

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)

Complainant,)

vs.)

ALAN DURKEE, d/b/a)

ALAN DURKEE SWINE FARM,)

Respondent.)

**PCB No. 09-35
(Enforcement)**

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on April 19, 2011, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, c/o John T. Therriault, Assistant Clerk, James R. Thompson Center, 100 W. Randolph St., Ste. 11-500, Chicago, IL 60601, a MOTION FOR LEAVE TO FILE SUBSTITUTE STIPULATION and STIPULATION AND PROPOSAL FOR SETTLEMENT, 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: 

Jane E. McBride
Sr. Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: April 22, 2011

CERTIFICATE OF SERVICE

I hereby certify that I did on April 22, 2011, cause to be served by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instruments entitled NOTICE OF ELECTRONIC FILING, MOTION FOR LEAVE TO FILE SUBSTITUTE STIPULATION and STIPULATION AND PROPOSAL FOR SETTLEMENT upon the persons listed on the Service List.


Jane E. McBride
Sr. Assistant Attorney General

This filing is submitted on recycled paper.

SERVICE LIST

Alan Durkee
d/b/a Alan Durkee Swine Farm
R.R. 1, Box 73
Stronghurst, IL 61480

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

Proposed Settlement that accompanies this motion, to correct the issue identified by the Board in its March 3, 2011 Order.

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 Division

BY:


JANE E. MCBRIDE
Sr. Assistant Attorney General

500 South Second Street
Springfield, Illinois 62706
(217) 782-9031

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS

Complainant,

v.

**ALAN DURKEE d/b/a
ALAN DURKEE SWINE FARM**

Respondent

**No. 09-35
Enforcement (Water)**

STIPULATION AND PROPOSAL FOR SETTLEMENT

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, the Illinois Environmental Protection Agency ("Illinois EPA"), and ALAN DURKEE, d/b/a ALAN DURKEE SWINE FARM ("Respondent"), have agreed to the making of this Stipulation and Proposal for Settlement ("Stipulation") and submit it to the Illinois Pollution Control Board ("Board") for approval. This stipulation of facts is made and agreed upon for purposes of settlement only and as a factual basis for the Board's approval of this Stipulation and issuance of relief. None of the facts stipulated herein shall be introduced into evidence in any other proceeding regarding the violations of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/1 *et seq.*, and the Board's Regulations, alleged in the Complaint except as otherwise provided herein. It is the intent of the parties to this Stipulation that it be a final adjudication of this matter.

I. STATEMENT OF FACTS

A. Parties to the Stipulation

1. On November 25, 2008, a Complaint was filed on behalf of the People of the State of Illinois by Lisa Madigan, Attorney General of the State of Illinois, on her own motion and upon the request of the Illinois EPA, pursuant to Section 31 of the Act, 415 ILCS 5/31, against the Respondent.

2. The Illinois EPA is an administrative agency of the State of Illinois, created pursuant to Section 4 of the Act, 415 ILCS 5/4.

3. At all times relevant to the Complaint, Respondent Alan Durkee ("Durkee") was and is an individual engaged in the business of swine production. Respondent Durkee owns and operates a 2,200 swine feeder-to-finish facility consisting of two confinement buildings and a cement manure pit measuring 100 feet by 20 feet and 8 feet deep. Respondent Durkee's swine operation is located at the intersection of County Road 800N and County Road 1700E, approximately two miles east of Stronghurst, Illinois in Henderson County (the "facility" or "site").

B. Allegations of Non-Compliance

Complainant and the Illinois EPA contend that the Respondent has violated the following provisions of the Act and Board regulations:

Count I

1. By depositing contaminants upon the land in such place and manner as to create a water pollution hazard, the Respondent has violated Section 12(d) of the Act, 415 ILCS 5/12(d).

2. By causing, allowing or threatening the discharge of contaminants to waters of the State so as to cause or tend to cause water pollution in Illinois, the Respondent has violated

Section 12(a) of the Act, 415 ILCS 5/12(a).

Count II

3. By causing or allowing the discharge of livestock wastewater to waters of the State without an NPDES permit, Respondent Durkee has violated 12(f) of the Act, 415 ILCS 5/12(f), and 35 Ill. Adm. Code 309.102(a).

