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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
Complaint,	
vs.))) PCB 06-173
	(Enforcement—Water)
FIRST COUNTRY HOMES, LLC, an) ` ` ` <i>`</i>
Illinois Limited Liability Company,)
)
Respondent.)

RESPONSE TO PETITIONER'S MOTION TO DISMISS RESPONDENT'S AFFIRMATIVE DEFENSES

Respondent, FIRST COUNTRY HOMES, LLC, an Illinois Limited Liability

Company ("First Country"), by Gardiner Koch & Weisberg, its attorneys, for its response
to Petitioner's Motion to Strike Respondent's Affirmative Defenses, hereby states as
follows:

STATEMENT OF THE LAW

Both Affirmative Defenses asserted by Respondent conform to the requirements of the Illinois Code of Civil Procedure. Illinois law requires that "[t]he facts constituting any affirmative defense . . . must be plainly set forth in the answer or reply." 735 ILCS 5/2-613(d). The clear purpose of this requirement is to facilitate the decision of cases on their merits, and to eliminate the harsh consequences which resulted from unfair surprise at trial prior to the enactment of modern civil procedure rules. Marmon Ins. Co. v. Thorson, 266 Ill.App.3d 1050, 1052 (3d Dist. 1992). 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. Raprager v. Allstate Ins. Co., 183 Ill. App. 3d 847, 854 (2d Dist. 1989).

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ARGUMENT

Respondent's Affirmative Defenses Meet the Requirements of 735 ILCS 5/2-613.

Respondent's Affirmative Defenses are pled plainly enough so that unfair surprise will not result from the defenses at hearing.

The first Affirmative Defense—that Petitioner fails to state a cause of action—is goes to the specific facts of this matter in that it fails to state the "events, nature, extent and strength of discharge or emissions and consequences alleged to constitute violations of the Act or regulations."

The second Affirmative Defense asserts that Respondent was prevented from compliance with the EPA due to various factors outside of Respondent's control, and what steps were taken to effect compliance with the Act. Again, these arguments go to the facts of the matter which will be specifically realized at hearing.

In conclusion, the Affirmative Defenses effectively put Petitioner on notice of the defenses which Respondent intends to argue at hearing.

WHEREFORE, for the foregoing reasons, Respondent, FIRST COUNTRY

HOMES, LLC, respectfully requests that this Board enter an Order denying Petitioner's

Motion to Dismiss Respondent's Affirmative Defenses, and for any other relief that this

Board deems is just and proper.

Respectfully Submitted,

FIRST COUNTRY HOMES, LLC

BY: One of Its Attorneys

Thomas G. Gardiner

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