

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
LISA MADIGAN, Attorney General of)
the State of Illinois,)
)
Complainant,)
)
v.)
)
AMERICAN CONSTRUCTION, LLC,)
INC., an Illinois limited liability company, and)
REAL ESTATE ELMHURST, LLC, an Illinois)
limited liability company,)
)
Respondents.)

No. 11-
(Enforcement-Water)

NOTICE OF FILING

TO: See attached service list (VIA ELECTRONIC FILING)

PLEASE TAKE NOTICE that today I have electronically filed with the Office of the Clerk of the Pollution Control Board the following Complaint, a copy of which is attached and hereby served on you.

Failure to file an answer to this complaint within 60 days may have severe consequences. Failure to answer will mean that all allegations in the complaint will be taken as if admitted for purposes of this proceeding. If you have any questions about this procedure, you should contact the hearing officer assigned to this proceeding, the clerk's office or an attorney.

NOTIFICATION

YOU ARE HEREBY NOTIFIED that financing may be available through the Illinois Environmental facilities financing act [20 ILCS 3515/1 et seq.] to correct the alleged pollution.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
LISA MADIGAN,
Attorney General of the State of Illinois

By: Vanessa C. Horton

VANESSA C. HORTON
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)	
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Complainant,)	
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v.)	PCB No. 11-
)	(Enforcement – Water)
AMERICAN CONSTRUCTION, LLC, an)	
Illinois limited liability company, and)	
REAL ESTATE ELMHURST, LLC, an)	
Illinois limited liability company,)	
)	
Respondents.)	

COMPLAINT

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, complains of Respondents AMERICAN CONSTRUCTION, LLC, and REAL ESTATE ELMHURST, LLC, as follows:

COUNT I
WATER POLLUTION

1. This Count 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).

2. The Illinois EPA is an administrative agency of the State of Illinois, created pursuant to Section 4 of the Act, 415 ILCS 5/4 (2008), and charged, *inter alia*, with the duty of enforcing the Act in proceedings before the Illinois Pollution Control Board (“Board”). The Illinois EPA is further charged with the duty to abate violations of the National Pollutant

Discharge Elimination System (“NPDES”) permit program under the Federal Clean Water Act (“CWA”), 33 U.S.C. § 1342(b)(7).

3. At all times relevant to this Complaint, Respondent, AMERICAN CONSTRUCTION, LLC (“ACL”), was an Illinois limited liability company duly organized and existing under the laws of the State of Illinois.

4. At all times relevant to this Complaint, Respondent, REAL ESTATE ELMHURST, LLC (“REEL”), was an Illinois limited liability company duly organized and existing under the laws of the State of Illinois.

5. At all times relevant to this Complaint, Respondent REEL was the owner of property located at the northeast corner of Route 83 and North Avenue, in Elmhurst, DuPage County, Illinois (“Site”). The Site consisted of approximately 1.75 acres.

6. At all times relevant to the Complaint, Respondent REEL was engaged in the development of a commercial business complex known as “Stone Cottage Shoppes” at the Site. Stone Cottage Shoppes consists of approximately 26,857 square feet of retail space.

7. Upon information and belief, Respondent REEL hired Respondent ACL to construct Stone Cottage Shoppes at the Site. At all times relevant to the Complaint, ACL was the construction contractor responsible for constructing Stone Cottage Shoppes, which comprises two commercial buildings, related parking and an underground storm water detention facility. ACL was also responsible for constructing a sanitary sewer that connects the two commercial buildings to the City of Elmhurst’s Sewage Treatment Plant (“Sanitary Sewer”).

8. On February 8, 2008, the Illinois EPA conducted a stormwater construction inspection at the Site, and observed no erosion control measures around the perimeter of the Site.

