ILLINOIS POLLUTION CONTROL BOARD
August 4, 2011

ROLF SCHILLING, PAM SCHILLING, and SUZANNE VENTURA,	)	
Complainants,	)	
v.	)	PCB 10-100
	)	(Enforcement – Water)
GARY D. HILL, VILLA LAND TRUST, an Illinois Land Trust, and PRAIRIE LIVING WEST, LLC,	)	
Respondents.	)	

ORDER OF THE BOARD (by G.L. Blankenship):

On June 1, 2010, Rolf Schilling, Pam Schilling and Suzanne Ventura (collectively, complainants) filed a citizen's water pollution complaint. Complainants named as respondents Gary D. Hill (Mr. Hill), Villa Land Trust (Villa) and Prairie Living West, LLC (Prairie) (collectively, respondents). The complaint alleged violations of the Environmental Protection Act (Act) (415 ILCS 5 (2010)) and a National Pollutant Discharge Elimination System (NPDES) permit (permit) for the construction site known as the "Prairie Living West" project (project) located at "900/955 Villa Court [in] Carbondale, Jackson County" (site). Comp. 1 at 2.

On March 22, 2011, the respondents filed a third-party complaint (Comp.) against Horve Contractors, Inc. (Horve), which alleged that Horve was contractually liable for any and all violations that occurred in the construction of the project. Compl. 2. at 2-3. On April 15, 2011, Horve filed a motion to dismiss the third-party complaint (Mot.). The Board grants Horve's motion to dismiss and dismisses the third-party complaint, finding that it is "frivolous" within the meaning of 415 ILCS 5/31(d)(1) (2010); 35 Ill. Adm. Code 103.212(a).

In the order below, the Board first sets forth the relevant procedural history of the case. Next, the Board describes the relevant pleadings in detail. Third, the Board provides the applicable legal background and framework. The Board then moves to a discussion of the legal issues and rules on the motion to dismiss the third-party complaint.

PROCEDURAL HISTORY

On June 1, 2010, the complainants filed their citizens' water pollution complaint. On August 2, 2010, the respondents filed a motion to dismiss the complaint. The Board accepted the respondents' motion to dismiss as timely on September 2, 2010 and denied the motion on November 4, 2010.

On January 7, 2011, the respondents filed their answer and affirmative defenses to the complaint, alleging four affirmative defenses. On January 26, 2011, the complainants filed a motion to strike all four affirmative defenses. On February 10, 2011, the respondents filed a response to the motion to strike. In the response, the respondents requested to withdraw two of their affirmative defenses.

On March 22, 2011, the respondents filed a third-party complaint against Horve. On April 1, 2011, the respondents filed a proof of service, showing that Horve was served the third-party complaint on March 18, 2011.

On April 7, 2011, the Board entered an order granting the complainants' motion to withdraw the first and fourth affirmative defenses and granting the respondents' motion to strike the second and third affirmative defenses without prejudice. In the same order, the Board granted the respondents until May 9, 2011 to amend their second and third affirmative defenses to correct factual deficiencies. The Board did not at the time rule on the third-party complaint.

On April 15, 2011, Horve filed a motion to dismiss the third party complaint. On May 11, 2011, the Respondents filed their amended affirmative defenses to the complaint. On May 18, 2011, the Respondents filed a response to Horve's motion to dismiss the third party complaint (Resp.). On May 25, 2011, Horve filed a reply to the Respondents' response to the motion to dismiss the third-party complaint (Rep.).

On June 2, 2011, the Complainants filed a reply to the amended affirmative defenses.

THIRD-PARTY COMPLAINT

On March 22, 2011, the respondents filed a third-party complaint against Horve. The third-party complaint alleges that Horve and Prairie Living West entered into a contract (Compl. Exh. B), which contained the general conditions of the contract for construction (contract). Compl. at 2. The respondents state that Prairie Living West contracted Horve to be the General Contractor on the Prairie Living West Project, located at 900 Villa Court, Carbondale, Illinois. *Id.* The project is also known as "Phase II of Prairie Living at Chautauqua." *Id.*

Respondents quote the Contract in their third-party complaint, which states:

> Contractor [HORVE] shall indemnify and hold harmless the Owner [LLC], Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for those acts they may be liable . . . *Id.* at 2-3, citing Compl. Exh. B § 3.18.

