

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 2

U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG. II  
2009 JUL 17 PM 1:25  
REGIONAL HEARING  
CLERK

**IN THE MATTER OF:**

Robinson Concrete, Inc.  
d/b/a Franklin Street Ready Mix Facility,  
Robinson Concrete, Inc. Franklin Street  
Pit Sand and Gravel Mine, and Vitale  
Ready Mix Concrete, Inc.  
3486 Franklin St. Rd.  
Auburn, New York 13021

NPDES Permit Numbers: NYR00E267,  
NYR00D442, and NYU000213

Respondent.

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

**DOCKET NO. CWA-02-2009-3404**

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

**I. STATUTORY AND REGULATORY AUTHORITIES**

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)(B) of the Clean Water Act (Act or CWA), 33 U.S.C. §1319(g)(2)(B). 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)(B) 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 CFR Part 22 (2001), a copy of which is attached, Complainant hereby requests that the Regional Administrator assess a civil penalty against Robinson Concrete, Inc. (Respondent, Permittee, or Robinson Concrete), as a result of Complainant's determination that the Respondent is in violation of Sections 301, 308 and 402 of the Act, 33 U.S.C. §1311, §1318 and §1342, respectively, for the

unlawful discharge of pollutants into navigable waters, and failure to apply for or obtain a National Pollutant Discharge Elimination System (NPDES) or State Pollutant Discharge Elimination System (SPDES) permit in a timely manner.

3. Section 301(a) of the Act, 33 U.S.C. §1311(a), provides in part that "except as in compliance with this Section and Sections . . . 402, and 404 of the Act, the discharge of any pollutant by any person shall be unlawful."
4. Section 308 of the Act, 33 U.S.C. §1318, 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.
5. Section 402 of the Act, 33 U.S.C. §1342, authorizes the Administrator to issue a NPDES permit for the discharge of any pollutant, or combination of pollutants, subject to certain requirements of the Act and such conditions as the Administrator determines are necessary.
6. Section 402(a) requires that permit coverage be obtained for the discharge of pollutants. Section 402 (p) of the Act, 33 U.S.C. §1342(p), requires a permit with respect to a storm water discharge associated with industrial activity.
7. The facility is a ready mix concrete manufacturer and sand and gravel operation, Standard Industrial Classification (SIC) codes 3273 and 1442.
8. The Administrator of EPA has promulgated regulations at 40 CFR §122.26(a)(1)(ii) and §122.26(b)(14), which require operators to obtain a NPDES permit for storm water discharges associated with industrial activity and construction activity.
9. The regulations at 40 CFR §122.26(b)(14) regulate storm water discharges associated with industrial activity which include SIC Codes 3273 and 1442.
10. In accordance with Section 402 of the Act, The New York State Department of Environmental Conservation (NYSDEC) issued the SPDES Multi Sector General Permit for Stormwater Discharges Associated with Industrial Activity GP-0-06-002 which became effective on March 28, 2007 (MSGP or MSGP 2007). Prior to the MSGP 2007, the MSGP 1998, GP-98-03 was effective from November 1, 1998 to October 31, 2003, and thereafter was administratively extended until the MSGP 2007 became effective.
11. The Act and its implementing regulations and applicable NPDES/SPDES permit contain the following definitions:
  - a) "Navigable waters" means the waters of the United States and territorial seas, pursuant to Section 502(7) of the Act, 33 U.S.C. §1362(7). "Waters of the United States" means, but are not limited to, waters which are currently used or may be susceptible to use in interstate or foreign commerce, including all waters which

are subject to the ebb and flow of the tide and including wetlands, rivers, streams (including intermittent streams) (40 CFR §122.2).

- d) "Pollutant" means, but is not limited to, solid waste, dredged spoil, rock, sand, cellar dirt, sewage, sewage sludge, and industrial, municipal and agricultural waste discharged into water, pursuant to Section 502(6) of the Act, 33 U.S.C. §1362(6).
- e) "Point source" means "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, ..." pursuant to Section 502(14) of the Act, 33 U.S.C. §1362(14).
- f) "Discharge of a pollutant" means any addition of any pollutant to navigable waters from any point source, pursuant to Section 502(12) of the Act, 33 U.S.C. §1362(12).
- g) "Person" means, but is not limited to, an individual, corporation, partnership or association, pursuant to Section 502(5) of the Act, 33 U.S.C. §1362(5).
- h) "Owner" or "Operator," for the purpose of the MSGP means the owner or operator of any facility or activity subject to regulation as defined in Appendix A of the MSGP.

