

U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG.II  
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REGIONAL HEARING  
CLERK

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 2  
290 BROADWAY  
NEW YORK, NY 10007-1568

**IN THE MATTER OF:**

**Dependable Towing & Recovery, Inc.  
And David A. Whitehill**  
2160 Lafayette Street  
P.O. Box 266  
Falconer, New York 14733

Docket No. CWA-02-2011-3601

Respondents.

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

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

**REPLY TO RESPONDENTS' OPPOSITION TO  
MOTION FOR EPA TO BE ALLOWED TO WITHDRAW THE INSTANT  
COMPLAINT WITHOUT PREJUDICE**

Pursuant to 40 C.F.R. §22.16(a) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* ("Rules of Practice"), the United States Environmental Protection Agency, Region 2 ("Complainant" or "EPA"), hereby submits this Reply to Respondents' Opposition to Complainant's Motion to Withdraw the instant Complaint without prejudice. In reply to Respondents' opposition, Complainant states as follows:

1. The instant case concerns allegations by EPA that Respondents unlawfully discharged fill material onto approximately sixteen (16) acres of wetlands that are waters of the United States, located in Jamestown, New York, in violation of Section 301(a) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. §1311(a).

2. On March 24, 2010, EPA issued an Administrative Compliance Order (“ACO”) pursuant to Section 309(a) of the Act, 33 U.S.C. §1309(a), requiring Respondents to comply with the Act and ordering Respondents, *inter alia*, to remove fill materials and restore the wetlands covered by unauthorized fill material to pre-existing condition, all by June 30, 2011.

3. To achieve the removal of the unauthorized fill, in the ACO, EPA specifically ordered Respondents to submit a restoration plan to EPA by April 23, 2010.

4. On July 8, 2010, over three months after the date of issuance of the ACO, Respondents submitted to EPA a restoration plan of the impacted wetlands, which EPA approved.

5. Respondents, after EPA’s approval of its restoration plan, scarcely performed any work pursuant to the restoration plan and quickly fell into non-compliance with EPA’s ACO.

6. In light of Respondents’ non-compliance with EPA’s ACO, on April 8, 2011, EPA exercised its discretionary enforcement authority granted by Congress under the CWA and brought the instant administrative penalty action pursuant to Section 309(g) of the Clean Water Act, 33 U.S.C. §1319(g).

7. The instant administrative penalty complaint proposes that the Administrator of EPA assess a class II administrative 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).

8. The administrative record of the instant proceeding includes an Answer to the Complaint, an Amended Answer, a Prehearing Order, Complainant’s and Respondents’ prehearing exchanges, and an “Order Scheduling Hearing”.

9. On March 16, 2012, the parties submitted a “Joint Motion for Extension of the Submissions Required by Order Scheduling Hearing,” jointly seeking an extension of time to file stipulated facts, exhibits, testimony and prehearing briefs, and jointly requesting that the hearing be rescheduled.

10. On March 20, 2012, this Court directed the parties to file a joint set of stipulated facts, exhibits and testimony on or before April 30, 2012, prehearing briefs on or before June 5, 2012, and the hearing was rescheduled for June 26, 2012.

11. To this date, Respondents have failed to make any efforts toward either removal of the unauthorized fill and restoration of the wetlands, in non-compliance with the ACO issued by EPA and in defiance of the CWA’s mandates.

12. As restoration of the affected environment is the CWA’s primary goal, as mandated by Congress, Complainant in this matter has decided to exercise its enforcement discretion and reassess its enforcement options pursuant to the Clean Water Act, 33 U.S.C. §1319, which include seeking a judicial action to obtain the injunctive relief and penalties, as authorized by Congress.

13. On April 30, 2012, Complainant filed its Motion to Withdraw the Complaint without prejudice, pursuant to 40 C.F.R. §22.14(d).<sup>1</sup>

14. On May 22, 2012, Respondents filed their Opposition to the instant motion, and Complainant was served with the opposition next day.

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<sup>1</sup> The EPA’s Motion to Withdraw was signed and hand-delivered to the Office of the Regional Hearing Clerk (“Clerk”) on April 30, 2012. It was, however, only on May 3, 2012 that the Clerk received and stamped that motion upon returning to the office from vacation. Respondents, notwithstanding, were timely notified with unsigned copy of the Motion on April 30, 2012. *See* Respondents’ Opposition ¶11.

15. For reasons discussed below, Complainant respectfully requests that this Court grant EPA's Motion to Withdraw the Complaint without prejudice.

