ORIGINAL

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	**PCB NO. 99-134**
	)	**(Enforcement)**
PEABODY COAL COMPANY,	)	
a Delaware corporation,	)	
	)	
Respondent.	)	

NOTICE OF FILING

To: David R. Joest
Peabody Coal Company
1951 Barrett Court
P.O. Box 1990
Henderson, KY 42420-1990

Stephen F. Hedinger
Attorney at Law
1225 South Sixth Street
Springfield, IL 62703-2407

W. C. Blanton
Blackwell Sanders Peper Martin LLP
2300 Main Street, Suite 1000
Kansas City, MO 64108

PLEASE TAKE NOTICE that on this date I mailed for filing with the Clerk of the Pollution Control Board of the State of Illinois, Complainant's MOTION TO STRIKE RESPONDENT PEABODY COAL'S AFFIRMATIVE DEFENSES.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

JAMES E. RYAN
Attorney General of the
State of Illinois

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

BY: _____
JANE E. McBRIDE
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: February 3, 2003

ORIGINAL

CERTIFICATE OF SERVICE

I hereby certify that I did on February 3, 2003, send by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box a true and correct copy of the following instruments entitled NOTICE OF FILING and MOTION TO STRIKE RESPONDENT PEABODY COAL'S AFFIRMATIVE DEFENSES.

To: David R. Joest
Peabody Coal Company
1951 Barrett Court
P.O. Box 1990
Henderson, KY 42420-1990

Stephen F. Hedinger
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Kansas City, MO 64108

and the original and ten copies by First Class Mail with postage thereon fully prepaid of the same foregoing instrument(s):

To: Dorothy Gunn, Clerk
Illinois Pollution Control Board
State of Illinois Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

A copy was also sent by First Class Mail with postage thereon fully prepaid

To: Carol Sudman
Hearing Officer
Pollution Control Board
600 South Second Street, Ste. 402
Springfield, Illinois 62704

Jane E. McBride
Assistant Attorney General

This filing is submitted on recycled paper.

ORIGINAL

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	**PCB NO. 99-134**
	)	**(Enforcement)**
	)	
PEABODY COAL COMPANY, a Delaware corporation,	)	
	)	
	)	
Respondent.	)	

MOTION TO STRIKE RESPONDENT PEABODY COAL'S AFFIRMATIVE DEFENSES

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

Procedural History

1. On or about October 21, 2002, Complainant filed a Motion for Leave to Amend Second Amended Complaint, Third Amended Complaint and a Motion for Reconsideration.

2. On November 21, 2002, the Board issued an Order granting Complainant's Motion for Leave to Amend Second Amended Complaint, and denied Complainant's Motion for Reconsideration on the grounds that it was now moot.

3. On or about December 20, 2002, Respondent filed its Answer and 16 Affirmative Defenses.

4. Complainant requested and received a two-week extension of time to file a pleading in response to the Respondent's affirmative defenses.

Standard

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

Code 103.204(d), any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before the hearing.

6. In an affirmative defense, the respondent alleges "new" facts or arguments that, if true, will defeat . . . the government's claim even if all allegations in the complaint are true. *People v. Community Landfill Co.*, PCB 97-193, slip op. at 3 (August 6, 1998), cited in *People v. Wood River Refining Company*, PCB 99-120, slip op. at 3-4 (August 8, 2002), and *People v. Stein Steel Mills Services*, PCB 02-1, slip op. at 1-2 (April 18, 2002).

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

> The facts constituting any affirmative defense . . . and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint, . . . in whole or in part, and any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, should be likely to take the opposite party by surprise, must be plainly set forth in the answer of reply. 735 ILCS 5/2-613(d) (2000).

cited in *People v. Wood River Refining Company*, PCB 99-120, slip op. at 3-4 (August 8, 2002), and *People v. Stein Steel Mills Services*, PCB 02-1, slip op. at 1-2 (April 18, 2002). In a ruling on Complainant's motion to strike affirmative defenses in the case of *People v. Midwest Grain*, PCB 97-179, slip op. at 3 (August 21, 1997), the Board stated that Section 2-613(d) provides guidance regarding the pleading of defenses and, relying on the case of *Handelman v. London Time, Ltd.*, 124 Ill. Ap. 3d 318, 320, 464 N.E.2d 710, 712 (1st Dist. 1984), stated that clearly the purpose of the above-quoted language is to specify the disputed legal issues before trial. The parties are to be informed of the legal theories which will be presented by their respective opponents. *Id.* This is a prime function of pleading. *Id.* Further guidance is available in Section 2-612 of the Code of Civil Procedure, 735 ILCS 5/2-612, which provides:

> Insufficient pleadings. (a) If any pleading is insufficient in substance or form the court may order a fuller or more particular statement. If the pleadings do not

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

8. A valid affirmative defense gives color to the opposing party's claim but then asserts new matter which defeats an apparent right. *Condon v. American Telephone and Telegram Co.*, 210 Ill. App. 3d 701, 709, 569 N.E.2d 518, 523 (2d Dist. 1991), citing *The Worner Agency Inc. v. Doyle*, 121 Ill. App. 3d 219, 222, 459 N.E.2d 633, 635 (4th Dist. 1984).

9. A motion to strike an affirmative defense admits well-pleaded facts constituting the defense, and attacks only the legal sufficiency of the facts. "Where the well-pleaded facts of an affirmative defense raise the possibility that the party asserting them will prevail, the defense should not be stricken." *International Insurance Co. v. Sargent and Lundy*, 242 Ill. App. 3d 614, 630-31, 609 N.E.2d 842, 853-54 (1st Dist. 1993), citing *Raprager v. Allstate Insurance Co.*, 183 Ill. App. 3d 847, 854, 539 N.E. 2d 787, 791 (2nd Dist. 1989).

10. Affirmative defenses that are totally conclusory in nature and devoid of any specific facts supporting the conclusion are inappropriate and should be stricken. See *International Ins. Co.*, 242 Ill. App. 3d at 635, cited in *Glave v. Harris et al, Village of Grayslake v. Winds Chat Kennel, Inc*, PCB 02-11, PCB 02-32 (Consolidated), slip op. at 2 (January 24, 2002). An asserted affirmative defense is not, by definition, an affirmative defense, even if proven true at hearing, if it is an assertion that will not impact the complainant's legal right to bring the action. *Glave v. Harris et al, Village of Grayslake v. Winds Chat Kennel, Inc*, PCB 02-11, PCB 02-32 (Consolidated), slip op. at 2 (January 24, 2002), citing *People v. Crane*, PCB 01-76 (May 17, 2000). An affirmative defense is a "response to a plaintiff's claim which attacks the plaintiff's legal right to bring an action, as opposed to attacking the truth of claim." *Farmers State Bank v. Phillips Petroleum Co.*, PCB 97-100, slip op. at 2 n-1 (quoting Black's Law

Dictionary) (January 23, 1997).

Affirmative Defenses

First Affirmative Defense - Section 31 180-day Time frame

11. In Paragraph 74 of Respondent Peabody's Answer, it sets forth its first affirmative defense, as follows:

> For its first affirmative defense to Counts I, II, and III, and each of them, PCC states that this Board is wholly and in part without jurisdiction to entertain the State's claim against it pursuant to Section 31(a)(1) of the Act, 415 ILCS 5/31(a)(1), in that the State did not issue and serve notice upon PCC within 180 days after the State possessed full knowledge of all material aspects of both PCC's conduct and the consequences thereof complained of, as required by said statutory period.

12. Respondent Peabody's first affirmative defense is totally conclusory in nature and completely devoid of any specific facts supporting the conclusion. Respondent Peabody has failed to plead any facts as to the specific alleged violation(s), the dates of the alleged violation(s) and dates of the notices or the dates upon which Respondent claims such notices must have been provided to Respondent Peabody, and the specific dates of and the factual basis for Respondent's claim of Complainant's alleged "full knowledge" of "material aspects of both PCC's conduct and the consequences thereof". Respondent has failed to plead facts with regard to what it specifically means by "material aspects of both PCC's conduct and the consequences thereof". The first affirmative defense is completely devoid of any facts that might support Respondent's claim that Complainant failed to meet the 180 time frame set forth in the statute. As such, Respondent's first affirmative defense is insufficiently pled and fails to inform Complainant of the nature of the defense and sufficiently define the issue. Therefore, it should be struck.

