ILLINOIS POLLUTION CONTROL BOARD
December 17, 2009

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 10-12
	)	(Enforcement – Water)
HICKS OILS & HICKSGAS,	)	
INCORPORATED, an Indiana corporation,	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by C.K. Zalewski):

For the reasons set forth below, this order grant's complainant's contested motion to strike affirmative defenses. But, as alternatively requested by respondent, the Board will allow respondent to file amended affirmative defenses at a time to be set by the hearing officer after consultation with the parties.

THE PLEADINGS

On July 31, 2009, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a one-count complaint against Hicks Oils & Hicksgas, Inc. (Hicks or respondent). The complaint (Comp.) concerns the respondent's bulk petroleum storage and transfer facility located at 1118 Wesley Road, in Creve Coeur, Tazewell County. By order of August 6, 2009, the Board accepted the complaint for hearing.

Respondents filed an answer and affirmative defenses (Ans.) on September 30, 2009, which the People moved to strike on October 16, 2009. Respondents filed their response in opposition to the People's motion on November 9, 2009.

The People's Complaint

In the complaint, the People allege that the respondent violated Section 12(a) of the Environmental Protection Act (Act) (415 ILCS 5 (2008))[1]Act (415 ILCS 5/12(a) (2008)), and the Board's groundwater quality standards at 35 Ill. Adm. Code 620.405 and 620.410. The People allege that Hicks, at all times relevant to the complaint, was the owner and operator of the bulk petroleum storage and transfer facility located at 1118 Wesley Road, just northwest of State Highway 29 in Creve Coeur, Tazewell County. Comp. para. 5 at 2. The People allege that respondent, at some time in 2001, removed five petroleum storage tanks, a loading rack, and the

[1] All citations to the Act will be to the 2008 compiled statutes, unless the provision at issue has been substantively amended in the 2008 compiled statutes.

majority of piping between the tanks and the loading area. Comp. para. 16 at 4. The People allege that laboratory results of tests from on-site monitoring wells submitted by the respondents to the Illinois Environmental Protection Agency in 2004 showed "high levels of benzene," including 1.080 milligrams per liter (mg/l) from monitoring well number 3. Comp. para. 19 at 4. (The standard for benzene is set at 0.005 mg/l in 35 Ill. Adm. Code 620.410. Comp. para 15(b) at 3-4.)

The People then assert that

> The facility is located in an area where the groundwater has an intrinsically high vulnerability to contamination due primarily to geological conditions, including permeable soils and a high infiltration rate of groundwater recharge. The groundwater is presently utilized as an aquifer and source of drinking water for local residences and is therefore a Class I resource groundwater. Comp. para. 21-22 at 4-5.

The People accordingly charge respondent with causing or allowing the discharge of contaminants to groundwater so as to exceed the Board's groundwater quality standards for a Class I: Potable Resource groundwater, and to thereby render such water harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses. The People assert that respondent has therefore violated Section 12(a) of the Act, 415 ILCS 5/12(a) (2008), and 35 Ill. Adm. Code 620.405 and 620.410. Comp. para. 22 at 5. In their prayer for relief, the People ask the Board to order the respondent to cease and desist from further violations, and to pay a civil penalty of $50,000 for each violation and an additional penalty of $10,000 for each day during which violation has occurred, pursuant to Section 42(a) of the Act (414 ILCS 5/42(a) (2008). Comp. at 6.

Hicks' Answer and Affirmative Defenses

In the answer, respondent admits some facts, denies others, and states that it has insufficient information to either admit or deny other facts. The facts denied include those in 1) paragraph 5 of the complaint, in that Hicks states it was a former owner and operator of the facility, but denies that it is "currently" the current owner or operator of the property at issue (Ans. at2); 2) paragraph 19 that the laboratory results respondent submitted in 2004 showed "high levels of benzene" of the complaint (Ans. at 6) and 3) paragraph 22 that Hicks discharged contaminants into groundwater so as to violate the Act and Board rules. Ans. at 7.

