BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
vs.	)	**PCB No. 09-107**
	)	**(Enforcement-Air)**
TATE AND LYLE INGREDIENTS	)	
AMERICAS, INC., an Illinois corporation,	)	

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on November 4, 2013, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

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CERTIFICATE OF SERVICE

I hereby certify that I did on November 5, 2013, cause to be served by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instruments entitled NOTICE OF ELECTRONIC FILING and MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES upon the persons listed on the Service List.

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PEOPLE OF THE STATE OF ILLINOIS,	)	
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Complainant,	)	
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v.	)	**PCB NO. 09-107**
	)	**(Enforcement)**
TATE AND LYLE INGREDIENTS AMERICAS, INC, an Illinois corporation,	)	
	)	
	)	
Respondent.	)	

MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, respectfully moves the Board, pursuant to Section 101.506 of the Board's Procedural Rules, 35 Ill. Adm. Code 101.506, to strike the Respondent's affirmative defenses. In support of this Motion to Strike, the People state as follows:

INTRODUCTION

1. On March 15, 2011, the People filed a Second Amended Complaint ("Complaint") alleging violations of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/1 *et seq.* and Illinois Pollution Control Board ("Board") Regulations, 35 Ill. Adm. Code 101.100 et *seq.*.

2. On May 13, 2011, Respondent filed its Answer to Second Amended Complaint.

3. On August 22, 2013, Respondent filed an Unopposed Motion for Leave to File Amended Answer Instanter, along with its Amended Answer to Second Amended Complaint.

4. The Amended Answer included the following affirmative defenses:

> 1) Respondent states that to the extent the Board determines that it emitted any pollutant or pollutants in excess of permitted limits at any time during the period relevant to this Complaint, such emissions occurred during start-up, shut-down, and/or malfunction and are therefore not subject to enforcement pursuant to 40 C.F.R. § 60.8(c), 35 Ill. Adm. Code §§ 201.149, 201.265 and Conditions 7.7.5(g) and 7.7.5(i) of CAAPP Permit No. 96020099.

2) Respondent states that to the extent the Board determines that Respondent, at any time, did not have a required operating permit, Respondent had submitted a timely and complete application for a CAAPP permit and was operating under a valid construction permit and therefore not subject to enforcement pursuant to 415 ILCS 5/39.5(5)(h) and Condition 14 of Construction Permit No. 03070016.

3) Respondent states that this Complaint is barred, in whole or in part, by the applicable statute of limitations set forth in 28 U.S.C. § 2462.

II. LEGAL STANDARDS APPLICABLE TO AFFIRMATIVE DEFENSES

5. Pursuant to Section 103.204(d) of the Board's Procedural Rules, any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before the hearing. 35 Ill. Adm. Code 103.204(d).

6. The Code of Civil Procedure gives additional guidance on pleading affirmative defenses. Section 2-613(d), 735 ILCS 5/2-613(d) (2012), provides as follows:

> The facts constituting any affirmative defense, such as payment, release, satisfaction, discharge, license, fraud, duress, estoppel, laches, statute of frauds, illegality, that the negligence of a complaining party contributed in whole or in part to the injury of which he complains, that an instrument or transaction is either void or voidable in point of law, or cannot be recovered upon by reason of any statute or by reason of nondelivery, want or failure of consideration in whole or in part, and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint, counterclaim, or third-party complaint, in whole or in part, and any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply.

cited in People v. Wood River Refining Co. ("*Wood River*"), PCB 99-120, slip op. at 3-4 (August 8, 2002), and People v. Stein Steel Mills Serv. ("*Stein Steel*"), PCB 02-1, slip op. at 2 (April 18, 2002). In a ruling on Complainant's motion to strike affirmative defenses, the Board stated that Section 2-613(d) provides guidance regarding the pleading of defenses and its purpose is clearly to specify the disputed legal issues before trial. People v. Midwest Grain, PCB 97-179,

slip op. at 3 (August 21, 1997), *citing* Handelman, et al. v. London Time, Ltd., 124 Ill. App. 3d 318, 320 (1st Dist. 1984).

