



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

JAN 07 2011

REPLY TO THE ATTENTION OF:

CERTIFIED MAIL 7001 0320 0005 9025 0006
RETURN RECEIPT REQUESTED

Mr. Jeff Misch
Misch Excavating, LLC
d/b/a Rooterman
Post Office Box 181
Downs, Illinois 61736-0181

Subject: Notice of Proposed Assessment of a Class II
Administrative Penalty Pursuant to Section 309(g) of
the Clean Water Act
Docket No. **CWA-05-2011-0003**

Dear Mr. Misch:

Enclosed is a copy of an "Administrative Complaint," which has been filed against Misch Excavating, LLC d/b/a Rooterman, under the authority of Section 309(g) of the Clean Water Act ("Act"), 33 U.S.C. § 1319(g). In the Complaint, the U.S. Environmental Protection Agency (U.S.EPA) alleges that your company violated Section 405(e) of the Act. The Complaint describes the alleged violations.

Your company may request a hearing regarding the violations alleged in the Complaint and the proposed administrative civil penalty. I invite you to pay particular attention to the section of the Complaint entitled "Notice of Opportunity to Request a Hearing." If Misch Excavating, LLC d/b/a Rooterman, fails to request a hearing within 30 days of receipt of the Complaint, your company waives its right to a hearing and may become liable for the entire proposed civil penalty. If your company requests a hearing, Misch Excavating, LLC d/b/a Rooterman, may seek the representation of an attorney, or represent itself at any point in these proceedings.

The rules governing these proceedings are 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," 40 C.F.R. Part 22. I have enclosed a copy for your reference.

Whether or not your company requests a hearing, I invite Misch Excavating, LLC d/b/a Rooterman, to confer informally with EPA concerning the alleged violations and the amount of the proposed penalty. Again, your company may seek representation by an attorney at any conference, whether the meeting occurs in person or by telephone. EPA encourages all parties to pursue settlement during an informal conference. If the parties reach a satisfactory settlement, a mutually negotiated and executed Consent Agreement will resolve this matter. The issuance of such a Consent Agreement will constitute a waiver by Misch Excavating, LLC d/b/a Rooterman, of its right to a hearing on, and judicial appeal of, the agreed civil penalty.

A request for an informal conference does not extend the 30 days during which Misch Excavating, LLC d/b/a Rooterman, may request a hearing on the proposed penalty assessment. You may pursue the two procedures simultaneously. If you have any questions or wish to discuss settlement of this matter, please contact Valdis Aistars, Water Division (WC-15J), EPA, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, or telephone Mr. Aistars at (312) 886-0264. For questions regarding legal issues, please contact Maria Gonzalez, Associate Regional Counsel, at (312) 886-6630.

We urge your prompt attention to this matter.

Sincerely,



Tinka G. Hyde
Tinka G. Hyde
Director, Water Division

Enclosures

cc: Thomas J. Anderson, MCHD
Mike Garretson, IEPA

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:)
)
MISCH EXCAVATING, LLC)
d/b/a ROOTERMAN)
DOWNS, ILLINOIS 61736)
)
RESPONDENT.)
_____)

CWA-05-2011-0003

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

RECEIVED
JAN 07 2011

REGIONAL HEARING CLERK
USEPA
REGION 5

COMPLAINT

1. This is an administrative Complaint issued under authority vested in the Administrator of the United States Environmental Protection Agency pursuant to section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g). The Administrator has delegated this authority to the Regional Administrator of U.S. EPA Region 5, who has redelegated the authority to the Director of the Water Division, U.S. EPA Region 5.

STATUTORY AND REGULATORY BACKGROUND

2. Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), states:
- (1) Violations
Whenever on the basis of any information available –
 - (A) The Administrator finds that any person has violated Section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated any permit condition or limitation implementing any such sections in a permit issued under section 1342 of this title

by the Administrator or by a State, or in a permit issued under section 1344 of this title by a State, or
(B) the Secretary of the Army (hereinafter in this subsection referred to as the "Secretary") finds that any person has violated any permit condition or limitation in a permit issued under section 1344 of this title by the Secretary, the Administrator or Secretary, as the case may be, may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.

