BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, By KWAME RAOUL, Attorney General of the State of Illinois, Complainant, -vs- INLAND-FRYCEK, INC., an Illinois Corporation, and 969 NORTHWEST HWY LLC, an Illinois Limited Liability Company, Respondents.	)	PCB No. 23-112

NOTICE OF FILING

PLEASE TAKE NOTICE that today, September 25, 2003, Complainant, PEOPLE OF THE STATE OF ILLINOIS, filed with the Office of the Illinois Pollution Control Board ("Board") its Response to Respondent Inland Frycek Inc.'s Motion to Dismiss, a copy of which is attached and herewith served upon you.

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CERTIFICATE OF SERVICE

I, CHRISTOPHER GRANT, an attorney, do certify that I caused to be served on those listed below this 25th day of September, 2023, Complainant's Response to Respondent Inland Frycek, Inc.'s Motion to Dismiss by email and by first class mail.

S/ Christopher Grant
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Complainant,	)	
-vs-	)	PCB No. 23-112
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Respondents.	)	

RESPONSE TO INLAND-FRYCEK INC'S MOTION TO DISMISS

Now comes Complainant, PEOPLE OF THE STATE OF ILLINOIS, by KWAME RAOUL, Attorney General of the State of Illinois, and responds to Respondent INLAND-FRCEK, INC.'s ("IFI") Motion to Dismiss ("*Motion*"), as follows:

I. STANDARD FOR MOTION TO DISMISS

In reviewing a Motion to Dismiss, the Illinois Pollution Control Board ("Board") will consider all well-pled allegations as true and draw all reasonable inferences in favor of the non-movant. *People v. Sheridan-Joliet Land Development, LLC* et al, PCB 13-19, p. 25, August 8, 2013. Although IFI does not specify under which section it brings its *Motion*, this policy is true whether a Motion is brought under Section 2-615 or Section 2-619 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615 or 5/2-619. *Patrick Engineering, Inc. v. City of Naperville,* 2012 IL 113148.

Accepting Complainant's well-pled allegations as true, the Board should find that Complainant has adequately alleged all of the violations of the Illinois Environmental Protection Act ("Act") and Board regulations in the Complaint, deny IFI's *Motion*, and direct IFI to file its

Answer to the Complaint.

II. FACTS DEEMED ADMITTED FOR THE PURPOSE OF THIS MOTION

Complainant incorporates its Complaint by reference into this Response, and points particularly to the following material allegations which defeat IFI's claims:

1. The Site had been enrolled in Illinois EPA's leaking underground storage tanks ("LUST") program to remediate historical petroleum contamination. The Site was not permitted for the storage, treatment or disposal of waste. (Count I, paragraphs 5-6). The approved LUST Corrective Action Plan did not authorize the use of Calcium Peroxide to assist in remediation (Count I, Par. 11).

2. Respondent 969 Northwest Hwy LLC ("969 LLC") retained IFI to remediate the petroleum contamination. IFI brought approximately 100,000 pounds of Calcium Peroxide to the Site, and stored the material in the building at the Site and in a metal trailer (Count I, Par. 13).

3. Calcium Peroxide is a powerful oxidizer which can cause eye damage and skin irritation upon exposure. (Count I, Par. 12).

4. One day after IFI put the calcium peroxide in the building, it caught fire. The calcium peroxide was soaked with water during attempts to put out the fire. The fire and the response to it caused calcium peroxide to be spread throughout the Site. (Count I, Par. 14).

5. IFI subsequently reported the release of 20,000 pounds of calcium peroxide at the Site as runoff from fire-fighting operations, and reported that two firefighters had been taken to the hospital for injuries incurred during the fire at the Site. (Count I, Par. 15).

6. On July 22, 2019, five days after the fire, calcium peroxide, mixed with debris, was spread throughout the Site, and had not been collected. (Count I, Par. 16). On September 9, 2019, IFI advised Illinois EPA that it would not remove the spilled calcium peroxide for disposal, and stated that at least 2 cubic yards of Calcium Peroxide had likely been washed into adjacent sewers. (Count I, Par. 17).

