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May 6, 2011

U.S. ENVIRONMENTAL  
PROTECTION AGENCY  
2011 MAY 11 A 7 32  
FILING CLERK

**VIA OVERNIGHT MAIL**

Regional Hearing Clerk  
U.S. Environmental Protection Agency  
290 Broadway - 16th Floor  
New York, New York 10007  
Attention: Filing Clerk

Re: In the matter of Dependable Towing & Recovery,  
Inc. and David Whitehill  
Docket No.: CWA-02-2011-3601

Dear Sir or Madam:

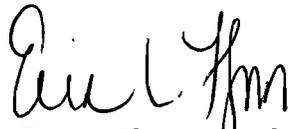
Enclosed herewith please find an original and two (2) copies of the Answer to Complaint and Request for Hearing in the above-referenced matter.

Kindly file the original and return a copy of Answer indicating thereon the date in which same was filed with your office. I have enclosed a self-addressed, stamped enveloped for your convenience.

Thank you for your kind attention to this matter.

Very truly yours,

KAVINOKY COOK LLP



Erin L. Flynn, Paralegal

ELF  
Encl.

cc: Eduardo J. Gonzalez, Esq. (via overnight mail)

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 2  
290 Broadway  
New York, New York 10007

U.S. ENVIRONMENTAL PROTECTION AGENCY  
2011 MAY 11 A 7:32  
R

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In the matter of

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

2160 Lafayette Street  
P.O. Box 266  
Falconer, New York 14733

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

Docket No. CWA-02-2011-3601

Respondents.

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**ANSWER TO COMPLAINT**  
**AND REQUEST FOR A HEARING**

Respondents, Dependable Towing & Recovery, Inc., and David A. Whitehill (collectively “Respondents”), by and through their attorneys, Kavinoky Cook LLP, for their Answer to the Complaint of the Director, Division of Environmental Planning and Protection (“DEPP”) of the U.S. Environmental Protection Agency (“EPA”), Region 2 (“Complainant”), state and allege as follows:

I. Statutory and Regulatory Authorities

1. With respect to the allegations set forth in paragraph “1” of the Complaint, such allegations are not statements of fact for which an answer is required, and Respondents do not dispute that Plaintiff has so pled.

2. With respect to the allegations set forth in paragraph “2” of the Complaint, such allegations are not statements of fact for which an answer is required, and Respondents do not dispute that Plaintiff has so pled.

3. With respect to the allegations set forth in paragraph “3” of the Complaint, such allegations are not statements of fact for which an answer is required, and Respondents respectfully refer to the statute.

4. With respect to the allegations set forth in paragraph “4” of the Complaint, such allegations assert a conclusion of law, not statements of fact, for which no response is required; however to the extent a response may be required the allegation is denied.

5. With respect to the allegations contained in paragraph “5” of the Complaint, such allegations assert a conclusion of law, not statements of fact, for which no response is required; however to the extent a response may be required the allegation is denied.

6. With respect to the allegations contained in paragraph “6” of the Complaint, such allegations assert a conclusion of law, not statements of fact, for which no response is required; however to the extent a response may be required the allegation is denied.

7. With respect to the allegations set forth in paragraph “7” of the Complaint, such allegations are not statements of fact for which an answer is required, and Respondents respectfully refer to the statute.

8. With respect to the allegations set forth in paragraph “8” of the Complaint, such allegations are not statements of fact for which an answer is required, and Respondents respectfully refer to the statute.

9. With respect to the allegations set forth in paragraph “9” of the Complaint, such allegations are not statements of fact for which an answer is required, and Respondents respectfully refer to the statute.

10. With respect to the allegations set forth in paragraph “10” of the Complaint, such allegations are not statements of fact for which an answer is required, and Respondents respectfully refer to the statute.