**BECAUSE RESPONDENTS WILL NOT SUFFER PLAIN LEGAL PREJUDICE,  
THIS COURT SHOULD GRANT COMPLAINANT'S MOTION TO WITHDRAW  
WITHOUT PREJUDICE**

16. The relevant parts of the Rule of Practice state that "[t]he complainant may withdraw the complaint, or any part thereof, without prejudice one time before the answer has been filed. After one withdrawal before the filing of an answer, or after the filing of an answer, the complainant may withdraw the complaint, or any part thereof, without prejudice only upon motion granted by the Presiding Officer." 40 C.F.R. §22.14(d). No standard is provided in the Rules of Practice upon which to rule on such a motion. *See In the Matter of: Corporacion para el Desarrollo Economico y Futuro de la Isla Nena, et al.*, No. CWA-II-97-61, 1998 EPA ALJ LEXIS 78, \*14. (Feb. 3, 1998).

17. The EPA's Office of Administrative Law Judges held that such parts of the Rules of Practice are substantially equivalent to Rule 41(a) of the Federal Rules of Civil Procedure. *In the Matter of City of Mandeville, Louisiana*, No. CWA-VI-97-1620, 1998 EPA ALJ LEXIS 57, \*7 (Jul. 14, 1998). Like the Rules of Practice, Rule 41(a) also requires an order of the court for dismissal of an action without prejudice, after the defendant has filed its answer. *Id.* The common law rule was established by the United States Supreme Court in *Jones v. S.E.C.* as follows: "[t]he general rule is settled for federal tribunals that a plaintiff possesses the unqualified right to dismiss his complaint at law or his bill in equity unless some plain legal prejudice will result to the defendant other than the mere prospect of a second litigation upon the subject matter." 298 U.S. 1, 18-19 (1935) (emphasis added).

18. Under Rule 41(a), a motion for voluntary dismissal of a complaint without

prejudice is addressed to the sound discretion of the court. *U.S. v. Outboard Marine Corp.*, 789 F.2d 497, 502 (7th Cir. 1986). As such, if the court concludes that a respondent would suffer legal prejudice, a motion to withdraw without prejudice will not be granted. *FDIC v. Knostman*, 966 F.2d 1133, 1142 (7th Cir. 1992).<sup>2</sup>

19. Based on Congress' delegation of enforcement discretion to EPA and on the case law cited above, it is undisputed that EPA has an unqualified right to withdraw its complaint and the only issue before this Court is whether Respondents would suffer legal prejudice.

20. In *Knostman*, the 7th Circuit listed the following factors to be considered if a respondent will suffer such legal prejudice: (1) the respondent's efforts and expense of preparation for hearing; (2) delay or lack of diligence on the part of the complainant in prosecuting the action; (3) the sufficiency of the explanation for the need to take a voluntary dismissal; and (4) whether the defendant has made a motion for summary judgment. *Id.*; see also *City of Mandeville*, 1998 EPA ALJ LEXIS 57, at \*3. However, the court need not resolve each and every factor in favor of the moving party in order to grant the motion to withdraw. *Kovalic v. DEC Int'l, Inc.*, 855 F.2d 471 (7th Cir. 1988).

21. As explained *infra*, examining the procedural posture of the instant case in light of the four factors set forth in *Knostman*, Respondents would not suffer plain legal prejudice as a result of the withdrawal.

22. Regarding the first factor, Respondents claim that they have expended substantial efforts and expense in preparing for the hearing. Respondents' Opposition ¶ 24. In particular,

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<sup>2</sup> This Court previously noted that even when the dismissal results in legal prejudice, a complainant may withdraw its complaint with prejudice. *In the Matter of Quality Engineers and Contractors, Inc., and Cidra Excavation, Inc.*, No. CWA-02-2007-3411, 2008 EPA ALJ 26, \*4 (Sep. 3, 2008).

Respondents noted that they have incurred significant legal fees and associated costs in retaining counsel to defend them in this action, as well as for the services of expert witnesses to assist with the defense of such action.<sup>3</sup> *Id.* Respondents, however, have not shown that this effort and expense would be significantly wasted if this proceeding were removed to federal court. Given that the litigation in federal court would address allegations of unauthorized discharges of pollutants into waters of the United States, such effort and expense will not be fruitless in the later litigation. *See, e.g., City of Mandeville*, 1998 EPA ALJ LEXIS 57, \*5; *Kelmer v. DFS Servs. LLC*, No. 10-050-GPM, 2010 U.S. Dist. LEXIS 79372, \*4 (S.D. Ill. 2010); *Knox v. Powers*, No. 09-0341-DRH, 2010 U.S. Dist. LEXIS 83215, \*4 (S.D. Ill. 2010).

