



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

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Article Number: 7005 3110 0000 5940 4720

Mr. Alfred Spaziano
Atlantic Funding and Real Estate, LLC
P.O. Box 26350
Rochester, New York 14626

Re: Notice of Proposed Assessment of a Civil Penalty Class II
Atlantic Funding and Real Estate, LLC and Mr. Alfred Spaziano
Docket No. CWA-02-2013-3401

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG.11
2013 SEP -9 A 9:36
REGIONAL HEARING
CLERK

Dear Mr. Spaziano:

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 you and Atlantic Funding Real Estate, LLC ("Respondents"), have violated Sections 301 and 402 of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. §§ 1311 and 1342, in your operation of the Gateway Landing construction site located off of Canal Landing Road in the Towns of Gates and Greece, New York, 14606. 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 **\$120,000** be assessed to Respondents 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 Consolidated Rules of Practice ("CROP"), found at 40 Code of Federal Regulations 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 to 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

Internet Address (URL) • <http://www.epa.gov>

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 Respondents 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:

Chris Saporita, 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) 637-3203
Fax: (212) 637-3199

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 Mr. Chris Saporita at the phone number above or Ms. 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: Joseph DiMura, NYSDEC

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-02-2013-3401

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2013 SEP -9 A 9:36
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 (“Administrator” or “EPA”) by Section 309(g)(2)(B) of the Clean Water Act (“Act” or “CWA”), 33 U.S.C. § 1319(g)(2)(B). 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)(B) 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, a copy of which is attached, Complainant hereby requests that the Regional Administrator assess a civil penalty against Alfred Spaziano and Atlantic Funding and Real Estate, LLC (“Respondents”), as a result of Complainant’s determination that Respondents are in violation of Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342, for failing to comply with the terms of the New York State Department of Environmental Conservation’s (“NYSDEC”) State Pollutant Discharge Elimination System (“SPDES”) General Permit for Stormwater Discharges from Construction Activity on a construction site Respondents 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. “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.
3. “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.
4. “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.
5. “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.
6. “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 tributaries thereto.
7. Section 402(a) of the CWA, 33 U.S.C. § 1342(a), authorizes the Administrator to issue a National Pollutant Discharge Elimination System (“NPDES”) permit for the discharge of any pollutant, or combination of pollutants, notwithstanding the prohibition in Section 301(a) of the CWA, upon the condition that any such discharges will meet the requirements of the CWA and its implementing regulations.
8. The Administrator has promulgated regulations, at 40 C.F.R. § 122.26, that require permits for stormwater discharges associated with, among other things, industrial activity, including discharges associated with construction activities that include clearing, grading and excavation, and that result in the disturbance of one (1) or more acres of total land area.
9. “Storm water” is defined by 40 C.F.R. § 122.26(b)(13) as storm water runoff, snow melt runoff, and surface runoff and drainage.
10. “Owner or operator” is defined by 40 C.F.R. § 122.2 as the owner or operator of any “facility or activity” subject to regulation under the NPDES program.

