

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

| | | |
|---------------------------------------|---|---------------------|
| PEOPLE OF THE STATE OF ILLINOIS, |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | PCB No. 10-86 |
| |) | (Water-Enforcement) |
| |) | |
| ILLINOIS FUEL COMPANY, LLC, |) | |
| a Kentucky limited liability company, |) | |
| |) | |
| Respondent. |) | |

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board by electronic filing (1) a MOTION FOR JOINDER, (2) a STIPULATION AND PROPOSAL FOR SETTLEMENT, and (3) a MOTION FOR RELIEF FROM HEARING, copies of which are herewith served upon you.

LISA MADIGAN
Attorney General
State of Illinois

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

BY: /s/ David G. Samuels
DAVID G. SAMUELS
Assistant Attorney General
500 South Second Street
Springfield, Illinois 62706
(217) 782-9031
dsamuels@atg.state.il.us

Dated: December 22, 2017

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served on the date of December 22, 2017, (1) a MOTION FOR JOINDER, (2) a STIPULATION AND PROPOSAL FOR SETTLEMENT, and (3) a MOTION FOR RELIEF FROM HEARING upon the persons listed on the Service List by electronic, as noted, or First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois by the time of 5:00 PM.

/s/ David G. Samuels
DAVID G. SAMUELS
Assistant Attorney General

SERVICE LIST

Carol Webb (via Electronic Mail)
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
Springfield, Illinois 62794

Illinois Fuel Company, LLC
c/o CT Corporation System
208 South LaSalle Street, Suite 814
Chicago, Illinois 60604

Illinois Fuel Company, LLC
c/o Stephen Addington
1512 North Big Run Road
Ashland, Kentucky 41102

Cheyenne Resources, Inc. (via Electronic Mail)
c/o Justin L. Leinenweber
Leinenweber Baroni & Daffada LLC
203 N. LaSalle St., Ste. 1620
Chicago, IL 60601

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MOTION FOR JOINDER

NOW COMES Complainant, People of the State of Illinois, by Lisa Madigan, Attorney General of the State of Illinois, and, pursuant to Section 101.403(a) of the Board's Rules, 35 Ill. Adm. Code 101.403(a), moves to join Cheyenne Resources, Inc., a Kentucky corporation, as a respondent in this matter, and in support states:

1. On April 22, 2010, Complainant filed a complaint against Respondent Illinois Fuel Company, LLC, (Illinois Fuel) alleging NPDES permit violations and water pollution at two coalmines operated by Respondent Illinois Fuel in Saline County and Gallatin County.

2. From July 2001 until July 2015, Respondent operated the "I-1 Mine" coalmine northeast of Herod, Saline County, Illinois, that is the subject of Counts I and II of the Amended Complaint in this matter (the Mine).

3. In July 2015, Respondent assigned its lease of the Mine to Cheyenne Resources, Inc. (Cheyenne). As part of the assignment, Cheyenne assumed liability for the violations alleged in Counts I and II of the Amended Complaint, which concern the Mine.

4. Section 101.403(a) of the Board's Rules provides that the Board may add a person as a party to any adjudicatory proceeding if that person "has an interest that the Board's order may affect." 35 Ill. Adm. Code 101.403(a).

5. The assignment of Respondent's liability to Cheyenne gives Cheyenne an interest that a Board order in this matter may affect.

6. Further, the Board has authority to determine a claim for liability of a successor in interest for the violations of a predecessor. *See Elmhurst Mem'l Healthcare v. Chevron U.S.A., Inc.*, PCB 09-66 (Dec. 16, 2010), slip op. at 15–16.

7. Joinder of Cheyenne is therefore proper under Section 101.403(a)(2) of the Board's Rules, 35 Ill. Adm. Code 101.403(a)(2).

