

ILLINOIS POLLUTION CONTROL BOARD

April 7, 2011

ROLF SCHILLING, PAM SCHILLING,)	
and SUZANNE VENTURA,)	
)	
Complainants,)	
)	
v.)	PCB 10-100
)	(Enforcement - Water)
GARY D. HILL, VILLA LAND TRUST,)	
an Illinois Land Trust, and PRAIRIE)	
LIVING WEST, LLC,)	
)	
Respondents.		

ORDER OF THE BOARD (by G.L. Blankenship):

On June 1, 2010, Rolf Schilling, Pam Schilling, and Suzanne Ventura (collectively, complainants) filed a citizen’s water pollution complaint. Complainants named as respondents Gary D. Hill (Mr. Hill), Villa Land Trust (Villa), and Prairie Living West, LLC (Prairie) (collectively, respondents). The complaint alleges violations of the Environmental Protection Act (Act) (415 ILCS 5 (2008)) and a National Pollutant Discharge Elimination System (NPDES) permit (permit) for the construction site known as the “Prairie Living West” project (project) located at “900/955 Villa Court [in] Carbondale, Jackson County” (the “site”). Comp. at 2.

Complainants allege that, from when construction commenced through the present, the respondents have allowed construction materials and sediment from the site to fill and pollute the complainants’ co-owned pond.

This order regards the respondents’ affirmative defenses and the complainants’ motion to strike said affirmative defenses, described in detail below. With today’s order, the Board grants the complainants’ motion to strike the respondents’ second and third affirmative defenses without prejudice and grants respondents leave to amend those two defenses if they so choose. The Board grants the respondents’ motion to withdraw affirmative defenses one and four and denies the complainants’ motion to strike those defenses as moot.

In this order, the Board first sets forth the procedural history of the case before describing the pleadings in detail. Next, the Board provides the applicable legal framework, including a discussion of affirmative defenses. The Board then rules on the complainants’ motion to strike affirmative defenses.

PROCEDURAL HISTORY

On June 1, 2010, the complainants filed their citizen’s water pollution complaint (Complaint). On August 2, 2010, the respondents filed a motion to dismiss the complaint. The

Board accepted the respondents' motion to dismiss on September 2, 2010 and denied the motion on November 4, 2010.

On January 7, 2011, the respondents filed their answer and affirmative defenses to the complaint, alleging four affirmative defenses. On January 26, 2011, the complainants filed a motion to strike all four affirmative defenses (Motion). On February 10, 2011, the respondents filed a response to the motion to strike (Response). In the response, the respondents request to withdraw two of their affirmative defenses.

On March 22, 2011, the respondents filed a third party complaint against Horve Contractors, Inc. On April 1, 2011, the respondents filed a notice of filing returned receipt which indicated proof of service on March 18, 2011. The Board will determine whether to accept that complaint for hearing after the thirty day response time has run.

COMPLAINT

Complainants make a number of general allegations in their 10-page complaint (Comp. at 1-3) before setting forth detailed allegations regarding the two phases of the respondents' construction activities. *Id.* at 3-4. Complainants then set forth the NPDES permit conditions and provisions of the Act that the respondents allegedly violated. *Id.* at 5.

General Allegations

Rolf and Pam Schilling are husband and wife who own property adjacent to the site. Comp. at 2. Suzanne Ventura also owns property adjacent to the site. *Id.* at 2. Together, complainants co-own a pond located between their properties and adjacent to the site. *Id.* at 3. The complaint alleges that Mr. Hill is one hundred percent owner of Villa, an Illinois land trust, and is the managing member of Prairie. *Id.* The complaint also states that Mr. Hill identified himself as the owner of the project in a Notice of Intent sent to the Environmental Protection Agency (Agency), which included a statement of "the intention of Mr. Hill to perform construction activities at the [site]." *Id.*

Complainants further believe that Prairie is acting as the operating entity for the project, which is a "planned unit development/skilled nursing facility." Comp. at 2. To date, complainants allege that the project is only partially completed, and more development is planned and underway. *Id.*

Complainants filed the complaint against the respondents alleging violations of the respondents' NPDES permit and Sections 12(a), 12(b), 12(d) and 12(f) of the Act (415 ILCS 5/12(a), 12(b), 12(d), 12(f) (2008)). Comp. at 5. Further, the complainants allege that the respondents' two phases of construction activities violated the terms of the permit and the Act's provisions by contaminating the complainants' co-owned pond with waste and construction materials. *Id.* at 3, 4.

