



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

APR 10 2007

CERTIFIED MAIL 7005 3110 0003 6266 0110
RETURN RECEIPT REQUESTED

Mr. D. Ray Ball, Jr.
Ball Homes, LLC
3609 Walden Drive
Lexington, KY 40583

SUBJ: Consent Agreement and Final Order
Docket No. CWA-04-2007-4509(b)
Gess Properties Parcel 4 and 5
Lexington, Kentucky

Dear Mr. Ball:

Enclosed please find a fully executed copy of the Consent Agreement and Final Order that has been finalized by the Environmental Protection Agency and the Regional Judicial Officer. Please make note of the provisions under Section VI. Payment.

Should you have any questions or problems, please contact Daryl Shoemake, P.G. at (404) 562-9792.

Sincerely,

A handwritten signature in black ink that reads "D. Giattina".

James D. Giattina, Director
Water Management Division

Enclosure

cc: Kentucky Department for Environmental
Protection
Lexington-Fayette County Urban Government

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:)

Ball Homes, LLC)
Gess Properties, Parcels 4 and 5)
Lexington, Kentucky)

CONSENT AGREEMENT AND
FINAL ORDER

Docket No. CWA-04-2007-4509(b)

RECEIVED
EPA REGION IV
2007 APR 10 PM 12:13
HEARINGS DIVISION

CONSENT AGREEMENT

I. Statutory Authority

1. This is a civil penalty proceeding pursuant to Section 309(g)(2)(B) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g)(2)(B), and the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits*, published at 64 Fed. Reg. 40176 (July 23, 1999) and codified at 40 Code of Federal Regulations ("C.F.R.") Part 22.

2. The authority to take action under Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), is vested in the Administrator of the United States Environmental Protection Agency ("EPA"). The Administrator has delegated this authority to the Regional Administrator, Region 4, who in turn has delegated this authority to the Director of the Water Management Division ("Complainant").

II. Allegations

3. Ball Homes, LLC ("Ball Homes"), is a limited liability company formed under the laws of the Commonwealth of Kentucky and is, therefore, a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

4. At all times relevant to this action, Ball Homes owned and/or operated a construction site known as Gess Properties Parcel 4 & 5 ("Facility") located in a portion of 400 and 480 Chilesburg Road, Lexington, Kentucky.

5. To accomplish the objective of the CWA, defined in Section 101(a) of the CWA, 33 U.S.C. § 1251(a), as to restore and maintain the chemical, physical and biological integrity of the nation's waters, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person into waters of the United States except as in compliance with a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

6. Section 402 of the CWA, 33 U.S.C. § 1342, establishes an NPDES Permit Program authorizing EPA or authorized states to administer the NPDES Permit Program, including the issuance of NPDES permits allowing for the discharge of pollutants, including storm water, into navigable waters subject to specific terms and conditions. EPA has granted the Commonwealth of Kentucky through the Department for Environmental Protection ("KDEP") approval to issue NPDES permits pursuant to Section 402(b) of the CWA.

7. The KDEP issued a *General KPDES Permit for Storm Water Point Source Discharges, Construction Activities* ("Permit"), Permit No. KYR10, in accordance with the provisions of the Kentucky Revised Statutes Chapter 224 16-050 and pursuant to 401 KAR 5:055, Sections 1 and 5 and the CWA. The Permit was effective October 1, 2002, and expires September 30, 2007.

8. On February 4, 2005, Ball Homes submitted a Notice of Intent ("NOI") requesting permit coverage to the KDEP. A Notice of Coverage was sent to Ball Homes with an effective date of April 11, 2005, and an expiration date of September 30, 2007.

9. Part II of the Permit incorporates 401 KAR 5:065 Section 1 by reference.

A. 401 KAR 5:065 Section 1(4) requires the Permittee to take all reasonable steps to minimize or prevent any discharge in violation of the Permit which has a reasonable likelihood of adversely affecting human health or the environment.

