ILLINOIS POLLUTION CONTROL BOARD
November 6, 2003

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	PCB 02-03
TEXACO REFINING and MARKETING, INC.,	)	(Enforcement – Land, Water)
	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by N.J. Melas):

On July 12, 2001, the People of the State of Illinois (People) filed a two-count complaint against Texaco Refining & Marketing, Inc. (Texaco). The complaint alleges that Texaco caused or allowed contamination of groundwater resulting in water pollution and caused or allowed the open dumping of waste at its facility located in Lockport, Will County (site). These activities were in alleged violation of Section 12(a) and 21(a) of the Environmental Protection Act (Act) (415 ILCS 5/12(a), 21(a) (2002)) and 35 Ill. Adm. Code 620.405.

On July 9, 2003, Texaco filed an answer and thirteen alleged affirmative defenses (Ans.). On July 25, 2003, the People filed a motion to strike all thirteen alleged affirmative defenses (Mot. to Strike). On August 7, 2003, Texaco filed a response to the People's motion to strike (Resp.). The People filed a motion for leave to reply (Mot. for Leave), accompanied by a reply (Reply), on August 20, 2003. Texaco opposed the People's motion for leave to file a reply in a filing dated September 2, 2003.

Section 101.500(e) of the Board's procedural rules provides that the moving party "will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice." 35 Ill. Adm. Code 101.500(e). The People's motion is timely and seeks to reply only to the fourth, seventh, eighth, ninth, and eleventh affirmative defenses. The People assert that Texaco initially argued these particular alleged affirmative defenses vaguely, then further clarified them in Texaco's response brief. Therefore, the People contend they will suffer material prejudice if not permitted to reply to Texaco's response. Mot. for Leave at 1. The Board finds the additional information and clarification Texaco provides in its response merits an opportunity to reply by the People. Accordingly, the Board grants the People's motion for leave to reply and accepts the reply brief.

For the reasons stated below, the Board grants the People's motion to strike nine of the thirteen alleged affirmative defenses. The Board denies the People's motion to strike the remaining four affirmative defenses, specifically, defenses 4, 6, 8, and 12.

BACKGROUND

The Site

Texaco was a Delaware corporation and operated an oil refinery from 1910 to 1981 located 301 West 2nd Street, Lockport in Will County. Comp. at 2. Texaco alleges that the corporate entity, Texaco Refining & Marketing, Inc., was succeeded by Chevron Environmental Services Company (Chevron). Ans. at 2. The People allege Texaco closed five Resource Conservation and Recovery Act (RCRA) interim waste disposal units at the facility in 1987. Comp. at 2. Texaco alleges the five units closed in 1987 consisted of one disposal unit and four treatment units. Ans. at 2. The parties agree Texaco performed the closure in accordance with an approved plan. Comp. at 2; Ans. at 2. The parties agree that under the closure plan, Texaco monitors and submits groundwater reports to the Environmental Protection Agency (Agency). Comp. at 3; Ans. at 3. The parties agree that in 1998 and 1999, Texaco detected constituents in eight monitoring wells. *Id.*; Comp. Exh. A. Additionally, Texaco's groundwater monitoring reports contained physical descriptions of groundwater samples. Comp. at 4, Exh. B; Ans. at 5. For example, the reports indicated water samples were turbid, brownish yellow or grayish, had oil droplets, film or sheen and/or hydrocarbon odor. *Id*.

Agency Action

Texaco agrees that it received a notice of violation letter on July 21, 1999, regarding the groundwater contamination. Comp. at 4; Ans. at 5. Texaco also agrees that it met with the Agency on October 6, 1999, and that subsequent to the meeting Texaco submitted compliance commitment agreements that were rejected by the Agency. *Id*. Texaco alleges the Agency indicated that the proposed agreements were rejected merely because the People wanted to collect a penalty, as opposed to any technical deficiency. Ans. at 6. Texaco agrees that it received notices of intent to pursue legal action from the Agency on December 14, 1999, and that the parties held a meeting concerning these letters on January 18, 2000. Comp. at 4-5; Ans. at 6.

