

ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS)	
)	
Complainant,)	
)	
v.)	PCB 08-17
)	
FELKER PHARMACY, INC., an Illinois)	(Enforcement-Water)
corporation, and ROD BENNETT)	
CONSTRUCTION, INC., an Illinois)	
corporation,)	
)	
Respondents)	

MOTION TO FILE THIRD PARTY COMPLAINT

Rod Bennett Construction, Inc. (Respondent), by and through its attorney, James E. Meason, files this Motion to File Third Party Complaint pursuant to 35 Ill. Admin. Code 103.206(d), stating as follows:

1. The Illinois Pollution Control Board (IPCB) regulations permit a party to file a third-party complaint upon moving IPCB for leave to file the pleading. 35 Ill. Admin. Code 103.206(d).
2. The basis for this Motion is that Respondent has a claim that arises out of the occurrences that are the subject of the proceeding.
3. In the alternative, pursuant to 35 Ill. Admin. Code 103.206(a), Respondent requests IPCB to add McClellan Blakemore Architects, Inc. (MBA) and Wendler Engineering Services, Inc. (Wendler) because a complete determination of the controversy cannot be had without the presence of the entities.
4. Moreover, the Illinois Code of Civil Procedure permits a defendant to, through the filing of a third-party complaint, "bring in as a defendant a person not a party to the action who is or may be liable to him or her for all or part of the plaintiff's claim against him or her." 735 ILCS 5/2-406(b).
5. The Environmental Protection Act (Act) (415 ILCS 5/1 et seq.) prohibits causing, threatening, or allowing the discharge of any contaminant into the environment so as to cause or tend to cause water pollution. 415 ILCS 5/12(a).
6. The Act prohibits the deposit of any contaminant as to create a water pollution hazard. 415 ILCS 5/12(d).
7. The Act prohibits the causing, threatening, or allowing of the discharge of any

contaminant into the waters of the State without a National Pollution Discharge Elimination System (NPDES) permit. 415 ILCS 5/12(f).

8. Respondent incorporates the Complaint in this case by reference. In addition to the allegations contained in the Complaint, Respondent maintains:

9. Respondent Felker Pharmacy, Inc. hired Respondent to build a store known as Snyder Pharmacy Dixon in Dixon, Illinois (project).

10. Respondent hired McClellan Blakemore Architects, Inc. (MBA) to design the project.

11. MBA hired Wendler Engineering Services, Inc. (Wendler) to provide engineering services on the project. It was within Wendler's scope of services to submit the Notice of Intent for General Permit to Discharge Wastewater from a Construction Site (NOI) application to the Illinois Environmental Protection Agency (IEPA). Wendler failed to do so.

12. Further, because Wendler failed to apply for the NOI, IEPA did not issue a NPDES permit for the project.

13. On or about August 26, 2005, an IEPA inspector visited the site and noted the lack of an NOI or NPDES permit. As a result of that inspection, IEPA referred a regulatory enforcement case for prosecution.

14. On or about August 20, 2007, Petitioner filed this case against Respondents, alleging violations of the Environmental Protection Act and its implementing regulations for water pollution, creating a water pollution hazard, and failing to obtain an NPDES Permit (i.e., 415 ILCS 5/12(a), (d), (f) and 35 Ill. Admin. Code 309.102(a).

15. Since Wendler did not obtain the NPDES permit, any storm water runoff from the project also was unpermitted, constituting and causing, threatening, or allowing water pollution and a water pollution hazard. Such a failure constitutes negligent conduct. Wendler had a duty to perform its services in a competent fashion, and it failed, thereby breaching its duty. Consequently, because of that breach of duty, Respondent is a named party in the Complaint and may incur liability.

16. MBA had a duty to properly supervise Wendler. MBA failed to properly supervise Wendler, and therefore breached its duty to Respondent to perform its services in a competent fashion, thereby breaching its duty to Respondent. Consequently, because of that breach of duty, Respondent is a named party in the Complaint and may incur liability.

17. The Joint Tortfeasor Contribution Act (Contribution Act) (410 ILCS 100/1 et seq.) provides "where 2 or more persons are subject to liability in tort arising out of the same injury to person or property . . . there is a right of contribution among them, even though judgment has not been entered against them . . ." 740 ILCS 100/2(a). Liability under the Act creates the requisite "liability in tort" for purposes of the Contribution Act. People v. Brockman, 143 Ill.2d 351, 373 (1991) (recognizing third party Contribution Act claim where original defendant sued under

Act); Illinois State Toll Highway Authority v. Amoco Oil Company and Mobil Oil Corp., 336 Ill.App.3d 300, 313 (2 Dist. 2003) (applying Contribution Act claim to underlying liability under Act). Illinois State Toll Highway Authority v. Amoco Oil Company and Mobil Oil Corp., 336 Ill.App.3d at 315-16 (allegation that Act's joint liability provisions subjected parties to liability is sufficient to maintain contribution action).

18. Respondent filed electronically a Third Party Complaint with IPCB on December 7, 2007.

19. Therefore, Respondent requests IPCB to either allow Respondent to add Wendler and MBA as third party respondents retroactively, using the previously filed complaint, or in the alternative, order the Petitioner to add Wendler and MBA as respondents to this case.

Respectfully submitted,

Rod Bennett Construction, Inc., Respondent

By: _____
James E. Meason

James E. Meason
Attorney at Law
113 W. Main Street
Rockton, IL 61072-2416
(815) 624-6517

VERIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Rod Bennett Construction, Inc., Respondent

By: _____
Rod Bennett

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CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 12, I certify that on December 28, 2007, I sent via U.S. mail from Rockton, Illinois, at 3:00 p.m. or via electronic filing as indicated the Motion to File Third Party Complaint to the following persons:

Illinois Pollution Control Board (electronic filing)
100 W. Randolph
Suite 11-500
Chicago, Illinois 60601

Bradley P. Halloran, Esq.
Hearing Officer, Illinois Pollution Control Board
100 W. Randolph
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Chicago, Illinois 60601

Stephen J. Sylvester, Esq.
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P.O. Box 10
Oregon, IL 61061-0010

Rod Bennett Construction, Inc.

By: _____
James E. Meason
Respondent's Attorney