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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I

In the Matter of)

Docket No. CWA-01-2008-0013)

McMANUS EXCAVATING CO., INC.)
361 Main Street)
Northborough, Massachusetts,)

ADMINISTRATIVE COMPLAINT)
Proposing to Assess a Civil Penalty)
Under Section 309(g) of the)
Clean Water Act)

Respondent)

STATUTORY AND REGULATORY AUTHORITY

1. This Administrative Complaint ("Complaint") is issued under the authority vested in the U.S. Environmental Protection Agency ("EPA") by Section 309(g) of the Clean Water Act ("the Act"), 33 U.S.C. § 1319(g), 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 C.F.R. §§ 22.1-22.52 ("the Consolidated Rules of Practice").
2. Pursuant to Section 309(g) of the Act, 33 U.S.C. § 1319(g), and in accordance with the Consolidated Rules of Practice, Complainant hereby provides notice of a proposal to assess a civil penalty against McManus Excavating Co., Inc. ("Respondent") for discharging pollutants into navigable waters of the United States without a permit in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a), and failing to apply for a National Pollution Discharge Elimination System ("NPDES") permit in violation of Section 308(a) of the Act, 33 U.S.C. § 1318(a).

3. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person into the navigable waters of the United States except in compliance with, among other things, a NPDES permit issued under Section 402 of the Act, 33 U.S.C. § 1342.
4. Section 502(12) of the Act, 33 U.S.C. § 1362(12), defines “discharge of pollutants” to include “any addition of any pollutant to navigable waters from any point source.” Section 502(14) of the Act, 33 U.S.C. § 1362(14), defines a “point source” as “any discernible, confined and discrete conveyance ... from which pollutants are or may be discharged.”
5. Section 402(p)(2)(B) of the Act, 33 U.S.C. § 1342(p)(2)(B), requires any storm water discharge associated with “industrial activity” to be authorized by a NPDES permit. Section 402(p)(6) of the Act, 33 U.S.C. § 1342(p)(6), requires the regulation of storm water discharges, other than those associated with industrial activity, necessary to protect water quality.
6. Section 308(a) of the Act, 33 U.S.C. § 1318(a), authorizes EPA to require the owner or operator of any point source to provide such information as EPA may reasonably require to carry out the objectives of the Act, including the issuance of NPDES permits pursuant to Section 402 of the Act, 33 U.S.C. § 1342.
7. Pursuant to Sections 308 and 402 of the Act, EPA promulgated storm water discharge regulations at 40 C.F.R. § 122.26. 40 C.F.R. § 122.26(c) requires dischargers of storm water associated with “industrial activity” and with “small construction activity” to apply for an individual permit or to seek coverage under a promulgated general permit.

40 C.F.R. § 122.26(b)(14)(x) and (15) defines industrial and small construction activities to include the clearing, grading, and excavation of land resulting in the disturbance of equal to or greater than one acre of land or the disturbance of less than one acre of land that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one acre of land. 40 C.F.R.

§ 122.26(b)(13) defines storm water to include storm water runoff, snow melt runoff, and surface runoff and drainage.

8. In February 1998, EPA issued the NPDES General Permit for Storm Water Discharges From Construction Activities, 63 Fed. Reg. 7858 (Feb. 17, 1998). The 1998 CGP was effective February 17, 1998 and expired February 17, 2003. EPA re-issued the CGP in July 2003, 68 Fed. Reg. 45817 (July 1, 2003). The re-issued CGP was effective July 1, 2003 and expires July 1, 2008. The CGP authorizes, subject to conditions contained therein, the discharge of pollutants in storm water runoff associated with construction activities, including construction activities within the Commonwealth of Massachusetts.
9. To obtain coverage under the CGP, Part I.C.1.c of the 1998 CGP required and Part 2 of the 2003 CGP requires “operators” to submit a notice of intent (“NOI”). The 1998 CGP Part IX.N. and the 2003 CGP Appendix A define “operator” as “any party associated with a construction project” that has either “operational control over construction plans and specifications, including the ability to make modifications to those plans and specifications” or “has day-to-day operational control of those activities at a project which are necessary to ensure compliance with a storm water pollution prevention plan for the site or other permit conditions (e.g., they are authorized to direct workers at a site

