit under an
16 “intended use” analysis because the material was not created with an intended use,
17 although it may later be put to an intended use. This contrasts with a sealant,
18 which is created for a specific end. As a result, it is unclear what the intended use
19 of sewage and manure is other than what the user subjectively intended to do with
20 the material.

1 stored the manure and spread it on the land intending to use it as fertilizer. Yet, the
2 very storage and application – the intended use – led to pollution. As a result, even
3 if this were a requirement, such is easily met.

4 Finally, Plaintiffs baldly assert the chemical drift liability provision does not
5 allow for the broad reading of pollutants. ECF No. 53 at 15. This is not correct. If
6 anything, the claw-back of certain polluting events for certain forms of chemicals
7 demonstrates the breadth of the definition of a pollutant, as claw-back provisions
8 are necessarily less expansive than the exclusion itself.

9 *ii. The manure was acting as a pollutant*

10 Although the definition of pollutant is recognizably broad, Washington has
11 tempered the breadth of the exclusion by limiting it to losses that arise from the
12 pollutant *acting as a pollutant*. *Kent Farms*, 140 Wash.2d at 401. This avoids the
13 concern that merely tripping over a container containing a pollutant would trigger
14 the exclusion.

15 For example, the absolute pollution exclusion applied in *Bremerton*, *Cook*,
16 *Quadrant* and *Xia*. In *Bremerton*, the court found noxious odors and fumes created
17 by sewage fell under the exclusion because it was polluting nature of the sewage
18 that caused such odors and fumes. 92 Wash. App. 17, 19-23. Similarly, in *Cook*
19 and *Quadrant*, fumes emitted from the application of sealant fell under the
20 exclusion because the toxic characteristic of the sealant caused the harm. *Cook*, 83

1 Wash. App. at 153-4; *Quadrant*, 154 Wash.2d at 180. As in *Cook* and *Quadrant*,
2 the absolute pollution exclusion was triggered in *Xia* when carbon monoxide
3 leaked and harmed the residents because the harm was caused by the very
4 attributes making the gas a pollutant. *Xia*, 2017 WL 3711907, at *4. In contrast,
5 in the case of *Kent Farms*, the exclusion did not apply where a jet stream of
6 gasoline caused bodily injury—the pollutant (the gasoline) was not acting as a
7 pollutant in causing the harm. 140 Wash.2d at 401. The Supreme Court of
8 Washington in *Xia* later distinguished *Kent Farms* from *Quadrant* by noting that
9 the harm in *Kent Farms* would have arisen even if the gasoline was water, as the
10 gasoline choked but did not pollute when causing the harm. *Xia*, 2017 WL
11 3711907, at *4.

12 Here, the manure was clearly acting as a pollutant in contaminating the
13 water. There is no lack of clarity on this issue. Had the manure been water, harm
14 would not have resulted. Rather, it was the polluting properties of the manure that
15 contaminated the water. This case is much different than *Kent Farms* and falls in
16 line with *Bremerton*, *Cook*, *Quadrant*, and *Xia* because the very attribute making
17 the material a potential pollutant caused the harm. This is not a case where
18 someone drowned in the pool, or where a cascading flood of manure destroyed a
19 building in its path. This is a case where the contaminating attributes of the
20 manure directly polluted the surrounding soil and drinking water.

1 b. Efficient Cause

2 Washington applies the “efficient cause” rule to insurance coverage
3 disputes. *Xia*, 2017 WL 3711907, at *5. “[T]he rule of efficient proximate cause
4 provides coverage ‘where a covered peril sets in motion a causal chain[,] the last
5 link of which is an uncovered peril.’” *Id.* (brackets in original) (quoting *Key*
6 *Tronic Corp. v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 124 Wash.2d 618, 625
7 (1994)). In other words, “[i]f the initial event, the ‘efficient proximate cause,’ is a
8 covered peril, then there is coverage under the policy regardless [of] whether
9 subsequent events within the chain, which may be causes-in-fact of the loss, are
10 excluded by the policy.” *Id.* (internal quotation marks omitted; citations omitted).
11 “*However, the efficient proximate cause rule applies only ‘when two or more*
12 *perils combine in sequence to cause a loss and a covered peril is the predominant*
13 *or efficient cause of the loss.’” *Id.* (emphasis in original) (quoting *Vision One,*
14 *LLC v. Philadelphia Indem. Ins. Co.*, 174 Wash.2d 501, 519 (2012)).*

