BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, Complainant,	)	
v.	)	PCB No. 10 - 108 (Enforcement - Water)
WILLIAM CHARLES REAL ESTATE INVESTMENT, L.L.C., an Illinois limited liability company, Respondent.	)	

NOTICE OF FILING

To: See Attached Service List.
(VIA ELECTRONIC FILING)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the Complainant's MOTION TO STRIKE AND DISMISS RESPONDENT'S AFFIRMATIVE DEFENSE, a copy of which is herewith served upon you.

Respectfully submitted,

Nancy J. Tikalsky
Assistant Attorney General

Office of the Illinois Attorney General
Environmental Bureau
69 West Washington Street, Suite 1800
Chicago, Illinois 60602
(312) 814-8567

Date: November 12, 2010

THIS FILING IS SUBMITTED ON RECYCLED PAPER

SERVICE LIST

Charles F. Helsten
Hinshaw & Culbertson LLP
100 Park Avenue
P.O. Box 1389
Rockford, Illinois 61105-1389

Chuck Gunnarson
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
100 W. Randolph Street, Suite 11-500
Chicago, Illinois 60601

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, Complainant, v. WILLIAM CHARLES REAL ESTATE INVESTMENT, L.L.C., an Illinois limited liability company, Respondent.	)	PCB No. 10 – 108 (Enforcement – Water)

MOTION TO STRIKE AND DISMISS RESPONDENT'S AFFIRMATIVE DEFENSE

Now comes Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, pursuant to Section 101.506 of the Illinois Pollution Control Board's Procedural Regulations and Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615 (2010), for an order striking Respondent WILLIAM CHARLES REAL ESTATE INVESTMENT, L.L.C.'s Affirmative Defense to the Complaint, and states as follows:

I. INTRODUCTION

On June 24, 2010, Complainant, People of the State of Illinois ("Complainant" or "State"), filed a three-count Complaint against William Charles Real Estate Investment, LLC ("William Charles" or "Respondent") alleging violations of the Illinois Environmental Protection Act, 415 ILCS 5/1 *et seq.* ("Act") and the Illinois Pollution Control Board's ("Board") regulations thereunder ("Complaint").

On August 23, 2010, William Charles filed its Answer and Affirmative Defenses to the Complaint ("Answer").

On September 17, 2010, Complainant filed a Motion to Strike Respondent's Affirmative Defenses ("Motion to Strike Affirmative Defenses").

On October 15, 2010, Respondent filed its Response to Complainant's Motion to Strike Affirmative Defenses, wherein Respondent withdrew its Affirmative Defenses filed on August 23, 2010.

On October 15, 2010, Respondent filed an Amended Answer and Affirmative Defense.

II. LEGAL STANDARD FOR AFFIRMATIVE DEFENSES

An affirmative defense is "*A Defendant's assertion raising new facts and arguments that, if true will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true.*" BLACK'S LAW DICTIONARY (7th edition, 1999). Under Illinois case law, the test for whether a defense is affirmative and must be pled by the Defendant is whether the defense gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated. *Condon v. American Telephone and Telegraph Company, Inc.*, 210 Ill.App.3d 701, 709, 569 N.E.2d 518, 523 (2nd Dist. 1991); *Vroegh v. J & M Forklift*, 165 Ill.2d 523, 530, 651 N.E.2d 121, 126 (1995). Accordingly, an affirmative defense confesses or admits the cause of action alleged by the Plaintiff, and then seeks to avoid it by asserting new matter not contained in the complaint and answer. *Worner Agency, Inc. v. Doyle*, 121 Ill. App.3d 219, 222, 459 N.E.2d 633, 635-636 (4th Dist. 1984); see also *People v. Community Landfill Co.*, PCB 97-193, slip op. at 3 (Aug. 6, 1998).

