UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington 98101

IN THE MATTER OF:	)	Docket No. 10-97-0090-CWA/G
	)	
LARRY RICHNER	)	Proceeding to Assess
NANCY SHEEPBOUWER	)	Class I Administrative
& RICHWAY FARMS,	)	Penalty Under Clean Water
Everson, Washington	)	Act Section 309(g)
	)	33 U.S.C. §1319
RESPONDENTS	)	
	)	

INITIAL DECISION

This is a proceeding for the assessment of a Class I administrative penalty under subsection 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g). The proceeding is governed by the United States Environmental Protection Agency's (EPA) procedural rules at 40 C.F.R. Part 22, Subpart I, the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 64 Fed. Reg. 40138 (July 23, 1999). This is the Initial Decision of the Presiding Officer under Section 22.27 of the Consolidated Rules.

I. INTRODUCTION

On March 13, 1997, employees of the U.S. Environmental Protection Agency, Region 10, conducted a National Pollutant Discharge Elimination System (NPDES) inspection of the Rickway Farms dairy farm[1] located at 3909 Hoff Road, Everson, Washington.

As a result of the inspection, the Unit Manager of the NPDES Compliance Unit of the Office of Water, EPA Region 10 (the Complainant), filed an initial Administrative Complaint against Richway Farms (the Respondent) on April 16, 1997, under Section

[1] The correct name of the dairy business operated at 3909 Hoff Road during 1995 - 1997 is Ric**k**way Farms; the initial Administrative Complaint, the Amended Complaint, and all other pleadings refer to the Respondent as Ric**h**way Farms.

309(g)(2)(A) of the Clean Water Act, 33 U.S.C. § 1319 (g)(2)(A), charging the Respondent with unauthorized discharge of pollutants into "navigable waters" in violation of Section 301(a) of the Clean Water Act, and proposing a civil penalty of $11,000.00.

The Administrative Complaint was served by registered mail on

Larry Richner
Richway Farms

Mr. Richner filed a Response to the initial Administrative Complaint dated May 30, 1997, in which he denied various allegations in the Complaint, and also asserted that he owned the real property at 3909 Hoff Road, but did not operate the dairy facility, that his daughter Nancy Sheepbouwer, was the controlling operator of the dairy farm, and that no wastewater was discharged from the property into navigable waters.

On May 15, 1997, the parties were notified that the undersigned was designated as Presiding Officer to conduct these proceedings.

Two commenters, the Lummi Nation, a federally recognized tribe of American Indians, and Puget Soundkeeper Alliance, an environmental organization, made written comments on the Administrative Complaint. See Complainant's Exhibit 11. The Lummi Nation also participated in the July 25, 2000, hearing.

On October 2, 1998, the Complainant moved for permission to amend the Administrative Complaint to name as additional respondents Larry Richner and Nancy Sheepbouwer. Over Mr. Richner's objection, Complainant was allowed to amend the Complaint. The Amended Complaint was served on Larry Richner approximately October 5, 1998, but was never successfully served on Nancy Sheepbouwer. Ms. Sheepbouwer did not participate in this proceeding.

After a series of prehearing conferences and unsuccessful settlement negotiations, a hearing was scheduled for March 28, 2000. The hearing was postponed at the request of Mr. Richner and the Complainant to June 13, 2000. The hearing was subsequently postponed to July 25, 2000, due to the death of Mr. Richner's mother. On May 1, 2000, the Complainant filed a Motion to Strike Defenses, which was denied on June 1, 2000.

The Complainant's prehearing exchange was filed April 14, 2000 and supplemented April 26, 2000 and July 21, 2000. Mr. Richner's

prehearing exchange was filed April 17, 2000. The parties also agreed to eleven stipulations regarding undisputed facts in the proceeding.

The Presiding Officer, the attorney for the Complainant, two EPA inspectors, and the Respondent participated in a site visit to the dairy farm at 3909 Hoff Road on July 24, 2000, the day prior to the hearing.

The hearing was held on July 25, 2000, in Bellingham, Washington. Mr. Richner filed corrections to the hearing transcript on approximately September 1, 2000; the Complainant filed corrections on September 1, 2000.[2] The Complainant filed proposed findings of fact and conclusions of law and a post-hearing brief on September 15, 2000. Mr. Richner filed proposed findings of fact and conclusions of law on September 29, 2000.

Mr. Richner acted pro se throughout the proceeding, but received advice from a private attorney during the hearing.

All proposed findings, conclusions, and supporting arguments of the parties and commenters have been considered. To the extent that the proposed findings and conclusions submitted by the parties are inconsistent with the conclusions stated herein they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings herein it is not credited.

Upon consideration of the entire administrative record in this matter, for the reasons set forth below, I find Respondents Larry Richner and Richway Farms not liable for violating Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), and dismiss this case against Respondent Nancy Sheepbouwer for lack of prosecution.

II STATUTE AND REGULATIONS

Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), provides that, except as otherwise authorized by other sections of the Act, the discharge of any pollutant by any person shall be unlawful. Section 502(12) of the Act, 33 U.S.C. § 1362(12), defines

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[2] The transcript contains several errors not noted by the parties.

"discharge of a pollutant" as "... (A) any addition of any pollutant to navigable waters from any point source." Section 502(6) of the Act, 33 U.S.C.§ 1362(6), defines "pollutant to include "... agricultural wastes discharged into water."

