ILLINOIS POLLUTION CONTROL BOARD
July 7, 2011

ELMHURST MEMORIAL HEALTHCARE and ELMHURST MEMORIAL HOSPITAL,	)	
Complainants,	)	
v.	)	PCB 2009-066
	)	(Citizen's Enforcement – Land)
CHEVRON U.S.A. INC. and TEXACO INC.,	)	
Respondents.	)	

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

On June 17, 2010, Elmhurst Memorial Hospital (EMH) and Elmhurst Memorial Healthcare (collectively, Complainants) filed an amended formal complaint against Chevron U.S.A. Inc. (Chevron) and Texaco Inc. (Texaco) (collectively, Respondents) alleging that Respondents violated Sections 21(a) and 21(e) of the Illinois Environmental Protection Act (Act) (415 ILCS 5/21(a), (e) (2010)). The amended formal complaint concerns EMH's remediation of a property that Texaco formerly owned and operated as a gas filling station located at 701 South Main Street, Lombard, DuPage County (Property). On February 9, 2011, Respondents answered the amended formal complaint and alleged eight affirmative defenses. On March 4, 2011, Complainants responded to the first affirmative defense and moved to strike the remaining seven. For the reasons below, the Board grants Complainants' motion to strike affirmative defenses IV, V, VI and VIII and denies the complainants' motion to strike affirmative defenses II, III, and VII.

In the order below, the Board first sets forth the procedural history of this case before summarizing the amended complaint and the answer and affirmative defenses. The Board then summarizes Complainants' motion to strike affirmative defenses II through VIII and Respondents' response. The Board next outlines the standard of review applicable to motions to strike affirmative defenses and finally separately addresses each of the defenses raised by Respondents.

PROCEDURAL BACKGROUND

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 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 the Act (415 ILCS 5/21(a) (2010)) 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(e) (2010)) 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.), raising nine affirmative defenses. 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.).

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). On July 21, 2009, Chevron filed its response to the motion for leave to file *instanter* a reply (Resp. Reply). On 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. On August 25, 2009, Chevron filed its sur-reply to Complainants' reply.

On March 18, 2010, the Board issued an order denying the Complainant's motion to strike Affirmative Defenses No. II and III and granting the Complainant's motion to strike Affirmative Defenses Nos. IV through IX.

On April 21, 2010, Complainants filed a motion for leave to file an amended complaint *instanster* as well as an amended formal complaint (Am. Comp.) which adds Texaco as a respondent. On June 3, 2010, the Board directed Complainants to provide proof of service on Texaco. On June 17, 2010, Complainants filed with the Board proof of service on both respondents on June 11, 2010.

On July 9, 2010, Respondents filed their motion that the amended formal complaint not be set for hearing (herein "Motion to Dismiss" or "Mot. Dismiss"). Complainants filed their response to the motion on July 23, 2010 (Resp. to Mot. Dis). On December 16, 2010, the Board issued an order granting Complainants' motion to file the amended formal complaint and approving the addition of Texaco to the case heading.

On February 9, 2011, Respondents filed their answer to the amended complaint (Ans. to Am. Comp.), raising eight affirmative defenses. On March 4, 2011, Complainants filed a response to affirmative defense I and a motion to strike affirmative defenses II through VIII (Am. Mot. Strike). Respondents filed their response to the motion to strike on March 25, 2011 (Resp. Mot.).

COMPLAINANTS' AMENDED FORMAL COMPLAINT

Parties

Complainants state that both EMH and Elmhurst Memorial Healthcare are Illinois not-for-profit corporations with primary offices in Elmhurst. Am. Comp. at 2. Complainants further state that "Chevron U.S.A. is a Pennsylvania corporation licensed to conduct business in Illinois" with its primary offices located in San Ramon, California. *Id.* Complainants state that "Texaco

is a Delaware corporation that conducted business in Illinois" with its primary offices also located in San Ramon, California. *Id.* at 3. Complainants argue that each of these four entities is a "person" under the Act. *Id.*, *citing* 415 ILCS 5/3.315 (2008).

Complainants allege that, pursuant to an October 9, 2001 transaction, the common stock of Texaco was acquired by a subsidiary of Chevron Corporation and that Texaco became a wholly-owned subsidiary of Chevron Corporation as a result. *Id*. Complainants allege that "Texaco remains liable for its pre-2001 actions relevant to this Amended Complaint." *Id*.

Complainants state that Chevron is a subsidiary of Chevron Corporation and that most of Chevron Corporation's United States businesses are managed and operated by Chevron. *Id*. Complainants allege that certain Chevron Corporation subsidiaries transferred assets to Chevron as a result of corporate restructuring and that Chevron may also be liable for Texaco's pre-2001 actions relevant to the Amended Complaint. *Id*.

Historical Background

On the basis of information and belief, Complainants allege that, from approximately 1957 to 1977, The Texas Company (which later became respondent Texaco) owned and/or operated a gasoline filing station under the name "Texaco" on the Property. Am. Comp. at 3. Complainants further allege that, "[i]n 1959, The Texas Company changed its names to 'Texaco, Inc.' (i.e., Respondent Texaco)." *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.* at 4. Complainants allege that "releases of petroleum occurred as a direct result of Texaco's operation of the gasoline USTs." *Id*. 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*.

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." *Id.* 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.* Complainants also allege that "a transferee of the Property removed two USTs in or about 1981." *Id.*

EMH Remediation

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

Complainants allege that, through contractors, they "conducted an electromagnetic search to locate any USTs remaining on the Property." *Id*. at 5. 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 they "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 amended 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*. 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 detection of petroleum odors, the UST was determined not to be leaking." *Id*.

Complainants allege that they did not at that time find gasoline USTs on the Property. *Id*. Complainants allege, however, that they "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." Am. Comp. at 5. Complainants allege that they "caused over 570 tons of contaminated soil to be excavated and disposed off-site." *Id*. Complainants further argue that, because groundwater seeped into the excavation, they collected approximately 1,350 gallons of water and disposed of it off-site. *Id*.

Complainants allege that, following this remediation, "the existing building on the Property was razed to make way for the new [] facility." *Id*. at 6. 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*. 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. Am. Comp. at 6. 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*., *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." *Id*. Complainants further allege that "[a]bout 315 tons of contaminated soil was excavated from the area affected by the gasoline USTs." *Id*.

The Complaint states that Complainants have spent more than $100,000 to remediate the Property. Am. Comp. at 6. Complainants allege that "[a] representative of [Complainants] contacted representatives of the Respondents at the time of the excavation, and the latter represented that Chevron U.S.A., or some other subsidiary of Chevron Corporation, was responsible for the liabilities of Texaco." *Id*. at 7. Complainants state that they "demanded that Respondents reimburse [Complainants] for the costs expended in relation to the USTs as early as

October 2, 2007." *Id*. Complainants further allege that, in spite of repeated demands, "Respondents have not reimbursed [Complainants] for any of the costs it incurred in relation to the USTs on the Property." *Id*.