13. Respondent Peabody's first affirmative defense does not assert a defense or other affirmative matter that avoids the legal effect of or defeats a cause of action set forth in

the complaint. The Board has held that Section 31 is not a statute of limitations. *People v. Eagle-Picher-Boge*, LLC, PCB 99-152, slip op at 6 (July 22, 1999). Further, the Board has held that the specific 180-day time frame set forth in Section 31(a)(1) is directory. Accordingly, the Board is not divested of jurisdiction to hear a complaint if the Illinois EPA fails to issue a Notice of Violation, and thereby begin the pre-referral process, within 180 days of "becoming aware" of the alleged violations. *People v. Crane*, PCB 01-76, slip op. at 405 (May 17, 2001). In the Crane case, the Board struck Crane's second alleged affirmative defense, which read: "The State's action is barred by the "applicable statute of limitations, including but not limited to, the limitations set forth in Section 31 of the Act." In so doing, the Board said, "Accordingly, any facts about when the Agency became aware of the alleged violations have no bearing on the Board's jurisdiction over this matter."

14. Respondent Peabody's first affirmative defense does not assert a defense or other affirmative matter that avoids the legal effect of or defeats a cause of action set forth in the complaint with regard to Counts II and III because Section 31 is applicable to the Illinois EPA only and does not bar the Attorney General from prosecuting an environmental violation. In considering the legislative history of the 1996 amendments to Section 31, the Board has repeatedly found that they were not intended to bar the Attorney General from prosecuting an environmental violation. See *People v. Eagle-Picher-Boge*, PCB 99-152 (July 22, 1999), *People v. Geon*, PCB 97-62 (October 2, 1997); and *People v. Heuermann*, PCB 97-92 (September 18, 1997). In its first affirmative defense, Respondent relies on a provision of Section 31 that was included within the 1996 amendments, that being the 180-day time frame. Count II and Count III of the Third Amended Complaint have been brought on the Attorney General's own motion.

15. Respondent's first affirmative defense should be struck because it is totally conclusory in nature and devoid of specific facts supporting the claimed defense, and because

it is not an affirmative defense in that it is does not assert affirmative matter that avoids the legal effect of or defeats a cause of action set forth in the Third Amended Complaint.

Second Affirmative Defense – Section 31 180-day Time frame

16. In Paragraph 75 of Respondent Peabody's Answer, it sets forth its second affirmative defense, as follows:

> For its second affirmative defense to Counts I, II, and III, and each of them, PCC states that the State's claims against it are barred wholly or in part by the limitations provision of Section 31(a)(1) of the Act, 415 ILCS 5/31(a)(1), in that the enforcement process under Section 31 of the Act was initiated by the State more than 180 days after the State possessed full knowledge of all material aspects of both PCC's conduct and the consequences thereof complained of.

17. Respondent Peabody's second affirmative defense is insufficiently pled because it provides no definition or factual basis for its use of the terms "by the limitations provision of Section (a)(1) of the Act, 415 ILCS 5/31(a)(1)" and "the enforcement process under Section 31 of the Act". Respondent provides no specific description, definition nor factual basis for its use of the term "limitations" relevant to Section 31(a)(1). Specifically what language contained within Section 31(a)(1) is it referring to when it states "limitations". Further, Respondent provides no definition, nor use for that matter, of the term "enforcement process" within the language of Section 31. Complainant cannot decipher what specific "limitations" and what portion of or what might constitute the "enforcement process" Respondent is referencing in this allegation. As such, the terms "limitations" and "enforcement process" as used in Respondent's second affirmative defense are vague and insufficient to reasonably inform Complainant of the nature of the defense and does not sufficiently define the issue. Further, Respondent Peabody has failed to plead any facts as to the specific dates of and the factual basis for Respondent's claim of Complainant's alleged "full knowledge" of "material aspects of both PCC's conduct and the consequences thereof". Respondent has failed to plead facts with regard to what it specifically means by "material aspects of both PCC's conduct and the

consequences thereof". It has failed to define and plead facts as to Complainant's "full knowledge". The second affirmative defense is completely devoid of any facts that might support Respondent's claim that Complainant failed to meet the 180 time frame set forth in the statute. As such, Respondent's second affirmative defense is insufficiently pled and fails to inform Complainant of the nature of the defense and sufficiently define the issue. Therefore, it should be struck.

18. Complainant re-asserts and incorporates herein the arguments set forth in Paragraphs 13 and 14 above as grounds for its motion to strike the second affirmative defense.

19. Respondent's second affirmative defense should be struck because it is insufficiently pled and therefore fails to reasonably inform Complainant of the nature of the defense and fails to define the issue, because it is totally conclusory in nature and devoid of specific facts supporting the claimed defense, and because it is not an affirmative defense in that it is does not assert affirmative matter that avoids the legal effect of or defeats a cause of action set forth in the Third Amended Complaint.

Third Affirmative Defense - Statute of Limitations

20. In Paragraph 76 of Respondent Peabody's Answer, it sets forth its third affirmative defense, as follows:

> For its third affirmative defense to Counts I, II, and III, and each of them, PCC states that the State's claims against it are barred wholly or in part by the generally applicable statute of limitations, 735 5/13-205, in that this proceeding was initiated by the State more than five years after the State possessed full knowledge of all material aspects of both PCC's conduct and the consequences thereof complained of.

21. Respondent Peabody's third affirmative defense is conclusory in nature and completely devoid of any specific facts supporting the conclusion. In its third affirmative defense, Respondent Peabody fails to plead any specific facts in support of its assertion and allegation. It fails to specifically state what time and date "this proceeding was initiated". It fails to provide a definition and factual basis for the use of the term "this proceeding", and it fails to

define and set forth facts with regard to its use of the term "initiate". It fails to set forth the date and time and a factual basis for its assertion of "material aspects of both PCC's conduct and the consequences thereof". Complainant cannot decipher from this language the specific facts that constitute the defense, and therefore the specific nature of the defense. As such, the third affirmative defense is insufficiently pled. It does not reasonably inform the Complainant of the nature of the defense nor does it sufficiently define the issue.

22. Section 13-205 of the Illinois Civil Code of Civil Procedure, 735 ILCS 5/13-205, provides as follows:

> Five Year Limitation. Except as provided in Section 2-725 of the "Uniform Commercial Code" approved July 31, 1961, as amended, and Section 11-13 of "The Illinois Public Aid Code", approved April 11, 1967, as amended, actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued.

Unless the terms of a statute of limitations expressly include the State, county, municipality or other governmental agencies, the statute, so far as public rights are concerned, as distinguished from private and local rights, is inapplicable to them. *Pielet Bros. Trading, Inc. v. The Pollution Control Board*, 110 Ill. App. 3d 752, 442 N.E.2d 1374 (5th Dist. 1982); *Clare v. Bell*, 378 Ill. 128 (1941). The question is whether the State (or its agency or subdivision) is asserting public rights on behalf of all the people of the State or private rights on behalf of a limited group. *Id., In re Estate of Bird*, 410 ILL 390, 394 (1951). The Complainant in the instant matter is the People of the State of Illinois, and all three counts of the Third Amended Complaint concern public rights. There is nothing in the provisions of 735 ILCS 5/13-205 that includes the State, county, municipality or other governmental agencies within its terms. Therefore, Respondent's third affirmative defense is not an affirmative defense in that it is does not assert affirmative matter that avoids the legal effect of or defeats a cause of action set forth

in the Third Amended Complaint.

23. Respondent's third affirmative defense should be struck because it is insufficiently pled and therefore fails to reasonably inform Complainant of the nature of the defense and fails to define the issue, because it is conclusory in nature and devoid of specific facts supporting the claimed defense, and because it is not an affirmative defense in that it is does not assert affirmative matter that avoids the legal effect of or defeats a cause of action set forth in the Third Amended Complaint.

Fourth Affirmative Defense - Laches

24. In Paragraph 77 of Respondent Peabody's Answer, it sets forth its fourth affirmative defense, as follows:

> For its fourth affirmative defense to Counts I, II, and III, and each of them, PCC states that the State's claims against it are barred wholly or in part by the doctrine of laches, in that the State has for many years possessed full knowledge of all material aspects of both PCC's conduct at Eagle No. 2 and the consequences thereof complained of but has failed to address those matters in a timely fashion and PCC has been prejudiced thereby.

