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APPEALS COMMISSION

BEFORE THE
ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO

SEP 27 PM 2:49

BEARCREEK FARMS, INC.,

Appellant,

v.

CHRIS KORLESKI, DIRECTOR
OF ENVIRONMENTAL PROTECTION,

Appellee.

CASE NO. ERAC 576141

JOINT STIPULATION AND SETTLEMENT AGREEMENT

The parties hereto, Appellant Bearcreek Farms, Inc. ("Bearcreek"), and Appellee Chris Korleski, Director of Environmental Protection ("Director"), have agreed to resolve the above-captioned appeal according to the terms set forth in this Joint Stipulation and Settlement Agreement ("Agreement"). In settlement of the above-captioned appeal, the parties hereto stipulate and agree as follows:

I. STIPULATION

Whereas, on or about September 16, 2006, a fire occurred at 7750 Dayton Farmersville Road, Jefferson Township, Montgomery County, Ohio; and

Whereas, thereafter, on or about September 20, 2006, the Regional Air Pollution Control Agency ("RAPCA"), Ohio EPA's contractual representative in Montgomery County, Ohio, in conjunction with the Jefferson Township Fire Department inspected Bearcreek Farms, Inc.'s property at 7750 Dayton Farmersville Road; and

Whereas, on October 5, 2006, RAPCA issued a Notice of Violation ("NOV") to Bearcreek Farms, Inc., for claimed violations of Ohio Adm. Code Rule 3745-19-04(A) and Ohio Revised Code § 3704.05; and

Whereas, on or about November 9, 2006, RAPCA received Respondent's response to the NOV; and

Whereas, on or about November 14, 2006, RAPCA issued Proposed Findings and Orders to Bearcreek; and

Whereas, on or about February 2, 2007, RAPCA issued final Administrative Findings and Orders to Bearcreek; and

Whereas, on or about December 28, 2007, Ohio EPA issued Director's Final Findings and Orders; and

Whereas, on or about January 17, 2008, Bearcreek filed a Notice of Appeal of the Director's Final Findings and Orders with the Environmental Review Appeals Commission ("ERAC"); and

Whereas, on or about February 11, 2008 an Amended Notice of Appeal was filed on behalf of Bearcreek with ERAC; and

Whereas, a Preliminary Pre-Hearing Conference was conducted; and

Whereas, the parties conducted a Telephone Settlement Conference; and

Whereas, the parties wish to settle and resolve, without adjudication, the violations alleged in the Director's Final Findings and Orders arising out of the fire that occurred at 7750 Dayton Farmersville Road, Jefferson Township, Montgomery County, Ohio on September 16, 2006;

II. SETTLEMENT AGREEMENT

In consideration of the mutual promises contained herein the parties agree as follows:

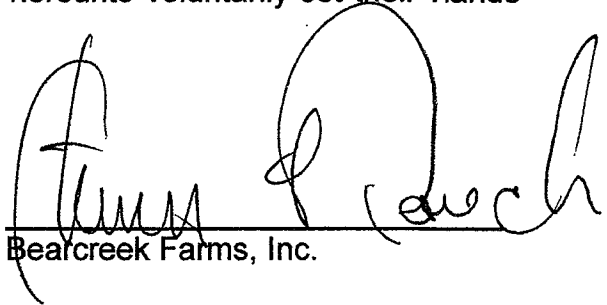
1. The Director agrees to issue revised Final Findings and Orders in the same or substantially equivalent form to the draft presented to Appellant by Ohio EPA and attached hereto as Exhibit A as a final action;
2. Appellant Bearcreek agrees to file a Motion seeking voluntary dismissal with prejudice of the appeal within ten (10) days of receipt of notification and confirmation that the Director has issued as a final action the revised Final Findings and Orders as reflected in this Agreement and in Attachment A;
3. Appellant Bearcreek agrees with the Director's issuance of the revised Final Findings and Orders as a final action. Appellant Bearcreek waives any right to contest the lawfulness and/or reasonableness of the actions provided for herein before the Ohio Environmental Protection Agency, the Environmental Review Appeals Commission, or any other court of competent jurisdiction, so long as the revised Final Findings and Orders, as a final action, are issued in conformity with Exhibit A. Appellant Bearcreek agrees that the Director's issuance of the revised Final Findings and Orders in accordance with this Agreement and Attachment A shall resolve the above-captioned appeal.

