BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

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Please take notice that on November 30, 2010, the undersigned electronically filed the Respondent's:

RESPONSE BRIEF IN OPPOSITION TO STATE'S MOTION TO STRIKE AFFIRMATIVE DEFENSE

with the Illinois Pollution Control Board, 100 West Randolph Street, Chicago, Illinois 60601.

Dated: November 30, 2010

Respectfully submitted,

On behalf of the Respondent, William Charles Real Estate Investment, LLC

/s/ Charles F. Helsten
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RESPONSE IN OPPOSITION TO STATE'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

NOW COMES Respondent WILLIAM CHARLES REAL ESTATE INVESTMENT, LLC, and for its Response Brief in Opposition to the State's Motion to Strike Affirmative Defense, states as follows:

INTRODUCTION

The U.S. Geological Survey has observed that during the summer of 2007, the area in which the subject Site is located was hit by a series of record-setting storms that caused catastrophic flooding.:

> Record rainfall occurred August 17–23, 2007, causing severe floods in parts of the Upper Mississippi River Valley and killing 14 people. Widespread, slow-moving thunderstorms developed and redeveloped along a stationary front, stretching from northern Iowa through northern Illinois, while the low-level jet stream transported warm, moist air from the remnants of Tropical Storm Erin into southern Minnesota and southern Wisconsin (National Weather Service, 2007a). **The rain broke drought conditions in parts of Minnesota and Wisconsin, but fell on saturated ground in Iowa and Illinois**.
>
> The greatest rainfall occurred in southeast Minnesota and southwest Wisconsin. Many locations exceeded the 100-year recurrence interval for 24-hour rainfall (6–7 inches) and 100-year 5-day rainfall (9–10 inches) (Huff and Angel, 1992). Record amounts of rainfall for August were recorded, including 15.18 inches in Madison, Wisconsin (National Weather Service, 2007b).
>
> ***

> **In northern Illinois and the Chicago area, flooding occurred on the Kishwaukee River**, Fox River tributaries, the Skokie River, and the Little Calumet River tributaries. **Additional precipitation on August 23 caused flooding at the 100-year recurrence interval on the South Branch Kishwaukee River**, Tyler Creek, and Deer Creek near Chicago Heights. Streamflows in larger rivers, including the DuPage and Fox, reached or exceeded recurrence intervals of 25–50 years.

http://mn.water.usgs.gov/flood/pdf/recordrain2007.pdf (emphasis added).

Two weeks before the storms described above struck the area, Winnebago County had already been so devastated by flooding that it was declared a disaster area. (www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=2&RecNum=6122). The 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, beginning in January and continuing through June, causing an estimated $1.3 billion in agricultural losses. http://www.isws.illinois.edu/atmos/statecli/2008/Flood2008/flood.htm. This disastrous turn of events that included storm upon storm, record-breaking floods, and catastrophic property damage, caused the stormwater runoff of which the State complains in this enforcement action.

The Purpose of the Environmental Protection Act

The General Assembly declared its purpose in creating the Environmental Protection Act (the "Act") to be the creation of laws designed to "restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and *borne by those who cause them*." 415 ILCS 5/4(b) (emphasis added). To prevail in an action that asserts a Respondent has violated the Act, the State 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." *People v. A.J. Davinroy Contractors*, 249 Ill.App.3d 788, 793, 618 N.E.2d 1282, 1286, 188 Ill.Dec. 712, 716 (5th Dist. 1993), citing *Phillips Petroleum Co. v. Illinois Environmental Protection Agency*, 72 Ill.App.3d 217, 390 N.E.2d 620, 28 Ill.Dec. 453

(1979). As noted above, and as discussed in more detail below, the Respondent is entitled to assert the "Act of God" defense because Respondent did not have the capability to prevent the runoff which is the basis of the State's Complaint.

