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ORIGINAL

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JUN 19 2000

JAMES R. LARSEN, CLERK
DEPUTY
RICHLAND, WASHINGTON

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

COMMUNITY ASSOCIATION FOR
RESTORATION OF THE
ENVIRONMENT (CARE), a Washington
nonprofit corporation,

Plaintiff,

v.

SUNNYVELD DAIRY, a Washington
proprietorship; and HERMAN TE VELDE,
owner of Sunnyveld Dairy,

Defendants.

Civil No. CY-98-3022-EFS

CONSENT DECREE

RECEIVED

APR 27 2000

CONSENT DECREE

CLERK, U.S. DISTRICT COURT
RICHLAND, WASHINGTON

WHEREAS, the Plaintiff, Community Association for the Restoration of the
Environment, Inc. ("Plaintiff" or "CARE"), filed a Complaint on February 20, 1998, against

JUN 21 2000

SunnyVeld Dairy and Herman te Velde ("Defendants"), alleging violations of the Clean Water Act ("CWA") as well as terms and conditions of a Washington General National Pollutant Discharge Elimination System ("NPDES") Permit for Dairies relating to an animal feeding operation within a dairy located in Sunnyside, Washington under § 402 of the Federal Water Pollution Control Act (hereinafter "the Clean Water Act"), 33 U.S.C. § 1342, seeking declaratory and injunctive relief, civil penalties and attorneys fees and costs;

WHEREAS, Defendants deny Plaintiff's claims and any liability for the alleged violations; and

WHEREAS, counsel for the parties to this action have engaged in discussions relating to the potential settlement of this litigation; and

WHEREAS, Plaintiff and Defendants agree that settlement of these matters is in the best interest of the parties and the public, and that entry of this Consent Decree without additional litigation is the most appropriate means of resolving this action; and

WHEREAS, Plaintiff and Defendants, after consultation with their respective counsel and without trial or final adjudication of the issues of fact or law with respect to Plaintiff's claims or allegations, consent to the entry of this Consent Decree in order to avoid the risks of litigation and to resolve the controversy between them;

NOW, THEREFORE, without trial of any issue of fact or law, and without admission by the Defendants of the facts or violations alleged in the Complaint, and upon consent of the parties, and upon consideration of the mutual promises herein contained, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. This Court has jurisdiction over the parties and subject matter of this action pursuant to Section 505(a)(1)(A) of the CWA, 33 U.S.C. § 1365(a)(1)(A).
2. The undersigned representative for each party certifies that he/she is fully authorized by the party or parties whom he/she represents to enter into the terms and conditions of this Consent Decree and to legally bind the party or parties to it.

3. This Consent Decree shall apply to and be binding upon the parties to this action, and upon the successors and assigns of the parties.

4. Defendants operate a concentrated animal feeding operation within their dairy and pasturelands located at 6160 Van Belle Road, Sunnyside, Washington. The Defendants shall abide by the CWA, any applicable Washington General NPDES permit for dairies and its dairy waste management plan. CARE shall have the right to have no more than two people inspect the Defendant's facility for compliance with any applicable NPDES requirements and the waste management plan once each year, during the normal five-day work week, after entry of this Consent Decree. CARE shall provide advance notice to SunnyVeld in writing at least two (2) days prior to coming onto SunnyVeld property.

5. This Consent Decree shall not constitute evidence in any proceeding, an admission or adjudication with respect to any allegation contained in the 60-day Notices or the Complaint, any fact or conclusion of law with respect to any matter alleged in or arising out of the 60-day Notices or the Complaint, or the admission or evidence of any wrongdoing, liability or misconduct on the part of the Defendants, any director, officer or any affiliated person. This Consent Decree shall not be admitted in any proceeding against a party over that party's objections.

6. In full and complete satisfaction of the claims covered by the Complaint filed in this case, Defendants shall pay funds as set forth in paragraphs 7, 8 and 9 below.

