

ILLINOIS POLLUTION CONTROL BOARD
February 16, 2012

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 12-21
) (Enforcement - Water)
ALTIVITY PACKAGING, LLC, a Delaware)
limited liability company, INTRA-PLANT)
MAINTENANCE CORPORATION, an)
Illinois corporation, IRONHUSTLER)
EXCAVATING, INC., an Illinois corporation)
and RON BRIGHT, d/b/a QUARTER)
CONSTRUCTION,)
)
Respondents.)

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

On July 26, 2011, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a four-count complaint against Altivity Packaging, LLC (Altivity), Intra-Plant Maintenance Corporation (Intra-Plant), Ironhustler Excavating, Inc. (Ironhustler) and Ron Bright d/b/a Quarter Construction (Ron Bright) (collectively, respondents). Altivity operates a wastewater treatment plant located at 1525 South Second Street, Pekin, Tazewell County. The complaint concerns open dumping of treatment plant wastes at a gravel pit located at 10513 Levy Road in Hopedale, Tazewell County (disposal site). The People allege that Altivity hired Intra-Plant to dispose of the waste at the site owned by Ron Bright.

Various motions are pending in this action. This order grants the sole motion before the Board ripe for decision: complainant's unopposed January 23, 2012 motion to strike certain affirmative defenses (Mot.) asserted by Altivity in its December 30, 2011 Answer and Affirmative defenses (Ans.). The Board reserves ruling on all other pending motions.

Under the Board's procedural rules at 35 Ill. Adm. Code 101.506 (d), if no response is filed by a party "[w]ithin 14 days after service of a motion", then "the party will be deemed to have waived objection to the granting of the motion". Altivity has filed no response, and also has informed the hearing officer by e-mail dated February 6, 2012 that it did not intend to do so.

The motion seeks to strike affirmative defenses 1, 2, 3, 4, 7, 9 and 10. These are that:

1. The Complaint fails to State a claim upon which relief can be granted.
2. The Complaint is barred, in whole or in part, by the applicable statute of limitations and laches, waiver, estoppel or unclean hands.
3. The State's damages, if any, are due solely to the acts or omissions of

- other parties or individuals for which Altivity has no responsibility.
4. The State's claims are barred, in whole or part, for lack of proximate causation between Altivity's actions and the State's injuries, which followed, if at all from other superseding and/or intervening causes.
 7. The native soil at the Wastewater Plant was not contaminated to unsafe levels.
 9. Altivity hereby incorporates by reference, as set forth fully herein, all other defenses and affirmative defenses to the Complaint alleged by any other Defendant.
 10. Altivity reserves the right to assert other defenses or affirmative defenses as this action proceeds. Mot. at 1-2.

The People assert that Affirmative Defenses 1, 2, 3, 4, 7, 9 and 10 must be stricken for factual insufficiency in their pleading. Mot. at 2, citing, *inter alia*, LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App.3d 550, 557, 616 N.E.2d 1297, 1303 (2nd Dist. 1993). The People next contend that Affirmative Defenses 1, 7, 9 and 10 do not admit the Complainant's claims and assert new matters which would defeat the claims, and consequently do not meet the definition of affirmative defense. Mot. at 2, citing, *inter alia*, Worner Agency, Inc. v. Doyle, 121 Ill. App.3d 219,222-23,459 N.E.2d 633,635-36 (4th Dist. 1984).

The People argue that the affirmative defense of statute of limitations included in Affirmative Defense 2 must be stricken because no statute of limitations applies here, citing Pielet Brothers Trading, Inc. v. Pollution Control Board, 110 Ill.App.3d 752,758,442 N.E.2d 1374, 1379 (5th Dist. 1982). The People believe that Affirmative Defense should be stricken because the People need not prove the extent of contamination, given that "miscellaneous material" is "waste" as defined by the Act and no statutory exception applies which would exclude it from that definition. Mot. at 3, citing People v. Lincoln, Ltd., 383 Ill. App.3d 198, 208, 890 N.E.2d 975, 983 (1st Dist. 2008). Finally, the People argue that Affirmative Defense 2 improperly groups multiple alleged defenses into one affirmative defense, in contravention of Section 2-613(a) of the Code of Civil Procedure (Code), 735 ILCS 5/2-613(a) (2010).

The Board is not bound by Altivity's waiver of objection to the grant of the motion under 35 Ill. Adm. Code 101.500(d). But, having reviewed the People's motion and the authorities cited therein, the Board grants the motion for the reasons argued by the People. The Board strikes respondents' affirmative defenses 1, 2, 3, 4, 7, 9 and 10.

As to affirmative defense 2, the Board additionally notes that, while the Code of Civil Procedure does not expressly apply in Board proceedings, the Board looks to the Code where the Board's procedural rules are silent. *See* 35 Ill. Adm. Code 101.100(b). The prohibition against "bunching" of defenses contributes to record manageability, and accordingly the Board finds its application appropriate here.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 16, 2012, by a vote of 5-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish extending to the right.

John Therriault, Assistant Clerk
Illinois Pollution Control Board