ILLINOIS POLLUTION CONTROL BOARD
June 6, 2002

COLE TAYLOR BANK, not individually, but solely as trustee under a certain Illinois land trust known as trust 40323; as successor trustee to Michigan Avenue National Bank of Chicago, under trust 1904,	)	
Complainant,	)	
v.	)	PCB 01-173
	)	(Citizens Enforcement - Land)
ROWE INDUSTRIES, INC, a corporation, successor to COLEMAN CABLE AND WIRE COMPANY, a corporation, and CHAPCO CARTON COMPANY, a corporation,	)	
Respondents.	)	

ORDER OF THE BOARD (by S.T. Lawton, Jr.):

This matter is before the Board on the parties' joint request that the Board rule on the validity of affirmative defenses raised by respondents, Rowe Industries Inc. (Rowe) and Chapco Carton Company (Chapco), to exonerate them from liability under Section 21(e) of the Environmental Protection Act (Act). *See* 415 ILCS 5/21(e) (2000). The complainant, Cole Taylor Bank (Cole Taylor) did not file a motion to strike the respondents' affirmative defenses. However, the parties stated at status conferences that they are awaiting a Board decision on this issue. *See e.g.* Cole Taylor Bank v. Rowe Industries Inc. and Chapco Carton Co., PCB 01-173, slip op. at 1 (May 9, 2002). The Board accordingly analyzes whether each alleged affirmative defense was properly pled.

For the reasons stated below, the Board strikes eight of nine alleged affirmative defenses raised by Chapco and all seven affirmative defenses raised by Rowe. The Board finds that the pleadings provided sufficient information to strike on the merits the respondents' defenses alleging that the complaint is duplicitous and this suit is barred by *res judicata*. Since Chapco did not provide sufficient legal or factual proof to support its allegation of collateral estoppel, the Board does not decide at this time whether the remaining alleged affirmative defense bars liability under the Act. The parties may address this issue in a subsequent motion or at hearing.

PROCEDURAL HISTORY

On June 26, 2001, Cole Taylor filed a complaint with the Board. It filed an amended complaint on July 19, 2001. Cole Taylor states that it is the trustee of real property located at 1810 North Fifth Avenue, River Grove, Cook County (site). Cole Taylor alleges that Rowe and Chapco caused or allowed the deposit of hazardous waste at the site in violation of Section 21(e) of the Act (415 ILCS 5/21(e) (2000)). On August 9, 2001, the Board accepted the amended complaint for hearing, finding that it was neither duplicitous nor frivolous.

Chapco and Rowe filed answers that included alleged affirmative defenses on August 27, 2002 and September 17, 2001, respectively. Chapco raised an additional affirmative defense on August 31, 2001. On October 1, 2001, Cole Taylor filed an answer to Rowe's affirmative defenses. Cole Taylor did not file an answer to the original or supplemental affirmative defenses raised by Chapco.

PRELIMINARY MATTER

Chapco filed a motion for leave to file *instanter* an additional affirmative defense of collateral estoppel on August 31, 2001. Although Cole Taylor filed its complaint with the Board on June 26, 2001, Chapco argues that Cole Taylor did not serve the complaint on Rowe until July 17, 2001. Because of the delayed service, Chapco argues that Cole Taylor agreed to an extension of time until September 17, 2001, for Chapco to file its Answer and Affirmative Defenses. Chapco contends that the new date is 60 days from the July 17, 2001 date of service on Rowe.

Despite this "agreement," Chapco filed its original answer and affirmative defenses on August 27, 2001, which was 60 days from the original June 26, 2001 filing date. Chapco then filed its motion for leave to file an additional affirmative defense on August 31, 2001, which was after 60 days from the date that Cole Taylor filed its complaint, but within the time "agreed upon" by Chapco and Cole Taylor to file its answer. Since Cole Taylor did not file a response to the motion, the Board finds that it waived any objection to granting it, pursuant to 35 Ill. Adm. Code 101.500(d). The Board grants Chapco's motion for leave *instanter* to file its additional affirmative defense in accordance with 35 Ill. Adm. Code 103.204(d). The Board evaluates the alleged defense later in the discussion section.

