

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

People of the State of Illinois )

Complainant, )

vs. )

Tradition Investments, LLC, an Illinois limited liability corporation )

Respondent. )

NO. 2011 068  
(Enforcement)

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JUN 15 2011  
STATE OF ILLINOIS  
Pollution Control Board

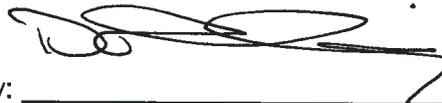
ORIGINAL

ENTRY OF APPEARANCE

On behalf of the Respondent, Tradition Investments LLC, Donald Q. Manning of McGreevy Williams, PC, hereby enters his appearance as attorney of record.

Respectfully submitted,

TRADITION INVESTMENTS, LLC



By: \_\_\_\_\_

Donald Q. Manning,

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Complainant,	)	
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vs.	)	NO. 2011 068
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Tradition Investments, LLC, an Illinois limited	)	
liability corporation	)	
	)	
Respondent.	)	

ORIGINAL

Respondent, Tradition Investments, LLC ("Tradition Investments"), by its attorneys, Donald Q. Manning and McGreevy Williams, PC states as follows for its answer and affirmative defenses to the complaint:

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COUNT I  
WATER POLLUTION

1. This Count is brought on behalf of the People of the State of Illinois, ex rel. LISA MADIGAN, the Attorney General of the State of Illinois, on her own motion pursuant to Section 31 of the Illinois Environmental Act ("Act"), 415 ILCS 5/31.

ANSWER: Respondent denies the allegations of paragraph 1 as legal conclusions.

2. The Illinois EPA is an agency of the State of Illinois created by the Illinois General Assembly in Section 4 of the Act, 415 ILCS 5/4, and which is charged, *inter alia*, with the duty of enforcing the Act.

ANSWER: Respondent denies the allegations of paragraph 2 as legal conclusions.

3. The Respondent TRADITION INVESTMENTS, LLC ("Tradition" or "Respondent") is and was at all times relevant to this Complaint an Illinois limited liability corporation, registered and in good standing with the Illinois Secretary of State to do business in Illinois. The registered agent for Tradition is Thomas J. Nack, 106 N. Main Street, PO Box 336. Galena. IL 61036.

ANSWER: Respondent admits the allegations of paragraph 3.

4. Respondent Tradition holds title to two parcels of land in JoDaviess County, Illinois for which A.J. Bos, managing partner for Respondent Tradition, has submitted Notices of Intent to Construct pursuant to the Illinois Livestock Management Facilities Act. The notices contain plans to construct dairy operations housing 5,464 cows at each of the two sites. The proposed facilities are called Tradition South Dairy Farm, located at 12504 E. Canyon Rd, Stockton, IL 61085 ("Tradition South"), and Tradition North Dairy Farm, located at 12521 E. Mahoney, Warren, IL 61085 ("Tradition North").

ANSWER: The Respondent admits that it owns real estate in Jo Daviess County, Illinois for which its agents have submitted notices of intent to construct to the Illinois Department of Agriculture pursuant to the Illinois Livestock Management Facilities Act. The Respondent denies the characterizations of the notices of intent to construct as incorrect and incomplete. The Respondent admits that the facility known as Traditions South is located at 12504 E. Canyon Road, Stockton, Illinois, but Respondent denies that Tradition North is a facility for which any current applications, permits or procedures are in place.

5. Construction of the Tradition South Dairy Farm has been approved by the Illinois Department of Agriculture and has been initiated. The facility will house 4,464 milking dairy cows and 1,000 young dairy stock. The facility design calls for four freestall barns, one dry cow barn, one maternity barn, one calf barn, a parlor/milk house, and a holding pen.

ANSWER: Respondent admits that construction of the Traditions South Dairy Farm has been approved. Respondent admits that construction activities with respect to Tradition South were commenced and that construction activities commenced in 2008. Respondent denies the remaining allegations of paragraph 5 as incomplete and inaccurate descriptions and characterizations of the facility as designed and approved.

6. On June 16, 2008, A.J. Bos submitted to the Illinois Department of Agriculture's proposal for a methane digester constructed of concrete as an addition to the design of Tradition South. The design and construction plan also includes three open air, clay-lined waste holding cells. The clay-lined cells will be 480 feet by 1,288 feet by 20 feet deep, 180 feet by 1,288 feet by 21 feet deep, and 109 feet by 906 feet by 15 feet deep. The plan includes a waste solids stacking area 100 feet by 180 feet and a waste solids separator house and tank measuring 100 feet by 30 feet by 16 feet deep. The digester itself is to be 150 feet by 335 feet by 16 feet deep. There is to be a reception tank 25 feet by 90 feet by 16 feet deep.

