

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

U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG.11  
2011 APR - 8 P 2: 31  
REGIONAL HEARING  
CLERK

<p><b>In the matter of</b></p> <p><b>Dependable Towing &amp; Recovery, Inc., and David A. Whitehill</b></p> <p><b>2160 Lafayette Street P.O. Box 266 Falconer, New York 14733</b></p> <p><b>Respondents.</b></p>	<p><b>Proceeding Pursuant to § 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g) to Assess Class II Civil Penalty</b></p> <p><b>Docket No. CWA-02-2011-3601</b></p>
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**COMPLAINT  
FINDINGS OF VIOLATION, NOTICE OF PROPOSED  
ASSESSMENT OF A CIVIL PENALTY, AND  
NOTICE OF OPPORTUNITY TO REQUEST A HEARING**

**I. Statutory and Regulatory Authorities**

1. This Findings of Violation, Notice of Proposed Assessment of a Civil Penalty, and Notice of Opportunity to Request a Hearing ("Complaint") is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 309(g) (2) (B) of the Clean Water Act ("Act"), 33 U.S.C. §1319(g) (2) (B). The Administrator has delegated this authority to the Regional Administrator of EPA, Region 2, who in turn has delegated it to the Director, Division of Environmental Planning and Protection ("DEPP") of EPA, Region 2 ("Complainant").
2. Pursuant to Section 309(g) (2) (B) of the Act, and in accordance with 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" ("CROP"), 40 CFR Part 22, a copy of which is attached, Complainant hereby requests that the Regional Administrator assess a civil penalty against Dependable Towing & Recovery, Inc., and David A. Whitehill ("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. "Person" means, but is not limited to, an individual, corporation, partnership or association, pursuant to Section 502(5) of the Act, 33 U.S.C. §1362(5).

4. Earthen fill material constitutes a “pollutant” within the meaning of the Act, 33 U.S.C. §1362(6).
5. The discharge of the earthen fill material into waters of the United States constitutes a "discharge of pollutants" as defined by Section 502(12) of the Act, 33 U.S.C. § 1362(12).
6. Mechanized earthmoving equipment constitutes a “point source” within the meaning of the Act, 33 U.S.C. §1362(14).
7. “Waters of the United States” means, but is not limited to, waters which are currently used or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide and including wetlands, rivers, streams (including intermittent streams), pursuant to 40 C.F.R. §122.2.
8. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into waters of the United States except as in compliance with Sections 301, 306, 307, 318, 402 and 404 of the Act.
9. Section 404 of the Act, 33 U.S.C. § 1344, authorizes the Secretary of the Army to authorize discharges of dredged and fill into navigable waters of the United States.
10. The discharge of pollutants, consisting of dredged and fill material, into navigable waters of the United States without authorization from the Secretary of the Army as provided by Section 404 of the Act is unlawful under Section 301(a) of the Act, 33 U.S.C. § 1311(a).

## II. Jurisdictional Findings

11. Dependable Towing & Recovery, Inc. (“Dependable”), located at 2160 Lafayette Street Falconer, New York, in the County of Chautauqua, is a New York domestic business corporation.
12. At all times relevant to this Administrative Complaint, David A. Whitehill, an individual, owned and/or operated Dependable.
13. Respondents are "persons" within the meaning of Section 502(5) of the Act, 33 U.S.C. §1362(5).
14. At all times relevant to this Administrative Complaint, David A. Whitehill owned four contiguous parcels of land in the Town of Ellicott, Chautauqua County, NY, upon which Dependable is located.
15. Respondents extended operations and/or business-related activities onto portions of three neighboring parcels of land, two of which are owned by the City of Jamestown Board of Public Utilities, and one is owned by Holly F. Bianco.

16. At all times relevant to this Complaint, Respondents exercised operational control of the four parcels of land owned by David A. Whitehill and over portions of the three neighboring parcels of land described in paragraphs 14 and 15, above.
17. The parcels of land described in paragraphs 14 through 16, above, together amount to seven contiguous parcels and are herein referenced to as "the Property" or "the Site".
18. Respondents have conducted mechanized or business-related activities on the Site including but not limited to storage and disposal of automobiles, trucks, heavy equipment, trailers, discarded material, lumber, and old steel, among others.
19. The Site contains wetlands ("the Wetlands") which are adjacent to Cassadaga Creek, which is a navigable-in-fact waterway.
20. The Wetlands are "waters of the United States" pursuant to Section 502(7) of the Act, 33 U.S.C. §1362(7).
21. Respondents discharged earthen fill material on the Wetlands at the Site by means of mechanized earth-moving equipment.

