

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

STATE OF OHIO ATTORNEY GENERAL,

CASE NO.: 1998 CV 03449

Plaintiff,

JUDGE MARY WISEMAN

-vs-

REPUBLIC ENVIRONMENTAL SYSTEMS, INC.,
et al.,

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Defendants.

**DECISION, ORDER AND ENTRY UPON
STIPULATED PENALTIES FOR
FAILURE TO COMPLY WITH
AMENDED CLOSURE PLAN
REQUIREMENTS**

FINAL APPEALABLE ORDER

I. INTRODUCTION

1. On February 13, 2009, this Court filed Findings of Fact and Conclusions of Law; Decision, Order and Entry Holding Defendants Republic Environmental Systems, Inc., Republic Environmental Systems (Ohio), Inc., BRAC, Inc., McCabe Corp., McCabe Engineering Corp. and Edward McCabe Jointly and Severally Liable in Contempt (hereafter referred to as Order I). That prior order (Order I) is incorporated here by reference.

2. On October 9, 2009, this Court filed its Decision, Order and Entry Granting Judgment to Plaintiff for Stipulated Penalties (Final Appealable Order) (hereafter referred to as Order II). That prior order (Order II) is incorporated here by reference.

3. In Order II, pp. 1-2, this Court noted that on May 28, 2009 the McCabe Defendants submitted a document entitled "May 2009 Amended Closure Plan." Plf. Ex. 34. The Court determined it appropriate to

treat the McCabe submission as an adequate amended closure plan, for purposes of calculating stipulated penalties until such time as OEPA formally notifies the McCabe Defendants that the submission is rejected as an amended

closure plan; OEPA must communicate to the McCabe Defendants its definitive position regarding the May 2009 Amended Closure Plan within sixty (60) days from the date of this order. The interim period of regulatory review by OEPA (from submission until formal acceptance or rejection) shall not accrue stipulated penalties, as otherwise substantial and undue unfairness would result to the McCabe Defendants. If the McCabe Defendants' submission of May 2009 is accepted by OEPA as an adequate and acceptable amended closure plan, then the applicable stipulated penalties for this specific contempt charge will be deemed to have ceased accruing as of the date of the submission [May 28, 2009]. However, if OEPA issues a rejection of the McCabe Defendants' May 2009 amended closure plan, determining that it is not an adequate and acceptable amended closure plan under Ohio law and regulations, then the McCabe Defendants shall have sixty (60) days in which to re-submit an amended closure plan for the OEPA's review and evaluation following that rejection. In the event that OEPA would reject that re-submittal, then at that time stipulated penalties will re-commence accruing on this violation, if sought by OEPA.

II. FINDINGS OF FACT

4. On August 7, 2009, OEPA, via a letter from Brian Gitzinger (Plf. Ex. 35), notified the McCabe Defendants of deficiencies in their May 28, 2009 Amended Closure Plan (Plf. Ex. 34, 35). Gitzinger Testimony, October 27, 2011, 3:31-3:35.
5. On or about April or May 2011, the McCabe Defendants submitted a Revised Amended Closure Plan to OEPA. Def. Ex. G. OEPA issued a Notice of Deficiency letter (Plf. Ex. 44) to the McCabe Defendants regarding this revised amended closure plan on July 20, 2011.
6. On or about September 19, 2011, the McCabe Defendants submitted to OEPA another revised amended closure plan. Def. Ex. H. OEPA's initial review of that revised amended closure plan noted issues with ground water remediation and the proposed soil sampling plan, among other concerns. As of the date of the Court's October 2011 hearing, OEPA had not officially commented upon nor approved that revised amended closure plan.
7. The Consent Decree (Plf. Ex. 1) filed October 22, 1998, ¶ 26, imposes a stipulated penalty of \$600.00 per day of failure to meet a requirement following ninety days of non-compliance. This is the applicable stipulated penalty amount for the issues before the Court.
8. Order II imposed stipulated penalties through June 5, 2009. OEPA, via Plf. Ex. 46 and the testimony of Mr. Ike Wilder, presented evidence that from June 6, 2009 through the date of the Court's evidentiary hearing on October 27, 2011, 873 days elapsed. At a per diem penalty rate of \$600.00, the State seeks the

imposition of additional stipulated penalties of \$523,800 for failure to adequately amend the closure plan such that an approved closure plan is in place for the required cleanup.

