BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

People of the State of Illinois Complainant, vs. Tradition Investments, LLC, an Illinois limited liability corporation Respondent.	)	NO. 2011 068 Enforcement

ORIGINAL

NOTICE OF FILING

TO: Jane McBride
Assistant Attorney General
500 South Second Street
Springfield IL 62706

Division Chief of Environmental Enforcement
Office of the Attorney General
100 West Randolph Street
Suite 1200
Chicago IL 60601

PLEASE TAKE NOTICE that on the 1st day of September, 2011, I filed by Federal Express with the Office of the Clerk of the Pollution Control Board, Respondent's Response and Objection to Complainant's Motion for Leave to File a Reply, copies of which are herewith served upon you.

Donald Q. Manning,
Plaintiff.

By: McGreevy Williams, P.C.

By: _____
Donald Q. Manning
One of Its Attorneys

Donald Q. Manning - ARDC#6194638
McGreevy Williams, P.C.
6735 Vistagreen Way
P.O. Box 2903
Rockford, IL 61132-2903
(815) 639-3700

STATE OF ILLINOIS)
) SS.
COUNTY OF WINNEBAGO)

AFFIDAVIT OF SERVICE

I, the undersigned, being first duly sworn on oath, depose and say that I served the Notice of Filing and Respondent's Response and Objection to Complainant's Motion for Leave to File a Reply upon the within named:

Jane E. McBride
Assistant Attorney General
500 South Second Street
Springfield IL 62706

Division Chief of Environmental
Enforcement
Office of the Attorney General
100 West Randolph Street
Suite 1200
Chicago IL 60601

ORIGINAL

by placing a true and correct copy of said notice in an envelope, addressed as is shown above; that I sealed said envelope and placed sufficient U.S. postage on each; that I deposited said envelope so sealed and stamped in the United States mail at Rockford, Illinois, at or about the hour of 5 o'clock P.M., on the 1st day of September, 2011.

Sherri A. Murray

Subscribed and sworn to before
me this 1st day of September, 2011.

Nancy J. Watters
NOTARY PUBLIC

OFFICIAL SEAL
NANCY J. WATTERS
Notary Public, State of Illinois
My Commission Expires 04/16/14

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

People of the State of Illinois	)	
	)	
Complainant,	)	
	)	
vs.	)	PCB NO. 2011-068
	)	(Enforcement)
Tradition Investments, LLC, an Illinois limited liability corporation	)	
	)	
Respondent.	)	

RESPONSE AND OBJECTION TO MOTION FOR LEAVE TO FILE REPLY

The Respondent, Tradition Investments, LLC ("Tradition Investments"), by its attorneys McGreevy Williams, P.C., states as follows for its Response and Objection to Complainant's Motion for Leave to File a Reply in Support of Complainant's Motion to Strike Affirmative Defenses:

1. Under 35 Ill. Adm.Code §101.500(e), Complainant is not entitled to file a reply except as to "prevent material prejudice" (see People of the State of Illinois v. The Bigelow Group, Inc., PCB No. 97-217, 1998 WL 12160 (January 8, 1998)). Complainant has failed to argue that it has been or will be materially prejudiced. Because Complainant has not articulated any possible prejudice, and because there is other no other authority under Board Rules to allow a Reply, the motion should be denied without reference to the proposed reply.

2. Further, even if Complainant tried to articulate some sort of prejudice, there still is no basis for a reply. Respondent requests the Board to strike and deny Complainant's motion

for leave to file its reply because the proposed reply is inappropriate on a number of grounds beyond the lack of prejudice, any one of which should prevent the Board from considering the materials raised in the proposed reply.

3. Specifically, Complainant improperly attaches excerpts of argument of counsel from a different proceeding but (a) the Board cannot review that information in connection with a motion attacking the sufficiency of the affirmative defenses; (b) Complainant has waived any possible contention or argument based on the improperly attached materials because Complainant waited until its proposed reply to submit the materials; (c) Complainant disregards the nature of a motion to dismiss - it is based on the pleadings, not materials from other cases; (d) Complainant's implicit assertion that a transcript of argument of counsel is the proper subject of judicial notice is not supported in the cases upon which Complainant relies, and (e) Complainant improperly uses its proposed reply to regurgitate its original motion, but it ignores the fact that the property does not meet the definition of a CAFO, which is a fundamental requirement for the application of an NPDES permit in this context.

