

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)

Complainant,)

PCB No. 2010-20
(Enforcement – Water)

MONTALBANO BUILDERS, INC.,)
an Illinois corporation, FIRST AMERICAN)
PROPERTIES, L.L.C., an Illinois limited)
liability company, and MBC XIV, LLC, a)
revoked Delaware limited liability company,)

Respondents.)

RECEIVED
CLERK'S OFFICE
JAN 11 2013
STATE OF ILLINOIS
Pollution Control Board



ORIGINAL

NOTICE OF FILING

TO: ZEMEHERET BERKEKET-AB
Assistant Attorney General
Environmental Bureau
69 W. Washington Str., 18th Floor
Chicago, Illinois 60602

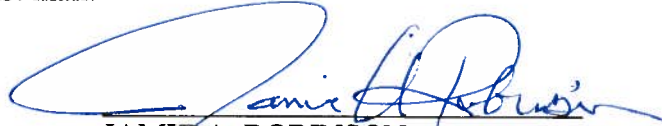
MONTALBANO BUILDERS, INC.
MBC XIV, LLC
Anthony P. Montalbano
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Oakbrook, Illinois 60523-4442

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National Registered Agents, Inc.
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MBC XIV, LLC
Anthony Montalbano, Manager
1801 S. Meyers Road, #500
Oakbrook Terrace, Illinois 60181

GINA KROL
105 W. Madison Street
Suite 1100
Chicago, Illinois 60602

PLEASE TAKE NOTICE that on January 11, 2013, I filed with the Office of the Clerk of the Illinois Pollution Control Board, Notice of Filing, Certificate of Service, First American Properties, LLC's Combined Motion to the Board Pursuant to 735 ILCS 5/2-619.1 to Dismiss Complainant's First Amended Complaint and First American Properties, LLC's Memorandum in Support of Its Combined Motion to the Board to Dismiss Complainant's First Amended Complaint, pursuant to the Board's order dated January 10, 2013, copies of which are attached and herewith served upon you via U.S. mail.



JAMIE-A. ROBINSON
One of the Attorneys for
First American Properties, LLC

1/11/2013

Dated: January 11, 2013

Tina B. Solis
Jamie A. Robinson
Brittany Smith
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312-977-4394

THIS FILING IS SUBMITTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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JAN 11 2013

STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS)
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 Complainant,)
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 v.)
)
 MONTALBANO BUILDERS, INC.,)
 an Illinois corporation, FIRST AMERICAN)
 PROPERTIES, LLC, an Illinois limited liability)
 company, & MBC XIV, LLC, a revoked)
 Delaware limited liability company,)
)
 Respondents.)
)

PCB No. 2010-20
(Enforcement – Water)

**FIRST AMERICAN PROPERTIES, LLC'S COMBINED MOTION TO THE BOARD
PURSUANT TO 735 ILCS 5/2-619.1 TO DISMISS
COMPLAINANT'S FIRST AMENDED COMPLAINT**

Respondent, First American Properties, LLC, ("First American"), by and through its counsel, Ungaretti & Harris LLP, respectfully requests that the Illinois Pollution Control Board (the "Board") dismiss Counts I and II of the People of the State of Illinois' ("People") First Amended Complaint against First American with prejudice pursuant to 735 ILCS 5/2-619(a)(1), (a)(9) and 735 ILCS 5/2-615. In support thereof, First American states as follows:

1. On August 30, 2011, the People filed their First Amended Complaint ("Amended Complaint") against First American, Montalbano Builders, Inc. ("Montalbano") and MBC XIV, LLC ("MBC XIV"). First American has never been served with the Amended Complaint, but became aware of the instant lawsuit when it was served with the People's First Requests for Admission of Facts on November 29, 2012.

2. The Amended Complaint purports to state two claims against First American, Counts I and II, both of which seek to hold First American liable for violations of the Illinois Environmental

Protection Act (the “Act”) regarding certain parcels of property that are the subject of the Amended Complaint and which are alleged to be owned by First American.

3. The Complainant, however, failed to get approval from the Board, properly serve First American or file its certificate of service of the Amended Complaint as required by 35 Ill. Adm. Code § 101.304(b)-(c). Accordingly, the Board does not have jurisdiction over the claims against First American and the Amended Complaint must be dismissed pursuant to 735 ILCS 5/2-619(a)(1).

4. Furthermore, First American does not own – nor has it ever owned – any parcels of the subject property or any interest in any parcels of the subject property. Therefore, First American has no duty with respect to the subject property and is entitled to dismissal of Counts I and II of the Amended Complaint with prejudice pursuant to 735 ILCS 5/2-619(a)(9).

5. Moreover, even if there was a legitimate dispute as to the ownership of the property, both counts are fatally deficient in that they do not identify the parcels owned by First American or identify the parcels of the subject property which contain the conditions that allegedly violate the Act. Therefore, First American also is entitled to dismissal of Counts I and II of the Amended Complaint pursuant to 735 ILCS 5/2-615.

WHEREFORE First American Properties, LLC respectfully requests that the Board dismiss Counts I and II of Complainant People of the State of Illinois' First Amended Complaint against First American Properties, LLC with prejudice, and for such other relief as the Board deems just and fair.

Respectfully submitted,

By: 
One of the Attorneys for First American
Properties, LLC

Tina B. Solis
Jamie A. Robinson
Brittany A. Smith
UNGARETTI & HARRIS LLP
70 W. Madison, Ste. 3500
Chicago, Illinois 60602
312-977-4394
Attorneys for Respondent
First American Properties, LLC

Dated: January 11, 2013

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS)
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 Complainant,)
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 v.)
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 MONTALBANO BUILDERS, INC.,)
 an Illinois corporation, FIRST AMERICAN)
 PROPERTIES, LLC, an Illinois limited liability)
 company, & MBC XIV, LLC, a revoked)
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**FIRST AMERICAN PROPERTIES, LLC'S
MEMORANDUM IN SUPPORT OF ITS COMBINED MOTION TO THE BOARD
TO DISMISS COMPLAINANT'S FIRST AMENDED COMPLAINT**

Respondent, First American Properties, LLC, ("First American"), by and through its counsel, Ungaretti & Harris LLP, submits this Memorandum of Law in Support of its Combined Motion to Dismiss Counts I and II of the People of the State of Illinois' ("People") First Amended Complaint ("Amended Complaint") against First American with prejudice pursuant to 735 ILCS 5/2-619.1.

