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U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG. II

2009 SEP 28 PM 4:09

REGIONAL HEARING  
CLERK

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ALSO ADMITTED IN: DISTRICT OF COLUMBIA

September 21, 2009

**VIA OVERNIGHT MAIL**

Regional Hearing Clerk  
U.S. Environmental Protection Agency  
290 Broadway, 16<sup>th</sup> Floor  
New York, New York 10007-1866

Melva J. Hayden, Esq.  
Asst. Regional Counsel  
Water and General Lay Brach  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 16<sup>th</sup> Floor  
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U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG. II  
2009 SEP 22 PM 3:56  
REGIONAL HEARING  
CLERK

Re: In the Matter of Robinson Concrete, Inc.  
Docket No. CWA-02-2009-3404.

Dear Regional Hearing Clerk and Ms. Hayden:

Enclosed on behalf of Robinson Concrete, Inc. please find its Answer in the above referenced matter.

Should you have any questions, do not hesitate to contact me.

Very truly yours,



Amy K. Kendall

AKK:drm  
Enclosure

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 2

U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG.  
2009 SEP 22 PM 3: 56  
REGIONAL HEARING  
CLERK

**IN THE MATTER OF:**

Robinson Concrete, Inc.  
d/b/a Franklin Street Ready Mix Facility,  
Robinson Concrete, Inc., Franklin Street  
Pit Sand and Gravel Mine, and Vitale  
Ready Mix Concrete, Inc.  
3486 Franklin St. Rd.  
Auburn, New York 13021

**HEARING REQUESTED**  
**PURSUANT TO 40 CFR §22.15(c)**

**ANSWER**

**DOCKET NO.: CWA-02-2009-3404**

NPDES Permit Numbers: NYR00E267,  
NYR00D442, and NYU000213

Respondent.

Respondent, ROBINSON CONCRETE, INC., by its attorneys, Hiscock & Barclay, LLP, for its answer to Complainant United States Environmental Protection Agency's ("Complainant") Complaint, alleges as follows:

**I. STATUTORY AND REGULATORY AUTHORITIES**

1. The allegations, if any, contained in paragraph 1 of the Complaint merely state the legal basis of this action, state a legal conclusion, recite a federal statute or regulation, purport to state what Complainant seeks or intends to do, and/or define terms used in the Complaint to which no answer is required. The referenced Complaint speaks for itself. To the extent the matters alleged in this paragraph are deemed to be allegations of fact which apply to Respondent Robinson Concrete, Inc., Respondent denies same.

2. The allegations, if any, contained in paragraph 2 of the Complaint merely state the legal basis of this action, state a legal conclusion, recite a federal statute or regulation, purport to state what Complainant seeks or intends to do, and/or define terms used in the Complaint to which no answer is required. The referenced Complaint speaks for itself. To the extent the

matters alleged in this paragraph are deemed to be allegations of fact which apply to Respondent Robinson Concrete, Inc., Respondent denies same.

3. The allegations, if any, contained in paragraph 3 of the Complaint merely state the legal basis of this action, state a legal conclusion, recite a federal statute or regulation, purport to state what Complainant seeks or intends to do, and/or define terms used in the Complaint to which no answer is required. The referenced Complaint speaks for itself. To the extent the matters alleged in this paragraph are deemed to be allegations of fact which apply to Respondent Robinson Concrete, Inc., Respondent denies same.

4. The allegations, if any, contained in paragraph 4 of the Complaint merely state the legal basis of this action, state a legal conclusion, recite a federal statute or regulation, purport to state what Complainant seeks or intends to do, and/or define terms used in the Complaint to which no answer is required. The referenced Complaint speaks for itself. To the extent the matters alleged in this paragraph are deemed to be allegations of fact which apply to Respondent Robinson Concrete, Inc., Respondent denies same.

5. The allegations, if any, contained in paragraph 5 of the Complaint merely state the legal basis of this action, state a legal conclusion, recite a federal statute or regulation, purport to state what Complainant seeks or intends to do, and/or define terms used in the Complaint to which no answer is required. The referenced Complaint speaks for itself. To the extent the matters alleged in this paragraph are deemed to be allegations of fact which apply to Respondent Robinson Concrete, Inc., Respondent denies same.

6. The allegations, if any, contained in paragraph 6 of the Complaint merely state the legal basis of this action, state a legal conclusion, recite a federal statute or regulation, purport to state what Complainant seeks or intends to do, and/or define terms used in the Complaint to

which no answer is required. The referenced Complaint speaks for itself. To the extent the matters alleged in this paragraph are deemed to be allegations of fact which apply to Respondent Robinson Concrete, Inc., Respondent denies same.

7. Admits the allegations contained in paragraph 7 of the Complaint.

8. The allegations, if any, contained in paragraph 8 of the Complaint merely state the legal basis of this action, state a legal conclusion, recite a federal statute or regulation, purport to state what Complainant seeks or intends to do, and/or define terms used in the Complaint to which no answer is required. The referenced Complaint speaks for itself. To the extent the matters alleged in this paragraph are deemed to be allegations of fact which apply to Respondent Robinson Concrete, Inc., Respondent denies same.

