ILLINOIS POLLUTION CONTROL BOARD
March 18, 2010

ELMHURST MEMORIAL HEALTHCARE and ELMHURST MEMORIAL HOSPITAL,	)	
Complainants,	)	
v.	)	PCB 09-066
	)	(Citizens Enforcement - Land)
CHEVRON U.S.A. INC.	)	
Respondent.	)	

ORDER OF THE BOARD (by G.L. Blankenship):

On March 6, 2009, Elmhurst Memorial Hospital (EMH) and Elmhurst Memorial Healthcare (collectively, Complainants) filed a complaint against Chevron U.S.A. Inc. (Chevron or Respondent) alleging that Chevron violated Sections 21(a) and 21(e) of the Illinois Environmental Protection Act (Act) (415 ILCS 5/21(a), (e) (2008)). The complaint concerns Elmhurst's remediation of a property that Chevron formerly owned and operated as a gas filling station located at 701 South Main Street, Lombard, DuPage County (Property). In answering the complaint on May 8, 2009, Chevron alleged nine affirmative defenses. On June 5, 2009, Complainants responded to the first affirmative defense and moved to strike the remaining eight. Having now received Chevron's response, Complainants' reply in support of its motion, and Chevron's sur-reply, the Board today proceeds to decide the motion to strike the affirmative defenses.

For the reasons below, the Board denies the Complainants' motion to strike Affirmative Defenses No. II and III, and grants the Complainants' motion to strike Affirmative Defenses Nos. IV through IX. The Board finds that Chevron has pleaded the ultimate facts necessary to establish Affirmative Defenses No. II and III, but the Board on various grounds described below grants Complainants' motion to strike Affirmative Defense Nos. IV through IX.

Below, the Board first provides the procedural history of this case before summarizing the substance of the complaint and the answer and affirmative defenses. The Board then reviews Complainants' motion to strike affirmative defenses II through IX, Chevron's response, Complainants' reply in support of its motion, and Chevron's sur-reply. Under "Discussion," the Board briefly discusses the standard of review applicable to motions to strike affirmative defenses. The Board then separately addresses each of the defenses raised by Chevron and determines whether to grant the motion to strike them. The Board closes by stating its conclusions and issuing its order.

PROCEDURAL HISTORY

On March 6, 2009, Complainants filed a complaint (Comp.) against Chevron seeking reimbursement for remediation costs. The Complaint alleges that Chevron is responsible for contamination associated with underground storage tanks (USTs) once operated by Texaco, Inc. (Texaco) at 701 South Main Street, Lombard, DuPage County. Comp. at 2. Count I of the complaint alleges that Texaco, Chevron's predecessor in interest, violated Section 21(a) of Act (415 ILCS 5/21(a) (2008)) by causing or allowing the open dumping of waste. Comp. at 6-7. Count II alleges that Texaco violated Section 21(e) of the Act (415 ILCS 5/21(a) (2008)) by disposing, treating, storing, or transporting waste at a facility that did not meet the requirements of the Act. Comp. at 7-8. In an order dated May 7, 2009, the Board accepted the complaint for hearing.

On May 8, 2009, Chevron filed its answer (Ans.), which raised nine affirmative defenses. Chevron stated in affirmative defense II that any claims alleged in the complaint were discharged as a result of Texaco's bankruptcy proceedings under a January 26, 1988 court order. Ans. at 13-14. On June 5, 2009, Complainants filed a response to affirmative defense I and a motion to strike affirmative defenses II through IX (Mot. Strike). On June 26, 2009, Chevron filed its response to the motion to strike (Resp.). Addressing affirmative defense II, Chevron stated that, under Texaco Inc. v. Sanders, 182 B.R. 937 (1995), all claims that the Complainants may have had against Texaco were barred because they were discharged as a result of Texaco's bankruptcy proceedings. Resp. at 4-9.

On July 10, 2009, Complainants filed a motion for leave to file *instanter* a reply in support of the motion to strike affirmative defenses (Mot. Reply). Complainants limited their motion for leave to reply to affirmative defense II. Mot. Reply at 1, 8. On July 21, 2009, Chevron filed its response to the motion for leave to file *instanter* a reply (Resp. Reply). Chevron argued that the Board should deny Complainants' motion or, as an alternative in the event that the Board granted the motion, grant Chevron 14 days in which to file a sur-reply. Resp. Reply at 5-6. In an order dated August 6, 2009, the Board granted Complainants' motion for leave to file a reply and also granted Chevron's request for leave to file a sur-reply. On August 12, 2009, Complainants filed a reply in support of their motion to strike affirmative defenses (Reply). On August 25, 2009, Chevron filed its sur-reply to Complainants' reply (Sur-Reply).

COMPLAINT

Parties

Complainants state that both EMH and Elmhurst Memorial Healthcare are Illinois not-for-profit corporations having primary offices in Elmhurst. Comp. at 2 (¶1). Complainants further state that "Chevron is a Pennsylvania corporation licensed to conduct business in Illinois" with its primary offices located in San Ramon, California. *Id*. (¶2). Complainants argue that each of these three entities is a "person" under the Act. *Id*., citing 415 ILCS 5/3.315 (2008).

Complainants allege that Chevron merged with Texaco in October 2001. Comp. at 2 (¶3). Complainants further allege that, as a result of that merger, "any liabilities arising from Texaco's pre-2001 actions relevant to this Complaint became the liabilities of Chevron

Corporation." *Id*. at 3 (¶4). On the basis of information and belief, Complainants allege that, after the merger, Chevron Corporation "effectively transferred such liabilities" to its subsidiary, the respondent. *Id*.

Historical Background

On the basis of information and belief, Complainants allege that, from approximately 1957 to 1977, The Texas Company owned and/or operated a gasoline filing station under the name "Texaco" on the Property. Comp. at 3 (¶6). Complainants further allege that, "in or about 1959, The Texas Company changed its names to 'Texaco, Inc.'" *Id*. Complainants further allege that Texaco caused the installation of "one heating oil UST, at least four gasoline USTs and two other USTs" at the Property. *Id*. (¶7). Complainants allege that "releases of petroleum occurred as a direct result of Texaco's operation of the gasoline USTs." *Id*. (¶8). Complainants also allege that "Texaco ceased using the Property as a gasoline filling station in or about 1977, and abandoned in place all of the USTs then located on the Property." *Id*. (¶9).

On the basis of information and belief, Complainants allege that a transferee of the Property discovered in 1981 "that some or all of the USTs had not been abandoned properly." Comp. at 3 (¶10). Complainants further allege that this discovery came at that time to the attention of the Lombard Fire Department, which "promptly notified the company that performed the 1978 abandonment of the deficiency in its work, stating that the USTs were only partially filled with an inert solid material." *Id*. at 3-4 (¶10). Complainants also allege that "a transferee of the Property removed two USTs in or about 1981." *Id*. at 4 (¶11).

EMH Remediation

Complainants allege that EMH in 2005 "identified the Property as a possible site for a facility to treat patients suffering from sleep disorders." Comp. at 4 (¶13). Complainants further allege that "Elmhurst Memorial Healthcare purchased the Property for that purpose in the same year." *Id*.

Complainants allege that, through contractors, "EMH conducted an electromagnetic search to locate any USTs remaining on the Property." Comp. at 4 (¶14). Complainants further allege that, on the east side of an existing building, the search detected one UST believed to have contained heating oil. *Id*. Complainants further allege that "EMH obtained a permit to remove the UST and drained approximately 230 gallons of water from it." *Id*. Complainants also allege that, "[o]n March 17, 2006, the UST was extracted in the presence of representatives of the Illinois State Fire Marshal and the Lombard Fire Department." *Id*. The complaint states that the UST was located near the soil surface, had a dented top, "and had holes of between two and four inches in length." *Id*. (¶15). Complainants allege that "[s]oil samples were collected from the vicinity of the excavation pit and submitted for laboratory analysis." *Id*. Complainants further allege that, "[n]otwithstanding the poor condition of the UST and the detection of petroleum odors, the UST was determined not to be leaking." *Id*. at 4-5 (¶15).

Complainants allege that EMH did not at that time find gasoline USTs on the Property. Comp. at 5 (¶16). Complainants allege, however, that EMH "did locate the area of the former

gasoline pump islands and collected soil samples in that vicinity." *Id*. Complainants allege that analysis of the samples "showed that the soil in the Property contained benzene and ethylbenzene at concentrations exceeding" regulatory standards. *Id*., citing 35 Ill. Adm. Code 734.405(b) (Indicator Contaminants), 35 Ill. Adm. Code 742.Appendix B (Tier I Illustrations and Tables). Complainants further allege that "[t]he soil was contaminated as a result of Texaco's operation of the gasoline filling station." Comp. at 5 (¶16). Complainants allege that EMH excavated more than 570 tons of contaminated soils and disposed of it off-site. *Id*. (¶17). Complainants further argue that, because groundwater seeped into the excavation, EMH collected approximately 1,350 gallons of water and disposed of it off-site. *Id*. (¶18).

Complainants allege that, following this remediation, "the existing building on the Property was razed to make way for the new EMH facility." Comp. at 5 (¶19). Complainants allege that construction revealed four gasoline USTs, each of which had a capacity of 3,000 gallons. *Id*. Complainants also allege that, on September 19, 2007, these four gasoline USTs were removed in the presence of a representative of the Office of the Illinois State Fire Marshal. *Id*. (¶20). Complainants argue that the representative determined that a release had occurred and that the release was reported to the Illinois Emergency Management Agency. *Id*. (noting Incident No. 20071269).

