

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 2  
290 BROADWAY  
NEW YORK, NY 10007-1866

**IN THE MATTER OF:**

**Michael B. Rapasadi**  
2106 Lake Road  
Oneida, NY 13421

**Thomas R. Rapasadi**  
2106 Lake Road  
Oneida, NY 13421

Respondents.

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

**Proceeding to Assess Class I  
Civil Penalty Pursuant to Section  
309(g) of the Clean Water Act**

**Docket No. CWA-02-2013-3601**

U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG.II  
2013 JUL -9 A 11:15  
REGIONAL HEARING  
CLERK

**COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION TO DISMISS**

**I. Introduction**

Complainant, the United States Environmental Protection Agency ("EPA"), by and through undersigned counsel, hereby responds to Michael B. Rapasadi and Thomas R. Rapasadi's ("Respondents") June 24, 2013, Motion to Dismiss EPA's Complaint ("Motion"), In the Matter of Michael B. Rapasadi and Thomas R. Rapasadi, Proceeding to Assess a Class I Civil Administrative Penalty Under Section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g), Docket No. CWA-02-2013-3601, dated May 31, 2013 ("the Complaint"). Respondents allege that Complainant's delay in processing their September 17, 2012, Freedom of Information Act ("FOIA") request amounts to a violation of their due process rights and serves as a basis for dismissal of this action.

As explained more fully below, even assuming all facts set forth in Respondents' Motion are true, they have not provided any basis to question the validity of the CWA violation charged in the Complaint as required to prevail on a motion to dismiss pursuant to the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" ("CROP"), 40 C.F.R. Part 22. For that reason alone, the Regional Judicial Officer ("RJO") should dismiss Respondents' Motion.

In any event, as described below, Respondents' failure to promptly obtain the requested FOIA documents was due solely to Respondents' delay in submitting financial assurance in accordance with the provisions of FOIA. Respondents waited until EPA commenced this proceeding to submit its financial assurance. EPA mailed (via UPS overnight service) all requested FOIA documents to Respondents on July 2, 2013, the same day it received notice that Respondents paid their FOIA invoice. Thus, assuming *arguendo* Respondents had a basis for their Motion, intervening events have now rendered it moot.

## **II. Background**

EPA hereby incorporates by reference the Stipulations and Findings of Fact set forth in Findings of Violation and Order, Docket No. CWA-02-2011-3502, dated September 28, 2011 ("2011 Compliance Order"), at ¶¶ 1-26. The same facts serve as the basis for the CWA violation in this matter.

On September 17, 2012, Respondents submitted a FOIA request to EPA for documents pertaining to this CWA violation. See Respondents' Exhibit B, September 17, 2012, email from Mr. Carroll, Respondents' attorney, to Dave Pohle, EPA.

In a letter dated November 16, 2012, EPA informed Respondents that it had located

responsive documents and requested assurance of payment by November 30, 2012. See Respondents' Exhibit B, EPA Letter to Ms. Julia Zimmer, Respondents' counsel. The letter further stated that "[i]f we do not hear back from you by November 30, 2012, we will cancel your request." Id. EPA did not receive any response. In an email dated January 2, 2013, EPA informed Respondents that it had closed the FOIA request and provided Respondents with a second copy of the November 16<sup>th</sup> letter and request for payment. See Exhibit A.

On May 31, 2013, EPA served Respondents with the Complaint alleging the same facts set forth in EPA's 2011 Compliance Order. See Complaint at ¶¶ 3-6. EPA's Complaint proposed a penalty of \$25,000.00 for failure to comply with the CWA. Id. at ¶ 9.

On June 17, 2013, Respondents reopened their September 2012 FOIA request. See Exhibit B. Again, EPA reiterated its request for payment in accordance with FOIA. Id. On July 2, 2013, the Region 2 FOIA Office received notice that Respondents submitted the requested payment. See Exhibit C. That same date, EPA mailed all requested FOIA documents via UPS overnight service. See Exhibit D, EPA Region 2 Response Letter, dated July 2, 2013. According to UPS tracking service, Respondents received the requested documents at 9:51a.m. on July 3, 2013. See Exhibit E, UPS Delivery Notice, dated July 3, 2013.

### **III. Argument**

#### **1. Respondents Have Not Satisfied the Standard for a Motion to Dismiss.**

Pursuant to the CROP, a movant will prevail on a motion to dismiss "if no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a). RJOs may grant a motion to dismiss if, assuming the complainant's allegations are true, the RJO determines that the complainant failed to prove the violation charged in the complaint. Roger Barber d/b/a Barber Trucking, Docket No. CWA-05-2005-0004 (February 16,

2006). Respondents have not satisfied this standard. Their Motion alleges general grievances with EPA's handling of their FOIA request. Respondents have entirely failed to address the prima facie CWA case described in EPA's Complaint, or otherwise argue that there are no grounds upon which relief can be granted under the law. Indeed, FOIA is separate and distinct from the CWA – noncompliance cannot result in nullifying a CWA violation. As such, Respondents' Motion does not satisfy the standards required for dismissal as required by CROP Part 22, and should accordingly be dismissed.

