

IN THE MATTER OF THE
FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT, RSBC 1996, c. 131
AND A COMPLAINT ARISING FROM DRAINAGE AND MANURE
MANAGEMENT PRACTICES ON A PROPERTY IN ALDERGROVE,
BRITISH COLUMBIA

BETWEEN: ROBERT AND SHARON HALL

COMPLAINANTS

AND: PAUL AND IRENE ROHRER

RESPONDENTS

DECISION

APPEARANCES:

For the British Columbia
Farm Industry Review Board

Honey Forbes, Presiding Member
Ron Bertrand, Member
Dave Merz, Member

For the Complainants

Pauline Gardikiotis, Counsel
Robert and Sharon Hall

For the Respondents

Irene and Paul Rohrer

Date of Hearing

January 26, 27, 28, 2010

Place of Hearing

Surrey, British Columbia

INTRODUCTION

1. The complainants, Robert and Sharon Hall, operate Highcrest Farm Equestrian Centre. Their property consists of approximately 20 acres located at 272nd Street, Aldergrove, British Columbia and is situated between the Rohrer home property to the south and the Rohrer's leased property to the north.
2. The respondents, Paul and Irene Rohrer, operate a cow/calf beef operation located at 272nd Street, Aldergrove. Their home farm is approximately 40 acres and they lease, among other acreages in the area, an approximately 20 acre parcel directly north of the Hall property. The Rohrer home farm and their leased property north of the Halls are the subject of this complaint.
3. All three properties are in the Agricultural Land Reserve and zoned agricultural.
4. The British Columbia Farm Industry Review Board (BCFIRB) received this complaint on October 7, 2008. The notice of complaint alleges that the Rohrer's:
 - used imported and farm produced manure to raise and contour land changing the natural run-off patterns increasing the drainage onto their property;
 - stored farm produced and imported manure at the top of a slope, sloping land and creating channels to direct manure laden run-off onto their fields and pastures;
 - installed drainage from farm buildings without providing for run-off on their own property;
 - removed hedges and cut down the north-west property height re-directing drainage from their property onto the Halls' outdoor arena and pasture with manure laden run-off;
 - directed drainage and dug trenches to move run-off from their farm buildings onto Halls' land flooding pastures in the west and east portions of the Halls' property;
 - on their leased land, blocked the complainant's drainage into a common ditch with bales and other materials, plugged other drainage pipes by pushing plastic materials into them, narrowed the common drainage ditch with imported manure and soil causing manure laden water to flood and pool on the complainant's fields and pastures;
 - altered water drainage on both the Rohrer property and leased property that resulted in flooding, erosion and ponding on the complainants' property rendering areas unusable;
 - improperly stored farm produced and imported manure and used farm produced and imported manure to change drainage patterns, causing contaminated or manure laden run-off into a common ditch, dust and odour.
5. The complainants allege that the above practices do not constitute normal farm practice and seek an order requiring the respondents to modify these practices.

6. The respondents deny the allegations and maintain that their water and manure management practices are in keeping with normal farm practice and in compliance with the *Farm Practices Protection (Right to Farm) Act* RSBC 1996 c. 131 (the *Act*).
7. BCFIRB retained Orlando Schmidt, M.Sc., PAg, Environmental Soil Specialist with the Ministry of Agriculture and Lands, as a knowledgeable person (KP) pursuant to section 4 of the *Act*. Mr. Schmidt conducted a site visit on November 26, 2008 and prepared a report.
8. The complaint was heard in Surrey on January 26, 27, & 28, 2010. The panel conducted a site visit on the first morning of the hearing and closing arguments were received by written submission.
9. At the hearing, the complainants raised the issue of pollution as a result of manure-laden run-off from the respondents' farm. The complainants confirmed that they were not seeking a determination with respect to the issue of pollution but rather their stated intent in leading this evidence was to support a finding that the complained of practices were not "normal farm practices" within the meaning the *Act*.
10. Issues of pollution are outside of the jurisdiction of the BCFIRB and as such we will confine our decision to whether the complained of water and manure management practices accord with normal farm practices.
11. On January 28, 2010, after the conclusion of this hearing, the panel heard Paul and Irene Rohrer's complaint regarding certain practices of Robert and Sharon Hall. That complaint is addressed in separate written reasons by this same panel.

