BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, Complainant, vs. CHEVRON ENVIRONMENTAL SERVICES COMPANY, Respondent.	)	PCB No. 02-03

NOTICE OF FILING

To: Christopher P. Perzan
Assistant Attorney General
Environmental Bureau
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John A. Urban, Civil Chief
Will County State's Attorney's Office
Will County Courthouse
14 W. Jefferson
Joliet, Illinois 60432

PLEASE TAKE NOTICE that I have on August 7, 2003 filed with the Office of the Clerk of the Pollution Control Board the attached RESPONSE TO MOTION TO STRIKE AFFIRMATIVE DEFENSES, a copy of which is hereby served on you.

Chevron Environmental Services Company

BY: _____
Their Attorney

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, Complainant, vs. CHEVRON ENVIRONMENTAL SERVICES COMPANY, Respondent.	)	PCB No. 02-03 (RCRA - Enforcement)

RESPONSE OF RESPONDENT TO COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

NOW COMES CHEVRON ENVIRONMENTAL SERVICES COMPANY ("CESC") by its attorneys, on behalf of its predecessor Texaco Refining & Marketing, Inc. ("TRMI") in accordance with 35 Ill. Adm. Code 101.500 and states as follows in response to Complainant's Motion to Strike Affirmative Defenses:

INTRODUCTION

In its Motion to Strike Respondent's Affirmative Defenses, Complainant attempts to show that the defenses are inadequately pled on both factual and legal bases. However, in making that attempt, Complainant fails to take into account that each defense must be evaluated assuming the facts of the Complaint and Answer are well pled. *Illinois v. Stein Steel Mills Services, Inc.* PCB 02-1 (April 18, 2002). Instead, Complainant reads each of the affirmative defenses in isolation in clear contravention of Board precedent and rule looking to the Answer and/or Supplemental Answer for facts underlying affirmative defenses. *Illinois v. QC Finishers, Inc.* PCB 01-7 (June 19, 2003) and 35 Ill. Adm. Code 103.204. Once the Respondent's Affirmative Defenses in this case are placed in the appropriate factual context, each must be viewed as sufficiently stated.

In *People v. Peabody Coal Company*, PCB 99-134 (June 5, 2003), the Board provided a two-fold definition of an affirmative defense. In that decision, the Board stated in relevant part, as follows:

> In a valid affirmative defense, the respondent 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. Community Landfill Co.*, PCB 97-193, slip op. at 3 (Aug. 6, 1998). The Board has also defined an affirmative defense as a *"response to a plaintiff's claim which attack the plaintiff's legal right to bring an action, as opposed to attacking the truth of the claim."* PCB 99-134 slip op. at page 3. (emphasis added)

An affirmative defense is legally sufficient if, taking all pled facts as true, it presents facts and/or arguments to negate an alleged claim or conclusion of law. *Pryweller v. Cohen*, 282 Ill. App. 3d 899 (1996). In evaluating whether any given affirmative defense meets this standard, it is key to read any such defense in the context of the facts reflected in the Complaint and Answer as a whole, in contrast to Complainant's narrowly focused reading. Precedent has clearly established that such a narrow focus is inappropriate. *Village of Riverdale v. Allied Waste Transportation*, 334 Ill. App. 3d 224 (2002) To the contrary, the Board has expressly found that defenses must be liberally construed and read in context.[1] *Illinois v. Midwest Grain Products of Illinois*, PCB 97-179 (August 21, 1007).

In this case, Respondent has included twelve substantive affirmative defenses in its Answer to the Complaint.[2] Each of those defenses, when read in the light of the Complaint and Answer, clearly places Complainant on notice of the nature of the defensive materials that will be presented at hearing and therefore must be viewed as adequately pled. *Illinois v. John Crane, Inc.* PCB 01-76 (May 17, 2001) and *People v. Douglas Furniture of California, Inc.*, PCB 97-133 (May 1, 1997). In each instance, Respondent has presented a legal argument targetted at Complainant's underlying cause of action and each must therefore be viewed as appropriately pled as an affirmative defense under relevant Board precedent. As stated in *Illinois v. Midwest*

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[1] The Board has also clearly stated that while the rules of Civil Procedure which Complainant cites in its Motion to Strike may offer guidance, such rules are not controlling in matters before the Board. *Illinois v. Douglas Furniture of California, Inc., supra.*

[2] The thirteenth affirmative defense included on the Answer was a reservation of Respondent's right to assert additional defenses as development of the case continued. That defense was concluded to forestall any argument that Respondent had waivered such right through its Answer.

