BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	**PCB NO. 11-68**
	)	**(Enforcement-Water)**
	)	
TRADITION INVESTMENTS, LLC,	)	
an Illinois limited liability corporation,	)	
	)	
Respondents.	)	

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on August 24, 2011, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, c/o John T. Therriault, Assistant Clerk, James R. Thompson Center, 100 W. Randolph St., Ste. 11-500, Chicago, IL 60601, a MOTION FOR LEAVE TO REPLY TO RESPONDENT'S RESPONSE and REPLY TO RESPONSE TO MOTION TO STRIKE AFFIRMATIVE DEFENSES, copies of which are attached hereto and herewith served upon you.

Respectfully submitted,

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: _____
JANE, E. McBRIDE
Sr. Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: August 24, 2011

CERTIFICATE OF SERVICE

I hereby certify that I did on August 24, 2011, cause to be served by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instruments entitled NOTICE OF ELECTRONIC FILING, MOTION FOR LEAVE TO REPLY TO RESPONDENT'S RESPONSE and REPLY TO RESPONSE TO MOTION TO STRIKE AFFIRMATIVE DEFENSES upon the persons listed on the Service List.

Jane E. McBride
Sr. Assistant Attorney General

SERVICE LIST

Donald Q. Manning
McGreevy Williams, P.C.
6735 Vistagreen Way
P.O. Box 2903
Rockford, IL 61132-2903

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 W. Randolph Street
Chicago, IL 60601

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	**PCB No. 11-68**
	)	**(Enforcement)**
TRADITION INVESTMENTS, LLC,	)	
an Illinois Limited Liability Corporation	)	
	)	
Respondent	)	

MOTION FOR LEAVE TO REPLY TO RESPONDENT'S RESPONSE

NOW COMES, Complainant, PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* Lisa Madigan, Attorney General of the State of Illinois, and moves for leave to reply to Respondent's Response to Complainant's Motion to Strike Affirmative Defenses, on the following grounds and for the following reasons:

1. The affirmative defenses and Complainant's Motion to Strike concern the application of state law and the federal CAFO rule. The federal rule has been evolving for the past eight years. The 2008 federal rule was recently vacated in part by the 5th Circuit District Court in the matter of *Nat'l Pork Producers Council v. United States EPA*, 2011 U.S. App. LEXIS 5018 (5th Cir. Mar. 15, 2011).

2. This case requires application of the new law.

3. Complainant requests that it be able to reply to the interpretation Respondent gives to the law in its Response to Complainant's Motion.

4. Complainant asserts that its Motion and this reply very positively contribute to the desired process of narrowing the issues and setting the pleadings. This process promotes a better definition of all questions of law and fact, thereby providing the parties with proper notice of the allegations and defenses. This process also greatly contributes to judicial economy and efficiency.

5. Complainant is contemporaneously submitting its Reply with this motion for leave.

WHEREFORE, on the foregoing grounds, Complainant respectfully request leave to reply to Respondent's Response and asks that the Reply provided contemporaneously with this motion be filed and entered in this matter.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,

LISA MADIGAN, Attorney General
State of Illinois

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

BY: _____
JANE E. MC BRIDE
Senior Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: 8/24/2011

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	**PCB No. 11-68**
	)	**(Enforcement)**
TRADITION INVESTMENTS, LLC,	)	
an Illinois Limited Liability Corporation	)	
	)	
Respondent	)	

REPLY TO RESPONSE TO MOTION TO STRIKE AFFIRMATIVE DEFENSES

NOW COMES, Complainant, PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* Lisa Madigan, Attorney General of the State of Illinois, and replies to Respondent's Response to Complainant's Motion to Strike Affirmative Defenses as follows:

Clarification of Question Regarding NPDES Permit Coverage

1. Specific facts fully alleged in the Complaint in the context of applicable law clearly establish that Respondent, at the time of the October 1, 2010 discharge, was constructing a confined feeding operation designed to house over 5,000 dairy cattle. The operator was storing and maintaining silage on site to serve as feed for the animals. The silage leachate was being managed by collection, containment and land application. Respondent did not obtain wastewater NPDES permit coverage for the site, and thus accepted that it was managing and land applying processed wastewater at risk of discharging without permit coverage.

