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HEARINGS CLERK
EPA -- REGION 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:)
) DOCKET NO. CWA-10-2007-0074
)
)
McGEE INDUSTRIES, INC.,)
Anchorage, Alaska) 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 in turn has re delegated this authority to the Regional Judicial Officer in EPA Region 10.

1.3. Pursuant to Section 309(g)(1) and (g)(2)(B), 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 hereby issues, and

1 McGee Industries, Inc. ("McGee Industries") hereby agree to issuance of, the Final Order
2 contained in Part V of this CAFO.

3 **II. PRELIMINARY STATEMENT**

4 2.1. In accordance with 40 C.F.R. §§ 22.13(b) and 22.45(b), issuance of this CAFO
5 commences this proceeding which will conclude when the Final Order contained in Part V of
6 this CAFO becomes effective.

7 2.2. Part III of this CAFO contains a concise statement of the factual basis for the
8 alleged violations of the CWA, together with specific provisions of the CWA and implementing
9 regulations that McGee Industries is alleged to have violated.

10 **III. ALLEGATIONS**

11 3.1. CWA Section 301(a), 33 U.S.C. § 1311(a), prohibits the "discharge of any
12 pollutants by any person" except as authorized by a National Pollutant Discharge Elimination
13 System ("NPDES") permit issued pursuant to CWA Section 402, 33 U.S.C. § 1342. Section
14 504(12) of the CWA, 33 U.S.C. § 1362(12), defines the term "discharge of a pollutant" to
15 include "any addition of any pollutant to navigable waters from any point source." "Navigable
16 waters" are defined as "waters of the United States." 33 U.S.C. § 1362(7).

17 3.2. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), specifies that an NPDES permit
18 is required for any storm water discharge "associated with industrial activity." 40 C.F.R.
19 § 122.26(b)(14)(x) defines "[s]torm water associated with industrial activity" to include
20 discharges associated with "[c]onstruction activity, including clearing, grading, and excavation"
21 resulting in the disturbance of at least five acres of total land area.

22 3.3. In July of 2003, EPA reissued the NPDES General Permit for Storm Water
23 Discharges from Construction Activities ("CGP") pursuant to Section 402 of the CWA, 33
24 U.S.C. § 1342. The CGP became effective on July 1, 2003 and authorizes discharges of storm
25

1 water associated with construction activities. The CGP's coverage extends to all facilities in the
2 State of Alaska and requires permittees to comply with the conditions and requirements set forth
3 in the CGP.

4 3.4. To obtain coverage for storm water discharges from a construction site under the
5 CGP, an operator must first "prepare and submit a complete and accurate Notice of Intent." CGP
6 at Part 2. An "operator" is defined as both (1) "[t]he part [who] has operational control over the
7 construction plans and specifications . . .," and (2) "[t]he party [who] has day-to-day operational
8 control of those activities at a project which are necessary to ensure compliance with a [storm
9 water pollution prevention plan] for the site or other permit conditions." CGP at Appendix A.

10 3.5. McGee Industries is a "person" as defined in Section 502(5) of the CWA, 33
11 U.S.C. § 1362(5). McGee Industries is also an "operator" as that term is defined in the CGP at
12 Appendix A.

13 3.6. Since approximately July of 2004, McGee Industries has been engaged in
14 construction activities at the Bailey's Furniture Outlet construction site ("Site"). The Site
15 consists of approximately 6.4 acres of real property located at 350 West International Airport
16 Road in Anchorage, Alaska.

17 3.7. The receiving water for any storm water discharges from the Site is the
18 Anchorage municipal separate storm sewer system ("MS4"). The Anchorage MS4 discharges to
19 Fish Creek which flows to Cook Inlet. Fish Creek and Cook Inlet are "navigable waters" as
20 defined in Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and are "waters of the United
21 States" as defined in 40 C.F.R. § 122.2.

22 3.8. McGee Industries obtained coverage under the CGP on July 14, 2004. Thus,
23 McGee Industries is authorized to discharge storm water from the Site in accordance with the
24 CGP.

1 3.9. On May 2, 2005, EPA conducted an inspection of the Site to determine
2 compliance with the CGP. EPA found that McGee Industries was in violation of the CGP as
3 alleged in the following paragraphs.