25. Laches is an equitable doctrine that bars relief when a defendant has been misled or prejudiced due to a plaintiff's delay in asserting a right. *People v. Crane*, PCB 01-76, slip op. at 7 (May 17, 2001), *City of Rochelle v. Suski*, 206 Ill. App. 3d 497, 501, 564 N.E.2d 933, 936 (2d Dist. 1990); *People v. State Oil Co.*, PCB 97-103, slip op. at 2 (May 18, 2000). There are two principal elements of laches: lack of due diligence by the party asserting the claim; and prejudice to the opposing party. See *Van Milligan v. Board of Fire & Police Commissioners*, 158 Ill. 2d 84, 610 N.E.2d 830, 833 (1994); *State Oil*, PCB 97-103, slip op. at 2. Although applying laches to public bodies is disfavored, the Illinois Supreme Court held in *Hickey v. Illinois Central Railroad Co.*, 35 Ill. 2d 427, 220 N.E. 2d 415 (1966), that the doctrine can apply to governmental bodies under compelling circumstances. There are very few cases in which there has been a finding of "compelling circumstances". The court in the *Hickey* case

relied on both laches and estoppel. In the case of *People v. Big O, Inc.*, PCB 97-130, slip op. at 1-2 (April 17, 1997), the Board followed the courts' holdings that if the right to bring a lawsuit is not barred by the statute of limitations, unless conduct or special circumstances make it inequitable to grant relief, then the equitable doctrine of laches does not bar a lawsuit either, when it struck Respondent Big O's affirmative defense that relied on the doctrine of laches. In *Big O*, the Board relied on the case of *Beynon Building Corp. v. National Guardian Life Ins. Co*, 118 Ill. App. 3d 754, 45 N.E.2d 246, 253 (2d Dist. 1983). As in the case of *People v. Big O, Inc.*, PCB 97-130, slip op. at 1-2 (April 17, 1997), the doctrine of laches is not applicable to the instant case. Respondent's fourth affirmative defense does not assert affirmative matter that avoids the legal effect of or defeats a cause of action set forth in the Third Amended Complaint and should be struck.

26. If, *arguendo*, Respondent Peabody's fourth affirmative defense did qualify as an affirmative defense, Respondent Peabody has failed to plead its fourth affirmative defense with sufficient specificity. Respondent Peabody, in its fourth affirmative defense, has failed to plead facts as to the alleged lack of due diligence on the part of the Complainant and it has failed to plead facts that form the basis of any claim it might have as to prejudice. Further, it has failed to plead facts as to how this case qualifies as one exhibiting exceptional circumstances. Respondent asserts only a conclusion, "that the State has for many years possessed full knowledge of all material aspects of both PCC's conduct at Eagle No. 2 and the consequences thereof complained of". This assertion fails to include specific facts as what is meant by "full knowledge". What period of time, exactly, does the Respondent contend the Complainant had knowledge of what conduct and circumstances? What constitutes "knowledge"? What is meant by "conduct" and "circumstances"? Respondent boldly concludes that Complainant "possessed full knowledge of all material aspects" but fails to plead specific facts as to what material aspects it claims Complainant had knowledge of. What is Respondent alleging qualify

as "material aspects" and what specific items are included in the material aspects Complainant allegedly had knowledge of? Respondent further asserts the conclusion that the Complainant "has failed to address those matters in a timely fashion and PCC has been prejudiced thereby". What "matters"? What is meant by "addressed"? What is meant and what specific facts are the basis for the assertion of a "timely fashion"? How, specifically, and what is the factual basis for the specific meaning of the assertion that "PCC has been prejudiced thereby"? How has PCC been prejudiced? Respondent has failed to reasonably inform Complainant of the specific allegation and nature of this defense, and has failed to sufficiently define the issue. As such, Respondent's fourth affirmative defense is insufficiently pled and should be struck.

Fifth Affirmative Defense - Waiver

27. In Paragraph 78 of Respondent Peabody's Answer, it sets forth is fifth affirmative defense, as follows:

> For its fifth affirmative defense to Counts I, II, and III, and each of them, PCC states that the State's claims against it are barred wholly or in part by the doctrine of waiver, in that PCC's conduct at Eagle No. 2 complained of in the Complaint was carried out in accordance with the terms and conditions of permits issued by agencies of the State that possessed full knowledge of all material aspects of both PCC's conduct that would be carried out pursuant to those permits and the consequences of that conduct complained of.

28. A wavier is the intentional relinquishment of a known right. There must be both knowledge of the existence of the right and an intention to relinquish it, *First Lutheran Church v. Rooks Creek Evangelical Lutheran Church*, 316 Ill 196 (1925), 147 N.E. 53, or conduct that warrants an inference of that intention. *Hartford Accident and Indemnity Co. v. D.F. Best, Inc.*, 56 Ill. App. 3d 960, 372 N.E.2d 829 (1st Dist. 1977), *People v. Douglas Furniture of California, Inc.*, PCB 97-133, slip op. at 5 (May 1, 1997). Waiver, as distinguished from estoppel, depends upon what the Complainant did or intended to do without regard to the effect of its conduct on the Respondent. *Pantle v. Industrial Commission*, 61 Ill.2d 365, 372 (1975), 335 N.E.2d 491,

496.

29. In order to accurately and sufficiently plead waiver, Respondent must plead the elements of wavier. In the instant matter, Respondent must plead facts relevant to Complainant's knowledge of the existence of a right, Complainant's intent to relinquish such right, or conduct on the part of the Complainant that warrants inference of that intention without regard to the effect of its conduct on the Respondent. In Respondent's fifth affirmative defense, Respondent has pled inferences and conclusions relevant to its own conduct. Respondent has failed to plead that Complainant had knowledge of an existence of a right, Respondent has failed to plead facts relevant to a claim that Complainant undertook an intentional relinquishment of a known right, and Respondent has failed to plead facts relevant to Complainant's intent to relinquish the right. As such, Respondent has failed to plead an affirmative defense of waiver and Respondent's fifth affirmative defense should be struck.

30. Respondent has failed to plead the fifth affirmative defense with sufficient factual specificity. Respondents conclusory reference to the "doctrine of waiver" followed by its conclusions that "in that PCC's conduct at Eagle No. 2 complained of in the Complaint was carried out in accordance with the terms and conditions of permits issued by agencies of the State that possessed full knowledge of all material aspects of both PCC's conduct that would be carried out pursuant to those permits and the consequences of that conduct complained of," fails to specifically alleged what right the Complainant relinquish, it fails to allege facts that support the element of intention on the part of the Complainant, and it fails to allege facts that support the element that the Complainant undertook an intentional relinquishment of a known right. Respondent has failed to reasonably inform Complainant of the specific allegation and nature of this defense, and has failed to sufficiently define the issue. As such, Respondent's fifth affirmative defense is insufficiently pled and should be struck.

Sixth affirmative defense - Estoppel

31. In Paragraph 79 of Respondent Peabody's Answer, it sets forth its sixth affirmative defense, as follows:

> For its sixth affirmative defense to Counts I, II, and III, and each of them, PCC states that the State's claims against it are barred wholly or in part by the doctrine of estoppel, in that PCC's conduct at Eagle No. 2 complained of in the Complaint was carried out in accordance with the terms and conditions of permits issued by agencies of the State that at the time of issuing such permits possessed full knowledge of all material aspects of both PCC's conduct that would be carried out pursuant to those permits and the consequences of that conduct complained of, PCC carried out the conduct complained of in reliance upon the State's issuance of those permits to PCC to its detriment, and the State knew at the time it issued those permits to PCC that PCC would rely upon the State issuing those permits in carrying out the conduct complained of.