7. Defendants shall pay twenty-one thousand five hundred dollars (\$21,500.00) to the Heritage College Groundwater Study or another entity to be agreed upon by the parties, as a supplemental environmental project, as follows:

a. Twenty-one thousand five hundred dollars (\$21,500.00) shall be paid to Heritage College, or the parties' alternative designee, within thirty (30) days of the entry of this Consent Decree. The following process shall govern payment to Heritage College or an alternative designee. A copy of the Consent Decree shall be forwarded with the check to: Heritage College, 3240 Fort Road, Toppenish, WA 98948, Attn: Professor Hossein Divanfar or the alternative

designee. A copy of the check and cover letter shall be sent simultaneously to CARE and to CARE's counsel. The penalty money shall be used to fund the following supplemental environmental project in the Yakima River watershed: Heritage College Project for Groundwater Monitoring in the Lower Yakima Valley or a comparable alternative designee project. The Defendants' facility subject to this Consent Decree is located within the Yakima River watershed, and the project has a nexus to the violations alleged in the Complaint. The project proposal and annual reports shall be provided to CARE, Defendants, United States Environmental Protection Agency ("USEPA") and the Court.

8. Defendants shall pay twenty-four thousand five hundred dollars (\$24,500.00) consisting of facility related projects as set forth in this paragraph and 11.f.(with the stated credit of \$7,500 offset against the \$24,500) plus attorneys' fees and costs of thirty-seven thousand five hundred dollars (\$37,500.00) as follows:

a. Agreement to invest seventeen thousand dollars (\$17,000.00) as follows: in certain soil sampling as described in 11.e. [\$3,000.00]; establishment of a 200-foot pastured setback as described in 11.c. and set forth in Addendum A. [\$6,000.00]; and two specific pilot programs on SunnyVeld [\$8,000.00]: (1) air quality improvement measures such as odor reduction through a lagoon bubbler/paddler or agitator systems to be mutually agreed upon; and (2) employee education and training in proper implementation of SunnyVeld's waste management program (including containment and land application). Every employee involved in waste management shall read and be familiar with the provisions of the BMPs or shall be instructed regarding the BMP requirements. For each of the next four years following entry of this Consent Decree, either the owner or facility manager shall certify by December 31 that each employee has received such training for the prior calendar year. SunnyVeld shall also provide readily understandable versions of BMP requirements and employee training programs and schedules in such a form as to allow other dairy farms to use these procedures as a model education and training program. CARE shall have the right to comment on the program prior to it being available for other facilities, but CARE shall not be represented as having agreed that

such program is adequate unless CARE specifically states such in writing. Defendants shall provide reports of expenditures consistent with this paragraph to CARE and USEPA by January 31 for the preceding calendar year until such funds have been expended.

9. Defendants recognize that reasonable attorney and expert witness fees are available to Plaintiff under the Clean Water Act, 33 U.S.C. §1365(d). After determining the hours expended in preparation and prosecution of this litigation, Defendants and Plaintiff agree that the sum of thirty-seven thousand five hundred dollars (\$37,500.00) will be paid to the Western Environmental Law Center, 1216 Lincoln St., Eugene OR 97401, Attention: Charles M. Tebbutt, within fifteen (15) days of the entry of this Consent Decree in full and complete satisfaction of an award of such costs and fees.

10. SunnyVeld also commits to the following environmental compliance measures as addressed in the waste management plan for SunnyVeld ("WMP", incorporated by reference herein as the 1998 WMP filed with the Washington State Department of Ecology.), including:

- a. Not to increase herd size, except in compliance with the WMP;
- b. Solids application will be done only during the Spring and liquid manure waste application may only be undertaken following a period of a minimum one week of above-freezing temperatures, both day and night. Defendants will not apply solids or liquid manure on its own property between November 1 and March 1 of each year. Under bare ground conditions, incorporation of solids into the soil will be mandatory at the time of application. Further, no conveyance of solids shall be made to any third party in the absence of a written contract between Defendants and the third party requiring the third party to only apply solids pursuant to the standard set forth in the first sentence;
- c. Good faith maintenance and provision of documents of manifest system describing the amount, treatment, disposal and/or application of wastes on-site and the amount and destination of wastes taken off-site and dates thereof, as set forth in Addendum B. Documents shall be provided to CARE by January 31 for the preceding year.

d. Development and implementation of a fly control program, including the use of an Orkin walk through trap or equivalent device in pens 1, 2, 3, 4 and 5 and Raybon, a larvae feed for dairy cows, may be used, but not in the areas where the walk through trap is used, during the four month fly larvae and hatch season and the weekly removal of manure from the cow pens, for a six month time period overlapping the beginning and ending of the fly larvae and hatch season, that will aid in the eradication of fly breeding and egg laying environments. Defendants will follow the manufacturers' protocols or other published protocols, for efficient utilization of the walk through trap and Rabon and shall provide to CARE copies of such protocols along with any efficiency results that are recommended by the protocols, contemporaneously as that data is generated by defendants.

