

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG.II
2011 DEC 27 P 2:44
REGIONAL HEARING
CLERK

IN THE MATTER OF

Dependable Towing & Recovery, Inc.,
and David A. Whitehill,

Respondents

Docket No. CWA-02-2011-3601

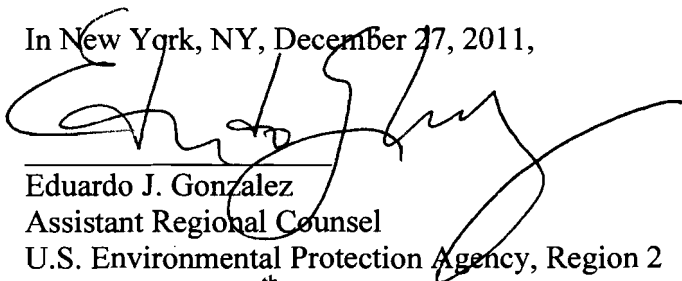
COMPLAINANT'S REBUTTAL PREHEARING EXCHANGE

Pursuant to an Order of Judge Barbara A. Gunning, dated October 5, 2011, the Complainant in the above captioned, the U.S. Environmental Protection Agency, respectfully submits its Rebuttal Prehearing Exchange:

- I. Within fifteen (15) days after Respondents file their prehearing information exchange, Complainant shall file a document specifying a proposed penalty and explaining in detail how the proposed penalty was determined.**

Complainant hereby is enclosing a document titled "Penalty Calculation pursuant to Section 309(g)(3) of the Clean Water Act", dated December 27, 2011, prepared by David Pohle, Wetlands Enforcement Coordinator for the Division of Environmental Planning and Protection, Region 2.

In New York, NY, December 27, 2011,



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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF

Dependable Towing & Recovery, Inc., and
David A. Whitehill,

Respondents

Docket No. CWA-02-2011-3601

CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing **Complainant's Rebuttal Prehearing Exchange**, dated December 27, 2011, and bearing the above-referenced docket number, in the following manner to the respective addressees below:

Original and copy, **Federal Express** to:

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

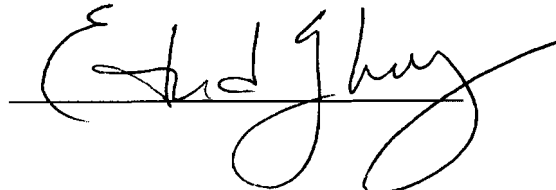
Copy by **Federal Express** to:

Deborah J. Chadsey, Esq.
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Copy by **Federal Express** to:

Administrative Law Judge:
The Honorable Barbara A. Gunning
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Franklin Court Building
1099 14th Street, N.W., Suite 350
Washington, D.C. 20005
[Phone: (202) 564-6281 Attn: Mary Angeles, Legal Staff Assistant]

12/27/11
Date



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

DATE: DEC 27 2011

SUBJECT: Penalty Calculation pursuant to Section 309(g)(3) of the Clean Water Act;
In the Matter of Dependable Towing & Recovery, Inc., and David A. Whitehill;
Docket No. CWA-02-2011-3601

FROM: David Pohle, Wetlands Enforcement Coordinator
Division of Environmental Planning and Protection, Region 2
Watershed Management Branch, Wetlands Protection Team



TO: File

This Memorandum for the Record presents the determination of an appropriate proposed penalty for assessment against Dependable Towing & Recovery, Inc. ("Dependable"), and David A. Whitehill, hereinafter the "Respondents," through the following application of the statutory factors in Section 309(g)(3) of the Clean Water Act ("the Act"), 33 U.S.C. §1319(g)(3).

(A) Nature, Circumstances, Extent and Gravity of the Violation

The penalty is for violation of Section 301(a) of the Act, 33 U.S.C. §1311(a), involving discharge of pollutants, consisting of earthen fill material, into waters of the United States, from point sources consisting of mechanized construction equipment, without authorization by the Secretary of the Army as provided by Section 404 of the Act, 33 U.S.C. §1344. The affected waters of the United States are freshwater, forested wetlands ("the Wetlands") adjacent to Cassadaga Creek, which is a navigable-in-fact waterway. The discharge of pollutants occurred initially in 2006, and, to the extent that such discharge has not been removed, it remains today as a continuing violation of Section 301 of the Act, 33 U.S.C. §1311, as it remains not authorized by the Secretary of the Army as provided by Section 404 of the Act, 33 U.S.C. §1344.

The location of the unauthorized work is the site of the Dependable facility ("the Site") with address 2160 Lafayette Street, Falconer, New York, just outside the limits of the Village of Falconer, in the Town of Ellicott, Chautauqua County, NY. The area is immediately northeast of the city of Jamestown. The Wetlands are a water of the United States which came under the jurisdiction of the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("the Corps") effective September 1, 1976. The Act's jurisdiction encompasses "navigable waters" which are defined as "waters of the U.S.," 33 U.S.C. §1362(7).

Background

Mr. Whitehill is an individual who owns property at the Site. His property consists of four contiguous tax parcels, together situated immediately on the north side of the Southern Tier Expressway (also known as Interstate 86), and immediately on the east side of North Work Street, totaling approximately 75 acres:

Parcel 354.00-1-38, which consists of 60.3 acres;
Parcel 354.18-1-9, which consists of 1.7 acres;
Parcel 354.18-1-11, which consists of 3.7 acres; and
Parcel 354.18-1-8, which consists of 8.9 acres.

