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HEARINGS CLERK
EPA--REGION 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10

In the matter of:

PAUL SAYER,
Respondent

Anchor Point, Alaska

Docket No. CWA-10-2008-0059

**CONSENT AGREEMENT AND FINAL
ORDER**

I. AUTHORITIES

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

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

CONSENT AGREEMENT AND FINAL ORDER (CAFO)
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U.S. Environmental Protection Agency
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(206) 553-1796

1 1.3. Pursuant to Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), and in
2 accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment
3 of Civil Penalties," 40 C.F.R. Part 22, EPA hereby issues, and Paul Sayer ("Respondent") hereby
4 agrees to issuance of, the Final Order contained in Part VI of this CAFO.

5 **II. PRELIMINARY STATEMENT**

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

9 2.2 Part III of this CAFO provides the statutory and regulatory background that
10 undergirds EPA's enforcement action. Part IV of this CAFO contains a concise statement of the
11 factual basis for alleging violations of the Act, together with specific references to the provisions
12 of the Act and implementing regulations that Respondent is alleged to have violated. Part V of
13 this CAFO provides the Consent Agreement between the parties. Part VI of this CAFO provides
14 the Final Order resolving the alleged Clean Water Act violations.
15

16 **III. STATUTORY AND REGULATORY BACKGROUND**

17 3.1 Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the "discharge of any
18 pollutant by any person" except as authorized by a National Pollutant Discharge Elimination
19 System ("NPDES") permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342.

20 3.2 Section 502(12) of the Act, 33 U.S.C. § 1362(12), defines the term "discharge of
21 a pollutant" to include "any addition of any pollutant to navigable waters from any point source."

22 3.3 Section 502(6) of the Act, 33 U.S.C. § 1362(6), defines "pollutant" to include,
23 *inter alia*, dredged spoil, rock, sand, and biological materials.
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1 3.4 Section 502(7) of the Act, 33.U.S.C. § 1362(7), defines “navigable waters” as
2 “waters of the United States.”

3 3.5 40 C.F.R. § 122.2 defines “waters of the United States” to include waters that
4 “may be susceptible to use in interstate or foreign commerce, including all waters which are
5 subject to the ebb and flow of the tide ... tributaries... [and adjacent] wetlands.”

6 3.6 Section 502(14) of the Act, 33 U.S.C. § 1562(14), defines “point source” to
7 include “any discernible, confined and discrete conveyance ... from which pollutants are or may
8 be discharged.”

9 3.7 Section 502(5) of the Act, 33 U.S.C. § 1562(5), defines “person” as “an
10 individual, corporation, partnership, association, State, municipality, commission, or political
11 subdivision of a State, or any interstate body.”

12 3.8 Section 402(p) of the Act, 33 U.S.C. § 1342(p), specifies that an NPDES permit is
13 required for any storm water discharge “associated with industrial activity.” Section 402(p) also
14 authorizes EPA to issue regulations that designate additional storm water discharge sources and
15 establish a comprehensive program to regulate these additional sources.

16 3.9 40 C.F.R. § 122.26(b)(14)(x) defines “[s]torm water associated with industrial
17 activity” to include discharges associated with “[c]onstruction activity, including clearing,
18 grading, and excavation” resulting in the disturbance of at least five acres of total land area.

19 3.10 In July of 2003, EPA re-issued the NPDES General Permit for Storm Water
20 Discharges from Construction Activities (“CGP”) pursuant to Section 402 of the Act, 33 U.S.C.
21 § 1342. The CGP became effective on July 1, 2003 and authorizes certain discharges of storm
22 water associated with construction activities. The CGP’s coverage extends to all facilities in the
23 State of Alaska and requires permittees to comply with the conditions and requirements set forth
24 in the CGP.

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1 3.11 To obtain coverage for storm water discharges from a construction site under the
2 CGP, a discharger must first "prepare and submit a complete and accurate Notice of Intent."
3 CGP at Part 2.

