



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
 REGION 8
 1595 WYNKOOP STREET
 DENVER, CO 80202-1129
 Phone 800-227-8917
<http://www.epa.gov/region08>

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FILED
 EPA REGION VIII
 HEARING CLERK

DOCKET NO.: CWA-08-2016-0005

IN THE MATTER OF:

Keller Homes, Inc.
 564 Chapel Hills Drive, Suite 150
 Colorado Springs, CO 80920

RESPONDENT

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FINAL ORDER

Pursuant to 40 C.F.R. §22.13(b) and 22.18(b)(2)(3), of EPA's Consolidated Rules of Practice, the Consent Agreement resolving this matter is hereby approved and incorporated by reference into this Final Order.

The Respondent is hereby **ORDERED** to comply with all of the terms of the Consent Agreement, effective immediately upon receipt by Respondent of this Consent Agreement and Final Order.

SO ORDERED THIS 7th DAY OF June, 2016.


 Elyana Sutin
 Regional Judicial Officer

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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In the Matter of:)	COMBINED
)	COMPLAINT AND
)	CONSENT AGREEMENT
Keller Homes, Inc.)	
564 Chapel Hills Drive, Suite 150)	
Colorado Springs, CO 80920)	
)	
)	Docket No. CWA-08-2016-0005
)	
Respondent)	

Complainant, United States Environmental Protection Agency, Region 8 (EPA), and Keller Homes, Inc. (Respondent) are agreeing and consenting to settle on the following terms:

A. PRELIMINARY MATTERS

1. The EPA has jurisdiction over these matters pursuant to sections 308 and 309(a) of the Federal Water Pollution Control Act (Clean Water Act or the Act), as amended. 33 U.S.C. §§ 1318 and 1319(a). The rules for this proceeding are the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits" (Rules of Practice), 40 C.F.R. part 22, a copy of which has been provided to Respondent.
2. This Combined Complaint and Consent Agreement (CCCA) is entered into by the parties for the purpose of simultaneously commencing and concluding this matter, as authorized by 40 C.F.R. § 22.13(b), and executed pursuant to 40 C.F.R. § 22.18(b)(2) and (3).
3. For the purposes of this proceeding, Respondent admits the jurisdictional allegations and neither admits nor denies the factual allegations. Respondent consents to the assessment of the civil penalty and waives any right to a hearing or appeal before any tribunal and to contest any issue of law or fact set forth herein.
4. Complainant asserts that settlement of this matter is in the public interest, and the parties agree that entry of this CCCA without further litigation and without adjudication of any issue of fact or law is the most appropriate means of resolving this matter.
5. This CCCA, upon incorporation into a final order, applies to and is binding upon the EPA and upon Respondent, and Respondent's successors and assigns. Any change in ownership of Respondent including, but not limited to, any transfer of assets or

real or personal property shall not alter Respondent's responsibilities under this agreement.

6. This CCCA contains all terms of the settlement agreed to by the parties.

B. STATUTORY AND REGULATORY FRAMEWORK

7. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant into waters of the United States except as in compliance with a permit issued pursuant to section 402 of the Act, 33 U.S.C. §1342.
8. Section 402 of the Act, 33 U.S.C. § 1342, establishes a National Pollutant Discharge Elimination System (NPDES) program, under which the EPA and, upon receiving authorization, states may permit discharges of pollutants into navigable waters, subject to specific terms and conditions.
9. Section 402(p) of the Act, 33 U.S.C. §1342(p), establishes a program under which NPDES permits may be issued to authorize discharges of storm water associated with industrial activities.
10. Any discharge from construction activity that disturbs at least one or more acres constitutes a storm water discharge associated with industrial activity. 40 C.F.R. § 122.26(b)(14)(x).
11. 40 C.F.R. § 122.21 requires persons who discharge or propose to discharge "storm water associated with industrial activity" to apply for an individual permit or seek coverage under a promulgated storm water general permit.
12. The State of Colorado was approved by the EPA to administer the NPDES program on March 27, 1975. 40 Fed. Reg. 16713, April 14, 1975. A permit issued by the Colorado Department of Public Health and Environment (CDPHE) under Colorado's EPA-approved NPDES program is known as a CDPS permit.
13. Effective July 1, 2007, CDPHE issued an NPDES general permit, CDPS Permit Number COR030000 (Permit) authorizing discharges of storm water associated with construction activities, if done in compliance with its terms and conditions. Dischargers may apply for authorization to discharge under the Permit by submitting a notice of intent for coverage to CDPHE.
14. Section 309(g)(2)(A) of the Act, 33 U.S.C. § 1319(g)(2)(B), authorizes the assessment of a Class II civil penalty of up to \$16,000 per day for each day during which the violation of section 301 of the Act, 33 U.S.C. § 1311, continues, up to a maximum of \$177,500 for violations occurring after January 12, 2009 and prior to December 6, 2013. For all violations occurring after December 6, 2013, the amount of the penalty is increased to \$16,000 per violation for each day with a maximum total penalty of \$187,500. These amounts have been adjusted for

inflation by 40 C.F.R. part 19.

