ILLINOIS POLLUTION CONTROL BOARD
August 8, 2002

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 99-120
	)	(Enforcement – Air)
WOOD RIVER REFINING COMPANY, a division of EQUILON ENTERPRISES, L.L.C.,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by R.C. Flemal):

On February 23, 1999, complainant, the People of the State of Illinois, filed a two-count complaint against respondent Wood River Refining Company, operator of a petroleum refinery located in South Roxana, Madison County. On July 5, 2000, complainant filed a supplemental complaint (Supp. Comp.) to allege violations that occurred subsequent to the violations alleged in the initial complaint. The supplemental complaint increased the total number of counts to thirteen. Respondent filed an answer and 29 affirmative defenses on April 26, 2002 (Answer). On May 30, 2002, complainant filed a motion to strike respondent's affirmative defenses (motion). On July 1, 2002, respondent filed a response to the motion to strike (Response).

For the reasons outlined below, the Board grants the motion to strike in part and denies the motion in part. The Board grants the motion to strike affirmative defenses for count I (defense 1), count II (defense 1), count III (defense 1), count IV (defenses 1 and 4), count V (defenses 1,3 and part of 4), count VI (defenses 1, 3 and part of 4), count VII, count VIII, count IX (defense 1), count X (defense 1), count XII (defense 1) and count XIII (defense 1). Respondent withdrew the defense 5 for count IX. *See* Resp. at 16.

The Board denies the motion with respect to the affirmative defenses for count II (defense 2), count III (defense 2), count IV (defenses 2 and 3), count V (defense 2 and part of 4), count VI (defense 2 and part of 4), count IX (defense 2), count X (defense 2), count XI, count XII (defense 2), count XIII (defense 2).

RELEVANT STATUTORY PROVISIONS

Section 9(a) of the Environmental Protection Act (Act), 415 ILCS 5/9(a) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002, provides:

No person shall:

> Cause or threaten or allow the discharge of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violation regulations or standards adopted by the Board under this Act.

Section 9(b) of the Act, 415 ILCS 5/9(b) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002, provides:

> No person shall:
>
> Construct, install, or operate any equipment, facility, vehicle, vessel or aircraft capable of causing or contributing to air pollution or designed to prevent air pollution, of any type designated by Board regulations, without a permit granted by the Agency, or in violation of any conditions imposed by such permit

Air pollution is defined as as:

> The presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property. 415 ILCS 5/3.02 (2000) *amended by* P.A. 92-0574, eff. June 26, 2002.

35 Ill. Adm. Code 201.141 states:

> No person shall cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as, either alone or in combination with contaminants from other sources, to cause or tend to cause air pollution in Illinois, or so as to violate the provisions of this Chapter, or so as to prevent the attainment or maintenance of any applicable ambient air quality standard.

35 Ill. Adm. Code 219.123(b) states, in part:

> Subject to subsection (a) of this Section, no owner or operator of a stationary storage tank shall cause or allow the storage of any VOL [volatile organic liquid) in the tank unless:
>
> * * *
>
> (3) All opening of any floating roof deck, except stub drains, are equipped with covers, lids or seal such that:
>
> (A) The cover, lid or seal is in the closed position at all times except when petroleum liquid is transferred to or from the tank;

* * *

(4) Routine inspections of floating roof seals are conducted through roof hatches once every six months;

(6) A record of the results of each inspection conducted under subsection (b)(4) or (b)(5) of this Section is maintained.

35 Ill. Adm. Code 219.124(a)(2):

(a) In addition to meeting the requirements of Section 219.123(b) of this Part, no owner or operator of a stationary storage tank equipped with an external floating roof shall cause or allow the storage of any volatile petroleum liquid in the tank unless:

(2) Each seal closure device meets the following requirements:

(A) The seal is intact and uniformly in place around the circumference of the floating roof between the floating roof and tank wall; and

(B) The accumulated area of gaps exceeding 0.32 centimeter (1/8 inch) in width between the secondary seal and the tank wall shall not exceed 21.2 square centimeters per meter of tank diameter (1.0 square inch per foot of tank diameter). Compliance with this requirement shall be determined by:

i. Physically measuring the length and width of all gaps around the entire circumference of the secondary seal in each place where a 0.32 cm (0.125 in.) uniform diameter probe passes freely (without forcing or binding against the seal) between the seal and the tank wall; and

ii. Summing the area of the individual gaps.

STANDARD

In an affirmative defense, the respondent alleges "new facts or arguments that, if true, will defeat . . . [complainant's] claim even if all allegations in the complaint are true." People v. Community Landfill Co., PCB 97-193, (Aug. 6, 1998). 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) (2000).

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 Telegraph Co., 210 Ill. App. 3d 701, 709, 569 N.E.2d 518, 523 (2nd Dist. 1991), citing The Worner Agency Inc. 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, 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).

COUNT I: DIESEL FUEL RELEASE

Complainant alleges respondent violated 9(a) of the Act (415 ILCS 5/9(a) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002) and 35 Ill. Adm. Code 201.141. Supp. Comp. at 3. Specifically, complainant alleges that an inspection on July 2, 1998, revealed that respondent had released gaseous hydrocarbons, hydrogen sulfide, and hydrodesulfurized middle distillate that allegedly caused or tended to cause air pollution. Supp. Comp. at 3. As a result of the release, diesel fuel settled onto private and public property, which unreasonably interfered with the enjoyment of life and property. Supp. Comp. at 3.

Affirmative Defense

Respondent alleges as an affirmative defense that respondent promptly removed any diesel fuel that settled onto public or private property. Ans. at 6. Respondent argues that because respondent removed the fuel, the fuel did not unreasonably interfere with the enjoyment of life or property. Ans. at 6.

Complainant responds that respondent's affirmative defense, is not an affirmative defense. Mot. at 2. Complainant argues the defense does not raise a new matter that constitutes a defense to the allegation. Mot. at 2.

Respondent replies that the affirmative defense should not be stricken because if respondent proves that the fuel was cleaned up before it became an unreasonable interference with the enjoyment of life or property, then respondent will prevail on this count. Resp. at 4-5. Also, respondent replies that the defense should not be stricken because it alleges facts which may take the State by surprise at hearing. Resp. at 5.

Discussion

Respondent's first affirmative defense addresses information relevant to the imposition of a penalty rather than whether or not air pollution occurred. The Board has previously held that affirmative defenses that concern factors in mitigation are not an appropriate affirmative defense to a claim that a violation has occurred. People v. Geon Company, Inc., PCB 97-62 (Oct. 2, 1997); People v. Midwest Grain Products of Illinois, Inc., PCB 97-179 (Aug. 21, 1997). The Board strikes respondent's affirmative defense for count I because it is not an affirmative defense. The Board reminds the parties that respondent is not precluded from introducing at hearing evidence regarding any clean-up efforts initiated by respondent.

