BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	**PCB NO. 09-107**
	)	**(Enforcement - Air)**
TATE AND LYLE INGREDIENTS AMERICAS, LLC, an Illinois limited liability company, f/k/a Tate and Lyle Ingredients Americas, Inc.,	)	
	)	
Respondent.	)	

NOTICE OF ELECTRONIC FILING

To: James L. Curtis
Jeryl L. Olson
Seyfarth Shaw LLP
131 South Dearborn Street
Suite 2400
Chicago, Illinois 60603

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274

PLEASE TAKE NOTICE that on the 19th day of November, 2014, Complainant's Motion to Strike Respondent's Affirmative Defenses was filed with the Illinois Pollution Control Board, a true and correct copy of which is attached hereto and is hereby served upon you.

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

By: Kathryn A. Pamenter

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COMPLAINANT'S MOTION TO STRIKE
RESPONDENT'S AFFIRMATIVE DEFENSES

Complainant, People of the State of Illinois, respectfully moves the Illinois Pollution Control Board ("Board"), pursuant to Sections 101.500 and 101.506 of the Board's Procedural Rules, 35 Ill. Adm. Code 101.500 and 101.506, to strike the Respondent's affirmative defenses. In support of this Motion to Strike, the Complainant states as follows:

I. INTRODUCTION

On June 26, 2014, the Complainant filed its Motion for Leave to File Fourth Amended Complaint, which the Hearing Officer granted on August 11, 2014. The Fourth Amended Complaint alleges (a) emission of contaminants in violation of Sections 9.1 and 39.5(6)(a) of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/9.1 and 39.5(6)(a) (2012), 40 C.F.R. § 60.43(a) and Condition 7.7.3 of Respondent's Clean Air Act Permit Program ("CAAPP") permit number 96020099 (the "CAAPP Permit"), (b) construction permit violations pursuant to Section 9(b) of the Act, 415 ILCS 5/9(b) (2010), and Conditions 6(a) and 5(a)(ii) of the construction permit issued to Respondent on February 25, 2004 numbered 03070016 (the "Construction Permit"), and (c) violation of Prevention of Significant Deterioration ("PSD")

requirements, namely Sections 165(a)(1) and (4) of the Clean Air Act, 42 U.S.C.S. 7475(a)(1) and (4) (2010), Sections 52.21(a)(2)(ii), (a)(2)(iii), (j)(1) and (j)(3) of Title 40 of the Code of Federal Regulations, 40 C.F.R. § 52.21(a)(2)(ii), (a)(2)(iii), (j)(1) and (j)(3), and thereby Section 9.1(d)(1) of the Act, 415 ILCS 5/9.1(d)(1) (2010).

On October 14, 2014, Respondent filed its "Answer to Fourth Amended Complaint," which included three affirmative defenses. Complainant moves herein to strike Respondent's affirmative defenses for the reasons outlined below.

II. ARGUMENT

A. Applicable Legal Standards for Motions to Strike Affirmative Defenses.

Pursuant to Section 103.204(d) of the Board's Procedural Rules, "[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 the hearing." 35 Ill. Adm. Code 103.204(d). The Code of Civil Procedure sets forth additional guidance on pleading affirmative defenses. Section 2-613(d) of the Illinois Code of Civil Procedure provides as follows:

> (d) 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.

735 ILCS 5/2-613(d) (2012).

Under Illinois law, "[t]he criteria to be applied in determining if a defense is or is not an affirmative nature is whether, by the raising of it, a defendant gives color to his opponent's claim and then asserts new matter by which the apparent right is defeated." *Horst v. Morand Bros. Beverage Co.*, 96 Ill. App. 2d 68, 80 (1st Dist. 1968) (citing *Cunningham v. City of Sullivan*, 15 Ill. App. 2d 561, 567 (3rd Dist. 1958)); *see also People v. Wood River Refining Co.*, PCB 99-120, 2002 WL 1875851 at *2-*3 (Aug. 8, 2002); *People v. Stein Steel Mills Services, Inc.*, PCB 02-1, 2002 WL 745624 at *1-*2 (April 18, 2002). The Illinois Supreme Court has interpreted the pleading standards for affirmative defenses as follows:

> An affirmative defense does not negate the essential elements of the plaintiff's cause of action. To the contrary, it admits the legal sufficiency of that cause of action. It assumes that the defendant would otherwise be liable, if the facts alleged are true, but asserts new matter by which the plaintiff's apparent right to recovery is defeated.

