ILLINOIS POLLUTION CONTROL BOARD
March 15, 2012

ROLF SCHILLING, PAM SCHILLING, and SUZANNE VENTURA,	)	
Complainants,	)	
v.	)	PCB 10-100 (Enforcement – Water)
GARY D. HILL, VILLA LAND TRUST, and PRAIRIE LIVING WEST, LLC,	)	
Respondents.	)	

GARY D. HILL, and PRAIRIE LIVING WEST, LLC,	)	
Third-Party Complainants,	)	
v.	)	PCB 10-100 (Enforcement – Water)
HORVE CONTRACTORS, INC.	)	(Third-Party Complaint)
Third-Party Respondent.	)	

ORDER OF THE BOARD (by J.A. Burke):

On June 1, 2010, Rolf Schilling, Pam Schilling and Suzanne Ventura (collectively, Schilling complainants) filed a citizen's water pollution complaint (Schilling complaint). The Schilling complainants named as respondents Gary D. Hill, Villa Land Trust and Prairie Living West, LLC (collectively, respondents). The Schilling complaint alleged violations of the Environmental Protection Act (Act) (415 ILCS 5 (2010)) and a National Pollutant Discharge Elimination System (NPDES) permit (permit) for the construction site known as the "Prairie Living West" project (project) located at "900/955 Villa Court [in] Carbondale, Jackson County" (site). Schilling Comp. at 2.

On March 22, 2011, respondents filed a third-party complaint against Horve Contractors, Inc. (Horve), which alleged that Horve was contractually liable for any and all violations that occurred in the construction of the project. Respondents' Compl. at 2-3. On August 4, 2011, the Board granted Horve's motion to dismiss, stating that the third-party complaint was "frivolous" within the meaning of 415 ILCS 5/31(d)(1) (2010); 35 Ill. Adm. Code 103.212(a).

On September 30, 2011, Gary D. Hill and Prairie Living West (collectively, Prairie) filed a new third-party complaint (Prairie complaint) against Horve. Horve moved to dismiss the

Prairie complaint on November 29, 2011. Villa Land Trust is not a party to the Prairie complaint.

The Board denies Horve's motion to dismiss the alleged violations of Sections 12(a), (b) and (d) of the Act. The Board grants Horve's motion to dismiss the alleged violation of Section 12(f) of the Act and grants Prairie until April 16, 2012 to file an amended Section 12(f) allegation if it so chooses. The Board accepts the Prairie complaint for hearing and grants Horve 60 days from the date of service of this order to file its answer to the Prairie complaint as amended by this order.

In the order below, the Board first sets forth the relevant procedural history of the case. Next, the Board describes the relevant pleadings in detail. Third, the Board provides the applicable legal background and framework. The Board then moves to a discussion of the legal issues and rules on the motion to dismiss the Prairie complaint.

PROCEDURAL HISTORY

On June 1, 2010, the Schilling complainants filed their citizens' water pollution complaint. On August 2, 2010, respondents filed a motion to dismiss the Schilling complaint. The Board accepted the motion to dismiss as timely on September 2, 2010 and denied the motion on November 4, 2010.

On January 7, 2011, respondents filed their answer and affirmative defenses to the Schilling complaint (respondents' answer), alleging four affirmative defenses. On January 26, 2011, the Schilling complainants filed a motion to strike all four affirmative defenses. On February 10, 2011, respondents filed a response to the motion to strike. In the response, respondents requested to withdraw two of their affirmative defenses.

On March 22, 2011, respondents filed a third-party complaint against Horve. On April 1, 2011, respondents filed a proof of service, showing that Horve was served the third-party complaint on March 18, 2011.

On April 7, 2011, the Board entered an order granting respondents' motion to withdraw the first and fourth affirmative defenses and granting the Schilling complainants' motion to strike the second and third affirmative defenses without prejudice. In the same order, the Board granted respondents until May 9, 2011 to amend their second and third affirmative defenses to correct factual deficiencies. The Board did not at the time rule on the third-party complaint.

On April 15, 2011, Horve filed a motion to dismiss respondents' third-party complaint. On May 11, 2011, respondents filed their amended affirmative defenses to the Schilling complaint. On May 18, 2011, respondents filed a response to Horve's motion to dismiss the third-party complaint. On May 25, 2011, Horve filed a reply to the respondents' response to the motion to dismiss the third-party complaint.

