

FILED

2008 JUL 10 AM 9:16

U.S. EPA, REGION IX  
REGIONAL HEARING CLERK

NANCY J. MARVEL  
Regional Counsel  
Jessica C. Kao  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region IX  
75 Hawthorne Street  
San Francisco, CA 94105

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION IX**

IN THE MATTER OF:

**Trees, Inc.,**

Respondent.

)  
) Docket No. CWA- *09-2008-0001*  
)  
) **CONSENT AGREEMENT AND**  
) **FINAL ORDER PURSUANT TO 40 C.F.R.**  
) **§§ 22.13 and 22.18**  
)  
) Proceeding for Class I Civil Administrative  
) Penalty under § 309(g) of the Clean Water Act

**I. CONSENT AGREEMENT**

The United States Environmental Protection Agency (“EPA”), Region IX, and Trees, Inc. (“Respondent”) agree to settle this matter and consent to the entry of this Consent Agreement and Final Order (“CAFO”).

**A. AUTHORITY AND PARTIES**

1. This is a class I civil administrative penalty proceeding under Section 309(g)(2)(A) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g)(2)(A), and 40 C.F.R. Part 22 (“Consolidated Rules of the Practice Governing the Administrative Assessment of Civil

Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits”) for the assessment of a penalty against Respondent for discharging pollutants into waters of the United States without the requisite permit in violation of CWA Section 301(a), 33 U.S.C. § 1311(a).

2. Complainant is the Director of Water Division, EPA Region IX, who brings this action pursuant to authority delegated by the Administrator of EPA and the Regional Administrator of EPA, Region IX.
3. Respondent is a corporation that operates a landscaping services business headquartered in Houston, Texas.
4. This CAFO, which contains the elements of a complaint required by 40 C.F.R. § 22.14(a), simultaneously commences and concludes this penalty proceeding, as authorized by 40 C.F.R. § 22.13(b).

#### B. STATUTORY AND REGULATORY BASIS

5. CWA Section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person from a point source into any navigable water except in compliance with a National Pollutant Discharge Elimination System (“NPDES”) permit issued under CWA Section 402, 33 U.S.C. § 1342.
6. “Person” includes any corporation. CWA Section 502(5), 33 U.S.C. § 1362(5).
7. “Discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source.” CWA Section 502(12), 33 U.S.C. § 1362(12).
8. “Pollutant” includes “chemical wastes.” CWA Section 502(6), 33 U.S.C. § 1362(6).

9. "Point source" means "any discernible, confined and discrete conveyance ... from which pollutants are or may be discharged." CWA Section 502(14), 33 U.S.C. § 1362(14).
10. "Navigable waters" means "the waters of the United States," CWA Section 502(7), 33 U.S.C. § 1362(7), which is further defined under EPA's implementing regulations to include all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, and their tributaries. 40 C.F.R. § 122.2.

### C. ALLEGED VIOLATIONS

11. On or about April 23, 2007, while clearing vegetation and brush around power poles on the Resighini Rancheria land in Klamath, California, Respondent sprayed pesticides, including Direx 4L and Garlon 4, in areas with standing water immediately adjacent to Junior Creek, causing the pesticides to enter Junior Creek.
12. Junior Creek, which flows continuously for nine or 10 months out of the year, seasonally supports a diversity of native fish, including coho salmon, steelhead salmon, sickle-back, and native trout. From where Respondent applied the pesticides, Junior Creek flows approximately half a mile to Waukell Creek, which flows approximately half a mile to the tidally-influenced Klamath River and another three and a half miles to the Pacific Ocean.
13. Respondent's application of Direx 4L and Garlon 4 failed to follow their Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") labeling instructions, which prohibit their application on water or areas where surface water is present.
14. Respondent is a "person" under CWA Section 502(5), 33 U.S.C. § 1362(5).
15. The pesticides applied by Respondent in violation of their water-related FIFRA labeling instructions are "pollutants" under CWA Section 502(6), 33 U.S.C. § 1362(6).

