



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 10
1200 Sixth Avenue
Seattle, WA 98101

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HEARINGS CLERK
EPA -- REGION 10

June 5, 2003

Certified Mail - Return Receipt Requested

Reply To
Attn Of: ORC-158

William Sherlock, Attorney at Law
Hutchinson Cox
777 High Street, Suite 200
Eugene, OR 97401

Re: Agee Construction Company
Docket No. CWA-10-2002-0070

Dear Mr. Sherlock:

Enclosed is a conformed copy of the Consent Agreement and Final Order (CAFO) which was filed in the matter referenced above earlier today. Please note that the first penalty payment of \$343 is due within 60 days of today's date as required in paragraph 3.5 of the CAFO. Please also note the deadlines for completing the Supplemental Environmental Project (SEP) and submitting the SEP Completion Report described in paragraphs 3.11 and 3.12 of the CAFO.

Please contact me at (206) 553-1810, if you have any questions regarding this matter. Thank you for your cooperation in resolving this matter.

Sincerely,

Deborah E. Hilsman
Assistant Regional Counsel

cc: Regional Hearing Clerk
Honorable Susan L. Biro

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HEARINGS CLERK
EPA--REGION 10

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BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

Gilbert Agee, individually,
and doing business as,
Agee Construction Co.,
Douglas County, Oregon,

Respondent.

)
)
) Docket No. CWA-10-2002-0070
)
)
)

)
) CONSENT AGREEMENT
) AND FINAL ORDER
)
)
)

I. AUTHORITY

1.1. This Consent Agreement and Final Order (“CAFO”) is issued under the authority vested in the Administrator of the United States Environmental Protection Agency (“EPA”) by Section 309(g) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g). The Administrator has delegated the authority to issue the Final Order contained in Part IV of this CAFO to the Regional Administrator of EPA, Region 10.

1.2. Pursuant to Section 309(g)(1) and (g)(2)(B) of the CWA and in accordance with the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties,” 40 C.F.R. Part 22, EPA hereby issues, and Respondent, Gilbert Agee, hereby agrees to the issuance of, the Final Order contained in Part IV of this CAFO.

II. PRELIMINARY STATEMENT

2.1. On July 9, 2002, EPA initiated this proceeding against Gilbert Agee, individually and doing business as Agee Construction Company (“Respondent”) pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), by filing a Complaint against Respondent for the assessment of an administrative penalty.

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Mellon Client Services Center
EPA Region 10
500 Ross Street
P.O. Box 360903
Pittsburgh, PA 15251-6903

Respondent shall note on each check the title and docket number of this case.

3.8. Respondent shall serve photocopies of the check described above on the Regional Hearing Clerk and Complainant at the following two addresses:

Regional Hearing Clerk
U.S. Environmental Protection Agency
1200 Sixth Avenue, Mail Stop ORC-158
Seattle, Washington 98101

Yvonne Vallette
U.S. Environmental Protection Agency
Oregon Operations Office
811 SW 6th Avenue, 3rd Floor
Portland, Oregon 97204

3.9. Should Respondent fail to pay the each penalty installment payment assessed by this CAFO in full by its due date, the entire unpaid balance of penalty and accrued interest shall become immediately due and owing. Should such a failure to pay occur, Respondent may be subject to a civil action to collect the assessed penalty under the CWA. In any collection action, the validity, amount, and appropriateness of the penalty shall not be subject to review.

3.10. Should Respondent fail to pay any portion of the penalty assessed by this CAFO in full by its due date, Respondent shall also be responsible for payment of the following amounts:

a. Interest. Pursuant to Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), any unpaid portion of the assessed penalty shall bear interest at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717(a)(1) from the effective date of the Final Order contained herein, provided, however, that no interest shall be payable on any portion of the assessed penalty that is paid within thirty (30) days of the effective date of the Final Order contained herein.

b. Attorneys Fees, Collection Costs, Nonpayment Penalty. Pursuant to Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), should Respondents fail to pay on a timely basis the amount of the penalty assessed by the Final Order contained herein, Respondents

1 shall pay (in addition to any assessed penalty and interest), attorneys fees and costs for
2 collection proceedings and a quarterly nonpayment penalty for each quarter during which
3 such failure to pay persists. Such nonpayment penalty shall be in an amount equal to twenty
4 percent (20%) of the aggregate amount of Respondent's penalties and nonpayment penalties
5 which are unpaid as of the beginning of such quarter.

