

ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 15-112
)	(Enforcement – Air)
INCOBRASA INDUSTRIES, LTD., an)	
Illinois corporation,)	
)	
Respondent.)	

ORDER OF THE BOARD (by J.A. Burke):

The People of the State of Illinois allege Incobrasa Industries violated air emission requirements at Incobrasa’s soybean processing and biodiesel manufacturing facility in Gilman, Iroquois County. Incobrasa asserted thirteen affirmative defenses against three counts in the amended complaint. The Board strikes the thirteen affirmative defenses because the defenses deny or attack the sufficiency of the complaint and do not assert affirmative matter to defeat the People’s claims.

DISCUSSION

Incobrasa asserted thirteen affirmative defenses (Ans.) addressing Counts VI, VII, and VIII of the amended complaint (Comp.). The People move to strike the affirmative defenses (Mot.), and Incobrasa responded (Resp.). The Board grants the People’s motion and strikes the affirmative defenses.

The Board’s procedural rules require that facts constituting an affirmative defense must be stated in the answer. 35 Ill. Adm. Code 103.204(d); *see also* 735 ILCS 5/2-613(d). An affirmative defense asserts new matter to defeat a claim. Rapraeger v. Allstate Insurance Co., 183 Ill. App. 3d 847, 854 (2nd Dist. 1989). An affirmative defense defeats a claim even if all allegations in the complaint are true. *Id.* An affirmative defense comprises allegations that do not negate the essential elements of the plaintiff’s claim, but rather admit the claim’s legal sufficiency, and assert new matter to defeat the plaintiff’s claim. Vroegh v. J&M Forklift, 165 Ill.2d 523,530 (1995). In other words, an argument that attacks the sufficiency of a claim is not an affirmative defense. *See* Worner Agency v. Doyle, 121 Ill. App. 3d 219, 222 (4th Dist. 1984).

Incobrasa directs its affirmative defenses at three counts in the complaint. The Board addresses each count.

CAAPP Permit
(Count VI/Affirmative Defenses One through Nine)

In Count VI, the People allege that Incobrasa violated monitoring and recordkeeping conditions in its Clean Air Act Permit Program (CAAPP) permit. Comp. at 18-28. In affirmative defenses one through nine, Incobrasa argues that it kept required records, contrary to the allegations in Count VI. In the first affirmative defense, Incobrasa maintains that it maintained monthly records of sulfur dioxide emissions. Ans. at 45. As to affirmative defenses two through nine, Incobrasa contends that the permit did not require recordkeeping on a rolling 12-month basis as alleged in the complaint. Ans. at 45-48. Rather, Incobrasa kept daily, monthly, and calendar-year records, which Incobrasa believes are consistent with the permit. *Id.*

The People contend Incobrasa's affirmative defenses are improper because they neither give color to the People's claims nor assert new matter defeating those claims. Mot. at 4. Rather, the affirmative defenses deny the allegations. *Id.* Incobrasa raises the affirmative defenses to avoid waiving its right to assert the defenses and not to surprise the People. Resp. at 11-12.

In these nine affirmative defenses, Incobrasa contends that it was not required to keep records as alleged by the People. Instead, Incobrasa kept other records consistent with permit requirements. Thus, in each of these defenses, Incobrasa denies the People's allegations that it did not maintain required records. These defenses are not affirmative defenses. An affirmative defense does not negate elements of the plaintiff's claim, but rather admits the claim's legal sufficiency. Vroegh, 165 Ill.2d at 530; *see also* People v. Community Landfill Company, Inc., PCB 97-193, slip op. at 3 (Aug. 6, 1998) (an affirmative defense takes allegations in the complaint as true). Indeed, Incobrasa argues that the allegations were not well pled because the People cite permit provisions that do not require what the People allege. Resp. at 12. The Board therefore grants the People's motion to strike these nine affirmative defenses.

Permit Fee Emission Limits
(Count VII/Affirmative Defense Ten)

In Count VII, the People allege that Incobrasa exceeded volatile organic material (VOM) and particulate matter (PM) annual emission limits used to establish the permit fee. Comp. at 29-30. The permit sets annual limits for individual pollutants as well as a total limit. Incobrasa, in its tenth affirmative defense, states that while there were slight exceedances of VOM and PM limits in certain years, emissions did not exceed the total limit in any of those years. Ans. at 47. The People argue that Incobrasa's defense attacks the legal sufficiency of Count VII and is not an affirmative defense. Mot. at 5. Incobrasa states that its affirmative defense contains specific facts that defeat the cause of action. Resp. at 15.

Incobrasa admits the People's allegations as to its annual emissions for VOM and PM (Ans. at 37) and that these emission levels slightly exceeded VOM and PM permit limits (Ans. at 47). However, Incobrasa asserts that it paid accurate fees because its total emissions were within the total limit. Ans. at 37, 47. This defense attacks the sufficiency of the People's allegation in that it offers a different interpretation of the meaning of the permit condition – *i.e.* that VOM and

PM emissions can exceed limits for individual pollutants as long as the total emission limit is met. This defense denies a violation of the permit. Accordingly, this defense is not an affirmative defense. The Board therefore grants the People's motion to strike Incobrasa's tenth affirmative defense.

Construction Permit
(Count VIII/Affirmative Defenses Eleven through Thirteen)

The People allege Incobrasa violated its construction permit by not maintaining required records on a rolling 12-month basis. Comp. at 32-34. This in turn resulted in a violation of Section 9(b) of the Act. *Id.* Incobrasa contends that it was not required to maintain rolling 12-month records. Ans. at 47-48. Rather, Incobrasa kept records on a monthly or calendar-year basis. *Id.*

Incobrasa again denies the People's allegations that it did not keep required records. As previously discussed, this is not an affirmative defense. The Board therefore grants the People's motion to strike these three affirmative defenses.

CONCLUSION

The Board grants the People's motion and strikes all thirteen affirmative defenses.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 7, 2016, by a vote of 5-0.



John T. Therriault, Clerk
Illinois Pollution Control Board