Complainants allege that each of the four gasoline USTs "contained gasoline and water and was partially filled with sand" and had holes at the bottom. Comp. at 5 (¶21). Complainants further allege that analysis of soil samples from the sidewalls and floor of the excavation pit showed that the soil contained benzene at levels exceeding regulatory standards. *Id*. at 6 (¶22), citing 35 Ill. Adm. Code 734.405(b), 35 Ill. Adm. Code 742.Appendix B. Complainants also allege that "[a]bout 10,500 gallons of gasoline and water was pumped from the tanks and the excavation pit and disposed [of] off-site." Comp. at 6 (¶23). Complainants further allege that "[a]bout 315 tons of contaminated soil was excavated from the area affected by the gasoline USTs." *Id*. (¶24).

The Complaint states that Complainants have spent more than $100,000 to remediate the Property. Comp. at 6 (¶26). Complainants allege that "EMH notified Respondent of the discovery of the four gasoline USTs at the time of the excavation, and demanded reimbursement of the costs expended in relation to the USTs as early as October 2, 2007." *Id*. (¶27). Complainants further allege that, in spite of repeated demands, Chevron "has not reimbursed EMH for any of the costs it incurred in relation to the USTs on the Property." *Id*.

Complainants allege that, on or about December 27, 2007, "[t]he Illinois Environmental Protection Agency issued a No Further Remediation Letter with respect to the four gasoline USTs. . . ." Comp. at 6 (¶25), citing 415 ILCS 5/57.10 (2008).

Count I

Complainants allege that "[t]he USTs, the substances in the USTs, and the contaminated media resulting from releases associated with the USTs on the Property (collectively, 'Gas Station Waste') all constitute "waste" within the meaning of the Act." Comp. at 7 (¶30), citing 415 ILCS 5/3.535 (2008) (defining "waste"). On the basis of information and belief,

Complainants allege that the Property did not at any relevant time fulfill the requirements of a sanitary landfill. Comp. at 7 (¶32). Complainants further allege that "[t]he abandonment of the Gas Station Waste constitutes 'open dumping' within the meaning of the Act." *Id*. (¶33), citing 415 ILCS 5/3.305 (2008) (defining "open dumping"). Complainants further allege that Texaco, Chevron's predecessor in interest, cause or allowed open dumping in violation of the Act. Comp. at 7 (¶34), citing 415 ILCS 5/21(a) (2008). Complainants request that the Board enter an order requiring Chevron to reimburse Complainants for costs incurred in investigating and remediating waste at the Property. Comp. at 7. Complainants also request any other relief that the Board and equity deem appropriate. *Id*.

Count II

Complainants restate their allegation that "[t]he Gas Station Waste constitutes "waste" within the meaning of the Act." Comp. at 8 (¶37), citing 415 ILCS 5/3.535 (2008). Complainants allege that the presence of the Gas Station Waste on the Property constitutes both "storage" and "disposal" under the Act. Comp. at 8 (¶¶38, 39), *see* 415 ILCS 5/3.185 (defining "disposal"), 415 ILCS 5/3.480 (defining "storage"). Complainants argue that "[t]he presence of Gas Station Waste on the Property for decades after the cessation of active use by Texaco constitutes 'abandonment'" under the Act. Comp. at 8 (¶40), citing 415 ILCS 5/21(e) (2008). Complainants further allege that "Texaco disposed, stored, and abandoned waste at a facility that did not meet the requirements of the Act, and the regulations thereunder, in violation of Section 21(e) of the Act." *Id*. (¶41), *see* 415 ILCS 5/21(e) (2008). Complainants request that the Board enter an order requiring Chevron to reimburse Complainants for costs incurred in removing USTs, investigating and remediating the Property, and disposing of contaminants such as contaminated soil and water. Comp. at 8-9. Complainants also request any other relief that the Board and equity deem appropriate. *Id*. at 9.

CHEVRON'S ANSWER AND AFFIRMATIVE DEFENSES

As noted above, Chevron filed its answer on May 8, 2009. In its answer, Chevron admits some facts, denies some facts, and states that it has insufficient information to either admit or deny other facts. The answer raised nine affirmative defenses, which the Board separately summarizes in the following subsections.

Affirmative Defense I: No Assumption of Texaco Inc.'s Liabilities

Chevron acknowledges Complainants' allegation "that Chevron Corporation (not the Respondent) merged with Texaco Inc." Ans. at 12, citing Comp. at 2 (¶3). Chevron notes Complainants' allegation that, "by virtue of the alleged merger, any liabilities arising from Texaco Inc.'s pre-2001 actions relevant to this Complaint became the liabilities of Chevron Corporation." Ans. at 12, citing Comp. at 3 (¶4). Chevron further notes Complainants' allegation, on the basis of information and belief, that "Chevron Corporation effectively transferred the liabilities of Texaco Inc. to Respondent." *Id*. Chevron argues that Complainants allege no facts supporting the information and belief on which these allegations are based. Ans. at 12.

Chevron states that, on October 9, 2001, a subsidiary of Chevron Corporation acquired the common stock of Texaco, which "became and remains a wholly-owned, indirect, subsidiary of Chevron Corporation." Ans. at 12. Chevron further states that "Texaco Inc. did not merge into or with Chevron Corporation" and that "no liabilities of Texaco Inc. were transferred to or assumed by Respondent in this transaction." *Id*. Chevron argues that no liability of Texaco Inc. for the actions alleged by Complainants has become the liability of the respondent. *Id*.

Affirmative Defense II: Discharge in Bankruptcy

In response to Complainants' allegation that Chevron has become responsible for the liabilities of Texaco, Chevron indicates that, "[o]n April 12, 1987, Texaco Inc. instituted a proceeding under Chapter 11 of the United States Bankruptcy Code, entitled *In re* Texaco Inc., *et al.*, 87 B 20142. . . ." Ans. at 13. Further, Chevron states that, on January 26, 1988, the bankruptcy court established March 15, 1988 "as the last date for creditors to file proofs of claim." *Id*. Chevron notes that, on March 23, 1988, the bankruptcy court confirmed the reorganization plan for Texaco Inc., which provided "that any claims not filed and approved by the Court are discharged and forever barred." *Id*. Chevron claims that "[n]o claims arising out [of] or relating to any acts, omissions or liabilities of Texaco Inc. arising out of or relating to the Property, including but not limited to the claims alleged in the Complaint, were filed in the Texaco Bankruptcy by Complainants or any other person or entity." *Id*. Chevron argues that "the claims alleged in the Complaint have been discharged and Complainants are barred from asserting such claims in this proceeding." *Id*. Chevron maintains that, because those claims have been discharged against Texaco, they "could not have been transferred to or assumed by Respondent as Complainants allege." *Id*. at 13-14.

Affirmative Defense III: Jurisdiction – Act Not Applicable

Chevron states that Complainants seek relief from releases of gasoline violating the Act that are alleged to have occurred while Texaco Inc. operated of a gasoline filling station on the Property beginning no earlier than 1957 and ending no later than 1977. Ans. at 14. Chevron argues that "[t]he Act did not become effective until June 29, 1970, some 12 years after Texaco Inc. began operating the filling station." *Id*. Chevron further argues that "[n]one of the sections of the Act which the Complaint alleged Texaco Inc. violated were in effect any earlier than January 1, 1985, which [is] at least eight years after Texaco Inc. last operated the filing station." *Id*. Chevron concludes that "the Act does not apply to the claims alleged" and that "there is no jurisdiction under the Act for the Illinois Pollution Control Board to adjudicate the complaint." *Id*.

Affirmative Defense IV: Jurisdiction – No Authority to Award Cost Recovery

Chevron acknowledges the allegation that, under Section 31 of the Act, the Board has jurisdiction of this matter. Ans. at 15, citing Comp. at 3 (¶5); *see* 415 ILCS 5/31 (2008). Chevron further notes that each of the two counts of the complaint requests that the Board order Chevron to reimburse Complainants' costs, including those incurred in investigating, cleaning up, and remediating the Property and in disposing of contaminated soils and water. Ans. at 15; *see* Comp. at 7, 8-9. Chevron characterizes the complaint as essentially a claim for cost

recovery. Ans. at 15. Chevron argues that the Act "grants authority to the Board to enter orders for certain specific relief, but does [not] grant authority to the Board to enter orders allowing cost recovery to Complainants for violations of the Act by respondents." *Id*., citing 415 ILCS 5/33(b) (2008). Chevron concludes that "the Board does not have the authority under the Act to grant the relief requested in the Complaint." Ans. at 15.

Affirmative Defenses V: Incurred Risk

Chevron notes Complainants' allegation that Elmhurst Memorial Healthcare purchased the Property "in 2005 more than 25 years after Texaco Inc had departed." Ans. at 16, citing Comp. at 4 (¶13). Chevron claims that Complainants fail to allege "that they performed any investigation or due diligence for the presence of USTs or releases of gasoline or other petroleum at the Property prior to purchasing the Property." Ans. at 16; *see* Comp. at 4-6. Chevron argues that "[r]easonable due diligence performed prior to purchasing the property would have disclosed information in the public records that USTs were or had been on the Property and that releases of gasoline or petroleum were present on the Property." Ans. at 16. Chevron asserts that "[a] reasonable and prudent person, therefore, would have performed such due diligence prior to purchasing the Property and would have discovered that USTs were or had been on the Property and that releases of gasoline or petroleum were present on the Property." *Id*. Chevron claims that Complainants either knew or should have known before purchasing the Property that USTs were or had been located there and that releases of gasoline or other petroleum products were present there. *Id*. Chevron concludes that "[c]omplainants, therefore, incurred the risk of USTs and releases of gasoline or other petroleum being present on the Property, and, consequently, incurred the risk of the cost of removal of the USTs and remediation of the Property." *Id*. Chevron claims that incurring this risk bars Complainants from recovering costs they could have avoided. *Id*.

