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STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ROLF SCHILLING, PAM SCHILLING and)
SUZZANE VENTURRA,)
)
Complainants,)
)
vs.) PCB. No. 10-100
)
GARY D. HILL, VILLA LAND TRUST, an Illinois)
Land Trust, and PRAIRIE LIVING WEST, LLC,)
)
Respondents.)

ORIGINAL

RESPONSE TO MOTION TO STRIKE AFFIRMATIVE DEFENSES

NOW COME the Respondents, Gary D. Hill, Villa Land Trust, an Illinois Land Trust, and Prairie Living West, LLC, by and through their attorneys, Winters, Brewster, Crosby and Schafer LLC, and for their response to Complainants' Motion to Strike, hereby state as follows:

1. On or about January 26, 2011, Complainants filed a Motion to Strike, wherein they seek to have Respondents' affirmative defenses stricken.
2. In their Motion, Complainants contend that Respondent's Affirmative Defenses I, II, and III should be stricken because Respondents fail to identify who the indispensable party referred to in Affirmative Defense I is, what natural occurrences may have caused or contributed to Complainants' alleged injury/damages, and that Respondents fail to identify the other parties who caused or contributed to Complainants' alleged injury/damages.
3. Pursuant to the rules of the Illinois Pollution Control Board, "any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing." 35 Ill. Adm. Code 103.204(d). In a valid affirmative defense, the respondent alleges "new facts or arguments that, if true, will defeat...the government's claim even if all allegations in the

complaint are true.” *Elmhurst Memorial Healthcare et. al v. Chevron U.S.A. Inc.*, PCB No. 09-066 (March 18, 2010), citing *Community Landfill Co.*, PCB 97-193 slip op. at 3. The Board has defined an affirmative defense as a “response to a plaintiff’s claim which attacks the plaintiff’s legal right to bring an action, as opposed to attacking the truth of the claim.” *Elmhurst, supra.*, citing *Farmer’s State Bank v. Phillips Petroleum Co.*, PCB 97-100, slip op. at 2 n. 1 (January 23, 1997).

4. A motion to strike an affirmative defense admits the well-pleaded facts constituting the defense, and attacks only the legal sufficiency of the facts. “Where the well-pleaded facts of an affirmative defense raise the possibility that the party asserting them will prevail, the defense should not be stricken.” *International Insurance Co. v. Sargent and Lundy*, 242 Ill. App. 3d 614, 630-31 (1st Dist. 1993), citing *Rapraeger v. Allstate Insurance Co.*, 183 Ill. App. 3d 847, 854 (2d Dist. 1989).

5. In regards to Affirmative Defense I, upon further review, Respondents hereby withdraw Affirmative Defense I.

6. In regards to Affirmative Defense II, if one is to assume, for the purposes of the Motion to Strike, that the allegations of Affirmative Defense II are true, namely that Complainants’ injuries and damages alleged are the result of natural occurrences, and not the result of anything over which Respondents have control, then Complainants’ claim will necessarily be defeated. Simply put, if the evidence presented exemplifies that the alleged siltification of the Pond, and the alleged damage to the fish and wildlife of the Pond, are the result of natural occurrences, and not the result of Respondents’ supposed “construction activities”, then Respondents will defeat Complainants’ claim. Because of the simplicity of Respondents’ Affirmative Defense, it is Respondents’ position that there are no additional facts

which, without the benefit of discovery, Respondents may properly plead in Affirmative Defense II.

Complainants' take issue with Affirmative Defense II, stating that Respondents have not identified what natural occurrences, or why Respondents would have no control over such natural occurrences. Complainants fail to cite any rules or case law which indicate that Respondents are required to do so. Further, if Respondents were to, without the benefit of discovery and the consultation of experts, speculate as to which specific natural occurrences occurred, then Respondents may be held to only the natural occurrence(s) specified. Lastly, Complainants' contention belies common sense because a natural occurrence, is by the very nature of its meaning, not within a party's control. Complainants cannot expect Respondents to plead the reasons for which Respondents would not be liable for such a natural occurrence, which would require expert testimony. Therefore, based upon the foregoing, Complainants' Motion to Strike Affirmative Defense II should be denied. If the Board should deem Affirmative Defense II to be insufficient, Respondents seek leave to file amended affirmative defenses to correct any such pleading deficiency

7. Like Affirmative Defense II, Respondents' Affirmative Defense III is a proper affirmative defense. If one assumes that the allegations in Affirmative Defense III are true, and that Complainants' injuries and damages were caused by the acts of someone else, other than Respondents, then Respondent will defeat Complainants' claim. Respondents are unable to plead Affirmative Defense III with any further specificity because Respondents have pled their Affirmative Defenses without the benefit of discovery or the consultation of experts. Therefore, Complainants' Motion to Strike Affirmative Defense III should be stricken. If the Board should deem Affirmative Defense III to be insufficient, Respondents seek leave to file amended

