

ILLINOIS POLLUTION CONTROL BOARD  
July 12, 2012

PEOPLE OF THE STATE OF ILLINOIS, )  
)  
Complainant, )  
)  
v. ) PCB 12-21  
) (Enforcement - Water)  
ALTIVITY PACKAGING, LLC, a Delaware )  
limited liability company, INTRA-PLANT )  
MAINTENANCE CORPORATION, an )  
Illinois corporation, IRONHUSTLER )  
EXCAVATING, INC., an Illinois corporation )  
and RON BRIGHT, d/b/a QUARTER )  
CONSTRUCTION, )  
)  
Respondents. )

ORDER OF THE BOARD (by C.K. Zalewski):

In summary, this order grants a motion for leave by one respondent to file a cross claim for contribution against all fellow respondents, and by another to file a cross-complaint against one respondent. No responses to the motions or motions to dismiss the cross claim or cross-complaint have been filed.

The Board grants the motions for leave to file the cross claim and cross-complaint. But, the Board dismisses them, finding that each seeks relief the Board cannot grant. Therefore, the Board finds the cross claim and cross-complaint are each frivolous<sup>1</sup> within the meaning of Section 31(d) of the Environmental Protection Act (Act), 415 ILCS 5/31(d) (2010).

**PROCEDURAL HISTORY**

On July 26, 2011, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a four-count complaint against Altivity Packaging, LLC (Altivity), Intra-Plant Maintenance Corporation (Intra-Plant), Ironhustler Excavating, Inc. (Ironhustler) and Ron Bright d/b/a Quarter Construction (Ron Bright) (collectively, respondents). Altivity operates a wastewater treatment plant located at 1525 South Second Street, Pekin, Tazewell County. The complaint concerns open dumping of wastes generated during the treatment plant's construction at a gravel pit located at 10513 Levy Road in Hopedale, Tazewell County (disposal site). The People allege that Altivity hired Intra-Plant to dispose of the waste at the site owned by Ron Bright.

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<sup>1</sup> The Section 31(d) terms "duplicative" and "frivolous" are discussed in detail later, at pp. 5-6.

In an order of February 16, 2012, in response to complainant's unopposed January 23, 2012 motion to strike certain affirmative defenses asserted by Altivity in its December 30, 2011 Answer and Affirmative defenses, the Board struck respondents' affirmative defenses 1, 2, 3, 4, 7, 9 and 10. The Board reserved ruling on all other pending motions.

Pending motions now ripe for decision are: 1) Altivity's January 10, 2012 Amended Motion for Leave to File Instantly an Amended Cross Claim for Contributions Against Defendants Intra-Plant, IronHustler, and Ron Bright, and 2) Intra-Plant's Maintenance Corporation's Motion for Leave to File Instantly a Cross-Complaint Against Ironhustler. Once each motion is granted, the Board must then consider whether the cross claim or cross-complaint can be accepted for hearing.

Since the filing of the motions for leave to file, service issues have been the subject of discussion at status conferences between the parties as memorialized in various hearing officer orders. *See* hearing officer orders of February 16, 2012, March 13-14, 2012, and May 14, 2012. The most recent hearing officer order stated:

In order to move this action forward without additional service, all parties have acknowledged receipt of all outstanding cross complaints and claims filed with the Board. The parties agree that all responses and motions to dismiss pertaining to all outstanding complaints and claims are due by June 14, 2012. *See* hearing officer order of May 14, 2012, p. 1.

No responses to the motions for leave to file have been received, and no motions to dismiss the complaint or cross-complaint have been received. Under the Board's procedural rules at 35 Ill. Adm. Code 101.506 (d), if no response is filed by a party "[w]ithin 14 days after service of a motion", then "the party will be deemed to have waived objection to the granting of the motion."

Finally, the Board observes that on June 13, 2012, Intra-Plant filed an Answer to Altivity's Amended Cross Claim for Contribution.

### **THE PEOPLE'S COMPLAINT**

The People's complaint alleges that Altivity operates a wastewater treatment plant located at 1525 South Second Street, Pekin, Illinois (source site). Construction of the wastewater treatment plant at the source site generated miscellaneous material, consisting of silt, sand, and gravel with cinders and brick fragments, that could not be used for the plant's foundation. The People allege that Altivity contracted with Intra-Plant for the construction of the wastewater treatment plant, and that Intra-Plant subcontracted the excavation and disposal of the miscellaneous material to Ironhustler. Comp. at 2.

The complaint states that on January 24, 2008, the Illinois Environmental Protection Agency conducted an inspection of a sand and gravel pit located at 10513 Levy Road in Hopedale, Tazewell County, Illinois (disposal site). This revealed that, on or before January 24, 2008, the Pekin source site miscellaneous material had been transported to and disposed of at the

Tazewell County disposal site. Comp. at 2. The People alleged that the results of testing of three soil samples from the site demonstrated that one or more of the samples showed exceedances of specified Tiered Approach for Corrective Action (TACO) Tier 1 Remediation Objectives for the parameters cadmium, lead, selenium, and mercury. *Id* at 3. According to the People, the TACO Tier 1 Remediation Objectives demonstrate that the miscellaneous material is therefore a waste as defined at Section 3.535 of the Act, 415 ILCS 5/3.535 (2010). *Id* at 3-4.