11. Section 402(b) of the CWA, 33 U.S.C. § 1342(b), allows any State, upon application to and approval by EPA, to directly administer the NPDES permitting program. EPA has authorized the New York State Department of Environmental Conservation (“NYSDEC”) to directly administer the NPDES program in New York. 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 State Pollutant Discharge Elimination System (“SPDES”) permit, and must comply with all of its terms.
12. NYSDEC issued a SPDES General Permit for Stormwater Discharges from Construction Activity, GP-0-10-001 (“Permit” or “CGP”), which became effective on January 29, 2010 and expires on January 28, 2015.
13. Under the CGP, the term “Construction Activity(ies)” means any clearing, 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 the facility.
14. Under the CGP, the term “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.
15. Under the CGP, the terms “Municipal Separate Storm Sewer” and “MS4” are defined as a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by State law) . . . that discharges into waters of the United States; (ii) designed or used for collecting or conveying stormwater; (iii) which is not a combined sewer; and (iv) which is not part of a Publicly Owned Treatment Works.
16. Under the CGP, the term “Owner or Operator” means 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.
17. A corporate officer can be held personally liable for violations of the Clean Water Act if he or she had “authority with respect to the conditions that formed the basis of the alleged violations” (*United States v. Iverson*, 162 F.3d 1015, 1024 (9th Cir. 1998) (quoting *United States v. Park*, 421 U.S. 658 (1975))).
18. 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 \$16,000 per day of violation, and not exceeding \$177,500.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondents are a corporation and an individual, and are therefore “persons” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
2. According to the Notices of Intent (“NOIs”) filed with the NYSDEC for the Site, on April 12, 2012 and April 9, 2013, Respondent Atlantic Funding and Real Estate, LLC¹ owns and operates the Gateway Landing construction site (“Site” or “Facility”), which is located off of Canal Landing Boulevard at Bellwood Drive, near Longleaf Boulevard, in the Towns of Greece and Gates, in Monroe County, New York, 14606. Therefore, Respondent Atlantic Funding and Real Estate, LLC, is an owner and an operator within the meaning of 40 C.F.R. § 122.2.
3. According to the above-mentioned NOIs, Respondent Alfred Spaziano is the contact person for Atlantic Funding and Real Estate, LLC regarding activities at the Site. Based on communications between EPA inspectors and Mr. Spaziano, and between EPA inspectors and the Site’s storm water consultant, “Stormwater Solutions,” Mr. Spaziano has full and ultimate authority with respect to all construction activities at the Site. And, upon information and belief, Alfred Spaziano is the chief corporate officer of Atlantic Funding and Real Estate, LLC. Therefore, Respondent Alfred Spaziano is an operator within the meaning of 40 C.F.R. § 122.2.
4. On April 17, 2012, Respondents obtained permit coverage for construction activities on the Site under the CGP.
5. Construction activities at the Site include the clearing, grading and excavating, of approximately eight (8) acres of land at the Site.
6. Stormwater discharges from the northwest portion of the Site flow into the Town of Greece’s MS4 through inlets located on Canal Landing Boulevard, and the MS4 discharges to Round Pond Creek. Stormwater discharges from the northeast portion of the Site flow into the Town of Gates’ MS4 through inlets on Bellwood Drive, and the MS4 discharges to the Erie Canal. Stormwater discharges from the southern and western portions of the Site directly enter the Erie Canal via an existing 30-inch corrugated metal stormwater outfall pipe located immediately southwest of the Site.
7. Round Pond Creek is a tributary to Lake Ontario, which is a Great Lake, and which is currently used in interstate and foreign commerce, and is therefore a water of the United States within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and 40 C.F.R. 122.2.
8. The Erie Canal is a water body that is currently used in interstate and foreign commerce, connecting the Hudson River to Lake Erie and Lake Ontario, which are both Great Lakes, themselves used in interstate and foreign commerce. Therefore, the Erie Canal is a water of the United States within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and 40 C.F.R. 122.2.

¹ The NOIs list the owner/operator as “Atlantic Funding and Real Estates, LLC,” but a search of public records at www.advance.lexis.com shows no such entity, but instead, shows one named “Atlantic Funding and Real Estate, LLC” (“Estate” is singular).

9. On September 19, 2012, the EPA conducted a Federal lead Compliance Evaluation Inspection (“CEI”) at the Site and EPA identified the following violations of the Site’s NYSDEC SPDES CGP (NYR10V310):
- a) Part II.C.1 of the Permit 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, and Part VII.L of the Permit states that the owner or operator shall at all times properly operate and maintain all facilities and systems of treatment and control which are installed or used by the owner or operator to achieve compliance with the conditions of this permit and with the requirements of the Storm Water Pollution Prevention Plan (“SWPPP”). Additionally, Part IV.A.1 of the Permit requires that the owner or operator must ensure that all erosion and sediment control practices identified in the SWPPP are maintained in effective operating conditions at all times. The following SWPPP elements had not been implemented and/or maintained in effective operating conditions at the time of the EPA inspection, in violation of Parts II.C.1, VII.L and IV.A.1 of the Permit:
- i. The SWPPP requires a designated concrete washout area. At the time of the inspection, a designated concrete washout was not installed or being utilized and according to Respondent Spaziano, the concrete washout had been buried on-site;
 - ii. The SWPPP requires a perimeter silt fence along the western and southern perimeter of the Site and requires that, in the construction sequence, perimeter silt fence shall be installed prior to commencing any earthwork. At the time of the inspection, earthwork had commenced and the perimeter silt fence had not been installed along the southwest and southeast perimeters of the Site;
 - iii. EPA observed perimeter silt fencing that had been installed approximately 300 feet along the southern portion of the Site southwest of the sediment basin that had not been maintained in effective operating conditions at the time of the inspection as detailed below:
 1. EPA observed turbid water pooling in disturbed soil around the silt fence and into a forested area south of the Site where the installed silt fence terminates to the east;
 2. EPA observed a section of the installed silt fencing towards the east end that was not keyed into the ground and disturbed soil was observed on the downslope side of the silt fencing in the forested area; and
 3. EPA observed a section of silt fencing towards the west end that had been buried with soil.
 - iv. EPA observed a check dam constructed of large stone across the partially vegetated drainage swale approximately seven (7) feet wide and of variable height from six (6) inches at the ends to two (2) feet at the center, which was inconsistent with design specifications in the SWPPP. The stone check dam, or rock dam, design specifications in the SWPPP requires abutments which result in the ends of the dam being taller than the center, a minimum of a five (5) foot wide crest, a stone apron on the downstream side of the dam and additional design criteria;