COUNT II: AIR POLLUTION AND PERMIT VIOLATIONS

Complainant alleges that because respondent failed to properly maintain the distillate hydrotreator, causing air pollution in violation of Section 9(a) of the Act (count I), respondent violated Standard Condition No. 7 of Operating Permit No. 72110637. Supp. Comp. at 5. Respondent also violated Section 9(b) of the Act and Standard Condition No. 7 of Operating Permit No. 72110637, by releasing gaseous hydrocarbons, hydrogen sulfide, and diesel oil from the refinery. Supp. Comp. at 5. Respondent raises two affirmative defenses.

First Affirmative Defense

First, respondent argues that air pollution did not occur. Ans. at 9. Respondent argues that complainant failed to allege that the release was of contaminants 'in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health or property, or to unreasonably interfere with the enjoyment of life or property', as Section 3.02 of the Act requires.[1] Ans. at 8.

Complainant asserts that the first affirmative defense should be stricken because it is not an affirmative defense. Mot. at 3. Complainant argues that the "affirmative defense" is actually an argument that complainant failed to state a cause of action against respondent. Mot. at 3.

Respondent replies with the same allegation regarding Section 3.02's requirements. Resp. at 6. Respondent also states that respondent should be allowed to allege and present evidence at hearing that air pollution did not occur, and therefore no permit violations could have occurred. Resp. at 6. Alternatively, respondent argues they should be allowed to file a motion to strike count II for failure to sufficiently plead a cause of action for permit violations. Resp. at 7.

Discussion

[1] Section 3.02 of the Act was recently amended P.A. 92-0574 by renumbering the section from Section 3.02 to Section 3.115.

The first affirmative defense does not allege new facts or arguments that, if true, could defeat complainant's claim even if all allegations in the complaint are true. The assertion that air pollution did not occur is merely a denial of the allegation. Further, respondent's argument that complainant failed to allege that the release was of contaminants 'in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health or property, or to unreasonably interfere with the enjoyment of life or property', as Section 3.02 (now Section 3.115) of the Act requires, is stricken. This also is not an affirmative defense. The Board strikes the first affirmative defense.

Regarding respondent's request to file a motion to strike count II for failure to sufficiently plead a cause of action, the Board notes that pursuant to 35 Ill Adm. Code 101.506, a motion to strike must be filed within 30 days after the service of the challenged document unless the Board determines material prejudice will result. The Board does not believe material prejudice will result if a motion for leave to file a motion to strike is not granted. Therefore, respondent's request to file a motion to strike is denied.

Second Affirmative Defense

Respondent's second affirmative defense is that any release of diesel fuel that occurred on or about July 2, 1998 from the distillate hydrotreater unit resulted from the malfunction of the gauge, which gave the unit's operator incorrect information. Ans. at 9. The malfunction of the gauge was not caused by a failure to properly maintain or operate the unit as Condition No. 7 of Operating Permit No. 72110637 requires, so the release was not a permit violation.

Complainant asserts the second affirmative defense to count II should be stricken. Mot. at 5. Complainant argues that the facts show that respondent violated the Act and its permit. Mot. at 4. Complainant states that to operate in excess of the applicable sulfur dioxide emission standards during a malfunction and breakdown, the breakdown must have been unexpected and non-preventable. Mot. at 5. Complainant also states that the definition of "malfunction" found in the Standard for Performance for New Stationary Sources, provides:

> Malfunction means any sudden, infrequent, and not reasonably preventable failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner. Failures that are caused in part by poor maintenance or careless operations are not malfunctions.

Complainant argues the gauge's breakdown was preventable. Mot. at 4. If the gauge provided an incorrect reading to the operator, then respondent should have replaced or repaired the gauge. Mot. at 4.

Respondent replies that the second affirmative defense states new factual material and legal arguments as to why no permit violation occurred (specifically, the gauge malfunction). Resp. at 7. If respondent can prove the new facts and legal arguments are true, they might be able to show the malfunction was not a result of a failure to properly maintain the unit. Resp. at 8.

Respondent further replies that the defense should not be stricken because respondent will show at hearing that the gauge malfunction was sudden, infrequent, not reasonably preventable, and not the result of faulty or poor maintenance. Resp. at 8. Also, respondent argues that these facts could surprise the complainant and should not be stricken. Resp. at 9.

Discussion

The Board will not strike the second affirmative defense. If indeed respondent can show that the gauge's malfunction was sudden, infrequent and not reasonably preventable, respondent may be able to prevail on count II.

COUNT III: TANK SEAL VIOLATIONS

Complainant alleges that on September 25, 1998, the Agency conducted an inspection of respondent's facility. Supp. Comp. at 7. The facility has the capacity to refine 295,000 barrels per day of crude oil. Supp. Comp. at 6.

Based on the facility records, complainant alleges that respondent violated 35 Ill. Adm. Code 219.123(b)(4) for failing to conduct visual inspections for floating roof seals on tanks A-53, A-54, F-21, and F-51, at least once every six months. Supp. Comp. at 8. Also, respondent violated 35 Ill. Adm. Code 219.123(b)(6) for failing to maintain the records for the visual inspections of the floating roof seals on tanks A-33 and A-40. Supp. Comp. at 8. Respondent violated 35 Ill. Adm. Code 219.124(a)(2)(B) for allowing the secondary seals on tank A-76 and A-83 to have gaps in excess of the 1.0 square inch per foot of tank diameter limit. Supp. Comp. at 8. Respondent violated 35 Ill. Adm. Code 219.123(b)(3)(A) by allowing the gauge hatches to be open on external floating roof tanks A-34 and A-78. Supp. Comp. at 8. Finally, in violating the Board regulations, complainant alleges that respondent also violated Section 9(a) of the Act (415 ILCS 5/9(a) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002,).

First Affirmative Defense

Respondent asserts as an affirmative defense that "the inspection and maintenance of the storage tanks in volatile organic or petroleum liquids service at the refinery are subject to and governed by federal law, 40 CFR 63.1 *et seq*." Ans. at 16. Respondent claims that all inspections and necessary repairs to the storage tanks were made in accordance with the time limits prescribed by federal law. Ans. at 16.

Complainant counters that respondent must comply with both the refinery maximum available control technology and the applicable state regulations, 35 Ill. Adm. Code 219.123 and 219.124. Mot. at 5. Compliance with the federal law does not excuse respondent's failure to comply with state law. Mot. at 6.

Respondent replies that being required to meet the time limitations and schedules for overlapping federal and state regulations for hundreds of tanks is unduly burdensome, and compliance with the federal regulations should be sufficient. Resp. at 10. Additionally, respondent notes that the State has not alleged which permits it claims cover the operation of the tanks at issue. Resp. at 10. Respondent argues that language in the relevant permit might determine which regulations should apply to the tanks at issue. Resp. at 10. Respondent argues that pending discovery on this issue, the motion to strike the affirmative defenses should be denied.

Discussion

Respondent's facility is subject to state law, and permits do not excuse the permittee from complying with state law and regulations. Regardless of what permit language applies to the tanks at issue, respondent must comply with state law. 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.