23. If Respondents' legal prejudice is that they have incurred attorneys' fees and litigation expenses and thus EPA is barred from pursuing its alternate enforcement options because violators choose to oppose EPA, then that would render the CWA's enforcement authority provisions ineffective.

24. A significantly large portion of the costs incurred by the Respondents associated with the instant administrative litigation will likely be subsumed as part of any subsequent judicial action seeking enforcement. Therefore, the first factor is in favor of granting EPA's Motion to Withdraw.

25. Regarding the second factor, Complainant has been diligently prosecuting the

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<sup>3</sup> Respondents also pointed out that they made multiple settlement offers to Complainant, but Complainant refused to consider the offers. *Id.* at ¶25. Unlike Respondents' argument, Complainant has fully considered all offers made by Respondents. However, finding that such offers did not meet the primary goal of the Clean Water Act, Complainant ultimately rejected such offers. EPA also asserts that since 2010 it made multiple offers of settlement to Respondents in an attempt to find a settlement resolution, and Respondents rejected EPA's offers. More importantly, because this effort was not made in preparation for the hearing, such an argument is irrelevant in this analysis.

instant matter since it was transferred from the United States Army Corps of Engineers (“Corps”) to EPA on September 3, 2009. Based on EPA’s primary goal of restoring the waters of the United States as mandated by the CWA, upon becoming a lead agency, on March 24, 2010 EPA issued an ACO directing Respondents to remove the entire discharge of unauthorized fill and restore the affected wetlands. In light of Respondents’ failure to comply with the EPA’s ACO, Complainant exercised the next level of enforcement provided by the CWA and initiated the instant administrative penalty action on April 8, 2011. Despite EPA’s efforts to use the administrative enforcement options provided by Congress to secure restoration of the nation’s waters, in this case to date Respondents have failed to remove the unauthorized fill or restore the environment.

26. Furthermore, in this instant penalty proceeding, EPA submitted on a timely basis all pleadings and prehearing exchange documents, which indicates that Complainant has diligently managed its participation in the instant proceeding.

27. EPA’s objective in requesting to withdraw the Complaint is not to forego its allegations, but rather to seek a more effective enforcement option as provided by the CWA, in light of the Respondents’ record of lack of compliance and EPA’s conclusion that Respondents have no interest in complying with the CWA, so long as they are only faced with the consequences of the limited administrative enforcement authority granted by the CWA. Please note that as soon as EPA expressed via its Motion to Withdraw that it is assessing its option of seeking judicial relief, the Respondents have attempted to curtail EPA’s authority to do so, in disregard of Congress’ mandate via the CWA.

28. Respondents claim that Complainant should have informed Respondents that it intended to file the instant motion. Respondents’ Opposition ¶35. This claim is groundless. EPA

can demonstrate that as early as February 23, 2012, EPA informed Respondents that if certain restorations to the affected wetlands were not agreed to, then EPA would be strongly considering seeking judicial relief. In addition, EPA can also demonstrate that on March 5, 2012, EPA gave Respondents notification that EPA would not engage in further negotiations unless Respondents agreed by March 9, 2012 to certain minimum restoration activities. Thus, Respondents must have known Complainant's intention to withdraw the Complaint by, at latest, the beginning of March 2012.

29. Next, Respondents allege that Complainant's filing of the instant motion evidences its bad faith. Respondents' Opposition ¶34. In addition, Respondents claim that the withdrawal of the Complaint at this late stage of the proceedings will subject Respondents to substantial prejudice. *Id.* at ¶29. In supporting their position, Respondents rely on *City of Mandeville. Id.* at ¶33.

30. In *City of Mandeville*, the court issued a prehearing order, setting a schedule for the parties to file their prehearing exchanges. 1998 EPA ALJ LEXIS 57, \*2. According to the order, the complainant was required to submit its prehearing exchange on April 30, 1998. *Id.* However, the complainant in *Mandeville* did not make any filing on the date required to do so and instead the complainant filed a motion to withdraw the complaint without prejudice on May 8, 1998. *Id.* at \*3. Because the complainant filed a motion to withdraw *after* it became subject to a possible default order by missing its prehearing exchange deadline, the court denied the motion. *Id.* at \*17. (Emphasis added).