6 3.11. Within one year of the effective date of this CAFO, Respondent shall complete a
7 SEP, which the parties agree is intended to secure significant environmental benefits, pursuant to the
8 following conditions:

9 a. Respondent will contract with the Douglas County Soil and Water Conservation District
10 (DCSWCD) to complete the Earthwork and Shaping phase of the Hockman Wetland Enhancement
11 Project. The project location is near Sutherlin, Oregon, adjacent to an unnamed tributary to
12 Calapooya Creek at Township 25S, Range 06W, Section 26. The project consists of earthwork
13 intended to improve the site's ability to retain water further into the dry season. The expected
14 benefits from the project will be improved hydrologic function and wild life habitat in an area where
15 past land use practices have degraded the surface hydrology of the area. In implementing the
16 Earthwork and Shaping phase of the project, Respondent will spend at least \$12,000 to construct a
17 water control structure, conduct spillway improvement earthwork, and provide spillway materials at
18 no cost to the DCSWCD up to and including the \$12,000 amount. A detailed description of the SEP
19 is contained in Attachment 1 to this CAFO. Respondent shall provide documentation of the total
20 cost of the SEP, including any expenditures made in implementing the SEP, as part of the SEP
21 Completion Report described below.

22 b. Respondent agrees not to deduct \$12,000, or any portion thereof, of the cost of the
23 SEP from its federal or state income tax.

24 3.12. Respondent shall submit a SEP Completion Report to EPA no later than thirty (30)
25 days following completion of the SEP. Failure by Respondent to timely submit a complete and
26 accurate SEP Completion Report shall be deemed a violation of this CAFO and shall subject
27 Respondent to stipulated penalties pursuant to paragraph 3.14 of this CAFO. The SEP Completion
28 Report shall contain the following information:

- 1 a. A detailed description of the SEP as implemented.
- 2 b. An itemization of costs incurred by Respondent in implementing the SEP
3 (documented by purchase orders, receipts, canceled checks, etc.);
- 4 c. Documentation from the DCSWCD that Respondent has satisfactorily completed
5 the Earthwork and Shaping phase of the Hockman Wetland Enhancement Project; and
- 6 d. Certification in the form of a signed declaration by Respondent that the SEP has
7 been fully implemented pursuant to this CAFO and that Respondent has not deducted
8 \$12,000, or any portion thereof, of the SEP expenditures from his federal or state income tax.

9 3.13. Following receipt of the SEP Completion Report described in the preceding
10 paragraph, EPA will do one of the following:

- 11 a. Approve the SEP Completion Report;
- 12 b. Reject the SEP Completion Report, notify Respondent in writing of deficiencies in
13 the Report, and grant Respondent an additional thirty (30) days in which to correct any
14 deficiencies; or
- 15 c. Disapprove the SEP Completion Report and seek stipulated penalties in
16 accordance with paragraph 3.14 of this CAFO.

17 If EPA elects to exercise option (b) or (c) above, EPA shall allow Respondent the opportunity to
18 object in writing to the notification of deficiency or disapproval given pursuant to this paragraph
19 within ten (10) days of receipt of such notification. EPA and Respondent shall have an additional
20 thirty (30) days from receipt by EPA of the notification of objection to reach agreement. If
21 agreement cannot be reached on any issue within this thirty (30) day period, EPA shall provide a
22 written statement of its decision to Respondent, which decision shall be final and binding upon
23 Respondent. Respondent agrees to comply with any requirements imposed by EPA as a result of any
24 deficiency. In the event the SEP is not completed as contemplated herein, as determined by EPA,
25 stipulated penalties shall be due and payable by Respondent to EPA in accordance with paragraph
26 3.14 of this CAFO.