The parties agree that the Agency inspected the Texaco facility on July 28, 1999. Comp. at 14; Ans. at 16. The People allege the Agency inspector observed coke fines and black tar-like material scattered across the ground in various areas over approximately an acre of the site. Comp. at 14. The People allege that coke was previously processed at the site until approximately 1981. *Id*. Texaco admits that coke was previously processed at the site until 1981, and adds that an independent contractor, Great Lakes Carbon, was the processor. Ans. at 16. The parties agree that on September 28, 1999, Texaco shipped coke fines and tar-like material to Allied Waste Services located in Morris, Grundy County, listing the waste as petroleum coke contaminated soil. Comp. at 14; Ans. at 16.

Exceedances of Groundwater Quality Standards

The People state that Texaco's 1998 fourth quarter groundwater monitoring results show Class I groundwater quality standards were exceeded for the following chemical constituents in various monitoring wells at the site: arsenic, lead, benzene, benzo(a)pyrene, bis(2-ethylhexyl)-

pthalate, chromium, ethylbenzene, toluene and xylenes. Comp. at 9; Comp. Exh. A. Texaco admits these exceedances occurred, but denies they constitute violations of Class I groundwater quality standards. Ans. at 10. The People state that Texaco's 1998 fourth quarter groundwater quality monitoring results show Class II groundwater quality standards were exceeded for the following constituents at the site: lead, benzo(a)pyrene, and bis(2-ethylhexyl)-pthalate. Comp. at 10; Comp. Exh. A. Texaco also admits these exceedances occurred but denies they constitute violations of Class II groundwater quality standards. Ans. at 11.

APPLICABLE LAW

Section 12(a) of the Act provides:

> No person shall: (a) cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act. 415 ILCS 5/12(a) (2002).

Section 620.405 of the Board's Groundwater Quality Regulations provides:

> No person shall cause, threaten or allow the release of any contaminant to groundwater so as to cause a groundwater quality standard set forth in this subpart to be exceeded. 35 Ill. Adm. Code 620.405.

Section 21(a) of the Act provides:

> No person shall: (a) cause or allow the open dumping of any waste. 415 ILCS 5/21(a) (2002).

STANDARD

The Board's procedural rules provide that "any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing." 35 Ill. Adm. Code 103.204(d). In a valid affirmative defense, the respondent alleges "new facts or arguments that, if true, will defeat . . . the government's claim even if all allegations in the complaint are true." People v. Community Landfill Co., PCB 97-193, slip op. at 3 (Aug. 6, 1998). The Board has also defined an affirmative defense as a "response to a plaintiff's claim which attacks the plaintiff's legal right to bring an action, as opposed to attacking the truth of claim." Farmer's State Bank v. Phillips Petroleum Co., PCB 97-100, slip op. at 2 n. 1 (Jan. 23, 1997) (quoting *Black's Law Dictionary*). Furthermore, if the pleading does not admit the opposing party's claim, but instead attacks the sufficiency of that claim, it is not an affirmative defense. Warner Agency v. Doyle, 121 Ill. App. 3d 219, 221, 459 N.E.2d 663, 635 (4th Dist. 1984).

DISCUSSION

Count I – Water Pollution

In count I, the People allege that Texaco caused or allowed water pollution in violation of Section 12(a) of the Act. 415 ILCS 5/12(a) (2002). The People also allege Texaco violated Section 620.405 of the Act because contaminants in the groundwater sampled at the Texaco facility exceed Class I and Class II groundwater quality standards (Class I and Class II groundwater quality standards are found at 35 Ill. Adm. Code 620.410 and 610.420, respectively). 35 Ill. Adm. Code 620.405. The People further allege that Texaco violated Section 12(a) of the Act because the contaminants in the sampled groundwater exceed one or more of the following objectives or detection limits: (1) Tier 1, Class I Groundwater Remediation Objectives found at 35 Ill. Adm. Code 742, Appendix E; (2) Tier 1, Class II Groundwater Remediation Objectives found at 35 Ill. Adm. Code 742, Appendix B, Table E; (3) two times the PQL:[1] and (4) the PQL where more than one constituent in a well is above the PQL.[2] Texaco answered that the alleged violations are legal conclusions and neither admitted nor denied the allegations.

