

DATE: MAY 18, 2009

CLERK: MARY BETH BAILEY

MASSILLON CITY COUNCIL
CITY OF MASSILLON, OHIO
GLENN E. GAMBER, PRESIDENT

COUNCIL CHAMBERS

LEGISLATIVE DEPARTMENT

ORDINANCE NO. 77 - 2009

BY: ENVIRONMENTAL COMMITTEE

TITLE: AN ORDINANCE authorizing the Mayor of the City of Massillon, Ohio, to enter into the Settlement Agreement with Infilco Degremont, Inc., regarding the pending lawsuit concerning the construction and upgrade of the Wastewater Treatment Plant, and declaring an emergency.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF MASSILLON, STATE OF OHIO, THAT:

Section 1:

The Council of the City of Massillon, Ohio, hereby determines it to be necessary in the public health, safety and welfare to enter into the Settlement Agreement with Infilco Degremont, Inc., regarding the pending lawsuit concerning the construction and upgrade of the Wastewater Treatment Plant.

Section 2:

The Mayor of the City of Massillon, Ohio, is hereby authorized and directed to enter into the Settlement Agreement with Infilco Degremont, Inc., regarding the pending lawsuit concerning the construction and upgrade of the Wastewater Treatment Plant. The terms of the agreement will be in substantially the form as attached hereto.

(ATTACHED EXHIBIT "A" HERETO)

Section 3:

The Settlement proceeds shall be deposited in the WWTP account from which the legal fees were paid.

Section 4:

This Ordinance is hereby declared to be an emergency measure necessary for the preservation of the health, safety and welfare of the community and for the additional reason that it is necessary the issues concerning the litigation regarding the construction and upgrade of the Wastewater Treatment Plant be resolved so that the city can receive the settlement and the ABW filters be made functional. Provided it receives the affirmative vote of two-thirds of the elected members to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor. Otherwise, it shall take effect and be in force from and after the earliest period allowed by law.

PASSED IN COUNCIL THIS 1st DAY OF June, 2009

ATTEST:

Mary Beth Bailey
MARY BETH BAILEY, CLERK OF COUNCIL

Glenn E. Gamber
GLENN E. GAMBER, PRESIDENT

APPROVED:

June 1, 2009

Francis H. Cicchinelli, Jr.
FRANCIS H. CICCHINELLI, JR., MAYOR

I hereby certify that the foregoing ordinance
is a true copy of the original, as passed by
the Council of the City of Massillon, Ohio,
and approved as noted therein:

Mary Beth Bailey
Clerk of Council

Date

6/1/09

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Settlement Agreement") is made as of the date a copy executed by the Mayor of the City of Massillon, Ohio is delivered to Infilco ("Effective Date") by and among **The City of Massillon, Ohio** ("Massillon") and **Infilco Degremont, Inc., f/k/a Ondo Degremont, Inc. ("Infilco")** and **Smith Environmental, Inc. ("Smith")** (Infilco and Smith are hereby collectively referred to as "Defendants").

WHEREAS, on or about December 18, 2001, Kokosing Construction Company, Inc. ("Kokosing") and Massillon entered into a construction agreement related to the project known as the Regional Waste Water Treatment Plant Upgrade 2000 in Massillon, Ohio (the "Project"); and

WHEREAS, on May 4, 1999, Massillon entered into an agreement with CTI Environmental, Inc. ("CTI") for the design and performance of civil and structural engineering services on the Project; and

WHEREAS, Kokosing entered into an agreement with Infilco in May of 2002 for Infilco to supply to Kokosing three automatic backwash filters ("ABW Filters") to be installed by Kokosing as part of the Project;

WHEREAS, on January 25, 2008, Massillon instituted suit against Smith, Infilco and CTI, being Case No. 2008 CV 00445 pending in Stark County, Ohio ("Lawsuit"), alleging causes of action against the Defendants for breach of express warranty, breach of implied warranty for fitness for a particular purpose, breach of implied warranty of merchantability, breach of implied warranty in tort, negligent misrepresentation and, pursuant to an Amended Complaint, promissory estoppel; and

WHEREAS, Massillon has assigned any claims it has against CTI arising out of the May 4, 1999 agreement with Kokosing, which claims are proceeding, if at all, in arbitration between Kokosing and CTI. A copy of the Settlement Agreement between Massillon and Kokosing was provided to counsel for Infilco and Smith during the discovery phase of the Lawsuit; and

