ILLINOIS POLLUTION CONTROL BOARD
March 17, 2011

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 10-108
	)	(Enforcement - Water)
WILLIAM CHARLES REAL ESTATE INVESTMENT, L.L.C., an Illinois limited liability company,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by T.E. Johnson):

Today the Board rules upon the complainant's motion to strike, with prejudice, the respondent's "act of God" defense. The Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a three-count complaint against William Charles Real Estate Investment, L.L.C. (William Charles), alleging the violation of Sections 12(a), 12(d), and 12(f) of the Environmental Protection Act (Act) (415 ILCS 5/12(a), 12(d), 12(f) (2008)). The complaint concerns William Charles' proposed 65-acre subdivision development in New Milford, Winnebago County (Site). In an amended answer to the complaint, William Charles pleads, as an affirmative defense, that the alleged violations resulted from a "24-hour, 250- or 500-year rain and flood event." For the reasons below, the Board denies the People's motion to strike the affirmative defense pled.

In this order, the Board first sets forth the procedural history of the proceeding, after which the Board provides relevant statutory background. The Board then describes the People's complaint and William Charles' alleged affirmative defense. This is followed by a summary of the People's motion to strike, William Charles' response, and the People's reply. The Board then discusses its ruling on the motion.

PROCEDURAL HISTORY

On June 24, 2010, the People filed the complaint (Comp.). On July 1, 2010, the Board issued an order accepting the complaint for hearing. On August 23, 2010, William Charles filed its original answer, which alleged three affirmative defenses. On September 17, 2010, the People filed a motion to strike all three affirmative defenses. On October 15, 2010, William Charles filed a response to the motion to strike, requesting to withdraw the original answer and attaching an amended answer (Am. Ans.) in which William Charles alleges only one affirmative defense, different from the three alleged in the original answer.

In an order of November 18, 2010, the Board granted William Charles' request that the original answer be withdrawn and replaced with the amended answer. The Board therefore

denied as moot the People's motion to strike the affirmative defenses pled in the original answer. On November 12, 2010, the People filed a motion to strike the affirmative defense pled in the amended answer (Mot.). The Board reserved ruling on this motion in its November 18, 2010 order. On November 30, 2010, William Charles filed a response (Resp.) to the People's second motion to strike. With the hearing officer's leave, the People filed a reply on January 24, 2011 (Reply).

STATUTORY BACKGROUND

The People allege that William Charles violated Sections 12(a), 12(d), and 12(f) of the Act (415 ILCS 5/12(a), 12(d), 12(f) (2008)). Those provisions read in pertinent part as follows:

> No person shall:
>
> (a) Cause or threaten or allow the discharge of any contaminants[1] into the environment in any State so as to cause or tend to cause water pollution[2] in Illinois, either alone or in combination with matter from other sources . . . .
>
> * * *
>
> (d) Deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard.
>
> * * *
>
> (f) Cause, threaten or allow the discharge of any contaminant into the waters of the State . . . in violation of any term or condition imposed by [a National Pollutant Discharge Elimination System (NPDES)] permit . . . . 415 ILCS 5/12(a), 12(d), 12(f) (2008).

COMPLAINT

Count I of the People's complaint against William Charles alleges the violation of Section 12(a) of the Act; count II alleges the violation of Section 12(d) of the Act; and count III alleges the violation of Section 12(f) of the Act. Comp. at 7, 8, 10. According to the complaint, "[t]he Site discharges into drainage ditches along the perimeter of the Site, which ultimately discharge into the Kishwaukee River." *Id*. at 2. The People allege that the ditches and the

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[1] The Act defines "contaminant" as "any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source." 415 ILCS 5/3.165 (2008).

[2] The Act defines "water pollution" as "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." 415 ILCS 5/3.545 (2008). The Act defines "waters" as "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." 415 ILCS 5/3.550 (2008).

Kishwaukee River are "'waters'" as defined in the Act, while eroded soil and sediment are each a "'contaminant'" as defined in the Act. *Id*. at 6. Each of the three counts is further described below, preceded by a chronological description of allegations common to all counts.