2. As set forth below, in paragraph 35 of Complainant's Motion to Strike, the recent holding in *Nat'l Pork Producers Council v. United States EPA*, 2011 U.S. App. LEXIS 5018 (5th Cir. Mar. 15, 2011), makes it very clear that a discharging CAFO must have permit coverage. Respondent's CAFO did not have NPDES permit coverage when it discharged, and thus violated NPDES requirements.

3. Given the fact of the October 1, 2010 discharge and the circumstances of that discharge, Complainant has requested relief in the form of a Board order requiring the Defendant to apply for and obtain NPDES permit coverage.

Complainant's Motion to Strike Correctly Sets Forth A Proper Basis For the Assertion That Respondents Affirmative Defenses are Insufficiently Pled

4. Complainant has correctly challenged the sufficiency of Respondent's affirmative defenses. Motions to dismiss or strike a pleading admit facts well pleaded, but not conclusions of law or conclusions of fact unsupported by allegations of specific facts upon which such conclusions rest. *Pierce v. Carpentier*, 20 Ill.2d 526, 531 (1960), 169 N.E.2d 747. As admitted by Respondent on page 4 of the Response, Complainant's Motion – setting forth why the legal conclusions that make up Respondents first, second and third affirmative defense are unsupported by law or specific facts – renders these three assertions moot. Complainant's Motion explains why, as stated, Respondent's affirmative defenses are unsubstantiated legal conclusions – with no support in law or fact -- and, as such, are insufficient in both substance and form.

Estoppel

5. Based on case law cited on page 2 of the Response, it is apparent that Respondent is relying on a theory of judicial estoppel as a basis for its second affirmative defense. For judicial estoppel to apply: (1) the party estopped must have taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial administrative proceedings, (4) intending the trier of fact to accept the truth of the facts alleged, and (5) have succeeded in the first proceeding and received a benefit thereby. *Giannini v. Kumho Tire USA, Inc.* 385 Ill.App.3d 1013, 1018-1019 (2d Dist 2008), 898 N.E.2d 1095. The doctrine of judicial estoppel does not apply to all types of inconsistencies, but only to factual inconsistencies. *Id.*

6. Respondent has failed to plead any allegation of factual inconsistencies. As

acknowledged by Respondent, in that the basis of NPDES liability as alleged by Complainant rests on the fact it is a CAFO that decided not to obtain a permit at its own risk, and then indeed was the source of a discharge on October 1, 2010, the 2008 litigation is wholly irrelevant to this enforcement matter. The October 1, 2010 discharge of process wastewater from Respondent's facility to waters of the United States was not at issue in the Jo Daviess case. The sole state authority in question in the Jo Daviess case was the Illinois Department of Agriculture's siting authority pursuant to the Illinois Livestock Management Facility Act.

Respondent's Fourth Affirmative Defense

7. Respondent claims that the fact Complainant attached a portion of a hearing transcript, in which A.J. Bos fully described the purpose and value of the silage that is the source of the silage leachate that discharged from the site, was improper. The transcript is from a multi-day hearing that resulted in a decision. The decision was issued the final day of the hearing and it is documented only in the transcript. The date of the final day of hearing and thus the date on which the decision appears in the record is December 18th, 2008.

8. For purposes of a section 2-615 motion, the court considers matters subject to judicial notice and judicial admissions in the record. *Kircher v. Greene*, 294 Ill.App.3d 672, 677 (1st Dist 1998), 691 N.E.2d 107, citing *Mt. Zion State Bank & Trust v. Consolidated Communications, Inc.* 169 Ill.2d 110, 115 (1995), 660 N.E.2d 863. Facts in a prior court opinion are subject to judicial notice. *Id.*, citing *Chicago v. American National Bank & Trust Co.*, 233 Ill.App.3d 1031, 1038 (1992), 599 N.E.2d 1126 ("[t]he trial court properly took notice of the facts stated in a published opinion of our supreme court"). The purpose, value and status of the silage play a large role in the bond calculation. Complainant attaches a copy of the transcript of portions of closing arguments concerning the silage and the decision hereto as Reply Exhibit 1.

