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SEP 18 2008

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
vs.)
)
CHAMPION ENVIRONMENTAL)
SERVICES, INC., a Wisconsin)
corporation,)
)
Respondent.)

PCB No. 05-199
(Enforcement - Air)

NOTICE OF FILING

To: Ms. Jennifer Nijman
Attorney at Law
NijmanFranzetti LLP
10 South LaSalle St., Suite 3600
Chicago, IL 60603

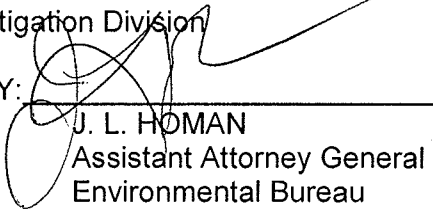
PLEASE TAKE NOTICE that on this date I mailed for filing with the Clerk of the Pollution Control Board of the State of Illinois, COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION TO FINALIZE SETTLEMENT AGREEMENT, copies of which are attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
State of Illinois

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

BY: 
J. L. HOMAN
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: September 16, 2008

CERTIFICATE OF SERVICE

I hereby certify that I did on September 16, 2008, send by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box a true and correct copy of the following instruments entitled NOTICE OF FILING and COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION TO FINALIZE SETTLEMENT AGREEMENT

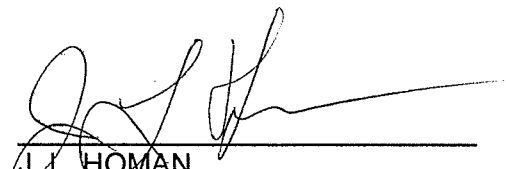
To: Ms. Jennifer Nijman
Attorney at Law
NijmanFranzetti LLP
10 South LaSalle St., Suite 3600
Chicago, IL 60603

and the original and ten copies by First Class Mail with postage thereon fully prepaid of the same foregoing instrument(s):

To: John T. Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

A copy was also sent by First Class Mail with postage thereon fully prepaid to:

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
Springfield, IL 62794


J.L. HOMAN
Assistant Attorney General

This filing is submitted on recycled paper.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF)
ILLINOIS, ex. rel. LISA MADIGAN,)
Attorney General of the State of Illinois,)

Complainant,)

vs.)

CHAMPION ENVIRONMENTAL)
SERVICES, INC., an Wisconsin)
corporation,)

Respondent.)

No. 05-199

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STATE OF ILLINOIS
Pollution Control Board

**COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION
TO FINALIZE SETTLEMENT AGREEMENT**

COMES NOW, the PEOPLE OF THE STATE OF ILLINOIS, ex rel. LISA MADIGAN, Attorney General of the State of Illinois, and for its Response to Respondent's Motion to Finalize Settlement Agreement, states as follows:

On May 23, 2005, the Complainant filed a complaint against Champion Environmental Services, Inc., before the Illinois Pollution Control Board.

Champion Environmental Services, Inc., corrected the concerns at the site which gave rise to the Complaint, within one week.

Since the date of filing of the Complaint, the parties have discussed settlement of this matter. The negotiations have been very protracted while the parties discussed language in the draft stipulation, and there have been several versions of that language passed between the counsels for both sides, and reviewed at various levels within the Illinois Environmental Protection Agency and Illinois Attorney General's Office.

Champion Environmental Services, Inc., provided a version of the stipulation to the Complainant which had been signed by representatives of Champion, after discussion with the Illinois Attorney General's Office. That version of the stipulation was not accepted by the Illinois

Environmental Protection Agency. During the negotiations between Champion and the Illinois AGO, an updated version of the stipulation was created by the Illinois AGO and Illinois EPA. The Illinois EPA expressed a preference for the updated version of the stipulation since neither it nor the Illinois AGO had signed the earlier stipulation, and the stipulation draft had not been reviewed, approved and accepted by all levels of management within the Illinois EPA and Illinois AGO. The Illinois EPA was not a signatory to the version previously discussed with Champion, and later provided to the Illinois AGO by Champion, signed by Champion.

Complainant denies that there is any enforceable agreement. The proposed stipulation provided by Champion with its Motion for consideration by the Illinois Pollution Control Board does not constitute a binding settlement document. The draft stipulation and proposal for settlement has not passed through the internal review of the Illinois Environmental Protection Agency, nor has it been signed by the Illinois Attorney General's Office. Although the primary terms are what has been discussed as settlement for this matter, most notably the amount of the penalty, the language in this draft document was not reviewed and accepted by the Illinois Environmental Protection Agency.