9. The allegations, if any, contained in paragraph 9 of the Complaint merely state the legal basis of this action, state a legal conclusion, recite a federal statute or regulation, purport to state what Complainant seeks or intends to do, and/or define terms used in the Complaint to which no answer is required. The referenced Complaint speaks for itself. To the extent the matters alleged in this paragraph are deemed to be allegations of fact which apply to Respondent Robinson Concrete, Inc., Respondent denies same.

10. The allegations, if any, contained in paragraph 10 of the Complaint merely state the legal basis of this action, state a legal conclusion, recite a federal statute or regulation, purport to state what Complainant seeks or intends to do, and/or define terms used in the Complaint to which no answer is required. The referenced Complaint speaks for itself. To the extent the matters alleged in this paragraph are deemed to be allegations of fact which apply to Respondent Robinson Concrete, Inc., Respondent denies same.

11. The allegations, if any, contained in paragraph 11, including subsections (a) through (h), of the Complaint merely state the legal basis of this action, state a legal conclusion, recite a federal statute or regulation, purport to state what Complainant seeks or intends to do, and/or define terms used in the Complaint to which no answer is required. The referenced Complaint speaks for itself. To the extent the matters alleged in this paragraph are deemed to be allegations of fact which apply to Respondent Robinson Concrete, Inc., Respondent denies same.

## **II. JURISDICTIONAL FINDINGS**

12. Admits the allegations contained in paragraph 12 of the Complaint.

13. Admits that at all relevant times, Robinson Concrete, Inc. was the owner/operator of a concrete ready-mix facility (d/b/a Franklin Street Ready-Mix Facility) and sand and gravel mine (d/b/a Franklin Street Pit Sand and Gravel Mine), both located at 3486 Franklin Street Road in Auburn, New York; admits that the property at 3486 Franklin Street Road was purchased by Robinson Concrete, Inc. in or about 1972 and has been owned/operated by Robinson Concrete, Inc. during that time; and denies the remainder of the allegations contained in paragraph 13 of the Complaint.

14. Admits the concrete ready-mix facility and sand and gravel mine that are the subjects of the Complaint are located at 3486 Franklin Street Road in Auburn, New York, and denies the remainder of the allegations contained in paragraph 14 of the Complaint.

15. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 15 of the Complaint and therefore denies the same.

16. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 16 of the Complaint and therefore denies the same.

17. Admits upon information and belief the allegations contained in paragraph 17 of the Complaint.

18. The allegations, if any, contained in paragraph 18 of the Complaint merely state the legal basis of this action, state a legal conclusion, recite a federal statute or regulation, purport to state what Complainant seeks or intends to do, and/or define terms used in the Complaint to which no answer is required. The referenced Complaint speaks for itself. To the extent the matters alleged in this paragraph are deemed to be allegations of fact which apply to Respondent Robinson Concrete, Inc., Respondent denies same.

19. The allegations, if any, contained in paragraph 19 of the Complaint merely state the legal basis of this action, state a legal conclusion, recite a federal statute or regulation, purport to state what Complainant seeks or intends to do, and/or define terms used in the Complaint to which no answer is required. The referenced Complaint speaks for itself. To the extent the matters alleged in this paragraph are deemed to be allegations of fact which apply to Respondent Robinson Concrete, Inc., Respondent denies same.

20. The allegations, if any, contained in paragraph 20 of the Complaint merely state the legal basis of this action, state a legal conclusion, recite a federal statute or regulation, purport to state what Complainant seeks or intends to do, and/or define terms used in the Complaint to which no answer is required. The referenced Complaint speaks for itself. To the extent the matters alleged in this paragraph are deemed to be allegations of fact which apply to Respondent Robinson Concrete, Inc., Respondent denies same.

### **III. FINDINGS OF VIOLATION**

21. With respect to the allegations contained in paragraph 21 of the Complaint, admits such allegations as are elsewhere herein admitted, has no knowledge or information

sufficient to form a belief with respect to those allegations as are elsewhere herein similarly treated, and denies such allegations as are elsewhere herein denied.

22. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 22 of the Complaint and therefore denies the same.

23. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 23 of the Complaint and therefore denies the same.

24. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 24 of the Complaint and therefore denies the same.

25. Admits the allegations contained in paragraph 25 of the Complaint insofar as they apply to Respondent Robinson Concrete, Inc.; and denies the remainder of the allegations contained in paragraph 26 of the Complaint.

26. Admits the allegations contained in paragraph 26 of the Complaint insofar as they apply to Respondent Robinson Concrete, Inc.; and denies the remainder of the allegations contained in paragraph 26 of the Complaint.

27. Admits the allegations contained in paragraph 27 of the Complaint insofar as they apply to Respondent Robinson Concrete, Inc.; and denies the remainder of the allegations contained in paragraph 27 of the Complaint.

