2001 WL 1704240 (E.D.Wash.), 52 ERC 1167

COMMUNITY ASSOCIATION FOR RESTORATION OF THE ENVIRONMENT (CARE), a Washington
nonprofit corporation, Plaintiff,
v.
HENRY BOSMA DAIRY, a Washington proprietorship, aka Hank Bosma Dairy, aka Bosma Dairy, aka H & M Dairy, aka H & S Bosma Dairy, aka B & M Dairy; Liberty Dairy, a Washington proprietorship; Henry Bosma, owner and operator of Henry Bosma Dairy and Liberty Dairy; and Bosma Enterprises, a Washington corporation,
Defendants.
No. CY-98-3011.
Feb. 27, 2001.

FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR PENALTY PHASE OF TRIAL AND ORDER IMPOSING PENALTIES AND GRANTING PLAINTIFF'S MOTION FOR ATTORNEY FEES

SHEA, J.

***1** Trial on the penalty and injunctive relief phase of this case began on December 1, 1999. The Plaintiff Community Association for the Restoration of the Environment (hereinafter "CARE"), was represented by Charles Tebbutt, Liz Mitchell, and Richard Eymann. The Defendants Henry Bosma, the various Bosma Dairies, and Liberty Dairy, (hereinafter collectively "Bosma"), were represented by Jerry Neal and John Moore. The Court heard the testimony of the witnesses and reviewed the admitted exhibits. In order to determine the necessity for injunctive relief related to the 14.3 acre field and the truck wash drain the Court ordered a dye test to be conducted with a written report of the results to be filed with the Court. The report was filed with the Court on December 27, 1999. Following trial the parties submitted memoranda supporting and opposing Plaintiff's request of attorney fees and costs. These materials were received in January and February of 2000 with a supplementation by Plaintiff in May of 2000.

The Court now enters its Findings of Fact and Conclusions of Law for Penalty Phase of Trial, which supplement its Findings of Fact and Conclusions of Law, (Ct.Rec.214), entered in the liability phase. Based on those Findings of Fact and Conclusions of Law, the Court imposes penalties against Bosma in the sum of $171,500.00 payable to the United States Treasury and orders judgment in favor of CARE against Bosma for attorneys fees in the amount of $326,166.04 and costs in the amount of $100,138.24.

I. HISTORY OF THE CASE

The liability phase of the case was tried in June of 1999 with a decision in favor of the Plaintiff entered by the Court in July of 1999. The Court found manure wastewater discharge violations on September 30, 1993, October 1, 1993, December 1, 1993, January 20, 1995, April 22, 1996, April 22, 1996, January 13, 1997, April 17, 1997, July 28, 1997, August 25, 1997, and September 9, 1997. In addition, the Court found that Bosma had failed to report discharge violations in violation of Condition S5.B of his general dairy permit on July 28, 1997, August 25, 1997 and September 9, 1997. Plaintiff pointed out that on September 9, 1997, coincident with its investigation of a report of a discharge violation, Washington Department of Ecology ("WADOE") sampled water in JD 26.6 into which the manure wastewater had been discharged. When analyzed, the sample from JD 26.6 was found to contain fecal coliform bacteria in an amount exceeding 48,000 colonies per 100 m/l, a level well above the 100 colonies per 100 m/l of fecal coliform allowed under State law. *See* WAC 173-201A- 030(2)(c)(i)(A) (2000). This is a violation of the water quality laws of Washington and a violation of Bosma's National

Pollution Discharge Elimination System ("NPDES") permit and was proven at trial based on testimony and exhibits. Through inadvertence, the Court omitted this from its initial findings. The Court thus finds that a violation occurred on September 9, 1997. Consequently, the September 9, 1997 water quality violation will be considered in the Court's imposition of a penalty.

*2 The Court also found ongoing violations at the 14.3 acre field, the truck wash drain and from operations and maintenance of Bosma's dairies. While the testimony of the two members of the Butler family, neighbors living very close to the Bosma dairies, persuaded the Court that manure wastewater being applied to the 14.3 acre field was running off into JD 26.6, they could not give dates of specific violations. Further, as explained in the decision on liability, the truck wash drain was a continuing discharge problem in Bosma's Dairy Waste Management Plan (or Dairy Nutrient Management Plan ("DNMP"), as it is known in Washington), and there was no evidence documenting remediation except for the testimony of Mr. Bosma. He testified that it had been corrected in March of 1998, after the Plaintiff filed the instant complaint. The court did not accept this testimony as persuasive, because Mr. Bosma's contention was contradicted by direct evidence and the testimony of other witnesses. The other evidence documented the conduct of Bosma's dairy operations, including the mounds of manure placed by Bosma along the roadside at the Price-Kellum location after the filing of Plaintiff's complaint. Accordingly, the Court found that as of the date of the filing of the complaint, and continuing through the trial on the liability phase, there was the likelihood of continuing violations of Bosma's DNMP and NPDES permit as set out in detail in that decision.

II. ISSUES PRESENTED

The following issues are raised for determination in this phase of trial:

1. Does Plaintiff continue to have standing?
2. Is the Court precluded from imposing penalties against Bosma by the "diligent prosecution bar" of 33 U.S.C. § 1319(g)(6)(A)(ii) and (iii)?
3. If not barred, what amount of penalties should be imposed for the proven past and ongoing violations by Bosma?
4. What, if any, injunctions should be imposed?
5. If penalties are awarded, what amount of attorney fees and costs should be awarded?

The Court hereby enters findings of fact and conclusions of law on each of these issues in turn below.

III. STANDING AND MOOTNESS

Bosma had challenged the standing of CARE to bring this case. In its original decision on damages, the Court ruled that CARE had standing based on the evidence accepted by the Court of the standing of its members including Helen Reddout and Shari Conant, the pertinent evidence having shown "injury in fact", causation and redressability as required by *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992). Defendant renewed this challenge at this phase of the trial, relying on *Steel Co. v. Citizens for Better Environment,* 523 U.S. 83 (1998).

Following the close of evidence in the penalty phase of trial, on January 12, 2000, the United States Supreme Court issued its opinion in the case of *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167 (2000).

In that case, the plaintiff, Friends of the Earth ("FOE"), notified Laidlaw of its intent to file a § 1365(a) citizens' suit against it. At the request of Laidlaw, within the 60-day citizen suit waiting period, the South Carolina Department of Health and Environmental Control ("DHEC") brought suit against it. On the last day of that waiting period, DHEC settled its case against Laidlaw for $100,000.00 in civil penalties and an agreement to make a permit compliance effort. FOE then filed suit seeking declaratory judgment, injunctive relief and civil penalties. Laidlaw sought summary judgment on the basis that FOE lacked standing to bring the lawsuit and that under § 1365(b)(1)(B), the DHEC lawsuit and settlement was bar to the FOE lawsuit. The district court denied summary judgment and later entered judgment against Laidlaw for its permit violations awarding civil penalties of $405,800.00, but denying injunctive relief because Laidlaw had achieved substantial compliance with its permit after the

lawsuit began. The Fourth Circuit vacated the district court's judgment on the grounds of mootness, and the Supreme Court reversed and remanded to the district court for further hearings. The issue on remand was whether the closure of the Laidlaw plant in question during the appeal process, together with the district court's original finding that Laidlaw had come into substantial compliance subsequent to the commencement of the FOE lawsuit, had "made it absolutely clear that the Laidlaw permit violations could not reasonably be expected to recur." *Id.* at 193. The Supreme Court did not discuss the § 1365(b)(1)(B) bar issue.