9. Order II directed OEPA to rule upon the adequacy of the McCabe Defendants' May 28, 2009 revised amended closure plan by no later than December 8, 2009 (sixty days from the date of the order). OEPA satisfied that deadline, as it had sent a letter notifying of deficiencies on August 7, 2009. Under Order II, the McCabe Defendants had sixty (60) days to submit a revised amended closure plan once and if the May plan was rejected by OEPA. Since the OEPA's NOD (Notice of Deficiency) was issued prior to the Court's Order, the deadline for the McCabe Defendants to re-submit an acceptable revised amended closure plan to OEPA was no later than December 8, 2009. The McCabe Defendants did not meet this deadline. The McCabe Defendants did not submit the next iteration of their revised amended closure plan until the spring of 2011.

10. There is no evidence that OEPA is acting arbitrarily or capriciously regarding its review and rejection of the McCabe Defendants' various iterations of the revised amended closure plan. There is no evidence of undue delay by OEPA in the performance of its functions involving its review of the various amended closure plans that have been submitted by the McCabe Defendants. Ohio law and regulations provide an exclusive administrative remedy to the McCabe Defendants for challenges to closure plan approval or rejection. There is no evidence that the McCabe Defendants have availed themselves of this administrative remedy.

III. CONCLUSION OF LAW

11. Applying the stipulated penalty rate of \$600.00 per diem, which is the rate applicable to the issue before the Court, the Court awards Plaintiff, against Defendants, jointly and severally, for failure to amend the closure plan such that OEPA approves an amended closure plan under its rules and regulations, the sum of \$523,800 under Contempt Charge I, encompassing the time period of June 6, 2009 through October 27, 2011.

SO ORDERED:

JUDGE MARY WISEMAN

THIS IS A FINAL APPEALBLE ORDER, AND THERE IS NOT JUST REASON FOR DELAY FOR PURPOSES OF CIV. R. 54 (B). PURSUANT TO APP. R. 4, THE PARTIES SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.

SO ORDERED:

JUDGE MARY WISEMAN

TO THE CLERK OF COURTS:

PURSUANT TO CIV. R. 54 (B), PLEASE SERVE THE ATTORNEY FOR EACH PARTY AND EACH PARTY NOT REPRESENTED BY COUNSEL WITH NOTICE OF THIS JUDGMENT AND ITS DATE OF ENTRY UPON THE JOURNAL.

JUDGE MARY WISEMAN

This document is electronically filed by using the Clerk of Courts e-Filing system. The system will post a record of the filing to the e-Filing account "Notifications" tab of the following case participants:

BRIAN A BALL
(614) 466-2766
Attorney for Plaintiff, State Of Ohio Attorney General

NORMAN A ABOOD
(419) 724-3700
Attorney for 3rd Party Plaintiff, Mccabe Engineering Corporation,
Mccabe Corporation, Edward M Mccabe
Attorney for Defendant, Mccabe Engineering Corporation,
Mccabe Corporation, Edward M Mccabe

ALAN N HIRTH
(216) 831-0042
Attorney for Defendant, Republic Environmental Systems Ohio Inc

TANDI DANKLEF, Bailiff (937) 225-4384 dankleft@montcourt.org



General Division
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

Case Title: STATE OF OHIO ATTORNEY GENERAL vs REPUBLIC ENVIRONMENTAL SYSTEMS INC
Case Number: 1998 CV 03449
Type: Decision

So Ordered

A handwritten signature in black ink that reads "Mary Wiseman". The signature is written in a cursive style with a large, looped 'y'.

Mary Wiseman