

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 2

U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG.II  
2012 SEP 21 P 2:47  
REGIONAL HEARING  
CLERK

**IN THE MATTER OF:**

Burton F. Clark, Inc.  
5057 State Highway 12  
Norwich, NY 13815

Proceeding pursuant to Sections 308(a) and  
309(a)(3) of the Clean Water Act, 33 U.S.C.  
§§ 1318(a) and 1319(a)(3)

**RESPONDENT**

**PROCEEDING TO ASSESS A CLASS I  
CIVIL PENALTY**

**DOCKET No. CWA-02-2012-3311**

**ADMINISTRATIVE COMPLAINT  
FINDINGS OF VIOLATION, NOTICE OF PROPOSED  
ASSESSMENT OF AN ADMINISTRATIVE PENALTY, AND  
NOTICE OF OPPORTUNITY TO REQUEST A HEARING**

**I. PRELIMINARY STATEMENT**

1. This Administrative Complaint, Findings of Violation, Notice of Proposed Assessment of an Administrative Penalty, and Notice of Opportunity to Request a Hearing (“Complaint”) is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency (“EPA”) by Section 309(g)(2)(A) of the Clean Water Act (“Act” or “CWA”), 33 U.S.C. §1319(g)(2)(A). The Administrator has delegated this authority to the Regional Administrator of EPA, Region 2, who in turn has delegated it to the Director, Division of Enforcement and Compliance Assistance (“DECA”) of EPA, Region 2 (“Complainant”).
2. Pursuant to Section 309(g)(2)(A) of the Act, and in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (“CROP”), 40 C.F.R. Part 22 (2001), a copy of which is attached, Complainant hereby requests that the Regional Administrator assess a civil penalty against Burton F. Clark, Inc. (“Respondent”), as a result of Complainant’s determination that the Respondent is in violation of Sections 301 and 402 of the Act, 33 U.S.C. §1311 and §1342, respectively, by discharging without a permit and by failing to comply with the terms of the New York State Department of Environmental Conservation (“NYSDEC” or “Department”) State Pollutant Discharge Elimination System (“SPDES”) Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (“MSGP” or “Permit”) at a facility it owns and operates.

**II. STATUTORY AND REGULATORY PROVISIONS  
AND PERMIT REQUIREMENTS**

3. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person from a point source into navigable waters of the United States, except in compliance with, *inter-alia*, Section 402 of the CWA, 33 U.S.C. § 1342.
4. Section 402(a)(1) of the CWA, 33 U.S.C. § 1342(a)(1), provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to that Section.
5. Section 402 of the CWA, 33 U.S.C. § 1342, authorizes the Administrator of EPA to issue a NPDES permit for the discharge of any pollutant, or combination of pollutants subject to certain requirements of the CWA and conditions which the Administrator determines are necessary. Under Section 402(b), EPA granted the NYSDEC the authority to administer the federal NPDES program in New York. EPA maintains concurrent enforcement authority with the authorized State for violations of the CWA. Additionally, the NYSDEC issues a SPDES permit to facilities for the discharge of pollutants from said facilities from a point source to a navigable water of the United States.
6. Section 308(a)(A) of the Act, 33 U.S.C. § 1318(a)(A), provides, in relevant part, that the Administrator of EPA may require the owner or operator of any point source to, among other things: maintain such records; make such reports; install, use and monitor such equipment; sample such effluents; and provide such other information as may reasonably be required in order to carry out Section 402 of the Act, 33 U.S.C. § 1342.
7. "Person" is defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5), to include, among other things, an individual, corporation, partnership, association or municipality.
8. "Pollutant" is defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6), to include, among other things, solid waste, dredged spoil, rock, sand, cellar dirt, sewage, sewage sludge and industrial, municipal and agricultural waste discharged into water.
9. "Discharge of a pollutant" is defined by Section 502(12) of the CWA, 33 U.S.C. § 1362(12), to include any addition of any pollutant to navigable waters from any point source.
10. "Navigable waters" is defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7), to include the waters of the United States.
11. "Point source" is defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14), to include any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

12. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), sets forth the requirements for municipal and industrial stormwater discharges.
13. The Administrator of EPA has promulgated regulations, 40 CFR § 122.26(a)(1)(ii) and § 122.26(b)(14), which require operators to obtain a NPDES permit for stormwater discharges associated with industrial activity. The regulations at 40 CFR § 122.26(b)(14) establish requirements for stormwater discharges associated with industrial activity.
14. "Owner or operator" is defined by 40 C.F.R. § 122.2 as owner or operator of any "facility or activity" subject to regulation under the NPDES program.
15. "Stormwater" is defined by 40 C.F.R. § 122.26(b)(13) as storm water runoff, snow melt runoff, and surface runoff and drainage.
16. The terms "Industrial Stormwater Permit," "Multi-Sector General Permit," "MSGP" or "Permit" mean the NYSDEC SPDES Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity, as defined by the present interim general permit number GP-0-11-009, which became effective on March 28, 2012 and expires on September 30, 2012. GP-0-11-009 replaced GP-0-06-002, which became effective on March 28, 2007 and expired on March 27, 2012. GP-0-06-002 replaced the former GP-98-03, which became effective on November 1, 1998 and expired on November 1, 2003; GP-98-03 was administratively extended by NYSDEC until the issuance of GP-0-06-002.
17. Owners or operators regulated under 40 CFR § 122.26(b)(14) must seek MSGP coverage by filing a Notice of Intent or Termination ("NOIT") form under the terms and conditions of the MSGP or if all of the conditions of "No Exposure" certification apply, they must be submitted in accordance with 40 CFR § 122.26.
18. In accordance with the MSGP, unless notified by the Department to the contrary, owners or operators who submit an NOIT in accordance with the requirements of the MSGP are authorized to discharge stormwater under the terms and conditions of the Permit 30 calendar days after a complete NOIT is received by the Department.
19. Under the terms and conditions of the MSGP, the permittee must develop and implement a Stormwater Pollution Prevention Plan ("SWPPP") which identifies specific best management practices ("BMPs") to be selected, installed, implemented and maintained at the facility to minimize the presence of pollutants in the stormwater discharges.
20. Sector J of the MSGP covers Mineral Mining and Dressing activities. The requirements listed under this section apply to stormwater discharges associated with industrial activity from active and inactive mineral mining and dressing facilities as identified by the SIC Major Group 14.

### **III. FINDINGS OF FACT**

21. Paragraphs 1 – 20 are re-alleged and incorporated herein by reference.
22. Respondent is an operator of the crushed stone and gravel facility located on the west side of the State Highway 12, south of Grotsinger Road in Norwich, New York (the “site” or “facility”) and conducts industrial activity under SIC Code 1429 (Crushed and Broken Stone, Not Elsewhere Classified).
23. Respondent is a corporation organized under the laws of the State of New York.
24. Mr. Wayne Hymers owns the property where the facility is located and leases the property to Respondent.
25. On August 3, 2011, EPA conducted a Compliance Evaluation Inspection (“CEI”) at the facility.
26. As evidenced by significant erosion identified by EPA at the time of the CEI, stormwater flows west to east, down a steep gravelly incline and off the site, to a drainage ditch that runs along State Highway 12. EPA identified accumulated sediment in the ditch, which continues approximately 30 – 40’ south of the site to a 30” culvert pipe. The culvert pipe drains east under State Highway 12 to the Chenango River. During the CEI, the EPA inspector identified a plume of sediment, approximately 30’×12’, in the Chenango River near the culvert outfall.
27. At the time of the CEI, Respondent had not obtained coverage under the MSGP for the facility and was ineligible for “No Exposure” certification.
28. On November 1, 2011, pursuant to Section 309(a) of the CWA, EPA issued an Administrative Order (“AO” or “Order”) (Docket No. CWA-02-2012-3006) requiring Respondent to comply with the provisions of the MSGP, including the submittal of a Notice of Intent (“NOI”) and SWPPP on or before 60 days of receipt of the Order.
29. On November 7, 2011, Respondent received the AO.
30. In a letter dated December 23, 2011, Respondent requested an extension until February 28, 2012 to complete and submit the NOI and SWPPP to EPA. EPA granted the extension in a letter dated January 12, 2012.
31. Respondent submitted a response to the Order, including the signed NOI and certified SWPPP to EPA on February 22, 2012. The response was received by EPA on February 23, 2012.
32. Records available to EPA indicate that Respondent’s NOI was received by the NYSDEC on February 26, 2012 and Respondent gained coverage under the MSGP on March 26, 2012.
33. On March 26, 2012, NYSDEC granted Respondent MSGP coverage; NYSDEC mining Permit (DEC #7-0842-00039/00001, Mine ID #70108) indicates that the facility has been in operation since at least 2003.

