

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Paul Christian Pratapas)	
)	
Complainant,)	PCB No. 2023-014
)	(Enforcement)
v.)	
)	
Horizon Construction Group, Inc.)	
)	
Respondent.)	

RESPONDENT'S ANSWER AND AFFIRMATIVE DEFENSES TO COMPLAINANT'S COMPLAINT

Pursuant to 35 Ill. Adm. Code Part 103.204, Respondent, Horizon Construction Group, Inc., by and through Husch Blackwell LLP, its counsel, provides the following Answer and Affirmative Defenses to the Complainant's Complaint as follows:

1. Your Contact Information

Name:	<u>Paul Christian Pratapas</u>
Street Address:	<u>1330 E. Chicago Ave. #110</u>
	<u>Naperville</u>
County:	<u>DuPage</u>
State:	<u>IL</u>
Phone Number:	<u>(630) 696 - 2843</u>

Answering Paragraph 1, Respondent dispute the allegations in this paragraph.

2. Place where you can be contacted during normal business hours (if different from above)

Name: _____
Street Address: _____
County: _____
State: _____
Phone Number: () - _____

Answering Paragraph 2, no response is required.

3. Name and address of the respondent (alleged polluter)

Name: Horizon Develop Build Manage
Street Address: 5201 E Terrace Dr #300
Madison Wisconsin
County: Dane
State: Wisconsin
Phone Number: (608) 354 - 0900

Answering Paragraph 3, Respondent objects to the characterization as “alleged polluter;” answering subject to the objection, Respondent Admits that this is its address.

4. Describe the type of business or activity that you allege is causing or allowing pollution (e.g., manufacturing company, home repair shop) and give the address of the pollution source if different than the address above.

Horizon Develop Build Manage: Daniel D. Fitzgerald, CEO
Construction Company

Pollition Source:
1150 Lily Cache Ln.
Bolingbrook, IL 60490
Will County

Answering Paragraph 4, Respondent disputes that the activity in question caused or allowed pollution; answering subject to the objection, admit that the construction site at issue is located at 1150 Lily Cache Ln, Bolingbrook, IL, 60490; Respondent affirmatively states that even if pollution occurred, no harm to the environment was done. This is further affirmed by stating that all project construction proceeded under a valid National Pollutant Discharge Elimination System (“NPDES”) Construction Permit No. ILR10ZAKV (“the NPDES Construction Permit”), issued by the Illinois Environmental Protection Agency (“ILEPA”) on June 5, 2021. This Construction Permit authorizes all discharges of stormwater associated with activities from the Spring at Lily Cache Creek construction site. The Respondent conducted all construction under the certified Storm Water Pollution Prevention Plan (“SWPPP”) associated with the NPDES Construction Permit.

5. List specific sections of the Environmental Protection Act, Board regulations, Board order, or permit that you allege have been or are being violated.

Amended by Complainant’s Motion to Modify Formal Complaint at 2 Paragraph 1: Complaint requested the following be included in response to questions asking which portion of The Environmental Protection Act and/or other laws which have been violated. Section 12(a) of the Act (415 ILCS 5/12(a) (2020)) and 35 Ill. Adm. Code 304.141(b). Comp. Mot. at 2.

Section 12(a) provides in its entirety that no person shall “[c]ause 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.” 415 ILCS 5/12(a) (2020). Section 304.141(b) of the Board’s water pollution rules provides in its entirety that

[n]o person may discharge any pollutant subject to, or which contributes or threatens to cause a violation of, any applicable federal or state water quality standard, effluent standard, guideline or other limitation, promulgated pursuant to the CWA or the Act, unless limitation for such a pollutant has been set forth in an applicable NPDES Permit. However, the Agency may, by permit condition, provide that the permittee may discharge pollutants present in its water supply intake sources in concentrations not greater than the concentrations in the intake sources, or which are added in trace amounts by normal domestic water usage. 35 Ill. Adm. Code 304.141(b).

Answering Paragraph 5, Respondent admits that the cited sections are the ones relied upon by the Complainant, but affirmatively states that the same constitute conclusions of law to which no response is necessary, and therefore Respondent denies the same, and further denies that it violated any of the cited provisions.