16. The pesticide sprayers used by Respondent are “point sources” under CWA Section 502(14), 33 U.S.C. § 1362(14).
17. Junior Creek is a “Water of the United States” under CWA Section 502(7), 33 U.S.C. § 1362(7), and 40 C.F.R. § 122.2.
18. Respondent did not apply for or receive NPDES permit authorization to discharge Direx 4L and Garlon 4 into any waters of the United States.
19. By discharging pesticides into Junior Creek in violation of their FIFRA labeling instructions and without an NPDES permit, Respondent violated CWA Section 301(a), 33 U.S.C. § 1311(a).

#### D. RESPONDENT’S ADMISSIONS

20. In accordance with 40 C.F.R. § 22.18(b)(2) and for the purpose of this proceeding, Respondent: (i) admits that EPA has jurisdiction over the subject matter of this CAFO and over Respondent; (ii) neither admits nor denies the specific factual allegations contained in Section I.C of this CAFO; (iii) consents to any and all conditions specified in this CAFO and to the assessment of the civil administrative penalty under Section I.E of this CAFO; (iv) waives any right to contest the allegations contained in this CAFO; and (v) waives the right to appeal the proposed Final Order contained in this CAFO.

#### E. CIVIL ADMINISTRATIVE PENALTY

21. In settlement of the CWA violations specifically alleged in Section I.C. above, Respondent shall pay to the United States a civil administrative penalty in the amount of ELEVEN THOUSAND DOLLARS (\$11,000.00). Respondent shall pay this penalty within thirty (30) calendar days of the effective date of this CAFO, shall make payment

by cashier's or certified check payable to the "Treasurer, United States of America," and shall send the check by certified mail, return receipt requested, to the following address:

U.S. Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, MO 63197-9000

Respondent shall accompany its payment with a transmittal letter identifying the case name, the case docket number, and this CAFO. Concurrent with delivery of the payment of the penalty, Respondent shall send a copy of the check and transmittal letter to the following addresses:

Regional Hearing Clerk (ORC-1)  
U.S. Environmental Protection Agency, Region IX  
75 Hawthorne Street  
San Francisco, CA 94105

Mary Butterwick (WTR-7)  
Clean Water Act Compliance Office  
Water Division  
U.S. Environmental Protection Agency, Region IX  
75 Hawthorne Street  
San Francisco, CA 94105

22. Respondent shall not use payment of any penalty under this CAFO as a tax deduction from Respondent's federal, state, or local taxes, nor shall Respondent allow any other person to use such payment as a tax deduction.
23. If the penalty identified above is overdue, interest shall accrue on any overdue amount from the first date after the due date through the date of payment, at the interest rate established by the Secretary of the Treasury under 31 U.S.C. § 3717. In addition, a late payment handling charge of fifteen dollars (\$15.00) will be assessed for each 30-day

period (or any portion thereof) following the due date in which the balance remains unpaid. Payment of any interest and late handling charges shall be made in accordance with paragraph 21 above.

24. Pursuant to CWA Section 309(g)(9), 33 U.S.C. § 1319(g)(9), if Respondent fails to pay the assessed penalty on time, EPA may request the Department of Justice to bring a civil action to recover the overdue amount, plus interest at currently prevailing rates from the date of the final order. In such an action, the validity, amount, and appropriateness of the assessed penalty shall not be subject to review. In addition to any assessed penalty and interest, Respondent shall pay attorney fees, costs for collection proceedings, and a quarterly nonpayment penalty, which shall equal 20% of the aggregate amount of Respondent's penalties and nonpayment penalties that are unpaid as of the beginning of such quarter, for each quarter during which such failure to pay persists. EPA may also take other debt collection actions as authorized by law, such as the Federal Debt Collection Act, 33 U.S.C. § 3711, and 33 C.F.R. Part 13.

#### F. RETENTION OF RIGHTS

25. In accordance with 40 C.F.R. § 22.18(c), this CAFO only resolves Respondent's liabilities for federal civil penalties for the violations and facts specifically alleged in Section I.C of this CAFO. Nothing in this CAFO is intended to or shall be construed to resolve: (i) any civil liability for violations of any provision of any federal, state, or local law, statute, regulation, rule, ordinance, or permit not specifically alleged in Section I.C of this CAFO; or (ii) any criminal liability. EPA reserves any and all authorities, rights, and remedies available to it (including, but not limited to, injunctive or other equitable

relief or criminal sanctions) to address any violation of this CAFO or any violation not specifically alleged in Section I.C of this CAFO.

