

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
vs.)
)
SMITHFIELD PROPERTIES IV, L.L.C.,)
an Illinois limited liability company, and)
WOOTON CONSTRUCTION, LTD.,)
an Illinois corporation,)
)
Respondents.)

PCB No. 04-192
(Enforcement – Land and Water)

VIA ELECTRONIC FILING

NOTICE OF FILING

TO: Kevin B. Hayes
O'Keefe, Lyons & Hynes, LLC
30 North LaSalle Street, Suite 4100
Chicago, Illinois 60602

Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph Street, Ste. 11-500
Chicago, Illinois 60601

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph Street, Suite 11-500
Chicago, Illinois 60601

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board ("Board") pursuant to Section 103.300(a) of the Board Procedural Rules, a Stipulation and Proposal for Settlement, an Agreed Motion for Relief from

THIS FILING IS SUBMITTED ON RECYCLED PAPER

the Hearing Requirement, Notice of Filing and a Certificate of Service, a copy of which is attached herewith and served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General
State of Illinois

BY:

A handwritten signature in black ink, appearing to read "Zemeheret Bereket-AB", written over a horizontal line.

ZEMEHERET BEREKET-AB
Environmental Bureau
Assistant Attorney General
69 W. Washington St., Suite 1800
Chicago, Illinois 60602
(312) 814-3816

DATE: October 11, 2011

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PEOPLE OF THE STATE OF ILLINOIS,)

Complainant,)

vs.)

SMITHFIELD PROPERTIES IV, L.L.C.,)

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**AGREED MOTION TO REQUEST RELIEF
FROM THE HEARING REQUIREMENT**

In support of this Motion, the parties state as follows:

1. Today, the parties filed a Stipulation and Proposal for Settlement, with the Illinois Pollution Control Board.

2. Section 31(c)(2) of the Illinois Environmental Protection Act, ("Act"), 415 ILCS 5/31(c)(2)(2010) provides:

Notwithstanding the provisions of subdivision (1) of this subsection (c), whenever a complaint has been filed on behalf of the Agency or 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 subdivision (1). . . .

3. Complainant and Respondent agree that a formal hearing is not necessary to conclude this matter and wish to avail themselves of Section 31(c)(2) of the Act, 415 ILCS 5/31(c)(2)(2010).


WHEREFORE, Complainant and Respondent, request relief from the hearing requirement pursuant to Section 31(c)(2) of the Act.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General
State of Illinois

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

BY: 

ZEMEHERET BEREKET-AB
Environmental Bureau
Assistant Attorneys General
69 W. Washington St., Suite 1800
Chicago, Illinois 60602
(312) 814-3094

DATE: October 11, 2011

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)	
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Complainant,)	
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v.)	PCB NO. 04-192
)	(Enforcement – Land & Water)
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an Illinois limited liability company, and)	
WOOTON CONSTRUCTION, LTD.,)	
an Illinois corporation,)	
)	
Respondents.)	

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 Respondents, Smithfield Properties IV, L.L.C. ("Smithfield"), and Wooton Construction, Ltd. ("Wooton") ("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., and the Board's Regulations, alleged in the 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.

I. STATEMENT OF FACTS

A. Parties

1. On May 5, 2004, 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, Smithfield was and is an Illinois limited liability company in good standing that is authorized to transact business in the State of Illinois.

4. At all times relevant to the Complaint, Wooton was and is an Illinois corporation in good standing that is authorized to transact business in the State of Illinois.

5. In October 1999, Smithfield acquired ownership of a property located at 222 South Racine, Chicago, Cook County, Illinois ("Site") and Smithfield contracted with Wooton to construct residential townhomes and condominiums at the Site.

6. In November 1999, Wooton contracted with Speedway Wrecking Co. to remove Tank 5, a 10,000-gallon diesel fuel tank. Speedway subcontracted the tank removal to Omega Environmental Services, Inc. ("Omega").

7. On November 29, 1999, Omega removed Tank 5 and disposed of the tank off-site.

8. A permit to remove Tank 5 was not applied for nor was a permit issued by the City of Chicago or the Illinois State Fire Marshall. According to Omega's report that was produced during discovery, Omega claimed to have received a permit from the City. There is,

however, no record of any such permit. A representative of the City of Chicago was not present during Tank 5's removal.

9. Sometime after the removal of Tank 5, Smithfield and Wooton constructed the townhomes and condominiums at the Site.

10. In the Spring of 2001, there was a water main break incident and a resident in one of the townhomes noted a petroleum taste in his drinking water.

