



from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act.

- (b) Construct, install, or operate any equipment, facility, vessel, or aircraft capable of causing or contributing to water pollution, or designed to prevent water pollution, of any type designated by Board regulations, without a permit granted by the Agency, or in violation of any conditions imposed by such permit.

\* \* \*

- (d) Deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard.

\* \* \*

### **COMPLAINT**

According to the complaint, Cortland owns and operates wastewater spray irrigation fields and rigs located east of Cortland, north of Maple Park Road, with Rigs A1, A2, A3 and A4 on the east side of Airport Road and Rigs B1, B2 and B3 on the west side of Airport Road in DeKalb County. Compl. at ¶¶ 4, 5. On August 18, 2006, the Illinois Environmental Protection Agency (Agency) issued Water Pollution Control Permit No. 2005-GA-3591 to Cortland for the operation of Cortland’s “Sewage Treatment Plant Spray Irrigation Phase 1A”. Compl. at ¶ 7.

The People state that the Agency received complaints on July 17, 2009, of “surface discharge of wastewater from the northwest corner of the designated spray field” and on July 24, 2009, of “the irrigation system . . . spraying wastewater directly onto Airport Road for a period of approximately thirty minutes.” Compl. at ¶¶ 8, 9. The People allege that the August 18, 2006 permit does not allow for either activity. *Id.* The People further allege that “sprayed wastewater entered Union Ditch #1, tributary to the Kishwaukee River and/or roadside stormwater ditches.” Compl. at ¶ 10. On September 24, 2009, the Agency sent a notice of violation (NOV) to Cortland for failure to comply with its permit and unlawful discharge of wastewater. Compl. at ¶ 11.

### **Count I**

Count I of the complaint alleges that Cortland violated Section 12(a) of the Act (415 ILCS 5/12(a) (2010)) “by discharging wastewater to areas outside of the spray irrigation application area” which “caused, threatened or allowed water pollution in Illinois.” Compl. at ¶ 22. The People further allege that this discharge “entered Union Ditch #1 and/or roadside stormwater ditches, tributary to Kishwaukee River” and that Union Ditch #1 and/or roadside stormwater ditches are “waters” of the State. Compl. at ¶¶ 19, 20.

## **Count II**

Count II alleges that Cortland violated Section 12(b) of the Act (415 ILCS 5/12(b) (2010)) “by operating in violation of Special Condition 7 of its State Operating Permit.” Compl. at ¶ 22. Special Condition 7 of the permit provides “[t]his permit is issued with the express understanding that there shall be no surface discharge from the permitted facilities.” Compl. at ¶ 20. The People contend that “the surface discharge of wastewater to areas outside the spray irrigation application area on July 17 and July 24, 2009, was in violation of Special Condition 7.” Compl. at ¶ 21.

## **Count III**

Count III alleges that Cortland violated Section 12(d) of the Act (415 ILCS 5/12(d) (2010)) by “spraying wastewater on areas outside the spray irrigation application area” which “allowed contaminants to be deposited on land in such a manner as to create a water pollution hazard.” Compl. at ¶ 20.

## **DISCUSSION**

### **Motion to Strike**

Pursuant to 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 hearing.” 35 Ill. Adm. Code 103.204(d); *see also* 735 ILCS 5/2-613(d). In an affirmative defense, a respondent alleges “new facts or arguments that, if true, will defeat . . . [a complainant’s] claim even if all allegations in the complaint are true.” People v. Community Landfill Co., PCB 97-193, slip op. at 3 (Aug. 6, 1998). “[T]o set forth a good and sufficient claim or defense, a pleading must allege ultimate facts sufficient to satisfy each element of the cause of action or affirmative defense pled.” Richco Plastic Co. v. IMS Co., 288 Ill. App. 3d 782, 784, 681 N.E.2d 56, 58 (1st Dist. 1997). The facts of an affirmative defense must be pled with the same degree of specificity necessary for establishing a cause of action. International Ins. Co. v. Sargent & Lundy, 242 Ill. App. 3d 614, 630, 609 N.E. 2d 842, 853 (1st Dist. 1993).

“A motion to strike an affirmative defense admits well-pled facts constituting the defense, as well as all reasonable inferences that may be drawn therefrom, and attacks only the legal sufficiency of the facts.” Raprager v. Allstate Insurance Co., 183 Ill. App. 3d 847, 854, 539 N.E.2d 787, 791 (2nd Dist. 1989). An affirmative defense should not be stricken “[w]here the well-pleaded facts [of an affirmative defense] . . . raise the possibility that the party asserting the defense will prevail . . . .” Raprager, 183 Ill. App. 3d at 854, 539 N.E.2d at 791.

