

Electronic Filing - Received, Clerk's Office, January 24, 2011

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ORIGINAL

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
)
 v.)
)
 WILLIAM CHARLES REAL ESTATE)
 INVESTMENT, L.L.C., an Illinois limited)
 liability company,)
)
 Respondent.)
)

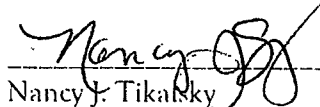
PCB No. 10 - 108
(Enforcement - Water)

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 REPLY TO RESPONDENT'S RESPONSE TO COMPLAINANT'S MOTION TO STRIKE RESPONDENT'S, WILLIAM CHARLES REAL ESTATE INVESTMENT, LLC, 'ACT OF GOD' 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: January 24, 2011

Electronic Filing - Received, Clerk's Office, January 24, 2011

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.)

ORIGINAL

PCB No. 10 - 108
(Enforcement - Water)

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on January 24, 2011, I served true and correct copies of Complainant's REPLY TO RESPONDENT'S RESPONSE TO COMPLAINANT'S MOTION TO STRIKE RESPONDENT'S, WILLIAM CHARLES REAL ESTATE INVESTMENT, LLC, 'ACT OF GOD' AFFIRMATIVE DEFENSE, upon the persons and by the methods as follows:

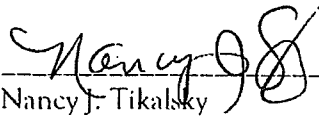
[US first class mail]

[Personal Delivery]

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

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

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



 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: January 24, 2011

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)

ORIGINAL

COMPLAINANT'S REPLY TO RESPONDENT'S RESPONSE TO COMPLAINANT'S MOTION TO STRIKE RESPONDENT'S, WILLIAM CHARLES REAL ESTATE INVESTMENT, LLC, 'ACT OF GOD' AFFIRMATIVE DEFENSE

NOW COMES COMPLAINANT, People of the State of Illinois, by LISA MADIGAN, Attorney General of the State of Illinois, pursuant Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615 (2010), and in reply to Respondent's, WILLIAM CHARLES REAL ESTATE INVESTMENT, LLC, Response to Complainant's Motion to Strike and Dismiss Respondent's Affirmative Defense, 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 at the Site as defined in the Complaint ("Complaint").

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

Electronic Filing - Received, Clerk's Office, January 24, 2011

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

On November 12, 2010, Complainant filed a Motion to Strike and Dismiss Respondent's Affirmative Defense ("Motion to Strike").

On November 30, 2010, Respondent filed a Response in Opposition to State's Motion to Strike Affirmative Defenses [sic] ("Response").

On December 17, 2010, Complainant filed a Motion for Leave to File a Reply to Respondent's Response to Complainant's Motion to Strike and Dismiss Respondent's Affirmative Defense.

On January 10, 2011, the Board issued an order allowing Complainant to file a Reply to Respondent's Response in Opposition to State's Motion to Strike Affirmative Defenses [sic].

II. LEGAL STANDARD FOR AFFIRMATIVE DEFENSES

Complainant repeats and incorporates by reference herein its Motion to Strike and Dismiss Respondent's Affirmative Defense.

III. RESPONDENT'S 'ACT OF GOD' AFFIRMATIVE DEFENSE IS LEGALLY INSUFFICIENT

1. Respondent's had control of the "source of pollution" at the Site.

Complainant repeats and incorporates by reference herein its Motion to Strike and Dismiss Respondent's Affirmative Defense, and further states that Respondent ignores the precedent that the control required of Respondent is not control of a third party or an "act of God" but of the source of the pollution. (See *A.J. Dawinoy 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)). Instead, Respondent prefers to argue it had no control of the rain as an 'act of God' and, therefore, was not obligated to make a reasonable effort to erect and maintain effective erosion control measures to prevent discharge of pollutants from the Site.

In this matter, the source of pollution is soil and sediment laden stormwater discharging from the Site. A rain event may cause water to accumulate on the Site but it is the lack of erosion control devices on the Site as required under Respondent's NPDES permit that causes the soil and sediment laden stormwater to discharge from the Site into the waters of the state.

Not only does Respondent admit to being the permittee of the NPDES permit for the property which is the subject matter of the State's Complainant ("Site") (See Amended Answer,

¹ In no instance in its Motion to Strike did the State declare that the 'act of God' defense is never available in a case of water pollution. Rather, the State asserts the "Illinois courts have long held the 'act of God' defense is not a defense against water pollution claims under Section 12 of the Act, 415 ILCS 5/12 (2010)" (emphases added). Instead, Respondent chooses to misread and exaggerate the State's claim by citing irrelevant federal and state laws such as the "Oil and Hazardous Substance Liability" section of the Clean Water Act, the Marine Sanctuaries Act, the Comprehensive Environmental Response, Compensation and Liability Act, and an exception for animal feeding operations under NPDES. Needless to say, all these laws are irrelevant to the claims brought against Respondents in the State's Complainant.