B. 401 KAR 5:065 Section 1(5) of the Permit requires the Permittee to properly operate and maintain at all times all facilities and systems of treatment and control and related appurtenances which are installed or used by the Permittee to achieve compliance with the conditions of the Permit.

10. Part IV.A of the Permit requires the Best Management Practices ("BMP") Plan to include, *inter alia*, the order of major soil disturbing activities, the post construction runoff coefficient, receiving water name, and a site map indicating storm water discharge locations.

11. Part IV.B.3 of the Permit requires the Permittee to install management devices during construction to control the pollutants in storm water discharges that will occur after construction has been completed. Velocity dissipation devices shall be placed at discharge locations and along the length of any outfall channel as necessary to provide a non-erosive flow so that the original physical and biological characteristics and functions of the receiving waters are maintained and protected. The installation of management devices may be subject to Section 404 of the CWA.

12. Part IV.C of the Permit requires the Permittee to ensure that no solid materials, including building materials, are discharged to surface waters, except as authorized by Section 404 of the CWA.

13. Part IV.F of the Permit requires the Permittee to ensure that qualified personnel inspect all storm water control measures, discharge locations, vehicle exits, disturbed areas of the construction site and material storage areas at least once every seven days (and within 24 hours of the end of a storm that is 0.5 inches or greater) and areas that have been temporarily or finally stabilized at least once a month. The Permittee shall make a report summarizing the scope of the inspection, names and qualifications of personnel making the inspection, the date of the inspection, major observations relating to the implementation of the BMP Plan, and any corrective actions. The reports shall also be signed in accordance with Part II of the Permit and 401 KAR 5:065 Section 1(11).

14. On April 20, 2006, representatives of EPA in conjunction with the KDEP performed a Compliance Storm Water Evaluation Inspection ("CSWEI") at Ball Homes' Facility. EPA's CSWEI was to evaluate the treatment and disposal of storm water at the facility in accordance with the CWA, the regulations promulgated thereunder at 40 C.F.R. § 122.26, and the KDEP Permit.

15. As a result of the CSWEI, EPA, Region 4 has determined that Ball Homes discharged storm water associated with industrial activity from its Facility within the meaning of Section 402(p) of the CWA, 33 U.S.C. § 1342(p), and its implementing regulations.

16. As a result of the CSWEI, EPA alleges the following:

A. Ball Homes failed to take all reasonable steps to minimize or prevent any discharge which has a reasonable likelihood of adversely affecting human health or the environment, as required by Part II of the Permit and 401 KAR 5:065 Section 1(4). Unprotected street inlets allowed the discharge of storm water and sediment into the lower pond. Piles of construction debris, road materials, tires, concrete piping, and other miscellaneous materials located north of the lower pond were not contained or protected from storm water run-off. A concrete wash down area in the southwest portion of the Facility was not properly contained to control potential run-off.

B. Ball Homes failed to reduce the pollutants in storm water discharges by properly operating and maintaining all facilities and systems of treatment and control and related appurtenances in accordance with Part II of the Permit and 401 KAR 5:065 Section 1(5). Several street inlets in Parcel 4 were unprotected as required by the BMP. Silt fences near these inlets and other drop inlets in the southern portion of Parcel 5 needed maintenance by providing the removal of sediments around the inlets and repair of the filter fabric. Rip rap was not installed

around several outlets and was not used for the designated aprons as per the BMP. Geotextile fabric was missing beneath the rip rap or not used at all for the designated apron areas throughout the central portion of the Facility. The street in Parcel 5 near the active construction area was not clear of sediment.

C. Ball Homes failed to develop and implement a BMP Plan that provided a map showing the name(s) of receiving waters and/or the Municipal Separate Storm Sewer System ("MS4"), wetlands, or the storm water discharge/outfall locations; the order of all major soil disturbing activities; the post-construction run-off coefficient value; and a sequence or schedule of implementation of the erosion and sediment control measures on-site, as required by Part IV.A of the Permit.

