

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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JAN '26 2011

STATE OF ILLINOIS  
Pollution Control Board

ROLF SCHILLING, PAM SCHILLING and )  
SUZANNE VENTURA, )

Complainants, )

v. )

PCB. No. 10-100

GARY D. HILL, VILLA LAND TRUST, )  
an Illinois Land Trust, and PRAIRIE )

LIVING WEST, LLC )

Respondents. )

MOTION TO STRIKE AFFIRMATIVE DEFENSES

NOW COME Complainants, ROLF SCHILLING, PAM SCHILLING and SUZANNE VENTURA, through their undersigned attorneys, Sorling, Northrup, Hanna, Cullen & Cochran, Ltd., Stephen F. Hedinger of Counsel, and for their Motion to Strike the Affirmative Defenses submitted by and on behalf of all Respondents, GARY D. HILL, VILLA LAND TRUST, and PRAIRIE LIVING WEST, LLC, state as follows:

1. In the Answer and Affirmative Defenses to Citizen's Complaint filed by all three Respondents on January 7, 2011, Respondents purport to set forth four Affirmative Defenses, given the titles of "Affirmative Defense I," and so on. By order entered January 10, 2011, the hearing officer established Complainant's deadline to respond to the affirmative defenses as January 24, 2011.

2. Section 103.204(d) of this Board's procedural rules, 35 Ill. Adm. Code Sec. 103.204(d), provides in pertinent part that "[a]ny facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing."

3. This Board recently noted that, “[i]n a valid affirmative defense, the respondent alleges ‘new facts or arguments that, if true, will defeat . . . [the complainant’s] claim even if all allegations in the complaint are true.’” Elmhurst Memorial Health Care v. Chevron U.S.A., Inc., PCB 09-66, 210 Ill. ENV. LEXIS 99, at \*58 (March 18, 2010) (citation omitted).

4. The Elmhurst Memorial Health Care ruling also noted that “[t]he pleader must allege an affirmative defense with the same degree of specificity as needed to establish a cause of action. . . . Legal conclusions unsupported by allegations of specific facts, however, are insufficient.” Id. (citations omitted).

5. In this case, all four of the “Affirmative Defenses” asserted by Respondents should be stricken.

6. “Affirmative Defense I” asserts that Complainants have failed to name an indispensable party. Aside from wrongly designating the parties in this case (rather than Complainants, the affirmative defense refers to Plaintiffs, and rather than Respondents, to Defendants), the purported Affirmative Defense I fails to set forth any facts identifying even who this supposed indispensable party is, let alone why the party is indispensable, and why that party’s absence somehow makes it not possible for this Board to determine the issues in this enforcement action.

7. Similarly, “Affirmative Defense II” asserts that “the injuries and damages allegedly suffered in this action . . . may have been caused in whole or in part by natural occurrences over which Respondents have no control and for which Respondents are not responsible.” This assertion is speculative—it does not claim that there were such natural causes, but only that there may have been. Moreover, again “Affirmative Defense II” fails to state any facts identifying any such natural occurrences, or in what manner Respondents could

have no control and are not responsible for such natural occurrences. Further, "Affirmative Defense II" is directed towards "the injuries and damages allegedly suffered in this action," but this action is one for a finding of violations of the Environmental Protection Act, and is not dependent upon the existence of any injuries or damages.

8. "Affirmative Defense III" asserts, similar to "Affirmative Defense II," that "the injuries and damages allegedly suffered in this action" were the result of other persons over whom Respondents exercised no control and as to whose actions Respondents are not legally responsible. The "Affirmative Defense" does not name any such parties (other than obliquely stating that Complainants are included), or any such acts or omissions; again, since this is a citizen's enforcement action under the Environmental Protection Act, there are not even "injuries and damages" for which redress is being directly sought.

9. Finally, "Affirmative Defense IV" is not an affirmative defense at all, but instead is merely a denial of violation. The "Affirmative Defense" asserts that the Respondents complied with their NPDES permit, and were never in violation; this is merely a denial of the allegations of the citizen's complaint, and states no "new facts or arguments that, if true, will defeat . . . [the complainant's] claim even if all allegations in the complaint are true."

10. Accordingly, none of the "Affirmative Defenses" asserted by the Respondents rise to the level required for pleading such matters before this Board, and so these should be stricken.

WHEREFORE Complainants, ROLF SCHILLING, PAM SCHILLING and SUZANNE VENTURA, request that this Board strike the "Affirmative Defenses to Citizen's Complaint" appended to the Answer and Affirmative Defenses to Citizen's Complaint filed by Respondents,

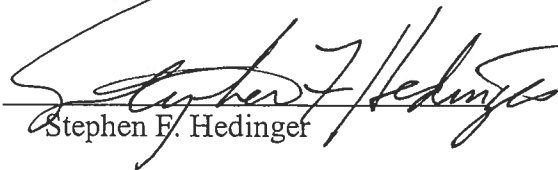
and enter all such other and further relief in favor of Complainants as this Board deems just and appropriate.

Date January 24, 2011

Respectfully submitted,

ROLF SCHILLING, PAM SCHILLING and  
SUZANNE VENTURA, Complainants

By:



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CERTIFICATE OF SERVICE

I, the undersigned, an attorney, certify that I have served a copy of the foregoing document upon the attorneys for Respondents and the hearing officer at the following addresses:

Jonathan R. Cantrell  
Molly Wilson Dearing  
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Illinois Pollution Control Board  
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by depositing same in the U.S. Mail, postage prepaid, on this 24<sup>th</sup> day of January, 2011.

Similarly, the original and nine copies were mailed to:

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

by depositing same in the U.S. Mail, first class, postage prepaid, on this 24<sup>th</sup> day of January, 2011.

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

  
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