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JUL 13 2006

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complaint,)
)
vs.)
)
FIRST COUNTRY HOMES, L.L.C., an)
Illinois Limited Liability Company,)
)
Respondent.)

PCB 06-173
(Enforcement—Water)

NOTICE OF FILING

TO: Mr. Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 West Randolph Street
Chicago, Illinois 60601

Lisa Madigan
Matthew Marinelli
Attorney General of the State of Illinois
Environmental Bureau
188 West Randolph Street, 20th Floor
Chicago, Illinois 60601

PLEASE TAKE NOTICE that on the 13th day of July 2006, we filed our Answer and Affirmative Defenses in the above-captioned cause, a copy of which is hereby served upon you.

First Country Homes, LLC

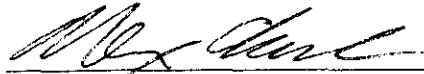
By: _____

One of Its Attorneys

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CERTIFICATE OF SERVICE

I, Alexander Chase, a non-attorney, do hereby affirm under oath that I served copies of the above-mention Answer and Affirmative Defenses, by Facsimile and U.S. Mail, from 53 W. Jackson Blvd., Chicago, IL, to the attorneys for the aforementioned parties, before 6:00 pm on the 13 day of July, 2006.



Alexander Chase

JUL 13 2006

STATE OF ILLINOIS
Pollution Control Board

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ANSWER AND AFFIRMATIVE DEFENSES

Respondent, FIRST COUNTRY HOMES, L.L.C., an Illinois Limited Liability Company (“First Country”), by Gardiner Koch & Weisberg, its attorneys, for its Answer to the PEOPLE OF THE STATE OF ILLINOIS, states as follows:

COUNT I
FAILURE TO OBTAIN A CONSTRUCTION PERMIT

1. This Complaint 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 the terms and provisions of Section 31 of the Illinois Environmental Protection Act (“Act”), 415 ILCS 5/31 (2004).

ANSWER: Respondent admits the allegations contained in paragraph 1 of Complainants Complaint.

2. The Illinois EPA is an administrative agency of the State of Illinois, created pursuant to Section 4 of the Act, 415 ILCS 5/4 (2004), and charged, *inter alia*, with the duty of enforcing the Act. The Illinois EPA is further charged with the duty to abate violations of the

National Pollutant Discharge Elimination System (“NPDES”) permit program under the Federal Clean Water Act (“CWA”), 33 U.S.C. §1342 (b)(7)(2004).

ANSWER: Respondent admits the allegations contained in paragraph 2 of the Complaint.

3. At all times relevant to this Complaint, Respondent, First Country Homes, L.L.C. (“First Country”), was and is an Illinois limited liability company in good standing, located at 25640 Jasmine Lane, Monee Will County, Illinois.

ANSWER: Respondent admits the allegations contained in paragraph 3 of the Complaint.

4. At all times relevant to this Complaint, First Country was the owner and developer of approximately 30 vacant residential lots, located in Section 22, Township 34 North, Range 13 East, in Monee, Will County, Illinois, known as Country Meadows – Phase 8 (“Site”).

ANSWER: Respondent admits the allegations contained in paragraph 4 of the Complaint.

5. On or before November 10, 2004, or at a time better known to the Respondent, Respondent began construction activities on the Site for the development of Country Meadows – Phase 8, by clearing large areas of land of all vegetation and creating substantial piles of dirt.

ANSWER: Respondent admits the allegations contained in paragraph 5 of the Complaint.

6. On November 10, 2004, Respondent submitted a sewer construction permit application to the Illinois EPA for the site.

ANSWER: Upon information and belief, Respondent admits the allegations contained in paragraph 6 of the Complaint.

7. On December 1, 2004, the Illinois EPA rejected the sewer construction permit application as incomplete. Among other deficiencies, the application was lacking all the required signatures and the permit fee had not been paid.

ANSWER: Respondent admits that the Illinois EPA rejected the sewer construction permit application as incomplete. Respondent is without sufficient information or belief to either admit or deny the remaining allegations contained in paragraph 7 of the Complaint, and accordingly denies the same. Respondent denies that the permit fee had not been paid.

8. On December 1, 2004, the respondent submitted another sewer construction permit application which was also denied because of the lack of required signatures.