7. Subsequent Illinois EPA inspections on September 12, 2019, December 23, 2019, and September 1, 2020, found that the spilled calcium peroxide, mixed with dirt and debris, remained in a large pile on the ground at the Site. (Count I, Par.'s 18, 19, 20).

8. On December 4, 2020, 506 days after the date of the fire and release of calcium peroxide, the calcium peroxide was taken for disposal to the Zion Landfill, a permitted municipal solid waste and special waste landfill. The disposal was arranged by 969 LLC as a result of local ordinance enforcement efforts. (Count I, Par. 22).

9. Neither Respondent tested the calcium peroxide spilled at the Site to determine whether it was a special or hazardous waste. (Count III, Par. 29)

10. No action was taken to prevent the calcium peroxide from migrating into groundwater at the Site. (Count IV, Par.'s 25-26).

Complainant sufficiently alleges facts to support all of the violations set forth in the Complaint against IFI. Nothing in IFI's *Motion* provides a sufficient basis to defeat Complainant's allegations. In fact, IFI's "*Motion*" is more like a "general denial" or answer instead of a legally sufficient motion to dismiss. Respondent only minimally cites any statutory authority or case law, and the *Motion* appears to merely deny specific allegations in the Complaint, instead of attacking its legal sufficiency.

III. COMPLAINANT HAS ADEQUATELY PLEAD THAT THE SPILLED CALCIUM PEROXIDE IS "WASTE".

IFI's principle contention is that the calcium peroxide spilled at the Site is not "Waste" as that term is used in Counts I, II, III, and V. (*Motion*, p. 3) Again, IFI's *Motion* merely denies this allegation, claiming that it is a "useful product", instead of waste. However, this contention misconstrues the definition of "waste" in the Act.

Section 3.535 of the Act, 415 ILCS 5/3.535 (2022), defines "waste" as:

> "WASTE" means any garbage...or any other discarded material, including any solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities....

Nothing in the definition of "waste" excludes material that is a discarded "useful product" from the definition of "waste". One would expect that all discarded items, when first

purchased, were useful for some purpose, prior to being discarded. Certainly, gasoline present at this LUST site was useful, prior to its leaking and spilling into the ground at the Site, thus becoming "waste", requiring remediation.

Complainant alleges:

> The Respondents caused and allowed mixed calcium peroxide residue and soil to be dumped and discarded inside the garage building at the Site. The Respondents also allowed the mixed calcium peroxide residue and soil to be dumped and distributed onto the ground throughout the Site. Mixed calcium peroxide residue and debris was also accumulated in roll-off boxes at the Site.

Complaint, Count I, Par. 28.

IFI refused to remove the spilled material for disposal, but also made no apparent effort to reclaim it either. Instead, it was left on the ground at the Site for 506 days, mixed with dirt and debris, and exposed to weather. Although IFI claims that the release was "… done by firefighters, not IFI" (*Motion*, p. 6), it must bear responsibility for its part in the dumping of the calcium peroxide, including the storage of a strong oxidizing chemical inside an old gas station building, which created a fire hazard. Notably, the fire started only one day after the calcium peroxide was brought to the Site. Further, the fact that the material was spread through response to the fire, does not excuse IFI's liability for allowing the continued open dumping and abandonment of the waste after the fire. Although IFI was not the property owner, the calcium peroxide was owned and controlled by IFI and brought to the Site by IFI, which was the operator of the LUST remediation project at the Site. Accordingly, IFI was the owner of the source of the alleged pollution in this matter. Further, IFI dealt with Illinois EPA after the spill, and was the party that refused to remove the calcium peroxide for disposal. It was IFI which decided to leave its material on site for 506 days.