Count III

4. By land applying livestock waste in exceedence of practical limits, and thereby allowing the discharge of facility contaminants to waters of the State, Respondent Durkee has violated Section 12(a) of the Act, 415 ILCS 5/12(a), and 35 Ill. Adm. Code 501.405.

Count IV

5. By improperly applying livestock waste on land so as to allow a discharge and cause turbid, discolored and odorous waters in an unnamed tributary of Middle Creek and a roadside ditch along County Road 1700E, Respondent Durkee has violated Section 12(a) of the Act, 415 ILCS 5/12(a), and Section 302.203 of the Board's Agriculture Related Pollution Regulations, 35 Ill. Adm. Code 302.203.

C. Admission of Violations

The Respondent represents that he has entered into this Stipulation and Proposal for Settlement for the purpose of settling and compromising disputed claims without having to incur the expense of contested litigation. By entering into this Stipulation and Proposal for Settlement and complying with its terms, the Respondent does not affirmatively admit the allegations of violation within the Complaint and referenced above, and this Stipulation and Proposal for Settlement shall not be interpreted as including such admission admits to the violation(s) alleged in the Complaint filed in this matter and referenced within Section I.B herein.II.

II. APPLICABILITY

This Stipulation shall apply to and be binding upon the Complainant, the Illinois EPA and the Respondent, and any officer, director, agent, or employee of the Respondent, as well as any successors or assigns of the Respondent. The Respondent shall not raise as a defense to any enforcement action taken pursuant to this Stipulation the failure of any of its officers, directors, agents, employees or successors or assigns to take such action as shall be required to comply with the provisions of this Stipulation. This Stipulation may be used against the Respondent in any subsequent enforcement action or permit proceeding as proof of a past adjudication of violation of the Act and the Board Regulations for all violations alleged in the Complaint in this matter, for purposes of Sections 39 and 42 of the Act, 415 ILCS 5/39 and 42.

III. IMPACT ON THE PUBLIC RESULTING FROM ALLEGED NON-COMPLIANCE

Section 33(c) of the Act, 415 ILCS 5/33(c), provides as follows:

In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved including, but not limited to:

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.

In response to these factors, the parties to this Stipulation state the following:

1. The land application of waste at a time when precipitation was forecasted and

imminent, resulted in pooling of waste and runoff when the precipitation did occur as predicted. The runoff drained west into a roadside ditch along County Road 1700E, which was upgradient and tributary to an unnamed tributary of Middle Creek. The Respondent has caused or allowed contaminants to be deposited upon the land in such place and manner as to create a water pollution hazard by causing contaminants in the soil to remain on the land and subject to surface drainage or leaching into waters of the State. The Respondent has caused or allowed the discharge of contaminants to waters of the State as will or was likely to create a nuisance or render such water harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses.

2. The social and economic benefit of this hog production facility is diminished when operation of the facility results in the threat of water pollution.

3. When properly maintained in compliance with the state's environmental regulations, the facility is suitable for the area in which it exists.

4. Proper land application of livestock waste so as to prevent runoff is both technically practicable and economically reasonable.

5. Respondent has subsequently complied with the Act and the Board Regulations.

IV. CONSIDERATION OF SECTION 42(h) FACTORS

Section 42(h) of the Act, 415 ILCS 5/42(h)(2006), provides as follows:

In determining the appropriate civil penalty to be imposed under . . . this Section, the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors:

1. the duration and gravity of the violation;
2. the presence or absence of due diligence on the part of the respondent in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;

3. any economic benefits accrued by the respondent because of delay in compliance with requirements, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance;
4. the amount of monetary penalty which will serve to deter further violations by the respondent and to otherwise aid in enhancing voluntary compliance with this Act by the respondent and other persons similarly subject to the Act;
5. the number, proximity in time, and gravity of previously adjudicated violations of this Act by the respondent;
6. whether the respondent voluntarily self-disclosed, in accordance with subsection i of this Section, the non-compliance to the Agency; and
7. whether the respondent has agreed to undertake a "supplemental environmental project," which means an environmentally beneficial project that a respondent agrees to undertake in settlement of an enforcement action brought under this Act, but which the respondent is not otherwise legally required to perform.