EPA regulations at 40 C.F.R. Section 12.23 provide that concentrated animal feeding operations are point sources subject to the NPDES permit program.

Section 309(g)(2)(A) of the Clean Water Act, 33 U.S.C. § 1319(g)(2)(A), provides that any person who violates Section 301(a) of the Act, 33 U.S.C. § 1311(a), shall be subject to a civil penalty of up to $11,000 per violation, except that the maximum amount of any civil penalty shall not exceed $27,500.

III ISSUES

In his Answer,[3] Respondent Larry Richner

(1) denied that he operated the facility, stating that he had had a heart attack in December, 1994, and his daughter, Nancy Sheepbouwer, took over operation of the dairy in January, 1995;

(2) stated that the "manure pile" observed by the EPA inspectors

> is mud and silt caused by a slide on the hill above the dairy barns that filled the creek channel and then ran through the dairy shed and catch basin to nearby fields

(3) stated that

> No water from any creek leaves this farm. All water from the four drainages run into an irrigation pond on the south side of the farm. No water from the farm goes to the Nooksack River. Burlington Northern Railroad runs the entire length of the farm on the south side. There is a 30 [inch] culvert under the tracks. This culvert has been plugged since October of 1994. No wastewater went into "navigable waters."

[3] Mr. Richner did not file an answer to the Amended Complaint. Mr. Richner's Response dated May 30, 1997 to the Administrative Complaint was accepted as his answer in the proceeding.

Mr. Richner reiterated these points at hearing and in his posthearing proposed findings of fact and conclusions of law.

IV DISCUSSION

In order to prove a prima facie violation of Section 301(a) of the Clean Water Act, the Complainant must demonstrate that the Respondent is legally responsible for (1) the discharge of a pollutant; (2) from a point source ; (3) into navigable water; (4) without an NPDES permit or other authorization.

A. Whether Mr. Richner is Liable as Owner or Operator of the Facility

Mr. Richner has maintained a home with his wife, Marilyn Richner, at 3909 Hoff Road, Everson, Washington for over thirty years. Mr. Richner testified that he operated a dairy farm with his wife at that address until he had a heart attack in December, 1994,[4] after which he decided to transfer the dairy business to his wife, Marilyn Richner and his daughter Nancy Sheepbouwer.[5] Hearing Transcript, pp. 137-38. An application for a milk producer permit reflecting an "ownership change" was submitted to the Washington State Department of Agriculture effective January 4, 1995, signed by Marilyn Richner and Nancy Sheepbouwer. They assumed the business name of Rickway Farms. At the time of the EPA inspection on March 13, 1997, Mr. Richner maintained his ownership interest in the real property on which the dairy farming operation at 3909 Hoff Road is located. Mr. Richner testified that since 1995 he has spent most of his time in Twisp, Washington, where he owns a heifer farming operation, but that he still helps out his children at 3009 Hoff Road by doing work around the farm when he is in Everson and feeling well enough. Tr., pp. 138-39. Mr. Richner also testified that he tries to teach his children the best way to run the dairy, does "leg work" to help them, and occasionally loans them money for the dairy operation. Tr., pp. 142-143. On the day of the inspection, he was feeding silage to cattle, which he could do on a tractor without having to walk a significant distance. Tr., p. 100.

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[4]Mr. Richner also has had a knee replacement operation since 1997, and suffers from diabetes.

[5] As noted above, Nancy Sheepbouwer was named as a Respondent in the Amended Complaint, but never served. There is no indication in the record why EPA did not name Marilyn Richner as a Respondent.

The Complainant argues that Mr. Richner is the owner of the "facility" and that he was responsible for its operation at the time of the inspection. Alternatively, the Complainant argues that Mr. Richner had sufficient control of the dairy operation to be held liable for the violation alleged in the Amended Complaint.

EPA regulations at 40 C.F.R. 122.2 define "owner or operator" as the owner or operator of any "facility or activity" subject to regulation under the NPDES program. "Facility or activity" is defined as any NPDES "point source" or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program. As discussed below, a concentrated animal feeding operation ("CAFO") is a "point source," and at least some part of the farm at 3909 Hoff Road is a CAFO.

Mr. Richner has not been shown to be the "owner" of the Rickway Farms dairy business.[6] I find Mr. Richner's testimony that he transferred ownership to his wife and daughter in 1995 due to health concerns to be credible, and his testimony is corroborated by the 1995 milk license for Rickway Farms, issued to "Marilyn Richner or Nancy Sheepbouwer," indicating that they, not Mr. Richner, own the Rickway Farms dairy business. Complainant's Exhibit 12. Neither the business license issued in 1989 to Marilyn J. Richner as "owner" of Larry Richner Dairy, Complainant's Exh. 27, nor the list of milk producers, Complainant's Exh. 17, which dates from 1993, is proof of Mr. Richner's ownership of the Rickway farms dairy operation at any time after 1995, or specifically at the time of the EPA inspection on March 13, 1997.

In arranging for the issuance of a new milk license, the Richners appear to have complied fully with State legal requirements regarding transfer of a milk producer's license:

> Every milk producer must obtain a milk producer's license to operate as a milk producer as defined in this chapter. A milk producer's license is not transferable with respect to persons or locations or both. The license, issued by the director upon approval of an application for the license and compliance with the provisions of this chapter, shall contain the license

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[6] Mr. Richner is admittedly an owner of the real property on which the dairy business is conducted. His potential liability in that regard is discussed below.

number, name, residence, and place of business, if any, of the licensee.