INTRODUCTION AND FACTUAL ALLEGATIONS

On August 30, 2011, the People filed their Amended Complaint against Montalbano Builders, Inc. ("Montalbano"), MBC XIV, LLC ("MBC XIV") and First American (collectively, the "Respondents"). First American has never been served with the Amended Complaint, but nevertheless became aware of the instant lawsuit when it was served with the People's First Requests for Admission of Facts on November 29, 2012. First American now moves to dismiss the Amended Complaint because the Complainant (1) never received proper approval by the Illinois Pollution Control Board ("Board"); (2) never properly served First American; and (3) never filed the

required certificate of service of the Amended Complaint. Further, First American is an improper party, as First American has never had any interest in the property that is the subject of the Amended Complaint, much less any involvement in any of the facts that form the foundation of the Amended Complaint. Finally, the Amended Complaint's vague and conclusory allegations fail to state a claim against First American.

In their Amended Complaint, the People allege that Montalbano was engaged in the development of a 378-lot residential subdivision, composed of single family and duplex homes, located in Cortland, DeKalb County, Illinois (the "Property"). See Amended Complaint ("Amd. Compl.") at Count I, ¶ 4, attached hereto as Exhibit A. Thereafter, the People vaguely claim that Montalbano sold "some portions" of the Property to First American and that, at all relevant times, First American has owned "a number of parcels" at the Property. *Id.* at ¶¶ 5; 10. The Amended Complaint then purports to state two claims against First American, both stemming from First American's alleged ownership of such parcels. Count I alleges that First American has allowed soil at the Property to remain unstabilized and failed to implement adequate erosion control measures, which is causing, threatening or allowing the discharge of a contaminant into State waters in violation of the Illinois Environmental Protection Act ("Act"). *Id.* at Count I, ¶¶ 34-35. Count II alleges that, by allowing soil at the Property to remain unstabilized and failing to implement adequate erosion control measures, First American is creating a water pollution hazard in violation of the Act. *Id.* at Count II, ¶ 33.

This tribunal lacks jurisdiction to hear the claims against First American because the Complainant (1) failed to obtain Board approval of the Amended Complaint; (2) failed to properly serve First American with the Amended Complaint; and (3) failed to file a certificate of service for the Amended Complaint indicating service on First American.

The motion to dismiss should be granted for a separate, independent reason. First American does not own – nor has it ever owned – any parcels of the Property or any interest in any parcels of the Property. Because First American has no duty with respect to the subject Property, it is entitled to dismissal of Counts I and II the Amended Complaint with prejudice. Furthermore, even assuming that First American did own parcels of the Property (which it does not), First American would nevertheless be entitled to dismissal because the People’s Amended Complaint is vague and fails to allege crucial facts necessary to state a claim upon which relief can be granted.

LEGAL STANDARD

I. Procedural Rules for Filing of Motions Before the Board.

Pursuant to 35 Ill. Adm. Code § 101.500(a), the Illinois Pollution Control Board (the “Board”) “may entertain any motion the parties wish to file that is permissible under the Act or other applicable law, these rules, or the Illinois Code of Civil Procedure,” including motions to dismiss pursuant to the Illinois Code of Civil Procedure. A party seeking to file a motion to dismiss must do so within 30 days after service of the challenged document, unless the Board determines that material prejudice would result. *Id.* at § 101.522. Although First American has been served with the People’s First Requests for Admission of Facts, First American has not yet been properly served with the Amended Complaint. As such, First American’s motion to dismiss is timely under the relevant regulations.

ARGUMENT

I. Counts I and II Should Be Dismissed Pursuant to Section 2-619 Because Complainant Failed to Obtain Board Approval, Properly Serve First American or File a Certificate of Service for the Amended Complaint as Required by 35 Ill. Adm. Code § 101.304(b)-(c).

Section 2–619(a)(1) of the Illinois Code of Civil Procedure provides for dismissal of an

action upon certain defects or defenses. 735 ILCS 5/2-619. Pursuant to Section 2-619(a)(1), dismissal is appropriate where “the court does not have jurisdiction of the subject matter of the action, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction.” 735 ILCS 5/2-619(a)(1). The grounds for dismissal pursuant to Section 2-619 must either be apparent on the face of the complaint or supported by affidavits or other evidentiary materials. *Webb v. Damisch*, 362 Ill. App. 3d 1032, 1037 (1st Dist. 2005).

Sections 101.304(b)-(c) of the general provisions governing actions before the Pollution Control Board provide:

b) Duty to Serve. Parties in Board adjudicatory proceedings are responsible for service of all documents they file with the Clerk’s Office. ***Proof of service of initial filings must be filed with the Board upon completion of service.***

c) Method of Service. Service may be effectuated by U.S. Mail or other mail delivery service, in person, by messenger, or as prescribed in Section 101.302(d), except for service of enforcement complaints and administrative citations which must be made personally, by registered or certified mail, or by messenger service. ***Proof of service of enforcement complaints and administrative citations must be filed with the Board upon completion of service.***

35 Ill. Adm. Code § 101.304(b)-(c) (emphasis provided).

The Complainant filed its original complaint on September 8, 2009. A copy of the case docket is attached as Exhibit B. First American was not a party to that complaint. On September 17, 2009, the Board issued an order accepting the complaint for hearing. *Id.* at Entry 9/17/09. On August 30, 2011, the Complainant filed its Amended Complaint adding First American as a party. *See Id.* at Entry 8/30/11 and Ex. A. While the docket identifies the filing, the docket does not contain an order providing Board approval for the Amended Complaint. *Id.* Furthermore, the docket does not contain a certificate of service for the Amended Complaint indicating service on First American. *Id.* The certificate of service attached to the First Amended Complaint provides that service was

effected by U.S. mail. Amd. Compl. at p. 12. However, an enforcement complaint must be served “personally, by registered or certified mail, or by messenger service.” 35 Ill. Adm. Code § 101.304(c). As a result, even if the Complainant had filed its certificate of service, service upon First American was still defective.

