

# Judge declines to dismiss oysterman's suit against state

## Tillamook man claims harm in dairy pollution

By MATEUSZ PERKOWSKI  
EO Media Group



Mateusz Perkowski/EO Media Group  
**An oysterman's lawsuit against the state over dairy pollution can continue.**

TILLAMOOK — A Circuit Court judge has refused to dismiss a lawsuit that alleges state environmental regulators allow pollution from dairies to harm oyster harvests in Tillamook Bay.

Attorneys for the state Department of Environmental Quality argued the agency cannot be held liable for the adverse effects suffered by oysterman Jesse Hayes, president of the Hayes Oyster Co.

According to Hayes' lawsuit, the state incorrectly assumes that local dairies aren't discharging fecal coliform bacteria into rivers that flow into Tillamook Bay.

Nonetheless, bacteria levels in the bay are so high that Hayes is entirely prohibited from harvesting oysters from 250 acres of his plats

and faces frequent shutdowns on 350 acres, according to his complaint.

Hayes argues that insufficient state regulation constitutes a public nuisance and an unjust taking of his property due to lost profits and reduced plat values.

The complaint seeks \$100,000 in damages and an order requiring the Department of Environmental Quality to strengthen its pollution regulations in the area.

Without deciding the merits of the case, Tillamook County Circuit Judge Mari Garric Tre-

**'The agency made the decision to take away the use of 250 acres of tideland from the Hayes Oyster Co. perpetually.'**

**Thomas Benke**  
attorney for oysterman Jesse Hayes

vino denied the state's motion to throw out the lawsuit and ordered the agency to answer Hayes' allegations.

The ruling means that Hayes has cleared an important first hurdle and may proceed with the litigation.

"We get to prove what's in our complaint," said Thomas Benke, his attorney.

### Arguments

During oral arguments on Friday, the Department of Environmental Quality claimed that Hayes incorrectly targeted the agency rather than the dairy farmers who are alleged to be the underlying source of the problem.

Hayes makes the "errone-

ous assumption" that the state unjustly deprived him of property by failing to regulate his neighbors strictly enough, but inadequate regulation isn't recognized as a government "taking" under legal precedents, according to the Department of Environmental Quality.

"The government is not responsible for inaction," said Christina Beatty-Walters, the department's attorney. "That's not a situation the government is responsible for."

The lawsuit also attempts an impermissible "collateral attack" against state regulations, which can only be challenged through an administrative process, said Beatty-Walters.

The state's "total maximum

daily load" order for fecal coliform bacteria in the region was enacted in 2001, so Hayes missed a deadline to challenge the action by 16 years, Beatty-Walters said.

"They're way too late," she said.

According to Hayes, the complaint is valid because it's challenging the adverse impacts that insufficient rules have imposed on his oyster operation, rather than attacking the validity of the regulations themselves.

"The agency made the decision to take away the use of 250 acres of tideland from the Hayes Oyster Co. perpetually," said Benke.

Hayes argues that the Department of Environmental Quality has unlawfully sanctioned pollution, which is a form of government taking.

The agency could restrict pollution from dairies with confined animal feeding operations or from municipal wastewater, but it's the act of allowing excessive pollution that Hayes is challenging in court, Benke said.

While polluters received

notice of the agency's regulation 16 years ago, Hayes did not and should still be allowed to seek a legal remedy, he said.

"It flies in the face of fundamental due process," he said.

### Closely watched

The Oregon Dairy Farmers Association is watching the case closely because it involves regulations affecting farmers, said Tami Kerr, the group's executive director.

The lawsuit also implies that dairies are polluters, she said. "I'm frankly tired of that."

Oregon is a national leader in manure management, with dairy farmers being regularly inspected by the state Department of Agriculture, Kerr said.

Faulty septic tanks, municipal wastewater and wildlife feces all contribute to fecal coliform bacteria in water, which has been confirmed by the Department of Environmental Quality, she said.

"Dairy is always the first thought when people talk about pollution but DNA testing has shown it's broader than that," Kerr said. "There's a large human influence in that."

## Coast Guard evacuates burn victim

The Daily Astorian

The Coast Guard medevaced a 38-year-old man from a cargo vessel 174 miles from the Columbia River entrance Saturday.

The shipping agent of the cargo vessel Tawa Arrow called watchstanders at Sector Columbia River in War-

renton and reported a crew member with burns on his legs and arms from boiler steam.

The Coast Guard launched an MH-60 Jayhawk helicopter crew from Air Station Astoria with a Life Flight Network nurse aboard and flew to the vessel. Because of concerns with the distance,

the sector brought in a C-27 Spartan surveillance plane from Air Station Sacramento for support.

The Jayhawk hoisted the injured crewman and transported him to the Astoria Regional Airport, where he was transferred to Life Flight and taken to Legacy Emanuel Medical Center in Portland.

## Body of missing mushroom picker found

Associated Press

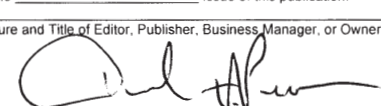
PORTLAND — Searchers have found the body of a man who went missing in the Tillamook State Forest.

Portland Mountain Rescue posted to Facebook

on Friday that the body of Michael Lund had been recovered from a ravine. The Tillamook County Sheriff's Office confirmed to KPTV that the body had been found.


The 49-year-old man was

reported missing by a friend Sept. 18 after he did not return from picking mushrooms in the wilderness. The sheriff's office said at the time that Lund did not have supplies for an extended stay in the forest.


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