Also, relevant to this case are the following three additional tax parcels, two of which are owned by the City of Jamestown Board of Public Utilities, and one of which is owned by Holly F. Bianco, of 226 East Everett Street, Falconer, NY:

City of Jamestown Board of Public Utilities

Parcel 354.00-1-39, which consists of 95.7 acres
Parcel 354.00-1-36, which consists of 22.3 acres

Holly F. Bianco

Parcel 354.00-1-37, which consists of 20.0 acres.

These three parcels are contiguous with each other, and are contiguous with, and to the north of, the four parcels owned by Mr. Whitehill. These seven tax parcels together total approximately two hundred acres, all situated east side of North Work Street, north of the Southern Tier Expressway, and south of Cassadaga Creek.

These seven parcels contain a large portion of a forested wetland, i.e., the Wetlands. The forested wetland is under the jurisdiction of both the federal and state governments. At the state level, the wetland has a specific identifying designation, wetland GE-14. It is one of a group of state-regulated wetlands adjacent to Cassadaga Creek, along the Marden E. Cobb Waterway Trail, which is a flatwater canoe and kayak trail maintained by Chautauqua County.

Mr. Whitehill is the Chief Executive Officer of Dependable. Dependable is a New York Domestic Business Corporation. Dependable operates at the Site. Dependable and Mr. Whitehill have been, and may presently continue to be, engaged in towing vehicles, transporting vehicles, and buying and selling vehicles. Mr. Whitehill and Dependable also operate at the Site under the name Dependable Auto Transport, Inc., which is not known to be a registered company. Dependable is known to hold or to have held towing contracts with various government entities, for example with the city of Jamestown for towing vehicles from its jurisdiction, and with the New York State Thruway Authority for towing vehicles from the Southern Tier Expressway. (An exit for the Southern Tier Expressway is located nearby the Site in Falconer). The active Dependable

facility consists of an office, mechanic shop, and approximately twenty acres of land where vehicles are stored. Mr. Whitehill's personal residence is also situated at the Site near the office. The buildings at the facility (office, mechanic shop, residence) are situated in the extreme southwest corner of the Site on Parcel 354.18-1-11. These are not within the Wetlands.

Approximately 16.5 acres of the land used for vehicles storage consists of filled Wetlands. These 16.5 acres consist of dry land created by discharging earthen fill material into the Wetlands without prior authorization from the Corps or the state. The discharging has occurred incrementally from 1994 through 2009. The circumstances of the discharging is that Mr. Whitehill allows local municipalities, and local and state highway departments, to bring excavation material (left over from infrastructure projects) to the Site for disposal, and he grades the material in the Wetlands using his mechanized earth-moving equipment. Of these 16.5 acres, approximately twelve to twelve-and-one-half acres of the dry land was created during the period 1994 to early 2006. At least four acres of this dry land was created by discharging earthen fill material into the Wetlands without prior authorization from the Corps within the five years prior to the date of filing of the Complaint in this case, more specifically from June 2006 to 2009, and is the subject of this penalty proceeding.

The four to four-and-one-half acres of dry land created within the five years prior to filing of the Complaint in this case consists of four, discrete footprints of fill area, representing incremental expansions of the total fill area during the period of June 2006 to 2009. Three of these four distinct footprints are located on tax parcels owned by Mr. Whitehill. These three footprints total 2.5 acres. The fourth footprint is located on portions of tax parcels owned by the City of Jamestown Board of Public Utilities and Holly F. Bianco, i.e. filling activities of Respondents encroached onto neighboring properties. See Attachment 1.

Case History

The New York State Department of Environmental Conservation ("NYSDEC") first took enforcement action against Respondents for unauthorized filling activities in state wetland GE-14 beginning in the 1990's. But the Corps only learned of the unauthorized filling activities in August 2008. The Corps met with Mr. Whitehill in May 2009, and learned that this activity was on-going at that time. The Corps learned that the filling activity involved thousands of truckloads of material discharged to depths of between a few inches and a few feet. The Corps inspected the Site in June 2009, and observed the discharging of earthen fill material into the Wetlands from mechanized earth-moving material in its presence. This discharging was occurring despite Mr. Whitehill's knowledge that the activity was illegal. The discharging was demonstrably under Mr. Whitehill's control as the Corps witnessed Mr. Whitehill direct a worker to cease the activity in its presence. During the inspection, the Corps made a field determination that the Wetlands are, in fact, wetlands as defined in the Clean Water Act implementing regulations. The Corps also created photographic documentation of the Wetlands and the fill area. Using this field data, historical aerial photography, and desktop reference material including National Wetland Inventory maps for the area, the U.S. Department of Agriculture soils mapping for the area, and topographic maps for the area, the Corps estimated that approximately 18.5 acres of dry land had been created from the Wetlands at the Site.

On June 15, 2009, the Corps issued a Cease and Desist Order to Respondents for the filling activities, and directed them to either restore the affected portions of the Wetlands or restore part of them and apply for an after-the-fact permit for the remainder. Since Respondents pursued neither option available to them, the Corps transferred the case to EPA for further enforcement. The transfer of lead enforcement agency status for the case was made in September 2009. EPA initially re-affirmed the Corps' action by issuing its own Cease and Desist Order to Respondents on September 30, 2009. Thereafter, upon the weight of the evidence provided to EPA by the Corps, and EPA's own review of historical aerial photography and desktop reference material, EPA issued Findings of Violation and Order, CWA-02-2010-3501 to Respondents on March 24, 2010 ("the Order"). The Order described a fill area of 16.5 acres, total, using a 1994 historical aerial photograph as the baseline (rather than including the entire 18.5 acres described by the Corps). The Order required restoration of all 16.5 acres, including replanting, by June 30, 2011.

