

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NEW YORK  
BUFFALO**

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UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:14-cv-188-RJA-MJR
	)	
DAVID A. WHITEHILL and DEPENDABLE	)	
TOWING & RECOVERY, INC.,	)	
	)	
Defendants.	)	

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**CONSENT DECREE**

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WHEREAS, Plaintiff United States of America, on behalf of the United States Environmental Protection Agency (“EPA”), has filed a Complaint in this action on March 20, 2014, alleging that Defendants David A. Whitehill and Dependable Towing & Recovery, Inc. violated and remain in violation of Sections 301(a) and 404 of the Clean Water Act (“CWA”), 33 U.S.C. §§ 1311(a), 1344;

WHEREAS, the Complaint alleges that Defendants violated CWA Section 301(a) by discharging dredged or fill material and/or controlling and directing the discharge of dredged or fill material into waters of the United States on real property owned and controlled by Defendant Whitehill and contiguous parcels in Chautauqua County, New York, including wetlands adjacent to and with a continuous hydrological surface connection to Cassadaga Creek, a navigable-in-fact waterway, without authorization by the United States Army Corps of Engineers pursuant to CWA Section 404;

WHEREAS, the Complaint also alleges that Defendants violated CWA Section 301(a) by failing to comply with an administrative order issued by EPA pursuant to CWA Section 309(a), 33 U.S.C. § 1319(a);

WHEREAS, the Complaint seeks to (1) enjoin the discharge of pollutants into waters of the United States in violation of CWA Section 301(a), 33 U.S.C. § 1311(a); (2) require Defendants, at their own expense and at the direction of EPA, to restore and/or mitigate the damage caused by their unlawful activities; and (3) require Defendants to pay civil penalties as provided in CWA Section 309(d), 33 U.S.C. § 1319(d);

WHEREAS, Defendants admit that third parties discharged fill and other materials into areas claimed by the EPA to be waters of the United States but do not admit any liability to the United States arising out of the transactions or occurrences alleged in the Complaint;

WHEREAS, the Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and will avoid further litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest; and

THEREFORE, before the taking of any testimony, without the adjudication or admission of any issue of fact or law except as provided in Section I, and with the consent of the Parties, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED as follows:

I. JURISDICTION, VENUE, AND SUFFICIENCY OF COMPLAINT

1. This Court has jurisdiction over the subject matter of this action, pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and over the Parties. Venue lies in this District pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and (c) and 1395(a), because the Defendants conduct business in this District, the subject property is located in this District, and the causes of action alleged herein arose in this District. For purposes of this Consent Decree, including any action to enforce this Decree, Defendants consent to the Court's jurisdiction over this Decree and any such action and over Defendants and consent to venue in this judicial district.

2. For purposes of this Consent Decree, including any action to enforce this Decree, the Parties agree, and the Court finds, that the Complaint states claims upon which relief may be granted pursuant to Sections 301, 309, and 404 of the CWA, 33 U.S.C. §§ 1311, 1319, and 1344.

II. APPLICABILITY

3. The obligations of this Consent Decree apply to and are binding upon the United States, and upon Defendants and their successors, assigns, or other persons otherwise bound by law.

4. The transfer of ownership or control of the Restoration Site or Preservation Site or of any less-than-fee-simple interest in the Restoration Site or Preservation Site (e.g., an easement) by any person shall not relieve Defendants of their obligation to ensure that the terms of the Decree are implemented, unless this Consent Decree is amended to provide differently pursuant to Paragraph 71 hereof. As a condition of any such transfer by Defendants, Defendants shall reserve all rights necessary to comply with this Consent Decree. At least 30 Days prior to any such transfer, Defendants shall provide a copy of this Consent Decree to the proposed transferee and shall concurrently provide written notice of the prospective transfer, together with a copy of the proposed written agreement, to EPA Region 2, the United States Attorney for the Western District of New York, and the United States Department of Justice, in accordance with Section XIV. Any attempted or actual transfer of any interest in the Restoration Site or Preservation Site by Defendants without complying with this Paragraph constitutes a violation of this Consent Decree.

5. Defendants shall provide a copy of this Consent Decree to all officers, employees, and agents whose duties might reasonably include compliance with any provision of this Consent Decree, including, for example, any contractor or consultant retained to perform any work identified in Appendix A to this Consent Decree. To the extent that Defendants retain any contractor or consultant to perform any obligation required under this Consent Decree, Defendants shall condition any such contract upon performance that conforms to the terms of this Consent Decree.

