

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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AUG 19 2011
STATE OF ILLINOIS
Pollution Control Board

People of the State of Illinois)	
)	
)	
Complainant,)	
)	
vs.)	NO. 2011 068
)	Enforcement
Tradition Investments, LLC, an Illinois limited)	
liability corporation)	
)	
Respondent.)	

ORIGINAL

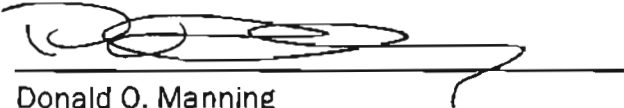
NOTICE OF FILING

TO: Jane McBride	Division Chief of Environmental Enforcement
Assistant Attorney General	Office of the Attorney General
500 South Second Street	100 West Randolph Street
Springfield IL 62706	Suite 1200
	Chicago IL 60601

PLEASE TAKE NOTICE that on the 18th day of August, 2011, I filed by Federal Express with the Office of the Clerk of the Pollution Control Board, Respondent's Response to Motion to Strike Affirmative Defenses, copies of which are herewith served upon you.

Donald Q. Manning,
Plaintiff.

By: McGreevy Williams, P.C.

By: 
Donald Q. Manning
One of Its Attorneys

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STATE OF ILLINOIS)
) SS.
COUNTY OF WINNEBAGO)

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STATE OF ILLINOIS
Pollution Control Board

AFFIDAVIT OF SERVICE

I, the undersigned, being first duly sworn on oath, depose and say that I served the Notice of Filing and Respondent's Response to Motion to Strike Affirmative Defenses upon the within named:

Jane E. McBride
Assistant Attorney General
500 South Second Street
Springfield IL 62706

Division Chief of Environmental
Enforcement
Office of the Attorney General
100 West Randolph Street
Suite 1200
Chicago IL 60601

by placing a true and correct copy of said notice in an envelope, addressed as is shown above; that I sealed said envelope and placed sufficient U.S. postage on each; that I deposited said envelope so sealed and stamped in the United States mail at Rockford, Illinois, at or about the hour of 5 o'clock P.M., on the 18th day of August, 2011.

Shawn B. McKenzies

Subscribed and sworn to before
me this 18th day of August, 2011.

Sherrri A. Murray
NOTARY PUBLIC

OFFICIAL SEAL
SHERRI A. MURRAY
Notary Public, State of Illinois
My Commission Expires 01/12/14

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STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

People of the State of Illinois)	
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Complainant,)	
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vs.)	PCB NO. 2011-068
)	(Enforcement)
Tradition Investments, LLC, an Illinois limited)	
liability corporation)	
)	
Respondent.)	

ORIGINAL

RESPONDENT'S RESPONSE TO MOTION TO STRIKE AFFIRMATIVE DEFENSES

The Respondent, Tradition Investments, LLC ("Tradition Investments"), by its attorneys McGreevy Williams, P.C., states as follows for its Response to Complainant's Motion to Strike Affirmative Defenses:

I. COMPLAINANT HAS BOUND ITSELF TO ITS LITIGATION HOLD

The Complainant's motion to strike itself constitutes a binding litigation position which the Complainant must maintain through the course of this action. The Complainant construes its own Complaint and thereby admits three critical points: (1) a property that does not discharge pollutants in fact is not obligated to apply for or obtain an NPDES permit; (2) there is no remedy available to the Complainant to seek relief against a property that "proposes" to discharge; and (3) most importantly, the purported basis for an NPDES permit here arises solely from an alleged 2010 discharge (see Motion to Strike, at pp. 4-7: "Complainant's allegation of violation and its demand for permit coverage wholly have their basis in factual allegations associated with an October 1, 2010 discharge"). In construing its own Complaint in that

manner, the Complainant concedes that it has no actionable claim regarding an NPDES permit based upon pre-October 1, 2010 facts. In fact, the Complainant is compelled by the current state of the law to limit its claim in that manner (see National Pork Producers Council v. USEPA, 635 F.3d 738 (5th Cir. 2011) (NPDES permits can be required only for facilities that actually discharge)).