Respondents also allege that Horve was responsible for complying with "applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to performance of the Work." Compl. at 3, citing Compl. 2 Exh. B § 3.7.2.

Respondents allege that, before Horve was contracted to carry out Phase II, Horve was hired to be the General Contractor on Phase I of Prairie Living at Chautauqua, located at 955 Villa Court, Carbondale, Illinois. Compl. at 3. For those reasons, the respondents assert that any violations of the Act alleged in the complainants' original complaint that may have occurred were the result of the acts or omissions of Horve and its agents. *Id.* Respondents state that Horve was in charge of the work and therefore was responsible for compliance with the relevant laws. *Id.* Therefore, the respondents state that, if the respondents are found liable to the complainants, the respondents are entitled to indemnification from Horve. *Id.* at 4.

For the above reasons, the respondents request that, should the Board find any violations of the Act, Horve should be found solely liable and any judgments the complainants obtain be entered against Horve. Compl. at 4.

HORVE'S MOTION TO DISMISS

On April 15, 2011, Horve filed a motion to dismiss the respondents' third-party complaint. Horve argues that the Board does not have the authority to grant the relief the third-party complaint requests. Mot. at 1. Therefore, Horve asserts that the Board should dismiss the action as frivolous. *Id.*

Horve contends that the Board does not have the authority to interpret or enforce contractual provisions or to grant relief in the form of contractual indemnification. Mot. at 2. Horve also argues that the Act contains no provision for bringing a third-party action for interpretation and enforcement of a contractual indemnity provisions. *Id.* Horve points out that the Board must have special authority to entertain such an action. *Id.*

Horve states that the indemnification provision requires that the conflict be referred to Spencer Architects, the architect listed in the contract, for an initial decision. Mot. at 2-3. After the initial decision, the ultimate and binding dispute resolution would be provided by arbitration. *Id.* at 3. Therefore, Horve believes that the final decision regarding a conflict resides in the arbitrator, not the Board. *Id.*

Horve also alleges a timing issue. Mot. at 3. Horve points out that the contract on which the respondents rely was entered into on June 17, 2009, while certain work complained of was completed before then for which no duty to indemnify is pled. *Id.*

Finally, Horve argues that the third-party complaint fails to meet the basic requirements of Section 103.204(c) of the Act because the third-party complaint fails to allege what specific "acts or omissions" Horve performed or did not perform that would give rise to any relief under the Act. Mot. at 3, citing also 415 ILCS 5/31(d)(1) and (c)(1).

Horve states that, because the complaint fails to state a cause of action and the requested relief is beyond the Board's authority to grant, the complaint is frivolous and must be dismissed. Mot. at 4.

RESPONDENTS' RESPONSE TO MOTION TO DISMISS

In the respondents' response to the motion to dismiss, the respondents state that the third-party complaint is not frivolous because Horve is into the suit in two ways. Resp. at 2.

First, the respondents claim that Document A201-2007 (attached as Exhibit B to the third-party complaint) 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" out of which the original complaint arises. Resp. at 2, citing Compl. Exh. B § 3.7.2.

Second, the respondents claim that Horve is contractually obligated to indemnify the respondents for any claims or damages arising from the work to be performed on the Prairie Living West project. Resp. at 2.

Respondents argue that the third-party complaint sufficiently states a cause of action because the third-party complaint alleges that any violations that the Board finds are the result of Horve's acts and omissions. Resp. at 2. Respondents assert that that reference is sufficient because the language makes Horve aware of what Horve is being accused. *Id.* Respondents request that, should the third-party complaint contain insufficient pleadings, the respondents be allowed to amend the third-party complaint to add such allegations. *Id.* at 2-3.