11. SunnyVeld commits to the following additional actions and monitoring activities to further reduce potential risk of discharges of manure or wastewater:

a. If manure is shipped off-site across any public roads (including Lester Road), any residual manure from the transport vehicle would be removed by a worker checking the road after transport and collecting the material with a shovel within one hour of transport;

b. Use and maintenance of a truck wash, on concrete or other impervious surface, on all manure transport vehicles that use public roads, except for transport vehicles used on immediately adjacent fields. In recognition of the practicalities of trucking directly to the fields across Lester Road from the pens, no wash would be required so long as measures described in 11.a. immediately above are implemented. All truck wash water must be collected in the lagoons.

c. Any new lagoons or new cattle pens would be constructed at least 100 feet from any portion of the property line that is within 100 feet of the Bos residence, and at least 20 feet from any other property line. In addition, a 200-foot pastured setback of the pens in the area of the Bos residence will be implemented on SunnyVeld property within 60 days of entry of this Consent Decree. In the "corral" area a 100 foot setback shall be maintained in either a natural or planted vegetative state. From June 15 through September 15 of each year, cows will not be

permitted in the corral area and shall be redirected into the 200 foot pastured setback. In addition, Defendants shall provide for and maintain an appropriate vegetative screening on a 20 foot setback beginning at the seventh pen ("Lionel") south from Van Belle Road to the southwest corner thereof, approximately 300 feet, more or less. Such appropriate vegetative screening shall be extended approximately 50 feet back into the dairy at that point. This 20-foot setback shall be planted and maintained with a mutually agreed upon appropriate vegetative screen. The present one foot berm will be moved to the east of the vegetative screening. The exact areas where the setbacks are required are set forth on the map attached hereto as Addendum C.

d. Soil berms will be constructed and maintained of native soil, to a minimum height of twelve inches above existing grade, with a minimum base width of three feet and side slopes less than 1:1, on the perimeters of all new and existing cattle pens where those perimeters are immediately adjacent to roads within fifteen (15) days of the entry of this Consent Decree. No manure shall be transported out of the pen area onto Lester Road.

e. Sampling of soils is to occur in all application areas on ten acre grids, except that on the 18 acre parcel sampling shall be on five acre grids. Annual testing will occur hereafter for those substances heretofore tested by Defendants and Defendants' agricultural operation. A copy of the test form is attached as Addendum D. Such sampling would occur in the spring and before application of manure, one week after inclusion in the soil, and after harvest of the Fall crop of each year.

f. Defendants shall receive a credit as described in paragraph 8 in the amount of seven thousand five hundred dollars (\$7,500.00) for agreed surface water testing and irrigation controls. The following states the agreed surface water testing and irrigation rates.

- Samples and analysis will be conducted for Total Kjeldahl Nitrogen ("TKN"), Ammonia, Fecal Coliforms and Biochemical Oxygen Demand ("BOD"). The analytical method for TKN will be EPA 351.4; for Ammonia will be EPA 350.4; for Fecal Coliforms will be EPA 9221.E. and for BOD will be EPA 5210-B.