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

33. Estoppel against public bodies is not favored, and a governmental body cannot be estopped by an act of its agent which exceeds the authority conferred on him. *County of Cook v. Patka*, 85 Ill. App.3d 5, 12-13 (1st Dist. 1980), 405 N.E.2d 1376. The paramount

consideration is the right of the people and estoppel will not be applied to defeat a policy adopted to protect the public. *Id.* At 13. The Illinois Supreme Court, citing *City of Quincy v. Sturhahn,* 18 Ill.2d 604, 614, 165 N.E.2d 271, 277 (1960), relied upon the following standard in its decision in the case of *Hickey v. Illinois Central Railroad Co.*, 35 Ill.2d 427, 448-449 (1966), 220 N.E.2d 415., "While situations may arise which justify invoking the doctrine of estoppel even against the State when acting in its government capacity, (citation), we have always adhered to the rule that mere non-action of governmental officers is not sufficient to work an estoppel and that before the doctrine can be invoked against the State or a municipality there must have been some positive acts by the officials which may have induced the action of the adverse party under circumstances where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had previously done. (Citing cases.) In applying the doctrine of estoppel, the courts will not decide the question by mere lapse of time but by all the circumstances of the case, and will hold the public estopped or not as right or justice may require. (Citing cases.) The doctrine is invoked only to prevent fraud and injustice. (Citation)." In the case of *Hamwi v. Zollar*, 299 Ill.App.3d 1088, 1095 (1st Dist 1998), 702 N.E.2d 593, the court cited the case of *Lindahl v. Des Plaines*, 210 Ill.App.3d 281, 295 (1991), 568 N.E.2d 1306, for authority that the affirmative act which prompts a party's reliance must be an act of the public body itself such as a legislative enactment rather than the unauthorized acts of a ministerial officer or a ministerial misinterpretation. A party seeking to estop the government must show that the government made a misrepresentation with knowledge that the misrepresentation was untrue. *People v. Panhandle Eastern Pipeline Company*, PCB 99-191, slip op. at 18 (November 15, 2001), citing *Medical Disposal Service, Inc. v. IEPA*, 286 Ill. App. 3d 562, 570, 677 N.E.2d 428, 433 (1st Dist. 1997); *City of Mendota v. PCB,* 161 Ill. App. 3d 203, 209, 514 N.E.2d 218, 222 (3rd Dist. 1987); *Chemetco*, PCB 96-76, slip op. at 11; *White & Brewer Trucking,* PCB 96-250, slip op. at 10.

34. It appears that Respondent Peabody is solely relying on the facts the "State issued permits" as the basis for its claim that the doctrine of estoppel applies in this case. As the Board held in the case of *People v. Panhandle Eastern Pipeline Company*, PCB 99-191, slip op. at 19 (November 15, 2001), in its denial of Panhandle's affirmative defense in where it asserted that estoppel applied, the Board said, "It is the responsibility of the companies doing business in Illinois to determine whether they are complying with Illinois' environmental laws. Panhandle's reliance on Agency permit renewals and inspections as the sole means by which Panhandle determined its compliance was unreasonable. See *Chemetco, Inc.*, PCB 96-76, slip of at 10; *White & Brewer*, PCB 96-250, slip op. at 10. Moreover, Panhandle has made no showing that any Agency personnel made misrepresentations to Panhandle with the knowledge that they were untrue. The Board denies Panhandle's third alleged affirmative defense."

35. In the case of *People v. Environmental Control and Abatement, Inc.*, PCB 95-170, slip op. at 8 (January 4, 1996), in making its ruling on an assertion of estoppel, the Board said, "The Board has rarely applied the doctrine of estoppel. (See *City of Herrin v. Illinois Environmental Protection Agency,* (March 17, 1994) PCB 93-195 at 8). In those cases where we have applied it, we found that the Agency affirmatively misled a party and then sought enforcement against that party for acting on the Agency's recommendation (See *In the Matter of Pielet Brothers' Trading, Inc.*, (July 13, 1989) AC 88-51, 101 PCB 131, and *IEPA v. Jack Wright*, (August 30,1 990) AC 89-227). In this case we do not find that the Agency or the State affirmatively misled ECA. ECA was fully aware of the fact that the Agency intended to pursue an enforcement action as evidenced by the responses to the CILs and the assurances of compliance. In addition, ECA has not demonstrated that the inaction or delay in filing the complaint resulted in a misrepresentation or concealment of materials facts. Therefore the Board will not apply the doctrine of estoppel in this case." Further, in the case of *White & Brewer Trucking v. IEPA*, PCB 96-250, slip op at 11 - 12 (March 20, 1997), with regard to the

Pielet Bros. case and the *Jack Wright* matter, the Board said in support of it ruling, "[*Pielet Bros.* and *Jack Wright*] were enforcement cases in which the Agency had indicated that certain conduct would not subject the respondent to enforcement, but then pursued enforcement cases against the respondents. (See *Pielet Brothers*, AC 88-51, slip of 9-10; *Wright*, AC 89-227, slip op 5-6.) Enforcement is committed to the Agency's discretion, and in those cases it was reasonable for the respondent to act upon the Agency's representation as to how it could exercise that discretion, and for the Board to estop the Agency from pursuing enforcement. This is not the case here, where the Agency is bound by regulation to require that certain information be included in a sig mod application. In *Earl R. Bradd v. IEPA* (May 9, 1991), PCB 91-173, slip op., and *Jack Pease* v. IEPA (July 20, 1995), PCB 95-118, slip op., it was not clear that the information upon which the Agency refused to issue a permit (e.g. in *Pease*, PCB 95-118, slip op 19-20), or rejected an affidavit of closure (e.g., in *Bradd*, PCB 91-173, slip op 11-13), was actually required by the regulations upon which the Agency relied. Again, when the regulations allow the Agency some discretion as to what will be required, the Agency can be estopped if it misleads the applicant as to what will be required. (See also *West Suburban Recycling and Energy Center, L.P. v. IEPA* (October 17, 1996), PCB 95-119 and 95-125, slip op. 45 (distinguishing *Pease* when application found incomplete because information clearly required under regulations was not included.).

36. Respondent Peabody has failed to plead the elements of estoppel with sufficient factual specificity to reasonably inform the Complainant of the nature of the defense and to define the issue. Respondent has failed to meet its pleading burden. It is clear from the case law that issuance of permits is not an act that will qualify as an affirmative misrepresentation or instance of misleading, known to be false by the Agency, that would meet the standard necessary for the application of estoppel. Further, Respondent Peabody fails to plead any factual information with regard to the permits. Which permits is Respondent alleging are an

element of its assertion of estoppel? Respondent Peabody fails to allege an instance of misrepresentation or misleading with factual specificity so as to reasonably inform Complainant of the nature of the defense. Respondent Peabody fails to allege knowledge of untruth on behalf of the State with sufficient factual specificity so as to reasonably inform Complainant of the nature of the defense and so as to adequately define the issue. By failing to plead the elements of the defense and any fact that is an element of the defense, Respondent has (1) failed to plead affirmative matter that avoids the legal effect of or defeats the cause of action set forth in the Third Amended Complaint, and (2) failed to plead with sufficient factual specificity to reasonably inform the Complainant of the nature of the defense. Therefore, Respondent's sixth affirmative defense should be struck.

Seventh affirmative defense – failure to join a party.

37. In Paragraph 80 of Respondent Peabody's Answer, it sets forth its seventh affirmative defense, as follows:

> For its seventh affirmative defense to Counts I, II, and III, and each of them, PCC states that the State's claims against it are barred wholly or in part by the State's failure to join a party necessary for a complete and just adjudication of the matters that are the subject of Complaint, i.e. the Saline Valley Conservancy District, which installed its production wells in such locations and operated them in such a manner as to cause and/or contribute to the presence of certain substances at locations in the groundwater in the vicinity of Eagle No. 2 complained of.

38. Pursuant to Section 101.403(b) of the Board's Procedural Rules, 35 Ill. Adm. Code 101.403 (b), the Board will not dismiss an adjudicatory proceeding for nonjoinder of persons who must be added to allow the Board to decide an action on the merits without first providing a reasonable opportunity to add the persons as parties. As justice may require, the Board may add new parties and dismiss misjoined parties at any stage of the adjudicatory proceeding.

39. Pursuant to Section 101.403(a) of the Board's Procedural Rules, 35 Ill. Adm.

Code 101.403(a), the Board, on its own motion or the motion of any party, may add a person as a party to an adjudicator proceeding if:

> 1) A complete determination of a controversy cannot be had without the presence of the person who is not already a party to the proceeding;
>
> * * *
>
> 3) It may be necessary for the Board to impose a condition on the person who is not already a party to the proceeding.

