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EPA -- REGION 10

BEFORE THE  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

DOCKET NO. CWA-10-2014-0003

MACMILLAN-PIPER, INC.  
(Airport Way Facility),  
Seattle, Washington

**CONSENT AGREEMENT AND  
FINAL ORDER**

Respondent.

**I. STATUTORY AUTHORITY**

1.1 This Consent Agreement and Final Order ("CAFO") is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 309(g)(2)(B) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g)(2)(B).

1.2 The Administrator has delegated the authority to issue the Final Order contained in Part V of this CAFO to the Regional Administrator of EPA Region 10, who has redelegated this authority to the Regional Judicial Officer in EPA Region 10.

1.3 Pursuant to Section 309(g)(1) and (g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(1) and (g)(2)(B), and in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties," 40 C.F.R. Part 22, EPA issues, and MacMillan-Piper, Inc. ("Respondent") agrees to issuance of, the Final Order contained in Part V of this CAFO.

## II. PRELIMINARY STATEMENT

2.1. In accordance with 40 C.F.R. §§ 22.13(b) and 22.45(b), issuance of this CAFO commences this proceeding, which will conclude when the Final Order contained in Part V of this CAFO becomes effective.

2.2. The Administrator has delegated the authority to sign consent agreements between EPA and the party against whom a Class II penalty is proposed to be assessed pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), to the Regional Administrator of EPA Region 10, who has redelegate this authority to the Director of the Office of Compliance and Enforcement, EPA Region 10 (“Complainant”).

2.3. Part III of this CAFO contains a concise statement of the factual and legal basis for the alleged violations of the CWA, together with the specific provisions of the CWA and implementing regulations that Respondent is alleged to have violated.

## III. ALLEGATIONS

3.1. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the “discharge of a pollutant” by any person into navigable waters of the United States, except, *inter alia*, as authorized by a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342. Section 402(a) of the CWA, 33 U.S.C. § 1342(a), provides that a state with an approved NPDES program may issue permits for the discharge of pollutants into waters of the United States upon such specific terms and conditions as the state may prescribe.

3.2. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.” Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as “waters of the United States.” EPA’s regulations define “waters of the United States” to include waters that are

currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce; all interstate waters; and tributaries to those waters. 40 C.F.R. § 122.2.

3.3. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines “pollutant” to include, *inter alia*, dredged spoil, rock, sand, chemical wastes and industrial waste.

3.4. Section 502(14) of the Clean Water Act, 33 U.S.C. § 1362(14), defines the term “point source” to include any “pipe, ditch, channel, tunnel, or conduit . . . from which pollutants are or may be discharged.”

3.5. Section 402(p) of the Act, 33 U.S.C. § 1342(p), specifies that an NPDES permit is required for any storm water discharge “associated with industrial activity.” Section 402(p) also authorizes EPA to issue regulations that designate additional storm water discharge sources and establish a comprehensive program to regulate these additional sources.

3.6. EPA’s regulations define “storm water discharge associated with industrial activity” to include discharges associated with facilities under Standard Industrial Classification 4221-25. 40 C.F.R. § 122.26(b)(14)(xi).

3.7. The State of Washington has a federally approved NPDES permit program administered by the Washington Department of Ecology (“Ecology”).

3.8. In October 2009, Ecology reissued the Washington Industrial Stormwater General Permit (“2010 Storm Water GP”) pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. The 2010 Storm Water GP became effective on January 1, 2010 and has an expiration date of January 1, 2010. The 2010 Storm Water GP was modified with the new effective date of July 1, 2012. The 2010 Storm Water GP authorizes certain discharges of storm water associated with industrial activity at permitted facilities.

3.9. The 2010 Storm Water GP requires facilities engaged in certain industrial activities to apply for coverage under the permit if storm water from the facility discharges to a surface water body, or to a storm sewer system that discharges to a surface water body.



Permittees are required to comply with the conditions and requirements set forth in the applicable Storm Water GP.

3.10. Respondent is a corporation duly organized under the laws of the State of Washington and is therefore a “person” as defined under Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

3.11. At all times relevant to this action, Respondent was the owner and/or operator of a bulk cargo and freight transloading facility located in Seattle, Washington (“Facility”). The Facility transloads dry bulk commodities such as grains, sand, clay, fertilizers, lumber, brick, and metal products.