Second Affirmative Defense

Respondent's second affirmative defense to count III is that tank A-33, A-40, and A-53 were not volatile organic or petroleum liquid storage service [sic], and therefore were not subject to the alleged regulations. Ans. at 17.

Complainant allege this affirmative defense is not adequately pled. Mot. at 6. Complainant argues that as drafted, the affirmative defense does not meet the pleading requirements of the Illinois Code of Civil Procedure in that it does not set forth the facts constituting an affirmative defense. Mot. at 6-7. Complainant surmises that respondent intended to allege that the tanks were no longer in service, they were not being used for storage of volatile organic liquids, and were not subject to regulation. Mot. at 7. As alleged, however, complainant states that respondent has not complied with 35 Ill. Adm. Code 219. Mot. at 7. Complainant seems to suggest that respondent should have stated when the tanks were emptied and when a final inspection occurred. Mot. at 7.

Respondent replies that the defense alleges that the tanks were not in service storing volatile organic or petroleum liquids. Resp. at 10. Respondent further replies that the regulations in count III regulate only storage tanks in volatile organic or petroleum liquids service, so the tanks are not subject to the regulations in count III. Resp. at 10.

Discussion

If respondent can show that the tanks were no longer in service of storing the volatile organic or petroleum liquids, the respondent may be able to prevail on the claim. The Board does not strike the second affirmative defense.

COUNT IV: SULFUR DIOXIDE AND NITROGEN OXIDE RELEASE

Complainant alleges that on May 17, 1993, the Agency issued respondent Operating Permit No. 72110621 for the Catalytic Cracking Unit #1 (CCU#1). Supp. Comp. at 9. On June 25, 1999, the Illinois Emergency Management Agency (IEMA) received a report that sulfur dioxide and nitrogen oxide were released from Wood River's north flare at the facility. Supp. Comp. at 10. Complainant alleges the gas originated from CCU#1 and was routed to the flare on the north of the facility. Supp. Comp. at 10. Complainant alleges that 1,380 pounds of sulfur dioxide and 22 pounds of nitrogen oxide were released from the flare. Supp. Comp. at 10. Complainant alleges that by allowing the emission of contaminants so as to cause or tend to cause air pollution, respondent violated Section 9(a) of the Act, ILCS 5/9(a)(2000) *amended by* P.A. 92-0574, eff. June 26, 2002.

First Affirmative Defense

Respondent asserts as an affirmative defense that count IV fails to allege that the release was in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property, as Section 3.02 (now Section 3.115) of the Act requires to show air pollution occurred. Ans. at 20. As no air pollution occurred, no violation of Section 9(a) of the Act occurred. Ans. at 20.

Complainant argues that this defense does not raise a new matter which is a defense to the allegation, and therefore is not an affirmative defense. Mot. at 8

Respondent replies that the complaint contains no facts which meet the requirements of Section 3.02 (now Section 3.115) of the Act, and respondent should be allowed to maintain as an affirmative defense that air pollution did not occur. Resp. at 12. Alternatively, respondent requests that respondent be allowed to file a motion to strike count IV for failure to sufficiently plead a cause of action for violation of Section 9(a) of the Act. Resp. at 12.

Discussion

Section 3.02 (now Section 3.115) of the Act defines air pollution. *See supra* p.2. Whether complainant sufficiently pled facts that fit the air pollution definition is not an affirmative defense. The affirmative defense does not allege new facts or arguments that, if true, would defeat complainant's claim even if all allegations in the complaint are true. The assertion that air pollution did not occur is merely a denial of the allegation. Further, respondent's argument that complainant failed to allege that the release was of contaminants 'in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health or property, or to unreasonably interfere with the enjoyment of life or property', as Section 3.02 (now Section 3.115) of the Act requires, is stricken. The Board strikes the first affirmative defense.

Regarding respondent's request to file a motion to strike for failure to sufficiently plead a cause of action, the Board notes that pursuant to 35 Ill Adm. Code 101.506, a motion to strike must be filed within 30 days after the service of the challenged document unless the Board determines material prejudice will result. The Board does not believe material prejudice will result if a motion for leave to file a motion to strike is not granted. Therefore, respondent's request to file a motion to strike is denied.

Second Affirmative Defense

Respondent asserts as an affirmative defense that the release was the result of an employee of an independent contractor working at the refinery inadvertently bumping into a valve causing the valve to close. Ans. at 20. Because the valve closed, materials containing sulfur dioxide were routed to the refinery's smokeless flare as a safety release device during periods of unit malfunction. Ans. at 21. The malfunction or breakdown of the unit was not the result of respondent's failure to properly maintain the unit. Ans. at 21.

Complainant argues that respondent's assertions are not relevant to the allegation that respondent's release of sulfur dioxide and nitrogen oxide caused or tended to cause air pollution in violation of Section 9(a) of the Act. Mot. at 8. Complainant states that whether the release was caused by operator error or inadequate maintenance is irrelevant to a Section 9(a) or 35 Ill. Adm. Code 201.141 violation. Mot. at 8-9. Liability under the Act is grounded upon control over the pollution source. Mot. at 8.

Respondent replies that the Board has previously recognized that an owner may not be liable for a release if it occurred as a result of an act of an independent contractor. Resp. at 13, citing Forest Preserve District of DuPage County v. Mineral and Land Resources Corp., *et al.*, PCB 96-84 (Dec. 18, 1997) and People v. Geon Company, PCB 97-62 (Oct. 2, 1997).

Discussion

The Board has found that owners' use of independent contractors may relieve the owner of liability under the Act, but owners may also be liable for the actions of independent contractors. In EPA v. James McHugh Construction Co., PCB 71-291 (May 17, 1972), the Board found the City of Chicago (City) liable for "allowing" water pollution that its independent contractors caused. In so doing, the Board observed,

> The statute makes it unlawful not only to "cause" but also to "allow" pollution. We think this language goes beyond the common law and imposes an affirmative duty on persons in a position of potential control to take action to prevent pollution. We hold that the common law of independent contractors is not incorporated as such into the statute, but that the question for our decision is whether, in light of statutory policy, a respondent is in such a relationship to the transaction that it is reasonable to expect him to exercise control to prevent pollution. McHugh, PCB 71-291, slip op. at 3.

In support of its finding that the City could reasonably have been expected to exercise control to prevent pollution, the Board noted that the City's contract with its independent contractor required the contractor to construct a settling basin, and that the City had an engineer on-site at all times to ensure that the contractor adhered to the contract specifications. McHugh, PCB 71-291, slip op. at 4-5. *See also* Forest Preserve District of DuPage County v. Mineral and Land Resources Corporation, PCB 96-84 (Dec. 18, 1997) (applying the same test of liability to claims involving an independent contractor).

The Board will not strike this affirmative defense because respondent may be able to prevail on this count.

Third Affirmative Defense

Respondent argues as a third affirmative defense that the total sulfur dioxide released during the 24-hour period for June 25, 1999, did not exceed the normal 25,000-30,000 pounds allowed by 35 Ill. Adm. Code 214.382. Ans. at 21.