An affirmative defense must do more than offer evidence to refute properly pleaded facts in a complaint. *Prysweller v. Cohen*, 282 Ill.App.3d 89, 668 N.E.2d 1144, 1149 (1st Dist. 1996), *appeal denied*, 169 Ill.2d 588 (1996); *Heller Equity Capital Corp. v. Clem Environmental Corp.*, 272 Ill. App. 3d 173, 178, 596 N.E.2d 1275, 1280 (1st Dist. 1993); *People v. Wood River Refining*

Company, PCB 99-120 at 6 (August 8, 2002); *Farmer's State Bank v. Phillips Petroleum Co.*, PCB 97-100, slip op. at 2 n.1 (January 23, 1997) (affirmative defense does not attack truth of claim, but the right to bring a claim).

The facts establishing an affirmative defense must be pled with the same degree of specificity required by a plaintiff to establish a cause of action. *International Insurance Co. v. Sargent & Lundy*, 242 Ill.App.3d 614, 630, 609 N.E.2d 842, 853 (1st Dist. 1993) ; *Community Landfill Co.* at 4. Thus, the issue raised by an affirmative defense must be one outside of the four corners of the complaint. The Board rule regarding affirmative defenses provides, in pertinent part, that:

> Any 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 addition, Section 2-613(d) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-613(d) (2010), is instructive, providing that "[t]he facts constituting any affirmative defense...must be plainly set forth in the answer or reply."

Affirmative defenses that concern factors in mitigation are not an appropriate affirmative defense to a claim that a violation has occurred. *People v. Texaco Refining and Marketing, Inc.* PCB 02-3, slip op. at 5 (Nov. 6, 2003)(citing *People v. Geon Co., Inc.*, PCB 97-62 (Oct. 2, 1997) and *People v. Midwest Grain Products of Illinois, Inc.*, PCB 97-179 (Aug. 21, 1997)).

III. RESPONDENT'S AFFIRMATIVE DEFENSE IS FACTUALLY AND LEGALLY INSUFFICIENT

1. Respondent's Act of God Defense is Legally Insufficient

Respondent's Affirmative Defense argues that a rain and flood event, (*i.e.*, act of God), in August 2007 for which it did not have control, caused the discharge of pollutants from the subject property of State's Complaint ("Site") and it should, therefore, relieve them of liability against Complainant's Section 12 water pollution claims. Respondent's 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 and are therefore liable.

Respondent's 'act of God' affirmative defense has been previously determined by Illinois courts. 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, 415 ILCS 5/12 (2010). *See Perkinson v. Illinois Pollution Control Board*, 187 Ill. App. 3d 689, 543 N.E.2d 901, 904 (3rd Dist. 1989) (citing *Freeman Coal Mining Corp. v. Illinois Pollution Control Board* 21 Ill. App. 3d 157, 313 N.E.2d 616, 621 (5th Dist. 1974)). "The 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." *People v. A.J. Davinroy Contractors*, 249 Ill.App.3d 788, 793, 618 N.E.2d 1283, 1286 (5th Dist. 1993) (*quoting People v. Fiorini* 143 Ill.2d 318, 346, 547 N.E.2d 612, 623 (1991) (*emphasis added*)).

The *Freeman* Court ruled it was no defense that the discharges were accidental or unintentional or that they were the result of an "Act of God" beyond the Respondent's control. *Freeman*, 21 Ill. App. 3d at 163. The fact that the pollution discharged and the land from which the pollution discharged was within Respondent's control was sufficient proof that the

Respondent allowed the discharge within the meaning of the Act. *Id.* The *Perkinson* court held Respondent was liable where it found Respondent failed to show it had taken action to prevent 3rd party vandals from causing pollution on land over which Respondent exercised control. *See Perkinson* at 693 – 695.