Count II- Open Dumping

In count II, the People allege that by allowing coke fines and tar-like material to be disposed of or stored on the ground in areas covering approximately an acre of the site, Texaco caused or allowed the consolidation of waste at the site. Comp. at 17. Texaco denies that it allowed the consolidation of waste at the site. Ans. at 19. The People also allege that from July 28, 1999 until September 28, 1999, Texaco caused or allowed the open dumping of the coke fines and tar-like material at the site, a site that did not fulfill the requirements of a sanitary landfill, in violation of Section 21(a) of the Act. 415 ILCS 5/21(a); Comp. at 17. Texaco denies these allegations. Ans. at 19.

Affirmative Defenses

After its admissions and denials, Texaco presented thirteen affirmative defenses to the alleged violations. The People have moved to strike all thirteen affirmative defenses. First the

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[1] Section 620.110 of the Board's Groundwater Quality Regulations defines PQL as follows: "'Practical Quantitation Limit' or 'PQL' means the lowest concentration or level that can be reliably measured within specified limits of precision and accuracy during routine laboratory operation conditions in accordance with 'Test Methods for Evaluating Solid Wastes, Physical/Chemical Methods', EPA Publication No. SW-846, incorporated by reference at Section 620.125." 35 Ill. Adm. Code 620.110.

[2] Texaco's Agency approved post closure plan establishes a tolerance range of two times the PQL. An exceedance occurs where: (1) two immediately consecutive samples exceed the tolerance range for one value; or (2) any two or more parameter values for a single well exceed the established PQL. Comp. at 12.

Board will address the affirmative defenses alleged by Texaco, the arguments presented by both parties, and then strike allegations that have no merit. The affirmative defenses are as follows:

1. The People's request for injunctive relief is moot because the alleged illegal activities have ceased or no longer exist;

2. The People are not entitled to costs under the Act;

3. Because Texaco has voluntarily installed ground water remedial systems, any penalty imposed would not serve to bring Texaco into compliance with the Act and would therefore be in appropriate;

4. Because the coke fines at the site were produced by an independent contractor, they are not "waste," and their presence on the site does not constitute "open dumping" by Texaco;

5. Because Texaco had already entered into a contract for the sale and reuse of some of the coke fines, a penalty is not appropriate under the Act;

6. The State's claims are barred by estoppel;

7. Because Texaco was in compliance with interim status and regulatory ground water requirements when the alleged violations occurred, Texaco did not violate the Act;

8. The Board's ground water standards found at 35 Ill. Adm. Code 620 did not apply to Texaco while Texaco was in compliance with interim status ground water regulatory requirements, and later a permitted groundwater management zone;

9. Application of the Board's ground water standards found at 35 Ill. Adm. Code 620 would constitute retroactive regulation in violation of Texaco's due process rights;

10. Application of the Act's prohibition against open dumping would constitute retroactive regulation in violation of Texaco's due process rights;

11. Violations of Tiered Approach to Corrective Action Objectives (TACO) remediation objectives (35 Ill. Adm. Code Part 742) and PQLs cited by the People are not enforceable standards in this matter and cannot form the basis of a violation of the Act; further, TACO remediation objectives are not applicable to the site because the site is subject to a federally delegated program;

12. Section 49(c) of the Act provides Texaco with a prima facie defense to any and all alleged violations of groundwater standards at the site; and