31. Unlike *City of Mandeville*, Complainant in this matter did not miss its prehearing exchange deadline, or any deadline. EPA submitted its prehearing exchange and rebuttal prehearing exchange on time, as it timely submitted other pleadings. As such, Complainant has



not been subject to a possible default.

32. In the instant matter, furthermore, the submission due on April 30, 2012 involved a joint set of stipulations. By definition, such stipulations require the consent of both parties, and litigation often times proceeds without stipulations, thus the consequence to the absence of stipulations cannot be construed as a legal prejudice to Respondents.

33. Please note that on the date that submission of Stipulations was due, April 30, 2012, EPA made a filing, in the form of its Motion to Withdraw with the Regional Hearing Clerk, by placing said Motion in the Clerk's receiving inbox via hand-delivery and it was circumstances beyond Complainant's control which prevented the Motion from being properly lodged by the Hearing Clerk on April 30, 2012.

34. Respondents' reliance on *City of Mandeville* is misplaced, and therefore Respondents' allegation that Complainant acted with bad faith is without basis. As such, this factor is also in favor of granting the motion.

35. Regarding the third factor, Complainant has two significant explanations why the instant Motion to Withdraw should be granted: (1) judicial economy and (2) a change in the circumstances of this matter.

36. Congress' stated objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the United States' waters, 33 U.S.C. § 1251(a). When Congress enacted the Clean Water Act, it provided the Administrator of EPA ("Administrator") with three available enforcement options when he/she finds that a person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of the Act: the Administrator may (1) issue an order requiring such person to comply with such section or requirement, (2) bring a civil action, and (3) assess a class I or a class II administrative penalty. 33 U.S.C. §§ 1319(a)(3),

1319(b) and 1319(g)(1)(A).

37. Upon the Corps' referral to EPA of Respondents' unauthorized discharge of pollutants into waters of the United States (wetlands), Complainant has made use of the administrative forum (as the first level of enforcement provided by Congress) to resolve the violations and to restore the environment. As fully explained *supra*, however, the Complainant's exercise of the administrative forum enforcement has failed to compel Respondents to comply with the restoration of the environment as required by the Act.

38. Despite having diligently used the administrative forum enforcement since the year 2010, EPA has not secured the restoration of the wetlands at issue, and has concluded that the administrative forum does not provide for this case the relief required to achieve the primary goal of the Clean Water Act.

39. The decision-making authority described in the paragraph immediately above is a perfect example of the discretionary enforcement authority provided by Congress to EPA through the enactment of the CWA. When EPA develops a record of harm to waters of the United States, EPA can seek to abate such harm by making use of the administrative or the judicial fora, whichever of those two achieves the stated goals of the CWA.

40. The Motion to Withdraw the Complaint filed by EPA is not an arbitrary agency action by EPA but rather a reasonable exercise of EPA's enforcement authority in the pursuit of the stated goals of the CWA. EPA's exercise of judicial enforcement will allow Complainant to seek a judicial action compelling injunctive relief, which can only be secured judicially when a respondent has failed to comply with EPA's enforcement actions in the administrative forum.

41. EPA's judicial enforcement authority is an option of legal authority provided by Congress and EPA's exercise of such legal authority therefore cannot be construed as a plain

legal prejudice to the Respondents. *See, e.g., Davis v. USX Corp.*, 819 F.2d 1270, 1275 (4th Cir. 1987) (“[T]he possibility that the plaintiff will gain a tactical advantage over the defendant in future litigation will not serve to bar a second suit.”); *Hamilton v. Firestone Tire & Rubber Co.*, 679 F.2d 143, 145 (9th Cir. 1982) (“Plain legal prejudice, however, does not result simply when defendant faces the prospect of a second suit or when plaintiff merely gains some tactical advantage.”).

42. In this case EPA has exercised to no avail its enforcement actions in the administrative forum, and Complainant has concluded in its discretionary enforcement authority that the protection of the affected wetlands needs to be served through the judicial process.

43. EPA originally chose to pursue a penalty in this matter in the administrative forum when it appeared likely that the necessary injunctive relief would likewise be attained in the administrative forum. Given that now the injunctive relief does not appear attainable administratively, EPA’s objective to move the compliance matter to the judicial forum prompts EPA to remove the disposition of the penalty also to the judicial forum.