**2. Respondents Failure to Comply with FOIA Resulted in Delays in Obtaining the Requested Information.**

While Respondents summarily allege that EPA deprived them of “due process rights,” they notably fail to cite any authority that supports their argument. Respondents thus fail to satisfy Part 22's requirement that a movant state the grounds for their motion with particularity. See CROP § 22.16. Moreover, to the extent any “rights” are at issue in Respondents' Motion, they are prescribed by FOIA, 5 U.S.C. § 552, which provides Respondents with the “right” to obtain public information from an agency under FOIA. However, in order to be entitled to such a “right” under FOIA, Respondents must comply with the requirements of the FOIA statute, which includes payment of a processing fee. See 40 C.F.R. § 2.107.

Respondents' delay in obtaining the requested FOIA documents resulted solely from their failure to timely submit payment. The Region 2 FOIA Office closed their request in November 2012 due to Respondents' failure to respond to a request for payment. See Exhibit A. 40 C.F.R. Section 2.107(j)(4) provides that EPA, after reopening the request on June 17, 2013, may do no further work on the request until the full payment is made because Respondents had previously failed to pay the FOIA fees pertaining to the September 17, 2012 request. See 40 C.F.R. § 2.107(j)(3)-(4) (providing that EPA may request full payment of a FOIA processing fee before

completing any work on the request if the requester previously failed to pay a properly charged FOIA fee within 30 calendar days of billing). EPA Region 2 promptly complied with Respondents' FOIA request the same day it was informed that Respondents submitted payment.

For these reasons, Respondents cannot now fault EPA for the delay in obtaining FOIA documents.

**3. Any Claim Respondents Had Regarding Failure to Obtain Information Has Now Been Rendered Moot.**

Assuming *arguendo*, Respondents' due process argument had merit, any such claim has been rendered moot by EPA's July 2, 2013, production of documents. A claim may be rendered moot where intervening events prevent the court from granting any effective relief, even assuming that the plaintiff were to prevail on its underlying claim. See, e.g., Burlington Northern R.R. Co. v. Surface Transp. Bd., 75 F.3d 685, 688 (D.C. Cir. 1996) (holding that a claim becomes moot when "intervening events make it impossible to grant the prevailing party effective relief"). Courts should not devote judicial time and resources to rendering advisory opinions that have no effect on the actual parties. See, e.g., North Carolina v. Rice, 404 U.S. 244, 246 (1971). The federal principles of judicial review, including mootness, may guide the RJO in the same way that administrative tribunals look to the Federal Rules of Civil Procedure for guidance in procedural matters. See, e.g., In re Pyramid Chemical Company, RCRA (3008) Appeal No. 03-03, 11 E.A.D. 657, 683 n.34, 2004 WL 14481 (2004) (stating, "[a]lthough the Board is not bound by the Federal Rules of Civil Procedure, the Board may, in its discretion, refer to the Federal Rules of Civil Procedure for guidance when interpreting EPA's procedural rules").

Assuming *arguendo* that Respondents could successfully allege they were deprived of a due process right from EPA's delay in processing their FOIA request, the intervening event of

the production of documents has rendered such a claim moot. This Court need not waste judicial time and resources rendering what would otherwise be an advisory opinion, as Respondents have obtained the requested relief. This Court may therefore also dismiss Respondents' Motion as moot.

**IV. Conclusion**

For all the reasons set forth above, this Court should deny Respondents' Motion to Dismiss.

DATED: July 8, 2013.

Respectfully submitted,



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LAUREN FISCHER  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
290 Broadway, 16th Floor  
New York, NY 10007

*Attorney for Complainant*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 2  
290 BROADWAY  
NEW YORK, NY 10007-1866

**IN THE MATTER OF:**

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309(g) of the Clean Water Act**

**Docket No. CWA-02-2013-3601**

**CERTIFICATE OF SERVICE**

I certify that, on the date noted below, I served the foregoing fully executed Complainant's Response to Respondents' Motion to Dismiss, bearing the above-referenced docket number, in the following manner.