D. Ball Homes failed to install appropriate management devices during construction to control the pollutants in storm water discharges in accordance with Part IV.B(3) of the Permit. Velocity dissipation devices at some of the discharge locations and along the length of outfall channels were not correctly installed in the central portion of the Facility. Erosion control devices and silt traps were in place either directly into or near the wetlands area, and a check dam installed in a live stream below the lower pond of Parcel 4 and 5, without an approved Permit pursuant to Section 404 of the CWA.

E. Ball Homes failed to ensure that no solid materials, including building materials, are discharged to surface waters in accordance with Part IV.C of the Permit. Debris and trash were present in the creek which flows from the lower pond of the Facility.

F. After March 3, 2006, Ball Homes failed to conduct inspections of all storm water control measures, discharge locations, vehicle exits, and disturbed areas of the Facility in accordance with Part IV.F of the Permit. Additionally, Ball Homes failed to sign inspection reports prior to March 3, 2006, in accordance with Part II of the Permit and 401 KAR 5:065 Section 1(11).

17. Therefore, Ball Homes has violated Sections 301 and 402(p) of the CWA, 33 U.S.C. §§ 1311 and 1342(p), by failing to comply with Parts II, IV.A, IV.B.3, IV.C, and IV.F of the Permit.

III. Stipulations and Findings

18. Complainant and Respondent have conferred for the purpose of settlement pursuant to 40 C.F.R. § 22.18 and desire to resolve this matter and settle the allegations described herein without a formal hearing. Therefore, without the taking of any evidence or testimony, the making of any argument, or the adjudication of any issue in this matter, and in accordance with 40

C.F.R. § 22.13(b), this Consent Agreement and Final Order ("CA/FO") will simultaneously commence and conclude this matter.

19. For the purposes of this CA/FO, Respondent admits the jurisdictional allegations set out above and neither admits nor denies the factual allegations set out above.

20. Respondent hereby waives its right to contest the allegations set out above and its right to appeal the Final Order accompanying this Consent Agreement.

21. Respondent consents to the assessment of and agrees to pay the civil penalty as set forth in this CA/FO and consents to the other conditions set forth in this CA/FO.

22. By signing this CA/FO, Respondent certifies that the information it has supplied concerning this matter was at the time of submission, and is, truthful, accurate, and complete for each such submission, response and statement. Respondent realizes that there are significant penalties for submitting false or misleading information, including the possibility of fines and/or imprisonment for knowing submission of such information.

23. EPA reserves the right to assess and collect any and all civil penalties for any violation described herein to the extent that any information or certification provided by Respondent was materially false or inaccurate at the time such information or certification was provided to EPA.

24. Complainant and Respondent agree to settle this matter by their execution of this CA/FO. The parties agree that the settlement of this matter is in the public interest and that this CA/FO is consistent with the applicable requirements of the CWA.

IV. Payment

25. Pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19, and considering the nature of the violations and other relevant factors, EPA has determined that Forty Thousand Dollars (\$40,000.00) is an appropriate civil penalty to settle this action.

26. Respondent shall submit payment of the penalty specified in the preceding paragraph within thirty (30) days of the effective date of this CA/FO via a cashier's or certified check, payable to the order of "Treasurer, United States of America." The check shall reference on its face the name of Respondent and the Docket Number of this CA/FO. Such payment shall be tendered to:

U.S. Environmental Protection Agency
Cincinnati Accounting Operations
Mellon Lockbox 371099M
Pittsburgh, PA 15251-7099.

27. At the time of payment, Respondent shall send a separate copy of the check, and a written statement that payment has been made in accordance with this CA/FO, to the following persons at the following addresses:

Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 4
61 Forsyth Street, S.W.
Atlanta, GA 30303-8960

and

Mary Mattox
U.S. Environmental Protection Agency, Region 4
Water Programs Enforcement Branch
Water Management Division
61 Forsyth Street, S.W.
Atlanta, GA 30303-8960.

28. The penalty amount specified above shall represent civil penalties assessed by EPA and shall not be deductible for purposes of federal taxes.

