



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

December 22, 2008

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DEC 24 2008

STATE OF ILLINOIS
Pollution Control Board

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STATE OF ILLINOIS
Pollution Control Board

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center, Ste. 11-500
100 West Randolph
Chicago, Illinois 60601

Re: **People v. J. B. Timmerman Farms, Ltd.**
PCB 07-70

Dear Mr. Therriault:

Enclosed for filing please find the original and ten copies of Complainant's Motion for Leave to File a Reply Brief, Complainant's Reply in Support of its Motion to Strike Respondent's Affirmative Defenses and Notice of Filing in regard to the above-captioned matter. Please file the originals and return file-stamped copies to me in the enclosed, self-addressed envelope.

Thank you for your cooperation and consideration.

Very truly yours,

Andrew J. Nicholas
Environmental Bureau
500 South Second Street
Springfield, Illinois 62706
(217) 782-9031

AJN/pjk
Enclosures

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,
Complainant,
vs.
J. B. TIMMERMANN FARMS, LTD.,
an Illinois corporation,
Respondent.

PCB No. 07-70
(Enforcement - Water)

NOTICE OF FILING

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DEC 24 2008

STATE OF ILLINOIS
Pollution Control Board

To: James Richard Myers
LeFevre Oldfield Myers Apke & Payne Law Group, Ltd.
303 S. Seventh St., P.O. Box 399
Vandalia, IL 62471

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 MOTION FOR LEAVE TO FILE A REPLY BRIEF and COMPLAINANT'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES, 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: [Signature]
ANDREW D. NICHOLAS
Assistant Attorney General
Environmental Bureau

Attorney I.D. #6285057
500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: December 22, 2008

CERTIFICATE OF SERVICE

I hereby certify that I did on December 22, 2008, send by U.S. mail, first class with postage thereon fully prepaid, by depositing in a United States Post Office Box a true and correct copy of the following instruments entitled NOTICE OF FILING, COMPLAINANT'S MOTION FOR LEAVE TO FILE A REPLY BRIEF and COMPLAINANT'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES


To: James Richard Myers
LeFevre Oldfield Myers Apke & Payne Law Group, Ltd.
303 S. Seventh St., P.O. Box 399
Vandalia, IL 62471

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

To: John T. Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

A copy of the Notice of Filing was also sent by First Class Mail with postage thereon fully prepaid to:

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
Springfield, IL 62794



Andrew J. Nicholas
Assistant Attorney General

This filing is submitted on recycled paper.

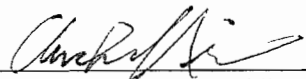
Affirmative Defenses (See Respondent's Response attached as Exhibit B).

5. As per Section 101.500(e) of the Board's Rules and Regulations, 35 Ill. Adm. Code 101.500(e) (2005), the Complainant requests leave to file its attached Reply in Support of its Motion to Strike Respondent's Affirmative Defenses.

WHEREFORE, the Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board enter an order granting the Complainant leave to file its Reply in Support of its Motion to Strike Respondent's Affirmative Defenses and granting any other relief it deems appropriate.

Respectfully submitted,
PEOPLE OF THE STATE OF ILLINOIS
ex rel. LISA MADIGAN, Attorney General
of the State of Illinois

MATTHEW J. DUNN
Environmental Enforcement/Asbestos
Litigation Division

BY: 
ANDREW J. NICHOLAS
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/557-9457

Dated: December 22, 2008

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ILLINOIS POLLUTION CONTROL BOARD
December 2, 2008

STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
)
 v.) PCB 07-70
) (Enforcement - Water)
J.B. TIMMERMANN FARMS, LTD., an)
Illinois incorporated cooperative,)
)
 Respondent.)

HEARING OFFICER ORDER

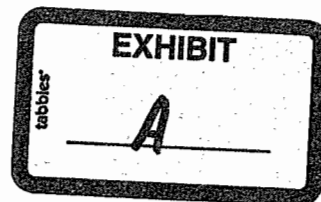
On December 1, 2008, the parties participated in a telephone status conference with the hearing officer. On October 29, 2008, complainant moved to strike respondent's affirmative defenses. The parties agree that respondent's response to this motion is due by December 15, 2008, and complainant's reply is due by December 29, 2008.