In response to Horve's allegation that the third-party complaint is based on contractual language from a contract of June 17, 2009 and the offending work was performed before that date, the respondents point out that the complainants allege violations of permit ILR10L1343, which is applicable to Phase II. Resp. at 3. That permit pertains to Phase II, which is covered by the contract of June 17, 2009. *Id.* Further, the respondents argue that the complainants' alleged violations from Phase I do not void Horve's obligations under Documents A101-2007 and A201-2007. *Id.* Respondents reiterate that Horve was the general contractor on Phase I and that Horve had control of both the source of any alleged pollution and of the premises. *Id.* Therefore, Horve is liable for any pollution from Phase I and the contract makes Horve liable for any pollution from Phase II. *Id.* Respondents contend that this makes Horve a proper party for this action. *Id.*

Respondents also argue that Section 31(d)(1) of the Act enables the respondents to file the third-party complaint. Resp. at 3-4. Respondents cite the Act in stating that any party can file a complaint "against any person allegedly violation [the] Act, any rule or regulation adopted under [the] Act, any permit or term or condition of a permit, or any Board order." *Id.*.

In response to Horve's assertion that the Board does not have the authority to hear indemnity actions, the respondents argue that 35 Ill. Adm. Code § 101.403 grants the Board the authority to hear third party motions. Resp. at 4. The respondents reason that the Act and the

Board's own rules provide a mechanism for adding third party litigants to an action and therefore "the Board has the authority to adjudicate disputes between the parties, including indemnification provisions." *Id.*

Respondents state that the Illinois General Assembly imbued the Board with the power to adjudicate and enforce indemnification provisions throughout the Act. Resp. at 4, citing 415 ILCS 5/57.8a(d); 415 ILCS 5/22.2(g)(1)-(2); 415 ILCS 5/57.6, 57.9, 57.11 Respondents state it is erroneous to contend that the Illinois General Assembly did not grant the Board such authority and to contend so would undermine the plain language of the Act. Resp. at 4-5. Respondents note that a statute's plain language is the best indicator of legislative intent and that statutes must be read as a whole. *Id.* at 5, citing People v. NL Industries, 152 Ill. 2d 82, 97-98 (1992).

Respondents request that the Board allow the respondents to maintain a cause of action against Horve for violating the Act whether or not the Board determines the Board has authority to interpret and enforce any indemnification provisions. Resp. at 5. In that event, the respondents request leave to file an amended third-party complaint. *Id.*

For the above reasons, the respondents believe that they sufficiently state a cause of action upon which relief can be granted. Resp. at 5. Respondents request that the Board deny the motion to dismiss the third-party complaint. *Id.* However, should the Board find the third-party complaint factually deficient, the respondents request that the Board grant them leave in which to file an amended third-party complaint to correct any pleading deficiencies. *Id.*

HORVE RESPONSE

On May 25, 2011, Horve filed a reply to the respondents' response to Horve's motion to dismiss. Horve begins by reiterating the facts of the case. Rep. at 1-2. Horve states that the respondents violated various provisions of Section 12 of the Act, which caused the complainants to seek an order enjoining the respondents from further violations of the Act and imposing a statutory penalty on the respondents. Rep. at 2.

Horve then summarizes the third-party complaint's allegations. Rep. at 2. Specifically, Horve states that the respondents and Horve entered into a contract on June 17, 2009 for the Phase II project, which stated that Horve indemnifies the respondents against claims regarding injury if Horve caused the injury through negligence. *Id.* The contract also states that Horve was to comply with all applicable laws. *Id.* The third-party complaint states further that if there were any violations of the Act, those violations were the result of the acts and omissions of Horve. *Id.* Horve states that the respondents believe they are entitled to indemnification from Horve for damages relating to Horve's acts or omissions. *Id.*

Horve next summarizes its motion to dismiss. Rep. at 3. Horve restates that the Board does not have the authority to interpret and enforce contracts. *Id.* Horve asserts that, even if the Board did have that authority, the contract mandates dispute resolution, the indemnification sought for Phase I acts are not covered by the June 17, 2009 contract and there is no allegation of Horve's negligence, which is a prerequisite to indemnity. *Id.* Horve states that the third-party

complaint does not allege specific acts or omissions that might give rise to any relief under the Act. *Id.*