- to carry out activities required by the SWPPP or comply with other permit conditions).”
10. Part II.A of the 1998 CGP required operators with operational control over construction plans and specifications to submit an NOI at least two (2) days prior to “commencement of construction activities” and operators with day-to-day operational control to submit an NOI at least two (2) days before assuming control of or commencing work on the site. Part 2.3.C of the 2003 CGP requires operators of unpermitted projects ongoing as of July 1, 2003, to submit an NOI within 90 days of that date.
 11. Parts I.C.1.b and III.E of the 1998 CGP required and Part 3.1 of the 2003 CGP requires operators to prepare a storm water pollution prevention plan (“SWPPP”) addressing each construction project covered by the permit. Part IV.A. of the 1998 CGP required and Part 3.1 of the 2003 CGP requires that the SWPPP be prepared prior to submission of an NOI.
 12. Part IV.A.2. of the 1998 CGP required that the SWPPP shall provide for compliance with the terms and schedule of the SWPPP beginning with the initiation of construction activities. Part 3.1.D of the 2003 CGP requires that operators implement the SWPPP as written from commencement of construction activity until final stabilization is complete.

ALLEGATIONS

13. Respondent is a domestic for profit corporation organized under the laws of the Commonwealth of Massachusetts and is located at 361 West Main Street, Northborough, Massachusetts, 01532. Respondent is a site work development company performing work in residential, commercial and public areas.
14. Respondent is the General Contractor for the construction of a residential subdivision on a 72.2 acre parcel located between the westerly side of Chapel Street and the easterly side

- of Wachusett Street in Holden, Massachusetts. The project is commonly known as the Alden Woods subdivision (hereinafter, the "Subdivision" or the "Construction Site").
15. Respondent is in charge of the construction of the Subdivision and the drainage system for the Subdivision.
 16. The Subdivision is comprised of 124 lots for single-family homes. Construction of the Subdivision will result in a disturbed area approximately 29.4 acres in size.
 17. The Subdivision is being developed in two phases. The first phase of the Subdivision ("Alden Woods Phase I") consists of 109 lots and is now complete.
 18. Respondent is a "person" within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).
 19. As the contractor responsible for the construction of the Subdivision and for the drainage system for the Subdivision, Respondent had day-to-day operational control of activities necessary to ensure compliance with permit conditions. Thus, Respondent is an "operator" within the meaning of the 1998 and 2003 CGPs.
 20. Respondent commenced off-site improvements of Wachusett Street, an existing public way, on August 1, 2000.
 21. Respondent commenced on-site construction of the Subdivision on July 7, 2002. On-site construction included clearing, grading and excavation activities.
 22. When Respondent commenced clearing, grading, and excavating at the Construction Site, Respondent engaged in the "commencement of construction activities" as defined in Part IX.C. of the 1998 CGP.

23. The on-site construction is “industrial activity” within the meaning of 40 C.F.R. § 122.26(b)(14)(x) because Respondent will have disturbed, using clearing, grading, and excavation activities, approximately 29.4 acres at the completion of the Subdivision.
24. The Construction Site is located entirely within the upper watershed of Chaffins Brook. Chaffins Brook is characterized as a Class A water by the Commonwealth of Massachusetts Department of Environmental Protection. Class A waters are designated as a source of public water supply. To the extent compatible with this use they are an excellent habitat for fish, other aquatic life and wildlife, and suitable for primary and secondary contact recreation. These waters have excellent aesthetic value. The waters are designated for protection as Outstanding Resource Waters under 314 CMR 4.04(3).
25. During storm events, the Construction Site’s “industrial activities” have resulted in a “discharge of pollutants” within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5), and the “discharge of storm water associated with industrial activities” as defined in 40 C.F.R. § 122.26(b)(14).
26. Respondent did not apply for an individual permit or submit an NOI to have industrial storm water discharges from the Construction Site authorized by either the 1998 or 2003 CGP.
27. The moderate to steep topography characteristic of a majority of the Construction Site conducts storm water drainage runoff fairly rapidly toward lower slopes located along the western border of Wachusett Street.
28. Storm water from the Alden Woods Phase I portion of the Subdivision during construction flowed westward toward Wachusett Street and was collected by three