Revised Code of Washington, Section 15.36.041.

Where, as here, an unincorporated business is being transferred from one family member to another, it is reasonable to expect a relative degree of informality. The Complainant has not provided citations to any relevant Washington State law regarding change of ownership of an unincorporated business, and has not argued that there is any legal defect in the transfer of ownership to Mr. Richner's wife and daughter.[7]

In contrast to the issue of ownership, on the evidence in the record it is a very close question whether Mr. Richner has been shown to be an "operator" of Rickway Farms. It is particularly difficult to sort out Mr. Richner's roles as landlord of the dairy farming operation, as parent of one owner of Rickway Farms, and as husband of the other, from his potential role as an "operator" of the Rickway Farms dairy business.

Mr. Richner has maintained consistently that he was not the operator of the dairy business at the time of the inspection.[8] Although Mr. Richner has performed what appears to be a substantial amount of work at the dairy consistent with his health restrictions, the most compelling evidence showing that Mr. Richner was an "operator" of Rickway Farms at the time of the EPA inspection involves Mr. Richner's frequent and continued represention of the dairy operation in dealings with state or federal agencies. While his actions are to some degree consistent with his dual roles as parent/landlord, and in some cases can be explained as relating to his earlier activities as operator of the previous dairy business, the relative frequency and the apparent consistency of his actions in this regard show that he continued to have an active de facto role in

[7] The record contains no indication whether Nancy Sheepbouwer and Marilyn Richner neglected to obtain a business license, as opposed to a milk license, for Rickway Farms, or whether Rickway Farms was for some reason exempt from that licensing requirement.

[8] The record does not show that Mr. Richner personally caused the alleged violation at the facility, or even that he was working at the facility at the time the violation initially occurred.

the dairy farming operation after transferring ownership in 1995, a role presumably acquiesced in by the new owners.

For example, an EPA inspector testified that on the day of the EPA inspection, Mr. Richner

> clearly did not indicate that he was not the person in charge but in fact gave us the impression that he was in charge and that he made the day-to-day decisions regarding the dairy operation. Tr. p.16.

Mr. Richner's contacts with the Soil Conservation Service regarding flooding on the property, Complainant's Exh. 13, are more ambiguous, since they initially dated from 1994 when he still operated the dairy. Thus, his later authorization to release documents in the Soil Conservation Service's files logically relates back to that earlier activity, and in any event may be consistent with his interest as landlord of the property. However, the fact that a Dairy Notice of Correction issued by the Washington State Department of Ecology in 1998, Complainant's Exh. 33, shows Mr. Richner as the "contact" for JM Dairy, and that the Department of Ecology dairy inspector testified that Mr. Richner was apparently in charge on two occasions when he inspected the dairy in 1998, Tr. p. 11-12, indicate that Mr. Richner's efforts to help his children in their operation of the dairy after 1995 caused him to appear to have authority over the dairy operation. Of particular note is the Department of Ecology inspector's observation regarding Mr. Richner's role in manure management for the dairy operation:

> Q Mr. Kaufman, on your subsequent visit who was in charge of the dairy farm?
> A Mr. Richner.
> Q Have you talked to Mr. Richner about the management of manure on his farm?
> A Yes quite extensively.
> Q Have you talked about who is in charge of manure?
> A Yes. He clearly stated that he was in charge of the manure management of that facility.

Tr. p. 12.

Mr. Richner testified that he was aware of the impression being conveyed by his actions:

Q You probably would not be surprised to hear that [a staff member of the Soil Conservation Service] considered you the person who calls the shots on that dairy farm?
A No, everybody does.
Q You are the person who calls the shots as far as that dairy farm?
A No. But everybody believes that because I've always been so vocal and I've always done a lot of the screaming over the years trying to teach the kids how to do things right. I think most people probably figure - and it's like the neighbor told me the other day he said when are you getting out of here? I said I've got my stuff and I'm gonna go over to Twisp. He said they're gonna end up hauling you right out of this driveway here. But I'm sure that everybody thinks that, yeah.

Tr. p. 142-3.

Thus, even though Mr. Richner's stated intention was to transfer both ownership and operation of the dairy business to his wife and daughter in 1995, he does not in fact appear to have succeeded in transferring operational responsibility to them. Mr. Richner's continuing actions in representing the dairy in dealings with state and federal regulators after 1995 are convincing evidence that he retained a sufficient degree of responsibility, control, or authority over the dairy operation to be considered an "operator" of Rickway Farms at the time of the March 13, 1997 inspection.