***3** As *Friends* makes clear the case or controversy requirement to support the exercise of federal judicial jurisdiction under Article III, Section 2 of the Constitution is composed of two materially different inquiries: standing and mootness. As to "standing", the Court has already ruled that Plaintiff has "standing" as explained in detail in its decision in Phase I--Liability, (Ct.Rec.214). This finding is unaffected by the subsequent *Friends* decision. As to "mootness", Bosma asserts that the post-complaint repairs brought operations into compliance with its permit, and thus deprive this court of jurisdiction to impose penalties. That would only be true if Bosma carried its burden to prove with absolute clarity that the past violations and ongoing violations could not reasonably be expected to recur. *Id.* at 193. "The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur lies with the party asserting mootness." *Id.* at 170.

At the conclusion of the liability phase of this case, the Court found that there was a reasonable likelihood of continuing violations of Bosma's DNMP and NPDES permit. The case had been bifurcated by the Court to avoid potentially unnecessary litigation costs to the parties in connection with the determination of penalties and the need for injunctive relief. Once the past discharge violations and the reasonable likelihood of recurrent discharge violations had been proven, those expenditures were necessary. However, the Court then had to determine in the exercise of its discretion "what form of relief is best suited, in the particular case, to abate current violations and deter future ones." *Id.* at 192. In making this determination, the Court considers how it should frame relief to meet this standard under the facts of the particular case. *See id.* at 193.

At the conclusion of final arguments by the parties in the penalty phase, the Court was, as part of its determination of penalties, considering the necessity for and the scope of injunctive relief. At that time, no engineering evidence or dye test evidence had been introduced to prove that the truck wash drain was incapable of discharging into JD 26.6 at a future date. Nor was there any satisfactory proof that the efforts in the 14.3 acre field to prevent irrigation runoff to JD 26.6 had been successful. The Court offered the parties the opportunity to examine and test the truck wash drain to determine if it was in fact still draining into JD 26.6 and the parties agreed to do so. On February 22, 2001, an engineer chosen by the parties filed his December 22, 1999 report with the Court documenting that neither the truck wash drain nor the drain pipe from the 14.3 acre field were discharging to JD 26.6., (Ct.Rec.401). However, unlike the Defendant in *Friends,* Bosma is not ceasing operations, and still retains NPDES permits. *See Friends,* 528 U.S. at 193- 194 (noting that retention of NPDES permit creates issue of future violations, despite plant closure). Although Bosma has not met the burden to demonstrate mootness, under the *Friends* decision

***4** We note that it is far from clear that vacatur of the District Court's judgment would be the appropriate response to a finding of mootness on appeal brought about by the voluntary conduct of the party that lost in District Court.

Friends, 528 U.S. at 194 n. 6 (citing *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership,* 513 U.S. 18 (1994) (mootness attributable to a voluntary act of a nonprevailing party ordinarily does not justify vacatur of a judgment under review); *see also Walling v. James V. Reuter, Inc.,* 321 U.S. 671 (1944)).

By the same reasoning, Bosma's evidence of compliance after a finding of liability does not prevent the imposition of penalties. On the contrary, this evidence is simply weighed by the Court to assess the appropriate scope of any injunction fashioned by the Court.

Applying the *Friends* test to the evidence, the Court holds that at the end of the liability phase and at

the end of the penalty phase, Bosma had not met its burden to prove with absolute clarity that there was no reasonable expectation that the discharge violations were likely to recur. The Court further holds that in a bifurcated case when the liability phase concludes with proven discharge violations and the reasonable likelihood of recurrent discharge violations, remediation after the liability phase or penalty phase will not moot the case. Instead, subsequent evidence of remediation will be taken into consideration by the court in deciding on the necessity for and scope of any injunctive relief. *See Friends,* 528 U.S. at 195-197 (Stevens, J., concurring). Conduct after the findings on liability therefore will not affect penalties imposed based on conduct prior to the imposition of liability. *See id.* at 196.

IV. DILIGENT PROSECUTION BAR -33 U.S.C. § 1319(g)(6)(A)(ii) and (iii)

Bosma for the first time in its trial brief in the penalty phase claims that the CARE lawsuit or, at the very least, penalties for discharge violations found by the Court are barred by 33 U.S.C. § 1319(g)(6)(A)(ii) and (iii). Bosma points to the fact that there is evidence in the record both at the trial on liability and also in this penalty phase of the case that both WADOE and the Washington Pollution Control Hearing Board ("WPCHB") have either assessed administrative penalties or entered final orders upholding administrative penalties. Bosma furhter asserts that it has paid at least one of those administrative penalties.

Based on the plain language of the statute, penalties are not barred by 33 U.S.C. § 1365(b)(1)(B), which provides that citizen suits may not be brought:

if the [EPA] Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as matter of right.

33 U.S.C. § 1365(b)(1)(B). Neither the EPA Administrator nor WADOE had filed a lawsuit against Bosma in any court. Accordingly, § 1365(b)(1)(B) of the Clean Water Act ("CWA") does not bar this lawsuit by CARE, and Bosma has never asserted that it does. *See Sierra Club v. Chevron U.S.A., Inc.,* 834 F.2d 1517 (9th Cir.1987).

***5** As to 33 U.S.C. § 1319(g)(6)(A)(ii) and (iii), at no time before or during the liability phase did Bosma assert that CARE's lawsuit against it was barred. No such position was advanced in any Motion for Summary Judgment or Motion of Dismissal filed by Bosma. It was not until just before trial in the penalty portion of the case in its Trial Brief that Bosma for the first time cited § 1319(g)(6)(A)(ii) and (iii) as a possible bar to the action as a whole, and a probable bar to the imposition of penalties. (Defs.' Trial Biref, Ct. Rec. 343 at 15-16). Bosma asserted that both WADOE and the WPCHB had assessed penalties for CWA and NPDES violations which were largely the same violations found by this Court. The statutory bar asserted therein raises the affirmative defense of lack of subject matter jurisdiction. It was Bosma's burden to both plead and prove it.

Section 1319, addressing enforcement, provides in pertinent part:

(g) Administrative penalties

* * *

(6) Effect of order

(A) Limitation on actions under other sections

Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation--

(i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,

(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or

(iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such

comparable State law, as the case may be,
shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.
(B) Applicability of limitation with respect to citizen suits
The limitations contained in subparagraph (A) on civil penalty actions under section 1365 of this title shall not apply with respect to any violation for which--
(i) a civil action under section 1365(a)(1) of this title has been filed prior to commencement of an action under this subsection, or
(ii) notice of an alleged violation of section 1365(a)(1) of this title has been given in accordance with section 1365(b)(1)(A) of this title prior to commencement of an action under this subsection and an action under section 1365(a)(1) of this title with respect to such alleged violation is filed before the 120th day after the date on which such notice is given. [FN1]

FN1. For a discussion of this origin and case analysis of this subsection which was added to the CWA in 1987, *see How Far Should the Bar on Citizen Suits Extend under § 309 of the Clean Water Act?* Heather L. Clauson, 27 Envtl. L. 967 (1997).

