

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG.II
2011 NOV 14 A 10:21
REGIONAL HEARING
CLERK

IN THE MATTER OF

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

Respondents

Docket No. CWA-02-2011-3601

COMPLAINANT'S INITIAL 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 Initial Prehearing Exchange:

- I. The names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of each witness' expected testimony, or a statement that no witnesses will be called.**

Complainant intends to call the following experts or witnesses at the hearing:

- A. David Pohle
Environmental Scientist
Wetlands Protection Team, June 1991 - Present
U.S. Environmental Protection Agency, Region 2, New York, NY

Mr. Pohle will testify about the factual and wetlands regulatory aspects of the case, among others, he will testify about the CWA regulations and how they apply to Respondent's facility. He will testify as to his experience in conducting CWA wetlands compliance inspections, and his knowledge about wetlands for regulatory purposes under the Clean Water Act. Mr. Pohle will testify about the conditions of the wetlands in this matter and specifically about those areas that are inundated or saturated by surface or groundwater, the frequency and duration, and the prevalence of vegetation and soil conditions.

Mr. Pohle will testify about the numerous beneficial services of wetlands for people and for fish and wildlife, including protection and improvement of water quality, providing fish and wildlife habitats, storing floodwaters, and maintaining surface water flow during dry periods. Mr. Pohle will testify about the inherent and unique natural characteristics of wetlands. Mr. Pohle will testify about the EPA's wetlands protection programs.

Mr. Pohle will testify as to the inspections he conducted at Respondent's facility and the findings that led to the issuance of the penalty complaint. He will also testify with regard to his knowledge and experience in calculating civil penalties for violations of the CWA program and

about the specific facts and circumstances in this case and how they were considered in supporting the calculation of the penalty assessed in the complaint. In his testimony, Mr. Pohle is expected to discuss and explain the significance of various exhibits Complainant intends to offer into evidence.

EPA may, pursuant to the requirements of Fed. R. Evid. 615, designate Mr. Pohle as its agency representative.

B. Harold Keppner
Chief, Monitoring & Enforcement Section
U.S. Army Corps of Engineers
Buffalo District

Mr. Keppner will testify about the Corps' Regulatory Program and the role of enforcement within the Program. In addition, he is the supervisor of Joe Kassler and Tim Crockett who performed the original investigation of the site for the Corps. Mr. Keppner is responsible for oversight of any enforcement actions within the Buffalo District, including the Respondents while the Corps investigated the site.

C. Joe Kassler
Biologist
U.S. Corps of Engineers
Buffalo District

Mr. Kassler will testify about the factual and wetlands regulatory aspects of the case, among others, he will testify about the CWA regulations and how they apply to Respondents facility. He will testify as to his experience in conducting CWA wetlands compliance inspections, and his knowledge about wetlands for regulatory purposes under the Clean Water Act. Mr. Kassler will testify about those areas identified as wetlands on the facility as determined by inundation or saturation by surface or groundwater and the prevalence of wetland vegetation and hydric soil conditions. Mr. Kassler will testify as to the Corps of Engineers inspection he conducted at Respondents facility and the findings that led to the issuance of the penalty complaint.

D. Tim Crockett
Biologist
U.S. Corps of Engineers
Buffalo District

Mr. Crockett will testify about the factual and wetlands regulatory aspects of the case, among others, he will testify about the CWA regulations and how they apply to Respondents facility. He will testify as to his experience in

conducting CWA wetlands compliance inspections, and his knowledge about wetlands for regulatory purposes under the Clean Water Act. Mr. Crockett will testify about those areas identified as wetlands on the facility as determined by inundation or saturation by surface or groundwater and the prevalence of wetland vegetation and hydric soil conditions. Mr. Crockett will testify as to the Corps of Engineers inspection he conducted at Respondents facility and the findings that led to the issuance of the penalty complaint.

E. Anne O. Rothrock
Senior Wildlife Biologist
Freshwater Wetlands Program
NYS Department of Environmental Conservation
Allegany, New York

Ms. Rothrock will testify about the factual and wetlands regulatory aspects of the case, among others, she will testify about the New York State Environmental Conservation Law and how it applies to Respondents' facility. She will testify as to New York State's Department of Environmental Conservation's history of violations and enforcement with Mr. Whitehill which dates back to 1994. Ms Rothrock will testify about her experience in conducting NYSDEC wetlands compliance inspections, and her knowledge about wetlands for regulatory purposes under the New York State's Environmental Conservation Law and the Clean Water Act. Ms. Rothrock will testify about the conditions of the wetlands in this matter and specifically about those areas that are inundated or saturated by surface or groundwater, the frequency and duration, and the prevalence of vegetation and soil conditions. Mr. Rothrock will testify as to the inspections she conducted on behalf of DEC at Respondent's facility and the findings that led to the issuance of the penalty complaint.

