

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

LENORA PERRINE, et al.,

Plaintiffs,

v.

Case No. 04-C-296-2
Judge Thomas A. Bedell

E. I. DUPONT DE NEMOURS &
COMPANY, et al.,

Defendants.

**FINAL ORDER DETERMINING THE USE AND DISTRIBUTION OF THE
REMEDATION FUND SURPLUS**

Presently before the Court is the issue of the fair and equitable use and distribution of the projected remaining funds in the Property Remediation Qualified Settlement Fund (the "Property QSF"), with the Claims Administrator having submitted a winding-up projected budget, and the surplus being projected to remain upon the completion of the remaining aspects of the Settlement Property Remediation Program, in late 2016 or early 2017. The Claims Administrator, Ed Gentle, filed a Report with the Court on this matter on June 15, 2016, which is incorporated by reference and made part of the record herein.

The Property Remediation Program is expected to be completed in late 2016 or early 2017, with remaining repairs resulting from the Remediation Program to be conducted on claimant properties, and previously approved road repairs to be conducted in Zone 1A due to the use of heavy equipment in the area during the past four (4) years for soil remediation. Also to be performed are Zone 1A infrastructure improvements described below. After the completion of these final measures of the Remediation Program, the Claims Administrator projects that there is a surplus in the Property QSF of approximately \$4 million.

Out of the 1,227 Property Remediation claims filed with the Claims Administrator and approved, approximately 992 properties participated in the Property Remediation Program (the "participating claimants"), while approximately 235 properties, at the option of their claimant owners, did not participate (the "nonparticipating claimants").

To fairly notice the Property Remediation Class of the surplus and possible uses of the surplus, the Claims Administrator conducted a multi-step process, beginning with inviting all participating claimant Class Members to a series of public Town Hall Meetings to gather their input and opinions. After the Town Hall Meetings, which were conducted in March 2016, the Claims Administrator developed a detailed questionnaire describing the available options for use of the surplus, which was mailed to the 992 participating claimants on May 26, 2016..

As of the June 8, 2016, response deadline for the questionnaires, 281 families responded and provided their opinions and votes, which are tabulated and described in the Report.

The Court set a public Fairness Hearing for June 22, 2016, at 8:30A.M., and the participating claimants received written notice of the hearing, together with the questionnaire results. The hearing was timely held to allow presentation of the issues related to the use and distribution of the surplus to the Court, and to allow any interested participating claimants to state their positions and concerns to the Court.

The following individuals attended the hearing: Ed Gentle, the Claims Administrator; Meredith McCarthy, Esq., as guardian *ad litem* and proxy for Class Counsel; Jim Arnold, Esq., telephonically, as counsel for DuPont; Michael Jacks, as local counsel for the Claims Administrator; Settlement Remediation Supervisor Paul Emerson; Settlement Staff members Christy Mullins and Sarah Cayton; Settlement Scientific and Technical Remediation Advisor Marc Glass; and Remediation Contractor, NorthStar Demolition and Remediation f/k/a NCM,

employees Stan Keifer and Tom Archer. Additionally, approximately 40 claimants appeared at the hearing, and seven claimants voiced their opinions on the matter, as summarized herein.

The salient issues presented to the Court are identified below:

- 1) Should the additional claimant requested Zone 1A infrastructure repairs, identified in Question A of the Report, be conducted and paid for out of surplus funds?
- 2) Should claimants living in Zone 1A, who had residential soil remediation as well as residential house remediation, receive a larger share of the surplus than claimants in the outer zones, who only received house remediation? A related issue is whether a Zone 1A claimant should receive one share of the dividend for the soil, and a second share of the dividend for the house, or only one share for the entire property.
- 3) Should surplus shares be divided per claimant or per property? For example, if one claimant owns three Class Area properties, should the claimant receive three shares or one share or should a compromise method be used?
- 4) Should claimants who were eligible to participate in the Remediation Program and who successfully completed and submitted a Property Claim but who then elected not to participate in the Remediation Program (the nonparticipating claimants) receive a share of the surplus?

The following claimants spoke at the hearing, and their input is summarized below.

Shafter "Bud" Drummond spoke, and noted that he is a lifelong resident of Spelter, and a retired volunteer Fire Fighter. Mr. Drummond requested that a small portion of the surplus be used to benefit the Spelter Volunteer Fire Department. Mr. Drummond noted that the Spelter Volunteer Fire Department is currently faced with an expense of approximately \$40,000 to

purchase new air tanks, and Mr. Drummond requested that adequate surplus funds be estimated for this expense.

Trudy Heil spoke, and requested that a portion of the surplus funds be used to drain surface water that is pooling behind her property, located in Eire, where soil remediation was conducted.

Athal Canaday spoke, and he also requested that the surface water pooling behind his property, which is adjacent to Ms. Heil's, be corrected with surplus funds. The Claims Administrator noted that Mr. Canaday's concerns are set for a separate hearing specific to his property on July 27, 2016, so they will not be addressed in this Order.

Albert Sheaffer spoke, and noted that he is also lifelong Spelter resident, and former employee of the zinc plant. Mr. Sheaffer noted that of the approximately 40 claimants in attendance, 4 were using breathing equipment for supplemental oxygen, and he requested that long term residents of the Class Area, particularly Zone 1A, receive a greater share of the surplus due to the claimed greater impact of the zinc plant on their lives and properties.