3. Section 308(a) of the CWA, 33 U.S.C. § 1318(a), states in pertinent part:

Whenever required to carry out the objective of this chapter, including but not limited to ... carrying out [Section 405 of the CWA]--

(A) the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports ...and (v) provide such information as he may reasonably require....

4. Section 405(e) of the CWA, 33 U.S.C. § 1345(e), states:

(e) Manner of sludge disposal

The determination of the manner of disposal or use of sludge is a local determination, except that it shall be unlawful for any person to dispose of sludge from a publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been established pursuant to subsection (d) of this section, except in accordance with such regulations.

5. Pursuant to section 405(d) of the CWA, 33 U.S.C. § 1345(d), the Administrator published the "Standards for the Use or Disposal of Sewage Sludge" on February 19, 1993, codified at 40 C.F.R. part 503. By the terms of the regulation, the requirements of part 503 became effective one year from the date of promulgation.

6. Pursuant to 40 C.F.R. § 503.1(b), the provisions of 40 C.F.R. Part 503 apply, in pertinent part, to any person who applies sewage sludge to the land.

7. The regulations at 40 C.F.R. Part 503 establish general requirements, pollutant limits, management practices, and operational standards for the final use or disposal of sewage sludge generated during the treatment of domestic sewage in a treatment works. 40 C.F.R. Part 503 includes standards for sewage sludge applied to the land as well as requirements for pathogen reduction and vector attraction reduction.

8. 40 C.F.R. § 503.3(b) states that: “No person shall use or dispose of sewage sludge through any practice for which requirements are established in this part except in accordance with such requirements.”

9. 40 C.F.R. § 503.7 states that: “Any person who prepares sewage sludge shall ensure that the applicable requirements in this part are met when the sewage sludge is applied to the land, placed on a surface disposal site, or fired in a sewage sludge incinerator.”

10. 40 C.F.R. § 503.9(w) defines “sewage sludge” to include “domestic septage.”

11. 40 C.F.R. § 503.9(f) defines “domestic septage” to include “liquid or solid material removed from a septic tank.”

12. 40 C.F.R. § 503.17(b) states that: “When domestic septage is applied to agricultural land, forest, or a reclamation site, the person who applies the domestic septage shall develop the following information and shall retain the information for five years.” This regulation then specifies 8 specific items of information which must be generated and/or recorded and maintained for a period of at least 5 years.

GENERAL ALLEGATIONS

13. Respondent is Misch Excavating, LLC (hereinafter “Respondent”) a limited liability company organized under the laws of the State of Illinois, doing business as Rooterman.

14. Respondent is a “person” as defined by Section 502(5) of the Act, 33 U.S.C. Section 1362(5), and 40 C.F.R. § 503.9(q).

15. In the course of conducting its business, Respondent collected liquid and solid material from domestic septage tanks, cesspools, portable toilets or other waste collection devices.

16. The materials referred to in Paragraph 15 are “domestic septage” as that term is defined in 40 C.F.R. § 503.9(f).

17. The materials referred to in Paragraph 15 are “sewage sludge” as defined at 40 C.F.R. § 503.9(w).

18. The sources from which Respondent collected materials, identified in Paragraph 15, were “treatment works treating domestic sewage” within the meaning of Section 405(e) of the CWA, 33 U.S.C. § 1345(e).

19. Respondent applied sewage sludge to a parcel of land located in McLean County (T.23N.-R.4.), P.O. Box 108, Downs, Illinois 61736 (the Parcel).