ANSWER: The Respondent admits that the design for the Traditions South Dairy was modified to include a methane digester. The Respondent denies the remaining allegations of paragraph 6 on the basis that the allegations are incorrect and constitute an incomplete statement and description of the facility and its component parts.

7. The new Notice of Intent to Construct, submitted on June 16, 2008, received initial approval from the Illinois Department of Agriculture ("IDOA") on January 26, 2009. The digester proposal was the subject of a public informational meeting requested by the Jo Daviess County Board and conducted by IDOA on July 29, 2008.

ANSWER: Respondent denies that a notice of intent to construct submitted on June 16, 2008 received initial approval from the IDOA on January 26, 2009. Respondent denies and moves to strike the second sentence of paragraph 7 on the basis that said material is immaterial to any claim or cause of action alleged. To the extent an answer is required, Respondent denies the characterization of any required or conducted public information or hearing or meeting. Answering further, the Jo Daviess County Board voted to approve and support the incorporation and use of the digester.

8. Construction at the Tradition South site began in 2008. Respondent Tradition constructed a concrete slab for the purpose of storing corn silage or other feeds. The slab is divided by precast concrete walls into three unequally sized bays. The walls are approximately 325 feet long and run in a north-south direction but do not extend to the south 200 feet of the slab.

ANSWER: Respondent admits that construction at the Tradition South Dairy site began in 2008. Respondent admits that a concrete system for corn silage and other uses was partially constructed but denies the remaining allegations of paragraph 8 as incorrect and incomplete characterizations of the progress of construction and the design elements of the same.

9. In August and/or September of 2008, the middle and easternmost bays of this feed storage area were filled with corn silage. At the time the silage was brought to the site, Respondent Tradition indicated it was the corporation's intent to begin populating the site with dairy cows as soon as possible. The silage was brought to the site as feedstock. The slab to the south and the largest bay located along the westernmost side of the slab were not filled with silage.

ANSWER: Respondent denies that in August and/or September, 2008 the middle and easternmost bays of a feed storage area were filled with corn silage.

Respondent admits that bays located along the westernmost side of the concrete improvement were not filled with silage. The Respondent denies the remaining allegations of paragraph 9 as factually incorrect and legally irrelevant.

10. Starting at a time better known to the Respondent, construction of the facility was stalled. The Tradition South site has been the subject of litigation between neighboring citizens, the Respondent and the Illinois Department of Agriculture.

ANSWER: Respondent denies the characterization of the status of the construction for the project as incorrect. Respondent admits that there has been litigation between Respondent and others with respect to the property which is the subject of the notice of intent to construct. Answering further, Complainant was a party to said litigation, litigated on behalf of Respondent's IDOA permit and is estopped to challenge the facility, its permitting or any component part.

11. During the time construction has been stalled, the stored corn silage has remained on the concrete slab. Respondent Tradition has caused some of it to be removed by selling it to other area dairy farmers. The silage that has remained on site has been covered with plastic except for the working face when off-loading occurred.

ANSWER: Respondent denies that the stored corn silage has remained on the concrete slab. Respondent denies the remaining allegations of paragraph 11 and states affirmatively that substantially all of the corn silage had been removed as of the date of the filing of this action.

12. concrete corn silage storage slab is approximately six acres in surface area and slopes from the highest point at the northeast corner to the low point at the southwest corner where there is a concrete catch basin to collect the surface water flow and silage leachate from the slab.

ANSWER: Respondent denies the allegations of paragraph 12 as inaccurate and incomplete descriptions of the construction of the improvements on the property.

13. The catch basin has a 24-inch-diameter pipe stubbed out of the bottom which, upon completion of site construction, including construction of the large waste holding cell to the immediate west of the silage pad (northernmost waste storage cell), Respondent Tradition intends to connect with a gravity flow PVC pipe under an access road to the northernmost proposed waste storage pond.

ANSWER: Respondent denies the allegations of paragraph 13 as incomplete and inaccurate descriptions of the improvements constructed and to be constructed on the property.

14. Currently, while construction has been stalled, the catch basin flows into an adjacent temporary waste silage leachate holding cell located directly south of the southwest part of the slab and catch basin.

ANSWER: Respondent admits that, during the construction process, measures were taken for the temporary storage of run-off, if any, but denies the allegations of paragraph 14 as incomplete and inaccurate descriptions of the status of construction or the physical make-up of the property.

15. The temporary silage leachate holding cell serves as a containment structure for runoff that drains from the feed storage area and the adjacent construction materials storage area. The basin is approximately 115 feet by 230 feet with an average depth of about 5.8 feet.

ANSWER: Respondent denies the allegations of paragraph 15 as inaccurate and incomplete descriptions of the improvements to the property and the temporary measures in place during construction.