2007

The Site, known as "Lookout Preserve," is a subdivision development, approximately 65 acres in size, located about two miles south of Rockford at the northwest corner of Rotary Road and Ryberg Road in New Milford, Winnebago County. Comp. at 2. The complaint alleges that on December 5, 2006, the Illinois Environmental Protection Agency (Agency) received William Charles' "Notice of Intent application for coverage under the General NPDES Permit for Storm Water Discharge From Construction Site Activities" for the Site. *Id*. On January 5, 2007, the Agency issued to William Charles a "notice of coverage under the construction site activity storm water general permit, NPDES Permit No. ILR10G970." *Id*.

The People allege that in August 2007, the Agency received reports of flooding in the area near the Site. Comp. at 2. On August 21, 2007, the complaint continues, an Agency inspector visited the Site and inspected the area allegedly affected by runoff from the Site. *Id*. at 2-3. The inspector allegedly observed that "grass at the Site had been matted down by the surface flow of the stormwater" and that "[t]opsoil had been removed from most of the Site and was stockpiled in two mounds in the northwest part of the Site." *Id*. at 3. The complaint states that when the Agency inspected the Site again on August 23, 2007, the inspector observed "stormwater flowing over a silt fence at the northeast corner of the Site." *Id*.

During a November 3, 2007 inspection of the Site, the complaint alleges that the inspector observed the following:

> 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. Comp. at 3.

2008

According to the complaint, the Agency's Watershed Management Section received a report from a trustee of the Village of New Milford on May 22, 2008, regarding "excessive stormwater runoff from the Site." Comp. at 3. The People allege that the trustee's 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. *Id*.

The complaint asserts that the trustee also reported the following:

> the topsoil had been 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 . . . . *Id*. at 3-4.

According to the People, the Agency inspected the Site on June 11, 2008, 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. Comp. at 4.

The Agency sent a Violation Notice to William Charles on December 8, 2008. Comp. at 4.

2009

After rejecting William Charles' proposed Compliance Commitment Agreement, the Agency, on April 16, 2009, sent to William Charles a Notice of Intent to Pursue Legal Action (NIPLA). Comp. at 4-5. The complaint alleges that the Agency inspected the Site on May 18, 2009, and noted that "vegetative cover remained sparse and stabilization of the topsoil stockpile was still lacking" and that "[a]reas of failed silt fence remained at the Site." *Id*. at 5. An October 21, 2009 Agency inspection of the Site allegedly revealed that William Charles was "in the process of completing the items needed to come into full compliance with its NPDES permit," that topsoil stockpiles had been removed, that the topsoil appeared to have been spread over the Site and seeded, and that much of the Site appeared to be stabilized. *Id*. During a November 9, 2009 Agency inspection of the Site, the inspector allegedly observed that "[s]tabilization work still needed to be completed at the Site." *Id*.

Count I

The People allege in count I of the complaint that William Charles "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." Comp. at 6-7. Count I further alleges that "[b]y failing to stabilize disturbed soils and provide adequate erosion control structures to prevent such contaminants from discharging to the environment," William Charles "caused, threatened and allowed 'water pollution'" as defined in the Act. *Id*. at 7. Count I alleges that William Charles has therefore violated Section 12(a) of the Act (415 ILCS 5/12(a) (2008)) by "causing, threatening and

allowing the discharge of eroded soil and sediment runoff off-Site so as to cause water pollution." *Id*.

Count II

Count II of the complaint re-alleges that William Charles "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." Comp. at 6-7. The People further allege in count II that "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," William Charles deposited contaminants on the land so as to cause a water pollution hazard, thereby violating Section 12(d) of the Act (415 ILCS 5/12(d) (2008)). *Id*. at 8.

Count III

The People allege in count III of the complaint that a condition of the NPDES permit requires William Charles to implement the provisions of a Stormwater Pollution Prevention Plan (SWPPP) "using best management practices." Comp. at 10. Count III further alleges that William Charles "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." *Id*. at 10. This failure, according to the People, is a violation of the NPDES permit and, in turn, a violation of Section 12(f) of the Act (415 ILCS 5/12(f) (2008)). *Id*.

AFFIRMATIVE DEFENSE

The affirmative defense set forth in William Charles amended answer states:

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 [William Charles] 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 ([2nd Dist.] 1979)).
5. The alleged injuries, damages and other matters giving rise to or the basis for any alleged relief requested by the [People] 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). Am. Ans. at 13.

