Phillips Lytle LLP

Via Federal Express

October 17, 2013

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

Re: Atlantic Funding and Real Estate, LLC and Mr. Alfred Spaziano
Docket No. CWA-02-2103-3401

Dear Ms. Maples:

Please find enclosed two (2) duplicate copies of the original fully executed Answer to the Administrative Complaint, Request for a Hearing and a Request for Confirmation of Informal Settlement Conference ("Answers") for the above-referenced matter, which was originally sent on October 15th, via U.S. Mail, during the government shutdown. Based on the fact the EPA offices are reopening and Federal Express is now able to make deliveries, we are resending this Answer so that delivery may be confirmed for our files.

Thank you.

Very truly yours,

Phillips Lytle LLP

By
Jennifer Dougherty
J-Dpjs
Enclosures
Doc #01-2715335.3

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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2

IN THE MATTER OF:
Atlantic Funding and Real Estate, LLC And Alfred Spaziano P.O. Box 26350 Rochester, New York 14626
Respondents,
SPDES Permit No. NYR10V310
Proceeding pursuant to Section 309(g) of the Clean Water Act, 33 U.S.C. §1319(g)

PROCEEDING TO ASSESS A CLASS II CIVIL PENALTY

DOCKET No. CWA-02-2103-3401

ANSWER TO ADMINISTRATIVE COMPLAINT AND REQUEST FOR HEARING AND REQUEST FOR CONFIRMATION OF INFORMAL SETTLEMENT CONFERENCE

Respondents, Alantic Funding and Real Estate, LLC[1] and Alfred Spaziano, (hereinafter, "Respondents"), by and through its counsel of record, answer the Administrative Complaint, Finding of Violation, Notice of Proposed Assessment of an Administrative Penalty, and Notice of Opportunity to Request a Hearing ("Complaint") and upon information and belief, state as follows:

I. STATEMENT OF AUTHORITY

1. The Respondents neither admit nor deny the allegations of Section I, Paragraphs 1 and 2, which are in part conclusions of law requiring no answer.

II. APPLICABLE LEGAL REQUIREMENTS

1. The Respondents neither admit nor deny the allegations of Section II, Paragraphs 1-11, 13-18, which are in part conclusions of law requiring no answer.

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[1] The Administrative Complaint lists the owner/operator as "Atlantic Funding and Real Estates, LLC", but no such entity exists. The correct spelling is Alantic Funding and Real Estate, LLC.

2. Respondents neither admit nor deny the allegations in Section II, Paragraph 12, as the document speaks for itself.

III. FINDINGS OF FACT AND CONCLUSION OF LAW

1. Respondents neither admit nor deny the allegations in Section III, Paragraph 1, of the Complaint, which are in part conclusions of law requiring no answer.

2. Respondents admit a Notice of Intent ("NOI") was filed on April 12, 2012 and April 9, 2013 by Atlantic Funding and Real Estates, LLC[2], for a construction site known as "Gateway Landing" ("Site" or "Facility") located off of Canal Landing Boulevard at Bellwood Drive in the Town of Greece and the Town of Gates. Respondents neither admit nor deny the remaining allegations in Section III, Paragraph 2, which are in part conclusions of law requiring no answer.

3. Respondents neither admit nor deny the allegations in Section III, Paragraph 3, which are in part conclusions of law requiring no answer. Respondents lack sufficient information and knowledge upon which to either admit or deny the allegations related to conversations between U.S. Environmental Protection Agency ("EPA") inspectors and others. As to the allegation that Respondent Spaziano is the contact person identified in the NOI, the document speaks for itself.

4. The Respondents admit that coverage for the construction activities at the Site was obtained under the New York State Department of Environmental Conservation Construction General Permit GP-0-10-001 ("CGP" or "Permit").

5. Respondents admit that the construction activities at the Site will include grading, clearing and excavating a total of approximately eight (8) acres of land at the Site.

