OHIO E.P.A.

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ENTERED DIRECTOR'S JOURNAL

BEFORE THE
OHIO ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

Whispering Farms, LLC
c/o Jeffrey Friesz
6117 West Fork Road
Cincinnati, Ohio 45247

Respondent

Director's Final Findings and Orders

PREAMBLE

It is agreed by the parties hereto as follows:

I. JURISDICTION

These Director's Final Findings and Orders (Orders) are issued to Whispering Farms, LLC (Respondent) pursuant to the authority vested in the Director of the Ohio Environmental Protection Agency (Ohio EPA) under Ohio Revised Code (ORC) §§ 6111.03 and 3745.01.

II. PARTIES BOUND

These Orders shall apply to and be binding upon Respondent and successors in interest liable under Ohio law. No change in ownership of the Respondent or of Whispering Farms Subdivision shall in any way alter Respondent's obligations under these Orders.

III. DEFINITIONS

Unless otherwise stated, all terms used in these Orders shall have the same meaning as defined in ORC Chapter 6111. and the rules promulgated thereunder.

IV. FINDINGS

All of the findings necessary for the issuance of these Orders pursuant to ORC §§ 6111.03 and 3745.01 have been made and are outlined below. Nothing in the findings

"I certify this to be a true and accurate copy of the official document as filed in the records of the Ohio Environmental Protection Agency.
By [illegible] Date 9-14-04

shall be considered to be an admission by Respondent of any matter of law or fact. The Director of Ohio EPA has determined the following findings:

1 Respondent is the developer of the Whispering Farms Subdivision, a 68-acre development consisting of single family residences, located off of Wessleman Road in Miami Township, Hamilton County, Ohio (Site).

2. Storm water from the Site discharges to an unnamed tributary of Taylor Creek. The unnamed tributary of Taylor Creek constitutes "waters of the state," as defined by ORC § 6111.01(H). Sediment contained in said storm water constitutes "other wastes," as defined in ORC § 6111.01(D). Placement of this waste into waters of the state constitutes "pollution," as defined in ORC § 6111.01(A).

3. Because construction of the Site disturbs more than five acres of land, Respondent was required to submit a Notice of Intent (NOI) to obtain coverage under the Ohio EPA's National Pollution Discharge Elimination System General Permit for Storm Water Discharges Associated with Construction Activity (Ohio EPA Storm Water General Permit). Respondent began construction of the Site sometime in May 2002 prior to receiving coverage under the Ohio EPA Storm Water General Permit.

4. On June 10, 2002, Ohio EPA received a NOI for the Site and granted Respondent coverage for the Site under Permit No. OHR 11333, effective on June 14, 2002.

5. On July 30, 2002, Ohio EPA, Hamilton County and Respondent met to discuss the actions that Respondent needed to take at the Site to bring the Site into compliance with the Storm Water General Permit. The results of the meeting were summarized in a letter from Hamilton County to Respondent dated August 2, 2002.

6. Pursuant to ORC § 6111.04, no person to whom a permit has been issued shall place or discharge, or cause to be placed or discharged, in any waters of the state any sewage, sludge, sludge materials, industrial waste, or other wastes in excess of the permissive discharges specified under an existing permit.

7. Pursuant to ORC § 6111.07(A), no person shall violate or fail to perform any duty imposed by ORC §§ 6111.01 to 6111.08 or violate any order, rule, or term or condition of a permit issued or adopted by the Director of Ohio EPA pursuant to those sections. Each day of violation is a separate offense.

8. Ohio EPA and/or Hamilton County Soil and Water Conservation District (Hamilton County) inspected the Whispering Farms Subdivision on June 6-7, 2002, June 13, 2003, June 21, 2003, July 22, 2002, August 26, 2002, September 3, 2002, September 5-6, 2002, September 10-11, 2002, September 24, 2002, September 30, 2002, October 2, 2002, October 22, 2002, November 13, 2002, November 22, 2002, December 21, 2002, January 22, 2003, March 14-15, 2003, April 2, 2003, May 1, 2003, May 16, 2003, July 23, 2003, July 29, 2003, August 28, 2003, and June 21, 2004 for compliance with Ohio's water pollution control laws, documenting the violations described below. The initial June 6-7, 2002 inspection was conducted in response to a complaint received by neighboring property owners regarding sediment from the Whispering Farms Subdivision being deposited within the neighbors' swimming pools. Ohio EPA and/or Hamilton County sent inspection letters to Respondent dated June 7, 2002, June 18, 2002, August 2, 2002, November 18, 2002, December 9, 2002, July 28, 2003 and July 8, 2004 outlining the results of the inspections, including deficiencies regarding compliance.

9. Part III.C.5.b. i.(A) of the Ohio EPA Storm Water General Permit requires the initiation of appropriate vegetative practices on all disturbed areas within seven days if they are to remain dormant (undisturbed) for more than 45 days. Inspections conducted by Ohio EPA and/or Hamilton County revealed that there were disturbed areas at the Site which had been left dormant for more than 45 days without vegetative cover, in violation of ORC §§ 6111.04 and 6111.07.

