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JUL 21 2013
Debra M. [unclear]
CLERK OF DISTRICT COURTS

IN THE DISTRICT COURT OF LINCOLN COUNTY, NEBRASKA

STATE OF NEBRASKA, ex rel,
MICHAEL J. LINDER, Director,
NEBRASKA DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Plaintiff,

v.

EmmaJean Myers, a/k/a E. Jean Myers, a/k/a
EmmaJean Fackler, a/k/a E. Jean Fackler,

Defendant and Third-Party Plaintiff,

v.

James R. Fackler,

Third-Party Defendant.

Case No. CI 12-544

CONSENT DECREE

COMES NOW the parties, Plaintiff, the Nebraska Department of Environmental Quality ("NDEQ"), proceeding on its Complaint filed herein and appearing through its Counsel, Jon C. Brining, Attorney General, Defendant, E. Jean Fackler, appearing through her Counsel, Jeffery M. Eastman, and Third-Party Defendant, James R. Fackler, appearing through his Counsel, Randy Fair, and each party having consented to the making and entering of this Consent Decree without trial, the Court finds that the Consent Decree should be and hereby is entered.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED as follows:

1. The Court has jurisdiction of the parties and the subject matter of this action pursuant to Environmental Protection Act, Neb. Rev. Stat. § 81-1501 *et seq.* (Reissue 2008, Supp. 2009), and all rules and regulations and orders promulgated thereunder.



2. On or about October 1, 2009, NDEQ issued a Compliant, Compliance Order and Notice of Opportunity for Hearing. A hearing on the Order was not requested and the Order became a final order. Defendant violated the Order by failing to comply with the deadlines set forth therein.

3. The parties agree that settlement of this matter is in the public interest and that entry of this consent decree is the most appropriate means of resolving their dispute. The parties desire to conclude this case without trial or adjudication of any issues of fact or law, without this consent decree constituting an admission by Defendant or Third-Party Defendant with respect to such issues.

4. This consent decree shall be in full satisfaction of all claims between the parties. The parties also agree to release any and all claims or actions arising out of the same transaction or occurrences referenced above and in NDEQ's complaint, provided that such claims were known to NDEQ, or were reasonably ascertainable from information in NDEQ's possession, as of the date of the filing of the consent decree.

5. The parties have agreed to the following timeline for Third-Party Defendant's compliance:

- a. Immediately eliminate the discharge of wastewater to the ground surface. All work done on the septic system shall be performed by a certified professional.
- b. By September 1, 2013, submit in writing to the Department what actions were taken to cease the discharge of wastewater and a schedule, not to exceed 45 days for completion of work to be performed, to provide for long term management of wastewater being generated.
- c. By November 15, 2013, construct, alter, or modify the wastewater system so that it complies with the design requirements of Title 124 and provides for the long term management of wastewater.

- d. Allow NDEQ or its agents access to the property to verify compliance.

6. An unexcused failure of Third-Party Defendant to comply with the timelines detailed in paragraph 5, subsections (a-d) of this Consent Decree shall result in assessment of a civil penalty in the following amounts until compliance with paragraph 5, subsections (a-d) of this Consent Decree is obtained:

- a. 1-30 days of violations - \$50.00 per day;
- b. 31-60 days of violation - \$100.00 per day; and
- c. 61 or more days of violation - \$250.00 per day.

7. Force majeure for the purposes of this Consent Agreement means any event arising from causes beyond the reasonable control of Third-Party Defendant and any entity controlled by Third-Party Defendant, which delays or prevents the timely completion of the tasks outlined above under this Consent Decree or the performance of any obligation under this Consent Decree. Third-Party Defendant shall exercise its best efforts to anticipate any potential force majeure and address the potential effects as the event is occurring, and following the event, to ensure that any delay is minimized to the greatest extent practicable. Unless excused by the NDEQ under paragraph 11, Third-Party Defendant shall bear the burden to prove that a failure to comply with the Consent Decree was the result of a force majeure event pursuant to this paragraph.

8. Economic circumstances shall not be considered circumstances beyond the control of Third-Party Defendant, nor shall the failure of a contractor, subcontractor, or material man or agent (collectively referred to as "Contractors") to whom responsibility for performance is delegated to meet contractually imposed deadlines be a force beyond

the control of Third-Party Defendant, unless the cause of the Contractors' late performance was also beyond the Contractors' control.

9. If any event occurs that is likely to delay the completion of the tasks outlined above, whether or not caused by force majeure, Third-Party Defendant shall notify NDEQ in writing, within seven business days of learning of the delay of the anticipated length and cause of the delay, the measures taken or to be taken to prevent or minimize the delay and the timetable by which Third-Party Defendant intends to implement these measures;

10. If NDEQ agrees that the delay is attributable to a force majeure, the time for performance of the work shall be extended for a period of time not to exceed the actual duration of the delay. Such request for extension shall not be unreasonably withheld, conditioned, or delayed by NDEQ.

11. NDEQ, in its discretion, may agree to an extension caused by any other event.

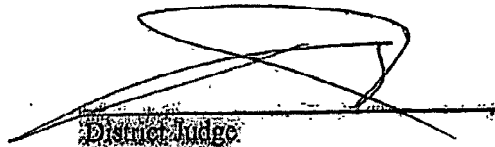
12. Failure of Third-Party Defendant to comply with the notice requirements of this consent decree shall constitute a waiver of Third-Party Defendant's right to request an extension of time for compliance with the requirements of this Consent Decree. Notice to NDEQ, for purposes of this consent decree shall be directed to Ryan S. Post, Assistant Attorney General, 2115 State Capitol Building, P.O. Box 98920, Lincoln, Nebraska 68509-8920, and Steven J. Moeller, Attorney, Nebraska Department of Environmental Quality, 1200 "N" Street, Suite 400, P.O. Box 98922, Lincoln, NE 68509-8922.

13. This consent decree will have no effect on any enforcement action brought by NDEQ against Defendant or Third-Party Defendant for future violations of any statutes or regulations.

14. The undersigned consent without further notice to the form and entry of this consent decree.

DATED THIS 31 day of July, 2013, in Lincoln County, Nebraska.

BY THE COURT:




District Judge

STATE OF NEBRASKA, ex rel.,
MICHAEL J. LINDER, Director
NEBRASKA DEPARTMENT OF
ENVIRONMENTAL QUALITY, Plaintiff

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