

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ROLF SCHILLING, PAM SCHILLING and)
 SUZZANE VENTURRA,)
)
 Complainants,)
)
 vs.)
)
 GARY D. HILL, VILLA LAND TRUST , and)
 PRAIRIE LIVING WEST, LLC,)
)
 Respondents,)
)
 and)
)
 GARY D. HILL and PRAIRIE LIVING WEST,)
 LLC,)
)
 Third Party Complainants,)
)
 vs.)
)
 HORVE CONTRACTORS, INC.,)
)
 Third Party Respondent.)

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MAY 18 2011
STATE OF ILLINOIS
Pollution Control Board

PCB. No. 10-100

ORIGINAL

RESPONSE TO MOTION TO DISMISS THIRD PARTY COMPLAINT

NOW COME the Respondents/Third Party Complainants, GARY D. HILL and PRAIRIE LIVING WEST, LLC, by and through their attorneys, Winters, Brewster, Crosby and Schafer LLC, and for their response to the Motion to Dismiss Third Party Complaint filed by Third Party Respondent, HORVE CONTRACTORS, INC., and for said Response, hereby state as follows:

1. On or about April 18, 2011, Third Party Respondent, HORVE CONTRACTORS, INC. (hereinafter "HORVE") filed a Motion to Dismiss Third Party Complaint, alleging that the Third Party Complaint should be dismissed because the Board has no authority to interpret and enforce the indemnification agreement, and

because the Third Party Complaint does not allege acts or omissions of Third Party Respondents giving rise to relief under the Act.

2. The Third Party Complaint brings HORVE into the suit via two avenues. First, Document A201 - 2007 makes HORVE contractually responsible for complying with “applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to performance of the Work,” (“Exhibit B”, § 3.7.2), from which the Complainants’ Complaint arises. Second, HORVE is contractually obligated to indemnify Third Party Complainants for any claims or damages arising from the work to be performed on the Prairie Living West project.
3. The Third Party Complaint sufficiently states a cause of action against HORVE because same alleges that “should it be shown there were violations of the IEPA as alleged in Complainants’ Complaint, those violations are the result of the acts or omissions of HORVE, and/or HORVE’s agents, as HORVE was in charge of the work and responsible for compliance with the SWPPP.” (Third Party Complaint, ¶ 11). Simply put, even if there are shown to be violations of the IEPA, enumerated in paragraphs 17 and 18 of the Complaint, those violations are the result of HORVE’s acts and omissions, and not that of Third Party Complainants. Even though HORVE claims that Third Party Complainants’ references to the Citizen’s Complaint are insufficiently pled because they refer only to Third Party Complainants violations, the reference sufficiently makes HORVE aware of what it is being accused. However, should this Board determine that Third Party Complainants have not sufficiently pled the acts and

omissions of HORVE, Third Party Complainants respectfully seek leave to amend the Third Party Complaint to add such allegations.

4. Further, HORVE maintains that the Third Party Complaint is based on a contract dated June 17, 2009, whereas the underlying Complaint alleges occurrences prior to said date for which no contractual indemnity is pled. However, Complainants' allege violations of permit ILR10L1343, which is the permit applicable to Phase II, and not Phase I. Further, even though Complainants' allege violations on Phase I, that does not void HORVE's obligations under Documents A101-2007 and A201-2007, and as general contractor for Phase I. As pled, Third Party Complainants allege that prior to June 17, 2009, HORVE was hired to be, and was the General Contractor on Phase I of Prairie Living at Chautauqua, located at 955 Villa Court, Carbondale, IL 629101. (Third Party Complaint, ¶ 9). "Liability for pollution of land or water extends under the Environmental Act to any person who has control of the source of pollution, or who owns or controls the premises where the pollution occurs. *Illinois State Toll Highway Authority v. Amoco Oil Co.*, 336 Ill. App. 3d 300, 313 (2d Dist. 2003). Because Third Party Complainants have alleged that HORVE was hired to be, and was the General Contractor on Phase I, in that capacity, HORVE had control of both the source of any alleged pollution and control of the premises, making a HORVE liable for any pollution on Phase I or Phase II of the project and thus, proper party in this case.
5. Second, Section 31(d)(1) of the IEPA enables a party to "...file with the Board a complaint, meeting the requirements of subsection (c) of this Section, against any person allegedly violating this Act, any rule or regulation adopted under this Act,

any permit or term or condition of a permit, or any Board order.”

6. Pursuant to 35 ILAC Section 101.403,

The Board, on its own motion or the motion of any party, may add a person as a party to any adjudicatory proceeding if:

- 1) A complete determination of a controversy cannot be had without the presence of the person who is not already a party to the proceeding;
- 2) The person who is not already a party to the proceeding has an interest that the Board’s order may affect; or
- 3) It may be necessary for the Board to impose a condition on the person who is not already a party to the proceeding.

7. According to HORVE, the Board does not have the authority, or essentially, the subject matter jurisdiction, to “entertain such actions [indemnity]”. (Motion to Dismiss, ¶ 2). In support of its contention, it states that “...the Illinois Legislature has provided that third-party actions may be brought in limited situations....” Because the Act and the Board’s rules provide a mechanism by which to add third party litigants to an action, see 415 ILCS 5/31(d)(1) and 35 ILAC § 101.403, the Board has the authority to adjudicate disputes between the parties, including indemnification provisions.