Complainant responds that the affirmative defense is misleading. Mot. at 9. Complainant states that 35 Ill. Adm. Code 214.382 pertains to emissions from normal exhaust stacks. Mot. at 9. Complainant argues the defense should be stricken because the release at the CCU #1, as respondent admits, was not from the normal exhaust stack, but was from a safety release device, the refinery's smokeless flare. Mot. at 9. Complainant concludes that because the sulfur dioxide emission limit in Section 214.382 does not address releases from flares like the safety release device, the defense should be stricken. Mot. at 9.

Respondent replies that Section 214.382 does apply to the flare. Resp. at 14. Respondent cites part of the section which states:

> (b) No person shall cause or allow the emission of more than 1,000 ppm of sulfur dioxide into the atmosphere from any process emission source in the St. Louis (Illinois) major metropolitan area designed to remove sulfur compounds from the flue gases of petroleum and petrochemical processes.

Respondent states that the refinery is in the St. Louis, Illinois major metropolitan area. Resp. at 14. The materials are from CCU#1 which is part of the overall separation of sulfur process at this petroleum refinery. Resp. at 14. Therefore, the release is within the limits of Section 214.382(b). Resp. at 14. Respondent also argues that when the Board adopted the Section 214.382(b) language, it did so to specifically provide the limitation for discharge of sulfur dioxide from the sulfur removal emissions processes at this refinery. Resp. at 14.

Discussion

The third affirmative defense only addresses the release of sulfur dioxide, and omits the allegation regarding nitrogen oxide. Regardless, respondent has alleged new facts that if true may convince the Board that Section 214.382(b) permits the sulfur dioxide emission. The Board will not strike this affirmative defense.

Fourth Affirmative Defense

Respondent's fourth affirmative defense to count IV states that the release occurred through a smokeless flare as permitted by 35 Ill. Adm. Code 219.143. Ans. at 21. 35 Ill. Adm. Code 219.143 provides:

> No person shall cause or allow the emission of organic material into the atmosphere from any vapor blowdown system or any safety relief valve, except such safety relief valves not capable of causing an excessive release, unless such emission is controlled:
>
> a) To 10 ppm equivalent methane (molecular weight 16.0) or less; or,
>
> b) By combustion in a smokeless flare; or,
>
> c) By other air pollution control equipment approved by the Agency according to the provisions of 35 Ill. Adm. Code 201, and further processed consistent with Section 219.108 of this Part.

Complainant responds that Section 219.143 does not provide an exemption for a Section 9(a) violation or for an exemption resulting from operator error. Mot. at 10. Based on the facts as pled by respondent, there is no indication that this blowdown resulted from normal maintenance activities. Mot. at 10. The emission was neither planned nor controlled, and thus, 35 Ill. Adm. Code 219.143 does not apply. Mot. at 10.

Respondent replies that complainant's reading of Section 219.143 is artificially narrow. Resp. at 15. Respondent asserts that nowhere in Section 219.143 is there a limitation that the release be only from normal maintenance activities. Resp. at 15. Respondent denies that the release occurred from operator error. Resp. at 15. Respondent argues that an employee of an independent contractor accidentally bumped a valve causing it to close which put the safety valve release process into motion. Resp. at 15. Respondent asserts that the sequence of events complies with Section 219.143 and is a permitted release. Resp. at 15.

Discussion

Sulfur dioxide and nitrogen oxide are inorganic materials. By its terms, Section 219.143 applies only to the emission of organic material. The Board strikes this affirmative defense because Section 219.143 is not relevant to the allegation raised in count IV. Finally, the Board notes that since respondent has withdrawn the affirmative defense (Resp. at 16), no discussion of it is necessary.

COUNT V: HYDROGEN SULFIDE RELEASE

Complainant alleges that on July 22, 1992, the Agency issued respondent Operating Permit No. 72110618 for the Rectified Absorber Unit (RAU). Supp. Comp. at 11. On July 1, 1999, IEMA received a report that hydrogen sulfide was released from a pressure relief valve (PRV) on the absorber column of the RAU. Supp. Comp. at 11. Complainant alleges that 850 pounds of hydrogen sulfide were released from the pressure relief valve on the absorber column of the RAU. Supp. Comp. at 11. The release of hydrogen sulfide by respondent has caused or tended to cause air pollution in the State. Supp. Comp. at 11. By allowing the emission of contaminants, so as to cause or tend to cause air pollution in violation of the regulations or standards adopted by the Board, respondent has violated Section 9(a) of the Act (415 ILCS 5/9(a) *amended by* P.A. 92-0574, eff. June 26, 2002) and 35 Ill. Adm. Code 201.141. Supp. Comp. at 11.

First Affirmative Defense

Respondent asserts that count V does not allege the release was in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property, as Section 3.02 (now Section 3.115) of the Act requires to demonstrate that air pollution occurred. Ans. at 25. As no air pollution occurred, no violation of Section 9(a) or 35 Ill. Adm. Code 201.141 occurred. Ans. at 25.

Complainant argues that this defense fails to raise new matter which is a defense to the allegations, and thus is not an affirmative defense. Mot. at 11

Respondent replies that it should be allowed to maintain as an affirmative defense that air pollution did not occur. Resp. at 17. Alternatively, respondent requests the opportunity to file a motion to strike count V for failure to sufficiently plead a cause of action in violation of Section 9(a) of the Act.

Discussion

The affirmative defense does not allege new facts or arguments that, if true, will defeat complainant's claim even if all allegations in the complaint are true. The assertion that air pollution did not occur is merely a denial of the allegation. Further, respondent's argument that complainant failed to allege that the release was of contaminants 'in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health or property, or to unreasonably interfere with the enjoyment of life or property', as Section 3.02 (now Section 3.115) of the Act requires, is stricken. This also is not an affirmative defense. The Board strikes the first affirmative defense.

Regarding respondent's request to file a motion to strike count II for failure to sufficiently plead a cause of action, the Board notes that pursuant to 35 Ill Adm. Code

101.506, a motion to strike must be filed within 30 days after the service of the challenged document unless the Board determines material prejudice will result. The Board does not believe material prejudice will result if a motion for leave to file a motion to strike is not granted. Therefore, respondent's request to file a motion to strike is denied. Section 3.02 of the Act defines air pollution. Whether complainant sufficiently pled facts that fit the air pollution definition is not an affirmative defense. The Board strikes the first affirmative defense.

Second Affirmative Defense

Respondent alleges as a second affirmative defense that the release was the direct and proximate result of a lightning strike to the pressure relief valve of the RAU triggering the pressure relief valve to open allowing the release. Ans. at 25. Respondent alleges the release was not the result of improper operation or maintenance of the RAU, but was the result of a malfunction breakdown caused by the lightning strike. Ans. at 25. The release was therefore not a violation of Section 9(a) or 35 Ill. Adm. Code 201.141. Ans. at 25

Complainant responds that regardless of the lightning, respondent owns the property and therefore exercised control over the pollution source. Mot. at 12-13. Complainant cites Perkinson v. PCB, 187 Ill. App. 3d 689 (3rd Dist. 1989) for the holding that lack of knowledge of pollution is not a defense. Mot. at 12-13. Complainant states that respondent has no defense to the alleged violation of the Act and Code. Mot. at 13.