A respondent "allows the open dumping of waste" when it fails to take action to remedy the dumping. *City of Chicago v. Speedy Gonzales Landscaping Inc., et al.,* AC 06-39, 06-41 (consolidated) (March 19, 2009), also citing *IEPA v. Rawe*, PCB 92-5 (October 16, 1992), (Passive conduct amount to acquiescence sufficient to find a violation of 21(a) of the Act), *aff'd* 2011 IL App (1st) 093021; *IEPA v. William Shrum*, AC 05-18, slip op. at 8 (March 16, 2006) (present inaction on the part of a current landowner to remedy past illegal disposal of waste previously placed on a site constitutes 'allowing' open dumping, because the owner allows the illegal situation to continue). In our case, both Respondents failed to take any action to remedy the disposal of waste for a period of 506 days.

Section 3.185 of the Act, 415 ILCS 5/3.185 (2022), provides, as follows:

> "Disposal" means the discharge, deposit, injection, dumping, spilling, leaking or placing of any waste or hazardous waste into or on any land or water or into any well so that such waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

Clearly, the discharge, spilling and deposit of calcium peroxide constituted "disposal" as that term is defined in the Act, because IFI's actions and inactions caused and allowed the placing of waste on land in such matter as to allow the calcium peroxide to enter the environment. *Complaint*, Ct. I, Par 32. Just as clearly the calcium peroxide was "discarded material" and "Waste" as that term is defined in the Act because the calcium peroxide was ultimately disposed in the Zion Landfill.

It is true that a material is not discarded, and therefore not "waste", if it is "… collected, separated, or processed and returned to the economic mainstream in the form of raw materials or products". *Alternate Fuels Inc. v. Illinois EPA*, 215 Ill.2d 219, 240 (2004). However, in our case the material was not "returned to the economic mainstream". It was eventually sent to the

Zion Landfill, a permitted municipal solid waste and special waste landfill, and disposed of. Accordingly, the spilled calcium peroxide accumulated at the Site is "waste".

IV. THE CALCIUM PEROXIDE BROUGHT TO THE SITE COULD NOT BE USED FOR REMEDIATION OF THE SITE.

At this point in the case, before discovery, it is impossible to know exactly why IFI brought 100,000 pounds of Calcium Peroxide to the Site. Whether IFI was storing it for use at another LUST Site or accumulating it for resale, it is clear that it could not be used for remediation of the Site under the LUST program. Yet IFI blithely claims "… nor does the Act require Agency approval to use calcium peroxide to remediate the Site" (*Motion*, p. 1) and "… mixing calcium peroxide with soil is exactly what calcium peroxide was on site to accomplish." (*Motion*, p. 3) First, such additional facts must be plead in an answer or affirmative defense, not raised in a Motion to Dismiss, which accepts the facts in the complaint, and attacks its legal sufficiency. Further, these statements are grossly misleading and legally incorrect. While, as plead, calcium peroxide (at least as an uncontaminated material) can be used for petroleum remediation, it was not approved for use by Illinois EPA in the approved Corrective Action Plan for the Site.

Section 57.7(b) of the Act, 415 ILCS 5/57.7(b) (2022), provides, in pertinent part, as follows:

> (b) Corrective action
>
> * * *
>
> (2) if any of the applicable contaminants exceed the remediation objectives approved for the site, within 30 days after the Agency approves the site investigation completion report, the owner or operator shall submit to the Agency for approval a corrective action plan designed to mitigate any threat to human health, human safety, or the environment resulting from the underground storage tank release. The plans shall describe the

> selected remedy and evaluate the ability and effectiveness to achieve the remediation objective approved for the site. At a minimum the report shall describe the selected remedy and evaluate its ability, and effectiveness to achieve the remediation objective approved for the site. At a minimum, the report shall include all of the following….
>
> * * *
>
> (4) Upon the Agency's approval of a corrective action plan, or as otherwise directed by the Agency, the owner or operator *shall proceed with corrective action in accordance with the plan*. (Emphasis added)

The Site had been entered into the LUST Program and had an approved corrective action plan, which did not include the use of calcium peroxide for remediation. The calcium peroxide brought to the Site, even before being contaminated with dirt and debris and being soaked with firefighting water, could not have been used for remediation of the Site, because that would have conflicted with the approved Corrective Action Plan.

