



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8
1595 WYNKOOP STREET
DENVER, CO 80202-1129
<http://www.epa.gov/region08>

Ref: 8ENF-W

SEP 24 2007

CERTIFIED MAIL #7006 3450 0002 1975 8728
RETURN RECEIPT REQUESTED

John Menard, Jr.
President and Registered Agent
Menard, Inc.
4777 Menard Drive
Eau Claire, WI 54703-9604

Re: Notice of Proposed Assessment of
Administrative Civil Penalty
Docket No. **CWA-08-2007-0023**

Dear Mr. Menard:

Enclosed is an Administrative Penalty Complaint ("Complaint"), which the United States Environmental Protection Agency ("EPA") is issuing to Menards, Inc. ("Respondent"), for which you are the president and registered agent. In the Complaint, EPA alleges that Respondent violated section 301 of the Clean Water Act ("CWA"), 33 U.S.C. § 1311, by placement of dredged and/or fill material into waters of the United States without authorization under the CWA during site grading activities and construction of a storm water management system associated with the development of a new Menards retail location at 110 N. Highline Avenue in Sioux Falls, South Dakota. These discharges have occurred in the southeast quarter of section 13, Township 101 North, Range 49 West, in Minnehaha County. The Complaint proposes that EPA assess a penalty of \$112,500 for these violations, pursuant to section 309 of the CWA, 33 U.S.C. § 1319.

You have the right to a hearing to contest the factual allegations in the Complaint. We have enclosed a copy of 40 CFR part 22, which identifies the procedures EPA follows in administrative penalty proceedings of this type. Please note the requirements for an answer to the Complaint in 40 CFR § 22.15(b).

If you wish to contest the allegations in the Complaint or the penalty proposed in the Complaint, you must file an answer within 30 days of receipt of the enclosed Complaint with the EPA Region 8 Hearing Clerk at the following address:

Regional Hearing Clerk (8RC)
U.S. EPA Region 8
1595 Wynkoop Street
Denver, CO 80202-1129

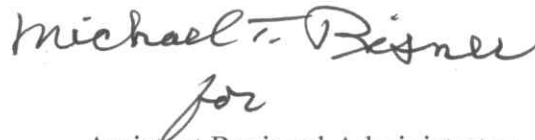


If you do not file an answer by the applicable deadline [See 40 CFR § 22.15(a)], you may be found in default. A default judgment may impose the full penalty EPA requests in a motion for default.

EPA encourages settlement of these proceedings at any time prior to a formal hearing if the settlement is consistent with the provisions and objectives of the CWA and applicable regulations [See 40 CFR § 22.18]. If a mutually satisfactory settlement can be reached, it will be formalized in a Consent Agreement. Upon final approval of the Consent Agreement by the Regional Judicial Officer, you will be bound by the terms of the Consent Agreement and will waive your right to a hearing on, and judicial appeal of, the agreed upon civil penalty. You have the right to be represented by an attorney at any stage of the proceedings, including any informal discussions with EPA, but it is not required.

Please note that arranging for a settlement meeting does not relieve you of the need to file a timely answer to EPA's Complaint. If you wish to discuss settlement of this matter, the most knowledgeable person on my staff for legal issues is Richard H. Baird, Enforcement Attorney, who can be reached at 303-312-6642. The most knowledgeable person on my staff for technical issues is Monica Heimdal, Enforcement Officer, who can be reached at 303-312-6359. We urge your prompt attention to this matter.

Sincerely,



for
Assistant Regional Administrator
Office of Enforcement, Compliance and
Environmental Justice

Enclosures:

1. Administrative Complaint
2. Administrative Penalty Procedures (40 CFR part 22)
3. Certificate of Service

cc: Tina Artemis, EPA, Regional Hearing Clerk
David Lagrone, U.S. Army Corps of Engineers
Thomas A. Larson, Briggs & Morgan (certified mail)
John Miller, South Dakota Department of Environment and Natural Resources
Steven Naylor, U.S. Army Corps of Engineers



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SEP 24 2007

Ref: 8ENF-W

CERTIFIED MAIL #7006 3450 0002 1975 8742
RETURN RECEIPT REQUESTED

Tim Tollefsrud, Director
Division of Environmental Services
South Dakota Department of Environment and Natural Resources
Joe Foss Building
523 East Capitol Ave.
Pierre, SD 57501

Re: Notice of Proposed Assessment of
Class II Civil Penalty
Docket No. **CWA-08-2007-0023**

Dear Mr. Tollefsrud:

Enclosed is a copy of an administrative complaint and notice of proposed assessment of a civil penalty against Menard, Inc. ("Respondent"), of Eau Claire, Wisconsin. The United States Environmental Protection Agency ("EPA") filed the complaint pursuant to section 309(g), 33 U.S.C. section 1319(g), of the Clean Water Act ("CWA") to begin the process to assess administratively a Class II civil penalty of \$112,500 against Respondent for violations of the CWA. Because the violations occurred in South Dakota, EPA is offering you the opportunity to confer with us regarding the proposed assessment.