- v. The SWPPP requires a sediment basin in the southern section of the Site and the construction sequence in the SWPPP requires that the immediate permanent stabilization of drainage swales and storm water management facilities shall be completed prior to building construction. At the time of the inspection, building construction had commenced and EPA observed an eroded channel and unvegetated soil on the north bank of the sediment basin located in the southern section of the Site;
 - vi. The SWPPP requires a second sediment basin in the southwestern section of the Site and the construction sequence in the SWPPP requires that the construction of drainage swales and stormwater management facilities need to be completed prior to building construction. At the time of the inspection, building construction had commenced and the sediment basin along the southwestern section of the Site had not been constructed;
 - vii. The SWPPP requires that, should mud and debris be tracked onto Canal Landing Boulevard from construction activity, the contractor shall take all necessary steps to clean the road. The SWPPP also includes construction specifications for stabilized construction entrances that require the use of three (3) inch stone not less than fifty (50) feet long, along with additional design criteria. Additionally, the construction sequence in the SWPPP requires that the construction of the stabilized construction entrance is to be completed first and prior to any land clearing and road or building construction. EPA observed sediment tracking on the paved construction entrance that leads to Bellwood Drive and woodchips on Canal Landing Boulevard from the second construction entrance, which was constructed of woodchips;
 - viii. The SWPPP requires that stabilization practices at the Site must include mulching the seeded area with hay or straw and must be initiated within fourteen (14) days of when construction activities have temporarily or permanently ceased and within no more than seven (7) days of when more than five (5) acres of land is open. The disturbed northern portion of the Site had been seeded, but vegetation had not been established and temporary erosion control measures, including hay or straw, were not in place at the time of the inspection. Additionally, this portion of the Site is located beyond the limit of disturbance specified in the SWPPP; and
 - ix. The SWPPP requires, in the construction sequence, that drainage swales are to be permanently stabilized with vegetation prior to road and building construction. At the time of the inspection, building construction had commenced and EPA observed a partially vegetated drainage swale extending southwest on the Site approximately 150 feet to the culvert pipe that discharges stormwater into the Erie Canal.
- b) Part II.C.2 of the Permit requires the owner or operator to maintain a copy of the General Permit (GP-0-10-001), NOI, NOI Acknowledgement Letter, SWPPP, MS4 Acceptance form and inspection reports at the construction site until all disturbed areas have achieved final stabilization and the NOT has been submitted to the NYSDEC. At the time of the inspection, a copy of the Permit (GP-0-10-001), NOI, NOI Acknowledgement Letter, SWPPP, MS4 Acceptance form and inspection reports were not available at the construction site, in violation of Part II.C.2 of the Permit.
 - c) Part IV.C.2.a of the Permit requires that, for construction sites where soil disturbance activities are on-going, the qualified inspector shall conduct a site inspection at least once every seven (7) calendar days. According to the submitted documentation covering the period from April 26,

2012 to November 28, 2012, weekly SWPPP inspections were not conducted in eleven (11) separate time periods of greater than seven (7) calendar days, in violation of Part IV.C.2.a of the Permit.