Copy by Certified Mail      John Benjamin Carroll, P.C.  
Return Receipt Requested:      Carroll and Carroll Lawyers, P.C.  
440 South Warren Street  
Syracuse, New York 13202

Original and One Copy      Regional Hearing Clerk  
By Internal Mail (pouch):      U.S. Environmental Protection Agency  
290 Broadway, 16<sup>th</sup> floor  
New York, New York 10007-1866

Date: July 9, 2013

  
\_\_\_\_\_  
New York, NY



FOIA Request No. 02-FOI-01491-12, Rapasadi Docket No.  
CWA-02-2011-3502

David Abrines to: julia  
Cc: David Pohle, Wanda Calderon

01/02/2013 12:46 PM

Hi Ms. Zimmer,

Regarding your request for information on the above Docket #, we are closing out your request for information. We did send to you a letter dated November 16, 2012, and the letter indicated to please respond to us by November 30, 2012. Copy of letter is attached below. If you decide to re-open the FOIA case file, please submit a new request. You can now submit a FOIA request by using FOIAonline. The address is <https://foiaonline.regulations.gov/>.

Thank you



R2-Wetlands\_Records\_Located.doc



**Fischer, Lauren**

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**From:** Calderon, Wanda  
**Sent:** Thursday, June 27, 2013 11:04 AM  
**To:** Carroll & Carroll  
**Cc:** Fischer, Lauren  
**Subject:** FW: FOIA Request No. 02-FOI-01491-12 Payment Required  
**Attachments:** 1491-12BFC.pdf

Hello Julia,

The record shows we have yet to hear from you with respect to advance payment. Let us know if you remain interested in receiving information by sending payment, otherwise, we will close the case. If you require data at a later date, you may resubmit. Thank you.

Wanda Calderon  
FOIA Specialist  
Public Outreach Branch  
Public Affairs Division

-----Original Message-----

**From:** Calderon, Wanda  
**Sent:** Wednesday, June 19, 2013 4:57 PM  
**To:** Carroll & Carroll  
**Cc:** Fischer, Lauren; Pohle, David; Edwards, Blake  
**Subject:** RE: FOIA Request No. 02-FOI-01491-12 Payment Required

Hi Julia,

In furtherance to our discussions involving incurred costs for the above mentioned FOIA, attached you will find an invoice in the amount of \$198.00 along with remittance instructions. Once payment confirmation has been received by us, the official signed disposition along with relevant materials will be mailed to you.

Thank you!

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**From:** Carroll & Carroll [wecare@carrolloffice.com]  
**Sent:** Monday, June 17, 2013 12:29 PM  
**To:** Calderon, Wanda  
**Subject:** RE: FOIA Request No. 02-FOI-01491-12

Yes, Please reopen. Can I pay via Credit Card? If not, where do I send the check. Thank you.

SENT ON BEHALF OF JOHN BENJAMIN CARROLL BY:  
Julia Zimmer, Paralegal  
Carroll & Carroll Lawyers, P.C.  
The Galleries, 440 South Warren Street  
Syracuse, New York 13202  
(315) 474-5356 x103



United States  
**ENVIRONMENTAL PROTECTION AGENCY**  
 Washington, DC 20460

BILL FOR COLLECTION	BILL NO. 2rin-foia-1491-12
BUREAU/OFFICE FOR REMITTANCE PAYABLE USEPA, FOIA and Miscellaneous Payments, Cincinnati Finance Center	DATE 6/18/13
ADDRESS FOR MAILING PAYMENT P.O. BOX 979078, St. Louis, MO 63197-9000 There is now an On Line Payment Option, available through the Dept. of Treasury. This option can be accessed at <a href="http://WWW.PAY.GOV">WWW.PAY.GOV</a> and enter "sfo 1.1" in the search forms field.	AMOUNT OF PAYMENT \$198.00

PAYER  
 Carroll & Carroll Lawyers, PC  
 440 South Warren Street  
 Syracuse, NY 13202

Re: Freedom of Information Act Request No. (2)RIN-02-FOIA-01491-12

DATE	DESCRIPTION	QUANTITY	UNIT PRICE		AMOUNT
			COST	PER	
6/18/13	Search and review	7 hrs	\$7.00	0.25 hr	\$196.00
6/18/13	Compact Disk	1	\$2.00		\$2.00

PAYMENT IS DUE WITHIN 30 DAYS OF THE DATE OF THIS BILL. IF PAYMENT IS NOT RECEIVED BY THIS DATE, A 3% PER ANNUM INTEREST CHARGE WILL BE ASSESSED FROM THE DATE OF THIS BILL. A LATE PAYMENT HANDLING CHARGE OF \$15.00 WILL BE IMPOSED AFTER 30 DAYS WITH AN ADDITIONAL CHARGE OF \$15.00 FOR EACH SUBSEQUENT 30 DAY PERIOD. AN ADDITIONAL 6% PER ANNUM PENALTY WILL BE APPLIED ON ANY PRINCIPAL AMOUNT NOT PAID WITHIN 90 DAYS OF THE DUE DATE.

