BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	**PCB NO. 17-45**
	)	
MAGNA TAX SERVICE CO., INC.,	)	
	)	
Respondent.	)	

NOTICE OF FILING

To: Claire Manning and William D. Ingersoll, Brown, Hay & Stephens, LLP
205 South Fifth Street, Suite 700, P.O. Box 2459, Springfield, IL 62705-2459

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board Notice of Filing and Complainant's Motion to Strike Respondent's Affirmative Defenses, a copy of which is herewith served upon you.

Respectfully submitted,

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

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Dated: August 21, 2017

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2017, I served a true and correct copy of the Notice of Filing and Complainant's Motion to Strike Respondent's Affirmative Defenses via electronic mail to:

William D. Ingersoll
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PEOPLE OF THE STATE OF ILLINOIS,
LISA MADIGAN, Attorney General of the
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MAGNA TAX SERVICE CO., INC.,	)	
	)	
Respondent.	)	

MOTION TO STRIKE
RESPONDENT'S AFFIRMATIVE DEFENSES III THROUGH VI

The PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois ("Complainant"), hereby moves the Illinois Pollution Control Board ("Board"), pursuant to Section 101.506 of the Board's regulations, 35 Ill. Adm. Code 101.506, to strike the additional affirmative defenses raised by the Respondent, MAGNA TAX SERVICE CO., INC. In support of this Motion, the Complainant states as follows:

I. INTRODUCTION

On February 12, 2017, the Complainant filed its Complaint alleging violations of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/1 et seq. (2014), and Board regulations, 35 Ill. Adm. Code 101.100 et seq. Earlier this year, Respondent filed Affirmative Defenses and Complainant filed a Motion to Strike the affirmative defenses. The Board's decision on the Motion

is pending. Respondent filed Additional Affirmative Defenses ("Add. Aff. Def.") on July 6, 2017, as follows:

> Affirmative Defense III: Open Dumping, Count I
>
> Affirmative Defense IV: Cause or Allow a Violation of the Act, Counts I, IV and V
>
> Affirmative Defense V: Failure to Conduct a Waste Determination, Count II
>
> Affirmative Defense VI: Operation of a Waste Disposal Site without a Landfill Permit, Count III.

For reasons described below, Respondent's additional affirmative defenses III, IV, V and VI are insufficiently pled. Complainant respectfully requests that each of the foregoing affirmative defenses be stricken with prejudice.

II. LEGAL STANDARDS

Section 103.204(d) of the Board's regulations, 35 Ill. Adm. Code 103.204(d), provides, in pertinent part, as follows:

> Any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing.

When a purported affirmative defense is insufficiently pled, a Complainant may raise its objections to the defense before the Board and ask that it be stricken, pursuant to Section 101.506 of the Board's regulations, 35 Ill. Adm. Code 101.506, which provides as follows:

> All motions to strike, dismiss, or challenge the sufficiency of any pleading filed with the Board must be filed within 30 days after the service of the challenged document, unless the Board determines that material prejudice would result.

An affirmative defense is defined as "[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint

are true." *Black's Law Dictionary* (10th ed. 2014). An affirmative defense essentially admits the allegations in the complaint, and then asserts new matter which defeats a plaintiff's right to recover. *Vroegh v. J & M. Forklift*, 165 Ill. 2d 523, 530 (1995). Therefore, an affirmative defense cannot attack the sufficiency of the claim. *Warner Agency, Inc. v. Doyle*, 121 Ill. App. 3d 219, 222-223 (4th Dist. 1984). In addition, an affirmative defense may not merely refute properly pleaded facts in a complaint. *Pryweller v. Cohen*, 282 Ill. App. 3d 899, 907 (1st Dist. 1996), *aff'd* 169 Ill. 2d 588 (1996). And, an affirmative defense cannot negate an element of a cause of action. *Rohr Burg Motors, Inc. v. Kulbarsh*, 2014 IL App (1st) 131664, ¶ 63. Thus, an affirmative defense that does not admit the apparent right to the claim and instead merely attacks the sufficiency of the claim is not a legally sufficient affirmative defense.

