

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII

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IN THE MATTER OF)
)
Honey Creek Farms, L.L.C.)
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)
)
Respondent)
_____)


ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

Docket No. CWA-07-2006-0174

ORDER

Pursuant to 40 C.F.R. § 22.5(a)(1), facsimile filing of the Complaint and Consent Agreement/Final Order is authorized in this proceeding. Counsel for Complainant shall file the original page 9 within one day of receipt of that document from Respondent.

Dated: September 28, 2007


Robert L. Patrick
Regional Judicial Officer

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION VII

901 NORTH FIFTH STREET KANSAS CITY, KANSAS 66101 ENVIRONMENTAL PROTECTION AGENCY-REGION VII REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

Honey Creek Farms, L.L.C., Respondent

Docket No. CWA-07-2006-0874

COMPLAINT AND CONSENT AGREEMENT/FINAL ORDER

Proceedings under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g)

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COMPLAINT

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (CWA), 33 U.S.C. § 1319(g), and in accordance with the United States Environmental Protection Agency's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 (Consolidated Rules of Practice).

2. This Complaint and Consent Agreement/Final Order alleges that the Respondent discharged pollutants into the waters of the United States in violation of Sections 301 and 402 of the CWA, 33 U.S.C. § 1311 and §1342, and regulation promulgated thereunder.

Parties

3. The Complainant, by delegation from the Administrator of EPA to the Regional Administrator, EPA, Region VII, is the Director of Region VII's Water, Wetlands and Pesticides Division.

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4. Respondent, Honey Creek Farms, L.L.C., is a limited liability company incorporated under the law of the State of Kansas and conducting business in Leavenworth County, Kansas.

Statutory and Regulatory Framework of the CWA

5. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342.

6. Section 402 of the CWA, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to that Section.

7. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), sets forth requirements for the issuance of NPDES permits for the discharge of storm water. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), requires, in part, that a discharge of storm water associated with an industrial activity must conform with the requirements of an NPDES permit issued pursuant to Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

8. Pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p), EPA promulgated regulations setting forth the NPDES permit requirements for storm water discharges at 40 C.F.R. § 122.26.

9. 40 C.F.R. § 122.26(a)(1)(ii) and 122.26(c) requires dischargers of storm water associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated storm water general permit.

10. 40 C.F.R. § 122.26(b)(14)(x) defines "storm water discharge associated with industrial activity", in part, as construction activity including clearing, grading, and excavation, except operations that result in the disturbance of less than five (5) acres of total land area which are not part of a larger common plan of development or sale.

11. The Kansas Department of Health and Environment (KDHE) is the state agency with the authority to administer the federal NPDES program in Kansas pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. EPA maintains concurrent enforcement authority with delegated states for violations of the CWA.

12. The KDHE issued a NPDES General Permit for the discharge of storm water associated with construction activities, Permit No. S-MCST-0110-1 (the General Permit). The General Permit became effective on March 1, 2003, and expired December 31, 2006. The General Permit governed storm water discharges associated with:

Large construction activity consists of any activity (e.g. clearing, grubbing, excavating, grading, etc.) which disturbs a cumulative total of five (5.0) or more acres or

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that is part of a larger common plan of development or sale which will disturb a cumulative total of five or more acres.

Factual Background

13. Respondent is a "person" as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

14. All times relevant to this action, Respondent was the owner and/or operator of a construction site known as Honey Creek Farms Development, located generally at 166th Street and U.S. 24/40 Highway, Basehor, Leavenworth County, Kansas (the Site). Construction and/or development activities occurred at the Site including clearing, grubbing, grading, excavation, and fill which disturbed five (5) or more acres of total land area or which disturbed less than five (5) acres of total land area that was part of a larger common plan of development or sale.

15. Storm water, snow melt, surface drainage, and runoff water leaves Respondent's facility and goes into an unnamed tributary to Hog Creek then into Hog Creek, then into Stranger Creek and ultimately into the Kansas River. The runoff and drainage from Respondent's facility is "storm water" as defined by 40 C.F.R. § 122.26(b)(13).

16. Storm water contains "pollutants" as defined by Section 502(6) of the CWA 33 U.S.C. § 1362(6).

17. Respondent's storm water runoff is the "discharge of a pollutant" as defined by CWA Section 502(12), 33 U.S.C. § 1362(12).

18. The Site was a "point source" which caused the "discharge of pollutants" as defined by CWA Section 502, 33 U.S.C. § 1362.

19. Respondent discharged pollutants into navigable waters as defined by Section 502 of the CWA, 33 U.S.C. § 1362, when conducting the activities described in Paragraph 14 above.

20. Respondent's discharge of pollutants associated with an industrial activity, as defined by 40 C.F.R. § 122.26(b)(14)(x), requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

21. Respondent applied for and was issued NPDES permit coverage under the General Permit described in Paragraph 12 above. KDHE assigned Respondent Permit No. KSR101315 issued on December 12, 2003.