C. GENERAL ALLEGATIONS

15. Keller Homes is a Colorado corporation.
16. Respondent is a "person" within the meaning of section 502(5) of the Clean Water Act, 33 U.S.C. § 1362(5).
17. Respondent is engaged in constructing housing within a pre-existing subdivision known as the Trails Subdivision and located in Colorado Springs, Colorado (the Site).
18. Respondent's plan of development at the Site encompasses approximately 3 acres of individual lots within an 87-acre subdivision.
19. Construction activities began at the Site on March 10, 2014.
20. Prior to beginning construction, Respondent was required to have obtained a Permit from CDPHE. 40 C.F.R § 122.21(c).
21. The Respondent has, at all times relevant to the allegations in this CCCA, had day-to-day responsibility for construction activities at the Site.
22. Storm water, snow melt, surface drainage and runoff water have the potential to leave the Site and flow into the City of Colorado Springs Municipal Separate Storm Sewer System to an outfall on an unnamed tributary of Sand Creek, to Sand Creek.
23. Sand Creek is a "navigable water" as defined in section 502(7) of the Act, 33 U.S.C. § 1362(7), and a "water of the United States" as defined in 40 C.F.R. § 122.2.
24. Sand Creek is a tributary of Fountain Creek.
25. Fountain Creek is a "navigable water" as defined in section 502(7) of the Act, 33 U.S.C. § 1362(7), and a "water of the United States" as defined in 40 C.F.R. § 122.2.
26. Fountain Creek flows year-round to the Arkansas River, which is a navigable-in-fact, interstate waterway.
27. The runoff and drainage from the Site is "storm water" as defined in 40 C.F.R. § 122.26(b)(13).
28. Storm water contains "pollutants" as defined by section 502(6) of the Act, 33 U.S.C. § 1362(6).

29. The Arkansas River, Fountain Creek, and Sand Creek are “navigable waters” as defined by section 502(7) of the Act, 33 U.S.C. § 1562(7), and “waters of the United States” as defined by 40 C.F.R. § 122.2.
30. Each storm water discharge from the Site is the “discharge of a pollutant” as defined by section 502(12) of the Act, 33 U.S.C. § 1362(12), and 40 C.F.R. § 122.2.
31. Each storm water discharge from the Site is a discharge from a “point source” as that term is defined in section 502(14) of the Act, 33 U.S.C. § 1362(14), and 40 C.F.R. § 122.2. In order to restore and maintain the integrity of the nation’s waters, section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person into navigable waters, unless authorized by certain other provisions of the Act, including section 402 of the Act, 33 U.S.C. § 1342.
32. On September 17, 2014, EPA inspectors conducted a storm water inspection at the Site to determine compliance with the Act. At the time, the Respondent had not sought nor obtained authorization under a Permit to discharge storm water.
33. On July 13, 2015, the Respondent applied for a Permit which became effective on July 22, 2015.

D. ALLEGED VIOLATIONS

34. Based on the EPA’s inspection on September 17, 2014 and a review of all the information regarding this matter, the Respondent was engaged in a regulated industrial construction activity at the Site and failed to obtain Permit Authorization prior to initiating construction activities in March 2014. This violation continued through July 22, 2015. Therefore, Respondent was in violation of 40 C.F.R. § 122.21 and the Act from the time Respondent commenced construction activities on March 10, 2014 until Respondent obtained Permit authorization on July 22, 2015.

E. CIVIL PENALTY

35. Section 309(g)(3) of the Clean Water Act, 33 U.S.C. § 1319(g)(3), requires the EPA to take into account the following factors in assessing a civil administrative penalty: the nature, circumstances, extent and gravity of the violation(s) and, with respect to the violator, ability to pay, any prior history of such violations, degree of culpability, any economic benefit or savings gained from the violations, and such other factors that justice may require.

