



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

OCT 17 2014

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Article Number: 7005 3110 0000 5967 7759

Mr. Michael Kelly
Kelly Development Corporation
96 South Ocean Avenue
Patchogue, New York 11772

Re: Notice of Proposed Assessment of a Civil Penalty Class I
Kelly Development Corporation
SPDES Tracking Numbers NYR10U297/NPDES NYU001027
DOCKET No. CWA-02-2015-3310

U.S. Environmental
Protection Agency-Reg 2
2014 OCT 20 PM 2:42
REGIONAL HEARING
CLERK

Dear Mr. Kelly:

Enclosed is a Complaint which the U.S. Environmental Protection Agency ("EPA" or "Agency") is issuing to you as a result of our determination that the Kelly Development Corporation ("Respondent"), has violated Sections 301, 308 and 402 of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. §§ 1311, 1318 and 1342, in your operation of the Riverwalk Phase II construction site located off of Clare Rose Boulevard in the Village of Patchogue, Suffolk County, New York. This Complaint is filed pursuant to Section 309(g) of the Act, 33 U.S.C. § 1319(g). Upon consideration of the factors in Section 309(g), the Complaint proposes that a penalty of **\$37,500** be assessed to Respondent for these violations.

You have the right to a hearing to contest the factual allegations in the Complaint. If you admit the allegations, or if they are found to be true after you have had an opportunity for a hearing on them, you have the right to contest the penalty proposed in the Complaint. I have enclosed a copy of the Consolidated Rules of Practice ("CROP"), found at 40 Code of Federal Regulations ("C.F.R.") Part 22, which the EPA follows in cases of this kind. Please note the requirements for an Answer at Section 22.15 of the CROP. **If you wish to contest the allegations in the Complaint or the penalty proposed in the Complaint, you must file an Answer within thirty (30) days of your receipt of the enclosed Complaint with the EPA Regional Hearing Clerk at the following address:**

Karen Maples
Regional Hearing Clerk
U.S. Environmental Protection Agency
290 Broadway, 16th Floor
New York, New York 10007-1866

If you do not file an Answer within thirty (30) days of receipt of this Complaint, you may be judged to have defaulted (*See*, §22.17 of the CROP). If a default order is entered, the entire proposed penalty may be assessed without further proceedings.

Regardless of whether you request a formal hearing, EPA encourages you to pursue the possibility of settlement by requesting an informal conference with the Agency concerning the alleged violations and the amount of the proposed penalty. Please note that a request for an informal conference does not substitute for a written Answer, or affect what you may choose to say in an Answer, nor does it extend the thirty (30) day deadline by which you must file an Answer.

The Agency also encourages Respondent to propose and perform Supplemental Environmental Projects ("SEPs"), where appropriate, as part of any settlement. Enclosed is a copy of the Final EPA Supplemental Environmental Projects Policy (May 1, 1998) for your consideration.

You may represent yourself or be represented by an attorney at any stage of the proceedings, including any informal discussions and/or a formal hearing, whether in person or by telephone. Any hearing held in this matter will be conducted in accordance with the CROP.

If you have any questions or wish to discuss a settlement of this matter with the EPA by an informal conference, please immediately contact:

Lauren Fischer, 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) 637-3231
Email: Fischer.Lauren@epa.gov

For your information, I am enclosing an Information Sheet which may be helpful if you are a small business as defined at 13 C.F.R. § 121.201, in obtaining compliance assistance or if you wish to comment on this action to the Small Business and Agriculture Regulatory Enforcement Ombudsman and Regional Fairness Board.

Should you have any questions concerning this matter, please feel free to contact Lauren Fischer at the phone number above or Justine Modigliani, Compliance Section Chief, at (212) 637-4268.

