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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD JAN 31 2012

STATE OF ILLINOIS
Pollution Control Board

ROLF SCHILLING, PAM SCHILLING and)
SUZANNE VENTURA,)

Complainants,)

vs.)

PCB. No. 10-100

GARY D. HILL, VILLA LAND TRUST, an Illinois)
Land Trust, and PRAIRIE LIVING WEST, LLC,)

Respondents.)

and)

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GARY D. HILL AND PRAIRIE LIVING WEST, LLC,)

Third-Party Complainants,)

vs.)

HORVE CONTRACTORS, INC.)

Third-Party Respondent.)

**THIRD-PARTY COMPLAINANTS' RESPONSE TO MOTION TO DISMISS
THE (AMENDED) THIRD-PARTY COMPLAINT**

NOW COME the 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 Third-Party Respondent, HORVE CONTRACTORS, INC.'s Motion to Dismiss The (Amended) Third-Party Complaint, hereby state as follows:

1. HORVE CONTRACTORS, INC., Third-Party Respondent (hereinafter "Horve"), filed their Motion to Dismiss the (Amended) Third-Party Complaint on November 29, 2011. Horve seeks dismissal of the (Amended) Third-Party Complaint on the bases that it contains insufficient factual allegations, Horve is not the NPDES permit holder on the subject project, and

the (Amended) Third-Party Complaint failed to contain the notice provision required by 35 Ill. Admin. Code 103.204(f).

I. The (Amended) Third-Party Complaint Contains Sufficient Factual Allegations to Withstand a Motion to Dismiss.

2. In its Motion, Horve contends that Third-Party Complainants' Amended Complaint should be dismissed because the Third-Party Complainants (hereinafter "Prairie Living West") fail to allege facts which, if proven, would establish that Horve is responsible for all activities including sediment control/water control occurring on the subject site.

3. The (Amended) Third-Party Complaint alleges that Horve was the general contractor on both Phases of a construction project, which is the subject of this action (See Third-Party Complaint, ¶5-8). Prairie Living West goes on to allege that Horve was responsible for complying with all applicable laws, statutes, rules, regulations, etc... in conjunction with the project. *Id.* Prairie Living West specifically alleges that Horve was in control of the premises where the pollution is alleged to have occurred. *Id.* at ¶ 9. Prairie Living West also alleges Horve supervised workers on the premises, and any violation(s) of the Act during the subject construction project are due to acts or omissions of Horve or its agents. *Id.* at ¶ 10, 15. It is clear that should these factual allegations be proven, Horve would be liable for violating the Act.

4. Citing Section 12(f) of the Act, Horve also contends that because they were not the holder of the NPDES permit, they were not required to comply with the permit's conditions. Section 12(f) of the act states that "no person shall cause, threaten, or allow the discharge of any contaminant into the waters of the State.....without an NPDES permit . . . ***or in violation of any term or condition imposed by such permit . . . or in violation of any regulations adopted by the***

Board with respect to the NPDES program.” 415 ILCS 5/12(f); emphasis added. It is clear by the language of Section 12(f) that its scope expands beyond the permit holder, and there is no basis for Horve’s argument that Section 12(f) may exculpate Horve for the other violations alleged by Prairie Living West, which include violations of Section 12(a), 12(b), and 12(d) of the Act.

5. The Act clearly and plainly states it is a violation of the Act to “cause . . . or allow the discharge of” contaminants into the waters of the state in violation of any term or condition of the NPDES permit and as a result, Horve cannot escape liability merely because they were not the holders of the permit. In order to be in violation of the Act it must be proven that “the alleged polluter has the capability of control over the pollution or that the alleged polluter was in control of the premises where the pollution occurred.” *People v. A.J. Davinroy Contractors*, 249 Ill.App.3d 788, 793 (5th Dist. 1993). In this case, the (Amended) Third-Party Complaint clearly alleges Horve was in control of the premises and is liable for any violation of the Act.

6. Further, the Complaint sufficiently meets this Board’s strictures as provided by Section 103.204(c)(2) because it sufficiently advises Horve of the alleged violations of the Act, which include the failure to control and eliminate sediments and erosion from leaving the construction site, failure to control water run-off, sediments, mud and other contaminants causing flooding and contaminating a pond, and allowing construction-site residues to flow into a pond (See (Amended) Third Party Complaint, ¶12-14). Importantly, the (Amended) Third-Party Complaint’s allegations reasonably allow Horve the preparation of a defense. 35 Ill. Admin. Code 103.204(c)(2).

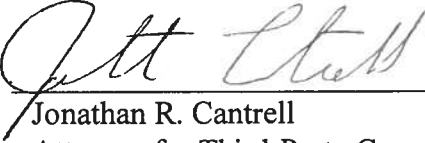
II. Any Failure to Provide Notice as Required by Section 103.204(f) is Moot.

6. Horve argues in its Motion that the (Amended) Third Party Complaint should be dismissed for failure to provide the notice required by Section 103.204(f), which is a warning to the Respondent of any complaint filed with this Board regarding the timeliness of answering a complaint and advising a respondent to seek counsel or contact the Clerk's Office with any procedural questions. Clearly, Horve was able to obtain the (Amended) Third-Party Complaint and prepare the pending Motion to Dismiss, which cites portions of the (Amended) Third-Party Complaint. Given that Horve had been served with Prairie Living West's initial Third-Party Complaint and been involved in this action for several months before the filing of the (Amended) Third-Party Complaint pursuant to Board Order, any failure to provide the notice required by Section 103.204(f) is moot, and the proper remedy for such failure should not be dismissal of the (Amended) Third-Party Complaint.

WHEREFORE, Respondents/Third-Party Complainants, GARY D. HILL and PRAIRIE LIVING WEST, LLC, respectfully request that this Board deny Horve's Motion to Dismiss the (Amended) Third-Party Complaint.

Respectfully submitted,

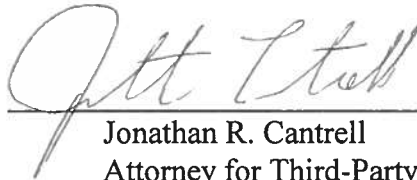
WINTERS, BREWSTER, CROSBY and SCHAFFER LLC

BY: 

Jonathan R. Cantrell
Attorney for Third-Party Complainants
ARDC No. 6296030

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the RESPONSE TO MOTION TO DISMISS THE (AMENDED) THIRD-PARTY COMPLAINT of GARY D. HILL and PRAIRIE LIVING WEST, LLC., a copy of which is herewith served upon you.

Dated this 27th day of January, 2012



Jonathan R. Cantrell
Attorney for Third-Party Complainants
ARDC No. 6296030

WINTERS, BREWSTER, CROSBY and SCHAFER LLC
Attorneys at Law
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Fax: (618) 997-6522

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CERTIFICATE OF SERVICE

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I, the undersigned, certify that I have served the attached RESPONSE TO MOTION TO DISMISS THE (AMENDED) THIRD-PARTY COMPLAINT of GARY D. HILL and PRAIRIE LIVING WEST, LLC., and the attached NOTICE OF FILING by depositing the same in a U.S. Post Office Box in the City of Marion, Illinois, postage fully prepaid upon the following persons:

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Pollution Control Board

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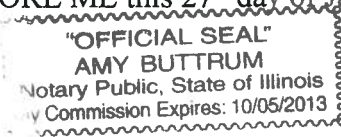
Dated this 27th day of January, 2012

Patricia L. Haber

Notary Seal

SUBSCRIBED AND SWORN TO BEFORE ME this 27th day of January, 2012.

Amy Buttrum
Notary Public



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