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." Am. Comp. at 7, *citing* 415 ILCS 5/3.535 (2010) (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. *Id*. Complainants further allege that "[t]he abandonment of the Gas Station Waste constitutes 'open dumping' within the meaning of the Act." *Id*. Complainants further allege that Texaco caused or allowed the open dumping of the Gas Station Waste in violation of the Act. *Id*. at 8, *citing* 415 ILCS 5/21(a) (2010). Complainants request that the Board enter an order requiring Respondents to reimburse Complainants for all costs incurred in investigating and remediating the Gas Station Waste at the Property. Am. 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." Am. Comp. at 8, *citing* 415 ILCS 5/3.535 (2010). Complainants allege that the presence of the Gas Station Waste on the Property constitutes both "storage" and "disposal" under the Act. Am. Comp. at 8, *citing* 415 ILCS 5/3.185 (defining "disposal"), 415 ILCS 5/3.480 (defining "storage"). Complainants argue that "[t]he presence of the Gas Station Waste on the Property for decades after the cessation of active use by Texaco constitutes 'abandonment'" under the Act. Am. Comp. at 8-9, *citing* 415 ILCS 5/21(e) (2010). 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 there under, in violation of Section 21(e) of the Act." *Id*. at 9, *see* 415 ILCS 5/21(e) (2010). Complainants request that the Board enter an order requiring Respondents to reimburse Complainants for all costs incurred in removing the USTs, investigating and remediating the Property, and disposing of contaminants such as contaminated soil and water. Am. Comp. at 9. Complainants also request any other relief that the Board and equity deem appropriate. *Id*.

RESPONDENTS' ANSWER AND AFFIRMATIVE DEFENSES

Respondents filed their answer and affirmative defenses on February 9, 2011. Respondents admit to some facts, deny others, and state that they have insufficient information to either admit or deny other facts. Respondents' answer also raises eight affirmative defenses, which the Board separately summarizes in the following subsections.

Affirmative Defense I: Chevron U.S.A. Is Not Liable For Texaco Inc.'s Actions

Respondents acknowledge Complainants' allegation "that, pursuant to an October 9, 2001 transaction, the common stock of Texaco Inc. was acquired by a subsidiary of Chevron Corporation" and that Chevron U.S.A. Inc. is a subsidiary of Chevron Corporation. Ans. to Am. Comp. at 13, *citing* Am. Comp. at 3 (¶¶ 4-5). Respondents also acknowledge Complainants' allegation that "as a result of corporate restructuring, certain Chevron Corporation subsidiaries transferred assets to Chevron U.S.A. Inc., and as a result, Chevron U.S.A. Inc. may also be liable for Texaco's pre-2001 actions relevant to this Amended Complaint." *Id.* at 13, *citing* Am. Comp. at 3 (¶ 6). Respondents note that "[t]he common stock of Texaco Inc. was acquired by a subsidiary of Chevron Corporation" and "as a result Texaco Inc. became and remains a wholly-owned, indirect, subsidiary of Chevron Corporation." *Id.* at 13-14. Respondents argue that "any liability of Texaco Inc. for the actions alleged in the Amended Complaint is not the liability of Chevron U.S.A. Inc." *Id.* at 14.

Affirmative Defense II: Discharge in Bankruptcy

In response to Complainants' allegations that Texaco remains liable for its pre-2001 actions and that Chevron U.S.A. may also be liable for Texaco's pre-2001 actions, Respondents indicate 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. to Am. Comp. at 14. Respondents add that on January 26, 1988, the bankruptcy court "entered an order [fixing] the date of March 15, 1988 as the last date for creditors to file proofs of claim." *Id.* Respondents further note that on March 23, 1988, the bankruptcy court confirmed the reorganization plan for Texaco, which provided "that any claims not filed and approved by the Court are discharged and forever barred." *Id.* Respondents assert that "[n]o claims arising out 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 Amended Complaint, were filed in the Texaco Bankruptcy by Complainants or any other person or entity." *Id.* at 14-15. Respondents argue that "the claims alleged in the Amended Complaint against Texaco Inc. have been discharged in bankruptcy and Complainants are, therefore, barred from asserting such claims in this proceeding against Texaco Inc." *Id.* at 15. Respondents maintain that, because Complainants' claims have been discharged against Texaco, "Chevron U.S.A. Inc. cannot have any liability to Complainants, by reason of assumption of Texaco Inc.'s liabilities, transfer to Texaco Inc.'s assets or liabilities, or otherwise; thus Complainants' claims against Chevron U.S.A. Inc. are similarly barred." *Id.*

Affirmative Defense III: Jurisdiction – Act Not Applicable

Respondents state that Complainants seek relief for releases of gasoline in violation of the Act that are alleged to have occurred while Texaco operated a gasoline filling station on the Property beginning no earlier than 1957 and ending no later than 1977. Ans. to Am. Comp. at 15. Respondents argue that "[t]he Act did not become effective until June 29, 1970, some 12 years after Texaco Inc. began operating the filling station." *Id.* Respondents further argue that "[n]one of the sections of the Act which the Amended Complaint alleges 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.* at 15-16. Respondents conclude 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 Amended Complaint." *Id.* at 16.

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

Respondents acknowledge that, under Section 31 of the Act, the Board has jurisdiction of this matter. Ans. to Am. Comp. at 16; *see* 415 ILCS 5/31 (2010). Respondents further note that each of the two counts of the amended complaint requests that the Board order Respondents to reimburse Complainants' costs, including those incurred in investigating, cleaning up and remediating the Property and in disposing of contaminated soils and water. *Id.* Respondents characterize the amended complaint as essentially a claim for cost recovery. *Id.* Respondents argue 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) (2010). Respondents conclude that "the Board does not have the authority under the Act to grant the relief requested in the Amended Complaint." *Id.* at 16-17.

Affirmative Defense V: Primary Implied Assumption of the Risk

Respondents state that "[i]t is usual and customary, and part of the standard conditions of a purchase contract" for commercial real estate buyers to "undertake an investigation of the environmental condition of such real estate, and that the results of such investigation must be acceptable to the buyer." Ans. to Am. Comp. at 17. Respondents further note that "[s]uch an investigation begins with a Phase I environmental audit, which is performed by a licensed environmental consultant." *Id.* Respondents also state that the Phase I environmental audit results "provide a buyer of commercial real estate with knowledge of the past and current uses of the site, whether the site may be environmentally impacted, and whether to perform a Phase II or other additional environmental investigations . . . to better determine the environmental condition of the site." *Id.* at 17-18.

Respondents assert that the environmental investigation results assist a commercial real estate buyer with determining "whether to assume the risks of the environmental condition of the site, negotiate changes to the purchase contract to provide for remediation of the site, or determine not to acquire the site at all." Ans. to Am. Comp. at 18. Respondents argue that "[h]ad Complainants performed a Phase I environmental audit of the Property, Complainants would have known that the Property had previously been used as a filling station, that USTs may be, or were, present on the Property and that the soil and/or groundwater on that Property may be, or was, contaminated by releases of gasoline or other petroleum products." *Id.* Respondents claim that "Complainants are sophisticated buyers and users of commercial real estate" but "the Amended Complaint does not allege that Complainants performed a Phase I or other environmental investigation of the Property before acquiring the Property." *Id.* Respondents conclude that Complainants "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." *Id.*

Respondents claim that "Complainants' alleged ignorance of the environmental condition of the Property, through simply electing not to perform an environmental investigation . . . does not relieve them of having assumed this risk." Ans. to Am. Comp. at 18. Additionally, Respondents argue that Complainants would not even have to perform an environmental investigation to know that the Property could have been used as a filling station in the past because a former filling station building was present on the Property at the time of Complainant's acquisition. *Id.* at 18-19. Respondents claim that Complainants' assumption of risk bars them from recovering costs they could have avoided. *Id.* at 19.

Affirmative Defense VI: Secondary Implied Assumption of the Risk

Respondents restate many of the claims and arguments raised in support of affirmative defense V. *Compare* Ans. to Amend. Comp. at 19- 21 (affirmative defense VI) *and* Ans. to Amend. Comp. at 17-19 (affirmative defense V). On the basis of these claims and arguments, Respondents conclude that Complainants "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. to Amend. Comp. at 20-21. Respondents claim that Complainants' assumption of risk bars them from recovering costs they could have avoided. *Id.* at 21.