ISSUE

12. Are the Rohrer farm operations with respect to alterations in water drainage and manure management practices conducted in accordance with normal farm practice?

BACKGROUND

13. To place this complaint in context, some background information is necessary. The knowledgeable person, Mr. Schmidt, in his report describes the property and the area in general:

The topography of this area of Aldergrove is gently undulating and the soils are commonly referred to as "hardpan". While the topsoil may be relatively fertile, the subsoil consists of glacial till, and has very poor drainage properties. During the wet fall and winter months, it is common to have ponding in the fields.

Mr. Rohrer has been farming on his property since 1991. Farm buildings include one cattle housing facility and a small machinery storage facility. There are a few fenced cattle pens around the perimeter of the buildings. The pens are earthen. Hog fuel (wood chips) are used as bedding in the pens. At the time of the visit, all the cattle were outside in the perimeter pens. They have access to feed inside the barn.

The cattle barn and surrounding pens are on a high spot in the landscape. It appears that without altering drainage patterns, run off from roofs and the pens would flow in at least three directions (northeast, west, and south). In the past, a berm and hedgerow prevented any drainage from flowing directly north onto the Hillcrest property.

The nearest water course is the Salmon River which passes through the southwest corner of Mr. Rohrer's property and passes near the front of both the Rohrer and Hall properties on the west side of 272nd Street. All drainage on the west side of the Rohrer and Hall properties proceeds into the Salmon River.

14. The Halls purchased their property in 2003. They board, breed and train horses and grow hay. They have boarded a maximum of 23 horses at one time and currently have 8-9 horses in their care. There is a large horse barn situated on the high point of the Halls' property. To the southwest, there is an outdoor riding arena beyond which the land gently slopes towards 272nd Street. Small outdoor horse pens are located on the east side of the barn; drainage is through a small south-north ditch across the Hall property into a common drainage ditch on the north side of the property. East of this south-north ditch is a low area that the Halls call the "soup bowl".
15. A common drainage ditch runs east west between the Hall property and Rohrer leased property. It starts at the east end of the Rohrer leased property and flows between the leased property and the Hall property; it finally crosses onto the Hall property and it proceeds west into the ditch on 272nd Street which drains into the Salmon River. This common ditch drains run off from the leased property, the east section of the Hall property and from the area east and north of the Rohrer barn originally by a swale and now by a newly constructed south-north ditch across the Hall property.
16. Initially, the Halls enjoyed an amicable relationship with the Rohrers. The Rohrers had an arrangement with the previous owner of the Hall property to use the land for hay production and grazing. After the Halls purchased the property, this arrangement continued without incident from 2003 until 2006. The Rohrers were also given access across the Hall property to move cows and haying equipment to the leased property. The Rohrers and the previous owner used the common ditch co-operatively, as did the Rohrers and Halls from 2003 to 2006.
17. In the summer of 2006, Mr. Hall and Mr. Rohrer had a disagreement about manure transport across the Hall property to the leased property. Mr. Hall told B&B Cleanout Services, hired by Mr. Rohrer, that they could no longer have access across his property as the manure transport vehicle had created large ruts. Following this incident, the relationship and communication between the Halls and Rohrers rapidly deteriorated and very little civil communication has occurred since.

KNOWLEDGEABLE PERSON

18. Mr. Schmidt testified as to his findings based on his observations and discussions with both the Rohrers and the Halls. He focussed on three main areas of alteration to the Rohrer properties and the manure management practices.