Sincerely,


Dore LaPosta, Director
Division of Enforcement and Compliance Assistance

Enclosures

1. Complaint
2. CROP
3. EPA Supplemental Environmental Projects Policy and SEP Brochure
4. Information for Small Business

cc: Joe DiMura, P.E., Director, Bureau of Water Compliance Programs, NYSDEC
Bill Spitz, NYSDEC Region I
Mayor Paul Pontieri, Jr, Village of Patchogue
Barry S. Cohen, Partner, Certilman Balin Adler & Hyman, LLP

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2

IN THE MATTER OF:

Kelly Development Corporation
96 South Ocean Avenue
Patchogue, NY 11772

SPDES Tracking Numbers
NYR10U297/NPDES NYU001027

Respondent,

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

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

DOCKET No. CWA-02-2015-3310

U.S. Environmental
Protection Agency-Reg 2
OCT 20 PM 2:42
REGIONAL HEARING
CLERK

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

I. STATEMENT OF AUTHORITY

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)(A) of the Clean Water Act (“Act” or “CWA”), 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, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (“CROP”), 40 C.F.R. Part 22 (2011), a copy of which is attached, Complainant hereby requests that the Regional Administrator assess a civil penalty against Kelly Development Corporation (“Respondent”), as a result of Complainant’s determination that the Respondent is in violation of Sections 301 and 402 of the Act, 33 U.S.C. § 1311 and § 1342, respectively, by failing to comply with the terms of the New York State Department of Environmental Conservation (“NYSDEC” or “Department”) State Pollutant Discharge Elimination System (“SPDES”) General Permit for Stormwater Discharges from Construction Activity (“CGP”), GP-0-10-001, at a site they own and operate.

II. APPLICABLE LEGAL REQUIREMENTS

1. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person from a point source into navigable waters, except in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342. Pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p), this prohibition also applies to discharges of stormwater associated with industrial activity.
2. Section 402(a)(1) of the CWA, 33 U.S.C. § 1342(a)(1), provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to that Section.
3. Section 402 of the CWA, 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 CWA and conditions which the Administrator determines are necessary. EPA granted the New York State Department of Environmental Conservation (“NYSDEC” or “Department”) the authority to administer the federal NPDES program in New York. EPA maintains concurrent enforcement authority with the authorized State for violations of the CWA. Additionally, the NYSDEC issues a State Pollutant Discharge Elimination System (“SPDES”) permit to facilities for the discharge of pollutants from said facilities from a point source to a navigable water of the United States. Accordingly, any person who will discharge pollutants from a point source to waters of the United States within New York State must first obtain a New York SPDES permit, and must comply with all of its terms.
4. Section 308(a)(A) of the Act, 33 U.S.C. § 1318(a)(A), 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. "Person" is defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5), to include, among other things, an individual, corporation, partnership, association or municipality.
6. "Pollutant" is defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6), to include among other things, solid waste, dredged spoil, rock, sand, cellar dirt, sewage, sewage sludge and industrial, municipal and agricultural waste discharged into water.
7. "Discharge of a pollutant" is defined by Section 502(12) of the CWA, 33 U.S.C. § 1362(12), to include any addition of any pollutant to navigable waters from any point source.
8. “Navigable waters” is defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7), as the waters of the United States, including the territorial seas, and “waters of the United States” is defined by 40 C.F.R. § 122.2, to include: all waters which are currently used, were used in the past, 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; all interstate waters, including interstate "wetlands;" all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce, including but not limited to, tributaries thereto.

