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II. PRELIMINARY STATEMENT

2.1. In accordance with 40 C.F.R. §§ 22.13(b) and 22.45(b), issuance of this CAFO commences this proceeding, which will conclude when the Final Order contained in Part V of this CAFO becomes final.

2.2. A concise statement of the factual basis for alleging violations of the Act, together with specific references to the provisions of the Act and implementing regulations Respondents are alleged to have violated, appears in Part III of this CAFO.

III. EPA'S ALLEGATIONS

3.1. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants to navigable waters by any person, except as authorized by a permit issued pursuant to Section 402 or 404 of the Act, 33 U.S.C. § 1342 or 1344. Each discharge of pollutants from a point source that is not authorized by such a permit constitutes a violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

3.2. Dave Forman is an officer of Pacific Topsoils, Inc. and is a "person" within the meaning of Sections 301(a) and 502(5) of the Act, 33 U.S.C. §§ 1311(a) and 1362(5).

3.3. Pacific Topsoils, Inc. is a corporation incorporated in the State of Washington, and is a "person" within the meaning of Sections 301(a) and 502(5) of the Act, 33 U.S.C. §§ 1311(a) and 1362(5).

3.4. Dave Forman and Pacific Topsoils, Inc. (jointly referred to hereafter as "Respondents") own and/or operate a business known as Rhode-A-Zalea on property located east of 35th Avenue SE, near Mill Creek, in Snohomish County, Washington ("the Site"). The Site is located within the southwest quarter of Section 33, Township 27 North, Range 5 East, Willamette Meridian.

1 3.5. The Site contains wetlands that are adjacent to Thomas Lake and Penny
2 Creek which are navigable-in-fact waters.

3 3.6. Thomas Lake, Penny Creek, and their adjacent wetlands are “navigable
4 waters” and “waters of the United States” within the meaning of Section 502(7) of the
5 Act, 33 U.S.C. § 1362(7), 33 C.F.R. § 328.3(a), and 40 C.F.R. § 232.2.

6 3.7. Sometime around June 2002, Respondents and/or persons acting on their
7 behalf discharged fill material into approximately 0.32 acres of adjacent wetlands at the
8 Site.

9 3.8. Respondents and/or persons acting on their behalf used heavy equipment
10 to place fill material into the adjacent wetlands at the Site. The heavy equipment used to
11 fill the wetlands is a “point source” within the meaning of Section 502(14) of the Act, 33
12 U.S.C. § 1362(14).

13 3.9. The fill material that Respondents and/or persons acting on their behalf
14 caused to be discharged included, among other things, dirt, spoil, rock, and sand, each of
15 which constitutes a “pollutant” within the meaning of Section 502(6) of the Act,
16 33 U.S.C. § 1362(6).

17 3.10. By causing such fill material to enter waters of the United States,
18 Respondents engaged in the “discharge of pollutants” from a point source within the
19 meaning of Sections 301 and 502(12) of the Act, 33 U.S.C. §§ 1311 and 1362(12).

20 3.11. Respondents’ discharges of fill material described above were not
21 authorized by any permit issued pursuant to Section 402 or 404 of the Act, 33 U.S.C.
22 § 1342 or 1344, and Respondents are therefore in violation of Section 301 of the Act,
23 33 U.S.C. § 1311.

24 3.12. On August 4, 2003, the U.S. Army Corps of Engineers (“Corps”) issued a
25 cease and desist letter to Pacific Topsoils, Inc., informing the company that the discharge
26

1 of fill material to the wetlands was in violation of federal law, and directing the company
2 to do no further discharging of dredged or fill material in wetlands at the Site.

3 3.13. In 2004, at the Corps' direction, Respondents removed the unauthorized
4 fill and replanted the wetland areas with native and naturally occurring wetland
5 vegetation.

6
7 **IV. CONSENT AGREEMENT**

8 The parties to this action hereby stipulate as follows:

9 4.1. Respondents admit the jurisdictional allegations contained in Part I of this
10 CAFO.

11 4.2. Respondents neither admit nor deny the allegations contained in Parts II
12 and III of this CAFO.

13 4.3. Pursuant to Section 309(g) of the Act, 33 U.S.C. § 1319(g), the nature,
14 circumstances, extent, and gravity of the alleged violations, Respondents' economic
15 benefit of noncompliance and ability to pay the proposed penalty, and other relevant
16 factors, EPA has determined and Respondents agree that an appropriate penalty to settle
17 this action is in the amount of TEN THOUSAND DOLLARS (\$10,000).

18 4.4. Respondents consent to the issuance of the Final Order in Part V below
19 and to payment of the civil penalty cited in the foregoing paragraph within thirty (30)
20 days of the effective date of the Final Order.