Respondent replies that the Board has previously refused to strike this type of affirmative defense. Resp. at 18. Citing People v. Chiquita Processed Foods, L.L.C., PCB 02-56 (Apr. 18, 2002), respondent asserts that in that case the Board allowed an affirmative defense to stand that alleged a forcemain ruptured, causing a release, because of a vibrations from passing trains. Resp. at 18. The Board, relying on caselaw, stated that "the owner of a pollution source is responsibility for the pollution unless the facts establish that the owner either lacked the capability to control the source or had undertaken extensive precautions to prevent . . . other intervening causes." Resp. at 18, *citing* People v. Chiquita Processed Foods, L.L.C., PCB 02-56 (Apr. 18, 2002), *citing* People v. A.J. Davinroy Contractors, 618 N.E.2d 1281, 1286 (5th Dist. 1993). Respondent also distinguishes the facts in Perkinson from the facts in this case.

Discussion

As the Board stated in Chiquita, the test it applies in determining whether an alleged polluter has violated that Act is whether or not an alleged polluter exercised sufficient control over the source of the pollution. *See* People v. A.J. Davinroy Contractors, 618 N.E. 2d 1282, 1286 (5th Dist. 1993) *citing* People v. Fiorini, 574 N.E.2d 612, 623 (1991). Additionally, Davinroy also states that the owner of a pollution source "is responsible for that pollution unless the facts establish that the owner either lacked the capability to control the source or had undertaken extensive precautions to prevent . . . other intervening causes." Davinroy, 618

N.E.2d at 1287. Because respondent may be able to prove that he lacked the capability to control the pollution source, the Board will not strike this affirmative defense.

Third Affirmative Defense

Respondent alleges that the total sulfur dioxide released from the RAU did not exceed the normal 3,816 pounds allowed by 35 Ill. Adm. Code 214.382. Ans. at 26.

Complainant responds that count V alleges a release of hydrogen sulfide, not sulfur dioxide. Mot. at 13. Moreover, even if respondent meant to refer to hydrogen sulfide, the emission limit in Section 214.382 solely pertains to emissions of sulfur dioxide. Mot. at 13.

Respondent replies that "the better parameter for measurement in determining whether air pollution occurred in respect to public or private property surrounding the refinery is sulfur dioxide." Resp. at 20. Respondent argues that it is a well-settled principle of chemistry that hydrogen sulfide reacts with oxygen, when released into the atmosphere, to become sulfur dioxide and water. Resp. at 20. Respondent also argues that the Board's decision Amendments to 35 Ill. Adm. Code 214, Sulfur Limitations (Petition of Shell Oil Company), R86-30 (Nov. 3, 1988) shows that Section 214.382(b) is an affirmative defense to the release that occurred. Resp. at 20. Respondent argues that Board amended Section 214.382(b) to specifically provide the limitation for discharge of sulfur dioxide from the sulfur removal emission processes at the facility. Resp. at 21.

Discussion

Count V alleges that respondent caused a release of hydrogen sulfide, not sulfur dioxide. Despite respondent's attempt to link hydrogen sulfide and sulfur dioxide, the Board strikes this affirmative defense. By its terms, Section 214.382 is not a defense to count V.

Fourth Affirmative Defense

Respondent alleges that 35 Ill. Adm. Code 219.143 and 219.144 allow the release that is alleged in count V. Ans. at 26. Section 219.144 states:

> Section 219.143 of this Part shall not apply to any set of unregulated safety relief valves capable of causing excessive releases, provided the owner or operator thereof, by October 1, 1972, supplied the Agency with the following:
>
> a) A historical record of each such set (or, if such records were unavailable, of similar sets which, by virtue of operation under similar circumstances, may reasonably have been presumed to have the same or greater frequency of excessive releases) for a three-year period immediately preceding October 1, 1972, indicating:
>
> 1) Dates on which excessive releases occurred from each such set; and

2) Duration in minutes of each such excessive release; and

3) Quantities (in pounds) of mercaptans and/or hydrogen sulfide emitted into the atmosphere during each such excessive release.

b) Proof, using such three-year historical records, that no excessive release is likely to occur from any such set either alone or in combination with such excessive releases from other sets owned or operated by the same person and located within a ten-mile radius from the center point of any such set, more frequently than 3 times in any 12 month period;

c) Accurate maintenance records pursuant to the requirements of subsection (a) of this Section; and,

d) Proof, at three-year intervals, using such three-year historical records, that such set conforms to the requirements of subsection (c) of this Section.

Complainant asserts that Section 219.143 is not applicable to the facts as respondent has asserted. Mot. at 14. Section 219.143 does not provide for an exemption from Section 9(a) violation or for an exemption resulting from an alleged lightning strike to a pressure relief valve on the RAU. Mot. at 14. Section 219.144 only provides for an exception if certain requirements are met, and in this instance they have not been met. Mot. at 15.

Respondent replies that that complainant's reading of Section 219.143 is artificially narrow. Resp. at 21. Respondent asserts that nowhere in Section 219.143 is there a limitation that the release be only from normal maintenance activities. Resp. at 21. Respondent alleges that complainant does not dispute that Section 219.144 provides the exception that respondent alleges. Resp. at 21. Respondent asserts it can prove at hearing that the Agency was supplied with the required information for the pressure relief valve to satisfy Section 219.144.

Discussion

Hydrogen sulfide is an inorganic material. Section 219.143 applies to the emission of organic material. The Board strikes the portion of the affirmative defense regarding Section 219.143 as not relevant to the allegation raised in count V. However, the Board will not strike the affirmative defense regarding Section 219.144 because respondent may be able to prevail on that claim if respondent can show it met the requirements of that Section.

COUNT VI: FAILURE TO MAINTAIN EQUIPMENT

Complainant alleges in count VI that respondent violated Standard Condition 7 of Operating Permit No. 72110618 when respondent failed to properly maintain the RAU on July 1999, which caused air pollution in violation of Section 9(a) of the Act and 35 Ill. Adm. Code 201.141. Supp. Comp. at 12-13. Condition 7 states:

> The permittee shall maintain all equipment covered under this permit in such a manner that the performance of such equipment shall not cause a violation of the Environmental Protection Act or the regulations promulgate thereunder. Supp. Comp. at 12.

Affirmative Defenses

Respondent raises the same four affirmative defenses to count VI as it did to count V. Ans. 22-23. Complainant raises the same arguments as raised against the affirmative defenses in count V. Mot. at 15-17. For the same reasons stated concerning count V, the Board strikes the first and third affirmative defense. The Board will not strike the second affirmative defense. The Board strikes the portion of the fourth affirmative defense regarding Section 219.143 as not relevant to the allegation raised in count VI. However, the Board will not strike the affirmative defense regarding Section 219.144 because respondent may be able to prevail on that claim if respondent can show it achieved the requirements of that Section.