Horve then addresses the respondents' response to the motion to dismiss. Rep. at 3. First, Horve notes that the response never addresses the contract's dispute resolution through arbitration mandate. *Id.* Second, Horve argues that the response does not explain how the contractual indemnity clause covers Phase I. I*d.* Third, Horve states that the response does not include any allegations of Horve's negligence, which is a prerequisite to any contractual indemnification obligation. *Id.* Fourth, Horve argues that neither the third-party complaint nor the respondents' response to the motion to dismiss contains factual allegations regarding Horve's control of any premises or the pollution's source regarding Phase I. *Id.* Fifth, Horve points out that the response does not include any relevant legal authority granting the Board the power to resolve contractual disputes concerning indemnification clauses. *Id.* at 4. Horve disagrees with the use of the legal provisions pointed to in the response, stating that none of them apply to the case at hand. Horve states that:

> 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. *Id.*

Finally, Horve argues that even if the respondents are allowed to plead that Horve violated the Act and that violation was properly pled and proven, indemnification would still not result. Rep. at 5. Horve believes that re-pleading is futile and the respondents' request to re-plead should be denied. *Id.* Horve reiterates that the respondents' indemnification rights are contractual and the Board does not have the authority to hear them. *Id.*

For the above reasons, Horve requests that the Board dismiss the third-party complaint with prejudice. *Id.*

LEGAL FRAMEWORK

The Board first provides the legal framework for its decision. The issues the Board explores are whether the complaint against Horve is frivolous or duplicative, the Board's authority to either accept or deny Horve as a third party and the motion to dismiss the third-party complaint against Horve.

Frivolous or Duplicative

Section 31(d) of the Act (415 ILCS 5/31(d) (2010)) allows any person to file a complaint with the Board. Section 31(d) further provides that "[u]nless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing." 415 ILCS 5/31(d)(1) (2010); 35 Ill. Adm. Code 103.212(a).

A complaint is duplicative if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. A complaint is frivolous if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *Id*.

Within 30 days after being served with a complaint, a respondent may file a motion alleging that the complaint is duplicative or frivolous. 35 Ill. Adm. Code 103.212(b). Filing such a motion stays the 60-day period for filing an answer to the complaint. *Id*. "The stay will begin when the motion is filed and end when the Board disposes of the motion." 35 Ill. Adm. Code 103.204(e).

Motion to Dismiss

When considering a motion to dismiss, the Board looks to Illinois case law. *See*, *e.g.*, People v. The Highlands, LLC, PCB 00-104, slip op. at 4 (Oct. 20, 2005); Sierra Club and Jim Bensman v. City of Wood River and Norton Environmental, PCB 98-43, slip op. at 2 (Nov. 6, 1997); Loschen v. Grist Mill Confections, Inc., PCB 97-174, slip op. at 3-4 (June 5, 1997). In ruling on a motion to strike or dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *E.g.*, Beers v. Calhoun, PCB 04-204, slip op. at 2 (July 22, 2004); *see also* In re Chicago Flood Litigation, 176 Ill. 2d 179, 184, 680 N.E.2d 265, 268 (1997); Board of Education v. A,C&S, Inc., 131 Ill. 2d 428, 438, 546 N.E.2d 580, 584 (1989). "To determine whether a cause of action has been stated, the entire pleading must be considered." LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297, 1303 (2nd Dist 1993), *citing* A,C&S, 131 Ill. 2d at 438 ("'the whole complaint must be considered, rather than taking a myopic view of a disconnected part[,]'" A,C&S *quoting* People ex rel. William J. Scott v. College Hills Corp., 91 Ill. 2d 138, 145, 435 N.E.2d 463, 466-67 (1982)).

"[I]t is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief." Smith v. Central Illinois Regional Airport, 207 Ill. 2d 578, 584-85, 802 N.E.2d 250, 254 (2003); *see also* Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303; Chicago Flood, 176 Ill. 2d at 189, 680 N.E.2d at 270 ("[T]he trial court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party."); People v. Peabody Coal Co., PCB 99-134, slip. op. at 1-2 (June 20, 2002); People v. Stein Steel Mills Services, Inc., PCB 02-1, slip op. at 1 (Nov. 15, 2001). The appellate court explained:

> It is impossible to formulate a simple methodology to make this determination, and therefore a flexible standard must be applied to the language of the pleadings with the aim of facilitating substantial justice between the parties. Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303 (*citing* Gonzalez v. Thorek Hospital & Medical Center, 143 Ill. 2d 28, 34, 570 N.E.2d 309 (1991)). The disposition of a motion to strike and dismiss for insufficiency of the pleadings is largely within the sound discretion of the court. Village of Mettawa, 249 Ill. App.

