1248-001

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS
Pollution Control Board

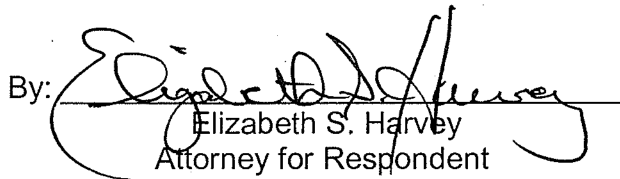
PEOPLE OF THE STATE OF ILLINOIS,)
ex rel. LISA MADIGAN, Attorney)
General of the State of Illinois,)
)
Complainant,)
)
v.) PCB NO. 2010-12
) (Enforcement)
HICKS OILS & HICKSGAS, INCORPORATED,)
an Indiana corporation,)
)
Respondent.)

NOTICE OF FILING

To: (See attached Service List.)

PLEASE TAKE NOTICE that on this 9th day of November 2009, the following was filed with the Illinois Pollution Control Board: **Respondent's Response to Motion to Strike Respondent's Affirmative Defenses**, which is attached and herewith served upon you.

HICKS OILS AND HICKSGAS, INCORPORATED

By: 
Elizabeth S. Harvey
Attorney for Respondent

Elizabeth S. Harvey
Michael J. Maher
SWANSON, MARTIN & BELL, LLP
330 North Wabash Avenue, Suite 3300
Chicago, Illinois 60611
312.321.9100
312.321.0990 (facsimile)

CERTIFICATE OF SERVICE

I, the undersigned non-attorney, state that I served a copy of the above-described document to counsel of record in the above-captioned matter via U.S. Mail on or before 5:00 p.m. on November 9, 2009.

Jeanette M. Podlin

[x] Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct.

1248-001

SERVICE LIST

People of the State of Illinois v. Hicks Oils & Hicksgas, Incorporated
PCB NO. 2010-12
(Enforcement)

Michael D. Mankowski
Assistant Attorney General
Environmental Enforcement Bureau
500 South Second Street
Springfield, Illinois 62706

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, Illinois 62794-9274

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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.	)	**PCB NO. 2010-12 (Enforcement)**
HICKS OILS & HICKSGAS, INCORPORATED, an Indiana corporation,	)	
Respondent.	)	

RESPONSE TO MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES

Respondent HICKS OILS & HICKSGAS, INCORPORATED ("Hicks"), by its attorneys Swanson, Martin & Bell, LLP, hereby responds to the motion to strike its affirmative defenses, filed by complainant PEOPLE OF THE STATE OF ILLINOIS ("complainant").

INTRODUCTION

1. On July 31, 2009, the complainant filed its complaint, alleging a violation of the Illinois Environmental Protection Act, ("Act"), 4125 ILCS 5/1 *et seq.* (2008) and Illinois Pollution Control Board Regulations, 35 Ill. Adm. Code 101.100 *et seq.* The Board issued an order accepting the complaint for hearing on August 6, 2009.

2. On September 30, 2009, Respondent filed its Answer, including the following 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.

3) On October 26, 2009, complainant moved to strike Affirmative Defenses #1 and #2.

4) A motion to strike an affirmative defense admits all well-pleaded facts constituting the defense, together with all reasonable inferences which may be drawn therefrom, and raises only a question of law as to the sufficiency of the pleading. *Raprager v. Allstate Ins. Co.,* 539 N.E.2d 787, 792 (2d Dist. 1989). No pleading or defense is bad in substance if it 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. *Raprager*, 539 N.E.2d at 792. Complainant's motion to strike Hicks' affirmative defenses should be denied because the affirmative defenses properly give color to the claim, the affirmative defenses plead facts sufficient under Illinois law, and the affirmative defenses are legally sufficient.