16. Tradition South is in the watershed of the South Fork of Apple River which flows into the Apple River. The Apple River is a scientific and ecological valuable watershed. Because of its cool water, high quality habitat and geologic setting in what is known as the "Driftless Area", the streams of the watershed harbor a unique assemblage of fish and mussel species, several of which are rare in Illinois. Included in this list are several fishes designated in the Illinois Department of Natural Resource's Wildlife Action Plan as "Species in Greatest Need of Conservation" ("SGNC"); largescale stoneroller, rosyface shiner, Ozark minnow, longnose dace, southern redbelly dace, and black redhorse. Smallmouth bass, a popular sportfish, is common in the Apple River. Among the freshwater mussels inhabiting the watershed are a state-threatened mussel, the slippershell, and three more designated as SGNC; creek heelsplitter, ellipse, and fluted shell. Because of their sedentary nature and exacting life history requirements, mussels are one of the most imperiled groups of organisms in North America. They have little capacity to avoid catastrophic pollution events.

ANSWER: Respondent is without sufficient information to form knowledge or belief as to the truth of the allegations of paragraph 16 and demands strict proof thereof. Answering further, and to the extent an answer is required, Respondent denies the allegations of paragraph 16 as conclusion unsupported by

allegations of specific fact. Answering further, Respondent denies that any damage or injury has been suffered by any of the alleged natural resources.

17. Respondent Tradition, via the services of a contract applicator, periodically causes the silage leachate wastewater contained in the temporary silage leachate holding cell to be surface applied to available cropland, or 10 other vegetated property that is part of the Tradition South facility.

ANSWER: Respondent admits that a contractor has periodically applied run off to properties owned by the Respondent, but denies the remaining allegations of paragraph 17 as incomplete and inaccurate descriptions of Respondent's activities in connection therewith.

18. On October 1, 2010, at approximately 2:15 P.M., the Illinois EPA investigated a complaint that a tributary to the South Fork of Apple River that exists on the south side of East Canyon Road exhibited a pink/purple coloration. The same tributary branches into a "Y" formation on the north side of East Canyon Road. The east branch of this "Y" formation was clear and west branch contained the same pink/purple coloration. An Illinois EPA inspector collected a water sample from the contaminated tributary from a location that is outside the boundaries of the facility and downstream of the facility property boundary. Sample analytical results indicated a five day biochemical oxygen demand ("BOD<sub>5</sub>") level of 153 mg/L.

ANSWER: Respondent is without sufficient information to form knowledge or belief as to the truth of the allegations of paragraph 18, neither admits nor denies the same, and demands strict proof thereof.

19. The Illinois EPA inspector observed that the entire west branch of the tributary had the pink/purple coloration to the point where a field tile discharged into the tributary. The tile discharge was located approximately 75 feet from the tip of a wooded ditch area leading to the northwest. The location of the tile discharge and ditch is part of the Tradition South facility owned by Respondent Tradition. At the time of the inspection, the tile was estimated to be discharging at a rate of 40 gallons/minutes. An ILLINOIS EPA inspector collected a water sample at the tile discharge. The sample had the pink/purple coloration, and results of sample analysis indicate a BOD<sub>5</sub> of 119 mg/L and total suspended solids ("TSS") of 670 mg/L.

ANSWER: Respondent denies that the tile discharge and ditch, as alleged, is a part of the Tradition South facility. Respondent is without sufficient information to form knowledge or belief as to the truth of the remaining allegations of

paragraph 18, neither admits nor denies the same, and demands strict proof thereof.

20. At the time of the October 1, 2010 inspection, the Illinois EPA contacted Respondent Tradition's contract land applicator Justin Peterson who informed the Illinois EPA that he had applied approximately 320,000 gallons from the contents of the silage leachate holding cell on a five acre land application site within the Tradition South facility boundary for the Respondent on the previous day. The Illinois EPA inspector observed that at the time of the application, soil conditions were dry. The dry, cracked condition of the soil allowed for rapid movement of the liquid waste through the soil. On February 1, 2011, Respondent submitted an investigation report to the Complainant concerning its evaluation of the discharge. In the report Respondent indicates that based on its investigation, review of the contractor's land application log and interviews it had conducted with the contractor, 172,500 gallons of silage leachate were applied on the land application site on September 30, 2010 over a period of 10.75 hours and 112,500 gallons of silage leachate were applied on October 1, 2010 over a 5 hour period. In its report, Respondent indicates the subject land application site is "about 9 acres more or less".

ANSWER: Respondent is without sufficient information to form knowledge or belief as to the truth of the allegations of the first and second sentences of paragraph 20, and neither admits nor denies the same and demands strict proof thereof. Respondent denies the allegations of the third sentence of paragraph 20 as unsupported factual conclusions. Respondent admits that on or about February 1, 2011, it submitted a report entitled "Storm Water Report for Traditions South Dairy, JoDaviess County, Illinois". Respondent denies the remaining allegations of paragraph 20 on the basis that said allegations consist of incomplete and inaccurate descriptions of the report, which speaks for itself.

