

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS
Pollution Control Board

SCOTT MAYER,)
Complainant,)
vs.)
) PCB 2011-022
LINCOLN PRAIRIE WATER COMPANY,)
KORTE & LUITJOHAN CONTRACTORS, INC.,)
and MILANO & GRUNLOH ENGINEERS, LLC,)
Respondents.)

COPY

ENTRY OF APPEARANCE

On behalf of the Respondent, Milano & Grunloh Engineers, LLC, Kirk A. Holman of the law firm of LIVINGSTON, BARGER, BRANDT & SCHROEDER hereby enters his Appearance as attorney of record.

Milano & Grunloh Engineers, LLC,
Respondent

By: LIVINGSTON, BARGER, BRANDT
& SCHROEDER

By: Kirk A. Holman
Kirk A. Holman

CERTIFICATE OF SERVICE

The undersigned certifies that on 12/13, 2010, all counsel of record were served with a copy of the foregoing document at their respective addresses by the method indicated below:

- U.S. Mail
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Kirk A. Holman

LIVINGSTON
BARGER
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 KORTE & LUITJOHAN CONTRACTORS, INC.,)
 and MILANO & GRUNLOH ENGINEERS, LLC,)
 Respondents.)

MOTION TO DISMISS PURSUANT TO TITLE 35, SECTION 103.212(B)

Now comes the Respondent, Milano & Grunloh Engineers, LLC, by its attorneys, LIVINGSTON, BARGER, BRANDT & SCHROEDER, and hereby moves the Illinois Pollution Control Board to dismiss the Complaint filed by the Complainant, Scott Mayer, pursuant to Section 103.212(b) of Title 35 of the General Provisions of the Pollution Control Act for the reason that the Complaint is duplicative and frivolous as that term is defined in Title 35, Subtitle A, Chapter 1, Section 101.202; and in support thereof, Respondent states as follows:

1. That the allegations contained in the Complainant's Complaint do not state a cause of action because the facts contained therein establish that there is no violation of the Illinois EPA, despite the conclusions found in the Complaint.
2. The Complainant's Complaint states that the Respondent, Korte & Luitjohan Contractors, Inc., on behalf of the Respondent, Lincoln Prairie Water Company, installed a water main along an easement on the property owned by the Complainant and in so doing, shredded into various sized pieces a telephone cable. (See Complaint at Paragraph 6).
3. Also stated in the Complaint, Complainant states that the pieces of wire, aluminum and plastic coating were bulldozed into the trench. (See Complaint at Paragraph 7).

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4. After the installation of the water main, the area of the Complainant's property was subsequently planted and harvested in corn. (See Complaint at Paragraphs 8 and 9).

5. It was not until after the field was tilled following the corn harvest that the Complainant noticed pieces of wire, aluminum and plastic coating in the soil within the easement.

6. The materials described in the Complaint are components of a telephone cable which was in the ground prior to the work of the Respondent, Korte & Luitjohan Contractors, Inc., and which was placed back in the ground (albeit in a different condition) after the work was completed.

7. After the materials were placed into the ground, it was possible to utilize the ground and, in fact, the Complainant admits to having utilized it in order to grow corn on the property.

8. As a matter of law, the components of telephone cable do not create an environmentally dangerous condition and are not to be considered pollutants.

9. The Complainant admits as much by asserting that they constitute "non-hazardous, uncontaminated materials".

10. That in Count III, Paragraph 7 of the Complainant's Complaint, the Complainant alleges that this Respondent, Milano & Grunloh Engineers, LLC, provided construction, inspection and observation for the benefit of the Complainant, Scott Mayer. This allegation is incorrect in that this Respondent did not have any contract with the Complainant but, rather, had a contract with Lincoln Prairie Water Company. There was no relationship between this Respondent and the Complainant and, therefore, this Respondent owed no duty to the Complainant to inspect and observe the construction work being performed by the Respondent, Korte & Luitjohan.

