BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	**PCB NO.**
	)	**(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 July 18, 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 TO STRIKE RESPONDENT TRADITION INVESTMENTS, LLC'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: _____
JANE, E. McBRIDE
Sr. Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: July 18, 2011

CERTIFICATE OF SERVICE

I hereby certify that I did on July 18, 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 and MOTION TO STRIKE RESPONDENT TRADITION INVESTMENTS, LLC'S AFFIRMATIVE DEFENSES upon the persons listed on the Service List.

Jane E. McBride
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 TO STRIKE
RESPONDENT TRADITION INVESTMENTS, LLC'S AFFIRMATIVE DEFENSES

NOW COMES, Complainant, PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* Lisa Madigan, Attorney General of the State of Illinois, and moves the Board, pursuant to Section 101.506 of the Board's Procedural Rules, 35 Ill. Adm. Code 101.506, to strike Respondent's Affirmative Defenses on the following grounds and for the following reasons:

Standard

1. Pursuant to Section 103.204(d) of the Board's Procedural Rules, 35 Ill. Adm. Code 103.204(d), 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 the hearing.

2. An affirmative defenses is a "response to a claim which attacks the legal right to bring an action, as opposed to attacking the truth of the claim." *Indian Creek Development Company and the Chicago Title and Trust Company v. BNSF*, PCB 07-44 slip op. at 3 (June 18, 2009). If the pleading does not admit the opposing party's claim but rather attacks the sufficiency of that claim, it is not an affirmative defense. *Indian Creek Development Company, PCB 07-44, slip op. at 3, citing The Worner Agency, Inc. v. Doyle*, 121 Ill. App. 3d 219, 221, 459 N.E. 2d 633, 635 (4th Dist. 1984).

3. In an 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. *People v. Community Landfill Co.*, PCB 97-193, slip op. at 3 (August 6, 1998), cited in *People v. Wood River Refining Company*, PCB 99-120, slip op. at 3-4 (August 8, 2002), and *People v. Stein Steel Mills Services*, PCB 02-1, slip op. at 1-2 (April 18, 2002) and *Indian Creek Development Company*, PCB 07-44, slip op. at 3. An asserted affirmative defense is not, by definition, an affirmative defense, even if proven true at hearing, if it is an assertion that will not impact the complainant's legal right to bring the action. *Glave v. Harris et al, Village of Grayslake v. Winds Chat Kennel, Inc*, PCB 02-11, PCB 02-32 (Consolidated), slip op. at 2 (January 24, 2002), citing *People v. Crane*, PCB 01-76 (May 17, 2000). An affirmative defense is 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 claim." *Farmers State Bank v. Phillips Petroleum Co.*, PCB 97-100, slip op. at 2 n-1 (quoting Black's Law Dictionary) (January 23, 1997).

4. The Code of Civil Procedure gives additional guidance on pleading affirmative defenses. Section 2-613 (d), 735 ILCS 5/2-613(d), provides in part:

> The facts constituting any affirmative defense . . . and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint, . . . in whole or in part, and any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, should be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply. 735 ILCS 5/2-613(d) (2008).

cited in *People v. Wood River Refining Company*, PCB 99-120, slip op. at 3-4 (August 8, 2002), and *People v. Stein Steel Mills Services*, PCB 02-1, slip op. at 1-2 (April 18, 2002). In a ruling on Complainant's motion to strike affirmative defenses in the case of *People v. Midwest Grain*, PCB 97-179, slip op. at 3 (August 21, 1997), the Board stated that Section 2-613(d) provides guidance regarding the pleading of defenses and, relying on the case of *Handelman v. London Time, Ltd.*, 124 Ill. Ap. 3d 318, 320, 464 N.E.2d 710, 712 (1st Dist. 1984), stated that clearly the purpose of the above-quoted language is to specify the disputed legal issues before trial. The

parties are to be informed of the legal theories which will be presented by their respective opponents. *Id.* This is a prime function of pleading. *Id.*

5. Further guidance is available in Section 2-612 of the Code of Civil Procedure, 735 ILCS 5/2-612, which provides:

> Insufficient pleadings. (a) If any pleading is insufficient in substance or form the court may order a fuller or more particular statement. If the pleadings do not sufficiently define the issues the court may order other pleadings prepared.
> (b) No pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet.
> (c) All defects in pleadings, either in form or substance, not objected to in the trial court are waived.

6. A valid affirmative defense gives color to the opposing party's claim but then asserts new matter which defeats an apparent right. *Condon v. American Telephone and Telegram Co.*, 210 Ill. App. 3d 701, 709, 569 N.E.2d 518, 523 (2d Dist. 1991), citing *The Worner Agency Inc.*, 121 Ill. App. 3d 219, 222.