Electronic Filing - Received, Clerk's Office, January 24, 2011

paragraph 6, page 3), and that a representative of Respondent was present when the Illinois EPA inspected the Site in August 2007 (See Amended Answer, paragraph 11, page 4), but the Respondent shows in its Response it had knowledge of the ongoing rain events in 2007 and 2008. Given Respondent's control of the Site, obligations under its NPDES permit, contact with an Illinois EPA inspector in August of 2007, and knowledge of the rain events, Respondent was aware and, therefore, capable of erecting erosion control devices to prevent discharge of soil and sediment laden stormwater from the Site during these ongoing rain events. In no instance does the Respondent show that no such erosion control devices existed that could prevent contaminated stormwater from discharging from the Site. Instead, Respondent complained of too much rain as an excuse to shirk its obligations under its NPDES permit, and failed, at various times in 2007 and 2008, to erect and maintain adequate erosion controls to address the level of rain from the ongoing rain events to prevent the ongoing threat of discharge of soil and sediment laden stormwater from the Site.

2. Respondent's had knowledge of the threat of water pollution discharge from the Site as defined under *Freeman*.

As previously shown, Respondent's control over the Site as the NPDES permittee and knowledge of the threat of water pollution leaving the Site, obligated Respondent to "control" the pollutant that threatened to discharge from the Site as defined by *Freeman Coal Mining Corp. v. IPCB*, 21 Ill.App.3d 157, 313 N.E.2d 616 (5th Dist. 1974).²

Here, the Complaint clearly alleges in its Complaint that in August 2007, an Illinois EPA inspector met with a representative of William Charles at the Site where the pathways the soil and

² whether a pollutant is toxic or non-toxic is irrelevant to the definition of contaminant in the Act. The Act defines a contaminant as "any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source."

Electronic Filing - Received, Clerk's Office, January 24, 2011

sediment laden stormwater was observed discharging off of the Site, and where erosion control devices were not being managed; of which both actions were threatening and allowing contaminated stormwater to discharge from the Site. Again, in June of 2008 (10 months after the first inspection), an Illinois EPA inspector found unstabilized and eroded soil and poorly managed erosion control devices where soil and sediment laden stormwater was observed threatening to discharge and discharging from the Site. Finally, in May 2009 (21 months after the first inspection), an Illinois EPA inspector continued to find unstabilized and eroded soil and poorly managed erosion control devices at the Site where soil and sediment laden stormwater was observed threatening to discharge and discharging from the Site.

It is clear that Respondent had control and erected, at various times in late 2007 and in 2008, erosion control devices at the Site for which it poorly managed. It is this poor management of erosion control devices along with the full knowledge of the levels of rainfall that caused, threatened and/or allowed soil and sediment laden stormwater to discharge offsite that caused and threatened to cause water pollution. Respondent clearly failed to take reasonable precautions given its knowledge of the level of rainfalls and its obligation under its NPDES permit to manage the soil and sediment laden stormwater discharging from the Site.

3. Initiation of administrative proceedings does not define the time period of violations of the Act.

Whether or not a violation notice has been issued by the Illinois EPA is irrelevant as to when and whether violations occurred at the Site. It is the obligation of the Respondent to know the law. Section 12(a) of the Act states in pertinent part "no person shall cause or threaten or allow the discharge of any contaminants into the environment ... so as to cause or tend to cause

Electronic Filing - Received, Clerk's Office, January 24, 2011

water pollution in Illinois.” In addition, it is the obligation of the Respondent, as the NPDES Permittee who has control of the Site, to erect and maintain erosion control devices to prevent soil and sediment from discharging or threatening to discharge from the Site.

Respondent fails to recognize the “threaten” or “allow” discharge of contaminants at any time are violations of the Act and its NPDES permit, not just actual discharge of contaminants from the Site. It is apparent that the Illinois EPA gave Respondent ten months to erect and maintain adequate erosion control devices to manage the threat of and discharge of soil and sediment laden stormwater from the Site after the Illinois EPA’s first observations of violations before pursue administrative procedures to cite the Respondent for violations of the Act. Unfortunately, Respondent failed to take its obligation, as permittee of the NPDES permit, seriously to prevent the threat of and discharge of soil and sediment laden stormwater from the Site.

IV. CONCLUSION

Because the Respondent had control of the source of pollution, the lack of erecting and maintaining erosion control devices to prevent the discharge of soil and sediment laden stormwater from discharging from the Site, and Illinois caselaw holds that an “act of God” defense is unavailable to defendant who has control of the source of pollution for its water pollution violations, Respondent’s, William Charles, ‘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, with prejudice, as a matter of law.

Electronic Filing - Received, Clerk's Office, January 24, 2011

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. TIKALSKI
Assistant Attorneys General
Environmental Bureau
69 W. Washington St., Suite 1800
Chicago, Illinois 60602
(312)814-8567