21. At the time of the October 1, 2010 inspection, upon reaching the area where the Respondent had land applied liquid from the silage leachate holding cell, the Illinois EPA inspector observed pink/purple wastewater pooled in tire tracks on the application field. An Illinois EPA inspector collected a sample of the pooled pink/purple wastewater. Analytical results of this sample indicate a BOS<sub>5</sub> of 406 mg/L and TSS of 3300 mg/L.

ANSWER: Respondent is without sufficient information to form knowledge or belief as to the truth of the allegations of paragraph 21, neither admits nor denies the same, and demands strict proof thereof.

22. On October 4, 2010, the Illinois EPA conducted a follow-up inspection at the Tradition South facility. The contents of the silage leachate holding cell, the same cell from which the Respondent removed liquid for land application that resulted in the October 1, 2010 discharge, was pink/purple in color.

ANSWER: Respondent is without sufficient information to form knowledge or belief as to the truth of the allegations of paragraph 22, neither admits nor denies the same, and demands strict proof thereof.

23. At the time of the October 4, 2010 inspection, the Illinois EPA inspector observed that pink/purple liquid remained in tire tracks on the land application field that was the source of the October 1, 2010 discharge.

ANSWER: Respondent is without sufficient information to form knowledge or belief as to the truth of the allegations of paragraph 23, neither admits nor denies the same, and demands strict proof thereof.

24. On October 6, 2010, the Illinois EPA conducted a follow-up inspection. At the time of the October 6, 2010 inspection, Respondent's personnel excavated a three foot wide trench on the downstream side of the application field and located a single five to six inch clay tile line extending into the leachate application area. The trench extended 400 - 500 feet north and south along the east side of the application field. At the time of the October 6, 2010 inspection some purple colored water was seeping into the trench. The excavation procedure produced blocks of compacted soil that was apparently caused by multiple 2010 leachate applications.

ANSWER: Respondent admits that on or about October 6, 2010, it caused certain work to be performed at the property but denies the allegations of paragraph 24 as inaccurate and incomplete descriptions of the aforesaid work. Respondent denies all other allegations of paragraph 24.

25. The Tradition South dairy confinement that is under construction is surrounded by cropland that is owned by Respondent Tradition. Respondent Tradition has planted this cropland in corn for the past two growing seasons. Part of the crop field located north of the concrete corn silage storage area and east of the facility driveway was left fallow during the 2010 growing season, in part to provide a location to land apply the contents of the silage leachate wastewater storage basin. It is this area that was the site of the wastewater application that resulted in the October 1, 2010 discharge.

ANSWER: Respondent admits that it owns cropland in the area of the Traditions South Dairy. Respondent denies the remaining allegations of paragraph 25 on the basis that said allegations consist of incomplete and inaccurate descriptions of the business of Respondent and its activities with respect to crops in the years alleged.

26. The exposed tile was flushed to confirm the connection between the upper end of the application field tile and the lower discharge end. Flush water made its way to the discharge end in about five minutes, confirming the application field tile connection to the downstream tile discharge.

ANSWER: Respondent admits that investigative activities were conducted with respect to field tile, but denies the allegations of paragraph 26 as inaccurate and incomplete descriptions of the work and results thereof.

27. Section 3.165 of the Act, 415 ILCS 5/3.165, provides:

"CONTAMINANT" is any solid, liquid, or gaseous matter, any odor or any form of energy, from whatever source.

ANSWER: Respondent denies the allegations of paragraph 27 on the basis that said allegations consist of legal conclusions.

28. Section 3.545 of the Act, 415 ILCS 5/3.545, provides the following definition: "Water pollution" is such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.

ANSWER: Respondent denies the allegations of paragraph 28 on the basis that said allegations consist of legal conclusions.

29. Section 3.550 of the Act, 415 ILCS 5/3.550, provides the following definition:

"WATERS" means all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State.

ANSWER: Respondent denies the allegations of paragraph 29 on the basis that said allegations consist of legal conclusions.

30. Section 12 of the Act, 415 ILCS 5/12, provides the following prohibitions:

No person shall:

- (a) Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act;

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- (d) Deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard.

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ANSWER: Respondent denies the allegations of paragraph 30 on the basis that said allegations consist of legal conclusions.