If Respondent is alleging and contending that Saline Valley Conservancy District is a necessary party, then proper procedure would dictate that Respondent move the Board for joinder of Saline Valley. Respondent also was free to file a third party claim against Saline Valley in this action, if Saline Valley is necessary to Respondent's defense. However, Respondent has failed to do so. If it is Respondent's contention that Saline Valley is an indispensable party to the litigation, then it is incumbent upon the Respondent to move the Board to join Saline Valley. The rule with regard to joinder of necessary parties has been described as a "fundamental doctrine" by the Illinois Supreme Court. It is the duty of trial and reviewing courts to enforce this principle of law *sue sponte* as soon as it is brought to their attention. *Glickauf v. Moss*, 23 Ill. App. 3d 679, 683-684 (1st Dist 1974), 320 N.E.2d 132; *B.J. Lind & Co. v. Diacou*, 3 Ill. App.3d 299, 302, 278 N.E.2d 526; *People ex rel. Meyer v. Kerner*, 35 Ill. 2d 33, 38, 219 N.E.2d 617, 620.

40. Respondent's seventh affirmative defense is not affirmative matter that avoids the legal effect of or defeats a cause of action and thus is not an affirmative defense and should be struck. Rather it is a question of proper joinder of all necessary parties. As such, If Respondent contends Saline Valley is an indispensable party, Respondent should move the Board to join Saline Valley pursuant to 35 Ill. Adm. Code 101.403.

Eighth affirmative defense – "permit shield" provisions of Section 12(f)

41. In Paragraph 81 of Respondent Peabody's Answer, it sets forth its eighth affirmative defense, as follows:

> For its eighth affirmative defense to Counts I, II, and III, and each of them, PCC states that the State's claims against it are barred wholly or in part by the "permit shield" provisions of Section 12(f) of the Act, 415 ILCS 5/12(f), to the extent that the State contends that (a) violations of applicable groundwater quality standards and/or (b) "water pollution" have been caused by water discharged from Outfall 1 at Eagle No. 2 into the unnamed ditch located between Outfall 1 and Cypress Ditch thereafter entering the groundwater in the vicinity of the mine, in that some or all of such discharges have been carried out pursuant to the terms of an NPDES permit.

42. The assertions set forth in Respondent's eighth affirmative defense, that being that violations of the Board's groundwater standards and the alleged water pollution violations have been caused by discharges that are carried out pursuant to the terms of an NPDES permit, do not constitute affirmative matter that avoids the legal effect of or defeats the cause of action set forth in the Third Amended Complaint. Rather, the assertion that the effluent limits allowed under the Mine NPDES regulations, operating in combination with the Respondent's choice of treatment programs, might be a contributing factor to the water pollution violations and exceedence of the Board's groundwater standards alleged in the Third Amended Complaint, is an assertion that might be considered a mitigating factor. Further, such an assertion might be considered a defense, but it does not constitute an affirmative defense.

43. In the case of *People v. Midwest Grain*, PCB 97-179, slip op. 4-5, (August 21, 1997), the Board held that Midwest Grain's second and fourth affirmative defenses set forth mitigating factors which, if proven, would bear on the appropriate penalty to be imposed, but do not impact the question of whether a violation of the Act has taken place. The Board thus concluded that Midwest Grain's second and fourth defenses were not proper affirmative defenses, and struck them. In this holding, the Board relied on the case of *People v. Douglas Furniture of California, Inc.*, PCB 97-133, slip op at 6 (May 1, 1997), wherein the Board ruled

that a defense which speaks of imposition of a penalty rather than the underlying cause of action is not an "affirmative defense" to that cause of action. The Respondent's eighth affirmative defense sets forth alleged mitigating factors and as such, it is not an affirmative defense and should be struck.

Ninth affirmative defense – Due Process

44. In Paragraph 82 of Respondent Peabody's Answer, it sets forth its ninth affirmative defense, as follows:

> For its ninth affirmative defense to Counts I, II, and III, and each of them, PCC states that the State's claims against it are barred wholly or in part by the due process clauses of the United States Constitution and the Illinois Constitution to the extent that such claims attempt to impose retroactive liability upon PCC for conduct at Eagle No. 2 and/or consequences of such conduct that was lawful in all respects at the time such conduct occurred.

45. In order to constitute "due process of the law" within the meaning of the State and Federal Constitutions, it is necessary that orderly proceedings according to established rules which do not violate fundamental rights should be observed, but where the person affected has due and sufficient notice and an adequate opportunity to present his defense, the constitutional requirements of due process of law are met. *Lincoln-Lansing Drainage Dist v. Stone*, 364 Ill. 41 (1936), 2 N.E.2d 885. Due process of law does not require the people to adopt any particular technical form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself. *People v. Terry*, 366 Ill. 520 (1937), 9 N.E.2d 322. Due process clause requires, at minimum, that a party have full and fair opportunity to litigate an issue before he is bound by that issue's resolution. *Central Illinois Public Service Co v. Allianz Underwriters Ins. Co.*, 158 Ill. 2d 218 (1994), 633 N.E.2d 675.

46. In the case of *Waste Management of Illinois v. Pollution Control Board*, 175 Ill. App. 3d 1023, 1036 (2d Dist 1988), 530 N.E.2d 682, the court set out the due process standard

applicable to administrative proceedings.

> Administrative proceedings are governed by the fundamental principles and requirements of due process of law. *(Scott v. Department of Commerce & Community Affairs* (1981), 84 Ill. 2d 42, 51, 48 Ill. Dec. 560, 416 N.E. 2d 1082.) Due process is a flexible concept and requires such procedural protections as the particular situation demands. (*Scott*, 84 Ill. 2d at 51, 48 Ill. Dec. at 565, 416 N.E. 2d at 1087.) In an administrative hearing, due process is satisfied by procedures that are suitable for the nature of the determination to be made and that conform to the fundamental principles of justice. (*Telser v. Holzman* (1964), 31 Ill. 2d 332, 339, 201 N.E. 2d 370; *Desai v. Metropolitan Sanitary District* (1983), 125 Ill. App. 3d 1031, 1033, 81 Ill. Dec. 243, 466 N.E. 2d 1045.) Furthermore, not all accepted requirements of due process in the trial of a case are necessary at an administrative hearing. (*Fox River Valley District Council of Carpenters v. Board of Education* (1978), 57 Ill. App. 3d 345, 349, 14 Ill. Dec. 929, 373 N.E.2d 60.) Due process requires that parties have an opportunity to cross-examine witnesses (*North Shore Sanitary District v. Pollution Control Board* (1972), 2 Ill. App. 3d 797, 801, 277 N.E. 2d 754), but such requirement is not without limits. (See *Fox River Valley Carpenters*, 57 Ill. App. 3d at 349, 12 Ill. Dec. at 932, 373 N.E. 2d at 63.) Due process requirements are determined by balancing the weight of the individual's interest against society's interest in effective and efficient governmental operation. *Scott,* 84 Ill. 2d at 51, 48 Ill. Dec. at 565, 416 N.E.2d at 1087.

47. With regard to amendatory acts, the court in *Chemrex, Inc. v. Pollution Control Board,* 257 Ill. App. 3d 274, 278-279 (1st Dist. 1993), 628 N.E. 2d 963, noted that the Illinois Supreme Court has defined a retrospective law as "one that takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past." (*United States Steel Credit Union v. Knight* (1965), 32 Ill 2d 138, 142, 204 N.E. 2d 4, 6 (quoting C.J.S. Statutes § 412 (1953)). This policy is founded upon constitutional provisions that guarantee due process of law, prohibit *ex post facto* laws and forbid impairment of the obligations of contracts. (*County Treasurer of Cook County v. City of Chicago,* 14 Ill. App. 3d 1062, 1065 (1st Dist 1973), 304 N.E. 2d 9, 11.) A general rule of statutory construction in Illinois requires that an amendatory act be construed as prospective only. (*Rivard v. Chicago Fire Fighters Union, Local No. 2* (1988), 122 Ill. 2d 303, 309, 119 Ill. Dec. 336, 339, 522 N.E. 2d 1195, 1198.)

48. In its ninth affirmative defense, Respondent has failed to plead with specificity as

to the basis for and how it is invoking a due process claim. Respondent has failed to plead specifically how its due process protections have been violated, or what portion of the due process guarantee is missing. Without further specificity and sufficient facts, Complainant is not reasonably informed as to the nature of the defense. The issue has not been defined. Complainant cannot discern the basis for Respondent's claim that it is subject to retroactive liability. Respondent has received proper notice of the claims, and certainly is currently involved in ample opportunity to litigate the claims under an established administrative procedure. All of the allegations in the Complaint allege violations of laws and regulations in effect at the time of the violation. None of the allegations pertain to amendatory acts. Respondent's ninth affirmative defense is not sufficiently pled, and as such is insufficient at law. Further, in that the ninth affirmative defense is insufficiently pled, it is impossible to ascertain if it is affirmative matter that avoids the legal effect or defeats the cause of action set forth in the Third Amended Complaint, which is yet another basis for it to be found insufficient in law. It should be struck.