MOTION TO STRIKE AFFIRMATIVE DEFENSE

The People's Motion

The People argue that William Charles' affirmative defense is both legally and factually deficient. According to the People, "Illinois courts have long held the 'act of God' defense is not a defense against water pollution claims brought under Section 12 of the Act." Mot. at 4, citing Perkinson v. PCB, 187 Ill. App. 3d 689, 543 N.E.2d 901, 904 (3rd Dist. 1989) (citing Freeman Coal Mining Corp. v. PCB, 21 Ill. App. 3d 157, 313 N.E.2d 616, 621 (5th Dist. 1974)). The People state that "[t]he analysis applied by courts in Illinois for determining whether an alleged polluter has violated the Act is whether the alleged polluter exercised sufficient control over the *source of the pollution*." Mot. at 4, citing Davinroy, 249 Ill. App. 3d at 793 (quoting People v. Fiorini, 143 Ill. 2d 318, 346, 547 N.E.2d 612, 623 (1991) (emphasis by People)).

The People argue that William Charles "had control over maintaining the soil in a stable condition at the Site to prevent the soil from discharging from the Site as a pollutant into the waters of the State." Mot. at 4. According to the People, William Charles "exercised control of the Site and therefore, control of the pollutant soil." *Id*., citing Fiorini, 143 Ill. 2d at 346. The People elaborate that William Charles "had the capability to control the source of the pollution and failed to undertake the requisite precautions to prevent the pollution both in August 2007 and for at least more than a 2 year period as alleged in the State's Complaint." Mot. at 5-6, citing Davinroy, 249 Ill. App. 3d at 793-94 (comparing Perkinson, 187 Ill. App. 3d 689, and Phillips, 72 Ill. App. 3d 217).

The People assert that the affirmative defense should be "dismissed with prejudice" because a rain and flood event in August 2007 cannot defeat the People's "water pollution claims that have continued for more than 2 years." Mot. at 7-8. According to the People, William Charles provides no specific facts explaining how the "onetime" rain and flood event (1) "obviates liability which has continued for more than 2 years"; (2) "contributed to or caused stormwater to discharge from Respondent's Site for more than 2 years by overcoming the necessary preventative measures required by [the] NPDES permit"; or (3) was the only time that the Site discharged. *Id*. at 8.

William Charles' Response

William Charles argues that it is entitled to assert the "act of God" defense because the company "did not have the capability to prevent the runoff which is the basis of the State's Complaint." Resp. at 4. According to William Charles, the United States Geological Survey (USGS) observed that during the summer of 2007, the area in which the Site is located was "hit by a series of record-setting storms that caused catastrophic flooding." *Id*. at 2. William Charles quotes from a USGS website, which noted that "[r]ecord rainfall occurred August 17-23, 2007," falling on saturated ground and causing flooding, including flooding on the Kishwaukee River at the 100-year recurrence interval. *Id*.[3] Two weeks before this weather arrived, William Charles

[3] http://mn.water.usgs.gov/flood/pdflrecordrain2007 .pdf

states, Winnebago County was "so devastated by flooding that it was declared a disaster area." *Id*. at 3, citing Illinois government website.[4]

William Charles claims that "[t]he catastrophic flooding continued on into 2008," with the Illinois State Climatologist's Office reporting that the State was "continually deluged with storms and flooding in 2008," from January through June, "causing an estimated $1.3 billion in agricultural losses." Resp. at 3, citing Illinois State Water Survey website.[5] According to William Charles, this "disastrous turn of events . . . caused the stormwater runoff of which the State complains in this enforcement action." *Id*.

William Charles asserts that the Act "is not a strict liability statute," but rather "the State must show that an alleged polluter had the ability to control the alleged pollution, or, that the Respondent was in control of the premises where the alleged pollution occurred." Resp. at 4, citing Phillips, 72 Ill. App. 3d at 220; *see also* Resp. at 3, citing Davinroy, 249 Ill. App. 3d at 793. According to William Charles, the People's view is that the "act of God" defense "is never available in a case alleging water pollution," such that "even when a tornado transports material from one location to another, the State can successfully prosecute the owner of the originating site." Resp. at 4.