33 U.S.C.A. § 1319(g)(6) (Supp.2000).
The Court finds that Bosma produced no evidence to prove that these WADOE or WPCHB processes are "comparable to this subsection" as is required by § 1319(g)(6)(A)(ii). There was no evidence that either procedure occurred under State law provisions that were sufficiently comparable to § 1319(g). Specifically, Bosma did not demonstrate a state process comparable to federal provisions governing "Determining amount," *id.* § 1319(g)(3); "Rights of interested persons," *id.* § 1319(g)(4); including "Public notice," "Presentation of evidence," and "Rights of interested persons to a hearing," *id.* § 1319(g)(4)(A), (B), and (C); nor "Finality of order," *id.* § 1319(g)(5). Additionally, there was no evidence as to whether WADOE or WPCHB penalty assessment processes, whatever they may have been, were actually followed.
***6** Examination of the evidence of WADOE or WPCHB action on discharge violations found by the Court is enlightening. On the September 30, 1997 and October 1, 1997 discharge violations, WADOE did assess penalties which, after administrative hearing on Bosma's protest, were appealed to the WPCHB. On the record of the administrative hearing before it, the WPCHB entered its Findings of Fact, Conclusions of Law and Order on October 13, 1995. (Ex. 302.) That exhibit does prove that the WPCHB did uphold a penalty in the sum or $3,000.00 against Bosma, which was paid. However, WPCHB suspended the second $3,000.00 penalty provided that Bosma had "no further water pollution violations or waste management plan violations" for three years after the date of that order. (Ex. 302.) Of course, as the Court found in the liability phase, Bosma did have such prohibited violations within the three years following October 13, 1995, the date of that WPCHB order. Additionally, nothing in the language of that WPCHB order proves that notice of the administrative hearing or of the WPCHB order was given to the public, or that interested parties had the right to comment on the proposed penalty, or participate in the administrative hearing, or seek judicial review of the WPCHB order, all of which are required to make the WADOE and WPCHB process "an action comparable to this subsection" as that phrase is used in § 1319(g)(6)(ii). Further, Bosma did not present any evidence that the payment of the $3,000.00 was under or pursuant to state law provisions comparable to § 1319 or pursuant to the state law administrative penalty provision, as is required by § 1319(g)(6)(A)(iii). *See Citizens for a Better Env't-Cal. v. Union Oil Co. of Cal.*, 83 F.3d 1111 (9th Cir.1996). Accordingly, the Court holds as a matter of law that there is no bar to this lawsuit or to the imposition of penalties for those two 1993 violations.
Bosma also asserts that CARE is barred by from bringing a lawsuit, and that the Court is barred from

imposing penalties, for the discharge violations which the Court found on April 22, 1996, on January 13, July 28, August 25, and September 9, 1997. The Court finds that none of these discharge violations were the subject of a WPCHB order. As to the April 22, 1996 discharge violation, the Court finds that WADOE did give notice of penalty assessment of $9,000.00 to Bosma on June 18, 1996, (Ex. 325). Based on that discharge violation, WADOE required Bosma to apply for an NPDES permit, (Ex. 322). Bosma did, and was given an NPDES permit on January 31, 1997, (Ex. 321). On June 30, 1996, Bosma applied for relief from the Notice of Penalty. On December 13, 1996, in an informal conference with Bosma, WADOE agreed to hold that $9,000.00 penalty in abeyance provided that Mr. Bosma implemented changes and managed his dairies so that manure was not conveyed into waters of the state, (Ex. 349, Bates No. 000032). As this Court has found, Bosma had further discharge violations in 1997.

*7 As to the 1997 violations which Bosma cites as barred from being included in CARE's lawsuit and from being the subject of penalties by this Court, the Court finds that on October 27, 1997, WADOE gave Bosma notice of violations occurring between January 1, 1997 and July 31, 1997, (Ex. 315). The Court further finds that this was not an assessment of penalties but only a notice requiring a response from Bosma. On October 31, 1997, CARE gave Bosma its 60-day notice of intent to file a citizen's suit as required by 33 U.S.C. § 1365(b)(1)(A). On that date, the Court finds there was no administrative action being diligently prosecuted by the State of Washington comparable to the administrative action specified in § 1319(g)(6)(A)(ii) as to any of the 1997 violations, in particular, to none of those occurring between January 1 and July 31, 1997. CARE then filed this lawsuit on January 15, 1998, (Ct.Rec.1). On January 18, 1998, WADOE records contain a RECOMMENDATION FOR ENFORCEMENT ACTION which cites not only the April 22, 1996 discharge violation being held in abeyance but also four discharge violations in 1997, (Ex. 331).

The Court finds that this recommendation is not a administrative penalty action as contemplated by § 1319(g) or comparable thereto. Also, there is no evidence that WADOE ever acted on the Recommendation. Further, the Recommendation occurred after both the date CARE gave notice of its intention to file a 33 U.S.C. § 1365(a)(1)(A) lawsuit, and after the date that lawsuit was filed. The Court also finds that there was no diligent prosecution of any administrative penalty action by WADOE at the time that CARE gave notice of its intent to file a citizens' suit nor at the time it actually filed its lawsuit. *See* *Knee Deep Cattle Co., Inc. v. Bindana Inv. Co. Ltd.,* 94 F.3d 514 (9th Cir.1996) (a settlement by the state agency with the NPDES permit holder by a stipulation and final order with a payment of penalty assessed where violations were ongoing, and where settlement was entered into before citizen suit was filed, was not a § 1319(g)(6)(A)(ii) bar to a citizen's suit under § 1365(a)); *Citizens for a Better Env't--Cal.,* 83 F.3d 1111 (a settlement by defendant UNOCAL paid to the Regional Water Quality Control Board to avoid enforcement action was not a "penalty" with meaning of § 1319(g)(6)(A)(iii), where agreement described a "payment", not a penalty, there was no comparability between the state provision under which it was paid and § 1319(g)(6)(A)(iii), and there was no ongoing prosecution of UNOCAL at the time the citizen's suit was filed).

For the foregoing reasons, as to the discharge violation dates for which Bosma asserts the § 1319(g)(6)(A) statutory bar, this Court holds as a matter of law that neither CARE's lawsuit nor the imposition of penalties by this Court are barred by § 1319(g)(6)(A)(ii) or (iii). Alternatively, on the facts found by the Court, this lawsuit was specifically allowed by § 1319(g)(6)(B) which allows a § 1365 citizen suit when such an action has been filed prior to the commencement of a § 1319(g)(6)(A) action or notice of the alleged violation of § 1365(a)(1) has been given as required in § 1365(b)(1)(A) prior to the commencement of a § 1319(g)(6)(A) action and suit is filed within 120 days after the date of that notice. In either case, the statutory bar asserted by Bosma does not apply to the facts of this case.

V. IMPOSITION OF PENALTIES

A. Legal Analysis

***8** The beginning point for consideration of imposition of penalties for violations of the CWA is 33 U.S.C. § 1319(d) which provides for the imposition of civil penalties:

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

33 U.S.C.A. § 1319(d) (West Supp.2000). "Subsection 1319(d)'s authorization of punishment to further retribution and deterrence clearly evidences that this subsection reflects more than a concern to provide equitable relief." *Tull v. U.S.,* 481 U.S. 412, 423 (1987).

The Court begins with a "top down" analysis which means that the Court begins with the maximum amount of the penalty and then applies the § 1319(d) factors to determine the appropriate reductions, if any, from the maximum. *See Atlantic States Legal Found. v. Tyson Foods, Inc.,* 897 F.2d 1128, 1137 (11th Cir.1990); *Hawaii's Thousand Friends v. City and County of Honolulu,* 821 F.Supp. 1368, 1394-1395 (D.Haw.1993). For violations occurring after January 30, 1997, the maximum penalty is $27,500, *see* 40 C.F.R. § 19.4; for those violations occurring prior to that date, the maximum penalty is $25,000. *See* 33 U.S.C. § 1319(d). In determining the appropriate penalty for each violation, the court may decide not to impose the maximum penalty but if it so decides, "it must reduce the fine in accordance with the factors spelled out in section 1319(d), clearly indicating the weight it gives to each of the factors in the statute and the factual findings that support its conclusions." *Tyson Foods, Inc.,* 897 F.2d at 1142.

B. Analysis of and Findings Of Fact regarding § 1319(d) Factors

1. Seriousness of Violations

The analysis of the seriousness of the various types of violations begins with an understanding of the nature and cause of those violations. The analysis of cause is related to the analysis of Bosma's good faith efforts to comply with the applicable laws as is discussed hereafter.

