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

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 Section 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

NOTICE OF MOTION FOR ACCELERATED DECISION ON LIABILITY

COUNSEL:

PLEASE TAKE NOTICE that, upon the accompanying exhibits and memorandum of law, Complainant, the Director of the Clean Water Division of the United States Environmental Protection Agency, Region 2 ("EPA" or "Complainant"), hereby moves this Court, the Honorable Helen S. Ferrara presiding, pursuant to 40 C.F.R. §§ 22.50(a)(1) and 22.20(a), for an order granting Complainant a partial accelerated decision establishing and declaring Respondents liable to the United States for the discharge of pollutants into navigable waters, without authorization by the Secretary of the Army as required by Section 404 of the Clean Water Act

("CWA" or the "Act"), 33 U.S.C. §1344, in violation of Section 301(a) of the Act, 33 U.S.C. §1311(a), and for such other and further relief as this Court deems may be lawful and proper.

PLEASE TAKE FURTHER NOTICE that response papers, if any, must be served in accordance with the 40 C.F.R. § 22.16(b).

Dated: May 1, 2015
New York, New York

Respectfully submitted,

Lauren Fischer
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290 Broadway, 16th floor
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212-637-3231

TO: Helen S. Ferrara
Regional Judicial Officer
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MEMORANDUM OF LAW IN SUPPORT OF COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY

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I. PRELIMINARY STATEMENT

This memorandum of law is submitted on behalf of Complainant, the Director of the Clean Water Division of the United States Environmental Protection Agency, Region 2 ("EPA" or "Complainant"), in support of Complainant's motion for an order, made pursuant to 40 C.F.R. §§ 22.16(a) and 22.20(a), granting Complainant a partial accelerated decision establishing and declaring Michael B. and Thomas R. Rapasadi ("Respondents"), liable as a matter of law to the United States for the underlying violation alleged in the complaint that commenced this administrative proceeding. Specifically, this motion seeks an order from this tribunal establishing and declaring that, as a matter of law, Respondents are liable to the United States for the discharge of pollutants into navigable waters, without authorization by the Secretary of the Army as required by Section 404 of the Clean Water Act ("CWA" or the "Act"), 33 U.S.C. §1344, in violation of Section 301(a) of the Act, 33 U.S.C. §1311(a).

Together with the accompanying exhibits, Complainant submits that, as will be demonstrated below, no genuine issue of material fact exists in this proceeding on the question of liability for the violation listed in the complaint. Thus, under established principles of law, Complainant is entitled to judgment as a matter of law and this Court should accordingly issue an order establishing and declaring such liability.

II. LEGAL BACKGROUND

A. The Clean Water Act

The purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To that end, the CWA, among other things, prohibits "the discharge of any pollutant by any person" except as provided in the Act. 33 U.S.C. § 1311(a). For purposes of the CWA, a "person" is, inter alia, any "individual, corporation, partnership, [or] association . . ." 33 U.S.C. § 1362(5). The term "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). "[P]ollutants" include "dredged or fill material" 33 U.S.C. §§ 1344(a) and 1362(6). The conveyance of dredged or fill material by mechanized earthmoving equipment constitutes a "point source" within the meaning of the Act. 33 U.S.C. § 1362(14). "[N]avigable waters" are "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

The regulatory definition of "waters of the United States" includes certain "wetlands." Wetlands are "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b). A finding that an area can be characterized as wetlands requires: (1) a prevalence of plant species typically adapted to saturated soil conditions, (2) hydric soil, meaning soil that is saturated, flooded, or ponded for sufficient time during the growing season to become anaerobic, or lacking in oxygen, in the upper part, and (3) wetland hydrology, a term generally requiring continuous inundation or saturation to the surface during at least five percent of the growing season in most years. See United States Army Corps of Engineers ("USACE" or "the Corps") Wetlands Delineation Manual, 1987 ("the 1987 Corps' Manual"), available online at http://el.erdc.usace.army.mil/elpubs/pdf/wlman87.pdf.

