

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ROLF SCHILLING, PAM SCHILLING and)	
SUZANNE VENTURA,)	
Complainants,)	
)	
v.)	
)	
GARY D. HILL, VILLA LAND TRUST, and)	
PRAIRIE LIVING WEST, LLC,)	
Respondents,)	PCB No. 10-100
)	
and)	
)	
GARY D. HILL and PRAIRIE LIVING WEST,)	
LLC,)	
Third-Party Complainants,)	
)	
v.)	
)	
HORVE CONTRACTORS, INC.,)	
Third-Party Respondent.)	

MOTION TO DISMISS

NOW COMES Third-Party Respondent, HORVE CONTRACTORS, INC., by its undersigned attorneys, and moves to dismiss the Third-Party Complaint herein, pursuant to Section 31(d)(1) of the Environmental Protection Act (Act) (415 ILCS 5/31(d)(1)) and Section 103.212(b) of the Board's Procedural Rules (35 Ill. Adm. Code 103.212(b)), on the grounds that the Third-Party Complaint seeks relief that the Board does not have the authority to grant and fails to state a cause of action upon which the Board can grant relief. In support of this Motion, Third-Party Respondent states as follows:

1. The Board should dismiss any action that is frivolous. An action before the Board is frivolous if it is a "request for relief that the Board does not have authority to grant" or "fails to state a cause of action upon which the Board can grant relief." 35 Ill. Adm. Code 101.202. In this case, the Third-Party Complaint is frivolous for both reasons.

2. The Third-Party Complaint herein proceeds on a theory of contractual indemnity, that is, on the theory that because Third-Party Respondent signed a contract containing an obligation to “indemnify and hold harmless” the Third-Party Complainant Prairie Living West, LLC, under certain circumstances, the Board should interpret and enforce that contractual provision here against Third-Party Respondent.

3. However, the Board has no authority to interpret and enforce contractual provisions or to grant relief in the form of contractual indemnification.

4. The Board, as an administrative agency, is a creature of statute, and therefore has only the authority given to it by the Act. Granite City Div. of Nat. Steel Co. v. PCB, 155 Ill 2d 149, 171, 613 NE 2d 719, 729 (1993). Nowhere in the Act is the Board expressly authorized to grant the relief requested by Third-Party Complainants herein, namely, “indemnifications . . . for damages” related to the alleged acts and omissions of Third-Party Respondent. Third-Party Complaint, Paragraph 12.

5. Nor can the right to bring a third-party action for interpretation and enforcement of a contractual indemnity provision be implied under the Act. Even though the Illinois Legislature has provided that third-party actions may be brought in limited situations (see, e.g., Section 45(d) of the Act, 415 ILCS 5/45(d)), the Board cannot itself entertain such actions without special authority, for it is “powerless to expand its authority beyond that which the legislature has expressly granted to it.” McHenry County Landfill, Inc. v. IEPA, 154 Ill. App. 3d 89, 95, 506 NE 2d 372, 376 (2nd Dist. 1987).

6. Moreover, the contract relied upon itself provides that a claim for indemnification, like any other claim that may be asserted by parties to the contract, shall first be

referred to the Architect, Spencer Architects, for initial decision, with ultimate and binding dispute resolution to be provided by arbitration. Third-Party Complaint, Exhibit A, Sec. 6.2; Exhibit B, Sec. 15.4.

7. Consequently, the relief available to the Third-Party Complainants, if any, under the contractual indemnification clause relied upon herein by them, is up to the arbitrator, not the Board, to decide.

8. Even if the Board were authorized to enforce contractual indemnity clauses (which it is not), the contract upon which Third-Party Complainants are basing their claim was entered into on June 17, 2009 (Third-Party Complaint, Paragraph 5), whereas the underlying Complaint alleges that certain complained-of acts occurred prior to June 17, 2009, as to which no contractual indemnity provision is pled; further, the Third-Party Complaint does not allege negligence on the part of Third-Party Respondent, without which no duty to indemnify arises. Third-Party Complaint, Paragraph 7.

9. In addition to the above-stated reasons for dismissal, the Third-Party Complaint fails to meet the basic pleading requirements of Section 103.204(c) of the Board's Procedural Rules by failing to allege what specific "acts or omissions" of Third-Party Respondent would give rise to any relief under the Act. See also 415 ILCS 5/31(d)(1) and (c)(1).

10. Third-Party Complainants' reference to the allegations appearing in the underlying Citizen's Complaint fails to satisfy these basic pleading requirements because the underlying Citizen's Complaint accuses only the Third-Party Complainants of violating the Act and actually admonishes them for having "ignored and disregarded" the advice given to them by Third-Party Respondent on the subjects of erosion and run-off:

Further, Respondents [Third-Party Complainants] have ignored and disregarded the advice and counsel of their own . . . construction company [Third-Party Respondent] with respect to measures which could and should be taken to control the erosion and run-off of sediments and other contaminants from the Phase II construction activities onto Complainants' property and into the Pond.

Citizen's Complaint, Paragraph 12.

11. Because the Third-Party Complaint fails to state a cause of action upon which the Board can grant relief, and because the relief requested is beyond the authority of the Board to grant, the Third-Party Complaint is frivolous and must be dismissed.

WHEREFORE, Third-Party Respondent respectfully prays that the Board dismiss the Third-Party Complaint, with prejudice, and for such other and further relief as may be meet and just.

Respectfully submitted,

HORVE CONTRACTORS, INC.,
Third-Party Respondent,

By its attorneys,
MOHAN, ALEWELT, PRILLAMAN & ADAMI

By: /s/Fred C. Prillaman
Fred C. Prillaman

By: /s/Joel A. Benoit
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NOTICE OF FILING AND PROOF OF SERVICE

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PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, pursuant to Board Procedural Rule 101.302 (d), a Motion to Dismiss, a copy of which is herewith served upon the hearing officer and upon the attorneys of record in this cause.

The undersigned hereby certified that a true and correct copy of this Notice of Filing, together with a copy of the document described above, were today served upon the hearing

officer and counsel of record of all parties to this cause by enclosing same in envelopes and addressed to such attorneys and to said hearing officer with postage fully prepaid, and by depositing said envelopes in a U.S. Post office mailbox in Springfield, Illinois on the 15th day of April, 2011.

/s/Fred C. Prillaman
Fred C. Prillaman

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THIS FILING SUBMITTED ON RECYCLED PAPER