On June 2, 2011, the Schilling complainants filed a reply to the amended affirmative defenses.

On August 4, 2011, the Board granted Horve's motion to dismiss the third-party complaint but stated that respondents may file a new third-party complaint if they so choose. Prairie filed the Prairie complaint on September 30, 2011. The Board directed Prairie to file proof of service of the Prairie complaint on November 3, 2011. On November 21, 2011, Prairie filed proof of service on Horve, which indicates that Horve was served on September 30, 2011.

On November 29, 2011, Horve filed a motion to dismiss the Prairie complaint. After receiving an extension of time in which to file, Prairie filed a response to the motion on January 31, 2012. To date, no reply has been filed.

PRAIRIE COMPLAINT

Prairie filed its third-party complaint on September 30, 2011. Prairie states that Horve was hired to be the general contractor on the project described as Prairie Living West, located at 900 Villa Court in Carbondale, Jackson County. Prairie Compl. at 2. The project is also referred to as "Phase II of Prairie Living at Chautauqua." *Id.* Phase II was constructed in or around 2009 and 2010. *Id.* Prairie also notes that Horve was hired to be the general contractor on Phase I of the project, which was completed in or around 2004. *Id.* Phase I is also referred to as "Phase I of Prairie Living at Chautauqua," located at 955 Villa Court in Carbondale, Jackson County.

Prairie contends that, as the general contractor on Phase I and Phase II of the project, Horve "was responsible for complying with applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to performance of the work." Prairie Compl. at 2. Prairie further contends that, as the general contractor, Horve was "in control of the premises upon which the construction activities occurred in Phase I and II." *Id.* Prairie states that Horve was responsible for construction operations and activities of both phases and that Horve directly supervised the workers working on the project sites. *Id.* at 3. Furthermore, Horve was responsible for the development and implementation of a Storm Water Pollution Prevention Plan, soil stabilization practices, soil erosion control structures, and the erection and maintenance of silt fencing for both phases. *Id.*

Prairie states that the Schilling complaint alleges that Prairie:

a) Disregarded and abandoned its construction plans and plans to control and eliminate sediments and erosion from leaving the construction site and polluting complainants' property and their adjacent pond.

b) Failed to construct, maintain and manage engineering features to control the run-off of water, sediments, mud and other contaminants that have allegedly resulted in serious and severe flooding and inundation of complainants' properties from materials coming off the Phase II construction site, including substantial deposition of contaminating materials into the Pond.

c) During Phase I, conducted construction activities which resulted in a substantial amount of water, mud, construction-site residues, eroded material, and other waste materials to flow from the project onto property owned by the Schilling complainants and into their pond. Prairie Compl. at 3.

Prairie denies any violations of the Act and states that, to the extent that the Schilling complainants are able to demonstrate any violations during Phase I or Phase II, those violations are the acts or omissions of Horve. Prairie Compl. at 4. Prairie states that Horve "was in charge of the work, solely in control of the premises upon which the projects were constructed, and responsible for compliance with the [Storm Water Pollution Prevention Plan]." *Id.* Prairie states that, as a result, Horve has violated Sections 12(a), 12(b), 12(d) and 12(f) of the Act. *Id.*, citing 415 ILCS 5/12(a), 12(b), 12(d), 12(f) (2010).

Prairie requests that the Board enters an order finding that Horve has violated the aforementioned sections of the Act, imposes a proper penalty on Horve pursuant to the Act, and for any further relief as the Board deems appropriate. Prairie Compl. at 4.

MOTION TO DISMISS

Horve filed its motion to dismiss on November 29, 2011, and requested that the Board dismiss the Prairie complaint on both substantive and procedural grounds. Mot. at 2.

Horve first states that the Prairie complaint should be dismissed because it does not allege facts which, if proven, would establish any violation of the Act. Mot. at 2. Horve contends that the Prairie complaint does not satisfy section 103.204(c)(2) of the Board's procedural rules, which states in part that a:

> complaint must . . . contain . . . [t]he dates, locations, events, nature, extent, duration, and strength of discharges and emissions and consequences alleged to constitute violations of the Act and regulations. The complaint must advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense . . .. *Id.*, citing 35 Ill. Adm. Code 103.204(c)(2).