6. In any action to enforce this Consent Decree, Defendants shall not raise as a defense the failure by any of their officers, directors, employees, agents, contractors, or consultants to take any actions necessary to comply with the provisions of this Consent Decree.

### III. DEFINITIONS

7. Terms used in this Consent Decree that are defined in the CWA or in regulations promulgated pursuant to the CWA shall have the meanings assigned to them in the CWA or such regulations, unless otherwise provided in this Decree. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:

“Complaint” shall mean the complaint filed by the United States in this action on March 20, 2014 (ECF No. 1).

“Consent Decree” shall mean this Decree, all Appendices hereto, and all modifications made effective in accordance with Section XVII.

“CWA” shall mean the Clean Water Act, 33 U.S.C. §§ 1251-1388.

“Day” shall mean a calendar day unless expressly stated to be a business day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next business day.

“Defendant(s)” shall mean David A. Whitehill, Dependable Towing & Recovery, Inc., and their successors and assigns, including purchasers of any interest in the Preservation Site, Restoration Site, or Dependable Towing & Recovery, Inc.

“EPA” shall mean the United States Environmental Protection Agency and any of its successor departments or agencies.

“Effective Date” shall have the definition provided in Section XV.

“Paragraph” shall mean a portion of this Decree identified by an arabic numeral.

“Parties” shall mean the United States and Defendant(s).

“Preservation Site” shall mean the property designated in Exhibits B and C of Appendix C to this Decree.

“Restoration Site” shall mean the property designated as “Proposed Removal Area”, “Previous Fill Removal Area”, and “Proposed Placement Areas” in Appendix B to this Decree.

“Section” shall mean a portion of this Decree identified by a roman numeral.

“United States” shall mean the United States of America, acting on behalf of EPA.

#### IV. CIVIL PENALTY

8. Within 30 Days after the Effective Date, Defendants shall pay the sum of \$10,000 as a civil penalty to the United States.

9. Defendants shall pay the civil penalty due to the United States by certified or cashier’s check payable to “U.S. Department of Justice,” referencing the civil action number of this case, DOJ#90-5-1-1-19741, and the Consolidated Debt Collection System (“CDCS”) number provided by the Financial Litigation Unit after the Effective Date. The check shall be delivered to the Financial Litigation Unit of the United States Attorney for the Western District of New York, 138 Delaware Ave., Buffalo, NY 14202, (716) 843-5700. At the time of payment, Defendants shall send a copy of the check together with a transmittal letter to (i) the United States as specified in Section XIV; and (ii) EPA as specified in Section XIV. The transmittal letter shall state that the payment is for the civil penalty owed pursuant to the Consent Decree in *United States v. Whitehill*, and shall reference the civil action number of this case, DOJ#90-5-1-1-19741, and the CDCS number.

10. Defendants shall not deduct any penalties paid under this Decree pursuant to this Section or Section VIII (Stipulated Penalties) in calculating their federal income taxes.

V. COMPLIANCE REQUIREMENTS

11. Permanent injunction. Except as in accordance with this Consent Decree, Defendants are enjoined from discharging any pollutant to waters of the United States, unless such discharge complies with the provisions of the CWA and its implementing regulations.

12. Restoration. Defendants shall conduct restoration at the Restoration Site in accordance with the Restoration Plan in Appendix A to this Consent Decree.

13. Preservation:

a. Within 30 Days of the Effective Date, Defendants shall execute and record with the recorder of deeds office in Chautauqua County, New York, the restrictive covenant set forth in Appendix C, which is designed to ensure the preservation of the Preservation Site in perpetuity as purely natural, as well as this Consent Decree. The instrument shall be designed to run with the land and bind Defendants and their agents, successors, and assigns. The instrument shall provide the United States with the right to enforce it by appropriate legal proceedings, including but not limited to enforcement of this Consent Decree.

b. Thereafter, each deed, title, conservation easement, or other instrument conveying an interest in any portion of the Preservation Site shall (1) contain a notice stating that the Preservation Site is subject to this Consent Decree and land use instrument; (2) refer to the recorded location of this Consent Decree and land use instrument; and (3) and be submitted to EPA, for its review as a deliverable pursuant to Section VI of this Consent Decree, prior to its recording.

c. Within 30 Days of any recording, Defendants shall provide written notice of such completion, along with a true and correct copy of the



recorded instrument, to the United States at the addresses specified in Section XIV.

d. Except as required to complete the work as specified in Appendix A, Defendants shall not disturb—or allow any other person to disturb—the Preservation Site in any manner inconsistent with the foregoing subparagraphs or the recorded instrument.