9. On March 5, 2008, Illinois EPA conducted a follow-up inspection at the Site and again observed no erosion control measures installed around the perimeter of the Site. At the time of the inspection, a piece of silt fencing had been installed in the middle of the property. The Illinois EPA inspector noted that the silt fencing was not preventing the migration of sediment into storm water, but merely acted as a partition for a building that was being constructed at the Site. During the inspection, the Illinois EPA inspector also observed noticeable solids and sediments being tracked through the construction entrance at the Site and entering the roadway.

10. During the March 5, 2008 inspection, Illinois EPA observed stormwater in a drainage ditch located on the east side of the Site. The drainage ditch exhibited noticeable erosion and was a chocolate brown color. The drainage ditch drained toward a storm sewer located in the southeast corner of the Site.

11. During the March 5, 2008 inspection, Illinois EPA further observed a storm sewer at the Site that was situated at grade with straw bales surrounding it. The Illinois EPA inspector noted that stormwater was able to enter the storm sewer through an unobstructed corner of the bales without first flowing through the bales. At the time of the inspection, erosion control fabric and other control measures were not in place to prevent the migration of sediment into the storm sewer.

12. On April 10, 2008, Illinois EPA conducted a final inspection of the Site. During the inspection, sediment-laden stormwater was discharging from the Site onto the roadway at the west and east boundaries. Additionally, sediment that had eroded from the Site was entering the storm sewer located on North Avenue along the west border, and the drainage ditch located along the east border of the Site.

13. Stormwater from the Site flows into the drainage ditch located on the east side of the Site that ultimately flows to Salt Creek.

14. Section 12(a) of the Act, 415 ILCS 5/12(a) (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.

15. 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.

16. Respondents REEL and ACL are each a “person” as that term is defined in Section 3.315 of the Act, 415 ILCS 5/3.315 (2008).

17. 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.

18. Sediment and stormwater runoff are “contaminants” as that term is defined in Section 3.165 of the Act, 415 ILCS 5/3.165 (2008).

19. 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.

20. 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.

21. The drainage ditch located on the east side of the Site and Salt Creek are each “waters” as that term is defined in Section 3.550 of the Act, 415 ILCS 5/3.550 (2008).

22. By failing to install erosion control measures at the Site, Respondents ACL and REEL caused and/or allowed the discharge of a contaminant, sediment, into the drainage ditch, and sediment-laden stormwater runoff from their activities to enter stormwater sewers.

23. By their actions and omissions, Respondents ACL and REEL caused, threatened or allowed the discharge of a contaminant into the environment so as to cause or tend to cause water pollution in Illinois, in violation of Section 12(a) of the Act, 415 ILCS 5/12(a) (2008).

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board enter an order in favor of Complainant and against Respondents, AMERICAN CONSTRUCTION, LLC and REAL ESTATE ELMHURST, LLC:

1. Authorizing a hearing in this matter at which time Respondents will be required to answer the allegations herein;

2. Finding that Respondents violated Section 12(a) of the Act, 415 ILCS 5/12(a) (2008);
3. Ordering the Respondents to cease and desist from any future violations of Section 12(a) of the Act, 415 ILCS 5/12(a) (2008);
4. Assessing a civil penalty of Fifty Thousand Dollars (\$50,000.00) against the Respondents for each violation of the Act, and an additional civil penalty of Ten Thousand Dollars (\$10,000) for each day of violation;
5. Ordering Respondents to pay all costs, pursuant to Section 42(f) of the Act, 415 ILCS 5/42(f) (2008), including attorney, expert witness, and consultant fees expended by the State in its pursuit of this action; and
6. Granting such other relief as the Board deems appropriate and just.

COUNT II
OFFENSIVE DISCHARGES

1-21. Plaintiff realleges and incorporates by reference herein paragraphs 1 through 21 of Count I as Paragraphs 1 through 21 of this Count II.