7. Further guidance is available in Section 2-612 of the Code of Civil Procedure, 735 ILCS 5/2-612 (2012), which provides:

> Insufficient pleadings. (a) If any pleading is insufficient in substance or form the court may order a fuller or more particular statement. If the pleadings do not sufficiently define the issues the court may order other pleadings prepared. (b) No pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet. . . .

8. Illinois requires fact-pleading, not the mere notice-pleading of federal practice. *See* Adkins v. Sarah Bush Lincoln Health Ctr., 129 Ill. 2d 497, 518 (1989). To adequately set forth an affirmative defense, an answer must plainly "allege ultimate facts sufficient to satisfy each element of the affirmative defense pled" with the same specificity required in a complaint to establish a cause of action. Indian Creek Dev. Co., *et. al* v. Burlington N. Santa Fe Ry. Co. ("*Indian Creek*"), PCB 07-44, slip op. at 4 (June 18, 2009), *citing* Richco Plastic Co. v. IMS Co., 288 Ill. App. 3d 782, 784-85 (1st Dist. 1997) *and* Int'l Ins. Co. v. Sargent & Lundy ("*Int'l Ins*."), 242 Ill. App. 3d 614, 630 (1st Dist. 1993).

9. An affirmative defense is a response to a claim which attacks the legal right to bring an action, as opposed to attacking the truth of the claim. *Indian Creek*, PCB 07-44, slip op. at 3, *citing* Farmers State Bank v. Phillips Petroleum Co., PCB 97-100, slip op. at 2, n.1 (Jan. 23, 1997) (quoting Black's Law Dictionary), *and* The Worner Agency, Inc. v. Doyle, 121 Ill. App. 3d 219, 222-23 (4th Dist. 1984) (if the pleading does not admit the opposing party's claim but rather attacks the sufficiency of that claim, it is not an affirmative defense). The respondent must allege "new" facts or arguments that, if true, will defeat the government's claim even if all allegations in the complaint are true. People v. Cmty. Landfill Co., PCB 97-193, slip op. at 3

(August 6, 1998), *cited in Wood River*, PCB 99-120, slip op. at 3-4, *and Stein Steel*, PCB 02-1, slip op. at 2, *and Indian Creek*, PCB 07-44, slip op. at 3-4.

10. Legal conclusions unsupported by allegations of specific facts are insufficient. LaSalle Nat'l Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557 (2d Dist. 1993), *cited in Indian Creek*, PCB 07-44, slip op. at 4. Thus, a simple factual denial of a fact pleaded in the complaint is not a sufficient affirmative defense. Pryweller v. Cohen, 282 Ill.App.3d 1144, 1149 (1st Dist. 1996). In determining the sufficiency of any claim or defense, any conclusions of fact or law that are not supported by allegations of specific fact must be disregarded. Knox College v. Celotex Corp., 88 Ill. 2d 407, 426-27 (1981). Affirmative defenses that are totally conclusory in nature and devoid of any specific facts supporting the conclusion are inappropriate and should be stricken. *See Int'l Ins*., 242 Ill. App. 3d at 635, *cited in* Glave v. Harris et al, Village of Grayslake v. Winds Chat Kennel, Inc., PCB 02-11, PCB 02-32 (Consolidated), slip op. at 2 (January 24, 2002).

ARGUMENT

11. None of the three affirmative defense pled by Respondent allege specific facts that identify which violations the defenses purportedly defeat, nor any specific facts supporting the conclusions of fact or law contained within. Furthermore, none of Respondent's affirmative defense admit the allegations contained in the complaint and then pleads additional facts that would nevertheless defeat the complainant's cause of action. Additionally, Affirmative Defense #3 pleads a federal defense that does not apply to any of the State claims alleged in the Second Amended Complaint. Therefore, all three of the Respondent's affirmative defenses should be stricken as both factually and legally insufficient.