1 3.14. In the event that Respondent fails to comply with any of the terms or provisions of
2 this CAFO relating to the performance of the SEP, Respondent shall be liable for stipulated penalties
3 according to the following provisions:

4 a. For a SEP that has not been completed satisfactorily pursuant to this CAFO,
5 Respondent shall pay a stipulated penalty to the United States in the amount of \$12,000.

6 b. If the SEP is satisfactorily completed, but Respondent spent less than ninety
7 percent (90%) of the amount of money required to be spent for the project, Respondent shall
8 pay a stipulated penalty to the United States in the amount of the difference between \$12,000
9 and the amount spent to complete the SEP.

10 c. If the SEP is satisfactorily completed, and Respondent spent at least ninety percent
11 (90%) of the amount of money required to be spent for the project, Respondent shall not be
12 liable for any stipulated penalty.

13 d. For failure to timely submit the SEP Completion Report required by paragraph
14 3.12 of this CAFO, Respondent shall pay a stipulated penalty in the amount of \$100.00 for
15 each day after the report is due until it is submitted. Such stipulated penalties shall begin to
16 accrue on the day after performance is due, and shall continue to accrue until the report is
17 submitted, provided that the total stipulated penalties for failure to submit the report shall not
18 exceed \$12,000.

19 3.15. The determination of whether the SEP has been satisfactorily completed and whether
20 Respondent has made a good faith, timely effort to implement the SEP shall be in the sole discretion
21 of EPA.

22 3.16. Respondent shall pay stipulated penalties within fifteen (15) days of receipt of a
23 written demand by EPA for payment of such penalties. Stipulated penalties shall be paid in
24 accordance with the provisions of paragraphs 3.7 and 3.8 of this CAFO. Interest and late charges
25 shall accrue as described in paragraph 3.10 of this CAFO.

26 3.17. Respondent will obtain access for EPA to inspect the site at any time in order to
27 confirm that the SEP is being undertaken in conformity with the representations made herein.

28 3.18. All reports and submissions required by this CAFO shall be made to:

1 Yvonne Vallette
2 U.S. Environmental Protection Agency
3 Oregon Operations Office
4 811 SW 6th Avenue, 3rd Floor
5 Portland, Oregon 97204

6 3.19. Any public statement, oral or written, in print, film, or other media, made by
7 Respondent making reference to the SEP, shall include the following language: "This project was
8 undertaken in connection with settlement of an enforcement action taken by the U.S. Environmental
9 Protection Agency for violations of the Clean Water Act."

10 3.20. The penalties described in paragraphs 3.3 and 3.14 of this CAFO shall represent civil
11 penalties assessed by EPA and shall not be deductible for purposes of federal taxes.

12 3.21. Except as described in paragraph 3.10 of this CAFO, each party shall bear its own
13 costs in bringing or defending this action.

14 3.22. Respondent expressly waives any rights to contest the allegations and to appeal the
15 Final Order contained herein.

16 3.23. The provisions of this CAFO shall bind Respondent and his agents, servants,
17 employees, successors, and assigns.

18 STIPULATED AND AGREED:

19 FOR GILBERT AGEE

20 
21 _____
22 WILLIAM SHERLOCK
23 Counsel for Respondent

Dated: 5/27/03

24 U.S. ENVIRONMENTAL PROTECTION AGENCY

25 
26 _____
27 DEBORAH E. HILSMAN
28 Assistant Regional Counsel

Dated: 5/29/03

1 **IV. FINAL ORDER**

2 4.1. The terms of the foregoing Consent Agreement are hereby ratified and incorporated
3 by reference into this Final Order. Respondent is hereby ordered to comply with the foregoing terms
4 of settlement.