9. Respondent's fourth affirmative defense is not an intelligible cause of action as

pled. Respondent's first sentence is: "Complainant's claim that an NPDES permit is required for this facility is pre-empted by federal law and is barred by same." It was presumed this legal conclusion, which is wholly inconsistent with federal law and the allegations in the Complaint, was the affirmative defense. The statement then proceeds to lay out a list of "specifics". The legal conclusions stated as each specific, as well, are inconsistent with federal law. Complainant's motion to strike this alleged affirmative defense explains why each specific legal conclusion, is just that, solely a legal conclusion and an inaccurate one at that based on current federal law. Complainant further illustrates that the Complaint's well pled facts, in particular the allegation of the storage of silage, the fact that silage is part of a AFO's operation, the fact that it was being purposefully being stored on site, it created process wastewater (silage leachate) that was being purposefully collected, stored and managed via land application, are supported by testimony provided in a previous judicial proceeding. This testimony is directly contradictory to a statement provided by Respondent in its Answer. In it's Motion, Complainant provided the federal law supported by specific allegation of fact that proved Respondent's affirmative defense to be merely a legal conclusion unsupported by law or fact and thus insufficient in both substance and form.

10. In its Response, Respondent's reliance on guidance issued by the U.S. EPA is improper. First, it is regulatory guidance and not law. Second, the guidance cited and referenced was issued prior to the federal 5th Circuit decision, *Nat'l Pork Producers Council v. United States EPA*, 2011 U.S. App. LEXIS 5018 (5th Cir. Mar. 15, 2011), that vacated portions of the 2008 federal CAFO rule. Complainant's allegations of NPDES violation and prayer for relief were alleged pursuant to authority consistent with the 5th Circuit decision.

11. All of the authority referenced by Respondent in the argument presented in its Response regarding the fourth affirmative defense either reference the US EPA guidance or

incorrectly apply the federal rule. Under the former rule, which required a facility to obtain a permit if it proposed to discharge, it could attempt to certify with the permitting authority that it was incapable of discharging in a process not unlike that required to apply for a permit. If, upon obtaining such certification, it then did discharge, the facility would be in violation of the NPDES permit requirements and required to obtain a permit. Under the current rules, where the "proposed to discharge" basis for the requirement of a permit has been vacated, there is no longer any need for a facility to obtain such certification.

12. Respondent has wholly failed to properly plead an affirmative defense that accurately alleges specific facts consistent with applicable law. Respondent attempts to cite to 40 CFR 122.23(i)(6). This regulation concerns the certification process relevant to the "proposed to discharge" basis that is no longer valid.

13. Even a single discharge warrants the requirement of an NPDES permit under the current rules. However, should Complainant through discovery or otherwise learn of additional discharges or conditions or management strategies that either have or may result in a discharge, such must be taken into consideration. Respondent has failed to plead affirmative matter that would avoid the legal effect of the requirement.

Respondent's Fifth Affirmative Defense

14. Complainant has clearly alleged a factual basis that Respondent's facility was the source of a pollutional discharge. In its Response, Respondent has provided no new or additional authority or facts in support of its assertion that the discharge was not pollutional in nature and that it did not cause environmental harm. Respondent's fifth affirmative defense is wholly conclusory in nature and completely void of any specific factual allegation.