WHEREAS, Infilco and Smith assert that to the extent that the ABW Filters are not performing to the satisfaction of Massillon, such failure is a direct result of the treatment process at the Massillon Waste Water Treatment Plant and other characteristics of the effluent being provided to the ABW Filters and is not a result of any defects or failures of the ABW Filters; and

WHEREAS, Infilco and Smith have denied and continue to deny any and all liability for any of the claims or causes of actions asserted by Massillon, but desire to resolve this Lawsuit solely in an effort to mitigate the costs of defending the Lawsuit; and

WHEREAS, Infilco, Smith and Massillon wish to enter into this Settlement Agreement in order to resolve their respective disputes with one another without any admission of liability or responsibility on the part of any of the parties hereto;

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein and for other good and valuable consideration, the adequacy of which is hereby acknowledged, it is hereby agreed as follows:

1. The above paragraphs are fully incorporated by reference and are not mere recitals and are relied upon by the parties hereto as a mutual material part of this Settlement Agreement.

2. Within ninety (90) days of the Effective Date, Infilco shall commence replacement of the porous plate underdrains on the three ABW Filters with porous aluminum oxide plates that are no smaller than 7-inches by 11-inches in size. The aluminum oxide plates shall be of the type customarily used as underdrain plates in the filtration of biologically treated settled secondary effluent. The aluminum oxide plates shall have a nominal pore size of 1200 to 1300 microns and shall be in reasonably close conformity to the aluminum oxide plates tested in connection with the Lawsuit by Infilco in March 2009 using 2,500 gallons of secondary effluent from Massillon's wastewater treatment plant. Infilco shall also furnish recommended operations and maintenance procedures for the aluminum oxide plates, including chemical cleaning procedures.

3. The media in each of the filters shall be removed and disposed of by Infilco and replaced by Infilco with sand and anthracite media meeting the following characteristics:

a. Silica Sand. The filter media shall be a nominal 8-inch thick layer of high grade silica sand, complying with the Standard Specifications for Filtering Material (American Water Works Association [AWWA] Designation B100). The sand will be well graded, and material showing abnormal grading will be rejected. The particle size distribution will be determined by screening through standard U.S. Series sieves. The percent size will be determined from a plot of percentages of the material passing each sieve, against the rated opening of the sieve. The 10 percent size or effective size will be between 0.55 and 0.65 millimeters. The uniformity coefficient (ratio of 60 percent size to 10 percent size) will not exceed 1.50.

b. Anthracite. The upper layer shall be a nominal 8-inch thick clean crushed type anthracite size number 1½ with an effective size of 0.85 to 0.95 millimeters. The uniformity coefficient shall not exceed 1.7.

During the replacement of the porous plate underdrain, Massillon shall divert the flow of water from the ABW Filter being renovated and shall work cooperatively and in good faith with Infilco to permit Infilco to accomplish the renovation in an effective and cost-efficient manner. Infilco shall exercise ordinary care in performing its work under this Settlement Agreement.

4. Infilco shall provide a guarantee for the joints between the aluminum oxide plates in the form and with the terms and conditions set forth in the guarantee attached hereto as Exhibit A, which is specifically incorporated herein.

5. Within five (5) business days of the Effective Date, Infilco shall pay Massillon the sum of Two Hundred Twenty Five Thousand and no/100 Dollars (\$225,000.00).

6. Within five (5) business days of the Effective Date, Massillon shall file a dismissal of all claims in the Lawsuit against Infilco and Smith, with prejudice, pursuant to Ohio Civil Rule 41(A)(1)(a). Each party shall pay its costs due to the Clerk of Courts.

7. Massillon has not and shall not hereafter institute or prosecute any suit, arbitration, demand, counterclaim, cross-claim, action or claim of any type or nature against CTI, Kokosing or any other third-party arising out of or resulting from the sale, installation or operation of the ABW Filters at the Project.

8. In consideration of the promises and agreements provided for in this Settlement Agreement, Massillon hereby releases and forever discharges Smith and Infilco, and their respective heirs, representatives, successors, predecessors, parent companies,

subsidiaries, affiliates, sister companies, divisions, beneficiaries, officers, directors, shareholders, members, employees, agents, subcontractors, attorneys, and insurers (collectively, "Releasees") from and against any and all claims, complaints, actions, causes of action, suits, liabilities, obligations, promises, controversies, damages, losses, debts and expenses (including attorneys' fees and costs), and claims in law or equity of any nature whatsoever, known or unknown, suspected or unsuspected, that they now have or ever had: (i) that were or could have been asserted in the Lawsuit; or (ii) that arose out of or related to the matters, allegations or circumstances in the Lawsuit, including the sale, installation and/or operation of the ABW Filters. Smith and Infilco likewise release Massillon from and against any and all claims, complaints, actions, causes of action, suits, liabilities, obligations, promises, controversies, damages, losses, debts and expenses (including attorneys' fees and costs), and claims in law or equity of any nature whatsoever, known or unknown, suspected or unsuspected, that they now have or ever had that were or could have been asserted in the Lawsuit. The releases in this paragraph shall not apply to the rights and obligations of the parties to enforce the terms of this Settlement Agreement.