14. Permits. Where any compliance obligation under this Section requires Defendants to obtain a federal, state, or local permit or approval, Defendants shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals. Defendants may seek relief under the provisions of Section IX (Force Majeure) for any delay in the performance of any such obligation resulting from a failure to obtain, or a delay in obtaining, any permit or approval required to fulfill such obligation, if Defendants have submitted timely and complete applications and have taken all other actions necessary to obtain all such permits or approvals.

## VI. DELIVERABLES

15. After review of any plan, report, or other item that is required to be submitted pursuant to this Consent Decree, EPA shall in writing: (a) approve the submission; (b) approve the submission upon specified conditions; (c) approve part of the submission and disapprove the remainder; or (d) disapprove the submission.

16. If the submission is approved pursuant to Paragraph 15, Defendants shall take all actions required by the plan, report, or other document, in accordance with the schedules and requirements of the plan, report, or other document, as approved. If the submission is conditionally approved or approved only in part pursuant to Paragraph 15(b) or (c), Defendants

shall, upon written direction from EPA, take all actions required by the approved plan, report, or other item that EPA determines are technically severable from any disapproved portions, subject to Defendants' right to dispute only the specified conditions or the disapproved portions, under Section X (Dispute Resolution).

17. If the submission is disapproved in whole or in part pursuant to Paragraph 15(c) or (d), Defendants shall, within 45 days or such other time as the Parties agree to in writing, correct all deficiencies and resubmit the plan, report, or other item, or disapproved portion thereof, for approval, in accordance with the preceding Paragraphs. If the resubmission is approved in whole or in part, Defendants shall proceed in accordance with the preceding Paragraph.

18. If a resubmitted plan, report, or other item, or portion thereof, is disapproved in whole or in part, EPA may again require Defendants to correct any deficiencies, in accordance with the preceding Paragraphs, subject to Defendants' right to invoke Dispute Resolution and the right of EPA to seek stipulated penalties as provided in the preceding Paragraphs.

19. Any stipulated penalties applicable to the original submission, as provided in Section VIII, shall accrue during the 45 day period or other specified period, but shall not be payable unless the resubmission is untimely or is disapproved in whole or in part; provided that, if the original submission was so deficient as to constitute a material breach of Defendants' obligations under this Decree, the stipulated penalties applicable to the original submission shall be due and payable notwithstanding any subsequent resubmission.

#### VII. REPORTING REQUIREMENTS

20. Defendants shall submit the following reports:

a. By July 31<sup>st</sup> and January 31<sup>st</sup> of each year after the lodging of this Consent

Decree, until termination of this Decree pursuant to Section XVIII, Defendants shall submit a report for the preceding six months that shall include a summary of the status of their compliance with Section V (Compliance Requirements); completion of milestones; and problems encountered or anticipated, together with implemented or proposed solutions.

b. If Defendants violate, or have reason to believe that they may violate, any requirement of this Consent Decree, Defendants shall submit a report of such violation and its likely duration, in writing, within ten working Days of the Day Defendants first becomes aware of the violation, with an explanation of the violation's likely cause and of the remedial steps taken, or to be taken, to prevent or minimize such violation. If the cause of a violation cannot be fully explained at the time the report is due, Defendants shall so state in the report. Defendants shall investigate the cause of the violation and shall then submit an amendment to the report, including a full explanation of the cause of the violation, within 30 Days of the Day Defendants become aware of the cause of the violation. Nothing in this Paragraph or the following Paragraph relieves Defendants of their obligation to provide the notice required by Section IX (Force Majeure).

c. Reports under this Paragraph shall be made to (i) the United States as specified in Section XIV; and (ii) EPA as specified in Section XIV.

21. Whenever any violation of this Consent Decree or of any applicable permits or any other event affecting Defendants' performance under this Decree, or the performance of its Facility, may pose an immediate threat to the public health or welfare or the environment, Defendants shall notify EPA orally or by electronic or facsimile transmission as soon as possible,

but no later than 24 hours after Defendants first knew of the violation or event. This procedure is in addition to the requirements set forth in the preceding Paragraph.