4. Complainant's proposed reply is objectionable on the basis that Complaintant is attempting to offer new materials for the first time in reply, which is universally described as improper (see, e.g., G.I.S. Venture v. Novak, 388 Ill. App.3d 184, 902 N.E.2d 744 (2nd Dist. 2009)). No modern tribunal allows the filing of new evidentary materials or arguments in reply. Here, Complainant attempts to introduce and rely on a transcript of argument of counsel from another case. Complainant offers no explanation why it waited until its proposed reply to submit the materials. The Board should summarily strike the objectionable material.

5. Complainant's proposed reply is objectionable in the context of Complainant's original motion attacking the responsive pleadings. The Board's consideration on the motion to strike is limited to the pleadings (see In re Chicago Flood Litigation, 176 Ill. 2d 179, 680 N.E. 2d 265 (1997)). Although courts can take judicial notice of facts in connection with motions, there is no authority available to Complainant to argue that transcripts from some other case between different parties on different issues at different times can be the subject of judicial notice. Complainant has failed to provide any authority to support the proposition that it can use transcripts from other matters in connection with its own motion to strike.

6. In addition, Complainant attempts to use the transcripts to avoid Respondent's denials of certain allegations of the original Complaint. There is no accepted practice which allows such a maneuver.

7. Complainant's proposed reply is objectionable on the basis that Complainant is attempting to argue the merits of its claim. Complainant will ultimately have to establish every element necessary to prove that the property meets the definition of a CAFO, but there is no rule or precedent which allows Complainant to win its case on the merits under the guise of its own motion to strike affirmative defenses. In other words, even if there were no affirmative defenses, Complainant must still prove that this property meets the definition of a CAFO in order to even begin to argue for the application of an NPDES permit.

8. Even if Complainant is allowed to argue the merits of its case in this context, Complainant's position is incorrect based on its own pleadings. Complainant has utterly failed to show how it has alleged or can prove that the property meets the definition of a CAFO.

Complainant ignores that issue in its proposed reply. The now uncontradicted materials from the Respondent's response to the motion bears this out. The following points were set forth in Respondent's response to the motion, none of which were contested by the Complainant in its proposed reply:

Complainant's entire theory of relief hinges on the definition of "animal feeding operation" ("AFO"):

> Animal Feeding Operation mean a lot or facility where:
>
> (1) Animals . . . have been, are or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12 month period and
>
> (2) Crops, vegetation, forage growth, or post harvest residues are not sustained in the normal growing season over any portion of the lot or facility (35 Ill.Adm. Code 501.225; 40 CFR §122.23(a)(b)(1)).

Complainant cannot allege any set of facts to sustain the claim that the property is an AFO. The simple reasons are: (1) it is total conjecture that the property will be populated with any animals; (2) there are no existing facts to show that any animal will be present on the property for 45 days or more during any 12 month period; and (3) Complainant has not and cannot allege that vegetation is not sustained in the normal growing season over the exact property Complainant now contends is an AFO. It is pure speculation to state what "will" happen here.

Complainant must focus on the words "will be" in the definition of AFO, but those words cannot be used to create CAFO NPDES liability where the AFO does not yet exist. First, the law is clear under National Pork Producers, 635 F.3d 788 (5th Cir. 2011) that a facility cannot be

required to apply for an NPDES permit if it proposes to discharge, but the existing rules purport to impose that requirement. The words "will be" must be made in that context. Prior to National Pork Producers, Complainant and others were trying to enforce a duty to apply based on designs instead of actual operation, but that is no longer available, and Complainant can no longer demand a permit based on what a proposed facility will consist of. Such prospective enforcement is not available.

