



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

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

February 11, 2011

REPLY TO THE ATTENTION OF  
E-19J

Honorable Susan L. Biro  
Office of Administrative Law Judges  
U. S. Environmental Protection Agency  
Ariel Rios Building, Mailcode: 1900L  
1200 Pennsylvania Ave., NW  
Washington, D.C. 20460

RE: In The Matter of: *MISCH EXCAVATING, LLC d/b/a ROOTERMAN*  
Docket No.: CWA-05-2011-0003  
Complaint Date: January 7, 2011  
Total Proposed Penalty: \$157,500

Dear Judge Biro:

Enclosed is a copy of the Respondent's Answer to an Administrative Complaint for *MISCH EXCAVATING, LLC d/b/a ROOTERMAN* in Downs, Illinois.

Please assign an Administrative Law Judge for this case.

If you have questions contact me at (312) 886-3713.

Sincerely,

A handwritten signature in blue ink that reads "La Dawn Whitehead".

La Dawn Whitehead  
Regional Hearing Clerk

Enclosure

cc: Thomas W. Daggett, Esquire  
Daggett Law Firm  
161 North Clark Street, Suite 4950  
Chicago, Illinois 60601  
(312) 960-1600

Maria Gonzalez, Esquire  
Associate Regional Counsel  
Office Regional Counsel  
U.S. EPA, Region 5  
77 West Jackson Blvd., C-14J  
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312-960-1600

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February 10, 2011

*Via U.S. Express Mail*  
Regional Hearing Clerk  
US EPA, Region 5  
77 West Jackson Blvd.  
Chicago, Illinois 60604-3590

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USEPA  
REGION 5

RE: IN THE MATTER OF:  
MISCH EXCAVATING LLC  
Docket No. CWA-05-2011-0003

Please file the enclosed ANSWER AND REQUEST FOR HEARING in the  
above captioned Administrative Penalty Proceeding. An Original and copy are included.  
I have been authorized by the Respondent to receive service of documents in this  
proceeding on its behalf.

Sincerely,



Thomas W. Daggett (ARDC #568678)  
Daggett Law Firm  
161 N. Clark Street, Suite 4950  
Chicago, IL 60601  
(312) 960-1600

cc.

*Via 1st Class Mail*  
Maria Gonzalez, Assoc. Regional Counsel  
US EPA, Region 5 (C-14J)  
77 West Jackson Blvd.  
Chicago, Illinois 60604-3590

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5**

_____ )	
IN THE MATTER OF: )	
)	CWA-05-2011-0003
MISCH EXCAVATING, LLC )	
d/b/a ROOTERMAN )	Proceeding to Assess a
)	Class II Civil Penalty
DOWNNS, ILLINOIS 61736 )	Pursuant to Section
)	309(g) of the Clean
Respondent. )	Water Act, 33 U.S.C.
)	§ 1319(g)
_____ )	

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REGION 5

**ANSWER**

Respondent, Misch Excavating, LLC, by its attorney, the Daggett Law Firm, timely submits its Answer to the Complaint it received on January 12, 2011, and hereby requests a hearing to challenge the allegations of violations and the proposed civil penalty, in accordance with the Consolidated Rules of Practice, 40 CFR Part 22. The numbered paragraphs, below, provide Respondent's answer to the corresponding numbered allegations in the Complaint, as follows:

1. Allegation 1 does not state factual allegations, but only Complainant's legal conclusions, to which no answer is required; Respondent reserves the right to challenge any incorrect legal conclusions later in this Answer, and in its briefs or legal memoranda later in this proceeding. To the extent that it is deemed to state factual allegations, respondent has insufficient knowledge to admit or deny such factual allegations so they are deemed denied pursuant to 40 CFR 22.15(b).

**STATUTORY AND REGULATORY BACKGROUND**

2. Allegation 2 does not state factual allegations, but only Complainant's paraphrasing of a provision of law, to which no answer is required. To the extent that an

answer is required, Respondent states that the cited provision of law speaks for itself. To the extent that Complainant's paraphrasing differs from the cited provision, the Allegation is denied.