22. All reports shall be submitted to the persons designated in Section XIV (Notices).

23. Each report submitted by Defendants under this Section shall be signed by an official of the submitting party and include the following certification:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I have no personal knowledge that the information submitted is other than true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

24. This certification requirement does not apply to emergency or similar notifications where compliance would be impractical.

25. The reporting requirements of this Consent Decree do not relieve Defendants of any reporting obligations required by the Act or implementing regulations, or by any other federal, state, or local law, regulation, permit, or other requirement.

26. Any information provided pursuant to this Consent Decree may be used by the United States in any proceeding to enforce the provisions of this Consent Decree and as otherwise permitted by law.

#### VIII. STIPULATED PENALTIES

27. Defendants shall be liable for stipulated penalties to the United States for violations of this Consent Decree as specified below, unless excused under Section IX (Force Majeure). A violation includes failing to perform any obligation required by the terms of this Decree, including any work plan or schedule approved under this Decree, according to all

applicable requirements of this Decree and within the specified time schedules established by or approved under this Decree.

28. Late Payment of Civil Penalty. If Defendants fail to pay the civil penalty required to be paid under Section IV (Civil Penalty) when due, Defendants shall pay a stipulated penalty of \$500 per Day for each Day that the payment is late.

29. Compliance Milestones.

a. The following stipulated penalties shall accrue per violation per Day for each violation of the requirements identified in subparagraph b:

<u>Penalty Per Violation Per day</u>	<u>Period of Noncompliance</u>
\$500.....	1st through 14th day
\$750.....	15th through 30th day
\$1000.....	31st day and beyond

b. Compliance milestones include:

(1) Paragraph 13.a (filing the restrictive covenant set forth in Appendix C within 30 Days of the Effective Date);

(2) Paragraph F.1 of Appendix A (completing removal of all of the fill material depicted in the Removal Area of Appendix B within one year of the Effective Date, unless Defendants obtain an extension of time pursuant to the procedures in paragraph F.2 of Appendix A);

(3) Paragraph 13.c (providing written notice within 30 Days of any recording of a deed, title, conservation easement, or other instrument conveying an interest in any portion of the Preservation Site).

30. Reporting Requirements. The following stipulated penalties shall accrue per violation per Day for each violation of the reporting requirements of Section VII:

<u>Penalty Per Violation Per day</u>	<u>Period of Noncompliance</u>
\$500.....	1st through 14th day
\$750.....	15th through 30th day
\$1000.....	31st day and beyond

31. Stipulated penalties under this Section shall begin to accrue on the Day after performance is due or on the Day a violation occurs, whichever is applicable, and shall continue to accrue until performance is satisfactorily completed or until the violation ceases. Stipulated penalties shall accrue simultaneously for separate violations of this Consent Decree.

32. Defendants shall pay any stipulated penalty within 30 Days of receiving the United States’ written demand.

33. The United States may in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due it under this Consent Decree.

34. Stipulated penalties shall continue to accrue during any Dispute Resolution, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to the Court, Defendants shall pay accrued penalties determined to be owing, together with interest, to the United States within 30 Days of the effective date of the agreement or the receipt of EPA’s decision or order.

b. If the dispute is appealed to the Court and the United States prevails in whole or in part, Defendants shall pay all accrued penalties determined by the Court to be owing, together with interest, within 60 Days of receiving the Court’s decision or order, except as provided in subparagraph c, below.

c. If any Party appeals the District Court’s decision, Defendants shall pay all accrued penalties determined to be owing, together with interest, within 15 Days of

receiving the final appellate court decision.

35. Defendants shall pay stipulated penalties owing to the United States in the manner set forth and with the confirmation notices required by Paragraph 9, except that the transmittal letter shall state that the payment is for stipulated penalties and shall state for which violation(s) the penalties are being paid.

36. If Defendants fail to pay stipulated penalties according to the terms of this Consent Decree, Defendants shall be liable for interest on such penalties, as provided for in 28 U.S.C. § 1961, accruing as of the date payment became due. Nothing in this Paragraph shall be construed to limit the United States from seeking any remedy otherwise provided by law for Defendants' failure to pay any stipulated penalties.

37. The payment of penalties and interest, if any, shall not alter in any way Defendants' obligation to complete the performance of the requirements of this Consent Decree.