Second, and more importantly, Complainant admits that the events leading up to the alleged discharge involve (1) a construction site; (2) made up of a stalled project; (3) arising from litigation concerning the property; (4) in connection with which stormwater and run-off management is handled in a manner different from final design of the facility if it is completed (see Complaint pars. 13 - 15). According to admissions set out in the Complaint:

> 13. The catch basin has a 24-inch-diameter pipe stubbed out of the bottom which, upon completion of site construction, including construction of the large waste holding cell to the immediate west of the silage pad (northernmost waste storage cell), Respondent Tradition intends to connect with a gravity flow PVC pipe under an access road to the northernmost proposed waste storage pond.
>
> 14. Currently, while construction has been stalled, the catch basin flows to an adjacent temporary waste silage leachate holding cell located directly south of the southwest part of the slab and catch basin.
>
> 15. The temporary silage leachate holding cell serves as a containment structure for runoff that drains from the feed storage area and the adjacent construction materials storage area. The basin is approximately 115 feet by 230 feet with an average depth of about 5.8. feet (emphasis added).

In making those allegations, Complainant thereby admits that the property is a construction site, not a CAFO and, as importantly, the admissions prove that the manner in

which run-off is managed bears no resemblance to the final design. There is no logical nexus between an alleged construction site discharge and the need for an NPDES for a fully operational CAFO, especially here, where the management of the precise run-off allegedly involved bears no relationship to the final design.

The Board should note that discovery in this action will prove that the construction site is and has been covered by an NPDES permit (General Permit for Stormwater Discharge from Construction Site Activities No. ILR 10), that inspections have been made and routine compliance issues addressed. As Complainant has done in the past with this very site, if there are compliance issues regarding run-off, stormwater or otherwise, those issues should be addressed under the existing permit.

Third, even if the claim were ripe, the Respondent would not be required to seek coverage under a NPDES permit (i) unless it actually discharges upon confinement of animals and (ii) until at least 180 days prior to the time it commences operation (40 CFR 122.23(d)(1), (f)(4)). It follows that a planned or conceptual CAFO by definition is not a CAFO if it will not house the requisite number of animals within the following one and one-half years (i.e. the 12-month period following the commencement of operations plus 180 days prior to commencement) nor if it will not discharge following confinement. In this case, construction remains delayed, no animals are confined or housed at the facility and it is not currently a CAFO subject to regulation under 40 CFR 122.23. It will not discharge following confinement.

In sum, Complainant ignores the existing NPDES permit and the fact that the property is a dormant construction site, not a CAFO. The Complainant clings to the words "will be" in the

definition of AFO, but a careful reading establishes the Complainant's failure to properly allege that the property meets the definition of AFO. This is a construction site utilizing run-off management measures which bear no resemblance to the final design of the operation. The Complainant is overreaching.

9. Complainant also attempts to distinguish the firmly established rule that a single discharge does not lead to an NPDES permit requirement, but Complainant's argument is implausible. First, Complainant misses the point: under existing law even assuming the CAFO rules applied, a single discharge does not require a permit. Complainant attempts to circumvent that basic proposition by claiming that National Pork Producers voided that rule, but there is no basis for such an argument. That case deals with proposed discharges and nothing in the case requires a complete disregard of all of the concepts underlying the regulations. The existing rules state the public policy: a single discharge even from an operating CAFO does not trigger and NPDES permit requirement. Complainant's assertions to the contrary are not supported in the law.

10. Complainant is overreacting in its attempts to repackage this construction site as a CAFO; Complainant is looking for a "gotcha" moment to pursue an agenda which is not supported under law. Based on the foregoing, the Board should not allow for filing of the proposed reply and the Board should strike the improperly filed exhibits from the record.

WHEREFORE, the Respondent, Tradition Investments, LLC, request the Board for the entry of an Order denying and striking Complainant's petition for leave to file a reply, and granting Tradition Investments, LLC, such other relief as the Board deems just and proper.

Respectfully submitted,

TRADITION INVESTMENTS, LLC

By: _____
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MCGREEVY • WILLIAMS

September 1, 2011

VIA FEDERAL EXPRESS
Illinois Pollution Control Board
Clerk's Office
James R. Thompson Center
100 W. Randolph, Suite 11-500
Chicago, IL 60601

Re: People of the State of Illinois v. Tradition Investments, LLC
No.: 2011-068 Enforcement

Dear Staff:

Enclosed please find an original and 9 copies of the Respondent's Response and Objection to Complainant's Motion for Leave to File a Reply and Notice of Filing in the above referenced matter. I have also enclosed 2 additional copies to be file-stamped and returned in the self-addressed stamped envelope.

If you have any questions regarding this request, please feel free to contact me.

Very truly yours,

Donald Q. Manning

DQM/ms
Enclosures

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