In closing, as affirmative defenses set forth as required by Section 103.204(d) of the Board's procedural rules [2], respondent alleges that:

[2] The Board's procedural rule at 35 Ill. Adm. Code 103.204(d) states that 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 be known before hearing.

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. Ans. at 7.

As a third point, Hicks asserted a right to assert any additional affirmative defenses which might become apparent during this case, and to amend its answer to include such affirmative defenses. Ans. at 7.

The People's Motion To Strike

In the October 26, 2009 motion to strike (Mot.), citing Illinois court and Board precedent, the People remind that "an affirmative defense confesses or admits the allegations in the complaint, and then seeks to defeat a [complainant's claim] by asserting new matter not contained in the complaint and answer." Mot. at 2, and cases cited therein. The People state that the Board has taken guidance from the Illinois Code of Civil Procedure (Code) concerning the proper pleading of affirmative defenses. Mot. at 2-3; *see also* 35 Ill. Adm. Code 101.100 of the Board's procedural rules, specifically stating that the provisions of the Code do not expressly apply in Board proceedings, but that the Board may look to the provisions of the Code where the procedural rules are silent.

The People relate that the provisions of Section 2-613(d)[3] states the elements of pleading, 735 ILCS5/2-613(d) (2008), while Section 2-612[4] discusses insufficient pleadings. The People

[3] 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).

[4] 735 LCS 5/2-612 (2008) provides:

> Insufficient pleadings.

state that both provisions give guidance on the proper pleading of affirmative defenses, noting that the Board has taken such guidance in prior decisions. Mot. at 3, and cases cited therein.

The People first assert that neither of respondents' alleged affirmative defenses admits the truth of the People's claims that respondents violated the Act and Board rules. The People accordingly request that the Board strike both affirmative defenses on this ground. Mot. at 6, citing, citing Indian Creek Development Company and Chicago Title and Trust Co. v. BNSF, PCB 07-44, slip op. at 3-4 (June 18, 2009); *see also* Farmers State Bank v. Phillips Petroleum Co., PCB 97-100, slip op. at 2 (Jan.23, 1997), The Worner Agency, Inc. v. Doyle, 121 Ill. App. 3d 219, 221 (Dist. 1984) , and Condon v. American Telephone and Telegram Co., 210 Ill. App. 3d 701, 709, 516 N.E.2d 518, 523 (2d Dist. 1991).

The People next challenge the substance of the facts alleged in the affirmative defenses, claiming that the respondent fails to plead sufficient facts in the asserted affirmative defenses. First, the People assert that

> 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. Mot. at 6-7, citing Indian Creek Development Company, PCB 07-44, slip op. at 4; *see also* International Insurance Co. V. Sargent and Lundy, 242 III. App. 3d at 630, 635, People ex rel. William J. Scott College Hills Corp., 91 Ill. 2d at 138, 145, 435 N. E. 2d 463, 467 (1982), Richco Plastic Co. v. IMS Co., 288 Ill. App. 3d 782, 784-85, 681 N.E.2d 56, 58 (1st Dist. 1997).

The People next assert that

> (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.

> 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 as 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. Mot at 7-8, citing Indian Creek Development Company, PCB 07-44, slip op. at 4; *see also* International lnsurance Co. v. Sargent and Lundy, 242 Ill. App. 3d at 630, 635, College Hills Corp., 91 Ill. 2d at 145, and Richco Plastic Co., 288 Ill. App. 3d at 784-85.

The People accordingly conclude that Hicks' affirmative defenses are both legally insufficient as pled, and lacking in legal basis. The People request that the Board strike both affirmative defenses.

Hicks' Response In Opposition

In the November 9, 2009 response in opposition to grant of the People's motion to strike, Hicks states that its asserted defenses properly give color to the People's complaint, plead sufficient facts, and are legally sufficient to be allowed to proceed. Resp. at 1-5. Hicks requests the Board to deny the motion to strike. In the alternative, Hicks requests leave to amend its affirmative defenses. Resp. at 6.

