

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
v.)	
)	PCB No. PCB 10-108
WILLIAM CHARLES REAL ESTATE)	
INVESTMENT, LLC, an Illinois limited)	
liability company,)	
)	
Respondent.)	

NOTICE OF FILING

TO: Jennifer A. Van Wie
Nancy Tikalsky
Asst. Attorneys General
Environmental Bureau
69 West Washington Street, Suite 1800
Chicago, IL 60602

Charles Gunnarson
Division of Legal Counsel, IEPA
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

Please take notice that on October 15, 2010, the undersigned electronically filed the Respondent's:

AMENDED ANSWER AND AFFIRMATIVE DEFENSES

with the Illinois Pollution Control Board, 100 West Randolph Street, Chicago, Illinois 60601.

Dated: October 15, 2010

Respectfully submitted,

On behalf of the Respondent, William Charles
Real Estate Investment, LLC

/s/ Nicola A. Nelson
One of Its Attorneys

Charles F. Helsten
Nicola A. Nelson
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AMENDED ANSWER AND AFFIRMATIVE DEFENSES

NOW COMES Respondent WILLIAM CHARLES REAL ESTATE INVESTMENT, LLC, and for its Answer and Affirmative Defenses to the Complaint filed by the State of Illinois, states as follows:

ANSWER

COUNT I - WATER POLLUTION

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 (2008), and is an action for civil penalties.

ANSWER: Respondent admits that this Complaint was filed by the Attorney General and alleges violations of Section 31 of the Illinois Environmental Protection Act. Respondent lacks sufficient knowledge or information to form a belief as to the truth or falsity of the remaining allegations of Paragraph 1.

2. The Illinois EPA is an administrative agency established in the executive branch of the State government by Section 4 of the Act, 415 ILCS 5/4 (2008), and is charged, *inter alia*, with

the duty of enforcing the Act. This Count is brought pursuant to Section 31 of the Act, 415 ILCS 5/31 (2008).

ANSWER: Respondent admits the allegations of Paragraph 2.

3. At all times relevant to this Complaint, Respondent, WILLIAM CHARLES REAL ESTATE INVESTMENT, L.L.C. ("William Charles" or "Respondent"), was and is an Illinois corporation in active standing with the Illinois Secretary of State.

ANSWER: Respondent admits the allegations of Paragraph 3.

4. Lookout Preserve is a subdivision development, approximately 65 acres in size, located at the northwest corner of Rotary Road and Ryberg Road in New Milford, Winnebago County, Illinois ("Site"). The Site is located approximately two miles south of Rockford, Illinois and consists of land on which residential and commercial buildings are to be built.

ANSWER: Respondent admits the description of the size and location of the subject property. Respondent denies that "residential and commercial buildings are to be built" on the property. Answering further, Respondent avers that the parcel has been returned to agricultural use, with no present plans to develop it in the future.

5. Pursuant to Section 402(b) of the Federal Clean Water Act ("CWA"), 33 U.S.C. §1342(b), the Illinois EPA administers and enforces the CWA's National Pollutant Discharge Elimination System ("NPDES") permit program within the State of Illinois.

ANSWER: Respondent admits the allegations of Paragraph 5.

6. On December 5, 2006, the Illinois EPA received William Charles' Notice of Intent application for coverage under the General NPDES Permit for Storm Water Discharges From Construction Site Activities ("NPDES Permit") for the Site.

ANSWER: Respondent admits the allegations of Paragraph 6.

7. On January 5, 2007, the Illinois EPA issued William Charles a notice of coverage under the construction site activity storm water general permit, NPDES Permit No. ILR10G970. The

Site discharges into drainage ditches along the perimeter of the Site, which ultimately discharge into the Kishwaukee River.

ANSWER: Respondent admits that IEPA issued the notice of coverage on January 5, 2007. Respondent lacks sufficient knowledge or information to form a belief as to the truth or falsity of the remaining allegation of Paragraph 7, and demands strict proof thereof.

8. On August 14, 2007, an Illinois EPA inspector received a citizen complaint of stormwater runoff from the Site entering the basement of a nearby resident's home ("resident").

ANSWER: Respondent lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of Paragraph 8, and demands strict proof thereof.