William Charles argues that the State's theory of liability "ignores reality" and conflicts with the Act's purpose of assuring that "adverse effects upon the environment are fully considered and *borne by those who cause them*." Resp. at 3, 4, quoting 415 ILCS 5/4(b) (2008) (emphasis by William Charles). William Charles further asserts that the People's position disregards the source of the Agency's delegated authority, the federal Clean Water Act, which "recognizes that it is inappropriate to punish a landowner for a discharge that results from something beyond the owner's control, *i.e.* an 'Act of God.'" Resp. at 4, citing 33 U.S.C. §§ 1321(f)(1), (f)(2), (f)(3), (g), (i).

William Charles maintains that the People completely ignore the cause of the stormwater runoff: "catastrophic flooding that devastated the entire region, something which was clearly not within the Respondent's control." Resp. at 6. William Charles argues that its situation was "a far cry" from Freeman, where "for years, [the defendant's] vast sludge pile leached toxic pollutants every time it rained" and "[o]ver the course of years, the toxins leaching from the sludge pile destroyed the productivity of nearby farmland, as well as fish and insect populations in the area." *Id*. at 6, 7.

According to William Charles, "[t]he Complaint itself memorializes the construction of berms and a detention basin, the erection of silt fencing, and the attempts to grow vegetative cover," contradicting the People's claim in their motion that William Charles took no precautions to prevent a discharge. Resp. at 10. Instead, William Charles continues, the complaint shows

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[4] www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=2&RecNum=6122

[5] http://www.isws.illinois.edu/atmos/stateclil20081F100d2008/flood.htm

that William Charles "repeatedly took actions designed to try and control the fallout from the continuous onslaught of storms and flooding," but, "[l]ike other property owners throughout the region," William Charles was "unable to fully avert the catastrophe nature sent its way." *Id*.

The People's Reply

The People argue that William Charles ignores the case law, under which control of the pollution source is relevant, not control of a third party or "act of God." Reply at 3. The pollution source here, the People explain, "is soil and sediment laden stormwater discharging from the Site." *Id*. According to the People:

> A rain event may cause water to accumulate on the Site but it is the lack of erosion control devices on the Site as required under Respondent's NPDES permit that causes the soil and sediment laden stormwater to discharge from the Site into the waters of the state. *Id*.

The People assert that William Charles' (1) control of the Site, (2) NPDES permit obligations, (3) August 2007 contact with an Agency inspector at the Site, and (4) knowledge of "the ongoing rain events in 2007 and 2008," taken together, mean that William Charles "was aware and, therefore, capable of erecting erosion control devices to prevent discharge of soil and sediment laden stormwater from the Site during these ongoing rain events." Reply at 4. The People claim that Agency inspections of the Site in August 2007, June 2008, and May 2009 evidenced William Charles' poor management of erosion control devices, threatening to discharge and discharging contaminated stormwater from the Site. *Id*. at 4-5. The People emphasize that it is a violation of the Act and the NPDES permit to "'threaten'" or "'allow'" the discharge of contaminants "at any time." *Id*. at 6.

The People conclude that because William Charles' "act of God" defense "is not capable of defeating" the People's cause of action, the defense "should be stricken as legally insufficient and dismissed, with prejudice, as a matter of law." Reply at 6.

DISCUSSION

In this portion of the order, the Board first addresses whether, in this case, William Charles "act of God" defense is an affirmative defense. Next, the Board determines whether William Charles "act of God" defense has been pled with sufficient facts. The Board then rules upon the People's motion to strike, with prejudice, William Charles "act of God" defense.

Whether William Charles' "Act of God" Defense Is an Affirmative Defense in This Case

Under the Board's procedural rules, "[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." 35 Ill. Adm. Code 103.204(d). In an affirmative defense, respondent alleges "new facts or arguments that, if true, will defeat . . . [complainant's] claim even if all allegations in the complaint are true." People v. Community

Landfill Co., PCB 97-193, slip op. at 3 (Aug. 6, 1998); *see also* Worner Agency v. Doyle, 121 Ill. App. 3d 219, 221, 459 N.E.2d 633 (4th Dist. 1984) (if the pleading does not admit the opposing party's claim but rather attacks the sufficiency of that claim, it is not an affirmative defense). Stated another way, a valid affirmative defense gives color to complainant's claim, but then asserts new matter that defeats an apparent right of complainant. *See* Condon v. American Telephone and Telegraph Co., 210 Ill. App. 3d 701, 569 N.E.2d 518, 523 (2nd Dist. 1991).