3.12. The Facility, which was under Respondent’s control at all times relevant to this action, discharges storm water offsite into municipal storm sewers that ultimately flow into the Duwamish River approximately one mile from the Facility. The Facility’s storm water discharges contain “pollutants” within the meaning of Section 502(6) and (12) of the CWA, 33 U.S.C. § 1362(6) and (12).

3.13. The Duwamish River is currently used, was used in the past, or may be susceptible to use in interstate and foreign commerce, and thus the Duwamish River is a “navigable water” as defined in Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and “water of the United States” as defined in 40 C.F.R. § 122.2.

3.14. The Facility is a point source within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14), and 40 C.F.R. § 122.2. In the alternative, the Facility contains point sources.

3.15. At all times relevant to this CAFO, the Facility had coverage under the 2010 Storm Water GP (permit no. WAR011326).

3.16. Respondent violated the 2010 Storm Water GP between January 2010 and January 2013. Violations were discovered during EPA inspections of the Facility on January 25,

2013 and February 11, 2013, and EPA's review of Respondent's storm water pollution prevention plan ("SWPPP"), Respondent's site inspection reports, and Respondent's daily monitoring reports.

**Count 1: Failures to Sample Storm Water Discharges**

3.17. Condition S4.B.1.a. of the 2010 Storm Water GP requires the Permittee to sample the storm water discharge from each designated location at least once per quarter.

3.18. Condition S4.B.2.a. states that the Permittee "shall designate sampling location(s) at the point(s) where it discharges stormwater associated with industrial activity off-site."

3.19. Condition S4.B.2.c. states that the Permittee "shall sample each distinct point of discharge off-site except as otherwise exempt from monitoring as a 'substantially identical outfall' per S3.B.5.b." Substantially identical outfall means "two or more outfalls [that] discharge substantially identical effluents (based on similar industrial activities and site conditions)."

3.20. Condition S3.B.5 requires the Permittee to include a sampling plan as part of its SWPPP that identifies the points of discharge and documents the location of discharge points that the Permittee does not sample because the pollutant concentrations are substantially identical to a discharge point being sampled.

3.21. In its June 2012 revised SWPPP, Respondent identified Outfall #3 as a sampling location on the west side of the Facility. Respondent failed to conduct quarterly sampling of the storm water discharge from Outfall #3 for the third quarter of 2012 in violation Condition S.B.4. of the 2010 the Storm Water GP and Section 301(a) of the CWA, 33 U.S.C. § 1311(a). Respondent filed a discharge monitoring report ("DMR") with the Department of Ecology for that quarter.

3.22. In its June 2012 revised SWPPP, Respondent identified a Containment Tank ("Vault") as a sampling location on the south side of the Facility. As of May 2012, however, the

Seattle Department of Transportation (“SDOT”) rerouted storm water from the south side of the Facility from the Vault to a new outfall connected to the municipal storm water line along Airport Way South (“New Outfall”). Respondent was not aware that SDOT rerouted storm water to the New Outfall until EPA’s inspection on February 11, 2013. Respondent failed to conduct quarterly sampling of the storm water discharge from the New Outfall for the second, third, and fourth quarters of 2012 in violation Condition S.B.4. of the 2010 the Storm Water GP and Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

3.23. Respondent also discharges storm water offsite from Outfall #21, located in the east side of the Facility. Discharges into Outfall #21 are not “substantially identical” to Outfall #3 or the Vault/New Outfall, nor was Outfall #21 identified or documented as “substantially identical” in the Facility’s SWPPP. Between March 2010 and December 2012, Respondent failed to conduct quarterly sampling of the storm water discharge from Outfall #21 for 12 consecutive quarters in violation Condition S.B.4. of the 2010 Storm Water GP and Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

**Count 2: Exceedance of Total Suspended Solids Effluent Limit**

3.24. Condition S5.C.1. and S6.C.1. require a Permittee with discharges to CWA Section 303(d)-listed waters to comply with effluent limitation guidelines and monitoring requirements specified in Condition S4. and Table 5. Table 5 contains an effluent limit for Total Suspended Solids (“TSS”).

3.25. Pursuant to Condition S5.C.2., the discharge of pollutants at a level more than that identified and authorized by the 2010 Storm Water GP for those activities constitutes a violation of the terms and conditions of the permit.