Tenth affirmative defense – Equal Protection

49. In Paragraph 83 of Respondent Peabody's Answer, it sets forth its tenth affirmative defense, as follows:

> For its tenth affirmative defense to Counts I, II, and III, and each of them, PCC states that the State's claims against it are barred wholly or in part by the equal protection clauses of the United States Constitution and the Illinois Constitution to the extent that such claims attempt to impose obligations upon PCC and/or to deny relief to PCC in a discriminatory manner with respect to the State's application of certain statutes and regulations as compared to its application of those laws to other parties similarly situated as PCC with respect to the matters that are the subject of such claims.

50. The heart of the constitutional equal protection guarantee is that persons similarly situated shall be treated similarly. *Brown v. Department of Public Aid*, 274 Ill. App. 3d 410 (4th Dist. 1995), 211 Ill. Dec. 120, 654 N.E.2d 582, *appeal denied, judgment vacated* 167

Ill.2d 550, 665 N.E. 2d 841, 216 Ill. Dec. 583. Equal protection challenges based on the Illinois Constitution are evaluated under the same standards as United States Constitution. *Kastel v. Winnetka Bd. of Educ., Dist. 36*, 946 F.Supp. 1329 (N.D. Ill. 1996). The guarantee of equal protection applies not only to facial legislative classifications, but also to administration of laws as well. *Brown's Furniture, Inc. v. Wagner*, 171 Ill.2d 410 (1996), 665 N.E.2d 795, 216 Ill. Dec. 537.

51. In the case of *Thillens v. Morey*, 11 Ill.2d 579, 594 (1957), 144 N.E. 2d 735, the court set out general legal principles applied to an equal protection question with regard to state statute:

> The general legal principles to be applied to this particular question are rather well settled. The equal-protection clause goes no further than the invidious discrimination. *Williamson v. Lee Optical of Okl., Inc.* , 348 U.S. 483, 75 S.Ct 461, 99 L.Ed. 563. The court in *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S.Ct. 337, 340, 55 L.Ed. 369, succinctly stated the rules for testing a discrimination as follows: 1. The equal-protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. The forgoing principles are of equal application in the State of Illinois. *Stewart v. Brady*, 300 Ill. 425, 133 N.E. 310; *Krebs v. Board of Trustees*, 410 Ill 435, 102 N.E.2d 321, 27 A.L.R.2d 1434; *Union Cemetery Ass'n of City of Lincoln v. Cooper*, 414 Ill. 23, 110 N.E.2d 239. This court has uniformly recognized that a class cannot be created by arbitrary declaration of the law-making powers and that only those classifications are valid which are based upon reasonable grounds of distinction with reference to the object of the legislation. *Wedesweiler v. Brundate*, 297 Ill. 228, 130 N.E. 520; *Berry v. City of Chicago*, 320 Ill. 536, 151 N.E. 581; *Chicago Park District v. Canfield*, 382 Ill 218, 47 N.E.2d 61. At the same time, this court further recognizes that the legislature is not bound to extend its regulation to all cases which it might possibly reach. It may confine its restrictions to those classes where the need is deemed to be the clearest. *Stewart v. Brady*, 300 Ill. 425, 133 N.E. 310; *People v. Saltis,* 328 Ill. 494, 160 N.E. 86; *Baim v. Fleck*, 406 Ill. 193, 92 N.E.2d 770.

52. In the case of *Beverly Bank v. Board of Review of Will County*, 117 Ill. App. 3d 656, 664 (3rd Dist. 1983), 453 N.E. 2d 96, the court reviewed the existing standard with regard to a equal protection claim against administration of a state statute:

> When state officers engage in unlawful administration of a state statute fair on its face, causing unequal application to those who are entitled to be treated alike, a denial of equal protection exists if the discrimination was intentional or purposeful (*Snowden v. Hughes* (1943), 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497; *International Society for Krshna Consciousness Inc. v. City of Evanston* (1st Dist. 1980), 89 Ill.App.3d 701, 44 Ill. Dec, 664, 411 N.E. 2d 1030.) In order to establish a discriminatory purpose, those aggrieved must show that "the decisionmaker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effects on an identifiable group." *(Shango v. Jurich* (7th Cir. 1982), 681 F.2d 1091, 1104.) Thus more is required than misinterpretation of law or even arbitrary application of statutes and rules.

In *Summers v. Illinois Commerce Comm'n* (1978), 58 Ill. App. 3d 933, 936, 16 Ill. Dec. 336, 338, 374 N.E.2d 1111, 1113, the court said, "The application of the equal protection clause is limited to instances of purposeful or invidious discrimination rather than erroneous or even arbitrary administration of state powers."

53. In the case of *Shell Oil Company v. Pollution Control Board*, 24 Ill. App. 3d 549, 553-554 (5th Dist. 1974), 321 N.E.2d 170, an oil refinery, which had been denied a variance by the Pollution Control Board, appealed the Board's denial of its motion for reconsideration and the Board's denial of the petition for variance. In the appeal, the refinery claimed the Board had denied it equal protection of the law. It its decision affirming the Board denial of the petition and denial of the motion for reconsideration, the court held as follows:

> Petitioner also argues that it was denied equal protection of the law because it was treated differently from other petitioners who were granted variances. Shell cites *Morey v. Doud*, 354 U.S. 457, 77 S. Ct. 1344, 1 L.Ed.2d 1485, for the proposition that distinctions between business entities engaged in the same business must be reasonably based on differences between the businesses. Petitioner contends that in two subsequent cases, *Clark Oil & Refining Corp v. Environmental Protection Agency,* PCB 73-238, and *Union Oil Co. v. Environmental Protection Agency*, PCB 72-447, the Board granted variances to the other refineries when the description of their operations and the cause of

> their cyanide problems indicated no real difference with the instant case. There were significant differences. In the Clark Oil case the Board found that the petitioner violated the cyanide standard only 10 percent of the time, that it was developing a firm program to correct excessive cyanide discharges and that its discharge had a minimal adverse impact on the Mississippi River. In the Union Oil case the petitioner presented extensive evidence showing that numerous methods of control had been attempted or were being seriously considered and that despite the fact that petitioner's emissions constantly exceeded the limit, it had instituted a good-faith program of continuing research and development. These factors combined with the finding that the ultimate environmental impact of granting the variance would be minimal.

In the case of *Discovery South Group, Ltd. v. Pollution Control Board*, 275 Ill. App. 3d 547, the subject theater petitioned the court for review of the Board's final order and in that review raised the issue as to whether the remedy fashioned by the Board imposed stricter standards upon the theater than provided for in the applicable regulations and as such were arbitrary, unduly restrictive, and violative of the theater's State constitutional rights to freedom of speech and equal protection. The court held:

> Illinois decisions reflect the generally acknowledged authority of the Board to take whatever steps are necessary to rectify the problem of pollution and to correct instances of pollution on a case-by-case basis. In *W.F. Hall Printing Co. v. Environmental Protection Agency* (1973), 16 Ill. App. 3d 864, 868, 306 N.E.2d 595, the court held that the Board is endowed with the discretion to "promulgate regulations or develop standards in the course of case-by-case enforcement proceedings." That is, "The Board is not required, nor would it be feasible, to adopt regulations for all types or sources of pollution" *W.F. Hall Printing Co.*, 16 Ill. App.3d at 869, 306 N.E.2d 595; see also *Mystik Tape v. Illinois Pollution Control Board* (1973), 16 Ill App.3d 778, 306 N.E.2d 574.
>
> Although *W.F. Hall* and *Mystik* both dealt with odor pollution and were decided before any regulations had been adopted by the Board with respect to their particular form of odor pollution, the grants of authority set forth in these cases apply here.
>
> In this case, the Theater falls within the general category of "property line noise source," but emits sound of a different type than other noise sources. Having already found that the Theater was in violation of the Act, it was appropriate for the Board to place reasonable restrictions on the Theater to correct the situation.
>
> The Board ordered the Theater to monitor its sound emissions and stay within sound emission limitations already adopted by the Board. The only difference was that it adapted the measuring procedures to the particular circumstances present.
>
> The Board's action was not arbitrary or capricious since it was based

upon expert evidence provided by both parties. We uphold the Board's remedy.