Affirmative Defense VII: Statute of Limitations

Respondents assert that "Complainants are private citizens bringing an action for cost recovery" and that "[a]ctions brought by private citizens for cost recovery are subject to application of the statutes of limitation. Ans. to Amend. Comp. at 21. Respondents state that "[t]he applicable Illinois statute of limitations is the five-year statute, Section 13-205 of the Code of Civil Procedure." *Id.*, *see* 735 ILCS 5/13-205. Respondents acknowledge the Amended Complaint's allegations that the releases occurred when Texaco owned and operated the gasoline filling station at the Property during 1959-1977. *Id.* at 22. Respondents maintain that Complainants' cause of action "accrued under the statute of limitations no later than December 31, 1977." *Id.* Respondents argue that Complainants' cause of action is therefore barred by the five year statute of limitations because the amended complaint "was not served on Texaco Inc. until June 11, 2010, more than 32 years after the cause of action accrued." *Id.* In addition, Respondents acknowledge that "[t]he five-year limitation may be extended by the 'discovery rule,' which would require that Complainants did not know, nor should Complainants have reasonably known, of the existence of their cause of action before June 11, 2005." *Id.* Respondents claim that "[t]he Amended Complaint admits that Complainants 'identified the Property' and 'purchased the Property' in 2005, but fails to allege any specific dates in 2005 for those actions." *Id.* Respondents conclude that "Complainants may have known or reasonably should have known of the existence of their cause of action before June 11, 2005 and their cause of action is barred by the statute of limitations." *Id.*

Affirmative Defense VIII: Laches

Respondents state that they are "not liable to the Complainants for the claims alleged . . .." Ans. to Amend. Comp. at 23. Respondents argue that their "ability to present [their] 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.* Respondents further argue that "[d]ocuments, witnesses and other evidence, upon which Respondents' defense would rest, cannot be located or are no longer in existence." *Id.* Respondents conclude that, under the doctrine of laches, "Complainants are estopped from bringing this action against Respondent." *Id.*

COMPLAINANT'S MOTION TO STRIKE

On March 4, 2011, Complainants filed a response to Respondents' affirmative defense I and a motion to strike affirmative defenses II through VIII. Complainants argue that affirmative defenses II through VIII "must be stricken because the Board has already ruled against these identical defenses, and because Respondents fail to assert facts which would preclude EMH's recovery." Am. Mot. Strike at 5. The Board separately summarizes Complainants' arguments below.

Affirmative Defense II: Discharge in Bankruptcy

Complainants assert that "[t]his affirmative defense is identical in substance to Chevron U.S.A.'s original Affirmative Defense II," therefore they will incorporate by reference their June 5, 2009, Motion to Strike, their August 12, 2009, Reply in Support of their Motion to Strike (which also incorporates by reference Complainants' July 10, 2009, Motion for Leave to File Reply *Instanter*), and reassert the same. Am. Mot. Strike at 5. In its March 18, 2010 Order, the Board summarized Complainants' June 5, 2009, Motion to Strike as follows:

> 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).
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> 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.
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> 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*.

Elmhurst Memorial Healthcare and Elmhurst Memorial Hospital v. Chevron U.S.A. Inc., PCB 09-66 slip op. at 9. (March 18, 2010) (case name herein cited as "EMH").

In its March 18, 2010 Order, the Board summarized Complainants' August 12, 2009, Reply in Support of its Motion to Strike and July 10, 2009, Motion for Leave to File Reply *Instanter* as follows:

> 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.

EMH, PCB 09-66 slip op. at 18-19. (March 18, 2010).

Complainants conclude that "Affirmative Defense II should be stricken." Am. Mot. Strike at 5.

Affirmative Defense III: Jurisdiction – Act Not Applicable

Complainants assert that "[t]his affirmative defense is identical in substance to Chevron U.S.A.'s original Affirmative Defense III," therefore they will incorporate by reference their June 5, 2009, Motion to Strike and reassert the same. Am. Mot. Strike at 5. The Board's March 18, 2010 Order summarized Complainants' arguments in support of striking affirmative defense III as follows:

> Complainants acknowledge Chevron's assertion that the Act does not apply because it did not become effective until 1970, twelve 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.
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> 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.
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> 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.

EMH, PCB 09-66 slip op. at 10. (March 18, 2010).

Complainants also assert the law of the case doctrine. Am. Mot. Strike at 5, *citing* EMH, PCB 09-06, slip op. at 22-23 (March 18, 2010); PCB 09-066 slip op. at 16-17 (Dec. 16, 2010). Complainants state that "[t]he Board previously ruled in this case that the Illinois Environmental Protection Act [(Act)] is to be applied retroactively if Respondents left contamination which remained on the Property through the time period in which the relevant sections of the [Act] were passed." Am. Mot. Strike at 5, *citing* EMH, PCB 09-066 slip op. at 17 (Dec. 16, 2010). Complainants conclude that affirmative defense III should be stricken since the Board has

previously rejected Respondents' affirmative defense III to the original complaint. Am. Mot. Strike at 5.

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

Complainants note that "[t]his affirmative defense is identical in substance to Chevron U.S.A.'s original Affirmative Defense IV, which was stricken by the Board." Am. Mot. Strike at 6. Complainants further note that "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.'" *Id.* at 6, *citing* EMH, PCB 09-066 slip op. at 23 (March 18, 2010). Complainants incorporate by reference their June 5, 2009, Motion to Strike, and reassert the same. The Board's March 18, 2010 Order summarizes Complainants' arguments in support of striking affirmative defense IV as follows:

> 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*.

EMH, PCB 09-66 slip op. at 10. (March 18, 2010).

Complainants further assert the law of the case doctrine and conclude that affirmative defense IV should be stricken. Am. Mot. Strike at 6.

Affirmative Defense V: Primary Implied Assumption of the Risk and Affirmative Defense VI: Secondary Implied Assumption of the Risk

Complainants note that "[t]hese affirmative defenses are identical in substance to Chevron U.S.A.'s original Affirmative Defense[s] [V and VI][1], which [were] stricken by the Board." Am. Mot. Strike at 6. Complainants further note that "[i]n its March 18 order, the Board clearly prescribed what Respondents would have to allege to survive a motion to strike – that EMH was 'in fact aware of the risk of petroleum releases and voluntarily purchased property knowing of the risk.'" *Id.* at 6, *citing* EMH, PCB 09-066 slip op. at 24 (March 18, 2010). In

[1] Complainants' Response to Amended Affirmative Defense I and Motion to Strike Affirmative Defenses II through VIII states that "[t]hese affirmative defenses are identical in substance to Chevron U.S.A.'s original Affirmative Defense IV[.]" Am. Mot. Strike at 6. Since Complainants already make this comparison with regards to Respondents' amended affirmative defense IV, the Board presumes that Complainants' intended to compare Respondents' Affirmative Defenses V and VI to Respondents' original Affirmative Defenses V and VI.

addition, Complainants state that Respondents did not cite to any case authority to propose that "EMH's purchases of the Property could possibly defeat its cause of action against Respondents." *Id.* Complainants therefore incorporate by reference their June 5, 2009 Motion to Strike and reassert the same. The Board's March 18, 2010 Order summarized Complainants' arguments in support of striking affirmative defenses V and VI as follows:

> Complainants argue that these three affirmative defenses[2] "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*.

EMH, PCB 09-66 slip op. at 11. (March 18, 2010).

Complainants again assert the law of the case doctrine and conclude that affirmative defenses V and VI should be stricken. Am. Mot. Strike at 6.