An Agency August 24, 2010 re-inspection of the disposal site revealed that “the source site miscellaneous material had been committed to grade but was still easily identifiable against the contrasting yellowish-orange materials native to the disposal site”. Comp. at 5, para. 21. 22.

Count I of the complaint charges Altivity, the treatment plant owner, with violations of Sections 21(a) and (e) of the Act, claiming that Altivity caused or allowed the open dumping of waste at the disposal site by hiring Intra-Plant Maintenance Corporation to dispose of the miscellaneous material at the disposal site, a site that is not permitted by the Agency as a sanitary landfill and does not meet the requirements of the Act and of Board regulations. Comp. at 6.

Count II of the complaint charges Ron Bright, the operator of the disposal site, with violations of Sections 21(a) and (e) of the Act, claiming that Ron Bright caused or allowed the open dumping of waste at the disposal site by accepting for disposal the source site miscellaneous material, at a site that is not permitted by the Agency as a sanitary landfill and does not meet the requirements of the Act and of Board regulations. Comp. at 7.

Count III of the complaint charges Intra-Plant, treatment plant construction contractor, with violations of Sections 21(a) and (e) of the Act, claiming that Intra-Plant caused or allowed the open dumping of waste at the disposal site by hiring Ironhustler to dispose of the miscellaneous source site material at the disposal site, a site that is not permitted by the Agency as a sanitary landfill and does not meet the requirements of the Act and of Board regulations. Comp. at 8-9.

Count IV of the complaint charges Ironhustler, as Intra-Plant’s subcontractor, claiming that Ironhustler has caused or allowed the open dumping of waste at with violations of Sections 21(a) and (e) of the Act, by transporting the miscellaneous source site material to the disposal site, a site that is not permitted by the Agency as a sanitary landfill and does not meet the requirements of the Act and of Board regulations. Comp. at 10-11.

As to each respondent, the People’s requested remedy is a finding of violation, a cease and desist order, and imposition of a civil penalty.

### **ALTIVITY’S CROSS CLAIM AGAINST INTRA-PLANT, IRONHUSTLER, AND RON BRIGHT**

In its December 30, 2011 answer, Altivity denied the allegations in the People’s complaint that it caused or allowed open dumping. On January 10, 2012, Altivity filed, along with a motion for leave to file instant, a cross claim for contribution (Alt. CC). Altivity refers

to Intra-Plant, Ironhustler, and Ron Bright as the “Excavating Defendants,” and claims that they owed Altivity “certain legal duties and obligations” that the respondents breached. Alt. CC at 1. The complaint goes on to state that:

Pleading in the alternative and without prejudice to Altivity’s denials set forth in its answer, in violation of said duties and obligations, the Excavating Defendants committed one or more of the following acts or omissions jointly, severally, or both:

- a. Carelessly and negligently designing the Wastewater Plant;
- b. Failing to properly test the native soil at the Wastewater Plant for potential contaminants;
- c. Carelessly and negligently excavating, removing, and disposing of native soil from the Wastewater Plant;
- d. Failing to inform Altivity regarding the acts and omissions taken related to the construction and excavation of the Wastewater Plant; and
- e. Otherwise acting to the detriment of Altivity or the State.

The aforementioned negligent acts and/or omissions were a direct and proximate cause of the losses for which damages are allegedly claimed by the State.

In the event the State obtains judgment in its favor and against Altivity, Altivity would be entitled to judgment in its favor and against the Excavating Defendants pursuant to the Contribution Among Joint Tortfeasors Act [Contribution Act], 740 ILCS 100/1 and the Illinois Environmental Protection Act, 415 ILCS 5/21, in an amount commensurate with each party’s relative percentage of fault to the extent they caused or contributed to the losses claimed by the State. Alt. CC at 2.

In its prayer for relief, Altivity requests that, if judgment is entered in favor of the State and against Altivity, the Board then enter judgment in favor of Altivity and against the Excavating Defendants. Alt. CC at 2-3.

### **INTRA-PLANT’S CROSS COMPLAINT AGAINST IRON HUSTLER**

In its January 12, 2012 motion for leave to file a cross-complaint, Intra-Plant references the cross-complaint previously filed along with its answer on December 30, 2011 (IMP CC). Intra-Plant cross complains against Ironhustler that, on or about January 21, 2008, Intra plant entered into an agreement with Ironhustler, attached as Exhibit A. IMP CC at 5, and Exh. A. Intra-Plant alleges that Ironhustler was to excavate and remove the material from property located in Pekin, Illinois. Intra-Plant’s cross-complaint recites that

The Agreement provides, in part, that "[All unsuitable material shall be hauled off site [the Pekin site] and disposed of legally."

The People of the State of Illinois have the (sic) alleged the Material removed from the Pekin Site was not disposed of legally.