ANSWER: Upon information and belief, Respondent admits that Respondent submitted a sewer construction permit application on or about December 1, 2004, which was denied. Respondent is without sufficient information or belief to either admit or deny the remaining allegations contained in paragraph 8 of the Complaint, and accordingly denies the same.

9. On December 28, 2004, Respondent had completed substantial earthwork at the Site and sanitary sewers had been installed. Approximately 20 of the 30 home sites had been sold by the end of December 2004.

ANSWER: Respondent admits it had completed substantial earthwork at the Site. Respondent denies the remaining allegations contained in paragraph 9 of the Complaint.

10. On June 8, 2005, the Illinois EPA issued an as-built and operating permit to the Village of Monee as operator for the sewer lines already in place, with hookups completed by the Defendant to the approximately 28 homes that had already been built.

ANSWER: Respondent denies the allegations contained in paragraph 10 of the Complaint.

11. Section 12 of the Act, 415 ILCS 5/12 (2004), provides, in pertinent part, as follows:

No person shall:

- a) Cause or threaten or allow the discharge of any contaminant 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.

- b) Construct, install, or operate any equipment, facility, vessel, or aircraft of causing or contributing to water pollution, or designed to prevent water pollution of any type designated by Board regulations, without a permit granted but the Agency, or in violation of any conditions imposed by such permit.

* * *

ANSWER: Respondent affirmatively states that the allegations contained in paragraph 11 of the Complaint contain a statement of law, for which no answer is required. To the extent an answer is required, Respondent states that 415 ILCS 5/12 (2004) references the Illinois Environmental Protection Act, and Respondent denies any allegations contained in paragraph 11 of the Complaint which are inconsistent therewith.

12. Respondent’s ownership and development of the Site is subject to the Act and the Rules and Regulations promulgated by the Illinois Pollution Control Board (“Board”). The Board’s regulations for Water Pollution are found in Title 35, Subtitle C, Chapter I, of the Illinois Administrative Code (“Board Regulations for Water Pollution”).

ANSWER: Respondent admits that its ownership and development of the Site is subject to the rules and regulations of the Illinois Pollution Control Board. Respondent affirmatively states that the remaining allegations contained in paragraph 12 of the Complaint reference a statement of law, for which no answer is required. To the extent an answer is required, Respondent denies any allegations contained in paragraph 12 of the Complaint which are inconsistent with the Illinois Administrative Code, as cited.

13. Section 309.202(a) of the Board Regulations for Water Pollution, 35 Ill. Adm. Code 309.202(a), provides as follows:

Construction Permits

Except for treatment works or wastewater sources which have or will have discharges for which NDES Permits are required, and for which NPDES Permits have been issued by the Agency:

- a) No person shall cause or allow the construction of any new treatment works, sewer or wastewater source or cause or allow the modification of any existing treatment works, sewer or wastewater source without a construction permit issued by the Agency, except as provided in paragraph (b).

ANSWER: Respondent affirmatively states that the allegations contained in paragraph 13 of the Complaint contain a statement of law, for which no answer is required. To the extent an answer is required, Respondent denies any allegations contained in paragraph 13 of the Complaint which are inconsistent with the Illinois Administrative Code, as cited.

14. Section 3.315 of the Act, 415 ILCS 5/3.315 (2004), provides the following definition:

“PERSON” is any individual, partnership, co-partnership, firm, company, limited liability company, corporation, association, joint stock company, trust, estate, political subdivision, state agency or any other legal entity, or their legal representative, agent or assigns.

ANSWER: Respondent affirmatively states that the allegations contained in paragraph 14 of the Complaint contain a statement of law, for which no answer is required. To the extent an answer is required, Respondent denies any allegations contained in paragraph 14 of the Complaint which are inconsistent with the Illinois Environmental Protection Act, as cited.

15. Respondent, First Country Homes, L.L.C., is a “person” as that term is defined in Section 3.315 of the Act, 415 ILCS 5/3.315 (2004).

ANSWER: Respondent affirmatively states that the allegations contained in paragraph 15 of the Complaint consists of conclusions of law, for which no answer is required. To the extent an answer is required, Respondent admits the allegations contained in paragraph 15 of the Complaint.