WHEREFORE, for the foregoing reasons and on the foregoing grounds, Complainant respectfully requests that the Board strike Respondent's five affirmative defenses.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,

LISA MADIGAN, Attorney General
State of Illinois

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

BY: _____
JANE E. MC BRIDE
Senior Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: 8/24/2011

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
OF THE STATE OF ILLINOIS, JO DAVIESS COUNTY

HELPING OTHER MAINTAIN ENVIRONMENTAL STANDARDS, an Illinois Not For Profit Corporation, Leroy Behrens, Laurel Behrens, Mary Jo Burke, Isabelle Cropper, Juanita Cropper, Jeffrey Graves, Roger Hicks II, Anita Hicks, Dean B. Hicks, Kathleen M. Hicks, Steve Holesinger, Russell Kruzinski, Will Libberton, Greg McKinstrey, Bonnie Rillie, Richard Runkle, Lori Runkle, Todd Sargent, Kathy Sargent, Dick Slamp, Kathryn Slamp, Dawn Tomlinson, Ronald Tomlinson, Plaintiffs,	)	
vs.	)	Case No.: 2008-CH-42
A.J. BOS and ILLINOIS DEPARTMENT OF AGRICULTURE, Defendants.	)	

REPORT OF THE PROCEEDINGS at the Bond Hearing on the Preliminary Injunction in the above-entitled cause, recorded on the Jo Daviess County computer based digital recording system before the HONORABLE KEVIN J. WARD, Associate Judge of said court, concluding on the 18th day of December, 2008.

APPEARANCES:

HELPING OTHERS MAINTAIN ENVIRONMENTAL STANDARDS, PLAINTIFFS Represented by their attorneys, DAVID ALBEE and CHARLES CRONAUER.

A. J. BOS, DEFENDANT represented by his attorney, MR. THOMAS NACK, MR. EDWARD L. FILER and MS. TINA M. BIRD.

ILLINOIS DEPARTMENT OF AGRICULTURE, DEFENDANT, represented by their attorney, MR. ALLAN ABINOJA.

Tammy Stephenson
Certified Electronic Recorder Operator

could I put this board on--could I stand this board up, Your Honor?

THE COURT: Please.

MR. FILER: Okay.

(Mr. Filer sets up display.)

MR. FILER: The first is silage. The uncontroverted testimony of Mr. Bos was that he expended $1.3 million to purchase the farm, to purchase basically I think his words were, "all in". This silage now sits on the Tradition South property covered and waiting for use.

The other side would like you to believe that he should have just sold it to a neighboring farmer or that he could have turned it at the time it was being chopped to corn feed and sell it that way.

Um..The evidence, however, again uncontroverted, was that provided by Mr. Hutjens, who was qualified not only as an economic dairy expert but also as a dairy nutritionist expert. His words I believe exactly were, "The chance that Mr. Bos could re-sell this silage is nil." Mr. Bos himself, again, uncontroverted, testified that it would be impossible.

The evidence also showed that as the silage sat there, the nutritional value was dropping; I believe Mr. Hutjens said, starting right at the third month that it sits. The nutritional value will continually drop until ultimately the silage becomes worthless. So in sum, I think that the silage sits rotting.

As a result, as the Court considers the damage that could be imposed upon Mr. Bos, should he prevail at the Permanent Injunction level, it must look to the total expenditure as noted of $1.3 million.

Additionally, Mr. Hutjens talked about the loss of the use of money spent on the silage; time value of money maybe put another way. Mr. Hutjens, again uncontroverted, Judge, his conservative estimate of the loss would have been $37,916 per month on the $1.3 million. He based this on a conservative (he identified the lowest) CD rate of 3.5 percent. Your Honor, if you do the math of that 3.5 percent at that monthly rate, it comes out to $455,000 a year.

Taking it a step further relative to this loss of the use of the money, Mr. Bos testified that, and again, we don't believe it's fair that we should have considered moving forward with the construction, however, let's assume we did. With respect to these numbers, we're done March 1.

The uncontroverted evidence, uncontroverted testimony from Mr. Bos is that assuming that we completed construction in March of 2009, it would take approximately seven to eight months before he could milk cows and the reason why he identified that, he broke it into two items.

