

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

LENORA PERRINE, et al., individuals
residing in West Virginia, on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

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

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

Defendants.

**FINAL ORDER APPROVING RULES FOR COMPUTATION OF ZONE 1A SOIL
ANNOYANCE AND INCONVENIENCE PAYMENTS IN RELATION TO THE
REMEDATION (CLEAN-UP) PROGRAM**

Presently pending before the Court is the Claims Administrator's October 27, 2011, Report and Recommendation for the computation of the soil inconvenience payments in the Property Clean-Up Program in Zone 1A filed on October 24, 2011 (the "Report,").

After a careful review of the Report, and in consideration of applicable law, the Court makes the following findings:

The Court entered the "Final Order Establishing Property Remediation (Clean-Up) Program" on June 27, 2011. With regard to the payment of annoyance and inconvenience money for houses or commercial structures fit for human occupancy and regularly occupied by people, which is a uniform amount of five hundred dollars (\$500) per house or eligible structure, there is no difficulty or un-workability in the implementation process.

With regard to the five thousand dollars (\$5,000) base soil remediation annoyance and inconvenience payment which the Court established for the Zone 1A Soil Remediation Program,

on a per property basis, there is some uncertainty brought when a "property" may be eligible for more than the base payment. The pertinent language follows:

With respect to payments for annoyance and inconvenience ... the Court Orders the following: Owners of eligible properties in Zone 1A, regardless of size, in recognition of the annoyance and inconvenience caused by the soil clean-up, shall receive (\$5,000.00) five thousand dollars per property. This amount shall be divided into two payments, one at the time of verification of a claim for remediation for eligible Zone 1A soil, and one at the time of testing and completion of remediation of the Zone 1A soil, and/or certification of the that the property is safe and does not need to be remediated. The first payment shall be one thousand dollars (\$1,000.00). The second payment shall be four thousand dollars (\$4,000.00).

...

The property remediation program and the related annoyance and inconvenience payments shall be based on each individual parcel for tax identification purposes in the Class Area ... if a Class Member owns more than one eligible lot or parcel that are next to each other, and assessed for property taxes together, only one annoyance and inconvenience payment will be made for the property's house(s) or soil (in Zone 1A only) if the Class Member qualifies the affected property. If a Class Member has more than one eligible lot or parcel assessed separately, then multiple annoyance and inconvenience payments will be made if the Class Member qualifies the affected properties.

June 27, 2011, "Final Order," at pages 11-12 (emphasis in original).

Difficulty has arisen in the definition of separate "properties" for annoyance and inconvenience payments based solely on tax parcels because the Claims Administrator reports that such tax assessments by the Harrison County Tax Office are not uniform or consistent, in the sense that they do not correlate with the size of a property uniformly.

The Claims Administrator reports that some Zone 1A property owners have requested an additional soil annoyance and inconvenience payment based on the separate assessment of contiguous small portions of their property which are separate for tax purposes, but visually and practically indistinguishable from their neighbors' properties, which are also contiguous and are

the same general size but have only one assessment. The average lot size in Spelter is approximately fifty (50) feet by one hundred and fifty (150) feet, totaling seven thousand five hundred (7,500) square feet, or 1/6 of an acre, according to the representations and research of the Claims Administrator. Some individuals own three contiguous lots assessed separately, and some own three contiguous lots assessed once, despite the properties being virtually identical, and consisting of one house and a larger than average yard. Three average Spelter lots, when combined, make up approximately one half acre.¹

Allowing a literal interpretation of the language of the Final Order quoted above without further definition and action by the Court may lead to some Zone 1A property owners receiving twice or three times as much money as other owners, for virtually identical properties. Such an inequitable result is the bane of Judges and Special Masters, who seek, above all else, to be consistent in their decisions in the application of rules.

A parallel issue is the request of some Zone 1A property owners to receive additional annoyance and inconvenience payments for large properties, assessed once, with an above average lot size. While the inconvenience to an owner of a five (5) acre parcel being remediated is certainly larger than that to the owner of the average lot in Spelter, which is much smaller, the benefit provided by the Settlement to the owner of a larger property, and the expenditure of limited Settlement resources on remediation, is much higher. Accordingly, the argument can be made that there should be increased money paid to the owners of large lots, although there is a counter-argument that the benefit to the owner of a large lot is already correspondingly larger than that to the owner of a small lot.

¹ One half acre is approximately 21,780 square feet. And $3 \times 7,500 = 22,500$.