In its amended answer, William Charles asserts, as an affirmative defense, that the violations of Section 12 of the Act alleged by the People were caused by an "act of God" in the form of a "24-hour, 250- or 500-year rain and flood event." Am. Ans. at 13. The People have moved to strike the claimed affirmative defense. The People argue that "Illinois courts have long held the 'act of God' defense is not a defense against water pollution claims brought under Section 12 of the Act." Mot. at 4. William Charles counters that the People are misreading the case law and that an "act of God," like a tornado, an earthquake, or the alleged rain and flood event, can be an affirmative defense when it causes the alleged violations. Resp. at 4, 6-7.

It is uncontested that "knowledge or intent is not an element to be proved for a violation of the Act." Fiorini, 143 Ill. 2d at 336; *see also* Freeman, 621 Ill. App. 3d at 163 (the Act is *malum prohibitum* and no proof of guilty knowledge or *mens rea* is necessary to find liability). Accordingly, "lack of knowledge is not a defense." Davinroy, 249 Ill. App. 3d at 793, citing Meadowlark Farms, Inc. v. PCB, 17 Ill. App. 3d 851, 308 N.E.2d 829 (5th Dist. 1974). However, "the fact that guilty knowledge is not a necessary element of proof under the Act does not mean that alleged polluters are under a theory of strict liability." Davinroy, 249 Ill. App. 3d at 793.

Instead, "[t]he analysis applied by courts in Illinois for determining whether an alleged polluter has violated the Act is whether the alleged polluter exercised sufficient control over the source of the pollution." Fiorini, 143 Ill. 2d at 346, citing Phillips and Meadowlark. For example, in Phillips, the owner of a chemical tank car was found not to have exercised sufficient control over the source of the pollution to be found liable for causing, threatening, or allowing a poisonous gas release that occurred when the train derailed. The tank car was under the control of the transporting railroad company at the time of derailment. *See* Phillips, 72 Ill. App. 3d at 220-21.

The 1974 decisions in Meadowlark and Freeman involved water pollution that took place when rain seeped through mine refuse piles, creating acidic runoff. *See* Meadowlark, 17 Ill. App. 3d at 854; Freeman, 621 Ill. App. 3d at 159-60. The Meadowlark and Freeman courts affirmed the Board's findings that the respective landowners violated Section 12(a) of the Act. *See* Meadowlark, 17 Ill. App. 3d at 860-61; Freeman, 621 Ill. App. 3d at 162-63. The piles of mine refuse in both Meadowlark and Freeman had accumulated for years and neither court suggested that the rainfall was out of the ordinary. In Meadowlark, the court emphasized that the company owned the refuse piles, that the rain seepage from the piles killed fish, and that the company "had the capability of controlling the pollutional discharge." Meadowlark, 17 Ill. App. 3d at 861. The Freeman court relied upon Meadowlark and found further support in another jurisdiction:

> in Akin & Dimock Oil Co. v. State, 95 Okla. Crim. 218, 243 P.2d 384 (1952), an employee of defendant allowed a quantity of oil to escape, and a heavy rainfall washed the oil into a nearby creek. Defendant was charged with violating a criminal statute which prohibited the discharge or permitting discharge of crude oil in the water of the State. The court, in rejecting defendant's argument that the discharge was caused by an act of God beyond its control, held defendant liable because the legislation imposed a duty to take all prudent measures to prevent the pollution. Freeman Coal, 621 Ill. App. 3d at 159.

In the 1989 Perkinson decision, the court reiterated that that the Act "does not impose strict liability on property owners for pollution which results from a cause beyond the owner's control." Perkinson, 187 Ill. App. 3d at 693, citing Phillips, 72 Ill. App. 3d 217. The Perkinson court affirmed the Board's finding that the owner/operator of a swine farm violated Sections 12(a) through 12(f) of the Act where liquid swine waste escaped from a lagoon and resulted in a fish kill. *See* Perkinson, 187 Ill. App. 3d at 691, 692, 695. The evidence showed that the discharge was caused by a man-made trench dug into the lagoon without the respondent's permission or knowledge, but there was no evidence that the respondent "had taken any precautions against vandalism." Perkinson, 187 Ill. App. 3d at 691, 693-94. The Perkinson court stated:

> The case before us is controlled by the long line of precedent in Illinois which holds that the owner of the source of the pollution causes or allows the pollution within the meaning of the statute and is responsible for that pollution unless the facts establish the owner either lacked the capability to control the source, as in Phillips Petroleum, or had undertaken extensive precautions to prevent vandalism or other intervening causes . . . . Perkinson, 187 Ill. App. 3d at 691.