### III. Findings of Violation

22. On June 10, 2009, the U.S. Army Corps of Engineers ("the Corps") inspected the Site and observed ongoing filling activities of the Wetlands with earthen fill material using mechanized earth-moving equipment. The Corps observed earthen fill material in the Wetlands, and observed that the filled Wetlands were being used to store automobiles, trucks, heavy equipment, trailers, discarded material, lumber, and old steel.
23. The Secretary of the Army has not authorized via a permit the discharge of fill material conducted by the Respondents as described in paragraphs 19 through 22, above, into the Wetlands at the Site.
24. Based on the above Findings, EPA finds Respondents to be in violation of Section 301 of the Act, 33 U.S.C. § 1311, for the discharge of pollutants consisting of earthen fill into waters of the United States from point sources without authorization by the Secretary of the Army as provided by Section 404 of the Act, 33 U.S.C. § 1344.
25. Each day that the subject discharges, described in Paragraphs 19 through 22, above, remain unauthorized by the Secretary of the Army pursuant to Section 404 of the Act, 33 U.S.C. § 1344, constitutes an additional day of violation of Section 301 of the Act, 33 U.S.C. § 1311.
26. Under Section 309(g)(2)(B) of the Act, 33 U.S.C. §1319(g)(2)(B), Respondents are liable for the administrative assessment of civil penalties as follows: (a) after March 15, 2004 through January 12, 2009 - in an amount not to exceed \$11,000 per day for each day during which the violation continues, up to a maximum of \$157,500, and, (b) after

January 12, 2009 through the present – in an amount not to exceed \$16,000 per day for each day during which the violation continues, up to a maximum of \$177,500. *See* 69 Fed. Reg. 7,121 (Feb. 13, 2004).

27. EPA has consulted with the State of New York regarding this proposed action by, at least, mailing a copy of this Complaint and Notice to the appropriate State officials, and offering an opportunity for the State to consult further with EPA on the proposed penalty assessment.
28. EPA has notified the public of this proposed action by, at least, posting notice of this proposed action on the EPA website.

#### IV. Notice of Proposed Order Assessing a Civil Penalty

Based on the foregoing Findings of Violation, and pursuant to the authority of Section 309(g) of the Act, 33 U.S.C. §1319(g), and the Debt Collection Improvement Act of 1996, EPA, Region 2 hereby proposes to issue a Final Order Assessing Administrative Penalties ("Final Order") to Respondents assessing a penalty of up to \$177,500. EPA determined the proposed penalty after taking into account the applicable factors identified at Section 309(g)(3) of the Act, 33 U.S.C. §1319(g)(3). EPA has taken account of the nature, circumstances, extent and gravity of the violation, Respondents' prior compliance history, degree of culpability, economic benefit or savings accruing to Respondents by virtue of the violations, and Respondents' ability to pay the proposed penalty. Based on the Findings set forth above, Respondents have been found to have violated the Act.

#### V. Notice of Opportunity to Request a Hearing

1. Respondents may, within thirty (30) days of receipt of this Complaint and as part of any Answer filed in this matter, request a Hearing on the proposed civil penalty assessment and at the Hearing may contest the factual allegations set forth in the Findings of Violation contained in Section III above, and the appropriateness of any penalty amount. The procedures for the Hearing, if one is requested, are set out in the CROP.
2. Be aware that should Respondents request a hearing on this proposed penalty assessment, members of the public, to whom EPA is obligated to give notice of this proposed action, will have a right under Section 309(g)(4)(B) of the Act, 33 U.S.C. §1319(g)(4)(B), to be heard and to present evidence on the appropriateness of the penalty assessment. Should Respondents not request a hearing, EPA will issue a Final Order, and only members of the public who submit timely comment on this proposal will have an additional thirty (30) days to petition EPA to set aside the Final Order and to hold a hearing thereon. EPA will grant the petition and will hold a hearing only if the petitioner's evidence is material and was not considered by EPA in the issuance of the Final Order.