20. Respondent applied sewage sludge to the land within the meaning of 40 C.F.R. §§ 503.1(b) and 503.10(a).

21. Respondent is subject to the requirements of 40 C.F.R. Part 503 subpart B. (See 40 C.F.R. § 503.10(a).)

22. Information available to U.S. EPA indicates that Respondent has disposed of septage sludge on the Parcel without complying with the applicable requirements of 40 C.F.R. Part 503.

23. Information available to U.S. EPA indicates that Respondent has disposed of sludge from treatment works treating domestic sewage within the meaning of Section 405(e) of the CWA, 33 U.S.C. § 1345(e), without complying with the applicable requirements of 40 C.F.R. Part 503.

24. Section 405(e) of the CWA, 33 U.S.C. § 1345(e), in part, provides that: “it shall be unlawful for any person to dispose of sludge from a publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been established pursuant to subsection (d) of this section, except in accordance with such regulations.”

25. Information available to U.S. EPA indicates that Respondent has violated Section 405 of the CWA.

26. Information available to U.S. EPA indicates that these violations may be continuing.

27. Section 309(a) of the CWA authorizes the Administrator to issue a compliance order or to bring a civil action whenever on the basis of any information available to him he finds that a person is in violation of, inter alia, Section 405 of the CWA.

28. On November 7, 2008, U.S. EPA issued an Order to Respondent pursuant to Sections 308 and 309(a) of the Clean Water Act (CWA), 33 U.S.C. §§ 1318 and 1319(a), (the Order).

29. Among other things, the Order sought information and documents relating to Respondent's compliance, or non-compliance, with regulations set forth in the Standards for the Use or Disposal of Sewage Sludge, 40 C.F.R. Part 503.

30. The Order required Respondent to submit the following information for the period November 15, 2003, to the present with respect to the Parcel within 20 days of the effective date of the Order:

- a. The number of acres to which domestic septage was applied at the Parcel;
- b. The date and time domestic septage was applied at the Parcel;
- c. The nitrogen requirement for the crop or vegetation grown at the Parcel during the year, including the expected annual crop yield(s);
- d. The rate, in gallons per acre per 365 day period, at which domestic septage was applied to the Parcel;
- e. Certification statements pursuant to 40 C.F.R. § 503.17 (b)(6);
- f. A description of how the pathogen reduction requirements in either 40 C.F.R. § 503.32 (c)(1) or (c)(2) were met for each batch of domestic septage land applied;
- g. A description of how the vector attraction reduction requirements in 40 C.F.R. § 503.33 (b)(9), (b)(10), or (b)(12) were met, including incorporation measures practiced; and
- h. If the Respondent is complying with 40 C.F.R. § 503.32 (c) (2) and/or 40 C.F.R. § 503.33 (b) (12), records for each batch that indicate: the pH of the domestic septage after initially adding lime; the pH of the domestic septage 30 minutes after initially adding lime; and receipts for bulk lime quantities purchased.

31. The Order also required Respondent, within 20 days of receipt of the request, to submit the following information for the period November 15, 2003, to the present, to the extent not provided in response to the previous paragraph :

- a. The address and legal description of any locations where Respondent applied domestic septage.
- b. The type of land involved, including whether it was agricultural, forest or a reclamation site.
- c. The number of acres to which domestic septage was applied.
- d. The dates of land application of septage.