3d at 557, 616 N.E.2d at 1303 (*citing* Groenings v. City of St. Charles, 215 Ill. App. 3d 295, 299, 574 N.E.2d 1316 (2nd Dist. 1991)).

Illinois requires fact-pleading, not the mere notice-pleading of federal practice. Adkins v. Sarah Bush Lincoln Health Center, 129 Ill. 2d 497, 518, 544 N.E.2d 733, 743 (1989); College Hills Corp., 91 Ill. 2d at 145, 435 N.E.2d at 466-67. In assessing the adequacy of pleadings in a complaint, the Board has accordingly stated that "Illinois is a fact-pleading state which requires the pleader to set out the ultimate facts which support his cause of action." Grist Mill Confections, PCB 97-174, slip op. at 4 (*citing* Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303); *see also* College Hills, 91 Ill. 2d at 145, 435 N.E.2d at 466-67; City of Wood River, PCB 98-43, slip op. at 2 (petitioner is not required "to plead all facts specifically in the petition, but to set out ultimate facts which support his cause of action"). "[L]egal conclusions unsupported by allegations of specific facts are insufficient." Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303 (*citing* Estate of Johnson v. Condell Memorial Hospital, 119 Ill. 2d 496, 509-10, 520 N.E.2d 37 (1988)). A complaint's failure to allege facts necessary to recover "may not be cured by liberal construction or argument." Condell Memorial Hospital, 119 Ill. 2d at 510, 520 N.E.2d at 43 (*quoting* People ex rel. Kucharski v. Loop Mortgage Co., 43 Ill. 2d 150, 152 (1969)). A complaint's allegations are "sufficiently specific if they reasonably inform the defendants by factually setting forth the elements necessary to state a cause of action." College Hills, 91 Ill. 2d at 145, 435 N.E.2d at 467.

"Despite the requirement of fact pleading, courts are to construe pleadings liberally to do substantial justice between the parties." Grist Mill Confections, PCB 97-174, slip op. at 4 (*citing* Classic Hotels, Ltd. v. Lewis, 259 Ill. App. 3d 55, 60, 630 N.E. 2d 1167 (1st Dist. 1994)); *see also* College Hills, 91 Ill. 2d at 145, 435 N.E.2d at 466 ("In determining whether the complaint is adequate, pleadings are liberally construed. The aim is to see substantial justice done between the parties."). Fact-pleading does not require a complainant to set out its evidence: "'[t]o the contrary, only the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts.'" People ex rel. Fahner v. Carriage Way West, Inc., 88 Ill. 2d 300, 308, 430 N.E.2d 1005, 1008-09 (1981) (*quoting* Board of Education v. Kankakee Federation of Teachers Local No. 886, 46 Ill. 2d 439, 446-47 (1970)); City of Wood River, PCB 98-43, slip op. at 2. Moreover, "pleadings are not intended to create technical obstacles to reaching the merits of a case at trial; rather, their purpose is to facilitate the resolution of real and substantial controversies." Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303 (*citing* College Hills, 91 Ill. 2d at 145).

DISCUSSION

The Board does not have the authority to try all manner of lawsuits. The Board is a creature of statute and the Board can only operate within the bounds of its powers set out by the Illinois General Assembly. The Board "has the authority to determine, define and implement the environmental control standards applicable in the State of Illinois and may adopt rules and regulations in accordance with Title VII of the Act." 35 Ill. Adm. Code 101.106(a) (2010), 415 ILCS 5/5(b) (2010). The Board also has:

> the authority to conduct proceedings upon complaints charging violations of the Act, any rule or regulation adopted under the Act, any permit or term or condition of a permit, or any Board order; upon administrative citations; upon petitions for review of the Agency's final determinations on permit applications in accordance with Title X of the Act; upon petitions to remove seals under Section 34 of the Act; upon other petitions for review of final determination which are made pursuant to the Act or Board rules and which involve a subject which the Board is authorized to regulate. The Board may also conduct other proceedings as may be provided by the Act or any other statute or rule. 35 Ill. Adm. Code. 101.106(b).