44. Disposition of both matters, injunctive relief and penalties, by removal to one single forum, the federal court, will not create an additional burden or costs for Respondents with regard to the penalty. Were both matters to be litigated in two different fora, then additional costs would accrue for the parties.

45. The Rule of Practice also limits the authority of the Presiding Officer in the administrative forum. *See* 40 C.F.R. §22.27(b) (the Presiding Officer’s authority is limited to penalty assessment). In addition, even if a final order is issued by the Presiding Officer, the order will not “affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief.” 40 C.F.R. §22.31(a). As such, regardless of this instant administrative

penalty action, Complainant may commence a civil action in federal court, and indeed is considering whether to do so.

46. If this Court denies the instant motion, both parties have to litigate in two separate fora. This will significantly increase efforts and expense for both parties. In addition, given heavily-burdened judicial dockets, it would be more efficient to withdraw this instant Complaint, so that the parties can focus on injunctive relief and civil penalties for non-compliance in a single forum, the federal court. As explained above, because Complainant already exercised administrative enforcement and has failed to secure restoration of the environment in the administrative forum, further enforcement must be pursued in federal court.

47. Next, on March 15, 2012, Respondents informed Complainant that it was proposing to conduct a reassessment of the wetlands boundaries.<sup>4</sup> The technical assessment report was, however, submitted to Complainant on April 24, 2012, over a month after it had been offered,<sup>5</sup> during which time EPA had maintained its willingness to entertain resolution via settlement. EPA's technical team was, however, very disappointed at the lack of technical information provided in Respondents' technical submission.

48. Accordingly, Respondents' failure to engage in good faith negotiations that would reflect any progress led Complainant to filing the instant motion with this Court on April 30, 2012. Because Complainant has significant explanations for the need to withdraw the

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<sup>4</sup> Respondents also made such representation on the Joint Motion for Extension of Time, filed on March 16, 2012.

<sup>5</sup> Complainant notified Respondents that it had not received the documents that Respondents claimed their environmental consultant sent out on March 15, 2012 on two separate occasions: March 22, 2012 and April 04, 2012. However, it was not until April 30, 2012 that Respondents acknowledged that such documents were indeed sent out.

Complaint, this factor is also in favor of granting EPA's Motion to Withdraw.

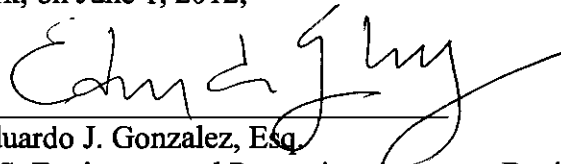
49. Regarding the fourth factor, neither party has moved for summary judgment, nor have any other dispositive motions been filed. Therefore, this factor is also in favor of granting EPA's Motion to Withdraw.

50. Based on the reasons explained *supra*, Complainant respectfully submits that the four factors, set forth in *Knostman*, do not indicate that Respondents will suffer plain legal prejudice as a result of the withdrawal of the instant Complaint. Therefore, this Court should grant Complainant's Motion to Withdraw without prejudice.

51. However, if the Court finds that the withdrawal of the case would result in plain legal prejudice on Respondents in a later litigation, Complainant respectfully requests that the instant Complaint be withdrawn with prejudice such that the further civil action can be promptly sought.

WHEREFORE, for the foregoing reasons, Complainant respectfully requests that the Complainant's Motion for Permission to Withdraw the Complaint Without Prejudice be granted.

Respectfully submitted, in New York, New York, on June 1, 2012,



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290 BROADWAY  
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**IN THE MATTER OF:**

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Docket No. CWA-02-2011-3601

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

**CERTIFICATE OF SERVICE**

I hereby certify that on June 1, 2012, the original of this motion was given to the Regional Hearing Clerk, U.S. EPA, Region 2 and copies were sent to the Administrative Law Judge and the Respondents' counsel by mail and electronic mail.

Original and One Copy  
By Hand:

Office of Regional Hearing Clerk  
U.S. Environmental Protection Agency – Region 2  
290 Broadway, 16<sup>th</sup> Floor  
New York, New York 10007-1866

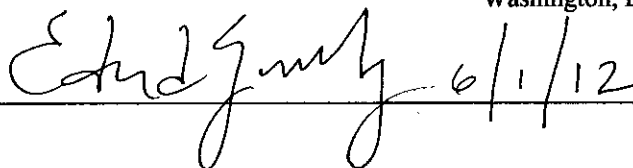
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Dated: \_\_\_\_\_

 6/1/12, New York, New York