WHEREFORE, Complainant, People of the State of Illinois, respectfully requests that the Board enter an order joining Cheyenne Resources, Inc., as a respondent and granting such other relief as the Board deems appropriate.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,

LISA MADIGAN
ATTORNEY GENERAL

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

BY: /s/ David G. Samuels
DAVID G. SAMUELS
Assistant Attorney General
500 South Second Street
Springfield, Illinois 62706
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**STIPULATION AND PROPOSAL FOR SETTLEMENT
WITH RESPONDENT CHEYENNE RESOURCES, INC.**

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 Respondent Cheyenne Resources, Inc. (Cheyenne), collectively the "Parties to the Stipulation," 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.* (2014), and the Board's regulations, alleged in the Amended Complaint except as otherwise provided herein. It is the intent of the Parties to the Stipulation that it be a final adjudication of this matter as to Respondent Cheyenne. This Stipulation resolves the State of Illinois's case against Respondent Cheyenne, and does not resolve the State of Illinois's case against any other Respondent in this action, except as provided in Section V.E, below.

I. STATEMENT OF FACTS

A. Parties

1. On April 22, 2010, Complainant, People of the State of Illinois, by Lisa Madigan, Attorney General of the State of Illinois, on her own motion and at the request of the Illinois EPA, pursuant to Section 31 of the Act, 415 ILCS 5/31 (2014), filed a four-count Complaint against Respondent Illinois Fuel Company, LLC (Illinois Fuel) alleging NPDES permit violations and water pollution at two coal mines operated by Respondent Illinois Fuel in Saline County and Gallatin County. On April 29, 2013, Complainant received leave to file *instante* an Amended Complaint adding a new count related to violations at the mine in Gallatin County.

2. Filed contemporaneously with this Stipulation is a Motion for Joinder to join Cheyenne as a Respondent.

3. The Illinois EPA is an administrative agency of the State of Illinois, created pursuant to Section 4 of the Act, 415 ILCS 5/4 (2014).

4. At all times relevant to the Amended Complaint, Respondent Illinois Fuel was and is a Kentucky limited liability company authorized to transact business in the State of Illinois. On November 10, 2016, the Illinois Secretary of State revoked Illinois Fuel's authorization to transact business in the State of Illinois.

5. Respondent Cheyenne was and is a Kentucky corporation authorized to transact business in the State of Illinois.

6. From July 2001 until July 2015, Respondent Illinois Fuel operated the "I-1 Mine" coal mine northeast of Herod, Saline County, Illinois, (the Mine) that is the subject of Counts I and II of the Amended Complaint.

7. In 1999, the Illinois EPA issued NPDES Permit No. IL0064611 (the Permit) to Jader Coal Company, LLC, for discharges from the I-I Mine. On July 25, 2001, Respondent Illinois Fuel requested transfer of the Permit to Respondent Illinois Fuel from Jader Coal Company.

8. The Permit imposes effluent limitations on discharges from the Mine.

9. Discharge monitoring reports for the Mine submitted by Respondent Illinois Fuel between 2004 and 2012 showed discharges exceeding the Permit's effluent limitations.

10. In July 2015, Respondent Illinois Fuel assigned its lease of the Mine to Respondent Cheyenne. As part of the assignment, Respondent Cheyenne assumed liability for the violations alleged in Counts I and II of the Amended Complaint concerning the Mine.

B. Allegations of Non-Compliance

Complainant contends that Respondent Illinois Fuel violated the following provisions of the Act and Board regulations:

Count I alleges that by discharging effluent from the Saline County mine into waters of the State in violation of the terms or conditions of NPDES Permit No. IL0064611, Illinois Fuel Company, LLC, violated Section 12(f) of the Act, 415 ILCS 5/12(f) (2014).

Count II alleges that by discharging effluent from the Saline County mine into waters of the State so as to cause or tend to cause water pollution in Illinois, Illinois Fuel Company, LLC, violated Section 12(a) of the Act, 415 ILCS 5/12(a) (2014).

Respondent Cheyenne is not alleged to have violated any provisions of the Act and is added as a respondent in this matter solely based on their assumption of Illinois Fuels' liability for alleged violations in Count I and II of the Amended Complaint.

C. Non-Admission of Violations

Respondent Cheyenne represents it has entered into this Stipulation for the purpose of settling and compromising disputed claims without having to incur the expense of contested litigation. By entering into this Stipulation and complying with its terms, Respondent Cheyenne does not affirmatively admit the allegations of violation within the Amended Complaint and referenced within Section I.B, and this Stipulation shall not be interpreted as including such admission.

D. Compliance Activities to Date

As of August 2016, Respondent Cheyenne has brought discharges from the Saline County Mine into compliance with the Permit.