F. Peter Stokely
National Wetlands Enforcement Program Coordinator
EPA, Office of Enforcement and Compliance Assurance
Headquarters
Washington, DC

Mr. Stokely will testify about the wetlands regulatory aspects of the case, among others, he will testify about the CWA regulations and how they apply to Respondent's facility. He will testify as to his knowledge about wetlands for regulatory purposes under the Clean Water Act. Mr. Stokely will testify about the numerous beneficial services of wetlands for people and for fish and wildlife, including protection and improvement of water quality, providing fish and wildlife habitats, storing floodwaters, and maintaining surface water flow during dry periods. Mr. Stokely will testify about the inherent and unique natural characteristics of wetlands. Mr. Stokely will testify about the EPA's wetlands protection programs. Mr. Stokely will testify as to the use of aerial photography and Geographic Information Systems in wetlands enforcement cases. In his testimony, Mr. Stokely is expected to discuss and explain the interpretation of aerial photography used in this case.

Complainant reserves the right, and nothing herein is intended or is to be construed to prejudice or waive any such right, to call or not to call any of the aforementioned potential witnesses, and to expand or otherwise modify the scope, extent and/or areas of the testimony of any of the above-named potential witnesses, where appropriate. In addition, Complainant reserves the right to list and to call additional potential hearing witnesses, including expert witnesses, to answer and/or rebut evidence (testimonial or documentary) listed by Respondent in its prehearing exchange or on matters arising as a consequence of such evidence.

II. Copies of all documents and exhibits which each party intends to introduce into evidence at the hearing. The exhibits should include curriculum vitae or resume for each proposed expert witness.

The Judge’s Order required that photographs submitted must be unretouched and unaltered photographs. EPA hereby notifies the Court that the violations alleged in the Complaint primarily are proven via a historical sequence of photographs. The primary tool that the government’s technical experts, listed above, use to document the progressive disturbance of wetlands (discharge of fill) is through aerial photographs which are over-layed with diagrams. All photos submitted which have overlays also have baseline photographs without overlays. The list of documents below also identifies the technical officer who worked on the photographs on a per-exhibit basis.

The documents and exhibits Complainant intends to introduce into evidence at hearing follow:

Complainant’s Exhibit No.	DOCUMENT
1	Screen shot of GIS Maps for Chautauqua County – Tax Map with Aerial Satellite photograph of Holly Bianco Property, New Tax No. 354.00-1-37 Author: David Pohle
2	2008 B&W Aerial photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties with overlay markings delineating 18.57 acres of fill as of 2009 Author: Army Corps of Engineers (Tim or Joe)
3	Powerpoint with photographs – “David Whitehill case Prelim GIS and Aerials by Dpohle” Author: David Pohle
4	U.S. EPA Region 2 Letter to Dependable Towing & Recovery, Inc. dated March 24, 2010, Re: In the matter of Dep and David A. Whitehill, Proceeding Pursuant to (section) 309(a) of the Clean Water Act, 33 U.S.C. § 1319(a); Findings of Violation and Order CWA -02-2010-3501
5	Powerpoint with photographs – “Enforcement Confidential: David Whitehill, Draft Violation Assessment” Author: David Pohle
6	Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties “Exhibit A” – April 1994 base aerial photograph of the Site showing locations of the geographic extent of fill material