15 For example, in *Xia*, the court found the insurance policy provided coverage
16 for damages resulting from a carbon monoxide leak, despite finding the exclusion
17 applied to the carbon monoxide. 2017 WL 3711907, at *9. There, the leak was a
18 direct result of the negligent installation of a water heater, which was a covered
19 occurrence. *Id.* at *8-9. In contrast, in *Quadrant*, the court found the exclusion
20 applied and there was no coverage because the initial peril that set in motion the

1 causal chain was the polluting event: the application of the sealant and the failure
2 to contain the fumes. 154 Wash.2d at 167-68. Similarly the Washington Court of
3 Appeals in *Bremerton* found an absolute pollution exclusion applied where the
4 plaintiffs complained they were damaged from the “‘emission of . . . noxious and
5 toxic fumes’ resulting from the City’s ‘negligent design, construction, and
6 operation of the treatment plant.’” 92 Wash. App. at 19.

7 The distinguishing feature between these two lines of cases is the relation
8 between the initial act and the pollutant causing harm—*viz.*, whether the initial
9 peril was the polluting act (*i.e.*, *whether the incident involved pollutants in the first*
10 *place*) or whether the initial peril was some other act that incidentally led to a
11 polluting harm. Although subtle, this framework is workable and leads to a clear
12 result in this case: the initial act was intimately tied to the pollutant and thus the
13 initial peril was the polluting act.

14 Defendants attempt to sidestep the analysis by arguing the “efficient” cause
15 rule does not apply. In support, Defendants contrast the relevant policy language
16 with the language of the policy in *Xia*—the instant policies use the term arising
17 from as opposed to proximately caused by. Although the term arising out of is
18 generally broader than proximately caused by – and the rule would not apply if
19 freedom of contract governed without restriction – the court in *Xia* expressly
20 disavowed attempts to circumvent the efficient cause rule with the “the use of

1 broad policy language which eliminates the relevance of the efficient proximate
2 cause rule under all possible circumstances.” *Xia*, 2017 WL 3711907, at *8
3 (quoting *Findlay v. United Pacific Ins. Co.*, 129 Wash.2d 368, 376 (1996)).⁷ As a
4 consequence, the difference of language does not appear to be material. Notably,
5 the use of broad language must be contrasted with the use of specific exclusions—
6 Washington courts do not limit “the use of clear policy language to exclude a
7 specifically named peril from coverage[.]” *Id.* “It is perfectly acceptable for
8 insurers to write exclusions that deny coverage when an excluded occurrence
9 initiates the causal chain and is itself either the sole proximate cause or the
10 efficient proximate cause of the loss.” *Id.* at *5 (citations omitted).

11 Here, the initial act giving rise to the peril was an excluded harm and there is
12 no other covered occurrence that otherwise led to the harm. In the instant case,
13 there are two sources of contamination: the over-application of manure directly to
14 the land and the inadvertent seepage of the manure from the holding ponds. As to
15

16 ⁷ The court in *Xia* gave examples of failed attempts to circumvent the rule,
17 including policy language stating: “We do not cover loss caused by . . . excluded
18 perils, whether occurring alone or in any sequence with a covered peril . . . “ *Xia*,
19 2017 WL 3711907, at *5 (quoting *Safeco Ins. Co. of America v. Hirschmann*, 112
20 Wash.2d 621, 624 (1989)).