31. Section 304.120 of the Board's Water Pollution Regulations, provides as follows:

#### Deoxygenating Wastes

Except as provided in 35 Ill. Adm. Code 30B.Subpart C, all effluents containing deoxygenating wastes shall meet the following standards:

- a) No effluent shall exceed 30 mg/L of five day biochemical oxygen demand (BOD<sub>5</sub>) (STORET number 00310) or 30 mg/L of suspended solids (STORET number 00530), except that treatment works employing three stage lagoon treatment systems which are properly designed, maintained and operated, and whose effluent has a dilution ratio no less than five to one or who qualify for exceptions under subsection (c) shall not exceed 37 mg/L of suspended solids.

ANSWER: Respondent denies the allegations of paragraph 31 on the basis that said allegations consist of legal conclusions.

32. By causing and allowing the discharge of silage leachate, a contaminant, from a land application field into waters of the State so as to create or likely create a nuisance, the Respondent has caused or tended to cause water pollution in Illinois in violation of Section 12(a) of the Act, 415 ILCS 5/12(a).

ANSWER: Respondent denies the allegations of paragraph 32.

33. By causing or allowing the discharge of silage leachate with an obvious unnatural color and BOD<sub>5</sub> and TSS levels that exceed the State's effluent limits from a land application field into a tributary of the South Fork of the Apple River, Respondent Tradition has violated Sections 12(a) of the Act, 415 ILCS 5112(a).

ANSWER: Respondent denies the allegations of paragraph 33.

#### PRAYER FOR RELIEF

WHEREFORE, Respondent, Tradition Investments LLC, respectfully requests that the Board enter an order striking and dismissing the Complaint and awarding Tradition Investments LLC its costs and such other relief as the Board deems just and proper.

#### COUNT II WATER POLLUTION HAZARD

1. This Count is brought on behalf of the People of the State of Illinois, by Lisa Madigan, Attorney General of the State of Illinois, on her own motion and at the request of the Illinois Environmental Protection Agency ("Illinois EPA"). pursuant to Sections 42(d) and (e) of the Illinois Environmental Protection Act ("Act"), 4151LCS 5/42(d), (e).

ANSWER: Respondent denies the allegations of paragraph 1 as legal conclusions.

2-33. Complainant re-alleges and incorporates by reference herein paragraphs-2 through 33 of Count I as paragraphs 2 through 33 of this Count II.

ANSWER: Respondent adopts and incorporates its responses to paragraphs 2-33 of Count I as if said responses were fully set forth herein.

34. By causing or allowing silage leachate to remain pooled on the land consisting of a very obvious unnatural color and with BOS<sub>5</sub>, and TSS levels that exceeded the State's effluent limits on October 1, October 4, and October 6, 2010, in a manner that allowed it to continually discharge from the land application field and thus exist as a water pollution

hazard on the land, Respondent Tradition has violated Section 12(d) of the Act, 415 ILCS 5/12(d).

ANSWER: Respondent denies the allegations of paragraph 34.

#### PRAYER FOR RELIEF

WHEREFORE, Respondent, Tradition Investments LLC, respectfully requests that the Board enter an order striking and dismissing the Complaint and awarding Tradition Investments LLC its costs and such other relief as the Board deems just and proper.

#### COUNT III NPDES VIOLATION

1. This Count is brought on behalf of the People of the State of Illinois, by Lisa Madigan, Attorney General of the State of Illinois, on her own motion and at the request of the Illinois Environmental Protection Agency ("Illinois EPA"), pursuant to Sections 42(d) and (e) of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/42(d), (e) (2008).

ANSWER: Respondent denies the allegations of paragraph 1 on the basis that said allegations consist of legal conclusions.

2-33. Complainant re-alleges and incorporates by reference herein paragraphs 2 through 33 of Count I as paragraphs 2 through 33 of this Count III.

ANSWER: Respondent adopts and incorporates its responses to paragraphs 2-33 of Count I as if said responses were fully set forth herein

34. Section 12 of the Act, 415ILCS 5/12, provides the following prohibitions:  
No person shall:

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- (f) Cause, threaten or allow the discharge of any contaminant into the waters of the State, as defined herein, including but not limited to, waters to any sewage works, or into any well or from any point source within 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 Section 39(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.

ANSWER: Respondent denies the allegations of paragraph 34 on the basis that said allegations consist of legal conclusions.

35. Section 309.102(a) of the Board's Water Pollution Regulations, 35. Ill. Adm. Code 309.102(a), provides:

Except as in compliance with the provisions of the Act, Board regulations, and the CWA, and the provisions and conditions of the NPDES permit issued to the discharger, the discharge of any contaminant or pollutant by any person into the waters of the State from a point source or into a well shall be unlawful.

ANSWER: Respondent denies the allegations of paragraph 35 on the basis that said allegations consist of legal conclusions.