9. "Point source" is defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14), to include 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.
10. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), sets forth the requirements for municipal and industrial stormwater discharges.
11. NYSDEC's SPDES General Permit for Stormwater Discharges from Construction Activity, GP-0-10-001, became effective on January 29, 2010 and expires on January 28, 2015 ("Permit" or "CGP").
12. Under 40 C.F.R. §§ 122.26(b)(14)(x), (15)(i), and (15)(ii), permit coverage is required for discharges of stormwater associated with construction activity for sites equal to or greater than 1 acre or part of a common plan that is greater or equal to one acre. As required by Sections 301 and 402 of the CWA and Part II.B.1 of the CGP, the owner or operator must have coverage under a SPDES permit prior to commencing construction activity.
13. "Stormwater" is defined by 40 C.F.R. § 122.26(b)(13) as stormwater runoff, snow melt runoff, and surface runoff and drainage.
14. "Owner or operator" is defined by 40 C.F.R. § 122.2 as owner or operator of any "facility or activity" subject to regulation under the NPDES program.
15. Operators regulated under 40 C.F.R. § 122.26(b)(14)(x) or 40 C.F.R. § 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 CGP.
16. Part II of the CGP requires an owner or operator to develop a stormwater pollution prevention plan ("SWPPP") in accordance with the applicable requirements and then file a completed NOI form to obtain permit coverage and fulfill all of the requirements of Part II.A and B of the CGP. The owner must not commence construction activity until coverage under the CGP is obtained.
17. Appendix A of the CGP defines the following terms:
 - a) "Construction activity(ies)" is defined as the grading, excavation, filling, demolition or stockpiling activities that result in soil disturbance. Clearing activities can include, but are not limited to, logging equipment operation, the cutting and skidding of trees, stump removal and/or brush root removal. Construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of a facility.
 - b) "Discharge" is defined as any addition of any pollutant to waters of the State through an outlet or point source.
 - c) "Owner or Operator" is defined as the person, persons or legal entity which owns or leases the property on which the construction activity is occurring; and/or an entity that has operational control over the construction plans and specifications, including the ability to make modifications to the plans and specifications.

- d) "SPDES" is defined as State Pollutant Discharge Elimination System, the system established pursuant to Sections 301 and 402 of the CWA and 6 NYCRR Part 750 for issuance of permits authorizing discharges to the waters of the state.
 - e) "Final Stabilization" means that all soil disturbance activities have ceased and a uniform, perennial vegetative cover with a density of eighty (80) percent over the entire pervious surface has been established, or other equivalent stabilization measures, such as permanent landscape mulches, rock rip-rap or washed/crushed stone have been applied on all disturbed areas that are not covered by permanent structures, concrete or pavement.
18. The term "SWPPP" means the Stormwater Pollution Prevention Plan as defined in Part III of the CGP.
 19. Pursuant to 40 C.F.R. § 122.41(a), permittees must comply with all conditions of their permit, and any permit noncompliance constitutes a violation of the CWA and is grounds for enforcement action.
 20. Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), authorizes the Administrator, upon a finding that any person has violated, among other things, Section 301(a) of the Act, or has violated any permit condition or limitation implementing such section in a permit issued under Section 402 of the Act, to assess a civil penalty, and Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), as adjusted by 40 C.F.R. § 19.4, authorizes the assessment of a penalty of up to \$11,000 per day of violation, and not exceeding \$37,500.

III. JURISDICTIONAL FINDINGS

1. Kelly Development Corporation ("Respondent") is a developer and corporation, and is therefore a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
2. The Notice of Intent ("NOI") to discharge stormwater pursuant the CGP at the Riverwalk Phase II construction site, located on Clare Rose Boulevard in the Village of Patchogue, Suffolk County, New York (the "Site" or Facility"), received by the NYSDEC on May 10, 2011, states that Respondent Kelly Development Corporation owns and operates the Site. Therefore, Respondent Kelly Development Corporation is an owner and an operator within the meaning of 40 C.F.R. § 122.2.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Stormwater at the Site discharges to the Patchogue River, a navigable water of the United States, via a catch basin and outfall pipe. The Site also discharges stormwater runoff from the North and South construction entrance/exit points to offsite catch basins which convey stormwater to the Patchogue River.
2. Respondent gained coverage under the CGP on May 16, 2011 (SPDES ID No. NYR10U297). NYSDEC issued a Notice of Commencement of Construction on May 9, 2013, pursuant to special conditions under the Bureau of Habitat wetlands permit.

