

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1**

IN THE MATTER OF)

BARDEN'S BOAT YARD, INC.)
2 Island Wharf Road)
Marion, Massachusetts 02738-1542)

Respondent.)

Docket No. CWA-01-2020-0029

**CONSENT AGREEMENT AND
FINAL ORDER FOR CLASS II
CIVIL PENALTY UNDER
CLEAN WATER ACT**

I. INTRODUCTION

1. The Director of the Enforcement and Compliance Assurance Division of the United States Environmental Protection Agency, Region 1 ("EPA") enters into this Consent Agreement and Final Order ("CAFO") with Barden's Boat Yard, Inc. ("Respondent") under authority Section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g), and in accordance with 40 C.F.R. §§ 22.13(b) and 22.18 of EPA's *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination, or Suspension of Permits* ("Consolidated Rules"), for the purpose of resolving alleged Clean Water Act violations by the Respondent.

2. EPA alleges that Respondent discharged stormwater associated with industrial activity into navigable waters of the United States without complying fully with all the requirements of the federal stormwater Multi-Sector General Permit for Industrial Activities, and also discharged untreated wastewater containing pollutants into navigable waters of the United States without authorization, both in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

II. STATUTORY AND REGULATORY AUTHORITY

3. EPA takes this action under the authority of Section 309(g) of the CWA, 33 U.S.C. § 1319(g) and in accordance with 40 C.F.R. § 22.13(b) of the *Consolidated Rules*.
4. Pursuant to Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), and 40 C.F.R. § 22.38(b), EPA has notified the Commonwealth of Massachusetts of this action.
5. EPA has provided the public a thirty-day opportunity for public notice and comment on this proposed CAFO, 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).

General Statutory Authority

6. The CWA is designed to restore and maintain the chemical, physical, and biological integrity of the nation's waters. Section 101(a) of the Act, 33 U.S.C. § 1251(a). To accomplish the objectives of the CWA, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person into navigable waters except in compliance with the terms and conditions of a permit issued pursuant to Section 402 or 404 of the CWA, 33 U.S.C. §§ 1342 or 1344, and EPA's implementing regulations, found at 40 C.F.R. Part 122.
7. Section 402(a) of the CWA, 33 U.S.C. § 1342(a), authorizes the Administrator of EPA to issue National Pollution Discharge Elimination System ("NPDES") permits for the discharge of pollutants into navigable waters in compliance with the CWA.
8. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines "person" to include "an individual, corporation, partnership [or] association."
9. 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."
10. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines "pollutant" to include,

inter alia, solid waste, chemical wastes, biological materials, rock, sand, and industrial waste discharged into water.

11. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines “point source” to include “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.”

12. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as “the waters of the United States, including the territorial seas.”

Stormwater Regulation and Permitting

13. Section 308(a) of the CWA, 33 U.S.C. § 1318(a), authorizes the Administrator of EPA to require the owner or operator of any point source to provide such information as the Administrator may reasonably need to carry out the objectives of the CWA, including, among other things, the development and issuance of NPDES permits under Section 402 of the CWA, 33 U.S.C. § 1342.

14. Pursuant to Sections 308 and 402 of the CWA, 33 U.S.C. §§ 1318 and 1342, EPA promulgated stormwater discharge regulations at 40 C.F.R. § 122.26.

15. Forty C.F.R. § 122.26(b)(13) defines “storm water” to include stormwater runoff, snow melt runoff, and surface runoff and drainage.

16. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), and implementing regulation 40 C.F.R. § 122.26(a)(1)(ii), require that facilities discharging storm water associated with industrial activity obtain a permit. Under 40 C.F.R. § 122.26(c)(1), dischargers of stormwater associated with industrial activity must apply for an individual permit or seek coverage under a general permit.

17. Facilities within the categories set out in 40 C.F.R. § 122.26(b)(14), including those

in Standard Industrial Classification (“SIC”) code 3732 (boat building and repairing), are industrial activities that must obtain permit authorization for stormwater discharges.

18. EPA re-issued the NPDES Stormwater Multi-Sector General Permit for Industrial Activities on June 4, 2015 (“2015 MSGP”), which was effective on the date of issuance. *80 Fed. Reg.* 34,403.

19. The 2015 MSGP contains terms and conditions designed to ensure the implementation of practices to minimize the pollutants in stormwater discharges associated with industrial activity.

20. Under the 2015 MSGP, a facility discharging stormwater associated with industrial activity is required to submit a Notice of Intent (“NOI”) to be covered under the Permit, prepare and implement a Stormwater Pollution Prevention Plan (“SWPPP”), conduct inspections, conduct monitoring and sampling, and meet other eligibility requirements.

