

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II

2013 MAY 30 P 2:56

REGIONAL HEARING
CLERK

IN THE MATTER OF

Town of Brookhaven
1 Independence Hill
Farmingville, New York 11738

Respondent

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

**CONSENT AGREEMENT
AND FINAL ORDER**

Docket No. CWA-02-2012-3313

Complainant, the United States Environmental Protection Agency ("EPA") filed the Complaint referenced herein on September 7, 2012, against Respondent, Town of Brookhaven. Complainant and Respondent ("the Parties") having agreed that settlement of this matter is in the public interest, and that entry of this Consent Agreement and Final Order ("CAFO" or "Agreement") without further litigation is the most appropriate means of resolving this matter, hereby consent and agree as follows:

I. PRELIMINARY STATEMENT

1. EPA initiated this proceeding for the assessment of a civil penalty, pursuant to Section 309(g) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1319(g).
2. The Complaint alleges that Respondent is liable for violations of the Clean Water Act in the operation of its municipal separate storm sewer system ("MS4") located in Suffolk County, New York, and proposes to assess a civil penalty of nineteen thousand five hundred dollars (\$19,500).
3. Respondent has not filed an Answer or requested a hearing pursuant to 40 C.F.R. Part 22.
4. This Consent Agreement and Final Order shall apply to and be binding upon Respondent, its officers, directors, employees, successors and assigns.
5. Respondent stipulates that EPA has jurisdiction over the subject matter alleged in the Complaint and that the Complaint states a claim upon which relief can be granted against Respondent. Respondent waives any defenses it might have as to jurisdiction and venue, and without admitting or denying the factual allegations in the Complaint, consents to the terms of this Agreement.

6. Respondent waives its right to a judicial or administrative hearing or appeal on any issue of law or fact set forth in the Complaint.

II. CIVIL PENALTY

7. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), the nature of the violations, Respondent's agreement to perform a Supplemental Environmental Project ("SEP") and other relevant factors, EPA has determined that an appropriate civil penalty to settle this action is in the amount of **TEN THOUSAND DOLLARS (\$10,000)**.
8. Respondent consents to the issuance of this Consent Agreement and Final Order, and consents, for the purposes of settlement, to the payment of the civil penalty cited in the foregoing paragraph and to the performance of the Supplemental Environmental Project.
9. Respondent shall pay the full penalty amount within thirty (30) days of its receipt of the Final Order adopting this Agreement. If the due date for payment falls on a weekend or legal federal holiday, the due date is the next business day. Payment must be received by 11:00 a.m. Eastern Standard Time to be considered received that day. Respondent shall submit a cashier's or certified check, including the name and docket number of this case, for **TEN THOUSAND DOLLARS (\$10,000)**, payable to "Treasurer, United States of America," by one of the following methods:

Regular Mail

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

Overnight Mail

U.S. Bank
Government Lockbox 979077
U.S. EPA Fines and Penalties
1005 Convention Plaza
Mail Station SL-MO-C2-GL
St. Louis, MO 63101

Wire Transfer: Wire transfers should be directed to the Federal Reserve Bank of New York with the following information:

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

Field tag 4200 of Fedwire message should read, "D 68010727
Environmental Protection Agency."

Online: This option is available through the Department of Treasury, at www.pay.gov. Enter "sfo 1.1" in the search field. Open the form and complete the required fields.

Respondent shall also provide copies of this check to each of the following:

Kim Kramer, Esq.
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, NY 10007

and

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

10. In the event the payment is not received by the specified due date, interest accrues from the date of the Final Order, not the due date (on the 1st late day, 30 days of interest will have accrued), at a rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717, and will continue to accrue until payment in full is received.
11. In addition, a handling charge of fifteen dollars (\$15) shall be assessed on the 31st day from the due date of any payment, and for each subsequent thirty day period that the debt, or any portion thereof, remains unpaid. A six percent (6%) per annum penalty shall also be assessed on any unpaid principal amount if payment is not received within 90 days of the due date. Payments are first applied to outstanding handling charges, 6% penalty interest, and late interest. The remainder is then applied to the outstanding principal amount.
12. Respondent shall not claim the penalty as a federal or other tax deduction or credit.
13. Failure to pay the penalty in full according to the above provisions will result in referral of this matter to the United States Department of Justice or the United States Department of the Treasury for collection.