3. Allegation 3 does not state factual allegations, but only Complainant's paraphrasing of a provision of law, to which no answer is required. To the extent that an answer is required, Respondent states that the cited provision of law speaks for itself. To the extent that Complainant's paraphrasing differs from the cited provision, the Allegation is denied.

4. Allegation 4 does not state factual allegations, but only Complainant's paraphrasing of a provision of law, to which no answer is required. To the extent that an answer is required, Respondent states that the cited provision of law speaks for itself. To the extent that Complainant's paraphrasing differs from the cited provision, the Allegation is denied.

5. Allegation 5 does not state factual allegations, but only Complainant's legal conclusions, to which no answer is required; Respondent reserves the right to challenge any incorrect legal conclusions later in this Answer, and in its briefs or legal memoranda later in this proceeding. To the extent that it is deemed to state factual allegations, respondent has insufficient knowledge to admit or deny such factual allegations so they are deemed denied pursuant to 40 CFR 22.15(b).

6. Allegation 6 does not state factual allegations, but only Complainant's paraphrasing of a provision of law, to which no answer is required. To the extent that an answer is required, Respondent states that the cited provision of law speaks for itself. To

the extent that Complainant's paraphrasing differs from the cited provision, the Allegation is denied.

7. Allegation 7 does not state factual allegations, but only Complainant's paraphrasing of a provision of law, to which no answer is required. To the extent that an answer is required, Respondent states that the cited provision of law speaks for itself. To the extent that Complainant's paraphrasing differs from the cited provision, the Allegation is denied.

8. Allegation 8 does not state factual allegations, but only Complainant's paraphrasing of a provision of law, to which no answer is required. To the extent that an answer is required, Respondent states that the cited provision of law speaks for itself. To the extent that Complainant's paraphrasing differs from the cited provision, the Allegation is denied.

9. Allegation 9 does not state factual allegations, but only Complainant's paraphrasing of a provision of law, to which no answer is required. To the extent that an answer is required, Respondent states that the cited provision of law speaks for itself. To the extent that Complainant's paraphrasing differs from the cited provision, the Allegation is denied.

10. Allegation 10 does not state factual allegations, but only Complainant's paraphrasing of a provision of law, to which no answer is required. To the extent that an answer is required, Respondent states that the cited provision of law speaks for itself. To the extent that Complainant's paraphrasing differs from the cited provision, the Allegation is denied.

11. Allegation 11 does not state factual allegations, but only Complainant's paraphrasing of a provision of law, to which no answer is required. To the extent that an answer is required, Respondent states that the cited provision of law speaks for itself. To the extent that Complainant's paraphrasing differs from the cited provision, the Allegation is denied.

12. Allegation 12 does not state factual allegations, but only Complainant's paraphrasing of a provision of law, to which no answer is required. To the extent that an answer is required, Respondent states that the cited provision of law speaks for itself. To the extent that Complainant's paraphrasing differs from the cited provision, the Allegation is denied.

#### **GENERAL ALLEGATIONS**

13. Admitted.

14. Admitted.

15. Respondent admits that collecting liquid and solid material from domestic septage tanks, cesspools, and portable toilets made up a small fraction (approximately 3%) of its business for approximately 2 years, ending when it first received notice of any governmental agency's problem with that activity in EPA's November 7, 2008 Order. Respondent denies that it collected such materials before or after that 2 year period. During that 2 year period, Respondent's activities that *did not* include collecting such material made up 97% of Respondent's business, primarily drain cleaning, trucking, and excavating. This included hydro-excavating with a high pressure water spray, followed by collecting the resulting liquid and solid mud material in vacuum pump trucks for disposal off site.