Grain Products of Illinois, Inc. PCB 97-179 (August 21, 1997): "Many affirmative defenses may involve, ultimately, a conclusion of law...then the defense is properly pleaded, notwithstanding that the resolution of the defense may involve a conclusion of law, and that the defense may be couched in terms of a legal theory." at Id. 3.

ARGUMENT

I. Respondent's Affirmative Defenses As To Count I Are Clearly Sufficiently Pled.

Turning to the individual Affirmative Defenses that counter Count I of the Complaint, it is clear, when each individual defense is read within the factual framework set forth by the Complaint and Answer, that each defense has been adequately stated to provide Complainant with notice of the theory or position to be demonstrated at hearing. In order to reach that conclusion, it is necessary to read each defense in the factual setting created by the Complaint and Answer.

The relevant facts underlying each of the Affirmative Defenses related to Count I of the Complaint included in the Answer may be summarized as follows:

1. Respondent operated an oil refinery at the site from 1910 to 1981 located at 301 W. 2nd Street, Lockport, Will County, Illinois. (Answer to Complaint, paragraph 3.)

2. On September 30, 1993, the Illinois EPA approved Respondent's RCRA Part B Post-Closure Permit Application with conditions. . . Some of the contested conditions were included in the permit to address the known groundwater contamination at the facility. (Answer to and Complaint, paragraph 5.)

3. CESC admits that TRMI monitored groundwater and routinely submitted data reports to the Illinois EPA. CESC further admits that ongoing groundwater monitoring and reporting are conducted in compliance with the Part B Post-Closure Permit for the site. CESC further admitted that under Texaco's interim status groundwater assessment plan and interim post-closure plan, Texaco monitors and submits groundwater reports to the Illinois EPA. Texaco's Fourth Quarter 1998 and First Quarter 1999 groundwater monitoring results detected various constituents in eight monitoring wells. Five of the wells are located on Landfarm No. 2, Monitoring Wells PM-9R, PM-10R, PM-13, PM-21 and PM-24; one is located on Landfarm No. 1, Monitoring Well PM-29R; and two are located

on the southwest corner of the facility, Monitoring Wells PM-5 and R-1. (Answer to and Complaint, paragraph 6.)

4. CESC admits that samples from Monitoring Well PM-9R indicated at least the following constituents in the groundwater: Acenaphthene, Fluorene, Ethylbenzene and Xylenes. (Answer to Complaint, paragraph 7.)

5. CESC admits that samples from Monitoring Well PM-10R indicated at least the following constituents in the groundwater: Lead. (Answer to Complaint, paragraph 8.)

6. CESC admits that samples from Monitoring Well PM-13 indicated at least the following constituents in the groundwater: Acenaphthene, Anthrancene, Fluorene, Phenanthrene, Pyrene and Xylenes. (Answer to Complaint, paragraph 9.)

7. CESC admits that samples from Monitoring Well PM-21R indicated at least the following constituents in the groundwater: Fluorene, Lead and Phenanthrene. (Answer to Complaint, paragraph 10.)

8. CESC admits that samples from Monitoring Well PM-24 indicated at least the following constituents in the groundwater: Lead. (Answer to Complaint, paragraph 11.)

9. CESC admits that samples from Monitoring Well PM-29R indicated at least the following constituents in the groundwater: Lead. (Answer to Complaint, paragraph 12.)

10. CESC admits that samples from Monitoring Well PM-5 indicated at least the following constituents in the groundwater: Acenaphthene, Anthrancene, [*sic*] Arsenic, Benzene, Benzo(a)anthracene, Chrysene, Ethylbenzene, Fluoranthene, Fluorene, 2-Methyl-naphthalene, Phenanthrene, Pyrene, Ethylbenzene, Toluene and Xylenes. (Answer to Complaint, paragraph 13.)

11. CESC admits that samples from Monitoring Well R-1 indicated at least the following constituents in the groundwater: Acenaphthene, Anthrancene, [*sic*] Benzo(a)-anthracene, Benzo(a)pyrene, Chromium, Chrysene, Fluoranthene, Fluorene, Lead, Phenanthrene, Pyrene, Ethylbenzene, Toluene and Xylenes. (Answer to Complaint, paragraph 14.)

12. CESC admits that groundwater monitoring reports also contain physical descriptions of potential groundwater contamination indicating that the water samples were turbid, brownish yellow or grayish, had oil droplets, film or sheen and/or hydrocarbon odor. (Answer to Complaint, paragraph 15.)