	(depict in light yellow) on Wetlands, consisting of approximately 16.5 acres of fill area in total Author: David Pohle
7	Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties "1998 Aerial" with legend and overlay crosshatching depicting 2004 fill limits/borders and 2009 fill limits/borders Author: Tim Crockett
8	Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties "2004 Aerial" with legend and overlay crosshatching depicting 2004 fill limits/borders and 2009 fill limits/borders Author: Tim Crockett
9	Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties "2008 Aerial" with legend and overlay crosshatching depicting 2004 fill limits/borders and 2009 fill limits/borders Author: Tim Crockett
10	Stormwater Pollution Prevention Plan: Final Draft – EPA Order: CWA-02-2010-3501 – Developed for The Wetland Restoration Project of 2160 Lafayette Street, Falconer, NY 14733, Dated: July 7, 2010 Author: Don Wilson
11	Aerial Photograph of NYC Regulated Wetland GE-14 with overlay depicting property lines of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties and excavation and spoil acreage, created by Ann M. Oyer, Senior Wildlife Biologist, September 30, 2010 Author: Ann Oyer Rothrock
12	Google Earth Pro Screenshot of search "Falconer, NY" from 2011, appearing to depict aerial satellite photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties from November 24, 2006 Author: David Pohle
13	Color Map of Marden E. Cobb Waterway Trail, Created by: CCPED
14	Powerpoint with photographs – "David Whitehill & Dependable Towing and Recovery, Inc., Wetlands Fill Violation: Inspection Sept 29, 2010" by Ann (Oyer) Rothrock, NYSDEC Author: Ann Oyer Rothrock and David Pohle
15	Chautauqua County Department of Finance Parcel Details as of 9/01/2011 for Parcel Identification No. 063803-371.14-1-2, Property Location: 525 W Falconer St, Primary Owner: Dependable Apartments, LL Author: David Pohle
16	Chautauqua County Department of Finance Parcel Details as of 9/01/2011 for Parcel Identification No. 063889-354.18-1-9, Property Location: Lafayette St, Primary Owner: Whitehill David A Author: David Pohle
17	Chautauqua County Department of Finance Parcel Details as of 9/01/2011 for Parcel Identification No. 060800-387.08-7-60, Property Location: Peterson St, Primary Owner Dependable Apts LLC Author: David Pohle

18	Chautauqua County Department of Finance Parcel Details as of 9/01/2011 for Parcel Identification No. 063803-371.10-4-10, Property Location: 109 N Work St, Primary Owner: Dependable Holdings LLC Author: David Pohle
19	Chautauqua County Department of Finance Parcel Details as of 9/01/2011 for Parcel Identification No. 063803-371.11-3-54, Property Location: 2 Williams St, Primary Owner: Dependable Apartments LCC Author: David Pohle
20	Chautauqua County Department of Finance Parcel Details as of 9/01/2011 for Parcel Identification No. 063803-371.10-5-49.1, Property Location: 3 S Alberta St, Primary Owner: Dependable Properties, LL Author: David Pohle
21	Chautauqua County Department of Finance Parcel Details as of 9/01/2011 for Parcel Identification No. 063803-371.06-3-59, Property Location: 106 N Work St, Primary Owner: Dependable Properties LLC Author: David Pohle
22	Chautauqua County Department of Finance Parcel Details as of 9/01/2011 for Parcel Identification No. 063889-354.18-1-8, Property Location: Lafayette St, Primary Owner: Whitehill David A Author: David Pohle
23	Chautauqua County Department of Finance Parcel Details as of 9/01/2011 for Parcel Identification No. 060800-388.17-4-42, Property Location: 11 Collins Ave, Primary Owner: Dependable Holdings LLC Author: David Pohle
24	Chautauqua County Department of Finance Parcel Details as of 9/01/2011 for Parcel Identification No. 063803-371.06-3-46, Property Location: 114 N Work St, Primary Owner: Dependable Properties LLC Author: David Pohle
25	Chautauqua County Department of Finance Parcel Details as of 9/01/2011 for Parcel Identification No. 060800-371.17-3-35, Property Location: 660 Buffalo St, Primary Owner: Dependable Holdings LLC Author: David Pohle
26	Chautauqua County Department of Finance Parcel Details as of 9/01/2011 for Parcel Identification No. 060800-370.15-1-73, Property Location: 1146 N Main St, Primary Owner: David A Whitehill Author: David Pohle
27	Chautauqua County Department of Finance Parcel Details as of 9/01/2011 for Parcel Identification No. 060800-387.13-5-65, Property Location: 104 Pershing Ave, Primary Owner: Whitehill David A Author: David Pohle
28	Chautauqua County Department of Finance Parcel Details as of 9/01/2011 for Parcel Identification No. 063803-371.14-1-1, Property Location: W Falconer St, Primary Owner: Dependable Apartments, LL Author: David Pohle
29	Chautauqua County Department of Finance Parcel Details as of 9/01/2011 for Parcel Identification No. 060800-387.08-7-59, Property Location: 303

