



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

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MAY 05 2011

REPLY TO THE ATTENTION OF:

C-14J

The Honorable Susan L. Biro, Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W., Mail Code 1900L
Washington, DC 20460

Re: Misch Excavating, LLC, d/b/a Rooterman
Docket No. CWA-05-2011-0003

Dear Chief Administrative Law Judge Biro:

Pursuant to your March 16, 2011, Prehearing Order, I am enclosing a Complainant's Initial Pre-Hearing Exchange for the above-referenced matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Maria Gonzalez".

Maria Gonzalez
Associate Regional Counsel
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Blvd.
Chicago, Illinois 60604
(312) 886-6630

Enclosures

cc w/ enclosures: Thomas W. Daggett
Regional Hearing Clerk

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

2011 MAR 15 PM 2:36

)	
	)	Docket No. CWA-05-2011-0003
IN THE MATTER OF:)	
)	
MISCH EXCAVATING, LLC	)	Proceeding to Assess a
d/b/a ROOTERMAN	)	Class II Civil Penalty
DOWNS, ILLINOIS 61736	)	Pursuant to Section
	)	309(g) of the Clean
	)	Water Act, 33 U.S.C.
RESPONDENT.	)	§ 1319(g)
_____)	

COMPLAINANT'S INITIAL PREHEARING EXCHANGE

COMPLAINANT, the Director of the Water Division, through one of its attorneys, in accordance with the March 16, 2011, Prehearing Order ("Prehearing Order") issued by the Presiding Officer, Chief Judge Biro, respectfully submits the following Complainant's Initial Prehearing Exchange pursuant to Section 22.19 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, codified at 40 Code of Federal Regulations ("C.F.R.") § 22.19.

1(A). EXPECTED WITNESSES

This section includes a list of the names of expert and other witnesses intended to be called at hearing, identifying each as a fact witness or an expert witness, a brief narrative summary of their expected testimony, and a curriculum vitae or resume for each identified expert witness as required by Paragraph 1.(A) of the of the Presiding Officer's Prehearing Order.

Complainant may call the following individuals to testify as fact witnesses in the hearing in this matter:

1. Scott Cook

Mr. Cook is a Staff Sanitarian for the McLean County Health Department. Mr. Cook may testify about his records, complaints received about Misch Excavating LLC, his communications with representatives of Misch Excavating, LLC and those submitting complaints, and his observations, notes and photographs at the site where Misch Excavating, LLC deposited waste sludge.

2. John Hendershot

Mr. Hendershot is an Environmental Health Program Supervisor for the McLean County Health Department. Mr. Hendershot may testify about his records, complaints received about Misch Excavating LLC, his communications with representatives of Misch Excavating, LLC and those submitting complaints, and his observations, notes and photographs at the site where Misch Excavating, LLC deposited waste sludge.

3. Hannah Delahunt

Ms. Delahunt is a Staff Sanitarian for the McLean County Health Department. Ms. Delahunt may testify about her records, complaints received about Misch Excavating LLC, communications with representatives of Misch Excavating, LLC and those submitting complaints, and observations, notes and photographs at the site where Misch Excavating, LLC deposited waste sludge.

4. Larry Jones

Mr. Jones lives next door to the property where Respondent and its representatives deposited waste sludge. He may testify about observations and photographs of Respondent's activities and the neighboring property and conversations with representatives of Respondent.

5. Christina Jones

Mrs. Jones lives next door to the property where Respondent and its representatives deposited waste sludge. She may testify about observations and photographs of Respondent's activities and the neighboring property and conversations with representatives of Respondent.

6. Valdis Aistars

Mr. Aistars is the Sludge Program Manager for the U.S. Environmental Protection Agency Region 5's Water Division. His duties include serving as an inspector and enforcement officer in the investigation of sludge cases under the Clean Water Act. Mr. Aistars may testify about his experience; EPA's records, the 40 C.F.R. Part 503 requirements; EPA's educational outreach efforts; interpretive guidance issued by EPA; his observations, his review of the evidence compiled as a result of EPA's review of this matter; the November 7, 2008, Findings of Violation and Order of Compliance and Request for Information (the Order) issued to Respondent seeking documents and other information from November 15, 2003 to the present (at that time) (CX1); the factual basis for the findings in the Order and his determination that Respondent violated the Order; correspondence, meetings and calls regarding the Order; and Respondent's response to the Order. Mr. Aistars will also testify as to how the penalty proposed in the Complaint was calculated applying the statutory penalty factors set forth within Section 309(g)(3) of the Clean Water Act, 33 U.S.C. § 1319(g)(3), as explained by EPA's Interim Clean Water Act Settlement Penalty Policy, dated March 1, 1995 (CX14), as set forth in greater detail in his Explanation of the CWA Class II Administrative Penalty attached as CX 2. He will offer his assessment of the appropriateness of the penalty proposed in the Complaint, considering the nature, circumstances, extent, and gravity of the violations, and, with respect to the Respondent, ability to pay, effect of ability to continue to do

business, any history of prior such violations, the degree of culpability, economic benefit, and such other matters as justice may require. If necessary, Mr. Aistars will testify regarding the delegations of authority pertaining to the Complaint. Mr. Aistars will also provide testimony sufficient to authenticate certain exhibits included in Complainant's prehearing exchange.

7. Witness on Ability to Pay

Complainant has not yet received documentation of an ability to pay claim by Respondent. Complainant reserves the right to call a witness on the analysis of Respondent's ability to pay and the information submitted and obtained and to request and introduce additional information on ability to pay, including records from the IRS.

1(B). DOCUMENTS AND EXHIBITS

Copies of documents and exhibits which Complainant intends to introduce into evidence at the hearing are attached hereto as Complainant's Exhibits, and are numbered sequentially. Included with these documents are those that the Court ordered to be exchanged in Paragraph 1.(B) of the Prehearing Order, as follows.