29. Pursuant to 40 C.F.R. Part 13 and 31 U.S.C. § 3717 et seq., if EPA does not receive payment of the penalty assessed by this CA/FO in full by its due date, interest shall accrue on the unpaid balance from the due date through the date of payment at an annual rate equal to the rate of the current value of funds to the United States Treasury as prescribed and published by the Secretary of the Treasury. If all or part of the payment is overdue, EPA will assess a late-payment handling charge of \$15.00, with an additional delinquent notice charge of \$15.00 for each subsequent thirty (30) day period. EPA will also assess on a monthly basis an up to six percent (6%) per annum penalty on any principal amount not paid within ninety (90) days of the due date.

30. Pursuant to Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), failure by Respondent to pay the penalty assessed by the CA/FO in full by its due date may subject Respondent to a civil action to collect the assessed penalty plus interest (at currently prevailing rates from the effective date of this CA/FO), attorney's fees, costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to twenty percent (20%) of the aggregate amount

of such penalty and nonpayment penalty which are unpaid as of the beginning of such quarter. In any such collection action, the validity, amount and appropriateness of the penalty and of this CA/FO shall not be subject to review.

V. General Provisions

31. This CA/FO shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, state, or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit. Other than as expressed herein, compliance with this CA/FO shall not be a defense to any actions subsequently commenced pursuant to federal laws and regulations administered by EPA.

32. Nothing in this CA/FO shall be construed as prohibiting, altering, or in any way limiting the ability of the United States to seek any other remedies or sanctions available by virtue of Respondent's violation of this CA/FO or of the statutes and regulations upon which this CA/FO is based, or for Respondent's violation of any federal or state statute, regulation or permit.

33. Except as otherwise set forth herein, this CA/FO constitutes a settlement by Complainant and Respondent of all claims for civil penalties pursuant to the CWA with respect to only those violations alleged in this CA/FO. Except as otherwise set forth herein, compliance with this CA/FO shall resolve the allegations of violations contained herein. Nothing in this CA/FO is intended to nor shall be construed to operate in any way to resolve any criminal liability of Respondent, or other liability resulting from violations that were not alleged in this CA/FO. Other than as expressed herein, Complainant does not waive any right to bring an enforcement action against Respondent for violation of any federal or state statute, regulation or permit, to initiate an action for imminent and substantial endangerment, or to pursue criminal enforcement.

34. Each undersigned representative of the parties to this CA/FO certifies that he or she is fully authorized to enter into the terms and conditions of this CA/FO and to execute and legally bind that party to it.

35. This CA/FO applies to and is binding upon Respondent and its officers, directors, employees, agents, successors and assigns.

36. Any change in the legal status of Respondent, including but not limited to any transfer of assets of real or personal property, shall not alter Respondent's responsibilities under this CA/FO.

37. Each party shall bear its own costs and attorneys fees in connection with the action resolved by this CA/FO.

38. In accordance with 40 C.F.R. § 22.5, the individuals below are authorized to receive service relating to this proceeding.

For Complainant:

Judy Marshall
Associate Regional Counsel
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street, S.W.
Atlanta, GA 30303-8960
(404) 562-9533.

For Respondent:

David A. Smart
Stoll Keenon Ogden PLLC
300 West Vine Street
Lexington, Kentucky 40507-1801
(859) 231-3056.

39. The parties acknowledge and agree that this CA/FO is subject to the requirements of 40 C.F.R. § 22.45(c)(4), which provides a right to petition to set aside a consent agreement and proposed final order based on comments received during the public comment period.

40. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and 40 C.F.R. § 22.38(b), Complainant represents that the Commonwealth of Kentucky was provided a prior opportunity to consult with Complainant regarding this matter.