6. Describe the type of pollution that you allege (e.g., air, odor, noise, water, sewer back-ups, hazardous waste) and the location of the alleged pollution. Be as specific as you reasonably can in describing the alleged pollution.

Toxic concrete washout water and slurry which is prohibited from making contact with soil and migrating to surface waters or into the ground water located in construction area and public parking lot frequented by residents. Also, on topsoil. Significant amounts of sediment and sediment laden water are freely allowed to enter the street and inlets. Vehicles parked on street covered in sediment leaking oil.

Site is an apartment complex being built with some residents moved in.

Answering Paragraph 6, Respondent denies that concrete and concrete washout water or slurry is “toxic” and further denies the remaining allegations of this paragraph.

7. Describe the duration and frequency of the alleged pollution. Be as specific as you reasonably can about when you first noticed the alleged pollution, how frequently it occurs, and whether it is still continuing (include seasons of the year, dates, and times of day if known).

Photographed : June 4, 2022 at 3:21pm

Photographed : June 8, 2022 at 1:39pm

ILEPA inspection leading to Enforcement Action : June 9, 2022

Letter of Compliance : June 24, 2022

Return to sitewide pollution photographed: July 9, 2022 3:08pm

Answering Paragraph 7, Respondent objects on the grounds that the Complainant fails to allege any durations and affirmatively states that the ILEPA has found that the site is in compliance by virtue of its letter dated June 24, 2022. (Attached hereto and incorporated herein by reference as Exhibit 1).

8. Describe any bad effects that you believe the alleged pollution has or has had on human health, on plant or animal life, on the environment, on the enjoyment of life or property, or on any lawful business or activity.

They are washing out concrete and mortar in the streets. Prior to the enforcement action they were photographed actively using the street inlet as the drain for the washout barrel and adjacent mortar mixer. Inlet drains to several adjacent neighborhood retention ponds before entering the Lily Cache Creek, a Water of The United States posing a risk to plant and animal life. As well as the water quality of the creek and ground water. Concrete washout left on the public parking lot where residents walk their dogs. Still refusing to show me the SWPPP Book as witnessed by two Village of Bolingbrook employees on June 7, 2022, and documented in text messages with the violator June 6, 2022 1:03pm. There is currently no SWPPP info posted, just a blank board on the trailer which is hidden and dangerous to approach for the elderly, people with disabilities or anyone who doesn't want to walk through very rough exposed soil.

Answering Paragraph 8, Respondent denies the allegations of this paragraph and puts Complainant to his proof.

9. Describe the relief that you seek from the Board (e.g., an order requiring that the respondent stop polluting, take pollution abatement measures, perform a cleanup, reimburse cleanup costs, change its operation, or pay a civil penalty (note that the Board cannot order the respondent to pay your attorney fees or any out-of-pocket expenses that you incur by pursuing an enforcement action)).

Immediately stop polluting. Use and maintain required BMPs. Control pollutants. Civil fines.

Answering Paragraph 9, Respondent affirmatively alleges that the relief requested in this paragraph is moot. As stated in the response to Answer 4, all construction undertaken at the site in 2022 was completed under the terms and conditions of the NPDES Construction Permit and the associated SWPPP, which authorize discharges of stormwater associated with construction activities from the Spring at Lily Cache Creek construction site. Respondent affirmatively states that ILEPA, in the exercise of its enforcement discretion, has determined not to seek penalties, and further alleges that the Complaint is not entitled to “civil fines.”

10. Identify any identical or substantially similar case you know of brought before the Board or in another forum against this respondent for the same alleged pollution (note that you need not include any complaints made to the Illinois Environmental Protection Agency or any unit of local government).

No identical or substantially similar cases have been brought to The Board which I am aware of.

Answering Paragraph 10, Respondent does not dispute Complainant’s statement.

11. State whether you are representing (a) yourself as an individual or (b) your unincorporated sole proprietorship. Also, state whether you are an attorney and, if so, whether you are licensed and registered to practice law in Illinois. (Under Illinois law, an association, citizens group, unit of local government, or corporation must be represented before the Board by an attorney. Also, an individual who is not an attorney cannot represent another individual or other individuals before the Board. However, an individual who is not an attorney is allowed to represent (a) himself or herself as an individual or (b) his or her unincorporated sole proprietorship, though the individual may prefer having attorney representation.)