Nature, Circumstances, Extent, and Gravity of Violations

36. At the time of the September 17, 2014 inspection, EPA noted that the Respondent

did not have a permit or storm water management plan, nor were there copies of any inspections. EPA noted in its inspection that Best Management Practices (BMPs) were in good operating condition. The Respondent did subsequently provide inspection reports that were performed within the timelines specified by the Permit.

37. Storm water discharges from construction sites can severely compromise the integrity of our nation's waters. High sediment loads can cause siltation, which EPA found in 1998 to be the largest cause of impaired water quality in rivers and the third largest cause of impaired water quality in lakes. Other pollutants can be absorbed into fine sediment, causing nutrients, especially phosphorus, metals, and organic compounds, to move into aquatic ecosystems. Discharges from construction sites have been identified as a source of pollution in 6 percent of impaired rivers; 11 percent of impaired lakes, ponds, and reservoirs; and 11 percent of impaired estuaries. Sediment can fill lakes and reservoirs and clog stream channels, with effects extending far downstream of the discharge. EPA has found that erosion rates from construction sites are much greater than from almost any other land use. Suspended sediment concentrations from construction sites have been found to be many times the concentrations from developed urban areas. Excess sediment is associated with increased turbidity, with reduced light penetration in the water column, with long-term habitat destruction, and with increased difficulty in filtering drinking water. See 64 Fed. Reg. 68722, 68728-68731 (Dec. 8, 1999) for more information on how discharges from construction sites cause water pollution.
38. The EPA and states with authorized NPDES programs rely on permits to implement the controls needed to prevent water pollution. Respondent's failure to obtain a Permit jeopardizes the integrity of EPA's and CDPHE's programs to control storm water pollution.

Prior Compliance History

39. This CCCA is the only enforcement action EPA has issued to Respondent regarding noncompliance with storm water requirements. CDPHE has not issued any enforcement actions to Respondent regarding noncompliance with storm water requirements.

Degree of Culpability

40. The EPA's storm water program has been in place since 1990. Respondent should have been aware of the applicable storm water requirements because they have been in business 1983, with numerous current developments in the Colorado Springs area. In their response to EPA's June 17, 2015 Letter of Potential Violation of the Clean Water Act, Respondent states that when they entered into a purchase agreement for the Site, the developer did not mention that the Respondent needed to obtain a permit. The Respondent stated it thought it was

operating under the developer's permit. The Respondent was responsible for determining its need to get a Permit prior to commencing construction activities at the Site.

41. In 1990, EPA promulgated Phase I of its storm water program. (55 Fed. Reg. 47990-48091, November 16, 1990.) Phase I required NPDES permit authorization for storm water discharges from construction activity disturbing five or more acres of land, either by itself or in conjunction with other parts of a common development. (55 Fed. Reg. at 48066.) In 1999, EPA extended this requirement to storm water discharges from construction activity disturbing between 1 and 5 acres of land. (64 Fed. Reg. 68722, 68839, December 9, 1999.)

Economic Benefit

42. Respondent received an economic benefit from its failure to fully comply with the requirements in the Permit. Respondent received an economic benefit by failing to timely develop, apply for, and receive, a Permit prior to initiating construction activities

Ability to Pay

43. The EPA did not reduce the proposed penalty due to this factor.

Other Matters that Justice May Require

44. The EPA made adjustments to the penalty for Respondent's cooperation and responsiveness in correcting the violation once they were notified of its failure to obtain the Permit.

Penalty

45. Respondent consents and agrees to pay a civil penalty in the amount of sixteen thousand dollars (\$16,000) and also consents to the issuance of a final order. Respondent shall pay the penalty within thirty (30) days of the effective date of the Final Order in this matter.
46. Payments shall be made in the manner described below:
 - a. Payment shall be made according to the instructions on the attached document entitled Attachment A, Collection Information, which is herein made a part of this CCCA. A copy of the check or evidence or wire transfer shall be sent simultaneously to:

Laurel Dygowski
NPDES Enforcement Unit
U.S. EPA, Region 8

1595 Wynkoop Street
MC- 8ENF-W-NP
Denver, CO 80202-1129

and

Tina Artemis, Regional Hearing Clerk (SRC)
U.S. EPA Region 8
1595 Wynkoop Street
Denver, CO 80202-1129

- b. In the event payment is not received by the specified due date, interest will accrue from the date of the Final Order, not the due date, at a rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717, and will continue to accrue until payment in full is received, (i.e., on the 1st late day, 30 days of interest accrues).
- c. In addition, a handling charge of fifteen dollars (\$15) shall be assessed the 31st day from the date of the Final Order, and each subsequent thirty day period that the debt, or any portion thereof, remains unpaid. In addition, a six percent (6 %) per annum penalty shall be assessed on any unpaid principal amount if payment is not received within 90 days of the due date (i.e., the 121st day from the date the Final Order is signed for the initial installment). Payments are first applied to outstanding handling charges, 6 % penalty interest, and late interest. The remainder is then applied to the outstanding principal amount.
- d. Respondent agrees that the penalty shall never be claimed as a federal or other tax deduction or tax credit.