21 4.5. Payment under this CAFO shall be made by cashier's check or certified
22 check, payable to the order of "Treasurer, United States of America" and shall be
23 delivered to the following address:

24 U.S. Environmental Protection Agency
25 Region 10
26 P.O. Box 371099M
Pittsburgh, PA 15251

1 Respondents shall note on the check(s) the title and docket number of this case.
2 Respondents may also pay the penalty by wire transfer in accordance with instructions
3 provided by EPA.

4 4.6. Respondents shall serve photocopies of the check or documentation of the
5 wire transfer described above on the Regional Hearing Clerk and EPA at the following
6 two addresses:

7 Regional Hearing Clerk
8 U.S. Environmental Protection Agency
9 1200 Sixth Avenue, Mail Stop ORC-158
10 Seattle, Washington 98101

11 Office of Ecosystems and Communities
12 U.S. Environmental Protection Agency
13 1200 Sixth Avenue, Mail Stop ECO-083
14 Seattle, Washington 98101
15 Attn: Steve Roy

16 4.7. Should Respondents fail to pay the penalty assessed by this CAFO in full
17 by its due date, the entire unpaid balance of penalty and accrued interest shall become
18 immediately due and owing. Should such a failure to pay occur, Respondents may be
19 subject to a civil action to collect the assessed penalty under the Clean Water Act. In any
20 collection action, the validity, amount, and appropriateness of the penalty shall not be
21 subject to review.

22 4.8. Should Respondents fail to pay the penalty assessed by this CAFO in full
23 by its due date, Respondents shall also be responsible for payment of the following
24 amounts:

- 25 a. Interest. Pursuant to Section 309(g)(9) of the CWA, 33 U.S.C.
26 § 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.

1 b. Attorney Fees, Collection Costs, Nonpayment Penalty. Pursuant to
2 Section 309(g)(9) of the Act, 33 U.S.C. § 1319(g)(9), should Respondents fail to
3 pay on a timely basis the amount of the penalty assessed by the Final Order
4 contained herein, Respondents shall pay (in addition to any assessed penalty and
5 interest) attorney fees, costs for collection proceedings, and a quarterly
6 nonpayment penalty for each quarter during which such failure to pay persists.
7 Such nonpayment penalty shall be in an amount equal to twenty percent (20%) of
8 the aggregate amount of Respondents' penalties and nonpayment penalties which
9 are unpaid as of the beginning of such quarter.

10 4.9. Respondents waive their right to an adjudicatory hearing on any issue
11 addressed in this CAFO.

12 4.10. The provisions of this CAFO shall bind Respondents and their agents,
13 servants, employees, successors, and assigns.

14 4.11. Except as provided in paragraph 4.8 above, each party shall bear its own
15 costs, fees, and disbursements in this action.

16 4.12. Respondents agree not to claim or attempt to claim a federal income tax
17 deduction or credit covering all or any part of the civil penalty paid to the United States
18 Treasury.

19 4.13. The parties represent that they are duly authorized to execute this CAFO
20 and that the person signing this CAFO on each of their behalf is duly authorized to bind
21 them to the terms of this CAFO.

22 STIPULATED AND AGREED:

23 DAVE FORMAN and
24 PACIFIC TOPSOILS, INC.

25 _____
26 DAVE FORMAN, as an individual and
 as President of PACIFIC TOPSOILS, INC.

Dated: 5/2/07

1 U.S. ENVIRONMENTAL PROTECTION AGENCY

2 

3 DEBORAH E. HILSMAN
4 Assistant Regional Counsel

Dated: May 3, 2007

5
6 **V. FINAL ORDER**

7 5.1. The terms of the foregoing Consent Agreement are hereby ratified and
8 incorporated by reference into this Final Order. Respondents are hereby ordered to
9 comply with the foregoing terms of settlement.

10 5.2. This CAFO constitutes a compromise and settlement by EPA and
11 Respondents of all EPA's claims for civil penalties pursuant to the Clean Water Act for
12 the particular violations alleged in the Complaint. In accordance with 40 C.F.R.
13 § 22.31(a), nothing in this CAFO shall affect the right of EPA or the United States to
14 pursue appropriate injunctive or other equitable relief or criminal sanctions for any
15 violations of law. This CAFO does not waive, extinguish, or otherwise affect
16 Respondents' obligations to comply with all applicable provisions of the CWA and
17 regulations and permits issued thereunder.

18 5.3. In accordance with Section 309(g)(1) of the CWA, 33 U.S.C.
19 § 1319(g)(1), and 40 C.F.R. § 22.38(b), the Washington Department of Ecology has been
20 given the opportunity to consult with EPA regarding the assessment of an administrative
21 penalty against Respondents.

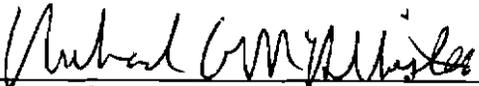
22 5.4. Pursuant to Section 309(g)(4)(A) of the Act, 33 U.S.C. ' 1319(g)(4)(A),
23 EPA has published public notice to inform the public of its intent to assess an
24 administrative penalty against Respondents and to invite public comment in accordance
25 with 40 C.F.R. ' 22.45. More than 40 days have elapsed since the issuance of this public
26 notice, and EPA has received no petitions to set aside the Consent Agreement contained
herein.

