



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Region 1

5 Post Office Square, Suite 100

Boston, MA 02109-3912

**BY HAND**

September 10, 2015

Ms. Wanda Santiago  
Regional Hearing Clerk  
U.S. Environmental Protection Agency - Region I  
5 Post Office Square  
Suite 100, Mail Code ORA18-1  
Boston, MA 02109-3912

Re: In the Matter of: Whipple Construction Company  
CWA-01-2015-0032

Dear Ms. Santiago:

For the above-referenced matter, please file the enclosed Administrative Complaint and Notice of Opportunity for a Hearing and the Certificate of Service. I have included the original and one copy of these documents. I have also included a copy of the letter notifying the Commonwealth of Massachusetts of the filing of this Complaint.

Thank you for your attention to this matter. Should you have any questions, please contact me at (617) 918-1796.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jeffrey Kopf".

Jeffrey Kopf  
Senior Enforcement Counsel

Enclosure

cc: Geoffrey Evancic, President, Whipple Construction Company

RECEIVED

SEP 10 2015

EPA ORC  
Office of Regional Hearing Clerk

WS

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 1**

<b>In the Matter of:</b>	)	<b>Docket No. CWA-01-2015-0032</b>
	)	
<b>Whipple Construction Company</b>	)	<b>Administrative Complaint</b>
<b>446 Main Street, 7<sup>th</sup> Floor</b>	)	<b>Proposing to Assess a Civil</b>
<b>Worcester, Massachusetts 01608</b>	)	<b>Penalty Under Section 309(g)</b>
	)	<b>of the Clean Water Act</b>

**I. 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 (“CWA”), 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 CWA, 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 Whipple Construction Company, (“Whipple Construction” or “Respondent”) for discharging pollutants into navigable waters of the United States in violation of Section 301(a) of the CWA, 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 CWA, 33 U.S.C. § 1318(a).

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**SEP 10 2015**

EPA ORC *ws*  
Office of Regional Hearing Clerk

3. The CWA is designed to restore and maintain the chemical, physical and biological integrity of the nation's waters. Section 101(a) of the CWA, 33 U.S.C. § 1251(a).

4. To accomplish the objectives of the CWA, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person except in certain circumstances, including in compliance with a permit issued pursuant to Section 402 or 404 of the CWA, 33 U.S.C. § 1342 or 1344.

5. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source."

6. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines "pollutant" to include, *inter alia*, dredged spoil, garbage, rock, sand and cellar dirt.

7. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines "navigable waters" as "the waters of the United States, including the territorial seas."

8. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines "point source" to include "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."

9. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines "person" to include "an individual, corporation, [or] partnership."

10. Section 308(a) of the CWA, 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 CWA, including the issuance of NPDES permits pursuant to CWA section 402, 33 U.S.C. § 1342.

11. Pursuant to Sections 308 and 402(p) of the CWA, 33 U.S.C. §§ 1318 and 1342(p), EPA promulgated stormwater discharge regulations at 40 C.F.R. § 122.26.

12. Forty C.F.R. § 122.26(c) requires dischargers of stormwater “associated with small construction activity” to apply for an individual permit or to seek coverage under a promulgated general permit.

13. Forty C.F.R. § 122.26(b)(15) defines “storm water discharge associated with small construction activity” to include stormwater from clearing, grading, and excavating activities that result in land disturbances of equal to or greater to one acre and less than five acres.

14. Forty C.F.R. § 122.26(b)(13) defines “storm water” to include stormwater runoff, snow melt runoff, and surface runoff and drainage.

### **Construction General Permit**

15. In February 1998, EPA issued the NPDES General Permit for Storm Water Discharges From Construction Activities (“1998 CGP”) 63 Fed. Reg. 7858 (Feb. 17, 1998). The 1998 CGP was effective February 17, 1998 and expired February 17, 2003. EPA re-issued the 1998 CGP in July 2003 (“2003”), 68 Fed. Reg. 45817 (July 1, 2003) (Massachusetts Permit Number: MAR100000). The 2003 CGP was effective July 1, 2003 and expired July 1, 2008. The 2008 CGP was effective June 40, 2008 and expired February 15, 2012. The EPA re-issued the 2008 CGP in February 2012. The re-issued permit was effective February 16, 2012 and expires February 16, 2017. The 2012 CGP authorizes, subject to conditions contained therein, the discharge of pollutants in stormwater runoff associated with construction activities, including construction activities within the Commonwealth of Massachusetts.