38. Non-Exclusivity of Remedy. Stipulated penalties are not the United States' exclusive remedy for violations of this Consent Decree. Subject to the provisions of Section XII (Effect of Settlement/Reservation of Rights), the United States expressly reserves the right to seek any other relief it deems appropriate for Defendants' violation of this Decree or applicable law, including but not limited to an action against Defendants for statutory penalties, additional injunctive relief, mitigation or offset measures, and/or contempt. However, the amount of any statutory penalty assessed for a violation of this Consent Decree shall be reduced by an amount equal to the amount of any stipulated penalty assessed and paid pursuant to this Consent Decree.

#### IX. FORCE MAJEURE

39. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Defendants, of any entity controlled by Defendants, or

of Defendants' contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Defendants' best efforts to fulfill the obligation. The requirement that Defendants exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (a) as it is occurring and (b) following the potential force majeure, such that the delay and any adverse effects of the delay are minimized. "Force Majeure" does not include Defendants' financial inability to perform any obligation under this Consent Decree.

40. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, Defendants shall provide notice orally or by electronic or facsimile transmission to 212-637-3115, within 72 hours of when Defendants first knew that the event might cause a delay. Within seven days thereafter, Defendants shall provide in writing to EPA pursuant to Section XIV an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Defendants' rationale for attributing such delay to a force majeure event if it intends to assert such a claim; and a statement as to whether, in the opinion of Defendants, such event may cause or contribute to an endangerment to public health, welfare or the environment. Defendants shall include with any notice all available documentation supporting the claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Defendants from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Defendants shall be deemed to



know of any circumstance of which Defendants, any entity controlled by Defendants, or Defendants' contractors knew or should have known.

41. If EPA agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. EPA will notify Defendants in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

42. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify Defendants in writing of its decision.

43. If Defendants elect to invoke the dispute resolution procedures set forth in Section X (Dispute Resolution), they shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Defendants shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Defendants complied with the requirements of Paragraphs 40 and 41. If Defendants carry this burden, the delay at issue shall be deemed not to be a violation by Defendants of the affected obligation of this Consent Decree identified to EPA and the Court.

#### X. DISPUTE RESOLUTION

44. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising

under or with respect to this Consent Decree. Defendants' failure to seek resolution of a dispute under this Section shall preclude Defendants from raising any such issue as a defense to an action by the United States to enforce any obligation of Defendants arising under this Decree.

45. Informal Dispute Resolution. Any dispute subject to Dispute Resolution under this Consent Decree shall first be the subject of informal negotiations. The dispute shall be considered to have arisen when Defendants send the United States a written Notice of Dispute. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed 20 Days from the date the dispute arises, unless that period is modified by written agreement. If the Parties cannot resolve a dispute by informal negotiations, then the position advanced by the United States shall be considered binding unless, within 30 Days after the conclusion of the informal negotiation period, Defendants invoke formal dispute resolution procedures as set forth below.

46. Formal Dispute Resolution. Defendants shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by serving on the United States a written Statement of Position regarding the matter in dispute. The Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting Defendants' position and any supporting documentation relied upon by Defendants.

47. The United States shall serve its Statement of Position within 45 Days of receipt of Defendants' Statement of Position. The United States' Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by the United States. The United States' Statement of Position shall be binding on Defendants, unless Defendants file a motion for judicial review of the dispute in accordance with the following Paragraph.

48. Defendants may seek judicial review of the dispute by filing with the Court and serving on the United States, in accordance with Section XIV (Notices), a motion requesting judicial resolution of the dispute. The motion must be filed within thirty Days of receipt of the United States' Statement of Position pursuant to the preceding Paragraph. The motion shall contain a written statement of Defendants' position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree.

49. The United States shall respond to Defendants' motion within the time period allowed by the Local Rules of this Court, or within such additional time as the Court may allow. Defendants may file a reply memorandum, to the extent permitted by the Local Rules.

50. Standard of Review

a. Disputes Concerning Matters Accorded Record Review. Except as otherwise provided in this Consent Decree, in any dispute brought under Paragraph 47 pertaining to any item requiring approval by EPA under this Consent Decree; the adequacy of the performance of work undertaken pursuant to this Consent Decree; and all other disputes that are accorded review on the administrative record under applicable principles of administrative law, Defendants shall have the burden of demonstrating, based on the administrative record, that the position of the United States is arbitrary and capricious or otherwise not in accordance with law.

b. Other Disputes. Except as otherwise provided in this Consent Decree, in any other dispute brought under Paragraph 47, Defendants shall bear the burden of demonstrating that their position complies with this Consent Decree.