11. On March 30, 2001, Smithfield's consultant, Patrick Engineering, Inc. ("Patrick"), reported to the Site and found that:

- a. a plumbing contractor may have ruptured a water line at the Site;
- b. in order to uncover the water main and service line, the contractor excavated the area surrounding the line to a depth of 5 feet;
- c. the plumbing contractor noticed what he believed was a diesel odor in the excavation;
- d. perched water filled the excavation;
- e. a petroleum sheen was observed on the water;
- f. the contractor dewatered the excavation and pumped the water into a nearby storm sewer; and
- g. a City of Chicago inspector on-site to inspect the repairs observed the sheen and instructed the contractor to report a release to IEMA.

12. On March 30, 2001, Patrick reported a 5-gallon release of diesel fuel to the Illinois Emergency Management Agency ("IEMA"), which issued Incident No. H2001-0544. The incident report states that the incident occurred at an unknown time on March 28, 2001.

13. Prior to March 30, 2001, Smithfield and Wooton did not report any release(s) to IEMA or Illinois EPA at the Site.

B. Allegations of Non-Compliance

Complainant contends that the Respondents have violated the following provisions of the Act and Board regulations:

- Count I: Failure to Perform Site Evaluation and Classification: in violation of Section 732.100(c) of the Board Waste Disposal Regulations, 35 Ill. Adm. Code 732.100(c), and Section 57.6(a) of the Act, 415 ILCS 5/57.6(a) (2010);
- Count II: Failure to Comply with Reporting and Response Requirements: in violation of Section 732.200 of the Board Waste Disposal Regulations, 35 Ill. Adm. Code 732.200 and Section 57.6(a) of the Act, 415 ILCS 5/57.6(a) (2010);
- Count III: Failure to Perform Initial Response Actions: in violation of Section 732.202(a) of the Board Waste Disposal Regulations, 35 Ill. Adm. Code 732.202(a) and Section 57.6(a) of the Act, 415 ILCS 5/57.6(a) (2010);
- Count IV: Failure to Perform Initial Abatement Measures: in violation of Section 732.202(b) of the Board Waste Disposal Regulations, 35 Ill. Adm. Code 732.202(b) and Section 57.6(a) of the Act, 415 ILCS 5/57.5(a) (2010);
- Count V: Failure to Assemble Information About the Site: in violation of Section 732.202(d) of the Board Waste Disposal Regulations, 35 Ill. Adm. Code 732.202(d) and Section 57.6(a) of the Act, 415 ILCS 5/57.6 (2010);
- Count VI: Failure to Submit Physical Soil Classification and Groundwater Investigation Plan: in violation of Section 57.7(a)(1) of the Act, 415 ILCS 5/57.7(a)(1) (2010);
- Count VII: Causing or Tending to Cause Water Pollution: in violation of Section 12(a) of the Act, 415 ILCS 5/12(a) (2010);
- Count VIII: Failure to Submit a 45-Day Report: in violation of Section 732.202(e) of the Board Waste Disposal Regulations, 35 Ill Adm. Code 732.202(e) and Section 57.6(a) of the Act, 415 ILCS 5/57.6(a) (2010).

C. Non-Admission of Violations

The Respondents neither admit nor deny the violations alleged in the Complaint filed in this matter and referenced herein.

II. APPLICABILITY

This Stipulation shall apply to and be binding upon the Parties to the Stipulation. The Respondents shall not raise as a defense to any enforcement action taken pursuant to this Stipulation the failure of any of its officers, directors, manager, 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 Respondents 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)(2010), 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, Complainant states the following:

1. Petroleum-related constituents remain in the soil at the Site, including under the residences and threatens the groundwater under the Site. The Respondents contend that there is no threat to the residents.
2. There is social and economic benefit to the construction of the residential townhomes and condominiums at the Site.
3. Construction of the townhomes and condominiums was suitable for the area.
4. Obtaining a City of Chicago and/or a State Fire Marshall permit prior to removal of the tank and removing the contaminated soil prior to construction of the townhomes at the Site was both technically practicable and economically reasonable.
5. Petroleum constituents remain in place below the townhomes and adjoining yards. The Respondents contend that there is no evidence of off-site contamination. Respondents did perform soil removal on approximately one-half of the Site.