In response to these factors, the parties to this Stipulation state as follows:

1. On April 24, 2007, an Illinois Department of Natural Resources ("IDNR") fisheries biologist reported to the Illinois EPA that Respondent Durkee surface applied livestock wastewater to pasture ground when precipitation was imminent. Rain did fall that evening, either during or immediately after Respondent land applied livestock wastewater. On April 25, 2007, an Illinois EPA inspector conducted an inspection of Respondent Durkee's swine farm and observed that livestock wastewater had recently been surface applied to a field adjacent to the facility. The wastewater formed ponds in the grass pasture next to the swine building and was draining to various off site areas. The wastewater drained to the north into an unnamed tributary of Middle Creek and to the west into a roadside ditch along County Road 1700E. The wastewater drained across County Road 1700E and into an adjacent field. The inspector observed a relatively strong swine waste odor west of the pasture and confinement buildings. Samples taken in the vicinity of the Respondent Durkee's application of waste were turbid and

odorous.

2. Respondent was diligent in attempting to come back into compliance with the Act, Board regulations and applicable federal regulations, once the Illinois EPA notified him of his noncompliance.

3. When the release occurred, even though the Respondent's on-site waste storage was somewhat full, it was not in danger of over topping. Respondent could have waited for better weather conditions before land applying waste. The basis for the compliance failure was poor management judgment. Respondent subsequently purchased land application equipment that would allow him to incorporate waste. Surface land application is more likely to run off than an application that has been incorporated into the soil.

4. Complainant and the Illinois EPA have determined, based upon the specific facts of this matter that a penalty of Five Thousand Five Hundred Dollars (\$5,500.00) will serve to deter further violations and aid in future voluntary compliance with the Act and Board regulations.

5. In 1998, the Attorney General's Office filed an odor air pollution and water pollution enforcement action against the Respondent. *People v. Alan Durkee d/b/a Alan Durkee Swine Farm and Eastern Iowa Pumping, Inc.*, Henderson County Circuit Court Case No. 98 CH 02. A Consent Order was entered in the matter in June 2000.

6. Respondent failed to report the waste release. He was required to do so pursuant to 35 Ill. Adm. Code 580.105.

7. The settlement of this matter does not include a supplemental environmental project.

V. TERMS OF SETTLEMENT

A. Penalty Payment

1. The Respondent shall pay a civil penalty in the sum of Five Thousand Five Hundred Dollars (\$5,500.00) within thirty (30) days from the date the Board adopts and accepts this Stipulation.

B. Stipulated Penalties, Interest and Default

1. If the Respondent fails to complete any activity or fails to comply with any response or reporting requirement by the date specified in this Stipulation, the Respondent shall provide notice to the Complainant and the Illinois EPA of each failure to comply with this Stipulation and shall pay stipulated penalties in the amount of \$25.00 per day until such time that compliance is achieved. The Complainant may make a demand for stipulated penalties upon the Respondent for its noncompliance with this Stipulation. However, failure by the Complainant to make this demand shall not relieve the Respondent of the obligation to pay stipulated penalties. All stipulated penalties shall be payable within thirty (30) calendar days of the date the Respondent knows or should have known of its noncompliance with any provision of this Stipulation.

2. If the Respondent fails to make any payment required by this Stipulation on or before the date upon which the payment is due, the Respondent shall be in default and the remaining unpaid balance of the penalty, plus any accrued interest, shall be due and owing immediately. In the event of default, the Complainant shall be entitled to reasonable costs of collection, including reasonable attorney's fees.

3. Pursuant to Section 42(g) of the Act, interest shall accrue on any penalty amount owed by the Respondent not paid within the time prescribed herein. Interest on unpaid penalties shall begin to accrue from the date such are due and continue to accrue to the date

full payment is received. Where partial payment is made on any penalty amount that is due, such partial payment shall be first applied to any interest on unpaid penalties then owing.

