

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 Broadway
New York, New York 10007-1866

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II

2009 AUG -7 AM 11:49

REGIONAL HEARING
CLERK

-----X
IN THE MATTER OF :
:
Vornado Realty Trust :
210 Route 4 East :
Paramus, New Jersey 07652 :
:
Proceeding pursuant to §309(g) of the :
Clean Water Act, 33 U.S.C. §1319(g) :
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Proceeding to Assess Class I
Civil Penalty Under Section
309(g) of the Clean Water Act

Docket No. CWA-02-2009-3317

COMPLAINT
FINDINGS OF VIOLATION, NOTICE OF PROPOSED
ASSESSMENT OF A CIVIL PENALTY, AND
NOTICE OF OPPORTUNITY TO REQUEST A HEARING

I. Statutory Authority

1. This Complaint, Findings of Violation, Notice of Proposed Assessment of a Civil 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”), 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 and the Revocation/Termination or Suspension of Permits” (“CROP”), 40 Code of Federal Regulations (“C.F.R.”) Part 22 (July 1, 2000), a copy of which is attached, Complainant hereby requests that the Regional Administrator assess a civil penalty against Vornado Realty Trust (“Respondent”) for its violations of the National Pollutant Discharge Elimination System (“NPDES”) requirements pursuant to

Section 402 of the Act, 33 U.S.C. §1342, Section 308 of the Act, 33 U.S.C. §1318 and Section 301(a) of the Act, 33 U.S.C. §1311(a).

II. Findings of Violation

3. Respondent is a corporation organized under the laws of the State of New Jersey and is a "person" within the meaning of Section 502(5) of the Act, 33 U.S.C. §1362(5).

4. Respondent, at all times relevant to this administrative Complaint, owns and/or operates a construction site facility located at 1770-1778 East Gun Hill Road, Bronx, New York 10469 (the "facility"). Vornado Realty Trust is primarily involved in the clearing, grading and excavation activities at the facility such that a restaurant ("TGIF") and a drug store ("Duane Reade") can be constructed. The total project acreage is approximately 7.4 acres of which the redevelopment project disturbs approximately 1.5 acres. Storm water associated with construction activity from this facility is discharged via the facility's storm drain system into the Hutchinson River, a navigable water of the United States pursuant to Section 502(7) of the Act, 33 U.S.C. §1362(7). The facility has been under construction since, at least, October 6, 2008.

5. Section 301(a) of the Act, 33 U.S.C. §1311(a), states that it is unlawful for any person to discharge any pollutant except as in compliance with, inter alia, Section 402 of the Act, 33 U.S.C. §1342.

6. Section 301(a) of the Act, 33 U.S.C. §1311(a), provides, in part, that the discharge of any pollutants by any person from a point source to a navigable water of the United States shall be unlawful except in accordance with the terms and conditions of a duly issued permit. Vornado Realty

Trust is subject to the National Pollutant Discharge Elimination System (“NPDES”) requirements pursuant to Section 402 of the Act, 33 U.S.C. §1342 and Section 301(a) of the Act, 33 U.S.C. §1311(a).

7. 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.

8. Section 402 of the Act, 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 Act and conditions which the Administrator determines are necessary. The authority to issue such permits has been delegated to the New York State Department of Environmental Conservation (“NYSDEC”) by the EPA under Section 402(b) of the Act, 33 U.S.C. §1342(b), and a State Pollutant Discharge Elimination System (“SPDES”) permit is required to be issued to facilities in New York State by the NYSDEC for the discharge of pollutants from said facilities from a point source to a navigable water of the United States.

9. Section 402(p) of the Act, 33 U.S.C. §1342(p), sets forth the requirements for the discharges of storm water.

10. The Administrator of EPA has promulgated regulations, 40 CFR §122.26(a)(1)(ii) and §122.26(b)(14), which require an NPDES permit for storm water discharges associated with industrial activity. The regulations at 40 CFR §122.26(b)(14)(x) and 40 CFR §122.26(b)(15)(i) establish

requirements for storm water discharges associated with industrial activity from construction sites which include clearing, grading and excavation activities:

Specifically, 40 CFR §122.26(b)(14)(x) defines applicability as follows: Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more.

40 CFR §122.26(b)(15)(i) further defines applicability as follows: Construction activities including clearing, grading and excavation that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of facility. The Director may waive the otherwise applicable requirements in a general permit for a storm water discharge from construction activities that disturb less than five acres (as defined in 40 C.F.R. §§122.26(b)(15)(i)(A) and (B)).

11. The terms “construction general permit” or “CGP” mean the New York State Department of Environmental Conservation’s (“NYSDEC”) State Pollutant Discharge Elimination System General Permit for Stormwater Discharges from Construction Activity (GP-02-01) (CGP, Construction General Permit, or Permit) which became effective on January 8, 2002 or CGP GP-02-08-001 (2008 CGP or CGP) which became effective on May 1, 2008.

12. The CGP issued pursuant to the Code of Federal Regulations for storm water discharges at 40 CFR §122.26(b)(14)(x), 40 CFR §122.26(b)(15)(i), Part I.A. of the 2008 CGP, and corresponding state regulations, are applicable to this site (Construction activities involving soil disturbances of one (1) or more acres; including disturbances of less than one acre that are part of a larger common plan of development or sale that will ultimately disturb one or more acres of land; excluding routine maintenance activity that is performed to maintain the original line and grade, hydraulic capacity or original purpose of a facility).

