BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, Complainant, v. AMSTED RAIL COMPANY, INC., Respondent.	)))))))))	PCB 16-61 (Enforcement – Air)

NOTICE OF FILING

To: Carol Webb
Hearing Officer
Illinois Pollution Control Board
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P.O. Box 19274
Springfield, Illinois 62794-9274

Jamie D. Getz
Assistant Attorney General
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PLEASE TAKE NOTICE that on this 24th day of February 2016, the following was filed electronically with the Illinois Pollution Control Board: **Respondent Amsted Rail Company, Inc.'s Response to Motion to Strike Affirmative Defenses**, which is attached and herewith served upon you.

AMSTED RAIL COMPANY, INC.

By: s/Elizabeth S. Harvey
One of its attorneys

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CERTIFICATE OF SERVICE

I, the undersigned, state that a copy of this notice and the above-described document were served electronically upon all counsel of record on February 24, 2016.

s/Elizabeth S. Harvey

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 16-61
	)	(Enforcement – Air)
AMSTED RAIL COMPANY, INC.,	)	
	)	
Respondent.	)	

RESPONSE TO MOTION TO STRIKE AFFIRMATIVE DEFENSES

Respondent AMSTED RAIL COMPANY, INC. (Amsted), by its attorneys Swanson, Martin & Bell, LLP, responds in opposition to complainant's motion to strike Amsted's affirmative defenses.

INTRODUCTION

On January 15, 2016, Amsted timely filed its answer to the complaint. Amsted's answer included five affirmative defenses:

1. Illinois's applicable statute of limitations bars the alleged violations in Counts VII, VIII, X, XI, and XII. In particular, the five-year statute of limitations set forth at 735 ILCS 5/13-205 bars each alleged action accruing before November 16, 2010.
2. The applicable federal statute of limitations bars the violations alleged in Counts XI and XII. The five-year statute of limitations established in 28 USC §2462 bars each allegation in those counts which accrued prior to November 16, 2010.
3. Two of the emission limits at issue in Count X are clearly in error, perhaps typographical. Illogical permit emission limits cannot be the basis for alleged violations of those limits.

4. Count XIII alleges Amsted failed to conduct required opacity testing. Amsted has been conducting opacity testing; however, Illinois EPA demands use of an improper testing method. Contrary to Illinois EPA's claim, Illinois EPA's incorrect demand for an improper test is not a failure to conduct testing.

5. The Board's procedural rules specifically allow for affirmative defenses to be pled after the filing of an answer, if the affirmative defense could not have been known before hearing. 35 Ill.Adm.Code 103.204(d). Amsted reserves the right to assert any additional affirmative defense which could not have been known before hearing.

On February 11, 2016, complainant filed a motion to strike all five of Amsted's affirmative defenses. Contrary to complainant's assertions, Amsted's affirmative defenses are proper and legally sufficient. The motion to strike should be denied.

ARGUMENT

In ruling on a motion to strike affirmative defenses, the Board evaluates whether the affirmative defense "alleges new facts or arguments that, if true, will defeat...the government's claim even if all allegations in the complaint are true." *People v. Texaco Refining & Marketing, Inc.*, PCB 02-03, slip op. at 3 (November 6, 2003), *citing People v. Community Landfill*, PCB 97-193, slip op. at 3 (August 6, 1998). The Board also looks to Section 2-613(d) of the Code of Civil Procedure, which provides:

> The facts constituting any affirmative defense...[which] seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint...and any defense...which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, <u>must</u> be plainly set forth in the answer or reply.

735 ILCS 5/2-613(d)(emphasis added).

See People v. Wood River Refining Company, PCB 99-120, slip op. at 3-4 (August 8, 2002). "Where the well-pleaded facts of an affirmative defense raise the possibility that the party asserting them will prevail, the defense should not be stricken." *Wood River Refining*, slip op. at 4, *citing International Insurance Co. v. Sargent & Lundy*, 242 Ill.App.3d 614, 630-631 (1st Dist. 1993)(emphasis added)(finding the trial court erred in striking an affirmative defense where the facts alleged in the affirmative defense could "conceivably" form the basis of a defense). Amsted's affirmative defenses allege facts which "raise the possibility...[Amsted] will prevail." Amsted's affirmative defenses should not be stricken.