1 the over-application, there is but one relevant event: the application (*i.e.*, the
2 release / dispersal) of the manure directly onto the land. This release of the
3 pollutant falls squarely under the specific cause of pollution (the release /
4 dispersal). Such exclusion of a “specifically named peril” – the release – is
5 specifically sanctioned in *Xia*. 2017 WL 3711907, at *8 (quoting *Findlay*, 129
6 Wash.2d at 376) (“the use of clear policy language to exclude a specifically named
7 peril from coverage” is not prohibited. “It is perfectly acceptable for insurers to
8 write exclusions that deny coverage when an excluded occurrence initiates the
9 causal chain and is itself either the sole proximate cause or the efficient proximate
10 cause of the loss.”).

11 As to the seepage via the holding ponds, Plaintiffs attempt to bifurcate the
12 allegedly negligent construction of the holding ponds from the resulting pollution
13 with the hope it will create a two-step pivot to coverage via the efficient cause rule.
14 This attempt fails. It was the inadequate storage of the manure that caused the
15 seepage—and the negligent construction is necessarily intertwined with the
16 storage. This very occurrence is explicitly excluded by the terms of the policy,
17 which excludes from coverage the seepage of pollutants stored or processed as
18 waste. There is no other occurrence beside the act intimately tied with the storing
19 of manure—the polluting event.

1 As a result, there is no coverage under the policy. In both instances, the only
2 acts Plaintiff can point to are the polluting events, which are intimately tied to
3 Plaintiffs use and storage of the manure, and these occurrences are spelled out in
4 the exclusion.

5 The instant case falls in line with *Bremerton*, *Cook*, and *Quadrant*. Here, the
6 initial peril that set in motion the causal chain was the polluting event: the
7 application and storage of a potential pollutant (the manure). Up until the point of
8 using and storing the manure, no negligent act had occurred and, importantly, the
9 exclusion explicitly extends to storage of waste. As noted above, Plaintiffs'
10 attempt to segregate the seepage event from the construction of the storage ponds,
11 but this approach is unworkable and otherwise fails because storage is covered.
12 Indeed, the same splitting of hairs could be done with *Bremerton*, *Cook*, and
13 *Quadrant* by arguing the failure to contain the fumes was negligence preceding the
14 harm. Such a reading would render the exclusion provision inert. *Washington*
15 *Public Utility Districts' Utilities System*, 112 Wash.2d at 11 (courts must not
16 construe policy in a way that renders it ineffective). Had the manure been released
17 due to an accident not related to the actual use / storage of the pollutant – *e.g.*,
18 accidentally driving a tractor into the barrier of the pond – the efficient cause rule
19 may have applied. But this is not the case. The application and the storage *of the*
20

1 *manure* was the triggering event, and the insurance policy specifically
2 contemplates the exclusion of these occurrences.

3 II. Duty to Defend

4 An insurer's duty to defend is broader than the duty to indemnify and arises
5 when an action is first brought based on the *potential* for liability. *Xia*, 2017 WL
6 3711907, at *4 (citation omitted). Upon receipt of a complaint against its insured,
7 the insurer is permitted to utilize the "eight corners" rule to determine whether, on
8 the face of the complaint and the insurance policy, there is an issue of fact or law
9 that could conceivably result in coverage under the policy. *Id.* (citation omitted).
10 "[I]f there is any reasonable interpretation of the facts or the law that could result
11 in coverage, the insurer must defend." *Id.* An insurer has no duty to defend "if the
12 alleged claims are clearly outside the policy's coverage." *Id.* (citation omitted).
13 Here, because non-coverage was clear, Defendants did not have a duty to defend
14 Plaintiffs in the underlying litigation.

15 Plaintiffs attempt to muddy the water by pointing to the case of *Silver Creek*
16 *Pig*, where the court found pollution from pig manure was not excluded from
17 coverage under a policy containing a similar absolute pollution exclusion.
18 Plaintiffs argue that the mere existence of a conflicting opinion undermines the
19 clarity needed to avoid the duty to defend. Plaintiffs are not correct. *Silver Creek*
20 *Pig* does not create doubt giving rise to the duty to defend because the law

1 governing that decision conflicts greatly with Washington’s approach to the
2 absolute pollution exclusion.