The inclusion of wetlands under the Act's protection recognizes that the restoration and maintenance of the chemical, physical, and biological integrity of the Nation's millions of miles of rivers and streams depends upon the vital functions that wetlands provide, such as the cleansing of stormwater, the buffering of floods and the maintenance of healthy aquatic ecological communities. Thus, wetlands are protected under the Act where: (1) they are adjacent to traditionally navigable waters, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 135 (1985); (2) they have a continuous surface connection with a relatively permanent body of water that is connected to traditionally navigable waters, Rapanos v. United States, 547 U.S. 715, 742 (2006); or (3) they have a "significant nexus" with traditional navigable waters, such that the wetlands, "alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical and biological integrity of" navigable waters. Id. at 780.

B. The Wetlands Permit Program

Section 404 of the Act establishes a permitting program whereby a person seeking to discharge dredged or fill material into waters of the United States, including wetlands, may apply for a permit from the Corps to do so. 33 U.S.C. § 1344. The purpose of the program, consistent with the purposes of the Act, is to prevent the discharge of dredged or fill material into wetlands, "unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts . . ." 40 C.F.R. § 230.1. To that end, discharges are permitted only where there is no practicable alternative that would have less adverse impact on the wetlands, and where mitigation is performed to compensate for the unavoidable impacts. 40 C.F.R. §§ 230.10, 230.91-98.

EPA and the Corps share Section 404 enforcement authority. Section 404 violations fall into two broad categories: failure to comply with the terms or conditions of a Section 404 permit, and discharging dredged or fill material to waters of the United States without a permit. Pursuant

to a Memorandum of Agreement ("MOA") between the Corps and EPA (http://www.epa.gov/owow/wetlands/guidance/404f.html), the Corps takes the lead on cases involving violations of a Corp-issued permit. For unpermitted discharges, EPA and the Corps determine the appropriate lead agency based on criteria in the MOA. In general, EPA will act as the lead enforcement agency when an unpermitted activity involves a repeat violator or flagrant violation, as well as situations where EPA requests a particular case or class of cases, or the Corps recommends that an EPA administrative penalty action be initiated.

C. Administrative Procedures

The rules governing administrative proceedings for violations of the Act are set out in 40 C.F.R. Part 22, formally known as the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination of Permits" (hereinafter "CROP").[1] This motion is made pursuant to 40 C.F.R. § 22.20(a), which provides, in part:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

Two inquiries are relevant to this provision: what constitutes a "genuine issue" and what constitutes a "material fact." The Environmental Appeals Board ("EAB") has, in the leading case of In re BWX Technologies, Inc., RCRA (3008) Appeal No. 97-5, 9 E.A.D. 61, 74 (EAB 2000),[2] addressed these two issues, and it has explained:

> A factual dispute is material where, under the governing law, it might affect the outcome of the proceeding.

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[1] 40 C.F.R. § 22.50(a)(1), in relevant part, grants the presiding officer authority for "the assessment of a penalty under sections 309(g)(2)(A) and 311(b)(6)(B)(i) of the CWA (33 U.S.C. 1319(g)(2)(A) and 1321(b)(6)(B)(i))."

[2] In addition to legal databases such as Westlaw and/or Lexis, copies of decisions of the Environmental Appeals Board are available at www.epa.gov/eab.

> Whether an issue is 'genuine' hinges on whether, in the estimation of a court, a jury, or other factfinder could reasonably find for the nonmoving party. If the evidence is viewed in the light most favorable to the nonmoving party is such that no reasonable decisionmaker could find for the nonmoving party, summary judgment is appropriate. Furthermore, the respective burdens of production of evidence that each party must meet on a motion for summary judgment in order to avoid an adverse decision implicates the substantive evidentiary standard of proof at trial or evidentiary hearing... [citations omitted] [footnotes omitted].

This standard is well-established. See, e.g., In re Consumers Scrap Recycling, Inc., CAA Appeal No. 02-06/CWA Appeal No. 02-06/RCRA (3008) Appeal No. 02-03/MM Appeal No. 02-01, 11 E.A.D. 269, 285 (EAB 2004). In determining whether a "genuine issue of material fact" does exist, the judge "must consider whether the quantum and quality [of the] evidence is such that a finder of fact could reasonably find for the party producing the evidence under the applicable standard of proof." In re Mayaguez Regional Sewage Treatment Plant, 4 E.A.D. 772, 781 (EAB 1993), aff'd sub nom, Puerto Rico Aqueduct & Sewer Authority v. EPA, 35 F.3d 600 (1st Cir. 1994), cert. denied, 513 U.S. 1148 (1995).