19. Mr. Schmidt observed that in 2007 and 2008, the Rohrs installed a new drainage system to the north and west of their barn. They also removed a berm with hedging on top that separated the Rohrer property from the Hall property in the northwest area and installed drainpipes. Because the work was completed near the crown of the land between the properties, some of the pipes drained eastward to the back of the property and some westward towards the frontage. The westward pipe, along with one or more trenches, initially drained water onto the Hall property near their riding arena resulting in flooding. To mitigate the flow onto their property, the Halls installed a series of interlocking concrete blocks to reinforce their property. The Rohrs extended the west flowing drainpipe beyond this wall with the outlet facing the Hall property and have since extended the drainpipe further west. Mr. Schmidt was of the view that despite the mitigation efforts of the parties, water flow and erosion of the Hall property was possible if not probable under storm conditions. He recommended that the Rohrs extend the drain pipe all the way to the 272nd Street ditch.
20. In the northeast portion of the Rohrer property, Mr. Schmidt observed that natural flow patterns were northeasterly. A significant portion of the Rohrs' field drainage, including that from a poultry manure storage area, drained into a small south-north ditch traversing the Hall property into the common ditch on the property line with the leased property. He observed a drain pipe northeast of the Rohrer barn draining towards a low swale near the Rohrer/Hall property line. He also observed a small, fenced off, detention pond in this area that does not work as intended as it lacks a control mechanism for rate of release to control run off. The pond overflow appeared discoloured which he attributed to the run off from the field-stored manure on the Rohrer property. The pond drained into the small south-north ditch crossing the Hall property. He noted that use of detention ponds in this area is uncommon.
21. Mr. Schmidt noted contouring in the field behind the Rohrer's barn but was unclear as to what changes had occurred in the area. He concluded that it was unlikely that this contouring increased the overall volume of drainage through the Hall property. However, he was of the view that the rate of flow may have increased as it was now directed through pipes and the detention pond. Mr. Schmidt recommended the implementation of a drainage plan to optimize drainage conditions for both properties.
22. On the north boundary of the Hall property with the Rohrer leased property Mr. Schmidt observed the common drainage ditch that runs primarily east-west towards 272nd Street. There was also a second newly constructed drainage ditch fully on the Hall property alongside the original common ditch. Remnants of round bales and hay were observed on the Hall property near the culvert from the small south-north drainage ditch into the common ditch. Mr. Hall claimed that these items had been used by Mr. Rohrer to block the culvert creating a risk of flooding on the Hall property. He built the new parallel ditch fully on his own property to mitigate this risk. Mr. Schmidt also noted plastic wrapping material from silage bales near the perimeter drains of Mr. Hall's horse barn. In this common ditch area, Mr. Schmidt

recommended that the Rohrer's stop blocking the drains and restore the ditch to its pre-existing condition effectively draining both properties.

23. Mr. Schmidt also observed the Rohrer's manure management practices. He observed a pile of partially covered poultry manure on the east side of the Rohrer barn, near the top of a slope, with run off flowing northeasterly towards the south-north drainage ditch across the Hall property. Mr. Schmidt recommended that Mr. Rohrer cease storing poultry manure in this location particularly if the manure is to be left uncovered. In his view, this method of manure storage was likely non-compliant with the Agricultural Waste Control Regulation since run off from a manure pile into a watercourse must be avoided. He recommended that the Rohrer's consider construction of a permanent covered manure storage facility or identify an alternate field storage site where manure could be covered through high precipitation periods.
24. After receiving the KP report, Mr. Rohrer undertook modifications. He has extended the west draining pipe but not all the way to the 272nd Street ditch as recommended and moved the farm produced manure (but not the imported manure) to a covered shed. He has not implemented a comprehensive drainage plan or restored the common ditch to its original state.

DECISION

25. Under section 3 of the *Act*, a person who is aggrieved by an odour, noise, dust or other disturbance resulting from a farm operation conducted as part of a farm business, may apply to the BCFIRB for a determination as to whether the disturbance results from a normal farm practice. If, after a hearing, the board is of the opinion that the disturbance results from a normal farm practice, the complaint is dismissed. If the practice is not a normal farm practice, the BCFIRB is empowered to order the farmer to cease or modify their practice.
26. A complaint under the *Act* involves a two-step analysis. First, the panel must be satisfied that the complainants are aggrieved by the odour, dust, noise or other disturbance emanating from the farm operation. If the complainants fail to establish that they are aggrieved, the complaint must be dismissed, without need to consider whether the alleged source of the grievance results from a normal farm practice. Once the initial step has been satisfied, the panel must make a determination as to whether the grievance results from a normal farm practice.
27. In this case, the panel is satisfied that the complainants have met the threshold of demonstrating that they are aggrieved by the alterations in drainage and certain manure management practices on the Rohrer property. Having found the threshold question met, the panel must determine whether the respondents' on-farm practices that are the subject of this complaint, are consistent with normal farm practice. Section 1 of the *Act* defines normal farm practice as:

"normal farm practice" means a practice that is conducted by a farm business in a manner consistent with

(a) proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances, and

(b) any standards prescribed by the Lieutenant Governor in Council,

and includes a practice that makes use of innovative technology in a manner consistent with proper advanced farm management practices and with any standards prescribed under paragraph (b).

