ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS Complainant, vs. FIRST COUNTRY HOMES, LLC, an Illinois Limited liability company, Respondents	)	PCB 06-173 (Enforcement – Water)

NOTICE OF FILING

TO: Thomas G. Gardiner
Gardiner Koch & Weisberg
53 West Jackson Blvd.
Suite 959
Chicago, Illinois 60604-3849

Mr. Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 West Randolph
Chicago, Illinois 60601

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board a Motion to Dismiss Affirmative Defenses, a copy of which is attached and herewith served upon you.

By: _____ Dated: July 27, 2006
Matthew Marinelli

PEOPLE OF THE STATE OF ILLINOIS
LISA MADIGAN
Attorney General of the State of Illinois
By: Assistant Attorney General Matthew Marinelli
Environmental Bureau
188 West Randolph St., 20th Floor
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS Complainant, vs. FIRST COUNTRY HOMES, L.L.C., an Illinois corporation, Respondent.	)	PCB No. 06-173 (Enforcement - Water)

MOTION TO DISMISS AFFIRMATIVE DEFENSES

Now comes Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, pursuant to Section 101.506 of the Illinois Pollution Control Board's procedural Regulations and Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 2-615 (2004), for an order dismissing, with prejudice, Respondent FIRST COUNTRY HOMES, L.L.C.'s Affirmative Defenses to the Complaint.

INTRODUCTION

On May 16, 2006, Complainant, People of the State of Illinois (''State''), filed a two-count complaint against Respondent, First Country Homes, L.L.C. (''First Country''). The complaint alleges that First Country committed numerous violations of the Illinois Environmental Protection Act (''Act''), 415 ILCS 5/1 *et seq.* (2004), and regulations thereunder.

Count I is titled *Failure to Obtain a Construction Permit* and Count II *Failure to Obtain an NPDES Permit.* On July 13,2006, First Country filed its Answer and Affirmative Defenses.

STANDARD

Under Illinois case law, the test for whether a defense is affirmative and must be pled by the defendant is whether the defense gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated. *Ferris Elevator Company, Inc. v. Neffco, Inc.*, 285 Ill. App. 3d 350, 354, 674 N.E.2d 449,452 (3rd Dist. 1996); *Condon v. American*

Telephone and Telegraph *Company,* Inc., 210 Ill. App. 3d 701, 709, 569 N.E.2d 518, 523 (2nd Dist. 1991). *Worner* Agency, *Inc.* v. Doyle, 121 Ill. App. 3d 219, 222,459 N.E.2d 633, 635-636 (4th Dist. 1984). In other words, an affirmative defense confesses or admits the cause of action alleged by the plaintiff, then seeks to avoid it by asserting new matter not contained in the complaint and answer. Where the defect complained about appears from the allegations of the complaint, it is not an affirmative defense and would be properly raised by a motion to dismiss. Corbett *v. Devon* ***Bank,*** 12 Ill. App. 3d. 559, 569-570,299 N.E.2d 521, 527 (1st Dist. 1973).

Thus, the issue raised by an affirmative defense must be one outside of the four comers of the complaint. Further, the facts constituting any affirmative defense must be plainly set forth in the answer. Section 2-613(d) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-613(d) (2004). Finally, the facts establishing an affirmative defense must be pled with the same degree of specificity required by a plaintiff to kstablish a cause of action. International Insurance Co. v. Sargent & Lundy, 242 Ill. App. 3d 614,609 N.E.2d 842, 853 (1st Dist. 1993).

I. First Country's First Affirmative Defense of "Failure to State a Claim" is an invalid and improperly pled affirmative defense and should be stricken.

First Country's first purported affirmative defense is legally insufficient and should be dismissed as a matter of law. First Country's affirmative defense that the Complaint "fails to sufficiently set forth all of the required information, including, specifically, the events, nature, extent and strength of discharges or emissions and consequences alleged to constitute violations of the Act or Regulations" does not meet the fundamental requirement that an affirmative defense give color to a plaintiffs claim and assert new matter that defeats it. In fact, the purported affirmative defense does not assert any new matter, much less new matter that might defeat the State's claim. Furthermore, First Country fails to plainly set forth any facts in support

of its affirmative defense as to how the complaint fails to state a cause of action. Thus, the defense is legally and factually insufficient.

Further, if the pleading does not admit the apparent right to the claim and instead merely attacks the sufficiency of the claim, it is not a valid affirmative defense. See Worner Agency, Inc. v. Doyle, 121 Ill. App. 3d 219,222-23 (4th Dist. 1984). By stating that the State's complaint fails to state a claim for which relief can be granted, First Country fails to admit the apparent right to the claim. First Country cannot establish in the same defense that there is both an apparent right to a claim and no claim for which relief can be granted. If First Country wishes to attack the sufficiency of the claim, it should do so properly, through a motion to strike or dismiss, and not by answering the complaint and asserting an affirmative defense.

Regardless of First Country's improper attack on the sufficiency of the complaint, the complaint does state a cause of action. The pleadings allege sufficient facts, which if proven, would entitle the plaintiff to recover and, thus, the complaint states a cause of action. See *e.g.* *Knox* College v. *Celotex* Corp., 88 Ill.2d 407 (1981); *Cahill* v. *Eastern Benefit* Systems, *Inc.*, 236 Ill. App. 3d 517 (1st Dist. 1992). The complaint fully alleges the dates, locations, events, and nature of First Country's failure to obtain both a sewer construction permit and a NPDES permit prior to constructing a sewer system.

Therefore, First Country's first purported affirmative defense asserting the failure to state a claim is without merit because it fails to plainly set forth any facts, fails to give color to the State's claim and fails to assert a new matter by which the apparent right is defeated. First Country's first affirmative defense is legally insufficient and should be dismissed, with prejudice, as a matter of law.