Moreover, the President of First American has no knowledge that the Amended Complaint was ever served upon First American. *See* Affidavit of Wayne Moretti (“Moretti Aff.”), ¶ 6, attached as Exhibit C. The Amended Complaint is both an initial pleading and an enforcement complaint, therefore the Complainant never properly effected service upon First American under the general rules. Moreover, the Amended Complaint did not receive Board approval. Accordingly, the Illinois Pollution Control Board has no jurisdiction over the claims against First American, and the Amended Complaint should be dismissed.

II. Counts I and II Should Be Dismissed Pursuant to Section 2-619 Because First American Does Not Own Or Have Any Interest in the Property in Question.

Section 2–619 of the Illinois Code of Civil Procedure also provides for dismissal of an action where “the claim asserted against the defendant is barred by affirmative matter avoiding the legal effect or defeating the claim.” 735 ILCS 5/2–619(a)(9). “[A]ffirmative matter” is something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint. *Ill. Graphics Co. v. Nickum*, 159 Ill. 2d 469, 486 (1994). A complaint is properly dismissed where the affirmative matter negates the plaintiff’s claims or refutes material, unsupported facts. *Webb*, 362 Ill. App. 3d at 1037.

Counts I and II of the Amended Complaint must be dismissed because the affirmative matter, which defeats the Complainant’s claims, is that First American, a real estate investment, development and management company was never involved in the development of the property,

doesn't own or manage the Property and has never owned or managed the Property. Moretti Aff., ¶¶ 4, 7-8. Because First American does not now nor has it ever owned or managed the Property, it had no duty to maintain the Property.

Taking this affirmative matter into consideration, the claims articulated in Counts I and II of the Amended Complaint against First American must fail. As First American did not own any parcel of the Property, First American did not cause soil at the Property to remain unstabilized, nor did it have a duty to implement adequate erosion control measures at Property. Therefore, First American cannot be held liable on Count I, pursuant to Section 12(a) of the Act, 415 ILCS 5/12(a), for causing, threatening or allowing water pollution in Illinois. Similarly, First American cannot be held liable on Count II, pursuant to Section 12(d) of the Act, 415 ILCS 5/12(d), for creating a water pollution hazard. Due to First American's complete lack of connection to the Property and the allegations in the Amended Complaint, the Board should grant this motion to dismiss.

III. Counts I and II Should Be Dismissed Pursuant to Section 2-615 Because the Complainant Fails to Allege Facts Sufficient to State a Claim.

Section 2-615 of the Code of Civil Procedure provides for the dismissal of a claim where a complaint fails to allege facts sufficient to state a claim upon which relief may be granted. 735 ILCS 5/2-615(a). Illinois is a fact-pleading jurisdiction. *Weiss v. Waterhouse Secs., Inc.*, 208 Ill. 2d 439, 451 (2004). Accordingly, to withstand a motion to dismiss under Section 2-615, a complaint must allege ultimate facts sufficient to bring a claim within a legally recognized cause of action, not simply conclusions of law or conclusory factual allegations that are unsupported by specific allegations of fact. *Anderson v. Vanden Dorpel*, 172 Ill. 2d 399, 408 (1996).

In reviewing a Section 2-615 motion to dismiss, a court must disregard all legal conclusions and conclusory factual allegations. *Lagen v. Balcov Co.*, 274 Ill.App.3d 11, 16 (2d Dist. 1995). If,

after disregarding all legal conclusions and conclusory factual allegations, the complaint fails to allege facts sufficient to state a claim, the motion to dismiss should be granted. *Barille v. Sears Roebuck & Co.*, 289 Ill. App. 3d 171, 174 (1st Dist. 1997).

Even assuming that First American did own parcels of the Property, the Amended Complaint still fails to state a claim on its face. A review of the vague allegations leaves First American guessing as to which parcels it allegedly owns and which of those parcels are allegedly in violation of the Act. Simply stated, the vagueness of the Amended Complaint leaves First American unable to properly respond to the claims asserted against it.

The first and most obvious defect in the Amended Complaint is the Complainant's failure to identify the parcels of property allegedly "owned" by First American. The Amended Complaint alleges that First American "purchased some portions" of the Property from Montalbano, and for all times relevant has owned "a number of parcels" of the Property. Amd. Compl. at Count I, ¶ 5. As such, the Complainant concludes that "First American has the duty to stabilize its portion of the property to prevent silt runoff" and to comply with the Act. *Id.* However, in order to state a valid claim and establish that First American in fact owes some type of duty, at the very least, the Complainant must identify the parcels of Property it alleges to be owned by First American. Without identifying specific parcels, First American is left without adequate information to properly investigate these claims. Simply stating that First American owns "a number of parcels" is not sufficient.

More problematic is the Complainant's failure to identify with any particularity the parcels of the Property that are the source of the alleged violations of the Act. The Complainant alleges that, back in 2008, an EPA inspector observed that "the DeKalb Site was in poor condition" and that certain "areas" were "affected by mass grading left unstablized." *Id.* at Count I, ¶ 13. Yet the


Complainant does not identify which “areas” were left unstabilized. Further, the Complainant alleges that: (1) “the detention basin was carrying a heavy sediment load; (2) the “bank of the detention basin in the area of the western inlet exhibited severe erosion;” and (3) “effluent was leaving the detention basin and entering into Union Ditch...” *Id.* But the Amended Complaint fails to identify on which parcel the detention basin is located, and which entity owns the particular parcel(s) containing the detention basin.