	Willard St, Primary Owner: Dependable Apts LLC Author: David Pohle
30	Chautauqua County Department of Finance Parcel Details as of 9/01/2011 for Parcel Identification No. 062201-358.12-1-31 , Property Location: Hillcrest Ave, Primary Owner: Whitehill David Author: David Pohle
31	Chautauqua County Department of Finance Parcel Details as of 9/01/2011 for Parcel Identification No. 063889-354.00-1-38, Property Location: Lafayette St, Primary Owner: Whitehill David A Author: David Pohle
32	Chautauqua County Department of Finance Parcel Details as of 9/01/2011 for Parcel Identification No. 063803-371.06-3-60, Property Location: 102 N Work St, Primary Owner: Dependable Properties LLC Author: David Pohle
33	Chautauqua County Department of Finance Parcel Details as of 9/01/2011 for Parcel Identification No. 063803-371.14-1-3.1, Property Location: W Falconer St, Primary Owner: Dependable Apartments, LL Author: David Pohle
34	Chautauqua County Department of Finance Parcel Details as of 9/01/2011 for Parcel Identification No. 060800-370.19-7-63, Property Location: 340 Price St, Primary Owner: Dependable Apts LLC Author: David Pohle
35	Chautauqua County Department of Finance Parcel Details as of 9/01/2011 for Parcel Identification No. 063889-354.18-1-11, Property Location: 2160 Lafayette St, Primary Owner: Whitehill David A Author: David Pohle
36	Chautauqua County Department of Finance Parcel Details as of 9/01/2011 for Parcel Identification No. 060800-388.05-2-26, Property Location: 10 Peterson St, Primary Owner: Dependable Apts LLC Author: David Pohle
37	Chautauqua County Department of Finance Parcel Details as of 9/01/2011 for Parcel Identification No. 063803-371.06-4-39, Property Location: 305 West Ave, Primary Owner: Dependable Properties LCC Author: David Pohle
38	Chautauqua County Department of Finance Parcel Details as of 9/01/2011 for Parcel Identification No. 060800-370.12-3-1, Property Location: 413 James Ave, Primary Owner: Dependable Properties LLC Author: David Pohle
39	Chautauqua County Department of Finance Parcel Details as of 9/01/2011 for Parcel Identification No. 063889-388.00-3-30, Property Location: 2115 Peck Settlement Rd, Primary Owner: Dependable Holdings LLC Author: David Pohle
40	Chautauqua County Department of Finance Parcel Details as of 9/01/2011 for Parcel Identification No. 060800-370.20-3-35, Property Location: 829 E 2Nd St, Primary Owner: Dependable Apts LLC Author: David Pohle

41	Chautauqua County Department of Finance Parcel Details as of 9/01/2011 for Parcel Identification No. 062201-385.12-1-34, Property Location: Hillcrest Ave, Primary Owner: Whitehill David Author: David Pohle
42	Chautauqua County Department of Finance Parcel Details as of 9/01/2011 for Parcel Identification No. 063803-371.06-5-65, Property Location: 128 E Pearl St, Primary Owner: Dependable Properties LLC Author: David Pohle
43	Chautauqua County Department of Finance Parcel Details as of 9/01/2011 for Parcel Identification No. 062201-385.12-1-8, Property Location: 180 Fairmount Ave, Primary Owner: Whitehill David Author: David Pohle
44	Stage 1 Restoration & Removal Plan USEPA CW A 02-2010-3501 Dependable Towing & Recovery, Inc., Prepared by Wilson Environmental Technologies, Inc., Date: July 8, 2010, Project No. 2010-0422. Whitehill, Prepared for: US EPA, NYS DEC Author: Don Wilson
45	Screen shot of GIS Maps for Chautauqua County – Tax Map with Aerial Satellite photograph of City of Jamestown Board of Public Utilities Property, New Tax No. 354.00-1-36 Author: David Pohle
46	Screen shot of GIS Maps for Chautauqua County – Tax Map with Aerial Satellite photograph of City of Jamestown Board of Public Utilities Property, New Tax No. 354.00-1-39 Author: David Pohle
47	Digital Globe Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties “April 21, 1994 ‘baseline’ aerial photograph” Author: David Pohle
48	Digital Globe Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties with overlay “violet polygons depict areas to be filled between April 1994 and April 2004” Author: David Pohle
49	Digital Globe Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties “April 1, 2004 aerial photograph” Author: David Pohle
50	Digital Globe Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties with purple overlay of “Total 8.3 acres filled between April 1994 and April 2004” Author: David Pohle
51	Digital Globe Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties with red and purple overlay of “Red polygons depicts areas to be filled between April 2004 and June 2006” Author: David Pohle