The Complainant is foreclosed from claiming that the plans, designs, proposals, submittals and related information relied upon by the Illinois Department of Agriculture in approving the use of the property for a dairy somehow trigger an NPDES requirement. Further, since the Complainant was a co-defendant with Tradition Investments in the HOMES litigation (2008 CH 42, Jo Daviess County), the Complainant is barred by its conduct, its litigation position there, and the decisions of the Courts, from now complaining that some additional NPDES requirement applies to the property (see, Giannini v. Kumbo Tire USA, Inc., 385 Ill.App.3d 1013, 98 N.E.2d 1095 (2d Dist., 2008); Ceres Terminals, Inc. v. City Bank & Trust Co., 259 Ill.App.3d 836, 635 N.E.2d 485 (1st Dist., 1994); Johnson v. DuPage Airport Authority, 268 Ill.App.3d 409, 644 N.E.2d 802 (2nd Dist., 1994)).

II. PROCEDURAL POSTURE

The Complainant's motion to strike is procedurally defective for a variety of reasons. The motion states that it is brought pursuant to 35 Ill. Adm. Code 101.506, but that section merely provides the timing for the filing of motions attacking a pleading. If the Complainant purports to bring the motion under the guidance of 735 ILCS 5/2-615, such a motion can only attack the legal sufficiency of the pleading. But the Complainant's motion goes beyond an attack on the

pleading and improperly attempts to argue the merits of the claim and further introduces matters outside the pleadings (see, e.g., page 16, paragraph 33 of the motion which improperly relies on a hearing transcript from related litigation). The motion in that regard is a motion under 2-619 or perhaps 2-1005. But a motion based on the guidance of either 735 ILCS 5/2-619 or 2-1005 is not available to attack affirmative defenses, and the Complainant has utterly failed to sustain any sort of moving papers for summary judgment. The Complainant's motion should be denied on that basis alone (see, e.g., *Kirchner v. Greene*, 254 Ill.App.3d 672, 691 N.E.2d 107 (1st Dist., 1988) (for purposes of a 2-615 motion, a court may not consider affidavits, affirmative factual defenses or other materials).

In addition, despite its litany of cases defining one aspect of an affirmative defense, the Complainant ignores the fact that the affirmative defenses asserted (estoppel, laches, res judicata) are either expressly referenced in the Code of Civil Procedure as affirmative defenses (735 ILCS 5/2-613) or are plainly the types of defenses which "seek to avoid the legal effect of or defeat the cause of action" (735 ILCS 5/2-613(d)). In other words, if the Complainant's cause is barred by laches, estoppel or res judicata, those are classic affirmative defenses which must be asserted.

The Complainant also ignores the admonition of the Code of Civil Procedure that "any ground or defense, whether affirmative or not, if not expressly stated in the pleading, should be likely to take the opposite party by surprise, [it] must be plainly set forth in the answer or reply" (735 ILCS 5/2-613(d)). This language on its face goes beyond the traditional analysis of whether a defense is "affirmative" or not. A party is plainly required to identify any defense -

affirmative or not - which might take the other side by surprise. This is precisely what Tradition Investments has done here.

III. THE FIRST THROUGH THIRD AFFIRMATIVE DEFENSES ARE CONDITIONALLY MOOT

By its admission that the purported NPDES requirement arises solely from and after the alleged October 1, 2010 discharge, the First through Third Affirmative Defenses will be rendered moot upon the entry of a clarifying order from the Board. Specifically, in the event the Board accepts the Complainant's admissions and binds the Complainant to proceed only on post-October 1, 2010 conduct, then the defenses of laches, estoppel and issue preclusion will be moot.