22. On May 9, 2005, EPA performed an inspection of the Site under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a). The purpose of the inspection was

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to evaluate Respondent's compliance with the permit described in paragraph 12 and Respondent's compliance with the CWA.

Findings of Violation

Failure to Properly Design, Install and/or Maintain a Sedimentation Basin - Count 1

23. The facts stated in Paragraphs 13 through 22 above are herein incorporated.

24. The General Permit, Part VII (Storm Water Pollution Prevention Plan (SWPPP) Requirements and Guidelines), requires Respondent to design, install, and maintain a sedimentation basin for each drainage area with 10 or more acres disturbed at one time and to provide at least 3,600 cubic feet of storage per acre drained (or otherwise similarly effective best management practices) to minimize erosion and control sediment.

25. The inspection referenced in Paragraph 22 above, revealed and documented that Respondent's SWPPP included construction of a detention basin, which was not properly designed, installed, and/or maintained to minimize erosion and control sediment, and resulted in the migration of sediment to the receiving water.

26. Respondent's failure to properly design, install, and/or maintain a sedimentation basin is a violation of Part VII of Respondent's General Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p).

27. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), it is proposed that a civil penalty be assessed against Respondent, the amount of which is set forth in Paragraph 45 below.

Failure to Maintain Best Management Practices - Count 2

28. The facts stated in Paragraphs 13 through 22 above are herein incorporated.

29. The General Permit, Part VII (Storm Water Pollution Prevention Plan (SWPPP) Requirements and Guidelines), requires Respondent to maintain all pollution control measures and systems in good order, in accordance with the reference document (Environmental Protection Agency document number EPA 832-R-92-005), to achieve compliance with the terms of the General Permit.

30. The inspection referenced in Paragraph 22 above, revealed and documented that Respondent's pollution control measures, which included sediment capture devices (i.e. silt fences and storm inlet, drain protections, and stabilization), were not properly maintained, and resulted in the migration of sediment to the receiving water.

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31. Respondent's failure to properly maintain its pollution control measures is a violation of Part VII of Respondent's General Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p).

32. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), it is proposed that a civil penalty be assessed against Respondent, the amount of which is set forth in Paragraph 45 below.

Failure to Inspect and Document Inspections Regularly – Count 3

33. The facts stated in Paragraphs 13 through 22 above are herein incorporated.

34. The General Permit, Part VII (Storm Water Pollution Prevention Plan (SWPPP) Requirements and Guidelines), requires that regular inspections be performed at a minimum of once per month to identify maintenance needs and/or SWPPP deficiencies, and within twenty-four (24) hours after each precipitation event of 0.5 inch or more. In addition, it requires that any deficiencies be noted in a report and corrected within seven calendar days of the inspection. The report is to be kept at a Site that is readily available from the permitted Site until final stabilization is achieved.

35. The inspection referenced in paragraph 22 above, revealed that Respondent did not adequately note deficiencies in a report and correct such deficiencies within twenty-four (24) hours of the inspection from the initiation of construction activity in May 2004 through September 2004, December 2004, and January 2005, which resulted in a failure to maintain and install appropriate pollution control measures to prevent the migration of sediment to the receiving water.

36. Respondent's failure to adequately perform, document, and respond to Site inspections is a violation of Part VII of Respondent's General Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

37. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), it is proposed that a civil penalty be assessed against Respondent, the amount of which is set forth in Paragraph 45 below.

CONSENT AGREEMENT

38. Respondent admits the jurisdictional allegations of this Complaint and Consent Agreement and Final Order and agrees not to contest the EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order.

39. Respondent neither admits nor denies the factual allegations contained in this Complaint and Consent Agreement and Final Order.

40. Respondent waives any right to contest the allegations and its right to appeal the proposed Final Order accompanying this Consent Agreement.

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41. Respondent and Complainant each agree to bear their own costs and attorney's fees.

42. Nothing contained in the Final Order shall alter or otherwise affect Respondent's obligations to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

43. Respondent consents to the issuance of the Final Order and consents to the payment of a mitigated civil penalty in the amount of Forty Thousand Dollars (\$40,000) to be paid within thirty (30) days of the effective date of the Final Order.

44. Respondent understands that its failure to timely pay any portion of the mitigated civil penalty stated in Paragraph 43 above, may result in the commencement of a civil action in Federal District Court to recover the full remaining balance, along with penalties and accumulated interest. In such case, interest shall accrue thereon at the applicable statutory rate on the unpaid balance until such civil penalty and any accrued interest are paid in full. Additionally, as provided by 31 U.S.C. § 3717(e)(2), a six percent (6%) per annum penalty (late charge) may be assessed on any amount not paid within ninety (90) days of the due date.

45. The penalty payment made by Respondent pursuant to this Complaint and Consent Agreement and Final Order is payment of a civil penalty and shall not be deductible for purposes of federal taxes.