- d) Part IV.C.2.b of the Permit requires that, for construction sites where soil disturbance activities are on-going and the owner or operator has received authorization in accordance with Part II.C.3 to disturb greater than five (5) acres of soil at any one time, the qualified inspector shall conduct at least two (2) site inspections every seven (7) calendar days, and that the two (2) inspections shall be separated by a minimum of two (2) full calendar days. At the time of the inspection, greater than five (5) acres of soil were disturbed at the Site, based on EPA's observations and according to the submitted SWPPP inspection documentation. According to the submitted documentation covering the period from April 26, 2012 to November 28, 2012, a total of four (4) SWPPP inspections were conducted in the twenty-six (26) days, between August 30, 2012 and September 24, 2012, where greater than five (5) acres of the Site were disturbed, whereas at least seven (7) inspections should have been conducted during that period. Therefore, at least two (2) site inspections every seven (7) calendar days were not conducted while greater than five (5) acres of soil were disturbed, in violation of Part IV.C.2.b of the Permit.
- e) Part IV.C.5 of the Permit requires 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 needs 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. A review of submitted SWPPP inspection reports covering the period from April 26, 2012 to November 28, 2012 identified instances where the same needed corrective actions were documented multiple times in subsequent inspection reports prior to corrective action being completed, in violation of Part IV.C.5 of the Permit, as detailed below:
- i. "Sediment basin needs to be constructed in accordance with the SWPPP" was documented as a deficiency in thirteen (13) consecutive inspection reports dated May 29, 2012 through September 28, 2012;
 - ii. "Construction entrance needs to be constructed and maintained in accordance with the SWPPP" was documented as a deficiency in thirteen (13) consecutive inspection reports dated May 29, 2012 through September 28, 2012;
 - iii. "Silt fencing needs to be installed in accordance with the SWPPP along the south edge of the Site" was documented as a deficiency in four (4) consecutive inspection reports dated May 29, 2012 through June 20, 2012;
 - iv. "Silt fencing needs to be maintained in accordance with the SWPPP" was documented as a deficiency in eleven (11) consecutive inspection reports dated May 29, 2012 through September 19, 2012;
 - v. "Disturbed areas need to be stabilized specifically in the north portion of the Site" was documented as a deficiency in seven (7) consecutive inspection reports dated August 1, 2012 through September 28, 2012; and

- vi. "The drainage swale to the canal in the south portion of the Site needs to be stabilized in accordance with the SWPPP" was documented as a deficiency in seven (7) consecutive inspection reports dated August 16, 2012 through October 5, 2012.
10. On November 13, 2012, EPA issued a Request for Information ("RFI") to Respondent Spaziano (Docket No. CWA-IR-13-002) requesting a copy of the Site's SWPPP and routine inspection reports within thirty (30) calendar days of receipt of the RFI.
11. On December 11, 2012, EPA received a response to the RFI from Laurey Ritchie of Stormwater Solutions on behalf of Respondents.
12. On January 15, 2013, EPA issued an Administrative Order ("AO") and transmitted the CEI Report to Respondents (Docket No. CWA-02-2013-3020).
13. Respondents submitted responses to the AO and CEI report on December 5, 2012, January 22, 2013 and February 21, 2013.
14. On February 28, 2013, EPA conducted a Reconnaissance Inspection ("RI") at the Site and identified the following violations of the Site's CGP:
 - a) Part III.A.4.a of the Permit requires the owner or operator to amend the SWPPP whenever the current provisions prove to be ineffective at minimizing pollutants in stormwater discharges from the Site. At the time of the RI, EPA observed an unstabilized dirt channel and installed sediment basin that was ineffective at preventing sediment from leaving the Site, in violation of Part III.A.4.a of the Permit.
 - b) Part II.C.1 of the Permit 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, and Part VII.L of the Permit requires that the owner or operator shall, at all times, properly operate and maintain all facilities and systems of treatment and control which are installed or used by the owner or operator to achieve compliance with the conditions of this permit and with the requirements of the SWPPP. Additionally, Part IV.A.1 of the Permit requires the owner or operator to ensure that all erosion and sediment control practices identified in the SWPPP are maintained in effective operating conditions at all times. The following SWPPP elements had not been implemented and/or maintained in effective operating conditions at the time of the EPA inspection, in violation of Parts II.C.1, VII.L and IV.A.1 of the Permit:
 - i. The SWPPP provides construction specifications for stabilized construction entrances that require the use of three (3) inch stone not less than fifty (50) feet long along with additional design criteria. Additionally, the construction sequence in the SWPPP requires that the construction of the stabilized construction entrance be completed first, and prior to any land clearing and road or building construction. At the time of the RI, EPA observed significant vehicle tracking of sediment from an unstabilized portion of the Site onto the paved portion of the road, in violation of Part IV.A.1 of the Permit.
 - ii. The SWPPP requires, in the construction sequence, that drainage swales be permanently stabilized with vegetation prior to road and building construction. At the time of the RI,

building construction had commenced and EPA observed an unvegetated drainage swale extending around the western edge of the Site to the sediment basin that discharges stormwater into the Erie Canal, in violation of Part IV.A.1 of the Permit.

c) Part I.B.1 of the Permit requires that there be no increase in turbidity that will cause a substantial visible contrast to natural conditions. At the time of the RI, EPA observed a turbid discharge from the Site into the Erie Canal via the pipe outfall, in violation of Part I.B.1 of the Permit.

15. Based on the foregoing Findings of Fact and Conclusions of Law, Respondents are liable for 2,317 violations of Section 301 of the Clean Water Act, 33 U.S.C. § 1311, over the course of one hundred and seventy seven (177) days, for violating the permit issued to them under Section 402 of the Act, 33 U.S.C. § 1342.