Horve states that the Prairie complaint contains no factual allegations supporting the legal conclusion that Horve "is responsible for all activities, including sediment control/water control, occurring on the site." *Id.* Horve contends that this allegation runs counter "to the [Schilling complaint's] admitted allegation that the [respondents] were granted the NPDES permit. . .. It is the NPDES permit holder who is required to comply with the permit's conditions, and the failure to do so may violate the Act." *Id.*, citing Schilling Complaint ¶11, Respondents Answer ¶11, and 415 ILCS 5/12(f).

Horve further argues that the Prairie complaint contains no factual allegations concerning what Horve did or failed to do that violated the Act, and that the vague reference to the Schilling complaint does not satisfy Section 103.204(c). Mot. at 2-3. Horve contends that it is entitled to

know what factual allegations and claims it must meet at the inception of the enforcement action so that it may prepare its defense. *Id.* at 3. Horve states that, because the Prairie complaint does not satisfy Section 103.204(c), it should be dismissed. *Id.*

Horve also contends that the Prairie complaint should be dismissed because, procedurally, it does not provide the required notice under Section 103.204(f) and Prairie did not serve Horve's counsel with either the Prairie complaint or the notice of filing returned receipt. Mot. at 3-4, citing Strunk v. Williamson Energy LLC, PCB 07-135, slip op. at 7-8 (Dec. 20, 2007). Horve states that, in proceedings before Illinois courts and before the Board, once an attorney files an appearance on behalf of a party, other parties to the proceeding are required to serve subsequent documents they file with the tribunal on that attorney. Mot. at 4. Horve's attorney filed an appearance on April 15, 2011. *Id.*

Horve requests that the Board dismiss the Prairie complaint with prejudice and for other relief that the Board deems appropriate. Mot. at 4.

RESPONSE TO MOTION TO DISMISS

Prairie filed its response to the motion to dismiss on January 31, 2012.

In response to Horve's allegation that the Prairie complaint is factually deficient, Prairie states that it alleges in its complaint that Horve: was the general contractor on both phases of the project; was responsible for complying "with all applicable laws, statutes, rules, regulations, etc…" in conjunction with the project; was in control of the premises where the pollution is alleged to have occurred; and supervised workers on the premises. Resp. at 2. Prairie states that any violations of the Act are due to the acts or omissions of Horve or its agents and that it is clear that, should Prairie prove these factual allegations, Horve would be liable for violating the Act. *Id.*

With regards to Horve's argument that Horve is not required to comply with Section 12(f) of the Act because it is not the NPDES permit holder, Prairie cites Section 12(f) as stating in part that:

> no person shall cause, threaten, or allow the discharge of any contaminant into the waters of the State . . . without an NPDES permit . . . *or in violation of any term or condition imposed by such permit . . . or in violation of any regulations adopted by the Board with respect to the NPDES program*. Resp. at 2-3 (emphasis added by Prairie).

Prairie contends that the language of Section 12(f) makes clear that its scope extends beyond the permit holder and that there is no basis for Horve's argument "that Section 12(f) may exculpate Horve for the other violations alleged by [Prairie], which include violations of Section 12(a), 12(b), and 12(d) of the Act." *Id.* at 3. Prairie states Horve's argument as being that, in order to be in violation of the Act, it must be proven that "the alleged polluter has the capability of control over the pollution or that the alleged polluter was in control of the premises where the

pollution occurred." *Id.*, citing People v. A.J. Davinroy Contractors, 249 Ill. App. 3d 788, 793 (5th Dist. 1993). Prairie contends that the Prairie complaint clearly alleges that Horve was in control of the premises and that Horve is liable for any violation of the Act. Resp. at 3.