4 3.12 The CGP defines a "discharger" as the operator of the construction site. An
5 "operator" is defined as both (1) "[t]he party [who] has operational control over construction
6 plans and specifications ...," and (2) "[t]he party [who] has day-to-day operational control of
7 those activities at a project which are necessary to ensure compliance with a [storm water
8 pollution prevention plan] for the site or other permit conditions." CGP at Appendix A.

9 3.13 Section 308(a) of the CWA, 33 U.S.C. § 1318(a), authorizes EPA to require the
10 owner or operator of any point source to provide such information as may be reasonably required
11 in carrying out Section 402 of the CWA, 33 U.S.C. § 1342. Pursuant to Section 308(a), EPA has
12 promulgated NPDES permit application requirements. Among these application requirements
13 are:

- 14 • The requirement set forth in 40 C.F.R. § 122.21(a)(1) that "[a]ny person
15 who discharges or proposes to discharge pollutants ... must submit a
16 complete application to [EPA],"
- 17 • The requirement set forth in 40 C.F.R. § 122.26(c)(1) that "[d]ischarges
18 of storm water associated with industrial activity and with small
19 construction activity are required to apply for an individual permit or
20 seek coverage under a promulgated storm water general permit," and
- 21 • The requirement set forth in 40 C.F.R. § 122.21(c)(1) that regulated
22 dischargers of construction storm water submit an NPDES permit
23 application or a Notice of Intent [NOI] to apply for coverage under an
24 NPDES general permit at least ninety (90) days before the date on which
25 construction is to commence unless an applicable NPDES general permit
specifies a different submittal date.

23 3.14 Section 2.1.B of the CGP requires operators to file an NOI at least seven days
24 before commencing construction activities.

1 3.15 Part 3 of the CGP requires operators to develop a Storm Water Pollution
2 Prevention Plan in accordance with good engineering practices.

3 3.16 Section 309(g) of the Act, 33 U.S.C. § 1319(g), provides, in pertinent part,
4 “[w]henever on the basis of any information available . . . the Administrator finds that any
5 person has violated Section 1311 . . . [or] 1318 [of the Act]. . . or has violated any permit
6 condition or limitation implementing any of such sections in a permit issued under Section 1342
7 of this title . . . the Administrator . . . may . . . assess a . . . class II civil penalty . . .”

8 **IV. ALLEGATIONS**

9 4.1 Respondent is a “person” as defined in Section 502(5) of the Act, 33 U.S.C. §
10 1362(5).

11 4.2 Respondent owns, possesses, and/or controls about 100 acres of real property on
12 the Kenai Peninsula, Alaska. Respondent’s property is located at Latitude 59.7113 and
13 Longitude 151.6897, along Sayer Road and North Fork Road in Anchor Point, Alaska.
14 Approximately 5.5 acres of Respondent’s property is under construction. The construction area
15 is hereinafter referred to as “the Site.” Respondent is developing the Site under the name
16 Hughes Tool Co. Sayer Addition No. 3.

17 4.3 Respondent has operational control over the construction plans and specifications
18 at the Site.

19 4.4 Respondent is a discharger under the CGP.

20 4.5 Storm water discharges from the Site discharge through either directly to or
21 through ditches and culverts into wetlands abutting Ruby Creek or into the Anchor River. Ruby
22 Creek is a tributary to the Anchor River, which is a traditional navigable water body. The
23 wetlands, Ruby Creek, and the Anchor River are “navigable waters” as defined in Section 502(7)
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1 of the Act, 33 U.S.C. § 1362(7), and are "waters of the United States" as defined in 40 C.F.R. §
2 122.2.

3 4.6 On or about April 17, 2006, Respondent commenced construction activities on the
4 Site that resulted in the clearing, grading, and/or excavation of more than five acres of land.

5 4.7 On August 21, 2006, Respondent submitted a NOI for CGP coverage.