ARGUMENT

Hicks' Affirmative Defenses Properly Give Color to the People's Claims

5. The test of whether a defense is affirmative and, therefore, must be pleaded by a defendant is whether the defense gives color to an opposing party's claim and asserts a new matter by which the apparent right to bring suit is defeated. *Worner Agency, Inc. v. Doyle,* 121 Ill.App.3d 219, 222 (4th Dist. 1984); *see also Raprager*, 539 N.E.2d at 792. Hicks' affirmative defenses give color to complainant's claim that there is or was contaminated groundwater on the land Hicks previously owned. The affirmative defenses act to cut off complainant's legal right to bring suit against Hicks, because Hicks had no control or capacity to control the contamination. *Meadowlark Farms v. Illinois Pollution Control Board*, 17 Ill. App. 3d 851, 861 (5th Dist. 1974) (holding that an owner must have had the capability to control the discharge to be liable under the Act). Thus, Affirmative Defenses #1 and #2 properly give color to the claim, and assert matter which defeats the complainant's apparent right to bring suit.

Hicks' Affirmative Defenses Plead Sufficient Facts

6. Complainant claims that neither Affirmative Defense #1 nor #2 offers any new facts that defeat Complainant's right to recover. Complainant wants Hicks to lay out, in detail, exactly how previous ownership by Cities Service and Gulf Oil defeats Complainant's claims against Hicks. Similarly, complainant would have Hicks lay out detailed evidence of how an adjacent owner of land, Amoco Oil Company Peoria Terminal, could cause the contamination.

7. Although Illinois requires more than the notice-pleading requirements of federal practice, complainant attempts to use the slightly elevated requirements of fact-pleading to force Hicks to prematurely provide a mountain of evidence. However, complainant admits that Illinois 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 (1981).

8. Only the ultimate facts of the elements of an affirmative defense must be alleged. *Indian Creek Development Company v. Burlington Northern Santa Fe Railway Company,* PCB 07-44, slip op. at 4 (June 18, 2009), citing *Carriage Way West*, 88 Ill.2d at 308. However, complainant argues Hicks should have included within Affirmative Defenses #1 and #2 a litany of evidence including: specifically when releases were made by neighboring sites or previous owners; exactly which contaminants were released; how much of the contaminants was released; and specifically how the contaminants contributed to the benzene found in the groundwater when the site was owned by Hicks.

9. Hicks' affirmative defenses state that previous owners or adjacent owners of land were wholly responsible for contaminating the groundwater at issue. Hicks identifies those previous owners and adjacent owners specifically, and plainly sets forth the facts

constituting an affirmative defense. *See* 35 Ill. Adm. Code 103.204(d). Providing more than the ultimate fact of who caused, controlled, or allowed the contamination of the groundwater at issue would be providing "evidentiary facts tending to prove such ultimate facts." *Carriage Way West, Inc.,* 88 Ill.2d at 308. Providing those evidentiary facts would be improper and premature at this stage of the case, and is not required. No discovery has been undertaken, and Hicks has no duty at this point to plead all underlying facts supporting its affirmative defenses.

<u>Hicks' Affirmative Defenses are Legally Sufficient</u>

10. Complainant asserts that Hicks' affirmative defenses lack legal sufficiency. On the contrary, the affirmative defenses are indeed sufficient. Though legal conclusions unsupported by allegations of specific facts are insufficient, "pleadings are not intended to create technical obstacles to reaching the merits of a case at trial." *La Salle Nat. Trust, N.A. v. Village of Mettawa*, 249 Ill. App. 3d 550, 557 (2d Dist.1993). Hicks' affirmative defenses rise above "mere factual denials" because they identify the parties responsible for the contamination found on land Hicks previously owned. These defenses strike at the legal sufficiency of the claim against Hicks. Even if the claim that contaminants were discharged from land previously owned by Hicks is true, the claim is legally insufficient if Hicks had no ability to control or allow the discharge. *Meadowlark Farms v. Illinois Pollution Control Board*, 17 Ill. App. 3d 851, 861 (5th Dist. 1974).

11. Complainant has misstated the holding in *Meadowlark Farms*. Complainant asserts that case stands for the proposition that "it does not matter whether the contamination present at the subject site was originally caused by previous owners or neighboring properties." (Complainant's motion at p. 8.) This is incorrect. *Meadowlark Farms* does not even involve contamination alleged to be from neighboring properties. In that case, a mine owner was found to be responsible for contamination caused by piles of

iron pyrite left on the mine owner's property. The appellate court found that the mine owner had ownership and control of the surface rights to the land, which contained the source of the contamination. More importantly, the appellate court found the landowner had "the capability of controlling the pollutional discharge" regardless of whether he caused the pyrite to be stacked on the land. *Meadowlark* Farms, 17 Ill. App. 3d at 861. Complainant ignores the language in *Meadowlark* stating that capability of controlling the discharge is key to determining whether a landowner "caused or allowed" discharge of contamination.

