



RECEIVED
CLERK'S OFFICE

OCT 29 2008

STATE OF ILLINOIS
Pollution Control Board

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

October 27, 2008

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center, Ste. 11-500
100 West Randolph
Chicago, Illinois 60601

Re: **People v. J. B. Timmerman Farms, Ltd.**
PCB 07-70

Dear Mr. Therriault:

Enclosed for filing please find the original and ten copies of a Motion to Strike Respondent's Affirmative Defenses and Notice of Filing in regard to the above-captioned matter. Please file the original and return a file-stamped copy to me in the enclosed, self-addressed envelope.

Thank you for your cooperation and consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read "Andrew J. Nicholas".

Andrew J. Nicholas
Environmental Bureau
500 South Second Street
Springfield, Illinois 62706
(217) 782-9031

AJN/pjk
Enclosures

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF)
ILLINOIS,)
)
Complainant,)
)
vs.)
)
J. B. TIMMERMANN FARMS, LTD.,)
an Illinois corporation,)
)
Respondent.)

PCB No. 07-70
(Enforcement - Water)

NOTICE OF FILING

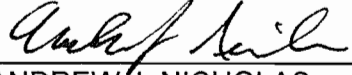
RECEIVED
CLERK'S OFFICE
OCT 29 2008
STATE OF ILLINOIS
Pollution Control Board

To: James Richard Myers
LeFevre Oldfield Myers Apke & Payne Law Group, Ltd.
303 S. Seventh St., P.O. Box 399
Vandalia, IL 62471

PLEASE TAKE NOTICE that on this date I mailed for filing with the Clerk of the Pollution Control Board of the State of Illinois, a MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES, a copy of which is 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: 
ANDREW J. NICHOLAS
Assistant Attorney General
Environmental Bureau

Attorney I.D. #6285057
500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: October 27, 2008

CERTIFICATE OF SERVICE

I hereby certify that I did on October 27, 2008, send by U.S. mail, first class with postage thereon fully prepaid, by depositing in a United States Post Office Box a true and correct copy of the following instruments entitled NOTICE OF FILING and MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES

To: James Richard Myers
LeFèvre Oldfield Myers Apke & Payne Law Group, Ltd.
303 S. Seventh St., P.O. Box 399
Vandalia, IL 62471

and the original and ten copies of the Notice of Filing by First Class Mail with postage thereon fully prepaid of the same foregoing instrument(s):

To: John T. Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

A copy of the Notice of Filing was also sent by First Class Mail with postage thereon fully prepaid to:

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
Springfield, IL 62794



Andrew J. Nicholas
Assistant Attorney General

This filing is submitted on recycled paper.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE)
OF ILLINOIS,)
)
 Complainant,)
)
 v.)
)
 J. B. TIMMERMANN FARMS, LTD.)
 an Illinois corporation,)
)
 Respondent.)

PCB No. 07-70
(Enforcement - Water)

RECEIVED
CLERK'S OFFICE

OCT 29 2008

STATE OF ILLINOIS
Pollution Control Board

**MOTION TO STRIKE RESPONDENT'S
AFFIRMATIVE DEFENSES**

The PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois, hereby moves this Court for an order pursuant to 735 ILCS 5/2-615 (2006) striking the Affirmative Defenses raised by the Respondent, J. B. TIMMERMANN FARMS, LTD. In support of this Motion to Strike Respondent's Affirmative Defenses, the Complainant states as follows:

I. INTRODUCTION

On January 29, 2007, the Complainant filed its Complaint alleging violations of the Illinois Environmental Protection Act, ("Act"), 415 ILCS 5/1 *et seq.* (2006) and Illinois Pollution Control Board Regulations, 35 Ill. Adm. Code 101.100 *et seq.* (2005). The Complainant alleges the Respondent violated Section 12 of the Act by causing or allowing livestock waste to discharge into waters of the State. Further, it is alleged the Respondent failed to maintain its livestock waste-handling facilities at levels such that there was adequate storage capacity to withstand a 25-year, 24-hour storm as required by Board regulations. On October 15, 2008, the