You or your staff may request a conference within 30 days of receiving this letter. The conference may be in person or by telephone and may cover any matters relevant to the proposed assessment.

A copy of EPA procedures governing the administrative assessment of civil penalties under the CWA is enclosed for your reference. If you have any questions, the most knowledgeable person on my staff for legal issues is Richard H. Baird, Enforcement Attorney,



who can be reached at 303-312-6642. The most knowledgeable person on my staff for technical issues is Monica Heimdal, Enforcement Officer, who can be reached at 303-312-6359.

Sincerely,

Michael T. Risner
for

Assistant Regional Administrator
Office of Enforcement, Compliance and
Environmental Justice

Enclosures:

1. Administrative Complaint
2. Administrative Penalty Procedures (40 CFR part 22)

cc: Tina Artemis, EPA, Regional Hearing Clerk

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2007 SEP 24 AM 9:24

IN THE MATTER OF:)
)
Menard, Inc.)
4777 Menard Drive)
Eau Claire, WI 54703-9604)
)
Respondent.)
_____)

ADMINISTRATIVE PENALTY REGION VIII
COMPLAINT HEARING CLERK

Docket No. CWA-08-2007-0023

This Administrative Penalty Complaint ("Complaint") is issued under the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by section 309(g)(1)(A) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g)(1)(A), and properly delegated to the undersigned EPA official ("Complainant").

Pursuant to section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits," 40 CFR part 22, Complainant hereby proposes the assessment of a civil penalty against Menard, Inc. ("Respondent") for its violations of section 301(a) of the CWA, 33 U.S.C. § 1311(a).

I. ALLEGATIONS

1. Respondent Menard, Inc. ("Menards") is a corporation incorporated under the laws of the State of Wisconsin. Respondent's business address is 4777 Menard Drive, Eau Claire, WI 54703-9604. Its president and registered agent at that address is John Menard, Jr.

2. Respondent is the third-largest home improvement chain in the United States, operating approximately 200 retail stores and employing approximately 35,000 people in the upper Midwest.
3. At all times relevant to this proceeding, Respondent has been engaged in constructing, developing, and operating a new retail store and parking lot on property located at the northwest corner of the intersection of South Dakota Highway No. 42 and Powder House Road in the City of Sioux Falls, South Dakota. The address of the store is 110 N. Highline Avenue, Sioux Falls, SD 57110. In this Complaint, the store, the parking lot, and Respondent's surrounding property will be referenced as the "Site."
4. The Site is located in the southeast quarter of section 13, Township 101 North, Range 49 West, in Minnehaha County, South Dakota.
5. Respondent has owned, controlled, and/or operated the Site at all times relevant to this proceeding.
6. Prior to Respondent's construction of its new retail store at the Site, a stream flowed from west to east through the Site (the "Stream"). The Stream, which was approximately four to seven feet wide and approximately two feet deep at the Site, is part of an unnamed tributary to the Big Sioux River. The Big Sioux River flows into the Missouri River. Both the Big Sioux River and the Missouri River are navigable, interstate waters.
7. On January 15, 2002, a consultant retained by Respondent wrote to the South Dakota Regulatory Office of the United States Army Corps of Engineers ("Corps") asking what steps must be taken to allow Respondent to proceed with its plans to develop the Site.

Respondent's consultant noted the presence of a draw at the Site in its letter to the Corps. The draw referred to in the letter corresponds to the Stream.

8. On January 23, 2002, the Corps informed Respondent's consultant that, if fill were to be placed in the Stream, Respondent would have to obtain a Department of the Army permit authorizing the discharge of dredged or fill material into waters of the United States.
9. On November 22, 2004, the Corps was notified by a third party that during the construction of the Menards store at the Site, the Stream running through the Site had been channelized, placed into an underground pipe, and buried. In addition, the land above the now channelized and buried Stream and the surrounding area had been paved and a parking lot created.
10. On January 11, 2005, the Corps made a jurisdictional determination that the Stream is a "water of the United States" subject to the jurisdiction of the CWA.
11. On January 28, 2005, the Corps issued a notice of violation of the CWA to Respondent for the unauthorized discharge of fill into waters of the United States and requested Respondent provide detailed information of the work that was performed at the Site.
12. On April 1, 2005, Respondent submitted to the Corps photographs, cross-sections, and construction plans related to the work performed at the Site.
13. On April 22, 2005, the Corps conducted an inspection of the Site and confirmed that Respondent had conducted the activities referenced in paragraph 9 of this Complaint during the construction of a storm water management system and site grading activities in conjunction with the construction of a new Menards store and parking lot at the Site. Based on its inspection, the Corps determined that Respondent had discharged dredged