Affirmative Defenses VI: Assumption of Risk

Chevron restates many of the claims and arguments it raised in support of affirmative defense V. *Compare* Ans. at 17-18 (affirmative defense VI) *and* Ans. at 15-17 (affirmative defense V). On the basis of these claims and arguments, Chevron concludes that "[c]omplainants, therefore, assumed the risk of USTs and releases of gasoline or other petroleum being present on the Property, and, consequently, assumed the risk of incurring the cost of removal of the USTs and remediation of the Property." Ans. at 17-18. Chevron claims that assuming this risk bars Complainants from recovering costs that it could have avoided assuming. *Id*. at 18.

Affirmative Defenses VII: Avoidable Consequence

Chevron restates many of the claims and arguments it raised in support of affirmative defenses V and VI. *Compare* Ans. at 18-19 (affirmative defense VII) *and* Ans. at 15-17 *and* Ans. at 17-18 (affirmative defenses V and VI). On these basis of these claims and arguments, Chevron concludes that "[c]omplainants, therefore, could have reasonably avoided the consequence of USTs and releases of gasoline or other petroleum being present on the Property, and, therefore avoided the cost of removal of the USTs and remediation of the Property." Ans. at

19. Chevron claims that, because Complainants could reasonably have avoided the these costs, they are barred from bringing this complaint to recover them. *Id*.

Affirmative Defense VIII: Causation

Chevron notes Complainants' allegation that "Texaco Inc. operated a gasoline filling station on the Property from approximately 1957 to 1977." Ans. at 19, citing Comp. at 3 (¶6); *see* Ans. at 3. Chevron also notes that Complainants allege, on the basis only of information and belief, "that releases of petroleum occurred as a direct result of Texaco's operation of the gasoline USTs." Ans. at 19, citing Comp. at 3 (¶8); *see* Ans. at 3. Chevron claims that Complainants allege, on the basis only of information and belief, "that Texaco abandoned in place all of the USTs then located on the Property." Ans. at 19, citing Comp. at 3 (¶9). Chevron argues that Complainants allege "that a subsequent transferee of the Property removed two USTs in or about 1981." Ans. at 19, citing Comp. at 4 (¶11); *see* Ans. at 4. Chevron states that, after Texaco Inc. left the Property, subsequent owners or operators "performed abandonment-in-place procedures to the USTs, including filling the USTs with sand." Ans. at 20. Chevron argues that, "[b]y reason of the foregoing, persons other than Texaco Inc. took actions with the USTs, including abandonment-in-place and removal. . . ." and that these actions could be the cause of any releases of gasoline or other petroleum on the Property. *Id*. Chevron concludes that "[c]omplainants cannot demonstrate that the releases of gasoline of other petroleum alleged occurred during the time that Texaco Inc. operated any USTs on the Property; thus, Texaco Inc.'s operation of the USTs could not have directly resulted in the releases alleged." *Id*.

Affirmative Defense IX: Laches

Chevron answers that it is "not liable to the Complainants for the claims alleged. . . ." Ans. at 20. Chevron argues that its "ability to present its defense has been substantially impaired and prejudiced by the passage of more than 30 years since it last had any contact with the Property." *Id*. Chevron further argues that "[d]ocuments, witnesses and other evidence, upon which Respondents' defense would rest, cannot be located or are no longer in existence." *Id*. Chevron concludes that, under the doctrine of laches, "Complainants are estopped from bringing this action against Respondent." *Id*.

COMPLAINANTS' MOTION TO STRIKE

As noted above under "Procedural History," on June 5, 2009, Complainants filed a response to affirmative defense I and a motion to strike affirmative defenses II through IX. Complainants argue that those affirmative defenses "must be stricken because they either fail to assert facts which would preclude Complainants' recovery, or because they merely attempt to refute well-pleaded facts. . . ." Mot. Strike at 6; *see id*. at 5 (citations omitted). Below, the Board separately summarizes Complainants' arguments in support of striking each of the eight affirmative defenses addressed in the motion.

Affirmative Defense II: Discharge in Bankruptcy

Complainants argue that the crux of this affirmative defense is an allegation that Complainants' claim is barred because it did not file a claim in Texaco's 1988 bankruptcy proceeding. Mot. Strike at 6, citing Ans. at 13. Complainants further argue that Chevron's "position rests on the implicit and irrefutably wrong assumption that all entities that enter and emerge from bankruptcy are absolved of all pre-bankruptcy sins." Mot. Strike at 6, citing *In re* Pettibone Corp., 90 B.R. 918, 923 (Bankr. N.D. Ill. 1988). Complainants argue that Chevron has not alleged facts showing "that Complainants had a claim that was required to be filed in the Texaco bankruptcy proceeding or that was otherwise dischargeable in bankruptcy." Mot. Strike at 6, citing People v. Highlands, PCB 00-104, slip op. at 4 (Oct. 20, 2005).

Complainants note Chevron's assertion that "Texaco filed its bankruptcy petition in 1987, and March 15, 1988 was set as the date by which proofs of claim has to be filed ("Bar Date")." Mot. Strike at 7, citing Ans. at 13. Complainants characterize as "the pivotal issue" whether this complaint for reimbursement qualifies as a "claim" having to be filed before the Bar Date of March 15, 1988. Mot. Strike at 7, citing *In re* Canseco, 330 B.R. 673, 685-86 (Bankr. N.D. Ill. 2005) (citing Bankruptcy Code definition of "claim"). Although Complainants acknowledge that contingent rights of payment may be claims, they argue that others are so contingent or remote that there exists no right of payment. Mot. Strike at 7, citing *In re* Canseco, 330 B.R. at 685.

Complainants continue by claiming that the Seventh Circuit has addressed the issue of what constitutes a "claim" in the environmental context by determining "whether the claimant had knowledge of releases pre-bankruptcy that will lead to claims." Mot. Strike at 8, citing *In re* Chicago, Milwaukee, St. Paul & Pacific R.R., 974 F.2d 775, 786 (7th Cir. 1992). Complainants argue that, "[w]here no such knowledge is possessed, the claims are not discharged." Mot. Strike at 8, citing AM Int'l., Inc. v. Datacard Corp., 106 F.3d 1342 (7th Cir. 1997) and *In re* Canseco, 330 B.R. at 685-86. Complainants claim that, in AM Int'l., the court allowed recovery of clean-up costs where "the purchase of the contaminated property occurred after the conclusion of the bankruptcy proceeding." Mot. Strike at 8. Complainants argue that, in that case, a subsequent purchaser of the property did not learn of the contamination until after the conclusion of the bankruptcy. Complainants further argue that, because subsequent purchaser in that case had no pre-bankruptcy right of payment, its claim was not discharged. *Id*., citing AM Int'l., 106 F.3d at 1349.

Complainants claim that, even if each of Chevron's allegations under affirmative defense II is assumed to be true, Complainants' "right to assert its present cause of action would not be defeated." Mot. Strike at 7 (citations omitted). Complainants argue that the Board must strike this affirmative defense "because it alleges absolutely no facts that even remotely suggest that EMH had a right to payment" or even a contingent right to payment before the Bar Date. *Id*. at 7, 8. Complainants further argue that, to withstand the motion, Chevron must allege that Complainants knew of the contamination on the Property before the Bar Date and knew at that time that the contamination would in the future give them a right of payment. Mot. Strike at 8. Complainants claim that Chevron cannot allege such facts because Complainants acquired the Property in 2005, approximately 17 years after the Bar Date. *Id*. Complainants conclude by arguing that they had no claim dischargeable in bankruptcy and that Chevron has asserted no contrary facts. *Id*.

Affirmative Defense III: Jurisdiction – Act Not Applicable

Complainants acknowledge Chevron's assertion that the Act does not apply because it did not become effective until 1970, 12 years after Texaco began operating a gasoline filing station at the Property. Mot. Strike at 9, citing Ans. at 14. Complainants respond, however, by citing Chevron's admission "that Texaco operated the gas station for seven years beyond 1970." Mot. Strike at 9, citing Ans. at 3.

Complainants note Chevron's assertion that the Act does not apply because Sections 21(a) and (e) were not in effect earlier than January 1, 1985. Mot. Strike at 9, citing Ans. at 14; *see* 415 ILCS 5/21(a), (e) (2008). Complainants respond, however, by claiming that, "[i]n fact, Sections 21(a) and (e) were part of the original 1970 Act." Mot. Strike at 9, citing Public Act 76-2429 (eff. July 1, 1970). While Complainants acknowledge that Section 21 has undergone various amendments since 1970, they argue that those amendments do not affect the validity of their claims. Mot. Strike at 9 n.1.

Complainants stress their allegation that Texaco caused or allowed releases violating the Act and that contamination resulting from those releases remained on the Property. Mot. Strike at 9, citing Comp. at 7, 8. Complainants argue that, "[w]hether the contamination occurred before 1970, after 1970, or partly before and after 1970 is of no consequence," as "[t]he Board has repeatedly and unequivocally held that the Act applies retroactively." Mot. Strike at 9, citing Grand Pier Center v. Kerr-McGee, PCB 05-157, slip op. at 5 (May 19, 2005) (Grand Pier Center I). Complainants argue that, in Grand Pier Center I, the Board agreed that a cause of action existed where wrongful acts caused contamination before 1970 but resulted in clean-up costs in and after 2000. Mot. Strike at 9, citing Grand Pier Center I, PCB 05-157, slip op. at 4. Complainants argue that the Board concluded "that the legislature intended the Act to 'address ongoing problems, which by definition existed at the time the Act was enacted.'" Mot. Strike at 10, citing Grand Pier Center I, PCB 05-157, slip op. at 5; *see* State Oil Co. v. People, 822 N.E.2d 876, 882 (2nd Dist. 2004).