12. In *Phillips Petroleum Company v. Illinois Environmental Protection Agency*, 390 N.E.2d 620 (2d Dist. 1979), the appellate court further held that an alleged violator must have had some control over the source of the alleged pollution. Finding no evidence that the alleged violator had "sufficient control over the source of the pollution in such a way as to have caused, threatened, or allowed the pollution," the appellate court reversed the finding of violation. *Phillips*, 390 N.E.2d at 623. The court noted that the Act is "malum prohibitum," but found that factor addressed only the lack of necessity of proving knowledge or intent. The alleged violator still must have had the capability of controlling the pollution.

13. Here, Hicks' affirmative defenses clearly allege that Hicks had no control over any discharges caused by previous owners of the land and adjacent owners of land. Hicks, unlike the mine owner in *Meadowlark*, had no capability to control discharges of past owners or adjacent owners. Affirmative Defense #1 pleads that Hicks did not have control of the property when the discharge of contaminants was "caused or allowed." Affirmative Defense #2 pleads that Hicks had no capability to control the discharge of contaminants by an adjacent land owner. Hicks' Affirmative Defenses #1 and #2 could defeat Complainant's claims under current Illinois law. Where the facts of an affirmative defense raise the possibility that the party asserting them will prevail, the affirmative defense should not be

stricken. *International Insurance Co. v. Sargent and Lundy,* 242 Ill. App. 3d 614, 630-31 (1st Dist. 1993). Therefore, Hicks' affirmative defenses should not be stricken.

Should the Board Grant the Motion,
Respondent Requests Leave to Amend its Affirmative Defenses

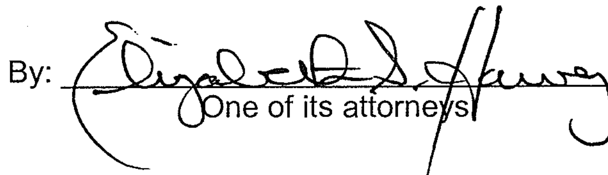
14. In the alternative, if the Board grants complainant's motion, Hicks seeks leave to amend its affirmative defenses. A court may allow amendments to the pleadings at any time before final judgment on just and reasonable terms. 735 ILCS 5/2-616(a). The Board has previously granted such requests to amend affirmative defenses and pleadings. *See, e.g., Indian Creek Development Co.,* PCB 07-44, slip op. at 8; *City of Yorkville v. Hammen*, PCB 08-96, slip op. at 8 (April 2, 2009); *People v. Riverdale Recycling, Inc.*, PCB 03-73, slip op. at 3-4 (Sept. 18, 2003. A court has broad discretion to allow the addition of new defenses and may do so before final judgment "so long as other parties do not thereby sustain undue prejudice or surprise." *Hobart v. Shin,* 185 Ill. 2d 283, 292 (1998). Allowing Hicks to file its amended affirmative defenses, at this early stage of the case, will not cause delay or prejudice any party.

Conclusion

WHEREFORE, the Respondent HICKS OILS & HICKSGAS, INCORPORATED requests that the Board deny complainant's motion to strike Hicks' affirmative defenses. In the alternative, if the Board grants complainant's motion, HICKS OILS & HICKSGAS, INCORPORATED requests that the Board grant leave to amend its affirmative defenses, and for such other relief as the Board deems appropriate.

Respectfully submitted,

HICKS OILS & HICKSGAS, INCORPORATED

By: 
One of its attorneys

Dated: November 9, 2009

Elizabeth S. Harvey
Michael J. Maher
Swanson, Martin & Bell, LLP
330 North Wabash Avenue
Suite 3300
Chicago, IL 60611
Telephone: (312) 321-9100
Facsimile: (312) 321-0990