#### **IV. CONCLUSIONS OF LAW/FINDINGS OF VIOLATION**

From the Findings of Fact set forth above:

34. Respondent is a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
35. Respondent discharges stormwater associated with industrial activity, a “pollutant” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6), via the above mentioned drainage ditch and culvert pipe, “point sources” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14), to the Chenango River, a “navigable water” of the United States pursuant to Section 502(7) of the Act, 33 U.S.C. § 1362(7), and as such, discharges pollutants pursuant to Section 502(12) of the CWA, 33 U.S.C. § 1362(12).
36. Respondent failed to submit an NOI and obtain Permit coverage prior to the start of industrial activity.
37. Respondent discharged pollutants without a Permit.
38. Respondent violated Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342.

#### **IV. NOTICE OF PROPOSED ORDER ASSESSING A CIVIL PENALTY**

Based on the foregoing Findings of Violation, and pursuant to the authority of Section 309(g) of the Act, 33 U.S.C. § 1319(g), and the Debt Collection Improvement Act of 1996, EPA, Region 2 hereby proposes to issue a Final Order Assessing Administrative Penalties (“Final Order”) to Respondent assessing a penalty of **\$32,000**. EPA determined the proposed penalty after taking into account the applicable factors identified at Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3). EPA has taken account of the nature, circumstances, extent and gravity of the violations, and Respondent’s prior compliance history, degree of culpability, economic benefit or savings accruing to Respondent by virtue of the violations, and Respondent’s ability to pay the proposed penalty. Based on the Findings set forth above, the **Respondent is liable for violations of the Act, one of which continued for at least one thousand six hundred and thirty-eight (1,638) days**. EPA may issue the Final Order Assessing Administrative Penalties thirty (30) days after Respondent’s receipt of this Notice, unless Respondent files an Answer to the Complaint within that time and requests a Hearing on this Notice pursuant to the following section.

## **V. PROCEDURES GOVERNING THIS ADMINISTRATIVE ACTION**

The rules of procedure governing this civil administrative litigation have been set forth in the CROP, 40 C.F.R. Part 22. A copy of these rules accompanies this Complaint.

### **A. Answering The Complaint**

Where Respondent intends to contest any material fact upon which the Complaint is based, to contend that the proposed penalty is inappropriate or to contend that Respondent is entitled to judgment as a matter of law, Respondent must file with the Regional Hearing Clerk of EPA, Region 2, both an original and one copy of a written Answer to the Complaint, and such Answer must be filed within thirty (30) days after service of the Complaint. 40 C.F.R. § 22.15(a). The address of the Regional Hearing Clerk of EPA, Region 2, is:

**Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 16th floor  
New York, NY 10007-1866**

Respondent shall also then serve one copy of the Answer to the Complaint upon Complainant and any other party to the action. 40 C.F.R. § 22.15(a). Respondent's Answer to the Complaint must clearly and directly admit, deny, or explain each of the factual allegations that are contained in the Complaint and with regard to which the Respondent has any knowledge. 40 C.F.R. § 22.15(b). Where Respondent lacks knowledge of a particular factual allegation and so states in the Answer, the allegation is deemed denied. 40 C.F.R. § 22.15(b). The Answer shall also set forth: (1) the circumstances or arguments that are alleged to constitute the grounds of defense, (2) the facts that Respondent disputes (and thus intend to place at issue in the proceeding), (3) the basis for opposing the proposed relief and (4) whether Respondent requests a Hearing. 40 C.F.R. § 22.15(b).

Respondent's failure to affirmatively raise in the Answer facts that constitute or that might constitute the grounds of a defense may preclude Respondent, at a subsequent stage in this proceeding, from raising such facts and/or from having such facts admitted into evidence at a Hearing.

### **B. Opportunity To Request A Hearing**

If requested by Respondent in its Answer, a Hearing upon the issues raised by the Complaint and Answer may be held. 40 C.F.R. § 22.15(c). If however, Respondent does not request a Hearing, the Presiding Officer (as defined in 40 C.F.R. § 22.3) may hold a Hearing if the Answer raises issues appropriate for adjudication. 40 C.F.R. § 22.15(c).

Any Hearing in this proceeding will be held at a location determined in accordance with 40 C.F.R. § 22.21(d). A Hearing of this matter will be conducted in accordance with the applicable provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-59, and the procedures set forth in Subpart D of the CROP, at 40 C.F.R. §§ 22.21-22.26.

Should Respondent request a Hearing on this proposed penalty assessment, members of the public to whom EPA is obligated to give notice of this proposed action, will have a right under Section 309(g)(4)(B) of the Act, 33 U.S.C. § 1319(g)(4)(B), to be heard and to present evidence on the appropriateness of the penalty assessment. Should Respondent not request a Hearing, EPA will issue a Final Order, and only members of the public who submit timely comment on this proposal will have an additional thirty (30) days to petition EPA to set aside the Final Order and to hold a Hearing thereon. EPA will grant the petition and will hold a Hearing only if the petitioner's evidence is material and was not considered by EPA in the issuance of the Final Order.