51. The invocation of dispute resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of Defendants under this Consent Decree, unless and until final resolution of the dispute so provides. Stipulated penalties with respect to the disputed matter shall continue to accrue from the first Day of noncompliance, but payment shall be stayed pending resolution of the dispute as provided in Paragraph 35. If Defendants do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section VIII (Stipulated Penalties).

#### XI. INFORMATION COLLECTION AND RETENTION

52. The United States and its representatives, including attorneys, contractors, and consultants, shall have the right of entry into any property covered by this Consent Decree, at all reasonable times, upon presentation of credentials, to:

- a. monitor the progress of activities required under this Consent Decree;
- b. verify any data or information submitted to the United States in accordance with the terms of this Consent Decree;
- c. obtain samples and, upon request, splits of any samples taken by Defendants or their representatives, contractors, or consultants;
- d. obtain documentary evidence, including photographs and similar data; and
- e. assess Defendants' compliance with this Consent Decree.

53. Upon request, Defendants shall provide EPA or its authorized representatives splits of any samples taken by Defendants. Upon request, EPA shall provide Defendants splits of any samples taken by EPA.

54. Until five years after the termination of this Consent Decree, Defendants shall retain, and shall instruct their contractors and agents to preserve, all non-identical copies of all

documents, records, or other information (including documents, records, or other information in electronic form) in its or its contractors' or agents' possession or control, or that come into its or its contractors' or agents' possession or control, and that relate in any manner to Defendants' performance of their obligations under this Consent Decree. This information-retention requirement shall apply regardless of any contrary corporate or institutional policies or procedures. At any time during this information-retention period, upon request by the United States, Defendants shall provide copies of any documents, records, or other information required to be maintained under this Paragraph.

55. At the conclusion of the information-retention period provided in the preceding Paragraph, Defendants shall notify the United States at least 90 Days prior to the destruction of any documents, records, or other information subject to the requirements of the preceding Paragraph and, upon request by the United States, Defendants shall deliver any such documents, records, or other information to EPA. Defendants may assert that certain documents, records, or other information is privileged under the attorney-client privilege or any other privilege recognized by federal law. If Defendants asserts such a privilege, it shall provide the following: (a) the title of the document, record, or information; (b) the date of the document, record, or information; (c) the name and title of each author of the document, record, or information; (d) the name and title of each addressee and recipient; (e) a description of the subject of the document, record, or information; and (f) the privilege asserted by Defendants. However, no documents, records, or other information created or generated pursuant to the requirements of this Consent Decree shall be withheld on grounds of privilege.

56. Defendants may also assert that information required to be provided under this Section is protected as Confidential Business Information ("CBI") under 40 C.F.R. Part 2. As to

any information that Defendants seeks to protect as CBI, Defendants shall follow the procedures set forth in 40 C.F.R. Part 2.

57. This Consent Decree in no way limits or affects any right of entry and inspection, or any right to obtain information, held by the United States pursuant to applicable federal laws, regulations, or permits, nor does it limit or affect any duty or obligation of Defendants to maintain documents, records, or other information imposed by applicable federal or state laws, regulations, or permits.

## XII. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

58. This Consent Decree resolves the civil claims of the United States for the violations alleged in the Complaint filed in this action through the date of lodging.

59. Defendants' obligations under this Decree are joint and several.

60. The United States reserves all legal and equitable remedies available to enforce the provisions of this Consent Decree. This Consent Decree shall not be construed to limit the rights of the United States to obtain penalties or injunctive relief under the Act or implementing regulations, or under other federal laws, regulations, or permit conditions.

61. This Consent Decree is not a permit, or a modification of any permit, under any federal, state, or local laws or regulations. Defendants are responsible for achieving and maintaining complete compliance with all applicable federal, state, and local laws, regulations, and permits; and Defendants' compliance with this Consent Decree shall be no defense to any action commenced pursuant to any such laws, regulations, or permits, except as set forth in this Decree. The United States does not, by its consent to the entry of this Consent Decree, warrant or aver in any manner that Defendants' compliance with any aspect of this Consent Decree will

result in compliance with provisions of the CWA or with any other provisions of federal, state, or local laws, regulations, or permits.