Prairie states that the Prairie complaint reasonably allows Horve to prepare a defense because it sufficiently advises Horve of the alleged violations of the Act. Resp. at 3. In this case, Prairie contends that Horve's violations include:

> failure to control and eliminate sediments and erosion from leaving the construction site, failure to control water run-off, sediments, mud and other contaminants causing flooding and contaminating a pond, and allowing construction-site residues to flow into a pond. *Id.*

Prairie further argues that any failure to provide notice as required by Section 103.204(f) is moot because "Horve was able to obtain the [Prairie complaint] and prepare the pending [motion to dismiss], which cites portions of the [Prairie complaint]." Resp. at 4. Prairie contends that, given that Horve was served with the previous third-party complaint and that Horve has been involved in this action for several months before the filing of the Prairie complaint, failure to provide the notice required is moot and the proper remedy should not be dismissal of the Prairie complaint. *Id.*

Prairie concludes by requesting that the Board deny Horve's motion to dismiss the Prairie complaint. Resp. at 4.

BOARD DISCUSSION ON MOTION TO DISMISS

Legal Standard

The Board has often looked to Illinois civil practice law for guidance when considering a motion to dismiss pleadings. 35 Ill. Adm. Code 101.100(b); *See also* United City of Yorkville, PCB 08-96, slip. op. at 14-15 (Oct. 16, 2008). 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). "[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).

Illinois requires fact-pleading, not the mere notice-pleading of federal practice. Adkins v. Sarah Bush Lincoln Health Center, 129 Ill. 2d 497, 518, 544 N.E.2d 733, 743 (1989). In assessing the adequacy of pleadings in a complaint, the Board has accordingly stated that "Illinois is a fact-pleading state which requires the pleader to set out the ultimate facts which support his cause of action." Grist Mill Confections, PCB 97-174, slip op. at 4 (*citing* LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297, 1303

(2nd Dist. 1993)). "[L]egal conclusions unsupported by allegations of specific facts are insufficient." Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303 (*citing* Estate of Johnson v. Condell Memorial Hospital, 119 Ill. 2d 496, 509-10, 520 N.E.2d 37 (1988)). A complainant's allegations are "sufficiently specific if they reasonably inform the defendants by factually setting forth the elements necessary to state a cause of action." People v. College Hills Co., 91 Ill. 2d 138, 145, 435 N.E.2d 463, 467 (March 16, 1982). Fact-pleading does not require a complainant to set out its evidence: "'[t]o the contrary, only the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts.'" People ex rel. Fahner v. Carriage Way West, Inc., 88 Ill. 2d 300, 308, 430 N.E.2d 1005, 1008-09 (1981) (*quoting* Board of Education v. Kankakee Federation of Teachers Local No. 886, 46 Ill. 2d 439, 446-47 (1970)).

Sufficient Allegation of Facts

Horve contends that the Prairie complaint should be dismissed because it does not allege facts which, if proven, would establish any violation of the Act. Mot. at 2. Horve further states that the Prairie complaint does not satisfy Section 103.204(c)(2) of the Board's procedural rules. *Id.*

In response, Prairies state that the Prairie complaint alleges that Horve: was the general contractor on both phases of the project; was responsible for complying "with all applicable laws, statutes, rules, regulations, etc…" in conjunction with the project; was in control of the premises where the pollution is alleged to have occurred; and supervised workers on the premises. Resp. at 2.

The Board finds that the Prairie complaint sufficiently alleges facts to survive the motion to dismiss with regards to the alleged violations of Section 12(a), 12(b) and 12(d) of the Act. "[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." Central Illinois Regional Airport, 207 Ill. 2d 584-85, 802 N.E.2d 254. The Prairie complaint references allegations in the Schilling complaint and states that, to the extent that violations of the Act during Phase I and Phase II are demonstrated, these are the acts and/or omissions of Horve or Horve's agents. Comp. at 4. By referencing allegations from the Schilling complaint, Prairie "reasonably inform[s] the defendants by factually setting forth the elements necessary to state a cause of action." College Hills Co., 91 Ill. 2d 145, 435 N.E.2d 467; *see also* People v. Felker Pharmacy, Inc. and Rod Bennett Construction, Inc., Rod Bennet Construction, Inc. v. McClellan Blakemore Architects, Inc. and Wendler Engineering Services, Inc, PCB 08-17, slip op. at 2 (March 20, 2008) (Board accepted for hearing third-party complaint by owner and general contractor of construction project filed against architect and engineer where original complaint was incorporated into third-party complaint).