### **C. Failure To Answer**

If Respondent fails in any Answer to admit, deny, or explain any material factual allegation contained in the Complaint, such failure constitutes an admission of the allegation. 40 C.F.R. § 22.15(d). If Respondent fails to file a timely Answer to the Complaint [i.e., not in accordance with the 30-day period set forth in 40 C.F.R. §22.15(a)], Respondent may be found in default upon motion. 40 C.F.R. § 22.17(a). Default by Respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. 40 C.F.R. § 22.17(a). Following a default by Respondent for a failure to timely file an Answer to the Complaint, any order issued therefore shall be issued pursuant to 40 C.F.R. § 22.17(c).

Any penalty assessed in the default order shall become due and payable by Respondent without further proceedings thirty (30) days after the Default Order becomes final pursuant to 40 C.F.R. § 22.27(c). 40 C.F.R. § 22.17(d). If necessary, EPA may then seek to enforce such Final Order of Default against Respondent, and to collect the assessed penalty amount, in federal court.

## **VI. INFORMAL SETTLEMENT CONFERENCE**

Regardless of whether Respondent requests a formal Hearing, EPA encourages settlement of this proceeding consistent with the provisions of the Act and its applicable regulations. 40 C.F.R. § 22.18(b). At an informal conference with a representative(s) of Complainant, Respondent may comment on the charges made in this Complaint and Respondent may also provide whatever additional information it believes to be relevant to the disposition of this matter, including: (1) actions Respondent has taken to correct any or all of the violations herein alleged, (2) any information relevant to Complainant's calculation of the proposed penalty, (3) the effect the proposed penalty would have on Respondent's ability to continue in business and/or (4) any other special facts or circumstances Respondent wishes to raise.

Complainant has the authority to modify the amount of the proposed penalty, where appropriate, in response to any relevant information previously not known to Complainant that demonstrates that any of the findings herein are without merit, or that the proposed penalty is not warranted. Respondent is referred to 40 C.F.R. § 22.18.

Any request for an informal conference or any questions that Respondent may have regarding this Complaint should be directed to:

Kara Murphy, Esq.  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 16th Floor  
New York, NY 10007-1866  
Telephone: (212) 637-3211

The parties may engage in settlement discussions regardless of whether Respondent has requested a Hearing. 40 C.F.R. § 22.18(b)(1). Respondent's requesting a formal Hearing does not prevent Respondent from also requesting an informal settlement conference; the informal conference procedure may be pursued simultaneously with the formal adjudicatory hearing procedure. A request for an informal settlement conference constitutes neither an admission nor a denial of any of the matters alleged in the Complaint.

A request for an informal settlement conference does not affect Respondent's obligation to file a timely Answer to the Complaint pursuant to 40 C.F.R. § 22.15. Note that no penalty reduction will be made simply because an informal settlement conference is held.

Any settlement that may be reached as a result of an informal settlement conference shall be embodied in a written Consent Agreement. 40 C.F.R. § 22.18(b)(2). In accepting the Consent Agreement, Respondent waives any right to contest the allegations in the Complaint and waives any right to appeal the Final Order that is to accompany the Consent Agreement. 40 C.F.R. § 22.18(b)(2). In order to conclude the proceeding, a Final Order ratifying the parties' agreement to settle will be executed. 40 C.F.R. § 22.18(b)(3).

Entering into a settlement through the signing of such Consent Agreement and complying with the terms and conditions set forth in such Consent Agreement and Final Order terminates this administrative litigation and these civil proceedings against Respondent (note that a new enforcement action may be initiated based on continued non-compliance). Entering into a settlement agreement does not extinguish, waive, satisfy or otherwise affect Respondent's obligation and responsibility to comply with all applicable statutory and regulatory requirements, and to maintain such compliance.

## **VII. RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR CONFERENCE**

Instead of filing an Answer, Respondent may choose to pay the total amount of the proposed penalty, **\$32,000**, within 30 days after receipt of the Complaint, provided that Respondent files with the Regional Hearing Clerk, Region 2 (at the address noted above), a copy of the check or other instrument of payment. 40 C.F.R. § 22.18(a). A copy of the check or other instrument of payment should be provided to the EPA Attorney identified in Section VI above. Payment of the penalty assessed should be made by sending a cashier's or certified check payable to the "Treasurer, United States of America", in the full amount of the penalty assessed in this Complaint to the following addressee:



U.S. Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, MO 63197-9000  
Docket No. CWA-02-2012-3311

Wire transfers should be directed to the Federal Reserve Bank of New York:

Federal Reserve Bank of New York  
ABA = 021030004  
Account = 68010727  
SWIFT address = FRNYUS33  
33 Liberty Street  
New York, NY 10045

Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency".

