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AUG 18 2003

STATE OF ILLINOIS  
Pollution Control Board

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

PEOPLE OF THE STATE OF ILLINOIS, )  
)  
Complainant, )  
)  
vs. )  
)  
MICHEL GRAIN COMPANY, INC., a/k/a )  
MICHEL FERTILIZER, an Illinois )  
corporation, CARYLE MICHEL, and )  
RONNIE TODD, )  
)  
Respondents. )

PCB 96-143  
(Enforcement-Water)

**NOTICE OF FILING**

To: Doug Antonik  
Antonik Law Offices  
1921 Broadway  
P.O. Box 594  
Mt. Vernon, IL 62864

F. William Bonan  
Bonan and Bonan and Rowland  
P.O. Box 309  
McLeansboro, IL 62859

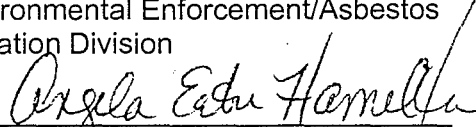
PLEASE TAKE NOTICE that on this date, I mailed for filing with the Clerk of the Pollution Control Board of the State of Illinois COMPLAINANT'S RESPONSE TO RESPONDENTS' RONNIE TODD AND RONNIE TODD LAND TRUST, MOTION TO DISMISS, copies of which are attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN  
Attorney General of the  
State of Illinois

MATTHEW J. DUNN, Chief  
Environmental Enforcement/Asbestos  
Litigation Division

BY:   
ANGELA EATON HAMILTON  
Assistant Attorney General  
Environmental Bureau

500 South Second Street  
Springfield, Illinois 62706  
217/782-9031  
Dated: August 13, 2003

**CERTIFICATE OF SERVICE**

I hereby certify that I did on August 13, 2003, send by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box true and correct copies of the following instruments entitled COMPLAINTANT'S RESPONSE TO RESPONDENTS', RONNIE TODD AND RONNIE TODD LAND TRUST, MOTION TO DISMISS

To: Doug Antonik  
Antonik Law Offices  
1921 Broadway  
P.O. Box 594  
Mt. Vernon, IL 62864

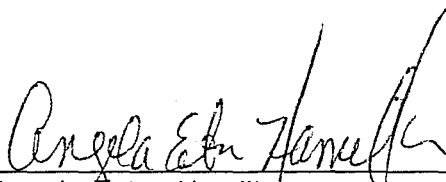
F. William Bonan  
Bonan and Bonan and Rowland  
P.O. Box 309  
McLeansboro, IL 62859

and the original and ten copies by First Class Mail with postage thereon fully prepaid of the same foregoing instrument(s):

To: Dorothy Gunn, Clerk  
Illinois Pollution Control Board  
State of Illinois Center  
Suite 11-500  
100 West Randolph  
Chicago, Illinois 60601

A copy was also sent by First Class Mail with postage thereon fully prepaid

To: Carol Sudman  
Hearing Officer  
Pollution Control Board  
1021 North Grand Avenue East  
Springfield, Illinois 62702

  
Angela Eaton Hamilton  
Assistant Attorney General

This filing is submitted on recycled paper.

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corporation, CARYLE MICHEL, )  
RONNIE TODD, and RONNIE TODD )  
LAND TRUST, )  
)  
Respondents, )

PCB No. 96-143  
(Enforcement-Water)

**COMPLAINANT'S RESPONSE TO RESPONDENTS', RONNIE TODD AND RONNIE TODD  
LAND TRUST, MOTION TO DISMISS**

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by Lisa Madigan, Attorney  
General of the State of Illinois, responds to the Motion to Dismiss filed by the Respondents,  
RONNIE TODD and RONNIE TODD LAND TRUST, and served upon the Complainant on July  
17, 2003, as follows:

**GENERAL COMMENTS**

1. The Board will determine this Motion to Dismiss according to the principles applied by the circuit courts pursuant to Sections 2-615 and 2-619 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615, 2-619 (2002). It is instructive to note that in *County of DuPage v. Waste Management of Illinois*, PCB 94-92 (December 1, 1994), in denying the motion to dismiss, the Board relied upon both "these [principles] and normal practice standards before the Board." (Order at p. 5)
2. The Courts have taken all well-pleaded facts as true and construe all reasonable inferences in favor of the Plaintiff. *Johnnie C. Gouge v. Central Illinois Public Service Co.*,

(1991) 144 Ill. 2d 535, 542. A cause of action shall not be dismissed unless it clearly appears from the pleadings that no set of facts can be proved that would entitle the Plaintiff to relief.