***9** The CWA requires CAFO's to obtain an NPDES permit and makes any disharge of manure or manure wastewater into the public waters by a CAFO a violation subject to the daily penalty of $27,500. *See* 33 U.S.C. §§ 1311(a) and 1319(d); 40 C.F.R. Part 412. The CWA also imposes strict liability on CAFO's for discharges into public waters. Section 1319(d) by its language does not require proof of negligence or intent; it simply punishes the violation. "Section 309(d) provides for judicially imposed civil penalties that ought to be imposed on a strict liability basis in light of the absence of language of culpability and the liability-without-fault analogues found elsewhere in the law." *See* 2 William H. Rodgers, Jr., *Environmental Law,* § 4.40 at 599 (1986). Because CAFO's have thousands of dairy cows and calves confined to a specific area as opposed to an open range where they can graze, hundreds of thousand of pounds of manure is accumulated in that confined area on a daily basis. In addition, the dairy herds are milked three times day which means that they must be washed three times a day with an accumulation of manure wastewater in addition to the manure itself. Manure discharged to the public waters is a threat to public health, hence the strict prohibitions against discharge. The imposition of strict liability demonstrates the seriousness with which Congress viewed the discharge itself. In calculating the amount of the penalty, the Court must consider the risk to public health and

the environment from the discharge in determining "seriousness of the violation".
Several of the discharge violations were the result of Defendants' conduct exemplified by the September 9, 1997, discharge violation. On that date the evidence showed that the intake to the lower lagoon was blocked by a piece of sheet metal which prevented manure waste water from Bosma dairies flowing down JD 26.6 from entering the lower lagoon south of Kirks Road. On that September date water samples taken from JD 26.6 by WADOE employees were analyzed and more than 48,000 colonies/100 ml were found. (Exs.87, 89.) This is far above the limit for Class A waters in the State of Washington. [FN2] On September 9, 1997, this manure wastewater from Bosma dairies was improperly put in JD 26.6, which must not be used by Bosma to convey manure wastewater to the lagoons south of Kirks Road. Additionally, the court finds that this manure wastewater went under the Sunnyside Canal ("Canal") and traveled south in JD 26.6 where it eventually became part of the Granger Drain which empties into the Yakima River.

FN2. For "Class A" water, "fecal coliform organism levels shall both not exceed a geometric mean value of 100 colonies/100 mL, and not have more than 10 percent of all samples obtained for calculating the geometric mean value exceeding 200 colonies/100 mL." Wash. Admin. Code § 173-201A- 030(2)(c)(i)(A).

The parties dispute the impact on public health from this discharge. However, the Court finds that there are significant public health risks from the presence of human pathogens--disease causing organisms--such as salmonella, *E coli* 0157:H7 ("E coli"), Cryptosporidium parvum, and Giardia lamblia which are found in the dairy cow or calf manure of infected cattle. When dairy cow or calf manure, or manure waste water, or manure water is used for irrigation and discharges into the public waters of the state, the public is exposed to significant health risks. Given the health risks to the public from exposure to manure contaminated water, Congress acted wisely in enacting the CWA, which requires CAFO's like the Bosma Defendants to obtain NPDES permits and forbids any discharge of manure contaminated water to the waters of the United States or waters of the state.
***10** That said, there is no evidence in the record of any outbreak of illnesses associated with any of the four pathogens found in dairy cow or calf fecal matter in Yakima County or any other county along the Yakima River. And there is no evidence that the cows or calves at Bosma's dairies were infected on the dates of the discharges.
In sum, the Court finds that there were significant health risks from the discharges that went under the Canal down JD 26.6 to the Granger Drain and into the Yakima River. The risks to the public from discharges to the Canal were reduced because there is virtually no recreation by the public in the waters of the Canal, which are only present during irrigation season. However, some members of the Sunnyside Valley Irrigation District do engage in non-commercial use of Canal water to irrigate lawns, shrubs and gardens at their homes and direct contact with manure contaminated waters constitutes a slight but potential health risk to them. The risk is exemplified by the October 1, 1993 drain log records of an employee of the Sunnyside Valley Irrigation District which stated that he had been told that farmers were complaining about "cow manure in the irrigation laterals." (Ex. 24.) This record established one of the Bosma discharge violations.
That there have not been recorded outbreaks of illness from the human pathogens found in manure of infected dairy cow or calves does not negate the seriousness of the public health risk from dairy cow and calf manure discharged to the waters of the state. Given the high levels of fecal coliform found on the sample taken on September 9, 1997, it is likely that the other discharges also exceeded the water quality levels and as such, constituted a threat to public health.
The impact on the plant life and water quality due to the effects of manure- contaminated water from Bosma's dairies spilling into the Canal and JD 26.6 which connects to the Granger Drain before joining

the Yakima River is disputed by the parties. At monitoring site # 1 which is in JD 26.6 at the south end of Bosma's property just above the Canal, high levels of total Kjeldahl nitrogen ("TKN") and fecal coliform bacteria were found throughout the 1997 irrigation season. These will affect water quality and aquatic environment due to toxicity, eutrophication and decreased habitat quality. One of the byproducts of decomposed TKN is ammonia which is toxic to aquatic life such as salmonids. Another impact of manure contaminated water is low dissolved oxygen which impacts aquatic life which needs adequate oxygen levels. A third impact is eutrophication which is the accumulation of nutrients in water bodies with associated plant growth to a nuisance level with resulting lowered dissolved oxygen levels. The Roza-Sunnyside Board of Joint Control monitoring data for 1997 indicates that the manure-contaminated spills from the Bosma dairies into the waters of the state have probably caused some harm to the aquatic ecosystem and contributed to the degradation of the water quality in the Granger Drain and Yakima River although there is no data showing the exact impact of each discharge.

***11** Bosma's experts point to the absence of any data showing that these discharges actually caused increased pollution of the Yakima River or effected public health. Their opinions are substantially undermined because both rely on an erroneous assumption that all discharges during the irrigation season were to the Canal and therefore there was little, if any, impact on Granger Drain and Yakima River. At least the discharges on July 28, 1997, August 25, 1997 and September 9, 1997, were to the undershot which carried water from JD 26.6 under the Canal south to the Granger Drain which empties into the Yakima River. Because of the high levels of fecal coliform found during the September 9, 1997 discharge and given the description of the appearance of the discharges in the WADOE discharge reports for July 28 and August 25, 1997, there is a likelihood that the fecal coliform content in those discharges exceeded the permissible level. For example, the discharge on July 28th was the result of manure contaminated waste water being pumped from one of Bosma's lagoons to a corn field. WADOE's report of that date contained this observation: "Between the base of the field and the toe of the lagoon manure contaminated water was flowing from the cornfield at a rate of about 10 gpm." (Ex. 74.) It continues to describe in detail a discharge of manure contaminated water of considerable size which traveled under the Canal south down JD 26.6. The WADOE discharge reports for both August and September of 1997 also describe in clear terms the discharge of manure contaminated water under the Canal down JD 26.6.

The Court finds that the higher the levels of fecal coliform, the higher the risk to public health. The Court also finds that the Granger Drain was out of compliance with water quality standards for fecal coliform and ammonia. Finally, the Court finds that the discharge violations were a public health risk, likely had an impact on the aquatic ecosystem and contributed to the degradation of the Granger Drain and the Yakima River. Based on these facts, no reduction in the maximum penalty would be appropriate.

2. Economic Benefit of Violations

To assess the economic benefit of violations, the Court considers the "after- tax present value of avoided or delayed expenditures." *United States v. The Municipal Authority of Union Township,* 150 F.3d 259, 264 (3d Cir.1998). Put another way, it is "the amount of money a company has gained over its competitors by failing to comply with the law." *United States v. Smithfield Foods,* 972 F.Supp. 338, 348 (E.D.Va.1997). If one dairy spends revenues for improvements in order to comply with the CWA and another dairy does not, the latter has revenues at its disposal with which to gain a competitive advantage over the former. Such a financial advantage from non-compliance with mandatory CWA obligations makes economic benefit achieved by non-compliance a necessary consideration when assessing penalties.