13. Texaco reserves the right to assert additional defenses as development of this matter continues.

First Affirmative Defense – The People's Request for Injunctive Relief is Moot

The People argue Texaco's mootness claim does not constitute an affirmative defense because it defends against relief sought, not liability. Mot. to Strike at 4. The People contend this defense raises a mitigation factor, which the Board has previously determined is not an affirmative defense. *Id.*; *citing* People v. Geon Co., Inc., PCB 97-62 (Oct. 2, 1997). The People also note an appellate court has held that the argument that an illegal activity has stopped is not a defense to a request for injunctive relief when a party is seeking a statutorily authorized injunction. Mot. to Strike at 4; *citing* Village of Riverdale v. Allied Waste Transportation, Inc., 334 Ill. App. 3d 224, 231, 777 N.E.2d 684, 690 (1st Dist. 2002). The People argue that for these reasons Texaco's first alleged affirmative defense is not proper and should be struck.

Texaco argues that the People have no legal basis for a claim of injunctive relief because all of the alleged violations have been resolved to the satisfaction of the Agency. Resp. at 12. Texaco further argues that Village of Riverdale is distinguishable from the present situation because in that case, ongoing violations were possible whereas here the alleged violations no longer exist. Resp. at 12. Texaco illustrates this point by arguing that groundwater is being remediated and is subject to a site-wide Groundwater Management Zone, and almost all of the coke fines have been removed in accordance with Agency-approved plans. *Id*. Texaco argues there is no current violation, and thus, the People's claim for injunctive relief is moot.

The Board finds that the issue of whether a claim for injunctive relief is moot pertains to remedy, not the cause of action. The fact that Texaco may have subsequently complied does not defeat the People's claims of water pollution or open dumping. The Board finds that Texaco's first alleged affirmative defense is not an affirmative defense and grants the People's motion to strike this affirmative defense. The Board notes that nothing precludes Texaco from raising this information in a remedy analysis as the information relates to Section 33(c) and 42(h) factors. .

Second Affirmative Defense – Complainant is Not Entitled to an Award of Costs

The People argue that a mere denial of well-plead facts does not constitute an affirmative defense. Mot. to Strike at 5; *citing* People v. Wood River Refining Co., Farmer's State Bank, PCB 99-120 at 6 (Aug. 8, 2002). Rather an affirmative defense must raise a new matter that, if true, defeats a complainant's claim. The People argue that Texaco's second alleged affirmative defense merely states the People are not entitled to costs under Section 42(f) because they do not meet the required conditions. Mot. to Strike at 5; 415 ILCS 5/42(f) (2002).

Texaco responds that the People have not claimed that the alleged violations are willful, repeated or knowing, as required for the People to collect costs under Section 42(f) of the Act. 415 ILCS 5/42(f) (2002). Therefore, Texaco contends, the People can make no claim for costs under the Act. Resp. at 13.

The Board finds that Texaco has not alleged any new facts in this alleged affirmative defense that if true may defeat the People's claims of groundwater contamination and open dumping even assuming all of the allegations in the complaint are true. Whether the People are entitled to costs is a determination that is made separate from and subsequent to a finding of violation. The Board grants the People's motion to strike this defense.

Third Affirmative Defense – Texaco's Voluntary Actions at the Site Render Any Penalty Inappropriate

In its third alleged affirmative defense, Texaco argues that because it voluntarily installed groundwater remedial systems at the site and has continued to comply with all Agency requirements, any penalty imposed would be inappropriate under the Act. Ans. at 20-21. Texaco did not address this affirmative defense in its response.

The People contend this alleged affirmative defense does not raise any defense to liability and should therefore be struck. Mot. to Strike at 5. The People argue that Section 33 of the Act provides that "[i]t shall not be a defense to findings of violations of the provisions of the Act or Board regulations or a bar to the assessment of civil penalties that the person has come into compliance subsequent to the violation" except where an applicable statute of limitations bars the action. *Id*.; *citing* 415 ILCS 5/33(a) (2002). The People further contend that Texaco did not allege that it came into compliance; merely that it attempted to address some violations. Mot. to Strike at 5-6.