## VI. Filing an Answer

1. If Respondents wish to avoid being found in default, Respondents must file a written Answer to this Complaint with the Regional Hearing Clerk no later than thirty (30) days from the date of receipt of this Complaint. EPA may make a motion pursuant to §22.17 of the CROP seeking a default order thirty (30) days after Respondents' receipt of the Complaint unless Respondents file an Answer within that time. If a default order is entered, the entire proposed penalty may be assessed without further proceedings.
2. The Answer must clearly and directly admit, deny or explain each of the factual allegations contained in the Complaint with respect to which Respondents have knowledge or clearly state that Respondents have no knowledge as to particular factual allegations in the Complaint. The Answer also shall state:
  - (A) The circumstances or arguments which are alleged to constitute grounds of any defense;
  - (B) The facts which Respondents dispute;
  - (C) The basis for opposing the proposed relief;
  - (D) Whether a Hearing is requested.
3. Failures of Respondents to admit, deny, or explain any material factual allegations in this Complaint shall constitute admission of the allegation.

## VI. Filing of Documents

1. The Answer and any Hearing Request and all subsequent documents filed in this action should be sent to:

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

2. A copy of the Answer, any Hearing Request and all subsequent documents filed in this action shall be sent to:

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

### VIII. Instructions for Paying Penalty

1. As set forth in §22.18 of the CROP, Respondents may resolve these proceedings by payment of the proposed penalty in full, and by filing with the Regional Hearing Clerk, at the address provided below, a copy of the check or other instrument of payment. Pursuant to §22.45(c)(3) of the CROP, opportunity for such resolution of these proceedings is available to Respondents no sooner than 10 days after the close of the 30-day public comment period which commences upon publication of the Public Notice of this proposed action.
2. To pay the proposed penalty in full, Respondents shall send a cashier's check or certified check in the amount of \$177,500, payable to the "Treasurer of the United States of America". The check shall be identified with a notation of the name and docket number of this case, set forth in the caption on the first page of this document.

Such check shall be mailed to:

EPA, Region 2 (Regional Hearing Clerk)  
P.O. Box 360188M  
Pittsburgh, Pennsylvania 15251

Respondents shall also send copies of such payment to:

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

And to:

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

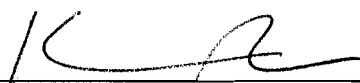
3. Upon receipt of payment in full, a Final Order shall be issued. Payment by Respondents shall constitute a waiver of Respondents' rights to contest the allegations and to appeal the Final Order.

### IX. General Provisions

1. Respondents have a right to be represented by an attorney at any stage of these proceedings.

2. This Complaint does not constitute a waiver, suspension or modification of the requirements of the Act, regulations promulgated thereunder, or any applicable permit.
3. Neither assessment nor payment of an administrative civil penalty pursuant to Section 309(g) of the Act, 33 U.S.C. §1319(g), will affect Respondents' continuing obligation to comply with the Act, and with any separate Compliance Order issued under Section 309(a) of the Act, 33 U.S.C. §1319(a), for the violations alleged herein.

ISSUED THIS 8<sup>th</sup> DAY OF April, 2011.

  
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Kevin Bricke, Acting Director  
Division of Environmental Planning and Protection  
U.S. EPA, Region 2  
290 Broadway  
New York, New York 10007

In the matter of

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

Proceeding Pursuant to § 309(g) of the  
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to Assess Class II Civil Penalty  
Docket No. CWA-02-2011-3601

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ENVIRONMENTAL PROTECTION AGENCY  
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**Certificate of Service**

I certify that on April 8, 2011, I served the foregoing fully executed Administrative Complaint, Findings of Violation, Notice of Proposed Assessment of an Administrative Penalty, and Notice of Opportunity to Request a Hearing, bearing the above referenced docket number, on the persons listed below, in the following manner:

Original and One Copy  
By Hand:

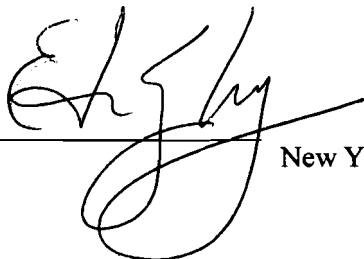
Office of Regional Hearing Clerk  
U.S. Environmental Protection Agency - Region 2  
290 Broadway, 16th floor  
New York, New York 10007-1866

Copy by Certified Mail  
Return Receipt Requested:

David A. Whitehill  
P.O. Box 266  
Falconer, NY 14733-0266

Dependable Towing & Recovery, Inc.  
P.O. Box 266  
Falconer, NY 14733-0266

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



New York, New York

4/8/2011