

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

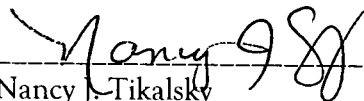
PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB No. 10-107
) (Enforcement - Water)
ROCKFORD SAND AND GRAVEL,)
INC., a division of Rockford Blacktop)
Construction Co., an Illinois corporation,)
)
Respondent.)

NOTICE OF FILING

To: See Attached Service List.
(VIA ELECTRONIC FILING)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the Complainant's MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES, a copy of which is herewith served upon you.

Respectfully submitted,



Nancy J. Tikalsky
Assistant Attorney General

Office of the Illinois Attorney General
Environmental Bureau
69 West Washington Street, Suite 1800
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(312) 814-8567

Date: September 17, 2010

THIS FILING IS SUBMITTED ON RECYCLED PAPER

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Complainant,)	
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v.)	PCB No. 10-107
)	(Enforcement - Water)
ROCKFORD SAND AND GRAVEL, INC., a)	
division of Rockford Blacktop Construction Co., an)	
Illinois corporation,)	
)	
Respondent.)	

MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES

Now comes Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, pursuant to Section 101.506 of the Illinois Pollution Control Board's Procedural Regulations and Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615 (2010), for an order striking Respondent ROCKFORD SAND & GRAVEL INC.'s Affirmative Defenses to the Complaint, and states as follows:

I. INTRODUCTION

On June 21, 2010, Complainant, People of the State of Illinois ("State" or "Complainant"), filed a two-count Complaint against Rockford Sand & Gravel, Inc. ("Rockford" or "Respondent") alleging violations of the Illinois Environmental Protection Act, 415 ILCS 5/1 *et seq.* ("Act") and the Illinois Pollution Control Board's ("Board") regulations thereunder ("Complaint").

On August 20, 2010, Rockford filed its Answer and Affirmative Defenses to the Complaint ("Answer").

II. LEGAL STANDARD FOR AFFIRMATIVE DEFENSES

An affirmative defense is "A Defendant's assertion raising new facts and arguments that, if true will defeat the Plaintiff's or prosecution's claim, even if all allegations in the complaint are true." BLACK'S LAW DICTIONARY (7th edition, 1999). Under Illinois case law, the test for whether a defense is affirmative and must be pled by the Defendant is whether the defense gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated. Condon v. American Telephone and Telegraph Company, Inc., 210 Ill.App.3d 701, 709, 569 N.E.2d 518, 523 (2nd Dist. 1991); Vroegh v. J & M Forklift, 165 Ill.2d 523, 530, 651 N.E.2d 121, 126 (1995). Accordingly, an affirmative defense confesses or admits the cause of action alleged by the Plaintiff, and then seeks to avoid it by asserting new matter not contained in the complaint and answer. Worner Agency, Inc. v. Doyle, 121 Ill. App.3d 219, 222, 459 N.E.2d 633, 635-636 (4th Dist. 1984); see also People v. Community Landfill Co., PCB 97-193, slip op. at 3 (Aug. 6, 1998).

An affirmative defense must do more than offer evidence to refute properly pleaded facts in a complaint. Pryweller v. Cohen, 282 Ill.App.3d 89, 668 N.E.2d 1144, 1149 (1st Dist. 1996), appeal denied, 169 Ill.2d 588 (1996); Heller Equity Capital Corp. v. Clem Environmental Corp., 272 Ill. App. 3d 173, 178, 596 N.E.2d 1275, 1280 (1st Dist. 1993); People v. Wood River Refining Company, PCB 99-120 at 6 (August 8, 2002); Farmer's State Bank v. Phillips Petroleum Co., PCB 97-100, slip op. at 2 n.1 (January 23, 1997) (affirmative defense does not attack truth of claim, but the right to bring a claim).

The facts establishing an affirmative defense must be pled with the same degree of specificity required by a Plaintiff to establish a cause of action. International Insurance Co. v. Sargent & Lundy, 242 Ill.App.3d 614, 630, 609 N.E.2d 842, 853 (1st Dist. 1993).

Thus, the issue raised by an affirmative defense must be one outside of the four corners of the complaint. The Board rule regarding affirmative defenses provides, in pertinent part, 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 addition, Section 2-613(d) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-613(d) (2010), is instructive, providing that “[t]he facts constituting any affirmative defense...must be plainly set forth in the answer or reply.” The facts establishing an affirmative defense must be pled with the same degree of specificity required by a Plaintiff to establish a cause of action, International Insurance Co. v. Sargent & Lundy, 242 Ill.App.3d 614, 609 N.E.2d 842, 853 (1st Dist. 1993); Community Landfill Co. at 4.

Affirmative defenses that concern factors in mitigation are not an appropriate affirmative defense to a claim that a violation has occurred. People v. Texaco Refining and Marketing, Inc. PCB 02-3, slip op. at 5 (Nov. 6, 2003)(citing People v. Geon Co., Inc., PCB 97-62 (Oct. 2, 1997) and People v. Midwest Grain Products of Illinois, Inc., PCB 97-179 (Aug. 21, 1997)).