22. Section 302.203 of the Board Water Pollution Regulations, 35 Ill. Adm. Code 302.203, provides, in pertinent part, as follows:

Offensive Conditions

Waters of the State shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, color or turbidity of other than natural origin

23. As observed during the Illinois EPA inspection on March 5, 2008, discharge of sediment into the drainage ditch on the east side of the Site caused color of other than natural

origin in the drainage ditch, in violation of Section 302.203 of the Board Water Pollution Regulations.

24. By causing and allowing "offensive conditions" as defined in 35 Ill. Adm. Code 302.203, in violation of Section 302.203 of the Board Water Pollution Regulations, Respondents also thereby violated 12(a) of the Act, 415 ILCS 5/12(a) (2008).

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board enter an order in favor of Complainant and against Respondents, AMERICAN CONSTRUCTION, LLC and REAL ESTATE ELMHURST, LLC:

1. Authorizing a hearing in this matter at which time Respondents will be required to answer the allegations herein;

2. Finding that Respondents violated Section 12(a) of the Act, 415 ILCS 5/12(a) (2008), and Section 302.203 of the Board Water Pollution regulations, 35 Ill. Adm. Code 302.203;

3. Ordering the Respondents to cease and desist from any future violations of Section 12(a) of the Act, 415 ILCS 5/12(a) (2008), and Section 302.203 of the Board Water Pollution regulations, 35 Ill. Adm. Code 302.203;

4. Assessing a civil penalty of Fifty Thousand Dollars (\$50,000.00) against the Respondents for each violation of the Act, and an additional civil penalty of Ten Thousand Dollars (\$10,000) for each day of violation;

5. Ordering Respondents to pay all costs, pursuant to Section 42(f) of the Act, 415 ILCS 5/42(f) (2008), including attorney, expert witness, and consultant fees expended by the State in its pursuit of this action; and

6. Granting such other relief as the Board deems appropriate and just.

COUNT III
FAILURE TO OBTAIN NPDES PERMIT

1-19. Plaintiff realleges and incorporates by reference herein paragraphs 1 through 13, paragraphs 15 through 18, and paragraphs 20 and 21 of Count II, as paragraphs 1 through 19 of this Count III.

20. Section 12(f) of the Act, 415 ILCS 5/12(f) (2008), provides, in pertinent part, 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.

21. The federal Clean Water Act regulates the discharge of pollutants from a point source into navigable waters and prohibits such point source discharges without an NPDES permit. The United States Environmental Protection Agency ("USEPA") administers the NPDES program in each State unless the USEPA has delegated authority to do so to that State.

22. The USEPA has authorized the State of Illinois to issue NPDES permits through the Illinois EPA in compliance with federal regulations, including stormwater discharges regulated by 40 CFR 122.26, which requires a person to obtain an NPDES permit and to

implement a stormwater pollution prevention plan for construction activity including clearing, grading and excavation.

23. In pertinent part, 40 CFR 122.26(a) provides as follows:

(a) Permit requirement.

* * *

(9)(i) On and after October 1, 1994, for discharges composed entirely of storm water, that are not required by paragraph (a)(1) of this section to obtain a permit, operators shall be required to obtain a NPDES permit only if:

* * *

(B) The discharge is a storm water discharge associated with small construction activity pursuant to paragraph (b)(15) of this section;

24. In pertinent part, 40 CFR 122.26(b) provides as follows:

(b) Definitions.

* * *

15) Storm water discharge associated with small construction activity means the discharge of storm water from:

i) Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres. . . .

25. Section 309.102(a) of the Board Water Pollution Regulations, 35 Ill. Adm. Code 309.102(a), provides as follows:

NPDES Permit Required

- (a) Except as in compliance with the provisions of the Act, Board regulations, and the CWA, and the provisions and conditions of the NPDES permit issued to the discharger, the discharge of any contaminant or pollutant by any person into the waters of the State from a point source or into a well shall be unlawful.