Complainants conclude by arguing that, under the case law and "a plain reading of the Act," affirmative defense III "is legally insufficient and should be stricken." Mot. Strike at 10.

Affirmative Defense IV: Jurisdiction – No Authority to Award Cost Recovery

Responding to Chevron's assertion "that the Board lacks statutory authority to award clean-up costs," Complainants argue that "[e]ven a casual look at the Board's cases show that Respondent is wrong." Mot. Strike at 10, citing Ans. at 15. Specifically, Complainants argue that the Board has consistently held that it "has the authority to award clean-up costs to private parties for a violation of the Act." Mot. Strike at 10 (citations omitted), citing 415 ILCS 5/33 (2008). Complainants conclude by claiming that Chevron "has provided no factual or legal basis to conclude that the Board's clear rulings should not obtain in the present case." Mot. Strike at 10. Complaints claim that the Board "must" strike affirmative defense IV. *Id.*

Affirmative Defenses V: Incurred Risk; Affirmative Defenses VI: Assumption of Risk; and Affirmative Defenses VII: Avoidable Consequence

Complainants argue that these three affirmative defenses "are essentially the same." Mot. Strike at 10. Complainants claim that each of the three asserts that, because Complainants did not allege that they performed due diligence before purchasing the Property, they have incurred the risk, assumed the risk, or could have avoided the consequences of the release of contaminants. *Id*. at 10-11.

Complainants argue that Chevron "has articulated no legal theory by which a third party's investigation (or lack of investigation) prior to entering into a contract for the purchase of property could possibly relieve Respondent of responsibility for violations of Section 21(a) or 21(e) some thirty years earlier." Mot. Strike at 11. Complainants further argue that whether they "conducted exhaustive due diligence is utterly irrelevant to the validity or strength of its claim..." *Id*. Complainants add that these three affirmative defenses "do not say how the contrary could possibly be true." *Id*. Complainants claim that Chevron's assertions are not genuine affirmative defenses "because they do not assert new facts or arguments that, if true," could defeat their claims. *Id*. (citations omitted). Characterizing these affirmative defenses as "preposterous," Complainants argue that they should be struck. *Id*.

Affirmative Defense VIII: Causation

Complainants note Chevron's claim that they "cannot demonstrate that the release of gasoline or other petroleum alleged occurred during the time that Texaco Inc. operated any USTs on the Property; thus, Texaco Inc.'s operation of the USTs could not have directly resulted in the releases alleged." Mot. Strike at 1, citing Ans. at 20. Complainants characterize this assertion as a "leap of logic" unsupported by any facts. Mot. Strike at 11, 12. Complainants also argue that Chevron has merely mused "that others *could be* the cause of any release of gasoline on the Property." *Id.* at 11 (emphasis in original), citing Ans. at 20. Complainants describe this assertion as "mere speculation" also unsupported by facts. Mot. Strike at 12. Complainants claim that, even if the claim is true, Chevron "suggest no principle of law as to how that fact would relieve it of responsibility for violations of Sections 21(a) and 21(e)." *Id*. Suggesting that Chevron has failed to raise a valid affirmative defense, Complainants argue that it is insufficient and should be struck. *Id*. at 11, 12 (citations omitted).

Affirmative Defense IX: Laches

Complainants argue that "[l]aches is an equitable doctrine that bars relief where a defendant has been misled or prejudiced because of a *plaintiff*'s delay in asserting a right." Mot. Strike at 12 (citations omitted). Complainants assert that this affirmative defense includes no facts attributing any delay to them and merely offer a statement about the age or existence of witnesses and evidence. *Id*. Complainants further argue that, even if those statements are true, they are not relevant to this issue of laches. *Id*. Complainants conclude by claiming that this affirmative defense was not sufficiently pled and should be struck. *Id*.

CHEVRON'S RESPONSE

Chevron argues that the Board has defined an affirmative defense as "new facts or arguments that, if true, will defeat . . . the government's claim even if all allegations in the complaint are true." Resp. at 1-2, citing People v. Community Landfill Co., PCB 97-193, slip op. at 3 (Aug. 6, 1998). Chevron further argues that the Board has "enlarged that definition to include the definition of an affirmative defense found in the Illinois Code of Civil Procedure." Resp. at 2, citing 735 ILCS 5/2-613(d); 35 Ill. Adm. Code 101.100(b).

Chevron claims that, under the Code of Civil Procedure and the Board's procedural rules, the facts or authorities that constitute an affirmative defense "must be pled or they are waived." Resp. at 2 (citations omitted). Chevron claims that, at this stage of the proceeding, it "must be accorded all appropriate opportunity to present any set of facts or any provisions of law that presently are an affirmative defense, or which may, through discovery and preparation for hearing, ripen into an affirmative defense." *Id*. at 2-3. Chevron argues that "the Board has held that pleading of defenses should be liberally allowed in order to inform the parties of the legal theories to be presented, prevent confusion as to whether a defense has been timely raised, and avoid taking the other party by surprise." *Id*. at 2 (citations omitted).

Chevron argues that the Board has "held that a motion to strike an affirmative defense admits all well-pleaded facts constituting the defense, and attacks only the legal sufficiency of those facts." Resp. at 3, citing People v. Stein Steel Mill Services, PCB 02-1, slip op. at 3 (Apr. 18, 2002). Chevron further argues that the Board has found that, "when the well-pleaded facts of an affirmative defense raise the possibility that the party asserting them will prevail, the defense should not be stricken." Resp. at 3 (citations omitted). In addition, Chevron claims that it may rely on the facts pled by Complainants and that it is not required to raise new facts in its affirmative defenses. *Id*., citing Int'l Union v. Caterpillar, PCB 94-240, slip op. at 1-2 (Jan. 11, 1995).

Chevron concludes that, by applying these argument to its affirmative defenses, the Board should deny Complainants' motion to strike them. Below, the Board separately summarizes Chevron's arguments in support of each of the seven affirmative defenses addressed in Complainants' motion to strile.

Affirmative Defense II: Discharge in Bankruptcy

Chevron argues that Complainants have not disputed a number of the assertions regarding the Texaco bankruptcy that it made in raising affirmative defense II. Resp. at 4-5; *see* Ans. at 13. Chevron further argues that, although Complainants have cited a number of cases in support of their position, "they do not refer to or discuss any cases that have been decided on this very issue by the Bankruptcy court as a part of the Texaco Bankruptcy." Resp. at 5; *see* Mot. Strike at 6-8. Chevron claims that these "decisions demonstrate that Complainants' claims have been discharged." Resp. at 5. Chevron concludes that Complainants consequently have no claims against Texaco for which Chevron can be responsible. *Id*. at 4.

Chevron states that, in Sanders, 182 B.R. at 937, Sanders and approximately 20 other persons, none of which had filed claims in the Texaco bankruptcy, pursued environmental claims against Texaco Inc. in Louisiana state courts in 1995. Resp. at 5. Chevron argues that the claims

alleged impacts resulting from the migration of contaminants generated by Texaco on property adjoining Sanders' property. *Id*. Chevron further argues that "[a]ll of Texaco Inc.'s action at the adjoining property were concluded years before the Texaco Bankruptcy was initiated. *Id*. Chevron indicates that Texaco brought an action "to reopen the Texaco Bankruptcy for the purpose of enforcing the discharge provisions of the order confirming the plan of reorganization. . . ." *Id*. Specifically, Chevron states that Texaco raised the affirmative defense that the Sanders claims had been discharged in the bankruptcy, and the court denied a motion to strike it. *Id*.

Chevron states that Texaco at the same time reopened the bankruptcy "to enforce against Sanders the injunction contained in the Order of Confirmation that prohibits any person from pursuing a claim that has been discharged." Resp. at 6. Chevron argues that, although Sanders asserted "that their claims had not manifested themselves and could not have been known by the respondents at the time of the Texaco Bankruptcy," the court "denied these defenses and enforced the discharge against Sanders." *Id*. Chevron states that the court determined that "[a]ll of the physical events required to establish causation and damage for such claims occurred prior to the confirmation." Resp. at 7, citing Sanders, 182 B.R. at 951. Chevron further states that the court applied the relevant statutory and caselaw to determine that the claims resulting from Texaco's operations at the adjoining property arose before the bankruptcy and that the Sanders claims were thus discharged in the bankruptcy. Resp. at 6-7, citing 11 U.S.C. 101(12), 524 (a)(2), 1141(d)(1); *In re* Chateaugay Corp., 944 F.2d 997, 1003 (2nd Cir. 1991).

Chevron argues that Complainants' claims have likewise been discharged. Chevron claims that because Texaco did not own or operate the USTs or the Property after 1977, years before the bankruptcy, "any action of Texaco Inc. that could have given rise to the claims alleged by Complainants were completed prior to the Texaco Bankruptcy." Resp. at 7-8. Chevron further argues that, because these claims were debts of Texaco Inc. at the time of the bankruptcy, they have been discharged. *Id*. at 8.

Chevron claims that Sanders had opposed discharge by arguing "that the contamination caused by Texaco Inc. was not visible at the surface of their land at the time of the Texaco Bankruptcy and, therefore, had not manifested itself." Resp. at 8. Chevron further claims that, although the court accepted that as a fact, it concluded that the controlling issue was instead "whether the contamination was capable of being detected prior to confirmation of the plan." *Id*. Chevron argues that the court found that the contamination "was capable of detection by reasonable investigation of the property prior to confirmation of the plan," making it a fully mature claim. *Id*. Chevron argues that, in this case, Complainants were capable of determining the presence of USTs and releases from them that existed in 1987. *Id*. Chevron concludes by arguing that, even if contamination was not visible on the surface of the Property, the Complainants' claims pertaining to any contamination there were discharged.