The Schilling complaint alleges that the construction activities at the site for Phase I occurred "during or about 2006" and for Phase II "began during or about 2009, and continues through the date of the filing of this complaint." Schilling Comp. at 2. The Schilling complaint also specifies that the alleged pollution to the Schilling complainants' pond and property from

Phase I occurred "during or about 2006 and 2007" and from Phase II "on numerous instances during the spring of 2010." *Id.* at 3-4. Moreover, the Notice of Intent that Gary Hill provided to the Agency lists the approximate start date for Phase II as March 1, 2009. Schilling Comp. Exhibit A.

The Schilling complaint also lists the contaminants as "substantial amounts of water, mud, construction-site residues, eroded material, and other waste materials." Schilling Comp. at 3-4. The Schilling complaint lists the source of these contaminants as Phase I and II of the Schilling respondents' "construction activities." *Id*. In addition, the Notice of Intent (NOI) filed with the Agency and the terms of the General NPDES permit attached to the complaint explicitly apply to storm water discharges from "construction site activities." Comp. Exhibits A, B.

Prairie references the Schilling complaint and alleges that Horve is responsible for those referenced activities because, among other actions, Horve was in control of the site and directing work at the site. The Board finds that Prairie alleges facts in sufficient detail to survive a motion to dismiss the alleged violations of Sections 12(a), 12(b) and 12(d) of the Act.

Section 12(f) Allegation

Horve contends that the Section 12(f) allegation runs counter "to the [Schilling complaint's] admitted allegation that [Prairie was] granted the NPDES permit. . .. It is the NPDES permit holder who is required to comply with the permit's conditions, and the failure to do so may violate the Act." *Id.*, citing Schilling Complaint ¶11, respondents' Answer ¶11, and 415 ILCS 5/12(f). Mot. at 2. Prairie contends that the language of Section 12(f) makes clear that its scope extends beyond the permit holder and that there is no basis for Horve's argument "that Section 12(f) may exculpate Horve for the other violations alleged by [Prairie], which include violations of Section 12(a), 12(b), and 12(d) of the Act." Resp. at 3.

Section 12(f) states in part that no person shall:

> Cause, threaten or allow the discharge of any contaminant into the waters of the State, . . . without an NPDES permit for point source discharges issued by the Agency under Section 39(b) of this Act, or in violation of any term or condition imposed by such permit, or in violation of any NPDES permit filing requirement established under 29(b), or in violation of any regulations adopted by the Board or of any order adopted by the Board with respect to the NPDES program. 415 ILCS 5/12(f) (2010).

Prairie alleges that Horve's acts and omissions regarding the construction activities violated Section 12(f) of the Act but does not identify any permit terms or conditions, or any Board regulations adopted with respect to the NPDES program, which Horve has violated. In its response to the motion, Prairie argues that Horve is in violation of a term or condition imposed by the NPDES permit, and that Horve is in violation of regulations adopted by the Board with respect to the NPDES program. Resp. at 3. However, there is no allegation in the complaint of

how Horve has violated Section 12(f).

Further, the Schilling complaint specifically alleges that the Group sought and obtained the NPDES permit in this case and proceeded to violate specific terms and conditions of the issued permit. Schilling Compl. at 3, 5. By contrast, the Prairie complaint, even when referring to the Schilling complaint, does not sufficiently set forth facts to support that Horve may be in violation of the permit or liable under Section 12(f). Therefore, Prairie has not adequately plead facts that reasonably give Horve an opportunity to respond to the allegations. *See* College Hills Co., 91 Ill. 2d 145, 435 N.E.2d 467.

The Board grants the motion to dismiss the alleged violation of Section 12(f) of the Act, but does so without prejudice. *See* Central Illinois Regional Airport, 207 Ill. 2d 584-85, 802 N.E.2d 254 ("[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."). The Board grants Prairie thirty days from the date of this order to file an amended third-party complaint addressing the Section 12(f) allegation deficiency, if Prairie so chooses.

Notice Requirement

Horve contends that the Prairie complaint should be dismissed because, procedurally, it does not provide the required notice under Section 103.204(f) and Prairie did not serve Horve's counsel with either the Prairie complaint or the notice of filing returned receipt. Mot. at 3-4, citing Strunk v. Williamson Energy LLC, 2007 Ill. ENV LEXIS 529 at *18-19 (PCB 07-135) (Dec. 20, 2007). Horve states that, in proceedings before Illinois courts and before the Board, once an attorney files an appearance on behalf of a party, other parties to the proceeding are required to serve subsequent documents they file with the tribunal on that attorney. Mot. at 4.