4. Appellant Bearcreek Farms, Inc., expressly denies that it caused or in any manner contributed to the fire being started at its property located at 7750 Dayton Farmersville Road, Jefferson Township, Montgomery County, Ohio on or about September 16, 2006;
5. Appellant Bearcreek agrees to pay a settlement amount of eight hundred fifty dollars (\$850.00), as reflected in the revised Final Findings and Orders, in full and final resolution of any and all claims made by or on behalf of the Ohio EPA arising out of the above stated fire;
6. Bearcreek expressly denies any liability pursuant to any Ohio Administrative Code regulation or that it actually violated any Ohio Administrative Code regulation and that payment tendered pursuant to this Settlement Agreement and Release is tendered for the sole purpose of reducing the cost and expense associated with pursuing any appeal of this matter with the Environmental Review Appeals Commission;
7. Ohio EPA expressly maintains the allegations as set forth in the Director's Final Finding and Orders which constitute violations of Ohio Adm. Code Rule 3745-19-04(A) and Ohio Revised Code § 3745.05 and that Ohio EPA has entered into this settlement agreement to facilitate prompt and efficient resolution of this matter without adjudication;
8. Each of the parties represent and warrant to the others that the parties signing for Plaintiff and Defendants have the authority to execute this Settlement Agreement and Release on their behalf as a legal binding contract;

9. This Settlement Agreement and Release shall be governed by the laws of the State of Ohio;
10. There shall be no oral amendments of this Settlement Agreement and Release. Any amendments shall be in writing, duly signed by all parties;
11. This Settlement Agreement and Release may be executed in duplicate in order that each party might retain an executed original. Each duplicate may serve as the original Settlement Agreement and Release;
12. This Settlement Agreement and Release constitutes the complete and entire agreement between the parties, and supersedes all previous negotiations, proposals, and understandings among the parties and their counsel. The foregoing terms represent the only consideration for signing this Agreement; no other promises or agreements of any kind have been made to or by the parties or their counsel, or to or by third parties, to cause the parties to execute this Settlement Agreement and Release;
13. The parties agree that they have read this Settlement Agreement and Release carefully; that they know and understand its contents and its legal, binding effect; that they have been represented by legal counsel with regard to the matters in dispute, including but not limited to the effect of this Settlement Agreement and Release, or have chosen of their own free will not to be represented by legal counsel; and that they execute this Settlement Agreement and Release voluntarily, as their own free act and deed.

IN WITNESS WHEREOF, the parties have hereunto voluntarily set their hands
this 15TH day of August, 2008.

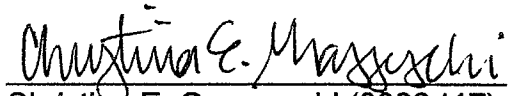
Date: 8/15/08


Bearcreek Farms, Inc.

By: STEVE RAUCH

Title: PRESIDENT

Nancy H. Rogers
Ohio Attorney General


Christina E. Grasseschi (0082417)
NicoleCandelora-Norman (0079790)
Assistant Attorney General
Environmental Enforcement Section
30 East Broad Street, 25th Floor
Columbus Ohio 43215

BEFORE THE
OHIO ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

Bearcreek Farms, Inc.	:	<u>Director's Final Findings</u>
1550 Soldiers Home-West Carrollton Road	:	<u>and Orders</u>
Dayton, Ohio 45418	:	

I. JURISDICTION

These Director's Final Findings and Orders ("Orders") are issued to Bearcreek Farms, Inc. ("Respondent") pursuant to the authority vested in the Director of the Ohio Environmental Protection Agency ("Ohio EPA") under Ohio Revised Code ("ORC") §§ 3704.03 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 shall in any way alter Respondent's obligations under these Orders.

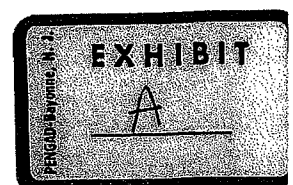
III. DEFINITIONS

Unless otherwise stated, all terms used in these Orders shall have the same meaning as defined in ORC Chapter 3704 and the rules promulgated thereunder.