Cortland has not filed a response to the People’s motion. “If no response is filed, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board . . . in its disposition of the motion.” 35 Ill. Adm. Code 101.500(d). The Board addresses the motion to strike in the subsections below.

**First Affirmative Defense -  
Failure to Follow the Act**

Cortland alleges that the Agency failed to follow the Act by not providing Cortland with a notice of violation under 415 ILCS 5/31(a)(1) that included all of the alleged violations in the complaint. Ans. at 10. Therefore, Cortland contends that the Agency did not give it the opportunity to respond to the Agency regarding the alleged violations. *Id.*

The People contend that Cortland's first affirmative defense is a denial of an allegation in the complaint. Motion at 2-3. Specifically, the People argue that Cortland's defense that the Agency did not provide notice of all alleged violations constitutes a denial of paragraph 11 of the Complaint which stated that the Agency sent Cortland a violation notice on September 24, 2009. Motion at 3.

The Board previously addressed the requirements of Section 31 of the Act and consistently found that the Section 31 requirements were not intended to bar the Attorney General from prosecuting an environmental violation. *See e.g., People v. Sheridan Sand & Gravel Co.*, PCB 06-177, slip op. at 14 (June 7, 2007); *People v. Barger Engineering, Inc.*, PCB No. 06-82, slip op. at 3 (March 16, 2006). The procedures in Sections 31 (a) and (b) are a precondition to the Agency's referral of alleged violations to the Attorney General. *Barger*, slip op. at 2. The Attorney General's authority to bring an enforcement action is not limited by Sections 31(a) and (b). *Id.* at 3. Here, the complaint was brought against Cortland by the Attorney General on her own motion. Compl. at 1. Accordingly, whether or not the Agency complied with Section 31 of the Act has no bearing on the allegations in the complaint. Therefore, the Board strikes the first affirmative defense.

**Second Affirmative Defense -  
Failure to State a Cause of Action**

Cortland's second affirmative defense requests that the Board dismiss the complaint for failure to state a cause of action. Ans. at 10. In its entirety, the defense states "[t]he People's Complaint should be dismissed because it fails to state a cause of action upon which relief can be granted." *Id.*

The People challenge Cortland's second affirmative defense as legally insufficient because it attacks the sufficiency of the complaint without asserting any new matter that defeats it. Motion at 3. Further, the People argue that Cortland failed to admit the People's right to bring their claims. *Id.* The People also state that Cortland "cannot possibly allege any facts to remedy or cure its purported affirmative defense." *Id.*

The second affirmative defense raises no new matter to defeat the People's claims. The Board has previously stricken similarly pled defenses. *See People v. Stein Steel Mills Services, Inc.*, PCB No. 02-1, slip op. at 3 (April 18, 2002). Rather than admitting the People's allegations

and alleging affirmative matter to defeat the complaint, Cortland instead challenges whether the complaint was adequately pled. Therefore, the Board strikes the second affirmative defense.

**Third Affirmative Defense -  
Subsequently Issued Permits**

Cortland's third affirmative defense asserts that, in the complaint, the Agency cited to a permit which was not the "most currently issued Operating Permit." Ans. at 10. Cortland contends that the Agency "had issued two permits since the cited permit was issued." *Id.*

The People argue that Cortland's defense that the Agency based its complaint on an outdated permit is a denial of allegations in the complaint, not an affirmative defense. Motion at 4. The People also state that the permit cited to in the complaint was in effect until June 30, 2010, well after the alleged violations took place. *Id.* Further, the People contend that Cortland's assertion that the Agency issued two subsequent permits to the permit identified in the complaint is not supported by sufficient facts. *Id.*

Cortland points to two permits issued after the cited permit was issued, but gives no other facts regarding the permits. Ans. at 10. These two other permits may present affirmative matter to defeat the People's claims, however Cortland provided insufficient facts to establish a cognizable affirmative defense. Accordingly, the Board strikes the third affirmative defense.

**Fourth Affirmative Defense -  
No Discharge Prior to Permit**

Cortland's fourth affirmative defense states, in its entirety, "[t]he Town of Cortland has never had a surface discharge of treated wastewater prior to the issuance of a [National Pollutant Discharge Elimination System (NPDES)] Permit authorizing such discharge." Ans. at 11.

The People argue that Cortland's defense that it did not discharge wastewater prior to receiving its NPDES permit is a denial of allegations in the complaint, not an affirmative defense. Motion at 5.

Cortland's fourth affirmative defense simply denies that Cortland had a discharge to surface waters prior to the issuance of a NPDES permit. Ans. at 11. Beyond this denial, Cortland has not pled sufficient facts to establish this affirmative defense. Accordingly, the Board strikes the fourth affirmative defense.

**Fifth Affirmative Defense -  
Authorized Discharge Under Permit**

Cortland's fifth affirmative defense states that, on December 22, 2009, the Agency issued NPDES Permit No. IL0079065 authorizing Cortland to discharge treated wastewater to Union Ditch #1. Ans. at 11.