7. "To set forth a good and sufficient claim or defense, a pleading must allege ultimate facts sufficient to satisfy each element of the cause of action or affirmative defense pled. . . . In determining the sufficiency of any claim or defense, the court will disregard any conclusions of.fact or law that are not supported by allegations of specific fact." *Richco Plastic Co. v. IMS Co.*, 288 Ill. App.3d 782, 784-85, 681 N.E.2d 56, 58 (1st Dist. 1997), cited in *Indian Creek Development Company and the Chicago Title and Trust Company v. BNSF*, PCB 07-44 slip op. at 4 (June 18, 2009).

8. Affirmative defenses that are totally conclusory in nature and devoid of any specific facts supporting the conclusion are inappropriate and should be stricken. See *International Ins. Co.*, 242 Ill. App. 3d at 635, cited in *Glave v. Harris et al, Village of Grayslake v. Winds Chat Kennel, Inc*, PCB 02-11, PCB 02-32 (Consolidated), slip op. at 2 (January 24, 2002).

9. A motion to strike an affirmative defense admits 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, 609 N.E.2d 842, 853-54 (1st Dist. 1993), citing *Raprager v. Allstate Insurance Co.*, 183 Ill. App. 3d 847, 854, 539 N.E. 2d 787, 791 (2nd Dist. 1989).

Respondent's First Affirmative Defense

1. Complainant is guilty of laches by reason of its failure to assert or allege a purported obligation on the part of Respondent to seek or obtain an NPDES permit prior to the filing of this action. Specifically, Complainant, through the Department of Agriculture, received, processed and approved the Notice of Intent to Construct for Tradition South based upon application materials and submittals dated as early as 2007. Complainant was aware at all times beginning in 2007 of the specific plans for Tradition South and failed to contend or allege that an NPDES permit was required. Respondent has been prejudiced by Complainant's state claim in that Respondent has incurred in excess of $22,000,000 in reliance of Complainant's finding that Respondent's facility is permissible.

10. In Count III of the Complaint, Complainant alleges violation of Section 12(f) of the Illinois Environmental Protection Act, 415 ILCS 5/12(f), and 35 Ill. Adm. Code 309.102(a). Complainant alleges that on October 1, 2010, Respondent caused or allowed the discharge of process wastewater from a CAFO without NPDES permit coverage. The factual basis for this allegation is the October 1, 2010 release of silage leachate from a land application field. In its prayer for remedy, Complainant requested the Board to order Respondent to obtain NPDES permit coverage for its facility that was the source of the discharge. Complainant has jurisdiction to bring these allegations pursuant to the Illinois Environmental Protection Act and the federal Clean Water Act and regulations promulgated thereunder.

11. In its first affirmative defense, Respondent asserts that the activity it undertook in 2007 relevant to requirements of the Illinois Livestock Management Facilities Act ("LMFA"), 510

ILCS 70/1 *et seq.*, that were concluded on May 30, 2008 when the facility received approval to construct, allegedly defeats the Complainant's right to assert NPDES violations and also voids the Complainant's demand that the Respondent obtain NPDES coverage for its facility. Complainant's allegation of violation and its demand for permit coverage wholly have their basis in factual allegations associated with a October 1, 2010 discharge (see paragraphs 11 through 22 of Count I of the Complaint). The alleged NPDES violations were brought by the Complainant pursuant to the Illinois EPA's authority and jurisdiction to enforce the Illinois Environmental Protection Act and exercise its delegated authority under the federal Clean Water Act.

12. The LMFA is irrelevant to Clear Water Act jurisdiction. There is nothing in the LMFA that states it was enacted pursuant to or in furtherance of the federal Clean Water Act. Further, as stated in the LMFA, "Nothing in this Act shall be construed as a limitation or preemption of any statutory or regulatory authority under the Illinois Environmental Protection Act." 510 ILCS 77/100. Respondent fails to cite any authority that activity undertaken pursuant to the requirements of the LMFA is determinative or relevant to a cause of action brought pursuant to the Illinois Environmental Protection Act, especially where the factual allegations leading to the environmental violations post date, by over 2 years, the timeframe during which activities under the LMFA were occurring.

13. *Laches* is an equitable doctrine. It is based upon the maxim that equity aids the vigilant and not those who slumber on their rights. It is defined as neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity. It is neglect for an unreasonable and unexplained length of time under circumstances permitting diligence, to do what in law, should have been done. Black's Law Dictionary, 6th Ed.