36. Section 502.101 of the Board's Agriculture Related Pollution Regulations, 35 Ill. Adm. Code 502.101, provides:

No person specified in Sections 502.102, 502.103 or 502.104 or required to have a permit under the conditions of Section 502.106 shall cause or allow the operation of any new livestock management facility or livestock waste-handling facility, or cause or allow the modification of any livestock management facility or livestock waste-handling facility, or cause or allow the operation of any existing livestock management facility of livestock waste-handling facility without a National Pollutant Discharge elimination System ("NPDES") permit. Facility expansions, production increases, and process modifications which significantly increase the amount of livestock waste over the level authorized by the NPDES permit must be reported by submission of a new NPDES application.

ANSWER: Respondent denies the allegations of paragraph 36 on the basis that said allegations consist of legal conclusions.

37. Section 502.103 of the Board's Agriculture Related Pollution Regulations, 35 Ill. Adm. Code 502.103, provides:

An NPDES permit is required if more than the numbers of animal specified in any of the following categories are confined:

Number of Animals	Kind of Animals
700	Milking Cows

ANSWER: Respondent denies the allegations of paragraph 37 on the basis that said allegations consist of legal conclusions.

38. Section 122.23 (b)(1), 40 CFR 122.23(b)(1), provides, in pertinent part:

§ 122.23 Concentrated animal feeding operations (applicable to State NPDES programs, see § 123.25).

(b) Definitions applicable to this section:

(1) Animal feeding operation ("AFO") means a lot or facility (other than an aquatic animal production facility) where the following conditions are met:

(i) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and

(ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

ANSWER: Respondent denies the allegations of paragraph 38 on the basis that said allegations consist of legal conclusions.

39. Section 122.23 (b)(2), 40 CFR 122.23(b)(1), provides, in pertinent part:

(2) Concentrated animal feeding operation ("CAFO") means an AFO that is defined as a Large CAFO

ANSWER: Respondent denies the allegations of paragraph 39 on the basis that said allegations consist of legal conclusions.

40. Section 122.23 (b)(4), 40 CFR 122.23(b)(1), provides, in pertinent part:

- (4) Large concentrated animal feeding operation ("Large CAFO"). An AFO is defined as a Large CAFO if it stables or confines as many as or more than the numbers of animals specified in any of the following categories:

700 mature dairy cows

ANSWER: Respondent denies the allegations of paragraph 40 on the basis that said allegations consist of legal conclusions.

41. Section 122.23 (b)(7), 40 CFR 122.23(b)(1), provides, in pertinent part:

- (7) Process wastewater means water directly or indirectly used in the operation of the AFO for any or all of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities; direct contact swimming, washing, or spray cooling of animals; or dust control. Process wastewater also includes any water which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs or bedding.

ANSWER: Respondent denies the allegations of paragraph 41 on the basis that said allegations consist of legal conclusions.

42. Section 122.23 (b)(8), 40 CFR 122.23(b)(1), provides, in pertinent part:

- (8) Production area means that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas.

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The raw materials storage area includes but is not limited to feed silos, silage bunkers, and bedding materials

ANSWER: Respondent denies the allegations of paragraph 42 on the basis that said allegations consist of legal conclusions.

43. Section 122.23(d) (1), 40 CFR 122.23(d)(1), provides, in pertinent part:

(d) Who must seek coverage under an NPDES permit?

(1) Permit requirement. The owner or operator of a CAFO must seek coverage under an NPDES permit if the CAFO discharges .... Specifically, the CAFO owner or operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit. If the Director has not made a general permit available to the CAFO, the CAFO owner or operator must submit an application for an individual permit to the Director.

ANSWER: Respondent denies the allegations of paragraph 43 on the basis that said allegations consist of legal conclusions.

44. Section 122.23(e), 40 CFR 122.23(e), provides, in pertinent part:

e) land application discharges from a CAFO are subject to NPDES requirements. The discharge of manure, litter or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements, except where it is an agricultural storm water discharge as provided in 33 U.S.C.1362(14).

ANSWER: Respondent denies the allegations of paragraph 45 on the basis that said allegations consist of legal conclusions.

45. A discharge from a land application field through a field tile is a point source discharge.

ANSWER: Respondent denies the allegations of paragraph 45 on the basis that said allegations consist of legal conclusions.

46. On October 1, 2010, Respondent Tradition had neither applied for nor had it obtained NPDES permit coverage for point source discharges for the Tradition South facility.

ANSWER: Respondent denies the allegations of paragraph 46 on the basis that it assumes, incorrectly, that the Respondent was required to apply for and obtain any NPDES permit. Answering further, the Respondent denies that it

was or is required to apply for or obtain an NPDES permit or that the Complainant herein has legal authority to assert a cause of action seeking such application or remedies for failure to do so.

47. The October 1, 2010 land application runoff discharged from the application field through a tile into an unnamed tributary to the South Fork of Apple River. The South Fork of Apple River is a perennial creek tributary to the Apple River which is tributary to the Mississippi River. As such, the October 1, 2010 discharge was a discharge to navigable water that exist as waters of the United States.