52	Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties "June 17, 2006 aerial photograph" Author: David Pohle
53	Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties with purple and red overlay of "3.9 acres fill placed between April 2004 and June 2006" Author: David Pohle
54	Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties with red, green, and purple overlays of "Green polygons depict additional fill placed between June 2006 and May 2009" Author: David Pohle
55	Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties "May 15, 2009 aerial photograph" Author: David Pohle
56	Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties with red, green, and purple overlays of "4.3 acres additional fill placed between June 2006 and May 2009" Author: David Pohle
57	Digital Globe Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties with red, green, and purple overlays of "Total 16.5 acres fill placed since 1994" Author: David Pohle
58	Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties with red and green overlays of "Total 8.2 acres fill placed since 2004" Author: David Pohle
59	Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties with red, green, and purple overlay and green shading which depicts "Almost all fill within NWI wetlands" Author: David Pohle
60	Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties with red, green, and purple overlay and purple shading which depicts "Most fill within mapped DEC wetlands" Author: David Pohle
61	Digital Globe Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties with red, green, and purple overlay with red cross-hatching which depicts "Most fill within mapped hydric soils" Author: David Pohle
62	Digital Globe Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties with red, green, and purple overlay with orange overlay which depicts property boundaries "Most fill on David Whitehill property." Author: David Pohle
63	USEPA Region 2 Order to Cease and Desist, CWA-02-2009-3503, In the Matter of Dependable Towing & Recovery, Inc. and David A. Whitehill,

	Proceeding pursuant to §309(a) of the Clean Water Act, 33 U.S.C. § 1319(a)
64	Website printout depicting with Aerial Photograph of “Whitehill Filling Activity 4/19/2006” printed on 7/06/2011 Author: David Pohle
65	Photo Album of Corps Photos from June 2009 David Whitehill Inspection, Falconer, NY Author: David Pohle
66	Letter from Stephen W. Cass, Esq. to NYSDEC, Region 9 re: David Whitehill, Dated: November 2, 1993 with attachments
67	Letter from Joseph P. Galati, NYSDEC, Region 9 to David Whitehill re: Wetland GE-14, Town of Ellicott, Chautauqua County, Dated June 22, 1994
68	NYS DEC Region 9 Order on Consent/Stipulation, Number: BU-0123-0995, certifying \$1000.00 payment made by David A. Whitehill to NYSDEC dated September 25, 1995, Received September 27, 1995
69	Digital Globe Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties with red overlay which depicts “EPA: Aerial Photograph of David Whitehill property, dated June 17, 2006. Red polygons with red cross-hatching demark in excess of four acres of wetland area that appears as filled on May 15, 2009 aerial photograph of the property.” Author: David Pohle
70	Digital Globe Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties with red overlay which depicts “EPA: Aerial Photograph of David Whitehill property, dated May 15, 2009. Red polygons with red cross-hatching demark in excess of four acres of wetland area that does not appear as filled on June 17, 2006 aerial photograph of the property.” Author: David Pohle
71	Site Inspection Report, Case: Dependable Towing & Recovery, Inc., and David A. Whitehill, David Whitehill Property, Falconer, Chautauqua County, NY, Findings of Violation and Order CWA 02-2010-3501, prepared by David Pohle, DEPP-WMB, dated 3/31/10
72	Powerpoint with photographs “David Whitehill & Dependable Towing and Recovery, Inc., Wetlands Fill Violation: Inspection October 20, 2010, all photographs, in order, without alterations” Author: David Pohle
73	Letter from Kevin Bricke, US EPA R2 to David A. Whitehill and Dependable Towing & Recovery, Inc., Re: in the matter of Dependable Towing & Recovery, Inc., and David A. Whitehill, Proceeding Pursuant to §309(a) of the Clean Water Act, 33 U.S.C. § 1319(a); Findings of Violation and Order CWA-02-2009-3503 dated September 30, 2009
74	Printout from Chautauqua County Board of Realtors, Inc. depicting a commercial real estate listing with Century 21 Broker contact information - MLS Number: 1022375, address: Route 60, Frewsburg, Chautauqua