Continuing its broad allegations, the Amended Complainant alleges that First American has allowed certain “soils to remain unstabilized” and has “failed to implement adequate erosion control measures.” *Id.* at Count I, ¶ 34. As such, the Complainant claims that First American is causing, threatening or allowing water pollution in violation of the Act (*Id.* at Count I, ¶¶ 34-35) and creating a water pollution hazard in violation of the Act. *Id.* at Count II, ¶ 33. However, the Complainant again fails to identify where on the Property these conditions are occurring, refusing to even identify the parcel number. Without identifying the parcels on which the “soils” are supposedly unstabilized and where First American should supposedly be instituting “erosion control measures,” the Complainant fails to sufficiently state a claim in Counts I and II of their Amended Complaint. As such, Counts I and II of the Amended Complaint should be dismissed.

CONCLUSION

WHEREFORE First American Properties, LLC respectfully requests that the Board dismiss Counts I and II of Complainant People of the State of Illinois' First Amended Complaint against First American Properties, LLC with prejudice, and for such other relief as the Board deems just and fair.

Respectfully submitted,

By: 
One of the Attorneys for First American
Properties, LLC

Tina B. Solis
Jamie A. Robinson
Brittany A. Smith
UNGARETTI & HARRIS LLP
70 W. Madison, Ste. 3500
Chicago, Illinois 60602
312-977-4394
Attorneys for Respondent
First American Properties, LLC

Dated: January 11, 2013

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
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Complainant,) PCB No. 2010-20
) (Enforcement - Water)
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liability company, & MBC XIV, LLC, a)
revoked Delaware limited liability company,)
)
Respondents.)

NOTICE OF FILING

TO: Montalbano Builders, Inc.
Anthony P. Montalbano
Registered Agent
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Oakbrook Terrace, Illinois 60181

First American Properties, L.L.C.
SCN&R Registered Agent, Inc.
233 S. Wacker Drive # 7800
Chicago, Illinois 60606

MBC XIV, LLC
National Registered Agents, Inc.
200 West Adams Street
Chicago, Illinois 60606

MBC XIV, LLC
Anthony Montalbano, Manager
1801 S. Meyers Road #500
Oakbrook Terrace, Illinois 60181

Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph Street, Ste. 11-500



Electronic Filing - Received, Clerk's Office, 08/30/2011

Chicago, Illinois 60601

PLEASE TAKE NOTICE that on August 30, 2011, I filed with the Office of the Clerk of the Illinois Pollution Control Board a Complaint, Notice of Filing, and a Certificate of Service on behalf of the People of the State of Illinois, a copy of which is attached and herewith served upon you.

Section 103.204(f) of the Pollution Control Board Procedural Rules, 35 Ill. Adm. Code 103.204(f) provides: "Failure to file an answer to this complaint within 60 days may have severe consequences. Failure to answer will mean that all allegations in the complaint will be taken as if admitted for purposes of this proceeding. If you have any questions about this procedure, you should contact the hearing officer assigned to this proceeding, the Clerk's Office or an attorney."

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General
State of Illinois

BY: 

ZEMEHERET BEREKET-AB
Assistant Attorney General
Environmental Bureau
69 W. Washington St., 18th Flr.
Chicago, IL 60602
(312) 814-3816

DATE: August 30, 2011

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
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Respondents.)

FIRST AMENDED COMPLAINT

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, on her own motion and at the request of the Illinois Environmental Protection Agency, files this First Amended Complaint against Respondents, MONTALBANO BUILDERS, INC., an Illinois corporation, FIRST AMERICAN PROPERTIES, L.L.C., an Illinois limited liability company, and MBC XIV, LLC, a revoked Delaware limited liability company, as follows:

COUNT I

CAUSE, THREATEN OR ALLOW WATER POLLUTION

1. The Complaint against Montalbano Builders, Inc. is brought on behalf of the PEOPLE OF THE STATE OF ILLINOIS by LISA MADIGAN, Attorney General of the State of Illinois, on her own motion and at the request of the Illinois Environmental Protection Agency ("Illinois EPA"), pursuant to Section 31 of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/31 (2010).

2. The Complaint against First American Properties, L.L.C. and MBC XIV, LLC is brought on behalf of the People of the State of Illinois by LISA MADIGAN, Attorney General of the State of Illinois, on her own motion.

3. The Illinois EPA is an administrative agency of the State of Illinois, created pursuant to Section 4 of the Act, 415 ILCS 5/4 (2010), and charged, *inter alia*, with the duty of enforcing the Act. The Illinois EPA is further charged with the duty to abate violations of the National Pollutant Discharge Elimination System ("NPDES") Permit Program under the Federal Clean Water Act ("CWA"), 33 U.S.C. §1342(b)(7).

4. At all times relevant to the First Amended Complaint, Montalbano Builders, Inc. ("Montalbano") operating under the name of Montalbano Homes was engaged in the development of a 378-lot residential subdivision known as Mission Oaks, composed of both single family and duplex homes, and located on the south side of Route 38 East near the intersection of Route 38 and Hahn Drive in Cortland, DeKalb County, Illinois ("Site"). Anthony P. Montalbano is president and registered agent of Montalbano.

5. At all times relevant to the First Amended Complaint, First American Properties, L.L.C. ("First American"), is an Illinois limited liability company which owns a number of parcels at the Site. First American purchased some portions of the property from Montalbano. First American does not hold coverage under the NPDES permit for the portion of the property it owns at the Site. First American has the duty to stabilize its portion of the property in order to prevent silt runoff.

6. At all times relevant to the First Amended Complaint, MBC XIV, LLC ("MBC") is a Delaware limited liability company. MBC purchased some portions of the property at the

Site from Montalbano. MBC does not hold coverage under the NPDES permit for the portion of the property it owns at the Site. MBC has the obligation to stabilize the portion of the Site it purchased in order to prevent silt runoff.

7. A review of the Illinois Secretary of State's record indicates that MBC's status was revoked as of February 11, 2010. The members of MBC are Anthony and Susan Montalbano. Mr. Anthony Montalbano is also President of Montalbano Builders, Inc.