## **II. JURISDICTIONAL FINDINGS**

- 12. Robinson Concrete, Inc. (Respondent) is a person within the meaning of Section 502(5) of the CWA, 33 U.S.C. §1362(5).
- 13. At all relevant times, Respondent was the owner/operator of Robinson Concrete, Inc., d/b/a Franklin Street Ready-Mix Facility, and Robinson Concrete, Inc. Franklin Street Pit Sand and Gravel Mine, Vitale Ready Mix, Inc., and its various ready mix and sand and gravel facilities (facility, site or industrial facility). The site was purchased by Robinson Concrete in or about 1972 and has been owned/operated by Robinson Concrete, Inc. since that time.
- 14. The industrial facility is located at 3486 Franklin Street Rd., Auburn, New York 13021.
- 15. Respondent's Site was and is, at all relevant times, a point source as defined in Section 502 (14) of the Act, 33 U.S.C. §1362(14).
- 16. Stormwater and groundwater from the site flows through an on-site drainage system to Outfall 001. Process wastewaters have also been discharged via Outfall 001.
- 17. Outfall 001 discharges to Bread Creek, a tributary of Putnam Brook, and then to the Seneca River/Erie Canal System.
- 18. Bread Creek, a tributary of Putnam Brook, is a water body of the United States.

19. Bread Creek, a tributary of Putnam Brook, is a water body of the United States.
20. The site was and is, at all relevant times, a point source.

### **III. FINDINGS OF VIOLATION**

21. Complainant realleges Paragraphs 12 – 20 above.
22. EPA Region 2's Underground Injection Control Section inspected the site on October 5, 2005 and sent a referral to EPA Region 2's NPDES/SPDES Personnel in March 2006.
23. Based on the aforementioned referral, on August 7, 2007, a duly authorized representative of EPA Region 2 conducted a NPDES/SPDES Compliance Evaluation Inspection (CEI) at the site (the Inspection).
24. At the time of the August 7, 2007 inspection, the EPA inspector saw a discharge from Outfall 001 and found that Respondent had failed to:
  - a. obtain coverage under an individual SPDES Permit for its process wastewater and storm water discharges, or;
  - b. obtain coverage under a SPDES MSGP and eliminate its process wastewater discharges.
25. On January 14, 2008, EPA issued a Request for Information (RFI) letter, CWA-IR-08-016 under Section 308 of the CWA.
26. On March 20, 2008, Respondent replied to the RFI letter.
27. On May 20, 2008, EPA issued an Administrative Compliance Order (AO) and subsequent RFI, CWA-02-2008-3015. The AO required Robinson Concrete to submit additional information and to obtain permit coverage.
28. By letters dated July 15, 2008, July 26, 2008, August 27, 2008 and September 30, 2008, Respondent replied to the AO. Respondent indicated that it had eliminated process wastewater discharges.
29. Respondent submitted an individual permit application to the NYSDEC on December 27, 2006. NYSDEC sent a notice of incomplete application dated January 12, 2007. Following a meeting with NYSDEC on May 11, 2007, on July 19, 2007, Robinson Concrete submitted additional information and requested that the facility be covered under the MSGP.
30. On or about July 15, 2008, Robinson Concrete submitted Notices of Intent (NOI) to the New York State Department of Environmental Conservation (NYSDEC). In late August

or September of 2008, Respondent obtained MSGP coverage for its ready mix and sand and gravel operations under SPDES Permit Nos. NYR00E267 and NYR00D442 respectively.

31. Based on the Findings above, Respondent violated Section 301, of the Act, 33 U.S.C. §1311, for unpermitted stormwater discharges from its facility for the period starting on or before April 1, 2004 and extending until August 2008.
32. Based on the Findings above, Respondent violated Sections 308 and 402 of the Act, 33 U.S.C. §1318 and §1342 by failing to adhere to relevant monitoring, reporting and pollutant control requirements of this part of the Act and to apply for and/or obtain SPDES Permit coverage for its facility for the period starting on or before April 1, 2004 and extending until August 2008.