Vroegh v. J & M Forklift, 165 Ill.2d 523, 530 (1995) (internal citations omitted); *see also Wood River*, 2002 WL 1875851 at *2-*3; *Stein Steel*, 2002 WL 745624 at *1-*2. An affirmative defense must do more than merely refute or deny well-pleaded facts in a complaint. *Id.* If the pleading does not admit the apparent right to the claim and instead merely attacks the sufficiency of the claim, it is not a valid affirmative defense. *Worner Agency, Inc. v. Doyle*, 121 Ill. App. 3d 219, 222-223 (4th Dist. 1984).

B. Respondent's Affirmative Defenses are Insufficient and Should be Stricken.

1. Respondent's First Affirmative Defense

> Respondent states that to the extent the Board determines that Respondent emitted pollutant or pollutants in excess of New Source Performance Standards at times during the periods relevant to the Complaint, as set forth in Paragraphs 21, 23, 24, 26, 27, 29, 30, 32, 33, 35, 37, 38, 40, 41 and 43 of Count I of the Complaint, where such emissions occurred during start-up, shut-down, breakdown and/or malfunction, they are not considered violations of emissions limitations, in accordance with 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. . . .

Section 103.204(d) of the Board's Procedural Rules provides that "[a]ny *facts* constituting an affirmative defense * * * must be plainly set forth before hearing in the [respondent's] answer." 35 Ill. Adm. Code 103.204(d); *see also* 735 ILCS 5/2-613(d) (2012) (emphasis added). In determining the sufficiency of any defense, a court will disregard any conclusions of law that are not supported by specific facts. *Richco Plastic Co. v. IMS Co.,* 288 Ill. App. 3d 782, 784-85 (5th Dist. 1997); *see also Int'l. Ins. Co. v. Sargent & Lundy*, 242 Ill. App. 3d 614, 630 (1st Dist. 1993) ("the facts establishing an affirmative defense must be pleaded with the same degree of specificity required by a plaintiff to establish a cause of action"). Respondents must specifically plead asserted affirmative defenses in their answers so that plaintiffs are not taken by surprise. *Hagen v. Stone*, 277 Ill. App. 3d 388, 390 (1st Dist. 1995). In fact, if a respondent fails to plead with sufficient specificity, it is "deemed to have waived the defense, and it cannot be considered even if the evidence suggests the existence of the defense." *Spagat v. Schak*, 130 Ill. App. 3d 130, 134 (2nd Dist. 1985) (citing *Parker v. Dameika,* 372 Ill. 235 (1939)).

Respondent asserts as an affirmative defense to Count I of the Complaint that each of the alleged 207[1] sulfur dioxide emission exceedances between July 2005 and December 2013 "were caused by" or "*may have been* the result of" malfunctions of the boilers due to various operational problems or "undetermined causes." (Answer at pp. 26-40 (emphasis added).) Such vague, ambiguous and conclusory statements fail to satisfy the requirement that the respondent plead the ultimate facts that would satisfy each element of the affirmative defense. *Sargent &*

[1] According to Respondent, the alleged December 8, 2011 emission exceedance was "caused by manufacturer's defect in the valve," not a malfunction. (Answer at p. 39.)

Lundy, 242 Ill. App. 3d at 630. In addition, Respondent's affirmative defense fails to allege facts that show how its emission exceedances satisfy the definition of a "malfunction."

> Malfunction means any sudden, infrequent, and not reasonably preventable failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner. Failures that are caused in part by poor maintenance or careless operation are not malfunctions.

40 C.F.R. § 60.2. The Respondent's allegations regarding the 208 events over an approximately eight year period that caused sulfur dioxide emission exceedances lack specificity relative to the nature of each sulfur dioxide emission exceedance, and why each was sudden, infrequent and more importantly, not preventable. *Id.* Accordingly, Respondent's First Affirmative Defense is factually insufficient and should be stricken.

Respondent also contends that sulfur dioxide emission exceedances that occur during malfunctions "are not considered violations of emission limitations" pursuant to 40 C.F.R. § 60.8(c),[2] 35 Ill. Adm. Code §§ 201.149,[3] 201.265,[4] and Conditions 7.7.5(g) and 7.7.5(i) of the CAAPP Permit (*see infra* p. 6). (Answer at p. 26.) Complainant does not allege a violation of any of those regulations or conditions, thereby rendering Respondent's reliance on them to be misplaced. None of those regulations or conditions provides a defense in this case to

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[2] 40 C.F.R. § 60.8(c) provides, in pertinent part, that, "[p]erformance tests shall be conducted under such conditions as the Administrator shall specify to the plant operator based on representative performance of the affected facility. . . . Operations during periods of startup, shutdown, and malfunction shall not constitute representative conditions for the purpose of a performance test nor shall emissions in excess of the level of the applicable emission limit during periods of startup, shutdown, and malfunction be considered a violation of the applicable emission limit unless otherwise specified in the applicable standard."