*People of the State of Illinois v. Datacom Systems Corp.*, (1991) 146 Ill. 2d 1, 11.

3. The Attorney General filed the Third Amended Complaint in this action on September 20, 2002 alleging violations of Section 12 and 21 of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/12 and 21 *et seq.* (2002), against MICHEL GRAIN COMPANY, INC. a/k/a MICHEL FERTILIZER, CARYLE MICHEL, RONNIE TODD, and RONNIE TODD LAND TRUST. Counts I and II of this action were brought only against the Respondents, CARYLE MICHEL, and MICHEL GRAIN COMPANY, INC., a/k/a MICHEL FERTILIZER, regarding an agri-chemical facility located in Ina, Jefferson County, Illinois. Counts III and IV of this action were brought against the Respondents, RONNIE TODD, RONNIE TODD LAND TRUST, CARYLE MICHEL and MICHEL GRAIN COMPANY, INC., a/k/a MICHEL FERTILIZER, regarding a liquid and dry fertilizer and agri-chemical facility located in Broughton, Hamilton County, Illinois.

4. Counts III and IV of the Complaint allege water pollution violations and waste disposal violations. As the Complaint alleges (and as admitted for purposes of this motion), the Illinois EPA began inspecting the Broughton facility in January of 1992. The Illinois EPA has observed two underground drains that discharge to a drainage way which is a tributary to an unnamed tributary of the North Fork Saline River.

5. In 1992, the Illinois EPA was told that the facility had been abandoned for approximately three years but found many above-ground tanks that still contained liquids, several discarded containers of pesticides and insecticides and approximately two tons of damp fertilizer. The Illinois EPA also observed, in another 1992 inspection, discolored soils and gravel. The soils appeared yellow in color and exhibited an agri-chemical odor while other soils manifested a petroleum odor. The soils and water were sampled and the lab results found

alachlor, atrazine, and trifluralin in the water and atrazine and trifluralin in the soils. These soil samples indicated potential exceedances of Class I and Class II groundwater standards for Atrazine and Alachlor and an exceedance of the health advisory level for Trifluralin.

6. The Illinois EPA has observed the demolition of most of the buildings and the removal of the above-ground tanks over the subsequent years. However, no action has been taken by any of the Respondents to cleanup the contamination contained within the soils and address the potential impact to the groundwater.

7. In their most recent motion to dismiss, Respondents, RONNIE TODD and RONNIE TODD LAND TRUST, seek a dismissal from this lawsuit on the ground that Complainant has no knowledge of Ronnie Todd and Ronnie Todd Land Trust releasing "substances" onto the property. Therefore, Ronnie Todd and Ronnie Todd Land Trust are only parties because they had or have title to the premises in question. Alternatively, Ronnie Todd and Ronnie Todd Land Trust request that the previous owners be added to the Complaint as party respondents if dismissal is not granted by the Board.

8. The Respondents, RONNIE TODD and RONNIE TODD LAND TRUST, however, are mistaken and, for the reasons set forth below, their Motion to Dismiss should be denied.

### **ARGUMENT**

#### **RELEASES AT THE FACILITY**

9. The issue to be resolved by the Board regarding Ronnie Todd and Ronnie Todd Land Trust is whether they exercise sufficient control over the source of the pollution at the facility and whether they have taken any precautions to prevent the release of contamination.