6 4.8 On July 25, 2007, EPA inspected the Site and discovered Respondent's
7 construction activity and observed indications that storm water was conveyed from the Site itself,
8 culverts, and ditches and into the waters described in Paragraph 4.5, and that the storm water
9 contained, among other things, sediment, sand, and dirt, which are pollutants under Section
10 502(6) of the Act, 33 U.S.C. § 1362(6).
11

12 4.9 As the operator of the Site, Respondent was required to either submit an NOI to
13 obtain coverage under the CGP or apply for an individual NPDES permit before beginning
14 construction activities at the Site.

15 4.10 Prior to the start of construction activities, Respondent failed to apply for an
16 individual NPDES permit or for coverage under the CGP.

17 4.11 During the July 25, 2007 inspection, EPA inspectors also discovered the
18 following deficiencies in Respondent's Storm Water Pollution Prevention Plan ("SWPPP") and
19 violations of CGP conditions:

20 4.11.1 Respondent did not sign or certify the SWPPP;

21 4.11.2 SWPPP site map did not identify the areas of soil disturbance;
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1 4.11.3 The SWPPP site map did not identify two equipment storage areas at
2 corner of Sayer Road and Mother Lode Circle, and at the intersection of Jolly Road and
3 Sayer Road;

4 4.11.4 The SWPPP did not identify or account for gravel mining occurring at
5 the intersection of Jolly Road and Sayer Road;

6 4.11.5 The SWPPP contained no dates or records for major grading activities,
7 temporary or permanent cessation of construction activities on a portion of the Site,
8 and/or initiation of stabilization measures;

9 4.11.6 The SWPPP did not describe any interim stabilization practices, nor an
10 implementation schedule; in addition, the SWPPP did not provide an implementation
11 schedule for or a description of final stabilization practices at the Site;

12 4.11.7 The SWPPP did not provide any description of post-construction storm
13 water management measures;

14 4.11.8 The SWPPP did not provide any description of measures to minimize
15 off-site vehicle tracking of sediments or generation of dust;

16 4.11.9 The SWPPP did not include a description of construction and waste
17 materials expected to be stored at the Site; nor did it describe controls to minimize
18 exposure of the materials to storm water, and spill prevention and response practices;

19 4.11.10 The SWPPP did not include a description of pollutant sources from areas
20 other than construction, and a description of controls and measures that will be
21 implemented at those sites to minimize pollutant discharges;
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1 4.11.11 The SWPPP did not identify and ensure the implementation of
2 appropriate pollution prevention measures for allowable non-storm water components of
3 any discharge;

4 4.11.12 In violation of the CGP, the individual who conducted 22 Site
5 inspections during the period from August 25, 2006 to July 25, 2007, did not have any
6 training in erosion and sediment control;

7 4.11.13 In violation of the CGP, the storm water controls measures utilized at
8 Site (i.e., hay bales and silt fences) were improperly installed and poorly maintained; and
9

10 4.11.14 In violation of the CGP, nine areas at the Site lacked required
11 stabilization.

12 4.12 Respondent's failure to timely apply for an NPDES permit is a violation of
13 Section 308 of the Act, 33 U.S.C. § 1318. In accordance with Section 309(g)(2)(B) of the Act,
14 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19, Respondent is liable for the administrative
15 assessment of civil penalties in an amount not to exceed \$11,000 per day for each day during
16 which a violation continues, up to a maximum of \$157,500.

17 4.13 Each SWPPP deficiency constitutes a violation of the CGP, and therefore,
18 violates a permit condition or limitation implementing any of such sections in a permit issued
19 under Section 402 of the Act, 33 U.S.C. § 1342. In accordance with Section 309(g)(2)(B) of the
20 Act, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19, Respondent is liable for civil penalties
21 not to exceed \$11,000 per day for each day during which the violation continues, up to a
22 maximum of \$157,500.
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1 4.14 Respondent's failure to comply with CGP violates a permit condition or limitation
2 implementing any of such sections in a permit issued under Section 402 of the Act, 33 U.S.C. §
3 1342. In accordance with Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), and 40
4 C.F.R. Part 19, Respondent is liable for civil penalties not to exceed \$11,000 per day for each
5 day during which the violation continues, up to a maximum of \$157,500.

