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**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

People of the State of Illinois,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 23-112
	)	
Inland-Frycek, Inc. and	)	(Enforcement – Land, Water)
969 Northwest Hwy LLC,	)	
	)	
Respondents.	)	

**NOTICE OF FILING**

On this date, Inland-Frycek Inc. filed its Motion to Dismiss with the Illinois Pollution Control Board by electronic filing.

Respectfully submitted,



Dated: August 11, 2023

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**CERTIFICATE OF SERVICE**

Jennifer A. Burke, an attorney, certifies that she caused a copy of this notice and attachment to be served on the following by the means described on this date.



Dated: August 11, 2023

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**INLAND-FRYCEK INC'S MOTION TO DISMISS**

Inland-Frycek Inc. (IFI) moves to dismiss the complaint brought by the State of Illinois. The complaint fails to state a claim because calcium peroxide - the alleged material present at the site – is a useful product which is not waste, not litter, and not a water pollution hazard. The complaint alleges that calcium peroxide is used to remediate petroleum contamination (Cplt Count I ¶11), thus rendering the complaint insufficient. The real dispute is that the Illinois Environmental Protection Agency's (Agency) Leaking Underground Storage Tank (LUST) section had not approved (Cplt Count I ¶11) using calcium peroxide to remediate petroleum releases at a former gasoline station for purposes of reimbursement from the LUST fund. However, the Illinois Environmental Protection Act (Act) does not require Agency approval to store calcium peroxide at the site nor does the Act require Agency approval to use calcium peroxide to remediate a site. Further, the complaint alleges wholly past, alleged violations no longer present at the site. Accordingly, the Board should dismiss the complaint against IFI.

**INTRODUCTION**

The complaint pertains to a site located at 969 North Northwest Highway, Park Ridge, Illinois. Cplt Count I ¶5. Historically, the site was operated as a gasoline station. Cplt Count I

¶6. Respondent 969 Northwest Hwy LLC later acquired the site and is the sole owner and operator. Cplt Count I ¶7. IFI is an environmental consulting and remediation business. Cplt Count I ¶3. IFI was hired to provide such services at the site. Cplt Count I ¶10.

The State filed a five-count complaint against IFI and 969 Northwest Hwy LLC. All counts are based on the same facts and same site. Essentially, Counts I, II, III, and V allege that calcium peroxide present at the site was discarded as waste or litter. Count IV alleges that calcium peroxide present at the site created a water pollution hazard. Because calcium peroxide is not waste, not litter, and not a water pollution hazard nor was it discarded or disposed, all counts should be dismissed against IFI.

Initially, the Board must determine whether the complaint is frivolous or duplicative. 415 ILCS 5/31(d); 35 Ill. Adm. Code 103.212(a). 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. 35 Ill. Adm. Code 101.202. A complaint is duplicative if it is identical or substantially similar to one brought before the Board or another forum. *Id.* In ruling on a motion to dismiss, the Board looks to Illinois civil practice for guidance. Elmhurst Memorial Healthcare v. Chevron USA, PCB 09-66 (December 16, 2010). In assessing the adequacy of pleadings, the Board has noted that Illinois is a fact-pleading state which requires the pleader to set out the ultimate facts which support the cause of action. Rolf Schilling v. Gary Hill, PCB 10-100 (August 4, 2011) (citations omitted). All well-pled facts are taken as true. People v. Stein Steel Mills Services, PCB 02-1 (Nov. 15, 2001).

**ARGUMENT**

**Calcium Peroxide Is Not Waste**

Counts I, II, and III should be dismissed for failing to allege an actionable claim because calcium peroxide is not waste. The Act defines “waste” as discarded material (415 ILCS 5/3.535) which is synonymous with “refuse” (415 ILCS 5/3.385). Counts I, II, and III should be dismissed because calcium peroxide is not waste and not refuse.

Count I alleges that calcium peroxide is waste and refuse and its presence at the site constitutes open dumping violating 415 ILCS 5/21(a). “Open dumping” means the “consolidation of refuse” at an unpermitted site. 415 ILCS 5/3.305. The complaint alleges calcium peroxide is an oxidizer that “can be used to assist in remediation of petroleum-contaminated soil.” Cplt Count I ¶11. Thus, calcium peroxide is a useful product, not waste or refuse. The complaint further alleges that calcium peroxide mixed with soil was present at the site. Cplt Count I ¶¶18, 20, 21, 28. Taking these allegations as true only for purposes of this motion, mixing calcium peroxide with soil is exactly what calcium peroxide was on site to accomplish. The complaint fails to allege how this mixture constitutes waste or disposal or open dumping. Count I alleging that calcium peroxide present at the site is waste should be dismissed for failure to state a cognizable claim.