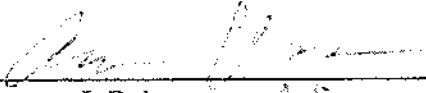
F. TERMS AND CONDITIONS

- 47. Nothing in this CCCA shall relieve Respondent of the duty to comply with the Act and its implementing regulations.
- 48. Failure by Respondent to comply with any of the terms of this CCCA shall constitute a breach of the CCCA and may result in referral of the matter to the Department of Justice for enforcement of this CCCA and for such other relief as may be appropriate.
- 49. Nothing in this CCCA shall be construed as a waiver by the EPA or any other federal entity of its authority to seek costs or any appropriate penalty associated with any collection action instituted as a result of Respondent's failure to perform pursuant to the terms of this CCCA.
- 50. The undersigned representative for Respondent certifies that he is fully authorized to enter into and be bound by the terms and conditions of this CCCA.

51. Respondent waives any and all claims for relief, and otherwise available rights to judicial or administrative review or other remedies which the Respondent may have, with respect to any issue of fact or law or any terms and conditions set forth in this CCCA, including any right of judicial review under the Administrative Procedure Act, 5 U.S.C. sections 701 through 706.
52. In accordance with 40 C.F.R. § 22.45, the EPA will provide public notice of this action. The EPA may modify or withdraw its consent to this CCCA if comments received disclose facts or considerations which indicate that the CCCA is inappropriate, improper, or inadequate.
53. If comments received during the public comment period do not require modification of or withdrawal from this CCCA by the EPA, the parties agree to submit this CCCA to the Regional Judicial Officer, with a request that it be incorporated into a final order.
54. Each party shall bear its own costs and attorney fees in connection with this matter.
55. This CCCA, upon incorporation into a final order by the Regional Judicial Officer and full satisfaction by the parties, resolve Respondent's liability for Federal civil penalties for the violations alleged herein.


**UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY, REGION 8**

Date: 3/23/16

By: 
Suzanne J. Bohan
Assistant Regional Administrator
Office of Enforcement, Compliance,
and Environmental Justice

KELLER HOMES, INC.

Date: 4/27/2016

By: 
David A. Keller, President
Keller Homes, Inc.

Attachment A

COLLECTION INFORMATION

Payment shall be due on or before 30 calendar days after the date of the Final Order issued by the Regional Judicial Officer who adopts this agreement. If the due date falls on a weekend or Legal Federal holiday, then the due date is the next business day. Payments must be received by 11:00 a.m. Eastern Standard Time to be considered as received that day.

In the event payment is not received by the specified due date, interest accrues from the date of the Final Order, not the due date, at a rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717, and will continue to accrue until payment in full is received. (That is, on the 1st late day, 30 days of interest accrues.) In addition, a handling charge of fifteen dollars (\$15) shall be assessed the 61st day from the date of the Final Order, and each subsequent thirty-day period that the debt, or any portion thereof, remains unpaid. In addition, a six percent (6%) per annum penalty shall be assessed on any unpaid principal amount if payment is not received within 90 days of the due date (that is, the 121st day from the date the Final Order is signed). Payments are first applied to handling charges, 6% penalty interest, and late interest; then any balance is applied to the outstanding principal amount.

The payment shall be made by remitting a cashier's or certified check, including the name and Docket number of this case, for the amount, payable to "Treasurer, United States of America," (or be paid by one of the other methods listed below) and sent as follows:

CHECK PAYMENTS- U.S. Postal Service:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000
Contact: Craig Steffen, 513-487-2091

OVERNIGHT MAIL

(Federal Express, Airborne, or other commercial carrier):

US Bank
Cincinnati Finance Center Box 979077
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

WIRE TRANSFERS (FEDWIRE):

Wire transfers should be directed to the Federal Reserve Bank of New York
Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address= FRNYUS33
3 3 Liberty Street
New York NY 10045
Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental
Protection Agency"

ON LINE PAYMENT:

There is now an On Line Payment Option, available through the Dept. of Treasury.
This payment option can be accessed from the information below:
WWW.PAY.GOV
Enter sfo 1.1 in the "Search Public Forms" field
Open form and complete required fields then click "Submit Data".