II. APPLICABILITY

This Stipulation shall apply to and be binding upon the Parties to the Stipulation. Respondent Cheyenne 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.

III. IMPACT OF ALLEGED NON-COMPLIANCE ON THE PUBLIC

Section 33(c) of the Act, 415 ILCS 5/33(c) (2014), provides:

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:

- (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
- (ii) the social and economic value of the pollution source;

- (iii) 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;
- (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
- (v) any subsequent compliance.

In response to these factors, the Parties to the Stipulation state:

1. Respondent Illinois Fuel's discharges from the Mine adversely impacted waters of the State so as to cause or tend to cause water pollution.
2. There is social and economic benefit to operating the Mine.
3. Operation of the Mine is suitable for the area in which it occurred.
4. Compliance with NPDES permit effluent limitations is both technically practicable and economically reasonable.
5. From the time Complainant filed the initial Complaint through transfer of the Mine lease to Respondent Cheyenne, Respondent Illinois Fuel never achieved compliance with the Permit, Act, or Board Regulations. However, Respondent Cheyenne has subsequently complied with the Permit, the Act, and the Board's Regulations.

IV. CONSIDERATION OF SECTION 42(h) FACTORS

Section 42(h) of the Act, 415 ILCS 5/42(h) (2014), provides, in pertinent part:

In determining the appropriate civil penalty . . . 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;
- (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; and
- (8) whether the respondent has successfully completed a Compliance Commitment Agreement under subsection (a) of Section 31 of this Act to remedy the violations that are the subject of the complaint.

In response to these factors, the Parties to the Stipulation state:

1. Respondent Illinois Fuel reported discharges at the Mine exceeding the Permit's effluent limitations for multiple parameters beginning in January 2004 and continuing through at least January 2012, as alleged in the Amended Complaint.

2. Respondent Illinois Fuel was not diligent in bringing the Mine into compliance with requirements of its Permit and the Act and regulations thereunder, as exhibited by the

effluent violations continuing over a span of at least eight years. However, Respondent Cheyenne has been diligent in bringing the Mine back into compliance with requirements of the Act and regulations thereunder since assuming the lease from Respondent Illinois Fuel.

3. No economic benefit accrued to Respondent Cheyenne because there was no delay in compliance once it assumed the Mine's lease from Respondent Illinois Fuel. The civil penalty does, however, take into account any economic benefit realized by Respondent Illinois Fuel as a result of avoided compliance at the Mine.

4. Complainant has determined, based upon the specific facts of this matter, that a penalty of \$75,000.00 will serve to deter further violations and aid in future voluntary compliance with the Act and Board regulations.

5. To Complainant's knowledge, neither Respondent Cheyenne nor Respondent Illinois Fuel has previously adjudicated violations of the Act.

6. Respondent Illinois Fuel did not self-disclose effluent exceedances in accordance with Section 42(i) of the Act, 415 ILCS 5/42(i) (2014).

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

V. TERMS OF SETTLEMENT

A. Penalty Payment

Respondent Cheyenne shall pay a civil penalty in the sum of \$75,000.00 within 30 days from the date the Board adopts and accepts this Stipulation.

B. Interest and Default

1. If Respondent Cheyenne fails to make any payment required by this Stipulation on or before the date upon which the payment is due, Respondent Cheyenne 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, Complainant shall be entitled to reasonable costs of collection, including reasonable attorney's fees.

2. Pursuant to Section 42(g) of the Act, interest shall accrue on any penalty amount owed by Respondent Cheyenne 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

1. 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.

2. 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, Illinois 62794-9276

3. The case name, case number, and Respondent Cheyenne's name shall appear on the face of the certified check or money order.

4. A copy of the certified check or money order and any transmittal letter shall be sent to:

David G. Samuels
Assistant Attorney General
Environmental Bureau
Illinois Attorney General's Office
500 S. Second Street
Springfield, Illinois 62701

D. Future Compliance

1. 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 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.