Mr. Richner's role as landlord also appears, on the facts of this case, to result in liability under the Clean Water Act. As noted above, EPA regulations at 40 C.F.R. 122.2 define "owner or operator" as the owner or operator of any "facility or activity" subject to regulation under the NPDES program, including land or appurtenances. While this would appear to make the landlord of a facility always liable for the facility's violations of the Clean Water Act, relevant case law appears to impose liability to a more limited degree. For example, see in In re Urban Drainage and Flood Control District, EPA Docket No. CWA-VIII-94-20-PII (ALJ Vanderhayden, February 14, 1995). In finding Respondent City of Lafayette, Colorado, not liable, the Administrative Law Judge stated:

> . . . to be liable for a discharge [under the Clean Water Act], it is not necessary to actually discharge a pollutant. Liability will attach if the respondent is the legal cause of the discharge. The causation requirement can be fulfilled if

> the respondent had responsibility, control or authority over the discharges. [citations omitted]

While Mr. Richner's status as landlord therefore does not appear sufficient by itself to result in liability, where Mr. Richner owned the real property on which the dairy business was located and has been shown to have been continuously active in working at the dairy and in representing the dairy business in dealings with state and federal regulatory agencies, his actions may result in liability for violations of the Clean Water Act. Donald J. Aardema and Joe Pacheco, EPA Docket No. 1091-08-06-309(g), Order Granting Partial Summary Determination, (a landlord might act in concert with a tenant . . . and thereby acquire liability) (dictum) (RJO Hamill, June 24, 1992).

As explained above, I find that Respondent Larry Richner has been shown to be potentially liable as an "owner or operator" under the Clean Water Act for the violations alleged in the Amended Complaint.

B. Whether There Was a Discharge of a "Pollutant"

Mr. Richner argues that the "manure pile" observed by the EPA inspectors

> is mud and silt caused by a slide on the hill above the dairy barns that filled the creek channel and then ran through the dairy shed and catch basin to nearby fields.

Contrary to Mr. Richner's assertion, the videotape, Complainant's Exh. 1, and the photographs taken during the inspection, Complainant's Exh. 2, combined with testimony of the EPA inspectors, provide ample evidence that at the time of the inspection a mixture of soil, mud, and manure from the dairy operation was contaminating the unnamed creek flowing across the southern portion of the property. Mr. Richner admitted that the manure catch basin on the property overflowed prior to the March 13, 1997 inspection. Tr. pp. 101, 107.

Section 502(6) of the Clean Water Act, 33 U.S.C. § 1362(6), defines the term pollutant as "... dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, ..., and agricultural wastes discharged into water." Manure is clearly a "pollutant." Concerned Area Residents for the Environment v. Southview Farm, 834 F. Supp. 1410 (W.D.N.Y. 1993), rev'd on other

grounds, 34 F.3d 114 (2d cir. 1994), cert. denied, 115 S. Ct. 1793 (1995) (argument rejected that manure is not a pollutant because it was not "discarded" but is instead used as a fertilizer).

While some of the fecal colliform contamination measured by the EPA inspectors may have been caused by upstream houses, the clear evidence of a substantial quantity of manure standing in the open field makes it reasonable to infer that the spilled manure is the primary source of the contamination measured by the inspectors.

The manure spill therefore resulted in discharge of a "pollutant" within the meaning of Section 502(12) of the Act, 33 U.S.C. § 1362(12).

C. **Whether an Act of God Defense Is Applicable**

Mr. Richner argues that landslides that caused a natural gas pipeline just north of his property to explode on February 8, 1997, also caused a series of mudslides off the hill to the east of his property which caused the creek at the foot of the hill to flood portions of the farm, including the concrete slab between the cow sheds and the manure catch basin. As a result, manure from the catch basin entered an unnamed creek on the property. Tr. p.7. The slides also destroyed the fence on the eastern side of the barn and shed area that kept cows from getting into the easterly unnamed creek.

Mr. Richner argues that because the slides were caused by a gas pipeline explosion and by building activities by other persons on the hill above the dairy, the Respondents should not be held responsible.

The Clean Water Act is a strict liability statute, and cases interpreting it do not recognize an "Act of God" defense.[9] See, for example, United States v. Earth Sciences, Inc., 599 F.2d 368, 374 (10th Cir.1979) which held that the Clean Water Act is a strict liability statute:

> The regulatory provisions of the [Act] were written without regard to intentionality, . . . making the person responsible

[9]A different defense is recognized where the discharge is caused by a 24 hour/25 year storm event. However, no such event appears to have occurred in the Everson area near the time of the alleged violations. Complainant's Exh. 19.

> for the discharge of any pollutant strictly liable . . . The Act would be severely weakened if only intentional acts were proscribed.[10]

Significantly, in the U.S. v. Earth Sciences case, liability was found where recirculation sumps at a gold leaching operation were overwhelmed by greater-than-expected snow melt runoff, causing cyanide discharges.

See in addition In re Town of Luray, EPA Docket No. CWA-III-185 (ALJ Kuhlman, Nov. 4, 1997) in which the Administrative Law Judge ruled that the Respondent's assertion that it had "done all that could be humanly expected" had no relevance in determining liability under the Clean Water Act. Similarly, in In re Puerto Rico Urban Renewal & Housing Corp., EPA Docket No. CWA-II-89-249 (ALJ Nissen, June 29, 1993) the owner of a sanitary collection system was found strictly liable for unpermitted discharges of untreated wastewater to a river, notwithstanding that the discharges resulted from illegal connections to the system by third parties.

In light of these cases interpreting the Clean Water Act, it is evident that Respondents would be responsible for violations of the Act even if the pipeline explosion or hillside construction by other parties were shown to be the original cause of the violations.

D. Whether There Was a Discharge From a "Point Source"

Section 502(14) of the Act, 33 U.S.C. § 1362(14) defines 'point source' as "... any discernable, confined and discrete conveyance, including but not limited to any ... concentrated animal feeding operation [emphasis added], ... from which pollutants are or may be discharged."