- e. The rate, in gallons per acre per 365 day period, at which domestic septage was applied at those locations;
- f. A detailed description of Respondent's specific land application procedures, from the emplacement of the septage into vehicles for transportation from any point of collection to the actual application of the septage to the ground, including any incorporation and/or injection.
- g. A statement of the method or a list of its methods Respondent used for achieving compliance with the vector attraction reduction requirements of 40 C.F.R. Part 503. If Respondent employed more than one method of complying with 40 C.F.R. Part 503 vector attraction reduction requirements during the above-referenced period, Respondent must state the method and the duration it employed any given method;
- h. Documentation to establish Respondent's compliance with the 40 C.F.R. Part 503 vector attraction reduction requirements during each month.
- i. A statement of the method or a list of its methods for achieving compliance with the pathogen reduction requirements of 40 C.F.R. Part 503. If Respondent employed more than one method of complying with 40 C.F.R. Part 503 pathogen reduction requirements during the above-referenced period, Respondent must state the method and the duration it employed any given method.
- j. Documentation to establish Respondent's compliance with the 40 C.F.R. Part 503 pathogen reduction requirements during each month.
- k. Whether Respondent ever attempted to comply with the pathogen reduction or vector attraction reduction requirements of 40 C.F.R. Part 503 by manipulating the pH of the septage under 40 C.F.R. § 503.32 (c)(2) or 40 C.F.R. § 503.33 (b)(12). If so, describe in detail the methods and procedures that Respondent employed to assure that the septage was sampled for compliance with those provisions.
- l. Any records of the testing and analyses performed for each container of septage Respondent land applied. If these documents do not exist, please state this fact and explain why these records do not exist.
- m. All information required to be developed and retained under 40 C.F.R. § 503.17 (b). If Respondent does not have records required under 40 C.F.R. § 503.17 (b) for any period of time, Respondent must state that these records do not exist and state the reason these records do not exist.

32. U.S. EPA held an informal conference with Respondent on February 9, 2009.

33. The Order became effective on February 14, 2009, five days from the date U.S. EPA held an informal conference with Respondent.

34. U.S. EPA sent Respondent a letter on April 24, 2009, reminding Respondent that the Order required that the information be submitted on March 6, 2009, requesting that Respondent provide the required information, and advising that failure to comply with the Order and Section 308 of the Clean Water Act could subject Respondent to civil penalties. This letter was received by Respondent on April 28, 2009.

35. U.S. EPA sent Respondent a Notice of Intent to File a Civil Administrative Complaint on January 27, 2010, advising Respondent that U.S. EPA planned to file an administrative complaint for civil penalties against Respondent for violating Section 308(a) of the Clean Water Act by not providing the information and documents requested in the Order, and planned to seek a civil penalty. U.S. EPA asked Respondent to identify any information Respondent thought U.S. EPA should consider before issuing the complaint. If Respondent believed there were financial factors which bore on Respondent's ability to pay a \$157,500 penalty, U.S. EPA asked Respondent to submit specific financial documents.

36. U.S. EPA received a response on March 15, 2010, indicating that Respondent's had used its site to land apply septic sludge and conduct hydro excavating, estimating the acreage, normal corn production, nitrogen rate and land application, and arguing that there are no restrictions on hydro excavating.

37. Respondent did not provide other information and records requested by the Order or documentation to support its assertions.

38. Respondent did not provide documentation indicating that it was unable to pay a penalty.

39. On September 8, 2010, U.S. EPA sent Respondent a letter

requesting that Respondent provide the information required by the Order as well as any additional information Respondent would like U.S. EPA to consider, including documentation to substantiate any claim of inability to pay by no later than September 30, 2010.

40. U.S. EPA has not received any additional information from Respondent.

COUNT I

41. EPA incorporates herein the allegations contained in paragraphs 1 through 40 of this complaint.

42. The Order was lawfully and properly issued under authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a).

43. The Order requested Respondent to submit certain information and documents relating to its compliance with the sewage sludge land application, pathogen reduction, and vector attraction reduction requirements of the Standards for the Use or Disposal of Sewage Sludge set forth in 40 C.F.R. Part 503, within 20 days of the effective date of the Order.

44. Respondent was required to submit the requested information and documents by March 6, 2009.

45. Respondent failed to provide the information and documents requested as required by the Order.

46. Respondent's failure to comply with the requests issued under Section 308(a) of the CWA is a violation of Section 308(a) of the CWA, 33 U.S.C. §1318(a).