COUNT VII: RELEASE OF DEBRIS

Complainant alleges that on August 12, 1994, the Agency issued respondent Operating Permit No. 72110626. Supp. Comp. at 14. On January 25, 2000, the Agency received a report from IEMA of an explosion at the respondent's facility. Supp. Comp. at 14. The Agency subsequently conducted a visit. Supp. Comp. at 14. The inspection documented strong asphaltic odors, and that the roof on Tank L-174 had abruptly blown off due to an apparent increase in pressure within the tank. Supp. Comp. at 14. Mineral or rock wool and asbestos were released into the surrounding South Roxana neighborhood. Supp. Comp. at 14. A fire simultaneously occurred and lasted for over an hour-and-a-half. Supp. Comp. at 14.

The Agency learned that the tank was 60 feet wide and 48 feet high, had a capacity of 20,000 gallons, was insulated, and was heated with steam coils. Supp. Comp. at 14.

The release of insulation debris that included mineral or rock wool and asbestos caused or tended to cause air pollution. Supp. Comp. at 14. As a result of the release on January 25, 2000, the mineral or rock wool and asbestos settled onto private and public property, which unreasonably interfered with the enjoyment of life and property. Supp. Comp. at 15. By allowing the emission of contaminants so as to cause or tend to cause air pollution, respondent violated Section 9(a) of the Act and 35 Ill. Adm. Code 201.141. Supp. Comp. at 15.

Affirmative Defense

Respondent argues that any mineral or rock wool that settled onto public or private property was promptly removed and did not unreasonably interfere with the enjoyment of life or property. Ans. at 36.

Complainant alleges that respondent did not assert that asbestos was promptly removed. Mot. at 17. Regardless, complainant states that removing the materials is not an affirmative

defense. Mot. at 17. Additionally, respondent does not raise a new matter that constitutes a defense to the allegations. Mot. at 17.

Respondent replies that the affirmative defense discloses new facts, which if proven at hearing would defeat complainant's claim. Resp. at 24. Respondent alleges that if it can show that respondent promptly and completely removed the insulation, the air pollution may not have occurred. Resp. at 24.

Discussion

Respondent's affirmative defense addresses information relevant to the imposition of a penalty rather than whether or not air pollution occurred. The Board has previously held that affirmative defenses that concern factors in mitigation are not an appropriate affirmative defense to a claim that a violation has occurred. People v. Geon Company, Inc., PCB 97-62 (Oct. 2, 1997); People v. Midwest Grain Products of Illinois, Inc., PCB 97-179 (Aug. 21, 1997). The Board strikes respondent's affirmative defense to count I because it is not an affirmative defense. The Board reminds the parties that at hearing, respondent may introducing evidence regarding any clean-up efforts initiated by respondent.

COUNT XIII: TANK MAINTENANCE AND DIESEL FUEL RELEASE

Based on the alleged facts in count VII, Complainant alleges that respondent failed to properly maintain the roof on Tank L-174 so as not to cause, threaten or allow air pollution. Supp. Comp. at 16. Also, by failing to properly maintain the roof on the tank and cause air pollution in violation of Section 9(a) of the Act and 35 Ill Adm. Code 201.141, respondent violated Condition No. 7 of Operating Permit No. 72110637 (see p.2 above). Supp. Comp. at 16. Supp. Comp. at 16. Additionally, by releasing gaseous hydrocarbons, hydrogen sulfide, and diesel oil from the refinery, respondent violated Section 9(b) of the Act (see p. 2 above) and Condition No. 7 of Operating Permit No. 72110637. Supp. Comp. at 16.

Affirmative Defense

Respondent alleges that count VIII does not allege that the release of mineral or rock wool was in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health or to property, or to unreasonably interfere with the enjoyment of life or property as Section 3.02 (now Section 3.115) of the Act requires, so no violation of Section 9(a) or the Act or 35 Ill. Adm. Code 201.141 occurred. Ans. at 39-40. Respondent also alleges that count VIII did not allege the release of gaseous hydrocarbons, hydrogen sulfide and diesel oil was in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health or to property, or to unreasonably interfere with the enjoyment of life or property as Section 3.02 (now Section 3.115) of the Act requires so no violation of Section 9(a) or the Act or 35 Ill. Adm. Code 201.141 occurred. Ans. at 39-40. Respondent also alleges that the operating permit was for a distillate hydrotreater and not Tank L-174, so no permit violation could have occurred. Ans. at 39.

Complainant responds that respondent's affirmative defense is really an allegation that complainant failed to state a cause of action against respondent. Mot. at 18. Complainant further responds that respondent alleges no new matter which is a defense to the allegations and therefore is not an affirmative defense. Mot. at 18.

Respondent replies that the affirmative defense raises factual and legal arguments which constitute at least a possible defense to complainant's claim and should not be stricken. Resp. at 26. Alternatively, respondent argues they should be allowed to file a motion to strike for failure to sufficiently plead a cause of action for permit violations. Resp. at 26.

Discussion

The affirmative defense does not allege new facts or arguments that, if true, will defeat complainant's claim even if all allegations in the complaint are true. The assertion that air pollution did not occur is merely a denial of the allegation itself. Further, respondent's argument that complainant failed to allege that the release was of contaminants 'in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health or property, or to unreasonably interfere with the enjoyment of life or property', as Section 3.02 (now Section 3.115) of the Act requires, is stricken. This is not an affirmative defense because it attacks the sufficiently of the claim itself. The Board strikes the affirmative defense.

Regarding respondent's request to file a motion to strike for failure to sufficiently plead a cause of action, the Board notes that pursuant to 35 Ill Adm. Code 101.506, a motion to strike must be filed within 30 days after the service of the challenged document unless the Board determines material prejudice will result. The Board does not believe material prejudice will result if a motion for leave to file a motion to strike is not granted. Therefore, respondent's request to file a motion to strike is denied.

COUNT IX: SHIPMENT TO IMPROPER FACILITY

Complainant alleges that respondent shipped hazardous carbon containing benzene to a disposal facility that had not received an Agency identification number in violation of Section 21(e) of the Act and 35 Ill. Adm. Code 722.112(c). Supp. Comp. at 19. Section 21(e) states that no person shall:

> Dispose, treat, store or abandon any waste, or transport any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder. 415 ILCS 5/21(e)(2000) *amended by* P.A. 92-0574, eff. June 26, 2002.

35 Ill. Adm. Code 722.112(c) states:

> A generator must not offer his hazardous waste to transporters or to treatment, storage or disposal facilities that have not received an EPA identification number.