<b>IMPORTANT:</b> A receipt will be issued for all cash remittances and for all other remittances when required by applicable procedures. Failure to receive a receipt for cash payment should be promptly reported to the bureau or office shown above.	AMOUNT DUE      \$      198.00
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**Fischer, Lauren**

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**From:** Calderon, Wanda  
**Sent:** Tuesday, July 02, 2013 8:02 AM  
**To:** White, Kim  
**Cc:** Lowenthal, Mitchell; Fischer, Lauren  
**Subject:** RE: FOIA Request No. 02-FOI-01491-12 Payment Required

Great to hear from you, Kim!! Have a great holiday.....ttyl

PS: Payment received FYI.

Wanda Calderon  
FOIA Specialist  
Public Outreach Branch  
Public Affairs Division

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**From:** White, Kim  
**Sent:** Tuesday, July 02, 2013 6:33 AM  
**To:** Calderon, Wanda  
**Subject:** RE: FOIA Request No. 02-FOI-01491-12 Payment Required

Hey lady! Going pretty good over here. Hope all is well with you.

Yeppers, we received payment...



**Document Review**

**Compass Document: NN  
2RIN-FOIA-1491-12**

**07/02/13**

**Document Summary:** General Ledger Entries  
**Document:** NN 2RIN-FOIA-1491-12  
**SFO:** CFC  
**Original Document Date:** 06/18/13  
**Accounts Receivable Date:** 06/18/2013  
**Amount:** \$198.00  
**Collected:** \$198.00  
**Closed:** 06/28/13  
**Due From:** CARROLL & CARROLL LAWYERS, PC  
440 SOUTH WARREN STREET  
SYRACUSE, NY 13202  
**Due Date:** 07/18/13  
**Title:** 2RIN-FOIA-1491-12  
**Comments:**  
**Extended Description:**  
**Overdue:** 06/20/13 13 - NON-DELINQ. DUE < 1 YEAR  
**Interest:** \$0.00  
**Handling:** \$0.00  
**Penalty:** \$0.00  
**Writeoff:** \$0.00



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 2  
290 BROADWAY  
NEW YORK, NY 10007-1866

Tuesday, July 2, 2013

Julia M. Zimmer  
Carroll & Carroll Lawyers, PC  
440 South Warren Street  
Syracuse, NY 13202

RE: Request No: 02-FOIA-01491-12

Dear Ms. Zimmer:

This letter responds to your Freedom of Information Act (FOIA), 5 U.S.C. § 552, request dated September 17, 2012, and received in this office on September 17, 2012, seeking "all records of the EPA or US Army Corp. of Engineers or the State of NY now in possession of the EPA dealing with Docket No. CWA-02-2011-3502" excluding non-substantive email and draft documents as per conversation with Mr. Ben Carroll on October 17, 2012. On November 16, 2012, EPA closed this FOIA request due to failure to submit requested financial assurance. On June 17, 2013, this request was reopened pursuant to your request. Region 2 FOIA office received notice of your payment on July 2, 2013.

Enclosed, please find a disk containing the responsive documents. The disk contains documents related to the U.S. Environmental Protection Agency's (EPA) administrative compliance order CWA-02-2011-3502. This matter was transferred to the EPA by the Buffalo District office of the U.S. Army Corps of Engineers (Corps). At the Corps, it is identified as Department of the Army Enforcement File Number 2010-01319. As the lead agency on this case, the EPA is in possession of the Corps' administrative record. Those documents are also included on the disk. To date, we are not aware of any New York State Department of Environmental Conservation involvement in this enforcement action.

For any questions concerning this determination, please contact Lauren Fischer, Esq. at (212) 637-3231, Office of Regional Counsel. Non-legal questions may be addressed to David Pohle at (212) 637-3824. Please include the above referenced request number in any subsequent communications.

Sincerely,

Wanda Calderon  
FOIA Specialist  
Public Outreach Branch

Enclosure

Exhibit E



Proof of Delivery

[Close Window](#)

Dear Customer,

This notice serves as proof of delivery for the shipment listed below.

**Tracking Number:** 1Z1327350145440337  
**Service:** UPS Next Day Air®  
**Weight:** .20 lb  
**Shipped/Billed On:** 07/02/2013  
**Delivered On:** 07/03/2013 9:51 A.M.  
**Delivered To:** SYRACUSE, NY, US  
**Signed By:** ZIMMEY  
**Left At:** Receiver

Thank you for giving us this opportunity to serve you.

Sincerely,

UPS

Tracking results provided by UPS: 07/03/2013 10:35 A.M. ET

[Print This Page](#)

[Close Window](#)