The litigation itself would last three months; at least that's what we're saying. So you have the March 1 into construction; the Permanent Injunction, I believe we have first

claims, right now as we sit here, in an uncontroverted amount of $219,230.54.

One more time, Your Honor?

THE COURT: Of course.

(Mr. Filer adjusts display.)

MR. FILER: In terms of the first factor or inquiry that the Save the Prairie looked at, the total damages then identified by Mr. Bos are: $1,300,000 for the silage; the loss of the use of money of $265,416.67; the loss of profits of $2,520,000 and the demobilization/re-mobilization of Hamstra of $219,230 coming to a grand total of $4,304,646.70.

Unlike Save the Prairie, of which the contractor simply--or the developer, excuse me, said, this is going to be the cost of my construction or what it's going to cost me to build these; $21 million is what I need to be paid. Mr. Bos identified, retained experts and took great pains to present evidence, which again was uncontroverted, to identify the specific damages that he experienced which is why this particular matter is different than the Save the Prairie relative to that analysis of damages, not of course, objecting to the inquiry itself.

The next inquiry that the Court in Save the Prairie looked at was the financial hardship or financial wherewithal or undue burden on the plaintiffs and the Court said that each of the plaintiff's applicants financial--the burden, the undue burden,

Injunction Order; he can still build it although he does build at his peril.

The case that we have also relied on, Nickles vs. Burnett, considered the applicability of the Livestock Management Facilities Act and in that case, they determined that the Act provides no protection to the builder of a facility should it be found to constitute a nuisance and Mr. Bos is presumed to be aware of the law and he built at his peril knowing that if he built something that would contaminate and pollute and be declared to be a public nuisance that it would--might possibly be stopped and the contracts for construction and silage were all entered into with this in mind and more than likely, with knowledge of the pendency of this present litigation in mind. He has proceeded to this point today with all of these factors in mind.

He has had many options during the course of this proceeding to mitigate any possible damages that might occur. He could sell the silage. He didn't have to turn the--make silage, he could have stored the grain on-site on the--in the silos that are on the farm and stored it for as long as necessary.

Um..As we speak, Mr. Bos does not have approval from the Illinois Department of Agriculture to operate a facility.

Dr. Hutjens, he testified the silage would be good for two and a half years and the decision to turn the corn into silage was made in September of 2008 during the pendency of the

hearings with respect to the issuance of a Preliminary Injunction.

Um...Compelling the plaintiffs to post of $4,304,646.70 bond in this case would place a chilling effect upon citizens who attempt to assert their fundamental, Constitutional right to a healthful environment.

This is an environmental case. We have a right to clean air. We have a right to clean water for free and we have a right to defend our right to clean air and clean water and we shouldn't have--no one should have to be compelled to pay $4.3 million to breathe clean air; that's fundamentally foul.

Now the plaintiffs are seeking to preserve, protect and defend their right to a healthful environment and they've entered into this lawsuit knowing what they're getting themselves into.

We've presented the evidence that we have as best as we can. The defendant, he purchased the property, knowing the existence of the karst aquifer underneath the land. The Jo Daviess County Board recommended to the State not to approve this facility. There are numerous public officials and entity that have spoken out against it.

The hardship to the applicant here in this case is great, if not impossible. This is citizens versus big business.

The lady from the Stockton hotel has a direct financial interest in the case. The real estate appraiser has a direct

The showing was not made, Judge, just as you identified. Thank you.

THE COURT: Alright, thank you.

Having had an opportunity to hear all of the evidence with respect to the issue of bond, which of course is on the heels of the evidentiary hearing that resulted in the October 20 Preliminary Injunction Order which specifically incorporated the requirement that it was then entered subject to the possible imposition of the bond, which I believe was a matter that was agreed by the parties and reserved by the Court on the basis of that agreement and considering what I think is the most relevant law specifically, and I think Mr. Filer referenced it, Section 11-103 of the Code of Civil Procedure which squarely talks about bond with respect to preliminary injunction, most notably the fact that it is discretionary with the Court and the Save the Prairie case which I've previously cited.