III. SUPPLEMENTAL ENVIRONMENTAL PROJECT

SEP Performance

14. **Mount Sinai Marine Stewardship Center Storm Water Retention Area/Rain Barrel and Rain Garden Demonstration Supplemental Environmental Project ("SEP")**
- a. Respondent shall complete this SEP, which the parties agree is intended to secure environmental protection or public health improvements, namely, the reduction of storm water discharges to waters of the United States;
 - b. Not more than ninety (90) days after receiving a copy of this Consent Agreement and Final Order, Respondent shall commence construction of the SEP;
 - c. Respondent shall complete construction of the SEP no later than July 31, 2013; and
 - d. Respondent shall complete the SEP in accordance with the Memorandum from Robert R. Tyson to EPA ("Memorandum") dated February 28, 2013 (attached hereto as Exhibit A and incorporated herein by reference), as follows: using the existing garden area that surrounds the Mount Sinai Marine Stewardship Center ("the building"), the Town will redesign the building's gutter and leader system to drain to rain barrels with an overflow to a rain garden. The garden area will be re-vegetated and restructured with the material necessary to replicate a larger scale rain garden. The storm water retention area, or rain garden, will cover approximately 294 square feet. The area will include an 11' x 22' rectangle that extends along the southern edge of the building and a second rectangular area of 15' x 3.5' located along the eastern edge of the building (contiguous with the rectangle at the southern edge of the building). Educational signage will depict the structural elements of a rain garden.
15. The total expenditure for the SEP shall not be less than **EIGHT THOUSAND DOLLARS (\$8,000)**, in accordance with the specifications set forth in the Memorandum.
16. Respondent hereby certifies that, as of the date of this Agreement, Respondent is not required to perform or develop this SEP as part of any federal, state or local law or regulation; nor is Respondent required to perform or develop the SEP by any other agreement, grant or as injunctive relief in this or any other case. Respondent further certifies that it has not received, and is not presently negotiating to receive credit in any other enforcement action for the SEP.
17. Any public statement, oral or written, in print, film, website or other media, made by Respondent making reference to the SEP shall include the following language: "This project was undertaken in connection with the settlement of an enforcement action (USEPA Region 2 docket number CWA-02-2012-3313) taken by the U.S. Environmental Protection Agency for violations of Section 301 of the Clean Water Act."

SEP Completion Report

18. Respondent shall submit a SEP Completion Report to EPA by September 1, 2013. The SEP Completion Report shall contain the following information:

- a. A detailed description of the SEP as implemented;
- b. A description of any operating problems encountered and the solutions thereto;
- c. Itemized costs;
- d. Certification that the SEP has been fully implemented pursuant to the provisions of this Agreement; and
- e. A description of the environmental and public health benefits resulting from implementation of the SEP (with a quantification of the benefits and pollutant reductions, if feasible).

19. In itemizing its costs in the SEP completion report, Respondent shall clearly identify and provide acceptable documentation for all eligible SEP costs. Where the SEP completion report includes costs not eligible for SEP credit, those costs must be clearly identified as such. For purposes of this Paragraph, "acceptable documentation" includes invoices, purchase orders, or other documentation that specifically identifies and itemizes the individual costs of the goods and/or services for which payment has been made. Canceled drafts do not constitute acceptable documentation unless such drafts specifically identify and itemize the individual costs of the goods and/or services for which payment is being made.

20. Respondent agrees that failure to submit the SEP Completion Report shall be deemed a violation of this Agreement and Respondent shall become liable for stipulated penalties pursuant to Paragraph 26 below.

21. Respondent shall submit all reports required by this Agreement by first class mail to the following:

Douglas McKenna, Chief
Water Compliance Branch
U.S. Environmental Protection Agency, Region 2
290 Broadway, 20th floor
New York, NY 10007

and

Kim Kramer, Esq.
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, NY 10007

22. Respondent agrees that EPA may inspect the facility at any time in order to confirm that the SEP is being undertaken in conformity with the representations made herein.
23. Respondent shall maintain legible copies of documentation of the underlying research and data for the SEP Completion Report and shall provide the documentation to EPA not more than seven days after EPA requests such information.
24. In all documents or reports submitted to EPA pursuant to this Agreement, Respondent shall, by its officers, sign and certify under penalty of law that the information contained in such document or report is true, accurate, and not misleading by signing the following statement:

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.

25. EPA Acceptance of SEP Report:

After receipt of the SEP Completion Report described in Paragraph 18 above, EPA will notify the Respondent, in writing, regarding:

- (i) Any deficiencies in the SEP Report itself along with a grant of an additional thirty (30) days for Respondent to correct any deficiencies; or
- (ii) Indicate that EPA concludes that the project has been completed satisfactorily; or
- (iii) Determine that the project has not been completed satisfactorily and seek stipulated penalties in accordance with Paragraph 26 herein.