BACKGROUND

Cole Taylor succeeded Michigan Avenue National Bank of Chicago (Michigan Avenue National Bank) as trustee of the site. Comp. at 1.[1] Cole Taylor alleges that Coleman Cable and Wire Company (Coleman), predecessor of Rowe, leased the site from Michigan Avenue National Bank in 1971. Comp. at 2. Coleman allegedly sublet the site to Chapco in 1984. Chapco and Cole Taylor dispute whether the sublease expired on December 31, 1996 (Comp. at 2) or
January 31, 2001 (Rowe Ans. at 3; Chapco Ans. at 3).

[1] Cole Taylor filed with the Board a complaint on June 26, 2001, which is referred to as "Comp. at ___."

Cole Taylor alleged that, between 1971 and the date of the complaint, Chapco and Rowe caused or allowed hazardous substances to be deposited on the site, including tetrachloroethene, arsenic, benzo(a)pyrene, and lead. Comp. at 2. Cole Taylor contends that respondents' conduct violated Section 21(e) of the Act (415 ILCS 5/21(e) (2000)). Comp. at 4. Cole Taylor requested that the Board order Chapco and Rowe to cease and desist from further violating this section, and to remediate contamination resulting from the deposit of the above hazardous substances. Comp. at 4-5. Respondents deny these allegations, and raise several affirmative defenses that they allege preclude liability under the Act, which the Board discusses below.

STANDARD

The Board's procedural rules specify that "[a]ny 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." 35 Ill. Adm. Code 103.204(d). 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 Company, PCB 97-193, slip op. at 3 (Aug. 6, 1998) (citation omitted).

The Code of Civil Procedure gives additional guidance on pleading affirmative defenses. Section 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, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply." 735 ILCS 5/2-613(d) (2001).

When asserting an affirmative defense, "the test is whether the defense gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated." Condon v. American Telephone and Telegraph Company, Inc., 210 Ill. App. 3d 701, 709, 569 N.E.2d 518, 523 (2nd Dist. 1991), citing Worner Agency v. Doyle, 121 Ill. App. 3d 219, 222, 459 N.E.2d 633, 635 (4th Dist. 1984).

A motion to strike an affirmative defense admits well-pleaded facts constituting the defense, only attacking the legal sufficiency of the facts. International Insurance Company 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 (1989). "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, 242 Ill. App. 3d at 631, 609 N.E.2d at 854 (citation omitted).

DISCUSSION

The Board first addresses affirmative defenses raised by both Rowe and Chapco. The respondents allege seven identical defenses. They submit that: (1) the complaint is duplicitous; (2) the respondents lacked material causation or contribution to any release of hazardous substances on the site; (3) an act of God caused the release; (4) a third party caused the release; (5) the release was permitted by state or federal law; (6) Section 33(c) criteria are not met; and (7) respondents suffer an arbitrary and unreasonable hardship under 415 ILCS 5/31(c). The Board then discusses the two affirmative defenses of *res judicata* and collateral estoppel that were solely raised by Chapco. The Board ultimately determines whether each of the respondents' arguments are properly characterized as affirmative defenses, and strikes allegations that either hold no merit or do not fall into this category.

Duplicitous Complaint

As previously stated, on August 9, 2001, the Board found that the July 19, 2001 amended complaint was neither duplicitous nor frivolous. In their answers, both Rowe and Chapco allege that the Board lacks subject matter jurisdiction under Section 31(d) of the Act (415 ILCS 5/31(d) (2000)) because the complaint in this matter is duplicitous. Section 31(d) provides that the Board shall schedule a hearing unless it finds a complaint is duplicitous or frivolous. *See* 415 ILCS 5/31(d) (2000). The Board's procedural rules define "duplicitous" or "duplicative" as a matter that is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202.

Rowe and Chapco allege that this matter is duplicative of a breach of contract action filed by Cole Taylor in Illinois Circuit Court on April 29, 1997. They contend that Cole Taylor alleged in the earlier complaint that they violated Section 21(e) of the Act by causing or allowing contamination of the soil at the site with hazardous substances. Rowe Ans. at 8;[2] Chapco Ans. at 8.[3] Chapco and Rowe also argue that Cole Taylor sought a $250,000 sum to cover the costs to remediate the site. Rowe Ans. at 9; Chapco Ans. at 9. In this case, Cole Taylor similarly requested the Board to order the respondents to undertake this remediation. *Id.* For these reasons, the respondents allege that this suit is substantially similar to the one that Cole Taylor brought before the Circuit Court. *Id.*

The Board finds that the contract dispute in the Circuit Court involves a separate cause of action, which is neither identical nor substantially similar to the environmental violations alleged in the complaint in this matter. The Board has previously found that complaints alleging violations of the Act are not duplicative of related cases concerning breach of contract

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[2] Rowe filed an answer to the complaint and affirmative defenses on September 17, 2001, which is referred to as "Rowe Ans. at __."