A concentrated animal feeding operation is defined in Section 122.23(b)(3) of EPA regulations, 40 C.F.R. Section 122.23(a)(3), as an "animal feeding operation" which meets the criteria in 40 C.F.R. Part 122, Appendix B.

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[10] The landslides might be relevant to mitigation of the penalty, assuming the Respondents could show appropriate diligence in addressing the pollution caused by the slides. On the record in this case, however, it appears that the discharge caused by the landslides was not cleaned up immediately.

An "animal feeding operation," in turn, is defined in Section 122.23(b)(1) of EPA regulations, 40 C.F.R. Section 122.23(a)(1), as

> A lot or facility . . . where the following conditions are met:
>
> (i) Animals . . . have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and
>
> (ii) Crops, vegetation forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

As defined in 40 C.F.R. Part 122, Appendix B, an animal feeding operation is a concentrated animal feeding operation ["CAFO"] for purposes of § 122.23 if either of the following criteria are met:

> (a) More than the numbers of animals specified in any of the following categories are confined . . .
>
> (2) 700 mature dairy cattle (whether milked or dry cows),
>
> . . .
>
> (10) 1,000 animal units; or
>
> (b) More than the following number and types of animals are confined . . .
>
> (2) 200 mature dairy cattle (whether milked or dry cows),
>
> . . .
>
> (10) 300 animal units;
>
> and either one of the following conditions are met: pollutants are discharged into navigable waters through a manmade ditch, flushing system or similar manmade device; or pollutants are discharged directly into waters of the United States which originate outside of and pass over, or across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

The Complainant does not explain exactly how the Rickway Farms dairy meets the above definition of "animal feeding operation" or

meets the criteria in Appendix B for a "concentrated animal feeding operation." See Complainant's Post Hearing Brief at p. 6.

Mr. Richner apparently does not dispute that at the time of the inspection the facility confined, and fed or maintained, dairy cattle for a total of 45 days or more in a 12 month period.

The main open-air confinement area for the cows is paved in concrete. Some areas of the farm show bare earth, while others have natural vegetation, or are planted to crops. Accordingly, it appears that part, but not all, of the farm is an animal feeding operation within the terms of the above definition.

According to the inspection report, at the time of the inspection there were 316 cows on the property. See page 1 of the inspection report, Complainant's Exh. 2. The inspection report is apparently based on information provided to EPA inspectors by Mr. Richner. While Mr. Richner has stated that he did not know the actual number of cows on the property the day of the inspection, I will accept the statements in the inspection report as accurate. (It should be noted that Mr. Richner has had the opportunity to prove that the dairy had fewer than 200 cows, and has not done so.)

I therefore find that at least some portion of the Rickway Farms dairy is an animal feeding operation and a concentrated animal feeding operation, and therefore a "point source" within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362 (14), and 40 C.F.R. Part 122, Appendix B.

E. <u>Into Navigable Water</u>

Mr. Richner argues that that

> [n]o water from any creek leaves this farm. All water from the four drainages run[s] into an irrigation pond on the south side of the farm. No water from the farm goes to the Nooksack River. Burlington Northern Railroad runs the entire length of the farm on the south side. There is a 30 [inch] culvert under the tracks. This culvert has been plugged since October of 1994.

Therefore, Mr. Richner argues that no manure-contaminated water went into "navigable waters" and there was no discharge of a pollutant to navigable waters. Response to the Administrative Complaint, p.3.

Paragraph 2.3 of the Amended Complaint, which describes the single alleged violation of the Clean Water Act that is the subject of this case, alleges that an unnamed creek on the property at 3909 Hoff Road flowed through a manure pile resulting from the dairy operation and that

> [t]he unnamed creek contained pollutants which flowed from the manure pile and discharged to the Nooksack River.(emphasis added)

Paragraph 2.4 of the Amended Complaint alleges that

> [t]his discharge of wastewater constitutes a discharge to 'navigable waters' within the meaning of [the Clean Water Act]. (emphasis added).

Paragraph 2.5 of the Amended Complaint alleges that

> The discharge described above constitutes "discharge of a pollutant", within the meaning of [Section 502[12] and Section 502[6] of the Clean Water Act], from a 'point source" within the meaning of Section 502[14] [of the Clean Water Act]. (emphasis added)

Thus, it appears that the sole violation alleged in the Amended Complaint is a discharge of pollutants into the Nooksack River, not a discharge into creeks on the dairy property. Mr. Richner's defense that no contaminated water left the property is based to some degree on a misunderstanding of the scope of the Clean Water Act.[11]

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[11] Both creeks on the property appear to be tributaries of Smith Creek and the Nooksack River. Thus, in spite of the fact that the creeks may sometimes be blocked from flowing to Smith Creek and the Nooksack River, the discharge of pollutants into the creeks appears to violate the Clean Water Act. See cases cited in the Complainant's Post Hearing Brief at pp. 4 and 5, and In re Robert Wallin dba Bob Wallin Dairy, EPA Docket No. 10-98-0069-CWA/G (RJO Smith, May 9, 2000) (discharge of pollutants into wetlands on dairy farm violates Clean Water Act even where discharge did not reach a river that was "navigable water"). However, as discussed in the main text above, the Amended Complaint does not charge the Respondents with this violation.

However, in making this defense he appears to be responding directly to the major allegations in the Complaint.

In essence, the Respondents were charged with the discharge of a pollutant into the Nooksack River. Absent a timely clarifying amendment to the Complaint, Mr. Richner is entitled to defend by alleging that no pollutants flowed to the Nooksack River.

