

ILLINOIS POLLUTION CONTROL BOARD  
December 18, 2008

PEOPLE OF THE STATE OF ILLINOIS, )  
)  
Complainant, )  
)  
v. ) PCB 08-17  
) (Enforcement - Water)  
FELKER PHARMACY, INC. and ROD )  
BENNETT CONSTRUCTION, INC., )  
)  
Respondents. )

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ROD BENNETT CONSTRUCTION, INC., )  
)  
Third-Party Complainant, )  
)  
v. ) PCB 08-17  
) (Citizens Enforcement - Water)  
MCCLELLAN BLAKEMORE ) (Third-Party Complaint)  
ARCHITECTS, INC. and WENDLER )  
ENGINEERING SERVICES, INC., )  
)  
Third-Party Respondents. )

ORDER OF THE BOARD (by G.T. Girard):

On November 18, 2008, Rod Bennett Construction, Inc. (Bennett) filed a stipulation and proposal for settlement (Stip.) and on November 19, 2008, a motion for relief from the hearing requirement. Bennett seeks to settle the third-party complaint as to third-party respondent Wendler Engineering Services, Inc. (Wendler). For the reasons discussed below the Board declines to accept the settlement.

**PROCEDURAL BACKGROUND**

On August 20, 2007, the People of the State of Illinois by the Attorney General, on her own motion and at the request of Illinois Environmental Protection Agency (People), filed a three-count complaint against Felker Pharmacy, Inc. (Felker) and Bennett (collectively, respondents). *See* 415 ILCS 5/31(c)(1) (2006); 35 Ill. Adm. Code 103.204. The complaint concerns the Synder Pharmacy site located at Galena Avenue and Everett Street, Dixon, Lee County. On August 23, 2007, the Board accepted the complaint for hearing.

On December 10, 2007, Bennett filed a third-party complaint against McClellan Blakemore Architects, Inc. (McClellan) and Wendler Engineering Services, Inc. (Wendler) (collectively, third-party respondents). On March 20, 2008, the Board accepted that complaint.

### **PROPOSED STIPULATION AND SETTLEMENT**

The proposed stipulation and settlement includes many terms, including indicating a desire to avoid costly and time consuming litigation by settling the matter. Stip. at 1. Further, the stipulation provides:

Without admitting or denying any facts or assertions in this matter, Third Party Respondent Wendler will pay five thousand dollars (\$5,000.00) to Respondent [Bennett] in full satisfaction of all claims in this matter. *Id.*

The stipulation requires payment of the \$5,000 to Bennett's attorney to hold until the Board enters an order accepting the stipulation. Stip. at 2. The payment is contingent on the People and respondents settling their action as well. *Id.* The payment of \$5,000 will result in Bennett agreeing to "indemnify and hold harmless" the third-party respondents. *Id.* The stipulation and settlement are not signed by any of the parties. Stip. at 2-3.

### **DISCUSSION**

The Board has accepted a stipulation and proposal for settlement in a citizen's enforcement case. *See York High Neighborhood Committee et al v. Elmhurst Public School, District 205*, PCB 05-93 (July 12, 2007). The Board is authorized to accept such stipulations under Section 31(d)(2) of the Environmental Protection Act (Act) (415 ILCS t/31(d)(2) (2006)). Section 31(d)(2) of the Act provides:

Whenever a complaint has been filed by a person other than the Attorney General or State's Attorney, the parties may file with the Board a stipulation and proposed settlement accompanied by a request for relief from the hearing requirement of Section 31(c)(1) of the Act [415 ILCS 5/31(c)(1) (2006)]. Unless the Board, in its discretion, concludes that a hearing should be held, no hearing on the stipulation and proposal for settlement is required. 415 ILCS 5/31(d)(2) (2006) *see also* 35 Ill. Adm. Code 103.301.

Under the Board's procedural rules the content of the stipulation is set forth. Specifically under Section 103.302 the stipulation:

A proposed stipulation and settlement agreement must contain a written statement, signed by the parties or their authorized representatives, 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.* [415 ILCS 5/33(c)]
- 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 5/42(h)]. 35 Ill. Adm. Code 103.302

The stipulation and settlement filed does not conform to the content requirements of the Board's procedural rules and was not signed. For this reason alone, the Board could reject the stipulation. However, the Board also cannot approve the stipulation because the stipulation requires payment of funds to a private party.


The Board, as an administrative agency, is a "creature of statute, and therefore has only the authority given to it by the Act. Granite City Div. of Nat. Steel Co. v. PCB, 155 Ill. 2d 149, 171, 613 N.E.2d 719, 729 (1993); see also Bevis v. PCB, 289 Ill. App. 3d 432, 437, 681 N.E.2d 1096, 1099 (5th Dist. 1997); McHenry County Landfill, Inc. v. IEPA, 154 Ill. App. 3d 89, 95, 506 N.E.2d 372, 376 (2nd Dist. 1987). Under the Act, the Board is authorized to impose civil penalties for violation of the Act payable to public funds, not private parties. 415 ILCS 5/33(b) 42 (2006), *see also* Kulpaka v. Mandel, PCB 92-33 (July 30, 1992) slip op. 9; Miehle v. Chicago Bridge and Iron Company, PCB 93-150 (Nov. 4, 1993) slip op. at 12; Schratz et al. v. Village of Villa Park et al., PCB 93-161 (Oct. 21, 1993) slip op. 6. The Act also authorizes the Board to order a party to cease and desist. *Id.*

In addition to express statutory authority in the Act, the Supreme Court of Illinois has provided case law establishing that the Board may award site clean-up costs. In People v. Fiorini 143 Ill.2d 318, 574 N.E.2d 612 (1991), the Supreme Court held that although the award of clean-up costs is not expressly provided for in the Act, it would not hold that such an award would not be an available remedy for a violation of the Act under appropriate facts. The Board has thus consistently held that the Board may award the costs of clean-up at site. See Grand Pier Center, LLC et al. v. River East LLC et al., PCB 05-157 (May 19, 2007) and Lake County Forest Preserve District v. Ostro, PCB 92-80 (Mar. 31, 1994).

The requested award of \$5000 is not for clean-up of the site and therefore, the Board lacks the authority under the Act to order such payment. Therefore, the Board rejects the proposed stipulation and settlement filed by Bennett and the motion for relief from the hearing requirement is thereby moot.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on December 18, 2008, by a vote of 5-0.



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John T. Therriault, Assistant Clerk  
Illinois Pollution Control Board