8. On June 19, 2006, Montalbano Homes submitted to the Illinois EPA a notice of intent ("NOI") for coverage under the NPDES stormwater permit for the DeKalb Site. The DeKalb Site is 187 acres in size and the receiving stream for stormwater runoff from the DeKalb Site, as listed in Montalbano's NOI, is Union Ditch. The stormwater discharges directly to a storm sewer and eventually makes its way into Union Ditch.

9. On July 19, 2006, the Illinois EPA granted Montalbano Homes coverage under NPDES Permit No. ILR10F880 for stormwater discharges associated with construction activities at the DeKalb Site.

10. First American Properties and MBC XIV both purchased property at the Site sometime after the original complaint was filed in September 2009. To date, Montalbano's NPDES permit has not been terminated or modified.

11. On May 9, 2008, the DeKalb County Soil and Water Conservation District ("DCSWCD") inspected the DeKalb Site to determine the effectiveness of soil erosion and sediment control measures in preventing water pollution and to review compliance with the conditions of NPDES Permit No. ILR10F880. During the inspection, DCSWCD observed:

- sediment leaving the Site at the outlet of the detention pond into Union Ditch;

- a lack of stabilization and erosion control measures, impacting the entire Site;
- severe bank erosion occurring in the detention basin, primarily on the north bank;
- sediment traps were not maintained; and
- stormwater channels were not stabilized.

12. On May 14, 2008, the Illinois EPA conducted a site inspection to review the erosion control measures employed at the DeKalb Site. The Illinois EPA's inspection was prompted by reports from DCSWCD's May 9, 2008 inspection.

13. During the May 14, 2008, Illinois EPA inspection, the inspector observed that:

- a. the DeKalb Site was in very poor condition with areas affected by mass grading left unstabilized, although new home construction was limited to a relatively small area;
- b. the detention basin was carrying a heavy sediment load as evidenced by the sandy color of the water and sediment that was building up and fanning out at the inlet;
- c. the bank of the detention basin in the area of the western inlet exhibited severe erosion;
- d. effluent was leaving the detention basin and entering into Union Ditch as evidenced by the visible sediment plume in Union Ditch.

14. On October 9, 2008, the Illinois EPA sent Montalbano a Violation Notice ("VN") pursuant to Section 31(a) of the Act, 415 ILCS 5/31(a)(1) (2010).

15. On November 11, 2008, Montalbano responded to the VN and proposed its Compliance Commitment Agreement ("CCA").

16. On November 19, 2008, the Illinois EPA conducted a follow-up inspection and observed very little progress towards remedying the violations noted in the previous inspections.

17. On December 12, 2008, Montalbano wrote a letter to the Illinois EPA stating that it had waived its right to a meeting pursuant to the VN letter.

18. On December 12, 2008, the Illinois EPA rejected Montalbano's CCA.
19. On February 4, 2009, the Illinois EPA sent Montalbano a Notice of Intent to Pursue Legal Action.
20. On February 19, 2009, Montalbano's legal counsel wrote a letter to the Illinois EPA waiving its rights under Section 31 of the Act, 415 ILCS 5/31 (2010).
21. On July 13, 2009, the Illinois EPA conducted a follow up inspection and observed continuing noncompliance at the stormwater detention pond. A black corrugated stand pipe installed to prevent discharge from the pond had been punctured in several places to allow the sediment laden water out to Union Ditch. The Illinois EPA observed sediment plume in the receiving stream.
22. On June 28, 2010, the Illinois EPA conducted an inspection of the Site to determine compliance. The Illinois EPA observed that portions of the Site owned by each of the three entities holding property at the Site had inadequate and improper stabilization. Large portions of the Site remain unstabilized.
23. Montalbano continues to hold the NPDES permit for the entire Site and it is its obligation to ensure compliance with the NPDES permit.
24. Section 12(a) of the Act, 415 ILCS 5/12(a) (2010), provides as follows:
 - No person shall:
 - (a) Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act.

25. Section 302.203 of the Illinois Pollution Control Board ("Board") Water Pollution Regulations, 35 Ill. Adm. Code 302.203, titled, Offensive Conditions, provides as follows:

Waters of the State shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, color or turbidity of other than natural origin. The allowed mixing provisions of Section 302.102 shall not be used to comply with the provisions of this Section.

26. Section 3.315 of the Act, 415 ILCS 5/3.315 (2010), provides as follows:

"Person" is any individual, partnership, co-partnership, firm, company, limited liability company, corporation, association, joint stock company, trust, estate, political subdivision state agency or any other legal entity, or their legal representative, agent or assigns.

27. Montalbano, First American Properties, and MBC XIV, are "persons" as that term is defined in Section 3.315 of the Act, 415 ILCS 5/3.315 (2010).

28. Section 3.165 of the Act, 415 ILCS 5/3.165 (2010), provides as follows:

"CONTAMINANT" is any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source.

29. Sediment leaving the DeKalb Site at the outlet of the detention pond and entering into Union Ditch is a "contaminant," as that term is defined by Section 3.165 of the Act.

30. Section 3.545 of the Act, 415 ILCS 5/3.545 (2010), provides as follows:

"WATER POLLUTION" is such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety, or welfare, or domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.

31. Sediment leaving the DeKalb Site that flowed into Union Ditch constitutes "water pollution," as that term is defined by Section 3.545 of the Act, 415 ILCS 5/3.545 (2010).

32. Section 3.550 of the Act, 415 ILCS 5/3.550 (2010), provides as follows:

"WATERS" means all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon the State.

33. The detention pond and Union Ditch into which the sediment discharges, are "waters," as that term is defined in Section 3.550 of the Act, 415 ILCS 5/3.550 (2010).

34. By allowing disturbed soils to remain unstabilized and failing to implement adequate erosion control measures, Respondents caused, threatened or allowed the discharge of a contaminant into the waters of the State.

35. By causing, threatening or allowing sediment from the Site, a "contaminant," to eventually discharge into Union Ditch, a "water" of the State, Respondents caused, threatened or allowed water pollution in Illinois, in violation of Section 12(a) of the Act, 415 ILCS 5/12(a)(2010).