EPA hand-delivered the Order to Mr. Whitehill in a meeting at the Site on March 31, 2010. EPA inspected the Site in conjunction with that meeting on March 31, 2010, and observed that substantial amounts of earthen fill material, equivalent to thousands of truck loads, had been discharged into the Wetlands to depths from a few inches to a few feet, and graded smooth to create dry land upon which vehicles could drive and be stored. EPA observed that the materials stored on the fill area included vehicles and other materials such as lumber. EPA also created photographic documentation of the Wetlands and the fill area.

Respondents submitted a restoration plan pursuant to the Order, but only removed approximately one acre of the fill material. EPA re-inspected the Site on October 20, 2010, and met again with Mr. Whitehill at the Site. EPA observed that the only fill material removed was material from the property of the City of Jamestown Board of Public Utilities consisting of approximately one acre. No replanting had commenced. Stored vehicles had been removed from the property owned by Ms. Bianco, but the earthen fill material had not been removed from there. EPA created photographic documentation of the removal area and the remaining fill. To EPA's understanding, no further removal or restoration activities have taken place at the Site since October 20, 2010.

Functions and Values of the Affected Resource, and Impacts of Violation Thereon

The Wetlands consist of a hardwood swamp covering approximately a couple hundred acres adjacent to Cassadaga Creek, a traditional navigable water. They are one of a series of wetlands situated adjacent to Cassadaga Creek. Cassadaga Creek itself is a wide creek that flows to Conewango Creek which itself empties into the Allegheny River at Warren, Pennsylvania. Cassadaga Creek is accessible to navigation by watercraft, and is used as a recreational canoe and kayak trail.

Wetlands, in general, potentially provide a number of commonly-identified ecological services for adjacent and downstream waters. These include flood water storage; shoreline stabilization; water quality improvement; groundwater recharge; organic carbon production; and provision of nursery grounds and habitat for finfish, shellfish, waterfowl, wildlife, and endangered and threatened species. They also provide areas for hunting, fishing, recreational pursuits, education and scientific research, and aesthetically-pleasing open space. The "opportunity" for providing the services

refers to whether or not a wetland that is, by its nature, capable of providing a service is actually in a landscape position, or publicly accessible, such that it provides the service. The value of the ecological service depends upon social and economic needs of the community.

The following are some ecological services which the Wetlands are capable of providing, have opportunity to provide, and are valuable to the community:

1. Flood water storage
2. Water quality improvement
3. Wildlife habitat
4. Organic carbon production/export

Flood Water Storage – Flooding affects properties and has adverse economic consequences within communities. The Wetlands function to provide flood water storage, which may be important now or in the future. Forested wetlands may store flood waters in a number of ways. Water may be ponded on the surface of the wetlands. It may also be taken up by the trees and shrubs, and stored within them. Some water may be stored as pore water within the wetland soils. Other water percolates from the soil to the groundwater. Forested wetlands typically have a “pit and mound” (a.k.a., “hummock and hollow”) microtopography. Hummocks exist around tree trunks and large roots. Small depressions, or “hollows” are found in between. Larger hummocks and hollows occur where trees (which typically have shallow roots in wetlands due to the high water table) have fallen. The root balls of fallen trees are large hummocks, and the pit left in the ground is a large hollow. The small and large pits and hollows of forested wetlands provide numerous collection places for water storage, much like an English muffin has “nooks and crannies” that hold melted butter. Fallen logs also act as “dams” creating small reservoirs of flood water. During the growing season, evaporation from the wetland is increased by the transpiration in the growing trees and shrubs. This represents not exactly a storage of water, but a release from the system that allows for increased capacity to store more flood water during the warmer months. This general description of forested wetlands accurately describes the Wetlands at the Site, based upon observations during inspections.

Loss of flood water storage capacity can exacerbate existing or cause new problems of property loss or damage in the Cassadaga Creek watershed and downstream watersheds. Creeks and rivers may be more likely to overflow their banks, and/or flood a greater area of properties adjacent to them. Furthermore, increased volume of flow in Cassadaga Creek could result from the loss of storage capacity with the effect of increasing the erosive force of the flow in the creek, and increasing damage to the creek banks from this force, and increasing the carrying capacity of Cassadaga Creek for sediment. Sediment in creeks is a form of pollution that affects breeding habitat for fish and invertebrates, and reduces the penetration of light into the water. Light is necessary for growth of submerged aquatic vegetation that provides nursery and feeding for aquatic species. In the converse, the stored flood water within the Wetlands is slowly released to Cassadaga Creek during dry periods. Thus, the Wetlands provide a reservoir for Cassadaga Creek, storing water during rainy periods and slowly releasing it such that the flow in Cassadaga Creek is less “flashy” and more constant. During dry periods, the Wetlands are a contributor of water to Cassadaga Creek to increase the flow and ensure the continued provision of habitat for fish and invertebrates in the creek through dry periods.

The filling activity which is the subject of this penalty proceeding involves loss of four to four-and-one-half acre of floodwater storage capacity within the Cassadaga Creek watershed.