- Cascade Analytical will collect the samples and analyze the samples. Sampling shall occur on a random unannounced basis in accordance with the frequency set forth below.
- A BOD sample shall be collected from the lowest lagoon at Sunnyveld Dairy (“Dairy”) as set forth in 11.g. and samples for TKN, Ammonia, Fecal Coliforms and BOD shall be collected from the Van Belle Road to Lester Road pipe, running under the Dairy, at both ends, i.e., at the manhole at the joint drain and at the manhole immediately outside of the Dairy on Lester Road. The location and description of the sampling points is illustrated in Addendum E.
- Assuming no threshold concentration exceedence results are detected, sampling will be conducted monthly for the first year, then quarterly for the next two years and then no samples during the fourth year. If in the second and third years, threshold concentration exceedence results are detected, then a subsequent monthly sampling will be conducted. If the threshold concentration is not exceeded in the subsequent monthly sample, the quarterly sampling will resume. If a threshold concentration exceedence is detected, the monthly samples will be conducted until no threshold concentration exceedence is detected.
 - “Threshold concentration” shall be defined, for purposes of additional sampling only, as an order of magnitude (multiplier of 10) at or below background concentration for Fecal Coliforms and a ½ order of magnitude (multiplier of 5) for Ammonia and TKN. No threshold concentration is established for BOD. Background concentration shall be defined by the concentration of the sample collected at the joint drain manhole, located on the north side of Van Belle Road, east of Lester Road and across from the Dairy.
- The Dairy will divert the irrigation water, which is composed of irrigation district water only, overflow line, presently outfalling into the sump area adjacent to the Bos

property. The line will be tied into the drain southwest of the sump area. No Dairy irrigation overflow water will be present in the sump area. The Dairy will construct a berm at the sump area to prevent flow from the Dairy reaching the sump area. The only water that may be in the sump area will be from the Bos and Tucker properties.

- The Dairy shall apply irrigation water on the agricultural field south of the Dairy at rates not to exceed those set forth in Addendum F. The Dairy will install, use and maintain an AM 400 soil moisture monitor with graphic display on the field and will make the data from the monitor available to CARE upon reasonable notice of request.

g. Defendants shall sample their lagoon for biochemical oxygen demand (BOD) and total suspended solids (TSS) three times, i.e. at 30, 90 and 180 day intervals from the entry of the Consent Decree.

All sampling records and sample analysis results generated pursuant to subparagraph 11.e, 11.f. and 11.g (as applicable) shall be kept in an accessible file for a minimum of four years by SunnyVeld Dairy. Sampling shall occur for a minimum of four years. Surface water and soil sample records shall be provided to CARE, USDA, NRCS, and to the Washington State Department of Ecology by the fifteenth day of the month following SunnyVeld's receipt of a final laboratory report from sampling. Sampling shall be conducted by a professional engineer or environmental scientist who has been appropriately professionally trained.

12. This Consent Decree is intended to be and shall constitute the exclusive remedy and final resolution between Plaintiff and its members, officers, and directors, and Defendants for all alleged violations of Defendants' NPDES permit and all issues as set forth in the Complaint and/or 60-day notices filed in this case that may have occurred or that could have been raised prior to the entry of this Consent Decree. This Consent Decree constitutes a full, final, and complete settlement of all claims, rights, demands, and causes of action for alleged past violations of any applicable NPDES permit or requirements actionable under 33 U.S.C. § 1365 or RCW 90.48 that Plaintiff asserted, or could have asserted, pursuant to 33 U.S.C. § 1365 or RCW 90.48, in the 60-day notices or complaint filed in this case, and of all claims relating to

compliance with the NPDES permit now existing or hereafter arising under 33 U.S.C. § 1365 or RCW 90.48 until entry of this Consent Decree. In further consideration of commitments that Defendants have made in this Consent Decree, Plaintiff releases all claims now pending against Defendants under 33 U.S.C. § 1365 and/or RCW 90.48. This release includes all such claims, whether known or unknown, and whether asserted or unasserted, and specifically includes, but is not limited to, claims for civil penalties, attorney's fees and costs, expert witness fees, and injunctive relief. This settlement and release does not apply to any of Defendants' future acts or omissions subsequent to entry of this Consent Decree arising independently and separable from the terms of this Consent Decree and does not constitute a release of issues related to this Consent Decree.

13. Neither Plaintiff, including any person(s) or entity acting with, by or through Plaintiff, in either their own or in any representative capacity, nor any of Plaintiff's members, officers, or directors, shall file or cause to be filed or intervene in any lawsuit in any Court under the Clean Water Act or the Washington Water Pollution Control Act ("WWPCA") or voluntarily participate in any administrative enforcement proceeding or hearing concerning Defendant's past violations of the CWA or the WWPA, including but not limited to allegations contained in the 60-day notices and/or Complaint filed by Plaintiff in this action or violations of any applicable NPDES permit that could have been alleged prior to the entry of this Consent Decree. Nothing herein shall preclude CARE from participating in any administrative permit/application/review process involving future acts of Defendants or any of them or any legal appeal therefrom, provided that nothing contained herein shall permit Plaintiff to relitigate claims settled by this Consent Decree.