Phase I

According to the complaint, the project was divided into two different construction phases. Comp. at 2. Both construction phases occurred at the site. *Id.* The complaint states that Phase I occurred “during or about 2006.” *Id.*

Complainants allege that “during and about 2006 and 2007,” the construction activities at the site caused “substantial amounts of water, mud, construction-site residues, eroded material, and other waste materials” to enter into the complainants’ pond. *Id.* at 3. As a result, the complainants state, the pond became “muddied and turbid,” “killing numerous fish and other aquatic life within the pond” and that the “silting-in of the floor of the pond . . . raised the floor by measurable amounts.” *Id.* The complaint states that, during Phase I of the construction activities, the complainants objected to the respondents. *Id.* Complainants contend that the contamination of their property and the pond ceased when the respondents ultimately concluded the Phase I construction activities. *Id.*

Phase II

The complainants allege that Phase II began “during or about 2009” and was still underway when the complaint was filed. Comp. at 2. In order to prepare for Phase II, the complaint continues, the respondents applied for and obtained a NPDES permit from the Agency. *Id.* at 3. The complaint attached both the statewide NPDES permit and a February 23, 2009 Agency letter acknowledging that the permit applies to the construction project. *Id.*, Exhibit B (Permit), Exhibit C (Letter).

The complaint further alleges that, after Phase II construction activities began, the respondents “disregarded and abandoned their construction plans and plans to control and eliminate sediments and erosion from leaving the . . . site and polluting [c]omplainants’ property and the [p]ond.” *Id.* at 4. Complainants also allege that the respondents:

ignored and disregarded the advice and counsel of their own retained engineers and of their construction company with respect to measures which could and should be taken to control the erosion and run-off of sediments and other contaminants from the Phase II construction activities onto [c]omplainants’ property and into the [p]ond. *Id.* at 4.

Complainants allege that, as a result of the respondents’ failure to “construct, maintain and manage engineering features to control the run-off of water, sediments, mud, and other contaminants,” in the Spring of 2010 the complainants’ property was subject to “serious and severe flooding and inundation” from materials coming off the construction site. *Id.* This included “substantial deposition of contaminating materials into the [p]ond.” *Id.*

Complainants again note that this deposition of materials into the pond has resulted in discoloration of the pond waters and created “muddy and turbid conditions” which will result in the death of fish and aquatic life in the pond as the water temperatures rise in the warmer months. *Id.* Complainants also contend that the deposition of materials has caused silting in the

bottom of the pond which has reduced its usable life and which, along with the death of fish and aquatic life, has caused and will continue to cause the complainants severe economic loss and the loss of their enjoyment of the pond. *Id.* Complainants believe that it will cost in excess of \$50,000 to dredge and remove the contaminants placed into the pond by the respondents. *Id.*

NPDES Permit Violations

The complainants allege that the respondents have violated the terms of their NPDES permit by:

- a) Failing to maintain a copy of their Storm Water Pollution Prevention Plan (SWPPP) at the site;
- b) Failing to put into effect soil stabilization practices applicable pursuant to the general permit and the SWPPP;
- c) Failing to complete and maintain erosion control structures;
- d) Failing to erect and maintain silt fencing;
- e) Failing to notify the IEPA of incidents of non-compliance and violation of the SWPPP during periods of construction; and
- f) Failing to amend known and observed deficiencies in the effectiveness of the SWPPP to control and eliminate off-site discharges of sedimentation and other contaminating materials from the respondents' construction activities. Comp. at 4.

Relief Requested

Complainants ask the Board to order the respondents to immediately cease and desist further violations and "any acts and omissions which cause or tend to cause such violations." Comp. at 5-6. Complainants also request that the Board impose an appropriate penalty on each respondent "for flagrant past noncompliance, to disgorge the economic benefits reaped by [r]espondents as a result of their noncompliance, and to encourage further compliance with all applicable environmental standards and requirements." *Id.*

ANSWER AND AFFIRMATIVE DEFENSES

Respondents deny the violations and allege four affirmative defenses, all of which are detailed below.

First Affirmative Defense

Respondents believe that the complainants have failed to name an indispensable party who “has a legal or beneficial interest in the subject matter of this litigation” and therefore the Board cannot proceed to a decision on the merits without naming said party. Ans. at 4.