28. In determining whether a complained of practice falls within the definition of normal farm practice, the panel looks to whether it is consistent with “proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances”. In making this decision, we necessarily take into account the particular circumstances of the site both on its own and in relation to those around it. This includes factors such as the proximity of neighbours, their use of their lands, any relevant history, geographical or meteorological features, types of farming in the area, the nature of the disturbance, and the size and type of operation that is the subject of the complaint.

29. The panel heard considerable evidence in respect to the alterations in water drainage and recognizes that drainage issues tend to be site specific in nature. In a recent farm practices complaint before the BCFIRB, it was accepted “as a general rule that property owners are responsible for water on their property. Should a property owner take steps to develop and alter their property, they must be sensitive to possible impacts on neighbouring properties”: *Deverell v. Morning Bay Vineyard and Estates Ltd., October 2007*. We agree with this principle. Turning to the issues on this complaint, we will first address the drainage modifications then examine the manure management practices.

Alterations in Water Drainage

30. The panel observes that significant drainage issues are a relatively recent problem for these properties. We had the benefit of evidence of the drainage going back as far as 1976 from previous owners and residents of both the Hall and Rohrer properties. Gary Eamor, a previous owner of the Hall property from 1991-1999, and Tom Hagedorn, a resident of the Rohrer property from 1976-1992, confirmed that the northwest portion of the Rohrer property was originally relatively level with the Hall property. Mr. Eamor built the outdoor riding arena in 1993 with north to south drainage pipes connected to a drain running west to the 272nd Street ditch. He did not have any flooding, erosion or drainage issues. Mr. Eamor also testified that in 1997-1998 Mr. Rohrer built a berm on his property running from just west of his barn to 272nd Street upon which he planted a row of trees. This resulted in the Rohrer property becoming higher than the Hall property adjacent to the riding arena and west towards 272nd Street. Both he and Mr. Hall agreed however that they did not experience drainage problems from this alteration.

31. Mr. Rohrer has been farming at this location since 1991. From the time the Halls bought their property in 2003 until 2006, they experienced minor drainage issues, as their property is the lowest lying in this area. Neither Mr. Rohrer nor Mr. Hall found it necessary to undertake significant modifications to the drainage on their respective properties during this period. Mr. Hall testified that run off flowed from the northeast area of the Rohrer property across his property into the common drainage ditch through the Hall's culvert. The Halls and Rohrers both used the common drainage ditch. This use is consistent with that of previous owners, Mr. Eamor and Mr. Neufeld, who confirmed that they jointly used the ditch without dispute.
32. However, Mr. Hall's decision in the summer of 2006 to stop Mr. Rohrer's transportation of manure across the Hall property to the leased property resulted in a rapid deterioration in neighbourly relationships. Lawyers were retained and there were allegations of various misdeeds and misconduct on the part of both Mr. Rohrer and Mr. Hall. Issues remained unresolved and have since festered.
33. According to Mr. Hall, in the fall of 2006 Mr. Rohrer threatened to block access to the common drainage ditch and began stockpiling manure. In the spring of 2007, Mr. Rohrer began modifying the drainage on his property and asserted ownership over the historically "common" ditch. Mr. Hall also made modifications to his property. In the site visit conducted by the panel, we observed large areas of exposed ground on both properties. There were ditches and trenches and piles of dirt. Some areas more resembled a construction site than two long-standing farm operations. Our view was only magnified after seeing photographs of what these properties used to look like. What is clear to this panel is that in undertaking modifications, there has been little care given to mitigate negative impacts on neighbours. In fact, the panel was left wondering whether the actual intent of some of these modifications was to improve usability of land or to create problems for a neighbour or perhaps a combination of both.
34. Despite possible motives, our task on this complaint is to consider whether the complained of practices accord with normal farm practice. With respect to the drainage issues. Mr. Hall's evidence is that in 2008, after the installation of the new drainage system to the north and west of Rohrer barn and the removal of a berm and hedge separating the two properties, his riding arena began to flood. He dug a channel on his property redirecting run off away from the riding arena but he alleges Mr. Rohrer then dug a channel further east and inserted plywood preventing Mr. Hall from filling in the channel. In September 2008, Mr. Hall installed an interlocking concrete block wall to stop run off from the Rohrer property from flowing into the riding arena. He also alleges that Mr. Rohrer then extended the west running drainage pipe to point directly at the riding arena.
35. Mr. Rohrer confirmed that, while building a new area for feed storage, he excavated and installed a new drainage system on the north and west sides of his barn. The drainage system is located at the highest point in the area and consists of drain pipes running north from the barn and storage shed and connecting to a drain pipe running