Affirmative Defense #1 Fails to Plead Sufficient Facts

12. Affirmative Defense #1 states that "to the extent the Board determines that it emitted any pollutant or pollutants in excess of permitted limits at any time . . . such emissions

occurred during start-up, shut-down and/or malfunction....” This alleged defense fails to plead specific facts that constitute a sufficient basis for an affirmative defense. The Respondent does not provide any facts to explain the conditions under which such emissions occurred or to support a conclusion that such operations were authorized by the facility’s permit.

13. In a recent case before the Board, the respondents asserted that damages were caused by “natural occurrences,” but failed to identify what those natural occurrences were. Rolf Schilling et al v. Gary Hill, et. al., PCB 10-100, slip. op. at 7 (April 7, 2011). The Board found the affirmative defense a “conclusion of fact” that failed to “allege the ultimate facts that would inform the complainants even of the general nature of the natural occurrence.” *Id* at 9. Because the defense lacked specific facts to “reasonably inform the complainants of the nature of the defense which the complainants [were] being called upon to meet,” the Board held that the affirmative defense was factually insufficient. *Id.*

14. Similar to the respondents in *Schilling*, Respondent here has made conclusions of fact and law that any excess emissions are a result of start-up, shut-downs and/or malfunctions yet fails to identify what those occurrences were and how they account for any excess emissions. As just one example, 40 C.F.R. 60.2 defines “malfunction” as “any sudden, infrequent, and not reasonably preventable failure of air pollution control equipment, process equipment, or a process to operate.” Respondent’s affirmative defense fails to even attempt to allege facts that show how its emission events fulfill the definition of a “malfunction.” Without any specific facts “plainly set forth in the answer,” conclusions of fact or law must be disregarded when determining the sufficiency of any claim or defense. *Knox College*, 88 Ill. 2d at 426-27. Therefore, Affirmative Defense #1 is factually insufficient and should be stricken.

Affirmative Defense #2 Fails to Plead Sufficient Facts

15. Affirmative Defense #2 states that “Respondent had submitted a timely and complete application for a CAAPP Permit and was operating under a valid construction

permit....” Again, Respondent’s allegation that it was “operating under a valid operating permit” is a conclusion of fact and law. The Respondent fails to allege any specific facts supporting such a conclusion, such as when the permit was issued, when it would expire, under what conditions, if any, it would extend in time and whether the Respondent met such conditions. Therefore, because any conclusions of fact or law that are not supported by allegations of specific fact must be disregarded when determining the sufficiency of any claim or defense, *Knox College*, 88 Ill. 2d at 426-27, Affirmative Defense #2 should also be stricken as factually insufficient.

Affirmative Defense #3 Fails to Plead Sufficient Facts

16. Affirmative Defense #3 states that “this Complaint is barred, in whole or in part, by the applicable statute of limitations set forth in 28 U.S.C. § 2462.” This affirmative defense does not plead any specific facts that constitute a sufficient basis for an affirmative defense.

17. Where a respondent alleges that a claim is barred by an applicable statute of limitations, respondent must, at a minimum, allege when the cause of action accrued. *Indian Creek*, PCB 07-44, slip op. at 6. In *Indian Creek*, BNSF went slightly further than Respondent here, stating that complainant knew or reasonably should have known of the alleged violations more than five years prior to filing the complaint; yet the Board still struck BNSF’s statute of limitations defense as factually insufficient because it alleged no specific fact to support its assertion, such as when the specific cause of action accrued, to support its assertion. *Id.*

18. Respondent again fails to identify to which of the alleged violations the defense applies or any specific facts supporting a sufficient basis for why the cited statute of limitations is applicable to those violations. Therefore, because any conclusions of fact or law that are not supported by allegations of specific fact must be disregarded when determining the sufficiency of any claim or defense, *Knox College*, 88 Ill. 2d at 426-27, Affirmative Defense #3 should also be stricken as factually insufficient.