In addition, an affirmative defense must offer new facts which are capable of negating the alleged cause of action. *Id.*; *Warner Agency, Inc.*, 121 Ill. App. 3d at 222-23. Any purported affirmative defense which does not assert such matter is legally insufficient as an affirmative defense.

Moreover, an affirmative defense must be factually sufficient. The facts establishing an affirmative defense must be pled specifically, in the same manner as facts in a complaint. *International Ins. Co. v. Sargent & Lundy*, 242 Ill. App. 3d 614, 630 (1st Dist. 1993). In determining the sufficiency of any defense, a court will disregard any conclusions of law that are not supported by specific facts. *Richco Plastic Co. v. IMS Co.*, 288 Ill. App. 3d 782, 784-85 (5th Dist. 1997). The facts establishing an affirmative defense must be pled with the same degree of specificity required by a plaintiff establishing a cause of action. *Int'l Ins. Co.*, 242 Ill. App. 3d at 630. Affirmative defenses that are totally conclusory in nature and devoid of any specific facts supporting the conclusion are inappropriate and should be stricken. *Id.* at 635.

This motion is brought pursuant to Section 101.506 of the Board's regulations, 35 Ill. Adm. Code 101.506, and seeks to strike the affirmative defenses raised by Respondent in its Additional Affirmative Defenses because they are factually and legally insufficient.

III. ARGUMENT

None of Respondent's purported additional affirmative defenses is a valid affirmative defense. The defenses are factually and legally insufficient in that they both fail to allege sufficient facts and to raise a defense and because they fail to meet the criteria of a valid affirmative defense. The Court should therefore strike Respondent's additional affirmative defenses.

A. Respondent's Affirmative Defense III Is Legally And Factually Insufficient To Negate The Complaint's Allegation of Open Dumping

Respondent's Affirmative Defense III alleges that the State did not present facts that constitute "open dumping." This allegation is conclusory in nature and is a legally insufficient basis for an affirmative defense in that it seeks to merely refute the claim. And, in any event, the facts Respondent pled to support its position are incapable of negating the cause of action. Respondent states that the release of heating oil from "an old abandoned Underground Storage Tank ('UST')," which was "placed in use and operated by prior owners and which remained underground and undiscovered" until Respondent "investigated the circumstances" and "entered the UST into the State's Leaking Underground Storage Tank ("LUST") Program," could not constitute open dumping. *See* Add. Aff. Def. III ¶¶ 4 and 5.

First, Respondent's statement that "upon becoming aware of the release, Respondent... entered the UST into the State's Leaking Underground Storage Tank ("LUST") Program" mischaracterizes the Complaint and the underlying facts. Complaint ¶¶ 6, 9, and 16. Respondent would have been aware of the effects of the release, a black oily liquid or substance on the ground,

at least as early as its receipt of Illinois EPA's May 2, 2012 Violation Notice ("VN"), if not earlier. Then, at the very least, Respondent delayed on-site investigation activities for a year, for the period between September 6, 2012 and September 13, 2013. *See* Complaint ¶¶ 9-15. Thus, for more than a year, Respondent allowed the black oily substance, a waste or refuse, to enter the environment and be consolidated at a site that is not a sanitary landfill. *See* 415 ILCS 5/3.305 (2016).

Second, even where an accumulation of a waste predates ownership, subsequent landowners nevertheless can be made liable for open dumping, for their failure to remove the waste. *Gonzalez v. Pollution Control Bd.*, 2011 IL App (1st) 093021, ¶ 34 (landowner held in violation of Act for failure to remove preexisting fly-dumped waste for 14 months); *see also Meadowlark Farms, Inc. v. Pollution Control Bd.*, 17 Ill. App. 3d 851, 853 (5th Dist. 1974) (liability established where ownership and capability of controlling the pollutional discharge existed). Thus, Respondent's statement that the UST was located and operated at the Site before the Site was owned by the Respondent is not a legally sufficient basis to negate liability for open dumping. This fact does not negate the allegation that Respondent caused or allowed those constituents to be released into the environment during its ownership of the Site.

Since Respondent's Affirmative Defense III attempts to attack the legal sufficiency of the claim and has not pled facts that would negate the allegation of open dumping, it is legally insufficient. Accordingly, Complainant respectfully requests that Affirmative Defense III be stricken with prejudice.