ARGUMENT

The "Act of God" is a Valid Affirmative Defense to Alleged Environmental Violations

Illinois courts, both State and Federal, have held that the Environmental Protection Act is not a strict liability statute. *See U.S. v. A & F Materials Co., Inc.*, 578 F.Supp. 1249, 1260 (C.D. Ill. 1984); *Phillips Petroleum*, 72 Ill.App.3d at 220. 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. *Phillips Petroleum Co.*, 72 Ill.App.3d at 220.

In the instant action, the State has asked the Board to strike the Respondent's "Act of God" defense, asserting that the "Act of God" defense is never available in a case alleging water pollution. (State's brief at 4). Under the State's theory, then, even when a tornado transports material from one location to another, the State can successfully prosecute the owner of the originating site. Similarly, under the State's theory, if an earthquake causes a discharge, prosecution is just as appropriate. This position ignores reality, directly conflicts with the General Assembly's purpose in enacting the Act, and disregards the source of the Agency's authority.

The State's authority to prosecute the violations alleged here arises from its delegated authority as the enforcer of federal water pollution laws. So, for example, it has authority to enforce the National Pollutant Discharge Elimination System (NPDES) program, which arises under the Clean Water Act. (Complaint at ¶5). But the Clean Water Act itself 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." *See, e.g.,* 33 U.S.C. §§ 1321(f)(1), (f)(2), (f)(3), (g), (i).

Similarly, the Oil Pollution Act of 1990 also excludes from liability a discharge of oil which is caused by an "Act of God." 33 U.S.C. § 2703(a)(1). The same is true under the Marine Sanctuaries Act, where there is no liability for damages to a marine sanctuary resource if the injury is caused by an "Act of God." 16 U.S.C.§ 1443. The same is true under CERCLA, which also excludes liability if a release or threat of release and resulting damages are caused by an "Act of God." 42 U.S.C. § 9607(b)(1). In the same way, the Illinois Environmental Protection Act provides that the State cannot prosecute a release or threatened release of a hazardous substance and resulting damages if the release is due to an "Act of God." 415 ILCS 22.2(j)(1)(A). The Illinois Administrative Code also contains provisions which recognize that a discharge caused by a freak storm event (*i.e.* an "Act of God") cannot be prosecuted as a violation of State law. *See, e.g.,* 35 Ill.Adm.Code 502.102 (providing that with respect to a stormwater discharge due to flooding, "no animal feeding operation shall require a [NPDES] permit if it discharges only in the event of a 25-year 24-hour storm event").

The legislature has expressly provided that any regulations issued as part of the State's implementation of the NPDES permit program "shall be consistent with the applicable provisions of such federal Act and regulations pursuant thereto, and otherwise shall be consistent with all other provisions of this Act." 415 ILCS 5/13(b)(1).

Inasmuch as the Clean Water Act expressly provides an "Act of God" defense, and both the Illinois Environmental Protection Act and the Illinois Administrative Code, in multiple places, recognize that discharges or releases resulting from an "Act of God" are not prosecutable offenses, the State's claim that there is no "Act of God" defense is incorrect, and its request to strike the Respondent's affirmative defense should therefore be denied.

Respondent Had No Control Over the Discharge

The State seeks to bolster its position by asserting that the Respondent was in control of the discharge alleged here because "the pollution discharged[1] and the land from which the pollution discharged was within Respondent's control." (Response at 4). This completely disregards the cause of the stormwater runoff: catastrophic flooding that devastated the entire region, something which was clearly not within the Respondent's control, just as a tornado or an earthquake is not within the control of the owner of property through which it passes.