Second Affirmative Defense

Respondents state that the injuries and damages allegedly suffered in this action, which the respondents deny, may have been caused in whole or in part by natural occurrences over which the respondents have no control and for which the respondents are not responsible. Ans. at 4.

Third Affirmative Defense

Respondents state that the injuries and damages allegedly suffered in this action, which the respondents deny, were caused in whole or in part by the acts (wrongful or otherwise), negligence, sole fault, misuse, abuse, modification, alteration, omission, or fault of one or more persons or entities over whom the respondents exercise no control and for whom the respondents are not legally responsible, including, without limitation, the complainants. Ans. at 4-5.

Fourth Affirmative Defense

Lastly, the Respondents argue that they have remained in compliance with the Act and that their construction activities have been conducted “within the purview of their NPDES Permit.” Ans. At 5.

MOTION TO STRIKE

The Board first summarizes the complainants’ motion to strike the respondents’ affirmative defenses before summarizing the respondents’ response.

Complainants’ Motion

The complainants move to strike all of the respondents’ affirmative defenses, as summarized below.

First Affirmative Defense

Complainants note that the respondents do not name the indispensable party alleged in the defense. Mot. at 2. Complainants further state that the defense does not:

set forth any facts identifying [the indispensable party, 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. *Id.*

Second Affirmative Defense

Complainants argue that the respondents' second affirmative defense is speculative because the defense does not claim that the injuries and damages actually were caused by natural occurrences, but only that the injuries and damages may have been caused by natural occurrences. Mot. at 2. Complainants further argue that the defense fails to identify the natural causes and how the respondents lacked control over those natural causes. *Id.* at 2-3. Complainants final assertion is that the defense is directed toward the injuries and damages suffered in the action, but the action is for a finding of violation and is not dependent upon the existence of any injuries or damages. *Id.* at 3.

Third Affirmative Defense

Complainants argue that the respondents should not be entitled to argue their third affirmative defense because the defense "does not name any such parties (other than obliquely stating that [c]omplainants are included), or any such acts or omissions" responsible for the complainants' injuries. Mot. at 3. Complainants again argue that the defense is directed toward the injuries and damages suffered in the action, but the action is for a finding of violation and is not dependent upon the existence of any injuries or damages. *Id.*

Fourth Affirmative Defense

Complainants argue that the respondents' fourth affirmative defense "is not an affirmative defense at all, but instead is merely a denial of violation." Mot. at 3. Complainants believe that the respondents' allegation that they complied with their NPDES permit does not state any "new facts or arguments that, if true, will defeat . . . the complainant[s'] claim even if all allegations in the complaint are true." *Id.* (internal parenthetical omitted).

Respondents' Response

The respondents indicated in their response that, upon further review, they had decided to withdraw their first (indispensable party) and fourth (acted in compliance) affirmative defenses. Resp. at 2, 4.

Second Affirmative Defense

Respondents argue that they should be entitled to assert their second affirmative defense because "if one is to assume, for the purposes of the Motion to Strike, that the allegations of [the second affirmative defense] are true, namely that [c]omplainants' injuries and damages alleged are the result of natural occurrences, and not the result of anything over which [r]espondents have control, then [c]omplainants' claim will necessarily be defeated." Resp. at 2. Respondents assert that without discovery, there are no additional facts that may be properly plead in affirmative defense two. *Id.* Respondents maintain that they are not required to identify what natural occurrences occurred or why the respondents had no control over the natural occurrences. *Id.* at 3.

Third Affirmative Defense

Respondents argue that they should be entitled to assert their third affirmative defense because “[i]f one assumes that the allegations in [a]ffirmative [d]efense [three] are true, and that [c]omplainants’ injuries and damages were caused by the acts of someone else, other than [r]espondents, then [r]espondent[s] will defeat [c]omplainants’ claim.” Resp. at 3.

STATUTORY BACKGROUND

The complainants allege that the respondents violated Sections 12(a), 12(b), 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 contaminants¹ into the environment in any State so as to cause or tend to cause water pollution² in Illinois, either alone or in combination with matter from other sources

* * *

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

* * *

(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).

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).

DISCUSSION

The Board construes the respondents' withdrawal of affirmative defense one (indispensable party) and affirmative defense four (acted in compliance) as a motion to withdraw those defenses. The Board grants the respondents' motion to withdraw affirmative defenses one and four and denies the complainants' motion to strike said affirmative defenses as moot. The Board therefore does not discuss the merits of the complainants' motion to withdraw the respondents' first and fourth affirmative defenses.