16. To obtain coverage under the 2012 CGP, Part 1 of the CGP requires “operators” to submit a notice of intent (“NOI”). The 2012 CGP, Appendix A, defines “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.”

17. Part 1.4.2 of the 2012 CGP requires operators of new projects to submit a complete and accurate NOI at least 14 days prior to commencement of earth-disturbing activities.

18. Part 3 of the 2012 CGP requires operators to prepare an adequate stormwater pollution prevention plan (“SWPPP”) addressing the portions of the project for which they are operators. The SWPPP must meet specific requirements and include certain information, such as the soil type, a description of the drainage patterns at the site, an identification of sensitive resources such as endangered species and historic buildings, and which person is responsible for implementing each portion of the plan.

19. Part 7.2 of the 2012 CGP requires an operator to develop a stormwater pollution prevention plan (“SWPPP”) describing the nature of construction activities and describing all stormwater control measures that are or will be installed and maintained at the construction project covered by the permit. Part 7.2.12 of the 2012 CGP requires that the SWPP describe the procedures for maintaining stormwater control measures, conducting site inspections, and taking corrective actions.

20. At the heart of the SWPPP is the selection of best management practices (“BMPs”) designed to eliminate, to the extent feasible, the migration of pollution from construction sites into the nation’s waters. These practices include measures to prevent erosion (such as the scheduling of the project to minimize the amount of land that is being graded at any particular time) and measures to capture sediment before it leaves the site (such as silt fences and sedimentation basins). The permits impose additional requirements, including those for inspection of the site during construction, maintenance of the SWPPP and sometimes other records at the site, and final stabilization of the site followed by termination of permit coverage.

## **II. ALLEGATIONS**

21. Lot 4 at 162 Ashby Road and Lot 1B at 168<sup>1</sup> Ashby Road (collectively, “the Site”) are adjacent lots on Ashby Road in Ashburnham, Massachusetts. The Site totals approximately 3.6 acres.

22. Earth disturbing activities began at the Site on or about October 1, 2013.

23. Both Lots were worked on concurrently in order to balance the cut and fill operations of each Lot.

24. Respondent did not prepare a SWPPP for the Site until December 31, 2014.

25. Respondent’s SWPPP (dated December 31, 2014) indicates that the maximum area to be disturbed at one time was 2.5 acres.

26. The two lots comprising the Site were part of a common plan of development.

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<sup>1</sup> In certain documents provided by Respondent, it appears that Lot 1B is sometimes referred to as 164 Ashby Road.

27. Respondent, Whipple Construction Company is a corporation organized under the Commonwealth of Massachusetts with its principal place of business located at 446 Main Street, 7<sup>th</sup> Floor, Worcester, Massachusetts.

28. Respondent is a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

29. Whipple Construction is responsible for the daily development and operations at the Site, and otherwise meets the definition of “operator” as defined at 40 C.F.R. § 122.2 and Appendix A of the CGP.

30. Stormwater from the Site runs along a series of swales and into detention basins. Those swales and detention basins are conveyed via culverts under the driveways of Lot 4 and Lot 1B in a northerly direction into a series of wetlands. The wetlands drain in a northerly direction directly into an existing culvert that flows westerly and into Winnekeag Lake. Winnekeag Lake drains to Phillips Brook, which drains to the Nashua River (North Branch), which drains to the Merrimack River, which drains to the Atlantic Ocean.

31. Winnekeag Lake, Phillips Brook, the Nashua River, the Merrimack River and the Atlantic Ocean are all “waters of the United States,” as defined at 40 C.F.R. § 122.2, and are “navigable waters,” as defined at Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

32. On November 7, 2014, EPA conducted an inspection at the Site to determine compliance with the Clean Water Act.

33. The stormwater discharges from the Site result in the “discharge of pollutants,” as defined at Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

34. The stormwater discharges from the Site are “storm water discharge associated with small construction activity” as defined in 40 C.F.R. § 122.26(b)(15).