The People argue that Cortland's assertion that it received a permit on December 22, 2009 authorizing discharges to Union Ditch #1 does not state a defense or legal theory on which Cortland can prevail. Motion at 5-6. The People reason that the alleged incidents which led to a surface discharge occurred on July 17, 2009 and July 24, 2009, which were prior to December 22, 2009. *Id.* Therefore, the December 22, 2009 permit "does not support a defense to the Complaint." *Id.*

Cortland's fifth affirmative defense asserts that, on December 22, 2009, the Agency issued a NPDES permit authorizing Cortland to discharge treated wastewater. Ans. at 11. The mere issuance of a permit on December 22, 2009 does not provide any cognizable defense as to alleged incidents on July 17, 2009 and July 24, 2009. Accordingly, the Board strikes the fifth affirmative defense.

**Sixth Affirmative Defense -  
Act of God**

Cortland's sixth affirmative defense contends that the alleged July 17, 2009 discharge event was due to an Act of God which was "beyond the reasonable control of the Town of Cortland." Ans. at 11.

The People contend that Cortland "fails to state a legally recognized claim which defeats [the People's] allegations." Motion at 6.

Cortland raises an Act of God defense that the alleged July 17, 2009 incident was caused by circumstances beyond its control. Ans. at 11. An adequately pled Act of God may constitute an affirmative defense. *See generally* People v. William Charles Real Estate Investment, PCB No. 10-108 (March 17, 2011) (discussion of "Act of God" defense in water pollution enforcement cases). However, Cortland has not pled any facts to establish the defense. As pled, Cortland's defense is conclusory and lacks the necessary factual allegations sufficient to conclude that any extraordinary circumstances caused the alleged events. Accordingly, the Board strikes the sixth affirmative defense.

**Seventh Affirmative Defense -  
Act of Third Party**

Cortland's seventh affirmative defense asserts that the alleged July 24, 2009 discharge event was due to "a malfunction caused by an act of sabotage or vandalism by an unknown third party and beyond the reasonable control of the Town of Cortland." Ans. at 11.

The People contend that Cortland's defense "fails to qualify as an affirmative defense." Motion at 6.

Cortland's statements that a malfunction, caused by sabotage or vandalism, led to the alleged July 24, 2009 discharge event (Ans. at 11) may present affirmative matter to defeat the complaint. However, similar to above, the issue is whether the affirmative defense has been

sufficiently pled. As pled, Cortland's defense is conclusory and lacks the necessary factual allegations sufficient to conclude that a third party caused the alleged incident on July 24, 2009. The defense does not allege the ultimate facts that would satisfy each element of the defense. Therefore, the Board grants the motion to strike the seventh affirmative defense.

### **Additional Affirmative Defenses**

Cortland states that it "reserves the right to add additional affirmative defenses after receiving information from the People or other parties through discovery." Ans. at 11.

The People contend that this defense should be dismissed because it does not "assert new matter by which the apparent right is defeated" and the "facts constituting any affirmative defense must be plainly set forth and pled with the same degree of specificity required by a complainant to establish a cause of action." Motion at 7.

Cortland's "additional affirmative defenses" section is not pled as an affirmative defense. Therefore, the Board denies the People's motion to strike this section.

### **Leave to Amend**

Cortland's third, fourth, sixth and seventh affirmative defenses, as pled, are factually insufficient. The Board grants Cortland leave to amend these affirmative defenses. The trial court has the discretion whether to allow amendments of pleadings, Old Salem Chautauqua Association v. Illinois District Council of the Assembly of God, 13 Ill.2d 258, 266, 148 N.E.2d 777 (1958), and the test in determining whether that discretion was properly exercised is whether allowing amendment of pleadings furthers the ends of justice. Bowman v. County of Lake, 29 Ill.2d 268, 281, 193 N.E.2d 833 (1963).

The Board finds that justice would be furthered by allowing Cortland to amend its affirmative defenses by providing more specific factual allegations, if Cortland so chooses to. Cortland has 30 days from the date of this order, up to and including Monday, December 5, 2011 (the first business day following the 30th day from this date), to file any amended affirmative defenses.

### **CONCLUSION**

After reviewing the answer and the motion to strike, the Board grants the People's motion to strike all affirmative defenses. The Board denies the People's motion to strike the section of the answer entitled "Additional Affirmative Defenses." The Board grants Cortland leave to amend its third, fourth, sixth and seventh affirmative defenses to correct factual deficiencies, if Cortland so chooses to. Any amendments must be filed by December 5, 2011.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on November 3, 2011, 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 at the end.

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John Therriault, Assistant Clerk  
Illinois Pollution Control Board