Water Quality Improvement - Wetlands filter pollutants such as nitrogen, phosphorus, silt and sediment, and waterborne toxics. Wetlands are able to purify water in several ways. Nutrients which are dissolved in water, such as nitrates and phosphates, are taken up by wetland plant roots and incorporated as plant tissue. When excess nutrients enter the aquatic ecosystem, they can promote the growth of harmful algae. By removing such components from runoff, wetlands purify the water that ultimately enters downstream water bodies, and thus work to maintain healthy aquatic ecosystems. Silt and sediments which enter a wetland settle out in the topographic depressions of the wetland, and get trapped by root complexes. While there, organic contaminants and heavy metals adsorb and bind with the sediment/root complexes, becoming for the most part unavailable for aquatic life. This function is extremely important to downstream aquatic systems. Sediments cause direct harm to aquatic systems because they limit light penetration, smother filter feeders, and cover riverine cobble/gravel substrates that provide spawning habitat for fish. In addition, the suspension and transport of sediments can mobilize adsorbed organic and heavy metal pollutants. Instead of being transported downstream where these pollutants would accumulate with pollutant-laden runoff from other sites and contribute to the degradation of the downstream waters, they are filtered from the runoff by wetlands. Sources of the pollutants described above may be varied. Nutrients such as nitrogen and phosphorus may come from fertilizers applied to lawns, and from animal wastes. Surface run-off from commercial and residential developments may contain silt and sediment from construction activities and areas of bare ground. Waterborne toxics such as polycyclic aromatic hydrocarbons and heavy metals may derive from automobiles, industrial activities, and from pesticides. Replacement of wetlands with an urbanized landscape use results not only in the loss of the existing wetland filter, but its replacement with new sources of pollution in many different forms and pathways.

The filling activity which is the subject of this penalty proceeding involves conversion of four to four-and-one-half acres of the Wetlands from being a filter of pollutants to being a new source of pollution.

Wildlife Habitat - Forested wetlands provide a diverse array of habitats for a wide variety of both wetland-dependent species and forest-dependent species. Such species groups include amphibians, reptiles, waterfowl, and passerine birds. They are particularly important to the maintenance of local amphibian populations. Although there are amphibians which remain water-dependent throughout their life, many species, especially those in urbanizing wetlands, use both terrestrial and wetland habitats; all amphibians must have aquatic habitats for breeding.

The filling activity which is the subject of this penalty proceeding involves elimination of four to four-and-one-half acres of wildlife habitat.

Organic Carbon Production/Export – This consists of the production and export of the organic carbon in the growing vegetation of forested wetlands, which accumulates as leaf litter, and gets broken down and converted to more usable forms of carbon by bacteria, fungi and invertebrates. This organic carbon makes its way downstream with water flow. In the particular circumstance

of the Wetlands, it accumulates in the topographic depressions, but is also released in some stormwater flow and makes its way to Cassadaga Creek where the organic carbon supports fish and invertebrate populations.

The filling activity which is the subject of this penalty proceeding involves elimination of four to four-and-one-half acres of organic carbon production and export.

The physical, chemical, and biological functions of the Wetlands have a synergy of function. The water quality maintenance that the Wetlands provide for Cassadaga Creek increases the quality and diversity of available habitats within the waterway for macroinvertebrates, fishes, and amphibians, and also improves food sources for waterfowl, wading birds, and other birds. The delay in the release of floodwaters stored by the Wetlands not only acts to control local flooding, but also decreases the energy of the released floodwater, so that there is less scour and thus lower sediment transport. Consequently, the Wetlands not only provide habitat and support biodiversity within themselves, but also contribute directly to the maintenance of fish, macroinvertebrates, and overall biodiversity in the adjacent and downstream waters.

Yet, the importance of the Wetlands arises only in part from the role they play as an area of floodwater storage, water filtration, wildlife habitat, and production export. Their importance lies further in the inverse circumstance of the consequence of their potential absence. The conversion of a portion of the Wetlands to dry land by filling for commercial use involves not only the loss of the functions provided by the affected portion of the Wetlands, but their replacement with further sources of the adverse factors. Filling of the Wetlands for vehicle storage eliminates its flood water storage function while at the same time replacing it with impervious surfaces that further contributes to potential flooding problems. The filling also eliminates the water quality improvement functions, while contributing further pollutants such as polycyclic aromatic hydrocarbons, heavy metals, silt and nutrients to the Cassadaga Creek watershed. It eliminates habitat, increasing the stress upon the remaining habitat within the watershed, since that remaining habitat must accommodate populations of wildlife seeking to exist in ever-decreasing areas of habitat.

Impacts of Violation on Program Integrity

In addition to the adverse ecological impacts of the unauthorized discharge upon the Wetlands, the four to four-and-one-half acre unpermitted fill has a serious potential for harm to the Section 404 regulatory program. The program is designed to protect the chemical, physical, and biological integrity of waters of the United States by requiring authorization from the Corps prior to discharge of dredged or fill material into such waters. The Corps evaluates applications for discharge of dredged or fill material in light of the public interest, the water-dependent nature of the project (or lack thereof), the potential secondary or cumulative effects of the project, and other factors such as potential impacts to essential fish habitat, Federally-recognized threatened or endangered species, historic properties, etc. The Corps determines compliance of proposed discharges with the Section 404(b)(1) guidelines, promulgated by EPA, which require avoidance of discharges to the maximum extent practicable, minimization of discharges when not completely unavoidable, and compensatory mitigation for unavoidable discharges after

minimization. Additional emphasis is given by the regulatory program for protection of “special aquatic sites”, including wetlands.

In this case, Respondents filled four to four-and-one-half acre of the Wetlands without prior authorization from the Corps, and therefore with no evaluation of the public interest factors; no consideration of the lack of a water-dependent nature of the fill purpose (i.e., vehicle storage); no assessment of the potential secondary or cumulative effects of the increase in the commercial footprint of the Dependable business operations by four to four-and-one-half acres; no determination with regard to compliance with the Section 404(b)(1) guidelines; no consultation with federal and state resource agencies regarding possible adverse impacts of the filling to Federally--recognized threatened or endangered species, historic properties, etc.; no issuance of a water quality certificate; among other things.