Statutory Enforcement Authority

21. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), provides for the assessment of penalties for violations of Sections 301 and 308 of the CWA, 33 U.S.C. §§ 1311 and 1318, and for violating any condition or limitation in a permit issued under Section 402 of the CWA, 33 U.S.C. § 1342.

III. FINDINGS OF VIOLATION

22. Respondent is a company with its principal place of business located at 2 Island Wharf Road, Marion, Massachusetts.

23. Respondent is a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

24. Respondent owns and operates a boat maintenance, repair, and storage facility located at 2 Island Wharf Road, in Marion, Massachusetts (the “Island Wharf Road Facility”), which is classified under Standard Industrial Classification (“SIC”) code 3732 (Boat Building and Repairing), and therefore listed under “Sector R– Ship and Boat Building and Repair Yards” of the 2015 MSGP.

25. The Island Wharf Road Facility encompasses approximately 1.2 acres that are adjacent to Inner Sippican Harbor and provides boat maintenance, boat and engine repair, boat storage, fueling, hauling, pressure washing and other marina operations and associated services.

26. Respondent has, at all times relevant to this CAFO controlled daily business and industrial operations at the Island Wharf Road Facility and otherwise meets the definition of “operator” of the facility, as defined under the 2015 MSGP.

27. On July 27, 2016, Respondent submitted a NOI to be covered for discharges of stormwater associated with industrial activity under the 2015 MSGP, and received coverage under the 2015 MSGP, effective August 26, 2016. The NPDES Permit number for the Island Wharf Road Facility is MAR052024.

28. Respondent identified in its NOI that stormwater is discharged to the Inner Sippican Harbor from one outfall (Outfall #001) at the Island Wharf Road Facility.

29. Inner Sippican Harbor is a “navigable waters,” under Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

30. Respondent prepared a Stormwater Pollution Prevention Plan (“SWPPP”) for the Facility in August 2015 and updated the SWPPP in December 2018.

31. On July 16, 2019, authorized representatives of EPA inspected the Island Wharf Road Facility to review compliance with Federal and State environmental laws and regulations,

including compliance with the CWA.

32. As a result of the July 16, 2019 inspection, EPA determined that the Island Wharf Road Facility was not in full compliance with the terms and conditions of the 2015 MSGP.

33. Respondent's NOI identifies the primary standard industrial classification code for the Island Wharf Road Facility as 3732, which therefore subjects it to the 2015 MSGP requirements of Sector R (Subsector R1) (Ship and boat Building and Repair Yards).

34. Through its Coastal Zone Management Program, the Commonwealth of Massachusetts has incorporated additional sector-specific requirements into the 2015 MSGP for facilities that are regulated under Subsector R1. Per Part 9.1.2.5 of the 2015 MSGP, facilities regulated under Subsector R1 are required to sample quarterly for four metals (total copper, total iron, total lead, and total aluminum).

35. Part 7.4 of the 2015 MSGP requires facilities to report their monitoring results electronically to EPA through the NetDMR program.

36. From at least October 2016 to July 2019, the Respondent failed to conduct and report the Subsector R1 specific benchmark monitoring to EPA.

37. The 2015 MSGP also requires the Respondent to sample for total nitrogen as part of the Impaired Water monitoring associated with its stormwater discharge to Inner Sippican Harbor.

38. From at least October 2016 to July 2019, the Respondent failed to conduct and report the Impaired Water monitoring to EPA.

39. When a permittee submits a NOI to be covered under the 2015 MSGP it must identify all applicable industrial sectors which apply to the facility, including co-located industrial activity, to ensure that all applicable benchmark monitoring is conducted.

40. On October 30, 2019, Respondent submitted a Change NOI identifying that it was also subject to the 2015 MSGP requirements for Sector Q (Subsector Q1) (Water Transportation Facilities).

41. Facilities that are regulated under Subsector Q1 of the 2015 MSGP, are required to sample quarterly for five metals (total copper, total iron, total lead, total aluminum, and total zinc).

42. Respondent failed to include in its NOI under the 2015 MSGP that certain activities under Subsector Q1 were co-located activities at the Facility, and as a result, from at least October 2016 to July 2019, the Respondent failed to conduct and report the Subsector Q1 specific benchmark monitoring to EPA.

43. Part 7.5 of the 2015 MSGP requires that a permittee submit Annual Reports to EPA through the NPDES eReporting Tool (“NeT”) MSGP program by January 30th of each year containing information generated from the previous year.

44. Respondent failed to timely submit Annual Reports for years 2016, 2017, and 2018.

45. Part 3.2.1 of the 2015 MSGP requires that a permittee conduct and document quarterly Visual Assessments of stormwater discharges.

46. Respondent failed to conduct quarterly Visual Assessment of its discharges for the years 2016, 2017, and 2018.

47. Part 3.1 of the MSGP requires a permittee to conduct Quarterly Routine Inspections in areas where industrial materials or activities are exposed to stormwater; areas identified in the SWPPP and those that are potential pollutant sources; areas where spills and leaks have occurred in the past three years; discharge points; and control measures used to comply with the effluent limits contained in the permit.