Pursuant to 40 C.F.R. § 22.18(a)(3), if Respondent elects to pay the full amount of the penalty proposed in the Complaint within thirty (30) days of receiving the Complaint, then, upon EPA's receipt of such payment, the Regional Administrator of EPA, Region 2 (or, if designated, the Regional Judicial Officer), shall issue a Final Order pursuant to 40 C.F.R. § 22.18(a)(3). In accordance with 40 C.F.R. § 22.45(c)(3), no Final Order shall be issued until at least ten (10) days after the close of the comment period on this Complaint. Issuance of a Final Order terminates this administrative litigation and the civil proceedings arising out of the allegations made in the Complaint (note that a new enforcement action may be initiated based on continued non-compliance). Further, pursuant to 40 C.F.R. § 22.18(a)(3), the making of such payment by Respondent shall constitute a waiver of Respondent's right both to contest the allegations made in the Complaint and to appeal said Final Order to federal court. Such payment does not extinguish, waive, satisfy or otherwise affect Respondent's obligation and responsibility to comply with all applicable statutory and regulatory requirements, and to maintain such compliance.

#### **VIII. FILING OF DOCUMENTS**

The Answer and any Hearing Request and all subsequent documents filed in this action should be sent to:

Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 16th Floor  
New York, NY 10007-1866

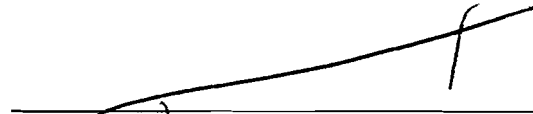
A copy of the Answer, any Hearing Request and all subsequent documents filed in this action shall be sent to:

Kara Murphy, Esq.  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 16th Floor  
New York, NY 10007-1866

**IX. GENERAL PROVISIONS**

1. Respondent has a right to be represented by an attorney at any stage of these proceedings.
2. This Complaint does not constitute a waiver, suspension or modification of the requirements of the Act, regulations promulgated there under, or any applicable permit.
3. Neither assessment nor payment of an administrative civil penalty pursuant to Section 309(g) of the Act will affect Respondent's continuing obligation to comply with the Act, and with any separate Compliance Order issued under Section 309(a) of the Act, 33 U.S.C. § 1319(a), for the violations alleged herein.

ISSUED THIS 13<sup>th</sup> DAY OF SEPTEMBER, 2012.

  
\_\_\_\_\_  
Dore LaPosta, Director  
Division of Enforcement and  
Compliance Assistance  
U. S. Environmental Protection Agency - Region 2  
290 Broadway  
New York, New York 10007

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 2

**IN THE MATTER OF:**

Burton F. Clark, Inc.  
5057 State Highway 12  
Norwich, NY 13815

Proceeding pursuant to Sections 308(a) and  
309(a)(3) of the Clean Water Act, 33 U.S.C.  
§§ 1318(a) and 1319(a)(3)

**RESPONDENT**

**PROCEEDING TO ASSESS A CLASS I  
CIVIL PENALTY**

**DOCKET No. CWA-02-2012-3311**

I certify that on \_\_\_\_\_, I served the foregoing fully executed Administrative Complaint, Findings of Violation, Notice of Proposed Assessment of an Administrative Penalty, and Notice of Opportunity to Request a Hearing, bearing the above referenced docket number, on the persons listed below, in the following manner:

Original and One Copy  
By Hand:

Office of Regional Hearing Clerk  
U.S. Environmental Protection Agency - Region 2  
290 Broadway, 16th floor  
New York, New York 10007-1866

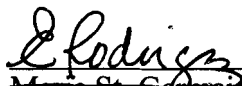
Copy by Certified Mail  
Return Receipt Requested:

Mr. Peter Gutliph, Manager  
Burton F. Clark, Inc.  
P.O. Box 427  
Delhi, New York 13753

Copy by Certified Mail  
Return Receipt Requested:

Joseph DiMura, P.E., Director  
Bureau of Water Compliance Programs  
Division of Water  
NYSDEC  
625 Broadway  
Albany, New York 12233-3506

Dated: SEP 21 2012

  
\_\_\_\_\_  
Marie St. Germain, Secretary  
New York, NY