62. This Consent Decree does not limit or affect the rights of the United States against any third parties, not party to this Consent Decree, nor does it limit the rights of third parties, not party to this Consent Decree, against Defendant, except as otherwise provided by law.

63. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.

64. Nothing in this Consent Decree or any Stipulation associated with the resolution of this matter will be construed or intended to constitute a waiver of claims against the Third-Party Defendants as named in the litigation.

#### XIII. COSTS

65. The Parties shall bear their own costs of this action, including attorneys' fees, except that the United States shall be entitled to collect the costs (including attorneys' fees) incurred in any action necessary to collect any portion of the civil penalty or any stipulated penalties due but not paid by Defendants.

#### XIV. NOTICES

66. Unless otherwise specified in this Decree, whenever notifications, submissions, or communications are required by this Consent Decree, they shall be made in writing and addressed as follows:

As to the United States:

Chief, Environmental Defense Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, DC 20044-7611  
Re: DJ # 90-5-1-1-19741

With a copy by email to Erica Zilioli at:  
erica.zilioli@usdoj.gov

As to EPA:

Director  
Clean Water Division  
U.S. EPA, Region 2  
290 Broadway, 24<sup>th</sup> Floor  
New York, NY 10007

As to the U.S. Attorney for the  
Western District of New York:

Office of the United States Attorney  
Western District of New York  
138 Delaware Avenue  
Buffalo, NY 14202

As to Defendant David Whitehill:

David A. Whitehill  
2610 Lafayette Street  
Falconer, NY 14733

With a copy by email to Robert E. Knoer at:  
rknoer@knoergroup.com

As to Defendant Dependable  
Towing & Recovery, Inc:

David A. Whitehill  
2610 Lafayette Street  
Falconer, NY 14733

With a copy by email to Robert E. Knoer at:  
rknoer@knoergroup.com

67. Any Party may, by written notice to the other Parties, change its designated notice recipient or notice address provided above.

68. Notices submitted pursuant to this Section shall be deemed submitted upon mailing, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties in writing.



#### XV. EFFECTIVE DATE

69. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court or a motion to enter the Consent Decree is granted, whichever occurs first, as recorded on the Court's docket; provided, however, that Defendants hereby agree that they shall be bound to perform duties scheduled to occur prior to the Effective Date. In the event the United States withdraws or withholds consent to this Consent Decree before entry, or the Court declines to enter the Consent Decree, then the preceding requirement to perform duties scheduled to occur before the Effective Date shall terminate.

#### XVI. RETENTION OF JURISDICTION

70. The Court shall retain jurisdiction over this case until termination of this Consent Decree, for the purpose of resolving disputes arising under this Decree or entering orders modifying this Decree, pursuant to Sections X and XVII, or effectuating or enforcing compliance with the terms of this Decree.

#### XVII. MODIFICATION

71. The terms of this Consent Decree, including any attached appendices, may be modified only by a subsequent written agreement signed by all the Parties. Where the modification constitutes a material change to this Decree, it shall be effective only upon approval by the Court.

72. Any disputes concerning modification of this Decree shall be resolved pursuant to Section X (Dispute Resolution), provided, however, that, instead of the burden of proof provided by Paragraph 50, the Party seeking the modification bears the burden of demonstrating that it is entitled to the requested modification in accordance with Federal Rule of Civil Procedure 60(b).

#### XVIII. TERMINATION

73. After Defendants have completed the requirements of Section V (Compliance Requirements) and have paid the civil penalty and any accrued stipulated penalties as required by this Consent Decree, Defendants may serve upon the United States a Request for Termination, stating that Defendants have satisfied those requirements, together with all necessary supporting documentation.

74. Following receipt by the United States of Defendants' Request for Termination, the Parties shall confer informally concerning the Request and any disagreement that the Parties may have as to whether Defendants have satisfactorily complied with the requirements for termination of this Consent Decree. If the United States agrees that the Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Decree.

75. If the United States does not agree that the Decree may be terminated, Defendants may invoke Dispute Resolution under Section X. However, Defendants shall not seek Dispute Resolution of any dispute regarding termination until 45 Days after service of its Request for Termination.

#### XIX. PUBLIC PARTICIPATION

76. This Consent Decree shall be lodged with the Court for a period of not less than 30 Days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, or inadequate. Defendants consent to entry of this Consent Decree without further notice and agree not to withdraw from or oppose entry of this Consent Decree by the Court or to

challenge any provision of the Decree, unless the United States has notified Defendants in writing that it no longer supports entry of the Decree.