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NO OPEN DUMPING

11. That in Count III, Paragraph 24, the Complaint refers to Section 21 of the Illinois EPA wherein it provides the following prohibitions against open dumping of any waste. The Complainant has alleged that the Respondent, Korte & Luitjohan Contractors violated Section 21 of the Illinois EPA by engaging in open dumping of waste, including general construction or demolition debris as defined in Section 3.160 of the Act.

12. The facts, as found in the Complaint, make it clear that the Respondents did not engage in open dumping during the course of this construction project. Open dumping is defined in the Act as:

"Consolidation of refuse from one or more sources at a disposable site that does not fulfill the requirements of a sanitary landfill." 415 ILCS 5/3.305 (2006).

13. That there is no allegation found in the Complaint that there has been consolidation of refuse from one or more sources at a disposable site of any kind. In fact, the evidence is that there has been no consolidation of refuse from one or more sources at a disposal site of any kind.

NO WASTE

14. The Complaint contains the language which it asserts represents a violation: the definition of general construction debris is cited at Paragraph 25 of Count III of the Complainant's Complaint. Section 3.160 of the Illinois EPA provides the following:

"General construction or demolition debris means non-hazardous, uncontaminated materials resulting from the construction, remodeling, repair and demolition of utilities, structures and roads, limited to the following: bricks, concrete,

and other masonry material; soil; rocks; wood, including non-hazardous painted, treated, and coated wood and wood products; wall coverings; plaster; drywall; plumbing fixtures; non-asbestos insulation; roofing shingles and other roof coverings; reclaimed asphalt pavement; glass; plastics that are not sealed in a manner that conceals waste; electrical wiring and components containing no hazardous substances; and piping or metals incidental to any of those materials.”

15. This section of the Illinois EPA and this paragraph of the Complainant’s Complaint itemizes what constitutes construction or demolition debris and specifically states that the definition of construction or demolition debris is “limited to” the itemized materials. Telephone wire is not one of those itemized materials and, therefore, the materials do not constitute general construction debris or demolition debris.

16. As such, the prohibition against open dumping has nothing whatsoever to do with this property and the materials generated do not constitute general construction or demolition debris as defined in Section 3.160(a) of the Act.

DUPLICATIVE LITIGATION

17. The Complainant, Scott Mayer, has already filed a lawsuit against this Respondent and the two Co-Respondents and that lawsuit is pending in Shelby County Circuit Court under case number 2008 L 5. Therefore, this Complaint filed before the Illinois Pollution Control Board is duplicative of Plaintiff’s already pending cause of action in Shelby County. The Complainant is complaining of the same acts of the Respondents in the Shelby County Circuit Court case. The Respondent, Korte & Luitjohan Contractors, Inc. has attached to its Motion to Dismiss a copy of the Complainant’s Third Amended Complaint filed in the Shelby County Circuit Court case and this Respondent, Milano & Grunloh Engineers, adopts those exhibits as part of this Motion to Dismiss. The claim in the pending Complaint before the Illinois Pollution

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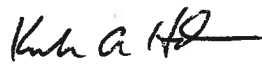
Control Board and the claim asserted in the Shelby County Circuit Court case are identical. In the interest of judicial economy, this Complaint before the Illinois Pollution Control Board should be dismissed because it is duplicative of the Complainant's already pending claim filed in February 2008 in the Circuit Court of Shelby County.

18. That this Respondent adopts and incorporates herein the Motions to Dismiss and Memorandum in support of the Motion to Dismiss filed by the Co-Respondent's, Lincoln Prairie Water Company and Korte & Luitjohan Contractors, Inc.

WHEREFORE, the Respondent, Milano & Grunloh Engineers, LLC, respectfully pray that the Complaint of the Complainant, Scott Mayer, be dismissed and that this Respondent, Milano & Grunloh Engineers, LLC, recover its costs, and for such further relief as the Illinois Pollution Control Board deems just and proper.

Milano & Grunloh Engineers, LLC,
Respondent

By: LIVINGSTON, BARGER, BRANDT
& SCHROEDER

By: 
Kirk A. Holman

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