IV. FINDINGS

The Director of Ohio EPA has determined the following findings:

1. Respondent is incorporated with the State of Ohio with an office located at 1550 Soldiers Home-West Carrollton Road, Dayton, Ohio. Respondent was formed for the purpose of, but not limited to, the sale of cattle and land.
2. Ohio Administrative Code ("OAC") Rule 3745-19-04(A) prohibits any person or property owner from open burning in an unrestricted area except as provided in OAC Rule 3745-19-04(B) to (C) and in ORC § 3704.11.
3. On September 16, 2006, the Jefferson Township Fire Department ("JTFD") responded to and extinguished a large debris fire, including tires and carpet, at a property owned and farmed by Respondent and located at 7750 Dayton Farmersville Road, Jefferson Township, Montgomery County, Ohio. This property is located in an "unrestricted area," as defined in OAC Rule 3745-19-01(K).



4. On September 20, 2006, the Regional Air Pollution Control Agency ("RAPCA"), Ohio EPA's contractual representative in Montgomery County, inspected Respondent's property in conjunction with JTFD. RAPCA observed a large burn site, approximately 40 feet by 20 feet, containing the remnants of the open burning of heavy equipment tires, carpet, and other debris. The open burning of this commercial waste was in violation of OAC Rule 3745-19-04(A).

5. On October 5, 2006, RAPCA sent a Notice of Violation ("NOV") to Respondent for the violation of Ohio Administrative Code ("OAC") Rule 3745-19-04(A).

6. On November 9, 2006, RAPCA received Respondent's response to the NOV. Respondent's President indicated that the debris pile that was burned on September 16, 2006 came from cleaning up the fence lines on properties he had acquired. He indicated that the materials that could not be burned would be put in a roll-off container to be properly disposed of.

7. On November 14, 2006 RAPCA issued proposed Findings and Orders ("F&Os") to Respondent that included a proposed penalty of \$1,000 for the open burning violation described above. In the response received by RAPCA on January 23, 2007 and after a series of communications between Respondent and RAPCA, Respondent made a counteroffer of \$500 to the proposed \$1,000 penalty.

8. On February 2, 2007, RAPCA issued final F&Os to Respondent that included a reduced civil penalty in the amount of \$750. Through numerous letters and phone messages, including a follow-up letter on May 29, 2007, Respondent was informed that the case would be referred to Ohio EPA if Respondent did not comply with the Orders within the specified time frame. Respondent never paid the civil penalty.

9. The OAC violation cited in the above findings also constitutes a violation of ORC § 3704.05(G), which states, in part, that no person shall violate any order, rule or determination of the Director, issued, adopted, or made under ORC Chapter 3704. OAC Chapter 3745-19 was adopted by the Director pursuant to ORC Chapter 3704.

10. Through unilateral orders, the Director may assess a violator not more than one thousand dollars (\$1,000) per day for each separate violation of the rules of OAC Chapter 3745-19 for open burning on commercial property as specified in OAC Rule 3745-19-06. A separate penalty is assessed for each day the violation occurs. If the violator fails to comply with the Orders, the Director has the authority, under ORC § 3704.06, to request the Attorney General to initiate legal action to seek penalties of up to twenty-five thousand dollars (\$25,000) for each day of each violation.

11. On December 28, 2007, Ohio EPA issued Director's Final Findings and Orders to Respondent for the above-mentioned violations. On January 17, 2008, Respondent filed a notice of appeal of the Director's Final Findings and Orders with the Environmental Review Appeals Commission ("ERAC"). On February 6, 2008, Respondent filed an amended notice of appeal of the Director's Final Findings and Orders with ERAC. A tentative settlement of the appeal was reached between the parties, whereby the parties agreed to settle this matter with the issuance of a settlement agreement specifying that Ohio EPA would issue these Orders and rescind the December 28, 2007 Orders.

12. The Director has given consideration to, and based his determination on, evidence relating to the technical feasibility and economic reasonableness of complying with the following Orders and their relation to benefits to the people of the State be derived from such compliance.

V. ORDERS

The Director hereby issues the following Orders:

1. The Director's Final Findings and Orders that were issued to the Respondent to address this violation and that became effective on December 28, 2007, are hereby rescinded.