***12** In this case the parties' experts both used the "BEN" model of the Environmental Protection Agency ("EPA") to calculate the economic benefit to Bosma of non-compliance, that is, to do a present value analysis of the economic benefit of non-compliance. "The purpose of the analysis is to compare

the present dollar value of the [party's] delayed compliance costs with the present value of the [party's] costs had it completed and begun operating necessary pollution control equipment in a timely manner." *Hawaii's Thousand Friends,* 821 F.Supp. at 1387.

Mr. Dennis, a business valuation expert, gave this lucid explanation of the BEN model in his report:

> The "BEN" model, as it is named, accepts an estimate for these costs. The one time costs are discounted from the estimate date to the non-compliance date, at the annual inflation rate, in order to estimate what these one time costs would have been at the date of non-compliance. The annual recurring costs, if there are any, are discounted to an estimate of the costs which would have been incurred at the non-compliance date. The total of these costs are adjusted for the reduction in taxes which would have occurred had they been incurred and reported on the non-compliance date. This portion of the model results in a net out of pocket costs at the non-compliance date, if compliance had occurred. The same one time and annually recurring costs are projected to the compliance date, or the assumed compliance date. Given this "current" cost estimate and the adjustment for tax effects, these costs are discounted back to the non-compliance date at a computed discount rate, assumed to be a rate of return which the offender achieved with the investment of these delayed or avoided costs. The model then subtracts the discounted value of the delayed or avoided costs from the costs which would have been incurred had compliance taken place at the non-compliance date. The resulting balance is the economic benefit achieved by the offender, but in dollars as reported at the non- compliance date. This value is then brought forward, by use of the investment (discount) rate, to develop the present value as of the payment date, that date at which it is anticipated that the economic benefit would be paid as a penalty.
>
> (Ex. 288 ¶ V.)

To simplify the analysis and make it somewhat comparable to the calculation of Mr. Dennis, Bosma's expert, Mr. Mason, used $111,872.01 as the current cost of compliance. This amount, used by Mr. Dennis, was based on expenditures Bosma made in 1996 and 1997 in an attempt to bring his dairies into compliance with his NPDES permit and DNMP. Mr. Mason then used this figure in the BEN model. He used the BEN default discount rate of 10.6, assumed 1986, the year WADOE required Bosma to obtain an NPDES permit, as the non-compliance date and both 1997 and 1999 as compliance dates. His calculations of the economic benefit to Bosma of non-compliance are $114,710.00 using a 1999 compliance date, (Ex. 288 F), and $100,184 using a 1997 compliance date, (Ex. 288 E). Using a non- compliance date of 1996 and a compliance date of 1997 with a discount rate of 5 .3%, Mr. Dennis arrived at an economic benefit to Bosma from non-compliance of less than $10,000.00.

***13** Even using 1993, the earliest year within the statute of limitations period, as the date of non-compliance and the other 10.5% BEN default discount rate with either 1997 or 1999 as the compliance year and the figure of $111,872.01, it is clear that Bosma's economic benefit was much greater than $10,000.00. The Court finds that Bosma enjoyed an economic benefit of less than $100,000.00 but more than $10,000.00 as a result of non-compliance. Considering only this factor, there should be no reduction in the penalty amount.

3. History of Such Violations

The Court finds the following facts regarding the history of violations which are in addition to those contained in the Court's decision on liability. Bosma did not apply for an NPDES permit until 1996 although he had requested to do so by WADOE for many years as it had determined his dairies were a CAFO. However, from 1986 until 1994, no NPDES permits were issued in Washington as is explained in the decision on liability. Specifically, Exhibit 129B documents the long history of contacts between WADOE and Bosma concerning repeated manure wastewater discharges from his dairies to the public waters. These discharges included but were not limited to: (1) the failure to shut off irrigation lines and guns distributing manure wastewater to his fields which then ran off into JD 26.6; (2) the failure to berm or trench to prevent manure waste water from entering JD 26.6; and (3) the use of JD 26.6 as a conduit to send manure waste water to lagoons or by lagoons to the Canal or under the Canal south to

the Granger Drain. Jim Milton of WADOE best described this relationship when he testified that "Mr. Bosma was a businessman and he had a business he was trying to grow. I respected that. It was difficult to convince him he should spend some of his assets on wastewater pollution equipment or operation and maintenance." The evidence is that Mr. Bosma was growing his dairy herd and therefore his dairy waste management problem continually beyond the capacity of his facilities. As a CAFO, albeit one without an NPDES permit until 1997 when he obtained one, he had to prevent dairy wastes from his dairies from discharging to the waters of the state. His dairy operation frequently failed to do so until after September of 1997. By then he had finished substantial and expensive improvement in the capacity of his dairies to contain the huge amount of dairy cow manure and manure wastewater generated daily by his dairies.

That was the last year in which WADOE verified any discharge violation by Bosma dairies. However, the 14.3 acre field on a west bank of JD26.6 south of Kirk's Road was not bermed and piped to one of the lagoons until the spring of 1999. Based on these facts, a modest reduction in the maximum penalty is appropriate.

4. Good Faith Efforts to Comply with the Particular Requirements

The Court finds that the discharge violations in this case were the result of remiss operation and maintenance of the Bosma dairies or intentional conduct on the part of Bosma employees due, in part, to a lax attitude on the part of Mr. Bosma who, for many years, disrespected both the CWA, related state regulations, and the WADOE employees who were attempting to enforce the NPDES program in the Yakima Valley. Both the testimony of WADOE employees and Exhibit 129 B demonstrate the history of Mr. Bosma's resistance to the efforts of the WADOE employees who were attempting to get him to comply with the CWA and state water laws. As the WADOE employees testified and the Court finds as a fact, Mr. Bosma was the most difficult dairy operator in their region to deal with on issues of CWA compliance. Mr. Bosma's attitude led to a lack of compliance with the CWA and state water quality standards and resulted in actual discharge violations which are the subject of the penalty phase of this case.

14 Balanced against those findings are the following findings of fact. In 1996, after years of conflict with WADOE over compliance with the CWA and state water laws, Bosma did ask for the help from the South Yakima Conservation District in drafting his dairy waste management plan and from WADOE in taking steps to come into compliance with the requirements of his NPDES permit. Mr. Bosma applied for the NPDES permit in late 1996, and received on January 31, 1997. While Mr. Bosma had improved his facilities over the years, beginning in 1996, he took serious steps to improve the ability of his facilities to prevent manure wastewater from entering the public waters of the state. He added lagoons and increased their capacity to hold manure wastewater, and slowly decreased his use of 26.6 to as a conduit for manure wastewater to the lagoons south of Kirks Road. The winter of 1996-1997 was a particularly wet, snow- filled season which slowed progress on these improvements. Mr. Barwin, the section manager of the water quality program in the WADOE's worked with Mr. Bosma on compliance issues since 1989. He acknowledged Bosma's history of non-compliance but indicated that since 1996, Bosma had been making improvements in his dairy operation and that in the 18 months before trial, he was not aware of any information indicating non-compliance by Bosma. To demonstrate his willingness to comply with the CWA and the requirements of his DNMP, Mr. Bosma hired consultants to establish policy booklets for his dairy workers, emphasizing compliance with the CWA and state water quality laws. In addition, in 1999, Bosma made improvements to the 14.3 acre field to prevent irrigation wastewater from entering JD 26.6.