The People state that this defense, that Texaco exercised due diligence in addressing the alleged violations, simply raises mitigation factors. Mot. to Strike at 6. The People note that due diligence is one of the factors the Board considers when determining the appropriate penalty amount after finding liability. 415 ILCS 5/42(h)(2) (2002). The People argue the Board has found that penalty mitigation factors are not affirmative defenses and has struck them when raised as such. Mot. to Strike at 6; *citing* People v. QC Finishers, Inc., PCB 01-7 at 5 (June 19, 2003); People v. Geon Co., Inc., PCB 97-62 (Oct. 2, 1997). The People contend that for these reasons Texaco's third alleged affirmative defense does not constitute a proper affirmative defense and should be struck. Mot. to Strike at 6.

The Board finds that voluntary compliance subsequent to a finding of violation is not an affirmative defense. Voluntary compliance relates to the issue of remedy and not to the cause of action. Information relating to Texaco's voluntary compliance may be raised during the remedy analysis. The Board grants the People's motion to strike Texaco's third alleged affirmative defense.

Fourth Affirmative Defense – Independent Contractor Defense

The People contend that Texaco's fourth alleged affirmative defense does not raise any new matters that, if true, would defeat the People's claims. Mot. to Strike at 6-7. Furthermore, the People argue this alleged affirmative defense is vague and should be stricken. Mot. to Strike at 7.

Texaco argues the state's claims in count II are barred because the materials deposited do not constitute "waste" within the meaning of Section 3.53 of the Act because the coke materials were in fact a product held for sale for recycling. Resp. at 10. Texaco further contends that an independent contractor is responsible for processing the coke fines found at the site. *Id*. Texaco contends the Board has recognized the independent contractor affirmative defense in the past. Resp. at 10; *citing* People v. Wood River Refining Co., PCB 99-120 (Aug. 8, 2002). Texaco argues it has properly pled this two-fold affirmative defense and it should not be struck. Resp. at 11.

The Board has found that owners' use of independent contractors may relieve the owner of liability under the Act, but owners can still be liable for the actions of independent contractors. Wood River Refining, slip op. at 10. The Act makes it unlawful to "cause" or "allow" pollution. Furthermore, a person can cause or allow a violation of the Act without knowledge or intent. County of Will v. Utilities Unlimited, Inc., AC 97-041, slip op. at 5 (July 24, 1997). The determinative question is whether the "respondent is in such a relationship to the transaction that it is reasonable to expect him to exercise control to prevent pollution." Wood River Refining, slip op. at 1-0; *citing* EPA v. James McHugh Construction Co., PCB 71-291 (May 17, 1972).

Regarding the definition of "waste," what Texaco claims it intended to do with the coke fines at some later date is not dispositive of whether the materials constitute waste. *See* IEPA v. Springer, AC 02-7, slip op. at 14 (Aug. 8, 2002). However, if Texaco can show that the coke fines present on the site do not constitute waste under the meaning of the Act, or that Texaco could not have reasonably been expected to exercise control to prevent the pollution, Texaco may be able to prevail on count II of the complaint. Accordingly, the Board denies the People's motion to strike Texaco's fourth alleged affirmative defense.

Fifth Affirmative Defense – Intent to Sell Coke Fines for Reuse Renders Any Penalty Inappropriate

Texaco argues that because it intended to sell some of the coke fines for reuse before the Agency issued any notice of violation, no penalty is appropriate under the Act. Ans. at 21.

The People assert that the allegations in Texaco's fifth alleged affirmative defense, like those in the third, are not defenses to liability, are not proper affirmative defenses, and should be struck. Mot. to Strike at 6. Similarly, the People state Texaco's fifth affirmative defense raises mitigation factors that may be raised by Texaco in the remedy phase of this proceeding, should there be one. *Id*.

The Board finds Texaco's fifth affirmative defense addresses penalty rather than the cause of action. Accordingly, the Board grants the People's motion to strike this defense.

Sixth Affirmative Defense – Estoppel

Texaco alleges that the People's claims are barred by the doctrine of estoppel. Ans. at 21. Texaco contends that the People knew of the violations alleged in count II of the complaint

for years without asserting that any violation existed. *Id*. Texaco claims that because the People asserted that coke fines have been present on the site since 1981 but did not raise the issue until 1999, the People are estopped from asserting the alleged violations in count II after 18 years. Resp. at 11.