6 **V. CONSENT AGREEMENT**

7 The parties to this action hereby stipulate as follows:

8 5.1 For the limited purpose of this CAFO, Respondent admits the jurisdictional
9 allegations contained in Part IV of this CAFO.

10 5.2 Respondent neither admits nor denies the specific factual allegations contained in
11 Part IV of this CAFO.

12 5.3 Pursuant to Section 309(g) of the Act, 33 U.S.C § 1319(g), based on the nature,
13 circumstances, extent, and gravity of the alleged violations, Respondent's economic benefit of
14 noncompliance and ability to pay the proposed penalty, and other relevant factors, EPA has
15 determined, and Respondent agrees, that \$27,600 is an appropriate penalty to settle this action.

16 5.4 Respondent consents to the issuance of the Final Order below and agrees to pay
17 the civil penalty cited in Paragraph 5.3 within 30 days of the effective date of the Final Order.

18 5.5 Payment under this CAFO shall be made by cashier's check or certified check,
19 payable to the order of "Treasurer, United States of America" and delivered to the following
20 address:
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23 ///
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U.S. Environmental Protection Agency
1200 Sixth Avenue, Suite 900 (ORC-158)
Seattle, Washington 98101
(206) 553-1796

1 U.S. Environmental Protection Agency
2 Fines and Penalties
3 Cincinnati Finance Center
4 PO Box 979077
5 St. Louis, MO 63197-9000

6 Respondent shall note on the check the title and docket number of this case.

7 5.6 Respondent shall serve photocopies of the check described in Paragraph 5.5 on
8 the Regional Hearing Clerk and the Region 10 Office of Compliance and Enforcement at the
9 following addresses:

10 Regional Hearing Clerk
11 U.S. Environmental Protection Agency
12 Region 10
13 1200 6th Ave (ORC-158)
14 Seattle, WA 98101

15 Office of Compliance and Enforcement
16 U.S. Environmental Protection Agency
17 Region 10
18 1200 6th Ave (OCE-133)
19 Seattle, WA 98101

20 5.7 If Respondent fails to pay the penalty assessed by this CAFO in full by its due
21 date, Respondent may be subject to a civil action to collect the assessed penalty under the Act,
22 together with interest, fees, costs, and additional penalties described below. In any collection
23 action, the validity, amount and appropriateness of the penalty shall not be subject to review.

24 5.8 If Respondent fails to pay any portion of penalty assessed by this CAFO in full by
25 its due date, Respondent shall also be responsible for payment in the amounts described below:

26 5.8.1 Interest: Pursuant to Section 309(g)(9) of the Act, 33 U.S.C. § 1319(g)(9),
27 any unpaid portion of the assessed penalty shall bear interest at the rate established by the
28 Secretary of the Treasury pursuant to 31 U.S.C. § 3717(a)(1) from the effective date of

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32 U.S. Environmental Protection Agency
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34 Seattle, Washington 98101
35 (206) 553-1796

1 the Final Order under Part VI; however, no interest shall be payable on any portion of the
2 assessed penalty that is paid within 30 days of the effective date of the Final Order.

3 5.8.2 Attorney Fees, Collection Costs, Nonpayment Penalty: Pursuant to
4 Section 309(g)(9) of the Act, 33 U.S.C. § 1319(g)(9), if Respondent fails to pay on a
5 timely basis the amount of the penalty assessed by the Final Order attached below,
6 Respondent shall pay (in addition to any assessed penalty and interest) attorney fees and
7 costs for collection proceedings and a quarterly nonpayment penalty for each quarter
8 during which such failure to pay persists. Such nonpayment penalty shall be in an
9 amount equal to 20% of the aggregate amount of Respondent's penalties and nonpayment
10 penalties that are unpaid as of the beginning of such quarter.

