

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
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AUG 23 2010

STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.)
)
FREEPORT AREA ECONOMIC)
DEVELOPMENT FOUNDATION, d/b/a)
Northwest Illinois Development Alliance, an)
Illinois not-for-profit corporation, & WEITZ)
INDUSTRIAL, LLC,)
)
Respondents.)

No. 10-89
(Enforcement - Water)

NOTICE OF FILING

To: ANDREW J. NICHOLAS
Assistant Attorney General
Environmental Bureau
69 W. Washington St., Suite 1800
Chicago, Illinois 60602

DAN G. FISHBURN
Fishburn Whiton Thrumman
8 East Stephenson Street
Freeport, IL 61032
(815) 235-2511

PLEASE TAKE NOTICE that on the 23rd day of August, 2010, we filed a MOTION FOR LEAVE TO FILE THIRD PARTY COMPLAINT AND CROSS CLAIM on behalf of Respondent Weitz Industrial, LLC before the Illinois Pollution Control Board, a copy which is attached and served upon you.

(THIS FILING IS SUBMITTED ON RECYCLED PAPER)

Respectfully submitted,

WEITZ INDUSTRIAL, LLC

By  _____
One of Its Attorneys

DATED: August 23, 2010

Jeryl L. Olson
Elizabeth Leifel Ash
Seyfarth Shaw LLP
131 S. Dearborn Street
Suite 2400
Chicago, Illinois 60603
(312) 460-5000

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RESPONDENT'S MOTION TO FILE THIRD PARTY COMPLAINT AND CROSS-CLAIM

NOW COMES RESPONDENT, WEITZ INDUSTRIAL, LLC, ("Weitz") by and through its attorneys, Seyfarth Shaw LLP, and pursuant to 35 Ill. Adm. Code § 103.206(d), seeks leave to file a Third Party Complaint against Fischer Excavating, Inc. and Fehr Graham & Associates, Inc., and to file a Cross-Claim against Respondent Freeport Area Economic Development Foundation. In support of its Motion, Weitz states as follows:

Third Party Claims

1. Respondent Freeport Area Economic Development Foundation ("FAEDF") hired Respondent Weitz as the general contractor to build a bio-fuels facility in Freeport, Illinois. FAEDF also hired Fehr Graham & Associates ("Fehr Graham"), an architecture firm, to select the site and design the bio-fuels facility.

2. Under the FAEDF contract, it was Fehr Graham's responsibility to submit the Notice of Intent to be covered under the Illinois Construction Site Activity Storm Water General Permit. Fehr Graham also prepared the Storm Water Pollution Prevention Plan ("SWPPP") for the site on behalf of the FAEDF.

(THIS FILING IS SUBMITTED ON RECYCLED PAPER)

3. Weitz sub-contracted site preparation work, including grading and sewer installation, to Fischer Excavating, Inc. (“Fisher Excavating”).

4. Under Weitz’s contract with Fischer Excavating, it was within Fischer Excavating’s scope of services to ensure that the construction site was compliant with NPDES Permit No. ILR10G259 (the “Permit”) and SWPPP developed under the Permit.

5. Specifically, Fischer Excavating was responsible for installing and maintaining silt fencing around the perimeter of the construction site in order to prevent sediment from running off of the site.

6. The Complainant has filed this action against FAEDF and Weitz, alleging that they caused or allowed pollution via the runoff of sediment from the construction site. Complainant’s Complaint does not name Fehr Graham or Fischer Excavating as Respondents in this matter.

7. The Illinois Pollution Control Board (IPCB) permits a party to file a third-party complaint to add a party to an existing enforcement action. 35 Ill. Adm. Code § 103.206(d).

8. Here, because Fischer Excavating was contractually obligated to ensure compliance with the Permit and the SWPPP, it is Weitz’s position that to the extent any non-compliance occurred at the construction site as alleged by the Complainant, Fischer Excavating is responsible.

9. In addition, because Fehr Graham was responsible for developing and implementing the SWPPP, it is Weitz’s position that Fehr Graham was responsible for ensuring that the SWPPP was implemented in compliance with the Permit.

10. Weitz therefore has claims against Fischer Excavating and Fehr Graham that arise out of the occurrences that are the subject of this proceeding, and a complete determination of this controversy cannot be had without the presence of Fischer Excavating and Fehr Graham.

11. Accordingly, Weitz requests leave from the Board to file a Third-Party Complaint against Fischer Excavating and Fehr Graham in this proceeding.

Cross-Claim

12. In addition, Weitz is requesting leave to file a Cross-Claim for indemnification against the FAEDF.

13. On or about January 23, 2008, Adam Holder, acting on behalf of the Stephenson County Board, which owned and operated the FAEDF, issued a written letter to Weitz that stated:

FAEDF hereby indemnifies and releases Weitz of any liability and/or payment responsibilities for any fines that may be levied by Stephenson County or any other regulatory agency for the IEPA Stormwater violation that occurred last fall. If a fine is issued, FAEDF will look solely to Fischer Excavating for payment the fine amount [sic] and any related liability by deducting it from the amounts owed by FAEDF to Fischer Excavating.

14. Subsequently, on December 9, 2008 and again on February 2, 2010, counsel for Weitz sent letters to Mr. Holder and to the Stephenson County Board requesting indemnification for any and all liabilities, including settlements, fines, and/or penalties incurred by Weitz as a result of the Complainant's enforcement action. Those letters have gone unanswered.

15. Accordingly, Weitz seeks leave from the Board to file a cross claim for indemnification against the FAEDF in this matter.

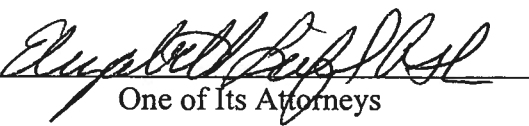
WHEREFORE, for all of the foregoing reasons, Respondent Weitz Industrial, LLC respectfully requests an Order granting leave to file a Third-Party Complaint against Fischer

Excavating, Inc. and Fehr Graham & Associates, Inc., and granting leave to file a Cross Claim against the Freeport Area Economic Development Foundation and ordering such other relief as is just and appropriate.

DATED: August 23, 2010

Respectfully submitted,

WEITZ INDUSTRIAL, LLC

By 
One of Its Attorneys

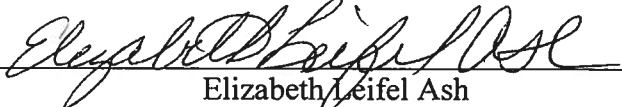
Jeryl L. Olson
Elizabeth Leifel Ash
SEYFARTH SHAW LLP
131 S. Dearborn Street, Suite 2400
Chicago, Illinois 60603
(312) 460-5000

CERTIFICATE OF SERVICE

I, Elizabeth Leifel Ash, an attorney, do hereby certify that I have caused a true and correct copy of the foregoing NOTICE OF FILING and RESPONDENTS' MOTION FOR LEAVE TO FILE THIRD PARTY COMPLAINT AND CROSS CLAIM to be served upon the following, by depositing a copy of same in the U.S. Mail, postage prepaid, on this 23rd day of August, 2010:

ANDREW J. NICHOLAS
Assistant Attorney General
Environmental Bureau
69 W. Washington St., Suite 1800
Chicago, Illinois 60602

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