V. IFI IS LIABLE FOR PAST VIOLATIONS

IFI states that dismissal is appropriate because "… the complaint alleges wholly past, alleged violations no longer present at the Site." (*Motion*, p. 1) However, this argument directly conflicts with the express language of the Act. Section 33(a) of the Act, 415 ILCS 5/33(a) (2022), provides, in pertinent part, as follows:

> Section 33. Board Orders
>
> (a) . . . *It shall not be a defense to findings of violations of the provisions of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order, or a bar to the assessment of civil penalties that the person has come into compliance subsequent to the violation,* except where such action is barred by any applicable State or federal statute of limitation…. (Emphasis added)

IFI has not argued that that any statute of limitations applies to Complainant's enforcement action, and even if it did, it would not apply here where Complainant brought this action to protect the public's right to a clean environment. *Pielet Bros. Trading, Inc. v. Pollution*

Control Board, 110 Ill. App. 3d 752, 758 (5th Dist. 1982) (where the State is protecting the public's right to a clean environment a statute of limitations will not apply). Per the express provisions in Section 33 of the Act, the fact that the violations have been corrected through Respondent 969 LLC's disposal of the waste at the Zion Landfill, does not provide grounds for dismissal of Complainant's allegations. The fact that the violations continued for 506 days is sufficient to allow a finding of liability and assessment of an appropriate civil penalty against both Respondents.

Complainant acknowledges that the duration of the violation will be considered for the purposes of an appropriate civil penalty, as it is one of the factors the Board is authorized to address. *See* 415 ILCS 5/42(h)(1) (2022). However, this case is not yet at the penalty stage, and subsequent compliance cannot defeat IFI's liability for the alleged violations.

VI. COMPLAINANT MAY RECOVER ON EACH ALLEGED VIOLATION

IFI finally complains that it is "vengeful and unnecessarily punitive" to allege multiple counts against IFI. First, this argument is improper in a Motion to Dismiss, as it does not test the legal sufficiency of the Complaint. Further, multiple violations occurred at the Site and Complainant has adequately alleged sufficient facts for each violation:

1. In Count I, Complainant alleges the open dumping of waste, in violation of Section 21(a) of the Act, 415 ILCS 5/21(a) (2022). Complainant alleges that the spilled calcium peroxide was discarded material, dumped and left at an unpermitted facility. (*Complaint*,Ct. I, Par's 5, 28.) This is sufficient to allege the open dumping of waste.

2 In Count II, Complainant alleges the disposal and abandonment of waste at an improper Site, because no Illinois EPA permit for the storage, treatment or disposal of waste had been obtained, in violation of Section 21(e) of the Act, 415 ILCS 5/21(e) (2022). Complainant

has alleged that IFI stored and abandoned discarded material, in the form of the calcium peroxide mixed with debris, at an unpermitted facility for a period of 506 days. (*Complaint*, Ct. II, Par. 32..) This is sufficient to allege a violation of Section 21(e) of the Act.

3. In Count III, Complainant alleges that the Respondents generated waste, but failed to make a required special waste determination after the waste was generated, in violation of Section 21(d)(2) of the Act, 415 ILCS 5/21(d)(2) (2022), and Section 818.121(a) of the Board Waste Disposal Regulations, 35 Ill. Adm. Code 818.121(a). The facts alleged track the plain language of Section 818.121(a) of the Board Waste Disposal Regulations. (*See, e.g., Complaint*, Ct. III, Par's 34-36.) A violation of this regulation is also a violation of Section 21(d)(2) of the Act, as Complainant plainly alleges that Respondents caused and allowed debris to be disposed and abandoned at the Site, thereby conducting a waste storage and waste disposal operation.