6. Respondents admit that stormwater discharges flow within the Town of Greece and the Town of Gates. Respondents deny knowledge or information sufficient to form a belief as to the remaining allegations contained in Section III, Paragraph 6.

7. Respondents deny knowledge or information sufficient to form a belief as to the first part of the allegation contained in Section III, Paragraph 7, and the second part of the allegation is in part a conclusion of law requiring no answer.

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[2] The correct spelling is Alantic Funding and Real Estate, LLC.

8. Respondents deny knowledge or information sufficient to form a belief as to the first part of the allegation contained in Section III, Paragraph 8, and the second part of the allegation is in part a conclusion of law requiring no answer.

9. Respondents admit the EPA conducted an inspection at the Site on or about September 19, 2012. Respondents neither admit nor deny the allegations in Section III, Paragraph 9(a)-(e) as they relate to the contents of the CGP or the Stormwater Pollution Prevention Plan ("SWPPP"), as the CGP and SWPPP speak for themselves. Respondents deny the allegations found in the last sentence of Section III, Paragraph 9(b). Respondents deny the allegations found in the last sentence of Section III, Paragraph 9(d). Respondents deny knowledge or information sufficient to form a belief as to the remaining allegations found in Section III, Paragraph 9, including the remaining allegations contained in paragraphs 9(a), 9(c)-(e) and all following subparts therein.

10. Respondents neither admit nor deny the allegations in Section III, Paragraph 10, as the document speaks for itself.

11. Respondents neither admit nor deny the allegations in Section III, Paragraph 11, as the document speaks for itself.

12. Respondents neither admit nor deny the allegations in Section III, Paragraph 12, as the document speaks for itself.

13. Respondents neither admit nor deny the allegations in Section III, Paragraph 13, as each document speaks for itself.

14. Respondents admit the EPA conducted an inspection at the Site on or about February 28, 2013. Respondents neither admit nor deny the allegations in Section III, Paragraph 14(a)-(c) as they relate to the contents of the SWPPP, which speaks for itself. Respondents deny all of the remaining allegations found in Section III, Paragraph 14, including the allegations contained in subparts 14(a)-(c).

15. Respondents deny the allegations contained in Paragraph 15.

IV. GENERAL DENIAL

1. Respondents deny each and every allegation contained in the Complaint unless specifically admitted herein.

V. CONTESTED FACTS

1. Respondents contest the EPA's Site observations, the EPA's interpretation of the SWPPP and EPA's interpretation of the required implementation measures.

VI. **INCORPORATION**

1. The allegations of and responses in all of the paragraphs of any part of this answer are incorporated into each of the affirmative defenses and counterclaims as if fully set forth therein.

VII. **FIRST AFFIRMATIVE DEFENSE**

1. The Complaint fails to state a claim upon which relief can be granted.

VIII. **SECOND AFFIRMATIVE DEFENSE**

1. Some or all of the alleged violations in the Complaint are barred by the statute of limitations.

IX. **THIRD AFFIRMATIVE DEFENSE**

1. Some or all of the alleged violations in the Complaint are barred by the doctrine of laches.

X. **FOURTH AFFIRMATIVE DEFENSE**

1. Some of the alleged violations in the Complaint are barred by the doctrine of estoppel.

XI. **FIFTH AFFIRMATIVE DEFENSE**

1. Some or all of the alleged violations were the result of actions taken at the direction of and or under the control of a third party.

XII. **SIXTH AFFIRMATIVE DEFENSE**

1. It was impossible for Respondents to satisfy regulatory requirements due to permitting delays related to the Town of Greece's permitting and approval process.

2. It was impossible for the Respondents to comply with the certain SWPPP conditions due to circumstances out of the Respondents' control. For example, where the Complaint states the Respondents failed to address deficiencies over multiple inspection periods, the Respondents were unable to provide vegetation or natural stabilization outside of the growing season.