9. On August 16, 2007, the Illinois EPA inspector contacted the resident. The resident stated that the runoff stormwater had flooded the resident's basement and that the stormwater had carried clay and gravel to a property adjacent to resident's.

ANSWER: Respondent lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of Paragraph 9, and demands strict proof thereof.

10. On August 17, 2007, the Illinois EPA's Rockford Regional Office received another report of flooding in the area near the Site.

ANSWER: Respondent lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of Paragraph 10, and demands strict proof thereof.

11. On August 21, 2007, an Illinois EPA inspector inspected the area affected by runoff from the Site. A project manager from William Charles and two representatives from Rockford Blacktop Construction Company, a subsidiary of William Charles, were present at the Site for this inspection.

ANSWER: Respondent admits that an Illinois EPA inspector inspected the area on August 21, 2007. Respondent admits that Rockford Blacktop is a subsidiary of William Charles Ltd. Respondent denies that Rockford Blacktop is a subsidiary of Respondent William Charles Real Estate Investment, LLC. Respondent admits that representatives from William Charles and Rockford Blacktop were present at the Site on August 21, 2007 when an Illinois EPA inspector inspected the Site.

12. During the August 21, 2007 inspection, the Illinois EPA inspector observed that grass at the Site had been matted down by the surface flow of the stormwater. Topsoil had been removed from most of the Site and was stockpiled in two mounds in the northwest part of the Site. The entire Site appeared to be sand, gravel and some clay.

ANSWER: Respondent lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of Paragraph 12, consisting of allegations of what the inspector allegedly said he saw, and demands strict proof thereof.

13. On August 23, 2007, the Illinois EPA conducted another inspection of the Site after a heavy rain event. The inspector observed stormwater flowing over a silt fence at the northeast corner of the Site.

ANSWER: Respondent admits that an Illinois EPA inspector inspected the Site on August 23, 2007, after heavy rains. Respondent lacks sufficient knowledge or information to form a belief as to the truth or falsity of the remaining allegations of Paragraph 13, consisting of allegations of what the inspector allegedly said he saw, and demands strict proof thereof.

14. On November 3, 2007, the Illinois EPA again visited the Site. The inspector observed that a detention basin had been constructed and seeded, and the vegetative cover was started but thin. The basin's discharge riser and overflow section of the berm had been reinforced with rip rap. Silt fencing was being maintained in good condition.

ANSWER: Respondent admits that an Illinois EPA inspector inspected the Site on November 3, 2007. Respondent lacks sufficient knowledge or information to form a belief as to the truth or falsity of the remaining allegations, consisting of allegations of what the inspector allegedly said he saw, and demands strict proof thereof.

15. On May 22, 2008, the Illinois EPA's Watershed Management Section received a report from a trustee of the Village of New Milford ("trustee") regarding excessive stormwater runoff from the Site. The report included photographs showing sediment-laden stormwater leaving the Site following heavy rains in April 2008. The photos also showed a full detention basin with no available flow through the north outlet pipe. The stormwater was instead flowing

out the back side of the detention pond and east berm. The high flows resulted in silt fencing being knocked down at the Site.

ANSWER: Respondent lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of Paragraph 15, and demands strict proof thereof.

16. Additionally, the trustee reported that the topsoil was removed from the entire Site and stockpiled in three large mounds near a private residence on the Site's western side and the Site was then covered with approximately 310,000 cubic yards of sand, gravel and clay from a nearby landfill expansion project in which Respondent has an interest.

ANSWER: Respondent lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of Paragraph 16, and demands strict proof thereof.

17. On June 11, 2008, the Illinois EPA inspector again inspected the Site and observed the following:

- a) sections of silt fence near the southeast corner of the detention basin and in other areas around the Site were washed out;
- b) evidence that sediment was leaving the Site;
- c) embankments along the channel leading to the detention basin were unstabilized and eroded;
- d) the Site had been seeded but there were large areas with sparse or no vegetation, particularly up-slope from the detention basin; and
- e) the topsoil stockpiles had sparse vegetation, were eroded, and lacked containment such as silt fencing.

ANSWER: Respondent admits that an Illinois EPA inspector inspected the site on July 11, 2008. Respondent lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of Paragraph 17, consisting of allegations of what the inspector allegedly said he saw, and demands strict proof thereof.