II. First Country's Second Affirmative Defense, which Responds to the Penalty Factors Under Section 33(c) of the Act, is Not a Defense to Liability

First Country's second purported affirmative defense is a direct response to the penalty factors set forth under Section 33 of the Act (415 ILCS 5/33). Section 33 of the Act sets forth both restrictions on what may constitute a defense to violations of the Act and the factors that the Illinois Pollution Control Board ("Board") shall consider in determining whether a civil penalty is appropriate in a particular case:

> (a) . . . It shall not be a defense to findings of violations of the provisions of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order, or a bar to the assessment of civil penalties that the person has come into compliance subsequent to the violation . . . * * *
>
> (c) In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved including, but not limited to:
>
> (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
> (ii) the social and economic value of the pollution source;
> (iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
> (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
> (v) any subsequent compliance.

First Country's use of the Section 33(c) factors as an affirmative defense is entirely inappropriate. Section 33(c) sets forth factors which, if proven, could only affect the imposition of a monetary penalty. These aggravating and mitigating factors do not address whether or not the alleged violations of the Act have occurred. "Subsequent compliance," which is listed as a factor that might mitigate any penalty in Section 33(c)(v), is explicitly rejected as a defense to a

violation by Section 33(a). Section 33(a) can only be reconciled with Section 33(c) if the Section 33(c) factors do not constitute affirmative defenses. See People v. Wilson, 405 Ill. 122, 90 N.E.2d 224,227 (Ill. 1950) ("the entire section and act must be read together and so construed as to make it harmonious and consistent in all its parts.").

It is a well recognized rule that a "defense which speaks to the imposition of a penalty, rather than the underlying cause of action, is not an 'affirmative defense' to that cause of action" and should be stricken. People v. Community Landfill Co., Inc., PCB No. 97-193, 1998 Westlaw 473246, at *4 (Aug. 6, 1998); see also People v. Geon Co.. Inc., PCB No. 97-62, 1997 Westlaw 621493; at *3 (Oct. 2, 1997); People v. Douglas Furniture of California, Inc., PCB No. 97-133, 1997 Westlaw 235230, at *5 (May 1, 1997); People v. Midwest Grain Prods. of Illinois, Inc., PCB No. 97-179, 1997 Westlaw 530544, at *4 (Aug. 21, 1997). "The appropriate penalty to be imposed for a violation of the Act is a separate inquiry from whether a violation of the Act has occurred, and *mitigation issues are only considered once a violation of the Act has been found."* Midwest Grain Prods., 1997 Westlaw 530544, at *4 (emphasis added).

This rule is well recognized by the Board, the agency charged with the primary responsibility for interpreting the Act. See 415 ILCS 5/5(b) (authorizing the Board to "determine, define and implement the environmental control standards applicable in the State."). Administrative interpretations of a statute made by an agency charged with administering that statute are entitled to considerable deference unless clearly erroneous, arbitrary or unreasonable. Winnetkans Interested in Protecting the Env't. v. Illinois Pollution Control Bd., 55 Ill.App.3d 475,479-80, 370 N.E.2d 1176, 1179 (1st Dist. 1977); see also Church v. State, 164 Ill.2d 153, 162, 646 N.E.2d 572, 577 (Ill. 1995) (Illinois Supreme Court held "A court will not substitute its own construction of a statutory provision for a reasonable interpretation by the agency charged

with the statute's administration"). Moreover, this rule of 'deference to administrative interpretation applies with particular force where there is a long-standing rule that has been consistently followed. See Moy v. State Dep't. of Registration and Educ., 85 Ill.App.3d 27, 31, 406 N.E.2d 191, 195 (1st Dist. 1980).

This rule is also supported by at least one court decision. In United States v. Vitasafe Corporation, the Defendants first denied liability, then proceeded to plead six affirmative defenses which included penalty mitigation arguments. See 212 F. Supp. 397, 398 (S.D.N.Y. 1962). The Vitasafe Court held, in relevant part, as follows (emphasis added):

> The way in which defendant carries on its operations, and its claimed good faith, have *no bearing on the question of whether it has [committed a violation]* . . . Defendant may urge its lack of intent to violate . . . in mitigation of the penalty. It cannot do so, however, as a defense to liability . . . *The pleading of such evidence as an affirmative defense is unnecessary and improper.* Id.

The Board and at least one court have made it abundantly clear that an affirmative defense which speaks to the imposition of a penalty rather than the underlying causes of action is not an "affirmative defense" to that cause of action and should be stricken. Therefore, First Country's second purported affirmative defense, which speaks to the penalty factors under Section 33(c) of the Act, is not an affirmative defense to the causes of action in the State's Complaint, and should be dismissed, with prejudice.

CONCLUSION

For the foregoing reasons, Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, requests that the Affirmative Defenses of the Respondent, FIRST COUNTRY HOMES, L.L.C., be dismissed, with prejudice.

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

BY: _____

MATTHEW MARINELLI
Assistant Attorney General
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188 West Randolph St., 20th Floor
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312-814-0608

CERTIFICATE OF SERVICE

I, MATTHEW MARINELLI, an Assistant Attorney General, do certify that I caused to be mailed this 27th day of July, 2006, the foregoing MOTION TO DISMISS AFFIRMATIVE DEFENSES to the persons listed on the said NOTICE by first-class mail in a postage prepaid envelope and depositing same with the United States Postal Service located at 188 West Randolph Street, Chicago, Illinois, 60601.

It is hereby certified that a true copy of the foregoing Notice was electronically filed with the following on July 27,2006:

Ms Dorothy Gunn
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, Illinois 60601

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