



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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OCT 26 2009

STATE OF ILLINOIS
Pollution Control Board

Lisa Madigan
ATTORNEY GENERAL

October 22, 2009

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center, Ste. 11-500
100 West Randolph
Chicago, Illinois 60601

Re: ***People v. Hicks Oils & Hicksgas, Inc.***
PCB No. 10-12

Dear Clerk:

Enclosed for filing please find the original and ten copies of a Notice of Filing Motion to Strike Respondent Hicks Oils & Hicksgas, Inc.,'s Affirmative Defenses in regard to the above-captioned matter. Please file the originals and return file-stamped copies to me in the enclosed, self-addressed envelope.

Thank you for your cooperation and consideration.

Very truly yours,

A handwritten signature in black ink that reads "Michael D. Mankowski". The signature is written in a cursive style.

Michael D. Mankowski
Environmental Bureau
500 South Second Street
Springfield, Illinois 62706
(217) 782-9031

MDM/pjk
Enclosures

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
vs.)
)
HICKS OILS & HICKSGAS, INC.,)
an Indiana corporation,)
)
Respondent.)

PCB No. 10-12
(Enforcement)

NOTICE OF FILING

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OCT 26 2009
STATE OF ILLINOIS
Pollution Control Board

To: Elizabeth Harvey
Swanson, Martin & Bell, Ltd.
330 North Wabash, Suite 300
Chicago, IL 60611

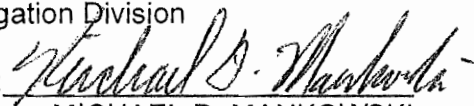
PLEASE TAKE NOTICE that on this date I mailed for filing with the Clerk of the Pollution Control Board of the State of Illinois, a MOTION TO STRIKE RESPONDENT HICKS OILS & HICKSGAS, INCORPORATED'S AFFIRMATIVE DEFENSES, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: 
MICHAEL D. MANKOWSKI
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: October 22, 2009

CERTIFICATE OF SERVICE

I hereby certify that I did on October 22, 2009, send by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box a true and correct copy of the following instruments entitled NOTICE OF FILING and MOTION TO STRIKE RESPONDENT HICKS OILS & HICKSGAS, INCORPORATED'S AFFIRMATIVE DEFENSES


To: Elizabeth Harvey
Swanson, Martin & Bell, Ltd.
330 North Wabash, Suite 300
Chicago, IL 60611

and the original and ten copies by First Class Mail with postage thereon fully prepaid of the same foregoing instrument(s):

To: John T. Therriaut, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

A copy was also sent by First Class Mail with postage thereon fully prepaid to:

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
Springfield, IL 62794


MICHAEL D. MANKOKWSKI
Assistant Attorney General

This filing is submitted on recycled paper.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
ex rel. LISA MADIGAN, Attorney)
General of the State of Illinois,)
)
Complainant,)
)
v.)
)
HICKS OILS & HICKSGAS, INCORPORATED,)
an Indiana corporation,)
)
Respondent)

PCB NO. 10-12

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STATE OF ILLINOIS
Pollution Control Board

MOTION TO STRIKE RESPONDENT HICKS OILS & HICKSGAS, INCORPORATED'S AFFIRMATIVE DEFENSES

NOW COMES, Complainant, PEOPLE OF THE STATE OF ILLINOIS, ex rel. Lisa Madigan, Attorney General of the State of Illinois, and moves the Board, pursuant to Section 101.506 of the Board's Procedural Rules, 35 Ill. Adm. Code 101.506, to strike Respondent's Affirmative Defenses on the following grounds and for the following reasons:

INTRODUCTION

1. On July 31, 2009, the People filed their Complaint alleging violations of the Illinois Environmental Protection Act, ("Act"), 415 ILCS 5/1 *et seq.* (2008) and Illinois Pollution Control Board Regulations, 35 Ill. Adm. Code 101.100 *et seq.*

2. On August 6, 2009, the Board issued an Order accepting Complainant's Complaint for Hearing.

3. On September 30, 2009, Respondent filed its Answer.

4. The Answer included the following the Affirmative Defenses:

- 1) Any contamination in or formerly in groundwater on the site formerly owned and operated by Hicks is the result of releases from previous owners of the site, including, but not limited to Cities Service and Gulf Oil.

- 2) Any contamination in or formerly in groundwater on the site formerly owned and operated by Hicks is the result of releases from other property not owned, operated, or controlled by Hicks, including but not limited to the former Amoco Oil Company Peoria Terminal located west of the subject site.