## II. Jurisdictional Findings

11. With respect to the allegations set forth in paragraph “11” of the Complaint, Respondents admit such allegations.

12. With respect to the allegations set forth in paragraph “12” of the Complaint, Respondents admit such allegations.

13. With respect to the allegations set forth in paragraph “13” of the Complaint, such allegations are not statements of fact for which an answer is required, and Respondents respectfully refer to the statute.

14. With respect to the allegations set forth in paragraph “14” of the Complaint, Respondents admit such allegations.

15. With respect to the allegations set forth in paragraph “15” of the Complaint, Respondents deny such allegations.

16. With respect to the allegations set forth in paragraph “16” of the Complaint, Respondents deny such allegations.

17. With respect to the allegations set forth in paragraph “17” of the Complaint, such allegations are not statements of fact for which an answer is required, and Respondents do not dispute that Plaintiff has so pled.

18. With respect to the allegations contained in paragraph “18” of the Complaint, Respondents admit in part and deny in part such allegations. Respondents only admit such allegations to the extent that Respondents have conducted operations on part of the Site.

19. With respect to the allegations contained in paragraph “19” of the Complaint, such allegations assert a conclusion of law, not statements of fact, for which no response is required; however to the extent a response may be required the allegation is denied.

20. With respect to the allegations contained in paragraph “20” of the Complaint, such allegations assert a conclusion of law, not statements of fact, for which no response is required; however to the extent a response may be required the allegation is denied.

21. With respect to the allegations set forth in paragraph “21” of the Complaint, Respondents deny such allegations.

### III. Findings of Violation

22. With respect to the allegations set forth in paragraph “22” of the Complaint, Respondents deny knowledge or information sufficient to form a belief as to such allegations.

23. With respect to the allegations set forth in paragraph “23” of the Complaint, Respondents deny knowledge or information sufficient to form a belief as to such allegations.

24. With respect to the allegations contained in paragraph “24” of the Complaint, such allegations assert a conclusion of law, not statements of fact, for which

no response is required; however to the extent a response may be required the allegation is denied.

25. With respect to the allegations contained in paragraph “25” of the Complaint, such allegations assert a conclusion of law, not statements of fact, for which no response is required; however to the extent a response may be required the allegation is denied.

26. With respect to the allegations contained in paragraph “26” of the Complaint, such allegations assert a conclusion of law, not statements of fact, for which no response is required; however to the extent a response may be required the allegation is denied.

27. With respect to the allegations set forth in paragraph “27” of the Complaint, Respondents deny knowledge or information sufficient to form a belief as to such allegations.

28. With respect to the allegations set forth in paragraph “28” of the Complaint, Respondents deny knowledge or information sufficient to form a belief as to such allegations.

**AS AND FOR A FIRST AFFIRMATIVE  
DEFENSE**

29. Respondents at all times acted reasonably and in good faith, based on all relevant facts and circumstances known by Respondents at the time they acted.

**AS AND FOR A SECOND AFFIRMATIVE  
DEFENSE**

30. At the time of the original fill, Respondents were unaware of the nature and circumstances of their actions.

31. Respondents reasonably believed that they were accommodating a request of local municipalities to put clean fill on the property, which was used in connection with road work.

32. A subsequent investigation revealed that local municipalities and private companies have acknowledged that they used the property to dump fill.

33. Accordingly, there are several other equally responsible parties.

**AS AND FOR A THIRD AFFIRMATIVE  
DEFENSE**

34. Complainant is barred from recovery based on the doctrine of laches and estoppel.

**AS AND FOR A FOURTH AFFIRMATIVE  
DEFENSE**

35. Complainant has no right to relief pursuant to 40 C.F.R. § 22.20(a).

**BASIS FOR OPPOSITION TO PROPOSED RELIEF**

According to Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g), “[i]n determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.”