AUTOMATED CLEARINGHOUSE (VENDOR EXPRESS)

Automated clearinghouse payments can be made through the US Treasury using the
following information:
US Treasury REX/Cashlink ACH Receiver
ABA: 051036706
Account Number: 310006, Environmental Protection Agency
CTX Format Transaction Code 22- checking
Physical location of US Treasury Facility:
5700 Rivertech Court
Riverdale, MD 20737

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION 8
1595 Wynkoop Street, Denver, CO 80202-1129**

**PUBLIC NOTICE OF PROPOSED COMBINED COMPLAINT AND CONSENT
AGREEMENT AND OPPORTUNITY TO COMMENT**

Action: The EPA is providing notice of the opportunity to comment on a proposed Combined Complaint and Consent Agreement (CCCA). The agreement relates to alleged storm water violations of the Clean Water Act (CWA) at the Trails Subdivision in Colorado Springs, Colorado where Keller Homes, Inc. (Keller) was constructing residential housing. The corporate address of Keller is 536 Chapel Hill Drive #150, Colorado Springs, Colorado, 80920.

Summary: The EPA is authorized by section 309(g)(2) of the CWA, 33 U.S.C. § 1319(g)(2), and by 40 C.F.R. §§ 22.13(b) and 22.38, to issue an order assessing a civil administrative penalty for violations of certain CWA requirements, after providing (1) an opportunity for the person to be assessed the penalty (Respondent) to request a hearing to contest the penalty, and (2) notification to the public of its rights to submit written comments and to participate in any hearing. The deadline for the public to submit comments is thirty days after issuance of this notice.

The EPA and Keller have agreed to enter into a CCCA to resolve the EPA's allegations that Keller violated the requirement listed below. Keller has agreed to pay a civil penalty of \$16,000.00 to resolve its civil penalty liability for this claim. Pursuant to section 309(g)(4) of the CWA, the EPA hereby notifies the public of the opportunity to comment on this proposed penalty assessment.

EPA Docket Number for proposed expedited settlement:

Alleged violation: (1) Respondent has discharged storm water into waters of the United States from its site without authorization by any permit issued under the CWA from March 2014 through July 22, 2015.

PUBLIC COMMENTS

Written comments on the expedited settlement agreement are encouraged and will be accepted at the address listed below for a period of thirty (30) days after the publication of this notice. Written comments submitted by the public as well as information submitted by Respondent will be available for public review, subject to the provisions of law restricting the disclosure of confidential information. Any person submitting written comments has a right to participate in a hearing, if one is held. The complaint is available for review between 9:00 a.m. and 4:00 p.m. at the address listed below and on the internet at: <http://yosemite.epa.gov/oa/rhc/epaadmin.nsf>.

Please submit written comments to:

Tina Artemis (8RC)
Regional Hearing Clerk
U.S. EPA, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129
Telephone: (303) 312-6765

FOR FURTHER INFORMATION: Persons wishing to receive a copy of the expedited settlement agreement or other documents in this proceeding (such as the regulations in 40 C.F.R. part 22, which establish procedures for the hearing), or to comment upon the proposed penalty assessment or upon any other aspect of the matter, should contact the Regional Hearing Clerk identified above.

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **COMBINED COMPLAINT AND CONSENT AGREEMENT and FINAL ORDER** in the matter of **KELLER HOMES, INC.:** **DOCKET NO.: CWA-08-2016-0005** was filed with the Regional Hearing Clerk on March 10, 2016.

Further, the undersigned certifies that a true and correct copy of the documents were emailed to, Marc Weiner, Senior Enforcement Attorney. True and correct copies of the aforementioned documents were placed in the United States mail certified/return receipt on June 7, 2016, to:

Respondent

David A. Keller, President
Keller Homes, Inc.
564 Chapel Hills Drive, Suite 150
Colorado Springs, CO 80920

And emailed to:

Jessica Farmer
U. S. Environmental Protection Agency
Cincinnati Finance Center
26 W. Martin Luther King Drive (MS-0002)
Cincinnati, Ohio 45268

June 7, 2016



Melissa Haniewicz
Regional Hearing Clerk