46. The undersigned representative(s) of Respondent certifies that he is fully authorized to enter the terms and conditions of this Complaint and Consent Agreement and Final Order and to execute and legally bind Respondent to it.

47. This Consent Agreement may be signed by EPA and Respondent in part and counterpart. This Consent Agreement and Final Order may be executed by EPA upon receipt from Respondent of a signature page. Upon its execution, a copy of the executed agreement shall be sent by U.S. mail to Respondent.

48. Respondent agrees that the original Consent Agreement and Final Order signed by Respondent shall be transmitted to Melissa A.C. Bagley, Assistant Regional Counsel, U.S. Environmental Protection Agency, Region VII, 901 N. 5th St., Kansas City, Kansas 66101. Upon the EPA's receipt of the signed original from Respondent, it shall be filed with the Regional Hearing Clerk.

FINAL ORDER

IT IS HEREBY AGREED BY THE PARTIES, and pursuant to Section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g), it is ORDERED that:

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1. Respondent shall pay a civil penalty of Forty Thousand Dollars (\$40,000). Said penalty shall be paid in full within thirty (30) days following receipt by Respondent of a fully executed copy of this Complaint and Consent Agreement and Final Order. Respondent shall pay the penalty by certified or cashier's check payable to "Treasurer, United States of America" and shall deliver it, with a transmittal that identifies the case name and docket number to:

EPA-Region VII
P.O. Box 371099M
Pittsburgh, PA 15251.

The check must also be annotated with the docket number and with the name of the case. Copies of the transmittal letter and the check shall be simultaneously sent to:

Regional Hearing Clerk
U.S. Environmental Protection Agency - Region VII
901 N. 5th Street
Kansas City, Kansas 66101; and

Melissa A.C. Bagley
Office of Regional Counsel
U.S. Environmental Protection Agency - Region VII
901 N. 5th Street
Kansas City, Kansas 66101.

2. Should the civil penalty not be paid as provided above, interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on the overdue amount from the due date through the date of payment.

3. Respondent and Complainant shall pay their own costs and attorneys' fees incurred as a result of this action.

Parties Bound

4. This Final Order shall apply to and be binding upon Respondent, its agents, successors and assigns. Respondent shall ensure that its directors, officers, employees, contractors, consultants, firms, or other persons or entities acting under or for them with respect to matters included herein comply with the terms of this Consent Agreement and Final Order.

Reservation of Rights

5. EPA reserves the right to enforce the terms of this Final Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

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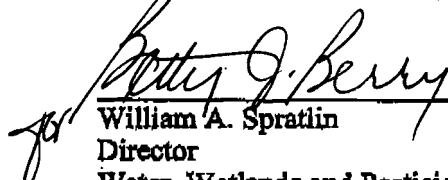
6. With respect to matters not addressed in this Final Order, EPA reserves the right to take any enforcement action pursuant to the CWA, or any other available legal authority, including without limitation, the right to seek injunctive relief, monetary penalties and for punitive damages.

Effective Date

7. This Final Order shall be effective upon receipt by Respondent of a fully executed copy hereof. All time periods herein shall be calculated from the effective date unless otherwise provided in this Final Order.


8. This executed Consent Agreement and Final Order shall be filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, 901 North 5th Street, Kansas City, Kansas 66101.

COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY



William A. Spratlin
Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency
Region VII

09/27/07
Date



Melissa A. C. Bagley
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region VII

9/27/07
Date

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**FOR RESPONDENT:
HONEY CREEK FARMS, L.L.C.:**

A handwritten signature in black ink, appearing to be "John [unclear]", written over a horizontal line.

8/17/07
Date

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IT IS SO ORDERED.

September 28, 2007
Date

Robert L. Patrick
Robert L. Patrick
Regional Judicial Officer

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CERTIFICATE OF SERVICE

I certify that on the date below, I hand delivered the original and one true copy of this Complaint and Consent Agreement/Final Order to the Regional Hearing Clerk, United States Environmental Protection Agency, 901 North Fifth Street, Kansas City, Kansas 66101. I further certify that on the date below I sent by certified mail, return receipt requested, a true and correct copy of the original Complaint and Consent Agreement/Final Order to the following:

Honey Creek Farms, L.L.C.
P.O. Box 3452
Lawrence, Kansas 66046.

Dated this _____ day of _____, 2007.

Name

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Complaint and Consent Agreement/Final Order was sent this day in the following manner to the addressees:


Copy hand delivered to
Attorney for Complainant:

Melissa A..C. Bagley
Assistant Regional Counsel
Region VII
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by U.S. Certified Mail,
Return Receipt Requested, to:

Honey Creek Farms, L.L.C.
PO Box 3452
Lawrence, Kansas 66046

Dated: 9/28/07


Kathy Robinson
Hearing Clerk, Region 7