In Illinois Environmental Protection Agency v. City of Marion, PCB 71-25, the Agency filed a complaint alleging water pollution and similar violations at the City's sewage treatment plant. Please see Complainant's Attachment A. At the hearing, the Assistant Attorney General agreed to a settlement of the matter without consulting his client. Two days later, the Illinois Attorney General's Office sent a letter to the Board indicated that the Illinois EPA did not agree to the terms of that settlement. The Board noted initially that "[i]t is elementary that an attorney is not to settle cases without the consent of his client." 1971 WL 4501 (1971). The Board goes on to refer to Procedural Rule 333, now 35 Il.ADC 103.302, which states that no case is to be settled "...without a Board order based upon a written statement by the parties to the case

setting forth the justifications for the proposal.” 1971 WL 4501 (1971). That rule also requires that the parties submit sufficient information for the Board to actually evaluate the proposed settlement to be certain it is “... in the public interest.” 35 II.ADC. 103.302 provides as follows:

No proceeding pending before the Board will be disposed of or modified without an order of the Board. [emphasis added] A proposed stipulation and settlement agreement **must contain a written statement, signed by the parties or their authorized representatives,** [emphasis added] outlining the nature of, the reasons for, and the purpose to be accomplished by the settlement. The written statement must include:

- a) a full stipulation of all material facts pertaining to the nature, extent, and causes of the alleged violations proposed to be settled;
- b) the nature of the relevant parties’ operations and control equipment;
- c) facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved, including
 - 1) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
 - 2) the social and economic value of the pollution source;
 - 3) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
 - 4) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
 - 5) any subsequent compliance.
- d) Details as to future plans for compliance, including a description of additional control measures and the dates for their implementation, if any; and
- e) the proposed penalty, if any, supported by factors in mitigation or aggravation of penalty, including the factors set forth in Section 42(h) of the Act [415 ILCS 4/42(h)].

35 II.ADC. 103.302.

Under this regulation, the Board will not order a matter dismissed until the Board has received and accepted a written statement signed by the parties. No such filing has been made in this matter, because the settlement negotiations have not yet reached the point of a signed agreement.

In Environmental Protection Agency v. Ralston Purina Co., PCB 71-88 (November 23, 1971), the Illinois Attorney General's Office filed an action alleging air pollution in April of 1971. Please see Complainant's Attachment B. Settlement negotiations took place for a time, and in November a document was submitted to the Board that was a purported settlement between the company, the Attorney General, and the neighbors. The Board declined to accept the agreement for a few reasons, primarily because the Illinois EPA, the complainant in the case, had not accepted the settlement. "As we held in EPA v. City of Marion, #71-25 (October 28, 1971), a party's attorney cannot settle a case without the party's consent." EPA v. Ralston Purina Co., PCB 71-88, 1971 WL 4196 (1971). This is precisely the case at bar. The Illinois EPA has declined to accept the draft stipulation version signed by Champion. The Respondent's own transmittal letter of March 6, 2008, acknowledges that the stipulation was pending signature by the Illinois EPA prior to submittal to the Board. Please see Attachment #8 to Respondent's Motion.

The language of the draft stipulation itself indicates that the agreement is not final until signed and submitted, approved and accepted. In the initial paragraph of the document, the draft states that the Illinois Attorney General's Office, the Illinois Environmental Protection Agency, and the Respondent "...have agreed to the making of this Stipulation... and submit it to the Illinois Pollution Control Board ... for approval..." and that only upon approval by the Board are the parties bound by its terms. Please see Respondent's Attachments 8, 9, and 12, page one of the draft stipulation. The draft also has a provision noting that the signatories to the stipulation have the authority to sign and thereby bind their represented party to the terms of that stipulation. Please see Respondent's Attachment 8, page 1-2, Attachment 9, page 1-2, and Attachment 12, page 12. Further, the stipulation provides that once the Board enters an Order approving and accepting the stipulation, the stipulation becomes an enforceable Order.

Please see Respondent's Attachment 8, pages 8-9, Attachment 9 pages 8-9, and Attachment 12, page 12. If it is not accepted, the stipulation is not binding. This draft document states that it is not effective until signed by all parties, then approved and accepted by the Board. The signature lines remain blank, reflecting the need for the document to be reviewed and signed by management at BOTH the Illinois Attorney General's Office and the Illinois EPA before it is even provided to the Board for review and possible entry. It seems absurd to only attempt to enforce part of the "agreement." Furthermore, the March 6, 2008, transmittal letter from the Respondent to the Complainant notes that the Illinois EPA signature was needed on the stipulation draft prior to submittal to the Board. Please see Respondent's Attachment 8. Also, the May 20, 2008, letter from the IAGO to the Respondent indicates that "[i]f the settlement meets with your approval, please have it signed by your client and return to us for filing." Please see Respondent's Attachment 12. This does not indicate a completed arrangement. Earlier emails discuss whether or not the Illinois EPA was even going to be a party to the agreement. In the signed version of the stipulation, the Illinois EPA was not a party, nor a signatory. Please see Respondent's Attachment 8.