Specifically, complainant states that at respondent's facility, there is a wastewater treatment plant that treats wastewater for benzene content. Supp. Comp. at 17. The wastewater is the product of a unit within the plant that generates a waste stream consisting of spent carbon from air pollution control equipment. Supp. Comp. at 17. On July 24, 1998, the Agency received a call from respondent that a 10 cubic yard roll-off box containing 9,998 pounds of spent carbon that was characteristically hazardous for benzene was inadvertently shipped to the Roxana landfill, a solid waste-only facility on July 14 1998. Supp. Comp. at 18. After shipment to the landfill, the carbon was deposited in the active face, and covered with other wastes and daily cover. Supp. Comp. at 18.

First Affirmative Defense

Respondent argues that due to the properties of benzene and carbon, the benzene will remain bound to the carbon in the landfill until the benzene has biodegraded to methane. Ans. at 44. Therefore, the benzene will not leach from the landfill and disposal of the benzene and carbon poses no greater threat to human health or the environment than does disposal of benzene contained in petroleum-contaminated soil from underground storage tanks (UST), which the landfill is license to, and does, accept. Ans. at 44.

Complainant replies that neither Section 21(e) of the Act nor 35 Ill. Adm. Code 722.112(c) require poof that the benzene will not leach or that it poses no greater threat to human health or the environment than benzene contained in petroleum contaminated soil from UST sites. Mot. at 19. Therefore, this affirmative defense is not an affirmative defense. Mot. at 19.

Respondent replies that the defense gives color to the complainant's allegations, but alleges facts which could possibly defeat complainant's claim. Resp. at 28. Respondent argues the respondent may be able to demonstrate that the waste will never leave the landfill and therefore "the essence of what the statutes and regulation relied upon by the State are designed to do – prevent the waste from becoming a threat of harm to human health or the environment, has not been violated." Resp. at 28. Respondent states these are new facts which show the "goals of the statutes and regulations" have not been violated. Resp. at 28. Also, these are new facts which may take the State by surprise at hearing. Resp. at 28.

Discussion

Respondent's affirmative defense addresses information relevant to the imposition of a penalty rather than that violations of 21(e) of the Act or 35 Ill. Adm. Code 722.112(c) occurred. The Board has previously held that affirmative defenses that concern factors in mitigation are not an appropriate affirmative defense to a claim that a violation has occurred. People v. Geon Company, Inc., PCB 97-62 (Oct. 2, 1997); People v. Midwest Grain Products

of Illinois, Inc., (Aug. 21, 1997). 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 IX. The Board strikes respondent's first affirmative defense to Count IX because it is not an affirmative defense. The Board reminds the parties that at hearing, respondent may introduce evidence regarding any clean-up efforts initiated by respondent.

Second Affirmative Defense

Respondent asserts as a second affirmative defense that respondent hired a licensed disposal contractor to perform all necessary testing and characterization of the spent carbon, and to properly dispose of the spent carbon. Ans. at 45. Any failure to properly dispose of the benzene was the result of an act or omission of the contractor. Ans. at 45

Complainant responds that this affirmative defense is irrelevant to this case. Mot. at 19. Citing the language of 21(e) and Section 722.112, complainant argues it is clear that it was respondent's duty to comply with the provisions of the Act and regulations. Mot. at 20. Complainant states that the language does not negate a generator's liability, even if a contractor, by act or omission, violates the Act or regulations. Mot. at 20. Respondent had control over the source of pollution and the capability to control the pollution. Mot. at 20.

Respondent replies that the Board has previously recognized the actions of an independent contractor may relieve the owner of liability under the Act. Resp. at 30, *citing* Forest Preserve District of DuPage County v. Mineral and Land Resources Corp. *et al.*, PCB 96-84 (Dec. 18, 1997) and People v. Geon Company, PCB 97-62 (Oct. 2, 1997).

Discussion

The Board will not strike this affirmative defense because respondent may be able to prevail on this count. *See* Discussion for count IV, Defense 2 on page 10 of this opinion and order.

COUNT X: IMPROPER MANIFESTS AND DISPOSAL FACILITY

Complainant alleges the manifests prepared by respondent for transportation of the hazardous carbon containing benzene designated the Roxana landfill, a facility which is not permitted to accept hazardous waste. Supp. Comp. at 20. Complainant alleges that respondent failed to prepare the manifests for the transportation of the hazardous carbon containing benzene, and failed to designate a facility which is permitted to accept the hazardous waste, thus violating Section 21(e) of the Act and 35 Ill. Adm. Code 722.120(a) and (b). Supp. Comp. at 20. Section 722.120(a) and (b) state:

> (a) A generator who transports, or offers for transportation, hazardous waste for off-site treatment, storage or disposal must prepare a manifest before transporting the waste off-site.

(b) A generator must designate on the manifest one facility which is permitted to handle the waste described on the manifest.

Affirmative Defenses

Respondent alleges the same two affirmative defenses as it did for count IX. Complainant's requests to strike the defense are the same as count IX. Respondent incorporated by reference the replies to the affirmative defenses for count IX.

Discussion

The Board strikes the first affirmative defense, but not the second affirmative defense for the reasons stated in count IX Discussion above.

COUNT XI:

Complainant alleges that respondent did not placard or offer the initial transporter of the hazardous carbon containing benzene appropriate placards for hazardous materials pursuant to Department of Transportation regulations listed at 49 C.F.R. Part 172, Subpart F. Supp. Comp. at 21. Section 722.133 of the Board's waste disposal regulations provides:

> Before transporting hazardous waste or offering hazardous waste for transportation off-site, a generator must placard or offer the initial transporter the appropriate placards according to Department of Transportation regulations for hazardous materials under 49 CFR Part 172, Subpart F.

By failing to placard or offer the initial transporter the appropriate placards for hazardous material pursuant to the Department of Transportation regulations, respondent violated Section 21(e) of the Act and 35 Ill. Adm. Code 722.122.

Affirmative Defense

Respondent argues respondent hired a licensed disposal contractor to perform all necessary testing and characterization of the spent carbon, and to properly dispose of the spent carbon. Ans. at 50. Any failure to properly placard the benzene was the result of an act or omission of the contractor. Ans. at 50.

Complainant reiterates its argument from count IX's second affirmative defense that respondent exercised control over the pollution source and respondent has no defense to the count. Mot. at 22.

Respondent re-alleges its response to complainant's arguments against Count IX's affirmative defense that the Board has previously recognized the actions of an independent contractor may relieve the owner of liability under the Act. Resp. at 30, *citing* Forest Preserve District of DuPage County v. Mineral and Land Resources Corp. *et al.*, PCB 96-84 (Dec. 18, 1997); and People v. Geon Company, PCB 97-62 (Oct. 2, 1997).

Discussion

The Board will not strike this affirmative defense as complainant may be able to prevail on this claim for the reasons discussed in the second affirmative defense for count IX above.

COUNT XII: FAILURE TO NOTIFY FACILITY

Complainant alleges respondent violated Section 21(e) of the Act and 35 Ill. Adm. Code 728.107(a)(1)[2] by failing to notify the treatment or storage facility in writing of the appropriate treatment standard and any applicable prohibition levels. Supp. Comp. at 23.