3. Respondent has conducted construction activities on approximately 12.15 acres in Phases I and II at the Site.
4. EPA conducted a Compliance Evaluation Inspection (“CEI”) at the “Riverwalk” Phase II site on August 19, 2013. Based on that inspection, EPA identified that the permittee failed to implement the sequencing of operations, and failed to implement erosion and sediment control practices, as described in its SWPPP of November 2010, and Erosion Control Plan, as required under Part III.B.1 (d) and (e) of the CGP.
5. Part II.C. of the CGP requires the owner or operator to ensure that the provisions of the SWPPP are implemented from the commencement of construction activity until all areas of disturbance have achieved final stabilization and a Notice of Termination has been submitted to the NYSDEC in accordance with Part V of the Permit. In addition, Part IV.A.1 of the Permit states that the owner or operator must ensure that all erosion and sediment control practices identified in the SWPPP are maintained in effective operating condition at all times. During the CEI, EPA identified that construction activity is occurring on one (1) or more acres of land located at the Site. The following SWPPP elements had not been implemented and/or maintained in effective operating condition at the time of the August 19, 2013 CEI, in violation of Parts II.C.1 and IV.A.1 of the CGP:
 - a) During the Inspection, EPA identified that, among other things, clearing, grading, excavation and stockpiling activities were occurring at the Site, and the Phase II portion of the Site, adjacent to the Patchogue River was not temporarily stabilized.
 - b) Part II.C.3.a of the CGP states the owner or operator of the construction activity will conduct at least two (2) site inspections every seven (7) calendar days, in which the two (2) inspections shall be separated by a minimum of two (2) full calendar days. Documented inspection reports indicated that the Facility did not have records for its qualified site inspections on the indicated dates at the Site (see Enclosed Inspection Report).
 - c) Part 2.32 of the SWPPP states that the construction entrance shall be maintained in a condition which will prevent tracking or flowing of sediment onto public rights-of-way. This may require periodic top dressing with additional stone as conditions demand. At the time of the CEI, EPA identified two construction entranceways on the Site that required maintenance. Sediment tracking was observed from the entranceways and the stone in the entranceways was in need of refreshing.
6. Part II.C.3 of the CGP states that the owner or operator of a construction activity shall not disturb greater than five (5) acres of soil at any one time without prior written authorization from the NYSDEC or, in the case of land under the jurisdiction of a regulated, traditional land use control MS4, from the MS4. At a minimum, the owner or operator must comply with the following requirements in order to be authorized to disturb greater than five (5) acres of soil at any one time:
 - a) The owner or operator shall have a qualified inspector conduct at least two (2) site inspections in accordance with Part IV.C every seven (7) calendar days, for as long as greater than five (5) acres of soil remain disturbed.

- b) In areas where soil disturbance activity has been temporarily or permanently ceased, temporary and/or permanent soil stabilization measure shall be installed and/or implemented within seven (7) days from the date the soil disturbance activity ceased.

In addition, Part 1.62 of the SWPPP states that there shall not be more than five (5) acres of disturbed soil at any one time without prior written approval from the NYSDEC. At the time of the CEI, approximately six (6) acres of disturbance were observed by EPA, and prior written authorization from the NYSDEC or MS4 had not been obtained for the Site, in violation of Parts II.C.1 and II.C.3 of the CGP. In addition, based on inspection records, a qualified inspector was not conducting inspections twice per week, in violation of Part II.C.3.a, and temporary stabilization measures had not been installed within seven (7) days in areas of the Site where soil disturbance activity had temporarily ceased, in violation of Part II.C.3.b of the CGP.

7. Part IV.C.5 of the CGP states that within one (1) business day of the completion of the inspection, the qualified inspector shall notify the owner or operator and appropriate contractor or subcontractor of any corrective actions that need to be taken. The contractor or subcontractor shall begin implementing the corrective actions within one (1) business day of this notification and shall complete the corrective actions in a reasonable time frame. In addition, Part 5.1 of the SWPPP states that all erosion and sediment control measures will be maintained in good working order and be fully operational. If repair is necessary, it will be initiated within 24 hours of discovery. Based on review of the inspection reports available at the Site, the following required corrective actions noted on March 26, 2013, had not been implemented at the Site at the time of the August 19, 2013 CEI: (1) seeding and mulching all inactive disturbed areas; (2) cleaning out the sediment basin and rip rap outlet protection; (3) removing sediment from silt fencing; and (4) providing inlet protection or stabilizing areas adjacent to catch basins, in violation of Parts II.C.1 and IV.C.5 of the Permit. In addition, Respondent failed to stabilize the sediment basin and the slopes of the basin, a requirement noted in the inspection reports dating back to March 12, 2013, in violation of Parts II.C.1 and IV.C.5 of the CGP.
8. On December 5, 2013, EPA issued an Administrative Order ("AO" or "Order") (CWA-02-2013-3002) and CEI Report detailing CGP violations identified by EPA at the time of the August 19, 2013 CEI. The AO required certain remedies within thirty (30) days of receipt. As a follow-up to the AO, by both email and telephone conversation with Kelly Development and J.R. Holzmacher P.E., LLC representatives, EPA required Respondent to submit written documentation and supporting photographs, describing the measures taken to address each item detailed in the potential non-compliance section of the CEI.
9. Respondent received the AO on December 13, 2013.
10. Based upon the Paragraphs above, the EPA finds that Respondent has violated Sections 301, 308, and 402, 33 U.S.C. §§ 1311, 1318 and 1342, for failing to obtain and comply with the conditions and limitations in the CGP (including the SWPPP), Respondent is liable for seven hundred and seventy five days (775) of violations of Section 301 of the Act, 33 U.S.C. § 1311, for violating Section 402 of the Act.