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board enter an order in favor of Complainant and against Respondents with respect to this Count I:

1. Authorizing a hearing in this matter at which time Respondents will be required to answer the allegations herein;

2. Finding that Respondents have violated Section 12(a) of the Act, 415 ILCS 5/12(a) (2010);

3. Ordering Respondents to cease and desist from any further violations of Section 12(a) of the Act, 415 ILCS 5/12(a) (2010);

4. Assessing a civil penalty of Fifty Thousand Dollars (\$50,000.00) against each Respondent for each violation of Section 12(a) of the Act, 415 ILCS 5/12(a) (2010), and an additional civil penalty of Ten Thousand Dollars (\$10,000.00) against each Respondent for each day during which said Respondent continues to be in violation of Section 12(a) of the Act;

5. Ordering Respondents to pay all costs including attorney, expert witness and consultant fees expended by the State in its pursuit of this action; and

6. Granting such other relief as the Board deems appropriate and just.

COUNT II

CREATING A WATER POLLUTION HAZARD

1-31. Complainant realleges and incorporates by reference herein paragraphs 1 through 22 and 26 through 34 of Count I as paragraphs 1 through 31 of this Count II.

32. Section 12(d) of the Act, 415 ILCS 5/12(d) (2010), provides as follows:

No person shall:

* * * *

(d) Deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard.

33. By failing to implement adequate erosion control for the measures for the graded Site, and by allowing unstabilized soils to remain in areas of the Site prone to runoff to waters of the State, Respondent hereby created a water pollution hazard in violation of Section 12(d) of the Act, 415 ILCS 5/12(d) (2010).

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests the Board enter an order in favor of Complainant and against Respondent with respect to this Count II:

1. Authorizing a hearing in this matter at which time Respondents will be required to answer the allegations herein;
2. Finding that Respondents have violated Section 12(d) of the Act, 415 ILCS 5/12(d) (2010);
3. Ordering Respondents to cease and desist from any further violations of Section 12(d) of the Act, 415 ILCS 5/12(d) (2010);
4. Assessing a civil penalty of Fifty Thousand Dollars (\$50,000.00) against each Respondent for each violation of Section 12(d) of the Act, 415 ILCS 5/12(d) (2010), and an additional civil penalty of Ten Thousand Dollars (\$10,000.00) against each Respondent for each day during which said Respondent continues to be in violation of Section 12(d) of the Act;
5. Ordering Respondents to pay all costs including attorney, expert witnesses and consultant fees expended by the State in its pursuit of this action; and
6. Granting such other relief as the Board deems appropriate and just.

COUNT III

**FAILURE TO COMPLY WITH THE TERMS
AND CONDITIONS OF THE NPDES PERMIT**

- 1-31. Complainant realleges and incorporates by reference herein paragraphs 1 through 22 and 26 through 34 of Count I as paragraphs 1 through 31 of this Count III.
32. Section 12(f) of the Act, 415 ILCS 5/12(f) (2010), provides as follows:

No person shall:

* * * *

- (f) Cause, threaten, or allow the discharge of any contaminant into the waters of the State, as defined herein, including but not limited to, any waters to any sewage works, or into any well or from any point source within the State, without an NPDES permit for point source discharges issued by the Agency under Section 39(b) of this Act, or in violation of any NPDES permit filing requirement established under Section 39(b), or in violation of any regulations adopted by the Board or of any order adopted by the Board with respect to the NPDES program.

33. Part IV.D.2(a) of Montalbano's NPDES General Permit for Storm Water Discharges from Construction Activities (Permit No. ILR10F880) provides in pertinent part as follows:

"... stabilization measures shall be initiated as soon as practicable in portions of the site where construction activities have temporarily or permanently ceased, but in no case more than 14 days after the construction activity in that portion of the site has temporarily or permanently ceased."

34. The Illinois EPA inspector observed that a large part of the Site remained dormant for more than 21 days and had not been stabilized within 14 days as required by NPDES Permit No. ILR10F880, Part IV.D.2(a).

35. By failing to maintain adequate stormwater pollution prevention measures as called for by its coverage under NPDES Permit No. ILR10F880, Montalbano one of the Respondents violated Section 12(f) of the Act, 415 ILCS 5/12(f) (2010).

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests the Board to enter an order in favor of Complainant and against Montalbano with respect to this Count III:

1. Authorizing a hearing in this matter at which time Montalbano will be required to answer the allegations herein;
2. Finding that Montalbano has violated Section 12(f) of the Act, 415 ILCS 5/12(f) (2010).
3. Ordering Montalbano to cease and desist from further violations of Section 12(f) of the Act, 415 ILCS 5/12(f) (2010).
4. Assessing a civil penalty of Ten Thousand Dollars (\$10,000.00) per day against Montalbano for each day of violation of Section 12(f) of the Act, 415 ILCS 5/12(f) (2010).
5. Ordering Montalbano to pay all costs including attorney, expert witness and consultant fees expended by the State in its pursuit of this action; and
6. Granting such other relief as the Board deems appropriate and just.

PEOPLE OF THE STATE OF ILLINOIS,
by LISA MADIGAN, Attorney
General of the State of Illinois

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

By: 

ROSEMARIE CAZEAU, Chief
Environmental Bureau North
Assistant Attorney General

Of Counsel:

ZEMEHERET BEREKET-AB
Assistant Attorney General
Environmental Bureau North
69 West Washington Street, Suite 1800
Chicago, Illinois 60602
(312) 814-3816
(312) 814-2347 – fax

CERTIFICATE OF SERVICE

I, ZEMEHERET BEREKET-AB, an Assistant Attorney General, do certify that I caused to be served on this 30th day of August 2011, the foregoing Notice of Filing, Complaint, and a Certificate of Service, upon the persons listed on said Notice by placing same in an envelope bearing sufficient postage with the United States Postal Service located at 100 West Randolph Street, Chicago, Illinois.