east and west near the Halls' southern property line. The west end of the east-west drain initially terminated roughly north of the Rohrer house. Mr. Rohrer states that he intended to extend the drainpipe further but he was "caught" in bad weather during excavation and it ended up pointing in the direction of the Hall property. He says that he dug north south trenches on the edge of his property in an effort to route the water towards the 272nd street ditch. Mr. Rohrer suggested that other factors might have contributed to the flooding of the riding arena such as run off from the Halls' property or their lack of maintenance.

36. With respect to the northeast area, Mr. Hall testified that when he bought his property it was level along the fence line north and northeast of the Rohrer barn but prior contouring work done by the Rohrers in 1997-1998 had raised the elevation of the Rohrer property adjacent to the fence by several feet, resulting in more northerly drainage (towards the Hall property) than its original southerly path towards the Salmon River. He also testified that after the construction of the new drainage system in 2007, there was a further increase in drainage from the northeast area of the Rohrer property. The new east drain of the system drained onto the Rohrers' field then flowed onto the Hall property into the soup bowl area and from there into the common ditch.
37. Mr. Hall applied to the Township of Langley for a Soil Permit to fill the soup bowl area. The permit was granted and work commenced in the fall of 2007 and continued in 2008. After the addition of approximately two hundred truckloads of fill, Mr. Hall testified that his property (adjacent to the fence line) was at the same elevation as the Rohrer property. He testified that Mr. Rohrer then contoured the north east area of his property to slope more directly north toward the property line and raised the area running east from the bottom of the slope along the Rohrer fence to drain run off onto the Hall property.
38. Birk Madsen from the Township of Langley testified regarding the Soil Permit. Following a site visit, he recommended that the Halls dig a south-north ditch across their property in the location of the original swale to allow for drainage from the Rohrers' property to the common ditch. On September 9, 2008, he met with the parties separately and noted that the Rohrers had pulled dirt on their property back and deposited it further south so the Hall property looked higher. He found an undisturbed area along the property line and marked it with orange spray paint on a fence post as the "height of land" as an elevation reference point for both properties. Mr. Madsen completed a site inspection in December 2009 and was satisfied that the Halls had complied with the Permit including the condition prohibiting the fill from interfering with the above or below ground drainage pattern of any adjoining lands.
39. In response, Mr. Rohrer denies that his new drainage system has had any impact on the northeast area of the Hall property. The soup bowl has always been a low lying area and the natural topography has always dictated water flow across the Hall property towards the common ditch. Mr. Rohrer argues that in fact the Halls' 2007

and 2008 filling operation caused drainage problems for him.¹ By raising the height of their land, the Halls caused water to pond along the fence line on the Rohrer property. The Halls do not deny this but state that the swale created along the fence line of the Rohrer's property can still drain to the low point on the Rohrer property. Mr. Rohrer, however, testifies that the fill placed by the Halls acts as a berm blocking natural down slope drainage from the Rohrer property and causes water to pool on his property. Mr. Rohrer says that water has overflowed the newly created swale and cut to the lowest area across the Halls' fill into the new south-north ditch then into the common ditch. He therefore filled in the low-lying area next to the Halls' fill and made a complaint to the Township of Langley.