and/or fill material into 1350 feet of the Stream at the Site as part of rerouting and placing the Stream within a 66-inch storm sewer pipe. The Corps also determined that Respondent had discharged dredged and/or fill material at the Site to an additional 40 feet of the Stream to construct a storm water control structure on the downstream end of the 66-inch storm sewer pipe.

14. Aerial photographs including the Site taken before, during, and after the construction of Respondent's store at the Site show that the discharges of unauthorized dredged and/or fill material to the Stream and the activities described in paragraphs 9 and 13 of this Complaint occurred during the summer of 2003 and were mostly completed by October of 2003.
15. The discharges described in paragraphs 9, 13, and 14 of this Complaint resulted in adverse impacts to 1390 feet of the Stream.
16. The discharges described in paragraphs 9, 13, and 14 of this Complaint were performed using common earthmoving vehicles and equipment, which were operated by Respondent or by person(s) on behalf of Respondent.
17. The unauthorized dredged and/or fill material described in paragraphs 9, 13, and 14 of this Complaint remains in place.
18. On March 2, 2006, EPA issued an Administrative Order for Compliance ("Compliance Order") to Respondent. Among other things, the Compliance Order directed Respondent to conduct restoration or mitigation activities for impacts to waters of the United States resulting from the unauthorized discharges of dredged and/or fill material into the Stream

at the Site and to submit a restoration or mitigation plan to EPA no later than 60 days after receiving the Compliance Order.

19. After extensions granted by EPA, the mitigation plan was conditionally approved by EPA on September 7, 2007.
20. To date, Respondent has not mitigated for the adverse impacts to 1390 feet of the Stream.
21. Respondent is a “person” within the meaning of section 502(5) of the CWA, 33 U.S.C. § 1362(5).
22. The pipe, storm water control structure, and other dredged and fill materials referenced in paragraphs 9, 13, and 14 of this Complaint are “dredged material” and “fill material” within the meaning of 33 CFR § 323.2(c) and 33 CFR § 323.2(e), respectively, and “pollutants” within the meaning of section 502(6) of the CWA, 33 U.S.C. § 1362(6).
23. The vehicles and equipment described in paragraph 16 of this Complaint are each a “point source” as that term is defined in section 502(14) of the CWA, 33 U.S.C. § 1362(14).
24. The Stream and the unnamed tributary to the Big Sioux River referenced in paragraph 6 of this Complaint are “waters of the United States” within the meaning of 33 CFR § 328.3(a) and therefore “navigable waters” within the meaning of section 502(7) of the CWA, 33 U.S.C. § 1362(7).
25. Respondent’s placement of dredged and/or fill material into the Stream and the unnamed tributary to the Big Sioux River constitutes the “discharge of pollutants” within the meaning of section 502(12) of the CWA, 33 U.S.C. § 1362(12).

26. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person into waters of the United States except as in compliance with, among other things, section 404 of the CWA, 33 U.S.C. § 1344.
27. Section 404 of the CWA, 33 U.S.C. § 1344, sets forth a permitting system authorizing the Secretary of the Army, acting through the Chief of Engineers of the Corps, to issue permits for the discharge of dredged or fill material into navigable waters, which are defined as waters of the United States.
28. 33 CFR § 323.3(a) specifies that, unless exempted pursuant to 33 CFR § 323.4, a permit issued by the Corps is required for the discharge of dredged or fill material into waters of the United States.
29. Respondent is not and never has been authorized by a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, to discharge dredged or fill material to any waters of the United States on the Site.
30. Respondent's discharges of dredged and/or fill material at the Site have not been exempt from permitting pursuant to section 404(f) of the CWA, 33 U.S.C. § 1344(f), or 33 CFR § 323.4.
31. Respondent's discharges of dredged and/or fill material into the Stream at the Site violate section 301(a) of the CWA, 33 U.S.C. § 1311(a). Each discharge of pollutants from a point source by Respondent into waters of the United States without authorization by a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, constitutes a violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a). Each day the discharges

- remain in place without the required permits constitutes an additional day of violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).
32. Before the discharges described above, the Stream provided important functions and values including aquatic habitat; an urban wildlife corridor for deer, pheasants, ducks and other wildlife; and aesthetics.
33. Pursuant to CWA § 309(g), 33 U.S.C. § 1319(g), EPA will consult with Tim Tollefsrud, Director, Division of Environmental Services, South Dakota Department of Environment and Natural Resources, on the assessment of this administrative penalty by furnishing a copy of this Complaint and inviting him to comment on behalf of South Dakota.