[3] Chapco filed an answer to the complaint and affirmative defenses on August 27, 2001, which is referred to as "Chapco Ans. at __."

and fraud. Illinois v. State Oil Company, William Anest f/d/b/a S & S Petroleum Products, *et al.* , PCB 97-103, slip op. at 6 (Aug. 19, 1999) (citing Morton College Board of Trustees v. Town of Cicero, PCB 98-59, slip op. at 5 (Jan. 8, 1998)).

The question as to whether Rowe and Chapco violated the Act as alleged in the July 19, 2001 amended complaint is properly before the Board. The previous Circuit Court proceeding concerning whether respondents violated their lease or were negligent in the care of the site in the context of a contract dispute does not affect our authority to hear this environmental matter at this time. *See* Village of Park Forest v. Sears, Roebuck & Co., PCB 01-77, slip op. at 4 (Feb. 15, 2001). The Board accordingly strikes this affirmative defense.

Lack of Material Causation / Contribution

Chapco and Rowe allege that their lack of material causation or contribution to a release of hazardous substances on the site is an affirmative defense to this action under Section 58.9(a)(2)(A) of the Act. *See* 415 ILCS 5/58.9(a)(2)(A) (2000). Section 58.1 sets forth a site remediation program (SRP) that persons may elect to utilize under certain circumstances where they are required to perform investigations and remediations under the Act. *See* 415 ILCS 5/58.1(a)(2) (2000). Section 58.9 of the Act provides that persons cannot be required to perform remedial action if they "neither caused nor contributed to in any material respect a release of regulated substances on, in, or under the site that was identified and addressed by the remedial action taken pursuant to this Title." 415 ILCS 5/58.9(a)(2)(A) (2000).

The respondents allege that this section provides them with an affirmative defense because the hazardous substances that Cole Taylor found in the soil at the site exist naturally in all soils throughout North America and the world. Rowe Ans. at 11; Chapco Ans. at 13. Rowe and Chapco also argue that neither party caused or contributed in any way to the presence of hazardous substances that Cole Taylor alleges to have found on the site. Rowe Ans. at 11; Chapco Ans. at 14. They state that any contamination was instead caused by unaffiliated nearby businesses. Rowe Ans. at 11; Chapco Ans. at 14.

Proportionate share liability is a limitation on remedies, not a bar to a cause of action. *See* Proportionate Share Liability: 35 Ill. Adm. Code 741, R97-16, slip op. at 4 (Dec. 17, 1998). The Board strikes this argument as an affirmative defense. However, the parties may further address this issue at hearing. The Board notes that, in striking this purported defense, it does not rule on the applicability of Section 58.9 of the Act (415 ILCS 5/58.9 (2000)) to this matter.

Act of God/Act of Third Parties

The respondents argue that Cole Taylor is barred from bringing this suit because any contamination on the site was either caused by an act of God or of third parties. Rowe Ans. at 13; Chapco Ans. at 15-16. They allege that the natural occurrence of contaminants allegedly

detected by Cole Taylor at the site is an act of God, which is an affirmative defense under Section 22.2(j)(1)(A) of the Act. *See* 415 ILCS 5/22.2(j)(1)(A)(2000). Cole Taylor responded that, while the substances may naturally exist in the soil, they do not occur in the concentrations detected at the site. Comp. Ans. at 5.

In the alternative, the respondents argue that any hazardous substances that allegedly exist on the site are a result of activity by nearby unrelated businesses. Rowe Ans. at 14-15; Chapco Ans. at 17-18. They contend that they never contributed in any way to the presence of hazardous substances alleged by Cole Taylor to be present on the property. Rowe Ans. at 15; Chapco Ans. at 18.