First affirmative defense: Illinois statute of limitations

Amsted's first affirmative defense alleges the five-year statute of limitations of 735 ILCS 5/13-205 bars Counts VII, VIII, X, XI, and XII because – as alleged by complainant – portions of Counts VII, VIII, X, XI, and XII accrued more than five years before the complaint was filed. Clearly Amsted has fully and properly alleged facts that would defeat portions of Counts VII, VIII, X, XI, and XII. Thus the affirmative defenses are well-pled; hence they are proper for purposes of the pleadings. Complainant's motion argues the merits of the affirmative defenses – not whether the affirmative defenses are properly pled.[1] However, the substantive merits of an affirmative defense are not at issue in a motion to strike, such as presented here. A motion to strike is solely a "pleadings motion," which tests whether sufficient facts have been alleged – not whether the State agrees with the substance. The substance of arguments on the statute of limitations question is fully briefed and before this Board in Amsted's pending Motion to Dismiss Counts I, II, III, IV, V, and VI. Similarly,

[1] Complainant's argument for striking the first affirmative defense is almost identical to the argument it has made in response to Amsted's motion to dismiss Counts I through VI of the complaint. That motion is fully briefed and currently pending before the Board.

whether the State has alleged a "public" right is also fully addressed in the pleadings regarding Amsted's motion to dismiss. Complainant has confused the merits of an affirmative defense with whether the affirmative defense "asserts new matter by which the asserted right is defeated." *Worner Agency, Inc. v. Doyle,* 121 Ill.App.3d 219, 222 (4th Dist. 1984). A statute of limitations defense is the very definition of an affirmative defense: it asserts new matter – the statute of limitations – which would defeat the allegations of the complaint. Complainant does not contend Amsted's first affirmative defense is not properly pled, or that statute of limitations is not a proper affirmative defense. Unless this Board directs the parties to re-argue the same substantive issues already fully briefed and presented, Amsted focuses its response regarding the pending "pleadings motion" on the correct issue: whether Amsted's affirmative defense properly alleges new facts which could defeat complainant's allegations.

Illinois courts have long held that a statute of limitations claim must be raised affirmatively. "The statute of limitations is an affirmative defense that must be pleaded and proved by a defendant." *Dever v. Simmons*, 292 Ill.App.3d 70, 73 (1st Dist. 1997); *see also Findley v. Posway*, 118 Ill.App.3d 824, 827 (1st Dist. 1983)(statute of limitations is an affirmative defense). In fact, the failure to specifically plead a statute of limitations defense constitutes waiver of the defense. *Goldman v. Walco Tool & Engineering Company*, 243 Ill.App.3d 981, 989 (1st Dist. 1993), *citing Ruddock v. First National Bank,* 201 Ill.App.3d 907, 918 (2d Dist. 1990). *See also Anfinsen Plastic Molding Co. v. Konen*, 68 Ill.App.3d 355, 361 (2d Dist. 1983)(statute of limitations claim waived where defendant did not plead it as an affirmative defense); *Book v. Ewbank*, 311 Ill.App. 312, 319 (2d Dist. 1941)(statute of limitations defense must be affirmatively pled by defendant, even if the defense was

apparent on the face of the document at issue). Complainant has not cited any rule of law that a statute of limitations claim is not properly an affirmative defense. In fact, as demonstrated by the case law, not only is the statute of limitations properly an affirmative defense, but the failure to plead it is a waiver of the defense. Amsted must raise the Illinois statute of limitations as its first affirmative defense in order to avoid a waiver.

<u>Second affirmative defense: federal statute of limitations</u>

Complainant's basis for seeking to strike Amsted's second affirmative defense is the same as for striking the first affirmative defense – that no statute of limitations applies to Counts XI and XII. Once again, complainant confuses form with substance. Complainant argues only the merits of the second affirmative defense, asserting that the federal statute of limitations does not apply to Counts XI and XII. When deciding a motion to strike an affirmative defense, the Board evaluates whether the affirmative defense "alleges new facts or arguments that, *if true,* will defeat...the government's claim even if all allegations in the complaint are true." *Texaco Refining*, slip op. at 3 (emphasis added). Amsted incorporates its arguments regarding its first affirmative defense, above, in response to complainant's attempt to strike the second affirmative defense.

Further, the federal courts routinely apply the federal five-year statute of limitations (28 USC §2462) to enforcement actions brought under the Clean Air Act. For example, in United *States v. Luminant Generation Company, LLC*, 2015 U.S.Dist. LEXIS 111322, 81 ERC 1569 (N.D. Tex. August 21, 2015), the court held that because the Clean Air Act does not establish a statute of limitations, enforcement actions under the Clean Air Act are subject to the general five-year statute of limitations. (*Luminant*, 2015 U.S.Dist. LEXIS 111322, *8, *citing National Parks Conservation Association, Inc. v. Tennessee Valley*

Authority, 502 F.3d 1316, 1322 (11th Cir. 2007); *see also United States v. Midwest Generation, LLC*, 720 F.3d 644, 646 (7th Cir. 2013)(applying five-year statute of limitations to Clean Air Act enforcement actions).) The statute of limitations is unquestionably applicable to the United States Environmental Protection Agency (USEPA). State actions brought under the Clean Air Act must also be subject to the statute of limitations. To hold otherwise would allow the State, and the Illinois EPA, to do what the federal government and USEPA cannot do: bring a Clean Air Act enforcement action more than five years after the cause of action accrues.