16. From at least December 28, 2004, or at a time better known to Respondent and continuing until June 8, 2005, when an as-built permit was issued, Respondent constructed a new sewer without a construction permit.

ANSWER: Respondent denies the allegations contained in paragraph 16 of the Complaint.

17. By failing to obtain a sewer construction permit prior to construction, Respondent violated Section 309.202(a) of 35 Ill. Adm. Code, thereby violating Sections 12(a) and (b) of the act, 415 ILCS 5/12(a), and 12(b) (2004).

ANSWER: Respondent affirmatively states that the allegations contained in paragraph 17 of the Complaint consist of conclusions of law, for which no answer is

required. To the extent an answer is required, Respondent denies the allegations contained in paragraph 17 of the Complaint.

WHEREFORE, Respondent, FIRST COUNTRY HOMES, L.L.C., by and through Gardiner Koch & Weisberg, its attorneys, respectfully request that this Board deny the relief requested by the People of the State of Illinois, that this matter be dismissed in its entirety, and that the Board award such other just and equitable relief as it deems appropriate.

COUNT II
FAILURE TO OBTAIN AN NPDES PERMIT

1-15. Complainant realleges and incorporated by reference herein paragraphs 1 through 15 of count 1 as paragraphs 1 through 15 of this Count II.

ANSWER: Respondent restates its answer to paragraphs 1 through 15 of Count 1 as if fully set forth herein in response to paragraphs 1 through 15 of this Count II.

16. Section 12(f) of the Act, 415 ILCS 5/12 (f) (2004), provides as follows:

No person shall:

- (f) Cause, threaten, or allow the discharge of any contaminant into the waters of the State, as defined herein, including but not limited to, any 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 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 affirmatively states that the allegations contained in paragraph 16 of the Complaint contain a statement of law, for which no answer is required. To the extent an answer is required, Respondent denies any allegations contained in paragraph 16 of the Complaint which are inconsistent with the Illinois Environmental Protection Act, as cited.

17. Section 309.102(a) of the Board Water Pollution regulations, 35 Ill. Adm. Code 309.102(a), provided as follows:

NPDES Permit Required

- a. 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 affirmatively states that the allegations contained in paragraph 17 of the Complaint contain a statement of law, for which no answer is required. To the extent an answer is required, Respondent denies any allegations contained in paragraph 17 of the Complaint which are inconsistent with the Illinois Administrative Code, as cited.

18. Storm waters from the Site discharge into the storm sewer system on the site and then into the storm sewers of the Village of Monee.

ANSWER: Respondent admits the allegations contained in paragraph 18 of the Complaint.

19. Section 3.550 of the Act, 415 ILCS 5/3.550 (2004), contains 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 affirmatively states that the allegations contained in paragraph 19 of the Complaint contain a statement of law, for which no answer is required. To the extent an answer is required, Respondent denies any allegations contained in paragraph 16 of the Complaint which are inconsistent with the Illinois Environmental Protection Act, as cited.

20. The storm sewer system of the Village of Monee is a “water” of the State of Illinois as that term is defined in Section 3.550 of the Act, 415 ILCS 5/3.550 (2004).

ANSWER: Respondent affirmatively states that the allegations contained in paragraph 20 of the Complaint consist of conclusions of law, for which no answer is required. To the extent an answer is required, Respondent admits the allegations contained in paragraph 20 of the Complaint.

21. Section 3.165 of the Act, 415 ILCS 5/3.165 (2004), provides the following definition:

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

ANSWER: Respondent affirmatively states that the allegations contained in paragraph 21 of the Complaint contain a statement of law, for which no answer is required. To the extent an answer is required, Respondent denies any allegations contained in paragraph 21 of the Complaint which are inconsistent with the Illinois Environmental Protection Act, as cited.

22. Silt-laden storm water is a contaminant as that term is defined in Section 3.165 of the Act, 415 ILCS 5/3.165 (2004).

ANSWER: Respondent affirmatively states that the allegations contained in paragraph 22 of the Complaint consist of conclusions of law, for which no answer is required.

23. From November 10, 2004, or at a time better known to Respondent, and continuing until January 3, 2005, Respondent threatened the discharge of contaminant from its Site to the storm water sewer system of the Village of Monee without first obtaining a general NPDES storm water permit.