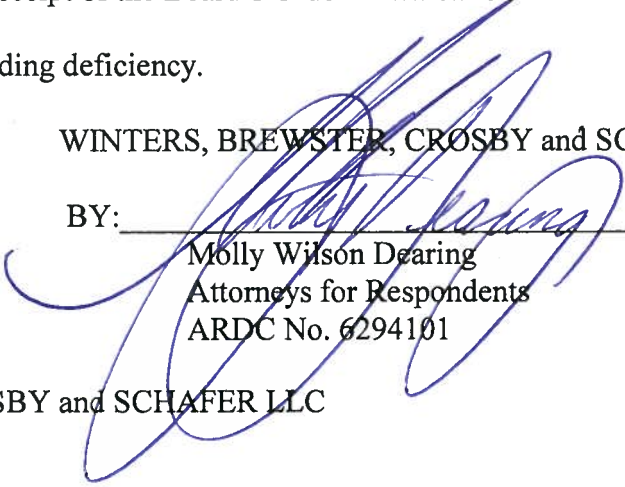
affirmative defenses to correct any such pleading deficiency

8. In regards to Affirmative Defense IV, upon further review, Respondents hereby withdraw Affirmative Defense IV.

WHEREFORE, Respondents, Gary D. Hill, Villa Land Trust, an Illinois Land Trust, and Prairie Living West, LLC, respectfully pray that this Board deny Complainants' Motion to Strike Affirmative Defenses II and III, and should the Board find that Affirmative Defenses II and III are factually deficient, Respondents respectfully request that the Board grant Respondents leave for twenty eight (28) days from receipt of the Board's Order in which to file amended affirmative defenses to correct any such pleading deficiency.

WINTERS, BREWSTER, CROSBY and SCHAFER LLC

BY: _____


Molly Wilson Dearing
Attorneys for Respondents
ARDC No. 6294101

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STATE OF ILLINOIS
Pollution Control Board

CERTIFICATE OF MAILING

The undersigned certifies that a copy of the above and foregoing instrument was mailed by depositing the same in a U.S. Post Office Box in the City of Marion, Illinois, postage fully prepaid and addressed to:

Sorling, Northrup, Hanna,
Cullen, & Cochran, Ltd.
Stephen F. Hedinger
Suite 800 Illinois Building
P O Box 5131
Springfield, IL 62705

Ms. Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274

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The undersigned certifies that the original and nine copies of the above and foregoing instrument was mailed by depositing the same in a U.S. Post Office Box in the City of Marion, Illinois, postage fully prepaid and addressed to:

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

Dated this 8th day of February, 2011.



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February 8, 2011

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Mr. John T. Therriault
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Illinois Pollution Control Board
James R. Thompson Center
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Chicago, IL 60601

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STATE OF ILLINOIS
Pollution Control Board

RE: Prairie Living West/Clean Water Suit
Case No. 10-L-43; PCB No. 2010-100, IL Pollution Control Board; Jackson Co.
WBCS No. 10-185-JSB/TFC

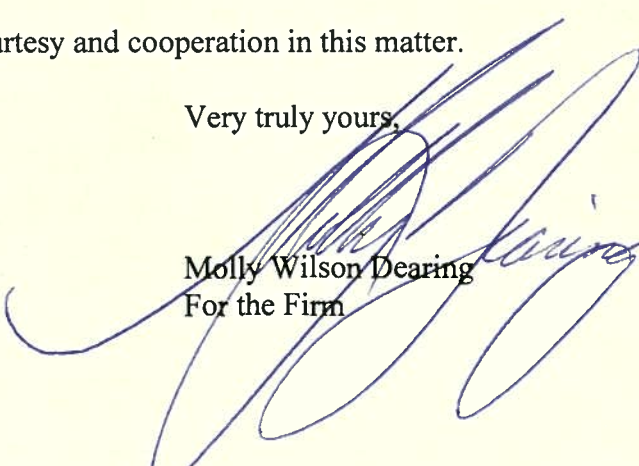
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Dear Mr. Therriault:

Enclosed you will find an original and nine copies of Response to Motion to Strike Affirmative Defenses in the above referenced matter. Please file the original(s) and return a file-stamped duplicates to me in the self-addressed, pre-posted envelope enclosed for this purpose.

Thank you for your courtesy and cooperation in this matter.

Very truly yours,


Molly Wilson Dearing
For the Firm

MRD:ajk
Enc.

cc: Stephan F. Hedinger and Ms. Carol Webb

Enclosures