Respondents oppose the proposed penalty assessed by the EPA, based on the following:

A. ~~Inability to pay: The proposed penalty is clearly beyond the financial~~ completed to date; approximately \$10,000.00 in extra or overtime wages to Dependable employees to move cars and other equipment to clear areas for further work; and approximately \$5,000.00 to various contractors for materials, fencing, supplies, etc. The work to date has completely exhausted Respondent's resources. Further, as a result of the EPA's notice letter, the City of Jamestown has determined to remove Respondent's company from the authorized tow list under City law. The towing portion of Respondent's business accounts for the largest part of the company's income and concomitantly, Mr. Whitehill's personal income. Since the City's removal of Respondent from the approved towing list, the company's income has decreased approximately sixty (60) percent. In addition, the constant rising price of gas and diesel fuel has taken a further toll on Respondent's business. Consequently, after having exhausted the company's reserve and having significantly decreased current income, it would be impossible for Respondent to continue to implement the scope of work outlined by the EPA, and to pay the proposed administrative penalty.

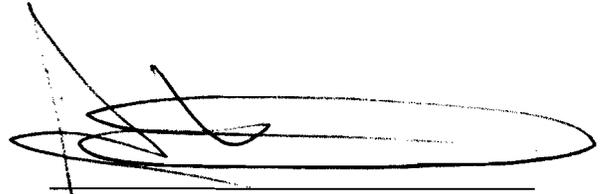
D. Degree of culpability: At the time of the original fill, Respondents were unaware of the nature and circumstances of their actions. Respondents reasonably believed that they were accommodating a request of local municipalities to put clean fill on the property, which was used in connection with road work. A subsequent investigation revealed that local municipalities and private companies have acknowledged that they used the property to dump fill. Accordingly, there are several other equally responsible parties.

E. Lack of Economic Benefit: Respondents have not obtained an economic benefit by obtaining an illegal competitive advantage, nor as the result of delayed or avoided pollution control expenditures during the period of noncompliance. As indicated in "A" above, Respondents have expended significant funds to perform the removal work to date.

### **REQUEST FOR HEARING**

Respondents respectfully request a hearing on the facts alleged in the Complaint and the civil penalties proposed thereunder pursuant to the Consolidated Rules of Practice Governing Administrative Assessment of Civil Penalties, 40 CFR Part 22, § 22.15.

Dated: May 6, 2010  
Buffalo, New York

A handwritten signature in black ink, appearing to read "Deborah J. Chadsey", is written over a horizontal line. The signature is stylized and somewhat cursive.

Deborah J. Chadsey, Esq.  
Kavinoky Cook LLP  
*Attorneys for Respondents*  
*Dependable Towing &*  
*Recovery, Inc., and*  
*David A. Whitehill,*  
726 Exchange Street, Suite 800  
Buffalo, New York 14210  
Telephone: (716) 845-6000

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**UNITED STATES**  
**IN THE MATTER OF ENVIRONMENTAL PROTECTION AGENCY**

**Dependable Towing & Recovery, Inc.,  
309(g) of the  
and David A. Whitehill  
1319(g)**

**2160 Lafayette Street  
P.O. Box 266  
Falconer, New York 14733**

**Proceeding Pursuant to §  
Clean Water Act, 33 U.S.C. §**

**to Assess Class II Civil Penalty**

**Docket No. CWA-02-2011-3601**

**Respondents.**

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**Certificate of Service**

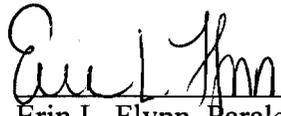
I certify that on May 6, 2011, I served the foregoing fully executed Answer to Complaint and Request for Hearing, bearing the above referenced docket number, on the persons listed below, in the following manner:

Original and Two Copies  
by Overnight Mail:

Regional Hearing Clerk  
U.S. Environmental Protection Agency  
290 Broadway – 16th Floor  
New York, New York 10007

Copy by Overnight Mail:

Eduardo J. Gonzalez, Esq.  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
290 Broadway, 16th Floor  
New York, New York 10007

  
Erin L. Flynn, Paralegal