10. On June 24, 1997, Mr. Todd acquired Block 35 in Broughton, Hamilton County, Illinois from Caryle and Catherine Michel by a quit claim deed. (See Attachment A of

Complainant's Response to Motion to Dismiss.) Block 35 is the facility that is the subject of the case at bar. Prior to the transfer from the Michels, Ronnie Todd had leased the facility from the Michels. (See Attachment B of Complainant's Response to Motion to Dismiss.) On July 21, 2000, Mr. Todd conveyed Block 35 to the Ronnie Todd Land Trust. (See Attachment C of Complainant's Response to Motion to Dismiss.)

11. Mr. Todd admits in his prior motions to dismiss and affidavit that he continues to use the property "as a truck lot and truck repair facility" even after he conveyed the property to the Ronnie Todd Land Trust. Since Mr. Todd still uses the facility after it was conveyed to the Trust, he has benefitted from this use and still has control over the facility. Mr. Todd has not alleged that anyone else receives any benefits from the facility. Moreover, Mr. Todd has not alleged that any other entity uses the facility other than himself for his trucking business.

12. As the operator and lessee of the facility prior to 1997, the owner of the facility from 1997 to 2000, and as a beneficial user of the facility since 2000, Mr. Todd and Ronnie Todd Land Trust have had the capability of control over the source of the pollution at the facility and they have not taken any necessary precautions to prevent the pollution from continuing. Therefore, Mr. Todd and Ronnie Todd Land Trust have caused, threatened and/or allowed water pollution in violation of Section 12 of the Act, 415 ILCS 5/12 (2002), and has conducted a waste disposal operation in violation of Section 21 of the Act, 415 ILCS 5/21 (2002).

13. In Meadowlark Farms, Inc. v. Pollution Control Board, 308 N.E.2d 829 (5<sup>th</sup> Dist. 1974), the Court held that the Environmental Protection Act is "*malum prohibitum*, no proof of guilty knowledge or *mens rea* is necessary to a finding of guilt" 308 N.E.2d 829, 837 (5<sup>th</sup> Dist. 1974). Specifically, the Meadowlark case involved water pollution that was caused by seepage from abandoned mine refuse piles. The prior owner of the mineral rights left a coal refuse pile on the surface of the property acquired by Meadowlark Farms. Meadowlark Farms contended that it did not cause, threaten or allow the discharge of contaminants because Meadowlark

Farms merely owned the surface rights to the property, not the mineral rights, 308 N.E.2d 829, 836 (5<sup>th</sup> Dist. 1974). The Court held that Meadowlark Farms, as the owner of the surface rights to the property, also owned the abandoned mine refuse piles. Therefore, Meadowlark Farms owned the source of the pollution and had control over the source of the pollutorial discharge and violated Section 12 of the Act, *id.*

14. The Meadowlark case was the beginning of a long line of precedent in Illinois which holds that “the owner of the source of pollution causes or allows the pollution within the meaning of the statute and is responsible for that pollution . . .” Russell Parkinson d/b/a Parksville v. The Pollution Control Board, 543 N.E.2d 901, 904 (3d Dist. 1989). In People v. A. J. Davinroy Contractors, the Court stated that the test to apply by the Illinois courts is “whether an alleged polluter has violated the Act is whether the alleged polluter exercised sufficient control over the source of the pollution,” People v. A. J. Davinroy Contractors, 618 N.E.2d 1282, 1286 (5<sup>th</sup> Dist. 1993) citing People v. Fiorini, 574 N.E.2d 612, 623 (1991). In that case, a sewer contractor was held to be liable for discharge from a sewer line where he had agreed to be “responsible for the operation and maintenance of the existing pumping system at the particular location” and “neither lacked the capability to control the source of the pollution nor undertook any precautions to prevent the pollution,” 618 N.E.2d at 1282, 1287 (5<sup>th</sup> Dist. 1993).

15. In the instant case, Mr. Todd and Ronnie Todd Land Trust have owned and still have beneficiary use of the property. As the owner and main beneficial user of the property, they have the capability to control the source of the pollution. As discussed *infra*, Illinois EPA discovered contaminated soils (the source of the pollution) among other contaminated media in 1992. However, the Respondents, including Mr. Todd and Ronnie Todd Land Trust, have committed no action to abate the soil contamination. Therefore, the contaminated soils remain at the property and the contamination is on-going. Mr. Todd and Ronnie Todd Land Trust have not alleged that they have taken any precautions to the prevent the pollution.