The parties are directed to participate in a telephone status conference with the hearing officer at 10:00 a.m. on February 2, 2009. The status conference shall be initiated by the complainant.

IT IS SO ORDERED.

Carol Webb

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, Illinois 62794-9274
217/524-8509
webbc@ipcb.state.il.us



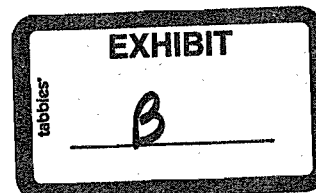
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF)
ILLINOIS,)
)
Complainant,)
)
vs.) PCB No. 07-70
) (Enforcement-Water)
J. B. TIMMERMANN FARMS, LTD.)
an Illinois Corporation,)
)
Respondent.)

RESPONSE TO MOTION TO STRIKE AFFIRMATIVE DEFENSES

COMES NOW the Respondent, J. B. Timmermann Farms, Ltd., by and through its attorney, James Richard Myers of LeFevre Oldfield Myers Apke & Payne Law Group, Ltd., and for its Response to the Motion to Strike Respondent's Affirmative Defenses states:

1. The Motion alleges that the Affirmative Defenses should be stricken as being both factually and legally deficient.
2. The allegations in the Affirmative Defenses are not factually deficient. The detail lacking in the allegations are issues for discovery, not pleading. The pleadings serve to advise the parties of the factual basis for the defenses, which is all that is required by law.
3. The affirmative defenses are legally relevant. The Complaint filed in this matter seeks not only a finding of a violation of the Illinois Environmental Protection Act, but also the assessment of a civil penalty. In determining the appropriate civil penalty to be imposed, the trial court is authorized, but not limited, by section 42(h) of the Act to



consider the following factors:

- (1) the duration and gravity of the violation;
- (2) the presence or absence of due diligence on the part of the violator in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;
- (3) any economic benefits accrued by the violator because of delay in compliance with requirements;
- (4) the amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with this Act by the violator and other persons similarly subject to the Act; and
- (5) the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator.

415 ILCS 5/42(h) (West 1994). In addition, the court can consider any other factor it chooses as this list is not exclusive. *See People ex rel. Ryan v. McHenry Shores Water Co.*, 295 Ill.App.3d 628, 693 N.E.2d 393 (2d Dist. 1998).

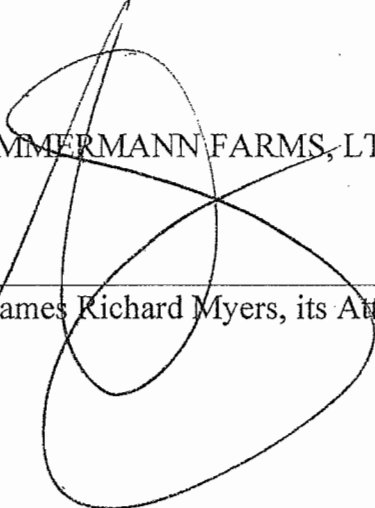
4. The affirmative defenses plead are relevant and material to the issue of the possible imposition of a penalty in this case.

WHEREFORE, the Respondent, J. B. Timmermann Farms, Ltd., respectfully requests that the Board enter an Order denying the Motion to Strike and requiring that a reply be filed within a short date certain.

Dated: December 6, 2008

J. B. TIMMERMANN FARMS, LTD.

By: _____
James Richard Myers, its Attorney



James Richard Myers
Reg. No. 06225705
Attorney for J. B. Timmermann Farms, Ltd.
LeFevre Oldfield Myers Apke & Payne Law Group, Ltd.
303 S. Seventh St., P.O. Box 399
Vandalia, IL 62471
Telephone: (618) 283-3034
Fax: (618) 283-3037
File #5753/9601

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE)
OF ILLINOIS,)
)
Complainant,)
)
v.)
)
J. B. TIMMERMANN FARMS, LTD.)
an Illinois corporation,)
)
Respondent.)