48. The Quarterly Routine Inspections conducted by Respondent failed to address areas where industrial activities and pollutant sources could be exposed to stormwater and failed to document what impacts activities at the site are having on stormwater discharges.

49. Respondent conducts pressure washing at the Island Wharf Road Facility in the designated Wash Area. The pressure-washing involves directing a high-pressure stream of water at the vessel's hull while the boat is located on a travel lift or other structure.

50. The discharge from the above-mentioned activity, a process wastewater, had been through drains the Respondent claims it originally believed were sewer drains owned and regularly cleaned by the municipality, but which were later identified as storm water drains discharging to Inner Sippican Harbor. The discharge of this process-wastewater occurred typically during the months of October and November when boats are removed from the water and at least during the years 2016, 2017 and 2018. The Respondent further claims that pressure-washing wastewater is not currently discharged through this drain but is being hauled off-site by a licensed hauler.

51. Part 1.1.3 of the MSGP lists the non-stormwater discharges authorized under the 2015 MSGP. The discharge of pressure-washing wastewater is not a discharge authorized under the 2015 MSGP.

52. Respondent has an Outboard Engine Repair Shop located in the western most Boat Shed building. One of the repair activities performed in the repair shop is to test the operation of smaller outboard engines. As part of the testing, water in the tank is circulated through the outboard engine coming into contact with the oil and petroleum in the engine. The contents of the outboard engine test tank are discharged to the concrete apron located outside of the Boat Shed each year.

53. The discharge from the above-mentioned activity, a process wastewater, had been through drains the Respondent claims it originally believed were sewer drains owned and regularly cleaned by the municipality, but which were later identified as storm water drains discharging to Inner Sippican Harbor. The discharge of this process-wastewater occurred at least during the years 2016, 2017 and 2018. The Respondent further claims that outboard engine test tank wastewater is not currently discharged through this drain but is being hauled off-site by a licensed hauler.

54. Part 1.1.3 of the MSGP lists the non-stormwater discharges authorized under the 2015 MSGP. The discharge of the contents of the outboard engine test tank is not a discharge authorized under the 2015 MSGP.

55. Respondent's noncompliance with Parts 9.1.2.5 (State Sector-Specific Requirements), 7.4 (Reporting Monitoring Data to EPA), 7.5 (Annual Reports), 3.2.1 (Quarterly Visual Assessments), 3.1 (Quarterly Routine Inspections), and 1.1.3 (Unauthorized Discharges) of the 2015 MSGP, are violations of Section 301(a) of the CWA, 33 U.S.C. § 1319(a).

IV. CONSENT AGREEMENT

EPA and Respondent agree that settlement of this case is in the public interest and that entry of this CAFO without further litigation is an appropriate means of resolving this matter. Therefore, before taking any testimony, upon the pleadings, without adjudication of any issue of fact or law, and upon consent and agreement of the parties, it is hereby ordered and adjudged as follows:

56. Respondent admits the jurisdictional allegations set forth herein and hereby waives any defenses it might have as to jurisdiction and venue.

57. Respondent neither admits nor denies the specific factual or other non-jurisdictional

allegations contained in herein.

Waiver of Rights

58. Respondent waives the right to a hearing under Sections 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and to any appeal of the Final Order in this matter under Section 309(g)(8)(B) of the CWA, 33 U.S.C. § 1319(g)(8)(B). Respondent consents to the issuance of a Final Order without further adjudication.

Penalty

59. EPA proposes, and Respondent consents to, the assessment of a civil penalty of \$32,000 for all violations contained in this CAFO.

Payment Terms

60. In agreeing to the penalty described in the previous paragraph, EPA has taken into account the statutory penalty factors at Sections 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3).

61. Respondent shall pay a total penalty of \$32,000 due within 10 days of the date this CAFO becomes final.

62. Respondent shall make the payment by cashier's or certified check, or by wire transfer. Respondent shall include the case name and docket number (*In re: Barden's Boat Yard, Inc.*; Docket No. CWA-01-2020-0029) on the face of the check or wire transfer confirmation. A check should be payable to "Treasurer, United States of America" and shall be remitted as follows:

If remitted by regular U.S. mail:

U.S. Environmental Protection Agency / Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

If remitted by any overnight commercial carrier:

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U.S. EPA, Region I
5 Post Office Square, Suite 100
Boston, MA 02109

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, Missouri 63101

If remitted by wire transfer: Any wire transfer must be sent directly to the Federal Reserve Bank in New York City using the following information:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, New York 10045
Field Tag 4200 of the Fedwire message should read:
“D 68010727 Environmental Protection Agency”