In support of its claim that the Respondent "controlled" the stormwater runoff in this case, the State points to *Freeman Coal Mining Corp. v. IPCB*, 21 Ill.App.3d 157 (5th Dist. 1974), a case decided 35 years ago, at a time when the Illinois Environmental Protection Act was a new law, and its reaches were being tested by defendants. The defendant mining company in *Freeman Coal* had created and maintained an enormous sludge pile that was 70 feet high, and occupied 70 acres of land, and for years, its vast sludge pile leached toxic pollutants every time it rained. *Id.* Over 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.* The court rejected the mining company's argument that it could not be found liable for the destruction from the toxins because they were caused by rain. The *Freeman* court pointed out that there was "no question that Petitioner had knowledge of the pollutional discharges flowing from its land and the gob pile it had created." *Id.* The *Freeman* court noted that the parties had, in fact, stipulated that the pile caused continuous water pollution from toxic leaching every time it rained, therefore the court concluded that it was a "legitimate exercise of [the State's] police power" for the State to prohibit the company from continuing to maintain that pile. *Id.* at 162-163. In other words, the

[1] By "pollution" the State refers to stormwater runoff that allegedly contained soil or sediment.

defendant's liability in *Freeman Coal* resulted from the fact that the defendant admitted it maintained a toxic waste pile that was killing wildlife and destroying nearby farmland. *Id.*

The situation here is a far cry from *Freeman Coal*, given that this case involves no toxins, and the State issued only a single violation notice, almost six months after an inspector reportedly observed that silt fencing had been washed out during a period of catastrophic storms and flooding.

Even accepting as true the State's claim that its inspectors observed stormwater runoff in 2007 (when the area was declared a disaster area due to flooding), the Complaint plainly shows that the State felt there was no reason to issue a Violation Notice until December 2008.

The State's Misrepresentations of Fact

Notably, the State misleads the Board by claiming that "the Complaint alleged pollutants discharged into the waters of the State for over a 2 year period." (Response at 5). The State repeats this erroneous claim again on page 6 of its brief, representing that "The State alleges at least six inspections of the Site by the Illinois EPA …where the Illinois EPA observed conditions that allowed pollutants to discharge from the Site into the waters of the State." The Complaint makes no such allegations.

Rather, the Complaint alleges that on August 14, 2007, a nearby resident complained of flooding in his basement. (Complaint at ¶¶ 8, 9). (Notably, this event occurred at about the time the region was declared a disaster area due to flooding.) But this resident's basement is not a water of the State. The Complaint further alleges that on August 21, 2007, an inspector observed matted down grass at the Site, and that the "entire Site appeared to be sand, gravel and some clay." (Complaint at ¶12). Again, there is no allegation of a discharge into waters of the State during this inspection. The Complaint further alleges that on August 23, 2007, IEPA inspected the Site once more "after a heavy rain event," and observed stormwater flowing over a silt fence

at the northeast corner of the Site." (Complaint at ¶13). This inspection at least acknowledges the reality of the serious storms plaguing the area at the time, but again, it makes no report of any discharge into a water of the State.

At paragraph 14, the Complaint alleges a November 2007 inspection which showed that silt fencing was in good condition, a detention basin had been constructed and seeded, and that the basin's discharge riser and overflow section were reinforced. Once again, there is no allegation of a discharge into a water of the State. The Complaint next alleges that the following spring, in May 2008, IEPA was provided with photographs by a resident that purportedly showed "sediment laden stormwater leaving the Site ***following heavy rains*** in April 2008." (Complaint at ¶15)(emphasis added). Again, there is no allegation of a discharge into a water of the State. In June and July 2008, according to the Complaint,[2] some of the silt fencing at the Site was observed to have been washed out, sediment was allegedly observed to have traveled offsite, and there were areas which, although seeded, had not yet sprouted vegetation.[3] (Complaint at ¶17). Once again, there is no allegation that any inspector observed a discharge into a water of the State.

In short, the Complaint makes no allegations whatsoever that any discharge was ever observed by anyone to have entered any water of the State. Accordingly, the State's representation to this Board that "the State's Complaint alleges pollutants discharged into the waters of the State for over a 2 year period" is plainly false.

