



RIVERKEEPER®

Via Certified Mail – Return Receipt Requested

September 14, 2009

Ferrara Bros. Building Materials Corp.
Joseph Ferrara, Chief Executive Officer
120-05 31st Avenue
Flushing, NY 11354

Ferrara Bros. Building Materials Corp.
435 Hoyt St.
Brooklyn, NY 11231

RE: Notice of Intent to Sue **Ferrara Bros. Building Materials Corp.** for Clean Water Act Violations at its property located at or near 435 Hoyt Street, Brooklyn, NY 11231

Dear Mr. Ferrara:

This letter constitutes Riverkeeper's NOTICE OF INTENT TO SUE Ferrara Bros. Building Materials Corp. (hereinafter "Ferrara"), as owner and operator of a concrete supply facility located at or about 435 Hoyt Street, Brooklyn, NY 11231, for violations of the federal Clean Water Act ("CWA" or "the Act"), 33 U.S.C. §1251 *et seq.* Specifically, this letter gives notice of our intent to seek redress for the illegal discharge of concrete waste, stone, and aggregate material from the Ferrara facility into the Gowanus Canal, which drains into New York Harbor.

Riverkeeper is a non-profit, environmental watchdog organization that protects and safeguards the ecological integrity of the Hudson River, its tributaries, and the New York City Watershed. On behalf of our 7,000 members, we routinely patrol the region's waters including the Gowanus Canal and, when necessary, file citizen suits under the CWA to prevent and remediate environmental pollution problems. Many of Riverkeeper's members and constituents live near the Gowanus Canal and recreate in and around this area of Brooklyn.

Ferrara is Discharging Concrete Waste and Stone into the Gowanus Canal

Ferrara owns and operates the above-referenced concrete supply facility located at 435 Hoyt Street, Brooklyn, NY 11231 sited directly adjacent to the Gowanus Canal (the "Canal"). Upon information and belief Ferrara uses trucks, loaders, mixers, and other equipment to move concrete and other raw materials which are stored in piles onsite. Ferrara uses large amounts of water to clean both its fleet of trucks and its property. Some of this wash water and any precipitation that falls on the property flow into the Canal through bulkhead fissures, gaps, and cracks, carrying concrete waste and other solids into the Gowanus Canal. Upon information and belief, Ferrara utilizes barges on the Canal to transport stone and other aggregate to its concrete

supply facility. During barge unloading operations some of this aggregate material falls onto the Ferrara bulkhead, the Canal's banks, and into the Canal.

Riverkeeper observed discharges of liquid concrete and/or other suspended solids from Ferrara into the Gowanus Canal as well as the presence of a discolored plume floating on the surface of the Canal on the following dates:

June 19, 2009: Riverkeeper staff observed a turbid discharge interspersed with fine white sediment entering the Canal from streams of water originating on the Ferrara property. The effluent was observed to be discharging into the Canal from cracks or discrete fissures in the bulkhead. There was a turbid, cloudy pool of water beneath the fissures in the Canal. In addition the bulkhead areas from which the effluent was discharging were observed to be discolored/stained a white color distinctive from the grey concrete bulkhead.

July 15, 2009: Riverkeeper staff again documented discharges into the Gowanus Canal from the Ferrara bulkhead. Staff witnessed two distinct violations on this date. At approximately 9:30 AM, we witnessed a turbid white discharge and floating cloudy pool beneath the bulkhead fissures. Soon after, the discharge stopped and the cloudy water dispersed. At approximately 11:00 AM, Riverkeeper staff witnessed the discharge again and the plume of turbid water. Riverkeeper staff collected a water sample directly from the discharge. Lab results show that this discharge had a pH of 9.73-a highly alkaline reading, a turbidity reading of 646 NTU, and a Total Suspended Solids reading of 653 mg/l.

Staff also documented the continued white discoloration/staining of the bulkhead in the vicinity of the observed discharges. Staining of the bulkhead suggests that the observed discharges are occurring on a regular basis.

In addition Riverkeeper has reason to believe that Ferrara is very likely discharging stone and other aggregate into the Gowanus Canal from the Ferrara property and from barges that moor adjacent to the property to unload stone/aggregate material. Riverkeeper staff has observed piles of stone and other aggregate along the Ferrara bulkhead and piled up in ledges on the concrete block wall on the Ferrara property adjacent to the Gowanus Canal. These piles of stone and other aggregate were observed on May 29, 2009, June 19, 2009, and July 15, 2009.

The April 2007 GEI Consultants, Inc. Draft Remedial Investigation Technical Report, Gowanus Canal, Brooklyn, New York, ACO Index No. A2-0523-0705 (pg 40, 48) found that the Canal sediments directly adjacent to the Ferrara property contained coarse gravel fill and noted that this appeared to have been caused by barge traffic and spillage.

The findings of this report and staff observations give Riverkeeper reason to believe that Ferrara brothers is discharging stone and other aggregate into the Gowanus Canal in violation of the Clean Water Act.