Affirmative Defense VII: Statute of Limitations

Complainants note that there are two parts to Respondents' statute of limitations defense. Am. Mot. Strike at 6. First, in response to Respondents' assertion that "the statute of limitations accrued in 1977, when Texaco allegedly ceased operating the Property as a gas station and returned possession and control to the Property owner, almost 30 years before EMH had any interest in the Property," Complainants argue that "[t]he Board previously ruled that '[t]he injury to [EMH] did not accrue prior to their purchase of the property.'" *Id.* at 7, *citing* EMH, PCB 09-066 slip op. at 18 (Dec. 16, 2010). Complainants further argue that the first part of Respondents' statute of limitations defense should be stricken under the law of the case doctrine. Am. Mot. Strike at 7.

[2] The three affirmative defenses referred to in Respondents' original affirmative defenses are Affirmative Defense V: Incurred Risk, Affirmative Defense VI: Assumption of Risk and Affirmative Defense VII: Avoidable Consequence.

Second, in response to Respondents' assertion that "when EMH purchased the property in 2005, it 'may have known or reasonably should have known of the existence of [EMH's] cause of action before June 11, 2005,' which was the filing date of the Amended Complaint," Complainants argue that "an affirmative defense 'must do more than merely refute well-pleaded facts in the complaint.'" Am. Mot. Strike at 7, *citing* Pryweller v. Cohen, 668 N.E.2d 1144, 1149, 282 Ill. App. 3d 988 (1st Dist. 1996), appeal denied 675 N.E.2d 640, 169 Ill. 2d 588 (1996). Complainants further argue that "Respondents offer neither a factual nor legal basis for the statement that EMH 'may have known or reasonably should have known' that it had a cause of action prior to June 11, 2005. Am. Mot. Strike at 7. Complainants conclude that "Respondents' Affirmative Defense VII is insufficient and should be stricken." *Id.*

Affirmative Defense VIII: Laches

Complainants state that "[t]his affirmative defense is identical in substance to Chevron U.S.A.'s original Affirmative Defense IX, which was stricken by the Board." Am. Mot. Strike at 7. Complainants therefore incorporate by reference their June 5, 2009, Motion to Strike, and their August 12, 2009, Reply in Support of its Motion to Strike, and reassert the same. The Board summarized Complainants' arguments in support of striking affirmative defense IX in the Board's March 18, 2010 Order as follows:

> 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*.

EMH, PCB 09-66 slip op. at 11. (March 18, 2010).

Complainants finally assert the law of the case doctrine and conclude that affirmative defense VIII should be stricken. Am. Mot. Strike at 7.

RESPONDENT'S RESPONSE

On March 25, 2011, Respondents filed their Response to Complainants' Motion to Strike Affirmative Defenses to Amended Complaint. The Board separately summarizes Respondents' arguments in support of each of the seven affirmative defenses addressed in Complainants' motion to strike.

Affirmative Defense II: Discharge in Bankruptcy

Respondents state that Affirmative Defense II is "identical to the Affirmative Defense No. II filed in respect to Complainants' Original Complaint." Resp. Mot. at 1. Thus, as part of Respondents' argument in support of their affirmative defense II, Respondents adopt and

incorporate by reference the June 26, 2009, Response of Chevron U.S.A. Inc. to Motion to Strike Affirmative Defense, the July 21, 2009, Response of Chevron U.S.A. Inc. to Complainants' Motion to File Reply *Instanter*, and the August 25, 2009, Sur-Reply of Chevron U.S.A. Inc. to Complainants' Reply in Support of Complainants' Motion to Strike Affirmative Defenses. Res. Mot. at 1-2. The Board's March 18, 2010 Order summarized Respondents' June 26, 2009 Response of Chevron U.S.A. Inc. to Motion to Strike Affirmative Defense as follows:

> 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.

EMH, PCB 09-66 slip op. at 12-14. (March 18, 2010).

Below is the Board's March 18, 2010 summary of Respondents' July 21, 2009, Response of Chevron U.S.A. Inc. to Complainants' Motion to File Reply *Instanter*, and August 25, 2009, Sur-Reply of Chevron U.S.A. Inc. to Complainants' Reply in Support of Complainants' Motion to Strike Affirmative Defenses:

> 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.
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> 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.
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> 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.
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> 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.

EMH, PCB 09-66 slip op. at 19-20. (March 18, 2010).

Respondents also assert that the law of the case doctrine is applicable to the Board's Order dated March 18, 2010 (March Order) in which "the Board refused to strike Affirmative Defense No. II," even though Complainants had incorrectly stated that the Board previously ruled against Affirmative Defense II. Resp. Mot. at 2. Respondents conclude that "as the March Order clearly states that Affirmative Defense No. II . . . has not been stricken by the Board, Complainants' position that Affirmative Defense No. II be stricken . . . is completely inconsistent with the law of the case established by the Board." *Id.* Respondents conclude that their affirmative defense II is still a valid defense. *Id.*

Affirmative Defense III: Jurisdiction – Act Not Applicable

Respondents state that affirmative defense III is "identical to the Affirmative Defense No. III filed in respect to Complainants' Original Complaint." Resp. Mot. at 2. Thus, as part of Respondents' argument in support of their Affirmative Defense III, Respondents adopt and incorporate by reference the June 26, 2009, Response of Chevron U.S.A. Inc. to Motion to Strike Affirmative Defense. *Id.* at 2-3. The Board's March 18, 2010 Order summarized this position as follows:

> 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.

EMH, PCB 09-66 slip op. at 14-16. (March 18, 2010).

Respondents indicate that Complainants once again incorrectly state that the Board previously ruled against affirmative defense III. Resp. Mot. at 3. Respondents argue that Complainants "are trying to confuse the issue by blurring two separate and distinct Board Orders." *Id.* Respondents indicate "[w]hen Complainants state that the Board has rejected this affirmative defense, Complainants cite to the Board's Order dated December 16, 2010

(December Order), which was the Order detailing the Board's decision regarding Respondents' Motion to Dismiss the Amended Complaint." *Id.* Respondents further argue that "[t]he December Order was not intended to address the sufficiency of Respondents' Affirmative Defenses," but to merely address "the Board's reasoning for denying the Motion to Dismiss the Amended Complaint." *Id.*

Respondents claim that the standard used for ruling on a motion to dismiss is completely different from the standard used for allowing or striking an affirmative defense. *Id.* Respondents indicate that "when ruling on a motion to dismiss, 'a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief.'" *Id.*, *citing* EMH, PCB 09-066, slip op. at 14 (Dec. 16, 2010); Smith v. Central Illinois Regional Airport, 207 Ill. 2d 578, 584-85 (2003). In contrast, Respondents point out that "when ruling on an affirmative defense, the Board will not strike an affirmative defense that alleges '. . . arguments that, if true, will defeat . . . [the] claim even if all allegations in the complaint are true.'" Resp. Mot. at 4, *citing* EMH, PCB 09-066, slip op. at 20 (March 18, 2010); People v. Community Landfill Co., PCB 97-193, slip op. at 3 (Aug. 6, 1998). Respondents add "[t]he Board further explained that an affirmative defense is a 'response to a plaintiff's claim which attacks the plaintiff's legal right to bring an action.'" Resp. Mot. at 4, *citing* Farmer's State Bank v. Phillips Petroleum Co., PCB 97-100, slip op. at 2 n. 1 (Jan. 23, 1997). Respondents conclude that the Board's December Order does not change its decisions with respect to the affirmative defenses in its March Order. Resp. Mot. at 4.

Respondents also assert that, in the Board's March Order, "the Board previously allowed Affirmative Defense No. III to stand and [therefore] the law of the case doctrine prevents Complainants from arguing that the Board should strike it at this time." Resp. Mot. at 4. Respondents conclude by respectfully requesting "that the Board enter an order denying Complainants' Motion to Strike Affirmative Defense No. III and for any further relief the Board deems appropriate." *Id.* at 4-5.