PCB No. 07-70
(Enforcement - Water)

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Pollution Control Board

COMPLAINANT'S REPLY IN SUPPORT OF ITS
MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES

The PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois, hereby replies in support of its Motion to Strike Respondent's Affirmative Defenses. In support of this Reply, the Complainant states as follows:

I. INTRODUCTION

On October 15, 2008, the Respondent raised the following Affirmative Defenses in its Answer to Complainant's Complaint:

- 1) **Act of God** - The lagoon overflow referenced in the Complaint occurred subsequent to a unusually heavy rainfall. Rainfall is an act of God, not within the control of the Respondent.
- 2) **Third-Party Intervention** - The lagoon overflow referenced in the Complaint occurred subsequent to a unusually heavy rainfall. Several other landowners in the area of Respondent have waste and water retention systems which failed at the same time as Respondent's.
- 3) **Mitigation** - The lagoon overflow referenced in the Complaint occurred subsequent to a unusually heavy rainfall. Respondent has acted with all due attentiveness and speed to rectify the situation and to prevent further overflows of its lagoon at its significant cost and expense.

The Respondent's Affirmative Defenses are both factually and legally insufficient and, therefore, should be stricken.

II. ARGUMENT

A. Respondent's Affirmative Defenses are Factually Insufficient

The Respondent does not plead sufficient facts to support its Affirmative Defenses. Facts establishing an affirmative defense must be pled specifically, in the same manner as facts in a complaint. *Int'l Ins. Co. v. Sargent & Lundy*, 242 Ill. App. 3d 614, 609 N.E.2d 842, 853 (1st Dist. 1993).

In *Int'l Ins. Co.*, an insurer sued its insured for rescission of a policy and restitution for money paid. *Int'l Ins. Co.*, 609 N.E.2d at 844-845. The defendant included ten affirmative defenses in its answer. While the appellate court later allowed nine of the ten defenses to stand, it held that facts establishing an affirmative defense must be pleaded with the same degree of specificity required by a plaintiff to establish a cause of action. *Id.* at 853. The court did, however, dismiss the defendant's affirmative defense of "unclean hands." It reasoned that the defendant merely alleged plaintiff's conduct was unconscionable and tainted with bad faith. *Id.* at 856. It found this affirmative defense to be totally conclusory in nature and did not include any specific facts to support its conclusion. *Id.*

In this case, the Respondent admits that its Affirmative Defenses are lacking in detail. (See Resp't[s] Resp. to Mot. to Strike, ¶ 2, attached as Exhibit A). It argues, however, that these are issues for discovery. The law in Illinois is clear; facts included in pleadings must be specific.

As in the affirmative defense of unclean hands in *Int'l Ins. Co.*, the Respondent's Affirmative Defenses do not include sufficient facts. Furthermore, the Respondent does not need

discovery to provide the necessary details. For example, rather than concluding there was an Act of God, e.g., heavy rainfall, Affirmative Defense #1 could easily be supported with information such as; when it rained, how long it rained or how much rainfall was received. Rather than concluding that the neighbors also experienced system overflows, Affirmative Defense #2 could easily be supported with more specific facts to show how many neighbors were affected and where they are located in relation to the Respondent's property. Rather than concluding that the Respondent has made repairs to its property, Affirmative Defense #3 could easily be supported with information that shows what work was done, or where and when it was done. This is information that is available only to the Respondent. Therefore, Respondent's Affirmative Defenses are totally conclusory in nature and devoid of specific facts to support their conclusions.

B. Respondent's Affirmative Defenses are Legally Insufficient

Respondent's Affirmative Defenses are legally insufficient. A proper affirmative defense admits the legal sufficiency of a cause of action but then asserts new matter which is capable of defeating a plaintiff's right to recover. *Vroegh v. J & M Forklift*, 165 Ill.2d 523, 651 N.E.2d 121, 125-126 (1995). See also *Pryweller v. Cohen*, 282 Ill. App. 3d 899, 668 N.E.2d 1144 (1st Dist. 1996) (affirmative defenses must offer facts which are capable of negating the alleged cause of action).