B. Respondent's Affirmative Defense IV Should Be Stricken Because Respondent Has Not Pled Any New Fact That Would Defeat Liability For Its Inaction At The Site

Respondent argues that it did not "cause" or "allow" open dumping, water pollution or a water pollution hazard under Counts I, IV and V, and in doing so attempts to improperly refute a

properly alleged element of each cause of action. *Rohr Burg Motors, Inc. v. Kulbarsh*, 2014 IL App (1st) 131664, ¶ 63. An affirmative defense must admit the complaint's allegations and assert new matter. *Vroegh,* 165 Ill. 2d at 530. By attempting to refute a particular element of the claim, Respondent is simply attacking the sufficiency of the claim, and the affirmative defense is therefore legally insufficient.

Respondent argues that it "did not conduct any operations at the Site." Respondent also argues that it did not "place or operate a UST on the property." The courts in Illinois have long held that knowledge is not an essential element to establish liability under the Act, and that landowners regardless of the extent of their involvement are liable for pollution on their property. *See, e.g., Gonzalez*, 2011 IL App (1st) 093021, ¶ 34 (owner liable for dumping performed by trespassers); *Perkinson v. Pollution Control Bd.*, 187 Ill. App. 3d 689, 691 (3d Dist. 1989) (owner of swine farm liable for discharge of swine waste via trench even though he "did not cause or authorize the trench and ha[d] no knowledge of who was responsible for it."); *Meadowlark Farms., Inc.*, 17 Ill. App. 3d at 854-854 (landowner liable for refuse pile created between 10 and 24 years before landowner purchased property and about which landowner had no knowledge). Rather, to "cause" or "allow" may include "present inaction on the part of the landowner to remedy a previous violation." *Illinois EPA v. Rawe*, AC 92-5 (Oct. 16, 1992), slip op. at 6.

Respondent also argues that it was only aware of the UST release subsequent to the issuance of a 2008 NFR letter. Again, knowledge is not an element to proving whether the Respondent caused or allowed pollution under Counts I, IV & V. Respondent nevertheless allowed an environmental condition - first identified during an Illinois EPA inspection on October 5, 2011, and also identified in the May 2, 2012 Violation Notice - to go unresolved for many months until Respondent finally pulled the UST on September 13, 2013 and proceeded with an investigation of

the source and extent of contamination under the LUST program. *See* Complaint ¶¶ 6-16. That the Respondent's investigation ultimately lead to a new NFR related to the LUST investigation does not negate the fact that the Respondent failed to take action to more promptly initiate, continue, and resolve an investigation of the condition first identified on October 5, 2011, and thereby avoid causing or allowing open dumping, water pollution and a water pollution hazard.

Since Respondent attempts to improperly refute an element of the causes of action under Counts I, IV & V, and its affirmative statements are not relevant to determining whether Respondent "caused" or "allowed" open dumping, water pollution or a water pollution hazard, Respondent's Affirmative Defense IV is legally insufficient. Accordingly, Complainant respectfully requests that this affirmative defense be stricken with prejudice.

C. Respondent's Affirmative Defense V Should Be Stricken Because Respondent's Claim That It Did Not Generate Waste Is Merely An Attempt to Improperly Attack An Element of the Claim

Affirmative Defense V is legally insufficient in that it attempts to attack the legal sufficiency of the claim and fails to assert any new affirmative matter. Respondent claims it did not generate waste and did not allow a release from the UST. These facts merely attempt to negate the factual allegation that it did generate waste, which is improper as an affirmative defense. Complaint ¶ 33; *Rohr Burg Motors, Inc. v. Kulbarsh*, 2014 IL App (1st) 131664, ¶ 63.

Moreover, Affirmative Defense V is legally insufficient in that the facts alleged in support of its affirmative defense -- that it investigated and remediated the UST and later characterized the waste - are not new affirmative matter. *See* Add. Aff. Def. V ¶¶ 1- 2. The Complaint specifically limits the allegation that the Respondent failed to make the waste determination for the time period "prior to the removal of the UST." Complaint, Count II, ¶ 29. The Complaint already

acknowledges that the Respondent later investigated the UST. *See* Complaint, Count II, ¶¶ 13-16. Thus Respondent's facts are stating nothing new.