18. On December 8, 2008, the Illinois EPA sent William Charles, care of the Site's Project Manager, Scott Perian, a Violation Notice ("VN") citing Respondent's failure to comply with NPDES Permit No. ILR10G970, failure to submit Incidence of Non-Compliance, causing or threatening to cause water pollution by failing to provide adequate erosion control measures, and depositing contaminants upon the land in such a place and manner so as to create a water pollution hazard.

ANSWER: Respondent admits that Illinois EPA sent a Violation Notice to William Charles alleging violations as stated in Paragraph 18. Answering further, Respondent denies the validity of the allegations of violations.

19. By letter dated January 16, 2009, counsel for William Charles responded to the VN. The response stated that the VN letter lacked specificity, denied William Charles' noncompliance with its stormwater permit on June 11, 2008 or at any other time, and proposed its commitment to comply with all applicable statutes, rules, regulations, and permits as its Compliance Commitment Agreement ("CCA") .

ANSWER: Respondent admits that counsel for Respondent sent a letter dated January 16, 2009 to Illinois EPA, which proposed a CCA. Answering further, Respondent avers that the letter speaks for itself.

20. On February 23,2009, the Illinois EPA sent William Charles a letter rejecting its proposed CCA as described in William Charles' January 16, 2009 response to the VN.

ANSWER: Respondent admits the allegations of Paragraph 20.

21. On April 16, 2009, the Illinois EPA sent William Charles a Notice of Intent to Pursue Legal Action ("NIPLA") letter for the violations contained in the VN.

ANSWER: Respondent admits the allegations of Paragraph 21.

22. On May 18, 2009, an Illinois EPA inspector again visited the Site. He noted that vegetative cover remained sparse and stabilization of the topsoil stockpile was still lacking. Areas of failed silt fence remained at the Site.

ANSWER: Respondent admits that an Illinois EPA inspector visited the Site on May 18, 2009. Respondent lacks sufficient knowledge or information to form a belief as to the truth or falsity of the remaining allegations of Paragraph 22, consisting of allegations of what the inspector allegedly said he saw, and demands strict proof thereof.

23. A meeting was held between representatives of William Charles and the Illinois EPA via telephone call on May 20, 2009, pursuant to the NIPLA letter. William Charles' representatives explained that the Site experienced a "more than 100-year" rain event in August 2007. William Charles' representatives also claimed the Site was seeded and fertilized in 2008 and would be again in 2009.

ANSWER: Respondent admits the allegations of Paragraph 23.

24. On October 21, 2009, the Illinois EPA conducted an inspection of the Site. Respondent was in the process of completing the items needed to come into full compliance with its NPDES permit. The topsoil stockpiles have been removed. The topsoil appears to have been spread over the Site and seeded. Much of the Site appeared stabilized.

ANSWER: Respondent admits that an inspector from Illinois EPA inspected the Site on October 21, 2009. Respondent lacks sufficient knowledge or information to form a belief as to the truth or falsity of the remaining allegations of this paragraph, consisting of allegations of what the inspector allegedly said he saw, and demands strict proof thereof.

25. On November 9, 2009, the Illinois EPA conducted an inspection of the Site. Stabilization work still needed to be completed at the Site.

ANSWER: Respondent admits that an Illinois EPA inspector inspected the Site on November 9, 2009. Respondent denies the remaining allegation of this paragraph. Answering further, Respondent avers that no further stabilization needed to be completed on November 9, 2009.

26. Section 12(a) of the Act, 415 ILCS 5/12 (2008), provides as follows:

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.

ANSWER: Respondent admits that Paragraph 26 accurately quotes a portion of 415 ILCS 5/12 but lacks sufficient knowledge and information as to its relevance in the present matter, and demands strict proof thereof.

27. Section 3.315 of the Act, 415 ILCS 5/3.315 (2008), 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 admits that Paragraph 27 accurately quotes 415 ILCS 5/3.315.

28. Respondent is a "person" as that term is defined in Section 3.315 of the Act, 415 ILCS 5/3.315 (2008).

ANSWER: Respondent admits the allegation of Paragraph 28.