13. CESC admits that levels of Arsenic, Lead, Benzene, Benzo(a)pyrene, Bis(2-ethylhexyl)-pthalate, Chromium, Ethylbenzene, Toluene and Xylenes found in Monitoring Wells PM-9R, PM-10R, PM-21R, PM-24, PM-29R, R-1 and PM-5 as set forth in Exhibit A, exceed the Board Class I groundwater quality standards, as set forth in the Board Groundwater Quality Regulations, 35 Ill. Adm. Code 620.410, (Answer to Complaint, paragraph 32.)

14. CESC admits that levels of Lead, Benzo(a)pyrene and Bis(2-ethylexyl)-pthalate, found in Monitoring Wells R-1, as set forth in Exhibit A, exceed the Board Class II groundwater quality standards, as set forth in the Board Groundwater Quality Regulations, 35 Ill. Adm. Code 620.420. CESC denies that any such exceedences constitute violations of 620.420 standards and affirmatively states that such standards are not applicable to the groundwater samples from Monitoring Well R-1 as set forth in Exhibit A. (Answer to Complaint, paragraph 34.)

15. CESC admits that levels of Arsenic, Benzene, Benzo(a)-anthracene, Benzo(a)pyrene, Bis(2-ethylhexyl)-pthalate, Chrysene, Chromium, Fluorene, Lead, Toluene and Xylene, found in Monitoring Wells PM-9R, PM-10R, PM-21R, PM-24, PM-29R, R-1 and PM-5 as set forth in Exhibit A, exceed the Groundwater Remediation Objectives set forth in Table E Tier 1 of the Board Waste Disposal Regulations, 35 Ill. Adm. Code 742, Appendix B, Table E, Tier 1 for Class I groundwater. (Answer to Complaint, paragraph 37.)

16. CESC admits that levels of Benzo(a)-anthracene, Chrysene, Benzo(a)pyrene, Bis(2-ethylhexyl)-pthalate and Lead and Toluene, found in Monitoring Well R-1 as set forth in Exhibit A, exceed the Groundwater Remediation Objective set forth in Table E Tier 1 of the Board Waste Disposal Objectives set forth in Table E Tier 1 of the Board Waste Disposal Regulations, 35 Ill. Adm. Code 742, Appendix B, Table E, Tier 1 for Class II groundwater. (Answer to Complaint, paragraph 38.)

17. CESC answers that the Illinois EPA approved Post-Closure Groundwater Quality Assessment Plan speaks for itself. (Answer to Complaint, paragraph 40.)

Given this litany of facts, it is clear that Respondent has adequately supported its Affirmative Defenses with well-pled facts in accordance with 35 Ill. Adm. Code 103.204 and Board precedent.

In Count 1, Complainant asserts that Respondent violated Section 12(a) of the Illinois Environmental Protection Act ("Act"):

a) because contaminants detected in groundwater are above 35 Ill. Adm. Code Class I and II Groundwater Quality Standards; and

b) such contaminants are above TACO Tier I, Class I or Class II Objectives, two times PQL's or the PQL.

(Complaint paragraphs 43 and 44.)

The Sixth, Seventh, Eighth, Ninth, Eleventh and Twelfth Affirmative Defenses each present a legal argument as to why, even taking the Complaint allegations and statements contained in the Answer as true, these assertions of violation cannot prevail as a matter of law. Such attacks on the fundamental viability of the Count 1 claim in the Complaint are the essence of Affirmative Defenses, and therefore, Complainant's Motion to Strike Respondent's Affirmative Defenses must be denied as to these Defenses.

Sixth Affirmative Defense: In the Sixth Affirmative Defense, Respondent stated that Complainant was estopped from pursuing its claims of Section 12(a) violations in this matter. Board precedent has clearly established that estoppel is an appropriate affirmative defense. *Illinois v. Peabody Coal Company*, PCB 99-134 (June 5, 2003) if it is assumed for purposes of evaluating the affirmative defenses that:

- the contaminants were noted in quarterly reports routinely submitted to EPA for years in advance of any Notice of Violation;
- Respondent was subject to an interim status groundwater assessment plan and interim post-closure care plan. (Complaint, paragraph 6.);
- Respondent closed various waste units at the Site. (Response to Complaint, paragraph 4.);
- the Illinois Environmental Protection Agency approved a Part B Post-Closure Permit for the Site on September 30, 1993. (Complaint, paragraph 5 and Answer thereto.); and
- Respondent has voluntarily addressed groundwater impacts at the Site in some of the same wells alleged to be contaminated by Complainant beginning in 1985. (Response to Complaint, paragraph 13.)