Finally, even if Respondent's Affirmative Defense V was proper, it is factually insufficient in that it does not allege any specific facts that support its conclusion that it did not allow a release from the UST. Respondent provides no explanation how the later remediation of the release means that it did not "allow" the release in the first place, and provides no explanation how it did not "generate" waste, in the form of material that was discharged from the UST at the Site into the environment, during a time when Respondent owned the Site.

Since Respondent's Affirmative Defense V attempts to attack the sufficiency of the claim, fails to assert any new affirmative matter, and is factually insufficient, it is legally insufficient. Accordingly, Complainant respectfully requests that this affirmative defense be stricken with prejudice.

D. Respondent's Affirmative Defense VI Should Be Stricken Because It Merely Attempts to Refute Plaintiff's Claim and Respondent's Purported Lack of "Intent" Fails As An Affirmative Defense

Affirmative Defense VI is legally insufficient in that it merely attempts to attack the sufficiency of Complainant's claim. A properly pled affirmative defense admits the allegation and then asserts new matter which would defeat the claim. Merely stating that Respondent did not conduct any activities which constitute waste disposal is an attempt to refute the facts alleged in the Complaint and is therefore not a proper affirmative defense.

Secondly, Affirmative Defense VI is legally insufficient in that the new affirmative matter asserted by the Respondent does not, even if true, defeat Complainant's claim. Affirmative Defense VI asserts that Respondent "had no intention" of conducting waste disposal operations. This fact fails as an affirmative defense because there is no requirement that Respondent "intend"

to conduct a waste-disposal operation. Rather, if Respondent's actions demonstrate that waste-disposal is taking place at the Site and Respondent has not obtained the requisite permits, then Respondent is liable under Section 21(d)(1) - (2) of the Act, 415 ILCS 5/21(d)(1)-(2) (2016) and Section 812.101(a) of the Board regulations, 35 Ill. Adm. Code 812.101(a). "The Environmental Protection Act is Malum prohibitum, no proof of guilty knowledge or Mens rea is necessary to a finding of guilt." *Meadowlark Farms, Inc.*, 17 Ill. App. 3d at 861; *Bath, Inc. v. Pollution Control Bd.*, 10 Ill. App. 3d 507, 510 (4th Dist. 1973) (owner of a landfill found in violation despite assertion that it lacked knowledge and that there was no finding that it intended the violations.)

Since Respondent's Affirmative Defense VI merely attempts to attack the sufficiency of Plaintiff's claim, and Respondent's assertion that it did not intend to conduct waste disposal operations is a legally insufficient basis for an affirmative defense, Affirmative Defense VI is legally insufficient in its entirety. Accordingly, Complainant respectfully requests that this affirmative defense be stricken with prejudice.

E. Respondent Failed to Seek Leave of the Board Prior to Filing its Additional Affirmative Defenses.

Finally, Respondent's additional affirmative defenses are not properly before the Board, because Respondent did not seek the Board's leave to file a supplemental answer. Section 103.204(d) of the Board's regulations, 35 Ill. Adm. Code 103.204(d), provides that affirmative defenses "must be plainly set forth . . . in the answer or in a supplemental answer." Respondent did not file a "supplemental answer," but rather simply "additional affirmative defenses." Moreover, in earlier cases, Respondents filing additional affirmative defenses in a supplemental answer have sought leave of the Board to do so. *See, e.g., Indian Creek Development Co. v. Burlington*

Northern Santa Fe Railway Co., PCB 07-44 (June 18, 2009), slip op. at 8; *People v. Sheridan Sand & Gravel Co.*, PCB 06-177 (Jan. 26, 2007), slip op. at 3-4. Seeking leave of the Board to file a supplemental answer would have been consistent with the Illinois Code of Civil Procedure. *See* 735 ILCS 5/2-616(a) (2016) (providing that amendments to pleadings "may be allowed [by the Court] on just and reasonable terms . . ."). Respondent's failure to seek leave of the Board before filing a new pleading provides an additional basis to strike the additional affirmative defenses, beyond their factual and legally insufficiency.

IV. CONCLUSION

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

Respectfully submitted,

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Dated: August 21, 2017