In this case, at the time that this specific, incremental filling activity commenced in June 2006, Respondents already had roughly fifteen acres of available storage space for vehicles at the Site, including approximately twelve to twelve-and-one-half acre of unauthorized fill. It is likely that, given the opportunity, the Corps would have found the addition of four to four-and-one-half acre of incremental fill, in addition to the existing fill, to be in excess of that which would be in the public interest, and not in compliance with the Section 404(b)(1) guidelines. It should be noted that, although the Corps offered Respondents the opportunity for after-the-fact permitting for the fill in June 2009, the Corps specified that a plan for restoration of some of the filled wetlands was also necessary. In other words, the Corps, having been given the opportunity to visit the Site, meet with Mr. Whitehill, and review available information, decided not to offer Respondents the opportunity to keep all the fill. It should also be noted that most of the four-and-one-half acre is situated at a distance from the office/mechanic shop, and none of it is located in the immediate vicinity of the office/mechanic shop. Therefore, it could be presumed that, even if some of the 18.5 acres of unauthorized fill being addressed by the Corps in June 2009 were to be left in-place, it would not include the footprints comprising the specific four to four-and-one-half acre which are the subject of this penalty proceeding.

Prior to 2006, it is known that Mr. Whitehill was aware of the state permitting requirements, and that the Wetlands were under New York State jurisdiction, and that his filling activity was unlawful. In addition, after being informed by the Corps in May 2009 that his filling activity was contrary to Federal law, he continued to discharge fill in June 2009. The violation was no accident. Mr. Whitehill knowingly converted Wetlands to commercial property without a permit, and knowingly violated Federal law.

Since the requirement for permits is the primary and fundamental means by which waters of the United States, including wetlands, are protected from the potential adverse impacts of dredged and fill material, any refusal to obtain a permit before commencing work, or knowing avoidance of permitting, is a direct affront to the program’s integrity, and to the success of the Act in meeting its goals. The requirement for obtaining a permit prior to discharge of dredged or fill material in waters of the United States offers the Corps the opportunity to deny a permit when a proposed discharge is contrary to the public interest or with the Act, or to require modifications to the proposal (including requirements for compensatory mitigation for unavoidable impacts) to make it consistent. It also offers the Corps the opportunity to set conditions on the manner in

which the work is performed, such as best management practices to control erosion, or seasonal work restrictions to protect endangered or threatened species. In addition, it offers the public and other Federal, State, and local agencies the opportunity to comment on the project, and for the Corps to ensure that their concerns are addressed before a project proceeds.

Finally, discharge of dredged or fill material without prior authorization, even if accidental, but especially if deliberate, greatly increases the likelihood that others in the regulated community will follow suit and commence construction activities in waters of the United States without prior authorization if they observe or hear of the illegal work, and perceive that the violation has gone unaddressed. Mr. Whitehill is a member of the Falconer business community. He is also known to have extensive business contacts with officials of local municipalities, and local and state highway departments, especially those who contributed earthen fill material for Respondents' filling activities. He personally owns additional portions of the Wetlands at the Site, not yet filled and he is known to own and/or control (through other businesses he controls, such as Dependable Holdings, Inc.) additional land. Therefore, this violation poses great risks to the Section 404 regulatory program in Chautauqua County, New York.

Summary

In summary, Respondents are in violation of Section 301(a) of the Act, 33 U.S.C. §1311(a), for the discharge of pollutants, consisting of earthen fill material, into waters of the United States, from point sources consisting of mechanized construction equipment, for the purpose of creating commercial land for vehicle storage, without authorization by the Secretary of the Army as provided by Section 404 of the Act, 33 U.S.C. §1344. The discharge has directly resulted in the conversion of approximately four to four-and-one-half acres of forested wetlands to urban land, and the elimination of the values and functions of that wetland acreage, as well as indirect impacts to the Cassadaga Creek watershed. The violation also poses a harm to the regulatory program and the chemical, physical, and biological integrity of the waters of the United States which the regulatory program is designed to protect.

Although an Order has been issued requiring restoration of the affected portions of the Wetlands, compliance has not been achieved (except for removal of fill material from approximately one acre), and EPA knows of no indication that compliance is likely in the near or distant future. For the purpose of this penalty proceeding, the Wetlands are considered permanently filled, the violation continuing, and even the area from which fill was removed is here considered permanently altered. Furthermore, the effects of the violation are not being mitigated.

(B) Prior History of Such Violations

Respondents were incrementally filling the Wetlands in violation of the Act prior to 2006. Whereas this filling activity is being treated as part of this case for injunctive relief purposes, it is not a subject of this penalty proceeding. Respondents have a history of wetlands filling violations at the state level for this Site prior to 2006. However, the NYSDEC has the opportunity to assess its own penalties and conduct its own enforcement for violations of state law. Respondents do not have a history of violation of Section 404 of the Act, prior to the instant violations alleged in this Complaint.