Discovery South, 275 Ill. App. 3d at 559.

54. Respondent has failed to plead any facts in support of its allegation that the State's claims are barred by the equal protection clause. As such, Complainant is completely unable to ascertain the nature of the defense. Specifically how has PCC been denied relief in a discriminatory manner? What obligations have been or may be imposed on PCC in a discriminatory manner? Specifically what statues and regulations are Respondent referencing in this affirmative defense? How are the statutes and regulations allegedly being imposed upon PCC differently than other similarly situated parties? What are the specific facts supporting the claim of "similarly situated"? How are they "similarly situated"? Who are these "similarly situated parties"? In that Respondent has failed to plead any facts in support of the claimed affirmative defense, it is insufficiently pled and therefore should be found to be insufficient in law and struck. Without any facts in support of the claim, it is totally conclusory in nature, is insufficient in law, and should be struck. Finally, without any facts in support of the allegation, it is impossible to determine if the affirmative defense concerns affirmative matter that avoids the legal effect of or defeats the cause of action. On this ground, as well, it should be struck.

Eleventh affirmative defense – Failure to Comply with Section 31

55. In Paragraph 84 of Respondent Peabody's Answer, it sets forth its eleventh affirmative defense, as follows:

> For its eleventh affirmative defense to Counts I, II, and III, and each of them, PCC states that the State's claims against it are barred wholly or in part by the State's failure to either fully or materially comply with the procedural prerequisites of such claims established by Section 31(a) and (b) of the Act, 415 ILCS 5/31(a) and (b).

56. The Board has held, in the cases of *People v. Panhandle Eastern Pipe Line Co*, PCB 99-191, slip op. at 3 (November 16, 2000), and *People v. John Crane*, PCB 01-76, slip op.

at 3 (May 17, 2001), that the Agency's compliance with Section 31 is not an element of the State's cause of action. If it is not an element of the cause of action, Respondent's eleventh affirmative defense alleging failure to comply with Section 31 is not affirmative matter that would void the legal effect or defeat the cause of action. Therefore, Respondent's eleventh affirmative defense should be struck because it is insufficient in law.

57. Respondent has failed to plead any facts in support of its allegation that the "State has failed to either fully or materially comply with the procedural prerequisites of such claims established by Section 31(a) and (b) of the Act, 415 ILCS 5/31(a) and (b)." Respondent must plead facts that inform the Complainant as to in what manner it alleges the State has failed to comply with Section 31; it must plead facts in support of its claim. What provisions of Section 31 did the State fail to comply with? What actions of the State constitute the alleged failure? In what manner did the failure occur: what deadlines were applicable and what were allegedly missed, if any; specifically which provisions of Section 31 were not adhered to; and specifically what were the circumstances of the failure to adhere to the specific provisions? In that Respondent has failed to plead any facts in support of its allegation, its eleventh affirmative defense is insufficient in law and should be struck.

58. Further, in that the eleventh affirmative defense consists of no factual basis for the allegation, it is merely duplicative of Respondent's first and second affirmative defense and should be struck. There is nothing contained within the eleventh affirmative defense to distinguish it from the first and second affirmative defense.

Twelfth affirmative defense – Previous Enforcement Action

59. In Paragraph 85 of Respondent Peabody's Answer, it sets forth its twelfth affirmative defense, as follows:

> For its twelfth affirmative defense to Counts I, II, and III, and each of them, PCC states that the State's claims against it are barred to the extent that the State has previously undertaken and completed enforcement action against PCC with

> respect to PCC's conduct and the consequences thereof that are the subject of this proceeding generally and with respect to certain alleged violations of the Act and/or this Board's regulations that the State has asserted in this proceeding specifically.

60. Respondent has failed to plead any facts in support of the allegation it sets forth in its twelfth affirmative defense. As such, Complainant is not reasonably informed of the nature of the defense. The complete void of any factual basis for this claim allows for no definition of an issue. Complainant cannot ascertain what Respondent is referring to in this affirmative defense. Respondent must provide facts as to what it is referring to when it states "the State has previously undertaken and completed enforcement action against PCC with respect to PCC's conduct and the consequences thereof that are the subject of this proceeding generally and with respect to certain alleged violations of the Act and/or this Board's regulations that the State has asserted in this proceeding specifically." In that Complainant is unable to even guess as to what Respondent is referring to in this affirmative defense, Complainant cannot reference any law as a basis upon which to ascertain if the affirmative defense constitutes affirmative matter that avoids the legal effect of or defeats the cause of action pled in the Third Amended Complaint. As such, this affirmative defense cannot be considered affirmative matter that qualifies as an affirmative defense, and is in insufficient at law and must be struck. It is also devoid of any facts, and as such is insufficiently pled and insufficient in law and on such additional grounds should be struck.

Thirteenth affirmative defense –
Challenge to Board's Authority to Promulgate Groundwater Quality Standards

61. In Paragraph 86 of Respondent Peabody's Answer, it sets forth its thirteenth affirmative defense, as follows:

> For its thirteenth affirmative defense to Counts I, II, and III, and each of them, PCC states that the State's claims against it are barred to the extent that the State bases those claims upon the presence of chlorides, sulfates, and total dissolved solids in the groundwater located at and in the vicinity of Eagle No. 2, for the reason that the Board exceeded its authority in promulgating 35 Ill. Adm.

> Code § 620.410(a), to the extent that this regulation purports to establish groundwater quality standards for those substances, because those substances have not reasonably been determined to cause and/or there is no reasonable basis to suspect that those substances cause cancer, birth defects, or any other adverse effect on human health according to nationally accepted guidelines, as required by Section 8(a) of the Illinois Groundwater Protection Act, 415 ILCS 5/8(a).

62. Pursuant to Section 41(c) of the Act, 415 ILCS 5/41(c), no challenge to the validity of a Board order shall be made in any enforcement proceeding under Title XII of the Act as to any issue that could have been raised in a timely petition for review under this Section. In the case of *People v. Wood River Refining Company*, PCB 99-120, slip op. at 6 (August 8, 2002), the Board struck an affirmative defense on the basis of Section 41(c). The Board stated: "To the extent that respondent may be attempting to challenge the Board's air rules, Section 41(c) of the Act precludes a challenge to rules in context of an enforcement action. See 415 ILCS 41(c)(2000) amended by P.A. 92-0574, eff. June 26, 2002. The Board strikes the first affirmative defense for count III." In its thirteenth affirmative defense, Respondent is challenging the Board's authority to promulgate the standards found at 35 Ill. Adm. Code § 620.410(a), to the extent that the cited regulation "purports to establish groundwater quality standards for the presence of chlorides, sulfates, and total dissolved solids". Said standards were established pursuant to order of the Board. Therefore, Respondent's thirteenth affirmative defense is not affirmative matter that avoids the legal effect of or defeats a cause of action set forth in the Third Amended Complaint and it should be struck.

Fourteenth affirmative defense –
Challenge to Board's Authority to Promulgate Groundwater Quality Standards

63. In Paragraph 87 of Respondent Peabody's Answer, it sets forth its fourteenth affirmative defense, as follows:

> For its fourteenth affirmative defense to Counts I, II, and III, and each of them, PCC states that the State's claims against it are barred to the extent that the State bases those claims upon the contention that the presence of substances

that have been released into the groundwater located at and in the vicinity of Eagle No. 2 from any area at the time at which coal mine refuse was disposed of violates certain regulations set forth at 35 Ill. Adm. Code, Part 620, for the reason that this Board exceeded its authority in promulgating those regulations, in that the Board did not in connection with promulgating those regulations take into account the relevant existing physical conditions or the technical feasibility and economic reasonableness of reducing the particular type of pollution addressed by those regulations as required by Section 27(a) of the Act, 415 ILCS 5/27(a).

