

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

THE CITY OF ALBUQUERQUE and)	
THE BERNALILLO COUNTY)	
COMMISSIONERS, et al)	
)	
Plaintiffs,)	Civil Action No.
)	CIV 97 0206 LH/JHG
v.)	
)	Consolidated with:
SPARTON TECHNOLOGY, INC.,))	CIV 97 0208 JC/RLP
)	CIV 97 0210 M/DJS
Defendant.)	CIV 97 0981 LH/JHG
)	

AGREED ORDER

Whereas, by Order dated July 7, 1998 this Court ordered Sparton Technology, Inc. ("Sparton") to implement the "Workplan for the Installation of Additional Wells and Conducting a Pump Test in the Area of the Leading Edge of the Contaminant Plume Originating From The Sparton Technology, Inc. Coors Road Facility" ("the Workplan") attached to that Order; and

Whereas, the schedule incorporated into the Workplan required Sparton to complete all work required by the Workplan within twenty-two weeks of July 7, 1998 (i.e., December 7, 1998); and

Whereas, Sparton did not complete all work required in the Workplan by December 7, 1998;

Whereas the United States of America, the State of New Mexico, the New Mexico Office of the Natural Resources Trustee, the New Mexico Environment Department, the City of Albuquerque, the Bernalillo County Commissioners (collectively "Plaintiffs"), and Sparton hereby consent to this Agreed Order.

It is hereby Ordered that the July 7, 1998 Order and the Workplan shall be modified as follows:

1. The deadline for completion of the work required by the Workplan is extended to February 12, 1999.

2. If Sparton fails to timely complete the work required by the Workplan and/or by this order on or before the specified deadline, Sparton shall pay stipulated penalties to the United States according to the following schedule:

- \$2000 per day from the first day after the deadline through the 10th day after the deadline;
- \$5,000 per day from the eleventh day after the deadline through the 28th day after the deadline; and
- \$8,000 per day from the 29th day after the deadline through the day all work required by the Workplan is completed.

Sparton shall pay any stipulated penalty incurred by cashier's or certified check or money order payable to "Treasurer of the United States" by the 15th day of the month following the month in which the violation(s) occurred. The certified check or money order shall be delivered to the Financial Litigation Unit for the United States Attorney's Office for the District of New Mexico accompanied by a letter listing the name and case number of this civil action and describing the basis for the stipulated penalties paid.

3. The following provisions shall apply to any failure by Sparton to comply with a deadline:

- A. "Force majeure," for purposes of this Agreed Order, is defined as any event arising from causes beyond the control of Sparton, any entity controlled by Sparton, or Sparton's contractors, that delays or prevents the performance of any obligation under this Agreed Order despite Sparton's best efforts to fulfill the obligation. Such events may include but not be limited to fire, unusual delay in transportation, adverse weather conditions, unavoidable casualties, and acts of God, war or riot. The requirement that the Settling Defendants exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects

of any potential force majeure event (1) as it is occurring and (2) following the potential force majeure event, such that the delay is minimized to the greatest extent possible.

"Force Majeure" does not include financial inability to complete the Work specified in the Workplan

B. If any event occurs or has occurred that may delay completion of the work required by the Workplan and/or this Agreed Order, whether or not caused by a force majeure event, Sparton shall notify orally the Plaintiffs' representatives identified in Section IV of the Workplan within twenty-four hours of when Sparton first knew that the event might cause a delay. Within five days thereafter, Sparton shall provide in writing to the Plaintiffs' representatives an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Sparton's rationale for attributing such delay to a force majeure event if it intends to assert such a claim; and a statement as to whether, in the opinion of Sparton, such event may cause or contribute to an endangerment to public health, welfare or the environment. Sparton shall include with any notice all available documentation supporting its claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Sparton from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Sparton shall be deemed to know of any circumstance of which Sparton, any entity controlled by Sparton, or Sparton's contractors knew or should have known.

C. If Plaintiffs agree that the delay or anticipated delay is attributable to a force majeure event, the time for completion of the work required by the Workplan and/or the work required by this Agreed Order will be extended for such time as is necessary to

complete those obligations. If Plaintiffs do not agree that the delay or anticipated delay has been or will be caused by a force majeure event, Plaintiffs will notify Sparton in writing of its decision. If Plaintiffs agree that the delay is attributable to a force majeure event, Plaintiffs will notify Sparton in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

D. If Sparton elects to dispute any determination made by Plaintiffs pursuant to Subparagraph C above, it shall appeal that decision by filing a motion seeking review no later than 15 days after receipt of Plaintiffs' notice. In any such motion, Sparton shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Sparton complied with the requirements of Subparagraphs A and B above. If Sparton meets this burden, the delay at issue shall be deemed not to be a failure by Sparton to comply with the deadline specified in this Agreed Order.

4. Sparton will perform an infiltration test as specified in the attached Workplan for a Robust Infiltration Test." Sparton will complete this infiltration test by March 31, 1999.

5. Sparton agrees to provide EPA access to one of the observation wells installed pursuant to Section II(B) of the Workplan so that EPA may arrange for Quantum Engineering to perform a borehole flowmeter test. **This test is to be performed (specify a date).** Either Quantum Engineering or the company to which it subcontracts shall maintain at least the minimum amounts of third person liability insurance coverage specified in the relevant company's contract with the EPA. EPA may elect to have a company other than Quantum Engineering perform the borehole flowmeter test; however, if EPA so elects, then EPA will provide to Sparton information regarding the technical qualifications, financial strength, and insurance coverage of the company

to perform the work. If EPA elects to have a company other than Quantum Engineering perform the borehole flowmeter test, then Sparton only agrees to provide EPA access to one its observation wells for the purpose of performing the test if Sparton is satisfied with the technical qualifications, financial strength, and insurance coverage of the company selected by EPA to perform the borehole flowmeter test. This Agreed Order shall not be construed as limiting the United States' right of access under any statute including, but not limited to, RCRA Section 3007, 42 U.S.C. 6927.

6. By their consent to this agreed order, Plaintiffs hereby waive any right to seek penalties or sanctions for Sparton's failure to complete the work required by the Workplan by December 7, 1998.

ORDERED this _____ day of _____ 1999.

Honorable C. Leroy Hansen
United States District Court Judge
District of New Mexico

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