ANSWER: Respondent affirmatively states that the allegations contained in paragraph 23 of the Complaint consist of conclusions of law, for which no answer is required. To the extent an answer is required, Respondent denies the allegations contained in paragraph 23 of the Complaint.

24. By threatening to allow storm water discharges from its construction Site without first obtaining coverage under a general NPDES storm water permit, Respondent violated Section 12(f) of the Act, 415 ILCS 5/12(f)(2004) and 35 Ill. Adm. Code 309.102 (a).

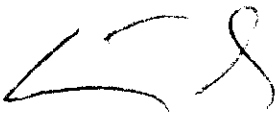
ANSWER: Respondent affirmatively states that the allegations contained in paragraph 24 of the Complaint consist of conclusions of law, for which no answer is required. To the extent an answer is required, Respondent denies the allegations contained in paragraph 24 of the Complaint.

WHEREFORE, Respondent, FIRST COUNTRY HOMES, L.L.C., by and through Gardiner Koch & Weisberg, its attorneys, respectfully request that this Board deny the relief

requested by the People of the State of Illinois, that this matter be dismissed in its entirety, and that the Board award such other just and equitable relief as it deems appropriate.

Respectfully submitted,

FIRST COUNTRY HOMES, LLC.

By: 

One of It's Attorneys

Thomas G. Gardiner
Matthew A. Sidor
GARDINER KOCH & WEISBERG
53 W. Jackson, Suite 950
Chicago, Illinois 60604
312-362-0000
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AFFIRMATIVE DEFENSES

Respondent, FIRST COUNTRY HOMES, L.L.C., an Illinois Limited Liability Company, by Gardiner Koch & Weisberg, its attorneys, for its Affirmative Defenses, states as follows:

First Affirmative Defense
Failure to State a Claim

1. 35 Ill. Adm. Code 103.204(c) provides:

The complaint must be captioned in accordance with 35 Ill. Adm. Code 101.Appendix A, Illustration A and contain:

...

The dates, location, events, nature, extent, duration, and strength of discharges or 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.

2. In the matter before the Board, Petitioner’s Complaint fails to sufficiently set forth all of the required information, including, specifically, the events, nature, extent and strength of discharges or emissions and consequences alleged to constitute violations of the Act or regulations.

Second Affirmative Defense
Section 33(c) Factors

1. 415 ILCS 5/33(c) (2004), part of the Illinois Environmental Protection Act under which the Complaint has been brought, provides:

In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved, including, but not limited to:

- (i) the character and degree of injury to, or interference with the protection to the health, general welfare and physical property of the people;
- (ii) the social and economic value of the pollution source;
- (iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
- (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
- (v) and subsequent compliance.

Factors I, III and IV-

The character and degree of injury to, or interference with the protection to the health, general welfare and physical property of the people;

The suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved; and

The technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source.

2. On October 16, 1986, the public utility service company, Consumer Illinois Water Company, n/k/a Aqua, Illinois (“Aqua”), and the Village of Monee (“Monee”) entered into an agreement by which Aqua agreed to provide sewerage and wastewater treatment services to Monee (“October 16 Agreement”). Under the October 16 Agreement, Aqua was legally obligated to execute the permit. Further, both Aqua’s actions and the facts surrounding the

matter further showed all signs that Aqua exhibited the capacity and would continue to act in fulfillment of its obligations under the existing annexation and servicing agreements, including:

- Aqua had previously installed the necessary sewerage facilities and was currently using the facilities at less than capacity;
- Aqua had previously executed the documents necessary to obtain a Phase VII permit;
- Phase VIII consisted of the same equipment and service as Phase VII, already in use at the time the Phase VIII application was sought;
- Aqua had accepted numerous payments from First Country in the amount of One Hundred Sixty-Two Thousand and Six Hundred Dollars (\$162,600) related to the permitting process, including payments going to Phase VIII in the amount of Eighteen Thousand Dollars (\$18,000); and
- Aqua had been issued an Illinois Environmental Protection Agency (“IEPA”) opinion letter pertaining to the application for permit of Eagle Fair Estates (a neighboring property owner who also required Aqua’s signature on its permit applications). The response of the IEPA in its letter dated December 3, 2004, set forth that it should sign the permit but “include an asterisk next to each item that require[d] their signature with an explanation that Aqua only certifies transport and treatment capacity until October 16, 2006.”