4 3.10. Erosion and sediment controls identified in the storm water pollution prevention
5 plan ("SWPPP") were not properly maintained, in violation of Part 3.6.A of the CGP.

6 3.11. Control measures were not properly selected for the maintenance area at the Site,
7 in violation of Part 3.13.A of the CGP.

8 3.12. A copy of the CGP was not included in the SWPPP, in violation of Part 3.8 of the
9 CGP.

10 3.13. Records of each site inspection were not retained as part of the SWPPP, in
11 violation of Part 3.10.G of the CGP.

12 3.14. The SWPPP did not identify all potential sources of pollution that may reasonably
13 be expected to affect the quality of the storm water discharges at the Site, in violation of Part
14 3.1.B of the CGP.

15 3.15. The SWPPP did not identify all operators for the Site and the areas of the Site
16 over which each operator had control, in violation of Part 3.3.A of the CGP.

17 3.16. The SWPPP did not describe the nature or sequence of the construction activity,
18 in violation of Parts 3.3.B.1 and 3.3.B.2 of the CGP.

19 3.17. The SWPPP did not contain a general location map with enough detail to identify
20 the location of the Site and the waters of the United States, in violation of Part 3.3.B.4 of the
21 CGP.

22 3.18. The site map in the SWPPP did not contain the location of major structural best
23 management practices ("BMPs"), in violation of Part 3.3.C.3 of the CGP.

1 3.19. The site map in the SWPPP did not contain the location of material, waste,
2 borrow or equipment storage areas, in violation of Part 3.3.C.5 of the CGP.

3 3.20. The SWPPP did not describe and identify the location and description of any
4 storm water discharge associated with industrial activities at the Site, in violation of Part 3.3.D of
5 the CGP.

6 3.21. The SWPPP did not identify the general sequence during the construction process
7 in which BMPs would be implemented and the operator responsible for the BMP's
8 implementation, in violation of Part 3.4.A of the CGP.

9 3.22. The SWPPP did not include dates of major grading activities, temporary or
10 permanent construction cessation, and initiation of stabilization practices, in violation of Part
11 3.4.C of the CGP.

12 3.23. The SWPPP did not include a description of all post-construction storm water
13 management measures that will be installed during the construction process to control pollutants
14 in discharges after construction operations have been completed, in violation of Part 3.4.E of the
15 CGP.

16 3.24. The SWPPP did not include a description of measures to minimize off-site
17 tracking of sediments onto paved surfaces and the generation of dust, in violation of Part 3.4.G
18 of the CGP

19 3.25. The SWPPP did not include a description of controls, including storage practices,
20 to minimize exposure of the construction and waste materials to storm water, and spill
21 prevention and response practices, in violation of Part 3.4.H of the CGP.

22 3.26. The SWPPP did not include a description of pollutant sources from areas other
23 than construction, in violation of Part 3.4.I of the CGP.

1 3.27. The SWPPP did not identify any allowable non-storm water discharges, in
2 violation of Part 3.5 of the CGP.

3 3.28. The SWPPP did not include endangered species documentation, in violation of
4 Part 3.7 of the CGP.

5 3.29. The SWPPP was not signed and certified by the operator, in violation of Part
6 3.12.D of the CGP.

7 3.30. Under CWA Section 309(g)(1), 33 U.S.C. § 1319(g)(1), EPA may assess an
8 administrative penalty against any person that EPA finds "has violated any permit condition or
9 limitation ... in a permit issued" pursuant to CWA Section 402, 33 U.S.C. § 1342.

10 Consequently, under CWA Section 309(g)(2)(B), 33 U.S.C. § 1319(g)(2)(B), McGee Industries
11 is liable for the administrative assessment of civil penalties for violations at the Site in an amount
12 not to exceed \$11,000 per day for each day during which the violation continues, up to a
13 maximum amount of \$157,500.

14 **IV. CONSENT AGREEMENT**

15 4.1. McGee Industries stipulates that EPA has jurisdiction over the subject matter
16 alleged herein.

17 4.2. McGee Industries neither admits nor denies the specific factual allegations
18 contained in Part III of this CAFO.