(C) Degree of Culpability

As noted above, it is not clear that Mr. Whitehill had prior knowledge of the Corps permitting requirements in 2006. Although a company named Kidder Exploration, Inc., applied in 1989 for a Corps permit to fill wetlands on Mr. Whitehill's property at the Site (specifically 0.94 acre of the Wetlands for construction of an access road to a natural gas well development site), it is not known if Mr. Whitehill had any direct involvement in that permitting process. But it is known that Mr. Whitehill was aware of the state permitting requirements, and that the Wetlands were under New York State jurisdiction, and that his filling activity was wrong. In addition, after being informed in May 2009 that his filling activity was contrary to Federal law, he continued to discharge fill in June 2009. The violation was no accident. Mr. Whitehill knowingly converted Wetlands to commercial property without a permit, and knowingly violated Federal law. The filling activity was under his control. This was not a circumstance of "midnight dumpers" trespassing on his property. Access to the areas of fill discharge is only via a driveway going immediately past Mr. Whitehill's residence and office. In other words, Respondents had control of the activity as both, the owner of the most of the property where the fill was placed and as chief executive of the business operating at the site. Respondents had a "24/7" personal presence at the entrance to the Site.

Applying the culpability factors in *Phoenix Construction Services, Inc.*, 11 E.A.D. 379, 418 (EAB 2004), to be considered when determining culpability:

- a. How much control the violator had over the events constituting a violation;
Complete control.
- b. The foreseeability of events constituting violations;
Very foreseeable given violation experience with NYSDEC.
- c. Whether the violator took reasonable precaution against the events constituting the violation;
Took no precaution.
- d. Whether the violator knew or should have known of the hazard;
Actually knew or should have known.
- e. The level of sophistication within the industry in dealing with compliance issues;
The automotive service industry deals regularly with environmental compliance matters related to wastes, though not necessary with land development.
- f. Whether the violator in fact knew of the legal requirement which was violated; and
Unknown for certain.
- g. The good faith and diligence of the violator in redressing the violations and fixing the problems.
None.

In summary, if a scale of 1 to 5 were applied, with “5” being the most culpable, and “1” being the least, Respondents would be a “4+”.

(D) Economic Benefit

As described in detail above, Respondents converted four to four-and-one-half acres of forested wetland into useable, commercial land for vehicle storage by means of an unpermitted discharge of earthen fill material into the Wetlands. Respondents have gained an illegal economic benefit from this conversion. They continue to obtain such illegal economic benefit, and it is anticipated that they will continue to obtain such benefit indefinitely.

The 2.5 acres of fill remaining on Mr. Whitehill’s property, which Respondents appear unlikely to ever remove, remains available to Respondents, and to any future owners of the parcels where they are located, as commercial land for vehicle storage and any other suitable purposes (e.g., building structures). These 2.5 acres are unpermitted, and it appears unlikely (as discussed above) that they would be permitted by the Corps. Therefore, they are considered illegally created commercial land.

The fill remaining on the Bianco property (at least a half acre) was available to Respondents and used by them temporarily in their commercial activities, but it is no longer available to them since this enforcement action has revealed that Respondents were trespassing.

The fill removed from the City of Jamestown Board of Public Utilities property (approximately one acre) was available to Respondents and used by them temporarily in their commercial activities, but it is no longer available to them since the fill material there has been substantially removed.

Since the standard of analysis for illegal economic benefit under the Act is a “reasonable approximation”, we will attempt to estimate the economic value of the permanent conversion of the 2.5 acres and the temporary use of the additional acreage on neighboring properties.

In August 2009, we downloaded from the internet four real estate listings for commercial properties in Chautauqua County that might serve as real estate comparables for “appraising” the created acreage. These are summarized as follows:

1. Former car lot with office building in Frewsburg – Listed at \$459,000 for 23.32 acres. (approx. \$19,700 per acre).
2. Commercial vacant land opposite a Thruway exit in the town of Hanover – Listed at \$250,000 for 20.5 acres (approx. \$12,200 per acre).
3. “Prime” commercial vacant land near a Thruway exit in Silver Creek – Listed at \$1,200,000 for 33.5 acres (approx. \$35,800 per acre).
4. Warehouse and storage facility with 20 acres of vacant land, including paved lot for 50+cars in Brocton – Listed at \$179,900 for 20 acres (approx. \$9,000 per acre).

Comparable #1 includes an office building, and, whereas it may be a good comparable for replacement of the Dependable facility in total, it may be a somewhat high comparable for vacant commercial land on an acre-per-acre basis due to the presence of the office building.

Comparable #2 appears to be an excellent comparable on an acre-for-acre basis with the Site, in particular due to its proximity to a Thruway exit.

Comparable #3 is high in price, and presumably, as “prime” land per the realtor’s description, is priced for use as something like a shopping center, and not a used vehicle storage lot.

Comparable #4, like Comparable #1, includes a building, and its price may be affected by the building condition.

Therefore, Comparable #2 @ \$12,200 per acre appears to be the closest approximate comparable on an acre-for-acre basis for the created, commercial outdoor space at the Site.

For the purposes of this analysis, we will separate the value of the permanently available 2.5 acres from the temporarily (i.e., formerly) available one acre on the City of Jamestown Board of Public Utilities and half- acre-plus on the Bianco property.

Therefore, the illegal economic benefit of the permanent conversion of 2.5 acres is reasonably approximated at $\$12,200 \times 2.5 = \$30,500$.

It is more difficult to estimate the illegal economic benefit from temporary use of approximately 1.5 acres over a period of up to three years. If we presume an equivalent “leasing” price of \$100 per acre per year, and use a half-way term of 1.5 years, we obtain a value of \$225. ($\$100 \text{ per acre} \times 1.5 \text{ acres} \times 1.5 \text{ years} = \225). This seems like a reasonable, nominal fee for trespassing onto 1.5 acres for 1.5 years to engage in commercial activities.

Therefore, the estimated illegal economic benefit of the violation is \$30,725. ($\$30,500 + \225 .)