11 5.9 The penalty described in Paragraph 5.3 of this CAFO, including any additional
12 costs incurred under Paragraph 5.8, represents a civil penalty assessed by EPA and shall not be
13 deductible for purposes of federal taxes.

14 5.10 The undersigned representative for Respondent certifies that he or she is fully
15 authorized to enter into the terms and conditions of this CAFO and to bind Respondent to this
16 document.

17 5.11 Except as described in Subparagraph 5.8.2 of this CAFO, each party shall bear its
18 own costs in bringing or defending this action.

19 5.12 Respondent expressly waives any rights to contest the allegations and to appeal
20 the Final Order attached below.

21 5.13 The provisions of this CAFO shall bind Respondent and its officers, directors,
22 agents, servants, employees, successors, and assigns.

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1 5.14 The above provisions are STIPULATED AND AGREED upon by Respondent
2 and EPA.

3
4 DATED:

5 3-20-08



6 PAUL SAYER
7 Respondent

8 DATED:

9 3-24-08

U.S. ENVIRONMENTAL PROTECTION AGENCY



10 ANKUR K. TOHAN
11 Assistant Regional Counsel
12 for Complainant

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14 ///
15 ///

1 **VI. FINAL ORDER**

2 6.1 The terms of the foregoing Consent Agreement are hereby ratified and
3 incorporated by reference into this Final Order. Respondent is hereby ordered to comply with
4 the foregoing terms of settlement.

5 6.2 This CAFO constitutes a settlement by EPA of all claims for civil penalties
6 pursuant to the Clean Water Act for the particular violations alleged in Part IV. In accordance
7 with 40 C.F.R. § 22.31(a), nothing in this CAFO shall affect the right of EPA or the United
8 States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any
9 violations of law. This CAFO does not waive, extinguish, or otherwise affect Respondent's
10 obligations to comply with all applicable provisions of the Act and regulations and permits
11 issued thereunder.

12 6.3 In accordance with Section 309(g)(1), 33 U.S.C. § 1319(g)(1), and 40 C.F.R. §
13 22.38(b), the Idaho Department of Environmental Quality has been given an opportunity to
14 consult with EPA regarding the assessment of an administrative penalty against Respondent.
15

16 6.4 Pursuant to Section 309(g)(4)(A), 33 U.S.C. § 1319(g)(4)(A), EPA has published
17 public notice to inform the public of its intent to assess an administrative penalty against
18 Respondent and to invite public comment in accordance with 40 C.F.R. § 22.45. More than 40
19 days have elapsed since the issuance of this public notice, and EPA has received no petitions to
20 set aside the Consent Agreement contained herein.
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CONSENT AGREEMENT + FINAL ORDER (CAFO)
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U.S. Environmental Protection Agency
1200 Sixth Avenue, Suite 900 (ORC-158)
Seattle, Washington 98101
(206) 553-1796

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **CONSENT AGREEMENT AND FINAL ORDER** in **In the Matter of: Paul Sayer, DOCKET NO.: CWA-10-2008-0059** was filed with the Regional Hearing Clerk on May 12, 2008.

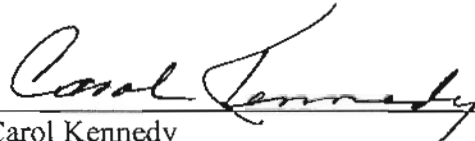
On May 12, 2008 the undersigned certifies that a true and correct copy of the document was delivered to:

Ankur Tohan, Esquire
US Environmental Protection Agency
Suite 900
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 May 12, 2008, to:

Paul Sayer
P.O. Box 10
Homer, Alaska 99603

DATED this 12th day of May 2008.



Carol Kennedy
Regional Hearing Clerk
EPA Region 10