If EPA elects to exercise option (i), above (i.e., if the SEP Report is determined to be deficient), but EPA has not yet made a final determination about the adequacy of SEP completion itself, EPA shall permit Respondent the opportunity to object in writing, to the notification of deficiency given pursuant to this paragraph, within ten (10) days of receipt of such notification. EPA and Respondent shall have an additional thirty (30) days from the receipt by EPA of the notification of objection to reach agreement on changes necessary to the SEP Report. If agreement cannot be reached on any such issue within this thirty (30) day period, EPA shall provide a written statement of its decision on the adequacy of the completion of the SEP to Respondent, which decision shall be final and

binding upon Respondent. In the event the SEP is not completed as contemplated herein, as determined by EPA, stipulated penalties shall be due and payable by Respondent to EPA in accordance with Paragraph 26, below.

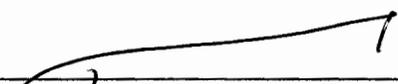
Stipulated Penalties

26. In the event that Respondent fails to comply with any of the terms or provisions of this Agreement relating to the performance of the SEP described in Paragraphs 14-17 above, and/or to the extent that the actual expenditures for the SEP do not equal or exceed the cost of the SEP described in Paragraph 15 above, Respondent shall be liable for the stipulated penalties according to the provisions below:
- a. Except as provided in subparagraphs (i)- (iii) immediately below, where Respondent fails to timely and completely perform the SEP pursuant to this Agreement, Respondent shall pay a stipulated penalty to the United States in the amount of **EIGHT THOUSAND DOLLARS (\$8,000)**.
 - (i) If the SEP is completed in accordance with Paragraph 14, and the Respondent spent at least 90 percent of the money required to be spent for the project, Respondent shall not be liable for any stipulated penalty.
 - (ii) If the SEP is completed in accordance with Paragraph 14, but the Respondent spent less than 90 percent of the amount of money required to be spent for the project, Respondent shall pay a stipulated penalty to the United States of **TWO THOUSAND DOLLARS (\$2,000)**.
 - (iii) If the SEP is not completed in accordance with Paragraph 14, but the Complainant determines that the Respondent made good faith and timely efforts to complete the project and certifies, with supporting documentation, that at least 90 percent of the amount of money which was required to be spent was expended on the SEP, Respondent shall not be liable for any stipulated penalty.
 - b. If Respondent fails to submit the SEP Completion Report required by Paragraph 18 above, Respondent shall pay a stipulated penalty in the amount of **\$100.00** for each day after the report was originally due until the report is submitted.
 - c. The determinations of whether the SEP has been satisfactorily completed and whether the Respondent has made a good faith, timely effort to implement the SEP shall be in the sole discretion of EPA.
 - d. Stipulated penalties shall begin to accrue the day after the SEP completion date or the day after the due date of the SEP completion Report, whichever is applicable, and shall continue to accrue through the final day of the completion of the SEP or submission of the report.
 - e. Respondent shall pay stipulated penalties not more than fifteen (15) days after receipt of a written demand by EPA for such penalties. The method of payment shall be in accordance with the provisions of Paragraph 9 above. Interest and late charges shall be paid as stated in Paragraphs 10-11 herein.

IV. OTHER TERMS AND CONDITIONS

27. Failure by Respondent to comply with any of the terms of this Agreement shall constitute a breach of the Agreement and may result in referral of the matter to the Department of Justice for enforcement of the Agreement and for such other relief as may be appropriate.
28. Nothing in this agreement shall be construed as prohibiting, altering or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this agreement or of the statutes and regulations upon which this agreement is based, or for Respondent's violation of any applicable provision of law.
29. Nothing in this Agreement shall be construed as a waiver by Complainant of its authority to seek costs or any appropriate penalty associated with any collection action instituted as a result of Respondent's failure to perform pursuant to the terms of the Agreement.
30. This Agreement, upon incorporation into a Final Order, and full satisfaction by the parties, shall be a complete, full and final settlement of the civil penalty owed for the violations alleged in the Complaint.
31. This Agreement shall not in any case affect EPA's right to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law whether or not alleged in this Agreement. This Agreement shall not affect Respondent's right to assert any defense in any action by EPA to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.
32. This Agreement shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, state or local law.
33. Compliance with this Agreement shall not be a defense to any actions subsequently commenced pursuant to federal laws and regulations administered by EPA.
34. Each undersigned representative of the parties to this Agreement certifies that he or she is fully authorized by the party represented to enter into the terms and conditions of this Agreement and to execute and legally bind that party to it.
35. Each party shall bear its own costs and attorneys fees in connection with the action resolved by this Agreement.
36. Respondent consents to service upon it by delivery of a copy of this Agreement by an EPA employee other than the Regional Hearing Clerk.