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

Respondents agree that affirmative defense IV is identical to the affirmative defense IV filed in response to Complainant's original complaint. Resp. Mot. at 5. Therefore, as part of Respondents' argument in support of their affirmative defense IV, Respondents adopt and incorporate by reference the June 26, 2009, Response of Chevron U.S.A. Inc. to Motion to Strike Affirmative Defense. *Id.* The Board's March 18, 2010 Order summarized Respondents' June 26, 2009 arguments as follows:

> 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*.

EMH, PCB 09-66 slip op. at 16. (March 18, 2010).

Respondents note that the Board struck down affirmative defense IV in its March Order but nevertheless, Respondents reallege this defense in order to preserve the record for appeal. Resp. Mot. at 5.

Affirmative Defense V: Primary Implied Assumption of the Risk and Affirmative Defense VI: Secondary Implied Assumption of the Risk

Respondents believe Complainants are incorrect in stating that affirmative defenses V and VI are identical to Chevron U.S.A.'s affirmative defenses V and VI to the original complaint. Resp. Mot. at 5. Respondents add that the affirmative defenses are significantly changed in order to comply with the Board's March Order requirements and "it would be premature to strike these defenses at this time." *Id.* In support of their affirmative defenses V and VI, Respondents reallege their defenses as summarized above in Respondents' Answer and Affirmative Defenses. *Id.* at 5-7.

Respondents cite to case law alleging that affirmative defenses V and VI are viable and recognized by Illinois courts. Respondents state that the Illinois Appellate Court in Russo v. Range, Inc., 76 Ill. App. 3d 236, 238 (1st Dist. 1979), held that "'under the implied form of assumption of risk, plaintiff's willingness to assume a known risk is determined from the

conduct of the parties rather than from an explicit agreement.'" Resp. Mot. at 8. Additionally, Respondents cite to Duffy v. Midlothian Country Club, 135 Ill. App. 3d 429, 433 (1st Dist. 1985), stating that the "'primary [assumption of the risk] label has been applied to situations where a plaintiff has assumed known risks inherent in a particular activity or situation.'" Resp. Mot. at 8.

Respondents further summarize Russo by explaining that "implied assumption of the risk involves 'some type of relationship with the defendant.'" Resp. Mot. at 8. The Russo court gave an example of a baseball fan's choice to sit at an unscreened seat and therefore consenting by implication to permit players to play baseball without taking care to protect the fan from being hit by a foul ball. Resp. Mot. at 8. Respondents explain that what is important to the implied assumption situations is the "'specific knowledge on the part of the plaintiff of the risk he is about to be subjected to . . . [and] the test for assumption of risk [is] a fundamentally subjective one.'" *Id.* Respondents add that the Russo court held "'a plaintiff cannot elude its application with protestations of ignorance in the face of obvious danger.'" Resp. Mot. at 8. Respondents also assert that the Illinois Appellate Court explained "'the doctrine of assumption of risk presupposes that the danger which caused the injury was one which ordinarily accompanies the activities of the plaintiff and that the plaintiff knew, or should have known, that both the danger and the possibility of injury existed before the occurrence.'" *Id.*, *citing* Falkner v. Hinckley Parachute Center, Inc., 178 Ill. App. 3d 597, 602 (2d Dist. 1989).

Respondents allege that Complainants' purchase of a commercial real estate property without conducting an environmental investigation "is in direct contravention to the usual and customary practice in commercial real estate transactions." Resp. Mot. at 9. Respondents further argue that "a respondent has a valid affirmative defense if the respondent alleges facts or arguments that, if true, will defeat the claim." *Id.*, *citing* EMH, PCB 09-066, slip op. at 20 (Mar. 18, 2010), *citing* Community Landfill, PCB 97-193, slip op. at 3 (Aug. 6, 1998). Therefore, Respondents assert that their defenses comply with the affirmative defense standard and conclude that Complainants are not relieved from assuming the inherent risks of USTs or releases of gasoline or other petroleum products when they "[s]imply elect not to perform an environmental investigation of the property before purchasing it." *Id.* Respondents further claim that they "have clearly alleged the necessary facts to support [their] affirmative defenses, and as it is Respondents' burden at trial to prove the existence of these facts and circumstances after having the opportunity to complete discovery, it is entirely reasonable to determine . . . that Respondents may prevail on these defenses at trial. *Id.*

Affirmative Defense VII: Statute of Limitations

Respondents contend that affirmative defense VII should not be stricken because "it is a new defense, alleges facts which, if proven at trial would defeat the claims made in the Amended Complaint, and it would be premature to strike it when discovery has not been completed." Resp. Mot. at 10. Respondents assert that "[i]t is well settled that statutes of limitation apply to cost recovery actions brought by private citizens." *Id.* at 11, *citing* Caseyville Sport Choice, LLC v. Erma I. Seiber, PCB No. 08-030 (Oct. 16, 2008); Union Oil Company of California d/b/a Unocal v. Barge-Way Oil Company, Inc., PCB No. 98-169 (Jan. 7, 1999). Respondents allege that Complainants are private citizens bringing an action for cost recovery and therefore a five

year statute of limitations, pursuant to Section 13-205 of the Code of Civil Procedure (735 ILCS 5/13-205), is applicable. Resp. Mot. at 10. Respondents further allege that, "Complainants' cause of action against Texaco Inc. under the statute of limitations accrued no later than December 31, 1977," when Texaco last owned or operated the gasoline filling station on the Property. *Id.* Respondents also allege that Complainants did not name Texaco as a Respondent, and did not serve Texaco the Amended Complaint until June 11, 2010, "more than 32 years after the cause of action accrued." *Id.* Respondents argue that Complainants' cause of action is therefore "time barred by the five year statute." *Id.*

In the alternative, Respondents note that the Board recognizes the discovery rule in applying statutes of limitation. Resp. Mot. at 12. Respondents explain that the discovery rule doctrine "provides that the beginning of the running of the statute of limitations may be delayed until the injured party knew or reasonably should have known of the injury or the injury could have been discovered through the exercise of reasonable or appropriate diligence." *Id., citing* Union Oil Company, PCB No. 98-169 (Feb. 15, 2001); Caseyville, PCB No. 08-030 (Oct. 16, 2008). Respondents allege that extension of the statute of limitation pursuant to the discovery rule would require Complainants to "affirmatively demonstrate that [they] did not know, or could not reasonably have known, through the exercise of reasonable diligence or otherwise, of the existence of the releases alleged at the property on or before June 11, 2005." Resp. Mot. at 12. However, Respondents further allege that Complainants did not give any specific date in 2005 when Complainants identified and purchased the Property during that year. *Id.* at 11. Respondents therefore argue that Complainants "may have known or reasonably should have known of the existence of their cause of action before June 11, 2005 and their cause of action would be barred by the statute of limitations under the 'discovery rule' also." *Id.* Respondents further argue that "[t]he discovery process . . . will provide the necessary facts to determine this issue" and that "[t]herefore, it would be prejudicial to Respondents and premature to strike this defense before discovery has been completed." *Id.* at 13-14.

Respondents state that "Complainants' statement that the Board has previously ruled against this defense is disingenuous." Resp. Mot. at 14. Respondents contend that the Board's December Order on the statute of limitations is in regards to "the Board's ruling on a defense in terms of a motion to dismiss [which] is not dispositive or controlling of the Board's ruling on that same defense in terms of it being alleged as an affirmative defense." *Id.* Respondents add that "the Board's December Order on the statute of limitations specifically envisions the limitations defense being pleaded by Respondents as an affirmative defense stating, 'this is not to say that the Board finds that Complainants prevail on any statute of limitations issue that may arise in this case . . ..'" *Id.*

Affirmative Defense VIII: Laches

Respondents note that affirmative defense VIII is identical to the affirmative defense IX filed in response to Complainant's original complaint. Resp. Mot. at 14. Therefore, as part of Respondents' argument in support of their affirmative defense VIII, Respondents adopt and incorporate by reference the June 26, 2009, Response of Chevron U.S.A. Inc. to Motion to Strike Affirmative Defense. *Id.* at 15. The Board's March 18, 2010 Order summarized Respondents' arguments as follows:

> 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.*

EMH, PCB 09-66 slip op. at 18. (March 18, 2010).