Prairie states that any failure to provide notice as required by Section 103.204(f) is moot because "Horve was able to obtain the [Prairie complaint] and prepare the pending [motion to dismiss], which cites portions of the [Prairie complaint]." Resp. at 4. Prairie contends that, given that Horve was served with the respondents' complaint and that Horve has been involved in this action for several months before the filing of the Prairie complaint, failure to provide the required notice is moot and the proper remedy should not be dismissal of the Prairie complaint. *Id.*

The Board agrees that, given the facts in this case, failure to provide the required notice should not result in dismissal of the Prairie complaint. Section 103.204(f) of the Board's procedural rules states:

> Any party serving a complaint upon another party must include the following language in the notice: "Failure to file an answer to this complaint within 60 days may have severe consequences. Failure to answer will mean that all allegations in the complaint will be taken as if admitted for purposes of this proceeding. If you have any questions about this procedure, you should contact the hearing officer

> assigned to this proceeding, the Clerk's Office or an attorney." 35 Ill. Adm. Code 103.204(f).

This notice was properly included in the previously dismissed third-party complaint and the Board acknowledges that the Prairie complaint has been served on the same party with the same representation as before. Because Horve was previously served this notice, the Board declines to dismiss the Prairie complaint on this basis.

Generally, Horve's filing of the motion to dismiss would stay the 60-day period for filing an answer to the Prairie complaint, which would end today with the Board's ruling on the motion. *See* 35 Ill. Adm. Code 103.204(e). However, under the current circumstances, the Board grants Horve 60 days from the receipt of this order to file an answer to the Prairie complaint as amended by this order. *See* Beers v. Calhoun (Let it Shine Car Wash), PCB 04-204, 2004 Ill. ENV LEXIS 404 *6-7 (July 22, 2004).

Horve also cites Ill. S. Ct. Rule 104(b) and 35 Ill. Adm. Code 101.304(b) in stating that Prairie was required to serve the complaint on Horve's counsel. Ill. S. Ct. Rule 104(b) states:

> Filing of Papers and Proof of Service**.** *Pleadings subsequent to the complaint*, written motions, and other papers required to be filed shall be filed with the clerk with a certificate of counsel or other proof that copies have been served on all parties who have appeared and have not theretofore been found by the court to be in default for failure to plead. (Emphasis added).

The Board previously granted a motion to dismiss the respondents' third-party complaint without prejudice and stated that respondents may file a new third-party complaint if they so choose. The Prairie complaint, which is not an amended third-party complaint, was filed with the Board on September 30, 2011 and proof of service on Horve on September 30, 2011 was later filed with the Board.

Regardless of Horve's interpretation of the above language, the rule makes clear that pleadings "subsequent to the complaint" shall be filed with proof that copies have been served on all parties who have appeared. Because the Prairie complaint is considered the initial filing, and not a filing "subsequent to the complaint," service on Horve's counsel was not required.

Section 101.304(b) of the Board's procedural rules states:

> Duty to Serve. Parties in Board adjudicatory proceedings are responsible for service of all documents they file with the Clerk's Office. Proof of service of initial filings must be filed with the Board upon completion of service.

On November 21, 2011, Prairie filed proof of service on Horve, which indicates that Horve was served on September 30, 2011. This sufficiently addresses the requirement of Section 101.304(b).

BOARD DISCUSSION ON DUPLICATIVE AND FRIVOLOUS DETERMINATION

Legal standard

Section 31(d) of the Environmental Protection Act (Act) (415 ILCS 5/31(d) (2008)) 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).

Complaint neither Duplicative nor Frivolous

The Board has not identified any other cases either substantially similar or identical to this matter pending in other forums. In addition, Horve's motion to dismiss does not allege that any potentially duplicative matters are now pending. Based on the record currently before the Board, none of the allegations in the Prairie complaint are duplicative.