In the present case the Complainant has been on notice of Mr. Richner's defense since his Response to the initial Administrative Complaint was filed in 1997, and the Complainant never argued that the ultimate discharge into the Nooksack River was legally irrelevant until it filed the Motion to Strike Defenses dated May 1, 2000 and the Post Hearing Brief dated September 15, 2000. The Complainant never sought to amend the Administrative Complaint or the Amended Complaint concerning this issue.[12] To the contrary, an unexplained wording change, from the Administrative Complaint's "The unnamed creek which flowed through the manure pile flows to the Nooksack River," to the Amended Complaint's "The unnamed creek contained pollutants which flowed from the manure pile and discharged to the Nooksack River" (emphasis added), makes the allegation even more explicit, that the alleged violation is a discharge to the Nooksack River, not a discharge into the creeks on the dairy property.

Considering that Mr. Richner has acted pro se throughout much of this proceeding, the Complainant would have simplified this case considerably if it had made clear earlier that it considered the contamination by manure of the creeks on the dairy farm to be a violation of the Clean Water Act regardless of whether the creeks flowed off the property or not.

Under the Consolidated Rules, the Complainant has the burden of proving the specific allegations in the complaint:

> The complainant has the burden of going forward with and of proving that the violation occurred as set forth in the complaint and that the proposed civil penalty . . . is appropriate (emphasis added).

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[12] Administrative pleadings are liberally construed and easily amended. Yaffe Iron and Metal Co., 774 F.2d 1008 (10th Cir., October 3, 1985).

40 C.F.R. Section 22.24 (1980).

> The complainant has the burdens of presentation and persuasion that the violation occurred <u>as set forth in the complaint</u> and that the relief sought is appropriate (emphasis added).

40 C.F.R. Section 22.24(a) (1999 revision).

Accordingly, in order to find for the Complainant that the specific violation alleged in the Amended Complaint occurred, I would have to find by a preponderance of the evidence[13] that at the time of the inspection the culvert under the railroad tracks had been at least partially open[14] so that the southern creek on the property could "discharge" to Smith Creek and to the Nooksack River. The facts in that regard are disputed, and the Complainant, not Mr. Richner, has the burden of persuasion on this issue.

The EPA inspection report states that the creek in question "flows to the Nooksack River," but does not state the source of that information. The inspection report also states that, with respect to another creek on the property, Mr. Richner said it "connected to the Nooksack River." Complainant's Exh. 2 Inspection Report). One of the EPA inspectors testified that on the day of the inspection Mr. Richner said that the creeks on the property flowed to the Nooksack River, and that the inspector "had no reason to doubt him." Tr. p. 28. However, Mr. Richner's statements in this regard on the day of the inspection are of limited probative

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[13]Section 22.24(b) of the Consolidated Rules, 40 C.F.R. S22.24(b), provides "[e]ach matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence."

[14]<u>Connecticut Fund for the Environment v. Upjohn Co.</u>, 660 F. Supp. 1397, 1418 (D. Conn. 1987) (court rejected defendant's argument that no violation occurred "when defendant discharged only a de minimis amount of wastewater into the river. The FWPCA does not distinguish between small discharges and large discharges. To the extent, in whatever amount of wastewater was discharged to the river, defendant exceeded the effluent limitations on a given day, a violation occurred.")

value, due to the obvious ambiguity in terms of the question Mr. Richner thought he was answering.[15]

Mr. Richner admits that the farm drains southwest in the direction of Smith Creek and the Nooksack River, and is in part in the drainage basin of the Nooksack River, Tr. pp. 108,116, but he disputes that any water from the creeks on the property could actually flow to Smith Creek or the Nooksack River at the time of the inspection and for many years previously. Tr. pp. 103,105. On the day of the inspection, neither EPA inspector followed the southernmost creek on the property to its assumed confluence with Smith Creek, due to the substantial amount of standing water at the lower end of the farm, and neither observed nor took pictures of the culvert under the Burlington Northern Santa Fe railroad embankment for the same reason. Tr. p. 47.

Mr. Richner testified that all the water from the property flows toward and alongside the railroad embankment, but that in his experience the culvert under the railroad tracks had never been open until late April, 1997, after the 1997 inspection, when a crew from the railroad cleaned it. Tr. p. 104. Mr. Richner testified that during extensive flooding of the Nooksack River in 1991, he observed that the water level on the north side of the railroad embankment was four feet lower than on the south (Nooksack River) side, indicating that water did not flow through the culvert at that time. Tr. pp. 115-116. Mr. Richner testified that in late April, 1997, the railroad crew was initially unable to locate the culvert because it was overgrown with brush. Tr. pp. 103-104. When the culvert was opened, standing water from the Smith Creek side of the embankment flowed onto Mr. Richner's property, indicating that the culvert had been completely plugged. Tr. p. 104. The culvert lies in a low spot, so it fills up rapidly with mud. Tr. pp. 119-120, 122-123. In the three years from the time the culvert was cleaned in 1997 until it was cleaned again in February, 2000, it filled with mud. Tr. p. 119.

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[15]Mr Richner's statements to EPA staff on the day of the inspection are not conclusive admissions for the purposes of this proceeding, but may be disputed or explained by him. American Desk Manufacturing Co., Inc., EPA Docket No. EPCRA-VI-4498, (ALJ Hoya, October 31, 1995).