ANSWER: Respondent denies the allegations of paragraph 47 and specifically demands strict proof of each and every allegation thereof.

48. The Traditions South facility is designed to confine 5,464 dairy cattle for the purpose of production of milk. Respondent Tradition has indicated every intention of completing construction, populating the facility and bringing it into production at its design capacity as soon as possible.

ANSWER: Respondent denies the allegations of paragraph 48 on the basis that the notice of intent to construct speaks for itself and describes the specific plans for the facility. Answering further, Respondent denies the remaining allegations of paragraph 48 on the basis that said allegations consist of factual conclusions unsupported by specific allegations.

49. The silage leachate contaminated runoff collected and contained in the temporary waste silage leachate cell on the Tradition South site that was land applied on September 30, 2010 and October 1, 2010 and that subsequently discharged through a field tile to waters of the United States, was processed wastewater as defined by 40 CFR 122.23(b)(7).

ANSWER: Respondent denies the allegations of paragraph 49 as legal conclusions. Respondent demands strict proof of each and every allegation of Paragraph 49.

50. By causing or allowing the discharge of silage leachate from a land application field without NPDES permit coverage, Respondent Traditions has violated Section 12(f) of the Act, 4151LCS 5/12In, and 35111. Adm. Code 309.102(a).

ANSWER: Respondent denies the allegations of paragraph 50.

PRAYER FOR RELIEF

WHEREFORE, Respondent, Tradition Investments LLC, respectfully requests that the Board enter an order striking and dismissing the Complaint and awarding Tradition Investments LLC its costs and such other relief as the Board deems just and proper.

COUNT IV  
OFFENSIVE CONDITIONS

1. This Count is brought on behalf of the People of the State of Illinois, by Lisa Madigan, Attorney General of the State of Illinois, on her own motion pursuant to Sections 42(d) and (e) of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/42(d), (e).

ANSWER: Respondent denies the allegations of paragraph 1 on the basis that said allegations consist of legal conclusions.

2-33. Complainant realleges and incorporates by reference herein paragraphs 2 through 33 of Count I as paragraphs 2 through 33 of this Count IV.

ANSWER: Respondent adopts and incorporates its responses to paragraphs 2-33 of Count I as if said responses were fully set forth herein

34. Section 302.203 of the Board's Water Pollution Regulations, 35 Ill. Adm. Code 302.203, provides, in pertinent part:

Waters of the State shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, color or turbidity of other than natural origin. The allowed mixing provisions of Section 302.102 shall not be used to comply with the provisions of this Section.

ANSWER: Respondent denies the allegations of paragraph 34 on the basis that said allegations consist of legal conclusions.

35. The October 1, 2010 discharge from Respondent's Tradition South facility land application field turned a tributary to the South Branch of the Apple River an unnatural pink/purple color. Liquid containing this color could be traced to the pooled liquid in the application field as well as the content of the holding cell of origin.

ANSWER: Respondent denies the allegations of paragraph 35 and demands strict proof thereof.

36. By applying silage leachate wastewater in such a manner to land that contained a field tile so as to allow a discharge and cause unnaturally pink/purple coloration in waters in a tributary of the South Fork of the Apple River, Respondent Tradition has violated Section 12(a) of the Act. 415 ILCS 5/12(a), and Section 302.203 of the Board's Water Pollution Regulations, 35 Ill. Adm. Code 302.203.

ANSWER: Respondent denies the allegations of paragraph 36 and demands strict proof thereof.

#### PRAYER FOR RELIEF

WHEREFORE, Respondent, Tradition Investments LLC, respectfully requests that the Board enter an order striking and dismissing the Complaint and awarding Tradition Investments LLC its costs and such other relief as the Board deems just and proper.

#### COUNT V OFFENSIVE DISCHARGE

1. This Count is brought on behalf of the People of the State of Illinois, by Lisa Madigan, Attorney General of the State of Illinois, on her own motion pursuant to Sections 42(d) and (e) of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/42(d), (e).

ANSWER: Respondent denies the allegations of paragraph 1 on the basis that said allegations consist of legal conclusions.

2-33. Complainant re-alleges and incorporates by reference herein paragraphs 2 through 33 of Count I as paragraphs 2 through 33 of this Count V.

ANSWER: Respondent adopts and incorporates its responses to paragraphs 2-33 of Count I as if said responses were fully set forth herein.

34. A discharge from a land application field through a field We is a point source discharge.

ANSWER: Respondent denies the allegations of paragraph 34 on the basis that said allegations consist of legal conclusions.