13. Facilities regulated under 40 CFR §122.26(b)(14)(x) or 40 CFR §122.26(b)(15)(i) may seek CGP coverage by filing a Notice of Intent (“NOI”) form under the terms and conditions of Part II of the 2008 CGP.

14. Part II of the 2008 CGP requires that an owner or operator file a completed NOI form to obtain permit coverage and fulfill all of the requirements of Part II.A and B of the 2008 CGP. The owner must not commence construction activity until coverage under the 2008 CGP is obtained.

15. EPA conducted a compliance evaluation inspection of the facility on April 2, 2009, to determine compliance with the Act’s requirements as cited above.

16. During the inspection of April 2, 2009, the following information was obtained via visual inspection and information received from facility personnel:

- a. Respondent has conducted construction activity on the 7.4 acre project site.
- b. Storm sewers (classified as separate storm sewer systems) discharge to the Hutchinson River (a navigable water of the United States).

- c. Respondent has not obtained permit coverage under a “SPDES General Permit for Stormwater Discharges from Construction Activity” (Permit No. GP-0-08-001). Submittal of a Notice of Intent (“NOI”) with the required Storm Water Pollution Prevention Plan (“SWPPP”) has not been prepared or submitted to the NYSDEC to obtain permit coverage.

17. Based upon Paragraphs 1-16 above, Respondent has violated Sections 301, 308 and 402 of the Act, 33 U.S.C. §§1311, 1318 and 1342, and federal NPDES regulations authorized thereunder.

III. 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 \$37,500.00. 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 has been found to have violated the Act in instances cited in Section II of this Administrative Penalty Order.

IV. Procedures Governing This Administrative Litigation

The rules of procedure governing this civil administrative litigation have been set forth in the CROP, which is codified at 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, 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 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 Respondent has any knowledge. 40 C.F.R. §22.15(b). Where Respondent lacks knowledge of a particular factual allegation

and so states in their 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 intends 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 its defense may preclude the 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 Subparts D and I of 40 C.F.R. 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 its 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 [*i.e.* in accordance with the thirty (30)-day period set forth in 40 C.F.R. §22.15(a)] Answer to the Complaint, 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 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. §22.17(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.

V. 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 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 that it believes is 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 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:

Diane T. Gomes
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866
(212) 637-3235

The parties may engage in settlement discussions irrespective of whether Respondent has requested a hearing. 40 C.F.R. §22.18(b)(1). Respondent's request for a formal hearing does not prevent them 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 C.F.R. §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 C.F.R. §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 C.F.R. §22.18(b)(2). In accepting the Consent Agreement, Respondent waives its right to contest the allegations in the Complaint and waives its 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).

Respondent's entering into a settlement through the signing of such Consent Agreement and its complying with the terms and conditions set forth in the such Consent Agreement terminate this administrative litigation and the civil proceedings arising out of the allegations made in the Complaint. Respondent's entering into a settlement does not extinguish, waive, satisfy or otherwise affect its obligation and responsibility to comply with all applicable statutory and regulatory requirements, and to maintain such compliance.

VI. 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 within thirty (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 Assistant Regional Counsel identified on the previous page. 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:

Regional Hearing Clerk

U. S. Environmental Protection Agency, Region 2

Fines and Penalties

Cincinnati Finance Center

P.O. Box 979077

St. Louis, MO 63197-9000

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 in accordance with 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. 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 regulations and requirements, and to maintain such compliance.

VII. Filing of Documents

1. 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, New York 10007-1866**

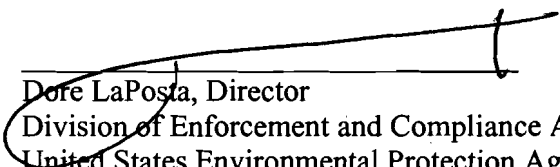
2 A copy of the Answer, any Hearing Request and all subsequent documents filed in this action shall be sent to:

**Diane T. Gomes
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866
(212) 637-3235**

VIII. General Provisions

1. Respondent has the 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 thereunder, 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 5th DAY OF AUGUST, 2009.


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

CWA-02-2009-3317

To: (40 C.F.R. §22.5(b)(1))

James Bry, Senior Vice President
Vornado Realty Trust
210 Route 4 East
Paramus, New Jersey 07652

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2**

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IN THE MATTER OF :
:
Vornado Realty Trust : Proceeding to Assess Class I
210 Route 4 East : Civil Penalty Under Section
Paramus, New Jersey 07652 : 309(g) of the Clean Water Act
:
Proceeding Pursuant to §309(g) of the : Docket No. CWA-02-2009-3317
Clean Water Act, 33 U.S.C. §1319(g) :
-----X

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 the foregoing "ADMINISTRATIVE COMPLAINT" and a copy of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits," (40 Code of Federal Regulations Part 22 (July 1, 2000)) to the following persons at the addresses listed below:

James Bry, Senior Vice President
Vornado Realty Trust
210 Route 4 East
Paramus, New Jersey 07652

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

I [hand carried / mailed] the original and a copy of the foregoing Complaint to the office of the Regional Hearing Clerk, United States Environmental Protection Agency, Region 2.

Date: 8/6/09
New York, New York

Marie St. Germain
[Signature of Sender]
[NOTE: must be over 18]