64. As set forth in response to Respondent's thirteenth affirmative defense, in paragraph 62 above, pursuant to Section 41(c) of the Act, 415 ILCS 5/41(c), no challenge to the validity of a Board order shall be made in any enforcement proceeding under Title XII of the Act as to any issue that could have been raised in a timely petition for review under this Section. In the case of *People v. Wood River Refining Company*, PCB 99-120, slip op at 6 (August 8, 2002), the Board struck an affirmative defense on the basis of Section 41(c). The Board stated: "To the extent that respondent may be attempting to challenge the Board's air rules, Section 41(c) of the Act precludes a challenge to rules in context of an enforcement action. See 415 ILCS 41(c)(2000) amended by P.A. 92-0574, eff. June 26, 2002. The Board strikes the first affirmative defense for count III." In its fourteenth affirmative defense, Respondent is challenging the Board's authority to promulgate regulations found at 35 Ill. Adm. Code Part 620 in that the Board did not in connection with promulgating those regulations take into account the relevant existing physical conditions or the technical feasibility and economic reasonableness of reducing the particular type of pollution addressed by those regulations as required by Section 27(a) of the Act, 415 ILCS 5/27(a)." Said regulations were established pursuant to order of the Board. Therefore, Respondent's fourteenth affirmative defense is not affirmative matter that avoids the legal effect of or defeats a cause of action set forth in the Third Amended Complaint and it should be struck.

Fifteenth affirmative defense – Due Process

65. In Paragraph 88 of Respondent Peabody's Answer, it sets forth its fifteenth affirmative defense, as follows:

> For its fifteenth affirmative defense to Counts I, II, and III, and each of them, PCC states that the State's claims against it are barred by the due process clauses of the United States Constitution and the Illinois Constitution to the extent that such claims attempt to impose liability upon PCC for conduct at Eagle No. 2 and/or consequences of such conduct that was not unlawful at the time the State initiated this proceeding.

66. Respondent's ninth affirmative defense states as follows:

> For its ninth affirmative defense to Counts I, II, and III, and each of them, PCC states that the State's claims against it are barred wholly or in part by the due process clauses of the United States Constitution and the Illinois Constitution to the extent that such claims attempt to impose retroactive liability upon PCC for conduct at Eagle No. 2 and/or consequences of such conduct that was lawful in all respects at the time such conduct occurred.

Respondent's fifteenth affirmative defense is duplicative of its ninth affirmative defense, and, as such, should be struck. Retroactive liability is generally something claimed with regard to an amendment that has been enacted or a change in the law. Respondent's fifteenth affirmative defense claims that Complainant is attempting to impose liability with regard to something that was previously lawful. The two affirmative defenses assert the same claim.

67. Respondent has failed to plead any facts in support of the assertions set forth in its fifteenth affirmative defense. Complainant is unable to ascertain what Respondent is claiming to have been lawful and when it is claiming the "conduct and consequences of such conduct" to have been lawful. The phrase "conduct and consequences of such conduct" is indiscernibly vague. It is completely without definition. There is no specific factual allegation of what time period that is the subject of this assertion. Is the Respondent claiming procedural due process or substantive due process? Respondent's fifteenth affirmative defense is insufficiently pled. It fails to adequately and reasonably inform the Complainant of the nature of the defense, and, as pled, it completely fails to define an issue. Therefore, in that it is

insufficient in law, it should be struck.

68. In that the Respondent's fifteenth affirmative defense includes no factual basis for the assertion, and fails to provide sufficient facts so as to allow the Complainant to ascertain the basis and essence of the affirmative defense, it is impossible to determine if the fifteenth affirmative defense is affirmative matter that avoids the legal effect of or defeats that cause of action alleged in the Third Amended Complaint. As such, because it is insufficiently pled and insufficient in law, it should be struck.

Sixteenth affirmative defense – Illinois EPA Failure to Establish GMZ

69. In Paragraph 89 of Respondent Peabody's Answer, it sets forth its sixteenth affirmative defense, as follows:

> For its sixteenth affirmative defense to Counts I, II, and III, and each of them, PCC states that the State's claims against it are barred wholly or in part because Illinois EPA has arbitrarily, capriciously, and unlawfully failed to establish a groundwater management zone with respect to the groundwater located at and in the vicinity of Eagle No. 2 pursuant to PCC's submission of a corrective action process plan to Illinois EPA, as required by 35 ILL. Adm. Code § 620.250.

70. Pursuant to Section 620.250 of the Board's Groundwater Quality Regulations, 35 Ill. Adm. Code 620.250, a groundwater management zone is established by the owner or operator that is subject to a corrective action process approved by the Illinois EPA, or for which the owner or operator undertakes an adequate corrective action in a timely and appropriate manner and provides a written confirmation to the Illinois EPA provided in a form prescribed by the Illinois EPA. Said zone is established upon concurrence by the Illinois EPA that the conditions specified in the corrective action plan are met and groundwater management continues for a period of time consistent with the action described in the plan. No where in the regulation does it state that the Illinois EPA is the one to establish the zone. The zone is established upon concurrence of the Illinois EPA that the corrective action plan for the zone is adequate to attain applicable standards. In that there is no requirement contained within

Section 620.250 for the Illinois EPA to establish the groundwater management zone, and in that it is the property owner and operator that has the requisite property rights and control to establish such a zone and perform the actions contained within the corrective action plan, Respondent's sixteenth affirmative defense is wrongly asserted. It is a misstatement of the regulation. Further, it is relevant only to the remedy, not the cause of action. As such, it is not affirmative matter that avoids the legal effect of or defeats the cause of action alleged in the Third Amended Complaint.

71. Respondent has failed to plead facts to support the assertion set forth as its sixteenth affirmative defense. It has failed to plead facts as to what specific actions of the Illinois EPA relevant to its assertions are alleged to be arbitrary, capricious, and unlawful. It has failed to assert specifically why such actions are alleged to be arbitrary, capricious, and unlawful. In that Respondent has failed to assert a factual basis for its assertion, it has failed to adequately and reasonable inform Complainant of the nature of the defense. Without the referenced facts, Complainant cannot know specifically the content and nature of the allegation. The assertion is very ill defined. Therefore, in that Respondent's sixteenth affirmative defense is insufficiently pled and, thereby, insufficient in law, it should be struck.

72. If, *arguendo,* the assertion that constitutes Respondent's sixteenth affirmative defense is found to be viable despite the complete failure to plead facts, it does not qualify as affirmative matter. Rather, at the very most, it might be considered a defense, but not an affirmative defense, or an assertion of a mitigating factor. As set forth in regard to Respondent's eighth affirmative defense, in the case of *People v. Midwest Grain*, PCB 97-179, slip op. 4-5, (August 21, 1997), the Board held that Midwest Grain's second and fourth affirmative defenses set forth mitigating factors. The Board held that, if proven, these assertions would bear on the appropriate penalty to be imposed, but do not impact the question of whether a violation of the Act has taken place. The Board thus concluded that Midwest

Grain's second and fourth defenses were not proper affirmative defenses, and struck them. In this holding, the Board relied on the case of *People v. Douglas Furniture of California, Inc.*, PCB 97-133, slip op at 6 (May 1, 1997), wherein the Board ruled that a defense which speaks of imposition of a penalty rather than the underlying cause of action is not an "affirmative defense" to that cause of action. The Respondent's sixteenth affirmative defense sets forth an alleged mitigating factor and as such, it is not an affirmative defense and should be struck.

WHEREFORE, for the foregoing reasons and on the foregoing grounds, Complainant respectfully moves and requests that the Board strike all sixteen (16) of the Respondent's Affirmative Defenses.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,

LISA MADIGAN, Attorney General
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
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BY: _____
JANE E. MC BRIDE
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Dated: 2/03/03

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

February 3, 2003

The Honorable Dorothy Gunn
Illinois Pollution Control Board
State of Illinois Center
100 West Randolph
Chicago, Illinois 60601

Re: ***People v. Peabody Coal Company***
PCB No. 99-134

Dear Clerk Gunn:

Enclosed for filing please find the original and ten copies of a NOTICE OF FILING and MOTION TO STRIKE RESPONDENT PEABODY COAL'S AFFIRMATIVE DEFENSES in regard to the above-captioned matter. Please file the original and return a file-stamped copy of the document to our office in the enclosed, self-addressed, stamped envelope.

Thank you for your cooperation and consideration.

Very truly yours,

Jane E. McBride
Environmental Bureau
500 South Second Street
Springfield, Illinois 62706
(217) 782-9031

JEM/pp
Enclosures