40. Mr. Rohrer testified that in September 2008, despite the Halls having dug a south-north ditch to allow water to flow across to the common ditch as recommended by Mr. Madsen of the Township of Langley, he pulled the dirt back along his property line and dug a detention pond to collect the water blocked by the Halls' fill. He then fenced the pond to keep his cattle out and channeled the east drain from his new drainage system into this pond. In June 2009, he extended the pond further west and built up the area between the pond and his barns. The Halls claim that run off from the Rohrer's property now enters the Hall property further east and it has eroded a new path through the fill on the Hall property to the small south-north ditch.
41. The Halls complaint also raises an issue with respect to the use of the common ditch between their property and the leased property. Mr. Hall alleges that in the summer of 2007, Mr. Rohrer placed hay bales and other debris into the common ditch plugging the Hall's culvert opening. In summer of 2008, the culvert opening was again plugged and the capacity of the common ditch was restricted by infilling and the planting of trees along the edge on the leased property. As a result, water overflowed from the leased property onto the Hall property. The Halls' perimeter barn drainage pipes were also plugged with plastic wrapping. In August and September 2008, Mr. Hall built a new drainage ditch completely on his property as a temporary measure pending resolution of this complaint.
42. Although Mr. Rohrer disputes the dates provided by Mr. Hall, he does not deny blocking the common drainage ditch and says he did so after receiving a letter from his lawyer confirming that the Halls' culvert opening and drain pipes emptying into the ditch were trespassing on his leased land. Mr. Rohrer stated that he blocked the common drainage ditch that his property relied on "because of the Halls' actions".
43. The Halls' expert Mr. Brisbin, a Water Resources Engineer and Agrologist, testified that in his view Mr. Rohrer had placed fill without authorization from the Township of Langley; the placement of fill interfered with established drainage patterns and resulted in surface run off draining to adjoining lands at greater rates than prior to the infilling; materials other than soil appear to be used as fill; and fill was deposited within 3 meters of the property line. In his view, altering drainage characteristics to

¹ This issue is addressed in the panel's reasons in the *Rohrer v. Hall* complaint.

44. Having considered all the evidence, the panel concludes that the new drainage system constructed by the Rohrers has significantly altered the historical drainage pattern from the Rohrer property to the Hall property. The panel accepts that the highest point in this area is near the Rohrer barn and the lowest area was the soup bowl area on the Hall property and as such drainage has always moved down slope onto the Hall property. The topographical maps and air photos confirm this. We accept the opinion of Mr. Schmidt that while it is difficult to conclude that Mr. Rohrer's alterations resulted in more volume, the channeling of flow through pipes, ponds and ditches has had the effect of increasing the rate of flow onto the Hall property such that flooding has resulted. We do not accept Mr. Rohrer's arguments that the flooding of the Halls' riding arena in the winter of 2008 was caused by lack of maintenance or some other action of Mr. Hall.
45. However, the panel does not accept that all the drainage problems are the result of the activities of Mr. Rohrer. As said earlier, the Halls' property is low lying and there has historically been run off from the Rohrer property. In 2007, the same year in which the Rohrers constructed their new drainage system, the Halls started (and continued in 2008) a significant fill project on their property which in effect made a portion of the adjacent Rohrer property the low-lying area. This too has impacted local drainage patterns.
46. We accept that a landowner has the right to improve drainage, subject to any applicable land use regulations, to more effectively use his property and maximize the profitability of his land. However, normal farm practice dictates that when undertaking such modifications, a farmer must make reasonable efforts to mitigate negative impacts on his neighbour. In this case, the Rohrers installed the new drainage system to create an area for feed storage and increase the grazing area of their land. We conclude that these modifications have resulted in increased flooding onto the Hall property. In considering whether or to what extent this flooding is consistent with normal farm practice, the panel finds that in these circumstances and given the historical drainage patterns, normal farm practice requires Mr. Rohrer to take appropriate steps to plan for and mitigate the possible negative impacts of his drainage modifications on his neighbour. We find that he failed to do so, instead adopting an unplanned, ad hoc and reactionary approach that is inconsistent with normal farm practice.
47. Turning to the issues relating to the common ditch between the Hall property and the Rohrer leased property, it appears that this dispute stems from Mr. Rohrer's belief that the common ditch and/or some of the Halls' drainage pipes and culverts into that ditch are on his property and he has no obligation to allow Mr. Hall access to this ditch for drainage. Mr. Rohrer readily acknowledges plugging drains, infilling the ditch and generally interfering with Mr. Hall's access to the ditch. Further,

Mr. Rohrer does not attempt to relate his activities to a legitimate farm practice. He does not say for example that plugging these pipes and restricting access to the common ditch improves his drainage making his farm more viable. In fact his evidence is to the contrary; he readily admits that he too relies on the common ditch for drainage and his actions have negatively impacted his drainage too.