In addition, at the time of payment, Respondent should also forward notice of payment of the civil penalty as well as copies of the payment check or payment receipt to:

Wanda Santiago, Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 1
5 Post Office Square, Suite 100
Mail Code: ORC 04-6
Boston, Massachusetts 02109-3912

and

Tonia Bandrowicz, Senior Enforcement Counsel
U.S. Environmental Protection Agency, Region 1
5 Post Office Square, Suite 100
Mail Code: 04-4
Boston, Massachusetts 02109-3912

63. Pursuant to Sections 309(g)(9) of the CWA, 33 U.S.C. §§ 1319(g)(9), a failure by Respondent to pay the penalty assessed by this CAFO in full by its due date shall subject Respondent to a civil action to collect the assessed penalty, plus interest at the prevailing rates, from the date this Agreement becomes final. The rate of interest assessed shall be at the rate set forth in 31 C.F.R. § 901.9(b), promulgated under 31 U.S.C. § 3717. Any person who fails to pay on a timely basis the amount of an assessed penalty shall be required to pay, in addition to such

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amount and interest, attorney's fees, costs for collection proceedings, and a quarterly non-penalty payment for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to twenty percent of the aggregate amount of such person's penalties and nonpayment penalties that are unpaid as of the beginning of such quarter. In any such collection action, the validity, amount, and appropriateness of the penalty shall not be subject to review.

General Provisions

64. The provisions of this CAFO shall apply to and be binding on Respondent, its officers, directors, agents, servants, employees, successors, and assigns.

65. The civil penalty provided under this CAFO, and any interest, nonpayment penalties, and charges described in this CAFO, shall represent penalties assessed by EPA within the meaning of 26 U.S.C. § 162(f) and are not tax deductible for purposes of federal, state, or local law. Accordingly, Respondent agrees to treat all payments made pursuant to this CAFO as penalties within the meaning of 26 C.F.R. § 1.162-21, and further agrees not to use those payments in any way as, or in furtherance of, a tax deduction under federal, state, or local law.

66. This CAFO does not constitute a waiver, suspension, or modification of the requirements of the CWA or any regulations or permits promulgated thereunder. Payment of the penalty pursuant to this CAFO resolves only Respondent's liability for federal civil penalties for the violations and facts alleged herein.

67. This CAFO in no way relieves Respondent or its employees of any criminal liability, and EPA reserves all its other criminal and civil enforcement authorities, including the authority to seek injunctive relief and the authority to undertake any action against Respondent in response to conditions which may present an imminent and substantial endangerment to the public health,

welfare, or the environment.

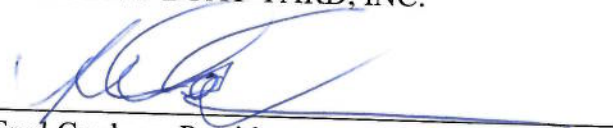
68. Nothing in this agreement shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this CAFO or of the statutes and regulations upon which this CAFO is based, or for Respondent's violation of any applicable provision of law.

69. The parties shall bear their own costs and fees in this action, including attorney's fees, and specifically waive any right to recover such costs from the other party pursuant to the Equal Access to Justice Act, 5 U.S.C § 504, or other applicable laws.

70. The terms, conditions, and requirements of this CAFO may not be modified or amended except upon written agreement of all parties, and approval of a Regional Administrator or his or her properly authorized delegate.


71. Each undersigned representative of the parties to this Consent Agreement certifies that he or she is fully authorized by the party represented to enter into the terms and conditions of this CAFO and to execute and legally bind that party to it.

BARDEN'S BOAT YARD, INC.


Fred Coulson, President
Barden's Boat Yard, Inc.

Date: 3/6/20

FOR U.S. ENVIRONMENTAL PROTECTION AGENCY:


Karen McGuire, Director
Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency, Region 1

Date: 3/16/20

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5 Post Office Square, Suite 100
Boston, MA 02109

FINAL ORDER

1. EPA has provided a thirty-day opportunity for public notice and comment on this proposed CAFO, pursuant to Sections 309(g)(4)(A) of the CWA, 33 U.S.C. § 1319(g)(4)(A) and 40 C.F.R. § 22.45(b).

2. Pursuant to 40 C.F.R. §§ 22.18(b) & (c) of EPA's *Consolidated Rules*, the foregoing Consent Agreement resolving this matter is incorporated by reference into this Final Order and is hereby ratified.

3. Respondent is hereby ordered to comply with the terms of the above Consent Agreement, which will become final thirty (30) days from the date it is signed by the Regional Judicial Officer unless a petition to set aside the order is filed by a commenter pursuant to Section 309(g)(4)(C), 33 U.S.C. § 1319(g)(4)(C), and 40 C.F.R. Part 22.

Date: _____

LeAnn Jensen
Regional Judicial Officer
U.S. Environmental Protection Agency, Region 1