3.26. Respondent discharges into a municipal storm water system that ultimately discharges to a 303(d)-listed impaired waterbody and must sample its discharges for TSS and comply with the TSS effluent limit of 30 mg/L.



3.27. Respondent's discharge sampling data for Outfall #3 during the second quarter of 2012 shows a TSS concentration of 102 mg/L in violation of Condition S5.C.2. of the 2010 Storm Water GP and Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

**Count 3: Failures to Conduct Visual Inspections**

3.28. Condition S7.A.1. requires the Permittee to conduct and document visual inspections of the site each month.

3.29. Respondent's site inspection report shows that Respondent failed to document monthly visual inspections during the following months: April 2010, May 2010, July 2010, November 2010, January 2011, December 2011, April 2012, July 2012, August 2012, September 2012, and November 2012. Respondent's failures to conduct monthly visual inspections are violations of Condition S7.A.1. of the 2010 Storm Water GP and Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

**Count 4: Failures to Implement Operational Source Control BMPs**

3.30. Condition S3.B.4.b.i.2. of the 2010 Storm Water GP requires the Permittee to include operational source control BMPs, including "good housekeeping" measures, in its SWPPP and implement the BMPs. Good housekeeping BMPs include "[k]eep all dumpsters under cover or fit with a lid that must remain closed when not in use."

3.31. During EPA's inspection of the Facility on January 25, 2013, EPA inspectors observed two dumpsters that were not under cover and did not have lids.

3.32. At the time of EPA's inspection of the Facility on January 25, 2013, Respondent failed to keep all dumpsters under cover or fit with a lid in violation of Condition S3.B.4.b.i.2. of the 2010 Storm Water GP and Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

**Count 5: Failures to Include Required Sample Documentation**

3.33. Condition S4.B.3. requires the Permittee to record information, including sample time, for each storm water sample taken, and to retain the information on-site.

3.34. Respondent conducted storm water sampling at Outfall #3 for the first quarter of 2010 and the second quarter of 2011, but failed to record the required sample times in those quarters in violation of Condition S3.B.3. of the 2010 Storm Water GP and Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

3.35. Under Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), EPA may assess an administrative penalty when EPA finds that “any person has violated any permit condition or limitation ... in a permit issued” pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. Consequently, under Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19, Respondent is liable for the administrative assessment of civil penalties for violations at the Facility in an amount not to exceed \$16,000 per day for each day during which the violation continues, up to a maximum of \$177,500.

#### **IV. CONSENT AGREEMENT**

4.1. Respondent admits the jurisdictional allegations contained in this CAFO.

4.2. Respondent neither admits nor denies the specific factual allegations contained in this CAFO.

4.3. As required by Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), EPA has taken into account the nature, circumstances, extent, and gravity of the alleged violations as well as Respondent’s economic benefit of noncompliance, ability to pay, and other relevant factors. After considering all of these factors, EPA has determined that an appropriate penalty to settle this action is \$37,500, and Respondent consents to the assessment of the stated civil penalty.

4.4. Respondent agrees to pay the total civil penalty set forth in Paragraph 4.3 within 30 days of the effective date of the Final Order.



4.5. Payment under this CAFO must be made by cashier's check or certified check payable to the order of "Treasurer, United States of America" and delivered via United States mail 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 must note on the check the title and docket number of this action.

4.6. Respondent must serve photocopies of the check described in Paragraph 4.5 on the Regional Hearing Clerk and EPA Region 10 at the following addresses:

Regional Hearing Clerk  
U.S. Environmental Protection Agency  
Region 10, Mail Stop ORC-158  
1200 Sixth Avenue, Suite 900  
Seattle, WA 98101

Chae Park  
U.S. Environmental Protection Agency  
Region 10, Mail Stop OCE-133  
1200 Sixth Avenue, Suite 900  
Seattle, WA 98101

4.7. If Respondent fails to pay the penalty assessed by this CAFO in full by the due date set forth in Paragraph 4.4, the entire unpaid balance of penalty and accrued interest shall become immediately due and owing. Such failure may also subject Respondent to a civil action to collect the assessed penalty under the CWA, together with interest, fees, costs, and additional penalties described below. In any collection action, the validity, amount, and appropriateness of the penalty shall not be subject to review.