	County Author: David Pohle
75	Printout from Chautauqua County Board of Realtors, Inc. depicting real estate listing with Midtown Realty Company, Inc. contact information - MLS Number: 1022051, address: rts. 5 & 20, Hanover, Chautauqua County Author: David Pohle
76	Printout from Chautauqua County Board of Realtors, Inc. depicting a commercial real estate development listing with Howard Hanna Hold Real Estate contact information - MLS Number: 1021713, address: Routes 5 & 20, Silver Creek, Chautauqua County Author: David Pohle
77	Printout from Chautauqua County Board of Realtors, Inc. depicting a commercial real estate listing with Howard Hanna Hold Real Estate contact information - MLS Number: 1020887, address: 9500 Lake Avenue, Brocton, Chautauqua County Author: David Pohle
78	US EPA Region 2- Findings of Violation and Order, CWA-02-2010-3501, In the matter of Dependable Towing & Recovery, Inc. and David A. Whitehill, Proceeding Pursuant to §309(a) of the Clean Water Act, 33 U.S.C. §1319(a), Dated: March 24, 2010
79	Letter from Mario Del Vicario, Watershed Management Branch, US EPA Region 2, to David A. Whitehill, Re: In the Matter of Dependable Towing & Recovery, Inc., and David A. Whitehill, Proceeding Pursuant to § 309(a) of the Clean Water Act, 33 U.S.C. § 1319(a); Findings of Violation and Order CWA-02-2010-3501, Date: September 09, 2010
80	Computer Screenshot of "Photos of the Month" titled page, with website text depicting reference to David Whitehill's "huge complex" with link text referencing "Dave Whitehill" Author: David Pohle
81	Letter from Harold T. Keppner, Department of the Army, Corps of Engineers, to Mr. David A. Whitehill, Subject: Unauthorized Activities, Department of the Army Enforcement No. 2008-01468, Dated: June 15, 2009
82	Letter from Mario Del Vicario, US EPA Region 2, to David A. Whitehill, Re: In the matter of Dependable Towing & Recovery, Inc., and David A. Whitehill, Proceeding Pursuant to §309(a) of the Clean Water Act, 33 U.S.C. §1319(a); Findings of Violation and Order CWA-02-2010-3501, Dated: December 7, 2010
83	Letter from Mario Del Vicario, US EPA Region 2, to David A. Whitehill, Re: In the matter of Dependable Towing & Recovery, Inc., and David A. Whitehill, Proceeding Pursuant to §309(a) of the Clean Water Act, 33 U.S.C. § 1319(a); Findings of Violation and Order CWA-02-2010-3501, Dated: October 13, 2010
84	Computer Screenshot of bing.com/maps search for "falconer, ny" depicting aerial photograph

	Author: David Pohle
85	Routine Wetland Determination Data Form – Project Site: Dependable Auto, Applicant/Owner: David Whitehill, Investigator: J. Kassler, Chautauqua County, Dated: 6/10/09
86	Site Visit Notes; Author: J. Kassler; Site Name/Location: Dependable Auto Transport (David Whitehill)/ 2160 Lafayette St., Village of Falconer, Town of Ellicott, Chautauqua County, New York; Date of Visit: 10 June 2009
87	Digital Globe Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties with orange overlay and orange crosshatching of “Total fill is approx. 16.5 acres” and suggesting location identified as “Whitehill home/office/mechanic shop” Author: David Pohle
88	Digital Globe Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties with orange and pink overlay and orange crosshatching of “4.3 acres of the 16.5 acres of fill was placed within last 5 years (based on aerial photography” and suggesting location identified as “Whitehill home/office/mechanic shop” Author: David Pohle
89	Digital Globe Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties with orange, red, yellow, and pink overlay and orange crosshatching of “3.3 acres of the 16.5 acres of fill was placed off his property” and suggesting location identified as “Whitehill home/office/mechanic shop” Author: David Pohle
90	Digital Globe Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties with orange, pink, purple and yellow overlay and orange crosshatching of “2.5 acres of the 16.5 acres of fill was placed on his property within last 5 years” and suggesting location identified as “Whitehill home/office/mechanic shop” Author: David Pohle
91	Digital Globe Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties with orange, purple, pink and yellow overlay, orange crosshatching, and green dots of “Corps Wetland Field Data Points” and suggesting location identified as “Whitehill home/office/mechanic shop” Author: David Pohle
92	Digital Globe Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties with orange, purple, pink, blue and yellow overlay, orange crosshatching, and green dots of “1.4 acres of the 16.5 acres field documented as in wetlands, shows as within 5 years on aerial photography, and located on Whitehill property” and suggesting location identified as “Whitehill home/office/mechanic shop” Author: David Pohle
93	Digital Globe Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties with orange, turquoise, pink and yellow overlay, orange crosshatching, and green dots of “3.2 acres of