Respondent is entitled to assert and demonstrate at hearing that the passage of time and Agency inaction is sufficient to estop the Agency from pursuing this 12(a) claim.

Basically these facts, if taken as true, show that the Complainant knew of the groundwater impacts of which it now complains for over fourteen years, took various regulatory actions, including permit issuance, and yet did not cite or notify Respondent of any violation in the pleadings. In this instance, there are enough facts before the Board and Complainant to allow Respondent the opportunity to establish whether the Count I claim is estopped.

Seventh Affirmative Defense: The Seventh Affirmative Defense should also be viewed as sufficient once it is reviewed in light of the Complaint, Answer and the facts alleged in the defense itself. The Complaint alleges that contaminants were detected in certain groundwater monitoring wells at the site. The defense then states that Respondent was in compliance with interim status and other groundwater regulatory requirements. Basically, the defense presents a legal question; if a facility is complying with requirements imposed by one regulatory program, may it still be claimed to be in violation of Section 12(a) of the Act. Respondent's position is that it may not, and that position constitutes an affirmative defense to Complainant's Count I.

Eighth Affirmative Defense: The Eighth Affirmative Defense is a more particularized statement of a defense similar to that presented in the Seventh Affirmative Defense. In paragraph 34 of the Complaint, Complainant has asserted that exceedences of 35 Ill. Adm. Code 620 numerical standards constitute violations of Section 12(a) of the Act. This defense is analogous to that upheld in *Illinois v. Stein Steel Mills, PCB 02-1 (April 18, 2002)*, concerning compliance with an operating program shielding a company from an allegation of a Section 9(b) of the Act violation.

With the Eighth Affirmative Defense, Respondent is averring that, as a matter of law, given the site's compliance with interim status regulations and a permit covering groundwater conditions at the site, as stated in the Answer to the Complaint, paragraph 6, a claim of Section 12(a) violation due to exceedences of 35 Ill. Adm. Code 620 standards may not be sustained. This affirmative defense clearly attacks Complainant's authority to assert Count I of the Complaint and so constitutes a sustainable affirmative defense. *Illinois v. QC Finishers, Inc. PCB 01-7 (June 19, 2003)*. Again, read in the context

of the Pleadings in this matter, the Eighth Affirmative Defense has been stated so as to provide Complainant with sufficient understanding of issues to be raised during the hearing and therefore should be allowed.

As the Complaint has alleged, operations at the site ceased in 1981, well before the 35 Ill. Adm. Code 620 numerical standards were promulgated in November, 1991. Therefore, any discharge to ground water would have occurred prior to that regulatory promulgation. The Answer states that treatment of groundwater to address impacts began as early as 1985 in the southwestern corner of the site, where wells R-1 and PM-5 - which are the subject of Count I of the Complaint - are located. (*See* Answer to Complaint, paragraphs 13 and 14.)

Ninth Affirmative Defense: Clearly sufficient facts are alleged in the Complaint and Answer to support the Ninth Affirmative Defense as presented in the Answer. If it is taken as true, for purposes of this analysis only, that any alleged discharge and groundwater impacts predated the adoption of 35 Ill. Adm. Code 630 numerical standards, than application of those standards in this case would constitute retroactive regulation as stated in the Ninth Affirmative Defense. The Defense has been adequately stated in the pleadings to allow Respondent the opportunity to demonstrate its validity at hearing.

Eleventh Affirmative Defense: In the Eleventh Affirmative Defense, Respondent has stated a clear legal argument in opposition to Count I of the Complaint. Paragraphs 37 and 38 of the Complaint assert that the contaminants at the site exceeded TACO Class I and II standards as grounds for a finding of a Section 12(a) violation. However, as stated in the Defense, these TACO standards are not applicable in this situation as a matter of law; and therefore no claim for violation of Section 12(a) of the Act may be maintained based on TACO numerical objectives. The facts underlying this defense are set forth in the Complaint and Answer as shown above. The question here becomes, whether, given these pled facts, a Section 12(a) claim may be maintained based on a TACO exceedence. Clearly, this legal issue goes to the Complainant's authority to

assert its claim and therefore must be viewed as an appropriate affirmative defense under prior Board decisions.