The People assert that Texaco has not properly pled the affirmative defense of estoppel. The People contend that estoppel requires a positive act by state officials that induced action by an adverse party in circumstances where it would be inequitable to hold that party responsible for the action. Mot. to Strike at 7; *citing* Pavlakos v. Dept. of Labor, 111 Ill. 2d 257, 489 N.E.2d 1325 (1985). Mere inaction by the State does not rise to estoppel against a governmental entity. *Id*. The People state that applying the doctrine of estoppel against public bodies is not favored. Mot. to Strike at 7; *citing* Monat v. County of Cook, 322 Ill. App. 3d 499, 750 N.E.2d 260 (1st Dist. 2001). The People assert that at most Texaco's allegations show inaction by the State, but under no circumstances do the facts rise to estoppel against the State. Mot. to Strike at 8. Accordingly, the People ask the Board to strike Texaco's sixth alleged affirmative defense.

The Board finds that Texaco has adequately pled estoppel as an affirmative defense. Without making a determination on the merits of the parties' assertions at this point in the proceeding, the Board will allow Texaco the opportunity to meet the substantial burden of establishing estoppel against the People at hearing or in future pleadings. Accordingly, the Board does not strike this affirmative defense.

Seventh Affirmative Defense – Compliance with a Regulatory Program Exempts Texaco from Violating Section 12(a) of the Act

Texaco argues in its seventh alleged affirmative defense that because it complied with interim status and other groundwater regulatory requirements, it is shielded from liability under Section 12(a) of the Act. Ans. at 21; Resp. at 7.

The People assert that nothing in the Act or Board regulations creates an exemption from Section 12(a) for parties that comply with some other Agency regulatory program. Reply at 1-2. The People argue that Texaco's seventh alleged affirmative defense is vague and lacks support and must therefore be struck. Mot. to Strike at 8; Reply at 2.

Section 12(f) of the Act provides a specific exemption from water pollution for any person in compliance with the terms and conditions of an National Pollutant Discharge Elimination System (NPDES) permit issued under the Act. 415 ILCS 5/12(f) (2002). Section 12(a) of the Act provides no exemption from liability for parties that comply with another regulatory program. Furthermore, Texaco has not presented the Board with any new facts that would defeat the People's claim of water pollution even if all of the facts in the complaint were true. The Board finds here that Texaco's seventh alleged affirmative defense is not an affirmative defense but rather a factor that may, if anything, mitigate any imposed penalty. The Board grants the People's motion to strike this affirmative defense.

Eighth Affirmative Defense – Compliance With a Regulatory Program, and a Permitted GMZ, Exempts Texaco From the State's Claims in Count I

Texaco argues that because the site complied with a interim status groundwater requirements, and later a permitted GMZ, it is shielded from liability under Section 12(a) of the Act and Part 620 of the Board rules as alleged by the People in count I of the complaint. Ans. at 21; Resp. at 7. Texaco cites to Board precedent for the principle that compliance with an interim status requirements and a permit may shield it from liability under a Section of the Act. Resp. at 7; *citing* Illinois v. Stein Steel Mills, PCB 02-1 (Apr. 18, 2002).

The People argue the facts at issue are distinguishable from Stein Steel Mills because that case involved compliance with operating programs specifically required by the Section of the Board rules that the People alleged the respondent violated (35 Ill. Adm. Code 212.309(a)) in that case. Stein Steel Mills, slip op. at 8. The People argue that in contrast Texaco is trying to allege that compliance with a RCRA regulatory program shields it from liability under Section 12(a) and Part 620 of the Board rules concerning groundwater quality. Reply at 2. The People conclude that Stein Steel Mills is not analogous to the present situation and that Texaco's eighth alleged affirmative defense is insufficient and should be struck.