16. By applying the Davinroy test to the instant case, Mr. Todd and Ronnie Todd Land Trust have the capability to control the source of pollution and have not taken any precautions to prevent the release. Therefore, they have violated Sections 12 and 21 of the Act, 415 ILCS 5/12 and 21 (2002).

17. By allowing the contamination to remain in the soil and the threat of release of this contamination to groundwater, the Respondents, Ronnie Todd and Ronnie Todd Land Trust, have released and continue to release contamination since 1997.

### **PREVIOUS OWNERS AS PARTY RESPONDENTS**

18. In this most recent motion, the Respondents, Ronnie Todd and Ronnie Todd Land Trust, state, albeit erroneously, that Complainant is holding Respondents, Ronnie Todd and Ronnie Todd Land Trust, liable for contamination at the facility merely because they had or have title to the property, therefore, all previous property owners are then liable for the current contamination and must be added as necessary parties.

19. The Illinois Courts define a necessary party as "one with a present, substantial interest in the subject matter of the litigation without whose participation a complete resolution cannot be had." Import Sales, Inc. v. Continental Bearings Corporation, 217 Ill. App. 3d 893, 902, 577 N.E. 2d 1205, 1211 (1<sup>st</sup> Dist. 1991); Chariot Holdings, Ltd. v. Eastmet Corp., 153 Ill. App. 3d 50, 61, 505 N.E. 2d 1076 (1987); and Brumley v. Touche, Ross & Co., 123 Ill App. 3d 636, 643-44, 463 N.E. 2d 195, 201 (1984).

20. In Brumley v. Touche, Ross & Co., the court further defines a necessary party as one whose presence in a lawsuit is required for any of three reasons: (1) to protect an interest which the absentee has in the subject matter which would be materially affected by a judgment entered in his absence; (2) to reach a decision which will protect the interests of those who are before the court; or (3) to enable the court to make a complete determination of the



controversy. Brumley v. Touche, Ross & Co., 123 Ill App. 3d 636, 643-44, 463 N.E. 2d 195, 201 (1984) citing Lain v. John Hancock Mutual Life Insurance Co., 79 Ill. App. 3d 264, 398 N.E. 2d 278 (1979).

21. The Respondents are not entitled to seek contribution; cross-claim or counter-claim relief against any party who had title to the property previously, because Respondents have not shown how these previous property owners are necessary parties in their most recent motion to dismiss.

22. As stated above, Ronnie Todd and Ronnie Todd Land Trust are liable for the ongoing contamination on the property because Ronnie Todd and Ronnie Todd Land Trust have the ability to control the source of pollution and have not taken any precautions to prevent the release, and not, because they merely have or had title to the property.

23. Complainant filed the original complaint in 1997 against MICHEL GRAIN COMPANY, INC. a/k/a MICHEL FERTILIZER, and CARYLE MICHEL since they were the owners and operators of the facility when the Illinois EPA first inspected the site and found the contamination in 1992.

24. It is not clear how the previous property owners are necessary parties. The previous property owners do not have a present or a substantial interest in the subject matter of this litigation and their participation is not needed to resolve the matter against the Respondents.

25. Moreover, Ronnie Todd and Ronnie Todd Land Trust can always request the Board to add these property owners by filing a proper third party complaint.

#### **CONCLUSION**

In closing, neither of these contentions proffered by the Respondents, Ronnie Todd and Ronnie Todd Land Trust, are sufficient to dismiss this matter against them.

WHEREFORE, the People of the State of Illinois respectfully request that the Board deny Ronnie Todd and Ronnie Todd Land Trust's Motion to Dismiss Complaint.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,

LISA MADIGAN  
Attorney General  
State of Illinois

MATTHEW J. DUNN, Chief  
Environmental Enforcement Division

BY: Angela Eaton Hamilton  
ANGELA EATON HAMILTON  
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Dated: 8/13/03