DAVE FORMAN AND PACIFIC TOPSOILS, INC
CONSENT AGREEMENT AND FINAL ORDER

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5.5. This Final Order shall become effective upon filing.

SO ORDERED this 18th day of June, 2007.



RICHARD G. MCALLISTER
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 10

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **CONSENT AGREEMENT AND FINAL ORDER** in **In the Matter of: Dave Forman and Pacific Topsoils, Inc., DOCKET NO.: CWA-10-2007-0115** was filed with the Regional Hearing Clerk on June 19, 2007.

On June 19, 2007 the undersigned certifies that a true and correct copy of the document was delivered to:

Deborah Hilsman, Esquire
1200 Sixth Avenue, ORC-158
Seattle, Washington 98101

Further, the undersigned certifies that a true and correct copy of the aforementioned document was placed in the United States mail certified/return receipt on June 19, 2007, to:

Brent Carson
Buck & Gordon, LLP
2025 First Avenue, Suite 500
Seattle, Washington 98121-3140

DATED this 19th day of June 2007.



Carol Kennedy
Regional Hearings Clerk
EPA Region 10



U.S. Environmental Protection Agency Region 10: The Pacific Northwest

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Pacific Topsoil Proposed Penalty

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10 (ORC-158)
1200 6TH AVENUE
SEATTLE, WA 98101

Date of Notice: May 4, 2007

Comment Period Open Until: June 4, 2007

Action: Proposal to Assess Penalty under the Clean Water Act

Description of Violation and Relief Sought: Pursuant to Section 309(g)(4) of the Clean Water Act (Act), the Environmental Protection Agency, Region 10 (EPA) is providing public notice of the proposed issuance of a penalty as described below. In order to provide opportunity for public comment, EPA will not take final action in this proceeding prior to 40 days after publication of this notice.

EPA proposes to commence an administrative penalty action against Pacific Topsoils, Inc., and Dave Forman (Respondents) for violations of the Clean Water Act (CWA). EPA alleges that in 2002, Respondents discharged dredged and/or fill material into about 0.32 acres of wetlands adjacent to Thomas Lake and Penny Creek. EPA alleges that these materials were discharged without a CWA permit in violation of Section 301(a) of the CWA. In 2004, the Respondents restored the site by removing the unauthorized fill and replanting the site with wetland vegetation. EPA proposes a penalty of \$10,000.

Persons wishing to comment on EPA's proposed action or to become participants in this action may do so by submitting their address and telephone number, along with written comments, to the Regional Hearing Clerk at the address above within 30 days of the date of this notice. This is a Class I administrative penalty proceeding, governed by Section 309(g)(2)(A) of the CWA and the procedural rules found at 40 C.F.R. Part 22. The requirements that apply to public comment and participation are set forth in 40 C.F.R. 22.45.

Name of Case: Dave Forman and Pacific Topsoils, Inc.

Docket Number of the Complaint: CWA-10-2007-0115

Name and address of Complainant:

Michelle Pirzadeh, Director
Office of Ecosystems Tribal And Public Affairs
U.S. Environmental Protection Agency
Region 10 (ETPA-087)
1200 Sixth Avenue
Seattle, Washington 98101

Cleanup
Waste and Toxics
Water Quality
Business & Industry
Concerned Citizens
Enforcement
Information Resources
Innovative Solutions

Name, address, and telephone number of Regional Hearing Clerk:

Carol Kennedy, Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 10 (ORC-158)
1200 Sixth Avenue
Seattle, Washington 98101
(206) 553-0242

Location of Property: Southwest quarter of Section 33, Township 27 North, Range 5 East, Willamette Meridian, also known as Rhode-A-Zalea on the East side of 35th Southeast, near Mill Creek, WA.

Applicable Permit No.: none

Business/activity of Respondents: Topsoil Company and Property Owners

Comments Accepted: In accordance with 40 C.F.R. 22.45, any person wishing to comment on or participate in this proceeding must notify the Regional Hearing Clerk within 30 days of this notice. The person must provide a name, complete mailing address, and any comments the person has on this action.

Further information regarding EPA's proposal to assess a penalty in this matter is available for review and copying between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday, at EPA's Seattle Office (see address listed above).

For any additional information on this action, please contact Steven Roy at (206) 553-6221.

[Pacific Topsoils Consent Agreement and Final Order PDF \(9pp, 305kb\)](#)

05/04/2007

Unit: Office of Compliance and Enforcement

Point of contact: Steve Roy

Email: roy.steve@epa.gov

Phone Number: (206) 553-6221

Last Updated: 05/04/2007 06:49:11 PM

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URL: <http://yosemite.epa.gov/R10/ENFORCE.NSF/Current+Public+Notices/PacificTopsoil>