Chevron also claims that the Sanders had opposed discharge by arguing "that they had no knowledge of the existence of their claims at the time of the Order of Confirmation." Resp. at 8. Chevron argues that, while the court accepted the truth of that assertion, it found "that response costs for pre-petition releases are within the definition of 'claim,' regardless of when such costs are incurred." *Id*. at 8-9, citing *In re* Chateaugay Corp., 944 F.2d at 1005. Chevron argues that, in this case, there is no real dispute that any release occurring during Texaco's operation of the

Property took place before the bankruptcy. Resp. at 9. Chevron further argues that "any response costs, no matter when incurred, including those which Complainants allege were recently incurred, are 'claims' and have been discharged." *Id.* Chevron concludes by arguing that "the fact that these Complainants did [not] own the Property at the time of the Texaco Bankruptcy, and, therefore, could not have pled a claim, does not change the rule that the debt for which they now seek recompense was discharged, and no one can now bring a claim for it." *Id*.

Chevron claims that the bankruptcy court's decision in Sanders, 182 B.R. at 958, is the law of the case both in the Texaco Bankruptcy and in determining Complainants' motion to strike. Resp. at 9. Chevron further claims that any other decisions relied upon by Complainants "are simply not controlling here." *Id*. Chevron argues that the claims alleged in the complaint were discharged in bankruptcy approximately 20 years ago. *Id*. at 4. Chevron further argues that Complainants consequently "cannot have any claims against Texaco Inc. for which they can allege Respondent could be responsible." *Id*. Chevron concludes that the Board should deny Complainants' motion to strike affirmative defense II. *Id*. at 9.

Affirmative Defense III: Jurisdiction – Act Not Applicable

Chevron notes the allegation in the complaint that it "is responsible for any liability of Texaco Inc." Resp. at 10, citing Comp. at 3 (¶4). Specifically, Chevron notes that allegation "that Texaco Inc. owned and/or operated the Property and USTs on the Property from 1959 through 1977 and that releases occurred from the USTs." Resp. at 10, citing Comp. at 3 (¶¶6-9). Chevron further notes that Complainants allege in Count I of the complaint that such releases constitute "waste" under the current provisions of the Act and that they violate the current Section 21(a) of the Act. Resp. at 10, citing Comp. at 6-7 (¶¶28-34); *see* 415 ILCS 5/3.535, 21(a) (2008). Chevron also cites the allegation in Count II that Texaco Inc.'s activities violate the current provisions of Section 21(e). Resp. at 10, citing Comp. at 8 (¶¶35-41); *see* 415 ILCS 5/21(e) (2008).

In lodging this affirmative defense, Chevron asserts that the complaint relies on current provisions of the Act that were not in effect in or prior to 1977 and that those provisions cannot be applied retroactively. Resp. at 9-10; *see* Ans. at 14. Chevron alleges that the Board accordingly lacks "jurisdiction to enforce these current versions against Respondent in this matter." Resp. at 11.

Chevron claims that Complainants have responded to this affirmative defense "by arguing that the Act (which became effective in 1970) and all subsequent amendments to the Act, including those to Sections 21(a) and (e), may be applied retroactively." Resp. at 11; *see* Mot. Strike at 9-10. Chevron characterizes as "both misleading and plainly wrong" Complainants claim "that the releases alleged, although admittedly alleged to have occurred not later than 1977 are, therefore, subject to these current provisions of the Act." Resp. at 11.

Specifically, Chevron argues that, when it became effective in 1970, the Act did not define "waste," and the predecessor to the current Section 21(a) did not refer to "waste." Resp. at 11, citing 1971 Ill. Rev. Stat., Ch. 111 1/2, Section 1021(a). Chevron further argues that,

although the Act then included a definition of "garbage," that definition did not include releases of petroleum from USTs. Resp. at 11, citing 1971 Ill. Rev. Stat., Ch. 111 1/2, Section 1003(e). Chevron concludes that in 1971 the Section 21(a) of the Act "did not relate to or regulate the releases from USTs that are alleged in the Complaint." Resp. at 11.

Chevron argues that in 1970, Section 21(e) also failed to refer to "waste." Resp. at 11-12, citing 1971 Ill. Rev. Stat., Ch. 111 1/2, Section 1021(e). Chevron further argues that, although that provisions referred to "refuse," the Act's definition of "refuse" did not include release of petroleum from USTs. Resp. at 12, citing 1971 Ill. Rev. Stat., Ch. 111 1/2, Section 1003(k). Chevron claims that "no other provision of the 1970 version of Section 1021, which is the only section of the 1970 Act prohibiting land pollution, related to or regulated the releases alleged from the USTs." Resp. at 12, citing 1971 Ill. Rev. Stat., Ch. 111 1/2, Section 1021(b-d), (f). Although Chevron suggests that the Act in 1970 defined "contaminant" broadly, it argues that "the release of a contaminant is regulated only in respect to air and water pollution, not land pollution." Resp. at 12 n.1, citing 1971 Ill. Rev. Stat., Ch. 111 1/2, Section 1009, 1012.

Noting that the complaint alleges that Texaco ceased operation at the Property in 1977, Chevron addresses the provisions of the Act then in effect. Resp. at 12, *see* Comp. at 3 (¶6). Chevron argues that, although the Act had been amended by that year, Section 1021(a) continued to address only the open dumping of "garbage," and Section 1021(e) continued to address only the disposal of "refuse." Resp. at 12, citing 1977 Ill. Rev. Stat., Ch. 111 1/2, Section 1021(a), (e). Chevron suggests that, although the definition of "refuse" had been amended, the amendment address radioactive materials that are not at issue in this proceeding. *See* Resp. at 12. Chevron argues that "in 1977 the releases from the USTs alleged in the Complaint were not regulated by the Act." *Id*.

Chevron acknowledges that the 1979 version of the Act incorporated changes including the first definition of the term "waste." Resp. at 13, citing 1979 Ill. Rev. Stat., Ch. 111 1/2, Section 1003(ff). Chevron argues, however, that "[w]hether the term 'waste' does or does not include the releases alleged in the Complaint is not relevant to this matter, as the earliest that any amendment contained in the 1979 Illinois Revised Statutes was effective July 1, 1978, which is after the date that the Complaint alleges Texaco Inc. ceased operating the USTs or the Property." Resp. at 13. Chevron concludes that "a plain reading of Section 21 of the Act from its inception in 1970 through 1978 demonstrates that the Act never regulated releases of petroleum from USTs; thus, the Act cannot be applicable to the releases alleged in the Complaint unless it were to be applied retroactively."

Chevron argues that the Board has consistently confirmed the position expressed in affirmative defense III that the Act cannot be applied retroactively. Resp. at 13. Chevron argues that, in Casanave v. Amoco Oil Co., PCB 97-84, slip op. at 8-9 (Nov. 20, 1997), "the Board refused to apply Section 21 of the Act retroactively." Resp. at 13. Chevron claims that Complainants in that case sought to apply the 1996 provisions of the Act relating to USTs to Amoco, which had ceased operating USTs and the property in 1952. *Id*. Chevron argues that the Board granted Amoco's motion to dismiss "and held that, in order for Amoco to have violated the provisions of the Act relied upon by Complainants, Amoco must have engaged in the proscribed conduct after those provisions became effective." *Id*. at 13-14 (citations omitted). In

Union Oil Co. v. Barge-Way Oil Co., PCB 98-169, slip op. at 4-5 (Jan. 7, 1999), Chevron claims that Union Oil sought to enforce the 1979 provisions of Section 21(e) with regard to activities alleged to have occurred in 1974. Resp. at 14. Chevron argues that the Board granted a motion to dismiss those allegations on the basis that they could not be applied retroactively. *Id*. at 14-15 (citations omitted). Chevron argues that Casanave and Union Oil Co. "are controlling here." *Id*. at 15. Chevron argues that 1979 amendments to Section 21 could only apply to it retroactively, which is contrary to the Board's decisions in those two cases. *See id*. at 15. Chevron concludes by claiming that Complainants' reliance on Grand Pier Center I is "misplaced." *Id*. Chevron argues that the controlling precedent is instead People v. Fiorini, 143 Ill. 2d 318, 574 N.E.2d 612 (1991), which provides that "a substantive statute cannot be applied retroactively." Resp. at 16. Chevron thus argues that the Complainants' motion to strike affirmative defense II should be denied.

Affirmative Defense IV: Jurisdiction – No Authority to Award Cost Recovery

Chevron states that it is "well aware" of the Board's decisions "that it has the authority to award clean[-]up costs." Resp. at 16. However, Chevron argues that Section 33(b) of the Act does not specifically grant this authority to the Board. *Id*., citing 415 ICLS 5/33(b) (2008). Chevron argues that the Board infers such authority from Section 33(a), which allows the Board to "enter such final order, or make such final determination, as it shall deem appropriate under the circumstances." Resp. at 16-17, citing 415 ILCS 5.33(a) (2008).

Chevron cites two authorities, suggesting that they cast some doubt on whether the Board possesses this authority. Chevron argues that, in NBD Bank v. Krueger Ringier, Inc., 292 Ill. App. 3d 691, 697 (1997), "the appellate court held that a private right of action [for] cost recovery does not exist under the Act for the circumstances of the instant case, stating"

> [t]he Illinois Environmental Protection Act and companion regulations were not designed to protect the purchasers of real estate who discover after the conveyance that remedial action is necessary to remove contaminants from the property, nor was the Act designed to protect against economic losses resulting from the obligation to remove contaminants. Resp. at 17.