Here, the Respondent William Charles admits in its Amended Answer that William Charles was issued a National Pollution Discharge Elimination System permit ("NPDES permit") for construction activities at the Site where the State's Complaint alleges pollutants discharged into the waters of the State for over a 2 year period. In applying *Fiorini*, the William Charles exercised control of the Site and therefore, control of the pollutant soil that discharged from the Site into waters of the State. *See Fiorini* 143 Ill.2d at 346. Even if William Charles 'act of God' rain event and its lack of control of said 'act of God' rain event is true, it is not capable of defeating the State's cause of action because the Illinois courts have made it clear that it is the control of the source of the pollution, not an uncontrollable third party or an 'act of God' that determines Respondent's liability.

Moreover, William Charles control of the Site and failure to undertake extensive precautions to prevent pollution from discharging from the Site into the waters of the State meets the Illinois courts analysis of the concept of 'control' of the pollution source. The Illinois courts have addressed the concept of 'control' of the pollution source required to determine a violation of water pollution as set out in Section 12(a) of the Act, 415 ILCS 12(a) (2010). In *Davinroy*, the court discussed the level of control required to determine a violation of Section 12(a) of the Act by analyzing facts to show that the Defendant had the capability to control the source of the pollutants or had undertaken extensive precautions to prevent the pollution. *See A.J. Davinroy Contractors*, 249 Ill.App.3d 788, 793-794 (comparing prior Illinois court analyses of

control of pollutants in *Perkinson*, 187 Ill. App. 3d 689, and *Phillips Petroleum Co. v. IEPA*, 72 Ill.App.3d 217, 390 N.E.2d 620 (1979))(emphasis added). The court in *Davinroy* held that the Defendant was liable for violation of the water pollution as set out in Section 12(a) of the Act, 415 ILCS 12 (a) (2010). Id at 794. The *Davinroy* court reasoned that the Defendant, who was responsible for the operation and maintenance of the existing pumps that broke down at the time and place where the pollution events occurred, had the capability to control the source of the pollution and failed to undertake any precautions to prevent the pollution. *Id.* In contrast, the *Phillips Petroleum* court held that Defendant was not liable where it did not have control of the tank car it owned that was traveling on a railroad, which was under the control of a separate defendant. *See Phillips Petroleum Co.* at 220-221.

There is nothing in the *Phillips* decision that discusses a Defendant's inability to control an 'act of God' or the source of pollutants as is the present case. *Id.* Yet, like *Davinroy*, William Charles clearly had control of the offending pollutant as alleged in the State's Complaint. *A.J. Davinroy Contractors*, 249 Ill.App.3d 788, 793-794. The State alleges at least six inspections of the Site by the Illinois EPA more than a 2 year period performed on August 21, 2007, August 23, 2007, November 3, 2007, June 11, 2008, May 18, 2009 and October 21, 2009 where the Illinois EPA observed conditions that allowed pollutants to discharge from the Site into the waters of the State. A one-time 'act of God' rain event in August 2007 could not have plausibly caused pollutants to leave the Site on an ongoing basis for over 2 years causing water pollution as alleged in the State's Complaint. Furthermore, as in *Davinroy*, the Respondent's 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. *Id.*

In argument, the William Charles cites *Davinroy*, 249 Ill.App.3d at 793 (citing *Phillips Petroleum Co.* 72 Ill.App.3d 217), in support of its position without explaining how either of the cited cases support William Charles' claim that it is not liable because it does not have any control of an 'act of God'. Yet, as previously shown herein, *Davinroy* defines 'control' as a capability to control the source of the pollution and to undertake any precautions to prevent the pollution, not a lack of control of an 'act of God'. *Id.* Accordingly, the Respondent's argument misconstrues the Illinois courts application of 'control' as it applies to the Acts water pollution violations.

Respondent's 'act of God' affirmative defense does not defend and is insufficient to pass as an affirmative defense. Accordingly, Respondent's Affirmative Defense is legally insufficient and should be stricken.

2. Respondent's Act of God Defense is Factually Insufficient

Respondent's Affirmative Defense pleads no exculpatory facts whatsoever. Instead, this 'affirmative defense' makes a statement about a 24-hour 250- or 500-year rain and flood event in August 2007 for violations that have continued for more than a 2 year period. Since Respondent fails to state a set of facts that would allow its 'act of God' defense to defeat Plaintiff's water pollution claims that have continued for more than 2 years, it should be dismissed with prejudice.