28. Admits the allegations contained in paragraph 28 of the Complaint insofar as they apply to Respondent Robinson Concrete, Inc.; states that the content of the referenced Administrative Compliance Order responses from Respondent speaks for itself; and denies the remainder of the allegations contained in paragraph 28 of the Complaint.

29. Admits the allegations contained in paragraph 29 of the Complaint insofar as they apply to Respondent Robinson Concrete, Inc.; and denies the remainder of the allegations contained in paragraph 29 of the Complaint.

30. Admits the allegations contained in paragraph 30 of the Complaint insofar as they apply to Respondent Robinson Concrete, Inc.; and denies the remainder of the allegations contained in paragraph 30 of the Complaint.

31. Denies the allegations contained in paragraph 31 of the Complaint.

32. Denies the allegations contained in paragraph 32 of the Complaint.

33. Denies each and every allegation contained in the Complaint not heretofore admitted, denied or otherwise controverted.

#### **FIRST AFFIRMATIVE DEFENSE**

34. Respondent repeats and realleges paragraphs 1 through 33 as though fully set forth herein.

35. Respondent Robinson Concrete Inc. is a separate corporate entity from Vitale Ready-Mix, Inc..

36. Vitale Ready-Mix, Inc. neither owns nor operates the concrete ready-mix and sand and gravel mine located at 3486 Franklin Street Road, Auburn, New York, which are the subjects of the instant Complaint.

37. Vitale Ready-Mix, Inc. is improperly named as a co-Respondent in the instant Complaint.

#### **SECOND AFFIRMATIVE DEFENSE**

38. Respondent repeats and realleges paragraphs 1 through 37 as though fully set forth herein.



39. The relief requested by the Complainant is barred in whole or in part by the doctrine of laches.

### **THIRD AFFIRMATIVE DEFENSE**

40. Respondent repeats and realleges paragraphs 1 through 39 as though fully set forth herein.

41. The relief requested by the Department is barred in whole or in part by the doctrine of waiver.

### **FOURTH AFFIRMATIVE DEFENSE**

42. Respondent repeats and realleges paragraphs 1 through 41 as though fully set forth herein.

43. Complainant has failed to join all necessary parties to this proceeding.

### **FIFTH AFFIRMATIVE DEFENSE**

44. Respondent repeats and realleges paragraphs 1 through 43 as though fully set forth herein.

45. Respondent applied to the New York State Department of Environmental Conservation (“Department”) in December 2006 for permit coverage for its facility at 3486 Franklin Street Road in Auburn, New York. Respondent thus attempted, in vain, to obtain permit coverage for its facility for two years before such coverage was finally granted.

46. Respondent was prevented from obtaining coverage due to the New York State Department of Environmental Conservation’s failure to promptly respond to and/or approve of Respondent’s submittals.

47. As a result of the foregoing, the Complainant is estopped from obtaining all or part of the relief requested in the Complaint.

### **SIXTH AFFIRMATIVE DEFENSE**

48. Respondent repeats and realleges paragraphs 1 through 47 as though fully set forth herein.

49. This proceeding is barred in whole or in part by the applicable statute of limitations.

### **SEVENTH AFFIRMATIVE DEFENSE**

50. Respondent repeats and realleges paragraph 1 through 49 as though fully set forth herein.

51. Upon information and belief, at all relevant times alleged in the Complaint, Respondent has fully cooperated with the Complainant and the Department and has continuously attempted to timely respond and address the allegations in the Complaint which give rise to the violations alleged.

52. Upon information and belief, Respondent has demonstrated, pursuant to 33 U.S.C 1319(d) and the Complainant's Interim Clean Water Act Settlement Penalty Policy, dated March 1, 1995, and other applicable statutes, regulations, and guidance that there are significant mitigating facts and circumstances that are relevant and must be considered in any assessment of any penalties for any violations alleged in the Complaint.

53. As a result of the foregoing, any calculation or assessment of penalties must take into account all of the mitigating factors on behalf of Respondent and such mitigating factors must reduce or eliminate any penalty otherwise due and payable to the Complainant.

### **RESERVATION OF RIGHTS**

Respondent reserves the right to amend and/or supplement its affirmative defenses during the course of discovery and this litigation.

**WHEREFORE**, Respondent respectfully requests an Order:

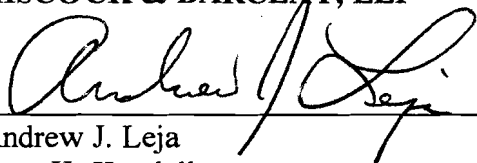
A. Dismissing the Complaint against Respondent in its entirety; and

B. Granting such other and further relief as the Administrative Law Judge or

Administrator deems just and proper.

**HISCOCK & BARCLAY, LLP**

By:



Andrew J. Leja

Amy K. Kendall

*Attorneys for Respondent, Robinson Concrete, Inc.*

**Office and P.O. Address**

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