2. Respondent shall immediately cease all open burning in violation of OAC Rule 3745-19-04, and shall maintain compliance thereafter.

3. Within thirty (30) days after the effective date of these Orders, Respondent shall pay Ohio EPA the amount of eight hundred and fifty dollars (\$850) in settlement of Ohio EPA's claims for civil penalties, which may be assessed pursuant to ORC Chapter 3704.06. Payment shall be made by an official check made payable to "Treasurer, State of Ohio" for \$850. The official check shall be submitted to Brenda Case, or her successor, together with a letter identifying the Respondent and the property, to the following address:

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

4. A copy of the check shall be sent to James A. Orlemann, Assistant Chief, SIP Development and Enforcement, or his successor, at the following address:

Ohio Environmental Protection Agency
Division of Air Pollution Control
P.O. Box 1049
Columbus, Ohio 43216-1049

VI. TERMINATION

Respondent's 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 the Chief of Ohio EPA's Division of Air Pollution Control 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 signed by Respondent and submitted to Ohio EPA and shall be.

VII. 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.

VIII. NOTICE

All documents required to be submitted by Respondent pursuant to these Orders shall be addressed to:

Regional Air Pollution Control Agency
117 South Main Street
Dayton, Ohio 45422-1280
Att: Brandie Lehman

and to:

Ohio Environmental Protection Agency
Division of Air Pollution Control
P.O. Box 1049
Columbus, Ohio 43216-1049
Attn: Thomas Kalman

IX. RESERVATION OF RIGHTS

Nothing contained herein shall be construed to prevent Ohio EPA from seeking legal or equitable relief to enforce the terms of these Orders or from taking other administrative, legal or equitable action as deemed appropriate and necessary, including seeking penalties against Respondent for noncompliance with these Orders and/or for the violations described herein. Nothing contained herein shall be construed to prevent Ohio EPA from exercising its lawful authority to require Respondent to perform additional activities pursuant to ORC Chapter 3704 or any other applicable law in the future. Nothing herein shall restrict the right of Respondent to raise any administrative, legal or equitable claim or defense with respect to such further actions which Ohio EPA may seek to require of Respondent. Nothing in these Orders shall be construed to limit the authority of Ohio EPA to seek relief for violations not addressed in these Orders.

X. EFFECTIVE DATE

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

IT IS SO ORDERED:

Ohio Environmental Protection Agency

Chris Korleski
Director

Date

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ATTORNEY GENERAL OFFICE
FINANCIAL ENFORCEMENT

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION

STATE OF OHIO

BEARCREEK FARMS, INC.
Appellant

v.

CHRIS KORLESKI, DIRECTOR OF
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Case No. ERAC 576141

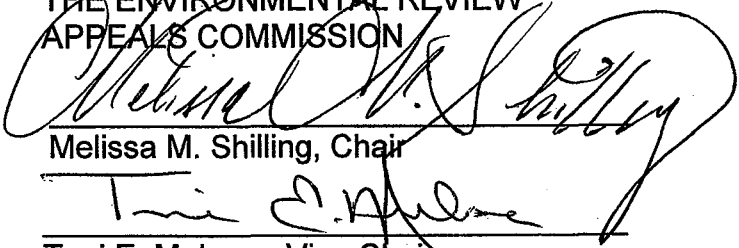
**ORDER FOR MOTION
TO DISMISS OR JOINT
STATUS REPORT**

Issued: August 28, 2008

On August 27, 2008, the Commission received a JOINT STIPULATION AND SETTLEMENT AGREEMENT that stated "Appellant Bearcreek agrees to file a Motion seeking voluntary dismissal . . . within the (10) days of receipt of the notification . . . that the Director has issued a final action" Accordingly, the Commission hereby ORDERS that a Motion to Dismiss or in the alternative a Joint Status Report be filed on or before October 27, 2008.

Entered in the Case File
of the Commission this 28th
day of Aug., 2008.

THE ENVIRONMENTAL REVIEW
APPEALS COMMISSION


Melissa M. Shilling, Chair


Toni E. Mulrane, Vice-Chair


Lisa L. Eschleman, Member

COPIES SENT TO:

Gregory S. Page, Esq.
Christina E. Grasseschi, Esq.
Nicole Candelora-Norman, Esq.

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