XIII. **SEVENTH AFFIRMATIVE DEFENSE**

1. The EPA failed to assist and aid Respondents to minimize and prevent continuation of the alleged violations at the time of the alleged investigation by failing to advise the Respondents, or their agent of the alleged violation of the CGP; and the EPA is estopped from asserting

instances of alleged non-compliance when the EPA representatives indicated to Respondents that certain actions or corrective actions were satisfactory and/or the instances of alleged non-compliance were of no consequence; by asserting this affirmative defense, Respondents do not admit any violations of the CGP or the Clean Water Act ("CWA"), and repeat and deny any and all allegations of any violation.

XIV. EIGHTH AFFIRMATIVE DEFENSE

1. The amount of the penalty proposed in the Complaint is unfair, unsupported and inappropriate based on the following reasons:

   i. The proposed penalty is not in compliance with the relevant and applicable EPA regulations and guidance.

   ii. The Respondents did not accrue any economic benefit or savings as a result of the alleged violations.

   iii. The gravity of the alleged violations is not sufficient to support the assessment of the proposed penalty.

   iv. The nature and circumstances of the alleged violations are not sufficient to support the assessment of the proposed penalty.

   v. The potential environmental impacts of the alleged violations are not sufficient to support the assessment of the proposed penalty.

   vi. The Respondents have no prior history of non-compliance with CGP requirements.

   vii. Respondents culpability, if any, is minimal for the alleged violations.

   viii. Respondents took all reasonable steps to minimize and prevent the alleged violations, and by asserting this affirmative defense, Respondents do not admit any violations, of the CGP or CWA and repeat and deny any and all allegations of any violation.

   ix. Any alleged instances of environmental impact or deviation from applicable laws or regulations was de minimis.

XV. NINTH AFFIRMATIVE DEFENSE

1. Respondents, at all times, made a good faith effort to fully comply with all applicable requirements of the CGP and the CWA, generally and did everything reasonably within their power to comply with all applicable regulations of the CWA.

XVI. TENTH AFFIRMATIVE DEFENSE

1. Respondents assert that it may have further and additional affirmative defenses which are not yet known, but which may become known through additional investigation and discovery. Respondents hereby assert each and every affirmative defense that it may later ascertain or identify through additional investigation and discovery, and the failure to identify and assert those affirmative defenses at this point and time shall not be considered a waiver thereof.

XVII. REQUEST FOR A HEARING

1. Pursuant to 40 C.F.R. §§ 22.15(c) and 22.19(d), Respondents request a formal hearing in Monroe County upon the issues raised by the Complaint and this answer.

2. Moreover, Respondents would like to note that during the majority of the response time for the Complaint, many EPA employees have been furloughed due to the government shutdown. The EPA contact identified in the Complaint for the informal conference has been furloughed since October 1, 2013 and unavailable[3]. The Respondents were unable to confirm an informal settlement conference prior to submitting this answer. Therefore, while this request is for a formal hearing, Respondents have requested an informal settlement conference take place after the government shutdown concludes.

WHEREFORE, Respondents respectfully request a hearing to contest the matters set forth in the Complaint.

PHILLIPS LYTLE LLP

By: _____
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Jennifer Dougherty, Esq.
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Alfred Spaziano
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Buffalo, New York 14203
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Doc #01-2714191.3

[3] According to the outgoing voice mail message for Chris Saporita, Esq., Assistant Regional Counsel, EPA Region 2.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2

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Atlantic Funding and Real Estate, LLC
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CERTIFICATION OF SERVICE

I certify that on October 17, 2013, I served the foregoing fully executed Answer to Administrative Complaint and Request for Hearing and Request for Confirmation of Informal Settlement Conference, bearing the above-referenced docket number, on the persons listed below, in the following manner:

Copy Via Federal Express

Office of Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, NY 10007-1866

Patti J. Schifferle

Doc #01-2714653.1