14. In a relatively recent decision, *Wabash County vs. Illinois Municipal Retirement Fund, et al*, 408 Ill. App. 3d 924, 933-934 (2d Dist. 2011), the Illinois Second District Appellate Court reviewed the legal standard for a finding of *laches*. The doctrine of *laches* is an equitable doctrine that precludes a litigant from asserting a claim when an unreasonable delay in raising ***the claim*** [i.e. one and the same cause of action] prejudices the other party. *Madigan ex rel. Department of Healthcare & Family Services v. Yballe*, 397 Ill. App. 3d 481, 493 (2009). (Emphasis added.) *Laches* is "grounded in the equitable notion that courts are reluctant to come to the aid of a party who has knowingly slept on his right to the detriment of the opposing party." *Tully v. State*, 143 Ill. 2d 415, 432 (1991). The defense of *laches* requires a showing that (1) a litigant has exhibited unreasonable delay in asserting a claim; and (2) the opposing party suffered prejudice as a result of the delay. *Monson v. County of Grundy*, 394 Ill. App. 3d 1091, 1094 (2009). *Laches* can be invoked to bar administrative complaints. *Christ Hospital & Medical Center v. Human Rights Comm'n*, 271 Ill. App. 3d 133, 137 (1995). Nonetheless, courts have expressed a "consistent reluctance" to impose *laches* on a government entity. *City of Chicago v. Alessia*, 348 Ill. App. 3d 228-29 (2004). *Laches* will not be applied to government entities absent extraordinary circumstances because the doctrine could impair the functioning of government, which, in turn, would harm the public. *Yballe*, 397 Ill. App. 3d at 493-94. In addition, the non-action of government officials will not support a *laches* defense. Rather, *laches* will apply only if the government officials initiated an affirmative act that induced the opposing party to act, making it inequitable to permit the government entity to retract what the government officials have done. *Alessia*, 348 Ill. App. 3d at 229.

15. In order for the doctrine of *laches* to be applicable, the lapse of time must concern one and the same right or claim. As stated above, activity undertaken pursuant to the LMFA in 2007 has nothing to do with, and is not within the jurisdiction of nor determinative of a

claim brought pursuant to the Illinois Environmental Protection Act and federal Clean Water Act based on factual allegations concerning a 2010 discharge. The fact that one activity took place under the authority of one statute and the later cause of action is asserted pursuant to the authority of and under the jurisdiction of a wholly different statute, and, in fact, is based on a set of facts that had not occurred at the time of the asserted 2007 activity, renders Respondent's claim of *laches* wholly without merit.

16. The legal basis for Complainant's allegation of violation, as well as its demand that the facility obtain coverage, contained in a pleading filed in 2011 and based on an October 1, 2010 discharge, was set forth in Count III, paragraphs 36 through 44, as follows:

36. Section 502.101 of the Board's Agriculture Related Pollution Regulations, 35 Ill. Adm. Code 502.101, provides:

> No person specified in Sections 502.102, 502.103 or 502.104 or required to have a permit under the conditions of Section 502.106 shall cause or allow the operation of any new livestock management facility or livestock waste-handling facility, or cause or allow the modification of any livestock management facility or livestock waste-handling facility, or cause or allow the operation of any existing livestock management facility of livestock waste-handling facility without a National Pollutant Discharge elimination System ("NPDES") permit. Facility expansions, production increases, and process modifications which significantly increase the amount of livestock waste over the level authorized by the NPDES permit must be reported by submission of a new NPDES application.

37. Section 502.103 of the Board's Agriculture Related Pollution Regulations, 35 Ill. Adm. Code 502.103, provides:

> An NPDES permit is required if more than the numbers of animal specified in any of the following categories are confined:
>
> | Number of Animals | Kind of Animals |
> |---|---|
> | * * * | * * * |
> | 700 | Milking Cows |

38. Section 122.23 (b)(1), 40 CFR 122.23(b)(1), provides, in pertinent part:

§ 122.23 Concentrated animal feeding operations (applicable to State NPDES programs, see § 123.25).

(b) Definitions applicable to this section:

(1) *Animal feeding operation* ("AFO") means a lot or facility (other than an aquatic animal production facility) where the following conditions are met:

(I) Animals (other than aquatic animals) have been, are, ***or will be*** stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and

(ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

39. Section 122.23 (b)(2), 40 CFR 122.23(b)(1), provides, in pertinent part:

(2) *Concentrated animal feeding operation* ("CAFO") means an AFO that is defined as a Large CAFO

40. Section 122.23 (b)(4), 40 CFR 122.23(b)(1), provides, in pertinent part:

(4) *Large concentrated animal feeding operation* ("Large CAFO"). An AFO is defined as a Large CAFO if it stables or confines as many as or more than the numbers of animals specified in any of the following categories:

700 mature dairy cows

41. Section 122.23 (b)(7), 40 CFR 122.23(b)(1), provides, in pertinent part:

(7) *Process wastewater* means water directly or indirectly used in the operation of the AFO for any or all of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities; direct contact swimming, washing, or spray cooling of animals; or dust control. Process wastewater also includes any water which comes into contact with any raw materials, products, or byproducts including manure, litter, **feed**, milk, eggs or bedding

42. Section 122.23 (b)(8), 40 CFR 122.23(b)(1), provides, in pertinent part:

(8) *Production area* means that part of an AFO that includes the animal confinement area, the manure storage area, the raw

materials storage area, and the waste containment areas.