In this case, the Respondent argues that its Affirmative Defenses are legally relevant. (See Resp't[s] Resp. to Mot. to Strike, ¶ 2, attached as Exhibit A). Relevancy is an evidentiary standard used at trial. *In re Stephen K*, 373 Ill. App. 3d 7, 867 N.E.2d 81, 101 (1st Dist. 2007). Respondent's Affirmative Defenses will be evaluated on whether they are capable of defeating

Complainant's claims, not on whether they are admissible at trial. Respondent's Affirmative Defenses do not meet this standard for the following reasons:

First, in Illinois, the "Act of God" defense is not a defense against water pollution claims brought under Section 12 of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/12 (2006). See *Perkinson v. Illinois Pollution Control Board*, 187 Ill. App. 3d 689, 543 N.E.2d 901, 904 (3rd Dist. 1989), citing *Freeman Coal Mining Corp. v. Illinois Pollution Control Board* (5th Dist. 1974). The *Freeman* Court ruled it was no defense that the discharges were accidental or unintentional or that they were the result of an "Act of God" beyond the Defendant's control. The fact that there was an unusually heavy rainfall does not provide new facts capable of defeating this cause of action.

Second, Section 12(a) of the Act provides that no person shall cause or allow water pollution "either alone or in combination with matter from other sources." 415 ILCS 5/12(a) (2006). It does not matter whether the Respondent's neighbors contributed to the discharge. The legal issue is whether the Respondent caused or allowed the discharge. Asserting there was discharge from the Respondent's neighbors does not offer new information that is capable of defeating the Complaint.

Finally, Section 33(a) of the Act, states: "It shall not be a defense to findings of violations of the provisions of the Act or Board regulations....that the person has come into compliance subsequent to the violation." 415 ILCS 5/33(a) (2006). The fact that the Respondent claims it has worked to rectify the situation is not a defense to liability. In its Response, Respondent correctly notes that a number of factors may be considered by the Court when making a penalty determination, however, Complainant's Motion only attacks the sufficiency of Respondent's

Affirmative Defenses, it does not raise the issue of penalty.

Therefore, Respondent's Affirmative Defenses are legally insufficient.

III. CONCLUSION

The Respondent's Affirmative Defenses are both factually and legally insufficient.

Therefore, they should be stricken pursuant to Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615 (2007).

WHEREFORE, the Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board enter an order striking the Respondent's Affirmative Defenses and granting any other relief it deems appropriate.

Respectfully submitted,
PEOPLE OF THE STATE OF ILLINOIS
ex rel. LISA MADIGAN Attorney General
of the State of Illinois

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

BY: _____
ANDREW J. NICHOLAS
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/557-9457
Dated:

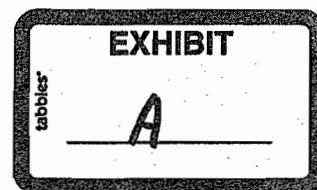
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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consider the following factors:

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- (2) the presence or absence of due diligence on the part of the violator in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;
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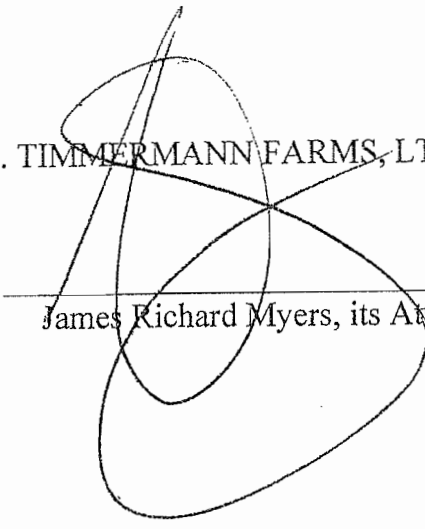
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Dated: December 6, 2008

J. B. TIMMERMANN FARMS, LTD.

By: _____
James Richard Myers, its Attorney



James Richard Myers
Reg. No. 06225705
Attorney for J. B. Timmermann Farms, Ltd.
LeFevre Oldfield Myers Apke & Payne Law Group, Ltd.
303 S. Seventh St., P.O. Box 399
Vandalia, IL 62471
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