29. Section 3.165 of the Act, 415 ILCS 5/3.165 (2008), provides the following definition:

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

ANSWER: Respondent admits that Paragraph 29 accurately quotes Section 3.165 of the Act, but lacks sufficient knowledge and information as to its relevance in the present matter, and demands strict proof thereof.

30. Eroded soil and sediment are each a "contaminant" as that term is defined by Section 3.165 of the Act, 415 ILCS 5/3.165 (2008).

ANSWER: Paragraph 30 states a legal conclusion that requires no response.

31. Section 3.545 of the Act, 415 ILCS 5/3.545 (2008), 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 admits that Paragraph 31 correctly quotes Section 3.545 of the Act but lacks sufficient knowledge and information as to its relevance in the present matter, and demands strict proof thereof.

32. Section 3.550 of the Act, 415 ILCS 5/3.550 (2008), 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 admits that Paragraph 32 correctly quotes Section 3.550 of the Act.

33. The drainage ditches along the perimeter of the Site and the Kishwaukee River are each "waters" as that term is defined in Section 3.550 of the Act, 415 ILCS 5/3.550 (2008).

ANSWER: Paragraph 33 states a legal conclusion that requires no response.

34. The Respondent caused, threatened and allowed the discharge of contaminants, such as eroded soil and sediment, into waters of the State such that they will or are likely to create a nuisance or render such waters harmful or detrimental or injurious.

ANSWER: Respondent denies the allegations of Paragraph 34.

35. By failing to stabilize disturbed soils and provide adequate erosion control structures to prevent such contaminants from discharging to the environment, Respondent caused, threatened and allowed "water pollution" as that term is defined by Section 3.545 of the Act, 415 ILCS 5/3.545 (2008).

ANSWER: Respondent denies the allegations of Paragraph 35.

36. The Respondent, by causing, threatening and allowing the discharge of eroded soil and sediment runoff off-Site so as to cause water pollution, has violated Section 12(a) of the Act, 415 ILCS 5/12(a) (2008).

ANSWER: Respondent denies the allegations of Paragraph 36.

COUNT II - WATER POLLUTION HAZARD

1-25. Complainant realleges and incorporates by reference Paragraphs 1 through 25 of Count I as Paragraphs 1 through 25 of this Count II.

ANSWER: Respondent realleges and incorporates by reference its answers to Paragraphs 1 through 25 of Count I as its answers to Paragraphs 1 through 25 of this Count II.

26. Section 12(d) of the Act, 415 ILCS 5/12(d) (2008), provides as follows:

No person shall:

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

ANSWER: Respondent admits that Paragraph 26 accurately quotes Section 12(d) of the Act but lacks sufficient knowledge and information as to its relevance in the present matter, and demands strict proof thereof.

27-34. Plaintiff realleges and incorporates by reference herein paragraphs 27 through 34 of Count I as paragraphs 27 through 34 of this Count II.

ANSWER: Respondent realleges and incorporates by reference herein paragraphs 27 through 34 of Count I as its answers to paragraphs 27 through 34 of this Count II.

35. The Respondent, by failing to provide adequate sediment and erosion controls for stockpiled soil at the graded portions of the Site and by failing to adequately stabilize disturbed areas, deposited contaminants on the land so as to cause a water pollution hazard.

ANSWER: Respondent denies the allegations of Paragraph 35.

36. By depositing contaminants on land so as to cause water pollution hazard, Respondent thereby violated Section 12(d) of the Act, 415 ILCS 5/12(d) (2008).

ANSWER: Respondent denies the allegations of Paragraph 36.

**COUNT III - NATIONAL POLLUTANT DISCHARGE
ELIMINATION SYSTEM ("NPDES") PERMIT VIOLATIONS**

1-25. Complainant realleges and incorporates by reference Paragraphs 1 through 25 of Count I as Paragraphs 1 through 25 of this Count III.

ANSWER: Respondent realleges and incorporates by reference its answers to Paragraphs 1 through 25 of Count I as its answers to Paragraphs 1 through 25 of this Count III.

26. Section 12(f) of the Act, 415 ILCS 5112(f) (2008), 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, 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 admits that Paragraph 26 accurately quotes a portion of Section 12(f) of the Act but lacks sufficient knowledge and information as to its relevance in the present matter, and demands strict proof thereof.