35. Section 301.275 of the Board's Water Pollution Regulations, 35 Ill. Adm. Code 301.275, provides:

Effluent

"Effluent" means any wastewater discharged, directly or indirectly, to the waters of the State or to any storm sewer, and the runoff from land used for the disposition of wastewater or sludges, but does not otherwise include nonpoint source discharges such as runoff from land or any livestock management facility or livestock waste handling facility subject to regulation under Subtitle E.

ANSWER: Respondent denies the allegations of paragraph 35 on the basis that said allegations consist of legal conclusions.

36. Section 304.106 of the Board's Water Pollution Regulations, 35 Ill. Adm. Code 304.106, provides:

#### Offensive Discharges

In addition to the other requirements of this Part, no effluent shall contain settleable solids, floating debris, visible oil, grease, scum or sludge solids. Color, odor and turbidity must be reduced to below obvious levels.

ANSWER: Respondent denies the allegations of paragraph 36 on the basis that said allegations consist of legal conclusions.

37. A discharge from a land application field through a field tile is a point source discharge.

ANSWER: Respondent denies the allegations of paragraph 37 on the basis that said allegations consist of legal conclusions.

38. By causing or allowing a point source discharge exhibiting a very obvious pink/purple color that resulted in the entire receiving body of water exhibiting the same color. Respondent Tradition has violated Section 12(a) of the Act, 415 ILCS 5/12(a), and Section 304.106 of the Board's Water Pollution Regulations, 35111. Adm. Code 304.106.

ANSWER: Respondent denies the allegations of paragraph 38 on the basis that said allegations consist of legal conclusions.

## PRAYER FOR RELIEF

WHEREFORE, Respondent, Tradition Investments LLC, respectfully requests that the Board enter an order striking and dismissing the Complaint and awarding Tradition Investments LLC its costs and such other relief as the Board deems just and proper.

## AFFIRMATIVE DEFENSES

Pursuant to 35 Ill. Adm. Code 103.204(d), Respondent, Tradition Investments, LLC, states as follows for its Affirmative Defenses:

### FIRST AFFIRMATIVE DEFENSE

1. Complainant is guilty of laches by reason of its failure to assert or allege a purported obligation on the part of Respondent to seek or obtain an NPDES permit prior to the filing of this action. Specifically, Complainant, through its Department of Agriculture, received, processed and approved the Notice of Intent to Construct for Tradition South based upon application materials and submittals dated as early as 2007. Complainant was aware at all times beginning in 2007 of the specific plans for Tradition South and failed to contend or allege that an NPDES permit was required. Respondent has been prejudiced by Complainant's stale claim in that Respondent has incurred in excess of \$22,000,000 in reliance of Complainant's finding that Respondent's facility is permissible.

### SECOND AFFIRMATIVE DEFENSE

2. Complainant is estopped to assert that an NPDES Permit is required for the operation of Tradition South. Beginning not later than Spring, 2008, Complainant approved the construction of the facility, and not later than June, 2008 and through Spring 2011, Complainant participated as a co-defendant of Respondent in certain litigation then pending as Case No. 2008 CH 42, previously pending in the Circuit Court of the 15th Judicial Circuit of Jo Daviess County, in which Complainant and Respondent together defended the legality and enforceability of Complainant's approval of Respondent's Tradition South facility. At no point in the above described litigation did Complainant contend that NPDES permit is required, despite claims by the Plaintiffs in that case that such a permit is required. Complainant is thus estopped to change its legal position to claim or contend that an NPDES permit is now required for their facility.

### THIRD AFFIRMATIVE DEFENSE

3. By reason of its participation as a Co-defendant in the above described litigation, Complainant is barred by the doctrines of issue preclusion and claim preclusion from now asserting that an NPDES permit is required for the facility.

FOURTH AFFIRMATIVE DEFENSE

4. Complainant's claim that an NPDES permit is required for this facility is preempted by federal law and is barred by the same. Specifically, (a) the Tradition South facility is a construction site, not a CAFO, in connection with which no animals have been populated. Run-off management in place is conducted pursuant to construction related measures, not the design for the facility as an animal feeding operation; (b) even accepting the allegation of a discharge, Respondent is not obligated by reason thereof to seek or obtain an NPDES permit; (c) there is no duty to apply for an NPDES permit unless the operation is actually discharging, which is not the case under the facts alleged here, and (d) there is no liability for a failure to apply for an NPDES permit.

FIFTH AFFIRMATIVE DEFENSE

5. Complainant has not alleged, nor has there been any environmental harm or damage by reason of the allegations set forth in the Complaint.

PRAYER FOR RELIEF

WHEREFORE, Respondent, Tradition Investments LLC, respectfully requests that the Board enter an order striking and dismissing the Complaint and awarding Tradition Investments LLC its costs and such other relief as the Board deems just and proper.

Respectfully submitted,

TRADITION INVESTMENTS, LLC

By:   
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