V. 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**. 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, Respondent is liable for violations of the Act. EPA may issue the Final Order Assessing Administrative Penalties thirty (30) days after Respondent’s receipt of this Notice, unless Respondent files an Answer to the Complaint within that time and requests a Hearing on this Notice pursuant to the following section.

VI. PROCEDURES GOVERNING THIS ADMINISTRATIVE ACTION

The rules of procedure governing this civil administrative litigation have been set forth in the CROP, 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, NY 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 the Respondent has any knowledge. 40 C.F.R. § 22.15(b). Where Respondent lacks knowledge of a particular factual allegation and so states in the 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 those 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 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 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 Subpart D of the CROP, at 40 C.F.R. §§ 22.21-22.26.

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 C.F.R. § 22.15(d). If Respondent fails to file a timely Answer to the Complaint [i.e. not in accordance with the 30-day period set forth in 40 C.F.R. § 22.15(a)], 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 therefore 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. § 22.27(c). 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.

VII. INFORMAL SETTLEMENT CONFERENCE

Regardless of whether 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 they believe 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. Note that no penalty will be made simply because an informal settlement conference is requested.

Complainant has the authority to modify the amount of the proposed penalty, where appropriate, in response to any relevant information previously not known to Complainant that demonstrates that any of the findings herein are without merit, or that the proposed penalty is not warranted. 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:

Lauren Fischer, Esq.
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, NY 10007-1866
Telephone: (212) 637-3236

The parties may engage in settlement discussions regardless of whether Respondent have requested a Hearing. 40 C.F.R. § 22.18(b)(1). Respondent's request for 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.

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. Note that no penalty reduction 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 waive any right to contest the allegations in the Complaint and waive any 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).

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.

VIII. 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, **\$37,500** 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 C.F.R. § 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
P.O. Box 979077
St. Louis, MO 63197-9000
Docket No. CWA-02-2015-3310

Wire transfers should be directed to the Federal Reserve Bank of New York

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

Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency".

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 pursuant to 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 statutory and regulatory requirements, and to maintain such compliance, and EPA may initiate a new enforcement action based on evidence of new or continued violations.

IX. 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, Region 2
290 Broadway, 16th Floor
New York, NY 10007-1866

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

Lauren Fischer, Esq.
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, NY 10007-1866

X. 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 17th DAY OF October, 2014.



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:

Kelly Development Corporation
96 South Ocean Avenue
Patchogue, NY 11772

SPDES Tracking Numbers NYR10U297/NPDES
NYU001027

Respondent,

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

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

DOCKET No. CWA-02-2015-3310

I certify that on OCT 17 2014, 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
New York, New York 10007-1866

Copy by Certified Mail
Return Receipt Requested:

Michael Kelly, Owner
Kelly Development Corporation
96 South Ocean Avenue
Patchogue, NY 11772

Copy by Certified Mail
Return Receipt Requested

Mr. Joseph DiMura, P.E., Director
Bureau of Water Compliance Programs
NYSDEC
625 Broadway
Albany, New York 12233-4500

Dated: 10/17/14

Marie St. Germain
Secretary
New York, NY