LEGAL STANDARDS APPLICABLE TO AFFIRMATIVE DEFENSES

5. Pursuant to Section 103.204(d) of the Board's Procedural Rules, 35 Ill. Adm. Code 103.204(d), 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 the hearing.

6. An affirmative defense is a "response to a [complainant's] claim which attacks the [complainant's] *legal* right to bring an action, as opposed to attacking the truth of the claim." *Farmers State Bank v. Phillips Petroleum Co.*, PCB 97-100, slip op. at 2, n.1 (Jan. 23, 1997), (emphasis in original) (quoting *Black's Law Dictionary*), cited in *Indian Creek Development Company and the Chicago Title and Trust Company v. BNSF*, PCB 07-44, slip op. at 3 (June 18, 2009); see also *The Worner Agency, Inc. v. Doyle*, 121 Ill. App. 3d 219, 221, 459 N.E.2d 633, 635 (4th Dist. 1984) (if the pleading does not admit the opposing party's claim but rather attacks the sufficiency of that claim, it is not an affirmative defense), also cited in *Indian Creek Development Company*, PCB 07-44, slip op. at 3.

7. In an 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 (August 6, 1998), cited in *People v. Wood River Refining Company*, PCB 99-120, slip op. at 3-4 (August 8, 2002), *People v. Stein Steel Mills Services*, PCB 02-1, slip op. at 1-2 (April 18, 2002), and *Indian Creek Development Company*, PCB 07-44, slip op. at 3-4.

8. The Code of Civil Procedure gives additional guidance on pleading affirmative

defenses. Section 2-613 (d), 735 ILCS 5/2-613(d), provides in part:

The facts constituting any affirmative defense, such as payment, release, satisfaction, discharge, license, fraud, duress, estoppel, laches, statute of frauds, illegality, that the negligence of a complaining party contributed in whole or in part to the injury of which he complains, that an instrument or transaction is either void or voidable in point of law, or cannot be recovered upon by reason of any statute or by reason of nondelivery, want or failure of consideration in whole or in part, 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, counterclaim, or third-party 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) (2008).

cited in *People v. Wood River Refining Company*, PCB 99-120, slip op. at 3-4 (August 8, 2002), and *People v. Stein Steel Mills Services*, PCB 02-1, slip op. at 1-2 (April 18, 2002). In a ruling on Complainant's motion to strike affirmative defenses in the case of *People v. Midwest Grain*, PCB 97-179, slip op. at 3 (August 21, 1997), the Board stated that Section 2-613(d) provides guidance regarding the pleading of defenses and, relying on the case of *Handelman v. London Time, Ltd.*, 124 Ill. Ap. 3d 318, 320, 464 N.E.2d 710, 712 (1st Dist. 1984), stated that clearly the purpose of the above-quoted language is to specify the disputed legal issues before trial. The parties are to be informed of the legal theories which will be presented by their respective opponents. *Id.* This is a prime function of pleading. *Id.*

9. Further guidance is available in Section 2-612 of the Code of Civil Procedure, 735 ILCS 5/2-612 (2008), which provides:

Insufficient pleadings. (a) If any pleading is insufficient in substance or form the court may order a fuller or more particular statement. If the pleadings do not sufficiently define the issues the court may order other pleadings prepared.
(b) No pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet.
(c) All defects in pleadings, either in form or substance, not objected to in the trial court are waived.

10. 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*

Telegram Co., 210 Ill. App. 3d 701, 709, 569 N.E.2d 518, 523 (2d Dist. 1991), citing *The Worner Agency Inc.*, 121 Ill. App. 3d at 222, 459 N.E.2d at 635, also cited in *Indian Creek Development Company*, PCB 07-44, slip op. at 4.

11. The "facts establishing an affirmative defense must be pleaded with the same specificity required by a plaintiff to establish a cause of action." *International Insurance Co. V. Sargent and Lundy*, 242 Ill. App. 3d 614, 630, 609, N.E.2d 842, 853 (1st Dist. 1993), cited in *Indian Creek Development Company*, PCB 07-44, slip op. at 4. A complaint's allegations are "sufficiently specific if they reasonably inform the defendants by factually setting forth the elements necessary to state a cause of action." *People ex rel. William J. Scott v. College Hills Corp.*, 91 Ill. 2d 138, 145, 435 N.E.2d 463, 467 (1982), cited in *Indian Creek Development Company*, PCB 07-44, slip op. at 4.