26. Section 301.240 of the Illinois Pollution Control Board ("Board") Water Pollution Regulations, 35 Ill. Adm. Code 301.240, provides the following definition:

"CWA" means the Federal Water Pollution Control Act, as amended, (33 U.S.C. 1251 et seq., Public Law 92-500 enacted by Congress October 18, 1972 as amended by the "Clean Water Act", Public Law 95-217, enacted December 12, 1977, as amended.)

27. Upon information and belief, in October 2007, on dates better known to Respondents, construction activities were commenced at the Site which included excavating and grading, without having first obtained an NPDES stormwater general permit.

28. On March 12, 2008, Illinois EPA issued a Notice of Coverage, determining that Stone Cottage Shoppes' construction activities at the Site were covered by General NPDES Permit No. ILR10J506 for Storm Water Discharges from Construction Site Activities at the Site.

29. From at least February 8, 2008 to at least March 12, 2008, on dates better known to Respondents, Respondents REEL and ACL did not have an NPDES permit allowing the discharge of stormwater associated with their construction activities at the Site.

30. By causing or allowing over one acre and less than five acres of land at the Site to be disturbed without first obtaining coverage under the NPDES storm water general permit for construction site activities prior to initiating such activities at the Site, Respondents REEL and ACL violated Section 12(f) of the Act, 415 ILCS 5/12(f) (2008), and Section 309.102(a) of the

Board Water Pollution Regulations, 35 Ill. Adm. Code 309.102(a).

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board enter an order in favor of Complainant and against Respondents, AMERICAN CONSTRUCTION, LLC and REAL ESTATE ELMHURST, LLC:

1. Authorizing a hearing in this matter at which time Respondents will be required to answer the allegations herein;
2. Finding that Respondents violated Section 12(f) of the Act, 415 ILCS 5/12(f) (2008), and 35 Ill. Adm. Code 309.102(a);
3. Ordering the Respondents to cease and desist from any future violations of Section 12(f) of the Act, 415 ILCS 5/12(f) (2008), and 35 Ill. Adm. Code 309.102(a);
4. Assessing a civil penalty of Ten Thousand Dollars (\$10,000.00) for each day during which each violation of the Act and any NPDES program-related regulation of the Board continued;
5. Ordering Respondents to pay all costs, pursuant to Section 42(f) of the Act, 415 ILCS 5/42(f) (2008), including attorney, expert witness, and consultant fees expended by the State in its pursuit of this action; and
6. Granting such other relief as the Board deems appropriate and just.

COUNT IV
FAILURE TO OBTAIN SANITARY SEWER PERMIT

1-20. Plaintiff realleges and incorporates by reference herein paragraphs 1 through 13 and paragraphs 15 through 21 of Count I, as paragraphs 1 through 20 of this Count IV.

21. On or about August 29, 2007, Respondents commenced construction of the Sanitary Sewer at the Site.

22. On April 9, 2008, Illinois EPA issued Sanitary Sewer Permit No. 2008-HB-0276 ("Sanitary Sewer Permit") to Respondents for the construction and operation of the Sanitary Sewer. The Sanitary Sewer Permit was issued subsequent to the date of completion of installation of the Sanitary Sewer.

23. The Sanitary Sewer is equipment or a facility that is capable of causing or contributing to water pollution.

24. Section 12(b) of the Act, 415 ILCS 5/12(b) (2008), provides, in pertinent part, as follows:

No person shall:

- (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.

25. Section 309.202(a) of the Board Water Pollution Regulations, 35 Ill. Adm. Code 309.202(a), provides as follows:

Except for treatment works or wastewater sources which have or will have discharges for which NPDES Permits are required, and for which NPDES Permits have been issued by the Agency:

- a) No person shall cause or allow the construction of any new treatment works, sewer or wastewater source or cause or allow the modification of any existing treatment works, sewer or wastewater source without a construction permit issued by the Agency, except as provided in paragraph (b).

26. Section 301.265 of the Board Water Pollution Regulations, 35 Ill. Adm. Code

309.265, provides as follows:

"Construction" means commencement of on-site fabrication, erection, or installation of a treatment works, sewer, or wastewater source; or the reinstallation at a new site of any existing treatment works, sewer, or wastewater source.