CX-1: April 6, 2008, Order.

CX-2: Valdis Aistar's Explanation of the CWA Class II Administrative Penalty.

CX-3: August 4, 2008, Correspondence from McLean County Health Department and attachments, including:

- Attachment A: plat showing farm where Respondent applied sewage sludge. (CX-3-4)
- Attachment B: an aerial photograph of the farm. (CX-3-5)
- Attachment C: dates and times neighbors observed Respondent land applying without incorporating the waste into the soil. (CX-3-6)
- A disc of pictures of the farm where Respondent applied sewage sludge. (CX-3-7 – CX-3-38)

CX-4: Letters and pictures submitted by Respondent during the February 9, 2009, informal conference.

CX-5: March 25, 2009, Email from John Hendershot to Valdis Aistars on licenses for pumping septic tanks issued to Respondent.

CX-6: April 24, 2009, letter to Respondent, following up on the lack of response to the Order.

CX-7: January 27, 2010, Notice of Intent issued to Respondent.

CX-8: February 11, 2010, Fax to Respondent of the Order, enclosing the January 27, 2010, Notice of Intent and a Questionnaire on ability to pay.

CX-9: March 1, 2010, request for extension to respond to the January 27, 2010, Notice of Intent.

CX-10: Extension until March 10, 2010, to respond to the January 27, 2010, Notice of Intent.

CX-11: March 15, 2010, Response to the January 27, 2010, Notice of Intent.

CX-12: Correspondence mailed August 24, 2010 from McLean County Health Department containing their files on Misch Excavating, LLC, including the following:

-Cover list of items in CX12 (CX-12-1)

-2009 files: application for private sewer disposal system pumper's license, pumper truck inspection form, 3/2/09 letter reminder on documentation requirements, and certification. (CX-12-2 – CX-12-8)

-2008 files: application for private sewer disposal system pumper's license, pumper truck inspection form, septage land disposal site form, certification, pictures, plat, 9/16/08 letter on lack of documentation, land application records (invoices) submitted in response. (C-X-12-9 - CX-12-39)

-2007 files: application for private sewer disposal system pumper's license, pumper truck inspection form, pictures, certification, aerial photograph. (CX-12-40 – CX-12-49)

-2006 IEPA permit, 2007 photographs. (CX-12-50 – CX-12-58)

-2006 files: application for private sewer disposal system pumper's license, pumper truck inspection form, septage land disposal site form, certification, pictures, plat. (CX-12-59 – CX-12-72)

-2005 files: application for private sewer disposal system pumper's license, pumper truck inspection form, memo to file, pumper's license renewal, certification, plat, pictures. (CX-12-73- CX-12-86)

-Reported land application records for 2004 submitted in 2005. (CX-12-87)

-Report of Complaint. (CX-12-89)

-2004 files: modified application for private sewer disposal system pumper's license, pumper truck inspection forms, septage land disposal site forms, plat, example record keeping, certification, table on productivity of Illinois soils, map, cover of August 2000 bulleting on optimum crop productivity ratings for Illinois soils, pictures. (CX-12-90 – CX-12-105)

CX-13: September 8, 2010, correspondence to Respondent following up on the need for information.

CX-14: Interim Clean Water Act Settlement Penalty Policy, dated March 1, 1995.

1(C). LOCATION OF HEARING

As required by Paragraph 1.(C) of the Prehearing Order, and 40 C.F.R. §§ 22.21(d) and 22.19(d), Complainant requests that the hearing in this matter be held at a suitable location in or near Chicago, Illinois, or in Downs, Illinois. Most of Complainant's witnesses will have to travel from locations at or near Downs, Illinois,

where Respondent conducts the business which the hearing concerns. However, one of Complainant's witnesses and counsel for both parties are located in Chicago, where EPA, Region 5's Office is located.

Complainant anticipates needing approximately 2 days to present its direct case.

Complainant does not expect to need translation services for witness testimony.

2(A). ADDITIONAL DOCUMENTS AND STATEMENTS

As required by Paragraph 2.(A) of the Prehearing Order, Complainant is providing narrative statements and copies of documents in support of the allegations in Paragraphs 22, 23, 25, 26, 37, and 40 of the Complaint, as follows:

Par. 22 . information indicating that Respondent Disposed of septage sludge on the Parcel without complying with the applicable requirements of Part 503.

The observations of witnesses and the photographs evidence that Respondent was disposing of septage sludge on the parcel in a manner that did not comply with Part 503. The regulations at Part 503 require that land application of septage be done by either pH adjustment, injection, or incorporation. The appearance of the land applied septage, as well as, the presence of various items on the surface which are associated with septage are indications that there was noncompliance with Part 503. *See* CX1, CX3, CX4, CX5, CX6, CX7, CX8, CX9, CX10, CX11, CX12 and CX13.

Par. 23. Information indicating that Respondent has disposed of sludge from treatment works treating domestic sewage within meaning of Section 405(e).

As defined at 40 C.F.R. 503.10(aa), a treatment works is a either a federally owned, publicly owned, or privately owned device or system used to treat (including recycle and reclaim) either domestic sewage or a combination of domestic sewage and industrial waste of a liquid nature. As such, a septic tank is a treatment works and the septage which is pumped from it and land applied is subject to the regulations under 40 C.F.R. §503.10(a). The records, observations and photographs evidence that Respondent has disposed of sludge from treatment works treating domestic sewage. *See* CX3, CX4, CX5, CX11 and CX12.

Par. 25 information indicating that Respondent has violated Section 405.