XX. 26 U.S.C. SECTION 126(f)(2)(A)(ii) IDENTIFICATION

77. For purposes of the identification requirement of Section 162(f)(2)(A)(ii) of the Internal Revenue Code, 26 U.S.C. § 162(f)(2)(A)(ii), performance of Section V (Compliance Requirements) is restitution or required to come into compliance with law.

XXI. SIGNATORIES/SERVICE

78. Each undersigned representative of Defendants and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document.

79. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis. Defendants agree to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rules 4 and 5 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons.

XXII. INTEGRATION

80. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supersedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. Other than deliverables that are subsequently submitted and approved pursuant to this Decree, the Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Consent Decree.

XXIII. FINAL JUDGMENT

81. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to the United States and Defendants. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

XXIV. APPENDICES

82. The following Appendices are attached to and part of this Consent Decree:

“Appendix A” is the Restoration Plan;

“Appendix B” is the Restoration Map; and

“Appendix C” is the Restrictive Covenant, including a legal description and map of the Preservation Site.


Dated and entered this \_\_ day of \_\_\_\_\_, 20\_\_

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UNITED STATES DISTRICT JUDGE

FOR THE UNITED STATES OF AMERICA:

5/22/2019  
Date

  
Heather E. Gange  
Erica M. Zilioli  
Senior Attorneys  
Environmental Defense Section  
Environment and Natural Resources Division  
U.S. Department of Justice

\_\_\_\_\_  
Date

\_\_\_\_\_  
Mary K. Roach  
Senior Litigation Counsel  
Office of the United States Attorney  
Western District of New York

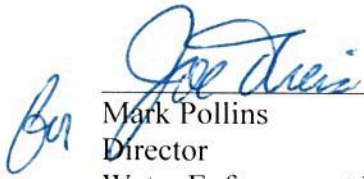
THE U.S. ENVIRONMENTAL PROTECTION AGENCY enters into this Consent Decree in the matter of *United States v. David A. Whitehill*, Case No. 1:14-cv-00188.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Eric Schaaf  
Regional Counsel  
U.S. Environmental Protection Agency, Region 2

Of Counsel:  
Eduardo J. Gonzalez  
Assistant Regional Counsel  
U.S. Environmental Protection Agency, Region 2

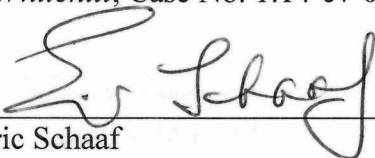
5/9/19  
Date

  
\_\_\_\_\_  
Mark Pollins  
Director  
Water Enforcement Division  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency

Of Counsel:  
Jeffrey Speir  
Attorney-Adviser  
Water Enforcement Division  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency

THE U.S. ENVIRONMENTAL PROTECTION AGENCY enters into this Consent Decree in the matter of *United States v. David A. Whitehill*, Case No. 1:14-cv-00188.

5/23/19  
Date

  
Eric Schaaf  
Regional Counsel  
U.S. Environmental Protection Agency, Region 2

Of Counsel:  
Eduardo J. Gonzalez  
Assistant Regional Counsel  
U.S. Environmental Protection Agency, Region 2

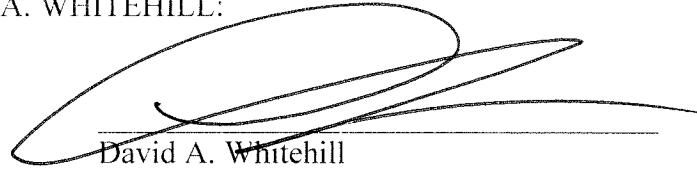
\_\_\_\_\_  
Date

\_\_\_\_\_  
Mark Pollins  
Director  
Water Enforcement Division  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency

Of Counsel:  
Jeffrey Speir  
Attorney-Adviser  
Water Enforcement Division  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency

FOR DEFENDANT DAVID A. WHITEHILL:

5/7/19  
Date



David A. Whitehill  
2610 Lafayette Street  
Falconer, NY 14733

FOR DEFENDANT DEPENDABLE TOWING & RECOVERY INC.:

5/7/19  
Date



David A. Whitehill  
President  
2610 Lafayette Street  
Falconer, NY 14733