27-33. Plaintiff realleges and incorporates by reference herein paragraphs 27 through 33 of Count I as paragraphs 27 through 33 of this Count III.

ANSWER: Respondent realleges and incorporates by reference herein its answers to paragraphs 27 through 33 of Count I as its answers to paragraphs 27 through 33 of this Count III.

34. Part IV of the Site's NPDES Permit provides that a Stormwater Pollution Prevention Plan ("SWPPP") must be developed for the Site and implemented using best management practices. The Respondent must implement the provisions of the SWPPP required under Part IV as a condition of the NPDES Permit.

ANSWER: Paragraph 34 states a legal conclusion that requires no response. Answering further, Respondent states that the NPDES Permit speaks for itself. Answering further, Respondent avers that it submitted a Notice of Termination after construction activities were terminated and vegetation was established, whereupon the NPDES permit was no longer applicable.

35. Respondent failed to adequately implement the SWPPP for the Site by causing, threatening or allowing the discharge of storm water containing eroded soil and sediment, contaminants, from the Site into drainage ditches along the perimeter of the Site and the Kishwaukee River.

ANSWER: Respondent denies the allegations of Paragraph 35.

36. By failing to adequately implement the SWPPP for the Site and causing, threatening or allowing the discharge of contaminants into the waters of the State, Respondent violated NPDES Permit No. ILR10G970.

ANSWER: Respondent denies the allegations of Paragraph 36.

37. By violating NPDES Permit No. ILR10G970, Respondent thereby violated Section 12(f) of the Act, 415 ILCS 5/12(f) (2008).

ANSWER: Respondent denies the allegations of Paragraph 37.

AFFIRMATIVE DEFENSE ONE – ACT OF GOD

1. In or about August 2007, Winnebago County, Illinois experienced a 24-hour, 250- or 500-year rain and flood event.

2. The subject property is in Winnebago County, Illinois, and was subject to and experienced the 24-hour, 250- or 500-year rain and flood event.

3. The 24-hour, 250- or 500-year rain and flood event was an Act of God, over which Defendant had no control or right of control.

4. To prevail in an action alleging violations of the Environmental Protection Act, the State must show that the Respondent had the “capability of control over the pollution or that the alleged polluter was in control of the premises where the pollution occurred.” *People v. A.J. Davinroy Contractors*, 249 Ill.App.3d 788, 793, 618 N.E.2d 1282 (5th Dist. 1993) (citing *Phillips Petroleum Co. v. IEPA*, 72 Ill.App.3d 217, 390 N.E.2d 620 (1979)).

5. The alleged injuries, damages and other matters giving rise to or the basis for any alleged relief requested by the Plaintiff were caused by a 24-hour, 250- or 500-year flood event over which the Respondent had no control or right of control (*i.e.*, an act of God).

WHEREFORE, Defendants respectfully request that this Court enter judgment in their favor, and for such other relief as this Court deems just and necessary.

Dated: October 15, 2010

Respectfully submitted,

On behalf of WILLIAM CHARLES REAL
ESTATE INVESTMENT, LLC

/s/ Nicola A. Nelson

One of Its Attorneys

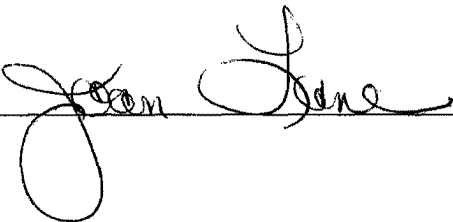
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AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on October 15, 2010, she caused to be served a copy of the foregoing upon:

Jennifer A. Van Wie Nancy Tikalsky Asst. Attorney General Environmental Bureau 69 West Washington Street, Suite 1800 Chicago, IL 60602	Charles Gunnarson Division of Legal Counsel Illinois Environmental Protection Agency 1021 North Grand Avenue East P.O. Box 19276 Springfield, Illinois 62794-9276
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by depositing a copy thereof, enclosed in an envelope in the United States Mail at Rockford, Illinois, proper postage prepaid, before the hour of 5:00 p.m., addressed as above.



A handwritten signature in cursive script, appearing to read "Jean Gunnarson", is written over a horizontal line.

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