PROPOSED CIVIL PENALTY

47. Under section 309(g)(2) of the CWA, 33 U.S.C. § 1319(g)(2), the Administrator may assess a Class II civil penalty not to exceed \$10,000 per day for each day during which a violation continues, not to exceed \$125,000 for violations of section 307 of the CWA, 33 U.S.C. § 1317. The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, required U.S. EPA to adjust its penalties for inflation on a periodic basis. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule, published at 40 C.F.R. Part 19, U.S. EPA may assess a civil penalty of up \$16,000 per day for each day during which a violation continues, not to exceed \$177,500, under section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), for violations that occurred after January 12, 2009.

48. Under section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), the Administrator, when assessing a penalty under section 309(g), must consider the nature, circumstances, extent and gravity of the violations alleged, as well as Respondent's ability to pay, history of violations, culpability, economic benefit of saving resulting from the violations, and other matters as justice may require.

49. Based upon an evaluation of the facts alleged in this Complaint, and the factors specified in section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), Complainant proposes that the Administrator assess a civil penalty against Respondent of \$ 157,500.

RULES GOVERNING THIS PROCEEDING

50. 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” (the Consolidated Rules) codified at 40 C.F.R. part 22, govern this proceeding to assess a civil penalty. A copy of the Consolidated Rules accompanies this Complaint.

FILING AND SERVICE OF DOCUMENTS

51. Respondent must file with the Regional Hearing Clerk the original and one copy of each document Respondent intends as part of the record in this proceeding. The Regional Hearing Clerk’s address is:

Regional Hearing Clerk (R-19J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

52. Respondent must serve a copy of each document filed in this proceeding on each party pursuant to section 22.5 of the Consolidated Rules. Complainant has authorized Maria E. Gonzalez, Associate Regional Counsel, to receive any answer and subsequent legal documents that Respondent serves in this proceeding. You may telephone Ms. Gonzalez at (312) 886-6630. Ms. Gonzalez’s address is:

Maria E. Gonzalez
Associate Regional Counsel
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Boulevard (C-14J)
Chicago, Illinois 60604-3590

PENALTY PAYMENT

53. Respondent may resolve this proceeding by paying the proposed penalty by certified or cashier's check payable to "Treasurer, the United States of America", and by delivering the check to:

U.S. EPA
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

54. Respondent must include the case name and docket number on the check and in the letter transmitting the check. Respondent simultaneously must send copies of the check and transmittal letter to Maria E. Gonzalez, Associate Regional Counsel, and to:

Compliance Section (WC-15J)
Water Division
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

55. Under section 22.45 of the Consolidated Rules, Respondent may not submit this penalty payment until ten days after the close of the public comment period. If Respondent intends to resolve this Complaint under this paragraph, please contact Mr. Guenther at the address or phone number provided in paragraph 52, above.

OPPORTUNITY TO REQUEST A HEARING

56. The Administrator must provide an opportunity to request a hearing to any person against whom the Administrator proposes to assess a penalty under section 309(g) of the CWA, 33 U.S.C. § 1319(g). Respondent has the right to request a

hearing on any material fact alleged in the Complaint, or on the appropriateness of the proposed penalty, or both. To request a hearing, Respondent must specifically make the request in its answer, as discussed in paragraphs 57 through 61, below.

ANSWER

57. Respondent must file a written answer to this Complaint if Respondent contests any material fact of the Complaint; contends that the proposed penalty is inappropriate; or contends that it is entitled to judgment as a matter of law. To file an answer, Respondent must file the original written answer and one copy with the Regional Hearing Clerk at the address specified in paragraph 51 above, and must serve copies of the written answer on the other parties.

58. If Respondent chooses to file a written answer to this Complaint, it must do so within 30 calendar days after receiving the Complaint. In counting the 30-day time period, the date of receipt is not counted, but Saturdays, Sundays, and federal legal holidays are counted. If the 30-day time period expires on a Saturday, Sunday, or federal legal holiday, the time period extends to the next business day.

