

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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AUG 30 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 Thruman  
8 East Stephenson Street  
Freeport, IL 61032  
(815) 235-2511

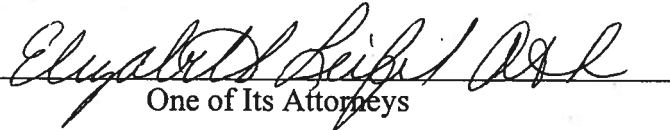
Fischer Excavating, Inc.  
c/o David D. Shockey  
208 W. Stephenson  
Freeport, IL 61032

PLEASE TAKE NOTICE that on the 30th day of August, 2010, we filed an AMENDED 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 30, 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 AMENDED 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. ("Fischer 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.

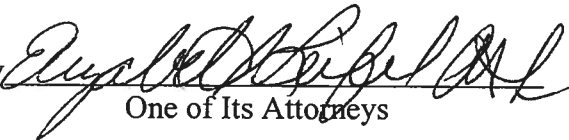
WHEREFORE, for all of the foregoing reasons, Respondent Weitz Industrial, LLC respectfully requests an Order granting leave to file a Third-Party Complaint against Fischer

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 30, 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  
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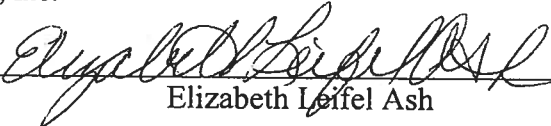
**CERTIFICATE OF SERVICE**

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' AMENDED 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 30th day of August, 2010:

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

DAN G. FISHBURN  
Fishburn Whiton Thruman  
8 East Stephenson Street  
Freeport, IL 61032  
(815) 235-2511  
Attorney for Respondent Freeport Area Economic Development  
Corp. and Registered Agent for Fehr-Graham & Associates

Fischer Excavating, Inc.  
c/o David D. Shockey  
208 W. Stephenson  
Freeport, IL 61032  
Registered Agent for Proposed Third-Party Respondent Fischer  
Excavating, Inc.

  
Elizabeth Leifel Ash