In order to prevail on this motion for accelerated decision, it must be shown that all of the elements of the violation are established so that a reasonable fact-finder could not find in favor of the Respondents.

III. FACTUAL BACKGROUND

A. Warning Letter

In September of 2010, staff members from the Corps and the EPA observed fill material being added to wetlands on Respondents' property located at 8151 North Main Street, Town of Lenox, Madison County, New York (hereinafter referred to as "the Property"), from the adjacent roadside. See Exhibit 1, Warning Letter. On September 28, 2010, the Corps issued a Warning

Letter to Michael B. Rapasadi, as the owner of the Property, stating that there is a potential violation. Id.

B. Notice of Violation Letter

On November 15 and 19, 2010, the Corps performed an onsite inspection. Id. On December 3, 2010, the Corps determined that approximately 1.13 acres of fill material had been added to wetlands on the Property and issued a Notice of Violation and Cease and Desist Order ("C&D Order") to Respondent, Michael Rapasadi, advising him that such filling and grading activities constitute a violation of Section 404 of the Act, 33 U.S.C. § 1344. See Exhibit 2, C&D Order. The C&D Order referenced relevant provisions of the Act and instructed Mr. Rapasadi to either remove the fill material and restore the wetlands or apply for an after-the-fact permit to authorize the fill. Id. The C&D Order required the submission of an after-the-fact permit application by no later than December 31, 2010, and required a description of the purpose and need for the fill, an alternatives analysis, and a compensatory mitigation plan. Id. at 2.

C. Request for Information Letters

In March 2011, having received neither a restoration plan nor an after-the-fact application, the Corps initiated coordination with EPA regarding further disposition of this case. See Exhibit 2 at 2. EPA issued Requests for Information ("RFI") to Michael B. Rapasadi, as the owner of the property, and Thomas R. Rapasadi, as an alleged discharger of pollutants, pursuant to Section 308 of the Act, 33 U.S.C. §1318(a), on April 26 and May 10, 2011, respectively. See Exhibits 3 and 4. Instead of responding to the RFI, in August 2011, Respondents submitted to EPA (rather than the Corps) an incomplete, undated after-the-fact permit application ("ATF Application") seeking authorization for the fill. See Exhibit 5, ATF Application. The ATF Application failed to include any purpose for the fill. See id. at 4. On September 1, 2011, after further consultation with EPA, the Corps transferred lead agency status to EPA for further enforcement pursuant to

the MOA on the grounds that it could not obtain voluntary resolution of the violation. See Exhibit 1.

D. EPA's Compliance Order

On September 28, 2011, EPA issued a Findings of Violation and Order, Docket No. CWA 02-2011-3502, in the matter of Michael and Thomas Rapasadi, pursuant to Section 309(a) of the Act, 33 U.S.C. §1319(a) ("the Compliance Order."). See Exhibit 6, Compliance Order. The Compliance Order restated the basis for the Section 404 violation at issue here and again ordered Respondents to come into compliance with the Act by removing all unauthorized fill material and restoring the affected portion of the wetlands within ninety days. To date, Respondents have failed to comply.

E. EPA's Penalty Order (the Instant Action)

On May 30, 2013, EPA initiated this enforcement action pursuant to Section 309(g)(2)(A) of the Act, 33 U.S.C. §1319(g)(2)(A), seeking a $25,000 penalty for the same Section 404 violations described above ("the Penalty Order"). Respondents filed a timely answer on or about July 2, 2013, denying liability primarily because of "lack of knowledge or information." See Docket No. CWA-02-2013-3601, Answer dated July 2, 2013 ("the Answer"). In the Answer, Respondents admit that Michael B. Rapasadi owns the Property and that Thomas R. Rapasadi is Michael B. Rapasadi's father. The Answer further alleges that Respondents "received permission from the Town involved before commencing work." Answer at 4.