ZEMEHERET BEREKET-AB

Docket Sheet

Case No: PCB 2010-020

Case Name: People of the State of Illinois v. Montalbano Builders, Inc., an Illinois corporation

Case Type: Enforcement

Board Member: Zalewski, C. K.

Media Type: Water

Hearing Officer: Halloran, B.

County: DeKalb

Status: Board Order

Case Activity

Date	Activity Type	Activity Notes
1/10/2013	125748	*Hearing Officer Order: Telephonic Status Conference January 10, 2013; attorney for First American asked for extension to file motion to dismiss, no objection, motion granted to January 11, 2013, any timelines for outstanding discovery served on First American is stayed; First American added by complainant as respondent in First Amended complaint, Board has not ruled on the complaint; Telephonic Status Conference set for March 28, 2013, at 10:00 am
1/3/2013	125695	*Hearing Officer Order: Telephonic Status Conference scheduled for January 24, 2013 is cancelled; Telephonic Status Conference set for January 10, 2013, at 10:00 am
12/13/2012	125540	First American Properties, LLC's Motion for Extension of Time to Hearing Officer Bradley P. Halloran; Appearances of Brittany A. Smith and Tina B. Solis and Jamie A. Robinson
12/6/2012	125449	*Hearing Officer Order: Telephonic Status Conference November 29, 2012, respondent represented by trustee; trustee will file appearance; complainant will discuss this matter with trustee before next conference; Telephonic Status Conference set for January 24, 2013, at 9:30 am
10/24/2012	124944	*Hearing Officer Order: Telephonic Status Conference scheduled for October 24, 2012, complainant absent; conference continued; Telephonic Status Conference set for November 29, 2012, at 9:30 am
9/11/2012	124500	*Hearing Officer Order: Telephonic Status Conference September 11, 2012, complainant absent; decided to continue conference; Telephonic Status Conference set for October 24, 2012, at 10:00 am
5/24/2012	123177	*Hearing Officer Order: On May 24, 2012, complainant said he learned site has been sold, requested IEPA to locate new owners, will file amended complaint naming new owners; Telephonic Status Conference set for September 11, 2012, at 9:00am
4/16/2012	122666	*Hearing Officer Order of April 5, 2012, mailed to Anthony P. Montalbano, Montalbano Builder, Inc. 1801 S. Meyers Road, Suite 500, Oakbrook Terrace, IL, returned today labeled, "MONTALBANO BUILDERS, 1010 JORIE BLVD, STE. 138, OAK BROOK, IL 60523-4442", remailed First Class mail and Service List changed
4/5/2012	122550	*Hearing Officer Order: On april 5, 2012, complainant said it was still in contact with bankruptcy trustee for respondent, trustee will send more information, based on that, complainant may amend its complaint to add a new party; Telephonic Status Conference set for May 24, 2012, at 10:00 am

Docket Sheet

1/26/2012	121758	*Hearing Officer Order: On January 26, 2012, complainant said it was in contact with bankruptcy trustee for respondent, trustee will send more information, based on information complainant may amend complaint or add a new party; Telephonic Status Conference set for April 5, 2012, at 9:30 am
11/15/2011	120848	*Hearing Officer Order: Telephonic Status Conference November 15, 2011, complainant only; respondent's attorney withdrew on September 15, 2011; complainant intends to file motion for default; Telephonic Status Conference set for January 26, 2012, at 9:30 am
9/15/2011	120098	Withdrawal of Appearance of Glenn C. Sechen for Respondent (electronic filing)
9/15/2011	120093	*Hearing Officer Order: Telephonic Status Conference September 15, 2011; respondent's attorney said he intends to file notice to withdraw; Telephonic Status Conference set for November 15, 2011, at 9:45 am
8/30/2011	119944	First Amended Complaint (electronic filing)
6/28/2011	119189	*Hearing Officer Order: On June 23, 2011, respondent's attorney said legal representation issues linger, may be resolved before next conference; Telephonic Status Conference set for September 15, 2011, at 9:30 am
4/21/2011	118191	*Hearing Officer Order: Telephonic Status Conference April 21, 2011; complainant presumed respondent's attorney no longer represents respondent, respondent's attorney directed to file notice of withdrawal; also complainant intends to file amended complaint before next conference; Telephonic Status Conference set for June 23, 2011, at 9:30 am
3/16/2011	117798	*Receipt of notice of meeting of creditors concerning respondent's filing of Chapter 7 Bankruptcy in United States Bankruptcy Court, Northern District of Illinois
2/3/2011	117385	*Hearing Officer Order: Telephonic Status Conference February 3, 2011; complainant absent; parties still in settlement mode; Telephonic Status Conference set for April 21, 2011, at 9:45 am
11/18/2010	116587	*Hearing Officer Order; On November 18, 2010, parties told hearing officer draft stipulation being circulated, respondent sent comments to complainant for review; Telephonic Status Conference set for February 3, 2011, at 9:45 am
9/16/2010	115833	*Hearing Officer Order: Telephonic Status Conference September 16, 2010; trying to resolve parcel ownership issue, settlement efforts continue; Telephonic Status Conference set for November 18, 2010, at 10:30 am
7/28/2010	115254	*Hearing Officer Order: Telephonic Status Conference July 22, 2010; complainant sent draft stipulation to respondent; Telephonic Status Conference set for September 16, 2010, at 10:00 am
5/20/2010	114494	*Hearing Officer Order: Telephonic Status Conference May 20, 2010; complainant will forward draft stipulation to respondent; Telephonic Status Conference set for July 22, 2010, at 10:00 am
3/18/2010	113803	*Hearing Officer Order: Telephonic Status Conference March 18, 2010; complainant will send draft stipulation to respondent; Telephonic Status Conference set for May 20, 2010, at 10:00 am
2/4/2010	113410	*Hearing Officer Order: Telephonic Status Conference February 4, 2010; negotiations continue; Telephonic Status Conference set for March 18, 2010, at 10:00 am
12/21/2009	112923	*Hearing Officer Order; Telephonic Status Conference December 21, 2009; parties negotiating possible settlement; Telephonic Status Conference set for February 4, 2010, at 10:00 am
12/10/2009	112802	Appearance of Glenn C. Sechen for Respondent (electronic filing)