The Board addresses whether the respondents' second affirmative defense (natural occurrences) and third affirmative defense (act of third party) have been pled with sufficient facts. The Board then rules upon the complainants' motion to strike the respondents' affirmative defenses.

Factual Sufficiency

Complainants' Motion to Strike is essentially a challenge to the factual sufficiency of the respondents' affirmative defenses. With regard to the affirmative defenses still at issue, the complainants argue that the second defense fails to identify what natural occurrences caused complainants' injuries, and the third defense fails to name what parties and which of those parties' actions contributed to the complainants' injuries. Mot. at 2-3.

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 determining the sufficiency of any claim or defense, the court will disregard any conclusions of fact or law that are not supported by allegations of specific fact. Knox College v. Celotex Corp., 88 Ill. 2d 407, 426-27, 430 N.E.2d 976 (1981).

Second Affirmative Defense

Respondents' second affirmative defense alleges that the complainants' injuries may have been caused in whole or in part by natural occurrences over which the respondents have no control and for which the respondents are not responsible. Ans. at 4. In their response, the respondents maintain that they are not required to identify what natural occurrences caused the injuries and cannot properly plead any additional facts without discovery. *Id.* at 3-4.

Respondents' "natural occurrences" defense is conclusory and lacks the necessary factual allegations sufficient to support the conclusion that the complainants' injuries were caused by natural occurrences. The defense fails to allege the ultimate facts that would inform the complainants even of the general nature of the natural occurrence.

The Board finds that the respondents' have not sufficiently pled the ultimate facts of the second affirmative defense. This affirmative defense is a conclusion of fact that has not been supported by an allegation of specific fact sufficient to reasonably inform the complainants of the nature of the defense which the complainants are being called upon to meet.

Third Affirmative Defense

Respondents' third affirmative defense alleges that the complainants' injuries:

were caused in whole or in part by the acts (wrongful or otherwise), negligence, sole fault, misuse, abuse, modification, alteration, omission, or fault of one or more persons or entities over whom [r]espondents exercise no control and for whom [r]espondents are not legally responsible, including, without limitation, [c]omplainants. Ans. at 4-5.

Similar to above, the respondents' "act of third party" defense is conclusory and lacks the necessary factual allegations sufficient to support the conclusion that the complainants injuries were caused by parties other than the respondents. The defense fails to allege the ultimate facts that would inform the complainants who caused the complainants' injuries or how these parties caused the complainants' injuries.

The Board finds that the respondents have not sufficiently pled the ultimate facts of their third affirmative defense and have not reasonably informed the complainants of the nature of the defense upon which the complainants are being called to meet.

Prejudice

The second and third affirmative defenses, as pled by the respondents, do not reasonably inform the complainants of what the natural occurrences and third parties are that contributed to the complainants' injuries. This finding of factual insufficiency is made without prejudice, and the Board grants the respondents leave to amend their second and third affirmative defenses. The trial court has the discretion whether to allow amendment of pleadings, Old Salem Chautauqua Association v. Illinois District Council of the Assembly of God, 13 Ill.2d 258, 266, 148 N.E.2d 777 (1958), and the test in determining whether that discretion was properly exercised is whether allowing amendment of pleadings furthers the ends of justice. Bowman v. County of Lake, 29 Ill.2d 268, 281, 193 N.E.2d 833 (1963).

The Board finds that justice would be furthered by allowing the respondents to amend their affirmative defenses by providing more specific factual allegations, if the respondents so choose to. The respondents have 30 days from the date of this order, up to and including

Monday, May 9, 2011 (the first business day following the 30th day from this date) to file any amended affirmative defenses.

**Ruling on Complainants' Motion to Strike
Respondents' Affirmative Defenses**

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 Rapraeger 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.

Respondents have failed to allege sufficient facts to constitute their second and third defenses. Therefore, the Board grants the complainants' motion to strike the respondents' second and third affirmative defenses as factually insufficient.

CONCLUSION

The Board grants the complainants' motion to strike the respondents' second and third affirmative defenses. The Board grants the respondents' motion to withdraw affirmative defenses one and four and denies the complainants' motion to strike the respondents' first and fourth affirmative defenses as moot. The respondents' second and third affirmative defenses are stricken without prejudice. The Board grants the respondents leave to amend their second and third affirmative defenses to correct factual deficiencies if they so choose to. Any amendments must be filed by May 9, 2011.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 7, 2011, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board