

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,)

and)
)
 GARY D. HILL and PRAIRIE LIVING WEST,)
 LLC,)
 Third-Party Complainants,)
 v.)
)
 HORVE CONTRACTORS, INC.,)
 Third-Party Respondent.)

PCB No. 10-100

**REPLY TO THIRD-PARTY COMPLAINANTS' RESPONSE TO MOTION TO DISMISS
THIRD-PARTY COMPLAINT**

NOW COMES Third Party Respondent Horve Contractors, Inc., by and through its attorneys, Mohan, Alewelt, Prillaman & Adami, and for its Reply to Third-Party Complainants' Response to Motion to Dismiss Third-Party Complaint, state as follows:

I. The Pleadings' Allegations

A. The following allegations are taken from the Complaint:

Complainants and Respondents are neighboring landowners. The Complainants jointly own a pond located between their properties.

Respondents constructed a skilled nursing facility in two phases. Phase I was constructed in 2006 and 2007, and Phase II began in 2009.

Phase I's construction resulted in water carrying material from Respondents' property and depositing it on Complainants' properties and into their pond.

Prior to beginning Phase II's construction, Respondents obtained an NPDES permit, No. ILR10L134, which included provisions to control water from carrying material off Respondents' property. Respondents did not comply with the NPDES permit, and water carried material from Respondents' property and deposited it onto Complainants' property and into their pond.

Respondents violated the NPDES permit's terms.

As to both Phase I and Phase II, Respondents violated various provisions of Section 12 of the Illinois Environmental Protection Act.

As relief, the Complaint seeks an order enjoining Respondents from further violations of the Act and imposing a statutory penalty on Respondents.

B. The following allegations are taken from the Third-Party Complaint:

Prior to June 17, 2009, Horve was the Phase I general contractor. On June 17, 2009, Respondents and Horve entered into a contract for the Phase II project. Per the written contract, as to Phase II, Horve was to indemnify Respondents against claims regarding injury to tangible property if the injury was caused by the negligence of Horve. Per the June 17, 2009, contract, Horve was to comply with all applicable laws regarding the construction of Phase II.

The Third-Party Complaint states that if there were violations of the Act as alleged in the Complaint, those violations were the result of the acts or omissions of Horve and that Respondents are entitled to indemnification from Horve for damages related to Horve's acts and omissions.

II. The Motion to Dismiss

Horve seeks dismissal of the Third Party Complaint because:

- (a) the Board has not been granted the authority to interpret and enforce contracts;
- (b) even if the Board had the authority to interpret and enforce contracts: (i) the June 17, 2009, contract mandates the arbitration of disputes; (ii) in part, indemnification is sought for Phase I acts not covered by the June 17, 2009, contract; and (iii) no allegation of negligence on the part of Horve is alleged, a prerequisite to any right to indemnity; and
- (c) the Third-Party Complaint doesn't allege specific acts or omissions of Horve that might give rise to any relief under the Act.

III. Respondents' Response demonstrates that the Motion to Dismiss should be granted

The Response recognizes that the Third Party Complaint seeks relief via two avenues, both contractual. However, the Response never addresses the contract's mandate that disputes arising under the contract are to be resolved via arbitration.

The Response never explains how the contractual indemnity clause in the June 17, 2009, contract concerning Phase II gives Respondents any indemnification rights concerning Phase I.

The Response does not address the absence of allegations of Horve's negligence, a prerequisite to any contractual indemnification obligation.

The Response claims that because it has alleged that Horve was the general contractor on Phase I, Horve had control of the source of the pollution and control of the premises and, thus, is a proper party to be held liable for violations of the Act. The Third Party Complaint, however, contains no factual allegation regarding Horve's control of any premises or control of the source

of any pollution in regard to Phase I. And, again, the Response does not explain the contractual basis for the indemnification claim regarding Phase I (i.e., the Response ignores that the indemnification clause is included in the contract governing only Phase II.).

The Response cites to no relevant legal authority granting the Board the power to resolve contractual disputes concerning indemnification clauses. Indeed, given the provisions of the Act cited by Respondents, it appears that electronic research of the Act for the term “indemnification” was conducted and, without analysis, the results were included in the Response.

Concerning the provisions of the Act cited by Respondents, Section 57.8(a)(d) simply provides indemnification protection to the State and its agents if the State makes certain payments. Section 22.3(g)(1)-(2) simply states that indemnification agreements do not transfer liability to the State or local governments for lawsuits to recover for certain remediation costs. Section 57.6 does not even mention indemnification. Section 57.9(a)(5) simply states that LUST funds will not be used to pay for indemnification claims based on payments made before IEMA notification of a confirmed release. Section 57.11(a)(5) simply states that the UST fund may be used to pay owners indemnification claims. None of these sections suggests that the Board has been granted the authority to interpret and enforce contractual indemnity provisions concerning private parties.

In short, that the Act uses the word “indemnification” in various sections does not mean that the Board has been granted the power to adjudicate contractual disputes between private parties concerning indemnification rights. The opposite conclusion would mean, for example, that because the Act uses the term “engineer,” the Board has been granted the authority to resolve all contractual disputes concerning engineers. This is nonsense.

As a fall-back position, the Response suggests that perhaps the Respondents, if given the opportunity, might be able to plead that Horve violated the Act. However, even if a violation were properly pled and proven, this would not result in the relief sought by Respondents, i.e., indemnification. Wherefore, the request to replead should be denied as futile. Respondent's indemnification rights, if any, are contractual, and the Board has not been granted the authority to grant the relief Respondents seek especially where, as here, the contract contains an arbitration clause.

IV. Conclusion

For all of the reasons set forth in the Motion to Dismiss and in this Reply, Third-Party Respondent Horve Contractors, Inc., prays that the Board dismiss the Third-Party Complaint with prejudice.

/s/Joel A. Benoit
Joel A. Benoit

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Third-Party Respondent.)

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 Reply to Third-Party Complainants' Response to Motion to Dismiss Third-Party Complaint, 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 25th day of May, 2011.

/s/Joel A. Benoit
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