

BRIGGS

BRIGGS **AND** MORGAN

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80 South 8th Street
Minneapolis, MN 55402-2157
Tel: 612.977.8400
Fax: 612.977.8650

2007 OCT 30 AM 10:53

RECEIVED
OCT 30 2007

October 24, 2007

Matthew J. Franken
612.977.8156
mfranken@briggs.com

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Regional Hearing Clerk (SRC)
United States Environmental Protection Agency
Region 8
1595 Wynkoop Street
Denver, CO 80202-1129

Re: In the Matter of Menards, Inc.
Administrative Penalty Complaint Docket No. CWA-08-2007-0023
Client-Matter No. 12488.5

Dear Sir:

Enclosed for filing please find an original and one copy of the Answer of Menard, Inc. in the above-referenced matter.

Very truly yours,



Matthew J. Franken

MJF/maj
Enclosure

cc: Richard H. Baird (w/enclosures, via certified mail, return receipt requested)
Gregg S. Greenfield (w/enclosures, via U.S. Mail)
Thomas A. Larson (w/enclosures)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2007 OCT 30 AM 8:53

RECEIVED
OCT 30 2007
EPA REGION 8
WISCONSIN OFFICE

IN THE MATTER OF:)
)
Menard, Inc.) **ANSWER OF RESPONDENT MENARD, INC.**
4777 Menard Drive)
Eau Claire, WI 54703-9604)
) **Docket No. CWA-08-2007-0023**
Respondent.)
_____)

Respondent Menard, Inc. ("Menards"), for its Answer to Complainant's Administrative Penalty Complaint, states and alleges as follows:

1. Except as expressly admitted or qualified, denies each and every allegation in the Complaint and puts Complainant to the strict proof thereof.

2. In response to paragraph 1, admits that Menards is a corporation incorporated under the laws of the State of Wisconsin; that its primary business address is 4777 Menard Drive, Eau Claire, Wisconsin 54703-9604; and that its President and Registered Agent at that address is John Menard, Jr.

3. In response to the allegations in paragraph 2, admits that Menards is a large home-improvement chain, operating approximately 200 retail stores and employing approximately 35,000 people in the upper Midwest.

4. In response to the allegations in paragraph 3, admits that Menards currently operates and, with the assistance of several consultants and contractors, constructed and developed a retail store and parking lot on property located at the northwest corner of the intersection of South Dakota Highway 42 and Powder House Road in the City of Sioux Falls,

South Dakota; and that the address of the store is 110 N. Highline Avenue, Sioux Falls, South Dakota 57110 (the "Site").

5. In response to the allegations in paragraph 4, admits that the Site is located in the southeast quarter of Section 13, Township 101 north, Range 49 west, in Minnehaha County, South Dakota.

6. In response to the allegations in paragraph 5, admits that Menards has owned, controlled, and/or operated the Site at all times relevant to this proceeding.

7. In response to the allegations in paragraph 6, admits that prior to construction of the new retail store at the Site, an unnamed channel (the "Unnamed Channel") was located at the Site; further admits that the bed of the Unnamed Channel varied in width and depth; but affirmatively alleges that during much of most years the Unnamed Channel was dry. Menards denies the remaining allegations.

8. In response to the allegations in paragraph 7, admits that a representative of Menards' Consultant, Sayre Associates, Inc., ("Sayre") wrote to the South Dakota Regulatory Office of the Army Corps of Engineers ("COE") on behalf of Menards to inquire regarding the steps involved in allowing Menards to proceed with plans to develop the Site; further admits that Sayre noted the presence of a draw and a stock pond at the Site.

9. In response to the allegations in paragraph 8, denies the allegations, and affirmatively alleges that COE advised Sayre that no permit was necessary.

10. In response to the allegations in paragraph 9, states that it is without sufficient information to admit or deny any notice COE received from a third party.

11. In response to the allegations in paragraph 10, denies the allegations.

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9. In response to the allegations in paragraph 8, denies the allegations, and affirmatively alleges that COE advised Sayre that no permit was necessary.

10. In response to the allegations in paragraph 9, states that it is without sufficient information to admit or deny any notice COE received from a third party.

11. In response to the allegations in paragraph 10, denies the allegations.

12. In response to the allegations in paragraph 11, admits that, on January 28, 2005, COE issued a Notice of Violation of the CWA to Menards for the unauthorized discharge of fill into the waters of the United States and requested that Menards provide information regarding the work that was performed at the Site.

13. In response to the allegations in paragraph 12, admits that, on April 1, 2005, Menards submitted correspondence and documents to COE related to work performed at the Site.

14. In response to the allegations in paragraph 13, states that it is without sufficient information to admit or deny the allegations.

15. In response to the allegations in paragraph 14, states that it is without sufficient information to admit or deny the allegations.

16. In response to the allegations in paragraph 15, admits that the Unnamed Channel in which a concrete pipe was placed, including water management modifications upstream and down stream of the ends of the pipe, is approximately 1,390 feet in length. Alleges that the impacted area was not a water of the United States nor a wetland area and did not include vegetation or other features that made it valuable for habitat, water quality functions, or storm water storage.

17. In response to the allegations in paragraph 16, admits that the work done on the Unnamed Channel was performed using common earth moving vehicles and equipment, which were operated on behalf of Menards.

18. In response to the allegations in paragraph 17, admits that the concrete pipe and water management modifications remain in place.

19. In response to the allegations in paragraph 18, admits that, on March 2, 2006, EPA issued an administrative order for compliance. Alleges that the terms of the compliance order speak for themselves, and that no further response to this paragraph is required.

20. In response to the allegations in paragraph 19, admits that the mitigation plan was conditionally approved by EPA on September 7, 2007, less than three weeks before this Complaint was served.

21. In response to the allegations in paragraph 20, admits that Menards has not yet mitigated the adverse impacts to the Unnamed Channel, but alleges that the mitigation process is complex and involves coordination with construction teams, land owners, and government officials, and Menards has been actively engaged in attempting to mitigate the impacts for more than a year; and that the United States has consented to, and in part contributed to, delays in the mitigation process.

22. In response to the allegations in paragraph 21, admits that Menards is a "person" within the meaning of 33 U.S.C. §1362(5).

23. In response to the allegations in paragraphs 22 and 23, alleges that these allegations state legal conclusions to which no responsive pleading is necessary, but in any event denies the same.

24. In response to the allegations in paragraphs 24 and 25, denies the same.

25. In response to the allegations in paragraphs 26, 27 and 28, states that the cited statutes and regulations speak for themselves.

26. In response to the allegations in paragraph 29, admits that Menards has not received a permit pursuant to §404 of the CWA, 33 U.S.C. §1344, to discharge dredged or fill material at the Site, but denies that there are waters of the United States at the Site.

Dated: October 24, 2007

BRIGGS AND MORGAN, P.A.

By 

Thomas A. Larson (#60902)

Matthew J. Franken (#31092X)

80 South Eighth Street

2200 IDS Center

Minneapolis, MN 55402

Telephone: 612-977-8400

**ATTORNEYS FOR RESPONDENT
MENARD, INC.**