***

The raw materials storage area includes but is not limited to feed silos, **silage bunkers**, and bedding materials

43. Section 122.23(d) (1), 40 CFR 122.23(d)(1), provides, in pertinent part:

> (d) *Who must seek coverage under an NPDES permit?*
>
> (1) *Permit requirement.* The owner or operator of a CAFO must seek coverage under an NPDES permit if the CAFO discharges . . . . Specifically, the CAFO owner or operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit. If the Director has not made a general permit available to the CAFO, the CAFO owner or operator must submit an application for an individual permit to the Director.

44. Section 122.23(e), 40 CFR 122.23(e), provides, in pertinent part:

> e) Land application discharges from a CAFO are subject to NPDES requirements. The discharge of manure, litter or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements, except where it is an agricultural storm water discharge as provided in 33 U.S.C.1362(14).

(Emphasis added.) As stated in paragraph 37 of Count III, an AFO with 700 milking dairy cows or more is considered a concentrated animal feeding operation ("CAFO"). According to Defendant's notice of intent to construct, the subject facility will house over 5,000 dairy cows. Pursuant to Section 122.23(d) (1), 40 CFR 122.23(d)(1), a CAFO is required to get a permit if it discharges. A discharge of silage leachate, which is processed wastewater pursuant to Section 122.23 (b)(7), 40 CFR 122.23(b)(1), in the course of land application, pursuant to Section 122.23(e), 40 CFR 122.23(e), is considered a point source discharge for which a CAFO must have a permit. Respondent's CAFO did not have NPDES permit coverage when it discharged, and thus violated NPDES requirements. An operator who does not obtain permit coverage for

a facility that otherwise qualifies as a CAFO, and then causes or allows a discharge, is in violation of NPDES requirements. The fact Defendant land applied process wastewater without a permit left the Defendant operating at its own risk. As set forth below, in paragraph 35, 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. Thus, given the fact of the October 1, 2010 discharge, Complainant has requested relief in the form of a Board order requiring the Defendant to apply for and obtain NPDES permit coverage.

17. Respondent's claim of prejudice, in excess of $22,000,000, is also without merit. Complainant has requested that the Respondent comply with Illinois law by applying for and obtaining permit coverage, not that it be prohibited from operation. The permit process requires that the facility generate and implement an acceptable comprehensive nutrient management plan, complete federal forms, generate a stormwater plan and generate an emergency release plan, and, in most instances, otherwise meet the requirements of the Illinois general agriculture NPDES permit. Every livestock management facility in the State of Illinois is potentially subject to these requirements if it discharges. The NPDES program is a federal program, applicable nationwide. For a discussion regarding the relevance of the most recent Court holding regarding the national program, *Nat'l Pork Producers Council v. United States EPA*, 2011 U.S. App. LEXIS 5018 (5th Cir. Mar. 15, 2011), see paragraph 35 below. The Respondent, if it does business anywhere in this country, should be aware of the NPDES program as it is applicable to livestock management facilities, and, if it intends to do business in Illinois, should be aware of the program requirements in Illinois. Ignorance of the law is not a defense. It certainly isn't an affirmative defense.

18. Respondent's first affirmative defense pleads neither affirmative matter nor new

facts that defeat Complainant's right to bring the cause of action or that void the legal effect of the claim. Respondent has wholly failed to set forth any authority for its assertion that activity undertaken under the LMFA is one and the same cause of action as NPDES requirements that are authorized under the federal Clean Water Act and the Illinois Environmental Protection Act. It has failed to plead facts or authority as to why unrelated and irrelevant activity undertaken more than 2 years prior to the October 1, 2010 discharge qualifies as an element of a cause of action that would meet the legal standard for a finding of laches. As such, Respondent's first affirmative defense is totally conclusory in nature, unsupported by authority or specific fact, and thus is inappropriate and should be stricken.

Respondent's Second Affirmative Defense

2. Complainant is estopped to assert that an NPDES Permit is required for the operation of Tradition South. Beginning not later than Spring 2008, Complainant approved the construction of the facility, and not later than June 2008 and through Spring 2011, Complainant participated as a co-defendant of Respondent in certain litigation then pending as Case No. 2008 CH 42, previously pending in the Circuit Court of the 15th Judicial Circuit of Jo Daviess County, in which Complainant and Respondent together defended the legality and enforceability of Complainant's approval of Respondent's Tradition South facility. At no point in the above described litigation did Complainant contend that NPDES permit is required, despite claims by the Plaintiffs in that case that such a permit is required. Complainant is thus estopped to change its legal position to claim or contend that an NPDES permit is now required for their facility.