IV. NOTICE OF PROPOSED ORDER ASSESSING A CIVIL PENALTY

Based on the foregoing findings, 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 Respondents assessing a penalty of **\$120,000**. EPA determined the proposed penalty after taking into account the applicable factors identified at Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3). EPA has taken account of the nature, circumstances, extent and gravity of the violations, and Respondents’ prior compliance history, degree of culpability, economic benefit or savings accruing to Respondents by virtue of the violations, and Respondents’ ability to pay the proposed penalty. EPA may issue the Final Order Assessing Administrative Penalties thirty (30) days after Respondents’ receipt of this Notice, unless Respondents file an Answer to this Complaint within that time and requests a Hearing on this Notice pursuant to the following section.

V. 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 Respondents intend to contest any material fact upon which the Complaint is based, to contend that the proposed penalty is inappropriate or to contend that Respondents are entitled to judgment as a matter of law, Respondents 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**

Respondents 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). Respondents’ 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 Respondents have any knowledge. 40 C.F.R. § 22.15(b). Where Respondents lack knowledge of a particular factual allegation and so state 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 that Respondents dispute (and thus intend to place at issue in the proceeding), (3) the basis for opposing the proposed relief and (4) whether Respondents request a Hearing. 40 C.F.R. § 22.15(b).

Respondents' failure to affirmatively raise in the Answer facts that constitute or that might constitute the grounds of a defense may preclude Respondents, 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 Respondents in their Answer, a Hearing upon the issues raised by the Complaint and Answer may be held. 40 C.F.R. § 22.15(c). If however, Respondents do 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 Respondents 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 Respondents 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 Respondents fail 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 Respondents fail 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)], Respondents may be found in default upon motion by Complainant. 40 C.F.R. § 22.17(a). Default by Respondents constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the Complaint and a waiver of Respondents' right to contest such factual allegations. 40 C.F.R. § 22.17(a). Following a default by Respondents 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 Respondents 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 Respondents, and to collect the assessed penalty amount, in federal court.

VI. INFORMAL SETTLEMENT CONFERENCE

Regardless of whether Respondents request 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, Respondents may comment on the charges made in this Complaint and Respondents may also provide whatever additional information they believe to be relevant to the disposition of this matter, including: (1) actions Respondents have taken to correct any or all of the violations herein alleged, (2) any information relevant to the amount of the proposed penalty, (3) the effect the proposed penalty would have on Respondents' ability to continue in business and/or (4) any other special facts or circumstances Respondents wish to raise. Note that no penalty reduction will be made simply because an informal settlement conference is held.

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. Respondents are referred to 40 C.F.R. § 22.18.

Any request for an informal conference or any questions that Respondents may have regarding this Complaint should be directed to:

Chris Saporita, 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) 637-3203
Fax: (212) 637-3199

The parties may engage in settlement discussions regardless of whether Respondents have requested a Hearing. 40 C.F.R. § 22.18(b)(1). Respondents' request for a formal Hearing does not prevent Respondents 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 Respondents' obligation to file a timely Answer to the Complaint pursuant to 40 C.F.R. § 22.15.

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 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). In accepting the Consent Agreement, Respondents waive any right to contest the allegations in the Complaint and waive any right to appeal the Final Order. 40 C.F.R. § 22.18(b)(2).

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 Respondents. Entering into a settlement agreement does not extinguish, waive, satisfy or otherwise affect Respondents' 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.

VII. RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR CONFERENCE

Instead of filing an Answer, Respondents may choose to pay the total amount of the proposed penalty, **\$120,000**, within thirty (30) days after receipt of the Complaint, provided that Respondents file 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-02-2013-3401

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 Respondents elect 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 Respondents shall constitute a waiver of Respondents' 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 Respondents' 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.

VIII. 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:

Chris Saporita, 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) 637-3203
Fax: (212) 637-3199

IX. GENERAL PROVISIONS

1. Respondents have 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 Respondents' continuing obligation to comply with the Act, and with any separate Compliance Order issued under Section 309(a) of the Act, 33 U.S.C. § 1319(a), for the violations alleged herein.

ISSUED THIS 5th DAY OF SEPTEMBER, 2013.



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:

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-02-2013-3401

CERTIFICATION OF SERVICE

SEP 06 2013

I certify that on _____, 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:

Alfred Spaziano and
Atlantic Funding and Real Estate, LLC
P.O. Box 26350
Rochester, New York 14626

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: 9/6/13


Secretary

New York, New York