First, Hicks states that both of its affirmative defenses "give color" to the claim that there is or was contaminated groundwater on the land Hicks previously owned. But, Hicks claims, the fact that it had no control or capacity to control the alleged pollution are proper affirmative defenses that cut off complainant's "apparent right" to bring suit. Resp. at 2, citing Meadowlark Farms v. Illinois Pollution Control Board, 17 Ill. App. 3d 851, 861 (5th Dist. 1974).

Next, Hicks contends that, even though Illinois is a fact pleading state, case law requires only that "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 III.2d 300, 308 (1981). Resp. at 3. The essence of Hicks affirmative defenses are that all pollution on the land it formerly owned was caused by prior owners of the property or by owners of adjacent

property, and that Hicks had no control or capacity to control the actions of these other individuals at the time any discharge of contaminants was "cause or allowed". Resp. at 3-4. Hicks contends that it has already alleged the ultimate facts it needs to prove under Meadowlark, and that to require it to provide evidentiary facts would be "improper and premature at this stage of the case, where no discovery had been undertaken. Resp. at 4.

ANALYSIS AND CONCLUSION

The Board grants the People's motion to strike the claimed affirmative defenses, finding they contain insufficient facts. The Board has very recently again discussed and reviewed the case law determining that Illinois is a fact-pleading jurisdiction, rather than a notice-pleading one as is the federal court system. People v. Waste Hauling Landfill, Inc. *et al.*, PCB 10-9 (Dec. 3, 2009) (dismissing complaint as to one of many respondents due to factual insufficiency).

Hicks argues that it has properly pled the "ultimate fact" in this case—that it had no control or capacity to control the contaminant discharge complained of here. But, the Board observes that even this was not clear from the face of the affirmative defenses themselves, and was a "fact" that Hicks teased out in its response to the People's motion.

More importantly to this decision, a landowner's control or lack thereof is a legal conclusion at which the Board arrives after consideration of all relevant facts. Here, the only facts asserted in the affirmative defenses are that Hicks was the owner of land formerly owned by Cities Service and Gulf Oil, and that any contamination on the former Hicks site is the result of releases from previous owners or from other property, including the former Amoco Oil Company Peoria Terminal. The affirmative defenses fail to give any timeframes as to when prior owners of the site at issue, or owners of adjacent sites, may have contaminated the site with benzene, details about how they did so, or circumstances that could lead to a conclusion that Hicks had no control or capacity to control the pollution.

It is well settled, as the People have argued, that legal conclusions unsupported by allegations of specific facts are insufficient. Mot at 4-5, citing, *inter alia*, 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. The Board continues to find that

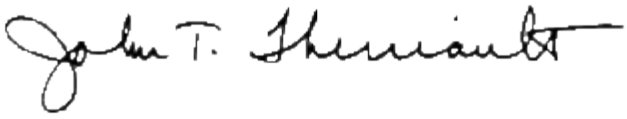
> To set forth a good and sufficient claim or defense, a pleading must allege ultimate facts sufficient to satisfy each element of the cause of action or affirmative defense pled. In determining the sufficiency of any claim or defense, the court will disregard any conclusions of fact or law that are not supported by allegations of specific fact. Richco Plastic Co., 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.

For all of the foregoing reasons, the Board strikes both of the alleged affirmative defenses. Having so ruled, the Board need not decide at this time whether the claimed

affirmative defenses are proper affirmative defenses. The People have not filed a response in opposition to Hicks' alternative request that Hicks be allowed to file amended affirmative defenses. *See* 35 Ill. Adm. Code 101.500 (lack of timely response to motion deemed waiver of objection). The Board will accordingly grant Hicks leave to file amended affirmative defenses. Rather than setting a date for the filing of amended affirmative defenses today, the Board directs the hearing officer to set an appropriate date after consultation with the parties[5].

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on December 17, 2009 by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board

[5] The Board notes that the hearing officer has scheduled the next status conference for January 10, 2010.