Discussing many of these decisions, the Davinroy court in 1993 stated that a complainant "must show that the alleged polluter has the capability of control over the pollution or that the alleged polluter was in control of the premises where the pollution occurred." Davinroy, 249 Ill. App. 3d at 793. In Davinroy, the defendant contractor was hired to repair or install lift stations for a sewer system. *Id*. at 789. The defendant was responsible for operating and maintaining pumps that could be used to re-route sewage at each construction site. *Id*. at 790, 794. The pumps broke down and resulted in pollution. *Id*. at 794. The court held that the defendant violated Section 12(a) of the Act because the defendant "neither lacked the capability to control the source of the pollution nor undertook any precautions to prevent the pollution." *Id*.

In the instant case, the three counts of the People's complaint are closely related and share many allegations. Central to the complaint is the claim that William Charles failed to provide adequate soil and sediment management at the Site. Counts I and II allege that William Charles caused, threatened, and allowed the discharge of stormwater containing eroded soil and sediment by not providing adequate soil and sediment management. Count III alleges that William Charles failed to provide adequate soil and sediment management by causing, threatening, or allowing the discharge of stormwater containing eroded soil and sediment.

In its purported affirmative defense, William Charles first alleges that the Site was subjected to a "24-hour, 250- or 500-year rain and flood event." Am. Ans. at 13. A 24-hour, 250-year or 500-year storm would be the rainfall expected during a 24-hour period on the average of every 250 or 500 years. After quoting Davinroy on the "control" required for liability, William Charles pleads in the affirmative defense that the 24-hour, 250- or 500-year rain and flood event, over which the company "had no control," "caused" the "alleged injuries, damages and other matters giving rise to or the basis for any alleged relief requested." *Id*.

Neither Meadowlark nor Freeman involved extraordinary weather. Logically, a landowner may lack the ability to control a pollution source on the land because of the ferocity of an intervening force of nature. The Board finds that these court decisions do not stand for the unconditional proposition that an "act of God," however extreme, can never be a defense to an alleged Section 12 water pollution violation. To hold otherwise would be tantamount to imposing strict liability. In Phillips, the owner of the source of pollution could not exercise sufficient control over the source to be found in violation. Under the Perkinson and Davinroy holdings, the owner of a pollution source could avoid a finding of violation if the owner lacked the capability to control the source. The People appear to acknowledge this construction of the case law when they re-state their position in reply: "Illinois caselaw holds that an 'act of God' defense is unavailable to [a] defendant *who has control of the source of pollution* for its water pollution violations." Reply at 6 (emphasis added).

Applying these court precedents, the Board has recognized that whether a claimed "act of God" defense is an affirmative defense cannot be divorced from the particular pleadings at issue. On a case-by-case basis, the Board has both granted and denied motions to strike weather-related affirmative defenses. In People v. J.B. Timmermann Farms, Ltd, PCB 07-70 (Feb. 19, 2009), the complaint included alleged violations of Sections 12(a), 12(d), and 12(f) of the Act in connection with an overflow from a livestock waste lagoon. *See* Timmermann, PCB 07-70, slip op. at 1-2. The People pled, among other things, that the lagoon had not been kept at required levels such that there would be adequate storage capacity to prevent all overflows except those occurring from precipitation exceeding a 25-year, 24-hour storm. In turn, the respondent claimed, as an affirmative defense, that the overflow was caused by an "'unusually heavy rainfall,'" an "'Act of God.'" *Id*. at 3. The People moved to strike the defense, noting that the storm precipitating the respondent's discharge did not amount to a 25-year, 24-hour storm and that the respondent failed to plead "when, for how long, or even how much rain was received." *Id*. The Board granted the People's motion to strike the alleged affirmative defense. *Id*. at 4.