Respondent has violated Section 405 by disposing of sludge from a treatment works treating domestic sewage without complying with the regulations at 40 C.F.R. Part 503. *See* Section 405(e) of the CWA, 33 U.S.C. § 405(e), and CX3, CX4, CX5, CX11 and CX12.

Par 26. Information indicating that the violations may be continuing.

The application to continue land applying and the lack of documentation indicate that the violations may be continuing. *See CX5, CX6, CX11, CX12, and CX13.*

Par. 37. Respondent did not provide other information and records requested by the Order or documentation to support its assertions.

The testimony on the correspondence sent and received and the contents of the Order evidence that Respondent did not provide the information requested by the Order. *See CX1, CX4, CX6, CX7, CX8, CX9, CX10, CX11, CX12, and CX13.*

Par. 40 U.S. EPA has not received any additional information from Respondent.

The testimony as to the correspondence and Agency recordkeeping evidence that U.S. EPA has not received additional information from Respondent. *See CX1, CX4, CX5, CX6, CX7, CX8, CX9, CX10, CX11, CX12, and CX13.*

2(B). DOCUMENTS REFERENCED IN PARAGRAPHS 28, 34-36, AND 39

The documents referenced at paragraphs 28,34-36, and 39 of the Complaint are contained in CX1, CX6, CX7, CX11, and CX13.

2(C). EPA PENALTY POLICY OR GUIDANCE DOCUMENT

A copy of any EPA policy or guidance document upon which Complainant has relied, or intends to rely, in calculating the proposed penalty is contained in CX14.

2(D). PROPOSED PENALTY

As required by Paragraph 2.(D) of the Prehearing Order, Valdis Aistars, who made the penalty determinations for Complainant, has prepared a detailed description of his penalty calculation, including a discussion of each of the penalty assessment factors in Section 309(g)(3) of the Clean Water Act, 33 U.S.C. § 1319(g)(3). This written description is set forth in Mr. Aistar's Explanation of the CWA Class II Administrative Penalty, which appears at CX 2.

2(E). RESPONSE POLICY REFERRED TO IN THE AMENDED COMPLAINT

As set forth in greater detail in Mr. Aistar's Explanation of the CWA Class II Administrative Penalty (CX 2), Complainant relied on the Interim Clean Water Act Settlement Penalty Policy, dated March 1, 1995 (CX 2) in calculating the proposed penalty in this matter.

2(F). APPLICATION OF THE PAPERWORK REDUCTION ACT

As stated in Paragraph 2.(F) of the Prehearing Order, the Presiding Officer directed Complainant to provide its position regarding the applicability of the Paperwork Reduction Act, 44 U.S.C. §§ 3501 et seq. (“PRA”), to this proceeding, including whether there is a current Office of Management and Budget (“OMB”) control number involved and whether the provisions of Section 3512 of the PRA may apply to this case.

1. Whether there is a current OMB control number involved.

The Information collection requirements of 40 C.F.R. Part 503 were assigned OMB no. 0240-0157. *See* 40 C.F.R. § 9.1 (2010). These information collection requirements were also incorporated into the National Pollutant discharge Elimination System (NPDES) and Sewage Sludge Monitoring and Reporting Requirements, OMB No. 2040-0004. *See* 59 Fed. Reg. 56077 (Dec. 12, 1994). As discussed below, however, the PRA Does not apply to this proceeding.

2. Whether Section 3512 of the PRA applies to this case.

The information required to be submitted pursuant to the Clean Water Act Section 308 Order was not subject to the Paperwork Reduction Act of 1995, 44 U.S.C §§ 3501 - 3521 (2008). That Order fell within the exception at 44 U.S.C. § 3518(c)(1)(B)(ii), for the collection of information during the conduct of an administrative action or investigation involving an agency against specific individuals or entities. EPA sought this information through its authority to seek information under Section 308 of the CWA after obtaining information indicating that Respondent was disposing of septage sludge on land without complying with the applicable requirements of 40 C.F.R. Part 503. “In practice, the administrative enforcement exemption to the PRA has been applied to ICRs [information collection requests or collections of information] that are compulsory in nature and a standard part of any agency’s investigatory program.” *In re: Virgin Petroleum -- Princess, Inc.*, Docket No. RCRA-02-2002-7501, 2003 EPA ALJ LEXIS 65 (ALJ Order on Cross Motions for Accelerated Decisions, September 10, 2003) (quoting *In Re : Zaclon, Inc.*, 7 E.A.D. 482, 493 (EAB 1998)). The request for information was issued for the purpose of determining Respondent’s compliance with 40 C.F.R. Part 503. The Order specified that the information required to be maintained or submitted pursuant to the Order was not subject to the Paperwork Reduction Act. *See* CX1 at 9.

JUDICIAL NOTICE

Complainant hereby requests the Presiding Officer take judicial notice of the following:


1. The Clean Water Act (CWA), U.S.C. §1251-1387, as amended, including the legislative history;

2. The Standards for the Use or Disposal of Sewage Sludge, codified at 40 C.F.R. Part 503, as amended.
3. The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22, as amended, including 61 Fed. Reg. 9064, March 6, 1996;
4. Federal Register notices;
5. Delegations of Authority.

RESERVATION OF RIGHTS

Complainant respectfully reserves the right to call all witnesses called by the Respondent, to recall any of their witnesses in rebuttal, and to modify or supplement the names of witnesses and exhibits prior to the Adjudicatory Hearing, pursuant to 40 C.F.R. Part 22, and upon adequate notice to the Respondent and the Presiding Officer.