Bosma was granted his NPDES permit on January 31, 1997. Therefore, only proven discharge violations after that date required a report by him. The NPDES permit and his DWNP require self-reporting by CAFO's like Bosmas of discharge violation. There is a serious risk to public health from discharges of manure wastewater to the public waters of the state which underlies the mandatory obligation of a CAFO to report any discharges to the waters of the state. The duty to report discharge

violations ensures that notification will enable WADOE and other appropriate government agencies to act to protect the public health interest of those who might be exposed to and affected by the discharge. It also produces a record of the CAFO's deficient compliance with the requirements of its NPDES permit.
In short, the purpose of this requirement to report a discharge in violation of the NPDES permit plays an important role in enabling WADOE to protect public health. Here Bosma did not self-report discharges on April 8, 1997, July 28, 1997, August 25, 1997 and September 9, 1997. Only the April discharge to the dry Canal was not verified by WADOE; the other three discharge violations were verified by WADOE thereby reducing its dependence on self-reporting. However, this did not eliminate Bosma's duty to file a report as required by his NPDES permit and DNMP. As to the April discharge violation, there was no report by Bosma. A CAFO might not report a discharge violation in order to avoid the imposition of a monetary penalty for the discharge and also for the water quality violation. Based on these facts, a modest reduction in the maximum penalty is warranted.
5. Economic Impact on Violator
15 At the commencement of the penalty phase of the trial, Mr. Bosma knew that the potential penalty for the 16 violations could total $422,500.00. He also knew that if CARE was found to be the prevailing party, he faced an award of substantial attorney fees and costs. He stipulated to having the economic capacity to pay penalties. The evidence shows that as of the 1997 financial statement, the net value of the Bosma dairies and the personal assets of the Bosmas as well as the annual income of the Bosma dairies was such that Bosma did have the economic capacity to pay the maximum statutory penalties for the discharge violations. The economic impact on Bosma of the penalties imposed will be quite modest but not insignificant. Based on these facts, a reduction in the maximum penalty is not appropriate for this factor.
6. Consideration of Other Matters as Justice may Require
The Court finds that as to the actual value of Bosma's assets at the time of trial, the figures available were those found in financial statements for the years 1992 through 1997. Mr. Bosma intentionally did not prepare a financial statement of 1998 in order to avoid giving the information to CARE for use in this case. The Court also finds that had Mr. Bosma obtained an NPDES permit when first informed by WADOE that he must do so, there would likely have been a greater number of failure to report violations related to those discharge violations occurring before the issuance of his NPDES permit on January 31, 1997, and therefore, a larger total penalty for non-reporting violations.
In addition, the Court finds that Bosma did apply for an NPDES permit shortly after the State of Washington began to issue them after an eight-year period of non-issuance. Additionally, Mr. Bosma did become proactive at remediation efforts in late 1996. But for the heavy precipitation during the winter of 1996-1997, Mr. Bosma would have made greater progress in improving the capacity of his dairies to contain manure and manure waste water and this may have avoided the discharge violation in January of 1997.
As to the dairy improvements made by Bosma after this case began, the Court finds that nature, extent and speed with which those improvements were made are, in part, directly attributable to this citizen's suit by CARE. In part, they are the result of Bosma's acceptance of the status of his dairies as CAFO's and of the need to comply with the requirements of the CWA and his NPDES permit. The improvements made by Bosma were extensive and costly. Based on these facts, a significant reduction in the maximum penalty amount is appropriate.
Having considered the § 1319(d) factors and having made findings of fact on those factors, the Court now imposes penalties for each of the violations found.
C. Imposition of Penalties
1. Violations for Failing to Report Discharges
The imposition of a penalty for failure to report a discharge violation is appropriate to deter both Bosma and other CAFOs from failing to report future discharge violations of their NPDES permits. It

also acts to reaffirm the importance of the duty of a CAFO to report discharge violations which enable both WADOE and the public to have notice of the discharge violations and related public health risks. Based on the Court's analysis of the § 1319(d) factors as applied to the facts of this case, the Court imposes a penalty of $13,500.00 for each of the four violations of the duty of Bosma to report each discharge violation. The total penalty for these failure-to-report violations is $54,000.00.

2. Discharge Violations

***16** Having analyzed the § 1319(d) factors as applied to the facts found, the Court imposes the following penalties for the discharge violations. For the discharge violations of January, July and August of 1997, the court imposes a penalty of $10,000.00 for each of those violations. For the April, 1997 discharge of manure wastewater into the dry Canal just before it filled with the Spring inflow of water, the Court imposes a penalty of $7,500.00. For the September 9, 1997, discharge violation caused by the placement of a piece of sheet metal which diverted the flow of manure water from the lower lagoon into JD 26.6 and down to the Granger Drain, the Court imposes a penalty of $20,000.00. The Court imposes a penalty of $7,500.00 for each violation discharge occurring on April 22 and April 23, 1996. For the discharges into JD 26.6 on September 30, 1993 and October 1, 1993, December 13, 1993 and on January 20, 1995, the Court imposes a penalty of $7,500.00 for each discharge.

The total penalties for discharge violations are $102,500.00.

3. Water Quality Violation

The court considered that all of the discharge violations probably caused water quality violations. However, the September 9, 1997 violation is the only discharge violation where the water quality violation was proven by laboratory analysis. WADOE did not take water samples for analysis when verifying those other discharges which benefits Bosma, who avoids additional penalties for water quality violations. The Court, having analyzed the § 1319(d) factors and applied them to the findings of fact, imposes a penalty of $15,000.00 for the water quality violation occurring on September 9, 1997.

4. Total Penalties Imposed

Accordingly, the sum of the penalties imposed for failing to report discharge violations, actual discharge violations, and water quality violations, is $171,500.00. This amount is approximately 40% of the maximum possible penalties, and the Bosma Defendants have stipulated to the economic capacity to pay the maximum. This penalty must be paid by Defendants, jointly and severally, to the United States Treasury. *See* *Gwaltney of Smithfield v. Chesapeake Bay Found. Inc.,* 484 U.S. 49, 53 (1987); *Public Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals Inc.,* 913 F.2d 64, 82 (3d Cir.1990).

VI. Injunctive Relief

The proof of irreparable injury and the inadequacy of legal remedies are prerequisites to the granting of injunctive relief in a CWA case. *See* *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 311-13 (1982). The Court must also balance the competing claims of injury and the public interest. *See* *Natural Res. Def. Council v. Texaco Refin. & Mktg, Inc.,* 906 F.2d 934 (3d Cir.1990).

CARE seeks injunctive relief consisting of (1) surface and groundwater monitoring, (2) certification of the engineering safety of Defendant's impoundments, (3) an order directing Defendants to permanently cap the existing pipe from the truck wash drain to J.D. 26.6 and to berm the 14.3 acre field along the western boundary with the Golob property, (4) the right for CARE to conduct unannounced site inspections on a monthly basis and (5) an order from this Court stating that Defendants must comply with the CWA and their NPDES permit, including their DNMP.

***17** Surface and groundwater monitoring are part of Bosma's DNMP which is subject to WADOE enforcement. The Court must consider Bosma's history of non- compliant operation and maintenance of the dairies which impact public health risk, the increased level of enforcement by WADOE dairy inspectors, extensive and costly improvements by Bosma before, during and after trial and testimony by Mr. Barwin of WADOE that there is no information of non-compliance by Bosma after 1997.

Having considered these factors, the Court finds there is insufficient evidence of irreparable injury at this time or the inadequacy of legal remedies to justify the imposition injunctive relief in the form of surface and groundwater monitoring, unannounced site inspections by CARE, or an order directing Defendants to comply with the CWA, their NPDES permit, and their DNMP.

As to the safety of the Bosma impoundments, the Court did not find that Bosma's lagoons leaked. Therefore, there is insufficient evidence of irreparable injury to justify imposition of the requested safety certification. The Court is satisfied that the drains from the truck wash and the 14.3 acre field to the lagoon have been proven, post-trial, to have been remediated, as reported by the engineer who ran the dye tests. (Ct.Rec.401.) Accordingly, there is no irreparable injury likely to recur at those locations, sufficient to justify injunctive relief.

Berming the 14.3 acre field will not prevent irrigation spray from reaching the Golob property. Over-spray onto the Golob house and yard may be a health hazard and a nuisance but unless it discharges to the waters of the state, it is not a NPDES permit or CWA violation. Accordingly, there is no basis for granting the requested injunctive relief as it relates to the Golob property. For the foregoing reasons, Plaintiff's request for injunctive relief is DENIED.