12. Illinois requires fact-pleading, not the mere notice-pleading of federal practice. See *Adkins v. Sarah Bush Lincoln Health Center*, 129 Ill. 2d 497, 518, 544 N.E.2d 733, 743 (1989); *College Hills*, 91 Ill. 2d at 145, 435 N.E.2d at 466-67, cited in *Indian Creek Development Company*, PCB 07-44, slip op. at 4. Fact-pleading does not require a pleader to set out its evidence: "To the contrary, only the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts." *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill. 2d 300, 308, 430 N.E.2d 1005, 1008-09 (1981), quoting *Board of Education v. Kankakee Federation of Teachers Local No. 886*, 46 Ill. 2d 439, 446-47 (1970), cited in *Indian Creek Development Company*, PCB 07-44, slip op. at 4.

13. Legal conclusions unsupported by allegations of specific facts are insufficient. *LaSalle National Trust N.A. v. Village of Mettawa*, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297, 1303 (2nd Dist 1993), cited in *Indian Creek Development Company*, PCB 07-44, slip op. at 4. Affirmative defenses that are totally conclusory in nature and devoid of any specific facts supporting the conclusion are inappropriate and should be stricken. See *International Ins. Co.*,

242 Ill. App. 3d at 635, cited in *Glave v. Harris et al, Village of Grayslake v. Winds Chat Kennel, Inc*, PCB 02-11, PCB 02-32 (Consolidated), slip op. at 2 (January 24, 2002). "To set forth a good and sufficient claim or defense, a pleading must allege ultimate facts sufficient to satisfy each element of the cause of action or affirmative defense pled. *** In determining the sufficiency of any claim or defense, the court will disregard any conclusions of fact or law that are not supported by allegations of specific fact." *Richco Plastic Co. v. IMS Co.*, 288 Ill. App. 3d 782, 784-85, 681 N.E.2d 56, 58 (1st Dist. 1997), cited in *Indian Creek Development Company*, PCB 07-44, slip op. at 4.

14. An asserted affirmative defense is not, by definition, an affirmative defense, even if proven true at hearing, if it is an assertion that will not impact the complainant's legal right to bring the action. *Glave v. Harris et al, Village of Grayslake v. Winds Chat Kennel, Inc*, PCB 02-11, PCB 02-32 (Consolidated), slip op. at 2 (January 24, 2002), citing *People v. Crane*, PCB 01-76 (May 17, 2000).

15. Section 2-615(a) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615(a) (2008) provides, in pertinent part, as follows:

- (a) All objections to pleadings shall be raised by motion. The motion shall point out specifically the defects complained of, and shall ask for appropriate relief, such as: that a pleading or a portion thereof be stricken because substantially insufficient in law...

16. 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), also cited in *Indian Creek Development Company*, PCB 07-44, slip op. at 4.

ARGUMENT

Respondent's Affirmative Defenses Do Not Admit People's Claims

17. Respondent's affirmative defenses fail to admit the People's claims. Both affirmative defenses merely attack the truth of the People's claims by stating that previous owners or neighbors are responsible for any contamination in or formerly in the groundwater at the site. Nowhere does the Respondent give color to the People's claims that Respondent caused or allowed the discharge of contaminants to groundwater so as to exceed the Board's Groundwater Quality Standards for a Class I resource groundwater. As such, Respondent's affirmative defenses only attack the sufficiency of the People's claims and are not a response to the People's legal right to bring an action for water pollution violations at the subject site. The Board should strike Respondent's affirmative defenses for failing to admit the People's claims. *Indian Creek Development Company*, PCB 07-44, slip op. at 3-4; see also *Farmers State Bank*, PCB 97-100, slip op. at 2, *The Worner Agency, Inc.*, 121 Ill. App. 3d at 221, *Condon v. American Telephone and Telegram Co.*, 210 Ill. App. 3d at 709.