II. PROPOSED ADMINISTRATIVE PENALTY

Based upon the foregoing allegations, and pursuant to its authority under section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), EPA Region 8 hereby proposes to assess an administrative penalty of \$112,500 against Respondent.

EPA proposes to assess this penalty after taking into account all factors identified at section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3). The statutory maximum penalty from section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), has been adjusted for inflation to \$157,500, as described in 40 CFR part 19.

The CWA penalty factors include the nature, circumstances, extent, and gravity of the violations. The CWA penalty factors also include the Respondent's prior compliance history, Respondent's degree of culpability for the cited violations, any economic benefit or savings

accruing to Respondent by virtue of the violations, Respondent's ability to pay the proposed penalty, and other matters that justice may require.

III. TERMS OF PAYMENT

If Respondent does not contest the findings and assessments set out above, it may pay EPA a penalty of \$112,500 for the violations. If such payment is made within 30 calendar days of receipt of this Complaint, then no answer need be filed. Penalty payment must be made by certified or cashier's check payable to "Treasurer, the United States of America," and remitted to:

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

For overnight delivery, please use the following address:

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

A copy of the check shall be sent to:

Richard H. Baird
Enforcement Attorney
U.S. EPA, Region 8 (8ENF-L)
1595 Wynkoop Street
Denver, CO 80202-1129

A transmittal letter identifying the case title and docket number must accompany the remittance and copy of the check. The case title and docket number should also be indicated directly on the check.

Neither the assessment nor the payment of an administrative penalty pursuant to section 309(g) of the CWA shall affect Respondent's continuing obligation to comply with the CWA or any other Federal, state, or local law or regulation or any compliance order issued under the CWA.

IV. NOTICE OF OPPORTUNITY TO REQUEST A HEARING

As provided in section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and 40 CFR § 22.15(c), Respondent has the right to a hearing in this matter. If Respondent (1) contests any material fact upon which the Complaint is based, (2) contends that the amount of penalty proposed in the Complaint is inappropriate, or (3) contends that it is entitled to judgment as a matter of law, Respondent must file a written answer in accordance with 40 CFR § 22.15 within 30 days after service of the Complaint.

Respondent's answer must (1) clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint, (2) state the circumstances or arguments that are alleged to constitute grounds for defense, (3) state the facts intended to be placed at issue, and (4) specifically request a hearing, if desired. 40 CFR § 22.15(b). Failure to admit, deny, or explain any materially factual allegation contained in the Complaint constitutes an admission of the allegation. 40 CFR § 22.15(d). An original and one copy of Respondent's answer must be filed with:

Regional Hearing Clerk (8RC)
U.S. EPA, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129

A copy of the answer and each other document filed in this action must be sent to:

Richard H. Baird
Enforcement Attorney
U.S. EPA, Region 8 (8ENF-L)
1595 Wynkoop Street
Denver, CO 80202-1129

If Respondent fails to request a hearing or to file a written answer within the 30 day time limit, it may waive its rights to contest any of the allegations set forth in this Complaint and/or be subject to a default judgment pursuant to 40 CFR § 22.17 imposing the full penalty proposed in this Complaint and/or default motion.

EPA is obligated to provide the public with an opportunity to comment on this proceeding and/or to participate in the hearing, if any. Please see section 309(g)(4)(B) of the CWA and 40 CFR § 22.45 for more details, including procedures for members of the public to participate in the hearing and comment on any settlement.

V. SETTLEMENT CONFERENCE

EPA encourages the exploration of settlement possibilities through an informal settlement conference. **Please note that a request for, scheduling of, or participation in a settlement conference neither substitutes nor extends the deadline for filing an answer and request for hearing as set out above.** The settlement process, however, may be pursued simultaneously with the administrative litigation process. If a settlement can be reached, its terms must be expressed in a written consent agreement signed by the parties and incorporated into a final order by the Regional Judicial Officer. 40 CFR § 22.18.

Please direct any request for a settlement conference, or any questions regarding this

Complaint, to:

Richard H. Baird
Enforcement Attorney
U.S. EPA, Region 8 (8ENF-L)
1595 Wynkoop Street
Denver, CO 80202-1129
303-312-6642

Docket No. **CWA-08-2007-0023**

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8
Complainant.

Date:

9/21/07

for Michael T. Bisner
Assistant Regional Administrator
Office of Enforcement, Compliance and
Environmental Justice