

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
)
 v.)
)
 UNION PACIFIC RAILROAD COMPANY, a)
 Delaware Corporation, and WALSH CONSTRUCTION)
 COMPANY, an Illinois corporation,)
)
 Respondents)

PCB No. 13-66 (Water)

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 Illinois Pollution Control Board by electronic filing the following Stipulation and Proposal for Settlement, a copy of which is attached and hereby served upon you.

Respectfully submitted,

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

By: 

ROBERT W. PETTI
Assistant Attorney General
Environmental Bureau
Illinois Attorney General's Office
69 W. Washington St., 18th Floor
Chicago, Illinois 60602
(312) 814-2069

Date: March 5, 2014

THIS FILING IS SUBMITTED ON RECYCLED PAPER

Service List

John Therriault
Assistant Clerk
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, IL 60601
(by electronic filing)

Mr. Rami S. Hanash
Senior Environmental Compliance Counsel
1400 Douglas Street – MS 1580
Omaha, NE 68179

Mr. Eric Klupp
Walsh Construction Company
929 W. Adams Street
Chicago, IL 60607

CERTIFICATE OF SERVICE

I, Robert W. Petti, an Assistant Attorney General, certify that on the 5th day of March 2014, I caused to be served by U.S. Certified Mail (return receipt requested), the foregoing Notice of Filing, Stipulation and Proposal for Settlement, and Certificate of Service to the parties named on the attached Service List, by depositing same in postage prepaid envelopes with the United States Postal Service located at 100 West Randolph Street, Chicago, Illinois 60601.

A handwritten signature in black ink, appearing to read 'Robert W. Petti', written over a horizontal line.

Robert W. Petti
Assistant Attorney General
Environmental Bureau
Illinois Attorney General's Office
69 W. Washington Street, Suite 1800
Chicago, Illinois 60602
(312) 814-2069

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB NO. 13-66
)	(Enforcement - Water)
UNION PACIFIC RAILROAD)	
COMPANY, a Delaware corporation, and)	
WALSH CONSTRUCTION COMPANY,)	
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"), Union Pacific Railroad Company, a Delaware corporation ("Union Pacific"), and Walsh Construction Company, an Illinois corporation ("Walsh"), (collectively "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. (2012), 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 29, 2013, 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 (2012), against Union Pacific and Walsh (collectively the "Respondents").

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 (2012).

3. At all times relevant to the Complaint, Union Pacific was and is a Delaware corporation that is authorized to transact business in the State of Illinois.

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

5. At all times relevant to the Complaint, Union Pacific owned and operated a railroad business.

6. At all times relevant to the Complaint, Walsh owned and operated a commercial construction business.

7. In, or subsequent to, 2008, on dates better known to Respondents, Union Pacific hired Walsh Construction to construct a railroad bridge over Addison Creek in Bellwood, Cook County, Illinois to replace an existing timber bridge (the "Bridge Project").

8. In late 2010, Respondents commenced work on the Bridge Project.

B. Allegations of Non-Compliance

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

Count I: Water Pollution, in violation of Section 12(a) of the Act, 415 ILCS 5/12(a) (2012); and

Count II: Water Pollution Hazard, in violation of Section 12(d) of the Act, 415 ILCS 5/12(d) (2012).

Complainant further contends that Union Pacific has violated the following provisions of

the Act:

Count III: Failure to Comply with a National Pollution Discharge Elimination System Permit, in violation of Section 12(f) of the Act, 415ILCS 5/12(f) (2012).

C. Non-Admission of Violations

The Respondents represent that they have entered into this Stipulation, jointly and severally, 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, the Respondents do not affirmatively admit the allegations of violation within the Complaint and referenced within Section I.B herein, and this Stipulation shall not be interpreted as including such admission.

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 their 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 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 (2012).

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

Section 33(c) of the Act, 415 ILCS 5/33(c) (2012), 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 the Stipulation state the following:

1. The environment was harmed by the Respondents' violations, which resulted in the release of silt and sediment laden stormwater into the waters of the State.
2. There is social and economic benefit to Union Pacific's railroad business and Walsh's commercial construction activities.
3. The construction of a new railroad bridge and embankment for the bridge as part of the Bridge Project was, and is, suitable for the area in which the activities were performed.
4. It is technically practical and economically reasonable to prevent silt and sediment laden stormwater from entering waters of the State.
5. Respondents have 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) (2012), 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;
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 as follows:

1. The Complainant contends that while performing construction work at the Site, Respondents failed to provide proper stormwater containment controls for the project, which resulted in the release of silt and sediment laden stormwater into the waters of the State over the duration of the Bridge Project in 2010 and 2011. The Complainant further contends that respondent Union Pacific failed to comply with the terms and conditions of its NPDES Permit during the performance of the Bridge Project in those same years.
2. Upon being informed of the violations and the discharge of silt and sediment laden stormwater into the waters of the State, Respondents have taken steps to ensure that no further discharges occur by implementing proper stormwater control measures at the Bridge Project.
3. Any economic benefit of noncompliance derived by Respondents will be recouped as part of the civil penalty to be paid in this matter.
4. Complainant has determined, based upon the specific facts of this matter, that a

joint and several penalty of \$25,000.00 will serve to deter further violations and aid in future voluntary compliance with the Act and Board regulations.

5. Since 1995, the Illinois Attorney General's Office has filed several complaints, not including the present matter, in circuit court or before the Board against Respondent Union Pacific for alleged violations of the Act and/or Board Regulations. Of the twelve complaints, eleven have been resolved by an order of the court or the Board and one remains pending.

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

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

8. A Compliance Commitment Agreement was not at issue in this matter.

V. TERMS OF SETTLEMENT

A. **Penalty Payment**

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

B. **Interest and Default**

1. If either Respondent fails 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, jointly and severally, and the remaining unpaid balance of the penalty, plus any accrued interest, shall be due and owing immediately from the Respondents. 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

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 ("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, Illinois 62794-9276

2. The case name and case number shall appear on the face of the certified check or money order.

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

Robert W. Petti
Assistant Attorney General
Environmental Bureau
Illinois Attorney General's Office
69 W. 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 joint and several penalty, and any accrued interest, their commitment to cease and desist as contained in Section V.D.2 above, 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 29, 2013. 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 Respondents' 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 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.

(The rest of this page is intentionally left blank.)

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 ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

LISA MADIGAN
Attorney General
State of Illinois

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

LISA BONNETT, Director

BY: _____
ELIZABETH WALLACE, Chief
Assistant Attorney General
Environmental Bureau

BY: _____
JOHN J. KIM
Chief Legal Counsel

DATE: _____

DATE: _____

Union Pacific Railroad Company

Walsh Construction Company

By: *David J. [Signature]*

By: _____

Its: *General Solicitor*

Its: _____

DATE: *January 31, 2014*

DATE: _____

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 ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

LISA MADIGAN
Attorney General
State of Illinois

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

LISA BONNETT, Director

BY: _____
ELIZABETH WALLACE, Chief
Assistant Attorney General
Environmental Bureau

BY: _____
JOHN J. KIM
Chief Legal Counsel

DATE: _____

DATE: _____

Union Pacific Railroad Company

Walsh Construction Company

By: _____

By: Eric Mygg

Its: _____

Its: CORPORATE COUNSEL

DATE: _____

DATE: 1-30-2014