

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2011 JUL -7 9 44
REGIONAL HEARING
CLERK

IN THE MATTER OF:

**Dependable Towing & Recovery, Inc.
and David A. Whitehill**
2160 Lafayette Street
P.O. Box 266
Falconer, New York 14733

Respondents.

Proceeding to Assess a Class II
Administrative Penalty Pursuant to
Section 309(g) of the Clean Water Act,
33 U.S.C. §1319(g)

Docket No. CWA-02-2011-3601

**Proceeding Pursuant to § 309(g) of the Clean
Water Act, 33 U.S.C. § 1319(g) to Assess Class II
Civil Penalty**

**COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION TO AMEND THE
ANSWER TO COMPLAINT**

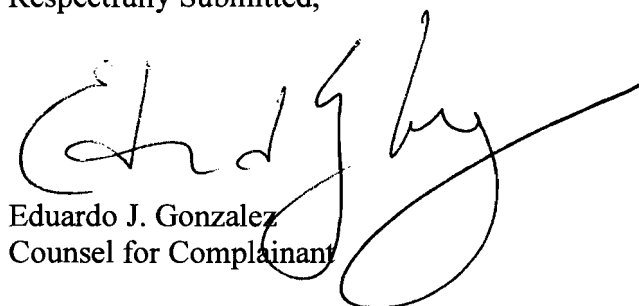
1. On May 6, 2011, Dependable Towing & Recovery, Inc., and David A. Whitehill (collectively "Respondents") filed their original Answer to the Complaint and Request for a Hearing ("Answer").
2. On June 23, 2011, Respondents moved to amend their original Answer.
3. Complainant, U.S. Environmental Protection Agency ("EPA"), Region 2, does not oppose Respondents' motion, and additionally addresses affirmative defenses raised by Respondents and several outstanding issues of fact in this matter.
4. Complainant agrees with Respondents that in the instant matter leave to amend the Answer will not unfairly prejudice Complainant and the request to amend is not the product of undue delay.
5. This case is in an early stage of proceedings and currently the Parties are in the stages of

Alternative Dispute Resolution (ADR) pursuant to 40 C.F.R. § 22.18(d). On June 20, 2011 the Parties had their initial conference with the ADR neutral. A follow-up conference is scheduled with the ADR neutral for Monday, July 11, 2011.

6. Complainant remains interested in pursuing potential resolution of the instant matter through the use of the ADR process.
7. If the Parties were not able to reach a resolution of this matter via the ADR process, the applicable Consolidated Rules of Practice, at 40 CFR § 22, provide for prehearing and hearing proceedings that will allow for the parties to exchange of information and allows the court to narrow the issues of fact and law, if any. In addition, the Rules provide ample time for the Parties to present their motions before the Court typically prior to the commencement of the hearing, whereby the applicability and merits of defenses can be argued. 40 C.F.R. § 22.21(a)-(b)
8. Based on the Parties' pleadings before the Court in this matter, particularly on Respondents' Amended Answer, genuine issues of material fact exist which warrant an administrative hearing if the parties were not able to resolve this matter via settlement.
9. In a timely manner within the purview of the proceedings in this matter, Complainant will be prepared to document and argue that Respondents have violated the Clean Water Act, by unlawfully discharging fill material into waters of the U.S. within the five years preceding the filing of the Complaint. As a result, the five year statute of limitations under 28 U.S.C. § 2462 does not bar Complainant's claim.
10. In addition, at the appropriate stage of the proceedings, Complainant will argue and document that Respondents did not act reasonably and good faith.
11. Respondents, additionally, will have to substantiate their affirmative defenses.

12. Complainant believes that this matter should continue within the purview of the ADR process in an attempt to explore resolution. Alternatively, because the Amended Answer confirms the existence of genuine issues of material fact, administrative proceedings should continue as per the court defined schedule. See C.F.R. § 22.21(b).

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Eduardo J. Gonzalez', with a long horizontal stroke extending to the right.

Eduardo J. Gonzalez
Counsel for Complainant

Dated: July 7th 2011