At meetings held with owners of the townhomes, the issue of placing an environmental land use control ("ELUC") on the deeds in order to prevent the owners from tampering with the basements was discussed. However, no consensus could be reached. Due to the fact that several townhomes and condominiums were built on contaminated soil at the Site, remediation of the soil by tearing down the townhomes was not a viable solution. Additionally, since no consensus could be reached regarding the ELUCs, the foundations and yards of the townhomes cannot serve as engineered barriers because there is no enforceable mechanism to assure that they will not be compromised at some future time. The Respondents believe that there is no need for ELUCs.

IV. CONSIDERATION OF SECTION 42(h) FACTORS

Section 42(h) of the Act, 415 ILCS 5/42(h)(2010), 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 Complainant states as follows:

1. Respondents have not submitted an acceptable physical soil classification and groundwater investigation plan. The Respondents believe that the plans and reports submitted to the Illinois EPA are adequate. As a consequence, the Illinois EPA is unable to determine the

extent and magnitude of the soil contamination at the Site. Respondents constructed several townhomes on top of the contaminated soil.

2. Respondents have not been diligent in working to achieve compliance. The Respondents disagree with this statement and maintain that they have performed soil removal activities on one-half of the Site and submitted multiple reports to the Illinois EPA. Respondents' proposal to achieve compliance is to consider the foundation of each of the homes built over contaminated soil as an engineered barrier.

3. The exact amounts of the economic benefits accrued by Respondents are unknown. However, Complainant believes that the \$25,000.00 penalty agreed to herein should capture some of the benefits.

4. Complainant has determined, based upon the specific facts of this matter, that a penalty of Twenty Five Thousand Dollars (\$25,000.00) will serve to deter further violations and aid in future voluntary compliance with the Act and Board regulations.

5. To Complainant's knowledge, Respondents have no previously adjudicated violations of the Act.

6. Self-disclosure is not at issue in this matter.

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

V. TERMS OF SETTLEMENT

A. Penalty Payment

The Respondents shall jointly and severally pay a civil penalty in the sum of Twenty Five Thousand Dollars (\$25,000.00) within thirty (30) days from the date the Board adopts and accepts this Stipulation.

B. Interest and Default

1. If the Respondents fail to make any payment required by this Stipulation on or before the date upon which the payment is due, the Respondents 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.

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

Zemeheret Bereket-Ab
Environmental Bureau
Illinois Attorney General's Office
69 South Washington Street, Suite 1800
Chicago, Illinois 60602

D. Future Compliance

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

2. The Respondents 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 Respondents' payment of the \$25,000.00 penalty, their commitment to cease and desist as contained in Section V.D.2. above, completion of all activities required hereunder, and upon the Board's approval of this Stipulation, the Complainant releases, waives and discharges the Respondents, 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 May 5, 2004. The Complainant reserves, and this Stipulation is without prejudice to, all rights of the State of Illinois against the Respondents 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 may have against any person, as defined by Section 3.315 of the Act, 415 ILCS 5/3.315, or entity other than the Respondents.

F. Enforcement and Modification of Stipulation

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. 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.

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

PEOPLE OF THE STATE OF ILLINOIS,

LISA MADIGAN
Attorney General
State of Illinois

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

BY: 

ROSEMARIE GAZEAU, Chief
Environmental Bureau
Assistant Attorney General

DATE: 10/11/11

THE ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

LISA BONNETT, Interim Director
Illinois Environmental Protection Agency

BY: 

JOHN J. KIM
Chief Legal Counsel

DATE: 10/6/11

SMITHFIELD PROPERTIES IV, L.L.C.
By Harris Management, Ltd, its manager

BY: 

Name: W. Harris Smith
Title: President

DATE: 9/21/11

WOOTON CONSTRUCTION, LTD.

BY: 


Name: W. Harris Smith

Title: President

DATE: 9/21/11

CERTIFICATE OF SERVICE

I, ZEMEHERET BEREKET-AB, an Assistant Attorney General, do certify that I caused to be served on this 11th day of October, 2011, the foregoing Notice of Filing, a Stipulation and Proposal for Settlement, and an Agreed Motion for Relief from the Hearing Requirement, upon the persons listed on said Notice by placing same in an envelope bearing sufficient postage with the United States Postal Service located at 100 West Randolph Street, Chicago, Illinois.

A handwritten signature in black ink, appearing to read "Zemeheret Bereket-AB", is written over a horizontal line.

ZEMEHERET BEREKET-AB

G:\Environmental Enforcement\Z BEREKET-AB\SMITHFIELD\NOF&Cert 10-11-11.Doc

THIS FILING IS SUBMITTED ON RECYCLED PAPER