C. Payment Procedures

All payments required by this Stipulation shall be made by certified check or money order payable to the Illinois EPA for deposit into the Environmental Protection Trust Fund ("EPTF"). Payments shall be sent by first class mail and delivered to:

Illinois Environmental Protection Agency
Fiscal Services
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

The name, case number and the Respondent's federal tax identification number shall appear on the face of the certified check or money order. A copy of the certified check or money order and any transmittal letter shall be sent to:

Environmental Bureau
Illinois Attorney General's Office
500 South Second Street
Springfield, Illinois 62706

D. Future Compliance

1. Respondent agrees not to surface land apply livestock waste to the field that exists between the subject facility and County Road 1700E.
2. By the date of acceptance of this Stipulation and Proposal for Settlement by the Board, Respondent shall provide the Illinois EPA with a plat map on which he has delineated the pasture and hay field ground on which he intends to surface apply livestock waste in the future. Further, for five years from the date of entry of the Board's Order accepting this settlement, Respondent agrees to provide the Illinois EPA with prior notice as to where and when he plans to surface apply waste from the subject facility. However, if Respondent constructs additional livestock waste storage at the facility as contemplated and discussed by

the parties within three years of the date of entry of the Board's Order accepting this settlement, Respondent shall provide Illinois EPA prior notice of land application for only one year after completion of construction of the additional storage.

3. In addition to any other authorities, the Illinois EPA, its employees and representatives, and the Attorney General, her employees and representatives, shall have the right of entry into and upon the Respondent's facility which is the subject of this Stipulation, at all reasonable times for the purposes of conducting inspections and evaluating compliance status. In conducting such inspections, the Illinois EPA, its employees and representatives, and the Attorney General, her employees and representatives, may take photographs, samples, and collect information, as they deem necessary.

4. This Stipulation in no way affects the responsibilities of the Respondent to comply with any other federal, state or local laws or regulations, including but not limited to the Act and the Board Regulations.

5. The Respondent shall cease and desist from future violations of the Act and Board Regulations that were the subject matter of the Complaint.

E. Release from Liability

In consideration of the Respondent's payment of the \$5,500.00 penalty, completion of all activities required hereunder, and upon the Board's approval of this Stipulation, the Complainant releases, waives and discharges the Respondent from any further liability or penalties for the violations of the Act and Board Regulations that were the subject matter of the Complaint herein. The release set forth above does not extend to any matters other than those expressly specified in Complainant's Complaint filed on November 25, 2008. The Complainant reserves, and this Stipulation is without prejudice to, all rights of the State of Illinois against the Respondent with respect to all other matters, including but not limited to, the following:

- a. criminal liability;
- b. liability for future violation of state, federal, local, and common laws and/or regulations;
- c. liability for natural resources damage arising out of the alleged violations; and
- d. liability or claims based on the Respondent's failure to satisfy the requirements of this Stipulation.

Nothing in this Stipulation is intended as a waiver, discharge, release, or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the State of Illinois or the Illinois EPA may have against any person, as defined by Section 3.315 of the Act, 415 ILCS 5/3.315, or entity other than the Respondent.

F. Enforcement and Modification of Stipulation

- 1. Upon the entry of the Board's Order approving and accepting this Stipulation, that Order is a binding and enforceable order of the Board and may be enforced as such through any and all available means.
- 2. The Complainant, in consultation with the Illinois EPA, and the Respondent may, by mutual written consent, agree to extend any compliance dates or modify the terms of this Stipulation. A request for any modification shall be made in writing. Any such request shall be made by separate document, and shall not be submitted within any other report or submittal required by this Stipulation. Any such agreed modification shall be in writing, signed by authorized representatives of each party to this Stipulation.

G. Execution of Stipulation

The undersigned representatives for each party to this Stipulation certify that they are fully authorized by the party whom they represent to enter into the terms and conditions of this Stipulation and to legally bind them to it.

WHEREFORE, the parties to this Stipulation request that the Board adopt and accept the foregoing Stipulation and Proposal for Settlement as written.

PEOPLE OF THE STATE OF ILLINOIS,

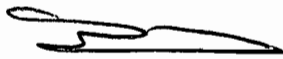
FOR THE ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

LISA MADIGAN
Attorney General
State of Illinois

LISA BONNETT, Interim Director
Illinois Environmental Protection Agency

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

BY:

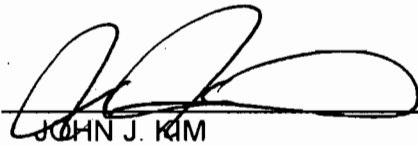


THOMAS DAVIS, Chief
Environmental Bureau
Assistant Attorney General

DATE:

3/21/11

BY:



JOHN J. KIM
Chief Legal Counsel

DATE:

3/16/11

FOR THE RESPONDENT

ALAN DURKEE

BY:



DATE:

4/16/11