Respondents note that the Board struck down affirmative defense IX in its March 18, 2010 Order but nevertheless, Respondents reallege this defense in order to preserve the record for appeal. *Id.*

DISCUSSION

In the discussion below, the Board sets forth the standard of review applicable to affirmative defenses and motions to strike them, discusses the arguments raised in the parties' filings and then explains its findings regarding Complainants' motion to strike the various affirmative defenses.

Standard of Review

The Board defines an affirmative defense as the "respondent's allegation of 'new facts or arguments that, if true, will defeat . . . the government's claim even if all allegations in the complaint are true.'" Community Landfill, PCB 97-193, slip op. at 3 (quoting *Black's Law Dictionary*). A defense that merely attacks the sufficiency of a claim fails to be an affirmative defense. Worner Agency v. Doyle, 121 Ill. App. 3d 219, 222-223, 459 N.E.2d 633, 636 (4th Dist. 1984). The Illinois Appellate Court states that "[t]he test of whether a defense is affirmative and must be pleaded by a 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." Worner, 121 Ill. App. 3d at 222, 459 N.E.2d at 636.

The Board's procedural rules for affirmative defenses state that "[a]ny 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, the party asserting the affirmative defense must plead it with the same degree of specificity necessary for establishing 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). However, legal conclusions that are not supported by allegations of specific facts are insufficient. LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297.

The Board previously held that "[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." EMH, PCB 09-066, slip op. at 21 (March 18, 2010), *citing* Raprager v. Allstate Insurance Co., 183 Ill. App. 3d 847, 854, 539 N.E.2d 787, 791 (2nd Dist. 1989). An affirmative defense should not be stricken "[w]here the well-pleaded facts [of an affirmative defense] . . . raise the possibility that the party asserting the defense will prevail . . .." Raprager, 183 Ill. App. 3d at 854, 539 N.E.2d at 791.

Affirmative Defense II: Discharge in Bankruptcy

As both parties noted, affirmative defense II is identical to the affirmative defense II filed in response to Complainants' original complaint. Resp. Mot. at 1.

Respondents argue that Complainants are barred from asserting the claims alleged against Texaco because such claims have been discharged in the Texaco bankruptcy. Ans. to Am. Comp. at 15. Respondents indicate that the Bankruptcy Court had approved a plan of reorganization providing that any claims not filed and approved by the Court before the appointed Bar Date of March 15, 1988 will be discharged and forever barred. *Id.* at 14, *citing* *In re* Texaco Inc., 87 B 20142.

Complainants respond by indicating that the right to payment must exist before the Bar Date and that, in the environmental context, the right to payment depends on whether the claimant knew about the releases before the bankruptcy. Mot. Strike at 7-8. Furthermore, Complainants claim Respondents have not asserted that Complainants had a right to payment before the Bar Date and thus Respondents cannot validly claim that Complainants are barred from bringing their claims. *Id.* at 8, *citing* AM Int'l., 106 F.3d at 1349.

Respondents reply by comparing Complainants' environmental claims to those in Sanders and indicating that the Sanders court enforced the discharge provision of the Texaco bankruptcy and discharged Sanders' environmental claims against Texaco. Resp. at 5, *citing* Sanders, 1982 B.R. at 942. Complainants reply by distinguishing themselves from Sanders, stating that, unlike Sanders, Complainants had no pre-bankruptcy relationship with Texaco and therefore Complainants did not have a pre-bankruptcy claim against Texaco, as supported by the

Bankruptcy Code. Mot. Reply at 4. Respondents respond by stating that Complainants are successors-in-interest to the owner at the time of the Texaco bankruptcy and therefore inherit and are bound by the previous owner's pre-bankruptcy relationship with Texaco. Resp. Reply at 3. Respondents add that the previous owner could have brought a claim against Respondents but did not do so. *Id.*

As the Board previously noted, "[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." EMH, PCB 09-066 slip op. at 22 (March 18, 2010), quoting Community Landfill Co., PCB 97-193 slip op. at 3. Here, Respondents allege that Complainants' claims have been discharged in Texaco's bankruptcy proceedings. Ans. to Am. Comp. at 15. As the Board previously reasoned, "[a]lthough the bankruptcy proceeding does not speak directly to the claims and facts of this case, there is a possibility that [Respondents] may prevail if the facts alleged in the affirmative defense are proven true." EMH, PCB 09-066 slip op. at 22 (March 18, 2010). As such, the Board denies the motion to strike affirmative defense II.

In the alternative, the Board agrees with Respondents that the law of the case doctrine is applicable to the Board's March 18, 2010 Order. Resp. Mot. at 2. Generally, the law of the case doctrine provides that "a rule established as controlling in a particular case will continue to be the law of the case in the absence of error or a change of facts." Madigan v. Ill. Comm. Commission, 407 Ill. App. 3d 207, 222, 941 N.E. 2d, 947, 960 (1st Dist. 2010), *quoting* Commonwealth Edison Co. v. Illinois Commerce Comm'n, 368 Ill.App.3d 734, 742, 858 N.E.2d 65, 76 (2006), People v. Patterson, 154 Ill.2d 414, 468, 610 N.E.2d 16, 41 (1992). This doctrine is binding on a court only where the decision was final. *Id.* As the Board's March 18, 2010 Order denying Complainants' motion to strike affirmative defense II is a final decision absent any signs of error or a change of facts, the Board deems the law of the case doctrine applicable to affirmative defense II. Therefore, Respondents' affirmative defense II continues to be a valid defense.

Affirmative Defense III: Jurisdiction – Act Not Applicable

As both parties have noted, affirmative defense III is identical to the affirmative defense III filed in response to Complainants' original complaint. Resp. Mot. at 2.

However, Complainants assert that the Board "soundly rejected" Respondents' affirmative defense III in its December Order. Am. Mot. Strike. At 5, *citing* EMH, PCB 09-066, slip op. at 16-17 (Dec. 16, 2010). Complainants' interpretation of the Board's December Order is incorrect. In its December Order, the Board ruled on Respondents' motion to dismiss. The Board did not rule on Complainants' motion to strike Respondents' affirmative defenses to the original complaint, which the Board addressed in its March Order.

The standard of review for a motion to dismiss is distinguishable from the standard of review for a motion to strike affirmative defenses. As the Board previously stated, "[i]n ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant." EMH, PCB 09-066, slip op. at 14 (Dec. 16, 2010), *citing* Beers v. Calhoun, PCB 04-204, slip op. at 2 (July 22, 2004). Furthermore, "it is

well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief." EMH, PCB 09-66. Slip op. at 14 (Dec. 16, 2010), *citing* Smith v. Central Illinois Regional Airport, 207 Ill. 2d 578, 584-85, 802 N.E.2d 250, 254 (2003).

In their motion to dismiss, Respondents argued that the Board did not have jurisdiction over the amended complaint against Texaco because the provisions of the Act that Texaco allegedly violated were not in effect at the time of the alleged contaminant releases. Mot. Dismiss at 9. In response, Complainants argued that the Act applied retroactively and "that the legislature intended the Act to 'address ongoing problems, which by definition existed at the time the Act was enacted.'" Resp. to Mot. Dism. at 2, incorporating by reference Resp. at 9-10. Since Complainants were the non-movant party, the Board took Complainants' allegations in a light most favorable to Complainants (*i.e.*, "that the contamination continued through the time period that the new laws were applied and also continued through the date the complainants purchased the property,") and found that enough facts existed against Respondents to survive their motion to dismiss. EMH, PCB 09-055, slip op. at 17 (Dec. 16, 2010).