I think Mr. Filer outlined quite accurately what I understand the elements which the Court is to consider for purposes of making the bond determination as they are described in the Save the Prairie case, and for what it is worth for context if nothing else, Save the Prairie certainly is distinguishable for, I think, probably all the reasons that Mr. Filer pointed out, notable among them; there was one Plaintiff in that case, it was a not-for-profit organization. There were

not other Plaintiffs or a larger number of pockets, if you will, as applicant.

It had a somewhat convoluted procedural history, but ultimately, as I understand it, the trial court did impose a bond of $200,000 and was reversed by the Appellate Court and in reversing the Appellate Court indicated that, I think there were four, as I read it, elements that a trial court is to consider with respect to making this determination.

First, is the possible loss to the enjoined party; second is the hardship to the applicant, I think it's clearly with respect to the finances or the financial aspect to the applicant or the plaintiffs in most cases and in this case; the impact a bond requirement would have on enforcement of the right. I take that to be the right at issue in the litigation, specifically as Mr. Albee has clearly indicated, that would be the right not to be subjected to nuisance and/or trespass even prospectively.

I am not unmindful and I think this is included in the Preliminary Injunction Order as well, of the very clear right that Mr. Bos has to put his property to any lawful use and I don't suggest that that is not a very important part of the consideration here, rather it seems to me that for purposes of following the Save the Prairie case, the right that is really contemplated is the right that is at issue pursuant to the litigation.

And finally, the public interest and we touched on this in the course of the hearing; Mr. Bos understandably presented evidence that the operation of this enterprise would have some positive effect for purposes of the general public and, frankly, I think that's true. Again, I don't really believe that that is the public interest contemplated by the Save the Prairie case.

I think the public interest contemplated there is much narrower. I understand Save the Prairie to be talking about whether or not the not-for-profit corporation that was the plaintiff in that case has, as one of its functions, serving the public interest.

That being said, for purposes of making my analysis, I am going to consider the fact that, and I find that, operation of the proposed facility would undoubtedly have some benefit to the public.

Taking all of these things together with respect to the first element here; possible loss to the enjoined party (to Mr. Bos) it is eminently clear and I point most squarely and as Mr. Filer argued, to the testimony of Mr. Hutjens, if nothing else, it is clear that there is going to be a loss to Mr. Bos with respect to the delay. Specifically, the per diem that he will not realize for a period of time, I don't think it's necessary to quantify it, although I appreciate Counsel's argument to that effect, due to the delay stemming from the Preliminary

Injunction. It is not even realistic to suggest that there is no such loss and that is clearly established.

I'm going to skip the hardship to the plaintiffs for the moment.

The impact a bond requirement (the third element that would have on the enforcement of the rights) I think that, in a sense, really goes hand-in-hand with the hardship question, so I'll skip that as well.

The public interest, as I previously stated, the gist of the evidence at preliminary hearing and this is only the beginning of this case, the gist of the evidence was in the nature of public nuisance or a prospective public nuisance. I think that, by definition, indicates that the public interest is being served with respect to what the plaintiffs are seeking to do here.

Again, I believe that the operation of Mr. Bos' enterprise would also serve the public interest and having made those observations, I frankly for purposes of making the necessary determination here, do not believe that that is really the most compelling element for purposes of making the necessary ruling.

Returning then to the hardship to the applicants, there is no practical certainly or legalistic way to separate any bond out or allocate it per Plaintiff; it just wouldn't make sense. We can't just partially enjoin Mr. Bos from doing something for purposes of some Plaintiffs and not others or maybe put another

way, I don't think it's realistic to think that we could allocate bond, one amount to the corporation, for example, another amount to one of the natural persons and a third to some of the other Plaintiffs, it just doesn't work that way. In other words, I think it's necessary to make the analysis collectively.