Section 728.107(a)(1) stated:

> Except as specified in Section 728.132, where a generator's waste is listed in 35 Ill. Adm. Code 721, Subpart D, the generator shall test his waste, or test an extract using the test method described in 35 Ill. Adm. Code 721, Appendix B, or use knowledge of the waste, to determine if the waste is restricted from land disposal under this Part. Except as specified in Section 728.132, if a generator's waste exhibits one or more of the characteristics set out in 35 Ill. Adm. Code 721, Subpart C, the generator must test an extract using the test method described in 40 CFR 268, Appendix IX (Extraction Procedure (EP) Toxicity Test Method and Structural Integrity Test (SW-846, Method 1310A)) as incorporated by reference in 35 Ill. Adm. Code 720.111, or use knowledge of the waste, to determine if the waste is restricted from land disposal under this Part. If the generator determines that his waste displays the characteristics of ignitability (D001)(and is not the High TOC Ignitable Liquids Subcategory or is not treated by INCIN, FSUBS, or RORGS or Section 728. Table C of this Part), or the characteristic or corrosivity (D002), and is prohibited under Section 728.137, the generator must determine shat underlying hazardous constituents (as defined in Section 728.102 of this Part), are reasonably expected to be present in the D001 or D002 waste.
>
> 1. If a generator determines that the generator is managing a restricted waste under this Part and determines that the waste does not meet the applicable treatment standards set forth in Subpart D of this Part or exceeds the applicable prohibition levels set forth in Section 728.132 or 728.139, with each shipment of waste the generator shall notify the

[2] This section was amended in an identical-in-substance rulemaking RCRA Update, USEPA Regulations (July 1, 1996 through December 31, 1996), R97-21, UIC Update, USEPA Regulations (January 1, 1997 through June 30, 1997), R98-3, RCRA Update, UPEPA Regulations (January 1, 1997 through June 30, 1997), R98-5, (Aug. 20, 1998). The language of the section as it is cited in the supplemental complaint is accurate for when the alleged offense occurred.

> treatment or storage facility in writing of the appropriate treatment standard set forth in Subpart D of this Part and any applicable prohibition levels set forth in Section 728.132 or 728.139.

First Affirmative Defense

Respondent argues that due to the properties of benzene and carbon, the benzene will remain bound to the carbon in the landfill until the benzene has biodegraded to methane. Ans. at 53. Therefore, the benzene will not leach from the landfill and disposal of the benzene and poses no greater threat to human health or the environment than does disposal of benzene contained in petroleum-contaminated soil from USTs, which the landfill is license to, and does, accept. Ans. at 53.

Complainant asserts that neither Section 21(e) of the Act nor 35 Ill. Adm. Code 722.112(c) require poof that the benzene will not leach or that it poses no greater threat to human health or the environment than benzene contained in petroleum contaminated soil from UST sites. Mot. at 23. Therefore, this affirmative defense is not an affirmative defense. Mot. at 23.

Respondent adopts and re-alleges the response to the first affirmative defense to Count IX.

Discussion

Respondent's affirmative defense addresses information relevant to the imposition of a penalty rather than violations of 21(e) of the Act or 35 Ill. Adm. Code722.112(c) occurred. The Board has previously held that affirmative defenses that concern factors in mitigation are not an appropriate affirmative defense to a claim that a violation has occurred. People v. Geon Company, Inc., PCB 97-62 (Oct. 2, 1997); People v. Midwest Grain Products of Illinois, Inc., (Aug. 21, 1997). 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 XII. The Board strikes respondent's affirmative defense because it is not an affirmative defense.

Second Affirmative Defense

Respondent asserts as a second affirmative defense that respondent hired a licensed disposal contractor to perform all necessary testing and characterization of the spend carbon, and to properly dispose of the spent carbon. Ans. at 53. Any failure to properly dispose of the benzene was the result of an act or omission of the contractor. Ans. at 53.

Complainant argues it's clear that it was respondent's duty to comply with the provisions of the Act and regulations. Mot. at 23. Respondent had control over the source of pollution. Mot. at 23.

Respondent replies that the Board has previously recognized the actions of an independent contractor may relieve the owner of liability under the Act. Resp. at 32, *citing* Forest Preserve District of DuPage County v. Mineral and Land Resources Corp. *et al.*, PCB 96-84 (Dec. 18, 1997), and People v. Geon Company, PCB 97-62 (Oct. 2, 1997).

Discussion

The Board strikes the first affirmative defense, but not the second affirmative defense for the reasons given in the discussion of count IX.

COUNT XIII: IMPROPER DISPOSAL

Complainant alleges that respondent violated Section 21(e) of the Act and 35 Ill. Adm. Code 728.138(a) by land disposing of debris contaminated with United State Environmental Protection Agency waste number D018. Section 728.138(a) states:

> The wastes specified in 35 Ill. Adm. Code 721.132 as U.S. EPA hazardous waste numbers K141, K142, K143, K144, K145, K147, K148, K149, K150, and K151 are prohibited from land disposal. In addition, debris contaminated with U.S. EPA hazardous waste numbers F037, F038, K107 through K112, K117, K118, K123 through K126, K131, K132, K136, U328, U353, U359 and soil and debris contaminated with D012 through D043, K141 through K145, and K147 through K151 are prohibited from land disposal. The following wastes that are specified in the table at 35 Ill. Adm. Code 721.124(b) as U.S. EPA hazardous waste numbers D012, D013, D014, D015, D016, D017, D018, D019, D020, D021, D022, D023, D024, D025, D026, D027, D028, D029, D030, D031, D032, D033, D034, D035, D036, D037, D038, D039, D040, D041, D042, and D043 that are not radioactive, that are managed in systems other than those whose discharge is regulated under the federal Clean Water Act (CWA; 33 U.S.C. Sections 1251 et seq.), that are zero dischargers that do not engage in CWA-equivalent treatment before ultimate land disposal, or that are injected in Class I deep wells regulated under the Safe Drinking Water Act (SDWA) are prohibited from land disposal. "CWA-equivalent treatment", as used in this Section, means biological treatment for organics, alkaline chlorination or ferrous sulfate precipitation for cyanide, precipitation and sedimentation for metals, reduction for hexavalent chromium, or another treatment technology that can be demonstrated to perform equally to or better than these technologies.

Affirmative Defenses

Identical defenses are made for count XIII as made for count IX. The arguments to strike the defense are also the same as made for count IX.

Discussion

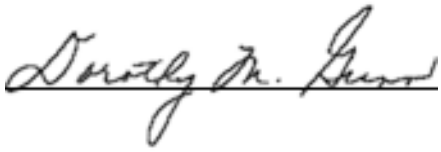
For the reasons stated concerning count IX, the Board strikes the first affirmative defense and will not strike the second affirmative defense.

CONCLUSION

In sum, the Board grants in part and denies in part complainant's motion to strike affirmative defenses.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on August 8, 2002, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board