

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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MAR 04 2004

STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
vs.)
)
FOX VALLEY DRY WALL, INC.,)
an Illinois corporation,)
)
Respondent.)

No. PCB 02-162
(Enforcement)

to: Ms Gretta Bieber
Alshuler et al
1961 W. Downer Place
Aurora, Illinois 60506

Mr. Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 W. Randolph, Chicago IL

NOTICE OF FILING

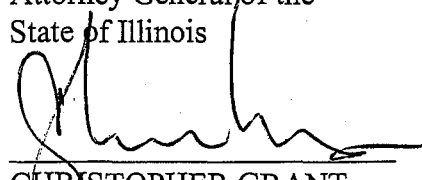
PLEASE TAKE NOTICE that we have today, March 4, 2004, filed with the Office of the Clerk of the Illinois Pollution Control Board, Complainant's Response to Board Request for Clarification, a copy of which is attached herewith and served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

ex rel. LISA MADIGAN
Attorney General of the
State of Illinois

BY:



CHRISTOPHER GRANT
Assistant Attorney General
Environmental Bureau
188 W. Randolph St., 20th Flr.
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(312) 814-5388

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PEOPLE OF THE STATE OF ILLINOIS,)
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COMPLAINANT'S RESPONSE TO BOARD REQUEST FOR CLARIFICATION

Now comes Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, and in response to the Board's February 5, 2004 request for clarification ("Request"), states as follows:

BACKGROUND

December 5, 2003, the parties filed a Stipulation and Proposal for Settlement ("Stipulation") with the Board, as proposed resolution of this matter. The Stipulation calls for Respondent to pay a civil penalty of \$8,000.00 to the Environmental Protection Trust Fund, and \$2,000.00 to the Attorney General State Projects and Court Ordered Distribution Fund ("AG Fund"). The Board has requested that the parties provide authority allowing it to accept the proposed terms.

DISCUSSION

The Act provides for settlement of Illinois Environmental Protection Act ("Act") enforcement cases through the Stipulation process contained in Section 31(c)(2) of the Act, 415 ILCS 5/31(c)(2) (2002). However, the Act does not specify the contents of a Stipulation.

Section 103.302 of the Board's Procedural Rules, 35 Ill. Adm. Code 103.302, requires only that the Stipulation address the factors listed in Section 33(c) of the Act, 415 ILCS 5/33(c) (2002). Complainant is unaware of any section of the Act or Board regulations that prohibits, as a part of settlement, payments into the AG fund.

The law favors the encouragement of settlements. *People v. Alloy Engineering and Casting Company*, PCB 01-155 (July 10, 2003) (Slip Op. at 3). A settlement agreement is in the nature of a contract between the parties. *Rose v. Mavrakis*, 343 Ill. App.3d 1086, (1st Dist. 2003). For settlements covered by the Contribution Act [740 ILCS 1002(c)], the Illinois Supreme Court directs a reviewing body to consider the entire circumstances surrounding the settlement. *In re Babb*, 162 Ill. 2d 1195 (1994).

In the instant case, the State filed its complaint in April, 2002. The Respondent did not file an appearance until June 4, 2003, after the State had obtained summary judgment, and only seven days before the scheduled hearing on penalty. At that time, the Respondent agreed, in principle, to the terms contained in the Stipulation, including the \$2,000.00 additional payment.

The State had offered to settle for a penalty of \$8,000.00 in November, 2002. The Respondent neither responded to this offer nor appeared. The Attorney General was compelled to expend public resources in filing for and obtaining summary judgment, attending status and pre-hearing conferences, and preparing for the hearing on penalty. For this reason, the State subsequently sought, and Respondent agreed to, payment of \$2,000.00 to the AG Fund. Complainant believes that the additional payment will act as an incentive to early resolution of comparatively undisputed cases.

The State could have increased the civil penalty, once the Respondent appeared.

However, both the Attorney General and Illinois EPA had already decided, based on the facts of this particular case, that an \$8,000.00 penalty was appropriate. The State could also have requested attorney fees, pursuant to Section 42(f) of the Act, 415 ILCS 5/42(f) (2002). However, neither Illinois EPA nor the Attorney General believed that the violations met the 'wilful, knowing or repeated' standard contained therein. The agreed payment to the AG Fund, which was established, *inter alia*, to receive court-imposed sanctions, provided a reasonable alternative.

As noted in the Board's Request, the Board has accepted Stipulations containing payments to the AG Fund in the past [citing *People v. Clark Refining & Marketing*, PCB 95-163 (January 23, 1997)] . In addition, the Board has accepted Stipulations containing other 'non-statutory' remedies. For example, until the recent amendments, effective January 1, 2004, the Act did not make reference to Supplemental Environmental Projects ("SEPs"). Yet the Board has accepted Stipulations containing SEPs on several occasions. For example, in *People v. Alloy Engineering and Casting Company*, PCB 01-155 (July 10, 2003), the Board found that the parties' proposal for a combined penalty/SEP settlement met the purposes of the Act, (Slip op. at 4).

The State believes that, in the particular circumstances of this case, the agreed \$2,000.00 payment to the AG Fund is fair, and will aid in enforcement. The State is not aware of any provision of the Act which prevents the Board from issuing an Order requiring payment as agreed by the parties.

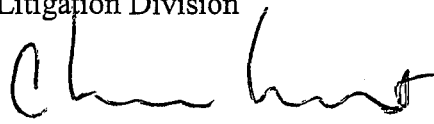
For the foregoing reasons, the State respectfully requests that the Board accept the Stipulation as submitted.

RESPECTFULLY SUBMITTED:

PEOPLE OF THE STATE OF ILLINOIS
by LISA MADIGAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

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