The documentation provided by the Respondent in support of its motion tends to show how very contentious all the language in the draft has been to date. The Illinois Environmental Protection Agency has not been continuously involved in all of the language discussions between the Illinois Attorney General's Office and the Respondent. During the pendency of this action, the draft stipulation itself was subject to some revisions by the Illinois EPA and Illinois AGO. When the latest draft of the stipulation, already signed by the Respondent and accepted by the Respondent, was presented to the Illinois EPA for their review, input and comment, the Illinois EPA declined to accept this version of the stipulation, preferring instead the more updated version. It is noteworthy that the majority of terms in the stipulation have not changed

overly much - the Respondent has agreed to a penalty amount, and it is agreed by the parties that no further work remains to be accomplished at the site itself. Complainant denies that continuing the ongoing negotiations "turns back the clock" by two years. The Respondent has suggested certain language changes for consideration, and the Illinois EPA has declined to accept those proposed changes.

The Respondent appears to advance a contracts theory in arguing that the stipulation was already complete. The documentation provided by the Respondent with its Motion does indeed show a significant amount of "back and forth" between Respondent's counsel and the IAGO, including discussions of the penalty amount and at least two versions of the draft stipulation, including one without the Illinois EPA as a signatory. The very title of the document in question, "Stipulation and Proposal for Settlement" indicate that this draft document is more than a mere contract and therefore not merely subject to a contracts interpretation. The Respondent did not indicate any willingness to accept the initial penalty demand made upon it. This is not unusual and the Complainant did not immediately assume that this meant the negotiations were over. However, penalty amount was not contingent upon language changes, additions or deletions in the stipulation - the Complainant did not hold language changes ransom for additional money to be extracted from the Respondent. It is frequently the case that a penalty amount is agreed upon long before all of the changes in language are drafted for review. It appears clear from review of the documentation that the parties were still discussing the draft stipulation. In fact, there were several versions of the stipulation reviewed before the Respondent was even willing to consider signing any. Certainly the Illinois EPA would be allowed to also review, comment, and elect whether or not to sign the draft. There has been no meeting of the minds of the parties to this proposed stipulation.

This draft document is not effective until and unless signed by all parties AND entered by the Board. The signature lines remain blank, reflecting the need for the document to be reviewed and signed by management at both the Illinois Attorney General's Office and the Illinois Environmental Protection Agency before it is even provided for review and possible entry. It seems absurd to only attempt to enforce portions of the "agreement." Also, the last letter from Complainant to the Respondent's counsel provides that the Respondent should have the draft signed and returned to Complainant for filing if the draft is suitable. This does not indicate a completed arrangement.

There are no circuit court cases directly on point. In the case at bar, the settlement itself states some conditions precedent - that it does not become effective until signed by the parties and approved and entered by the Board. The document is both a settlement and a stipulation. This language itself shows that there was no "meeting of the minds" regarding formalization of the settlement until the agreement was signed and entered. As the negotiations continued, proposed changes were discussed and reviewed by the Respondent and at various levels of management within both the Illinois Attorney General's Office and the Illinois Environmental Protection Agency. The individual Assistant Attorney General handling the case is not a signatory to the proposed Consent Order and does not have the authority to sign this document on behalf of management of either of those entities.

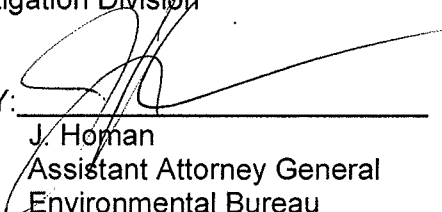
Complainant denies that there was a final settlement agreement prior to agreeing to the proposed terms of, completing any necessary and/or acceptable changes to, and signing the anticipated formal written document, then having that document reviewed by, approved by, and entered by this Board. The draft stipulation attached to the Respondent's motion is only one step in that ongoing process. The Illinois Attorney General's Office is well within its scope of

authority to continue the negotiations/settlement process. The Respondent's Motion is improper as there has been no contract created in this case.

WHEREFORE, Complainant would respectfully request the Board STRIKE the Motion to Enforce Settlement Agreement. In the alternative, Complainant would respectfully request that the Board DENY the Respondent's Motion.