5 4.2. This CAFO constitutes a settlement by EPA of all claims for civil penalties pursuant
6 to the Clean Water Act for the particular violations alleged in the Complaint. In accordance with
7 40 C.F.R. § 22.31(a), nothing in this CAFO shall affect the right of EPA or the United States to
8 pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.
9 This CAFO does not waive, extinguish, or otherwise affect Respondent's obligations to comply with
10 all applicable provisions of the CWA and regulations and permits issued thereunder.

11 4.3. In accordance with Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), and
12 40 C.F.R. § 22.38(b), the Oregon Division of State Lands has been given an opportunity to consult
13 with EPA regarding the assessment of an administrative penalty against Respondent.

14 4.4. Pursuant to Section 309(g)(4)(A) of the CWA, 33 U.S.C. § 1319(g)(4)(A), in July
15 2002, EPA published public notice of its intent to assess an administrative penalty against
16 Respondents and invited public comment in accordance with 40 C.F.R. § 22.45. More than 40 days
17 have elapsed since the issuance of the public notice and EPA has received no comments concerning
18 this matter.

19 4.5. This Final Order shall become effective upon filing.

20
21 SO ORDERED this 29th day of MAY, 2003.

22
23 
24 L. JOHN IANI
25 Regional Administrator
26 U.S. Environmental Protection Agency
27 Region 10
28

1 **CERTIFICATE OF SERVICE**

2 I certify that the foregoing "Consent Agreement and Final Order" was sent to the following
3 persons, in the manner specified, on the date below:

4 Original and one copy, hand-delivered:

5 Carol Kennedy, Regional Hearing Clerk
6 U.S. Environmental Protection Agency, Region 10
7 1200 Sixth Avenue, Mail Stop ORC-158
Seattle, Washington 98101

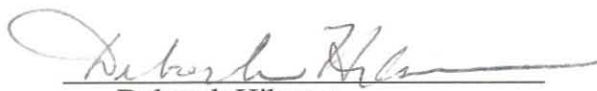
8 True and correct copy via pouchmail:

9 Hon. Susan L. Biro
10 Chief Administrative Law Judge
11 Office of the Administrative Law Judges
12 U.S. Environmental Protection Agency
Ariel Rios Building
Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

13 A true and correct copy, by certified mail, return receipt requested and courtesy copy via fax:

14 William Sherlock, Attorney at Law
15 Hutchinson Cox
16 777 High Street, Suite 200
Eugene, OR 97401
17 FAX: 541-343-8693

18 Dated: June 5, 2003

19 
20 Deborah Hilsman
21 U.S. EPA Region 10

Description of Hockman Wetland Enhancement Project as contained in
the Oregon Watershed Enhancement Board, Soil and Water
Conservation District Small Grant Program Application

Oregon Watershed Enhancement Board
Soil and Water Conservation District
Small Grant Program
Application Form



District Name Douglas SWCD

Name of Project Hockman Wetland Enhancement

Amount Requested \$4,024

To Be Completed by ODA

Reference to Capitol Expenditure Definition _____

Recommend for funding to OWEB _____

Signature

Date

Other Comments _____

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OFFICE OF REGIONAL COUNSEL
EPA - REGION IX

APPLICATION FORM
OREGON WATERSHED ENHANCEMENT BOARD (OWEB)
SOIL AND WATER CONSERVATION DISTRICT GRANT PROGRAM

Soil and Water Conservation District

<i>Name</i> Douglas SWCD
<i>Address</i> 1443 NE Vine St.
<i>City, State, Zip</i> Roseburg, OR 97470
<i>Phone No.</i> 541-957-5061

