

ILLINOIS POLLUTION CONTROL BOARD  
September 21, 2006

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 06-173
	)	(Enforcement - Water)
FIRST COUNTRY HOMES, L.L.C., an	)	
Illinois limited liability company,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by G.T. Girard):

On May 16, 2006, complainant filed a two-count complaint against the respondent, First Country Homes, L.L.C., an Illinois Limited Liability Company, (First Country), alleging violations of the Environmental Protection Act (Act) and the Board's regulations. See 415 ILCS 5/1 *et. seq.* (2004) and 35 Ill. Adm. Code 309. The allegations in the complaint revolve around the respondents' sewer construction activities, development and ownership of approximately 30 vacant residential lots, located in Section 22, Township 34 North, Range 13 East, in Monee, Will County, known as Country Meadows – Phase 8 (Site).

Count I of the complaint alleges that First Country built sewer lines without a construction permit in violation of Section 12(a) and (b) of the Act and Section 309.202(a) of the Board's regulations for water pollution. 415 ILCS 5/12 (2004); 35 Ill. Adm. Code 309.202(a). Count II of the complaint alleges that First Country threatened the discharge of contaminants from its Site to the storm water sewer system of the Village of Monee without first obtaining a general National Pollutant Discharge Elimination System (NPDES) storm water permit in violation of Section 12(f) of the Act and Section 309.102(a) of the Board's water pollution regulations. 415ILCS 5/12(f) (2004); 35 Ill. Adm. Code 309.102(a).

**PROCEDURAL BACKGROUND**

On June 1, 2006, the Board accepted the complaint for hearing. In response to the complaint, First Country filed an answer to the complaint and two affirmative defenses (Ans.) on July 13, 2006. On July 27, 2006, the People filed a motion to dismiss First Country's affirmative defenses (Mot.). On August 18, 2006 First Country responded to the motion (Resp.). For the reasons discussed below the Board grants the motion to dismiss both of the alleged affirmative defenses.

**MOTION TO DISMISS AFFIRMATIVE DEFENSES**

**Standard of Review**

If a pleading does not admit the opposing party's claim, but instead attacks the sufficiency of that claim, it is not an affirmative defense. Worner Agency v. Doyle, 121 Ill. App. 3d 219, 222-23, 459 N.E.2d 633, 636 (4th Dist. 1984). 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). An affirmative defense is 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*). "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. Texaco Refining and Marketing, Inc., PCB 02-3, slip op. at 5 (Nov. 6, 2003); citing People v. Geon Co., Inc., PCB 97-62, (Oct. 2, 1997); People v. Midwest Grain Products of Illinois, Inc., PCB 97-179 (Aug. 21, 1997).

The validity of an independent contractor affirmative defense turns on the question of whether "respondent is in such a relationship to the transaction that it is reasonable to expect him to exercise control to prevent pollution." Texaco Refining and Marketing, Inc., PCB 02-3, slip op. at 5; citing EPA v. James McHugh Construction Co., PCB 71-291 (May 17, 1972). "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 actions of independent contractors." *Id.* at 5 (Nov. 6, 2003); citing People v. Wood River Refining Co., a division of Equilon Enterprises, L.L.C., PCB 99-120, slip op. at 10 (Aug. 8, 2002).

### **First Country's Alleged Affirmative Defenses**

First Country alleges two affirmative defenses. First Country first alleges that the People fail 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, pursuant to Section 103.204(c) of the Board's rules. 35 Ill. Adm. Code 103.204(c). The second affirmative defense lists and applies the factors set forth in Section 33(c) of the Act (415 ILCS 5/33(c) (2004)), which the Board uses in making its orders and determinations. The 33(c) factors provide that the Board must consider "facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved," when making determinations regarding violations and penalties. 415 ILCS 5/33(c) (2004).

First Country, under its second affirmative defense, alleges that an independent contractor was responsible for the alleged violations. However, First Country does not argue an independent contractor affirmative defense, but instead argues that an independent contractor's actions are relevant to the enumerated Section 33(c) factors in the second affirmative defense. First Country alleges that its failure to comply with the Act and the Board's regulations was the fault of an independent contractor, Aqua. *See* Ans. at 10-11. First Country alleges, under the second affirmative defense, that in attempt "to leverage [First Country] to execute an extension of its service agreement [with Aqua], Aqua withheld its signature from the permit application." Ans. at 11.

## **ARGUMENTS AND BOARD ANALYSIS**

### **First Alleged Affirmative Defense: Failure to State a Claim**

The People contend that First Country's first alleged affirmative defense is legally insufficient and must be struck as a matter of law. Mot. at 1. According to the People, First Country does not admit the claim and assert a new matter that defeats the claim. The People contend that First Country's first affirmative defense merely attacks the sufficiency of the claim and does not attack the complainant's legal right to bring an action, and therefore, is an invalid affirmative defense. See Farmer's State Bank, PCB 97-100, slip op. at 2 n. 1; Worner Agency, at 222-23, 636. If the respondent wishes to attack the sufficiency of the claim, argue the People, First Country should do so through a motion to strike or dismiss, not by answering the complaint and asserting an affirmative defense. Mot. at 3.