3 Rather than determining whether the pollutant is acting as a pollutant, the
4 relevant state law in *Silver Creek Pig* hinged on whether the pollutants were “non-
5 natural occurring chemicals” and whether the harm was “traditional environmental
6 pollution[.]” *Indemnity Insurance Company v. Silver Creek Pig, Inc.*, 2015 WL
7 1910019, at *10-11 (2015) (C.D. Ill. 2015).⁸ This is not consistent with
8 Washington law. The case of *Bremerton* is inconsistent with the “non-natural
9 occurring chemicals test” because the sewage was not composed of non-natural
10 chemicals. 92 Wash. App. at 19-23 (1998) (applying exclusion to sewage). The
11 cases of *Cook*, *Quadrant*, and *Xia* are inconsistent with the “traditional
12 environmental pollution” requirement because the fumes harmed persons, not the
13 land or environment. *Cook*, 83 Wash. App. at 153-4 (fumes harming persons);
14 *Quadrant*, 154 Wash.2d at 180 (same); *Xia*, 2017 WL 3711907, at *4 (same).

15 Notably, the Court in *Quadrant* specifically held that the traditional environmental
16

17 ⁸ The court in *Silver Creek Pig* conceded that the manure was a pollutant, but
18 was not convinced that it fell under the exclusion because manure was not a “non-
19 natural occurring chemical” and the complained of, noxious smell was not
20 considered “traditional environmental pollution.” *Id.*

1 harms is limited to the facts of *Kent Farms. Quadrant*, 154 Wash.2d at 183 (“if
2 anything, the absence of that phrase instead indicates that the exclusionary
3 language is not limited to traditional environmental harms.”). In declining to adopt
4 the “classic environmental pollution” requirement, the court in *Quadrant* reasoned
5 that the contract made no such distinction between types of pollution (as is the case
6 here). 154 Wash.2d at 175; *see also Cook*, 83 Wash. App. at 154 (“Nor does the
7 exclusion limit its application to classic environmental pollution.”). Irrespective,
8 the underlying pollution in the instant case is traditional environmental pollution.
9 Even the *Silver Creek Pig* court reached this conclusion with respect to the manure
10 polluting the surrounding areas. 2015 WL 1910019, at *11.

11 In Washington, what matters is whether the substance causing harm was a
12 pollutant acting as a pollutant. That is the case here. A different approach in
13 another state does not create a lack of clarity where the underlying rules are much
14 different and are clearly inconsistent with the approach in Washington.

15 Non-coverage is also clear despite Plaintiff’s brief and conclusory
16 contentions that the negligent application and storage was a covered occurrence
17 that proximately caused the pollution. Here, as discussed above, the only relevant
18 occurrences were directly related to the handling of the pollutant and were
19 specifically excluded under the policy (*i.e.*, the dispersal / release of pollutants and
20 storage of waste).

1 **IT IS HEREBY ORDERED:**

2 1. Defendants QBE Insurance Corporation and Unigard Insurance
3 Company's Motions for Partial Summary Judgment (ECF No. 35) is
4 **GRANTED.**

5 2. Defendants Bedivere Insurance Company and Armour Risk
6 Management, Inc.'s Motion for Partial Summary Judgment (ECF No. 38)
7 is **GRANTED.**

8 3. Plaintiffs' The Dolsen Companies, Cow Palace, LLC, and Three D
9 Properties, LLC's Motion for Partial Summary Judgment (ECF No. 48) is
10 **DENIED.**

11 The District Court Executive is directed to enter this Order and furnish
12 copies to counsel.

13 **DATED** September 11, 2017.



14 *Thomas O. Rice*
15 THOMAS O. RICE
16 Chief United States District Judge
17
18
19
20