Despite prolonged settlement discussions in this matter that commenced upon the issuance of the Penalty Order, the Parties remain unable to resolve this matter. Accordingly, EPA hereby files this motion for an accelerated decision to determine liability.

IV. CWA LIABILITY

The CWA holds owners and/or operators strictly liable for the discharge of a pollutant. "The regulatory provisions of the Federal Water Pollution Control Act were written without regard to intentionality, however, making the person responsible for the discharge of any pollutant strictly liable." United States v. Earth Sciences, Inc., 599 F.2d 368, 374 (10th Cir. 1979). Section 301 of the Act states "[e]xcept as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act …, the discharge of any pollutant by any person shall be unlawful." Therefore, in accordance with the Act's definition of a discharge of a pollutant, any (1) person who (2) discharges (3) a pollutant, into (4) a water of the United States, from a (5) point source, (6) without a permit, is in violation of the Act without regard to intent. As explained more fully below, all six elements of a CWA violation have been satisfied here, therefore, Respondents are strictly liable.

A. Person

Under Section 301 of the Act, the violator must be a "person." The Act defines a person as an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body, pursuant to Section 502(5) of the Act, 33 U.S.C. §1362(5). Courts have held that "the CWA imposes liability both on the party who actually performed the work and on the party with responsibility for or control over performance of the work." United States v. Lambert, 915 F. Supp. 797, 802 (S.D. W. Va. 1996), citing United States v. Bd. of Trustees, 531 F. Supp. 67, 274 (S.D. Fla. 1981).

Thomas R. Rapasadi and Michael B. Rapasadi are both persons within the meaning of the Act. Both individuals are responsible, Michael B. Rapasadi as owner of the Property, and Thomas R. Rapasadi, as the operator responsible and in control of the work being done to fill wetlands on the Property. Exhibit 5. Thomas R. Rapasadi, as operator, held himself out as the

"applicant" in submitting the ATF Application seeking to authorize the fill in the wetlands on the Property. See Exhibit 5; see also Exhibit 7 (Rapasadi Timeline, noting in October 25, 2010, that "Michael is the owner of the property, but his father [is] doing the work on this site."). The ATF Application also states that Michael B. Rapasadi is the owner of the Property. Id. at 1. Both Michael and Thomas Rapasadi signed the ATF Application. Id. Michael Rapasadi's ownership of the Property was further admitted in the Answer. See Answer at 2 ¶ 13.1; see also Exhibit 5 at 3 (property tax bill naming Michael Rapsasadi as the owner). These facts conclusively show that each named Respondent satisfies the definition of a "person" within the meaning of the Act.

B. Discharge

The term "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12). There is no dispute that fill material, the pollutant described below, was added to wetlands on the Property. From 2008 through at least September 2010, Respondents filled approximately 1.13 acres of wetlands on the Property using mechanized earth-moving equipment. See Hydrologic Report, Exhibit K, Site Notes/Rational (describing the fill and pictured on sheet 11 of 11); see also Exhibit 8, Unauthorized Activity Report Form ("UA Report"). Respondents have not denied filling the wetlands on the Property. See Answer. Moreover, Respondents have sought to legalize the fill by submitting an ATF Application, albeit incomplete. The ATF Application notes that "[w]ork [has] [b]egun on [p]roject," and that it will "require additional Federal, State, or Local Permits including zoning changes." See Exhibit 4. Further, it states "[t]his project is to fill an area that once was a producing farm that no longer is used for this purpose. The fill is to be placed to the elevation of the Road." Id. at 4. Respondents admit that the purpose of the project is to fill the wetlands on the Property with "fill material from road material, site improvement from state, local government and local construction sites." Id. According to these facts, the Court should

find that there has been a discharge.

C. Pollutant

The term "pollutant" is defined in the Act as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6); see also 33 C.F.R. § 232.2 (defining the discharge of fill material). Fill material, such as the "dirt, rock, concrete, construction debris, etc." placed in the wetlands on the Respondents' land, falls within the definition of a pollutant within the meaning of the Act. Exhibit 8, UA Report at 1.