In contrast, the Board has established that, "[w]here 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." EMH, PCB 09-066, slip op. at 21 (March 18, 2010), *citing* Raprager, 183 Ill. App. 3d at 854, 539 N.E.2d at 791.

In their third affirmative defense, Respondents argue that the Board does not have jurisdiction under the Act to adjudicate the complaint because the relevant sections of the Act were not applicable to the claims alleged at the time of the violations. Ans. at 14. Specifically, Respondents assert 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 eight years after Texaco Inc. last operated the filling station." *Id.* Complainants reply by arguing that "[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 2 (May 19, 2005). Respondents argue that the Act did not define "waste" until 1979. Resp. at 11. Before 1979, Section 21(a) addressed the open dumping of "garbage" and Section 21(e) addressed the disposal of "refuse," neither of which referred to the Gas Station Waste. *Id.* Respondents therefore argue that since Texaco sold the property in 1977 and did not have ownership at the time the 1979 provisions went into effect, Texaco was not liable for release violations. *Id.* at 13.

In its March 18, 2010 Order, the Board addresses the issue of retroactivity:

> 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. People v. Fiorini, 143 Ill. 2d 318, 333, 574 N.E.2d 612, 617 (1991).
>
> 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. v. People, 822 N.E.2d 876, 882 (2nd Dist. 2004). The Court found that 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 Company of California d/b/a Unocal v. Barge-Way Oil Company, Inc., PCB 98-169 (Feb. 15, 2001), *citing* Casanave v. Amoco Oil Co., PCB 97-84 (Nov. 20, 1997). 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).

EMH, PCB 09-66 slip op. at 22-23. (March 18, 2010).

Respondents facts and reasonable inferences drawn therefrom raise the possibility that they will prevail on this issue. Thus, similar to the Board's March 18, 2010 Order, the Board denies the Complainants' motion to strike affirmative defense III. In the alternative, the Board agrees with Respondents' assertion that the law of the case doctrine is applicable to its March Order.

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

As both parties have noted, affirmative defense IV is identical to the affirmative defense IV filed in response to Complainants' original complaint. Resp. Mot. at 5. Furthermore, Respondents agree that the Board had struck down affirmative defense IV in its March 18, 2010 Order, but nevertheless reallege this defense in order to preserve the record for appeal. *Id.*

Respondents state in their affirmative defense IV that the Board does not have authority under the Act to award cost recovery for violations. Ans. at 15. Complainants' indicate in their reply that the Board has consistently held that it has the authority to award clean-up costs to private parties under Section 33(a) of the Act. Mot. Strike at 10. Respondents acknowledge that the Board has granted clean-up recovery costs in the past, but request the Board to reconsider its position. Resp. at 16-17. Moreover, Respondents argue that Section 33(b) of the Act does not specifically grant the Board such authority to award clean-up costs to private parties. *Id.*

The Board has previously indicated that, "[u]nder Section 33(a) of the Act, the Board may issue and enter a final order it deems appropriate under the circumstances." EMH, PCB 09-066 slip op. at 23 (March 18, 2010). Furthermore, "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." EMH, PCB 09-066 slip op. at 23 (March 18, 2010), *citing* Grand Pier Center v. Kerr-McGee, PCB 05-157, slip op. at 4 (May 19,

2005). For these reasons, the Board grants the Complainants' motion to strike Respondents' Affirmative Defense IV.

Affirmative Defense V: Primary Implied Assumption of the Risk and Affirmative Defense VI: Secondary Implied Assumption of the Risk

Respondents' fifth and sixth affirmative defenses are based on similar arguments. Respondents assert that Complainants "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. to Am. Comp. at 20-21. Therefore, Respondents believe that Complainants' assumption of risk bars them from recovering avoidable costs. *Id.* at 21.

Complainants reply to Respondents affirmative defenses V and VI by stating that they are identical in substance to Chevron U.S.A.'s original affirmative defense VI, assumption of risk, which the Board had stricken in its March 18, 2010 Order. Am. Mot. Strike at 6. Additionally, Complainants indicate that the Board had prescribed to Respondents that in order to survive a motion to strike, Respondents would have to allege that Complainants were "in fact aware of the risk of petroleum releases and voluntarily purchased property knowing of the risk." *Id.*, *citing* EMH, slip op. at 24 (March 18, 2010). Complainants state that Respondents failed to make such an assertion, but instead "beat around the bush and caused the Board to use its imagination about what [Complainants] knew." *Id.* Complainants also incorporate by reference their June 5, 2009 Motion to Strike, reasserting the same argument that "Respondent 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 Respondents of responsibility for violations of Sections 21(a) or 21(e) some 30 years earlier." Mot. Strike at 11. Additionally, Complainants argue that Respondents' assertions do not constitute affirmative defenses because they do not assert new facts or arguments that, if true, could defeat Complainants' claims. Mot. Strike at 11, *citing* People v. Wood River Refining Co., PCB 99-120, slip op. at 4 (Aug. 8, 2002).

Respondents believe that Complainants are incorrect to state that affirmative defenses V and VI are identical to Chevron U.S.A.'s affirmative defenses V and VI to the original complaint. Resp. Mot. at 5. Respondents further argue that they have "significantly amended these defenses to comply with the requirements of the Board's March Order" and therefore "it would be premature to strike these defenses at this time." *Id.* Respondents allege "that it is usual and customary, and part of the standard conditions of a real estate purchase contract, that a buyer of commercial real estate will undertake an investigation of the environmental condition of the real estate." *Id*. Respondents further allege that the buyer, "armed with the results of such an environmental investigation, then determines whether to assume the risks of the environmental condition of the site, negotiate changes to the purchase contract to provide for remediation of the site, or determine not to acquire the site at all." *Id.* Moreover, Respondents allege that although Complainants are "sophisticated buyers and users of commercial real estate," they did not perform an environmental investigation of the property, and therefore, assumed the risk of USTs and releases of gasoline or other petroleum being present on the site. *Id.* at 7.

Respondents contend that Complainants assumed the risk of incurring the cost of removal of the USTs and remediation of the property. Resp. Mot. at 7. Respondents add that at the time of Complainants' purchase of the property, the former filling station building was present on the property and therefore Complainants "knew or should have known, even without the benefit of an environmental investigation, that the Property could have been used as a filling station in the past." *Id.* Respondents maintain that the primary and secondary implied assumptions of risk are viable affirmative defenses recognized by Illinois courts. *Id.* Respondents indicate that the Illinois Appellate Court has held that under the implied assumption of risk, "plaintiff's willingness to assume a known risk is determined from the conduct of the parties rather than from an explicit agreement," while the primary assumption of risk "has been applied to situations where a plaintiff has assumed known risks inherent in a particular activity or situation." *Id.* at 8, *citing* Duffy v. Midlothian Country Club, 135 Ill. App. 3d 429, 433 (1st Dist. 1985); Russo v. The Range Inc., 76 Ill. App. 3d 236, 238 (1st Dist. 1979).

The Board grants Complainants' motion to strike affirmative defenses V and VI. The Board previously held that assumption of risk may be a valid defense when properly pled. EMH, PCB 09-066, slip op. at 24 (March 18, 2010). The Board has also indicated that, to apply the defense, Respondents "must demonstrate that Complainants were aware of and voluntarily assumed liability of the risk that releases of petroleum were present on the property." *Id., citing* Grand Pier Center v. Kerr-McGee, PCB 05-157 (Jan. 5, 2006). Respondents' arguments do not demonstrate that Complainants were in fact aware of the risk of petroleum releases and voluntarily purchased the property knowing of the risk. Although Respondents refer to Russo to indicate that a plaintiff's willingness to assume a known risk is determined by the parties' conduct, Respondents do not adequately demonstrate how Complainants' conduct indicates Complainants' willingness to assume the risk. Respondents also cite to Duffy to indicate that there is an assumption of known risks inherent in a particular activity or situation. However, Respondents do not plead facts indicating Complainants were aware of and voluntarily assumed liability of the risk that releases of petroleum were present on the property.