Applicant

<i>Name</i> Same
<i>Address:</i>
<i>City, State, Zip</i>
<i>Phone No.</i>

1. Use of Funds/Type of Project (check all that apply)

- Personal property of a non-expendable nature including items that are not consumed in the normal course of operations, can normally be used more than once, have a useful life of more than two years, and are for use in the enforcement of fish and wildlife habitat protection laws and regulations; or
- Projects that restore, enhance or protect fish and wildlife habitat, watershed functions, native salmonid populations, or water quality, including, but not limited to:
 - Assessment, research, design, or other technical requirements for the implementation of a project;
 - Acquisition of determinate interests, including fee and less-than-fee interests, in land or water in order to protect watershed resources, including appraisal costs and other costs directly related to such acquisitions;
 - Development, construction, or implementation of a project to restore, enhance, or protect water quality, a watershed, fish or wildlife, or riparian or other habitat;
 - Technical support directly related to the implementation of a project; and
 - Monitoring or evaluation activities necessary to determine the actual effectiveness of a project.

2. Project Name

Hockman Wetland Enhancement

3. Describe the problem the project proposes to address (attach additional sheets, if necessary).

The project area was planted with conifers within the last ten years and all are dead or dying. The soils in the area are not suitable for conifers. The area is surprisingly wet and is best suited for some other land use. The landowner is interested in improving habitat and returning it to a more natural function.

(The attached photos show the area and a number of dead trees.)

4. Describe the proposed project (attach additional sheets, if necessary).

This phase of the project will be the design and development stage. The site work will require a permit and that requires a design. Ultimately, the goal is to do some well-planned earthwork to improve the site's ability to retain water further into the dry season and greatly increase shallow water. Additional native vegetation will be planted to improve the habitat. Because no livestock is on the property, no fencing is needed and wildlife will not be hindered by it. After the phase one work is completed, other funding sources will be used to accomplish the on-the-ground work.

5. Describe the expected benefits of the project.

The project will improve hydrologic function and wildlife habitat in an area under different management (tree production). This area will benefit from re-establishment of native vegetation. By retarding the movement of water, the wet area will stay wet later into the season and increase downstream benefits of water availability.

6. Describe specifically how requested OWEB funds are to be used.

OWEB funds will be used for management, design/planning costs, in-field surveying, survey equipment rental, and mileage.

7. What aspects of the projects will be monitored?

What	How	Length of Time
Vegetation (Planted with other funds)	Photos will be taken to show the changes over time. Plant survival will be evaluated. A minimum survival rate will be required.	10 years
Wildlife Utilization (Habitat benefits will be completed with other funding)	Landowner will periodically note what animal species are utilizing the enhanced area.	10 years

The outcome from this specific application will be a technical design and a permit. The outcome from the on-the-ground work will be monitored.

8. Identify the project location:

Township 25S

Range: 06W

Section 26

River Name: Unnamed trib to Calapooya Ck

Mile: 1.6 (is @ headwaters)

Name of Nearby Town: Sutherlin

9. List names and addresses of all affected landowners as a result of the project.

Name	Address
Lee Hockman	359 Tanglewood Roseburg, OR 97470

10. Identify all groups, volunteers or agencies, participating in the project.

Name Douglas SWCD	Participation Effort Project management, project design, construction supervision, etc.
Name Oregon Department of Fish and Wildlife	Participation Effort Technical support
Name Lee Hockman	Participation Effort Labor, planning, etc.

11. Indicate evidence of authorization for access to the location to perform and monitor project work.

Landowner will enter into a Douglas SWCD District agreement prior to starting the project. That agreement specifies authorization to access the property.

12. Have the permits required for the project been obtained? If no, please explain.

Because the wetland area will effectively "store" water and extend the wet season, a permit is required from Water Resources Department. The permit can't be obtained until after the design has been completed and approved. The permit will be one of the outcomes of the first phase. A second permit (DSL wetland GA) will be needed. The application for this permit will be part of the outcomes of this project.

13. Projected Project Budget Estimate.

Category	No. of Units	Unit Cost	OWEB Funds	In-kind Funds or Services	Description
See attached					
Total Budget			4,024.00	24,650.60	

14. Date when project will be completed:

Design and permit applications will be completed by 6/30/03.