Respectfully submitted,
U.S. Environmental Protection Agency



Maria Gonzalez
Associate Regional Counsel
U.S. Environmental Protection Agency
Region 5 (C-14J)
77 West Jackson Blvd.
Chicago, IL 60604
Telephone: (312) 886-6630
Facsimile: (312) 692-2964

***In the Matter of: Misch Excavating LLC,
d/b/a Rooterman
Docket No. CWA-05-2011-0003***

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CERTIFICATE OF SERVICE

I hereby certify that today I filed the original and one copy of COMPLAINANT'S INITIAL PRE-HEARING EXCHANGE in the office of the Regional Hearing Clerk (E-19J), U.S. Environmental Protection Agency, Region 5, 77 W. Jackson Boulevard, Chicago, IL 60604-3590


I then mailed a true and accurate copy of the filed document to:

The Honorable Susan L. Biro
Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W., Mail Code 1900L
Washington, D.C. 20460

Thomas W. Daggett
Daggett Law Firm
161 N. Clark Street, Suite 4950
Chicago, IL 60601

I also faxed a courtesy copy of the pleading (without its exhibits) to (202) 565-0044.

Dated: 5 May 2011



Donald E. Ayres,
Paralegal Specialist, MM2-4
Office of Regional Counsel
U.S. EPA Region 5
77 W. Jackson Blvd.
Chicago, IL 60604-3590
(312) 353-6719

Complainant's Exhibit

CX-1



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

NOV 07 2008

REPLY TO THE ATTENTION OF:

WC-15J

CERTIFIED MAIL 7001 0320 0005 8922 5695
RETURN RECEIPT REQUESTED

Mr. Jeff Misch
Misch Excavating, LLC d/b/a Rooterman
P.O. Box 181
Downs, Illinois 61736-0181

Subject: Misch Excavating, LLC d/b/a Rooterman Order Pursuant to 33 U.S.C. §1318
and 1319(a) of the Clean Water Act. Docket No. V-W-09-AO- 02

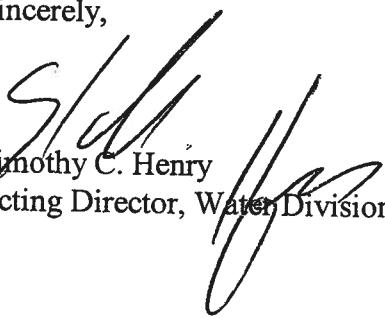
Dear Mr. Misch:

Enclosed is the above-referenced Administrative Order.

Compliance with the terms of this Order is required within the periods specified therein. Failure to comply with the Order may subject Misch Excavating, LLC d/b/a Rooterman to further enforcement action pursuant to Section 309 of the Clean Water Act, 33 U.S.C. §1319(a).

Please send your written responses to the addresses specified in the Order. If you have any questions concerning this matter, please contact Mr. Valdis Aistars of my staff at (312) 886-0264.

Sincerely,


Timothy C. Henry
Acting Director, Water Division

Enclosure

cc: Thomas J. Anderson, MCHD w/enclosure
Mike Garretson, IEPA w/enclosure.

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

IN THE MATTER OF:	)	DOCKET NO. V-W-09-AO- 02
)	
MISCH EXCAVATING d/b/a ROOTERMAN DOWNS, ILLINOIS 61736	)	FINDINGS OF VIOLATION
)	
	)	AND
)	
	)	ORDER FOR COMPLIANCE
)	
	)	AND
)	
	)	REQUEST FOR INFORMATION

The following **FINDINGS** are made and **ORDER** issued pursuant to the authority vested in the Administrator of the U. S. Environmental Protection Agency under Sections 308 and 309(a) of the Clean Water Act (CWA), 33 U.S.C. §§ 1318 and 1319(a). The Administrator has delegated this authority to the Regional Administrator of EPA, Region 5, who has duly re-delegated this authority to the undersigned Acting Director, Water Division, EPA – Region 5, who hereby issues the following Findings and Order.

FINDINGS

1. **Misch Excavating, LLC** (hereinafter “Respondent”) is a limited liability corporation organized under the laws of the State of Illinois doing business as Rooterman.
2. Respondent is a “person” as defined by Section 502(5) of the Act, 33 U.S.C. Section 1362(5), and 40 C.F.R. § 503.9(q).
3. Pursuant to section 405(d) of the CWA, 33 U.S.C. § 1345(d), the Administrator published the “Standards for the Use or Disposal of Sewage Sludge” on February 19, 1993, which have been codified, at 40 C.F.R. Part 503, with amendments.

4. 40 C.F.R. § 503.3(b) provides that: “No person shall use or dispose of sewage sludge through any practice for which requirements are established in this part except in accordance with such requirements.”
5. 40 C.F.R. § 503.2 provides that “[c]ompliance with the standards in this part shall be achieved as expeditiously as practicable, but in no case later than February 19, 1994.”
6. 40 C.F.R. § 503.2(c) provides that compliance with requirements for frequency of monitoring, recordkeeping, and reporting are effective on July 20, 1993.
7. Pursuant to 40 C.F.R. § 503.1(b), the provisions of 40 C.F.R. Part 503 apply, in pertinent part, to any person who applies sewage sludge to the land.
8. In the course of conducting its business, Respondent collected liquid and solid material from domestic septage tanks, cesspools, portable toilets or other waste collection devices.
9. The materials referred to in Paragraph 10 are “domestic septage” as that term is defined in 40 C.F.R. § 503.9(f).
10. The materials referred to in Paragraph 10 are “sewage sludge” as defined at 40 C.F.R. § 503.9(w).
11. The sources from which Respondent collected materials, identified in Paragraph 10, were “treatment works treating domestic sewage” within the meaning of Section 405(e) of the CWA, 33 U.S.C. § 1345(e).
12. Respondent applied sewage sludge to a parcel of land located in McLean County (T.23N.-R.4.), P.O. Box 108, Downs, Illinois 61736 (the Parcel).
13. Respondent applied sewage sludge to the land within the meaning of 40 C.F.R. §§ 503.1(b) and 503.10(a).
14. Respondent is subject to the requirements of 40 C.F.R. Part 503 subpart B.