In People v. Chiquita Processed Foods , L.L.C., PCB 02-56 (Apr. 18, 2002), the People alleged that the respondent violated Sections 12(a), 12(d), and 12(f) of the Act. *See* People v. Chiquita Processed Foods , L.L.C., PCB 02-56, slip op. at 1 (Nov. 15, 2001). As an affirmative defense, the respondent pled that uncontrollable circumstances in the form of heavy rainfalls and rapid snow melt placed the respondent's lagoons and stormwater retention basin under extreme stress, requiring emergency discharges to avoid lagoon or retention basin failure. *See* Chiquita, PCB 02-56, slip op. at 2 (April 18, 2002). The Board noted that where the well-pled facts of an affirmative defense "raise the possibility" that the party asserting them will prevail, the defense should not be stricken. *Id*. at 5. The Board denied the People's motion to strike, finding that the affirmative defense presented "facts that, if proven true at hearing, could establish that Chiquita

lacked the capability to control the source of the pollution." *Id*.

In the instant case, William Charles claims as an affirmative defense that extraordinary weather, a 24-hour, 250- or 500-year rain and flood event, caused the violations alleged by the People. William Charles' defense gives color to the complaint's allegations of water pollution (actual and threatened), water pollution hazard, and inadequate soil and sediment management. The defense does not dispute these occurrences. The defense then raises new matter (*i.e.*, the rain and flood event) that could have rendered William Charles incapable of controlling the pollution source at the Site. The Board finds that the defense, as pled, could defeat the alleged violations, at least in part as discussed below. Accordingly, the Board finds that William Charles' "act of God" defense is an affirmative defense in this case. The corollary of this finding is that William Charles was *required* to timely raise the defense, or face waiver of the defense. *See* Afshar, Inc. v. Condor Air Cargo, Inc., 250 Ill. App. 3d 229, 231, 621 N.E.2d 126 (1st Dist. 1993) (if litigant fails to set out affirmative defense in answer or reply, litigant waives defense, and defense cannot be considered even though the evidence suggests its existence). In this manner, the People are not unfairly surprised at hearing. *See* Salazar v. State Farm Mutual Auto. Ins. Co., 191 Ill. App. 3d 871, 876, 548 N.E.2d 382, 385 (1st Dist. 1989) (purpose of 735 ILCS 5/2-613(d) is to prevent unfair surprise at trial).

The Board acknowledges that should a violation be found in this case, William Charles' affirmative defense could pertain to factors in mitigation of a civil penalty. That does not mean, however, for purposes of today's ruling, that the defense is not capable of defeating the People's alleged violations. When a claimed affirmative defense relates *solely* to mitigation factors, however, the defense should be stricken as an improper affirmative defense. *See* People v. Texaco Refining and Marketing, Inc., PCB 02-3, slip op. at 6 (Nov. 6, 2003) (alleged affirmative defense "pertains to remedy, *not the cause of action*" and therefore "does not defeat the People's claims of water pollution or open dumping" (emphasis added)).

Whether William Charles' Affirmative Defense Is Factually Sufficient

The "facts establishing an affirmative defense must be pleaded with the same degree of specificity required by a plaintiff to establish a cause of action." International Insurance Co. v. Sargent and Lundy, 242 Ill. App. 3d 614, 630, 609 N.E.2d 842 (1st Dist. 1993). Illinois requires fact-pleading, not the mere notice-pleading of federal practice. *See* Adkins v. Sarah Bush Lincoln Health Center, 129 Ill. 2d 497, 518, 544 N.E.2d 733 (1989). Fact-pleading, however, does not require a pleader to set out its evidence: "'To the contrary, only the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts.'" People *ex rel.* Fahner v. Carriage Way West, Inc., 88 Ill. 2d 300, 308, 430 N.E.2d 1005 (1981), quoting Board of Education v. Kankakee Federation of Teachers Local No. 886, 46 Ill. 2d 439, 446-47 (1970). To set forth "'a good and sufficient . . . defense,'" a pleading must "'allege ultimate facts sufficient to satisfy each element of the . . . affirmative defense pled.'" Indian Creek Development Co. v. Burlington Northern Santa Fe Railway Co., PCB 07-44, slip op. at 5 (June 18, 2009), quoting Richco Plastic Co. v. IMS Co., 288 Ill. App. 3d 782, 784-85, 681 N.E.2d 56 (1st Dist. 1997).