Facts establishing an affirmative defense must be pled with the same degree of specificity required by plaintiff to establish a cause of action. *Int'l Ins. Co.* 609 N.E. 2d at 853. Dismissal for failure to state a cause of action is appropriate only when no set of facts can be proven under the pleadings that will entitle the pleader to recovery. *Douglas Theater Corp. v. Chicago Title & Trust*

Co., 288 Ill. App. 3d 880, 681 N.E.2d 564, 566 (1st Dist. 1997). In order for the defense to stand it must include factual allegations that can be proven under the pleadings by which the Respondent may avoid the legal effect of Complainant's water pollution claims. *Id.* As with a Section 2-615 motion, a dismissal based on certain defects or defenses is proper if no set of facts may be proven by which

the pleader can recover. *Griffin v. Fluellen*, 283 Ill. App. 3d 1078, 670 N.E.2d 845, 849 (1st Dist. 1996).

Here, Respondent William Charles argues it experienced a 24-hour, 250- or 500-year rain and flood event (*i.e.*, an act of God) in August 2007, over which it had no control. Respondent does not provide specific facts explaining how a onetime rain and flood event obviates liability which has continued for more than 2 years. Respondent also fails to show how the rain event as a result of an 'act of God' contributed to or caused stormwater to discharge from Respondent's Site for more than 2 years by overcoming the necessary preventative measures required by its NPDES permit, including, for example, proper soil stabilization and a detention pond. Alternatively, Respondent fails to provide facts showing that Respondent only discharged during a supposed 250- to 500-year, 24-hour rain and flood event. Therefore, Respondent has not provided a specificity of facts to avoid the State's claim that Respondent caused, and allowed water pollution as defined by the Act.

Respondent's 'act of God' affirmative defense is factually insufficient to prove that it is entitled to recovery and should be dismissed with prejudice.

IV. CONCLUSION

Because the Respondent has not provided requisite factual support for their act of God affirmative defense, and Illinois law holds that an "act of God" defense is unavailable against liability for water pollution violations, Respondent's 'act of God' affirmative defense is not capable of defeating Plaintiff's cause of action and, therefore, should be stricken as legally insufficient and dismissed as factually insufficient.

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that this court enter an order striking and dismissing Respondent's, WILLIAM CHARLES REAL ESTATE INVESTMENT, L.L.C., Affirmative Defense, with prejudice.

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

By: _____
NANCY J. TIKALSKY
Assistant Attorneys General
Environmental Bureau
69 W. Washington St., Suite 1800
Chicago, Illinois 60602
(312)814-8567

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, Complainant, v. WILLIAM CHARLES REAL ESTATE INVESTMENT, L.L.C., an Illinois limited liability company, Respondent.	)	PCB No. 10 - 108 (Enforcement - Water)

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on November 12, 2010, I served true and correct copies of Complainant's MOTION TO STRIKE AND DISMISS RESPONDENT'S AFFIRMATIVE DEFENSE, upon the persons and by the methods as follows:

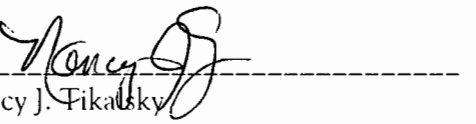
[First Class U.S. Mail]

Charles F. Helsten
Hinshaw & Culbertson LLP
100 Park Avenue
P.O. Box 1389
Rockford, Illinois 61105-1389

Chuck Gunnarson
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

[Personal Delivery]

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
100 W. Randolph Street, Suite 11-500
Chicago, Illinois 60601



Nancy J. Tikalsky
Assistant Attorney General
Office of the Illinois Attorney General
Environmental Bureau
69 West Washington Street, Suite 1800
Chicago, IL 60602
(312) 814-8567

Date: November 12, 2010