	<p>the 16.5 acres of fill was placed under Whitehill direction on or off his property, at his facility, within last 5 years, and is documented by the Corps in the field as wetlands” and suggesting location identified as “Whitehill home/office/mechanic shop”</p> <p>Author: David Pohle</p>
94	<p>Digital Globe Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties with orange, purple, pink and yellow overlay, orange crosshatching, and green dots of “Corps Wetland Field Data Points” and suggesting location identified as “Whitehill home/office/mechanic shop”</p> <p>Author: David Pohle</p>
95	<p>Digital Globe Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties with pink and yellow overlay depicting property boundaries and “Approx. 1 acre of the 16.5 acres of fill was removed” and suggesting location identified as “Whitehill home/office/mechanic shop”</p> <p>Author: David Pohle</p>
96	<p>Digital Globe Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties with orange and yellow overlay depicting property delineations “June 16, 2006”</p> <p>Author: David Pohle</p>
97	<p>Digital Globe Aerial Photograph of Whitehill, Bianco, and City of Jamestown Board of Public Utilities properties with orange, red and yellow overlay of “May 29, 2008: Filing between June 2006 and May 2008 = 1.5 acres”</p> <p>Author: David Pohle</p>
98	<p>Letter from Mario Del Vicario, US EPA Region 2, to David A. Whitehill, Re: In the matter of Dependable Towing & Recovery, Inc., and David A. Whitehill, Proceeding Pursuant to §309(a) of the Clean Water Act, 33 U.S.C. §1319(a); Findings of Violation and Order CWA-02-2010-3501, Dated: October 13, 2010</p> <p>Author: David Pohle</p>
99	<p>Powerpoint with photographs “David Whitehill & Dependable Towing and Recovery, Inc., Wetlands Fill Violation: Inspection March 31, 2010”</p> <p>Author: David Pohle</p>
100	<p>Screen shot of GIS Maps for Chautauqua County – Tax Map with Aerial Satellite photograph of David A Whitehill Property, New Tax No. 354.00-1-38</p> <p>Author: David Pohle</p>
101	<p>Screen shot of GIS Maps for Chautauqua County – Tax Map with Aerial Satellite photograph of David A Whitehill Property, New Tax No. 354.18-1-9</p> <p>Author: David Pohle</p>
102	<p>Screen shot of GIS Maps for Chautauqua County – Tax Map with Aerial Satellite photograph of David A Whitehill Property, New Tax No. 354.18-1-11</p>

	Author: David Pohle
103	Screen shot of GIS Maps for Chautauqua County – Tax Map with Aerial Satellite photograph of David A Whitehill Property, New Tax No. 354.18-1-8 Author: David Pohle
104	Letter from Barbara A. Finazzo, US EPA Region 2, to David A. Whitehill Re: In the matter of Dependable Towing & Recovery, Inc., and David A. Whitehill, Proceeding Pursuant to §309(a) of the Clean Water Act, 33 U.S.C. §1319(a); Findings of Violation and Order CWA-02-2010-3501, Dated: March 24, 2010
105	Screen shot of GIS Maps for Chautauqua County – Aerial Satellite photograph, depicting abutting town borders of Ellicott, Poland, Falconer and Jamestown, New York Author: David Pohle
106	Memorandum for: Chief, Monitoring and Enforcement, Subject: Dependable Auto Transport (DA# 2008-01468), Author: J. Kassler, Date of Memo: 15 May 2009 Author: Joe
107	Computer Printout of http://www.dependableautotransport.com/ dated: 6/18/2009 Author: David Pohle
108	Computer Printout of http://www.dependableautotransport.com/about_us.htm dated: 6/18/2009 Author: David Pohle
109	Computer Printout of http://www.dependableautotransport.com/contact_us.htm dated: 6/18/2009 Author: David Pohle
110	Computer Printout of http://www.dependableautotransport.com/for_sale.htm dated: 6/18/2009 Author: David Pohle
111	Excerpts from “Take a Paddle- Western New York Quiet Water for Canoes & Kayaks” by Rich & Sue Freeman, Copyright 2004
112	Screen shot of GIS Maps for Chautauqua County – Tax Map with Aerial Satellite photograph of City of Board of Public Utilities Property, New Tax No. 354.00-1-39, Address: 3070 Falconer-Kimball Stand Rd Author: David Pohle
113	Screen shot of GIS Maps for Chautauqua County – Tax Map with Aerial Satellite photograph of Holly B Property, New Tax No. 354.00-1-37, Address: E Main St Ext (Rear) Author: David Pohle
114	Screen shot of GIS Maps for Chautauqua County – Tax Map with Aerial Satellite photograph of City of Jamestown BPU Property, New Tax No. 354.00-1-36, Address: E Main St Ext (Rear) Author: David Pohle
115	Screen shot of Intelligence on Demand 1.9 – Aerial Satellite photograph of City of Jamestown Board of Public Utilities, Address 3070 Falconer-

	Kimball Stand Rd
116	Curriculum Vitae for Peter Stokely, Current Position – Environmental Scientist for Environmental Protection Agency, Office of Civil Enforcement
117	Resume for David G. Pohle – Environmental Scientist for Environmental Protection Agency, Region 2
118	Resume for Timothy J. Crocket – Biologist/Team Leader/District GD&S Coordinator for U.S. Army Corps of Engineers
119	Resume for Harold T. Keppner – Supervisory Biologist for U.S. Army Corps of Engineers
120	Resume for Joseph E. Kassler – Biologist for U.S. Army Corps of Engineers
121	Resume for Anne Rothrock – Biologist for New York State Department of Environmental Conservation
122	Screen capture of Google Earth aerial image of the wetlands and Cassadaga Creek dated October 6, 2008. Author: David Pohle
123	Screen capture of Google Earth aerial image of the wetlands and Cassadaga Creek dated March 31, 2004. Author: David Pohle
124	Web Soil Survey map of the soil types at and in the vicinity of the Property mapped by the U.S. Department of Agriculture. Author: David Pohle

III. Each party shall submit a statement expressing its view as to the place for the hearing and the estimated amount of time needed to present its direct case.