Chevron also argues that a special concurring opinion in Casanave expressed the opinion that the Board does not have authority to hear private cost recovery actions. *Id*., citing Casanave, PCB 97-84.

Chevron requests that the Board reconsider its prior decisions allowing cost recovery. Resp. at 17. Chevron argues that "[t]his request is especially relevant in actions such as this matter, where any reasonable due diligence by Complainants prior to purchasing the property would have disclosed the releases alleged and Complainants could have avoided incurring the costs which they now request the Board award to them." *Id*. Chevron concludes that Complainants' motion to strike affirmative defense IV should be denied. *Id*.

Affirmative Defenses V: Incurred Risk; Affirmative Defenses VI: Assumption of Risk; and Affirmative Defenses VII: Avoidable Consequence

According to Chevron, these three defenses assert that the complaint fails to allege that Complainants "performed any due diligence, which would surely have disclosed the existence of the USTs and the releases alleged." Resp. at 17; *see* Ans. at 15-19. Chevron argues that the three defenses specifically assert that Complainants either "incurred, assumed or could have avoided the risk of (a) the existence of the USTs and the alleged releases being on the Property, and (b) the remediation costs, which they now ask the Board to award the from Respondent." Resp. at 17-18. Chevron notes that Complainants have responded to these defenses by stating that Chevron "has articulated no legal theory by which a third party's investigation (or lack of investigation) prior to entering into a contract of the purchase of property could possibly relieve Respondent of responsibility for violations of Section 21(a) or (e). . . ." Resp. at 18, citing Mot. Strike at 11.

Chevron claims that Complainants' position is "not correct." Resp. at 18. Chevron argues that, "[w]ithout the benefit of discovery it is not yet known what the contract documents between Complainants and their seller provided in respect to the environmental condition of the Property." *Id*. Chevron further argues that the complaint shows that "Complainants are sophisticated business enterprises and are, assumedly, represented by professional advisors." *Id*. Chevron claims that, while Complainants should therefore have known about any environmental risks associated with a site they acquired in 2005, it appears that they did not detect releases from USTs until 2006. *Id*., citing Comp. at 4-6 (¶¶13-24).

Chevron argues that, in NBD Bank, 292 Ill. App. 3d at 696, the court characterized the "post-closing discovery of USTs and related releases by a buyer of commercial real estate" as merely "disappointed commercial expectations." Resp. at 18-19. Chevron further argues that the court "held that the Act was not intended to be used by such a disappointed buyer to recover the costs of removal of contaminants." Chevron concludes that, under the authority of NBD Bank, Complainants "should not be allowed to use the Act to recover remediation costs that should have been resolved with their seller in the acquisition of the Property." *Id*. at 19. Chevron argues that the Board should deny Complainants' motion to strike affirmative defenses V, VI, and VII. *Id*.

Affirmative Defense VIII: Causation

Chevron notes that affirmative defense VIII asserts that third parties' operation of USTs at the Property after Texaco operated them may have resulted in releases when third parties abandoned those USTs in place or removed them. Resp. at 19; *see* Ans. at 19-20. Chevron argues that, at this stage of the proceeding and where the claim could surprise Complainants, the affirmative defense should not be struck because "[d]iscovery will be taken on this issue and may support this defense." Resp. at 19.

Chevron also responds to Complainants' claim that this assertion "cannot be a defense because it presents no new facts and is merely a denial." Resp. at 19. Chevron claims that an affirmative defense need not plead new facts and that "any set of facts or law which could defeat a claim or take the opposing party by surprise must be pled." *Id*. at 19, citing *id*. at 1-3. Chevron

concludes that the Board should deny Complainants' motion to strike affirmative defense VIII. *Id*. at 19.

Affirmative Defense IX: Laches

According to Chevron, Complainants' argument that the doctrine of laches does not apply here because they have not unreasonably delayed bringing this action demonstrates Complainants' misunderstanding of the doctrine. Resp. at 19-20; *see* Mot. Strike at 12. Chevron argues that application of laches requires two elements: "unreasonable delay in bringing a claim and prejudice to the party against whom the claim is brought." Resp. at 20, citing People v. Skokie Valley Asphalt Co., PCB 96-98, slip op. at 8 (Sept. 2, 2004).

Chevron argues that "[t]he first element has been met." Resp. at 20. Chevron acknowledges that "[it] is not that these Complainants unreasonably delayed, as they acquired the Property in the past few years." *Id*. Chevron argues, however, that, "[i]f the owner of the Property at the time that Texaco operated the USTs were to have brought this action at this time, the delay would be unreasonable and laches would certainly apply." *Id*. Suggesting that any delay on the part of a previous owner should be attributable to Complainants, Chevron claims that their recent acquisition of the Property does not mitigate any delay. *Id*. Chevron argues that "[a] simple sale of the Property from a person who would have been subject to a laches defense to another person should not do away with the laches defense." *Id*. Chevron thus argues that the Board should deny Complainants' motion to strike affirmative defense IX. *Id*.

COMPLAINANTS' REPLY

On August 12, 2009, Complainants filed a reply indicating that they would rely on their "'Motion for Leave to File Reply *Instanter* in Support of Its Motion to Strike Affirmative Defenses,' filed with the Board on July 10, 2009, which is incorporated by reference as if fully set for the herein." Reply at 1. Complainants limited their reply to affirmative defense II, addressing the bankruptcy of Texaco. Mot. Reply at 1. Complainants state with regard to the remaining affirmative defenses that they rest on their motion to strike. Mot. Reply at 8. Below, the Board summarizes Complainants' arguments contained in the reply.

Complainants argue that Chevron has ignored fundamental principles of bankruptcy instead of successfully confronting them. Mot. Reply at 5. Among these bankruptcy principles, argue Complainants, is the definition of a "claim" as a "right to payment." *Id*. at 4 (citations omitted). Complainants further argue that "[a] claim cannot be discharged in bankruptcy if no pre-bankruptcy claim exists, and there can be no such claim where, as here, there was no pre-bankruptcy relationship between the claimant and the debtor." *Id*. Complainants suggest that they have established that the claim or right to payment "must exist *before* the bankruptcy." *Id*. (emphasis in original), citing *In re* Chicago, Milwaukee, St. Paul & Pacific R.R., 3 F.3rd at 202, 207; *see* Mot. Strike at 7-8.

Complainants argue that Chevron's response relies on cases in which a pre-bankruptcy relationship actually existed. Mot. Reply at 5. Complainants cite *In re* Chateaugay Corp., 944 F.2d at 999-1001, in which USEPA filed claims based on the federal Superfund statute for future

response costs in the bankruptcy proceeding of LTV Steel. Mot. Reply at 5. Complainants claim that USEPA "argued that its claims for future response costs could not be discharged because no 'right to payment' existed, and thus no claim existed until [US]EPA incurred response costs." *Id*. Complainants acknowledge that the *In re* Chateaugay Corp. court recognized Congress' intent that "right to payment" should be interpreted broadly in order to fulfill the policy of the bankruptcy statute. *Id*. Complainants argue, however, that the court stated that "[t]o expect 'claims' to be filed by those who have not yet had any contact whatever with the tort-feasor has been characterized as 'absurd.'" *Id*. (citations omitted). Complainants further argue that Chevron seeks to achieve this "absurd" result when it cites no pre-bankruptcy contact between Texaco and Complainants. *Id*. at 6.

Complainants argue that they had no pre-bankruptcy relationship to Texaco and none that resembled the relationship in Sanders. Mot. Reply at 6, citing Sanders, 182 B.R. 937. Complainants state that "[t]he pre-bankruptcy relationship in Sanders consisted of long-standing contractual relationships relating to oil and gas wells with certain claimants and salt water storage pits located on one of the claimant's property." *Id*., citing Sanders, 182 B.R. at 941-42. Complainants suggest that it can be difficult to determine "how close a pre-bankruptcy relationship must be to give rise to a claim." Mot. Reply at 7. Complainants argue that it is beyond dispute that "no relationship equals no discharge." *Id*. Complainants further argue that any other conclusion would be "fundamentally unfair" and would deprive them of due process. *Id.* n.4.

CHEVRON'S SUR-REPLY

On August 25, 2009, Chevron filed its sur-reply to Complainants' reply. Chevron stated that, for its sur-reply, it "adopts and incorporates herein by reference the 'Response of Chevron U.S.A. to Complainants' Motion to File Reply *Instanter*,' that was filed with the Board on July 21, 2009. . . ." Sur-Reply at 1. Below, the Board summarizes Chevron's arguments contained in the sur-reply.

Chevron argues that Complainants' motion to strike affirmative defense II neither cited nor distinguished the holding in Sanders. Resp. Reply at 2, citing Sanders, 182 B.R. 937. Chevron claims that it is "the law of the case regarding Texaco Inc. bankruptcy discharge issues" and that it "is on point with the underlying facts of this case." *Id*. Chevron notes that the court discharged plaintiffs' claim and stated that "[a]ll of the physical events required to establish causation and damage for such claims occurred prior to the confirmation." *Id*. at 3, citing Sanders, 182 B.R. at 951. Chevron argues that the complaint alleges that releases occurred nine years before the Texaco bankruptcy, making then "pre-petition releases." Resp. Reply at 2. Chevron claims that, "[b]ecause of this, any debt or claim created by those releases (no matter who may bring that claim) was discharged by the Texaco Inc. bankruptcy." *Id*. at 2-3.