Count II alleges that calcium peroxide present at the site between July 17, 2019 and December 4, 2020 is waste disposed at an unpermitted disposal site violating 415 ILCS 5/21(e). The complaint alleges calcium peroxide is an oxidizer that “can be used to assist in remediation of petroleum-contaminated soil.” Cplt Count I ¶11. Thus, calcium peroxide is a useful product, not waste, and continued to be a useful product from July 17, 2019 and December 4, 2020. The complaint further alleges that between July 17, 2019 and December 4, 2020 calcium peroxide

was mixed with dirt. Cplt Count II ¶32. Taking these allegations as true only for purposes of this motion, mixing calcium peroxide with dirt is exactly what calcium peroxide was on site to accomplish. The complaint fails to allege how this mixture constitutes waste or disposal. Count II alleging that calcium peroxide present at the site is waste should be dismissed for failure to state a cognizable claim.

Count III alleges that calcium peroxide present at the site between July 17, 2019 and December 4, 2020 is waste requiring testing to determine whether it is special waste or hazardous waste and failure to perform this waste determination violates 415 ILCS 5/21(d)(2). The complaint explains calcium peroxide is an oxidizer that “can be used to assist in remediation of petroleum-contaminated soil.” Cplt Count I ¶11. Thus, calcium peroxide is a useful product, not waste, and continued to be a useful product from July 17, 2019 and December 4, 2020. The complaint further alleges that between July 17, 2019 and December 4, 2020 calcium peroxide was mixed with soil. Cplt, Count III ¶29, 32. Taking these allegations as true only for purposes of this motion, mixing calcium peroxide with soil is exactly what calcium peroxide was on site to accomplish. The complaint fails to allege how this mixture constitutes waste. Count III alleging that calcium peroxide present at the site is waste should be dismissed for failure to state a cognizable claim.

**Calcium Peroxide Is Not Water Pollution Hazard**

Count IV should be dismissed for failing to allege an actionable claim because the presence of calcium peroxide at the site did not create a water pollution hazard. Count IV alleges that calcium peroxide is a contaminant deposited on the ground so as to create a water pollution hazard violating 415 ILCS 5/12(d). The Act defines “contaminant” as “any solid, liquid, or gaseous matter . . .” 415 ILCS 5/3.165. The complaint alleges calcium peroxide is a useful

product that can be used for petroleum remediation. Cplt Count I ¶11. Thus, calcium peroxide is a useful product, not a contaminant, present to remediate contamination and improve site conditions. The complaint fails to allege how calcium peroxide caused a water pollution hazard. It is not sufficient to summarily assert that useful calcium peroxide which was on-site to remediate petroleum-containing soil somehow created a water pollution hazard.

Further, the State does not allege that calcium peroxide actually reached Illinois waters. It is pure speculation that IFI caused, threatened, or allowed the discharge of a contaminant into waters of the State.

Count IV alleging that calcium peroxide present at the site created a water pollution hazard should be dismissed for failure to state a cognizable claim.

**Calcium Peroxide Is Not Litter**

Count V should be dismissed for failing to allege an actionable claim because calcium peroxide is not litter. Count V alleges that calcium peroxide present at the site is litter violating 415 ILCS 5/21(p)(1) as open dumping. The Act does not define “litter.” However, other statutes define litter as waste or something discarded, abandoned, or disposed. See Cplt Count V ¶38. The complaint alleges calcium peroxide is an oxidizer that “can be used to assist in remediation of petroleum-contaminated soil.” Cplt Count I ¶11. Thus, calcium peroxide is a useful product, not litter. Count V also duplicates Count I because it alleges that the same material, calcium peroxide, was open dumped at the same location. Count V alleging that calcium peroxide present at the site is litter should be dismissed for failure to state a cognizable claim and as duplicative of Count I.

**Firefighting Activities Distributed Calcium Peroxide**

To the extent calcium peroxide was distributed at the site, this was done by firefighters, not IFI. A fire occurred July 2019 while calcium peroxide was present. Cplt Count I ¶14. Firefighting caused “powdered calcium peroxide to be deposited in the garage building.” Cplt Count I ¶14. Firefighters “spread large quantities of calcium peroxide throughout the property and comingled the calcium peroxide with dirt and debris at the site.” Cplt ¶14. The complaint alleges various cleanup activities after the fire. Cplt Count I ¶¶15-21. By December 2020, the last of the calcium peroxide had been removed from the site. Cplt Count I ¶22.

Calcium peroxide is used to remediate petroleum contamination and is not waste or litter. Cplt Count I ¶11. The firefighting activities did not transform calcium peroxide into a waste, water pollution hazard, or litter. Cleanup after the fire did not transform calcium peroxide into a waste, water pollution hazard, or litter. Rather, calcium peroxide is used to remediate petroleum contamination in soil. Cplt Count I ¶11. The complaint fails to allege how these activities transformed useful calcium peroxide into waste. A useful product at the site is not waste, not a water pollution hazard, and not litter. Further, firefighting activities do not amount to IFI having dispersed, discarded, or disposed calcium peroxide. The State fails to plead adequately that useful calcium peroxide is a waste, water pollution hazard, or litter.