15. 40 C.F.R. § 503.15(b) provides that the pathogen requirements in either 40 C.F.R. § 503.32(c)(1) or (c)(2) shall be met when domestic septage is applied to agricultural land, forest, or a reclamation site.
16. 40 C.F.R. § 503.15(d) provides that the vector attraction reduction requirements of 40 C.F.R. § 503.33(b)(9), (b)(10), or (b)(12), shall be met when domestic septage is applied to agricultural land, forest, or a reclamation site.
17. As stated at 40 C.F.R. § 503.32(c)(1) or (c)(2) and 40 C.F.R. § 503.33(b)(9), (b)(10), or (b)(12), the pathogen reduction and vector attraction reduction requirements shall be met when domestic septage is applied to agricultural land, forest, or a reclamation site.
18. 40 C.F.R. § 503.13(c) states that the annual application rate for domestic septage applied to agricultural land, forest, or a reclamation site shall not exceed the annual application rate calculated using the following equation:
- $$\text{AAR} = N / 0.0026 \quad \text{where:}$$
- AAR= Annual application rate in gallons per acre per 365 day period.
- N = Amount of nitrogen in pounds per acre per 365 day period needed by the crop or vegetation grown on the land.
19. The Parcel is agricultural land.
20. Respondent has applied domestic septage to agricultural land.
21. Information available to EPA indicates that Respondent has disposed of septage sludge on the Parcel without complying with the applicable requirements of 40 C.F.R. Part 503.
22. Information available to EPA indicates that Respondent has disposed of sludge from treatment works treating domestic sewage within the meaning of Section 405(e) of the

CWA, 33 U.S.C. § 1345(e), without complying with the applicable requirements of 40 C.F.R. Part 503.

23. Section 405(e) of the CWA, 33 U.S.C. § 1345(e), in part, provides that: “it shall be unlawful for any person to dispose of sludge from a publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been established pursuant to subsection (d) of this section, except in accordance with such regulations.”
24. Information available to EPA indicates that Respondent has violated Section 405 of the CWA.
25. Information available to EPA indicates that these violations may be continuing.
26. Section 309(a) of the CWA authorizes the Administrator to issue a compliance order or to bring a civil action whenever on the basis of any information available to him he finds that a person is in violation of, inter alia, Section 405 of the CWA.

ORDER FOR COMPLIANCE

BASED ON THE FOREGOING FINDINGS and the authority vested in the undersigned Acting Director, Water Division, Region 5, IT IS HEREBY ORDERED:

1. Within five (5) calendar days of receipt of this Order, Respondent shall submit a written certification of its intent to comply with this Order.
2. Respondent shall immediately cease land applying domestic septage. Respondent cannot resume land applying domestic septage on the Parcel until a) Respondent demonstrates to EPA that it is in compliance with 40 C.F.R Part 503; b) the McLean County Health Department determines that the Parcel is suitable for further land application of domestic septage; and c) EPA notifies Respondent that Respondent has

achieved compliance with 40 C.F.R. Part 503. Respondent cannot resume land applying domestic septage elsewhere until a) Respondent identifies the location; b) Respondent demonstrates to EPA that land application at this location is in compliance with 40 C.F.R Part 503; and c) EPA notifies Respondent that Respondent has achieved compliance with 40 C.F.R. Part 503. Respondent's land application of domestic septage must comply with 40 C.F.R. Part 503 and all applicable State and local requirements.

3. Within twenty (20) calendar days of the effective date of this Order, Respondent shall submit the following information for the period November 15, 2003, to the present with respect to the Parcel:
 - a. The number of acres to which domestic septage was applied at the Parcel;
 - b. The date and time domestic septage was applied at the Parcel;
 - c. The nitrogen requirement for the crop or vegetation grown at the Parcel during the year, including the expected annual crop yield(s);
 - d. The rate, in gallons per acre per 365 day period, at which domestic septage was applied to the Parcel;
 - e. Certification statements pursuant to 40 C.F.R. § 503.17 (b)(6);
 - f. A description of how the pathogen reduction requirements in either 40 C.F.R. § 503.32 (c)(1) or (c)(2) were met for each batch of domestic septage land applied;
 - g. A description of how the vector attraction reduction requirements in 40 C.F.R. § 503.33 (b)(9), (b)(10), or (b)(12) were met, including incorporation measures practiced; and

- h. If the Respondent is complying with 40 C.F.R. § 503.32 (c) (2) and/or 40 C.F.R. § 503.33 (b) (12), records for each batch that indicate: the pH of the domestic septage after initially adding lime; the pH of the domestic septage 30 minutes after initially adding lime; and receipts for bulk lime quantities purchased.
4. Within 20 days of receipt of this request, Respondent must also submit the following information for the period November 15, 2003, to the present, to the extent not provided in response to the previous paragraph:
- a. The address and legal description of any locations where Respondent applied domestic septage.
 - b. The type of land involved, including whether it was agricultural, forest, or a reclamation site.
 - c. The number of acres to which domestic septage was applied.
 - d. The dates of land application of septage.
 - e. The rate, in gallons per acre per 365 day period, at which domestic septage was applied at those locations;
 - f. A detailed description of Respondent's specific land application procedures, from the emplacement of the septage into vehicles for transportation from any point of collection to the actual application of the septage to the ground, including any incorporation and/or injection.
 - g. A statement of the method or a list of its methods Respondent used for achieving compliance with the vector attraction reduction requirements of

40 C.F.R. Part 503. If Respondent employed more than one method of complying with 40 C.F.R. Part 503 vector attraction reduction requirements during the above-referenced period, Respondent must state the method and duration it employed any given method;