Section 22.2(j)(1) provides that:

> There shall be no liability under this Section for a person otherwise liable who can establish by a preponderance of evidence that the release or substantial threat of release of a hazardous substance and the damages resulting therefrom were caused solely by:
>
> A. an act of God . . . .
> ***
> C. an act or omission of a third party other than an employee or agent of the defendant, or other than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant . . . . 415 ILCS 5/22.2(j)(1)(A), (C) 2000.

The Board finds that these arguments do not raise valid affirmative defenses here because Section 22.2(j)(1) of the Act (415 ILCS 5/22.2(j)(1) (2000)), by its terms, only applies to actions under Section 22.2 of the Act (415 ILCS 5/22.2 (2000)). Cole Taylor brings this action under Section 31(d) of the Act. *See* 415 ILCS 5/31(d) (2000). Accordingly, the Board strikes these alleged affirmative defenses as inapplicable to this case.

Release Permitted by State or Federal Law

Rowe and Chapco allege that they are not liable because any release of hazardous substances on the site was permitted by state or federal law. *See* 415 ILCS 5/22.2(j)(2) (2000). They argue that the level of contaminants in the soil on the site is permitted under regulatory standards for remediating sites that are used for commercial or industrial purposes. Rowe Ans. at 17; Chapco Ans. at 19-20. Rowe and Chapco contend that the Tiered Approach to Corrective Action Objectives (TACO) regulations permit the current level of contamination to remain on the site because: (1) engineered barriers contain the contamination in accordance with TACO, which the new lessors of the property do not plan to disturb; and (2) the site is located in a community that has an ordinance outlawing the use of groundwater for potable purposes. *See* 415 ILCS 5/58.11; 35 Ill. Adm. Code 742; Rowe Ans. at 17; Chapco Ans. at

19-20. Respondents allege that if TACO applies to the site, then the levels of present contamination do not exceed the standards for commercial/industrial use of the property because of the above circumstances, and respondents are therefore not in violation of the Act. Rowe Ans. at 22; Chapco Ans. at 24.

Cole Taylor admits that the site is presently zoned commercial/industrial. Comp. Ans. at 10. It agrees that an unaffiliated third party now leases the site with knowledge of the alleged existence of the hazardous substances on the property. Comp. at 11. Cole Taylor also admits that, although it and the new lessor have exclusive possession and control of the property, neither has initiated remediation of the alleged contamination. *Id.*

For the same reasons as above, the Board finds that the respondents do not raise an affirmative defense because it is based upon Section 22.2(j)(2) of the Act (415 ILCS 5/22.2(j)(2) (2000)), which only applies to causes of action under Section 22.2 of the Act (415 ILCS 5/22.2 (2000)). Since Cole Taylor brings this cause of action under Section 31(d) of the Act (415 ILCS 5/31(d) (2000)), the Board strikes this as an affirmative defense.

The Board has not previously addressed the issue of whether the existence of the TACO clean-up standards preclude the finding that a person violated Section 21(e) of the Act by disposing, treating, storing, or abandoning waste on the site. *See* 415 ILCS 5/21(e) (2000); *but see also* Village of Park Forest v. Sears, Roebuck & Company, PCB 01-77, slip op. at 5, 8 (June 6, 2002). Upon appropriate motion or pleading, the Board will entertain further evidence and argument on this issue, but will not presently rule on the merits of the claim.

Section 33(c) Criteria

Respondents allege that, if standards under TACO apply to the site in the manner described in the previous section, then the contamination constitutes a reasonable emission, discharge, and/or deposit under Section 33(c) of the Act. *See* 415 ILCS 5/33(c) (2000). When the Board makes orders and determinations, it considers "all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved . . . . *Id.* The Board includes an analysis of five criteria under this section when determining whether a party violated the Act. *Id.*

The Board finds that the alleged defense is not properly raised because it attacks the sufficiency of the claim rather than the complainant's legal right to bring a cause of action. People v. John Crane, Inc., PCB 01-76, slip op. at 3 (May 17, 2001), citing Farmers State Bank v. Phillips Petroleum Co., PCB 97-100, slip op. at 2, n.1 (Jan. 23, 1997). "An affirmative defense is a response to a claim which attacks the complainant's right to bring an action." People v. Midwest Grain Products of Illinois, PCB 97-179, slip op. at 5 (Aug. 21, 1997) (citations omitted). For these reasons, the Board strikes this argument as an improperly pled affirmative defense. Even though the argument concerning the Section 33(c) criteria is not an affirmative defense, the parties are still free to address this issue at hearing.