**IFI Is Not Site Owner**

IFI is not the site owner; the owner is 969 Northwest Hwy LLC. See Count I Cplt ¶5. After the Agency inspected the site on July 22, 2019 (Cplt Count I ¶16), the Agency issued a violation notice to the owner - IFI was not named in the violation notice dated July 29, 2019. Yet, the complaint names both IFI and the owner. Taking the complaint’s allegations as true, the complaint is properly directed to the owner, not IFI, as the violation notice was addressed. At its



core, the complaint alleges that the fire and resulting firefighting activities caused calcium peroxide to be distributed at the site. Cplt Count I ¶14. The complaint alleges IFI conducted various post-fire cleanup activities (Cplt Count I ¶¶15-21) but does not allege – and cannot allege - IFI participated in dispersing calcium peroxide during the fire.

Rather, the complaint includes IFI because “IFI did not obtain approval from Illinois EPA’s LUST section for the use of calcium peroxide at the site” (Cplt Count I ¶11). Calcium peroxide’s presence at the site without prior approval from Illinois EPA does not render it a waste, water pollution hazard, or litter. Dispersal of calcium peroxide by firefighters does not render it a waste, water pollution hazard, or litter. However, even if firefighting created a waste, any potential violations cannot be alleged against IFI who does not own the site and is not alleged to have participated in firefighting.

**Site Complies with Act**

The complaint alleges wholly past violations and only seeks penalties. The complaint should be dismissed for failing to allege an actionable claim because the allegations show that the site complied with the Act at the time the complaint was filed. As alleged in the complaint, the site was enrolled in the Leaking Underground Storage Tank (LUST) program to remediate petroleum. Cplt Count I ¶6. IEPA approved the corrective action plan in April 2015. Cplt Count I ¶7. Underground storage tanks were removed in August 2018. Cplt Count I ¶9. A fire occurred at the site in July 2019. Cplt Count I ¶14. The complaint describes various cleanup activities after the fire. Cplt Count I ¶¶15-18. By December 2019, the building on the site had been demolished. Cplt Count I ¶19. By September 2020, two roll-off boxes had been removed. Cplt Count I ¶21. By December 2020, “mixed calcium peroxide residue and soil” had been removed from the site. Cplt Count I ¶22.

This complaint was filed on April 17, 2023 based on allegations dating to 2020 and prior. After the fire, the Agency inspected the site on various occasions (Cplt Count I ¶¶16-21) and IFI acted on Agency directions. By December 2020, IFI had complied with the Agency's demands. This complaint was filed years later. The complaint should be dismissed because the site complied with the Act when the complaint was filed.

The Appellate Court has reversed penalties awarded by the Board where a party acted in good faith. For example, the State brought an enforcement action against Park Crematory. Park Crematory, Inc. v. Pollution Control Bd., 264 Ill.App.3d 498, 505 (1994). The Board determined that Park Crematory committed several violations and imposed a fine. On appeal, Park Crematory contended that the fine was excessive because Park Crematory corrected the alleged violations nearly ten months before the complaint was filed. The Appellate Court noted that a violation of the Act does not warrant the imposition of a fine unless such a fine would aid in the enforcement of the Act. Accordingly, where compliance with the Act has already happened, a civil penalty would not aid enforcement of the Act.

Here, the complaint alleges steps taken to remove calcium peroxide from the site after the fire. Cplt Count I ¶¶15-18. By December 2020, "mixed calcium peroxide residue and soil" had been removed from the site. Cplt Count I ¶22. There are no allegations that calcium peroxide was present at the site after December 2020. Accordingly, the complaint that calcium peroxide present at the site is waste, water pollution hazard, or litter should be dismissed as frivolous.

#### **Five Counts Are Duplicative**

The five counts of the complaint are duplicative of each other in that they allege that the same material (calcium peroxide) was present at the same location at the same time. This piling on of multiple violations for the same factual allegations is vengeful and unnecessarily punitive.

This complaint appears aimed at punishing IFI for a disagreement on using calcium peroxide to remediate petroleum contamination. The Illinois Supreme Court has explained that “the principal reason for authorizing the imposition of civil penalties was to provide a method to aid the enforcement of the Act and that the punitive considerations were secondary.” S. Illinois Asphalt Co. v. Pollution Control Bd., 60 Ill.2d 204, 207 (1975). Here, the presence of calcium peroxide, which could have been used for petroleum remediation, did not violate the Act. After the fire, various activities led to removal of the calcium peroxide by December 2020, as demanded by IEPA. The complaint, therefore, can only be viewed as punishment, and is not required as an aid to enforce the Act.

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