[3] 35 Ill. Adm. Code 201.149 provides that "[n]o person shall cause or allow the continued operation of an emission source during malfunction or breakdown of the emission source or related air pollution control equipment if such operation would cause a violation of the standards or limitations set forth in Subchapter c of this Chapter unless the current operating permit granted by the Agency provides for operation during a malfunction or breakdown."

[4] 35 Ill. Adm. Code 201.265 provides that "[t]he granting of permission to operate during a malfunction or breakdown, or to violate the standards or limitations of Subchapter c of this Chapter during startup, and full compliance with any terms and conditions connected therewith, shall be a prima facie defense to an enforcement action alleging a violation of Section 201.149, of the emission and air quality standards of this Chapter, and of the prohibition of air pollution during the time of such malfunction, breakdown or startup."

Respondent's alleged sulfur dioxide emission exceedance violations. Indeed, neither the New Source Performance Standards specified in 40 CFR Subpart D ("NSPS"), nor the CAAPP Permit requirements authorize sulfur dioxide emissions in excess of the applicable NSPS sulfur dioxide emission standard, even during malfunction.

In addition, Respondent seeks to rely on Condition 7.7.5(g) of the CAAPP Permit in support of its affirmative defense to its alleged violation of Condition 7.7.3 of the CAAPP Permit.[5] Condition 7.7.5(g) of the CAAPP Permit provides:

> In the event of a malfunction or breakdown of an affected boilers [sic] #1 and #2, the Permittee is authorized to continue operation of the affected boilers in violation of the applicable requirements of Conditions 7.7.3 (except the NO_x standard under 40 CFR 60 44b), as necessary to provide essential service, prevent risk of injury to personnel or severe damage to equipment, or if shutting down the boiler would lead to a greater amount of emissions during subsequent startup than would be caused by continuing to run the boiler for a short period until repairs can be made. This authorization is subject to the following requirements:
>
> i. Upon occurrence of excess emissions due to malfunction or breakdown, the Permittee shall as soon as practicable repair the affected boiler(s) or remove the boiler(s) from service, so that excess emissions cease. This shall be accomplished within 12 hours or noon of the Illinois EPA's next business day, whichever is greater, unless the Permittee obtains an extension from the Illinois EPA. The Illinois EPA may grant such extension if the Permittee demonstrates that the affected boiler(s) could not be reasonably repaired or removed from service within the allowed time and that, based on the actions, which have been taken and will be taken, the Permittee is taking reasonable steps to minimize excess emissions and will repair the affected boiler(s) or remove it from service as soon as practicable.
>
> ii. The Permittee shall fulfill all applicable recordkeeping and reporting requirements of Conditions 7.7.9 and 7.7.10.
>
> iii. Following notification to the Illinois EPA of a malfunction or breakdown with excess emissions, the Permittee shall comply with

[5] Respondent's reference to Condition 7.7.5(i) of the CAAPP Permit setting forth "startup provisions" is misplaced, as none of the 208 instances of excess emissions were the result of startup issues, according to Respondent. (Answer at pp. 26-40.)

> all reasonable directives of the Illinois EPA with respect to such incident, pursuant to 35 IAC 201.263.

Respondent sets forth no facts to support that continued operation of the boilers following each of the 207 alleged malfunctions was "necessary to provide essential service, prevent risk of injury to personnel or severe damage to equipment, or if shutting down the boiler would lead to a greater amount of emissions during subsequent startup than would be caused by continuing to run the boiler for a short period until repairs can be made." (Condition 7.7.5(g) of the CAAPP Permit.) In addition, Respondent provides no facts regarding whether it complied with subsections i, ii or iii of Condition 7.7.5(g) of the CAAPP Permit. (*Id.*) Respondent's conclusory reference to Condition 7.7.5(g) of the CAAPP Permit is insufficient to constitute an affirmative defense to its alleged violation of Condition 7.7.3 of the CAAPP Permit. *Richco Plastic,* 288 Ill. App. 3d at 784-85.