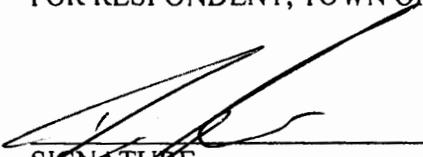
FOR COMPLAINANT, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
REGION 2:



DORE LAPOSTA
Director, Division of Enforcement and Compliance Assistance
United States Environmental Protection Agency-Region 2
290 Broadway
New York, New York 10007

 MAY 22, 2013
DATE

FOR RESPONDENT, TOWN OF BROOKHAVEN:



SIGNATURE

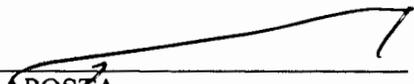
 4-30-13
DATE

 Daniel Panico
NAME (Please print)

 Deputy Supervisor
TITLE (Please print)

V. FINAL ORDER

The Director of the Division of Enforcement and Compliance Assistance of the U.S. Environmental Protection Agency, Region 2, ratifies the foregoing Consent Agreement. The Agreement entered into by the parties is hereby approved, incorporated herein, and issued as an Order. The effective date of this Order shall be the date of filing with the Regional Hearing Clerk, U.S. EPA Region 2, New York, New York.



DORE LAPOSTA
Director, Division of Enforcement and Compliance Assistance
United States Environmental Protection Agency-Region 2
290 Broadway
New York, New York 10007

MAY 23, 2013
DATE

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

IN THE MATTER OF

Town of Brookhaven
1 Independence Hill
Farmingville, NY 11738

Respondent

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

CONSENT AGREEMENT
AND FINAL ORDER

Docket No. CWA-02-2012-3313

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2013 MAY 30 P 2:56
REGIONAL HEARING
CLERK

CERTIFICATE OF SERVICE

I certify that, on the date noted below, I caused to be mailed, by certified mail, return-receipt-requested, a copy of this "Consent Agreement and Final Order" to the following person at the address listed below:

Mr. Ed Romaine, Town Supervisor
Town of Brookhaven
1 Independence Hill
Farmingville, NY 11738

I further certify that, on the date noted below, I caused to be mailed, by EPA internal mail (pouch), the original and a copy of this "Consent Agreement and Final Order" to the following person at the address listed below:

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

5/30/13
Date


Signature

Katherine Zuckerman

Print Name

Air Branch Secretary

Title for Water & General Law Branch

TO: Kim Kramer, Esq.
U.S. Environmental Protection
Agency

FROM: Robert R. Tyson

DATE: February 28, 2013

RE: Town of Brookhaven Supplemental Environmental Project
Docket No. CWA-02-2012-3313

This memorandum provides information regarding a proposed Supplemental Environmental Project (SEP) consisting of a stormwater retention area/rain garden to be constructed at the Mount Sinai Marine Stewardship Center (pictured below). The Town of Brookhaven (Town) is providing this information to assist in the preparation of a Consent Agreement/Final Order (CA/FO) for the referenced matter.



Background: The Town owns and operates a marine education facility - the Mount Sinai Marine Stewardship Center - on the Cedar Beach peninsula in Mount Sinai. Long Island Sound is immediately north of the facility, and Mount Sinai Harbor is located to the south. The Marine Stewardship Center was once a privately owned home that was acquired by the Town with the intent to open a publicly accessible space.

In 1983 the Town opened the Cedar Beach Nature Center (now known as the Marine Stewardship Center). The Marine Stewardship Center is intended to provide a friendly atmosphere in which Town residents may obtain firsthand knowledge of the

marine environment, free of charge. The area surrounding the Marine Stewardship Center lends itself well to a natural outdoor classroom experience where local elementary, middle and high schools can bring students to explore the diverse marine environs.

The interior of the Marine Stewardship Center contains a variety of exhibits highlighting different aspects of the Mount Sinai Marine Sanctuary. Coastal dune, salt marsh, and freshwater pond habitats are detailed in hand-painted murals. Educational exhibits interpret these natural communities and identify some of the plants and animals occupying them. Saltwater tanks house local marine species year-round. Popular exterior features of the complex include outdoor touch tanks and paved walkways. The outdoor touch tanks are a temporary home for some of the plants and animals found in the waters of Long Island Sound and Mount Sinai Harbor. Members of the public can see and touch common animals such as horseshoe crabs, sea stars, and spider crabs. The one-half mile paved walkway is handicapped accessible and meanders through the dune system of the Long Island Sound, offering a transitional walking experience from dunes to a maritime forest.