15. Signatures

Soil and Water Conservation District

Applicant

By _____

By _____

Title District Manager

Title District Manager

Date _____

Date _____

Attach the following to this Application:

- **Map of project site or location**
- **"Before" color photographs**
- **Other documentation supporting the project and expenditures (i.e., bids, reports, surveys, studies, etc.)**
- **Intergovernmental Agreement**
- **Certification to Comply with Federal, State and Local Laws**
- **Certification to Natural Resources Division**

Districts Return Application to: Natural Resources Division, Oregon Department of Agriculture

Attn: Torey Labrousse

635 Capitol Street NE, Salem, Oregon 97301-2532

Phone: (503) 986-4775

Fax: (503) 986-4730

Email: vlabrous@oda.state.or.us

Budget for Hockman Wetland Enhancement

	Unit	# of Units	Unit Cost	Total	ODA Small Grant	Other Cash Source	District/ Landowner	
Project Planning								
Project and Maintenance Plan Development	hr.	24	39.00	936.00	936.00	0.00	0.00	
Permit Development and Application	hr.	8	39.00	312.00	312.00	0.00	0.00	
Water Right Evaluation	hr.	8	20.00	160.00	0.00	0.00	160.00	
Site Characteristic Evaluation and Project Design								
Topography Evaluation and Surveying (2 person crew)	hr.	6	70.00	420.00	420.00	0.00	0.00	
Survey Equipment and Software (Rental fee)	total	1	500.00	500.00	500.00	0.00	0.00	
Site Design/Engineering for Hydrologic Improvements	hr.	36	39.00	1,404.00	702.00	0.00	0.00	
Earthwork and Shaping								
Water Control Structure Construction	total	1	11,500.00	11,500.00	0.00	11,500.00	0.00	
Spillway Improvement Earthwork/Handwork	total	1	500.00	500.00	0.00	500.00	0.00	
Spillway Materials	total	1	1,000.00	1,000.00	0.00	1,000.00	0.00	
Construction Supervision	hr.	24	39.00	936.00	0.00	936.00	0.00	
Wetland Vegetation Establishment								
Planting Plan Development (Multi-year Plan)	hr.	16	39.00	624.00	624.00	0.00	0.00	
Plants/Shrubs/Trees/Seed (Wetland Component)	acre	2	750.00	1,500.00	0.00	1,500.00	0.00	
Plant Protection Supplies	total	600	0.28	168.60	0.00	168.60	0.00	
Planting Labor	total	32	20.00	640.00	0.00	640.00	0.00	
Planting Supervision	hr.	16	31.00	496.00	0.00	496.00	0.00	
Weed Control/Maintenance Labor (Cert. Applicator, 8 years@ 5 hrs/yr)	hr.	40	61.00	2,440.00	0.00	0.00	2,440.00	
Weed Control/Maintenance Supplies (8 years)	total	1	1,000.00	1,000.00	0.00	0.00	1,000.00	
Monitoring								
Monitoring Labor (Year 1, 2, 5, 10)	hr.	24	35.00	840.00	0.00	840.00	0.00	
Monitoring Mileage (8 years)	mile	200	0.36	72.00	0.00	72.00	0.00	
Project/Fiscal Management								
Project Management/Coordination/Contracting/Bidding, etc.	hr.	24	42.00	1,008.00	500.00	508.00	0.00	
Project Mileage (All phases except monitoring)	mile	250	0.36	90.00	30.00	60.00	0.00	
Landowner Contacts, Meetings, and Agreement Development	hr.	24	42.00	1,008.00	0.00	0.00	1,008.00	
Admin./Fiscal Mgt., Fraction of Audit Cost, Bookkeeper Reviews, etc.	total	1	1,822.00	1,822.00	0.00	1,822.00	0.00	
				Total-	29,376.60	4,024.00	20,042.60	4,608.00
						14%	68%	16%

Hockman Wetland Enhancement Project