VII. ATTORNEY FEES AND COSTS

The parties to this case have been determined and well-financed adversaries. The case was tried in two phases: phase one addressed liability; and six months later, phase two addressed penalties. Investigation, legal research, and discovery have been necessarily extensive, on occasion because the defendants were exceedingly reluctant to provide certain discovery. The two phases of trial were conducted over five weeks. The number of experts called by each party required significant expenditures of money and time to prepare both for depositions and for trial. There were several hundred exhibits produced at trial reflecting the diligent preparation of the parties and the complexity of the issues. This was a costly case to litigate. In the end, CARE prevailed on several important issues, proved 16 CWA violations, and also proved that there exists a reasonable likelihood that these violations will recur.

Under the CWA, "[t]he court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." 33 U.S.C. § 1365(d). A party is a "prevailing party or a substantially prevailing party" if "(1) as a factual matter, the relief sought by the lawsuit was in fact obtained as a result of having brought the action, and (2) there was a legal basis for the plaintiffs' claim." *Idaho Conservation League, Inc. v. Russell,* 946 F.2d 717, 719 (9th Cir.1991) (quoting *Andrew v. Bowen,* 837 F.2d 875 (9th Cir.1988)). Pursuant to the Court's decision in the liability phase of trial, CARE is the "prevailing" party and will be awarded reasonable attorney and expert fees and costs as allowed by 33 U.S.C. § 1365(d). Thus, the Court must determine what fees and costs are reasonable.

A. Standard for Award of Fees and Costs

***18** The starting point to determine reasonable attorney fees for the prevailing party in a CWA suit is "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983) (setting standard for fee award under 42 U.S.C. § 1988); *see also Thorne v. City of El Segundo,* 802 F.2d 1131, 1141 n. 10 (9th Cir.1986) (finding *Hensley* applicable "in all cases in which Congress has authorized an award of fees to a 'prevailing party.' " (citations omitted)). In making the initial lodestar determination, the Court "also should exclude from this initial fee calculation hours that were not 'reasonably expended.' " *Id.* at 434 (citation omitted).

After the product of reasonable hours times reasonable rate is determined, the Court next may "adjust the fee upward or downward, including the important factor of the 'results obtained.' " *Id.* In making any adjustments, two questions must be asked and answered. First, "did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded?" *Id.* If so, then work on the

unsuccessful claim which cannot be attributed to ultimate result achieved should not be part of the reasonable attorney fees. Second, "did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" *Id.* A court may award the entire fee requested, limited to cases with "excellent results," if it would be unjust to reduce fee "simply because the plaintiff failed to prevail on every contention raised." *Id.* at 435. On the other hand, if success is partial or limited, awarding fees for the entire litigation is likely excessive. *See id.* at 436. For partial or limited success, the "court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." *Id.* at 436-437. Where success is minor or technical, the reasonable attorney fees may be extremely limited. *See id.* at 440 n. 14.

The Court should also consider the twelve factors set forth in *Kerr v. Screen Extras Guild, Inc.,* 526 F.2d 67, 70 (9th Cir.1975). However, the Court recognizes that consideration of some of the *Kerr* factors is forbidden or cast into doubt. *See, e.g. Davis v. City and County of San Francisco,* 976 F.2d 1536, 1546 (9th Cir.1992) (citations omitted) (consideration of contingent fee not appropriate, and doubtful that "desirability" of the case is appropriate for consideration). Further, some of the *Kerr* factors, such as time and labor, novelty or difficulty, requisite skill, preclusion of employment, customary fee, and results obtained, are subsumed by the *Hensley* analysis. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 566 (1986) ("the lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee"), *but see McGinnis v. Kentucky Fried Chicken,* 51 F.3d 805, 809 (9th Cir.1995) (suggesting that *Kerr* remains good law, although rote recitation of factors is unnecessary).

***19** In applying this test to the instant case, the Court also considers various policy concerns in the award of attorney fees. For example, the applicant for fees should exercise "billing judgment," and not attempt to bill the opponent for fees that would not have been billed to the client. *See Hensley,* 461 U.S. at 437. If counsel's time records are insufficient to distinguish time spent on particular claims, then a reduced fee award may be warranted. *See id.* at 437 n. 12. The quality of counsel and novelty and complexity of the case, should ordinarily be reflected in the lodestar rate, not in an upward adjustment, which poses the risk of double counting. *See Delaware Valley Citizens' Council,* 478 U.S. at 565-566. Finally, the overall purpose of awarding costs to the prevailing party is to encourage the individual to act as a "private attorney general," and attorneys may "recover more than the benefit to their client would make reasonable, because they also confer benefits on others throughout society...." *McGinnis,* 51 F.3d at 810 (9th Cir.1994). "But the benefit is not infinite. What the lawyers do for their actual client is an important measure of 'extent of success." ' *Id.* Thus, the degree of success is relevant to a fee award, but strict proportionality between relief obtained and attorney fees is not required. *See Riverside v. Riviera,* 477 U.S. 561, 574 (1986).

B. Amounts Requested by CARE

1. Attorney Fees and Costs

CARE originally requested $464,720.00 in attorneys fees and expenses including expert fees, plus costs of $100,276.97 for a total requested award of $564,996.97. A supplemental request was filed by Mr. Tebbutt seeking an additional amount of $14,203.49 for his time and costs for preparation of both his original motion for fees and his reply to Bosma's response. In addition, he included a request for an additional $9,022.50 for fees inadvertently omitted from the original petition.

Later, Richard Eymann filed two supplemental requests: one for fees for additional work done after January 1, 2000 in the sum of $2,035.00, the other, for costs and expenses of litigation paid for CARE by his law firm in the final sum $7,179.47. This brought the amount requested by Mr. Eymann for fees for work done by him and his law partners to $161,630.00 and for expenses to $7,178.47. CARE asked that the Court approve as reasonable the following hourly rates for attorneys and law clerks:

ATTORNEY AND LAW CLERK FEES REQUESTED

Attorney	Hourly Rate	Hours Expended	Total
Charles Tebbutt *	$ 225.00	1,000.33	$ 225,074.25
Charles Tebbutt (supplemental)	$ 225.00	40.1	$ 9,022.50
Charles Tebbutt for WELC			$ 14,203.49
Richard Eymann	$ 275.00	575.6	$ 158,290.00
Marianne Dugan	$ 165.00	96.42	$ 15,909.30
Elizabeth Mitchell	$ 145.00	234.6	$ 34,017.00
Carrie Stilwell *	$ 145.00	6.7	$ 971.50
Law Clerks *	$ 65.00	323.13	$ 21,003.45
Michael Axline *	(not billed)		
Total Request			$ 478,491.49

FN* reflects work for which CARE has already excluded certain hours

*20 In support of the hourly rates requests, each attorney submitted a declaration listing education and law practice experience. Also submitted in support of the requested hourly rates and fees were the declarations of experienced and reputable litigators with knowledge of these attorneys and their work and reputation as litigators. Bosma argues only with the hourly rate of $275.00 requested by Mr. Eymann.

2. Expert Witness Fees and Costs

For the total expert witness expenses requested of $65,576.89, CARE has submitted the following expense detail: (1) Mr. Mason, economic evaluation, $22,400.00 in fees based on an hourly rate of $120.00 per hour for non-court time, and $175.00 for trial and deposition time, plus $1,168.00 in costs for a total of $23,23,568.00; (2) Mr. Gay of TechCon, Inc., a registered civil engineer, $11,150.00 in fees based on an hourly rate of $75.00 per hour, plus $1,800.00 for costs; (3) Mr. Monk, a hydrogeologist, $7,164.00 for fees based on an hourly rate of $60.00 per hour, plus $962.21 for costs for a total of $8,126.21; (4) Jones & Roth, accountants, $777.50 in fees; (5) Dr. Mark Powell, an aquatic biologist, $19,875.00 for fees based on an hourly rate of $125.00 per hour; and (6) Dr. Stephanie Harris, a veterinary officer with the U.S. Public Health Service, who charged no fee, and only incurred travel expenses of $279.00. The Court finds that the hourly rates and costs of the expert witnesses listed above are reasonable.