(E) Ability to Pay

Respondents have asserted an inability to pay the costs of fill removal, and, with the exception of the material placed on the City of Jamestown Board of Public Utilities property, Respondents have declined to act to remove the fill and restore the Site. However, Respondents have declined to authorize EPA to forward Respondents’ documents to an economic analysis contractor for review (signed documents with signed release).

Respondents have, however, provided unsigned tax returns for 2009 and 2010 for Mr. Whitehill which indicate a modest personal income of approximately \$43,000 to \$45,000 per year, charitable contributions of approximately \$10,000 to \$12,000 per year (approximately a quarter of his income), and ownership of 18 to 20 income-generating, rental properties. A check of the publicly-available property tax information on the Chautauqua County website reveals that Mr. Whitehill or companies controlled by him (i.e., Dependable Holdings, LLC., Dependable

Properties, LLC, Dependable Apartments, LLC., and J. Sirianno Holdings, LLC.; all companies with address 2160 Lafayette Street, Falconer, NY) own approximately 25 properties in addition to the four parcels at the Site. Among these properties are residential properties, vacant land, and a motel. Based on the available tax assessment information, and the manner in which these properties are assessed (as explained on the Chautauqua County website) the sum fair market value of these properties exceeds one million dollars. The unsigned tax returns of Mr. Whitehill do not show mortgage deductions for his rental properties, therefore it may be presumed that these properties are not mortgaged, and are available as assets against which to borrow, or available for sale, for the purpose of raising funds to pay the proposed penalty, as well as to pay for remediation of the Site.

(F) Other matters as Justice May Require

Respondents have represented that third parties “contributed” to the violation by providing earthen fill material and bringing earthen fill material to the Site. Third party “contributors” named by Respondents include the village, town, county, and the New York State Department of Transportation. Respondents have attempted to assert that liability should be diffused among the “contributors”. There is no specific evidence that any of these “contributors” actually discharged the earthen fill material into the waters of the United States, and no such evidence has been proffered to EPA by Respondents despite multiple entreaties for such. The mere allegation of third party “contributors” to the filling activity does nothing to reduce the size of the penalty due to Respondents’ liability.

Respondents have demonstrated a pattern of bad faith in addressing and remediating the violations presented to them by various regulatory agencies over many years. Respondents’ filling activity at the Site dates back to, at least, 1993. NYSDEC has been periodically conducting enforcement/compliance activities with the Respondents for filling activities also since at least 1993. In addition, the Corps issued a Cease and Desist Order in June 2009; EPA issued a Cease and Desist Order in September 2009 and an Order requiring restoration in March 2010. To this date the Site remains unremediated and the Wetlands have not been restored except for the removal of approximately 1 acre of fill.

Since, furthermore, Mr. Whitehill and companies controlled by him own additional, unfilled vacant forested wetlands at the Site, and other vacant properties, it is important that the penalty in this case be sufficient as a specific deterrent against future violations by Mr. Whitehill and his various companies.

Finally, since the NYSDEC has not taken action in pursuing Respondents for penalties, it is warranted that the Administrator of the EPA demonstrate a willingness to conduct affirmative enforcement.

PENALTY CALCULATION

Based upon the analysis of the statutory factors in Section 309(g) of the Act, 33 U.S.C. §1319(g), as they are applied to this case, and an estimate of illegal economic benefit of \$30,725, it is recommended that EPA pursue a Class II penalty action with a proposed penalty in the amount

of \$174,418.

The illegal economic benefit of the violation has been reasonably approximated at \$30,725.

The nature, circumstances, and extent of the violation consist of an unpermitted discharge by Respondents, using earthen fill material provided by third parties, into four to four-and-one-half acres of wetlands, for the purpose of converting them to commercial, outdoor storage space. In the case of Service Oil, a multiplier of 4.5 was applied to the illegal economic benefit for a violation involving two counts, one of which was an unpermitted discharge count. Therefore, we divide 4.5 by 2, and obtain a multiplier of 2.25 to account for the nature, circumstances and extent of the present unpermitted discharge violation.

$\$30,725 \times 2.25 = \$69,131.$

Gravity – In the Service Oil case, the interim penalty figure was increase by 10% to account for the gravity of the violation, including potential harm to the Red River and actual harm to the regulatory scheme from the delay in obtaining a permit and the failure to abide by the permit terms. In the present case, it is appropriate to increase the interim penalty figure of \$69,131 by 45% to account for the gravity of the violation. This 45% is made up of three parts:

An increase of 5% attributed to the potential harm to Cassadaga Creek from loss of the ecological services of the four to four-and-one-half acre of the Wetlands;

An increase of 20% for the harm to the regulatory scheme resulting from the absolute refusal to seek a permit or comply with the Act; and

An increase of 20% for the direct harm to the Wetlands from the actual conversion of four to four-and-one-half acre of the Wetlands to dry land.

Therefore, applying an increase of 45% to the interim penalty of \$69,131 to account for the gravity of the violation, we obtain an interim penalty of \$100,323.

$\$69,131 \times 0.45 = \$31,109.$ $\$69,131 + \$31,109 = \$100,240.$

Culpability – As described above, Respondents have a culpability of “4+” on a scale of 1 to 5. Therefore, an increase of the interim penalty by 45% is appropriate to account for the high degree of culpability of Respondents. Applying an increase of 45% to the interim penalty of \$100,240 to that Respondents and other companies under their control will additional vacant land, and the need to provide federal “back-up” support to the state efforts to protect wetland resources, together warrant an increase of 20% to the interim penalty. Applying an increase of 20% to the interim

penalty of \$145,348 to account for other matters as justice may require, specifically high deterrence need, we obtain a final penalty of \$174,418.