Respondent filed its Answer to the Complaint. The Answer included the following the

Affirmative Defenses:

- 1) Act of God - The lagoon overflow referenced in the Complaint occurred subsequent to a unusually heavy rainfall. Rainfall is an act of God, not within the control of the Respondent.
- 2) Third-Party Intervention - The lagoon overflow referenced in the Complaint occurred subsequent to a unusually heavy rainfall. Several other landowners in the area of Respondent have waste and water retention systems which failed at the same time as Respondent's.
- 3) Mitigation - The lagoon overflow referenced in the Complaint occurred subsequent to a unusually heavy rainfall. Respondent has acted with all due attentiveness and speed to rectify the situation and to prevent further overflows of its lagoon at its significant cost and expense.

II. LEGAL STANDARDS

Section 2-615(a) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615(a) (2007)

provides, in pertinent part, as follows:

- (a) All objections to pleadings shall be raised by motion. The motion shall point out specifically the defects complained of, and shall ask for appropriate relief, such as: that a pleading or a portion thereof be stricken because substantially insufficient in law...

Section 2-613(d) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-613(d) (2007), sets forth requirements for properly pleading affirmative defenses. Section 2-613(d) provides, in relevant part, as follows:

- (d) The facts constituting any affirmative defense...must be plainly set forth in the answer or reply.

An affirmative defense essentially admits the allegations in the complaint, and then asserts new matter which defeats a plaintiff's right to recover. *Vroegh v. J & M. Forklift*, 165 Ill.2d 523, 651 N.E.2d 121, 126 (1995). An affirmative defense must do more than offer

evidence to refute properly pleaded facts in a complaint. *Pryweller v. Cohen*, 282 Ill.App.3d 899, 668 N.E.2d 1144, 1149 (1st Dist. 1996), *appeal denied*, 169 Ill.2d 588 (1996). Rather, an affirmative defense must offer facts which are capable of negating the alleged cause of action. *Id.* Moreover, facts establishing an affirmative defense must be pled specifically, in the same manner as facts in a complaint. *International Ins. Co. v. Sargent & Lundy*, 242 Ill.App.3d 614, 609 N.E.2d 842, 853 (1st Dist. 1993).

III. ARGUMENT

A. Respondent's Affirmative Defenses are Factually Insufficient

Affirmative Defense # 1 - Act of God

Affirmative Defense # 1 does not provide any new facts that defeat the Complainant's right to recover. It fails to provide any facts that could form a sufficient basis for an affirmative defense. Respondent merely states that there was an "unusually heavy rainfall." It does not plead when it rained, how long it rained or how much rainfall was received. Therefore Affirmative Defense # 1 is factually insufficient and should be stricken.

Affirmative Defense # 2 - Third Party Intervention

Affirmative Defense # 2 does not offer any new facts that defeat the Complainant's right to recover. The Respondent claims that neighbors in the area also experienced livestock waste overflows, however, it does not provide specific factual support for this defense. For example, the Respondent does not plead who specifically experienced overflows or how those overflows defeat Complainant's claims against the Respondent. In addition, the Respondent does not provide when these other overflows occurred or how much overflow contributed to the total discharge to the waters of the State. The Respondent merely states several other landowners

experienced overflows at the same time. This is simply an attempt by the Respondent to divert causation. Therefore, Affirmative Defense # 2 is factually insufficient and should be stricken.

Affirmative Defense # 3 - Mitigation

Affirmative Defense # 3 does not offer any new facts that defeat the Complainant's right to recover. Merely stating that it has acted with attentiveness and speed to rectify the situation to prevent further overflows does not meet the standard for a well-pleaded affirmative defense. The Respondent does not plead what work was done or where it was done. Furthermore, the Respondent does not provide information regarding how its subsequent work may have improved its livestock waste system or its ability to divert storm water and/or livestock waste. Therefore, Affirmative Defense # 3 is factually insufficient and should be stricken.