27. Section 301.375 of the Board Water Pollution Regulations, 35 Ill. Adm. Code

309.375, provides as follows:

"Sanitary Sewer" means a sewer that carries wastewater together with incidental land runoff.

28. Section 301.390 of the Board Water Pollution Regulations, 35 Ill. Adm. Code

309.390, provides as follows:

"Sewer" means a stationary means of transport or stationary system of transport, excluding natural waterways, constructed and operated for the purpose of collecting and transporting wastewater or land runoff, or both.

29. Respondents' installation of the Sanitary Sewer constitutes "construction" as that term is defined in Section 301.265 of the Board Water Pollution Regulations, 35 Ill. Adm. Code 301.265.

30. The Sanitary Sewer is a stationary system of collecting and transporting wastewater and land runoff, and is therefore a "sewer" as that term is defined in Section 301.390 of the Board Water Pollution Regulations, 35 Ill. Adm. Code 309.390.

31. By commencing and completing construction the Sanitary Sewer without a permit from the Illinois EPA, the Respondents violated Section 12(b) of the Act, 415 ILCS 5/12(b) (2008), and Section 309.202(a) of the Board Water Pollution Regulations, 35 Ill. Adm. Code 309.202(a).

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board enter an order in favor of Complainant and against Respondents, AMERICAN CONSTRUCTION, LLC and REAL ESTATE ELMHURST, LLC:

1. Authorizing a hearing in this matter at which time Respondents will be required to answer the allegations herein;
2. Finding that Respondents violated Section 12(b) of the Act, 415 ILCS 5/12(b) (2008) and Section 309.202(a) of the Board Water Pollution Regulations, 35 Ill. Adm. Code 309.202(a);
3. Ordering the Respondents to cease and desist from any future violations of Section 12(b) of the Act, 415 ILCS 5/12(b) (2008) and Section 309.202(a) of the Board Water Pollution Regulations, 35 Ill. Adm. Code 309.202(a);
4. Assessing a civil penalty of Fifty Thousand Dollars (\$50,000.00) against the Respondent for each violation of the Act, and an additional civil penalty of Ten Thousand Dollars (\$10,000) for each day of violation;
5. Ordering Respondents to pay all costs, pursuant to Section 42(f) of the Act, 415 ILCS 5/42(f) (2008), including attorney, expert witness, and consultant fees expended by the State in its pursuit of this action; and

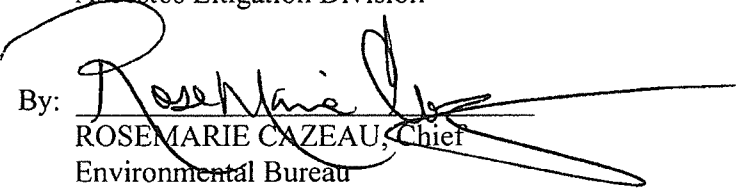
6. Granting such other relief as the Board deems appropriate and just.

PEOPLE OF THE STATE OF ILLINOIS,

LISA MADIGAN,
Attorney General
of the State of Illinois,

MATTHEW J. DUNN, Chief
Environmental Enforcement/
Asbestos Litigation Division

By:



ROSEMARIE CAZEAU, Chief
Environmental Bureau
Assistant Attorney General

Of Counsel

VANESSA C. HORTON
Assistant Attorney General
Environmental Bureau
Office of Illinois Attorney General
69 W. Washington Street, 18th Floor
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(312) 814-0608

CERTIFICATE OF SERVICE

I, VANESSA C. HORTON, an Assistant Attorney General, do certify that I caused to be mailed this 9th day of August, 2010, the foregoing Complaint and Notice of Filing upon the person listed on said notice, by certified mail.



VANESSA C. HORTON
Assistant Attorney General
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Chicago, IL 60602
312-814-0608