Respondent's Affirmative Defense #1 and Affirmative Defense #2 are Legally Insufficient

19. Respondent's first two affirmative defenses fail to admit the People's claims and therefore lack the legal sufficiency to be proper. *Indian Creek*, PCB 07-44, slip op. at 3-4; *see also Farmers State Bank*, PCB 97-100, slip op. at 2; *The Worner Agency, Inc.*, 121 Ill. App. 3d at 221; Condon v. Am. Tel. and Tel. Co., Inc., 210 Ill. App. 3d 701, 709 (2d Dist. 1991). Affirmative Defenses #1 and #2 merely attack the truth of the People's claims by stating the reasons why the Respondent believes it did not violate the Act as alleged in the Complaint.

20. Affirmative Defense #1 asserts the Respondent did not violate the Act because any excess emissions were allowed under the permit.

21. Affirmative Defense #2 asserts the Respondent did not violate the Act because it had a valid permit.

22. Respondent's first two affirmative defenses attempt to refute the facts as pled in the Complaint by asserting that it was operating under a valid construction permit and any excess emissions were allowed under that permit. However, a simple factual denial of a fact pleaded in the Complaint is not a sufficient affirmative defense. *Pryweller*, 282 Ill.App.3d at 1149. These affirmative defenses only attack the sufficiency of the People's claims and are not a response to the People's legal right to bring an action that includes permit and emissions limits violations at the subject facility. Therefore, because neither Affirmative Defense #1 nor Affirmative Defense #2 provides any new facts capable of defeating claims in the Second Amended Complaint, they are both are insufficient as a matter of law.

Respondent's Affirmative Defense #3 is Legally Insufficient

23. Respondent's final affirmative defense vaguely concludes that the Second Amended Complaint is "barred, in whole or in part, by the applicable statute of limitations, including the statute of limitations set forth in 28 U.S.C. § 2462." Since the federal statute of limitations is the only statute cited, the People will address the legal insufficiency of

Respondent's application of the statute in this matter, with the caveat that Respondent's failure to allege to which of the Complaint's five Counts the defense allegedly applies and why prevents full analysis of the legal sufficiency of Respondent's statute of limitations defense.

24. Complainant's research has not revealed any case law in which the federal statute of limitations has been applied to bar State claims. However, Complainant has found one district court that has stated the obvious premise that the five-year period of limitations prescribed by 28 U.S.C. § 2462 applies only to federal violations and does not apply to actions accruing under State law. *See* U.S. v. Magnolia Motor & Logging Co., 208 F. Supp. 63, 65 (N.D. Cal. 1962).

25. Counts I, II, III and IV of the Complaint solely allege violations of the Illinois Environmental Protection Act and Board Regulations – all State claims to which 28 U.S.C. § 2462 does not apply.

26. Count V of the Complaint alleges violations of Prevention of Significant Deterioration ("PSD") requirements under the federal Clean Air Act and is the only count to which Respondent's Affirmative Defense #3 could conceivably apply. Nevertheless, the enforcement of these federal regulations are State claims brought under State authority in a State venue, and application of 28 U.S.C. § 2462 is inappropriate.

27. Preparation of this Motion has revealed the omission of citations to the Act in Count V. The People have simultaneously filed a Motion to file a Third Amended Complaint in this matter, wherein previously omitted citations to Section 9.1(d) of the Act have been added to Count V.

28. Because the People's Complaint alleges State claims brought under State authority in a State venue, the federal statute of limitations in 28 U.S.C. § 2462 does not apply and is therefore not a bar to any claims brought in this matter.

CONCLUSION

29. Respondent's Affirmative Defenses are both factually and legally insufficient and should therefore be stricken pursuant to Section 103.204(d) of the Board's Procedural Rules, 35 Ill. Adm. Code 103.204(d).

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board enter an order striking Respondent's Affirmative Defenses and granting any other relief it deems appropriate.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,

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