B. Respondent's Affirmative Defenses are Legally Insufficient

Affirmative Defense # 1 - Act of God

Affirmative Defense # 1 lacks the legal sufficiency to be proper. A simple factual denial of a fact pleaded in the Complaint is not a sufficient affirmative defense. *Pryweller*, 668 N.E.2d at 1149. Affirmative Defense # 1 attempts to refute the facts as pleaded in the Complaint by merely asserting that an Act of God, namely "unusually heavy rainfall," was the cause of the violations. This assertion falls well short of constituting a legally sufficient affirmative defense.

In Illinois, the "Act of God" defense is not a defense against water pollution claims brought under Section 12 of the Act, 415 ILCS 5/12 (2006). 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* (5th Dist. 1974). 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 Defendant's control. The fact the pollution came from the owner's

land was sufficient proof that the owner allowed the discharge within the meaning of the Act. Here, the Parties do not dispute that the discharge came from the Respondent's land. The fact that it rained does not release the Respondent from liability.

Furthermore, the law requires the Respondent to maintain its facility such that it can handle storm water run-off and avert livestock waste overflows. Section 501.403(a) of the Board's Water Pollution Regulations, requires the Respondent to have adequate diversion dikes, walls or curbs to handle storm water. 35 Ill. Adm. Code 501.403(a) (2005). Section 501.404(c)(3) requires the Respondent to maintain adequate storage capacity in its waste-handling facilities so that an overflow does not occur except in cases of precipitation in excess of a 25-year, 24-hour storm. 35 Ill. Adm. Code 501.404(c)(3) (2005). The storm that precipitated the Respondent's discharge was not a 25-year, 24-hour storm event. The Complainant alleges the Respondent does not have adequate storm water diversion capability or adequate storage capacity in its waste-handling facilities. The rainfall caused discharge of contaminants at the Respondent's property in violation of the law.

To constitute a proper affirmative defense, an allegation must be capable of defeating the claims in the complaint. Since the law holds that an "Act of God" denial of causation is an insufficient defense to liability for water pollution violations, and the Respondent's water diversion and waste-storage facilities are inadequate, Affirmative Defense # 1 should be stricken as legally insufficient.

Affirmative Defense # 2 - Third Party Intervention

This affirmative defense has no legal basis and should be stricken. Section 12(a) of the Act provides that no person shall cause or allow water pollution either alone or in combination with matter from other sources. 415 ILCS 5/12(a) (2006). It does not matter whether other

waste and water retention systems in the Respondent's neighborhood failed, what matters is that the Respondent's system failed. A discharge from the Respondent's neighbor does not alleviate the Respondent of its legal obligations. Therefore, Affirmative Defense # 2 should be stricken as legally insufficient.

Affirmative Defense # 3 - Mitigation

Here, the Respondent raises the defense that it has taken steps to reach compliance subsequent to the violation. This is a legally insufficient defense and must be stricken. Section 33(a) of the Act, provides: "It shall not be a defense to findings of violations of the provisions of the Act or Board regulations or a bar to the assessment of civil penalties that the person has come into compliance subsequent to the violation." 415 ILCS 5/33(a) (2006). The fact that the Respondent claims it has worked to rectify the situation is of no legal consequence. Therefore, Affirmative Defense # 3 is legally insufficient and should be stricken.

IV. CONCLUSION

The Respondent's Affirmative Defenses are both factually and legally insufficient. Therefore, they should be stricken pursuant to Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615 (2007).

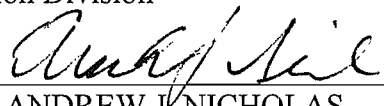
WHEREFORE, the Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board enter an order striking the Respondent's Affirmative Defenses and granting any other relief it deems appropriate.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

ex rel. LISA MADIGAN Attorney General
of the State of Illinois

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

BY: 

ANDREW J. NICHOLAS
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/557-9457
Dated: October 27, 2008