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[2] Again, this incident occurred in the very midst of historic and catastrophic flooding, in an area ultimately designated a federal natural disaster area. www.fema.gov/news/dfrn.fema?id=10913; www.fema.gov/news/dfrn.fema?id=10733; www.fema.gov/news/dfrn.fema?id=10817.

[3] The fact that the seed had not sprouted is unsurprising, given the continuing onslaught of torrential rains during the spring and early summer of 2008.

Respondent's Affirmative Defense Provides Sufficient Factual Support

The State alleges that Respondent's Affirmative Defense "pleads no exculpatory facts whatsoever." Apparently the State failed to read Respondent's Affirmative Defense, which begins as follows:

> 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 Defendant had no control or right of control.

These facts are set forth in support of the Affirmative Defense asserted. Although the State claims that the Respondent's Act of God defense is not sufficient because it does not address "violations that have continued for more than a 2 year period," the Complaint does not allege violations, or discharges into a water of the State, over a 2-year period.

The IEPA issued only a single Violation Notice, in December 2008, and that Violation Notice referred to a single alleged violation in June 2008. No other inspection of the Site ever resulted in a Violation Notice, and even after the June 11, 2008 inspection, the State waited almost six (6) months to issue the Violation Notice.

In addition, although the State claims that Respondent failed to undertake precautions to prevent pollution from allegedly discharging into waters of the State, even the Complaint itself memorializes that inspectors observed in November 2008 that "a detention basin had been constructed and seeded, and the vegetative cover was started," although the cover was thin. Notably, the fact that the vegetation was thin in November is not particularly remarkable, given the time of year. Moreover, the fact that silt fencing at the Site was repeatedly erected and

repeatedly knocked over during the severe storms and catastrophic flooding in 2007 and 2008 hardly supports the claim that the Respondent failed to take any precautions.

The Complaint itself memorializes the construction of berms and a detention basin, the erection of silt fencing, and the attempts to grow vegetative cover. This contradicts the State's claim that the Respondent took no precautions to prevent a discharge, and instead shows that the Respondent repeatedly took actions designed to try and control the fallout from the continuous onslaught of storms and flooding. Like other property owners throughout the region, however, the Respondent was unable to fully avert the catastrophe nature sent its way. It is accordingly entitled to assert the "Act of God" defense.

WHEREFORE, Respondent respectfully requests that this Court deny the State's Motion to Strike Affirmative Defense and grant such other relief as this Court deems just and necessary.

Dated: November 30, 2010

Respectfully submitted,

On behalf of WILLIAM CHARLES REAL ESTATE INVESTMENT, LLC

/s/ Charles F. Helsten
One of Its Attorneys

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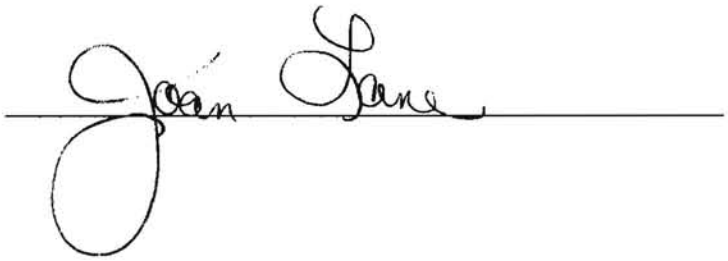
AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on November 30, 2010, she caused to be served a copy of the foregoing upon:

Jennifer A. Van Wie Nancy Tikalsky Asst. Attorney General Environmental Bureau 69 West Washington Street, Suite 1800 Chicago, IL 60602	Charles Gunnarson Division of Legal Counsel Illinois Environmental Protection Agency 1021 North Grand Avenue East P.O. Box 19276 Springfield, Illinois 62794-9276

by depositing a copy thereof, enclosed in an envelope in the United States Mail at Rockford, Illinois, proper postage prepaid, before the hour of 5:00 p.m., addressed as above.



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