48. This is, at its core, a dispute about ownership of and access to a ditch; it is not a dispute about farm practices, normal or otherwise. Not everything that happens on a farm is a farm practice related to a farm operation such that it falls within the jurisdiction of the BCFIRB. Mr. Rohrer alleges that Mr. Hall's use of this ditch amounts to trespassing and he asserts his right to regulate access to the ditch. Mr. Hall asserts his right to use the ditch and says that Mr. Rohrer is intentionally interfering with that right. Intentionally plugging culverts and blocking ditch drainage is not a farm practice, let alone a normal farm practice and while such actions may be actionable at common law, this panel cannot adjudicate on matters outside our jurisdiction or provide remedies for complained of practices which are not farm practices. The parties will have to pursue this matter in another forum if they cannot find a resolution between themselves.

Manure Management

49. The complainants also take issue with the Rohrers' manure management practices. Mr. Hall states that the Rohrers store large amounts of manure on their property upslope from the Halls and close to the property line causing odour and contaminated run off.² Manure is often left uncovered from October through April contrary to the Agricultural Waste Control Regulation. There is visible leachate run off in the detention pond and onto the Hall property and manure piles on the lease property are located within 30 meters of the common drainage ditch resulting in contaminated run off entering the common ditch. Mrs. Hall has taken water samples of the run off and confirmed the presence of fecal coliform.
50. Mr. Hall states that he has observed Mr. Rohrer using stockpiled manure and wood waste as fill. Mr. Rohrer has not obtained a fill permit leaving Mr. Hall to conclude that manure has been used to recontour the Rohrer property as the material excavated in 2007 would have been insufficient for all the revisions. Mr. Hall also alleges that Mr. Rohrer spreads excessive amounts of imported poultry manure on both properties. The invoices of the manure delivery company support that large quantities of poultry manure have been delivered to the Rohrers from 2007 to June 2009. Mr. Rohrer also applies mushroom manure and manure from his cattle to his property. Mr. Hall alleges that the amount of manure applied is twice what is needed for crop growth.

² Mr. Hall testified that there was a marked reduction in manure deliveries in the fall of 2009, which he attributes to the upcoming hearing.

51. Mr. Hall also has testified regarding an incident where he observed Mr. Rohrer spreading manure in windy conditions resulting in manure dust blowing onto Hall land and odour. Mr. Hall has also observed Mr. Rohrer spreading manure in areas with standing water, on saturated soils, during rain and throughout the winter months in 2007 - 2008. The complainants' expert Mr. Brisbin, testified that in his opinion, Mr. Rohrer was applying agricultural wastes under conditions which resulted in run off of agricultural waste water beyond the farm boundary, agricultural waste (manure) was stored without being properly covered October through April as required by the Agricultural Waste Control Regulation and agricultural wastes were being applied at rates greater than required by the crop.
52. In response, Mr. Rohrer testified that he purchases 70-80 truckloads of poultry manure (40 cubic yards each) annually and approximately 20 loads of poultry manure are stockpiled in the fall. In addition, he also uses his cattle's manure and mushroom manure as fertilizer. He denies using agricultural and wood waste as fill and states that he has only used the fill from the excavation in the summer of 2007. Mr. Rohrer uses the various manures to amend his soil, tilling it in deeply prior to reseeded. He argues that excessive fertilization would result in poor grass growth and this has never occurred. Mr. Rohrer called several witnesses whose properties he leased. These gentlemen, Tom Yakashiro, Jack Foster, George DeGianni and Ric Hombrebueno all testified that in their view Mr. Rohrer was a good farmer; they trusted his judgment and felt he got good production from the land through his management of manure and winter crop cover. Mr. Rohrer provided no evidence that countered Mr. Hall's allegation that he spread manure on water saturated soil. As for the allegation of spreading manure in wind, Mr. Rohrer concedes that this occurred on one occasion when the wind came up while he was spreading manure and he simply finished the job.
53. The panel finds that Mr. Rohrer has used materials other than soil as fill for some of his contouring projects. KP Mr. Schmidt testified that hog fuel and mushroom manure were used as filter material to cover the pipes in the new drainage system. This evidence was confirmed by Mr. Merckley, the gentleman that assisted Mr. Rohrer with the installation, who stated the drains were covered with "a foot or so" of hog fuel, mushroom and manure mix and dirt. The use of hog fuel and manure as fill or filter material is not normal farm practice and in fact runs contrary to the *Farm Practices in BC Reference Guide*.
54. We heard much about the excessive rate of manure application by Mr. Rohrer. Much was made regarding the completeness of the records of the manure hauling company and the accuracy of the evidence (in affidavit and testimony) of the company's representatives. In looking at the totality of the evidence, we prefer the common sense evidence of the farmers called by Mr. Rohrer who testified that the good quality of the crop raised by Mr. Rohrer was inconsistent with over fertilization. Accordingly, we find that the rate of application of manure, while perhaps on the high side, is in these circumstances consistent with normal farm practice.