10. Part III.C.5.b.i.(A) of the Ohio EPA Storm Water General Permit requires that permanent or temporary soil stabilization be applied to disturbed areas within seven days if the areas will remain undisturbed for 45 days or more and to disturbed areas after final grade is reached on any portion of the site. Inspections conducted by the Ohio EPA and/or Hamilton County revealed that there were numerous areas at the Site that had reached final grade that had not been stabilized, in violation of ORC §§ 6111.04 and 6111.07.

11 Part III.C.5.b.i.(B)(1) of the Ohio EPA Storm Water General Permit requires that sediment control structures be functional throughout earth disturbing activity. Sediment ponds and perimeter sediment barriers are to be installed as the first step of grading and within seven days from the start of grubbing. The sediment control structures are required to continue to function until the upslope development area is restabilized. Inspections conducted by Ohio EPA and/or Hamilton County revealed that sediment ponds and perimeter sediment barriers were not constructed in the aforementioned time frame, in violation of ORC §§ 6111.04 and 6111.07.

Part III.C.5.b.i.(B)(3) of the Ohio EPA Storm Water General Permit requires sediment transported by sheet flow runoff from denuded areas to be intercepted by sediment barriers to protect adjacent properties and water resources. Inspections conducted by Ohio EPA and/or Hamilton County revealed that Respondent failed to install the necessary sediment barriers at the Site and failed to protect water resources, in violation of ORC §§ 6111.04 and 6111.07.

Part III.C.5.b.i.(B)(4) of the Ohio EPA Storm Water General Permit requires that structural practices be designed and implemented on site to protect all adjacent streams from the impacts of sediment runoff. Inspections conducted by Ohio EPA and/or Hamilton County revealed that installation of inlet protection and temporary riser pipes on the sediment detention basins were not implemented. Inspections further revealed that the unnamed tributary to Taylor Creek was being impacted by the discharge and deposition of sediment laden runoff, in violation of ORC §§ 6111.04 and 6111.07 and OAC § 3745-1-04.

14. Part III.C.5.b.v. of the Ohio EPA Storm Water General Permit requires that all temporary and permanent control practices shall be maintained and repaired as needed to assure continued performance of their intended function. Inspections conducted by Ohio EPA and/or Hamilton County revealed that Respondent failed to maintain and repair sediment barriers at the Site as needed to ensure continued performance of their intended function, in violation of ORC §§ 6111.04 and 6111.07.

15. Part III.C.5.b.vi. of the Ohio EPA Storm Water General Permit requires that all erosion and sediment controls shall be inspected at least once every seven calendar days and within 24 hours after any storm event greater than 0.5 inch of rain per 24 hour period. In addition, the Storm Water General Permit requires that weekly inspections of the construction site be conducted to identify areas contributing to storm water discharges associated with construction activity and evaluate whether measures to prevent erosion and control pollutant loadings identified in the storm water pollution prevention plan are adequate and properly implemented or whether additional control measures are required. Respondent failed to inspect all erosion and sediment controls at the Site at least once every seven calender days and/or within 24 hours after storm events greater than 0.5 inch of rain per 24 hour period and failed to conduct weekly inspections of the Site to identify areas contributing to storm water discharges associated with construction activity and evaluate whether measures to prevent erosion and control pollutant loadings are adequate and properly implemented or whether additional control measures are required in violation of ORC §§ 6111.04 and 6111.07.

Respondent has produced no records of any inspections conducted at the Site.

16. The Director has given consideration to, and based his determination on, evidence relating to the technical feasability and economic reasonableness of complying with these Orders and to evidence relating to conditions calculated to result in compliance with these Orders, and its relation to the benefits to the people of the State to be derived from such compliance in accomplishing the purpose of ORC Chapter 6111.

V. ORDERS

1. Within thirty (30) days after the effective date of these Orders, Respondent shall submit to Ohio EPA and Hamilton County, a revised and current storm water pollution prevention plan for the Site. The revised and current storm water pollution prevention plan shall incorporate the comments and recommendations made by Ohio EPA and Hamilton County in the correspondence dated June 7, 2002, June 18, 2002, August 2, 2002, November 18, 2002, December 9, 2002, July 28, 2003 and July 8, 2004.

2. From the effective date of these Orders and until all disturbed areas at the Site meet the criteria for final stabilization as outlined in the Ohio EPA Storm Water General Permit, Respondent shall comply with the revised and current storm water pollution prevention plan referenced in Order No. 1. of these Orders and Permit No. OHR 11333.