D. Point Source

The term "point source" means "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." 33 U.S.C. § 1362(14). Here, Respondents used a bulldozer, mechanized earth-moving equipment, to place the fill material into position. See Exhibit 9, Photo of Bulldozer on Property; see also Exhibit 8, UA Report at 4. Such earth moving equipment is considered a point source. See Nat'l Ass'n of Home Bldrs. v. United States Army Corps of Eng'rs, 311 F. Supp. 2d 91 (D.D.C. 2004) (prohibiting the "discharge of dredged material" using mechanized earth moving equipment. 40 C.F.R. § 232.2); Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 922 (5th Cir. 1983)(holding that bulldozers and backhoes are point sources).

E. Waters of the United States

The Act prohibits the discharge of pollutants to "navigable waters." "Navigable waters" mean the waters of the United States and territorial seas, pursuant to Section 502(7) of the Act, 33 U.S.C. §1362(7). "Waters of the United States" means, but is not limited to,

> (a) 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;
> (b) All interstate waters, including interstate "wetlands;". . .
> (g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

40 C.F.R. §122.2; see also Section III.A., Legal Background (discussing the regulatory definition of a wetland). In the 2006 Rapanos decision, the Supreme Court addressed the term "waters of the United States." All Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. A four-Justice plurality interpreted the term as covering "relatively permanent, standing or continuously flowing bodies of water . . .," Rapanos, 547 U.S. at 739, that are connected to traditional navigable waters, id. at 742, as well as wetlands with a "continuous surface connection . . ." to such water bodies, id. (Scalia, J., plurality opinion). The Rapanos plurality noted that its reference to "relatively permanent" waters did "not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstance, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months . . . ." Id. at 732 n.5 (emphasis in original).

The wetlands at issue here satisfy the regulatory definition of a wetland. The USACE conducted a field inspection of the Property on November 15 and 19, 2010, and determined that the portion of the Property at issue here satisfies the definition of wetlands under the CWA using the 1987 Corps' Manual for identifying and delineating wetlands and the Northcentral and

Northeast Regional Supplement Interim Version. See Exhibit 7, UA Report; see also Exhibit 10, Hydrologic Report, Exhibit K, Site Notes/Rationale. The 1987 Corps' Manual applies three characteristics of wetlands when making wetland determinations: vegetation, soil, and hydrology. This USACE inspection verified and confirmed through soil samples that all three characteristics exist on the Property. See Exhibit 10, Hydrologic Report, Exhibit K, Site Notes/Rationale at 2. Exhibit 10, the Hydrologic Report and its accompanying attachments, in particular, Exhibit K (the site visit notes/rational), fully support a finding that the Property contains wetlands.

The wetlands here also satisfy the plurality standard in Rapanos. As established in the Hydrologic Report, the Property contains wetlands with a continuous surface connection to relatively permanent channels and tributaries that flow to Oneida Lake. See generally Hydrologic Report. Specifically, [t]hese wetlands are connected by a roadside ditch that conveys water from the Property to a natural, unnamed water body, which flows to Cowelson Creek, which in turn flows to Oneida Lake." Id. at 1. The Hydrologic Report details the flow and surface connection of these relatively permanent channels and tributaries. See id. at 3-6. Oneida Lake is a traditional navigable water body open to boat traffic and subject to the protection of Section 10 of the Rivers and Harbors Appropriation Act of 1899 (also known as "Section 10 waters"). See Exhibit 8, UA Report, see also Exhibit 10, Hydrologic Report. Section 10 waters are per se jurisdictional waters. "If the plurality's test is satisfied, then at least the four plurality members plus the four dissenters would support jurisdiction." United States v. Johnson, 467 F.3d 56, 64 (1st Cir. 2006). Accordingly, the wetlands at issue here are jurisdictional waters of the United States.

F. Without a Permit

Section 301 of the Act prohibits the discharge of pollutants except as done in compliance with another provision of the Act. Section 404 authorizes the Secretary of the Army to permit a

person to discharge dredge or fill material. See 33 U.S.C. § 1344. To date, Respondents have failed to obtain authorization for the fill on the Property pursuant to any provision of the Act, nor does the fill satisfy any exemption from CWA regulation. See Answer at ¶ 13, sub¶ 16 (admitting only that they requested a permit).