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

3. 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

1. In consideration of Respondent Cheyenne's payment of the \$75,000.00 penalty, its commitment to cease and desist as contained in Section V.D.3 above, completion of all activities required hereunder, and upon the Board's approval of this Stipulation, Complainant releases, waives and discharges Respondent Cheyenne from any further liability or penalties for the violations of the Act and Board regulations that were the subject matter of the Amended Complaint herein, and Respondent Illinois Fuel from any further liability or penalties for the violations of the Act and Board regulations that were the subject matter of Counts I and II of the Amended Complaint herein.

2. The release set forth above does not extend to any matters other than those expressly specified in Counts I and II of Complainant's Amended Complaint for which leave to file was granted on April 29, 2013.

3. Complainant reserves, and this Stipulation is without prejudice to, all rights of the State of Illinois against Respondent Cheyenne and Respondent Illinois Fuel 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 Respondent Cheyenne's failure to satisfy the requirements of this Stipulation.

4. 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 may have against any person, as defined by Section 3.315 of the Act, 415 ILCS 5/3.315, or entities other than Respondent Cheyenne or Respondent Illinois Fuel.

F. Enforcement

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.

G. Opportunity For Public Comment

Pursuant to 35 Ill. Adm. Code 103.300(b)(2), the Board shall publish notice of this Stipulation for at least 30 days prior to the Board accepting the Stipulation. If public comments are submitted to the Board regarding this Stipulation, the Complainant reserves the right to withdraw its consent if the comments regarding the Stipulation disclose facts or considerations which indicate that the Stipulation is inappropriate, improper, or inadequate. Respondent Cheyenne consents to the entry of this Stipulation without further notice and agrees not to withdraw from or oppose acceptance of this Stipulation or to challenge any provision of the Stipulation, unless the Complainant has notified Respondent Cheyenne in writing that it withdraws or withholds its consent for the Stipulation. In the event the Complainant notifies Respondent Cheyenne that it withdraws or withholds its consent for the Stipulation, then the terms of the agreement may not be used as evidence in any litigation between those entities.

H. Execution of Stipulation

The undersigned representatives for the Parties to the 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.

[THE REMAINDER OF THIS PAGE IS LEFT BLANK]

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


FOR COMPLAINANT


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

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

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

ALEC MESSINA, Director

BY: 
ANDREW B. ARMSTRONG, Chief
Environmental Bureau
Assistant Attorney General

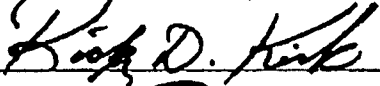
BY: 
JOHN J. KIM
Chief Legal Counsel

DATE: 11/27/2017

DATE: 11/22/17

FOR RESPONDENT CHEYENNE RESOURCES, INC.

CHEYENNE RESOURCES, INC.

BY: 
Its Pres.

DATE: 11/9/17

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| Respondent. |) | |

MOTION FOR RELIEF FROM HEARING

NOW COMES Complainant, People of the State of Illinois, by Lisa Madigan, Attorney General of the State of Illinois, and requests relief from the requirement of a hearing in this matter. In support thereof, Complainant states as follows:

1. Filed contemporaneously with this Motion is a Motion for Joinder to join Cheyenne Resources, Inc., (Cheyenne) as a respondent in this matter, and a Stipulation and Proposal for Settlement executed between Complainant and Cheyenne to resolve Counts I and II of the Amended Complaint.

2. Section 31(c)(2) of the Illinois Environmental Protection Act (Act), 415 ILCS 5/31(c)(2) (2016), provides that “whenever a complaint has been filed . . . by the People of the State of Illinois, the parties may file with the Board a stipulation and proposal for settlement accompanied by a request for relief from the requirement of a hearing pursuant to [section 31(c)(1) of the Act, 415 ILCS 5/31(c)(1)].”

3. No hearing is scheduled in this matter.

4. Complainant hereby requests relief from the requirement of a hearing pursuant to Section 31(c)(2) of the Act, 415 ILCS 5/31(c)(2) (2016).

5. Complainant will resolve remaining counts of the Amended Complaint through its pending Motion for Summary Judgment against Respondent Illinois Fuel Company, LLC.

WHEREFORE, Complainant, People of the State of Illinois, respectfully requests that the Board enter an order joining Cheyenne Resources, Inc., as a respondent and granting such other relief as the Board deems appropriate.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,

LISA MADIGAN
ATTORNEY GENERAL

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
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Dated: December 22, 2017