Ferrara is Violating the Federal Clean Water Act

Pursuant to sections 505(a) and (b) of the CWA, 33 U.S.C. sections 1365(a) and (b), Riverkeeper intends to sue Ferrara for violating, and continuing to violate, effluent standards and limitations as defined under section 505(f) of the CWA, 33 U.S.C. § 1365(f), by discharging pollutants into waters of the United States without a permit required by CWA section 301(a), 33 U.S.C. § 1311(a).

The CWA prohibits the discharge of pollutants from a point source to the waters of the United States except when pursuant to and in compliance with a permit.¹ *See* 33 U.S.C. § 1311(a); 33 U.S.C. § 1342. The Act defines “pollutant” to include chemical wastes, biological materials, rock, sand, and industrial waste discharged into water. 33 U.S.C. § 1362(6). Discharges from Ferrara’s property qualify as pollutants under the CWA because such discharges contain liquid concrete, rock particles, suspended solids, settleable solids, turbidity, and alkalinity. Any discharge of any pollutant into the Canal is a violation of the Act, enforceable by citizens. *See* 33 U.S.C. §1365.

The CWA defines “point source” as “any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, tunnel, conduit, well, discrete fissure . . . from which pollutants are or may be discharged.” 33 U.S.C. §1362(14). As described above, the fissures, gaps, and cracks in the bulkhead through which Ferrara is discharging pollutants constitute “point sources” under CWA §1362(14). In addition the barges moored in front of Ferrara’s property and the loaders and equipment used to unload and move stone and aggregate constitute “point sources” under the Act.

The CWA also prohibits placement of fill or debris in waters of the United States without a permit from the US Army Corps of Engineers. *See* CWA section 404, 33 U.S.C. §1344. The dumping of debris such as rocks and aggregate into the Gowanus Canal is precisely what this section of the Act is designed to prohibit.

The United States Supreme Court has defined the phrase “waters of the United States” under the CWA to include, at its most basic, all waters “navigable in fact, or readily susceptible of being rendered so.” *Rapanos v. United States*, 547 U.S. 715, 723 (2006). This definition clearly includes the Gowanus Canal. The Supreme Court further elaborated that the phrase also encompasses more waters than those simply navigable in fact. Specifically, it held that wetlands with a continuous surface connection to bodies that are “waters of the United States” in their own right are adjacent to such waters and therefore covered under the CWA. *Rapanos*, 547 U.S. at 742. The Gowanus Canal is navigable in fact and is therefore a “water of the United States” under the CWA.

¹ The State of New York was delegated authority by the Environmental Protection Agency to administer the National Pollution Discharge Elimination System (“NPDES”) permit program pursuant to 33 U.S.C. Section 1342(b). The State Pollution Discharge Elimination System (“SPDES”) permit program is the functional equivalent of NPDES.

Upon information and belief Ferrara does not have a State Pollution Discharge Elimination System ("SPDES") permit, which is required by the CWA for such discharges and does not have a CWA section 404 permit for discharging dredged or fill material into the Canal.

Upon information and belief Ferrara's discharge of pollutants is ongoing, continuous, and in violation of the federal Clean Water Act, 33 U.S.C. §1251 *et seq.* Each day of unpermitted discharges comprises a series of separate violations of the CWA, with a discrete violation for each pollutant illegally discharged from each point source. Ferrara will remain in violation of the Act each day that the company discharges concrete waste and other pollutants without a CWA permit.

Summary

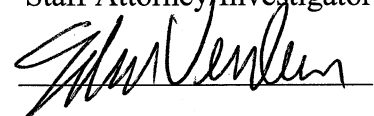
Riverkeeper, Inc. believes that this Notice of Intent to Sue sufficiently states grounds for filing suit. The discharges referenced above and Ferrara's failure to obtain a required SPDES permit constitutes on-going violations of the CWA. Each day of unpermitted discharges without a SPDES permit comprises a series of separate violations of the CWA, with a discrete violation for each pollutant illegally discharged from the point source. Ferrara will remain in violation of the Act until it ceases all discharges of pollutants to waters of the United States or obtain permits therefore. CWA section 33 U.S.C. §1319(d) and 40 C.F.R. §19.4, authorize civil penalties of up to \$37,500 for each violation of the Act over a five year statute of limitations.

At the close of the 60-day CWA notice period, we intend to file a citizen suit against Ferrara as owner and operator of the above-referenced facility for the violations discussed herein and for **all similar violations that occur after your receipt of this notice letter**. We intend to seek civil penalties (payable to the U.S. Treasury) and injunctive relief, as well as attorney's fees and costs, for these CWA violations.

During the 60-day notice period, we will be willing to discuss effective remedies for the violations noted in this letter. If you wish to pursue a settlement, we suggest that you initiate those discussions within ten (10) days of receiving this notice so that a meeting can be arranged and negotiations may be completed before the end of the 60-day notice period. Please do not hesitate to contact the undersigned at 914-478-4501 x 247 if you wish to discuss these matters further.

Very truly yours,

Joshua S. Verleun, Esq.
Staff Attorney/Investigator



Michael Hill,
Legal Intern

/Michael Hill/

Cc (all via certified mail- return receipt requested)

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