VI. Effective Date

41. The effective date of this CA/FO shall be the date on which the CA/FO is filed with the Regional Hearing Clerk.

AGREED AND CONSENTED TO:

For COMPLAINANT, U.S. ENVIRONMENTAL PROTECTION AGENCY:

James D. Giattina
James D. Giattina, Director
Water Management Division
U.S. EPA Region 4

Date: 3/23/07

For RESPONDENT, BALL HOMES, LLC:



Date: 1/29/2007

NAME: D. Ray Ball, Jr.
TITLE: President

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:

Ball Homes LLC
Gess Properties, Parcels 4 and 5
Lexington, Kentucky

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CONSENT AGREEMENT AND
FINAL ORDER

Docket No. CWA-04-2007-4509(b)

FINAL ORDER

In accordance with the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits*, 40 C.F.R. Part 22, and authorities delegated to me, the foregoing Consent Agreement is hereby approved and incorporated by reference into this Final Order. Pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), Respondent is hereby ordered to comply with the terms of the foregoing Consent Agreement.

U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: MAR 29 2007



J.I. Palmer, Jr.
Regional Administrator

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the attached **CONSENT AGREEMENT AND FINAL ORDER** in the matter of **Ball Homes, LLC, Lexington, Kentucky**, Docket No. **CWA-04-2007-4509(b)** (filed with the Regional Hearing Clerk on APR 10 2007, 2007) was served on APR 10 2007, 2007, in the manner specified to each of the persons listed below.

By hand-delivery: Judy K. Marshall
Associate Regional Counsel
U.S. EPA, Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

**By certified mail,
return receipt requested:** David A. Smart, Esq.
Stoll Keenon Ogden PLLC
300 West Vine Street
Lexington, Kentucky 40507-1801

Mr. D. Ray Ball, Jr.
Ball Homes, LLC
3609 Walden Drive
Lexington, Kentucky 40583

Ms. Susan Rose Green, Director
Division of Enforcement
Kentucky Department of Environmental Protection
14 Reilly Road
Frankfort, Kentucky 40601



Patricia A. Bullock, Regional Hearing Clerk
United States Environmental
Protection Agency, Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, S.W.
Atlanta, Georgia 30303
(404) 562-9511

EPA ACCOUNTS RECEIVABLE CONTROL NUMBER FORM

TO BE COMPLETED BY THE ORIGINATING OFFICE:

(Attach a copy of the final order and transmittal letter to Defendant/Respondent)

This form was originated by: Mary Mattox on 4/5/07
(Name) (Date)

in the WMD/WPEB/GES at (404) 562- 9733
(Office) (Telephone Number)

Non-SF Judicial Order/Consent Decree
USAO COLLECTS

Administrative Order/Consent Agreement
FMO COLLECTS PAYMENT

SF Judicial Order/Consent Decree
DOJ COLLECTS

Oversight Billing - Cost Package required:
Sent with bill

Other Receivable

Not sent with bill

This is an original debt

Oversight Billing - Cost Package not required

This is a modification

PAYEE: BAIL HOMES, LLC Gess Properties, Parcel 4 & 5, Lexington, KY
(Name of person and/or Company/Municipality making the payment)

The Total Dollar Amount of the Receivable: \$ 40,000
(If installments, attach schedule of amounts and respective due dates. See Other side of this form.)

The Case Docket Number: CWA-04-2007-4509(b)

The Site Specific Superfund Account Number: _____

The Designated Regional/Headquarters Program Office: WMD

TO BE COMPLETED BY LOCAL FINANCIAL MANAGEMENT OFFICE:

The IFMS Accounts Receivable Control Number is: _____ Date: _____

DISTRIBUTION:

A. **JUDICIAL ORDERS:** Copies of this form with an attached copy of the front page of the **FINAL JUDICIAL ORDER** should be mailed to:

- | | |
|--|---|
| 1. Debt Tracking Officer
Environmental Enforcement Section
Department of Justice RM 1647
P.O. Box 7611, Benjamin Franklin Station
Washington, D.C. 20044 | 2. Originating Office (EAD)
3. Designated Program Office |
|--|---|

B. **ADMINISTRATIVE ORDERS:** Copies of this form with an attached copy of the front page of the Administrative Order should be to:

- | | |
|--|---|
| 1. Originating Office
2. Regional Hearing Clerk | 3. Designated Program Office
4. Regional Counsel (EAD) |
|--|---|