19 4.3. As required under Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3), EPA has
20 taken into account the nature, circumstances, extent, and gravity of the alleged violations as well
21 as McGee Industries' economic benefit of noncompliance, ability to pay, and other relevant
22 factors. After considering all of these factors, EPA has determined and McGee Industries agrees
23 that an appropriate penalty to settle this action is in the amount of Six Thousand Dollars
24 (\$6,000.00).

1 4.4. McGee Industries consents to issuance of the Final Order set forth in Part V, and
2 agrees to pay the total civil penalty set forth in Paragraph 4.3, above, plus all applicable interest
3 in such penalty, in accordance with the payment schedule described in the subparagraphs 4.4.1
4 through 4.4.3, below.

5 4.4.1. Within thirty (30) days of the effective date of the Final Order, McGee
6 Industries shall pay a first installment of \$2,000.00.

7 4.4.2 Within ninety (90) days of the effective date of the Final Order, McGee
8 Industries shall pay a second installment of \$2,051.78 (\$2,000.00 plus \$51.78 interest).

9 4.4.3. Within 180 days of the effective date of the Final Order, McGee Industries
10 shall pay a third installment of \$2,025.89 (\$2,000.00 plus \$25.89 interest).

11 4.5. Payment under this CAFO shall be made by cashier's check or certified check,
12 payable to the order of "Treasurer, United States of America" and delivered to the following
13 address:

14 Mellon Bank
15 EPA Region 10
16 P.O. Box 36903M
Pittsburgh, Pennsylvania 15251

17 McGee Industries shall note on the check the title and docket number of this action.

18 4.6. McGee Industries shall serve photocopies of the check described in Paragraph
19 4.5, above, on the Regional Hearing Clerk and the EPA Region 10 Office of Compliance and
20 Enforcement at the following addresses:

21 Regional Hearing Clerk
22 U.S. Environmental Protection Agency
23 Region 10
1200 Sixth Avenue, ORC-158
24 Seattle, WA 98101
25

1 Office of Compliance and Enforcement
2 Attn: Robert Grandinetti
3 U.S. Environmental Protection Agency
4 Region 10
5 1200 Sixth Avenue, OCE-133
6 Seattle, WA 98199

7 4.7. If McGee Industries fails to pay the penalty assessed by this CAFO in full by the
8 due date set forth in Paragraph 4.4, above, the entire unpaid balance of penalty and accrued
9 interest shall become immediately due and owing. If McGee Industries fails to pay the penalty
10 assessed, McGee Industries may be subject to a civil action to collect the assessed penalty under
11 the CWA, together with interest, fees, costs, and additional penalties described below. In any
12 collection action, the validity, amount, and appropriateness of the penalty shall not be subject to
13 review.

14 4.8. If McGee Industries fails to pay any portion of the penalty assessed by this CAFO
15 in full by the due date set forth in Paragraph 4.4, above, McGee Industries shall be responsible
16 for payment of the amounts described below:

17 4.8.1. Interest. Pursuant to Section 309(g)(9) of the Act, 33 U.S.C. 1319(g)(9),
18 any unpaid portion of the assessed penalty shall bear interest at a rate established by the
19 Secretary of Treasury pursuant to 31 U.S.C. § 3717(a)(1) from the effective date of the
20 Final Order set forth in Part V, below, provided, however, that no interest shall be
21 payable on any portion of the assessed penalty that is paid within thirty (30) days of the
22 effective date of the Final Order.

23 4.8.2. Attorneys Fees, Collection Costs, Nonpayment Penalty. Pursuant to
24 Section 309(g)(9) of the Act, 33 U.S.C. § 1319(g)(9), if McGee Industries fails to pay on
25 a timely basis the amount of the penalty set forth in Paragraph 4.3, above, McGee
Industries shall pay (in addition to any assessed penalty and interest) attorneys fees and

1 costs for collection proceedings and a quarterly nonpayment penalty for each quarter
2 during which such failure to pay persists. Such nonpayment penalty shall be in an
3 amount equal to twenty percent (20%) of the aggregate amount of McGee Industries'
4 penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

5 4.9. The penalty described in Paragraph 4.3, above, including any additional costs
6 incurred under Paragraph 4.8, above, represents an administrative civil penalty assessed by EPA
7 and shall not be deductible for purposes of federal taxes.