In response to the motion to dismiss, First Country maintains that the affirmative defenses were properly pled. According to First Country, the affirmative defenses "go to the facts of the matter which will be specifically realized at hearing." Resp. at 2.

The Board agrees with the People that rather than admitting the People's allegations in count I, First Country instead challenges whether the claim was adequately pled. The Board is persuaded by the People's arguments and finds that First Country's first alleged affirmative defense is legally insufficient. Therefore, the Board strikes the first affirmative defense.

### **Second Alleged Affirmative Defense: Section 33(c) Factors**

The People claim that First Country's use of the Section 33(c) factors as a second alleged affirmative defense is entirely inappropriate. Mot. at 4. The People state that the Section 33(c) factors can only affect the imposition of a monetary penalty, but do not address whether or not the alleged violations occurred. *Id.* The People state that a well recognized rule is 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. Mot. at 5; citing People v. Community Landfill Co., Inc., PCB 97-193 (Aug. 6, 1998); People v. Geon Co. Inc., PCB No. 97-62 (Oct. 2, 1997); People v. Douglas Furniture of California, Inc., PCB 97-133 (May 1, 1997); People v. Midwest Grain Prods. of Illinois, Inc., PCB 97-179 (Aug. 21, 1997). Accordingly, contend the People, First Country's second alleged affirmative defense is invalid and should be dismissed with prejudice.

As First Country did with the first alleged affirmative defense, First Country maintains that the second affirmative defense was properly pled and puts the People on notice as to the defenses First Country intends to raise at hearing. Resp. at 2. First Country argues that the second affirmative defense "asserts that Respondent was prevented from compliance with EPA due to various factors outside of Respondent's control." Resp. at 2.

Section 33(c) matters are "potentially relevant to the question of the appropriate terms of a final order[.]" Environmental Site Developers, Inc. v. White & Brewer Trucking, Inc., PCB 96-

180, slip op. at 26 (Nov. 20, 1997). The Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an on-going violation, if anything, and second, whether to order the respondent to pay a civil penalty. The factors bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicality and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

The Board finds that First Country's claim that the allegations are moot because of subsequent compliance is not an affirmative defense, but rather a mitigation factor. *See People v. Texaco Refining and Marketing, Inc.*, PCB 02-3, slip op. at 4-5. "Compliance relates to the issue of remedy and not to the cause of action." *Id.* at 5. The Board agrees with the People that while the Section 33(c) arguments set forth by the First Country may be relevant to the Board's determination of whether a remedy is appropriate, these mitigating factors do not constitute an affirmative defense.

The arguments First Country raises, under the Section 33(c) factors, do not attack the complainant's legal right to bring an action, and therefore, do not constitute an affirmative defense. *See Farmer's State Bank v. Phillips Petroleum Co.*, PCB 97-100, slip op. at 2 n.1 (Jan. 23, 1997). However, First Country is free to raise the Section 33(c) factors and related facts for the Board's consideration in making its final determination as to whether a remedy or penalty are appropriate. The Board finds the second alleged affirmative defense is also not properly pled.

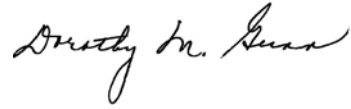
First Country's second affirmative defense alleges that an independent contractor's actions were relevant to the Section 33(c) factors it argues as an affirmative defense. However, First Country did not argue an independent contractor affirmative defense. Therefore, the Board will not make a determination as to whether First Country could have reasonably been expected "to exercise control to prevent pollution[]" at this time. *Texaco Refining and Marketing, Inc.*, PCB 02-3, slip op. at 5; citing *Wood River Refining Co.*, PCB 99-120, slip op. at 10. The Board strikes the second affirmative defense.

### **CONCLUSION**

Because First Country has failed to properly plead affirmative defenses, the Board grants the People's motion to dismiss. First Country's first alleged affirmative defense is not a valid affirmative defense because the defense merely attacks the sufficiency of the claim and fails to attack the complainant's legal right to bring an action. The respondent's second alleged affirmative defense is not a valid affirmative defense because the defense does not attack complainant's legal right to bring an action. The Section 33(c) factor in respondent's second affirmative defense are considered by the Board in making final determinations as to whether a remedy is appropriate, but do not constitute an affirmative defense. The Board directs the hearing officer to proceed expeditiously to hearing.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 21, 2006, by a vote of 4-0.

A handwritten signature in cursive script that reads "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board