Affirmative Defense VII: Statute of Limitations

Respondents assert in their seventh affirmative defense that the five year Illinois statute of limitations is applicable, relying upon Section 13-205 of the Code of Civil Procedure. Ans. to Am. Comp. at 21. The statute provides:

> Five year limitation. Except as provided in Section 2-725 of the "Uniform Commercial Code", approved July 31, 1961, as amended [810 ILCS 5/2-725], and Section 11-13 of "The Illinois Public Aid Code", approved April 11, 1967, as amended [305 ILCS 5/11-13], actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued. 735 ILCS 5/13-205 (2011).

Respondents allege that Complainants' cause of action against Texaco accrued under the statute of limitations no later than December 31, 1977. *Id.* Respondents further allege that Complainants named Texaco as a respondent and served Texaco on June 11, 2010, more than 32 years after the cause of action accrued. *Id.* Respondents admit that the five year statute of limitations may be extended by the discovery rule, which would require that Complainants not know or reasonably should not know of the existence of their cause of action prior to June 11, 2005. *Id.* Respondents argue that because Complainants fail to allege any specific dates for when they identified and purchased the Property in 2005, Complainants may have known or reasonably should have known of the existence of their cause of action before June 11, 2005. *Id.* Therefore, Respondents conclude that Complainants' cause of action is barred by the five year statute of limitations. *Id.*

In their reply, Complainants assert that the Board previously held that Complainants' injury does not start to accrue before they purchased the property. Am. Mot. Strike at 7, *citing* EMH, PCB 09-066, slip op. at 18 (Dec. 16, 2010). Complainants therefore argue that under the law of the case doctrine, Respondents' first part of the statute of limitations defense should be stricken. *Id.* In response to Respondents' second statute of limitations defense, the discovery rule argument, Complainants state that "Respondents offer neither a factual nor legal basis for the statement that [Complainants] 'may have known or reasonably should have known' that it had a cause of action prior to June 11, 2005." *Id.* Complainants conclude that Respondents' affirmative defense VII is insufficient and should be stricken. *Id.*

In their response, Respondents cite case law to indicate that "[i]t is well settled that statutes of limitation apply to cost recovery actions brought by private citizens." Resp. Mot. at 11, *citing* Caseyville, PCB 08-030 (Oct. 16, 2008); Union Oil, PCB 98-169 (Jan. 7, 1999). Respondents add that for private costs recovery actions, the applicable statute of limitations is the five year statute found at Section 13-205 of the Code of Civil Procedure, 735 ICLS 5/13-205. *Id.* Respondents re-assert that "more than 32 years have passed between the date that the cause of action accrued and the date of service of the Amended Complaint on Texaco Inc." and thus this affirmative defense would defeat Complainants' claims at trial unless the discovery rule applies. *Id.* at 12. In regards to the discovery rule, Respondents indicate the "doctrine provides that the beginning of the running of the statute of limitations may be delayed until the injured party knew or reasonably should have known of the injury or the injury could have been discovered through the exercise of reasonable or appropriate diligence." *Id.*, *citing* Caseyville, PCB 08-030 (Oct. 16, 2008); Union Oil, PCB 98-169 (Feb. 15, 2001). Respondents claim that Complainants' failure to allege specific dates in 2005 for when they identified and purchased the Property creates an inference that they cannot meet the requirements of the statute of limitations. *Id.* at 13. Respondents further allege that the discovery process "will provide the necessary facts to determine this issue." *Id.*

The Board denies Complainants' motion to strike affirmative defense VII. The well-pled facts of this affirmative defense and the reasonable inferences drawn therefrom raise the possibility that Respondents will prevail on this issue. The Board recognizes that the statute of limitations defense is a proper affirmative defense. Indian Creek Development Co. v. BNSF Railway Co., PCB 07-44 (June 18, 2009). Additionally, the Board notes that the discovery rule is appropriate where mechanical application of a statute of limitations can be avoided "in

situations where an individual would be barred from suit before he was aware that he was injured." Caseyville, PCB 08-030 (Oct. 16, 2008), *citing* Hermitage Corp. v. Contractors Adjustment Co., 166 Ill. 2d 72, 651 N.E.2d 1132 (1995). The Board agrees with Respondents that, under the discovery rule, Complainants may not meet the requirements of the statute of limitations.

The Board also rejects Complainants' assertion of the law of the case doctrine. Complainants referred to the Board's December Order, in which the Board ruled on Respondents' motion to dismiss. Am. Mot. Strike at 7. As the Board stated above, the standard of review for a motion to dismiss is distinguishable from that of a motion to strike affirmative defenses. The Board's December Order ruling on the motion to dismiss is not dispositive of the Board's ruling in regards to a statute of limitations affirmative defense. As the Board stated in its December Order, by denying Respondents' motion to dismiss, the Board did not hold that Complainants will "prevail on any statute of limitations issues that may arise in this case." EMH, PCB 09-066, slip op. at 18 (Dec. 16, 2010). Therefore, the law of the case doctrine as argued is not applicable to affirmative defense VII.

Affirmative Defense VIII: Laches

As both parties have noted, affirmative defense VIII is identical to the affirmative defense IX filed in response to Complainants' original complaint. Resp. Mot. at 14. Furthermore, Respondents agree that the Board had struck down affirmative defense IX in its March Order, but nevertheless reallege this defense in order to preserve the record for appeal. *Id.*

As the Board previously indicated, "[l]aches 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." EMH, PCB 09-066 slip op. at 26 (March 18, 2010), *citing* Indian Creek Development Co. v. Burlington Northern Santa Fe Railway Co., PCB 07-44 slip op. at 18-19 (June 18, 2009). The Board further stated that "[t]here are two principle 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." EMH, PCB 09-066 slip op. at 26 (March 18, 2010), *citing* Indian Creek Development, PCB 07-44 slip op. at 18-19.

In asserting this affirmative defense, Respondents claim that their ability to present their defense has been substantially prejudiced by the passage of more than 30 years since they last had any contact with the property. Ans. at 20. In response, Complainants argue that the delay in asserting the right is not attributed to them and thus the defense should be struck. Mot. Strike at 12. Although Respondents acknowledge that the delay is not Complainants' fault, they argue that the defense of laches is still applicable because Complainants inherited the delay when they purchased the Property from a person who would have been subject to the laches defense. Resp. at 20.

The Board grants Complainants' motion to strike Respondents' Affirmative Defense VIII. The Board agrees with Complainants' that Respondents' presumption (*i.e.*, that delay in asserting a right can carryover from one property owner to a subsequent owner) is incorrect. As the Board previously indicated, "[t]he plain language of the affirmative defense requires that *the*

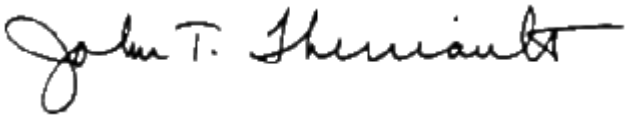
party asserting the claim must lack the due diligence under the first element." EMH, PCB 09-066 slip op. at 26 (March 18, 2010). Therefore, "a subsequent owner does not inherit a delay in asserting a right [and] Complainants may not be barred from bringing a claim because a previous owner failed to assert the claim." *Id.*

CONCLUSION

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

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 7, 2011, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board