- detention basins. The storm water discharged from the detention basins, flowed through culverts under Wachusett Street and then flowed overland toward Chaffins Brook.
29. During storm events that took place on September 28, 2004 and December 1, 2004, storm water from detention basins #2 and #3 flowed overland and discharged to Chaffins Brook. On January 14, 2005, storm water from detention basin #3 flowed overland and discharged to Chaffins Brook.
 30. Storm water from part of the western side of the Alden Woods Phase II portion of the Construction Site flows into the municipal drainage system on Wachusett Street. On Wachusett Street adjacent to the Construction Site storm water is channeled into a swale approximately 20 feet long and then flows into a drop inlet. A pipe then conveys the storm water approximately 750 feet to a discharge point into an unnamed tributary to Chaffins Brook ("Unnamed Tributary"). The Unnamed Tributary then flows approximately 35 feet at the surface and then flows into Chaffins Brook.
 31. Storm water from the southern side of the Alden Woods Phase II portion of the Construction Site flows down a slope into a bordering vegetated wetland that partially extends into the southeastern property boundary.
 32. The storm water flows through the bordering vegetated wetland and drains to the Unnamed Tributary. The Unnamed Tributary flows at the surface and then through a culvert and emerges through a pipe on the western side of side of Wachusett Street. The Unnamed Tributary then flows for approximately 35 feet at the surface and then flows into Chaffins Brook.

33. Chaffins Brook flows into Unionville Pond which flows into the Quinapoxet River which discharges into the Wachusett Reservoir, a public drinking water supply. The Wachusett Reservoir flows into the Nashua River which flows into the Merrimack River which flows into the Atlantic Ocean.
34. At a minimum, Chaffins Brook, Unionville Pond, the Quinapoxet River, the Wachusett Reservoir, the Nashua River, the Merrimack River and the Atlantic Ocean are “waters of the United States,” as defined in 40 C.F.R. § 122.2, and, thereby, “navigable waters,” as defined in Section 502(7) of the Act, 33 U.S.C. § 1362(7).
35. During certain storm events beginning no later than September 28, 2004 and continuing until at least May 16, 2006 sediment laden storm water was observed being discharged from the Construction Site into Chaffins Brook.
36. The outlet structures for detention basins #2 and #3 in Alden Woods Phase I portion of the Subdivision are “point source[s]” as defined in Section 502(14) of the Act, 33 U.S.C. § 1362(14).
37. The swale that collects storm water from the Construction Site and channels it into the drop inlet on Wachusett Street, the drop inlet and the pipe through which storm water flows after entering the drop inlet are “point source[s]” as defined in Section 502(14) of the Act, 33 U.S.C. § 1362(14).
38. Each channel draining the southern side of the Alden Woods II portion of the Construction Site into the bordering vegetated wetland and the pipe through which the Unnamed Tributary flows are “point source[s]” as defined in Section 502(14) of the Act, 33 U.S.C. § 1362(14).

39. The discharge of storm water associated with industrial activity from these point sources constitutes a “discharge of pollutants” within the meaning of Section 502(12) of the Act, 33 U.S.C. § 1362(12).

**COUNT 1: UNAUTHORIZED DISCHARGE OF STORM WATER
ASSOCIATED WITH INDUSTRIAL ACTIVITY**

40. The Complaint incorporates Paragraphs 1 through 39 by reference.
41. During storm events from at least September 28, 2004 through at least January 16, 2007, Respondent discharged without authorization under any NPDES permit “stormwater associated with industrial activities” as defined by 40 C.F.R. § 122.26 from “point source[s]” to “waters of the United States” as defined in 40 C.F.R. § 122.2.
42. The discharge of stormwater associated with industrial activity from these point sources to “waters of the United States” without authorization under any NPDES permit violates Section 301(a) of the Act, 33 U.S.C. § 1311(a).
43. Pursuant to Section 309(g) of the Act, 33 U.S.C. § 1319(g), the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, *et seq.*, the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, *et seq.*, and the rule for Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. §§ 19.1-19.4 (61 Fed. Reg. 69360, 69 (Dec. 31, 1996); 69 Fed. Reg 7121, 7 (Feb. 13, 2004)), Respondent is subject to civil penalties of up to eleven thousand dollars (\$11,000) per day for each day during which the violation continued, up to a maximum of one hundred fifty-seven thousand five hundred dollars (\$157,500).

COUNT 2: FAILURE TO APPLY FOR A NPDES PERMIT

44. The Complaint incorporates Paragraphs 1 through 43 by reference.
45. By failing to timely apply for an individual permit or submit an NOI for coverage under a general storm water permit, Respondent was in violation of Section 308(a) of the Act, 33 U.S.C. § 1318(a), from at least September 28, 2004 to at least January 16, 2007.
46. Pursuant to Section 309(g) of the Act, 33 U.S.C. § 1319(g), the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, *et seq.*, the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, *et seq.*, and the rule for Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. §§ 19.1-19.4 (61 Fed. Reg. 69360, 69 (Dec. 31, 1996); 69 Fed. Reg 7121, 7 (Feb. 13, 2004)), Respondent is subject to civil penalties of up to eleven thousand dollars (\$11,000) per day for each day during which the violation continued, up to a maximum of one hundred fifty-seven thousand five hundred dollars (\$157,500).