19. Approval to initiate construction of the Tradition South facility was granted by the Illinois Department of Agriculture in 2008 pursuant to its authority under the LMFA. As stated above in paragraph 10 and 17, activity undertaken pursuant to the LMFA has nothing to do with, and is not within the jurisdiction of nor is it determinative of a claim brought pursuant to the Illinois Environmental Protection Act and federal Clean Water Act based on factual allegations concerning a 2010 discharge. The Illinois Department of Agriculture was a named defendant in Jo Daviess County Case No. 2008 CH 42, a suit brought by a citizen's organization against A.J. Bos and the Illinois Department of Agriculture. The Illinois Attorney General's Office

represented the Illinois Department of Agriculture in that matter.

20. The October 1, 2010 discharge that is the factual basis for the NPDES violation allegation as well as the basis for Complainant's request that Respondent be required to obtain NPDES permit coverage was not at issue in the Jo Daviess County case between the citizen's organization, AJ Bos and the Illinois Department of Agriculture.

21. Six elements must be shown in order for the doctrine of equitable estoppel to apply: (1) Words or conduct by the party against whom the estoppel is alleged constituting either a misrepresentation or concealment of material facts; (2) knowledge on the part of the party against whom the estoppel is alleged that representations made were untrue; (3) the party claiming the benefit of an estoppel must not have known the representations to be false either at the time they were made or at the time they were acted upon; (4) the party estopped must either intend or expect that his conduct or representations will be acted upon by the party asserting the estoppel; (5) the party seeking the estoppel must have relied or acted upon the representations; and (6) the party claiming the benefit of the estoppel must be in a position of prejudice if the party against whom the estoppel is alleged is permitted to deny the truth of the representation made. *People v. Environmental Control and Abatement, Inc.*, PCB 95-170, slip op. at 7 (January 4, 1996), citing *City of Mendota v. Pollution Control Board*, 161 Ill.App.3d 203, 209 (3rd Dist 1987), 514 N.E.2d 218.

22. In that 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, and in that 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 has not and cannot meet the pleading requirements set forth in the six elements required for a finding of estoppel.

23. Respondent's second affirmative defense is neither affirmative matter nor new facts that defeat Complainant's right to bring the cause of action or that void the legal effect of the claim. Respondent's second affirmative defense is totally conclusory in nature and insufficiently pled. It does not, and cannot, meet the pleading requirements of a sufficiently pled assertion of equitable estoppel. As such, Respondent cannot prevail. The second affirmative defense is inappropriate and it should be stricken.

Respondent's Third Affirmative Defense

3. By reason of its participation as a Co-Defendant in the above described litigation, Complainant is barred by the doctrines of issue preclusion and claim preclusion from now asserting that an NPDES permit is required for the facility.

24. For the reasons set forth in paragraphs 10 through 23 above, Respondent's third affirmative defense fails to assert affirmative matter that defeats the cause of action or voids the legal affect of the claim regarding NPDES liability set forth in Count III of the Complaint.

25. As set forth in paragraphs 20 and 22, neither the October 1, 2010 discharge of process wastewater from Respondent's facility to waters of the United States, being the factual basis for the allegation of NPDES liability in this matter, nor the Illinois EPA were included in the subject matter of the "above described litigation". Thus, it is patently impossible for there to be any means to successfully plead issue or claim preclusion. Respondent's third affirmative defense is frivolous.

26. In that Respondent's third affirmative defense fails to assert affirmative matter that will impact the Complainant's legal right to bring the action that is the subject of Count III of the Complaint, it fails as an affirmative defense, it is inappropriate and it should be stricken.

Respondent's Fourth Affirmative Defense

4. Complainant's claim that an NPDES permit is required for this facility is preempted by federal law and is barred by the same. Specifically, (a) the Tradition South facility is a construction site, not a CAFO, in connection with which no animals have been populated. Run-off management in place is conducted pursuant to construction related

measures, not the design for the facility as an animal feeding operation (b) even accepting the allegation of a discharge, Respondent is not obligated by reason thereof to seek of obtain an NPDES permit; (c) there is no duty to apply for an NPDES permit unless the operation is actually discharging, which is not the case under the facts alleged here, and (d) there is no liability for failing to apply for an NPDES permit.

27. Respondent's assertion that it is not a CAFO is a legal conclusion, and it is a legal conclusion that is not and cannot be supported in law. Further, Respondent has pled no authority nor any factual basis for its assertion that it currently does not have a duty to apply for a permit.

28. Respondent's fourth affirmative defense does not assert affirmative matter that would defeat the Complainant's allegation of an NPDES violation or Complainant's demand for permit coverage. Respondent has failed to plead authority for or a factual basis for the assertions set forth in this defense. The fourth affirmative defense is insufficient in substance and form, and, as such, does not sufficiently define issues that constitute a proper defense. Respondent's fourth affirmative defense is inappropriate and should be stricken.

