

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,)	PCB No. 10-100
Respondents,)	
)	
and)	
)	
GARY D. HILL and PRAIRIE LIVING WEST,)	
LLC,)	
Third-Party Complainants,)	
v.)	
)	
HORVE CONTRACTORS, INC.,)	
Third-Party Respondent.)	

NOTICE OF FILING AND PROOF OF SERVICE

Mr. Stephen F. Hedinger
Sorling, Northrup, Hanna
Cullen & Cochran, Ltd.
1 N. Old Capitol Plaza
Suite 200
Springfield, IL 62701

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

Ms. Molly Wilson Dearing
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Schafer LLC
Attorneys at Law
111 West Main
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Marion, IL 62959

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

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 the (Amended) 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 29th day of November, 2011.

/s/Joel A. Benoit
Joel A. Benoit

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THIS FILING SUBMITTED ON RECYCLED PAPER

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MOTION TO DISMISS THE (AMENDED) THIRD-PARTY COMPLAINT

NOW COMES Third-Party Respondent, HORVE CONTRACTORS, INC., by its undersigned attorneys, and moves to dismiss the (Amended) Third-Party Complaint herein, pursuant to Section 101.506 of the Board’s Procedural Rules (35 Ill. Adm. Code 101.506).

I. Factual Allegations

The following allegations are taken from the (Amended) Third-Party Complaint:

Prairie Living West, LLC, hired Horve to act as the general contractor for the construction of Phase I and II of a development known as Prairie Living at Chautauqua. As the general contractor, Horve was responsible for construction operations, supervising workers, and developing and implementing a Storm Water Pollution Prevention Plan. The Complaint alleges that Third-Party Complainants, during both Phase I and Phase II, allowed water and waste to

flow from the construction areas onto Complainants' property in violation of the Act. The Third-Party Complainants deny that they violated the Act, but to the extent Complainant demonstrates any violations, Third-Party Complainants contend that these violations are the acts and/or omissions of Horve.

II. On both substantive and procedural grounds, the (Amended) Third-Party Complaint should be dismissed.

The (Amended) Third-Party Complaint should be dismissed because it fails to allege facts which, if proven, would establish any violation of the Act.

Section 103.204(c)(2) provides that a "...complaint must...contain...[t]he dates, locations, events, nature, extent, duration, and strength of discharges and emissions and consequences alleged to constitute violations of the Act and regulations. The complaint must advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense...." 35 Ill. Admin. Code 103.204(c)(2). Here, the (Amended) Third-Party Complaint does not satisfy the requirements of Section 103.204(c)(2).

First, it contains no factual allegations supporting the legal conclusion that Horve is responsible for all activities, including sediment control/water control, occurring on the site. Indeed, these unsupported allegations run counter to the Complaint's admitted allegation that the Third-Party Complainants were granted the NPDES permit. (Complaint, para. 11; Answer, para. 11). It is the NPDES permit holder who is required to comply with the permit's conditions, and the failure to do so may violate the Act. 415 ILCS 5/12(f).

Second, the Third-Party Complaint is devoid of any factual allegations concerning what Horve did or failed to do that violated the Act. Paragraph 15 of the (Amended) Third-Party

Complaint merely states that “...to the extent that Complainants demonstrate a violation of the Act during Phase I and II, those violations are the acts and/or omissions of HORVE....” Such a vague allegation does not satisfy Section 103.204(c).

It is unknown what facts supporting the claimed violations of the Act, if any, Complainants may ultimately “demonstrate.” Further, such demonstration would presumably be presented either via a summary judgment motion or at hearing, both of which would occur long after Horve’s response to the claims is due. The unfairness of this obvious. Horve is entitled to know what factual allegations and claims it must meet at the inception of the enforcement action so that it may prepare its defense.

It is impossible to discern from the (Amended) Third-Party Complaint what acts or omissions of Horve are alleged to have caused violations of Section 12(a), 12(b), 12(d), and 12(f) of the Act. This is why the Third-Party Complainants are required to include factual allegations—if they exist-- that support the proposition that Horve violated the Act in their (Amended) Third-Party Complaint. Section 103.204(c)(2) sets forth the types of facts which must be alleged to withstand a motion to dismiss. *Strunk v. Williamson Energy LLC*, 2007 Ill. ENV LEXIS 529 at *20-25 (PCB No. 07-135)(Citizens Enforcement)(Dec. 20, 2007)(dismissing numerous claims due to noncompliance with 35 Ill. Admin. Code 103.204(c)). The (Amended) Third-Party Complaint does not satisfy Section 103.204(c) and, accordingly, should be dismissed.

Procedurally, the (Amended) Third Party Complaint should be dismissed because it fails to provide the notice required by Section 103.204(f). 35 Ill. Admin. Code 103.204(f) (warning concerning need to timely respond to complaint). Also, the Third-Party Complainants have

failed to serve Horve's counsel with either the (Amended) Third-Party Complaint or the Notice of Filing Returned Receipt. *Strunk*, at *18-19. In proceedings before Illinois courts and in proceedings before the Board, once an attorney files an appearance on behalf of a party, which Horve's attorneys did on April 15, 2011, other parties to the proceeding are required to serve subsequent documents they file with the tribunal on that attorney. (Ill. S. Ct. Rule 104(b); 35 Ill. Admin. Code 101.304(b)).

III. Conclusion

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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