Respondent's Affirmative Defenses Fail to Plead Sufficient Facts

18. Affirmative Defense # 1 does not offer any new facts that defeat the Complainant's right to recover. The Respondent claims that any contamination in or formerly in groundwater at the site was caused by releases by previous owners of the site; however, it does not provide specific factual support for this defense. Respondent pleads that Cities Service and Gulf Oil are previous owners but does not plead how this previous ownership defeats Complainant's claims against the Respondent. In addition, the Respondent does not provide any information such as when or if other releases by previous owners occurred, which contaminants were released, how much of the contaminants were released or how these releases contributed to the amount of benzene found in the groundwater at the site when it was

owned and operated by Hicks. The Respondent merely states that any contamination at the site was caused by releases by previous owners of the site. This is wholly conclusory and is simply an attempt by the Respondent to divert causation. Therefore, Affirmative Defense # 1 fails to plead sufficient facts and should be stricken. *Indian Creek Development Company*, PCB 07-44, slip op. at 4. See also *International Insurance Co. V. Sargent and Lundy*, 242 Ill. App. 3d at 630, 635, *College Hills Corp.*, 91 Ill. 2d at 145, *Richco Plastic Co.*, 288 Ill. App. 3d at 784-85.

19. Affirmative Defense #2 does not offer any new facts that defeat the Complainant's right to recover. The Respondent claims that any contamination in or formerly in groundwater at the site is the result of releases from other property not owned, operated, or controlled by Hicks, including but not limited to the former Amoco Oil Company Peoria Terminal located west of the subject site; however, it does not provide specific factual support for this defense. Respondent pleads that the former Amoco Oil Company Peoria Terminal located west of the subject site is the source of the contamination but does not provide when or if releases were made on the former Amoco site or other neighboring sites, which contaminants were released, how much of the contaminants were released, how material released on neighboring sites could travel into the groundwater at the subject site or how these releases contributed to the amount of benzene found in the groundwater at the site when it was owned and operated by Hicks. The Respondent merely states that any contamination at the site was caused by releases from other property not owned, operated, or controlled by Hicks. This is, once again, conclusory and lacks any specific facts to support the conclusion that neighboring properties are the sole cause of contamination at the site. Therefore, Affirmative Defense # 2 fails to plead sufficient facts and should be stricken. *Indian Creek Development Company*, PCB 07-44, slip op. at 4. See also *International Insurance Co. V. Sargent and Lundy*, 242 Ill.

App. 3d at 630, 635, *College Hills Corp.*, 91 Ill. 2d at 145, *Richco Plastic Co.*, 288 Ill. App. 3d at 784-85.

Respondent's Affirmative Defenses are Legally Insufficient

20. Respondent's affirmative defenses lack the legal sufficiency to be proper. A simple factual denial of a fact pleaded in the Complaint is not a sufficient affirmative defense. *Pryweller v. Cohen*, 282 Ill.App.3d 899, 668 N.E.2d 1144, 1149 (1st Dist. 1996), appeal denied, 169 Ill.2d 588 (1996). In Affirmative Defenses # 1 and 2, Respondent attempts to refute the facts as pleaded in the Complaint and deny responsibility for contamination present at the site by merely asserting that previous owners or neighbors of the subject site were the cause of the contamination. This assertion falls well short of constituting a legally sufficient affirmative defense.

21. Furthermore, both of Respondent's Affirmative Defenses have no legal basis. Section 12(a) of the Act provides that no person shall cause or allow water pollution either alone or in combination with matter from other sources. 415 ILCS 5/12(a) (2008). From the early days of the Act, the Board has held that it does not matter whether the contamination present at the subject site was originally caused by previous owners or neighboring properties. *Meadowlark Farms v. Illinois Pollution Control Board*, 17 Ill. App. 3d 851, 860-861, 308 N.E.2d 829, 835-837 (5th Dist. 1974), *Freeman Coal Mining Corp. v. Illinois Pollution Control Board*, 21 Ill. App. 3d 157, 162-63, 313 N.E.2d 616, 620-621 (5th Dist. 1974). The contamination was present at the site during the time that Hicks owned and operated the site. Hicks allowed the contamination to be present on the site during their ownership and operation. The possibility that the contamination was originally caused by a previous owner or neighbor does not alleviate the Respondent of its legal obligations. Those assertions, even if properly plead, are not facts which would defeat the People's claims under *Meadowlark* and *Freeman*. Therefore, Respondent's Affirmative Defenses should be stricken as legally insufficient.

CONCLUSION

22. The Respondent's Affirmative Defenses are both factually and legally insufficient. Therefore, they should be stricken pursuant to Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615 (2008).


WHEREFORE, the Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board enter an order striking the Respondent's Affirmative Defenses and granting any other relief it deems appropriate.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

ex rel. LISA MADIGAN Attorney General
of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: 
MICHAEL D. MANKOWSKI
Assistant Attorney General
Environmental Bureau

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Dated: October 21, 2009