IV. THE COMPLAINANT IMPROPERLY ARGUES THE MERITS OF ITS OWN CLAIM IN ATTEMPTING TO AVOID WELL-PLED AFFIRMATIVE DEFENSES

Whether the First through Third Affirmative Defenses are mooted by the Complainant's admissions about the limited scope of its claim, the Complainant's motion goes beyond the issue of whether the defenses are appropriate as "affirmative defenses" and instead argues the merits of its case - - a backhanded sort of motion for summary judgment. For the first three affirmative defenses, the Complainant first admits that its claims are based solely on post-October 1, 2010 discharge conduct, but then the Complainant argues about the legal sufficiency and effect of its own pleadings. That part of the motion, and others like it (pars. 28-37 of the motion to strike) should be stricken and disregarded in connection with the pending motion. The same result should prevail with respect to the Fourth Affirmative Defense, but that Defense is treated separately, below.

V. THE COMPLAINANT IMPROPERLY ARGUES THE MERITS OF THE FOURTH AFFIRMATIVE DEFENSE AND IMPROPERLY RELIES UPON MATERIALS OUTSIDE THE PLEADINGS

In direct violation of recognized practice on motions directed to pleadings, the Complainant attacks the Fourth Affirmative Defense with facts taken from materials outside the pleadings, and, based on that improper citation to and reliance on those additional materials, the Complainant goes on to argue the merits of its claim. That practice is contrary to accepted motion practice and the Code and Rules. The Board should deny the motion to dismiss the Fourth Affirmative Defense on that basis alone.

In addition, there are substantive reasons why the Motion to Strike the Fourth Affirmative Defense should be denied. Consistent with the admonition of the Code of Civil Procedure (5/2-613(d)), Tradition Investments asserted the following as its Fourth Affirmative Defense, so as to avoid taking the Complainant by surprise:

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 or 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 a failure to apply for an NPDES permit.

Rather than replying to the defense with a denial, and proceeding to discovery, the Complainant improperly and without any foundation or authentication, attaches a portion of a trial transcript from Circuit Court Case 2008 CH 42, uses the transcript to contradict Tradition Investments' pleading, and then relies on the re-cast facts to argue the merits of the

Complainant's own claim (Motion to Strike at pars. 32-34). Of course, this is a motion to strike, which is limited to the pleadings, so the Complainant's strategy cannot succeed. Tradition Investments moves the Board to strike from the record the improper reference to unsupported materials from outside the pleadings and to deny the motion to strike the fourth affirmative defense on that basis (Kirchner v. Greene, 294 Ill.App.3d 672, 691 N.E.2d 107 (1st Dist., 1998); Hamilton v. Conley, 356 Ill.App.3d 1048, 827 N.E.2d 949 (2d Dist., 2009)).

But even if the Board were to consider the merits of the case - which is wholly improper - the Complainant would not be able to sustain its cause. Here, the property cannot be characterized as a CAFO subject to CAFO NPDES requirements. Taking the facts as alleged, through unproven, and even ignoring the denials in the Answer, the property in question is an unpopulated construction site (Complaint at par. 48, Count III: "Tradition has indicated every intention of completing construction, populating the facility and bringing it into production at its design capacity as soon as possible"). The alleged discharge arose from a pumping operation from a collection area. There is no allegation that there have ever been any animals present on the property. The best allegation is the claim the Respondent intends at some point to complete construction and then to populate the property. But what Respondent might or could do in the future does not make the property a CAFO now. As is addressed in greater detail below, this fact - admitted in the Complainant's own complaint - defeats the NPDES claim in its entirety.

A. The Property is Not an AFO under Applicable Law

The Complainant's entire theory of relief hinges on the definition of "animal feeding operation" ("AFO"):

Animal Feeding Operation mean a lot or facility where:

- (1) 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
- (2) Crops, vegetation, forage growth, or post harvest residues are not sustained in the normal growing season over any portion of the lot or facility (35 Ill. Adm. Code 501.225; 40 CFR §122.23(a)(b)(1)).

The Complainant cannot allege any set of fact to sustain the claim that the property is an AFO. The simple reasons are: (1) it is total conjecture that the property will be populated with any animals; (2) there are no existing facts to show that any animal will be present on the property for 45 days or more during any 12 month period; and (3) the Complainant has not and cannot allege that vegetation is not sustained in the normal growing season over the exact property the Complainant now contends is an AFO. It is pure speculation to state what "will" happen here.