III. RESPONDENT'S AFFIRMATIVE DEFENSES ARE FACTUALLY AND LEGALLY INSUFFICIENT

A. Respondent's First Affirmative Defense Should Be Stricken Because it is Factually and Legally Insufficient.

Respondent's First Affirmative Defense provides, as follows:

Rockford Sand and Gravel has, at all relevant times, been in substantial compliance with its NPDES permit.

Respondents' First Affirmative Defense pleads no exculpatory facts whatsoever. Instead, this 'affirmative defense' merely argues a properly pled fact of the complaint that Rockford was not

in compliance with its National Pollution and Discharge Elimination System ("NPDES") permit by arguing Rockford was in *substantial compliance* while, at the same time, admitting Complainant's allegation that Rockford was not in *full compliance* with its NPDES permit. Adding an adjective to the alleged fact without additional facts or law to justify the adjective is not an assertion of new matter. In fact, the State's Complaint alleges that Rockford exceeded its allowable discharge limit of 70 mg/l per day of total suspended solids ("TSS") when it discharged 3,860 mg/l of TSS for as long as a ninety minute period. A discharge 55 times Rockford NPDES permit allowable limits is a substantial discharge.

In addition, Respondent's First Affirmative Defense states a legal conclusion without any new statement of fact. Respondent concludes that it has been in 'substantial' compliance with its NPDES permit without citing any new facts to show said 'substantial' compliance. Finally, the Act and Respondent's NPDES permit do not define 'compliance' as merely *substantial compliance* but in terms of strict liability, which requires complete and full compliance.

Rockford's First Affirmative Defense does not defend and is insufficient to pass as an affirmative defense. Accordingly, Respondent's First Affirmative Defense is factually and legally insufficient and should be stricken.

B. Respondent's Second Affirmative Defense Should Be Stricken Because it is Factually and Legally Insufficient.

Respondent's Second Affirmative Defense provides, as follows:

There is no evidence that any alleged discharge at Respondent's property ever caused "water pollution" to any "waters of the State."

Once again, Respondent's Second Affirmative Defense pleads no exculpatory facts nor does it 'defend'. Instead, Respondent denies the factual allegations in the State's Complaint and, as a result of its denial, asserts a legal conclusion. The State clearly allege facts in its Complaint that Respondent exceeded its allowable discharge limits for TSS as required by Respondent's NPDES permit and, resultantly, caused water pollution. If these allegations are taken as true for the purpose of evaluating this affirmative defense, Respondent's Second Affirmative Defense is merely a denial, not new affirmative matter.

Finally, the Complainant does not need to prove actual 'harm', past the mere violation of the Act. See People v. Conrail, 245 Ill. App. 3d 167, 178 (5th Dist. 1993).

Respondent's Second Affirmative Defense does not defend and is insufficient to pass as an affirmative defense. Accordingly, Respondent's Second Affirmative Defense is legally insufficient and should be stricken.

C. Respondents' Third Affirmative Defense Should Be Stricken Because It is Factually and Legally Insufficient.

Respondent's Third Affirmative Defense provides, as follows:

Any violation of the NPDES permit for Respondent's property was de minimus in its effect, and was immediately resolved.

Similar to Respondent's First Affirmative Defense, Respondent's Third Affirmative Defense pleads no exculpatory facts nor does it 'defend'. Instead, Respondent argues a legal conclusion irrelevant to the allegations of the Complaint for violations of the Act and Board regulations. Again, Respondent denies the factual allegations Complainant clearly lays out in its Complaint that Respondent substantially exceeded its allowable discharge limits for TSS as

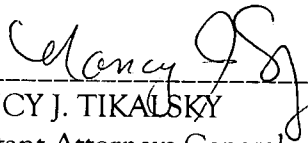
required by Respondent's NPDES permit. In fact, by exceeding its allowable discharge limit of 70 mg/l per day of total suspended solids ("TSS") when it discharged 3,860 mg/l of TSS, 55 times its allowable daily limit, for as long as a ninety minute period, Respondent's discharge was not de minimus. Even if the Respondent's discharge is found to be de minimus, the Act and Respondent's NPDES permit do not allow *de minimus* levels of violations of discharge limits but requires strict liability of all pollutant discharge limits required by Respondent's NPDES permit.

Finally, Respondent's assertion that the violation was immediately resolved is a claim of mitigation, which is not an affirmative defense.

Rockford's Third Affirmative Defense does not defend and is insufficient to pass as an affirmative defense. Accordingly, Respondent's Third Affirmative Defense is legally insufficient and should be stricken.

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that this court enter an order striking and dismissing all of Respondent's, ROCKFORD SAND AND GRAVEL, INC., Affirmative Defenses, with prejudice.

PEOPLE OF THE STATE OF ILLINOIS, LISA
MADIGAN
Attorney General of the State of Illinois

By: 
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CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on September 17, 2010, I served true and correct copies of Complainant's MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES, upon the persons and by the methods as follows:

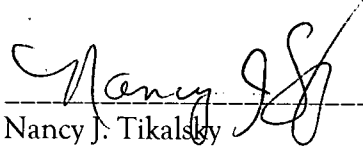
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