29. Paragraph 48 of Count III of the Complaint states:

> 48. The Traditions South facility is designed to confine 5,464 dairy cattle for the purpose of production of milk.

In its Answer, Respondent states the following regarding Paragraph 48 of Count III:

> ANSWER: Respondent denies the allegations of paragraph 48 on the basis that the notice of intent to construct speaks for itself and describes the specific plans for the facility . . .

Respondent's notice of intent to construct indicates the facility is designed to house over 5,000 dairy cattle.

30. As stated in paragraph 38 of Count III of the Complaint, the definition of animal feeding operation contained in the NPDES requirements includes an operation where animals

either are ***or will be*** stabled or confined, in a manner consistent with the provision of the regulations:

38. Section 122.23 (b)(1), 40 CFR 122.23(b)(1), provides, in pertinent part:

> § 122.23 Concentrated animal feeding operations (applicable to State NPDES programs, see § 123.25).
>
> (b) Definitions applicable to this section:
>
> (1) *Animal feeding operation* ("AFO") means a lot or facility (other than an aquatic animal production facility) where the following conditions are met:
>
> (I) Animals (other than aquatic animals) have been, are, ***or will be*** stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and (Emphasis added.)
>
> (ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

31. As stated in paragraph 37 of Count III, an AFO with 700 milking dairy cows or more is considered a concentrated animal feeding operation ("CAFO"). Pursuant to Section 122.23(d) (1), 40 CFR 122.23(d)(1), a CAFO is required to get a permit if it discharges. A discharge of silage leachate, which is processed wastewater pursuant to Section 122.23 (b)(7), 40 CFR 122.23(b)(1), in the course of land application, pursuant to Section 122.23(e), 40 CFR 122.23(e), is considered a point source discharge for which a CAFO must have a permit. Respondent's CAFO did not have NPDES permit coverage when it discharged, and thus violated NPDES requirements.

32. Paragraph 9 of Count I of the Complainant, incorporated by reference in Count III, states:

> 9. In August and/or September of 2008, the middle and easternmost bays of this feed storage area were filled with corn silage. At the time the silage was brought to the site, Respondent Tradition indicated it was the corporation's intent to begin populating the site with dairy cows as soon as possible. The silage was brought to the site as feedstock. The slab to the south and the largest bay located along the westernmost side of the slab were not filled with silage.

Respondent's answer states the following with regard to paragraph 9:

> Respondent denies that in August and/September, 2008, the middle and easternmost bays of a feed storage area were filled with corn silage. Respondent admits that bays located along the westernmost side of the concrete improvement were not filled with silage. The Respondent denies the remaining allegations of paragraph 9 as factually incorrect and legally irrelevant.

33. The information that the middle and easternmost bays of the feed storage area were filled with silage in August and/or September of 2008 is information provided to Complainant by Respondent in response to the October 1, 2010 discharge. Further, at the time of a November 24, 2008 hearing in Jo Daviess County Circuit Court, in the matter of *HOMES et al v. A.J. Box and Illinois Department of Agriculture*, Case No. 2009 CH 42, AJ. Bos, managing partner of Tradition Investments, LLC, testified that 26,000 tons of silage were placed in the silage feed storage area. Pages 46 through 51 of the transcript of the proceeding are attached as Exhibit A. On page 50, A.J. Bos indicated the silage stored on site would be fed beginning March 1. He testified that they "put up" 26,000 tons. The silage had been generated through crop sharing arrangements with local farmers as well as buying from local farmers. Mr. Bos testified that it would be cost prohibitive to sell the silage and move it off site.

34. In its fourth affirmative defense, Respondent further claims that even "accepting" the fact of the discharge, Respondent has no duty to apply for an NPDES permit, and Respondent has no liability for failure to obtain a permit. Complainant's Count III alleged a violation of discharging without a permit, not failure to obtain a permit.

35. In the consolidated case of *Nat'l Pork Producers Council v. United States EPA*, 2011 U.S. App. LEXIS 5018 (5th Cir. Mar. 15, 2011), the Court held that US EPA has no

authority to require a permit from a CAFO that *has not experienced a discharge*. The *Nat'l Pork Producers* case directly addresses the distinction between a cause of action for failure to apply for a permit and a cause of action for discharging without a permit:

> ". . . the 2008 Rule requires CAFOs that discharge or propose to discharge to apply for an NPDES permit – the duty to apply. If a CAFO discharges and does not have a permit, the CAFO will not only be liable for discharging without a permit, but also prosecuted for failing to apply for a permit – failure to apply liability."