16. Allegation 16 does not state factual allegations, but only Complainant's legal conclusions, to which no answer is required. Answering further, Respondent specifically denies that the liquid and solid mud material that it collected in vacuum pump trucks from its hydro-excavating activities during the 2 year period as referenced in its answer to paragraph 15 met the cited "domestic septage" definition.

17. Allegation 17 does not state factual allegations, but only Complainant's legal conclusions, to which no answer is required. Answering further, Respondent specifically denies that the liquid and solid mud material that it collected in vacuum pump trucks from its hydro-excavating activities during the 2 year period as referenced in its answer to paragraph 15 met the cited "sewage sludge" definition.

18. Allegation 18 does not state factual allegations, but only Complainant's legal conclusions, to which no answer is required. Answering further, Respondent specifically denies that the sources of the liquid and solid mud material that it collected in vacuum pump trucks from its hydro-excavating activities during the 2 year period as referenced in its answer to paragraph 15 met the cited "treatment works treating domestic sewage" definition.

19. See answer to paragraph 17, which is incorporated here; Respondent admits that a portion of the liquid and solid materials it collected during the 2 year period set out in its response to Allegation 15 were applied to the land on an approximately 2 acre portion of the 30 acre "Parcel" described in Allegation 19, tilled into the soil and treated with lime, with the oversight of the McLean County Health Department. Other portions of that material was transported to and disposed of at a sewage treatment plant.

20. See answers to paragraphs 17 and 19, which are incorporated here.

21. Allegation 21 does not state factual allegations, but only Complainant's legal conclusions, to which no answer is required; Respondent reserves the right to challenge any incorrect legal conclusions later in this Answer, and in its briefs or legal memoranda later in this proceeding.

22. Respondent has no knowledge as to what "Information available to the U.S. EPA" Complainant is referring to in this Allegation, and the Allegation is therefore denied pursuant to 40 CFR 22.15(b). Respondent demands an opportunity to review and refute any such information during the course of this proceeding.

23. Respondent has no knowledge as to what "Information available to the U.S. EPA" Complainant is referring to in this Allegation, and the Allegation is therefore denied pursuant to 40 CFR 22.15(b). Respondent demands an opportunity to review and refute any such information during the course of this proceeding.

24. Allegation 24 does not state factual allegations, but only Complainant's paraphrasing of a provision of law, to which no answer is required. To the extent that an answer is required, Respondent states that the cited provision of law speaks for itself. To the extent that Complainant's paraphrasing differs from the cited provision, the Allegation is denied.

25. Respondent has no knowledge as to what "Information available to the U.S. EPA" Complainant is referring to in this Allegation, and the Allegation is therefore denied pursuant to 40 CFR 22.15(b). Respondent demands an opportunity to review and refute any such information during the course of this proceeding.

26. Respondent has no knowledge as to what "Information available to the U.S. EPA" Complainant is referring to in this Allegation, and the Allegation is therefore

denied pursuant to 40 CFR 22.15(b). Respondent demands an opportunity to review and refute any such information during the course of this proceeding. Answering further, Respondent incorporates its answer to Allegation 15.

27. Allegation 27 does not state factual allegations, but only Complainant's legal conclusions as to the meaning of a provision of law, to which no answer is required. To the extent that an answer is required, Respondent states that the cited provision of law speaks for itself. To the extent that Complainant's legal conclusions differ from the cited provision, the Allegation is denied.

28. Respondent admits that it received an Order or Notice from U.S. EPA on or about the referenced date. Respondent has no knowledge or insufficient knowledge of the remainder of this Allegation because its office and records were destroyed by a fire, and water damage from striking that fire, in 2009, so the remainder of this Allegation is denied pursuant to 40 CFR 22.15(b). Respondent demands an opportunity to review such U.S. EPA Order or Notice and refute Complainant's allegations concerning its contents during the course of this proceeding.