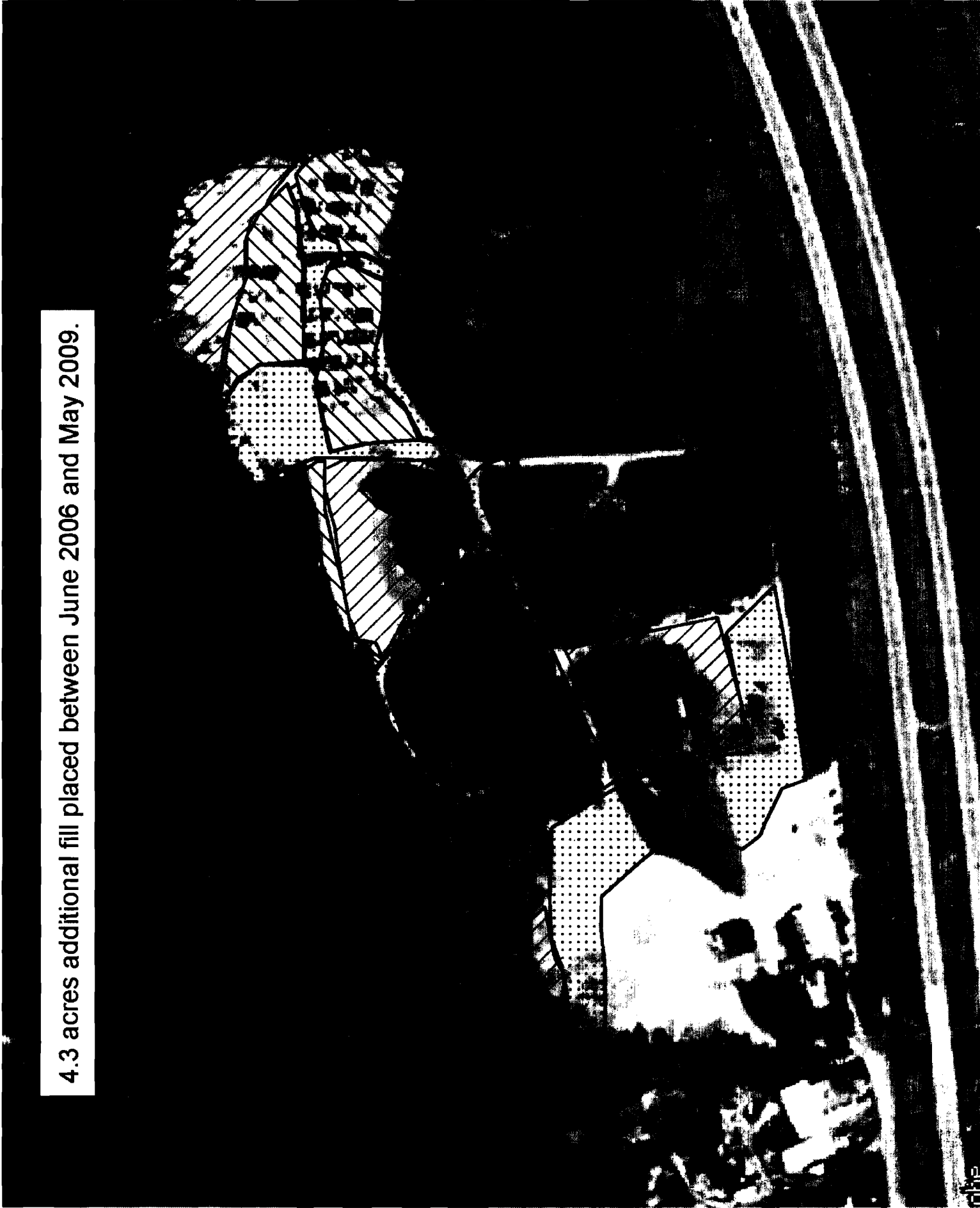
$$\$145,348 \times 0.2 = \$29,070. \quad \$145,348 + \$29,070 = \$174,418.$$

Therefore, a final penalty of \$174,418 is recommended.

This penalty calculation presumes an illegal economic benefit of \$30,725. However, illegal economic benefit is very difficult to approximate in wetlands enforcement cases since estimates require regulators to look into a “crystal ball” to see whether a violator may reduce illegal economic benefit in the future by restoring wetlands and/or providing compensatory mitigation with an after-the-fact permit. Estimates also require regulators to reach into the past to try to ascertain whether a permit would likely have been issued for a filling activity if such authorization had been sought prior to the discharge. In Section 404 permitting, that determination may be dependent upon the availability of alternatives, such as alternative properties available on the real estate market for a project (this is a factor in a typical alternatives analysis under the Section 404(b)(1) guidelines). Information regarding alternatives formerly extant, may no longer be available when the violation is discovered. Furthermore, abatement of a violation through restoration, with its inherent costs, may be seen by some economists as a balance sheet subtraction from illegal economic benefit, resulting theoretically in a lower or even “negative” illegal economic benefit. However, by this logic a violator may be given monetary “credit” in a penalty calculation for the fact that he or she got caught and was compelled to comply with the Act.

In conclusion, based upon the analysis of the statutory factors in Section 309(g)(3) of the Act, EPA recommends that a penalty of \$174,418 assessed against Respondents will satisfy the objectives of the CWA.

4.3 acres additional fill placed between June 2006 and May 2009.



Attachment #1 to Property Memo.
See 2006-2009 Bill in green hatching.