- h. Documentation to establish Respondent's compliance with the 40 C.F.R. Part 503 vector attraction reduction requirements during each month.
- i. A statement of the method or a list of its methods for achieving compliance with the pathogen reduction requirements of 40 C.F.R. Part 503. If Respondent employed more than one method of complying with 40 C.F.R. Part 503 pathogen reduction requirements during the above-referenced period, Respondent must state the method and duration it employed any given method.
- j. Documentation to establish Respondent's compliance with the 40 C.F.R. Part 503 pathogen reduction requirements during each month.
- k. Whether Respondent ever attempted to comply with the pathogen reduction or vector attraction reduction requirements of 40 C.F.R. Part 503 by manipulating the pH of the septage under 40 C.F.R. § 503.32 (c)(2) or 40 C.F.R. § 503.33 (b)(12). If so, describe in detail the methods and procedures that Respondent employed to assure that the septage was sampled for compliance with those provisions.
- l. Any records of the testing and analyses performed for each container of septage Respondent land applied. If these documents do not exist, please state this fact and explain why these records do not exist.

- m. All information required to be developed and retained under 40 C.F.R. § 503.17 (b). If Respondent does not have records required under 40 C.F.R. § 503.17 (b) for any period of time, Respondent must state that these records do not exist and state the reason these records do not exist.

5. Respondent shall submit all documents, letters, and reports and other information required by this Order to the Water Division, Region 5, EPA, Attention: Valdis Aistars, Water Enforcement & Compliance Assurance Branch, (WC-15J), at 77 West Jackson Boulevard, Chicago, Illinois 60604, with copies to the Illinois Environmental Protection Agency, Attention: Mike Garretson, Chief, Compliance Assurance Section, Illinois Environmental Protection Agency, 1021 North Grand Avenue East, Post Office Box 19276, Springfield, Illinois 62794-9276; and to the McLean County Health Department (MCHD), 200 W. Front St., Rm. 304, Bloomington, Illinois 61701, Attention: Thomas J. Anderson, Director of Environmental Health.

GENERAL PROVISIONS

Opportunity to Confer and Provide Information This Order will become effective five (5) days from the date the Respondent receives it, unless within that five-day period Respondent requests an informal conference to discuss the Findings or the Order and to present any information it wishes EPA to consider regarding the Findings or Order. If an informal conference is requested, it will be held at EPA's Region 5 offices at 77 West Jackson Boulevard, Chicago, Illinois. Alternatively, it can be conducted by telephone at Respondent's request. Respondent may be represented by an attorney or other representative at the informal conference, but the conference will not take the form of a hearing. Additionally, even if no conference is requested, Respondent may submit to U.S. EPA, at the addresses shown in paragraph 5 of this

Order, written information regarding these Findings or this Order, provided they do so within ten days of the date they receive this Order. The conduct of an informal conference or the submittal of written information does not confer a right of judicial review of this Order. To request an informal conference, Respondent should contact Mr. Valdis Aistars of my staff at (312) 886-0264, or Respondent's attorney may contact Ms. Maria Gonzalez of the EPA Region 5 Office of Regional Counsel at (312) 886-6630.

Unless it is withdrawn or modified based on information presented in the informal conference, the Order will become effective five days from the date of the informal conference or EPA's receipt of written information.

All documents, letters and reports submitted pursuant to this Order must be returned under an authorized signature of a responsible official of Respondent certifying that all statements contained therein are true and accurate and all documents submitted to EPA pursuant to this Order are authentic to the best of the signatory's knowledge and belief.

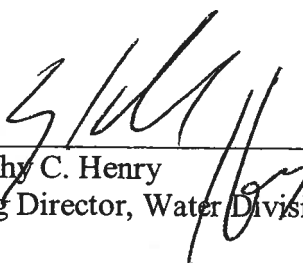
Should the signatory find at any time after submittal of the requested information that any portion of its response is false or incorrect, the signatory shall notify EPA Region 5 immediately. (See attached Authority and Confidentiality Provisions, Attachment B). If any portion of the response certified as true is found to be false, the signatory can be prosecuted under 18 U.S.C Section 1001. The EPA has the authority to use the information requested herein, in an administrative, civil, or criminal action.

The information required to be maintained or submitted pursuant to this Order is not subject to the Paperwork Reduction Act of 1995, 44 U.S.C §§ 3501 -3521(2008). Neither the issuance of this Order by the EPA nor compliance with its terms affects Respondent's ongoing obligation to comply with the CWA or any other federal or state law or regulation, nor does it

preclude further enforcement action pursuant to 33 U.S.C § 1319 for the violations cited herein or any other violations committed by Respondent.

Neither the issuance of this Order by the EPA, nor compliance with this Order by Respondent, shall be deemed to relieve Respondent of liability for any penalty, remedy, or sanction authorized to be imposed pursuant to Section 309(b), (c), or (g) of the CWA, 33 U.S.C. § 1319(b), (c), or (g), for any violation of applicable requirements of the CWA. EPA specifically reserves the right to seek any or all of the remedies authorized under these provisions for each and every violation specified in this Order. The CWA includes provisions for administrative penalties, for civil injunctive relief and penalties, and for criminal sanctions for violations of the CWA. Specifically, the EPA may assess civil administrative penalties of eleven thousand dollars (\$11,000) per day of violation up to a maximum of one hundred fifty-seven thousand five hundred dollars (\$157,500) under 33 U.S.C. § 1319(g), and 40 C.F.R. Part 19, or seek civil, judicial penalties of \$32,000 per day of violation and civil injunctive relief for violations of the CWA under 33 U.S.C. §1319(b) and 40 C.F.R. Part 19. Furthermore, EPA may seek criminal sanctions, including fines and imprisonment, for negligent or knowing violations of the CWA under 33 U.S.C. § 1319(c).