The Board does not have the authority to settle a contractual issues of indemnity. As stated previously by the Board, "[a]ny request for indemnity must be decided in a court of law." EPA v. Martin, PCB 71-308, slip op. at 6 (May 24, 1973). It is incorrect to infer that the Board has the authority to try any case as long as Section 103.206 of the Board's procedural rules does not specifically exclude the type of proceeding.

Further, a statute's sections must be construed together in light of the general purpose. Scofield v. Board of Ed. of Community Consol. School. Dist. No. 181, 103 N.E.2d 640, 643, 411 Ill. 11, 15 (1952). When taking Chapter 1 of the Illinois Administrative Code in its entirety, it is clear that the Illinois General Assembly has not granted the Board the authority to hear contractual issues.

Respondents base their third-party complaint on two contractual issues. Compl. at 2-3. Specifically, the third-party complaint attempts to draw Horve into this proceeding through two clauses in the June 17, 2009 contract. *Id.* The first noted clause allegedly holds Horve responsible for complying with all applicable laws. *Id.* at 3. The second clause relates to Horve's indemnification of the respondents. *Id.* at 2-3. However, the third-party complaint only faintly references a possibility that Horve has violated the Act. *Id.* at 4.

The respondents' response to Horve's motion to dismiss does not clarify which provisions of the Act Horve is alleged to have violated. Rather, the response only reiterates the respondents' use of the two contractual tracks to bring Horve into the proceeding and mentions that Horve is responsible for any violations of the Act which may or may not have occurred. Resp. at 2. As previously held by this Board, "a complaint 'shall specify the provision of the Act or the rule or regulation . . . under which such person is said to be in violation, and a statement of the manner in, and the extent to which such person is said to violate the Act or such rule or regulation.'" Gregory v. Regional Ready Mix, PCB 10-106, slip op. at 4 (Oct. 7, 2010), citing Finley, *et al.* v. IFCO ICS-Chicago, Inc., PCB 02-208, slip op. at 4 (Aug. 8, 2002), and 415 ILCS 5/31(c) (2000). As alluded to by this Board in Gregory, "[i]t is not enough for [the respondents] to simply cite to [the Act] and expect [Horve] to prepare a defense for [the Act] in its entirety." Gregory, PCB 02-208, slip op. at 4 (Oct. 7, 2010). Respondents must cite to the specific "provision [or provisions] of the Act or the rule or regulation or permit or term or condition thereof under which [Horve] is said to be in violation[.]" *Id.*

The type of relief which the Board may grant the respondents is limited under Section 33(b) of the Act, which states that a Board order:

> may include a direction to cease and desist from violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order, and/or the imposition by the Board of civil penalties in accord with Section 42 of this Act. The Board may also revoke the permit as a penalty for violation." 415 ILCS 5/33(b) (2010).

The respondents ask that "judgment in favor of [the respondents] and against [Horve] be entered for any judgment obtained by the [complainants], and for such further and additional relief as this Board deems just and proper." Compl. at 4. The Board cannot order that Horve be held liable for any judgment that may be found against the respondents in their proceeding with the complainants.

A complaint is frivolous if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." 35 Ill. Adm. Code 101.202. Because the third-party complaint alleges contractual issues, does not specify any provisions of the Act allegedly violated by Horve and does not seek relief that the Board is able to grant, the Board finds that it cannot accept the third-party complaint. Respondents' contractual claims will have to be brought up in a court of law.

CONCLUSION

The Board grants Horve's motion to dismiss the third-party complaint because the third-party complaint is frivolous. The third-party complaint is based on contractual issues that the Board does not have the authority to hear, does not specify which provisions of the Act Horve is in violation of and seeks relief that the Board cannot grant. The Board dismisses the third-party complaint without prejudice. Respondents may file a new complaint if they so choose to.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 4, 2011, by a vote of 5-0.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board