People of the State of Illinois v. Panhandle Eastern Pipe Line Company, PCB 99-191 (November 15, 2001), cited by complainant, is not applicable to the instant motion. The *Panhandle* decision did not involve a motion to strike affirmative defenses – it was a thirty-seven page decision on the merits. The Board was not presented with a motion to strike, and did not consider or discuss whether an affirmative defense should be stricken at the pleading stage. *Panhandle*, slip op. at 22-23. The *Panhandle* decision is not relevant to a determination on complainant's motion to strike Amsted's second affirmative defense. Amsted's second affirmative defense is sufficiently pled, and is a proper affirmative defense. Complainant's attempt to strike Amsted's second affirmative defense must be denied.

Third affirmative defense: error in permit terms

Once again, complainant confuses form with substance. Complainant does not argue that Amsted's third affirmative defense is insufficiently pled. Instead, complainant asserts the third affirmative defense should be stricken because complainant believes Amsted will not prevail on the merits of the affirmative defense, but whether a defendant

will prevail on an affirmative defense is not the issue. Both the Board and Illinois's appellate court have held that, when the well-pleaded facts of an affirmative defense raise the possibility that the asserting party will prevail, the defense should not be stricken. *Wood River Refining*, slip op. at 4. At this stage, the question is whether Amsted has alleged facts that – if correct -- will defeat the government's claims. Amsted's third affirmative defense is sufficiently pled, and is a proper affirmative defense. Complainant's motion to strike Amsted's third affirmative defense must be denied.

<u>Fourth affirmative defense: incorrect testing method</u>

Complainant claims that Amsted's fourth affirmative defense is merely a denial of the violations of the allegations of the complaint, and is thus not a valid affirmative defense. Complainant is mistaken. The defense raised in Amsted's fourth affirmative defense is the very definition of an affirmative defense. Amsted raises the affirmative matter – an improper testing method – which, if not expressly raised would be likely to take the opposing party by surprise. 735 ILCS 5/2-613(d); *Wood River Refining*, slip op. at 3-4. The fourth affirmative defense certainly asserts new matter (correct test method) which, if Amsted prevails, would defeat the allegations of Count XIII. Complainant repeatedly asserts that the affirmative defense is "merely" a denial of the alleged violations, but simply stating that does not make it true. Amsted has alleged sufficient, additional facts which would defeat the claim and which would take complainant by surprise, if not asserted as such. Amsted's fourth affirmative defense should not be stricken.

<u>Fifth affirmative defense: additional affirmative defenses</u>

Amsted's fifth affirmative defense reserves the right to assert any additional affirmative defense which could not have been known before hearing. Amsted does not,

by its fifth affirmative defense, seek to avoid or expand the requirements of the Board's procedural rules. In fact, the fifth affirmative defense specifically recognizes the limitation on affirmative defenses set forth in the Board's procedural rule: that affirmative defenses must be raised before hearing "unless the affirmative defense could not have been known before hearing." 35 Ill.Adm.Code 103.204(d). Complainant grumbles this affirmative defense is meaningless. The Board's procedural rules specifically allow an affirmative defense to be raised after hearing, if the respondent can demonstrate the additional affirmative defense could not have been known prior to hearing. If complainant agrees that reserving that right is unnecessary as an affirmative defense, Amsted will withdraw the fifth affirmative defense and rely on the Board's specific procedural rule.

CONCLUSION

Amsted's affirmative defenses properly allege new facts or arguments that, if true, will defeat the government's claims. *Texaco Refining*, slip op. at 3. Complainant argues the merits of the affirmative defenses – whether Amsted will prevail on the affirmative defenses. The merits of affirmative defenses are not the issue on a motion to strike affirmative defenses. For purposes of a motion to strike, the question is whether the affirmative defenses properly plead defenses which will defeat complainant's allegations. Complainant does not contend that the affirmative defenses are insufficiently pled, and does not argue that the defenses do not raise issues which would be likely to take complainant by surprise.

The affirmative defenses raise the possibility that Amsted will prevail; therefore, the affirmative defenses should not be stricken. *Wood River Refining*, slip op. at 4, *citing International Insurance Co.*, 242 Ill.App.3d at 630-631. Complainant's motion to strike Amsted's affirmative defenses should be denied.

Respectfully submitted,

AMSTED RAIL COMPANY, INC.

By: *s/Elizabeth S. Harvey*
One of its attorneys

Dated: February 24, 2016

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