SEP Description. The SEP will be performed in the existing garden area next to the Stewardship building. Specifically, the Town will redesign the building's gutter and leader system to drain to rain barrels with an overflow to a rain garden. The garden area will be re-vegetated and restructured with the material necessary to replicate a larger scale rain garden. Educational signage will depict the structural elements of a rain garden. The anticipated cost of the SEP is \$8,000.00.

Completion Date. The SEP is expected to be completed by July 31, 2013. Any plants that die off in the first season will be replaced either in the fall of 2013, or spring of 2014.

Compliance with EPA SEP Policy: For the reasons set forth below, the Town believes the proposed SEP meets the criteria contained in EPA's SEP Policy.

The proposed SEP will protect the environment in the immediate vicinity of the Marine Stewardship Center, and will be conducted on a voluntary basis. The Town has developed this proposal in response to EPA's Notice of Proposed Assessment of Civil Penalty Class I, dated September 7, 2012 (Notice), and had not considered implementation of this project until receipt of the Notice and evaluation of potential SEP ideas. The Town believes the project would fit within the "Pollution Prevention" and "Environmental Restoration and Protection" categories of SEPs, and given its focus on mitigating the pollutant impact of storm water, it serves to reduce the impact to the environment to which the alleged violations contribute. Finally, the project is consistent with similar SEP ideas that EPA identified as noteworthy in its July 20, 2006 Memorandum entitled "Transmittal of Updated List of Project Ideas for Potential Supplemental Environmental Projects." Specifically, in that memorandum, EPA identified the following SEP ideas:

- Rain garden incentive programs and storm water control projects;
- Utilities or companies could develop incentive programs to encourage

homeowners and businesses to engage in practices such as installation and maintenance of rain gardens. Rain gardens are vegetated depressions which have the potential to decrease stormwater runoff and peak stream flows, and combined sewer overflows. Build rain garden demonstration projects in public spaces, e.g. schools, libraries, public meeting facilities, transportation rights of way, etc.

Specific information needed to assist in preparation of the CA/FO is set forth below:

1. Description of "environmentally sensitive area"

The Mt. Sinai Marine Stewardship Center, the location of the proposed rain garden, is located on the Cedar Beach peninsula. The peninsula is made of sand and is six hundred feet wide and a little more than six thousand feet long. It separates the waters of Long Island Sound from the waters of Mt. Sinai Harbor. The combination of the open waters of the Sound, the sheltered waters of the Harbor, and the maritime nature of the peninsula form an environmentally sensitive area of beaches, parkland, and tidal wetlands. Human uses, such as a marina, are mixed with natural areas such as the beaches and interior of the peninsula. The plant community is a mix of salt and drought tolerant species that include populations of rare eastern prickly pear cactus. The waters support commercially and recreationally important species such as bluefish and striped bass. A host of threatened and endangered species can be found either seasonally during migration, or as resident populations. The Long Island Sound was designated an Estuary of National Significance by Congress in 1987. Mt. Sinai Harbor is listed as providing Significant Coastal Fish and Wildlife Habitat by New York State.

2. Dimensions of storm water retention area

The proposed storm water retention area covers approximately 294 square feet; the area includes an 11' x 22' rectangle that extends along the southern edge of the Stewardship building. A second rectangular area of 15' by 3.5' is located along the eastern edge of the Stewardship building and is contiguous with the rectangle at the southern edge of the building.

3. Community involvement in SEP development

The Mt. Sinai Harbor Advisory Committee will advise the Town and comment on the rain garden design. The Town will request assistance in the planting and maintenance of the rain garden from Boy Scout Troop 384, which is based in Mt. Sinai.

4. How the Town estimated the cost (quotes, engineer certified etc.)

The original cost of the SEP was based on estimates provided by David Barnes, Landscape Architect. The costs were derived based on estimates for projects using similar materials and amount of labor that the Town had either completed on its own, or contracted for within recent years.

5. Any native plant, fertilizer, pesticide, integrated pest management usage?

The SEP will exclusively use native plants. It is anticipated that because of the limited size of the rain garden area that no pesticides will be required. In addition, the Town will only apply fertilizer that does not contain phosphate (fertilizer containing phosphate has been banned in Suffolk County) to reduce any potential nutrient loading to the Long Island Sound or Mt. Sinai Harbor. In either event, the use of fertilizer and pesticides (if needed) will be minimized, and integrated pest management will be incorporated. To the extent practical, any on-site compost that is generated will be used for fertilizer application.

On behalf of the Town of Brookhaven, thank you for your consideration of this information, and please call if you have questions.

cc: Annette Eaderesto, Esq.
Matt Miner
Anthony Graves