In light of the above issues, the Court hereby **ORDERS** the following:

1. The soil annoyance and inconvenience payment for Zone 1A "property" whose components are contiguous, i.e. a "property" in Zone 1A which has the same owners and is not separated by other properties owned by other individuals or entities and has a uniform boundary that closes on all sides, shall be uniform regardless of the number of tax parcels that make up the "property," and shall be \$5,000 (the "general rule"), except as qualified below.
2. An exception to the general rule shall be when one owner has two or more adjacent houses each on separate lots (that can be contiguous) that are assessed separately. Each lot shall be considered a separate property meriting a separate \$5,000 soil inconvenience and annoyance payment, despite there being a common boundary between the lots and/or tax parcels.
3. A property that is equal to or less than one half (1/2) acre, i.e. less than 21,780 square feet, shall be considered one property for purposes of the \$5,000 soil annoyance and inconvenience payment, and will merit only one payment, unless the exception in paragraph 2, above, applies.
4. A property that does not meet the exception in paragraph 2 and is larger than one half (1/2) acre but equal to or less than one (1) acre shall entitle the owner(s) to a total soil annoyance and inconvenience payment of seven thousand five hundred dollars (\$7,500).
5. A property that does not meet the exception in paragraph 2 and is larger than one (1) acre shall entitle the owner(s) to a soil annoyance and inconvenience payment of ten thousand dollars (\$10,000).

6. In no case shall the owner(s) of a soil Zone 1A property be entitled to more than a ten thousand dollars (\$10,000) soil annoyance and inconvenience payment for a single property.
7. Properties that are not contiguous shall be considered separate for the assessment of soil annoyance and inconvenience payments, regardless of the size of each property.

The Court **FURTHER ORDERS** that the Claims Administrator has the authority to utilize the above rules in the determination of the soil appropriate award of annoyance and inconvenience monies to Zone 1A Soil property owners. Further, should an unusual or special case arise, the Claims Administrator has the authority to design a unique remedy for the property. In any case that a property owner disagrees with the decision of the Claims Administrator, the Claims Administrator shall first try to resolve the issue fairly, and such decision shall be appealable to this Court for a final determination as necessary.

Lastly, 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.

Finally, it is **ORDERED** that the Clerk of this Court shall provide certified copies of this Order to the following:

David B. Thomas
James S. Arnold
Stephanie Thacker
Guthrie & Thomas, PLLC
P.O. Box 3394
Charleston, WV 25333-3394

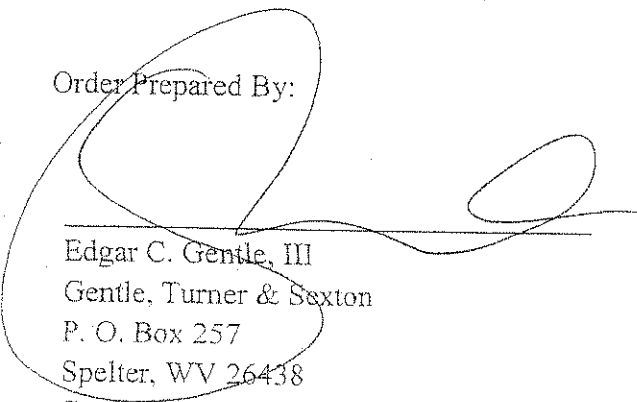
Meredith McCarthy
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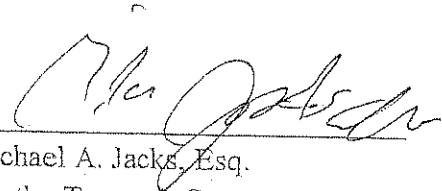
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Order Prepared By:



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Special Master



Michael A. Jacks, Esq.
Gentle, Turner & Sexton
W.Va. Bar No 11044
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Spelter, WV 26438

ENTER: November 1, 2011



Thomas A. Bedell, Circuit Judge

STATE OF WEST VIRGINIA
COUNTY OF HARRISON, TO-WIT:

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18th
Family Court Circuit of Harrison County, West Virginia, hereby certify the
foregoing to be a true copy of the ORDER entered in the above styled action
on the 1 day of November, 2011.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix

Seal of the Court this 2 day of November, 20 11.

Donald L. Kopp II
Fifteenth Judicial Circuit & 18th Family Court
Circuit Clerk
Harrison County, West Virginia