Arbitrary and Unreasonable Hardship Under Section 31(e) of the Act

Respondents allege that this suit is barred because holding Rowe and Chapco to a more stringent standard than found under TACO would impose an arbitrary and unreasonable hardship on them. Rowe Ans. at 29; Chapco Ans. at 32. Section 31(e) of the Act provides that:

> In hearings before the Board under this Title the burden shall be on the Agency or other complainant to show either that the respondent has caused or threatened to cause air or water pollution or that the respondent has violated or threatens to violate any provision of this Act or any rule or regulation of the Board or permit or term or condition thereof. If such proof has been made, the burden shall be on the respondent to show that compliance with the Board's regulations would impose an arbitrary or unreasonable hardship. 415 ILCS 5/31(e) (2000).

Whether compliance would be deemed arbitrary or cause an unreasonable hardship is simply a matter to be considered in mitigation when determining whether to assess monetary penalties. *See* Lonza, Inc. v. PCB, 21 Ill. App. 3d 468, 315 N.E.2d 652 (1974); Archer Daniels Midland Co. v. PCB, 119 Ill. App. 3d 428, 456 N.E.2d 914 (1983). The Board accordingly strikes this issue as an improperly pled affirmative defense. The respondents may present evidence and arguments concerning Section 31(e) of the Act (415 ILCS 5/31(e) (2000) at hearing.

Res Judicata

Chapco alleged the affirmative defense of *res judicata*, stating that the Illinois Circuit Court dismissed with prejudice the earlier described breach of contract case, which involved the same parties and the same cause. Chapco Ans. at 11-12. *Res judicata* is a legal doctrine stating that once a court decides a cause of action, it cannot be retried between the same parties. People v. Jersey Sanitation Corp., PCB 97-2, slip op. at 4 (Apr. 4, 2002); ESG Watts, Inc. v. IEPA, PCB 96-181 and PCB 97-210, slip op. at 2 (July 23, 1998), citing Burke v. Village of Glenview *et al.*, 257 Ill. App. 3d 63, 69, 628 N.E. 2d 465, 469 (1st Dist. 1993). The elements of *res judicata* are: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of cause of action; and (3) an identity of parties, or privity between subsequent parties and the original parties. Jersey Sanitation, PCB 97-2, slip op. at 4-5; ESG Watts, PCB 96-181 and 97-210, slip op. at 2, citing People *ex rel.* Burris v. Progressive Land Developers, Inc., 151 Ill. 2d 285, 294, 602 N.E. 2d 820, 825 (1992). Where these elements are present, a judgment in a suit between the parties will be conclusive of all questions decided as well as questions which could have been litigated and decided, and will bar re-litigation of any such issues in a subsequent action. ESG Watts, PCB 96-181 and 97-210, slip op. at 2; citing Progressive Land Developers, 151 Ill. 2d at 294, 602 N.E. 2d at 825.

Chapco included in its answer a copy of the final judgment rendered on July 16, 1999, by the Circuit Court of Cook County, dismissing Chapco from a breach of contract case brought by Cole Taylor. *See* Chapco Ans. Attachment at 59. Chapco alleges that Cole Taylor brought both suits against the same parties, Rowe and Chapco. Chapco Ans. at 11. Chapco attached the former complaint as proof of this element. *See* Chapco Ans. Attachment at 1. Lastly, Chapco argues that both cases involve the same cause of action. Chapco Ans. at 11. Chapco contends that Cole Taylor alleged that Rowe and Chapco breached their contracts because they violated Section 21(e) of the Act by "causing or allowing the contamination of the soil at the Property with hazardous substances." *See* Chapco Ans. at 11; 415 ILCS 5/21(e) (2000). In this case, Cole Taylor alleges that Chapco and Rowe violated the same provision of the Act for the same conduct.

Chapco also alleges that the remedy requested by Cole Taylor in both proceedings proves that the cases covered the same cause of action. Chapco Ans. at 11. In the former proceeding before the Circuit Court, Cole Taylor requested Rowe and Chapco to pay $250,000 for the cost of remediating the site. In this matter, Cole Taylor requests the Board to order Chapco and Rowe to undergo this remediation.