Docket Sheet

12/10/2009	112801	Respondent's Answer to Complaint (electronic filing)
11/24/2009	112660	*Hearing Officer Order: Due to complainant's conflict, conference scheduled for December 10, 2009 is rescheduled to December 21, 2009, at 10:15 am
11/23/2009	112655	Proof of Service of Complainant on Respondent (electronic filing)
10/16/2009	112161	*Hearing Officer Order: Telephonic Status Conference October 15, 2009; attorney who represented respondent in another matter said he was served with complaint, but not yet retained for this matter, counsel for complainant will serve respondent and they will have 60 days after receipt to answer; Telephonic Status Conference set for December 10, 2009, at 12:00 pm
9/29/2009	111939	*Hearing Officer Order; Hearing officer assigned, from this date any document filed with the Clerk of the Board must also be individually served on the hearing officer; Telephonic Status Conference set for October 15, 2009, at 11:45 am
9/17/2009	111791	Order of the Board by G. T. Girard: Board accepts complaint for hearing
9/8/2009	111709	Complaint

Notice List

Party Name	Address	City/State/Zip	Phone/Fax	Name
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Total Number of Participants: 0

Service List

Party Name	Address	City/State/Zip	Phone/Fax	Name
Gina Krol, Esquire	105 W. Madison St. Suite 1100	Chicago IL 60602	312/368-0300	*
Montalbano Builders, Inc.	1010 Jorie Blvd Suite 130	Oakbrook IL 60523-4442		Anthony P. Montalbano
Office of the Attorney General	Environmental Bureau North 69 West Washington Street, Suite 1800	Chicago IL 60602	312/814-2550 312/814-2347	Zemeheret Bereket-Ab
Ungaretti & Harris LLP	3500 Three First National Plaza	Chicago IL 60602	312/977-4479	Brittany A. Smith

Docket Sheet

Ungaretti & Harris LLP	3500 Three First National Plaza	Chicago IL 60602	312/977-4479	Jamie A. Robinson
Ungaretti & Harris LLP	3500 Three First National Plaza	Chicago IL 60602	312/977-4479	Tina B. Solis

Total Number of Participants: 4

Scheduled Hearings

<u>Hearing Date/Time</u>	<u>Location</u>	<u>City & State</u>
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Appeals on File

<u>Court Docket</u>	<u>Court Name</u>	<u>Court Type</u>	<u>Date Of Appeal</u>	<u>Court Decision</u>
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS)	
)	
Complainant,)	
)	
v.)	
)	
MONTALBANO BUILDERS, INC.,)	PCB No. 2010-20
an Illinois corporation, FIRST AMERICAN)	(Enforcement – Water)
PROPERTIES, LLC, an Illinois limited liability)	
company, & MBC XIV, LLC, a revoked)	
Delaware limited liability company,)	
)	
Respondents.)	
)	

DECLARATION OF WAYNE MORETTI

I, Wayne Moretti, being over the age of 18, and first duly sworn, do state upon oath as follows:

1. I have personal knowledge of the facts contained herein and if called to testify would testify to the same.
2. I am the President of First American Properties, LLC, ("First American") and have been the President since August, 2003.
3. As the President of First American, my duties and responsibilities include the supervision of approximately a dozen employees engaged in commercial development and leasing.
4. First American is real estate investment, development and management company that was incorporated in August, 2003.
5. I have reviewed the allegations contained in the Amended Complaint in the above captioned matter.



6. To the best of my knowledge, First American was never served with the Amended Complaint.

7. First American does not own or manage the property identified in the Amended Complaint.

8. First American was not involved in the development of the property identified in the Amended Complaint, and has never owned or managed the property identified in the Amended Complaint.

FURTHER DECLARANT SAYETH NOT

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters stated herein to be on information and belief, and as to such matters, the undersigned certifies as aforesaid that he verily believes the same to be true.

Signed and dated this
10th day of January, 2013


Wayne Moretti

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,

Complainant,

PCB No. 2010-20
(Enforcement – Water)

MONTALBANO BUILDERS, INC.,
an Illinois corporation, FIRST AMERICAN
PROPERTIES, L.L.C., an Illinois limited
liability company, and MBC XIV, LLC, a
revoked Delaware limited liability company,

Respondents.



ORIGINAL RECEIVED
CLERK'S OFFICE

JAN 11 2013

STATE OF ILLINOIS
Pollution Control Board

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served Notice of Filing, Certificate of Service, First American Properties, LLC's Combined Motion to the Board Pursuant to 735 ILCS 5/2-619.1 to Dismiss Complainant's First Amended Complaint and First American Properties, LLC's Memorandum in Support of its Motion to Dismiss to Complainant's First Amended Complaint to the Board, via U.S. mail on January 11, 2013, upon the following persons:

TO: **ZEMEHERET BERKEKET-AB**
Assistant Attorney General
Environmental Bureau
69 W. Washington Str., 18th Floor
Chicago, Illinois 60602

MONTALBANO BUILDERS, INC.
MBC XIV, LLC
Anthony P. Montalbano
1010 Jorie Blvd., Suite 138
Oakbrook, Illinois 60523-4442

MBC XIV, LLC
National Registered Agents, Inc.
200 W. Adams Street
Chicago, Illinois 60606

MBC XIV, LLC
Anthony Montalbano, Manager
1801 S. Meyers Road, #500
Oakbrook Terrace, Illinois 60181

GINA KROL
105 W. Madison Street
Suite 1100
Chicago, Illinois 60602


Jamie A. Robinson

Dated: January 11, 2013

Tina B. Solis
Jamie A. Robinson
Brittany A. Smith
UNGARETTI & HARRIS LLP
70 W. Madison, Ste. 3500
Chicago, Illinois 60602
312-977-4394
Attorneys for Respondent
First American Properties, LLC

THIS FILING IS SUBMITTED ON RECYCLED PAPER