WHEREFORE, in the event the Board determines that the Material removed from the Pekin Site was not disposed of legally, or that such disposal violated any term or provision of the Illinois Environmental Protection Act, [Intra-Plant] asks that the Board enter an order whereby Ironhustler shall indemnify and hold harmless from any and all damages resulting from this cause of action [Intra-Plant] including, without limitation, penalties, fines, costs, and costs incurred for the proper removal, relocation and disposal of the Materials. IPM CC at 6.

## **LEGAL FRAMEWORK UNDER THE ACT**

### **Citizen's Enforcement Case Procedures**

Section 31(d)(1) of the Act provides that:

Any person may file with the Board a complaint, meeting the requirements of subsection (c) of this Section, against any person allegedly violating this Act or any rule or regulation thereunder . . . Unless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing . . . 415 ILCS 5/31(d)(1) (2010); *see also* 35 Ill. Adm. Code 103.212(a).

This type of enforcement action is referred to as a "citizen's enforcement proceeding," which the Board defines as "an enforcement action brought before the Board pursuant to Section 31(d) of the Act by any person who is not authorized to bring the action on behalf of the People of the State of Illinois." 35 Ill. Adm. Code 101.202. Where respondents in an enforcement action initiated by the People seek to bring cross claims or counter complaints against one another, the Board must determine whether the resulting citizen's enforcement proceedings can be accepted for hearing.

Section 31(c), referred to in the passage of Section 31(d)(1) quoted above, states that the 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 . . .". 415 ILCS 5/31(c) (2010); *see also* 35 Ill. Adm. Code 103.204(c) codifying complaint requirements.

### **Duplicative/Frivolous Determination Procedures**

Section 31(d) of the Environmental Protection Act (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) (2008); 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).

### **DISCUSSION**

As there has been no objection made to Altivity's or Intra-Plant's motions for leave to file, the motions for leave to file are each granted. Based on the information currently before the Board, the Board finds that neither Altivity's cross claim nor Intra-Plant's cross-complaint is duplicative within the meaning of the Act. But, on its own motion the Board finds that the cross-claim and cross complaint are frivolous.

Under the circumstances of this case, the Board believes it is a fair reading of Altivity's and Intra-Plant's pleadings to find that each asserts that any violations of Section 21(a) and (e) of the Act with which they are charged were committed by other respondents. But, each requests relief which the Board cannot grant.

Altivity asserts that because of "certain legal duties and obligations", presumably established by contract, if judgment is entered in favor of the State and against Altivity, the Board should then enter judgment in favor of Altivity and against the Excavating Defendants. Alt. CC at 2-3. The alleged basis for such relief is the Contribution Act and the Act. As the Board observed in dismissing a counter-claim

the counterclaim is filed pursuant to the Contribution Act and not the Environmental Protection Act. The Board only has the authority granted to the Board by the General Assembly and that authority is limited to hearing cases alleging violations of the Environmental Protection Act. Therefore, the counterclaim is dismissed. Grand Pier Center LLC and American International Specialty Lines Insurance Co., as subrogee of Grand Pier Center LLC v. River East LLC, Chicago Dock and Canal Trust, Chicago Dock and Canal Company, and Tronox LLC, PCB 05-157, slip op. at 9 (Jan. 5, 2006).

Accordingly, the Board cannot grant the relief requested by Altivity under the Contribution Act, and finds this portion of the relief request frivolous.

To the extent that Altivity seeks relief for violations of contractual duties and obligations, the Board has found that this type of relief request too is frivolous.

The Board does not have the authority to settle 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). Rolf Schilling, Pam Schilling and Suzanne Ventura v. Gary D. Hill, Villa Land Trust, and Prairie Living West, LLC v. Horve Contractors, Inc. PCB 10-100, slip op. at 9 (Aug. 4, 2011).

As Altivity seeks relief the Board cannot grant, the Board dismisses the cross claim as frivolous.

Likewise, the Board dismisses Intra-Plant’s counter claim as frivolous, since it too seeks indemnification under the terms of a contract. Since the result of today’s action is that neither the Altivity cross-complaint nor the Intra-Plant cross claim may proceed, the caption of today’s order remains unchanged (as shown on this order).

Consistent with prior Board practice, the parties are free to file new cross claims or cross-complaints if they choose to again attempt to satisfy the pleading requirements of Section 31(d) of the Act.. But, the Board reminds the parties that they need not do so to introduce evidence of any contractual arrangements they may have with other respondents in their defense to claims by the People. Such evidence may be relevant to whether each respondent had the requisite degree of control to be found guilty of causing or allowing land pollution, and whether any penalty should be imposed (see Sections 21(a) and (e) and 33(c) of the Act). It may also be relevant to aggravation or mitigation of any penalty (see Section 42(h) of the Act). 415 ILCS 5/21 (a) and (e), 33(c), and 42(h) (2010).

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 12, 2012, by a vote of 5-0.



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John Therriault, Assistant Clerk  
Illinois Pollution Control Board