IT IS HEREBY ORDERED:

By: 

Timothy C. Henry
Acting Director, Water Division

Date 11/7/08

Attachment

AUTHORITY AND CONFIDENTIALITY PROVISIONS

Authority

Information requests are made under authority provided by Section 308 of the Clean Water Act, 33 U.S.C. 1318. Section 308 provides that: "Whenever required to carry out the objective of this Act, ...the Administrator shall require the owner or operator of any point sources to (i) establish and maintain such records, (ii) make such reports, (iii) install, use and maintain such monitoring equipment and methods (including where appropriate, biological monitoring methods), (iv) sample such effluent... and (v) provide such other information as he may reasonably require; and the Administrator or his authorized representative, upon presentation of his credentials, shall have a right of entry to...any premises in which an effluent source is located or in which any records...are located, and may at reasonable times have access to and copy any records...and sample any effluents..."

Please be advised that the submission of false statements is subject to federal prosecution under 18 U.S.C. §1001 and that this or any other failure to comply with the requirements of Section 308 as requested by U.S. EPA may result in enforcement action under the authority of Section 309 of the Clean Water Act, which provides for specified civil and/or criminal penalties.

Confidentiality

U.S. EPA regulations concerning confidentiality and treatment of business information are contained in 40 CFR Part 2, Subpart B. Information may not be withheld from the Administrator or his authorized representative because it is viewed as confidential. However, when requested to do so, the Administrator is required to consider information to be confidential and to treat it accordingly, if disclosure would divulge methods or processes entitled to protection as trade secrets (33 U.S.C. §1318(b) and 18 U.S.C. §1905), except that effluent data (as defined in 40 CFR §2.302(a)(2)) may not be considered by U.S. EPA as confidential.

The regulations provide that one may assert a business confidentiality claim covering part or all of any trade secret information furnished to U.S. EPA at the time such information is provided to the Agency. The manner of asserting such claims is specified in 40 CFR §2.203(b). In the event that a request is made for release of information covered by such claim of confidentiality or the Agency otherwise decides to make determination as to whether or not such information is entitled to such confidential treatment, notice will be provided to the claimant prior to any release of the information. However, if no claim of confidentiality is made when information is furnished to U.S. EPA, any information submitted to the Agency may be made available to the public without prior notice.

Note:

This information request is not subject to the approval requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. § 3501 et seq.

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none"> Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. Print your name and address on the reverse so that we can return the card to you. Attach this card to the back of the mailpiece, or on the front if space permits. 	<p>A. Received by (Please Print Clearly) <i>Diara Norman</i> B. Date of Delivery <i>11/13/08</i></p> <p>C. Signature <i>Diara Norman</i> <input checked="" type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes <input type="checkbox"/> No if YES, enter delivery address below:</p>
<p>1. Article Addressed to:</p> <p><i>Mr. Jeff Misch Misch Excavating, LLC d/b/a Rooterman P.O. Box 181 Downs, IL 61736-0181</i></p>	<p>3. Service Type</p> <p><input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail</p> <p><input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise</p> <p><input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p> <p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>
<p>2. Article Number (Transfer from service label) <i>7001 0320 0005 8922 5695</i></p>	
PS Form 3811, March 2001	Domestic Return Receipt 102595-01-M-1424

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)


7001 0320 0005 8922 5695

Mr. Jeff Misch

Postage	\$ <i>270</i>
Certified Fee	<i>270</i>
Return Receipt Fee (Endorsement Required)	<i>220</i>
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$ <i>760</i>

Sent To: *Mr. Jeff Misch*
Street, Apt. No., or PO Box No.: *Misch Excavating, LLC d/b/a Rooterman*
City, State, ZIP+4: *P.O. Box 181 Downs, IL 61736-0181*

PS Form 3800, January 2001 See Reverse for Instructions



Complainant's Exhibit

CX-2

**CWA CLASS II ADMINISTRATIVE PENALTY
IN THE MATTER OF MISCH EXCAVATING -- ROOTERMAN
DOWNS, ILLINOIS**

The United States Environmental Protection Agency (U.S. EPA), Region 5, Water Division, is planning to issue an administrative complaint to assess a Class II administrative penalty under section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g), against Misch Excavating, LLC d/b/a Rooterman ("Rooterman"), for violations of 308 (a) of the CWA, 33 U.S.C. § 1318 (a). Based upon the facts of this case and after consideration of the criteria provided in section 309(g) of the CWA, U.S. EPA proposes a penalty of one hundred fifty-seven thousand five hundred dollars (\$157,500).

According to section 309(g) of the CWA, 33 U.S.C. § 1319(g), in assessing any penalty, the Administrator must consider the nature, circumstances, extent and gravity of a violation, and with regard to the violator, the degree of culpability, the economic benefit or savings resulting from the violations, and such other matters as justice may require.

The complaint in this matter will allege violations of the requirement to comply with a request issued under Section 308 (a) of the Clean Water Act. It will allege that Rooterman did not respond to a November 7, 2008 Order issued to them which required them to provide information regarding their compliance with the Part 503 regulations for disposal of domestic septage to agricultural land. Specifically, the Order required Rooterman to provide the following information for the period November 15, 2003, to the present within 20 days of the effective date of the Order:

- a. The number of acres to which domestic septage was applied at the Parcel;
- b. The date and time domestic septage was applied at the Parcel;
- c. The nitrogen requirement for the crop or vegetation grown at the Parcel during the year, including the expected annual crop yield(s);
- d. The rate, in gallons per acre per 365 day period, at which domestic septage was applied to the Parcel;
- e. Certification statements pursuant to 40 C.F.R. § 503.17 (b)(6);
- f. A description of how the pathogen reduction requirements in either 40 C.F.R. § 503.32 (c)(1) or (c)(2) were met for each batch of domestic septage land applied;
- g. A description of how the vector attraction reduction requirements in 40 C.F.R. § 503.33 (b)(9), (b)(10), or (b)(12) were met, including incorporation measures practiced; and
- h. If the Respondent is complying with 40 C.F.R. § 503.32 (c) (2) and/or 40 C.F.R. § 503.33 (b) (12), records for each batch that indicate: the pH of the domestic septage after initially adding lime; the pH of the domestic septage 30 minutes after initially adding lime; and receipts for bulk lime quantities purchased.