9. Massillon represents and warrants that none of the claims it has asserted against Infilco or Smith in the Lawsuit or which it could have asserted against Infilco or Smith in the Lawsuit have been assigned, transferred or otherwise conveyed to any other person or entity, and that such claims are fully and exclusively owned by Massillon. Massillon represents and warrants that it has not made or asserted, and will not make or assert, any claim against CTI, Kokosing or any other party that could form the basis of such third-party asserting any claim against any one or more Releasees, arising out of the sale, installation or operation of the ABW Filters. Massillon represents and warrants that if it

asserts any claim against CTI, Kokosing or any other party which causes such party to directly or indirectly assert a claim against any one or more of the Releasees, arising out of the sale, installation or operation of the ABW Filters, Massillon shall promptly dismiss such claim and shall not continue to assert such claim.

10. This Settlement Agreement shall be binding upon and inure to the benefit of the agents, assigns, affiliates, parents, subsidiaries, directors, officers, members, employees, representatives, partners, shareholders, insurers, and attorneys of the parties to this Settlement Agreement.

11. This Settlement Agreement shall be governed by the laws of the State of Ohio.

12. Infilco, Smith and Massillon further agree that any claims or disputes between them arising out of or related to this Settlement Agreement shall be subject to and decided by mandatory and binding arbitration in accordance with the construction industry rules of the American Arbitration Association ("AAA") and that such arbitration shall be commenced by either party through the filing of a demand for arbitration with AAA, with such arbitration being administered through the AAA Management Center. Any such arbitration shall take place in the State of Ohio.

13. The parties to this Settlement Agreement stipulate and agree that the settlement provided for herein is not and shall not be construed to be evidence of any admission by Infilco or Smith concerning the validity of any of the claims asserted by Massillon. Rather, Infilco and Smith have entered into this Settlement Agreement for the strict and sole purpose of resolving the matters relating to the Lawsuit.

IT IS AGREED.

MAYOR, CITY OF MASSILLON, OHIO

Sign: _____

Print: _____

Date: _____

CITY ATTORNEY, CITY OF MASSILLON, OHIO

Sign: _____

Print: _____

Date: _____

INFILCO DEGREMONT, INC.

Sign: 

Print: S.J. BHAN

Title: CEO

Date: 5/28/09

SMITH ENVIRONMENTAL, INC.

Sign: _____

Print: _____

Title: _____

Date: _____

EXHIBIT A TO SETTLEMENT AGREEMENT BETWEEN INFILCO DEGREMONT AND CITY OF MASSILLON, OHIO

IDI EXTENDED SPECIAL WARRANTY

IDI warrants that the butt joints on the porous plate for the ABW Filters at the Massillon Regional Wastewater Treatment Plant shall be free from defects in material and workmanship for a period of five (5) years from the date of installation. Upon IDI's receipt of written notice within five (5) business days of discovery of any defect, and a determination by IDI that such defect is covered under the foregoing warranty, IDI shall, at its option, repair or replace the defective part or parts, including any labor incurred in such repair or replacement. This warranty does not cover failure or damage due to operation or maintenance not in conformance with IDI's written instructions and requirements or due to accident, misuse, abuse, or neglect. Without limiting the generality of the foregoing, this warranty does not cover failure or damage due to upstream processes, including, but not limited to, caustic or corrosive elements in the influent stream. In addition, as a condition of this warranty, Owner must supply IDI with documentation (such as operator logs) verifying compliance upon request. IDI provides no warranty of product performance or process results. Correction of non-conformities in the manner and for the period of time provided above shall constitute IDI's sole liability and purchaser's exclusive remedy for failure of IDI to meet its warranty obligations, whether claims of purchaser are based in contract, tort (including negligence or strict liability), or otherwise. The foregoing warranties are exclusive and in lieu of all other warranties of any kind, express or implied, including any implied warranty of merchantability or fitness for a particular purpose.