G. Respondents' Reliance Upon Alleged Representations by the Town is not a Defense to Liability.

In their Answer, Respondents allege that the Town of Lenox authorized the work involved in filling the wetlands on the Property. See Answer, Aff. of Ben Carroll at ¶5. Respondents' reliance upon the Town's alleged statement that they could fill in wetlands on the Property does not alter the finding of liability. The Act is a "strict liability statute, so defendant's prior knowledge of need for a 404 permit is irrelevant." United States v. Bailey, 571 F.3d 791 (8th Cir. 2009). However, the fact that Respondents knew enough to ask the Town for permission suggests they did have some knowledge of the applicable law. Nevertheless, assuming *arguendo* Respondents were entirely without fault, as "criminal penalties were not sought in this case, the [Respondents'] intent is irrelevant." United States v. Bradshaw, 541 F. Supp. 880, 18 ERC 1614, 1616 (D. Md. 1981); see also United States v. Sheyenne Tooling, 952 F. Supp. 1414, 1419 (D.N.D. 1996) (CWA is a strict liability statute and good faith efforts to comply are not relevant to the issue of liability); In re Barber, Docket No. CWA-05-2005-0004 (ALJ Gunning 2005) (on motion for accelerated decision, held that ignorance of the law is not a valid defense).

Nor can Respondents credibly claim that EPA is estopped from prosecuting this CWA violation. As explained by the Supreme Court in Immigration and Naturalization Serv. v. Miranda, 459 U.S. 14, 16-17 (1982) (per curiam), the affirmative defense of estoppel may only be asserted upon a showing that *the complainant* is "guilty of intentional conduct while knowing

the Respondent should be misled into detrimental reliance." Here, Respondents do not claim that the United States has made any misrepresentations.

V. CONCLUSION

Complainant submits that the elements necessary for establishing liability under the CWA discussed above have been satisfied for a judgment granting EPA the relief it seeks — a judgment as a matter of law declaring Respondents liable. For all the reasons set forth above, Complainant respectfully requests this Court: 1) render a judgment that Respondents: a) are each a person within the meaning of the Section 502(5) of the Act, 33 U.S.C. § 1362(12); b) the earthen fill used on the Property is a pollutant within the meaning of Section 502(6) of the Act, 33 U.S.C. § 1362(6); c) a discharge occurred when there was an addition of fill to the wetlands on the Property within the meaning of Section 502(12) of the Act, 33 U.S.C. § 1362(12); d) the mechanized earth moving equipment used to move the fill qualifies as a point source within the meaning of Section 502(14) of the Act, 33 U.S.C. §1362(14); e) wetlands on the Property are waters of the United States within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7), as further defined by caselaw; f) at no time did Respondents have a permit for such a discharge as required by Section 404 of the Act, 33 U.S.C. § 1344; 2) issue an order granting Complainant an accelerated decision establishing and declaring Respondents liable for said violation; and 3) grant Complainant such other and further relief as this Court deems lawful and proper.

Dated: May 1, 2015
New York, New York

Respectfully submitted,

Lauren Fischer
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290 Broadway, 16th floor
New York, New York 10007-1866
212-637-3231

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

Docket No. CWA-02-2013-3601

CERTIFICATE OF SERVICE

I certify that the foregoing "Motion For Accelerated Decision on Liability" against Michael B. Rapasadi and Thomas R. Rapasadi, was sent on this 1st day of May, 2015, in the following manner to the addressees listed below:

Copy by Hand:

Helen S. Ferrara
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 2
290 Broadway
New York, NY 10007-1866

Original and Copy by Hand:

Karen Maples
Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 2
290 Broadway
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Copy by Certified Mail,
Return Receipt Requested:

John Benjamin Carroll, P.C.
Attorney for Respondents
Carroll & Carroll, PC
440 South Warren Street
Syracuse, NY 13202

Dated: 5-1-15

Jessalyn Lorzo
Secretary