Mr. Richner testified that when there is standing water against the northeast side of the railroad embankment, the water either percolates into the ground due to the porous soil near the railroad embankment, or flows along the north side of the embankment to an adjacent property where it percolates into the ground. Tr. p. 140.

The large amount of standing water in the lower part of the farm property near the culvert at the time of the inspection is convincing evidence that the culvert was fully blocked, as is Mr. Richner's observation that standing water flowed onto his property when the culvert was cleaned shortly after the inspection.

Although the Complainant points to the railroad's written policy of inspecting culverts annually, Complainant's Exh. 14, it is doubtful that the railroad was implementing the policy consistently in 1997 and earlier. Under the railroad's policy, culverts larger than thirty-six inches in diameter are inspected by a different office of the railroad than smaller culverts. The culvert is apparently thirty inches in diameter. Tr. p. 8. Possible internal confusion over the railroad's division of responsibility for a culvert of that size may explain the apparent lack of inspection and maintenance on the culvert.

The railroad apparently keeps no log of the maintenance done on culverts, Tr. p. 112, and the testimony of the railroad's employee at hearing was vague and tended to prove that the railroad's actual practice was different from its written policy. Tr. pp. 49-52. The railroad employee had only a general recollection of the location of the culvert and did not recall when it had been cleaned last; from his testimony, it was also unclear which unit of the railroad is responsible for cleaning the culvert. Tr. pp. 49-52. Thus, while the employee's sincerity is not disputed, his evident lack of recollection makes his testimony of very limited probative value for the Complainant's case.

I find that the Complainant has failed to show by a preponderance of the evidence that the railroad culvert in the embankment running along the southwest side of the dairy farm at 3909 Hoff Road was at least partially open at the time of the EPA inspection on March 13, 1997. The Complainant has therefore also failed to show that at the approximate time of the inspection there was a discharge to the Nooksack River from creeks on the property at 3909 Hoff Road.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) EPA's authority for this action is set forth in Sections 301 and 309 of the Clean Water Act, 33 U.S.C. §§ 1311 and 1319.

(2) Section 301 of the Clean Water Act prohibits the unauthorized discharge of any pollutant by any person except as authorized by a National Pollution Discharge Elimination System ("NPDES") permit or other specified statutory sections.

(3) Section 309 of the Clean Water Act provides EPA with the authority to enforce the prohibitions against unlawful discharge and to seek penalties against violators.

(4) Respondents Larry Richner and Nancy Sheepbouwer are persons within the meaning of Section 502(5) of the Clean Water Act, 33 U.S.C. § 1362(5).

(5) It has not been established that Respondent Richway Farms is a person within the meaning of Section 502(5) of the Clean Water Act, 33 U.S.C. § 1362(5).

(6) EPA filed its initial Complaint on April 16, 1997, against Richway Farms and served the Complaint on Mr. Richner.

(7) EPA filed an Amended Complaint on October 2, 1998. Richway Farms, Larry Richner, and Nancy Sheepbouwer were all named as Respondents in the Amended Complaint.

(8) EPA served Larry Richner and Nancy Sheepbouwer with the Amended Complaint by certified mail. EPA did not receive a return receipt for the service on Ms. Sheepbouwer and attempted personal service of the Complaint. Ms. Sheepbouwer avoided personal service.

(9) Larry Richner operated a dairy business at 3909 Hoff Road, Everson Washington, until 1995.

(10) Larry Richner had a heart attack in December, 1994 and on advice of his physician he relinquished ownership of the dairy business at 3909 Hoff Road to his wife Marilyn and his daughter Nancy Sheepbouwer in January, 1995; he intended also to relinquish responsibility for operation of the dairy business at that time.

(11) An application for a Grade A Milk Producer Permit reflecting an "ownership change" was submitted to the Washington State Department of Agriculture effective January 4, 1995, signed by Marilyn Richner and Nancy J. Sheepbouwer. They assumed the business name of Rickway Farms.

(12) Marilyn Richner is not a party to this proceeding.

(13) Since 1995, Larry Richner has maintained an ownership interest in the land on which the dairy farming operation at 3909 Hoff Road is located.

(14) Since 1995, Larry Richner and his wife maintain a home on the property at 3909 Hoff Road; Larry Richner also spends time in Twisp, Washington, where he owns a heifer farming operation.

(15) Since 1995, Larry Richner has continued to help out his children by doing work around the farm at 3909 Hoff Road when he is available and continues to represent the dairy business in its dealings with state and federal regulatory agencies, including EPA, the Soil Conservation Service, and the Washington State Department of Ecology.

(16) Larry Richner has not been shown to be an owner of Rickway Farms; his continuing involvement in the operation of the dairy business at 3909 Hoff Road shows that he was an operator of Rickway Farms at the time of the March 13, 1997 EPA inspection, and is therefore an "owner or operator" of the Rickway Farms dairy business, as that phrase is defined in 40 C.F.R. Part 122

(17) Section 402 of the Clean Water Act, 33 U.S.C. § 1342, provides that a state with an approved NPDES program may issue permits for the discharge of any pollutant into waters of the United States upon such specific terms and conditions as the state may prescribe. Washington has an NPDES permit program.

(18) Animal manure is included in the listing of types of discharge regulated by Washington's General Permit for Dairies. Effluent limitations in this permit prohibit any discharge unless such discharge is the direct result of a 25-year 24 hour rainfall event for that location.