14. The Court shall retain jurisdiction to enforce the terms of this Consent Decree and to resolve any disputes arising hereunder until the Consent Decree has been terminated in accordance with Section 15 below.

15. This Consent Decree shall terminate four (4) years after the Court's entry of the Consent Decree.

16. The parties recognize that no consent judgment can be entered in a Clean Water Act suit in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator pursuant to § 505(c)(3) of the Clean Water Act. Therefore, upon the signing of this Consent Decree by the parties, Plaintiff shall serve copies of it upon the Administrator of the U.S. EPA and the Attorney General and provide notice to the Court, all as required by 40 C.F.R. § 135.5.

17. This Consent Decree may be modified only upon the written consent of the parties and the approval of the Court.

18. This Consent Decree shall take effect on the date it is entered by the Court.

19. Defendants shall comply with the requirements of this Consent Decree within the time periods specified herein. If any event occurs that is outside the reasonable control of Defendants (a “force majeure event” as further defined below), which causes delay or anticipated delay in performing tasks required by this Consent Decree, any resulting failure to meet the timetables or other requirements set forth herein shall not constitute a failure to comply with the terms of this Consent Decree, provided that Defendants have notified Plaintiff no later than thirty (30) days after the date that Defendants first conclude that such event has caused or will cause non-compliance. The burden of proving a force majeure event shall be on the Defendants.

A force majeure event shall include, but not be limited to, the following:

- a. Acts of God, war, insurrection, or civil disturbance;
- b. unanticipated breakage or accident in machinery, equipment or lines of pipe that occurs despite reasonably diligent maintenance, or any fire or explosion, despite the exercise of reasonable diligence by defendants.
- c. adverse weather conditions that could not be reasonably anticipated or unusual delay in transportation;
- d. any strike or labor dispute;
- e. restraint by court order or order of public authority;
- f. inability to obtain necessary authorizations, licenses, permits, approvals;

g. challenges or appeals of necessary authorizations, licenses, permits or approvals or any other litigation, arbitration, or mediation which causes delay.

Provided that Defendants comply with the notice provision of this section, then in the event that Defendants fail to comply or anticipate failing to comply with the requirements of this Consent Decree because of a force majeure event, Defendants' failure to comply shall not be a violation of this Consent Decree, shall not result in any liability or other sanctions, and the milestone dates shall be extended for a reasonable period of time following the force majeure event.

20. In the event of any dispute regarding implementation of or compliance with the Consent Decree, the parties shall first attempt to informally resolve the dispute through meetings between the parties by serving written notice of a request for dispute resolution. If no resolution is reached within thirty (30) days from the date that the notice of dispute is served, the parties may resolve the dispute by filing motions with the Court.

21. Each party acknowledges and represents that they have relied on the legal advice of their attorney, who is the attorney of their own choice and that the terms of this Consent Decree have been completely read and explained to them by their attorney, and that the terms are fully understood and voluntarily accepted. Plaintiff has been represented by Charles M. Tebbutt of the Western Environmental Law Center and Corrie Yackulic of Schroeter, Goldmark and Bender, P.S. Defendants have been represented by William H. Chapman and Thomas H. Wolfendale of Preston Gates & Ellis, LLP.

22. If, for any reason the Court should decline to approve this Consent Decree in the form presented, the parties agree to continue negotiations in good faith in an attempt to cure any objection raised by the court to entry of this Consent Decree. If the defects are not curable, then this Consent Decree and the settlement embodied herein shall be voidable at the sole discretion of either party.

23. As set forth in this Consent Decree, this is a settlement of disputed facts and law.
WE HEREBY CONSENT to the entry of this Consent Decree.

Dated and entered this 19th day of June, 2000.



UNITED STATES DISTRICT JUDGE

COMMUNITY ASSOCIATION FOR
RESTORATION OF THE ENVIRONMENT, INC.

Signature: Helen Reddout
Print: Helen Reddout
Title: President CARE

SUNNYVELD DAIRY AND HERMAN te VELDE

Signature: Herman te Velde
Print: Herman te Velde
Title: Owner

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