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June 23, 2011

U.S. ENVIRONMENTAL
PROTECTION AGENCY

2011 JUN 24 P 12:25
REGIONAL HEARINGS
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 Respondents' Motion to Amend the Answer to Complaint and Request for Hearing, Proposed Order and Amended Answer in the above-referenced matter.

Kindly file the original and return a copy 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

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.

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG II
2011 JUN 24 P 12:26
REGIONAL HEARING
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MOTION OF RESPONDENTS
TO AMEND THE ANSWER TO COMPLAINT

Pursuant to 40 C.F.R. § 22.15(e) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*, Respondents, Dependable Towing & Recovery, Inc., and David A. Whitehill (collectively “Respondents”), by and through their attorneys, Kavinoky Cook LLP, hereby move for leave to amend their Answer to the Complaint in the above-captioned matter. In support thereof, Respondents state as follows:

1. This is a civil administrative action brought to assess a Class II Civil Administrative Penalty under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g) (the “Act”).

2. On April 8, 2011, the Director, Division of Environmental Planning and Protection (“DEPP”) of the U.S. Environmental Protection Agency (“EPA”), Region 2 (“Complainant”), filed a Complaint against Respondents. The Complaint requests that the Regional Administrator assess a civil penalty against Respondents for the discharge of pollutants consisting of fill materials into navigable waters, without authorization by the Secretary of the Army as required by Section 404 of the Act, 33 U.S.C. § 1344, in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

3. On May 6, 2011, Respondents filed an Answer to the Complaint and Request for a Hearing.

4. As of the date of this motion, the case remains in an early stage, as the parties have not yet exchanged prehearing information, and the hearing date has not been scheduled.

5. With regard to Claimant’s allegations that Respondents have discharged fill materials on the property in violation of the Act, it has recently come to our attention that a majority of the fill materials were placed on the property more than five (5) years prior to the commencement of the action.

6. It is well recognized that courts have applied the five year general federal statute of limitations to administrative actions for civil penalties under the Clean Water Act. *In re Leed Foundry, Inc.*, 2007 WL 1933126 (EPA 2007)(see 28 U.S.C. § 2462; *3M Co. v. Browner*, 17 F.3d 1453, 1455-59 (D.C. Cir. 1994)). Further, the Environmental Appeals Board (“EAB”) has applied the five year statute of limitations running from the date of the filing of the administrative complaint. *Id.* (citing *In re Britton Construction Co., et al.*, CWA Appeal Nos. 97-5 & 97-8, 8 E.A.D. 261, 274-275 (EAB 1999)).

7. Therefore, Respondents seek leave to amend the Answer to the Complaint to assert that with respect to claims relating to the alleged placement of fill materials on the property occurring more than five (5) years prior to the commencement of the action, the applicable statute of limitations, 28 U.S.C. § 2462, bars such claims.

8. Pursuant to 40 C.F.R. § 22.15(e) of the Consolidated Rules, “[t]he respondent may amend the answer to the complaint upon motion granted by the Presiding Officer.” “The Rules of Practice do not, however, illuminate the circumstances when amendment of the answer is or is not appropriate.” *In re San Pedro Forklift*, 2010 WL 3324918 (EPA 2010). “In the absence of administrative rules on this subject, the [EAB] has offered guidance by consulting the Federal Rules of Civil Procedure (“FRCP”) as they apply in analogous situations.” *Id.* (citing *In re Carroll Oil Co.*, 10 E.A.D. 635, 649 (EAB 2002); *In re Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 n.20 (EAB 1993)).

9. The FRCP adopt a liberal stance toward amending pleadings, stating that leave to amend “shall be freely given when justice so requires.” *In re San Pedro Forklift*, 2010 WL 3324918 (EPA 2010)(*see* Fed. R. Civ. P. 15(a)). “In considering a motion to amend under Rule 15 (a), the Court has held that leave to amend shall be freely given in the absence of any apparent or declared reason, such as undue delay, bad faith or dilatory motive on the movant’s part, repeated failure to cure deficiencies by previous amendment, undue prejudice, or futility of amendment.” *Id.* (*Id.* at 182; *accord Carroll Oil*, 10 E.A.D. at 649-50). “Similarly, the EAB has found that administrative pleadings should be easily amended to serve the merits of the action.” *Id.* (citing *In re Wego Chem. & Mineral Corp.*, 4 E.A.D. at 52 5 n.11; *In re Asbestos Specialists, Inc.*, 4 E.A.D. at 830; *In the Matter of Port of Oakland and Great Lakes Dredge and Dock Company*, 4 E.A.D.