As its first option, Complainant requests that the hearing be held in Buffalo, NY, since this location is convenient for both parties and witnesses listed above who work in the Buffalo region.

In the alternative, it could be held in New York, NY, where Complainant has its offices or in Washington D.C where the Administrative Judge is located.

Complainant estimates it will need two days (2) to present its direct case.

IV. Determination Of The Proposed Penalty Amount

This is a proceeding for the assessment of a penalty. The Agency did not specify a proposed penalty in the Complaint. EPA has included in this initial prehearing exchange all factual information relevant to the assessment of a penalty. No later than fifteen (15) days after Respondent files its prehearing information exchange, Complainant will file a document specifying a proposed penalty and explain how the proposed penalty was determined in accordance with the criteria set forth in Section 309 of the Clean Water Act, 33 U.S.C. § 1319(g)((3), including a description of how the specific provisions of any Agency penalty or enforcement policies and/or guidelines were applied in calculating the penalty.

V. The Complainant shall submit a statement on the applicability of the Paperwork Reduction Act of 1980 (PRA), 44 U.S.C. §3501 et seq., to this proceeding, including whether there is a current Office of Management and Budget Control number involved and whether the provisions of Section 3512 of the PRA may apply to this case.

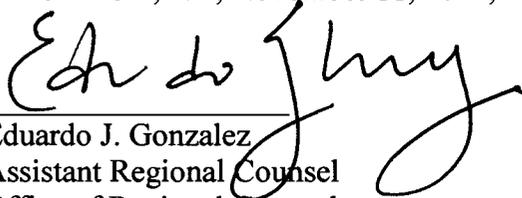
Pursuant to the PRA, federal agencies such as EPA may only collect penalties regarding the “collection of information”¹ if the Agency first receives and properly notices approval for the collection of that information from the Office of Management and Budget (“OMB”). *Id.* This requirement protects the public from *paperwork* regulations; it does not apply to statutory or substantive requirements. See generally *Dole v. United Steelworkers of America*, 494 U.S. 26 (1990); *Gossner Foods v. Environmental Protection Agency*, 918 F. Supp. 359, 362 (D. Utah 1996).

With respect to the Complaint’s primary finding of violation (the unauthorized discharge of fill material into a water of the U.S.), involving a violation of Section 301(a) of the CWA, 33 U.S.C. §1311, the PRA is not a bar to seeking a penalty because this Count asserts a violation of a statutory requirement; the public protection provision of 44 U.S.C. § 3512 does not apply to a requirement Congress has directly imposed. 5 C.F.R. § 1320.6(e). *In the Matter of: AutoAlliance International, Inc.*, Respondent, 1999 EPA ALJ LEXIS 74 (Moran).

Alternatively, the regulatory sections relating to dredge and fill permits found at 33 C.F.R. Parts 320 to 330 do have an OMB Control Number associated with them. The OMB Control Number associated with this Part is 0710-0003. This OMB Control Number was recently re-approved on July 31, 2009 and is set to expire on August 31, 2012.

Thus, assuming the PRA is applicable to this Count, the OMB Control Number associated with this Count was properly approved for the times corresponding to those encompassing the dates of the inspections and at the time the Complaint was issued. Similarly, at this time, there is no bar to the injunctive relief being sought in this case

In New York, NY, November 11, 2011,



Eduardo J. Gonzalez
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¹ The “collection of information” is defined in the PRA to include the “obtaining . . . , soliciting, or requiring the disclosure...” of information.”

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG.II
2011 NOV 14 A 10 21

IN THE MATTER OF

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

Respondents

Docket No. CWA-02-2011-3601 REGIONAL HEARING
CLERK

CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing **Complainant's Prehearing Exchange**, dated November 10, 2011, and bearing the above-referenced docket number, in the following manner to the respective addressees below:

Original and copy (with one set of original exhibits), hand delivered to Ms. Maples in-box:

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

Copy with attachments (in digital form as agreed by counsel) to:

Deborah J. Chadsey, Esq.
Kavinoky Cook, LLP
Attorneys at Law
726 Exchange Street, Suite 800
Buffalo, NY 14210

Copy (with attachments) by UPS.service 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]

11/11/11
Date