4.7.1. Interest. Pursuant to Section 309(g)(9) of the CWA, 33 U.S.C.

§ 1319(g)(9), any unpaid portion of the assessed penalty shall bear interest at a rate established by the Secretary of Treasury pursuant to 31 U.S.C. § 3717(a)(1) from the effective date of the Final Order set forth in Part V, provided however, that no interest shall be payable on any portion of the assessed penalty that is paid within thirty (30) days of the effective date of the Final Order.

4.7.2. Attorneys Fees, Collection Costs, Nonpayment Penalty. Pursuant to Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), if Respondent fails to pay on a timely basis the penalty set forth in Paragraph 4.3, Respondent shall pay (in addition to any assessed penalty and interest) attorneys fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to twenty percent (20%) of the aggregate amount of Respondent's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

4.8. The penalty described in Paragraph 4.3, including any additional costs incurred under Paragraph 4.7, above, represents an administrative civil penalty assessed by EPA and shall not be deductible for purposes of federal taxes.

4.9. The undersigned representative of Respondent certifies that he or she is authorized to enter into the terms and conditions of this CAFO and to bind Respondent to this document.

4.10. The undersigned representative of Respondent also certifies that, as of the date of Respondent's signature of this CAFO, Respondent has corrected the violation(s) alleged in Part III above.

4.11. Except as described in Subparagraph 4.7.2, above, each party shall bear its own fees and costs in bringing or defending this action.

4.12. Respondent expressly waives any right to contest the allegations and waives any right to appeal the Final Order set forth in Part V.

4.13. The provisions of this CAFO shall bind Respondent and its agents, servants, employees, successors, and assigns.

4.14. The above provisions are STIPULATED AND AGREED upon by Respondent and EPA Region 10.

DATED:

11/12/13

FOR RESPONDENT:



John Odland, Vice President  
MacMillan-Piper, Inc.

DATED:

11/30/2013

FOR COMPLAINANT



EDWARD J. KOWALSKI, Director  
Office of Compliance and Enforcement  
EPA Region 10

#### **V. FINAL ORDER**

5.1. The terms of the foregoing Parts I-IV are ratified and incorporated by reference into this Final Order. Respondent is ordered to comply with the terms of settlement.

5.2. This CAFO constitutes a settlement by EPA of all claims for civil penalties pursuant to the CWA for the violations alleged in Part III. In accordance with 40 C.F.R. § 22.31(a), nothing in this CAFO shall affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This CAFO does not waive, extinguish or otherwise affect Respondent's obligations to comply with all applicable provisions of the CWA and regulations promulgated or permits issued thereunder.

5.3. In accordance with Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), and 40 C.F.R. § 22.38(b), the Washington Department of Ecology has been given the opportunity to




consult with EPA regarding the assessment of the administrative civil penalty against Respondent.

5.4. Pursuant to Section 309(g)(4)(A) of the CWA, 33 U.S.C. § 1319(g)(4)(A), and 40 C.F.R. § 22.45(b), EPA has issued public notice of and provided reasonable opportunity to comment on its intent to assess an administrative penalty against Respondent. More than 40 days have elapsed since issuance of this public notice and EPA has received no petition to set aside the Consent Agreement contained herein.

5.5. This Final Order shall become effective upon filing.

SO ORDERED this 23<sup>rd</sup> day of December, 2013.



M. SOCORRO RODRIGUEZ  
Regional Judicial Officer, U.S. Environmental Protection Agency, Region 10

**CERTIFICATE OF SERVICE**

The undersigned certifies that the original of the attached **CONSENT AGREEMENT AND FINAL ORDER** in **In the Matter of: MacMillan-Piper (Airport Way Facility)**, **DOCKET NO.: CWA-10-2014-0003** was served on the addressees in the following manner on the date specified below:


The undersigned certifies that a true and correct copy of the document was delivered to:

Endre M. Szalay  
Office of Regional Counsel  
U.S. Environmental Protection Agency  
Region 10, Mail Stop ORC-158  
1200 Sixth Avenue, Suite 900  
Seattle, WA 98101

Further, the undersigned certifies that a true and correct copy of the aforementioned document was placed in the United States mail certified/return receipt to:

Michael Dunning  
Perkins Coie LLP  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099

DATED this 23<sup>rd</sup> day of December, 2013



Signature

Candace Smith  
Regional Hearing Clerk  
EPA Region 10