Jerry Stevens spoke, and he thanked the remediation crews and the Court, and suggested that a greater portion of the surplus go to the claimants who had lived in the Class Area the longest, and therefore were most impacted. The Court noted, in a moment of levity, that this approach would require inquiring into the age of all of the ladies in the Class Area, a task in which Mr. Stevens wisely declined to participate. The Court also finds that this suggested approach is impractical, as the surplus is from a Remediation Fund and not a Personal Injury Fund.

Shawn Shingleton, another lifelong Spelter resident, spoke, and he suggested that claimants from Zone 1A receive double shares of the surplus, due to the claimed larger impact of

the remediation process on their lives during the past four years. Mr. Shingleton noted that he was relocated for more than three weeks to allow his property to be remediated, and indicated that he has ongoing issues with the new sod on his property, which the Claims Administrator is addressing through separate proceedings. The Court therefore will not address the sod issue in connection with Mr. Shingleton's property in this Order.

Frank Tate, another Spelter resident, spoke, and he thanked the clean-up crews for their efforts. Mr. Tate suggested that distribution of the surplus should go to those who lived in the area the longest, and to those who lived in Zone 1A, and were impacted the most. Mr. Tate also voiced his opinion that the State was responsible for repairing the roads, not the Settlement. The Claims Administrator noted that the Court has already approved a Road Improvement Program to ensure that the Remediation Program leaves the roads in Zone 1A as good as they were found, with such road repairs being standard in similar Remediation Programs.

The Court has carefully reviewed the documents and questionnaire results in the Report, and the other relevant submissions of the Claims Administrator. The Court further thanks the Class Members for their opinions and input into these important matters, which are a great benefit to the Court, and which were carefully considered by the Court.

The Court notes that the law as to the distribution of residual funds in a class action case is generally governed by the *cy pres* doctrine, which literally translates to "as nearly as possible" to the original purpose of the funds, and shares principles with the distribution of funds in estate matters, sometimes referred to as equitable reformation or equitable approximation. *Berry v. Union National Bank*, 262 S.E.2d 766 (W.Va. 1980). See also, Ed Gentle, [The Cy Pres Distribution of a Class Action Recovery Surplus: Equity or Inequity?](#), 66 Alabama L. Rev. 1 On-Line (2015).

The Court has also been advised by the Claims Administrator that some of the properties subject to the Remediation Program, both those owned by participating claimants and those owned by nonparticipating claimants, have been sold during the course of the Remediation Program. It is therefore appropriate to determine the relative rights of former and current owners of such properties to the surplus.

After a careful review of the facts of the matter and of the pertinent law, the Court hereby **ORDERS** that the Claims Administrator apply the following rulings to the distribution of the surplus:

- 1) The additional road and infrastructure repairs and modifications described in the Report and questionnaire are approved, as are the requested drainage repairs in Eire identified by Ms. Heil, and to the extent they are consented to by the affected property owner(s), and shall be performed under the supervision of the Claims Administrator;
- 2) The Zone 1A participating claimants, defined above, shall each receive a double share, compared to participating claimants in the outer zones. That is, the soil property that participated is entitled to a share and the house that participated is entitled to a share. Because these were 2 claims, with each being counted as a separate claim, this decision is in accordance with the Court's prior Order dated June 27, 2011 which states that "any extra remediation funds shall be distributed equally to all participants in the Property Remediation Program". Of course, if a Zone 1A property only had soil and not a house that participated, or a house and not a soil that participated, the property is only to receive a single share.

8) The surplus pertaining to properties sold between November 1, 2011 and the date of this Order shall be distributed as follows:

a. For participating claimants, defined above, the Court notes that they received 2 remediation annoyance and inconvenience payments, a 20% payment after their property was tested for contaminants, and an 80% payment after remediation was determined not to be necessary or was completed. It is therefore appropriate to pay (i) 20% of the surplus share to the then owners of the property at the time of the 20% initial payment; and (ii) 80% of the surplus share to the then owners of the property at the time of the second 80% payment.

b. For nonparticipating claimants, defined above, by analogy, the Court finds it appropriate to pay 20% of the surplus to the owners of the property when it was tested for contaminants and at the time the 20% payment was made (if the claimant unit withdrew from the Remediation Program prior to receiving the 20% payment, the determination date will be November 1, 2011), and 80% as of the date of this Order. Provided the Claims Administrator acts strictly in accordance with the protocols and the directives of this Order, he and his staff are granted Judicial Immunity.

Pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, the Court directs entry of this Order as a Final Order as to the claims and issues above upon an express determination that there is no just reason for delay and upon an express direction for the entry for judgment.

IT IS SO ORDERED.

The Clerk of this Court shall provide certified copies of this Order to the following:

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James S. Arnold
Thomas Combs & Spann, PLLC
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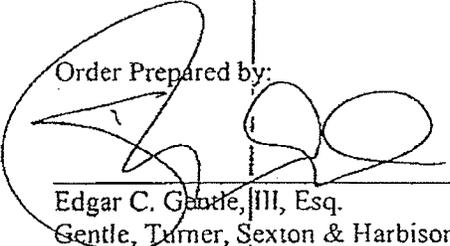
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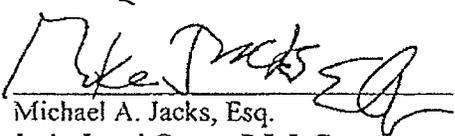
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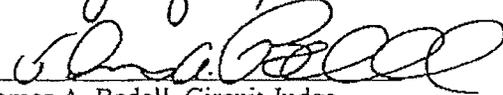
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ENTER:

July 13, 2016

Thomas A. Bedell, Circuit Judge