The Board also finds that the Prairie complaint is not frivolous. As explained above, Prairie is only required to set forth ultimate facts in its complaint, not "the evidentiary facts tending to prove such ultimate facts." People ex rel. Fahner, 88 Ill. 2d at 308, 430 N.E.2d at 1008-09. The Prairie complaint sufficiently alleges the ultimate facts necessary for Horve to prepare its defense as to the alleged violations of Sections 12(a), (b) and (d) of the Act.

Hearing and Answer

The Board accepts the Prairie complaint as amended by this order for hearing. *See* 415 ILCS 5/31(d)(1) (2010); 35 Ill. Adm. Code 103.212(a). Under the Board's procedural rules, a respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if a respondent fails within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider the respondent to have admitted the allegation. 35 Ill. Adm. Code 103.204(d). Filing of a motion to dismiss generally stays the 60-day period for filing an answer to the complaint. *See* 35 Ill. Adm. Code 103.204(e). However, for reasons discussed above, Horve has 60 days from receipt of this order to file an answer to the Prairie complaint as amended by this order.

The Board directs the hearing officer to proceed expeditiously to hearing. Among the hearing officer's responsibilities is the "duty . . . to ensure development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Adm. Code 101.610. A complete record in an enforcement case thoroughly addresses, among other things, the appropriate remedy, if any, for the alleged violations, including any civil penalty.

Determination of Civil Penalty

If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2010). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an on-going violation, if any, and, second, whether to order the respondent to pay a civil penalty. The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount, such as the duration and gravity of the violation, whether the respondent showed due diligence in attempting to comply, any economic benefit that the respondent accrued from delaying compliance, and the need to deter further violations by the respondent and others similarly situated.

With Public Act 93-575, effective January 1, 2004, the General Assembly changed the Act's civil penalty provisions, amending Section 42(h) and adding a new subsection (i) to Section 42. Section 42(h)(3) now states that any economic benefit to respondent from delayed compliance is to be determined by the "lowest cost alternative for achieving compliance." The amended Section 42(h) also requires the Board to ensure that the penalty is "at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary of unreasonable financial hardship."

Under these amendments, the Board may also order a penalty lower than a respondent's economic benefit from delayed compliance if the respondent agrees to perform a "supplemental environmental project" (SEP). A SEP is defined in Section 42(h)(7) as an "environmentally beneficial project" that a respondent "agrees to undertake in settlement of an enforcement action . . . but which the respondent is not otherwise legally required to perform." SEPs are also added as a new Section 42(h) factor (Section 42(h)(7)), as is whether a respondent has "voluntary self-disclosed . . . the non-compliance to the [Illinois Environmental Protection] Agency" (Section 42(h)(6)). A new Section 42(i) lists nine criteria for establishing voluntary self-disclosure of

non-compliance. A respondent establishing these criteria is entitled to a "reduction in the portion of the penalty that is not based on the economic benefit of non-compliance."

Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any (including whether to impose a civil penalty), and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if any (including a specific total dollar amount and the portion of that amount attributable to the respondent's economic benefit, if any, from delayed compliance), and supporting its position with facts and arguments that address any or all of the Section 42(h) factors. The Board also directs the hearing officer to advise the parties to address these issues in any stipulation and proposed settlement that may be filed with the Board.

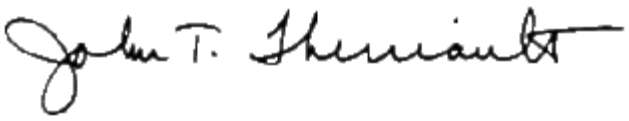
CONCLUSION

The Board denies Horve's motion to dismiss the alleged violations of Sections 12(a), 12(b) and 12(d) of the Act. The Board grants Horve's motion to dismiss the alleged violation of Section 12(f) of the Act without prejudice. Prairie may file an amended third-party complaint addressing the Section 12(f) allegation if it so chooses by April 16, 2012, which is the first business day following the 30th day after the date of this order.

The Board accepts the Prairie complaint as amended by this order for hearing. Horve has 60 days from receipt of this order to file an answer to the alleged violations of Sections 12(a), 12(b) and 12(d) of the Act. If Prairie files an amended Section 12(f) count, Horve will have 60 days from receipt of that amended complaint to file an answer to the alleged Section 12(f) violation.

IT IS SO ORDERED

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 15, 2012, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board