The Complainant must focus on the words "will be" in the definition of AFO, but those words cannot be used to create CAFO NPDES liability where the AFO does not yet exist. First, the law is clear under National Pork Producers, 635 F.3d 788 (5th Cir. 2011) that a facility cannot be required to apply for an NPDES permit if it proposes to discharge, but the existing rules purport to impose that requirement. The words "will be" must be made in that context. Prior to National Pork Producers, the Complainant and other were trying to enforce a duty to

apply based on designs instead of actual operation, but that is no longer available, and the Complainant can no longer demand a permit based on what a proposed facility will consist of. Such prospective enforcement is not available.

Second, and more importantly, the Complainant admits that the events leading up to the alleged discharge involve (1) a construction site; (2) made up of a stalled project; (3) arising from litigation concerning the property; (4) in connection with which stormwater and run-off management is handled in a manner different from final design of the facility if it is completed. (see Complaint pars. 13 - 15). According to admissions set out in the Complaint:

13. The catch basin has a 24-inch-diameter pipe stubbed out of the bottom which, upon completion of site construction, including construction of the large waste holding cell to the immediate west of the silage pad (northernmost waste storage cell), Respondent Tradition intends to connect with a gravity flow PVC pipe under an access road to the northernmost proposed waste storage pond.

14. Currently, while construction has been stalled, the catch basin flows to an adjacent temporary waste silage leachate holding cell located directly south of the southwest part of the slab and catch basin.

15. The temporary silage leachate holding cell serves as a containment structure for runoff that drains from the feed storage area and the adjacent construction materials storage area. The basin is approximately 115 feet by 230 feet with an average depth of about 5.8. feet (emphasis added).

In making those allegations, the Complainant thereby admits that the property is a construction site, not a CAFO and, as importantly, the admissions prove that the manner in which run-off is managed bears no resemblance to the final design. There is no logical nexus between an alleged construction site discharge and the need for an NPDES for a fully

operational CAFO, especially here, where the management of the precise run-off allegedly involved bears no relationship to the final design.

The Board should note that discovery in this action will prove that the construction site is and has been covered by an NPDES permit (General Permit for Stormwater Discharge from Construction Site Activities No. ILR 10), that inspections have been made and routine compliance issues addressed. As the Complainant has done in the past with this very site, if there are compliance issues regarding run-off, stormwater or otherwise, those issues should be addressed under the existing permit.

Third, even if the claim were ripe, the Respondent would not be required to seek coverage under a NPDES permit (i) unless it actually discharges upon confinement of animals and (ii) until at least 180 days prior to the time it commences operation (40 CFR 122.23(d)(1), (f)(4)). It follows that a planned or conceptual CAFO by definition is not a CAFO if it will not house the requisite number of animals within the following one and one-half years (i.e. the 12-month period following the commencement of operations plus 180 days prior to commencement) nor if it will not discharge following confinement. In this case, construction remains delayed, no animals are confined or housed at the facility and it is not currently a CAFO subject to regulation under 40 CFR 122.23. It will not discharge following confinement.

In sum, the Complainant ignores the existing NPDES permit and the fact that the property is a dormant construction site, not a CAFO. The Complainant clings to the words “will be” in the definition of AFO, but a careful reading establishes the Complainant’s failure to properly allege that the property meets the definition of AFO. This is a construction site utilizing

run-off management measures which bear no resemblance to the final design of the operation.

The Complainant is overreaching.

B. A Single Alleged Discharge Does Not Warrant an NPDES Permit

Even assuming that the property “will be” an AFO, which Respondent denies is the current state of the facts, and further assuming that the decision in National Pork Producers does not materially change current regulatory practices by the time this property becomes a AFO, if ever, then a single discharge does not result in an NPDES permit requirement. As USEPA’s own guidance notes, “a CAFO proposes to discharge if based on an objective assessment it is designed, constructed, operated, or maintained such that a discharge will occur, not simply such that it might occur” (Implementation Guidance on CAFO Regulations - CAFOs That Discharge or Are Proposing to Discharge, USEPA Office of Water, EPA-833-R-10-006 (May 28, 2010) (hereafter “2010 Guidance”) at 3).