The Board finds Stein Steel Mills is distinguishable from the present situation. In refusing to strike the respondents' alleged affirmative defense, the Board in Stein Steel Mills held "the existence of a valid operating program is at the heart of the alleged violations of Section 212.309(a) of the Board's regulations and Section 9(b) of the Act." Stein Steel Mills, slip op. at 8. In contrast, whether Texaco complied with interim status groundwater regulatory requirements or a permitted GMZ is not at the heart of the alleged violations of the Board's Part 620 groundwater standards. Additionally, the present allegations involve a different section of the Act. Compliance with a permitted GMZ would provide Texaco immunity from violating the Part 620 standards. Therefore, the Board finds Texaco may be able to prevail on this defense, and accordingly denies the People's motion to strike the eighth alleged affirmative defense.

Ninth and Tenth Affirmative Defenses – Due Process

In Texaco's ninth and tenth alleged affirmative defenses, Texaco argues the state's claims in both counts I and II (respectively) are barred by due process because enforcing the alleged violations would constitute retroactive regulation of Texaco. Ans. at 22. Regarding the alleged groundwater quality violations, Texaco argues that any alleged discharge and impacts on the groundwater at the site predated the adoption of the Section 630[3] numerical standards. Resp. at 8. Thus, Texaco argues, application of those standards in count I of the complaint constitutes retroactive regulation.

[3] Texaco cites to "35 Ill. Adm. Code 630 numerical standards" in the complaint, but the Board assumes Texaco is referring to the standards set forth at 35 Ill. Adm. Code 620.

Regarding the alleged open dumping violations, Texaco contends that it can demonstrate that coke fines were placed on the site prior to 1980, prior to the Act's prohibition of open dumping. Resp. at 12. Therefore, Texaco argues, application of the open dumping prohibition in count II of the complaint constitutes retroactive regulation, and is a viable affirmative defense. *Id.*

The People contend the Board should strike Texaco's ninth and tenth alleged affirmative defenses because they are factually and legally insufficient. Mot. to Strike at 9-10. The People argue that the Part 620 rules do not regulate releases, but groundwater conditions. Reply at 3. Therefore, the only relevant consideration is the condition of the groundwater at the time the regulations became effective and thereafter. *Id*. The People cite to Illinois caselaw and Board precedent for the principle that liability may arise when one maintains a condition after a prohibition of that condition becomes effective. Reply at 3; Freeman Coal Mining Corp. v. PCB, 21 Ill. App. 3d 851, 308 N.E.2d 829 (5th Dist. 1974); People v. Peabody Coal Co., PCB 99-134 slip op. at 11-12 (June 5, 1999).

The Board finds no allegations in the People's complaint that amount to an attempt of retroactive regulation. Both counts allege violations of the Act or Board regulations in effect at the time the violations occurred. In count I, the People allege violations of groundwater standards occurred in 1998 and continue to the present date. Ans. at 12. In count II, the People allege Texaco caused or allowed open dumping at the site prior to July 28, 1999 until September 28, 1999. Ans. at 17. Section 620.405 of the Board rules, effective November 25, 1991, and Sections 12(a) and 21(a) of the Act, effective July 1, 1970, were in effect at the time the violations allegedly occurred. The Board finds no allegations in the complaint that amount to an attempt at retroactive regulation as Texaco argues. Accordingly, the Board grants the People's motion to strike Texaco's ninth and tenth affirmative defenses.

Eleventh Affirmative Defense – Violations of TACO Objectives and PQLs Cannot Form the Basis of Violations of the Act

Texaco argues that violations of TACO remediation objectives or PQLs do not constitute a violation of Section 12(a) of the Act. Ans. at 12. Texaco argues that because they are not enforceable, exceedances of TACO remediation objectives and PQLs do not constitute violations of Section 12(a) of the Act. *Id*. Texaco also alleges that TACO objectives (Part 742 objectives) cannot be applied to a site subject to a federally delegated program. *Id*.