29. Respondent incorporates its answer to paragraph 28 as its answer to this Allegation.

30. Respondent incorporates its answer to paragraph 28 as its answer to this Allegation.

31. Respondent incorporates its answer to paragraph 28 as its answer to this Allegation.

32. Respondent admits to participating in a conference with U.S. EPA on or about February 9, 2009. Respondent has no knowledge or insufficient knowledge of the

precise date cited in this Allegation because its office and records were destroyed by a fire, and water damage from striking that fire, in 2009, so the remainder of this Allegation is denied pursuant to 40 CFR 22.15(b).

33. Respondent has no knowledge or insufficient knowledge of the matters set out in this Allegation because its office and records were destroyed by a fire, and water damage from striking that fire, in 2009, so the remainder of this Allegation is denied pursuant to 40 CFR 22.15(b). See also, Respondent's answer to paragraph 28.

34. Respondent has no knowledge or insufficient knowledge of the letter referenced in this Allegation because its office and records were destroyed by a fire, and water damage from striking that fire, in 2009, so this Allegation is denied pursuant to 40 CFR 22.15(b). Respondent demands an opportunity to review such U.S. EPA letter and refute Complainant's allegations concerning its contents during the course of this proceeding.

35. Allegation 35 sets out Complainant's paraphrasing of the contents of a January 27, 2010 Notice. Respondent answers that the cited Notice speaks for itself. To the extent that Complainant's paraphrasing differs from the language of the Notice, the Allegation is denied.

36. Respondent admits submitting a written response to U.S. EPA on or about March 15, 2010, attempting to provide requested information as could be reconstructed after the fire, referenced above. As to Complainant's paraphrasing of that response, Respondent states that the response speaks for itself. To the extent that Complainant's paraphrasing differs from the response itself, the Allegation is denied.

37. Denied. Answering further, Respondent orally provided additional information in phone calls and a meeting with U.S. EPA representatives; Respondent could not provide written records and other documentation that may have been responsive as it was destroyed in the fire, referenced above.

38. Respondent admits that it has not provided documentation showing that it is unable to pay the proposed penalty as substantial portions of its financial records were destroyed in the fire referenced above; respondent adds that it is still in the process of trying to reconstruct financial records sufficient to allow it to file tax returns for 2009.

39. Respondent has no knowledge or insufficient knowledge of the letter referenced in this Allegation to respond, so this Allegation is denied pursuant to 40 CFR 22.15(b).

40. Respondent incorporates its answer to paragraph 37 as its answer to this Allegation.

### **COUNT 1**

41. Respondent incorporates its answers to Allegations 1 through 40 of this Answer.

42. Allegation 42 does not state factual allegations, but only Complainant's legal conclusions, to which no answer is required; Respondent reserves the right to challenge any incorrect legal conclusions later in this Answer, and in its briefs or legal memoranda later in this proceeding. To the extent that it is deemed to state factual allegations, respondent has insufficient knowledge to admit or deny such factual allegations so they are deemed denied pursuant to 40 CFR 22.15(b).

43. Respondent incorporates its answer to paragraph 28 as its answer to this Allegation.

44. Respondent has no knowledge or insufficient knowledge of the matters set out in this Allegation because its office and records were destroyed by a fire, and water damage from striking that fire, in 2009, so this Allegation is denied pursuant to 40 CFR 22.15(b). See also, Respondent's answer to paragraph 28.

45. Denied; Respondent provided the requested information as it could reconstruct it after the fire as set out in the answer to Allegation 36, above; as to other requested information and documents that may have been required by the Order, Respondent has no knowledge or insufficient knowledge of the matters set out in this Allegation because its office and records were destroyed by a fire, and water damage from striking that fire, in 2009, so this Allegation is denied pursuant to 40 CFR 22.15(b). See also, Respondent's answer to paragraph 28.