8. HORVE overlooks the fact that the Illinois General Assembly has empowered the Board to adjudicate and enforce indemnification provisions throughout the IEPA. See 415 ILCS 5/57.8a(d); 415 ILCS 5/22.2(g)(1)-(2); 415 ILCS 5/57.6, 57.9, 57.11. Several other sections talk about the Board’s ability to order reimbursement for costs and fees, including attorney’s fees, see 415 ILCS 5/57.5, while other sections talk about the ability seek subrogation under the IEPA. See 415 ILCS 5/22.2(g)(2), 415 ILCS 5/57.6(h). Therefore, to contend that the Illinois

General Assembly did not grant the Board authority to adjudicate and enforce such issues as indemnification clearly undermines the plain language of the Act. The clear language of a statute is the best indicator of legislative intent. *People v. NL Industries*, 152 Ill.2d 82, 97 (1992). “Statutes must be read as a whole; all relevant parts of the statute must be considered when courts attempt to divine the legislative intent underlying the statute.” *Id.* at 98.

9. In the event that the Board determines that it does not have the authority to interpret and enforce any such indemnification agreement, then Third Party Complainants nonetheless maintain a cause of action against HORVE for violating the Act, and respectfully request leave to amend their Third Party Complaint.
10. Based upon the foregoing, Third Party Complainants have sufficiently stated a cause of action upon which relief can be granted by the Board, and the Motion to Dismiss filed by Third Party Respondent should be denied.

WHEREFORE, Third Party Complainants respectfully request that the Board deny Third-Party Respondent’s Motion to Dismiss, and should the Board find the Third Party Complaint factually deficient, Third Party Complainants respectfully request that the Board grant them leave for twenty eight (28) days from receipt of the Board’s Order in which to file a First Amended Third Party Complaint to correct any such pleading deficiency.

WINTERS, BREWSTER, CROSBY and SCHAFFER LLC

BY: _____

Molly Wilson Dearing
Attorneys for Third Party Complainants
ARDC No. 6294101

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the above and foregoing instrument was mailed by depositing the same in a U.S. Post Office Box in the City of Marion, Illinois, postage fully prepaid and addressed to:

Mr. Stephen F. Hedinger
Sorling, Northrup, Hanna,
Cullen, & Cochran, Ltd.
Suite 800 Illinois Building
P O Box 5131
Springfield, IL 62705

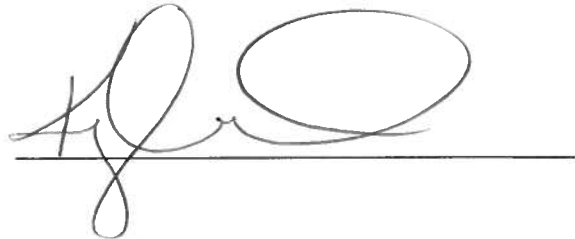
Ms. Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274

Mr. Fred C. Prillaman
Mohan, Alewelt, Prillaman & Adami
Suite 325, 1 North Old Capitol Plaza
Springfield, IL 62701-13223

The undersigned certifies that a copy of the above and foregoing instrument was mailed by delivering the original and nine copies to the U.S. Post Office Box in the City of Marion, Illinois, postage fully prepaid and addressed to:

Mr. John T. Therriault
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, IL 60601

Dated this 16th day of May, 2011.

A handwritten signature in black ink, appearing to read "John T. Therriault", is written over a horizontal line. The signature is stylized and cursive.

WINTERS, BREWSTER, CROSBY and SCHAFER LLC
Attorneys at Law
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Marion, IL 62959
Phone: (618) 997-5611
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May 16, 2011

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MAY 18 2011

STATE OF ILLINOIS
Pollution Control Board

RE: Prairie Living West/Clean Water Suit
Case No. 10-L-43; PCB No. 2010-100, IL Pollution Control Board; Jackson Co.
WBCS No. 10-185-JSB/TFC/MRD

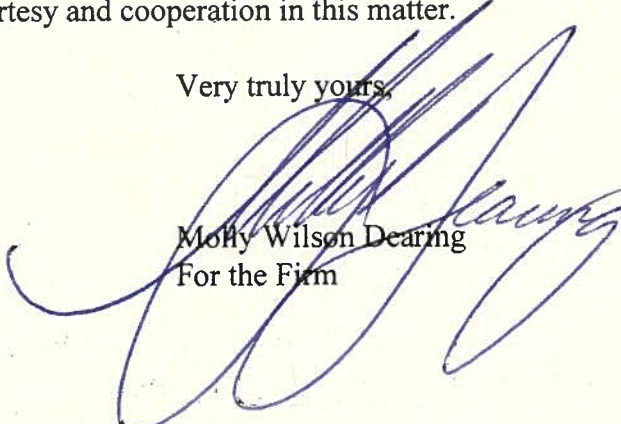
ORIGINAL

Dear Mr. Therriault:

Enclosed you will find an original and nine (9) copies of Response to Motion to Dismiss Third Party Complaint in the above referenced matter. Please file the original(s) and return a file-stamped duplicate to me in the self-addressed, preposted envelope enclosed for this purpose.

Thank you for your courtesy and cooperation in this matter.

Very truly yours,


Molly Wilson Dearing
For the Firm

MD/kw

Enc.

cc: Mr. Stephen Hedinger
Ms. Carol Webb
Mr. Fred Prillaman