



is that the calcium peroxide at the Site is a useful product and that it did not cease being a useful product after it was mixed with soil and debris during the fire on July 17, 2019. Mot. at 3-6.

The People contend that the complaint sufficiently alleges facts to support all of the violations alleged against IFI. Resp. at 3. The People note that “[n]othing in the definition of ‘waste’ excludes material that is a discarded ‘useful product’.” *Id.* The People also allege that IFI’s motion is more like a general denial or answer than a true motion to dismiss defeating the Complainant’s allegations. *Id.*

The People’s response alleges the following taken from the complaint:

1. The Site had been enrolled in Illinois E[nvironmental] P[rotection] A[gency]’s leaking underground storage tank (“LUST”) program to remediate historical petroleum contamination. The Site was not permitted for the storage, treatment or disposal of waste. (Count I, par. 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. 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. 25-26).

Resp. at 2-3.

### **Discussion**

In ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See, e.g., Beers v. Calhoun*, PCB 04-204, slip op. at 2 (July 22, 2004); *see also In re Chicago Flood Litigation*, 176 Ill. 2d 179, 184, 680 N.E.2d 265, 268 (1997); *Board of Education v. A, C & S, Inc.*, 131 Ill. 2d 428, 438, 546 N.E.2d 580, 584 (1989). “To determine whether a cause of action has been stated, the entire pleading must be considered.” *LaSalle National Trust N.A. v. Village of Mettawa*, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297, 1303 (2nd Dist. 1993), citing *A, C & S*, 131 Ill. 2d at 438, 546 N.E.2d at 584 (“[T]he whole complaint must be considered, rather than taking a myopic view of a disconnected part[.]” *A, C & S*, quoting *People ex rel. William J. Scott v. College Hills Corp.*, 91 Ill. 2d 138, 145, 435 N.E.2d 463, 466-67 (1982)).

“[I]t is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief.” *Smith v. Central Illinois Regional Airport*, 207 Ill. 2d 578, 584-85, 802 N.E.2d 250, 254 (2003); *see also Chicago Flood*, 176 Ill. 2d at 189, 680 N.E.2d at 270 (“[T]he trial court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party.”); *People v. Peabody Coal Co.*, PCB 99-134, slip op. at 1-2 (June 20, 2002); *People v. Stein Steel Mills Services, Inc.*, PCB 02-1, slip op. at 1 (Nov. 15, 2001).

The Board finds that nothing in IFI’s motion attacks the legal sufficiency of the complaint. Rather, IFI’s motion disputes the alleged facts supporting the cause of action. IFI’s argument that the calcium peroxide at the Site is a “useful product” does not negate that it could become a “waste” or “refuse” once mixed with soil or debris. *See* 415 ILCS 5/3.535, 3.385, and 3.165 (2022). Interpreting the pleadings in the light most favorable to the non-moving party, the Board cannot find that no set of facts could be proved which would entitle the People to relief. The Board denies IFI’s motion to dismiss for failure to state a claim.

### **MOTION TO DISMISS: OTHER AFFIRMATIVE MATTER**

IFI also moves to dismiss the complaint on the grounds that it is barred by the other affirmative matter, namely that IFI is not the Site owner and that the Site complies with the Act. Mot. at 6-8.

### **Discussion**

A defendant may file a motion to dismiss on the grounds that the plaintiff's claim is barred by other "affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (2022). In ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See, e.g., Beers*, PCB 04-204, slip op. at 2; *see also Chicago Flood*, 176 Ill. 2d at 184, 680 N.E.2d at 268; *A, C & S*, 131 Ill. 2d at 438, 546 N.E.2d at 584. Because the allegations of the complaint are taken as true, the "affirmative matter" presented by the defendant must do more than just refute a well-pleaded fact in the complaint. *Doe v. Univ. of Chi. Med. Ctr.*, 2015 IL App (1st) 133735, P39.

Each of the counts alleged in the People's complaint identifies "person" as subject to the prohibition, not "owner" or "operator". *See generally*, Comp. Under the Act, a "person" includes numerous entities including corporations, such as IFI. *See* 415 ILCS 5/3.315 (2022). In their response to IFI's motion, the People further argue that "[a]lthough 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" and that IFI "was the owner of the source of the alleged pollution in this matter." Resp. at 4.

The Board finds that IFI's argument that it is not the Site owner fails to defeat any of the alleged violations of the complaint. Interpreting the pleadings in the light most favorable to the non-moving party, the Board cannot find that no set of facts could be proved which would entitle the People to relief. The Board denies IFI's motion to dismiss as to the argument that IFI is not the Site owner.

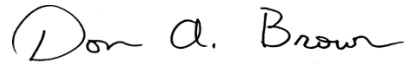
Finally, IFI argues that the "complaint alleges wholly past violations and only seeks penalties." Mot. at 7. IFI argues that the Site complied with the Act when the complaint was filed. *Id.* at 7-8. The People refute this argument by citing to Section 33 of the Act, which specifically provides that "...[i]t shall not be a defense to findings of violations of the provisions of this Act, any rule or regulation adopted under this Act, ... or a bar to the assessment of civil penalties that the person has come into compliance subsequent to the violation...". Resp. at 7. *See also* 415 ILCS 5/33(a) (2022). The Board denies IFI's motion to dismiss for wholly past violations based on the plain language of Section 33 of the Act.

### **ORDER**

1. The Board denies IFI's motion to dismiss based on failure to state a claim.
2. The Board denies IFI's motion to dismiss for other affirmative matter.
3. IFI has 60 days from receipt of this order to file an answer to the complaint. *See* 35 Ill. Adm. Code 103.204(d), (e).

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on April 4, 2024, by a vote of 4-0.

A handwritten signature in cursive script that reads "Don A. Brown". The letters are fluid and connected, with a prominent loop on the "D" and a long, sweeping tail on the "B".

Don A. Brown, Clerk  
Illinois Pollution Control Board