8 4.10. The undersigned representative of McGee Industries certifies that he or she is
9 fully authorized to enter into the terms and conditions of this CAFO and to bind McGee
10 Industries to this document.

11 4.11. Except as described in Subparagraph 4.8.2, above, each party shall bear its own
12 costs in bringing or defending this action.

13 4.12. McGee Industries expressly waives any rights to contest the allegations and
14 waives any right to appeal the Final Order set forth in Part V, below.

15 4.13. The provisions of this CAFO shall bind McGee Industries and its agents, servants,
16 employees, successors, and assigns.

17 4.14. The above provisions are STIPULATED AND AGREED upon by McGee
18 Industries and EPA.

19 DATED: McGEE INDUSTRIES, INC.:

20
21 1-29-07

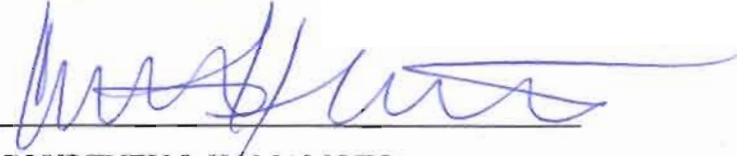


22 THOMAS MCGEE
23 Owner
24 For Respondent
25

1 DATED:

U.S. ENVIRONMENTAL PROTECTION AGENCY:

2
3 2/2/07



4 COURTNEY J. HAMAMOTO
5 Assistant Regional Counsel
6 For Complainant

7
8 **V. FINAL ORDER**

9 5.1. The terms of the foregoing Parts I-IV are hereby ratified and incorporated by
10 reference into this Final Order. McGee Industries is hereby ordered to comply with the
11 foregoing terms of the settlement.

12 5.2. This CAFO shall constitute a settlement by EPA of all claims for civil penalties
13 pursuant to the CWA for the violations alleged in Part III, above. In accordance with 40 C.F.R.
14 § 22.31(a), nothing in this CAFO shall affect the right of EPA or the United States to pursue
15 appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.
16 This CAFO does not waive, extinguish, or otherwise affect McGee Industries' obligations to
17 comply with all applicable provisions of the CWA, applicable CWA regulations, and/or any
18 permits issued thereunder.

19 5.3. In accordance with Section 309(g)(1) of the Act, 33 U.S.C. § 1319(g)(1), and 40
20 C.F.R. § 22.38(b), the Alaska Department of Environmental Conservation has been given the
21 opportunity to consult with EPA regarding the assessment of the administrative civil penalty
22 against McGee Industries.

23 5.4. Pursuant to Section 309(g)(4)(A) of the Act, 33 U.S.C. § 1319(g)(4)(A), EPA has
24 published public notice of its intent to assess an administrative penalty against McGee Industries
25 and to invite public comment in accordance with 40 C.F.R. § 22.45. More than forty (40) days

1 have elapsed since the issuance of this public notice, and EPA has received no petition to set
2 aside the Consent Agreement contained herein.

3 5.5. This Final Order shall become effective upon filing.
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5
6

7 SO ORDERED this 27th day of March, 2007.
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10 RICHARD G. McALLISTER
11 Regional Judicial Officer
12 U.S. Environmental Protection Agency
13 Region 10
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CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **CONSENT AGREEMENT AND FINAL ORDER** in **In the Matter of: McGEE INDUSTRIES, INC., DOCKET NO.: CWA-10-2007-0074** was filed with the Regional Hearing Clerk on March 23, 2007.

On March 23, 2007 the undersigned certifies that a true and correct copy of the document was delivered to:

Courtney Hamamoto, Esquire
US Environmental Protection Agency
1200 Sixth Avenue, ORC-158
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 on March 23, 2007, to:

McGee Industries, Inc.
6200 Lake Otis Parkway, #202
Anchorage, Alaska 99507

DATED this 23rd day of March 2007.



Carol Kennedy
Regional Hearing Clerk
EPA Region 10