The Save the Prairie case and maybe this is an example of quantifying for purposes of trying to make the analysis a little simpler, does point out the fact that the $200,000 bond in that case was more than three times the plaintiff's total annual revenues and about 100 times the plaintiff's annual net income. Again, that was only with respect to the one plaintiff, the not-for-profit corporation.

Using very, very round numbers on the basis of the evidence that was presented by the plaintiffs, I find that there is approximately, and I'm giving the benefit of the doubt to the defendant's evaluation evidence, there is approximately $1 million worth of assets (really illiquid assets) that would be useable, if you will, for purposes of considering the appropriateness of setting a bond amount. And the request, and by the way, I think under the circumstances for all the reasons argued by Mr. Bos, the request for a $4.3 million bond is well taken. I think there is a very legitimate reason for making that request for all the reasons that are argued but the fact is it's four times what I heard what was available to the plaintiffs.

This is an aside but I think it might be a related one, there is reference in the Save the Prairie case to a presumption a Court can make when dealing with a commercial entity and it specifically talks about where a commercial entity is an applicant, a Court could probably assume the applicant was capable of posting a bond.

I am not going to consider that an element for purposes of making this analysis but I will say, and this is absolutely and completely to his credit, that I do consider Mr. Bos, although he is, of course, a natural person and is a party to this case in that capacity, he is seeking to operate a commercial entity. He is the party sought to be enjoined; he is not the applicant, so that's why I am not going to call that element of this case one of the factors that needs to be considered, nevertheless, I think it is of factual significance. And as stated, with respect to the third element, the impact the bond requirement would have on the enforcement of the rights.

The rights here are, again, the right and I'm going to differ with you, Mr. Albee; you have made reference repeatedly and I think I understand why, to the Constitutional provision that recognizes a right to a healthful environment. It is my understanding that that is, of course, a true statement but not in and of itself. In other words, a party needs to have a cognizable cause of action in order for that Constitutional right to be enforceable in any fashion.

The cognizable cause of action here is prospective nuisance and/or prospective trespass, public and private and in consideration of those things and most significantly having weighed all of them, but according to the rationale of the Save the Prairie Society case, particularly with respect to the hardship to the applicants and the impact a $4.3 million bond would have on the plaintiffs' ability in this case to seek to enforce their legal rights with respect to a prospective legal nuisance or trespass, I am not going to require that the plaintiffs give bond.

Do you have any questions, Mr. Filer?

MR. FILER: Several, but not at this moment.

THE COURT: Alright, Mr. Albee?

MR. ALBEE: No, sir.

THE COURT: Mr. Abinoja?

MR. ABINOJA: No, Your Honor.

THE COURT: Alright, thank you, all of you again. There certainly is a lot here but for purposes of looking forward as I think Mr. Filer referenced in his argument, we do have a case management order in place. It, in fact, sets out several weeks in, I think it's May, for trial and a number of things that are to happen in the meantime but our next court hearing, and I intend this as a question, I should know, but correct me if you have a different understanding, is January 15th

with respect to the *Certiorari* motion. Is that your understanding, Mr. Albee?

MR. ALBEE: Yes, it is.

THE COURT: Mr. Abinoja?

MR. ABINOJA: Yes, Your Honor.

THE COURT: Mr. Filer?

MR. FILER: I'm sorry, Your Honor?

THE COURT: I'm just trying to verify that we all understand that the next court date that we currently have scheduled is January 15th for hearing on the Motion for Cert.

MR. FILER: Yes.

THE COURT: Alright, that being said, is there anything else we can or should address before adjourning today, Mr. Albee?

MR. ALBEE: No, sir.

THE COURT: Mr. Filer?

MR. FILER: No, sir.

THE COURT: Mr. Abinoja?

MR. ABINOJA: Well, yes, Your Honor, just very briefly.

The Department, in addition to filing their response brief on the Motion for Writ of Cert issue, did file a combined Section 2-619.1 Motion to Dismiss. It was filed in response to the Plaintiffs' amended pleading and while we did not motion that for--notice that for hearing or notice the motion per se,