Chevron characterizes as "fundamentally flawed" Complainants' argument that, because they did not own the Property at the time of the bankruptcy, they could not have had their claim discharged because they could not have known that they had one. Resp. Reply at 3. Chevron argues that, under Sanders, the entity owning the Property at the time of the bankruptcy is barred from bringing this claim. *Id*. Chevron further argues that, "[a]s successors-in-interest to the

owner at the time of the Texaco Inc. bankruptcy, Complainants inherit and are bound by that owner's pre-bankruptcy relationship with Texaco Inc." *Id*., citing Humphrey Property Group, LLC v. Village of Frankfort, 910 N.E.2d 193 (3rd Dist. 2009). Chevron claims that determining whether a claim has been discharged does not hinge on whether that claim is brought by the owner at the time of the bankruptcy or a subsequent owner. Resp. Reply at 3-4.

Stating that Complainants are unable legally or factually to distinguish these conclusions from their own case, Chevron argues that they rely on the language but not the holding in *In re* Chateaugay Corp., 944 F.2d at 1008. Resp. Reply at 4. Chevron notes that this case affirmed a decision discharging claims for future cost recovery for pre-petition releases. *Id*. Chevron acknowledges that the court "stated that it would be absurd to find that the claim of a person who is injured in a post-bankruptcy accident, as a result of a pre-bankruptcy design flaw, was discharged." *Id*. Chevron argues, however, that this "does not mean that any claim brought by a claimant, who did not have a pre-bankruptcy relationship with the bankrupt party, cannot be discharged." *Id*. Chevron suggests that Complainants cannot extend the holding in *In re* Chateaugay Corp. "to mean that a subsequent owner such as Complainants would have the right to bring this claim." *Id*. at 5.

Chevron concludes by stating that Complainants' claim was discharged by the Texaco Inc. bankruptcy, suggesting that their motion to strike affirmative defense II should be denied. *See* Resp. Reply at 5-6.

DISCUSSION

Below, the Board sets forth the standard of review applicable to affirmative defenses and motions to strike them, discusses the issues raised in the parties' filings, and then reaches the Board's conclusion on Complainants' motion to strike the various affirmative defenses.

Standard of Review

The Board's procedural rules provide 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 have been known before hearing." 35 Ill. Adm. Code 103.204(d). 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." Community Landfill Co., PCB 97-193 slip op. at 3. The Board has also defined an affirmative defense as 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*). Furthermore, if the 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, 221, 459 N.E.2d 663, 635 (4th Dist. 1984).

The pleader must allege an affirmative defense with the same degree of specificity as needed 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). The party pleading an affirmative

defense need not set out evidence, so long as the party alleges the ultimate facts to be proved. People v. Carriage 5 Way West, Inc., 88 Ill. 2d 300, 308, 430 N.E.2d 1005, 1008-09 (1981). Legal conclusions unsupported by allegations of specific facts, however, 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).

A motion to strike an affirmative defense admits well-pled facts constituting the defense, as well as all reasonable inferences that may be drawn therefrom, and attacks only the legal sufficiency of the facts. *See* Raprager v. Allstate Insurance Co., 183 Ill. App. 3d 847, 854, 539 N.E.2d 787, 791 (2nd Dist. 1989); *see also* International Insurance, 242 Ill. App. 3d at 630, 609 N.E.2d at 853-54. Where the well-pled facts of an affirmative defense and reasonable inferences drawn therefrom raise the possibility that the party asserting them will prevail, the defense should not be stricken. *See* Raprager, 183 Ill. App. 3d at 854, 539 N.E.2d at 791.

Affirmative Defense II: Discharge in Bankruptcy

In its second affirmative defense, Chevron asserts that under Texaco's bankruptcy proceedings, no claims can be brought against Texaco. Ans. at 13. Chevron argues that on March 23, 1988, the Court in the Texaco Bankruptcy approved a plan of reorganization which provides that claims not filed before the appointed Bar Date of March 15, 1988 and approved by the Court are discharged and forever barred. *Id*., citing *In re* Texaco Inc., 87 B 20142. Therefore, according to Chevron, the Complainants are barred from asserting claims. *Id*.

In response, Complainants argue that the right to payment must exist before the Bar Date, and in the environmental context, the right to payment turns on whether the claimant was aware of releases pre-bankruptcy that would lead to claims. Mot. Strike at 7-8. Complainants specifically cite AM Int'l, 106 F.2d at 1349, where the Seventh Circuit court allowed clean-up recovery costs for a property owner who purchased the contaminated property subsequent to the conclusion of the bankruptcy proceeding. *Id*. Complainants claim that because Chevron had not asserted that Complainants had a right to payment prior to the Bar Date, Chevron cannot validly claim that Complainants are barred from bringing their claims. *Id*.

Chevron replied by citing Sanders, 1982 B.R. at 942, in which Sanders, like the Complainants, pursued environmental claims against Texaco in Louisiana state courts. Resp. at 5. The Sanders court reopened the bankruptcy proceeding to enforce the discharge provision, thereby discharging Sanders' claims. *Id*.

In its reply, Complainants reiterate that because they had no pre-bankruptcy relationship with Texaco, Complainants did not have a pre-bankruptcy claim against Texaco, as supported by the Bankruptcy Code. Mot. Reply at 4. Complainants distinguish themselves from the claimants in Sanders because of Sanders' pre-bankruptcy relationship with Texaco as well. *Id*. at 7. Chevron responds that successors-in-interest to the owner at the time of the Texaco Inc. bankruptcy, Complainants inherit and are bound by that owner's pre-bankruptcy relationship with Texaco, particularly because the previous owners could have brought the claim but did not. Resp. Reply at 3.

The Board denies Complainants' motion to strike affirmative defense II. A valid affirmative defense presents new facts or arguments that, if true, will defeat the claimant's claim even if all allegations in the complaint are true. Community Landfill Co., PCB 97-193 slip op. at 3. Chevron has alleged that Complainants' claims have been discharged under the provisions of the bankruptcy proceeding. Ans. at 13. Although the bankruptcy proceeding does not speak directly to the claims and facts of this case, there is a possibility that Chevron may prevail if the facts alleged in the affirmative defense are proven true. Therefore, the Board denies the motion to strike the affirmative defense.

Affirmative Defense III: Jurisdiction – Act Not Applicable

Chevron's third affirmative defense is that, at the time of the violations, the relevant sections of the Act did not apply to the claims alleged, and therefore the Board does not have jurisdiction under the Act to adjudicate the complaint. Ans. at 14. Specifically, Chevron asserts that "[n]one of the sections of the Act which the Complaint alleges Texaco violated were in effect any earlier than January 1, 1985, which [is] at least 8 years after Texaco Inc. last operated the filling station." Ans. at 14.

Complainants respond that "Sections 21(a) and (e) were part of the original 1970 Act (P.A. 76-2429, eff. July 1, 1970)." Mot. Strike at 9. Complainants argue that "[t]he Board has repeatedly and unequivocally held that the Act applies retroactively." Mot. Strike at 9, citing Grand Pier Center I, PCB 05-157.

Chevron argues that Complainants' response is misleading and "plainly wrong." Resp. at 11. Chevron argues that, when it became effective in 1970, the Act did not define "waste," and the predecessor to the current 21(a) did not refer to "waste." *Id* at 12. Chevron notes that the first definition of "waste" was included in the 1979 version of the Act, and prior to then, the predecessors to 21(a) and (e) addressed the open dumping of "garbage" and the disposal of "refuse," respectively. *Id*. Neither "waste" nor "garbage" referred to the release of petroleum from USTs. *Id*. Chevron then argues that because Texaco sold the property in 1977 and did not have ownership at the time the 1979 provisions became effective, Texaco is not liable for violations. *Id.* at 13.

Illinois law holds that a statutory amendment is construed as applying prospectively absent express language to the contrary, except where the legislature intended that the amendment apply retroactively and only to changes in procedure or remedies, rather than substantive rights. Fiorini, 143 Ill. 2d at 333, 574 N.E.2d at 617.

The Appellate Court, Second District has stated that "the legislature intended the Act to address ongoing problems, which by definition, existed at the time the Act was enacted." State Oil Co., 822 N.E.2d at 882. The Court found that the Section 2 of the Act indicates "that the legislature generally intended the Act to be given retroactive application." *Id*., citing 415 ILCS 5/2 (1996). In addition, the Board has held that "attaching liability to present conditions stemming from past acts does not necessarily have a retroactive application of the Act... when the allegations [involve]... continuing violations that began before Illinois adopted the [law] sought to be applied." Union Oil Co., PCB 98-169, citing Casanave, PCB 97-84. Furthermore,

the Board has found that, under a continuing violation theory, a person violates provisions if the person had "ownership, possession or control over the property or source of pollution after the effective date of the cited provisions." Union Oil Co., PCB 98-169; Casanave, PCB 97-84. *See* Meadowlark Farms v. PCB, 17 Ill. App. 3d 851, 862, 308 N.E.2d 829, 837 (5th Dist. 1974).

The Board denies the Complainants' motion to strike affirmative defense III. The well-pled facts of this affirmative defense and the reasonable inferences drawn therefrom, raise the possibility that Chevron will prevail on this issue..

Affirmative Defense IV: Jurisdiction – No Authority to Award Cost Recovery

Chevron's fourth affirmative defense is that the Board does not have authority under the Act to award cost recovery for violations. Ans. at 15. Chevron notes that both counts I and II request that the Board order Chevron to reimburse Complainants' costs, including those incurred in investigating, cleaning up, and remediating the Property and in disposing of contaminated soils and water. Ans. at 15, citing Comp. at 7-9.