59. Respondent's written answer must clearly and directly admit, deny, or explain each of the factual allegations in the Complaint; or must state clearly that Respondent has no knowledge of a particular factual allegation. Where Respondent states that it has no knowledge of a particular factual allegation, the allegation is deemed denied.

60. Respondent's failure to admit, deny, or explain any material factual allegation in the Complaint constitutes an admission of the allegation.

Respondent answer must also state:

- a. the circumstances or arguments which Respondent alleges constitute grounds of defense;
- b. the facts that Respondent disputes;
- c. the basis for opposing the proposed penalty; and
- d. whether Respondent requests a hearing as discussed in paragraph 56, above.

61. If Respondent does not file a written answer within 30 calendar days after receiving this Complaint the Presiding Officer may issue a default order, after motion, under section 22.17 of the Consolidated Rules. Default by Respondent constitutes an admission of all factual allegations in the Complaint and a waiver of the right to contest the factual allegations. Respondent must pay any penalty assessed in a default order without further proceedings 30 days after the order becomes a final order of the Administrator of U.S. EPA under section 22.27(c) of the Consolidated Rules.

SETTLEMENT CONFERENCE

62. Whether or not Respondent requests a hearing, Respondent may request an informal settlement conference to discuss the facts of this proceeding and to arrive at a settlement. To request an informal settlement conference, Respondent may contact Ms. Gonzalez at the address or phone number specified in paragraph 52, above.

63. Respondent's request for an informal settlement conference does not extend the 30 calendar day period for filing a written answer to this Complaint. Respondent may pursue simultaneously the informal settlement conference and the adjudicatory hearing process. U.S. EPA encourages all parties facing civil penalties to

pursue settlement through an informal conference. U.S. EPA, however, will not reduce the penalty simply because the parties hold an informal settlement conference.

NOTICE TO THE STATE AND TO THE PUBLIC

64. Complainant has consulted with Illinois about this proceeding by mailing a copy of this Complaint to the Chief of the Bureau of Water of the Illinois Environmental Protection Agency, and by offering the State an opportunity to comment on the proposed penalty.

65. Complainant is providing public notice of and a reasonable opportunity to comment on the proposed assessment of an administrative penalty against Respondent. If a hearing is held in this proceeding, members of the public who submitted timely comments on this proposed penalty will have the right to be heard and present evidence at the hearing.

CONTINUING OBLIGATION TO COMPLY

66. Neither the assessment nor payment of a civil penalty will affect Respondent's continuing obligation to comply with the CWA and any other applicable federal, state, or local law.

Date: Dec 10, 2010

for Peter Svensson
Tinka G. Hyde, Director
Water Division
U.S. Environmental Protection
Agency, Region 5
77 West Jackson Boulevard
Chicago, Illinois

RECEIVED
JAN 07 2011
REGIONAL HEARING CLERK
USEPA
REGION 5

CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of this Administrative Complaint were filed with the Regional Hearing Clerk on 1-7-11, and that a true and correct copy was mailed along with a copy of the Consolidated Rules of Practice to the addressees as follows:

CERTIFIED MAIL 7001 0320 0005 9025 0006
RETURN RECEIPT REQUESTED

Mr. Jeff Misch
Misch Excavating, LLC
d/b/a Rooterman
Post Office Box 181
Downs, Illinois 61736-0181

RECEIVED
JAN 07 2011
REGIONAL HEARING CLERK
USEPA
REGION 5

Date: 1-7-11

CERTIFIED MAIL 7001 0320 0005 9024 9994
RETURN RECEIPT REQUESTED

Mr. William Ingersoll
Acting Chief Legal Counsel
1021 N. Grand Avenue East
Springfield, IL 62794-9276

Date: 1-7-11

Daniel Moore
U.S. Environmental Protection Agency
Region 5
77 West Jackson, WC-15J
Chicago, Illinois 60604