In its affirmative defense, William Charles first alleges that in or about August 2007, Winnebago County experienced "a 24-hour, 250- or 500-year rain and flood event." Am. Ans. at 13. Second, William Charles asserts that the Site is located in Winnebago County, and was subjected to the rain and flood event. *Id*. Next, William Charles alleges that the 24-hour, 250- or 500-year rain and flood event was "an Act of God" over which the company had no control. *Id*. After citing Davinroy concerning a respondent's "control" that the People must show to prevail, William Charles asserts that the "alleged injuries, damages and other matters giving rise to or the basis for any alleged relief requested . . . 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)." *Id*. The Board finds that William Charles has sufficiently pled the ultimate facts of its affirmative defense, reasonably informing the People of the nature of the defense they are being called upon to meet.

The Board's finding that the affirmative defense is factually sufficient, however, relates only to the alleged violations occurring in 2007. The People's complaint alleges various observations from Site inspections conducted in 2007, 2008, and 2009. In their reply, the People argue that the Agency's Site inspections in August 2007, June 2008, and May 2009 evidenced violations by William Charles. Reply at 4-5. William Charles' response to the motion to strike mentions storms and flooding continuing in January 2008 through June 2008, and makes no mention of 2009. The only timeframe provided in the affirmative defense itself is "[i]n or about August 2007." Am. Ans. at 13.

The affirmative defense, as pled by William Charles, does not reasonably inform the People of how the rain and flood event in or about August 2007 concerns violations alleged for 2008 and 2009. The Board finds that William Charles has not sufficiently pled ultimate facts in its affirmative defense that could defeat the People's cause of action with respect to alleged violations in 2008 and 2009. This finding of factual insufficiency is not made with prejudice and does not compel striking the affirmative defense. To survive a motion to strike, an affirmative defense need not seek to avoid the legal effect of the *entire* cause of action. Guidance comes from Section 2-613(d) of the Code of Civil Procedure, which provides:

> The facts constituting any affirmative defense . . . and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint, . . . *in whole or in part*, . . . must be plainly set forth in the answer or reply. 735 ILCS 5/2-613(d) (2008) (emphasis added); *see also* 35 Ill. Adm. Code 101.100(b) (Board may look to Code for guidance where the Board's procedural rules are silent).

An affirmative defense will not be stricken where it could defeat the cause of action in whole or in part. *See* People v. QC Finishers, Inc., PCB 01-7, slip op. at 14-15 (July 8, 2004) (relying upon 735 ILCS 5/2-613(d) to deny motion to strike where affirmative defense could defeat only part of period of alleged noncompliance). The Board will therefore not strike William Charles' "act of God" defense merely because of its factual deficiency regarding the violations that allegedly took place in 2008 and 2009.

Ruling on the People's Motion to Strike William Charles' Affirmative Defense

A motion to strike an affirmative defense admits well-pled facts constituting the defense, as well as all reasonable inferences that may be drawn therefrom, and attacks only the legal sufficiency of the facts. *See* Raprager v. Allstate Insurance Co., 183 Ill. App. 3d 847, 854, 539 N.E.2d 787 (2nd Dist. 1989); *see also* International Insurance, 242 Ill. App. 3d at 630. Where the well-pled facts of an affirmative defense and reasonable inferences drawn therefrom raise the possibility that the party asserting them will prevail, the defense should not be stricken. *See* Raprager, 183 Ill. App. 3d at 854.

From the well-pled facts of William Charles' affirmative defense, the reasonable inferences to be drawn are that because of the 24-hour, 250- or 500-year rain and flood event in or about August 2007, soil and sediment management measures were rendered inadequate and William Charles was accordingly incapable of controlling the pollution source at the time of the alleged violations in 2007. The Board finds that it is possible that the new matter raised by William Charles could defeat the People's claim of violations occurring in 2007. Accordingly, the Board denies the People's motion to strike, with prejudice, the affirmative defense.

CONCLUSION

Based on the reasons set forth above, the Board denies the People's motion to strike, with prejudice, William Charles' "act of God" defense. In this case, the "act of God" defense as pled by William Charles is an affirmative defense. The defense, which is based on the Site being subjected to an alleged 24-hour, 250- or 500-year rain and flood event in August 2007, is factually sufficient with respect to violations alleged to have taken place in 2007, but not as to violations alleged to have occurred in 2008 and 2009.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 17, 2011, by a vote of 5-0.

John Therriault, Assistant Clerk
Illinois Pollution Control Board