The Eleventh Affirmative Defense also deals with the Complainant's attempts to rest its Section 12(a) claim on an alleged exceedence of a PQL. Again the facts pertinent to this aspect of the affirmative defense are set forth in the Complaint and Answer. The Defense posits that an exceedence of a PQL is insufficient to establish any violation of the Act, as a matter of law, and therefore the Section 12(a) Count must fail. The Eleventh Affirmative Defense sets forth a valid and sufficient legal affirmative defense to Count I.

The Seventh, Eighth, Ninth and Eleventh Affirmative Defenses each constitute a legal theory that, if adopted, would contravene Complainant's assertion of Section 12(a) violations. Under *Midwest Grain, supra,* such defenses are properly presented as conclusions of law. Therefore, the inclusion of these Affirmative Defenses in the Answer should be sustained, and Complainant's Motion denied.

II. Respondent's Affirmative Defenses Are Sufficiently Pled As To Count II.

The majority of the remaining Affirmative Defenses relate to Count II of the Complaint. That Count alleges a violation of Section 21(a) of the Act, the open dumping prohibition. Here again, when the First, Sixth, and Tenth Affirmative Defenses are examined in the context of the facts contained in the pleadings, they must be viewed as legally and factually sufficient.

Count II of the Complaint and Answer set forth the following facts relevant to the Affirmative Defenses to the alleged violation in this Count:

1. Operations ceased at the site in 1981. (Answer to Complaint, paragraph 3.);
2. Great Lakes Carbon processed coke at the Site until about 1981. (Answer to Complaint, paragraph 9.);
3. CESC affirmatively states that such shipment was made to remove the coke fines from the site expeditiously to address IEPA's interest, despite the fact that CESC was already involved in identifying recycling options for the materials prior to issuance

of the IEPA Violation Notice. (Answer to paragraph 10 of Complaint and First Affirmative Defense.); and

4. CESC had plans to recycle the coke fines prior to issuance of IEPA Violation Notice. (Answer to Complaint, paragraph 10, and Fifth Affirmative Defense.)

In Count II of the Complaint, it is then alleged that Respondent violated Section 21 of the Act as follows:

> By allowing the coke fines and tar-like material to be disposed of or stored on the ground in various areas over approximately an acre in the west-central part of the site, Texaco caused or allowed the consolidation waste at the site. (Complaint, paragraph 21.)

To counter these allegation of violation, Respondent has included three affirmative defenses negating Complainant's assertion of violation. When read in the context of the factual elements in the Complaint and Answer, and taking into consideration Board precedent upholding legal theories as affirmative defenses, it is clear that each of these affirmative defenses should survive the Complainant's Motion to Strike *Illinois v. Midwest Grain Products of Illinois, supra.*

Fourth Affirmative Defense: The Fourth Affirmative Defense states that the coke fines at the site were the product of an independent contractor, not Respondent. Such an Affirmative Defense has been recognized as acceptable in prior cases before the Board. *Illinois v. Wood River Refining Company,* PCB 99-120 (August 8, 2002). As noted above, Complainant has recognized that coke was previously processed and Respondent has confirmed that such processing was done by independent contractor Great Lakes Carbon (*See* Complaint, paragraph 9 and Answer thereto). This confirmation is also contained in the Fourth Affirmative Defense itself. Clearly, Respondent has adequately pled an independent contractor affirmative defense to Complainant's claim of open dumping and should have an opportunity to establish that defense at hearing. *Cole Taylor Bank v. Rowe Industries, Inc.* PCB 01-173 (June 6, 2002).

In response to paragraph 10 of the Complaint, the Answer also states that the coke materials were not wastes, but were in fact a product held for sale for recycling. The determination of whether the coke fines were wastes or not is an essential legal

element of Complainant's Section 21 claim. The factual allegations before the Board indicate that the material was processed and held for sale. (*See* Affirmative Fifth Defense, as well as Answers to paragraphs 3, 9 and 10 of the Complaint.) Again, the Fourth Affirmative Defense sets forth a viable defensive legal theory when viewed in context of the Complaint and Answer and therefore should be upheld.

With these facts before it, the Board clearly has adequate basis to evaluate Respondent's Fourth Affirmative Defense. Simply put, Respondent has asserted that no Section 21 violation may be found when the coke was the product of an independent contractor and was never consolidated as waste by CESC. This two-fold Affirmative Defense has been properly asserted.