170, 205 (EAB 1992)). “The burden is on the party opposing the amendment to show prejudice, bad faith, undue delay, or futility.” *Id.* (citing *Isochem North America, LLC*, Docket No. TSCA-02-2006-9143, 2007 EPA ALJ LEXIS 37, at *33 (EPA ALJ Dec. 27, 2007)).

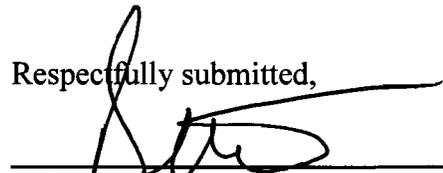
10. As the EAB has adopted the FRCP’s policy of liberal amendment of pleadings for administrative penalty enforcement proceedings, motions to amend an answer are generally granted in accordance with such policy, as well as “the principle that mere delay is generally insufficient reason to deny a party an opportunity to raise a defense.” *In re City of St. Charles*, 2008 WL 2626264 (EPA 2008)(citing *Lazarus, Inc.*, 7 E.A.D. 318, 332; *Asbestos Specialists, Inc.*, 4 E.A.D. 819, 830 (EAB 1993)). “A respondent may file a motion to amend its answer at any time until the motions deadline, which is after the prehearing exchange is complete and generally a few weeks before the hearing is scheduled to commence.” *Id.*

11. In the instant matter, Respondents’ request for leave to amend the Answer to add an affirmative defense is not the product of undue delay, bad faith, or dilatory motive. Further, Complainant will not be unfairly prejudiced by this proposed amendment because this case is in an early stage and the parties have not exchanged prehearing information.

12. For the foregoing reasons, Respondents respectfully request that the Presiding Officer grant them leave to amend the Answer. Respondents have attached a signed copy of the proposed Amended Answer to the Complaint, in which Paragraphs 36 and 37 have been added to include the fifth affirmative defense of the statute of limitations.

Dated: June 23, 2011
Buffalo, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Deborah J. Chadsey', written over a horizontal line.

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

373582.1

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

In the matter of

Dependable Towing & Recovery, Inc.,
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2160 Lafayette Street
P.O. Box 266
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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.

**[PROPOSED] ORDER GRANTING RESPONDENTS'
MOTION TO AMEND THE ANSWER TO COMPLAINT**

Having considered Respondents' motion filed with the Regional Hearing Clerk, I hereby grant Respondents' motion to amend the answer to add an additional affirmative defense.

Dated: _____

ORDERED:

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REGION 2
2011 JUN 21 10:12:26
REGIONAL HEARING
CLERK

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

In the matter of

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to Assess Class II Civil Penalty

Docket No. CWA-02-2011-3601

Respondents.

AMENDED 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 Amended 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.

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REGION 2
2011 JUN 24 P 12:25
REGIONAL HEARING
CLERK

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,

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).

**AS AND FOR A FIFTH AFFIRMATIVE
DEFENSE**

36. A majority of the fill materials were placed on the property more than five (5) years prior to the filing of the Complaint.

37. Accordingly, with respect to claims relating to the alleged placement of fill materials on the property occurring more than five (5) years prior to the commencement of this action, the applicable statute of limitations, 28 U.S.C. § 2462, bars such claims.

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 capability of the violator. The proposed penalty would seriously jeopardize the violator’s ability to continue business operations and achieve compliance. Since the issuance of the EPA notice letter, Respondents have paid out approximately \$105,000, including legal fees; \$12,500.00 to Wilson Environmental; \$61,895.00 to environmental contractors and surveyors to perform the removal work 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

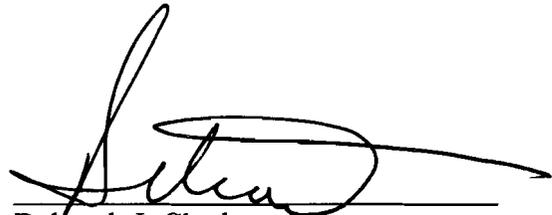
clean fill on the property, which was used in connection with road work. A subsequent investigation revealed that local municipalities and private companies have acknowledged that they used the property to dump fill. Accordingly, there are several other equally responsible parties.

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: June 23, 2011
Buffalo, New York



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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Respondents.

Certificate of Service

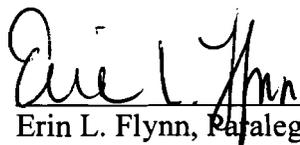
I certify that on June 23, 2011, I served the foregoing Motion to Amend the Answer to Complaint, Proposed Order, and Amended Answer to Complaint, bearing the above referenced docket number, on the persons listed below, in the following manner:

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

U.S. ENVIRONMENTAL
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