Complainants move to strike on the basis that the Board has consistently held that it has the authority to award clean-up costs to private parties under Section 33(a). Mot. Strike at 10. In response, Chevron acknowledges that the Board has granted clean-up cost recovery, but requests the Board to reconsider its position. Resp. at 16-17. Chevron argues that Section 33(b) of the Act does not specifically grant such authority. Id. Chevron cites NBD Bank, 292 Ill. App. 3d at 697, 686 N.E.2d at 709, in which the Appellate Court, First District held that the Act was not designed to protect purchasers of real estate who discover after the conveyance that remedial action is necessary, nor was the Act designed to protect against economic losses resulting from the obligation to remove contaminants.

The Board grants the Complainants' motion to strike affirmative defense IV. Under Section 33(a) of the Act, the Board may issue and enter a final order it deems appropriate under the circumstances. As the Board noted in Grand Pier Center I, PCB 05-157, the Board has consistently held that, pursuant to the broad language in Section 33 of the Act, the Board has the authority to award clean-up costs to private parties for a violation of the Act. *See* Fiorini, 143 Ill. 2d at 350, 574 N.E.2d at 625; Chrysler Realty Corp. v. Thomas Industries, Inc. and TDY Industries, Inc., PCB 01-25 slip. op. at 7 (Dec. 7, 2000); Lake County Forest Preserve v. Ostro, PCB 92-80 (Mar. 31, 1994).

Affirmative Defenses V, VI, and VII: Incurred Risk, Assumption of Risk, and Avoidable Consequences

Chevron's fifth, sixth, and seventh affirmative defenses are based on similar arguments. Chevron asserts that Complainants failed to perform any investigation or due diligence for the presence of USTs or releases of petroleum, and therefore Complainants "incurred the risk," "assumed the risk," and "could have avoided the consequences" of the presence of USTs and releases of petroleum on the Property and consequently the associated clean-up costs. Ans. at 15-19.

Complainants move to strike each affirmative defense on the basis that Chevron has not articulated a legal theory by which a third party's investigation prior to purchasing the property would relieve Chevron of liability. Mot. Strike at 10-11. In response, Chevron again cites NBD Bank, 292 Ill. App. 3d at 696, claiming that the Act was not intended to be used to allow the disappointed buyer to recover clean-up costs. Resp. at 17-19.

The Board has found no indication that affirmative defenses V and VII of incurred risk and avoidable consequences have been pled or recognized in Illinois courts; nor have the parties pointed the Board to any cases. Therefore, the Board grants Complainants' motion to strike affirmative defenses V and VII.

The Board recognized the affirmative defense of assumption of the risk in Grand Pier Center v. Kerr-McGee, PCB 05-157, slip op. at 15-16, 21-22 (Jan. 5, 2006) (Grand Pier Center II). Grand Pier sought reimbursement of clean-up costs associated with property that it had purchased from Kerr-McGee Chemical LLC (Kerr-McGee). Kerr-McGee counter-claimed that Grand Pier violated the Act and was liable for the remediation costs. Both parties asserted a number of affirmative defenses including assumption of risk. The Board denied both parties' motion to strike the affirmative defense, finding in part that Kerr-McGee alleged that Grand Pier took steps at the site that directly resulting in the release of contaminants and that Grand Pier should have known that the steps taken would or could result in such a release. *Id*. The Board thus has found that assumption of the risk may be a valid defense when properly pled.

In Grand Pier Center II, the Board did not specifically define the affirmative defense of assumption of the risk. In Illinois courts, however, the doctrine of assumption of the risk is classified into three categories: express assumption of the risk, primary implied assumption of the risk, and secondary implied assumption of the risk. Evans v. Lima Lima Flight Team, Inc., 373 Ill. App. 3d 407, 418, 869 N.E.2d 195, 206 (1st Dist. 2007). Each category requires the plaintiff to have been aware of and voluntarily assumed the risk. *Id*. As in Grand Pier Center II, to apply the defense, Chevron must demonstrate that Complainants were aware of and voluntarily assumed liability of the risk that releases of petroleum were present on the property.

The Board grants Complainants' motion to strike the affirmative defense VI of assumption of the risk. Chevron did not properly plead the affirmative defense, nor did Chevron plead the appropriate facts to support the defense. According to Chevron, public records disclose that releases of gasoline and petroleum were present on the property, and a reasonable and prudent person would have performed due diligence. Ans. at 17-18. Therefore, Chevron asserts, Complainants either knew or should have known of the risks before purchasing the property. *Id*. These assertions do not demonstrate that Complainants were in fact aware of the risk of petroleum releases and voluntarily purchased property knowing of the risk, but indicate that Complainants may not have known of the risk. Because Chevron did not properly plead or support the defense, the motion to strike affirmative defense VI is granted.

Affirmative Defense VIII: Causation

Chevron's eighth affirmative defense is that the Complainants cannot demonstrate that the releases of gasoline or other petroleum alleged occurred during Texaco's operation of the

USTs, thus Texaco's operation of the USTs could not have directly resulted in the releases. Ans. at 20. Chevron asserts that persons other than Texaco took actions with the USTs, including abandonment-in-place and removal of the USTs, which could be the cause of releases of gasoline or other petroleum. *Id*. at 19-20. In response, Complainants describe Chevron's assertion as speculation and unsupported by fact. Mot. Strike at 11-12.

The Board has not recognized the affirmative defense of causation, but has considered a similar affirmative defense in People v. Hicks Oils and Hicksgas, Inc. PCB 10-12 slip op. at 4-5 (Dec. 17, 2009). There, the People alleged that Hicks was the owner and operator of a bulk petroleum storage and transfer facility which contaminated groundwater. *Id*. at 1-2. In one of its affirmative defenses, Hicks asserted that any contamination was the result of releases from previous owners of the site without any supporting facts. *Id*. at 4-5. The People moved to strike the affirmative defense because the defense was conclusory and lacked any facts to support the conclusion. *Id*. at 6-11.

In Hicks Oils, the Board granted the motion to strike the affirmative defense as well as leave to file an amended affirmative defense, but clarified that it was not deciding at that time whether the claimed affirmative defense was a proper affirmative defense. *Id*. at 13-16. In granting the People's motion to strike, the Board stated that a landowner's control or lack thereof is a legal conclusion at which the Board arrives after consideration of all relevant facts. *Id*. at 14. The Board noted that the defense failed to give a timeframe of when prior owners may have contaminated the site, 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. *Id*.

In the present case, Complainants alleged that Texaco caused or allowed open dumping within the meaning of the Act (count I) and that Texaco disposed, stored and abandoned waste at the facility in violation of the Act (count II). Comp. 6-9. Chevron's affirmative defense asserts that a third party may be liable and Complainants' facts do not undoubtedly support a conclusion that the release occurred under Texaco's supervision. Ans. at 19-20. Chevron has identified a third party that may or may not be responsible for the releases, and points to the lack of factual support in the complaint for the assertion that releases undoubtedly occurred under Texaco's operation of the USTs. *Id*. Chevron identifies the timeframe that a third party took action at the site and roughly describes what they did, thereby giving the supporting facts missing from the affirmative defense in Hicks Oils.

The Board, however, grants the Complainants' motion to strike affirmative defense VIII of causation for attacking the sufficiency of the claim. An affirmative defense is a response to a claim which attacks the Complainants' right to bring an action. Farmer's State Bank, PCB 97-100, slip op. at 2 n. 1. In effect, Chevron is attacking the truth to Complainants' claim that Texaco is liable for the releases. Further, the affirmative defense of causation has not been pled or recognized in Illinois courts, and the Board chooses not to recognize a new affirmative defense at this time.

Affirmative Defense IX: Laches

In asserting the affirmative defense of laches, Chevron claims that its ability to present its defenses has been substantially prejudiced by the passage of more than 30 years since it last had any contact with the property. Ans. at 20. Complainants argue that Chevron's assertion of this defense includes no facts attributing any delay to them and should be struck. Mot. Strike at 12. Chevron acknowledged that it is not that the Complainants delayed, but that the delay is not mitigated simply because Complainants recently acquired the property. Resp. at 20. Chevron argued that a simple sale of the Property from a person who would have been subject to a laches defense to another person should not do away with the laches defense. *Id.*

Laches is an equitable doctrine that bars relief when a defendant has been misled or prejudiced due to a plaintiff's delay in asserting a right. Indian Creek Development Co. v. Burlington Northern Santa Fe Railway Co., PCB 07-44 slip op. at 18-19 (Jun. 18, 2009). There are two principal elements of laches: (1) lack of due diligence by the party asserting the claim; and (2) prejudice to the opposing party as a result of the delay. *Id.*

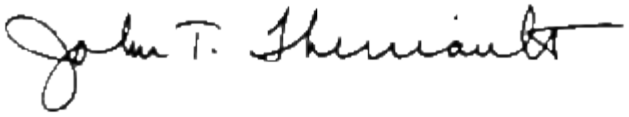
The Board is persuaded by Complainants' arguments and grants Complainants' motion to strike affirmative defense IX. Chevron presumes that the delay in asserting a right can carryover from one property owner to a subsequent owner. Resp. at 20. This presumption is incorrect. The plain language of the affirmative defense requires that *the party asserting the claim* must lack the due diligence under the first element. A subsequent owner does not inherit a delay in asserting a right. The Complainants may not be barred from bringing a claim because a previous owner failed to assert the claim.

CONCLUSION

For the reasons above, the Board denies Complainants' motion to strike affirmative defenses II and III and grants Complainants' motion to strike affirmative defenses IV, V, VI, VII, VIII, and IX.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 18, 2010 by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board