3. Accordingly, First Country had received all indications that Aqua would execute the application in due course. At the same time, First Country came to numerous agreements and executed 28 contracts for the sale of the lots and construction of homes in Phase VIII.

4. On or about December 28, 2004, First Country was unable to obtain a Phase VIII permit due to the unjustified refusal of Aqua to execute the application. Aqua’s refusal stemmed from a notice to Aqua from Monee dated August 28, 2003, wherein Monee noticed Aqua that it would not renew the October 16 Agreement with Aqua to service the area. In an improper attempt to leverage the municipality to execute an extension of its service agreement, Aqua withheld its signature from the permit application.

5. When Aqua refused to sign the permit application, First Country was left with the difficult option to move forward with completion and sale of the homes or delay the same. On the one hand, to delay construction due to Aqua’s unjustified refusal would cause numerous third

parties extreme hardship in that their contracted-for homes would not be available as planned, causing those innocent third parties to breach the contracts for sale of their current homes. The delay would result in vast, unnecessary, litigation which would involve numerous parties (including the homeowners, parties who had contracted for the purchase of homes from lot owners, First Country, Aqua, Monee, the neighboring property owners, and the IEPA), and millions of dollars in cost and expense. First Country believed that it could act without any harm to the environment and resolve the matter in extremely short order by filing suit to compel Aqua to act in accordance with its previously executed agreements.

6. Accordingly, First Country believed it left with no option but to move forward with construction in Phase VIII. Prior to taking any action or beginning work, First Country called the IEPA and asked whether the plans pertaining to the permit were acceptable, to which the IEPA responded affirmatively. At the same time, First Country retained Gardiner Koch & Weisberg to file suit against Aqua in order to compel them to sign the necessary permit application. First Country filed a Complaint at Law against Monee and Aqua in the Circuit Court of Will County on March 30, 2005. Immediately thereafter, on April 7, First Country filed an Emergency Motion for a Temporary Restraining Order and Preliminary Injunction, seeking to compel Monee and Aqua to execute the applicable form WPC-PS-1 permits. The matter settled on April 22, 2005, when Aqua agreed to sign the permit, the terms of which remain confidential.

Factor II-
The social and economic value of the pollution source.

7. First Country is an Illinois family-owned and operated residential development company. James Sylvester is the principal of First Country. Since Mr. Sylvester began property development in 1971, he has sought at all times to comply fully with the statutory requirements

of the Illinois Environmental Protection Act. Other than the matter at hand, neither he nor his corporate entities have ever received a notice of violation by IEPA.

8. First Country has acted in good faith to avoid unnecessary cost and expense to numerous innocent third parties. In pursuit of the same, First Country has incurred greater than Twenty Thousand Six Hundred Dollars (\$20,600) in legal costs. Indeed, First Country has taken the ultimate step of releasing Aqua from liability in order to obtain the necessary permits.

Nonetheless, First Country currently stands subject to great penalties related to the actions which have proven to be the best possible course for all parties involved (other than First Country).

Factor I-

The character and degree of injury to, or interference with the protection to the health, general welfare and physical property of the people.

9. At all relevant times, there was never discharge through the sewerage system in question, without a permit. The earliest possible date of discharge was July 8, 2005, the date possession was granted to the first party in the sale of the property at issue. Logically, since no parties were in possession of the property, no discharge could have occurred prior to the date of July 8, 2005.

10. Even had discharge occurred, the discharge was harmless, as it was, in fact, received in the capacity of utility service provider, by Aqua's facilities, and treated there-at.

Factor V-


Subsequent compliance.

11. As of June 8, 2005, the permit in question has been issued.

WHEREFORE, Respondent, FIRST COUNTRY HOMES, L.L.C., by and through Gardiner Koch & Weisberg, its attorneys, respectfully request that this Board deny the relief requested by the People of the State of Illinois, that this matter be dismissed in its entirety, and that the Board award such other just and equitable relief as it deems appropriate.

Respectfully submitted,

FIRST COUNTRY HOMES, LLC.

By: 

One of It's Attorneys

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