The Order also required Rooterman to submit the following information for the period November 15, 2003, to the present, to the extent not provided in response to the previous paragraph, within 20 days of receipt of the request:

- a. The address and legal description of any locations where Respondent applied domestic septage.
- b. The type of land involved, including whether it was agricultural, forest or a reclamation site.
- c. The number of acres to which domestic septage was applied.
- d. The dates of land application of septage.
- e. The rate, in gallons per acre per 365 day period, at which domestic septage was applied at those locations;
- f. A detailed description of Respondent's specific land application procedures, from the emplacement of the septage into vehicles for transportation from any point of collection to the actual application of the septage to the ground, including any incorporation and/or injection.
- g. A statement of the method or a list of its methods Respondent used for achieving compliance with the vector attraction reduction requirements of 40 C.F.R. Part 503. If Respondent employed more than one method of complying with 40 C.F.R. Part 503 vector attraction reduction requirements during the above-referenced period, Respondent must state the method and the duration it employed any given method;
- h. Documentation to establish Respondent's compliance with the 40 C.F.R. Part 503 vector attraction reduction requirements during each month.
- i. A statement of the method or a list of its methods for achieving compliance with the pathogen reduction requirements of 40 C.F.R. Part 503. If Respondent employed more than one method of complying with 40 C.F.R. Part 503 pathogen reduction requirements during the above-referenced period, Respondent must state the method and the duration it employed any given method.
- j. Documentation to establish Respondent's compliance with the 40 C.F.R. Part 503 pathogen reduction requirements during each month.
- k. Whether Respondent ever attempted to comply with the pathogen reduction or vector attraction reduction requirements of 40 C.F.R. Part 503 by manipulating the pH of the septage under 40 C.F.R. § 503.32 (c)(2) or 40 C.F.R. § 503.33 (b)(12). If so, describe in detail the methods and procedures that Respondent employed to assure that the septage was sampled for compliance with those provisions.
- l. Any records of the testing and analyses performed for each container of septage Respondent land applied. If these documents do not exist, please state this fact and explain why these records do not exist.
- m. All information required to be developed and retained under 40 C.F.R. § 503.17 (b). If Respondent does not have records required under 40 C.F.R. §

503.17 (b) for any period of time, Respondent must state that these records do not exist and state the reason these records do not exist.

CWA Section 308, 33 U.S.C. § 1318(a), authorizes the Administrator to request this information.

The Order became effective on February 14, 2009, 5 days after the informal conference held at the request of Rooterman. Pursuant to the Order, the information was due on March 6, 2009. During the informal conference it was emphasized that Rooterman was expected to provide the information requested in the November 7, 2008 Order; and Rooterman's representative indicated that it would be provided. Absent a response, a letter of April 24, 2009 was sent to Rooterman, reminding of their responsibility to provide the requested information. As of November 16, 2009, Rooterman had not provided the information required by the Order. The complaint would seek penalties based on Rooterman's non-compliance with the 308 (a) request.

NATURE, CIRCUMSTANCES, EXTENT AND GRAVITY OF VIOLATIONS

The violation alleged in the complaint is serious. The McLean County Health Department (MCHD) had requested the USEPA to intervene in a case of apparent noncompliance with the Part 503 regulations. The USEPA is the permitting authority for the Part 503 regulations in the State of Illinois and has the responsibility to ensure that the requirements of domestic septage land application are enforced. Without additional information from Rooterman regarding their land application operations, it is not possible to determine the extent of a threat to public health and the environment. In view of the existing data from the MCHD, that threat could be considerable. Over 255 days have elapsed since the information was due.

HISTORY OF VIOLATIONS

I reviewed the enforcement files of U.S. EPA Region 5 and did not discover any prior violations of the CWA or any other environmental statutes.

ABILITY TO PAY THE PENALTY

Financial information has not yet been made available in order to determine Rooterman's ability to pay a penalty.

DEGREE OF CULPABILITY

There is some culpability for Rooterman in that someone who is in the business of septage hauling and chooses to land apply must be cognizant of the requirements that are imposed upon them to protect the environment around them and the health of the population nearby. The Part 503 regulations have been in existence since 1993 (when septage haulers were required to start keeping records), so this is not a new regulation. If indeed they are in compliance with the Part 503 requirements, it would not be burdensome to respond to the Order and provide the requested information regarding their operation and compliance status. Their noncompliance with the 308 (a) request renders the USEPA unable to carry out its responsibility under the CWA to ensure that

public health and the environment are protected.

ECONOMIC BENEFIT OR SAVINGS RESULTING FROM THE VIOLATIONS

The economic benefit was assumed to be de minimis.

OTHER MATTERS AS JUSTICE MAY REQUIRE

The maximum penalty allowable in an administrative case (\$157,500) was applicable in this case because of the serious and continuing nature of the violations.

After reviewing the factors stated at section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), I conclude that the facts of this case warrant a substantial penalty, and that the proposed penalty of \$157,500 is appropriate.



VALDIS AISTARS
Environmental Engineer
Water Division
Enforcement and Compliance Assurance Branch
U.S. Environmental Protection Agency
Region 5 (WC-15J)



Date