D. Reasonable Fees and Costs

Before addressing Bosma's objection to Mr. Eymann's requested hourly rate, on the basis of the declarations submitted and observation of the work of these attorneys in this case, the Court finds that the hourly rate requested by the other attorneys for CARE are reasonable in amount. Each of those lawyers is experienced and well-qualified to bill and receive the hourly rates requested, which compare

favorably to hourly rates charged by equally qualified attorneys here in the Pacific Northwest region. Additionally, the rate of $65.00 per hour for law clerks is reasonable. Work done at that hourly rate certainly reduces the expense of such work, and reflects the exercise of appropriate billing judgment. As to Mr. Eymann, he enjoys a well-deserved reputation as a preeminent litigator in tort and employment cases. While he now charges $300.00 per hour, a reasonable hourly rate for his work in this environmental law case is appropriately set at $250.00. The Court thus finds that the respective hourly rates requested are reasonable with this modification.

After determining this lodestar rate, the Court must determine whether this represents a reasonable fee considering the results obtained. Bosma's basic objection to the CARE fee and expense request is that CARE did not prevail on many of the issues litigated because in the liability phase, the Court found that CARE proved only 11 of the 61 CWA violations alleged. Thus, Bosma argues that the request should be reduced to account for CARE's limited success, to find the reasonable number of hours expended.

***21** At the outset, the Court notes that reductions for limited success are first made if the plaintiff did not prevail on claims unrelated to the plaintiff's successful claims. *See Hensley,* 461 U.S. at 434-35. In this case, all of CARE's initial claims had similar factual bases, were based on similar legal theories, and targeted a single course of conduct by Bosma. *See Thorne v. City of El Segundo,* 802 F.2d 1131, 1141 (9th Cir.1986). As such, none of the fee is excluded for unsuccessful claims that are unrelated to the successful claims. Next, the Court must determine whether CARE simply "failed to prevail" on every claim, justifying the full fee award, or whether some reduction should be made for partial or limited success. *Hensley,* 461 U.S. at 435-37.

It is true that CARE had limited success on the actual number of violations proven at trial. On the other hand, CARE did prove that Bosma not only had committed past violations, but was continuing to violate the CWA. Further, CARE met its burden to prove that there was a reasonable likelihood that these violations would recur in the future. By bringing this action, counsel's success, although limited to some extent, benefitted the public at large beyond the benefit conferred on the client. At the same time, a full fee award would be excessive in light of CARE's limited success. Considering all relevant factors, and the history of this litigation as a whole, the Court finds that a reduction of 30% in requested attorney fees adequately represents a limited success reduction in attorney fees.

For expert witness fees and costs, Bosma did not contest the reasonableness of the hourly rates charged by the CARE experts, although Bosma did asset that because CARE was unsuccessful on a number of its claims, no expert costs for Mr. Gay and Mr. Monk should be awarded. In addition, Bosma disputed the reasonableness of any award of expert costs for Mr. Mason, asserting that his testimony was largely excluded by the Court. The Court notes that only three pages of a twenty-six page report prepared by Mr. Mason were excluded. In addition, Mr. Mason's testimony dealt in large part with a business evaluation of Bosma's dairies as well as an economic benefit calculation, which is an important factor to be weighed by the Court in assessing a penalty under § 1319. Given the importance of Mr. Mason's expertise, the Court finds that the expert costs requested for Mr. Mason's work are reasonable. For the remaining experts, the Court finds that fees requested were reasonable, and will not reduce these fees.

Accordingly, after considering all relevant factors and arguments of the parties, the Court awards costs and fees in the total amount of $428,304.28, as follows:

Attorney Fees	Hourly Rate Expended	Hours	Total
Charles Tebbutt *	$ 225.00	1,000.33	$ 225,074.25

Charles Tebbutt (supplemental)	$ 225.00	40.1	$ 9,022.50
Charles Tebbutt for WELC (supplemental)			$ 14,203.49
Richard Eymann	$ 250.00	575.6	$ 143,900.00
Richard Eymnann (supplemental)	$ 250.00	7.4	$ 1,850.00
Marianne Dugan	$ 165.00	96.42	$ 15,909.30
Elizabeth Mitchell	$ 145.00	234.6	$ 34,017.00
Carrie Stilwell *	$ 145.00	6.7	$ 971.50
Law Clerks *	$ 65.00	323.13	$ 21,003.45
Michael Axline *	(not billed)		
Subtotal			$ 465,951.49
Reduction of 30%			$ 139,785.45
Total Attorney Fees			$ 326,166.04

Costs	
WELC Costs	$ 29,383.37
Local Counsel Costs	$ 7,178.47
Total Costs	$ 36,561.84

Expert Witnesses	
Mr. Mason	$ 23,568.00
Mr. Gay	$ 12,950.69
Mr. Monk	$ 8,126.21
Jones & Roth	$ 777.50
Dr. Powell	$ 19,875.00
Dr. Harris	$ 279.00

Total Witness Fees	$ 65,576.40
TOTAL AWARD OF FEES AND COSTS	$428,304.28

FN* reflects work for which CARE has already excluded certain hours

VIII. CONCLUSIONS OF LAW

*22 1. The Court has jurisdiction over this matter pursuant to 33 U.S . C. § 1365(a) and pursuant to 33 U.S.C. § 1365(c), venue in this District is proper.

2. The Court has supplemental jurisdiction over plaintiff's state law claims pursuant to 28 U.S.C. § 1367. Those claims involve the "same case or controversy" as the federal claims.

3. The Court concludes that the Diligent Prosecution Bar of 33 U.S.C. § 1319(g)(6)(A)(ii) and (iii) does not apply. Alternatively, the Court concludes that 33 U.S.C. § 1319(g)(6)(B) exceptions to § 1319(g)(6)(A)(ii) and (iii) do apply.

4. The Defendants have committed sixteen (16) violations of the CWA and state water laws.

5. Pursuant to the factors and penalty amounts in 33 U.S.C. § 1319(d) and 40 C.F.R. § 19.4, penalties should be imposed against the Defendants in the amount of $171,500.00 and judgment entered against them jointly and severally in that amount.

6. CARE is the prevailing party and should be awarded a judgment against Bosma for its attorney fees and costs in the amount of $428,304.28 as ordered herein.

IT IS HEREBY ORDERED:

1. Defendants are jointly and severally liable for a penalty in the amount of one hundred seventy-one thousand five hundred dollars ($171,500.00). Defendants shall pay the penalty on or before April 27, 2001, by submitting a check(s) totaling $171, 500.00 and made payable to "Clerk of the Court" to the following address:

United States District Court, Eastern District of Washington
920 West Riverside, Room 840
P.O. Box 1493
Spokane, Washington, 99210

The Clerk of the Court is instructed to disburse the funds to the United States Treasury c/o Sandra Doyle, United States Department of Justice, Environmental Division, Room 3914, P.O. Box 7754, Washington D.C. 20044-7754.

2. Plaintiff's Petition for Attorney Fees and Costs, (Ct.Rec.367), docketed as a Motion for Attorney Fees, is GRANTED in the total amount of four hundred twenty-eight thousand three hundred and four dollars and twenty-eight cents ($428,304.28) in fees and costs. Plaintiff shall have judgment against Defendants jointly and severally in the amount of $326,166.04 for attorneys fees and in the amount of $100,138.24 for costs, for the total award of $428,304.28.

IT IS SO ORDERED. The District Court Executive is directed to

1. Enter this Order;
2. Provide copies to counsel;
3. Prepare and enter JUDGMENT accordingly;
4. CLOSE THIS FILE.

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