PROPOSED ASSESSMENT OF CIVIL PENALTY

51. Pursuant to Section 309(g) of the Act, 33 U.S.C. § 1319(g), the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, *et seq.*, the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, *et seq.*, and the rule for Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. §§ 19.1-19.4 (61 Fed. Reg. 69360, 69 (Dec. 31, 1996); 69 Fed. Reg 7121, 7 (Feb. 13, 2004)), Respondent is subject to civil penalties of up to eleven thousand dollars (\$11,000) per day for each day during which the violation continued up to a maximum of one hundred fifty-seven thousand five hundred dollars (\$157,500) for each violation occurring after March 15, 2004.

52. EPA is seeking a penalty under Counts 1 and 2 from Respondent of up to \$11,000 for each day of violation for at least 841 days up to a maximum of \$157,500.
53. In determining the amount of the penalty to be assessed under Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), EPA will take into account the statutory factors listed in Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3). These factors include the nature, circumstances, extent and gravity of the violation, or violations, and the Respondent's prior compliance history, the degree of culpability for the cited violations, any economic benefit or savings accruing to the Respondent resulting from the violations, the Respondent's ability to pay the proposed penalty, and such other matters as justice may require.
54. The violations alleged are significant because failure to implement and maintain the BMPs necessary to prevent the discharge of pollutants may result in stormwater runoff that contributes to the impairment of water quality. These violations are also significant because of the extent and duration of the violations.

NOTICE OF OPPORTUNITY TO REQUEST A HEARING

55. Pursuant to Section 309(g) of the Act, 33 U.S.C. § 1319(g), and 40 C.F.R. § 22.14, notice is hereby given that Respondent has the right to request a hearing on any material fact alleged in this Complaint and on the appropriateness of any proposed penalty. Any such hearing will be conducted in accordance with the Consolidated Rules of Practice, a copy of which is enclosed. Members of the public, to whom EPA is obliged to give notice of this proposed action, have a right under Section 309(g)(4)(B) of the Act, 33 U.S.C.

§ 1319(g)(4)(B), to comment on any proposed penalty and to be heard and to present evidence at the hearing.

56. Respondent's Answer must comply with 40 C.F.R. § 22.15 and must be filed with the Regional Hearing Clerk at the following address within thirty (30) days of receipt of the Complaint:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region I
1 Congress Street, Suite 1100 RCA
Boston, Massachusetts 02114-2023

To be entitled to a hearing, Respondent must include its request for a hearing in its Answer to this Complaint.

57. Pursuant to Section 22.5(c)(4) of the enclosed Consolidated Rules of Practice, the following individual is authorized to receive service on behalf of EPA:

Kathleen E. Woodward
U.S. Environmental Protection Agency
Region I
1 Congress Street, Suite 1100 (SEL)
Boston, Massachusetts 02114-2023

58. If Respondent does not file a timely Answer to this Complaint, that Respondent may be found in default. Default constitutes, for purposes of this action only, an admission of all facts alleged in the Complaint and a waiver of the Respondent's right to a hearing on factual allegations contained therein.

CONTINUED COMPLIANCE OBLIGATION

59. Neither assessment nor payment of an administrative penalty shall affect the Respondent's continuing obligation to comply with the Act and implementing regulations and other applicable federal, state and local laws.

Date: 11-26-07

Susan Studlien, acting for

Susan Studlien, Director
Office of Environmental Stewardship
U.S. Environmental Protection Agency
Region I
1 Congress Street, Suite 1100 SAA
Boston, Massachusetts 02114-2023

In the Matter of: McManus Excavating, Inc.
Docket No. CWA 01-2008-0013

CERTIFICATE OF SERVICE

I certify that the foregoing Complaint was sent to the following persons, in the manner specified on the date below:

Copy hand-delivered:

Wanda Rivera
Regional Hearing Clerk
U.S. EPA, Region I
One Congress Street
Suite 1100, Mail Code RAA
Boston, Massachusetts 02114-2023

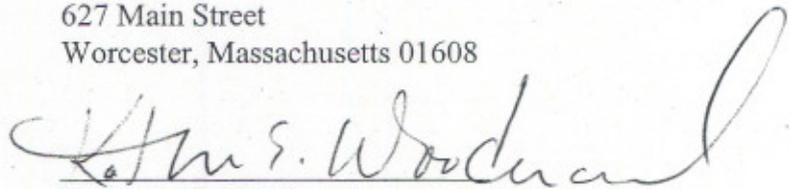
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Dated: December 3, 2007



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