The Board finds that Chapco properly raised *res judicata* as an affirmative defense. However, as stated above in the discussion concerning duplicitous complaints, the Board finds that a case that seeks to resolve a breach of contract involves a different cause of action than one that requests abatement and remediation of an environmental violation. *See* Illinois v. State Oil Company, William Anest f/d/b/a S & S Petroleum Products, *et al.*, PCB 97-103, slip op. at 6 (Aug. 19, 1999), citing Morton College Board of Trustees v. Town of Cicero, PCB 98-59, slip op. at 5 (Jan. 8,. 1998).

Additionally, the Board finds that the two cases involve different causes of action because this matter covers an extended time frame beyond that found in the former breach of contract suit. *Res judicata* does not bar this cause of action because the contract dispute only involved conduct by Chapco between 1971 and 1999. In this case, Cole Taylor alleges the Section 21(e) violation continued unabated up to the date that it filed its complaint with the Board. Comp. at 3. Chapco admitted that it was in possession of the property after the July 16, 1999 final judgment by the Circuit Court, until January 31, 2001. Chapco Ans. at 3. For these reasons, the Board strikes the affirmative defense of *res judicata*.

Collateral Estoppel

Chapco alleged in its last affirmative defense of collateral estoppel that Cole Taylor is barred from re-litigating any issue of law or fact that is identical to those previously raised. Collateral estoppel can preclude relitigation of a specific issue even where *res judicata* does not apply. Jersey Sanitation, PCB 97-2, slip op. at 5. The Illinois Supreme Court has set three minimum threshold requirements for applying collateral estoppel: (1) the issue decided in the prior adjudication is identical with the one presented in the instant matter; (2) there was a final judgment on the merits in the prior adjudication; and (3) the party against whom estoppel is

asserted was a party or a party in privity with a party to the prior adjudication. Jersey Sanitation, PCB 97-2, slip op. at 5; ESG Watts, PCB 96-181 and 97-210, slip op. at 2-3, citing Talarico v. Dunlap, 177 Ill. 2d 185, 191; 685 N.E.2d 325, 328 (1997).

There are exceptions to collateral estoppel. The doctrine must not be applied to bar a party from presenting a claim or defense unless no unfairness results to the party being estopped. Jersey Sanitation, PCB 97-2, slip op. at 6; ESG Watts, PCB 96-181 and PCB 97-210, slip op. at 2-3, citing Talarico, 177 Ill. 2d at 191-192. *See also* Van Milligan v. Board of Fire and Police Commissioners, 158 Ill. 2d 85, 96-97; 630 N.E.2d 830, 836 (1994). Collateral estoppel also does not apply if the burden has shifted from the party against whom the doctrine is to be applied to its adversary. Jersey Sanitation, PCB 97-2, slip op. at 6; citing ESG Watts, PCB 96-181 and PCB 97-210, slip op. at 2-3 (citation omitted).

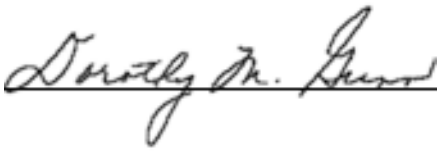
The Board finds that Chapco properly raised the issue of collateral estoppel as an affirmative defense that asserts a new matter to defeat the right to bring this suit. However, the Board does not have enough information to decide whether the affirmative defense has merit. The Board accordingly does not make a finding as to the sufficiency of the claim at this time. The parties may, at their own discretion, raise or dispute this issue in a subsequent motion or at hearing.

CONCLUSION

The Board strikes eight of the nine affirmative defenses raised by Chapco, and all seven affirmative defenses raised by Rowe. The Board finds that respondents improperly pled affirmative defenses concerning: Section 31(e) and 33(c) criteria under the Act; act of God; act of third parties; lack of material causation/contribution, and whether any release was permitted by state or federal law. *See* 415 ILCS 5/31(e), 33(c) (2000). The Board determines that respondents properly raised affirmative defenses concerning *res judicata* and whether the complaint was duplicitous, but finds that these defenses were without merit. The Board reserves its ruling on the sufficiency of the remaining affirmative defense concerning collateral estoppel, which the Board finds was appropriately pled in this matter. Although the Board struck several of the affirmative defenses, Rowe and Chapco may address the issues raised in their answers and subsequent filings, including those in its stricken affirmative defenses, in future motions and at hearing.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 6, 2002, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board