35. From at least October 1, 2013, Respondent has either directed or participated directly in construction activities at the Site including grubbing, clearing, grading, filling, and excavation activities that have resulted in the disturbance of at least 2.6 acres of land.

36. These construction activities have resulted in the discharge of “storm water associated with small construction activity” to waters of the U.S. This stormwater has been conveyed through ditches, culverts, swales, gullies, detention basins, culverts, and channels through disturbed areas of the Lots and through the Town’s stormwater collection system into Winnekeag Lake, and has been contaminated with sand, dirt, sediment, suspended solids, residues of construction material, and turbidity.

37. The sand, dirt, sediment, suspended solids, residues of construction material, and turbidity discharged into waters of the U.S. constitute “pollutant[s]” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

38. The ditches, culverts, swales, gullies, detention basins, culverts, channels and the stormwater collection system constitute “point source[s]” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

39. As “operator” of the Site, Whipple Construction, was required to obtain NPDES permit coverage for the construction activities and then comply with all requirements and conditions for operation under the CWA, its regulations and the applicable permit.

40. Respondent did not submit an NOI for coverage under the 2012 CGP until January 30, 2015.

41. Respondent obtained coverage under the 2012 CGP for the Site on Feb. 13, 2015.

**COUNT 1: UNAUTHORIZED DISCHARGE OF STORMWATER  
ASSOCIATED WITH INDUSTRIAL ACTIVITY**

42. The Complaint incorporates Paragraphs 1-41 above by reference.



43. By discharging stormwater associated with small construction activity at the Site during storm events from October 1, 2013 to February 13, 2015, without authorization under any NPDES permit, Respondent was in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311.

**COUNT 2: FAILURE TO APPLY FOR A NPDES PERMIT**

44. The Complaint incorporates Paragraphs 1-43 above by reference.

45. By failing to timely apply for an individual permit or submit an NOI for coverage under the 2012 CGP, Respondent was in violation of Section 308(a) of the CWA, 33 U.S.C. § 1318(a), for each day, from October 1, 2013 to January 30, 2015.

**III. NOTICE OF PROPOSED ASSESSMENT OF CIVIL PENALTY**

46. Based upon the foregoing allegations and pursuant to the authority of Sections 309(g) of the CWA, 33 U.S.C. §§ 1319(g), and 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 (Dec. 31, 1996); 69 Fed. Reg. 7121 (Feb. 13, 2004); 73 Fed. Reg. 75340 (Dec. 11, 2008); 78 Fed. Reg. 66643 (Nov. 6, 2013)), Complainant proposes that a Final Order assessing civil penalties be issued against Respondents of up to sixteen thousand dollars (\$16,000) per day for each day during which the violations continued, up to a maximum of one hundred and eighty-seven thousand five hundred dollars (\$187,500) for each Count in the Complaint.

47. The violations alleged represent significant violations of the CWA because of the extent and duration of the violations and because compliance with the federal stormwater

program is important to ensuring that stormwater runoff does not contribute to the impairment of water quality.

48. Prior to any hearing on this case, EPA will file a document specifying a proposed penalty for the CWA violations and explaining how the proposed penalty was calculated, as required by the Consolidated Rules of Practice. EPA is alleging 500 days of violation between October 1, 2013 and February 13, 2015.

#### **IV. NOTICE OF OPPORTUNITY TO REQUEST A HEARING**

49. Respondent has the right to request a hearing to contest the issues raised in this Complaint. Any such hearing would be conducted in accordance with the Consolidated Rules of Practice. Any request for a hearing must be included in Respondent's written Answer to this Complaint and filed with the Regional Hearing Clerk at the address listed below within 30 days of receipt of this Complaint.

50. In its Answer, Respondent may also: (1) dispute any material fact in the Complaint; (2) contend that the proposed penalty is inappropriate; or (3) contend that it is entitled to judgment as a matter of law. The Answer must clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint of which Respondent has any knowledge. If Respondent has no knowledge of a particular factual allegation and so states, the allegation is considered denied. The failure to deny an allegation constitutes an admission of that allegation. The Answer must also include the grounds for any defense and the facts Respondent intends to place at issue.