The People argue that Texaco's eleventh alleged affirmative defense is vague and misstates the law and should therefore be struck. Mot. to Strike at 11. The People assert that Texaco mischaracterizes the complaint since the People do not cite to TACO remediation objectives or PQLs as violations, but as facts that support the alleged violation of Section 12(a). The People contend that violations of TACO objectives and PQL standards are relevant evidence that water pollution has occurred. Reply at 4.

The People further contend that TACO objectives can be applicable to federally delegated programs, for example RCRA. The People state that Section 742.105(b)(3) regarding applicability provides: "This Part is to be used in conjunction with the procedures and

requirements applicable to the following programs: . . . RCRA Part B Permits and Closure Plans (35 Ill. Adm. Code 724 and 725)." 35 Ill. Adm. Code 742.105(b)(3). The People state that even so, it is unclear how this allegation constitutes an affirmative defense to a Section 12(a) violation. The People move the Board to strike this affirmative defense.

The Board finds that count I of the complaint alleges only violations of Section 12(a) of the Act and Section 620.405 of the Board rules. Exceedances of the TACO remediation objectives and PQL standards are not part of the cause of action in count I. Therefore, Texaco's eleventh alleged affirmative defense raises no new facts that if true would defeat the People's claim of water pollution in count I of the complaint. Accordingly, the Board grants the People's motion to strike this alleged affirmative defense.

Twelfth Affirmative Defense – Section 49(c) is a Prima Facie Defense to the Violations Alleged in Count I

The People argue that Section 49(c) of the Act is blank. Mot. to Strike at 12. The People further argue that "allowing the Respondent the assumption that Respondent meant 415 ILCS 5/49(e), the prima facie defense still does not apply." Id. Section 49(e) requires Texaco to have complied with Board rules and regulations. The People contend Texaco did not comply with the Act and Board rules and regulations, thereby negating Section 49(e) as a possible defense. *Id*. The People argue accordingly that neither Section 49(c) nor Section 49(e) is a viable affirmative defense.

Texaco did not respond to the People's motion to strike this alleged affirmative defense.

In the twelfth alleged affirmative defense, Texaco cites to Section 49(c) of the Act while using the prima facie defense language of Section 49(e) of the Act. Assuming from Texaco's argument that Texaco meant to cite Section 49(e) of the Act, the Board finds it is a valid affirmative defense. Accordingly, the Board denies the People's motion to strike the twelfth alleged affirmative defense.

Thirteenth Affirmative Defense – Reservation of Rights

In its thirteenth alleged affirmative defense, Texaco reserved its right to assert additional defenses throughout this proceeding. Ans. at 22.

The People move the Board to strike Texaco's thirteenth affirmative defense as improper. Mot. to Strike at 12. The People argue that Section 103.204(d) of the Board rules requires all affirmative defenses to be presented before hearing unless the affirmative defense could not be known before hearing. 35 Ill. Adm. Code 103.204. The People contend Texaco cannot change this rule simply by asserting a reservation of rights. Mot. to Strike at 12.

The Board finds this is not a proper affirmative defense. A reservation of rights to assert additional defenses does nothing to attack the People's right to bring the claims it sets forth in the complaint. The Board grants the People's motion to strike this defense. Furthermore, Texaco is limited by Board procedural rules, which require all affirmative defenses to be

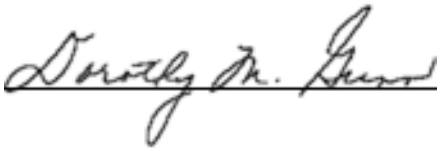
presented before hearing unless the affirmative defense could not be known before hearing. 35 Ill. Adm. Code 103.204.

CONCLUSION

The Board grants the People's motion to strike in part and denies the motion in part. The Board grants the motion to strike nine of the thirteen alleged affirmative defenses raised by Texaco, affirmative defenses 1, 2, 3, 5, 7, 9, 10, 11, and 13. The Board denies the People's motion to strike regarding four of the alleged affirmative defenses, affirmative defenses 4, 6, 8, and 12.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 6, 2003, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board