26. This CAFO is not a permit or a modification of any permit. This CAFO shall not exempt, relieve, modify, or affect in any way Respondent's duties to comply with all applicable federal, state, and local laws, regulations, rules, ordinances, and permits, including but not limited to any CWA requirements, permits or orders.

**G. ATTORNEYS' FEES AND COSTS**

27. Each party shall bear its own attorneys' fees, costs, and disbursements incurred in this proceeding.

**H. EFFECTIVE AND TERMINATION DATES**

28. In accordance with 40 C.F.R. §§ 22.18(b)(3) and 22.31(b), this CAFO shall be effective on the date that the Final Order, having been signed by the Regional Judicial Officer, is filed with the Regional Hearing Clerk, and shall terminate when Respondent has complied with this CAFO in full.

**I. BINDING EFFECT**

29. The undersigned representative of each party certifies that he or she is fully authorized to execute and legally bind that party to this CAFO.
30. This CAFO shall apply to and be binding upon Respondent and its officers, directors, employees, agents, trustees, servants, authorized representatives, successors, and assigns. Changes in ownership, including but not limited to any transfer of assets of real or personal property, shall not alter Respondent's status or responsibilities under this CAFO.

J. PUBLIC NOTICE

31. EPA's consent to this Consent Agreement is subject to CWA Section 309(g)(4), 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45(b), which require that EPA provide the public notice of, and a reasonable opportunity for comment on, the Consent Agreement. EPA reserves the right to withdraw from or withhold the consent if public comments disclose material information that was not considered by EPA in entering into this Consent Agreement. In such case, Respondent's obligations under this document shall terminate, and EPA may pursue any and all enforcement options as provided by law. If no comment is received during the comment period regarding the Consent Agreement, EPA shall file the Final Order.

CONSENTING PARTIES:

For Respondent Trees, Inc.:

BY: 1) AVID FLEISCHER, PRESIDENT DATE: 4/23/08

*(Print name and title of person with  
authority required by paragraph 29 above)*

650 North Sam Houston Parkway East  
Suite 209  
Houston, TX 77060

For the U.S. Environmental Protection Agency, Region IX ("EPA"):

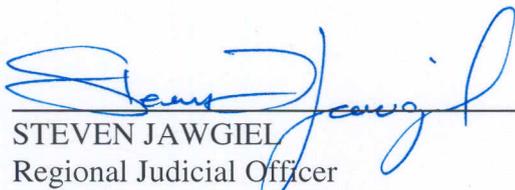
BY: Alexis Strauss DATE: 13 May 2008  
Alexis Strauss, Director \_\_\_\_\_  
75 Hawthorne Street Water Division  
San Francisco, CA 4105

**II. FINAL ORDER**

EPA and Trees, Inc. having entered into the foregoing Consent Agreement,

IT IS HEREBY ORDERED that this CAFO be entered, and Respondent shall pay a civil administrative penalty in the amount of ELEVEN THOUSAND DOLLARS (\$11,000) and comply with the terms and conditions set forth in the Consent Agreement.

July 9, 2008  
DATE

  
\_\_\_\_\_  
STEVEN JAWGIEL  
Regional Judicial Officer  
U.S. Environmental Protection Agency, Region IX

2008 JUL 10 AM 9:16  
U.S. EPA, REGION IX  
REGIONAL HEARING CLERK

FILED

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **Consent Agreement and Final Order** in the matter of **Trees , Inc., Docket # CWA-09-2008-0001**, signed by Steven L. Jawgiel, Regional Judicial Offfcer, was served on each of the parties at the address below:

By hand delivery to:

Jessica Kao  
Assistant Regional Counsel  
U.S. EPA, Region 9  
75 Hawthorne Street, ORC-2  
San Francisco, California 94105

By certified mail # 7099 3220 0000 2685 5901, return receipt requested

David Fleischner and William Houck  
Trees, Inc.  
650 North Sam Houston Parkway East  
Suite 209  
Houston, TX 77060

Dated at San Francisco, California, this 11 day of July, 2008

  
\_\_\_\_\_  
Danielle E. Carr  
Regional Hearing Clerk  
U.S. EPA, Region 9