3. Respondent shall pay to Ohio EPA $15,000.00 in settlement of Ohio EPA's claims for civil penalties, which may be assessed pursuant to Chapter 6111. of the Ohio Revised Code in accordance with the following schedule:

   a. Respondent shall pay to Ohio EPA $13,250.00. This payment shall be made by tendering an official check payable to the **"Treasurer, State of Ohio"** within 30 days of the effective date of these Orders to the following address:

Office of Fiscal Administration
Ohio Environmental Protection Agency
P.O. Box 1049
Columbus, Ohio 43216-1049

A photo copy of the check shall be sent to Ohio EPA's Southwest District Office at:

Ohio Environmental Protection Agency
Southwest District Office
401 East Fifth Street
Dayton, Ohio 45402

b. In lieu of payment of the remaining $1,750.00 of the civil penalty settlement, Respondent shall pay, within 30 days of the effective date of these Orders, $1,750.00 to the Hamilton County Soil & Water Conservation District to support the 2005 Southwest Ohio Sediment and Erosion Control Field Day (Field Day), an environmental educational workshop which will focus on sediment and erosion controls, storm water requirements, impacts on water quality, and alternative best management practices for construction sites. Respondent's payment shall be used by the Hamilton County Soil & Water Conservation District for educational purposes, e.g., speakers, training materials, and demonstrations pertaining to storm water issues and erosion and sediment controls at the Field Day workshop. The payment shall be made by tendering an official check payable to "Hamilton County Soil & Water Conservation District," 29 Triangle Park Drive, Suite #2901, Cincinnati, Ohio 45246-3411. Respondent shall provide Ohio EPA with a copy of the check and transmittal letter evidencing such payment.

c. If Respondent fails to pay the $1,750.00 to the Hamilton County Soil & Water Conservation District within the time frame established in Order No. 3.b. of these Orders, Respondent shall pay to Ohio EPA the $1,750.00. Respondent shall pay the $1,750.00 in accordance with the procedures set forth in Order No. 3.b. of these Orders. Payment shall be due no later than 7 days of the date the payment was due to the Hamilton County Soil & Water Conservation District.

VI. TERMINATION

Respondents obligations under these Orders shall terminate when Respondent certifies in writing and demonstrates to the satisfaction of Ohio EPA that Respondent has performed all obligations under these Orders and Ohio EPA's Division of Surface Water acknowledges, in writing, the termination of these Orders. If Ohio EPA does not agree that all obligations have been performed, then Ohio EPA will notify Respondent of the obligations that have not been performed, in which case Respondent shall have an opportunity to address any such deficiencies and seek termination as described above.

The certification shall contain the following attestation: "I certify that the information contained in or accompanying this certification is true, accurate and complete."

This certification shall be submitted by Respondent to Ohio EPA and shall be signed by a responsible official of Respondent. For purposes of these Orders, a responsible official is defined in OAC rule 3745-33-03(D)(1) for a corporation, OAC rule 3745-33-03(D)(2) for a partnership, OAC rule 3745-33-03(D)(3) for a sole proprietorship, and OAC rule 3745-33-03(D)(4) for a municipal, state, or other public facility.

VII. OTHER CLAIMS

Nothing in these Orders shall constitute or be construed as a release from any claim, cause of action or demand in law or equity against any person, firm, partnership or corporation, not a party to these Orders, for any liability arising from, or related to activities occurring on or at the Site.

VIII. OTHER APPLICABLE LAWS

All actions required to be taken pursuant to these Orders shall be undertaken in accordance with the requirements of all applicable local, state and federal laws and regulations. These Orders do not waive or compromise the applicability and enforcement of any other statutes or regulations applicable to Respondent.

IX. MODIFICATIONS

These Orders may be modified by agreement of the parties hereto. Modifications shall be in writing and shall be effective on the date entered in the journal of the Director of Ohio EPA.

X. RESERVATION OF RIGHTS

Ohio EPA and Respondent each reserve all rights, privileges and causes of action except as specifically waived in Section XI. of these Orders.

XI. WAIVER

In order to resolve disputed claims, without admission of fact, violation or liability, and in lieu of further enforcement action by Ohio EPA for only those violations specifically cited in these Orders, Respondent consents to the issuance of these Orders and agrees to comply with these Orders. Compliance with these Orders shall be a full accord and satisfaction for Respondent's liability for the violations specifically cited herein.

Respondent hereby waives the right to appeal the issuance, terms and conditions, and service of these Orders, and Respondent hereby waives any and all rights Respondent may have to seek administrative or judicial review of these Orders either in law or equity.

Notwithstanding the preceding, Ohio EPA and Respondent agree that if these Orders are appealed by any other party to the Environmental Review Appeals Commission, or any court, Respondent retains the right to intervene and participate in such appeal. In such an event, Respondent shall continue to comply with these Orders notwithstanding such appeal and intervention unless these Orders are stayed, vacated or modified.

XII. EFFECTIVE DATE

The effective date of these Orders is the date these Orders are entered into the Ohio EPA Director's journal.

XIII. SIGNATORY AUTHORITY

Each undersigned representative of a party to these Orders certifies that he or she is fully authorized to enter into these Orders and to legally bind such party to these Orders.

IT IS SO ORDERED AND AGREED:

Ohio Environmental Protection Agency

Christopher Jones
Director

9-13-04
Date

IT IS SO AGREED:

Whispering Farms, LLC

Signature

9-1-04
Date

JEFFREY E FRIESZ MEMBER
Printed or Typed Name

Title

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