(19) At no time relevant to this action has the dairy at 3909 Road, Everson Washington, been authorized by an NPDES permit to discharge wastewater, manure, or other pollutants to waters of the United States.

(20) At all times relevant to this action, the dairy farm at 3909 Road has included a milking parlor and a fenced confinement area with a concrete floor. The milking parlor is plumbed to a manure catch basin. Manure in the confinement area is scraped to the catch basin by means of a tractor.

(21) The facility's dairy cattle are confined and fed in these areas for at least 45 days in any 12-month period.

(22) At the time of the March 13, 1997 inspection, this facility confined more than 200 mature cows and more than 300 "animal units" as that term is defined in 40 C.F.R. Part 122, Appendix B.

(23) At the time of the March 13, 1997, inspection at least some portion of the dairy was a "concentrated animal feeding operation" as that phrase is defined in 40 C.F.R. Part 122, Appendix B, and was therefore a "point source" as that phrase is defined in Section 502(14) of the Clean Water Act, 33 U.S.C. § 1362(14).

(24) The manure catch basin on the property overflowed prior to EPA's March 13, 1997 EPA inspection.

(25) At the time of EPA's inspection, waters of a creek on the property flowed through manure which had overflowed from the catch basin.

(26) Analysis of water samples taken on March 13, 1997, from the creeks on the property showed the presence of fecal coliform bacteria at concentrations of up to 50,000 MPN/100ml.

(27) The fecal coliform-contaminated discharge observed and sampled on March 13, 1997, contained "pollutants" within the meaning of Section 502(6) of the Clean Water Act, 33 U.S.C. § 1362(6).

(28) A creek on the property at 3909 Hoff Road flows southward along the eastern edge of the stalls in the dairy cattle confinement area, across the access road, then southwest across the pasture to another creek.

(29) Another creek on the above property flows across the southern portion of the property from east to west.

(30) Railroad tracks run along an embankment which extends the length of the southwestern border of the property.

(31) The railroad embankment forms an artificial barrier separating the property from the Nooksack River and Smith Creek.

(32) A 30 inch culvert runs under the railroad embankment and connects to the area southwest of the tracks.

(33) Aside from the culvert, no evidence was produced which showed that any water from the east side of the railroad embankment could flow to the southwest side of the embankment as of March 13, 1997.

(34) On March 13, 1997, the date of EPA's inspection, the area around the culvert under the railroad embankment was under water, and was not examined by EPA inspectors or by Mr. Richner.

(35) If the culvert had been open at the time of the inspection, water from the creeks on the property would have gone under the track through the culvert and to Smith Creek and the Nooksack River.

(36) Smith Creek and the Nooksack River are "navigable waters" and "waters of the United States" within the meaning of Section 502(7) of the Clean Water Act, 33 U.S.C. § 1362(7), and 40 C.F.R. § 122.2.

(37) Burlington Northern Santa Fe has a policy on inspecting culverts, but does not keep a record of when culverts are cleaned.

(38) The culvert under the railroad embankment was cleared by Burlington Northern Santa Fe Railroad employees approximately two weeks after the March 13, 1997 EPA inspection with the use of a crane and an auger. The standing water on the west side of the tracks rushed toward the northeast side of the tracks until water levels on the two sides of the embankment were balanced out.

(39) Based on the specific allegations of the Amended Complaint, the discharge of manure and water observed by EPA inspectors on March 13, 1997, would have been an unauthorized discharge of pollutants to waters of the United States and a violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), if the contaminated water had been able to flow through the culvert under the railroad embankment into Smith Creek and the Nooksack River.

(40) It has not been shown by a preponderance of the evidence that as of the date of the March 13, 1997, inspection the culvert under the railroad embankment was open so that water could pass through it from the property at 3909 Hoff Road to Smith Creek and the Nooksack River.

(41) The Lummi Nation is highly dependent on the fisheries resource in the Nooksack watershed and adjacent areas for cultural and subsistence use as well as commercial and recreational use. The Chinook salmon, in particular, are most prized because of their beauty and size. The Chinook has great spiritual importance to the Tribe. Tribal members look to the Chinook salmon as an indication of their environmental health.

(42) In light of the foregoing findings and conclusions, the Amended Complaint must be dismissed as to all Respondents.

ACCORDINGLY, IT IS ORDERED that

(1) The Complainant’s Motion to Conform Transcript to Actual Testimony is granted, and the Respondent’s corrections to the hearing transcript submitted by letter dated August 31, 2000 are accepted.

(2) Respondents Larry Richner and Richway Farms are found not liable for violating Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), and this proceeding is dismissed as to each Respondent.

(3) This proceeding is dismissed as to Respondent Nancy Sheepbouwer for lack of prosecution.

(4) Pursuant to the Consolidated Rules, 40 C.F.R. § 22.27(c), this initial decision will become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties and without further proceedings unless: (1) a party moves to reopen the hearing; (2) a party appeals the initial decision to the Environmental Appeals Board; or (3) the Environmental Appeals Board elects to review this initial decision on its own initiative.

(5) Under the Consolidated Rules, 40 C.F.R. § 22.30, any party may appeal this initial decision by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board within thirty days after this initial decision is served.

SO ORDERED This 15th Day of February, 2001.

/S/
Steven W. Anderson
Regional Judicial Officer