Sixth Affirmative Defense: The next affirmative defense as to Count II of the Complaint is the Sixth Affirmative Defense. In this Defense, Respondent has asserted that the Complainant is estopped from asserting a violation of the open dumping provision based on coke fines which have been present on site since at least 1981 when operations ceased. The Complaint demonstrates a gap of about eighteen years from when the last possible time coke fines could have been placed at the site until any action was taken by Complainant. In that interim period, the IEPA reviewed the site for groundwater monitoring, waste management unit closures and permitting as stated in the Complaint. (Complaint and Answer, paragraphs 4, 5, 6 and 13.) Yet, no note of the coke fines was made until 1999. Clearly, sufficient acts are presented in the pleadings to raise an estoppel issue. As stated above, estoppel has been recognized as a proper affirmative defense in prior cases. *Illinois v. Peabody Coal, supra.*

Tenth Affirmative Defense: The Tenth Affirmative Defense states that application of the open dumping prohibition to the coke fines at the site would constitute retroactive regulation. An allegation of retroactive regulation may constitute an affirmative defense. *Illinois v. Peabody Coal, supra.* The coke fines could only have been placed at the site prior to the cessation of operations in 1981 at the very latest. In all likelihood, the fines were placed at the site prior to that time - during the preceding seventy years of refinery operation. Based on this chronology, it is quite possible that

Respondent can demonstrate at hearing that placement of the coke fines on the site (or in the terms of the Act, "consolidation of refuse from one or more sources") would have had to have taken place before the 1980 enactment of the open dumping prohibition. If that is the case, application of the opening dumping provision here would constitute retroactive regulation in contravention of Respondent's due process rights. Therefore, the Tenth Affirmative Defense is a viable affirmative defense to Count II and has been sufficiently pled.

III. Sufficiency of Remaining Defenses

Complainant seeks to strike the remaining affirmative defenses based on the assertion that they speak to the relief sought, rather than the claims of violation. While the Respondent does not agree with this view, Respondent is willing to forego these affirmative defenses, with the understanding that defenses to the imposition of any penalty amount or costs remain admissible at hearing. However, Respondent believes it is important to address a few points raised with respect to the First, Second and Third Affirmative Defenses in Complainant's Motion to Strike regardless of its above stated position.

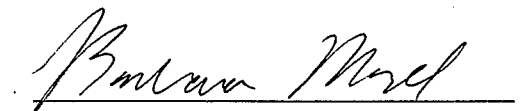
The First Affirmative Defense deals with Complainant's claim for injunctive relief. In its Motion to Strike, Complainant asserts that it can get injunctive relief simply based on the statutory provision allowing such relief. *Village of Riverdale v. Allied Waste Transportation*, 334 Ill. App. 3d 224 (2002) is cited as support for that proposition. However, that case dealt with a situation in which ongoing violations were possible, if not probable, and is readily distinguishable from the current matter. In this situation, as shown in the Answer, there are no ongoing violations. The groundwater is being remediated and is subject to a site-wide Groundwater Management Zone, and almost all of the coke fines have been removed in accordance with Illinois EPA approved plans. Therefore, no allegation of violation for which injunctive relief would be needed can be pursued here. All of the conditions complained of have been resolved already to the satisfaction of the IEPA. Complainant basically has no legal basis to assert any claim for injunctive relief.

With respect to the Second Affirmative Defense, Complainant is similarly without legal basis to make any claim for costs. The Act states that costs may be claimed when a violation is willful, knowing or repeated violation of the Act. 415 ILCS Section 5/42(f). Complainant has made no allegation that the claimed violations here are willful, repeated or knowing. Therefore, Complainant can make no claim for costs under the Act and Respondent is entitled to contest any such claim or award.

The remaining Affirmative Defenses deal with the excessiveness of Complainant's penalty demands given the circumstances of this case. Respondent reserves all of it rights and defenses to demonstrate that any penalty here would be inappropriate under the Act and precedent.

WHEREFORE Respondent respectfully prays that Complainant's Motion to Strike be denied. In the alternative, if the Motion to Strike is not denied, Respondent respectfully requests leave to file amended Affirmative Defenses to address any insufficiencies identified by the Board.

Respectfully Submitted,



Karaganis, White & Magel Ltd.

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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached RESPONSE TO MOTION TO STRIKE AFFIRMATIVE DEFENSES by United States mail, postage prepaid, or hand delivery, upon the following persons:

Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
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Bradley Halloran
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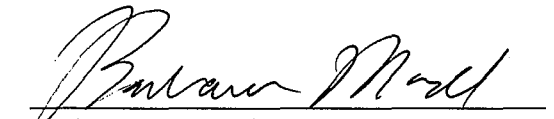

Barbara A. Magel
Attorney

Dated: August 7, 2003