4. In Count IV, Complainant alleges that by leaving the calcium peroxide on the ground for an extended period of time, exposed to weather, the Respondents created a water pollution hazard, which threatened to contaminate the groundwater in violation of Section 12(d) of the Act, 415 ILCS 5/12(d) (2022). As alleged Calcium peroxide is an oxidizer and can be deemed likely to have been instrumental in causing the July 17, 2019 fire at the Site. (Complaint, Ct. I, Par's 11-12.) Exposure to the fire sent fire fighters to the hospital. (*Complaint*, Count I, Par. 15.) Complainant alleges that calcium peroxide is a "contaminant" whose migration to groundwater could easily cause, threaten or allow the groundwater to become "… harmful or detrimental or injurious to public health" and create a nuisance, i.e., water pollution. However, instead of removing the material and threat to water pollution, , IFI advised Illinois EPA on September 9, 2019, that it had gathered spilled calcium peroxide dispersed on the ground and placed it in a pile on the ground at the Site. (*Complaint*, Ct. I, Par. 17.) By gathering spilled

calcium peroxide dispersed on the ground and placing it in a pile on the ground at the Site that threatened to contaminate groundwater, exposed to weather, for 506 days, IFI created a water pollution hazard. Complainant has adequately alleged a violation of Section 12(d) of the Act.

5. Finally, in Count V, Complainant alleges open dumping of waste resulting in litter, in violation of Section 21(p)(1) of the Act, 415 ILCS 5/21(p)(1) (2022). While the Act does not define "litter", the Board commonly applies the definition from the Illinois Litter Control Act, which defines litter as "any discarded, used or unconsumed substance or waste or anything else of an unsightly or unsanitary nature, which has been discarded, abandoned, or otherwise disposed of improperly. " *Illinois EPA v. Northern Illinois Service Co.*, AC 12-51, (November 20, 2014, slip op. at 10). As alleged, the discarded calcium peroxide was intermingled with debris and soil, and a large pile of the mixed debris was left on the ground, partially covered with a tarp, for a period of 506 days. (*Complaint*, Count I, par's 18 & 20). The presence of the waste product at the Site resulted in a municipal ordinance enforcement action. (*Complaint*, Count I, Par. 22). Complainant has adequately alleged a violation of Section 21(p)(1) of the Act.

In each of the five counts of the Complaint, Complainant alleges separate, individual violations of the Act. The violations were specified by the General Assembly as *separate* violations in the Act, and IFI cites no authority in support of its argument that Complainant is barred from alleging multiple statutory violations for IFI's actions and inactions at the Site. The facts alleged in the Complaint, which for purposes of IFI's *Motion* must be taken as true, are more than sufficient to establish the violations. Although IFI notes that civil penalties are to aid in enforcement of the Act (*Motion* pp. 8-9), the Board will determine an appropriate civil penalty when evidence is presented to it at hearing or during an appropriate motion for summary

judgment, and the Board may assess such penalty as it believes "will aid in enforcement of the Act". But IFI's argument about civil penalty are premature, and the fact that multiple violations could possibly result in a larger civil penalty provides no basis for dismissal of any of the alleged violations.

VII. CONCLUSION

IFI's fails to provide any legally sufficient basis for dismissal of any of the Counts alleged in the Complaint. Instead, IFI essentially denies the factual allegations, which is the function of an answer, not a motion to dismiss. Because IFI fails to adequately attack the legal sufficiency of Plaintiff's allegations, it's *Motion* is "legally insufficient". Moreover, Complainant has adequately plead sufficient facts to establish each of the violations alleged in Counts I through V of the Complaint that are waste-related as well as the alleged violation for creating a water pollution hazard. As alleged, and taken as true for the purpose of IFI's *Motion*, the spilled calcium peroxide is "discarded material" and therefore "waste" as that term is defined in Section 3.535 of the Act, which is a sufficient predicate for the violations alleged in Counts I through IV of the Complaint. In addition, IFI's placement of the calcium peroxide mixed with soil in a pile at the Site is sufficiently alleged to support the claim in Count IV that IFI created a water pollution hazard. Therefore, IFI's *Motion* should be denied, and IFI should be ordered to file its answer to the Complaint without further delay.

Respectfully submitted,

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