Respectfully submitted,
PEOPLE OF THE STATE OF ILLINOIS,
ex rel. LISA MADIGAN,
Attorney General
of the State of Illinois,

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

BY: 

J. Homan
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: _

1971 WL 4501 (Ill.Pol.Control.Bd.)

Illinois Pollution Control Board
State of Illinois

*1 ENVIRONMENTAL PROTECTION AGENCY

v.

CITY

OF

MARION

71-25

May 12, 1971

Opinion of the Board

This is a complaint by the Agency charging water pollution and related violations at the City's sewage treatment plant. At the hearing the Special Assistant Attorney General representing the Agency, without consulting his client, agreed to a purported settlement of the case. The City admitted the violations alleged and stated that it was "understood" that plans would be submitted, a contract let, and the needed facilities completed by specified dates. The Special Assistant Attorney General further urged that no penalties be imposed on the ground that the City had not received timely notice of the requirements in question. No order was proposed.

Two days after the hearing we received a letter from the Assistant Attorney General in charge of environmental control for the Southern Region of the State advising us that the Agency disapproves of the proposed settlement and urges us to take appropriate action on the basis of the complaint, which in the Agency's view would include both a cease and desist order and money penalties.

It is elementary that an attorney is not to settle cases without the consent of his client. Our Procedural Rule 333 makes clear that no case is to be settled without a Board order based upon a written statement by the parties to the case setting forth the justifications for the proposal. It is the Agency, not its attorney, that is the party complainant in the present case, and the Agency's approval is a prerequisite to our consideration of any proposed settlement. Since the parties have not agreed, there is no settlement proposal for us to consider.

For future guidance we point out also that Rule 333 requires the parties to submit to the Board adequate information on which we can base an intelligent evaluation of whether any proposed settlement is in the public interest. After all it is the

ATTACHMENT A

Board and not the Agency or its attorneys that is given statutory responsibility to determine whether a violation exists and what is the appropriate remedy. Cf. Environmental Protection Agency v. **City** of Springfield, # 70-9, decided May 12, 1971. Such information must contain a full stipulation of the relevant facts pertaining to the nature, extent, and causes of the violations, the nature of the respondent's operations and control equipment, any explanations of past failures to comply, and details as to future plans for compliance, including descriptions of additional control measures and the dates for implementing them, as well as a statement of reasons why no hearing should be conducted. Opportunity will also be provided by the Board for individual citizens to express their views as is contemplated by the statute.

The Agency asks us to pass on the case on the basis of our present information, but that information fails in a number of respects to satisfy what we need to make an intelligent decision, and the respondent is entitled to its day before the Board. A new hearing will be scheduled as expeditiously as is convenient for the parties; no second twenty-one-day notice will be necessary since the respondent has long been on notice of the charges against which it must defend.

*2 It is so ordered.

Mr. Currie

1971 WL 4501 (Ill.Pol.Control.Bd.)
END OF DOCUMENT

1971 WL 4196 (Ill.Pol.Control.Bd.)

Illinois Pollution Control Board
State of Illinois

*1 ENVIRONMENTAL PROTECTION AGENCY

v.

RALSTON

PURINA

CO.

71-88

November 23, 1971

Preliminary Order

This complaint respecting air pollution in Bloomington was filed April 21, 1971. Hearings belatedly began in September, only to be interrupted for settlement negotiations. On November 12 we were sent a purported settlement agreement among the company, the Attorney General, and the intervening neighbors.

We cannot consider this agreement. In the first place it has not been accepted by the Environmental Protection Agency, which is the complainant in the case. As we held in EPA v. City of Marion, # 71-25 (October 28, 1971), a party's attorney cannot settle a case without the party's consent. Moreover, there is no stipulation of facts as is required in order to give us a basis for evaluating the proposed order. The question of what to order is for the Board to decide, and it cannot be decided in the absence of a knowledge of the facts. We call attention specifically to the proposal for "directing the emissions of odors away from the Sunnyside Housing Development." Any settlement proposal ought to explain why it is necessary that odors be simply deflected rather than controlled.

Settling disputes without the burdens of hearings is encouraged by the Board. But the attempt at settlement must not be permitted to delay the resolution of the controversy, and it must not leave the Board in the dark as to the facts on which its determination of the public interest depends. Had the hearings been completed as scheduled, this case would have been decided by now. We trust there will be no further delays.

The proposed settlement is rejected. Further proceedings are to be held with all reasonable dispatch.

ATTACHMENT B

Mr. Currie

1971 WL 4196 (Ill.Pol.Control.Bd.)
END OF DOCUMENT