Based on the foregoing, Respondent's affirmative defense to Count I of the Complaint is factually and legally insufficient. Accordingly, Respondent's First Affirmative Defense must be stricken.

2. Respondent's Second Affirmative Defense.

> 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 is not subject to enforcement pursuant to 415 ILCS 5/39.5(5)(h) and Condition 14 of Construction Permit No. 03070016. Specifically, Respondent was issued a valid construction permit on February 25, 2004 and began construction under the permit in March, 2004.

Respondent fails to delineate the counts of the Complaint to which its second affirmative defense applies. None of the counts allege that Respondent failed to have a required operating permit. Count I of the Complaint concerns Respondent's CAAPP Permit, while Count II alleges

Respondent violated conditions within its Construction Permit. Counts I and II of the Complaint do not allege that Respondent failed to obtain a construction permit. Only Count III of the Complaint includes an allegation that "Respondent failed to acquire the requisite construction permit setting for the BACT limitation prior to constructing the facility, and thereafter failed to implement BACT." (Complaint at p. 18, § 16.)

Respondent cites 415 ILCS 5/39.5(5)(h) and Condition 14 of Construction Permit No. 03070016 to contend that it is not subject to enforcement. Section 39.5(5)(h) of the Act provides:

> If the owner or operator of a CAAPP source submits a timely and complete CAAPP application, the source's failure to have a CAAPP permit shall not be a violation of this Section until the Agency takes final action on the submitted CAAPP application, provided, however, where the applicant fails to submit the requested information under paragraph (g) of this subsection 5 within the time frame specified by the Agency, this protection shall cease to apply.

415 ILCS 5/39.5(5)(h). Condition 14 of the Construction Permit provides:

> Operation of the affected xanthum gum process is allowed under this construction permit for 270 days to allow for emissions testing and compliance demonstration as required by Condition 7 of this permit.
>
> a. If the emissions testing demonstrates compliance with this permit then operation of the affected xanthum gum process is allowed under this construction permit until the source's CAAPP permit is next revised or renewed.

(Condition 14 of the Construction Permit.) Neither provision, though, applies to any of the Counts of the Complaint. Therefore, Respondent's conclusory Second Affirmative Defense must be stricken.

3. Respondent's Third Affirmative Defense.

> Respondent states that Counts I, II, and II [sic] of this Complaint are barred, in whole or in part, by the applicable statute of limitations, including but not limited to the statute of limitations set forth in 28 U.S.C. § 2462. Specifically, the 5-year statute of limitations under 28 U.S.C. §

> 2462 accrued in this case when "construction commence[d] with a permit in hand." *U.S. v. Midwest Generation LLC et al.*, 720 F.3d 644 (7th Cir. 2013). Respondent commenced construction in March, 2004 under its valid construction permit issued on February 25, 2004. Accordingly, Complainant's initial Complaint filed May 11, 2009 was untimely.

Counts I and II of the Complaint allege violations of the Act and Board regulations, which are State claims to which 28 U.S.C. § 2462 does not apply.[6] Count III of the Complaint alleged violations of PSD requirements under the Clean Air Act and is the only count to which Respondent's Third Affirmative Defense could apply. Yet, the enforcement of the PSD requirements are brought under State authority in a State venue. Therefore, Respondent's Third Affirmative Defense should be stricken.

WHEREFORE, Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that this Board enter an Order striking and deeming waived Respondent's affirmative defenses, and granting such other and further relief as this Board deems proper.

Respectfully submitted,

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

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[6] Count I of the Complaint also includes an alleged violation of 40 C.F.R. § 60.43(a). "[W]hen 'construction commence[d] with a permit in hand'" and the alleged date of construction is irrelevant to Respondent's violation of the sulfur emission limitations.

CERTIFICATE OF SERVICE

I, Kathryn A. Pamenter, an Assistant Attorney General, do certify that I caused to be served this 19th day of November, 2014, the attached Notice of Electronic Filing and Complainant's Motion to Strike Respondent's Affirmative Defenses upon (a) James L. Curtis and Jeryl L. Olson *via regular mail* by placing a true and correct copy in an envelope addressed as set forth on the Notice of Electronic Filing, first class postage prepaid, and depositing same with the United States Postal Service at 100 West Randolph Street, Chicago, Illinois, at or before the hour of 5:00 pm. and (b) Carol Webb *via email*.

KATHRYN A. PAMENTER