I am representing myself as an individual.

Answering Paragraph 11, Respondent admits.

AFFIRMATIVE DEFENSES

Respondent alleges and asserts the following affirmative and other defenses in response to Complainant's allegations. Respondent further reserves all rights to allege additional defenses that become known through the course of discovery.

First Affirmative Defense

1. The Complaint fails to state a cause of action or claim upon which relief may be granted in whole or in part for Respondent's alleged damage

2. In Complaint's Motion to Modify the Formal Complaint, the Complainant alleges that the Respondent violated Section 12(a) of the Illinois Environmental Protection Act ("the Act") (415 ILCS 5/12(a) (2020)) and 35 Ill. Adm. Code 304(b). Section 12(a) of the Act provides in its entirety that no person shall "[c]ause 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." Respondent did not violate the cited provisions of the Act.

3. Section 304.141(b) provides "[n]o person may discharge any pollutant subject to, or which contributes or threatens to cause a violation of, any applicable federal or state water quality standard, effluent standard, guideline, or other limitation, promulgated pursuant to the CWA ("Clean Water Act") or the Act, *unless limitation for such pollutant has been set forth in an applicable NPDES permit.* (Emphasis added.) Respondent substantially complied with its NPDES Construction Permit with its certified SWPPP, complete with erosion and sediment controls, stabilization and structural practices to control stormwater volume and minimize sediment discharges.

4. The Respondent properly conducted inspections of disturbed areas of the construction site that had not been finally stabilized, structure control measures, and locations where vehicles enter or exit the site at least once every seven calendar days and within 24 hours of the end of a storm or by the end of the following business or work day that is 0.5 inches or greater or equivalent of snowfall.

5. While Complainants are authorized by the Act to seek mandatory injunctive relief from the Illinois courts, they may not obtain that relief from the Illinois Pollution Control Board. Instead, complainants before the Board are authorized to seek only three specific types of relief: orders to “cease and desist from violations,” civil penalties, and revocation of permits. 415 ILCS 5/33(b). ILEPA has exercised its discretion not to impose civil penalties, and no reason exists to modify or reverse that determination.

6. The Act does not authorize complainants to seek mandatory injunctive relief before the Board. *See, e.g., Clean the Uniform Co.-Highland vs. Aramark Uniform & Career Apparel, Inc.*, PCB 03-21, Order of the Board, at 2 (Nov. 7, 2002; *Krempel v. Martin Oil Marketing, Inc.*, No. 95-c-1348, 1995 WL 733439, at *3 (N.D. Ill., Dec. 8, 1995) (“The plain language of the statute prohibits a suit for injunctive relief until a ruling from the PCB is obtained.”); *People v. NL Indus.*, 152 Ill. 2d 82, 99–100 (Ill. 1992), opinion modified on denial of reh'g (Nov. 30, 1992) “The Board has no enforcement powers. . . . Section 42 allows for the institution of a civil action to obtain an injunction.” (Emphasis in original)).

7. Section 304.141(b) of the Board’s water pollution rule provides an exception for discharges that are authorized in an applicable NPDES permit. Respondent had such a NPDES Construction Permit at all times material to this dispute.

8. The NPDES Construction Permit authorizes all discharges of stormwater associated with Respondent's construction activities from the Spring at Lily Cache Creek construction site in Bolingbrook, Will County.

9. Respondent complied with the conditions of the NPDES Construction Permit approval, by developing and maintaining a SWPPP in accordance with good engineering practices.

10. The SWPPP properly described, and the Respondent implemented and maintained erosion and sediment controls, stabilization and structural practices to control stormwater volume, minimize sediment discharges, and minimize topsoil exposure during construction.

11. The SWPPP described and the Respondent properly implemented and maintained silt fence and stabilization construction entrances, installed inlet sediment traps and inlet basket filters above the storm sewer system, and kept sediment basins in good operating condition.

12. The SWPPP described, and the Respondent properly ensured the implementation and maintenance of best management practices to reduce the pollutants in stormwater discharges associated with construction and assure compliance with the terms and conditions of the NPDES Construction Permit.