A CAFO that experiences a single, isolated discharge is not rendered a facility that discharges. USEPA regulations clarify this point, stating that “[o]nce a CAFO’s certification is no longer valid [because a discharge occurred], the CAFO is subject to the requirement in [40 CFR 122.23(d)(1)] to seek permit coverage if it discharges or proposes to discharge” (40 CFR 122.23(i)(5)(ii) (emphasis added)). Furthermore, USEPA’s own guidance acknowledges this point, stating that “[i]f the [certified] CAFO has discharged, the CAFO would be a CAFO that discharges *unless the circumstances giving rise to the discharge have changed and the cause of the discharge has been corrected* such that the CAFO is not discharging and will not discharge based on the design, construction, operation, and/or maintenance of the facility”

(2010 Guidance at 5 (emphasis added)). The CAFO regulations do not require an NPDES permit following a discharge provided that necessary modifications are undertaken to permanently address the cause of the discharge (40 CFR 122.23(i)(6)).

Here, the evidence will show that the Respondent removed all silage and the previously unknown tile line that was at the center of the alleged stormwater discharge incident and that it no longer land applies this storm/wastewater. Thus, the cause of the alleged discharge “has been corrected” and will not recur and the Respondent does not propose to discharge once its property becomes operational, i.e., once it actually becomes a CAFO.

That line of authority illustrates the prematurity and erroneous nature of the Complainant’s legal theory. First, the fact that a single discharge at an actual operating CAFO does not require an NPDES permit if the cause of the discharge is corrected defeats the Complainant’s notion that an alleged discharge during the construction of the facility mandates NPDES coverage. Second, the Respondent has legal rights available to it - - to be exercised when appropriate, if appropriate - - if it actually becomes a CAFO. Importantly, the final design utilizes completely different designs than the one allegedly involved in the October 1, 2010 incident.

From an objective view, this property is a construction site subject to its own existing NPDES permit. The management of run-off during construction bears no resemblance to the final design. There are no animals present; the facility is not operational. This is no more a CAFO than any number of properties where silage is stored. The Respondent has rights and

options with respect to future permitting, if necessary. Based upon the foregoing, the Complainant's theory is not actionable.

VI. THE FIFTH AFFIRMATIVE DEFENSE SHOULD NOT BE DISMISSED

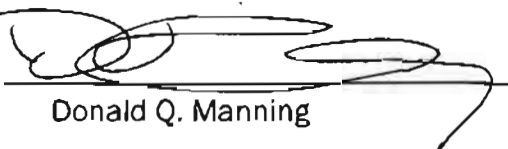
The alleged requirement for an NPDES permit for the single alleged discharge of October 1, 2010, is only actionable if pollutants were discharged; further, any relief available under any theory of the Complaint must be tailored and viewed in light of the lack of actual environmental harm. On that basis, the Fifth Affirmative Defense should not be dismissed.

VII. CONCLUSION

Based on the foregoing, Tradition Investments requests the Board to deny the motion to strike and to grant Tradition Investments such other relief as the Court deems just and proper.

Respectfully submitted,

TRADITION INVESTMENTS, LLC

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MCGREEVY • WILLIAMS

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James R. Thompson Center
100 W. Randolph, Suite 11-500
Chicago, IL 60601

Re: *People of the State of Illinois v. Tradition Investments, LLC*
No.: 2011-068 Enforcement

ORIGINAL

Dear Staff:

Enclosed please find an original and 9 copies of the Respondent's Response to Motion to Strike Affirmative Defenses and Notice of Filing in the above referenced matter. I have also enclosed 2 additional copies to be file-stamped and returned in the self-addressed stamped envelope.

If you have any questions regarding this request, please feel free to contact me.

Very truly yours,

Donald Q. Manning

DQM/ms
Enclosures