2011 U.S. App. LEXIS 5018, at 25. In its holding, the Court eliminated the permitting authority's ability to bring a cause of action for failure to apply for a permit. However, a federal or state claim for discharging without a permit is clearly preserved and available:

> . . . In fact, the text of the Act indicates that a discharging CAFO must have a permit. The CWA explains that discharging without a permit is unlawful, *33 USC § 1311*, and punishes such discharges with civil and criminal penalties, *33 U.S.C § 1319*. This has been the well-established statutory mandate since 1972. ***It logically follows that, at base, a discharging CAFO has a duty to apply for a permit***. (Emphasis added.)

2011 U.S. App. LEXIS 5018 at 32.

36. Respondent has pled no authority nor any factual basis for its assertion that it currently does not have a duty to apply for a permit.

37. As stated above, Respondent's fourth affirmative defense does not assert affirmative matter that would defeat Complainant's allegation of violation or demand for permit coverage. Respondent has failed to plead authority for or a factual basis for the assertions set forth in this defense. The fourth affirmative defense is insufficient in substance and form, and, as such, does not sufficiently define issues that constitute a proper defense. Respondent's fourth affirmative defense is inappropriate and should be stricken.

Respondent's Fifth Affirmative Defense

5. Complainant has not alleged, nor has there been any environmental harm or damage by reason of the allegations set forth in the Complaint.

38. In Count I, Complainant alleges analytical results from sampling that indicate that the material discharged and the downstream receiving water exceeded the State's effluent limits for biochemical oxygen demand and total suspended solids. Further, in Counts IV and V, Complainant alleged violation of the State's water quality offensive conditions provision and the State point-source effluent offensive discharge provision. All of these standards are established at levels that represent a point at which harm and damage is threatened to the environment.

39. Respondent's fifth affirmative defense is a denial. It is not affirmative matter that will defeat a cause of action. Respondent's fifth affirmative defense contains no affirmative matter that would void or defeat Complainant's allegation of exceedence and violation of the State's effluent and water quality standards. Respondent's fifth affirmative defense should be struck.

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: July 18, 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 Liberton, 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, beginning on the 24th day of November, 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

MR. FILER: Um...Your Honor, first of all, it goes directly to the public interest when you're talking about property that Mr. Bos owns and I believe he is fully aware of...um...in a general sense, the amount of taxes he is going to be paying out relative to the property because that analysis would have been done at the time of purchase, no matter what state he was in.

THE COURT: Alright, I am guessing, but it is only a guess that he does have that information but I'm taking the objection essentially to be the bases of knowledge so I'm going to sustain it for that reason with the assumption that that can be developed.

MR. FILER: Mr. Bos, before purchasing the Tradition Dairy, did you perform analyses of the amount of taxes that you would be paying...ah...if a dairy would be up and running and fully functioning.

A Yes.

Q Alright, can you tell me, a fully functioning dairy...um...when you performed that analysis, how much in taxes that you anticipated you would be paying?

A It was about 175,000 or 80,000 total.

Q Okay, is that per year?

A Per year.

Q Okay. Um...Mr. Bos, when were you first served with the instant lawsuit that we're involved in and have you sitting here today for?

A On June 16th.

Q Why do you specifically remember that date, June 16?

A Because I was in the County Road Department in Elizabeth.

Q What were you doing in the County Road Department in Elizabeth?

A Meeting with the Road Commissioner of Nora and the--Steve Keeffer, the County Road Commissioner.

Q And you were served while you were in that meeting?

A I was served...ah...I was--we finished the meeting, I walked out of the door and there stood two officers to serve me.

Q Did you have any knowledge whatsoever of this instant lawsuit case prior to being served with this suit?

A No.

Q I'm going to ask you a few questions...um...about feed. First of all, how important is high quality feed in a dairy business?

A Well, high quality feed is, it could be the most important thing. Feed is 50 percent of the cost of making milk so it's very important to maintain the health, the reproductive and the amount of milk that you get from each cow. High quality

feed is--it's probably the most important thing in dairy business.

Q Knowing that then, how early did you actually begin addressing the issue or issues of feeding the animals you intended to maintain on the property?

A As soon as I--the first week that I looked at the property.

Q Um...That would seem to be pretty early; why--why would it need to be so early?

A Well, that went hand--that went hand-in-hand talking to the farmers to make sure that I could get good quality feed and making sure that that area makes good quality feed.

Q Okay, so if I could ask the question again, why exactly then, um...if you could just break them down point by point, did you start thinking about this issue so early, whether it's timing of planting, fermenting; whatever it may be?

A Well, I had to put up--you have to put up feed on this year's crop because we're all harvesting our crops, our corn just right now and we're just getting finished right now. So if I'm anticipating to milk cows in March of '09, I need to have a storage of some amount of feed there to feed until next year's harvest, actually about 60 or 90 days past next year's harvest because what you do with that corn silage, you cut the whole plant and you put it up in a pile and you pack it with a--like an eight wheel tractor, if you've seen one of those, and you

keep going over it. You pack it and then you cover it and it takes about 60 or 90 days to ensile and then you can start feeding that. So you actually have to have feed inventory about 90 days past next year's harvest and then next year you put new up again.