55. As for storage and manure spreading practices, we find that Mr. Rohrer has stored manure on both his properties in uncovered piles through the months of October through April. In this case the panel finds that winter manure storage in uncovered piles is in contravention of the Agricultural Waste Control Regulation and is not normal farm practice. Mr. Schmidt and Mr. Hall both testified regarding the presence of manure leachate in the runoff onto the Hall property, in the Rohrer detention pond and flowing out of the west and east drain pipes. We note that since Mr. Schmidt prepared his report in February 2008, Mr. Rohrer has started using a covered manure shed for on farm manure as observed on our site visit. He has also agreed to cover imported manure during the winter months. Regarding the spreading of manure on water saturated soil, having heard no evidence to the contrary, we are prepared to accept Mr. Hall's allegations and find this is not normal farm practice.
56. Further, Mr. Rohrer's decision to use more rather than less fertilizer to enhance crop growth creates a corresponding obligation to carefully manage on site manure and drainage to minimize the risk of manure contaminated run off onto other properties and into water courses. While we have found that Mr. Rohrer's fertilization practices are consistent with normal farm practice, we find that his storage of significant quantities of imported poultry and mushroom manure on the top of a slope on his home property, a site with identified drainage issues, as well as near the common ditch on his leased property, does not accord with normal farm practice and modification is required.
57. As for the one time incident involving excessive dust during the spreading of manure, we note that Mr. Rohrer acknowledged his mistake. We agree this is not normal but observe that one mistake is not a practice. We therefore dismiss this aspect of the complaint.

ORDER

58. Given that we have found a breach of the *Act* regarding certain farm drainage and manure management practices, section 6(1)(b) of the *Act* confers upon the panel the jurisdiction to order the farm to cease the practice or modify the practice in the manner set out in the order, to be consistent with normal farm practice. The panel finds that in these circumstances, given the historical drainage patterns and the farmer's decision to use large amounts of fertilizer to support his crops, normal farm practice requires the farmer to take appropriate steps to mitigate the possible negative impacts of the drainage modifications and manure use on his neighbour.
59. Accordingly, and in accordance with the findings we have made regarding normal farm practice and to be consistent with normal farm practice, the panel orders the respondents, pursuant to section. 6(1)(b) of the *Act*, to cease the practice of using hog fuel and manure as fill or filter material on the Rohrer property and the lease property.
60. The panel also orders the respondents, pursuant to section. 6(1)(b) of the *Act*, to modify their drainage management practices as follows:

- a) in accordance with the advice and recommendations of a qualified professional, to develop a drainage management plan to be completed no later than November 1, 2010; a copy of which is to be provided to the Halls and BCFIRB;
- b) in accordance with the advice and recommendations of a qualified professional, to implement the drainage management plan to be completed as soon as practicable; and
- c) to advise the complainants and BCFIRB of the anticipated completion date of the drainage management plan

61. In making the above direction, the panel's view is that a drainage management plan takes into account the impacts of any modifications on adjacent land users and looks for ways to minimize or mitigate those impacts. This complaint has demonstrated that drainage modifications cannot be done in isolation; run off does not respect property lines. The panel is of the view that the preferable approach is a single, integrated plan that looks at the drainage irrespective of property lines.

62. The panel also found a breach of the *Act* with respect to manure management practices. The respondents have started using a manure storage shed for farm produced manure. Regarding the onsite storage and spreading of poultry and mushroom manure, the panel orders the respondents, pursuant to section. 6(1)(b) of the *Act*, to modify their manure management practices as follows:

- a) to cease storing imported manure in a field within 30 metres of a water course immediately;
- b) to cover imported manure from October 1 to April 1 inclusive;
- c) to cease spreading manure on water saturated soil; and
- d) to otherwise comply with the Agricultural Waste Control Regulation.

63. There will be no order as to costs.

Dated at Victoria, British Columbia this 26th day of August, 2010.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Honey Forbes, Presiding Member



Ron Bertrand, Member



Dave Merz, Member