13. The Respondent properly conducted inspections of disturbed areas of the construction site that had not been finally stabilized, and inspected structural control measures, and locations where vehicles enter or exit the site at least once every seven calendar days and within 24 hours of the end of a storm or by the end of the following business or work day that is 0.5 inches or greater or equivalent of snowfall.

WHEREFORE, the Respondent, respectfully requests that the Board enter an order in favor of Respondent and any such other relief as the Board deems appropriate.

Respectfully submitted December 16, 2022

HUSCH BLACKWELL LLP

Jon Micah Goeller

Jon Micah Goeller
120 South Riverside Plaza, Suite 2200
Madison, WI 53703
Tel: (312) 655- 1624
Fax: 312.655.1501
JonMicah.Goeller@huschblackwell.com
Illinois Bar No. 6337904

Richard J. Lewandowski
33 East Main Street, Suite 300
Madison, WI 53703
Tel.: (608) 255- 4440
Fax: (608) 258-7138
richard.lewandowski@huschblackwell.com
Wisconsin Bar. No 1018459
Illinois Attorney Registration No. 6343394

EXHIBIT 1



Leadership in Resource Management Since 1946

1201 S. Gougar Rd • New Lenox, IL 60451
(815) 462-3106 • Fax (815) 462-3176
www.will-scookswcd.org

Mr. Jay Patel, Manager
Illinois Environmental Protection Agency DWPC
9511 West Harrison Street
Des Plaines, IL 60016

June 24, 2022

RE: Springs at Lily Cache Creek
General Construction NPDES Permit Number ILR10ZAKV

A 2nd soil erosion and sediment control site observation was conducted on June 23, 2022, by the Will/South Cook Soil and Water Conservation District (SWCD) per the existing agreement with the Illinois Environmental Protection Agency (IEPA).

The site and relative documentation are in compliance.

If you have any questions, please contact Lyn Nitz-Mercaeant at (815) 462-3106, ext. 3.


Sincerely,
Will / South Cook SWCD

Lyn Nitz-Mercaeant CESSWI in Training
Resource Conservationist

Cc: Continental 561 Fund LLC

Electronic Filing: Received, Clerk's Office 12/16/2022
SWPPP - INSPECTION PHOTOS


Date: 6/23/2022	Site Location: Springs at Lily Cache Creek
Photo By: Ryan Gibbons	
County: Will-S.Cook	
Comments: Streets have been swept	
Photo # 1	

Date: 6/23/2022	Site Location: Springs at Lily Cache Creek
Photo By: Ryan Gibbons	
County: Will-S.Cook	
Comments: Construction entrance in place near a stockpile	
Photo # 2	

Electronic Filing: Received, Clerk's Office 12/16/2022
SWPPP - INSPECTION PHOTOS

Date: 6/23/2022	Site Location: Springs at Lily Cache Creek
Photo By: Ryan Gibbons	
County: Will - S.Cook	
Comments: Typical stockpile protection	
Photo # 3	


Date: 6/23/2022	Site Location: Springs at Lily Cache Creek
Photo By: Ryan Gibbons	
County: Will-S.Cook	
Comments: Streets near the curbs have also been cleaned	
Photo # 4	

Date: 6/23/2022	Site Location: Springs at Lily Cache Creek
Photo By: Ryan Gibbons	
County: Will - S.Cook	
Comments: Inlet baskets in place on the entire site	
Photo # 5	

Date: 6/23/2022	Site Location: Springs at Lily Cache Creek
Photo By: Ryan Gibbons	
County: Will-S.Cook	
Comments: Typical silt fence	
Photo # 6	

Electronic Filing: Received, Clerk's Office 12/16/2022
SWPPP - INSPECTION PHOTOS

Date: 6/23/2022	Site Location: Springs at Lily Cache Creek
Photo By: Ryan Gibbons	
County: Will-S.Cook	
Comments: Concrete washout in use	
Photo # 7	

Date: 6/23/2022	Site Location: Springs at Lily Cache Creek
Photo By: Ryan Gibbons	
County: Will-S.Cook	
Comments: Rip rap in place at site outlet near a pond	
Photo # 8	