51. The original and one copy of the Answer, as well as a copy of all other documents which Respondent files in this action, must be sent to:

Wanda Santiago  
Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 1  
5 Post Office Square, Suite 100 (Mail Code: ORA18-1)  
Boston, Massachusetts 02109-3912

52. Respondent should also send a copy of the Answer, as well as a copy of all other documents that Respondent files in this action, to Jeffrey Kopf, the attorney assigned to represent EPA and who is designated to receive service in this matter, at:

Jeffrey Kopf  
Senior Enforcement Counsel  
U.S. Environmental Protection Agency, Region 1  
5 Post Office Square, Suite 100 (Mail Code: OES04-4)  
Boston, Massachusetts 02109-3912  
Tel: (617) 918-1796  
[Kopf.jeff@epa.gov](mailto:Kopf.jeff@epa.gov)

53. If Respondent fails to file a timely Answer to this Complaint, it may be found to be in default, which constitutes an admission of all the facts alleged in the Complaint and a waiver of the right to a hearing.

#### **V. CONTINUED COMPLIANCE OBLIGATION**

54. Neither assessment nor payment of a civil penalty pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), shall affect any Respondent's continuing obligation to comply with the CWA, the regulations promulgated thereunder, or any other applicable Federal, State or local law.

Date: 09/03/2015

Susan Studlien  
Susan Studlien  
Director, Office of Environmental Stewardship  
U.S. Environmental Protection Agency  
Region I

**In the Matter of: Whipple Construction Company**  
**Docket No. CWA-01-2015-0032**

CERTIFICATE OF SERVICE

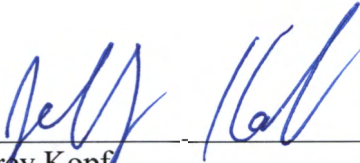
I certify that the foregoing Complaint was sent to the following persons, in the manner specified on the date below:

Original and copy hand-delivered: Wanda Santiago  
Regional Hearing Clerk  
U.S. EPA, Region I  
5 Post Office Square, Suite 100  
Mail Code ORA18-1  
Boston, Massachusetts 02109-3912

Copy by certified mail, return receipt requested, and a copy of the Part 22 Rules Geoffrey Evancic, President  
Whipple Construction Company  
446 Main Street, 7<sup>th</sup> Floor  
Worcester, MA 01608

Copy by first-class mail to: Pamela Talbot, Enforcement Coordinator  
Massachusetts Dep't of Environmental Protection  
One Winter Street, 7<sup>th</sup> floor  
Boston, Massachusetts 02108

Dated: 9/10/15

  
\_\_\_\_\_  
Jeffrey Kopf  
Senior Enforcement Counsel  
Office of Environmental Stewardship  
U.S. EPA, Region I  
5 Post Office Square, Suite 100  
Mail Code OES4-4  
Boston, MA 02109-3912  
(617) 918-1796



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**Region 1**

**5 Post Office Square, Suite 100**

**Boston, MA 02109-3912**

**September 10, 2015**

**Certified Mail- Return Receipt Requested**

Pamela Talbot, Enforcement Coordinator  
Massachusetts Department of Environmental Protection  
One Winter Street, 7<sup>th</sup> floor  
Boston, Massachusetts 02108

Re: In the Matter Whipple Construction Company  
Administrative Penalty Complaint  
Docket No. CWA-01-2015-0032

Dear Ms. Talbot:

Enclosed please find a copy of the Administrative Complaint referenced above. The Complaint involves a construction project at 162 and 168 Ashby Road in Ashburnham, Massachusetts that included grubbing, clearing, grading, filling, and excavation activities. The Complaint alleges that the Respondent, Whipple Construction Company, violated the Clean Water Act by discharging stormwater associated with small construction activity into waters of the U.S. without having obtained permit coverage and for failure to apply for coverage under the 2012 Construction General Permit. Should you wish to consult further on this matter, please call me at (617) 918-1796 or email me at Kopf.Jeff@epa.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff Kopf", written over a white background.

Jeffrey Kopf  
Senior Enforcement Counsel  
U.S. Environmental Protection Agency, Region 1

Enclosure (complaint)