#### **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 \$ **88,000**. 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 violation (or 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 has been found to have violated the Act in 1,641 instances. EPA may issue the Final Order Assessing Administrative Penalties thirty (30) days after Respondent's receipt of this Notice, unless Respondent within that time files an Answer to the Complaint 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 CFR 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 CFR § 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, New York 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 CFR §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 CFR §22.15(b). Where Respondent lacks knowledge of a particular factual allegation and so states in the Answer, the allegation is deemed denied. 40 CFR §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 CFR §22.15(b).

Respondent's failure affirmatively to 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 CFR §22.15(c). If, however, Respondent does not request a Hearing, the Presiding Officer (as defined in 40 CFR §22.3) may hold a Hearing if the Answer raises issues appropriate for adjudication. 40 CFR §22.15(c).

Any Hearing in this proceeding will be held at a location determined in accordance with 40 CFR §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 40 CFR Part 22.

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 CFR

§22.15(d). If Respondent fails to file a timely [i.e. in accordance with the 30-day period set forth in 40 CFR §22.15(a)] an Answer to the Complaint, Respondent may be found in default upon motion. 40 CFR §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 CFR §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 CFR §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 CFR §22.27(c). 40 CFR §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**

Whether or not Respondent requests a formal Hearing, EPA encourages settlement of this proceeding consistent with the provisions of the Act and its applicable regulations. 40 CFR §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 is believed 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, to reflect any settlement agreement reached with Respondent, to reflect any relevant information previously not known to Complainant or to dismiss any or all of the charges, if Respondent can demonstrate that the relevant allegations are without merit and that no cause of action as herein alleged exists. Respondent is referred to 40 CFR §22.18.

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

Melva J. Hayden, Esq.  
Assistant Regional Counsel  
Water and General Law Branch  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 16th Floor  
New York, NY 10007-1866  
Telephone (212) 637-3230

The parties may engage in settlement discussions irrespective of whether Respondent has requested a Hearing. 40 CFR §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. Complainant does not deem a request for an informal settlement conference as a request for a Hearing as specified in 40 CFR §22.15(c).

A request for an informal settlement conference does not affect Respondent's obligation to file a timely Answer to the Complaint pursuant to 40 CFR §22.15. No penalty reduction, however, 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 CFR §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 CFR §22.18(b)(2). In order to conclude the proceeding, a Final Order ratifying the parties' agreement to settle will be executed. 40 CFR §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 (\$88,000) 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 CFR §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  
PO Box 979077  
St. Louis, MO 63197-9000

Pursuant to 40 CFR §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 in accordance with 40 CFR §22.18(a)(3). In



accordance with 40 CFR §22.45(c)(3), no Final Order shall issue 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 CFR §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.

### **VII. 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  
290 Broadway, 16th Floor  
New York, New York 10007-1866

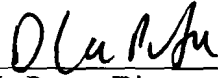
A copy of the Answer, any Hearing Request and all subsequent documents filed in this action shall be sent to:

Melva J. Hayden, Esq.  
Assistant Regional Counsel  
Water and General Law Branch  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 16th Floor  
New York, NY 10007-1866  
Telephone (212) 637-3230

### **VIII. 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 15 DAY OF July, 2009.



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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:**

Robinson Concrete, Inc.  
d/b/a Franklin Street Ready Mix Facility,  
Robinson Concrete, Inc. Franklin Street Pit and  
Sand and Gravel Mine, and Vitale Ready Mix  
Concrete, Inc.  
3486 Franklin Street Rd.  
Auburn, New York 13021

SPDES/NPDES Permit Numbers NYR00E267,  
NYR00D442 and NYU000213

Respondent.

Proceeding pursuant to Section 309(g) of  
the Clean Water Act, 33 U.S.C. §1319(g)

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

**DOCKET NO.  
CWA-02-2009-3404**

**JUL 16 2009**

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

Copy by Certified Mail  
Return Receipt Requested:

Michael Vitale, Sr.  
Robinson Concrete, Inc.  
3486 Franklin Street Rd.  
Auburn, New York 13021

Copy by Certified Mail  
Return Receipt Requested:

Mr. Joe DiMura, P.E., Director,  
Bureau of Water Compliance Programs  
NYSDEC  
625 Broadway  
Albany, NY 12233-4500

Dated: 7/16/09

  
NAME OF SECRETARY, Secretary  
New York, New York