Q Okay, um...knowing that, what did you do to address that need?

A Talked to the farmers around me and made agreements that I was going to purchase and sharecrop with them; I think we put up about 1100 acres of corn.

Q Now...um...you said talk to the farmers and you said that generally, who were you talking about?

A Names?

Q Yes.

A The Harbach family, Gerry and Linda Gerlach, John Creighton.

Q Um...And if you can, when did you enter into these agreements with them, if you can remember?

A They were agreements that we--we planted probably April of last year or of this year, so it was March or so.

Q Um...Did you outweigh or expend any...um...actual dollars in growing these crops?

A We sharecropped with them so we had to--we had to, you know, purchase the seed and the--the tractor work and fertilizer and insurance and everything it takes to grow a crop of corn and

then I purchased--you know, I only grew half so then I purchased the rest of it of which I paid about $41 per ton for that, of which I put up 26,000 ton and I paid the farmers $41 a ton. I paid $180,000 to harvest it. I paid, I believe about $20,000 in inoculant to preserve it, it helps eliminate some of the shrink that you get and things of that nature. Shrink is when--shrink is when, especially when you put up a wet product like that, you put up corn silage at around 30 to 35 percent dry matter, so it's mostly water in there and so when you--when you put it up in the pile, you assume a--well, and there's been studies for that, 10 percent shrink in--as you feed it and the longer you let it sit in that pile, the more it shrinks so it doesn't quit shrinking, it continues to shrink and if you let it sit in there too long, the sugars start to break down and that's more of--a nutritionist can answer those questions, but the feed starts to break down and becomes less valuable the longer you let it sit in there.

Q Um...You identified...um...several numbers there relative to the outweigh, if I were to ask you all in relative to the feed, how much did you pay?

A About $1.3 to $1.4 million and there was 26,000 ton. There is 26,000 ton in that inventory.

Q Um...An obvious question...um...would be, would you be able to sell this feed if you didn't use it to feed the cows at the Tradition Dairy?

A No, because again, as I stated before, that feed is about 30 or 35 percent dry matter only, so it's mostly water; it's three-quarters water and you can't--no one can afford to haul that water anywhere on a truck because there's such--so little dry matter content. A cow--A cow is going to eat about 55 pounds to 60 pounds of feed a day; well, that's dry feed. If you feed him a product, to make it easy, that's 50 percent dry matter, well their intake is going to be 55 to 60 pounds of dry matter intake. So if the product is 50 percent dry matter, they've got to eat double that to get that.

You follow that?

(Laughter)

A So anyway, if...ah...if it's 50 percent dry matter, to get 60 pounds of dry matter intake, they're going to have to eat 120 pounds so that's just that much you would have to haul down the road because it's got so much water in it.

Q If I could put it a different way, it would be cost-prohibitive then?

A Yes.

Q Okay. When did you originally plan on being able to use this feed that sits on-site?

A Starting on March 1.

Q I'm going to ask you a bit about your construction contract next. Um...You talked about starting work with Hamstra

and contacting Hamstra in the Spring of '08. How did you know about Hamstra; Hamstra Builders, that is?

A Hamstra is a big company and they've built--well, they've built five dairies--six dairies for my cousins and they've built--I don't know, seven or eight other ones right in the same area and, you know, I just know that they built really, really good dairies and they know what they're doing so there's that much less risk or question in what their end product is.

Q Okay...um...do you recall what the scope of Hamstra's contract was?

A You mean how much money or...?

Q Let me ask it...what were their duties?

A Hamstra Builders, their duties were to build the facilities.

Q All in?

A All in.

Q Okay, did you give them a down payment?

A I gave them $200,000 on June 2.

Q Okay. Do you know when Hamstra began its work and I think you may have already answered that relative to being on-site and being specific on-site?

A I think that was June 2. It could have been it May 30.

Q May 30? Do you remember what they began doing?

A I--You know, I wasn't here, you'd have to ask Mr. Hamstra that.

Q Okay. Um...Did you eventually tell Hamstra to stop...um... work at the Tradition South property?

A Yes.

Q When did you do that?

A Sometime in the middle of October of '08.

Q Why did you do that?

A Because we went through the court preliminary injunction hearings and we got a injunction that kept us for operating--from operating the facility with more than 199 cows and not using our waste handling or confining the animals; injunction.

Q Did--Mr. Bos...um..., from a financing perspective, could you have continued working if you would have wanted to when you told Hamstra to stop in October?

A No.

Q Why not?

A Well, why would I want to build--continue building a $30 million, plus million project, if I can't operate it.

Q Okay and asked in a different way, did you take out any loans to finance the construction of Tradition South?

A I was drawing money out of my current operations in California, using my cows for collateral there, working on getting loans set up from Bank of the West.