46. Denied.

#### **Proposed civil penalty**

47. Allegation 47 does not state factual allegations, but only Complainant's legal conclusions, to which no answer is required; Respondent reserves the right to challenge any incorrect legal conclusions later in this Answer, and in its briefs or legal memoranda later in this proceeding. To the extent that it is deemed to state factual allegations, respondent has insufficient knowledge to admit or deny such factual allegations so they are deemed denied pursuant to 40 CFR 22.15(b). Answering further, Respondent states that Allegation 47 solely addresses penalties which may be assessed for violations of section 307 of the CWA, 33 U.S.C. §1317, addressing toxic pollutants and pretreatment

standards, which are irrelevant to this matter. Complainant has not alleged any violations of 33 U.S.C § 1317.

48. Allegation 8 does not state factual allegations, but only Complainant's paraphrasing of a provision of law, to which no answer is required. To the extent that an answer is required, Respondent states that the cited provision of law speaks for itself. To the extent that Complainant's paraphrasing differs from the cited provision, the Allegation is denied.

49. Respondent denies that the Complainant's proposed \$157,500 penalty is justified based upon the facts and the factors that the Administrator is required to consider under CWA § 309(g)(3), 33 U.S.C. § 1319(g)(3). The single Count in its Complaint alleges violation of CWA § 308, 33 U.S.C. § 1318 by failure to provide information under an administrative order; Complainant's Allegation 36 admits that Respondent provided a March 15, 2010 written response addressing its land application, estimated acreage, corn production, and nitrogen rate; Respondent will provide evidence that a 2009 fire, and water damage from striking that fire, destroyed its records making Complainant's demands for records documenting its assertions impossible to fulfill.

#### **RULES GOVERNING THIS PROCEEDING**

50. Admitted.

#### **FILING AND SERVICE OF DOCUMENTS**

51. - 52. Admitted.

#### **PENALTY PAYMENT**

53. - 55. Respondent is challenging the proposed violation and penalty.

### **OPPORTUNITY TO REQUEST A HEARING**

56. Respondent hereby requests a hearing to challenge the facts, alleged violation, and proposed penalty.

### **FILING AN ANSWER**

57. - 61. These Allegations do not state factual allegations, but only Complainant's paraphrasing of a various provisions of law and the Rules, to which no answer is required. To the extent that an answer is required, Respondent states that the cited provisions of law and the Rules speak for themselves. To the extent that Complainant's paraphrasing differs from these provisions, the Allegations are denied. The Complainant has provided no rationale or explanation of how it developed or justified its proposed penalty under the requirements of CWA section 309, 33 U.S.C. 1319; Respondent demands that it be provided such rationale during the course of this proceeding, and reserves the right to provide its contrary arguments upon reviewing Complainant's rationale.

### **SETTLEMENT CONFERENCE**

62. - 63. Respondent intends to seek a settlement conference, and will contact Ms. Gonzalez to schedule it.

### **NOTICE TO THE STATE AND THE PUBLIC**

64. - 65. Respondent has no knowledge as to what consultations or notices Complainant has provided as referred to in this Allegation, and the Allegation is therefore denied pursuant to 40 CFR 22.15(b).

**CONTINUING OBLIGATION TO COMPLY**

66. Allegation 66 does not state factual allegations, but only Complainant's legal conclusions, to which no answer is required; Respondent reserves the right to challenge any incorrect legal conclusions in its briefs or legal memoranda later in this proceeding.

Misch Excavating LLC

by: Thomas W. Daggett  
Its Attorney

Thomas W. Daggett (ARDC #568678)  
Daggett Law Firm  
161 N. Clark Street, Suite 4950  
Chicago, IL 60601  
(312) 960-1600

Certification of Service: I hereby certify that the original and one copy of the foregoing Answer was filed with the Regional Hearing Clerk on Friday February 11, 2011, by sending it by overnight U.S. Express Mail on Thursday February 10, 2011; and served on counsel of record Associate Regional Counsel Maria Gonzalez by depositing copy in the U.S. Mail, 1<sup>st</sup> class postage pre-paid, and addressed to such counsel, on February 10, 2011.

Thomas W. Daggett 2/10/11

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