

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
)
 v.)
)
 PETCO PETROLEUM CORPORATION,)
 an Indiana corporation,)
)
 Respondent.)

PCB No. 2013-072
 (Water-Enforcement)

PEOPLE'S RESPONSE TO AFFIRMATIVE DEFENSES

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, hereby responds to the affirmative defenses pleaded by this Respondent in its Answer filed on December 2, 2013 and states as follows:

Introduction

Section 103.204(d) of the Board's procedural rules provides in pertinent part as follows: "Any 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." Section 101.100(b) provides that the Supreme Court Rules and the Code of Civil Procedure do not expressly apply to Board proceedings; however, the Board may look to these legal requirements "for guidance where the Board's procedural rules are silent." The Board has noted that its procedural rules contain provisions for the filing of affirmative defenses and that the parties are expected to present arguments regarding the applicability of the Code of Civil Procedure if the Board is to consider such other requirements. See, e.g., *People v. Belden Tools et al.*, PCB 96-208 (August 1, 1996). The People respectfully suggest that Section 2-613(d) of the

Code of Civil Procedure [735 ILCS 5/2-613(d)], which pertains to affirmative defenses in civil actions, and more particularly the appellate opinions thereunder regarding the adequacy of pleading affirmative defenses, are useful to the Board's consideration of such issues.

It is well settled in the case law that the facts of an affirmative defense must be alleged with particularity. Whether a defense is an affirmative defense turns on whether the defense "gives color to the opposing party's claim and thus asserts a new matter by which the apparent right is defeated." *Ferris Elevator Co. v. Inc. v. Neffco, Inc.*, 285 Ill. App. 3d 350, 354 (3rd Dist. 1996). An affirmative defense that lacks a factual basis is inadequately pled. *Estate of Wrage v. Tracey*, 194 Ill. App. 3d 117, 122 (1st Dist. 1990). The facts establishing the defense must be pleaded by the defendant with the same degree of specificity as is required of a plaintiff alleging the essential elements of a cause of action. *Goldman v. Walco Tool & Engineering Co.*, 243 Ill. App. 3d 981, 989 (1st Dist. 1993), appeal denied 152 Ill.2d 558 (1993). An exception to this rule applies where the facts constituting the defense are already pleaded in the complaint. Lastly, the burden of proof as to any particular affirmative defense is upon the party asserting the defense. *Pascal P. Paddock, Inc. v. Glennon*, 32 Ill.2d 51, 54 (1965). What must be proven must first be pleaded. The Respondent has failed to properly plead any affirmative defense.

Response to Allegations

First Affirmative Defense

The Complaint fails to establish that the State of Illinois, as the Complainant, has properly met the statutory pre-requisites for filing each of these 61 Counts in a Complaint before the Board. The Complaint generally alleges, in Paragraph 1, that the Complaint is brought on behalf of the People of the State of Illinois, by the Attorney General "on her own motion and at the request of the [IEPA] pursuant to the terms and provisions of Section 31 of the [IEPAct]." Section 31 of the Act sets forth certain timing requirements related to filing before the Board, as well as a notice and opportunity to be heard,

including the opportunity to negotiate and implement a Compliance Commitment Agreement ("CCA"). See 415 ILCS 5/31(a) (1).

As to the majority of these counts, Section 31 was bypassed and the legislatively created opportunity to reach compliance through the timely negotiation of a CCA was not afforded Respondent. The Board, as a creature of statute, is without authority to ignore these statutory requirements. Thus, the Complaint needs to allege compliance with Section 31 for each and every Count and, absent such, the Complaint (or at least any nonconforming Counts) must be dismissed.

The People respond by objecting to the lack of any factual specificity. For instance, the Respondent seems to contend that under Section 31 of the Act violation notices should have been issued and meetings should have been held for each of the polluttional releases. The Respondent's contentions herein are legal conclusions and merit no response.

Second Affirmative Defense

Respondent's authorization to operate is pursuant to permits issued by the Illinois Department of Natural Resources ("IDNR"), pursuant to its enabling authority under the Illinois Oil and Gas Act ("IOGA"). It is not pursuant to any authority of the IEPA under the IEPA Act. Section 3 of the IOGA charges IDNR with the "duty of enforcing [IOGA] and all rules, regulations and orders promulgated in pursuance of [IOGA]" and Section 8 sets forth IDNR's enforcement authority and responsibility. 225 ILCS 725/3 and 725/8.

Upon information and belief, IDNR investigated most, if not all, of the factual underpinnings for the 61 Counts and, pursuant to its authority and jurisdiction, either (a) fined Respondent (and Respondent paid) or (b) determined that Respondent was not in violation (or was no longer in violation) and declined to pursue any administrative enforcement. The State is without authority to prosecute Respondent twice for essentially the same offense. Thus, the Board should dismiss any of the Counts which allege facts identical to those here and which have been adjudicated to finality by IDNR.

The People respond by objecting to the lack of any factual specificity. For instance, there is no attempt to identify any of the events "which have been adjudicated to finality by IDNR." The Respondent's contentions herein are legal conclusions and merit no response.

Third Affirmative Defense

As stated in the Complaint and admitted by Respondent (Paragraphs 13, 14 and 15) prior adjudications have resulted in prior judicial orders requiring Respondent to take

certain actions, including the development of a written oil and gas facilities operation maintenance plan – which is applicable to some of the very same wells relevant here. Complainant alleges no violations of those orders. Accordingly, any release that has occurred despite Respondent's best efforts under the prior orders cannot appropriately be alleged to be a violation, or a repeat violation, or a continuing violation, in this Complaint.

The Respondent's contentions herein are legal conclusions and merit no response.

Conclusion

The Respondent has raised legal issues in the context of purported affirmative defenses. The alleged legal deficiencies, however, are not supported by any factual allegations. Moreover, the assertion of these so-called defenses is not supported by applicable law. For instance, in its First Affirmative Defense, the Respondent contends (despite Board precedent to the contrary) that the Attorney General must plead “the statutory pre-requisites for filing” in the Complaint and thereby establish the Illinois EPA's prior compliance with the Section 31 procedures. This assertion is simply wrong. The Board has previously stated that, after ““considering the legislative history of the 1996 amendments to Section 31 the Board has repeatedly found that they were not intended to bar the Attorney General from prosecuting an environmental violation.”” *Sheridan Sand & Gravel*, PCB 06-177, slip op. at 14 (June 7, 2007), quoting *People v. Chiquita Processed Foods, L.L.C.*, PCB 02-156, slip op. at 4-5 (Nov. 21, 2002); see also *People v. Freeman United Coal Mining Co., LLC*, PCB 10-61 & 11-02 (cons.), slip op. at 31 (Nov. 15, 2012); *People v. Eagle-Picher Boge*, PCB 99-152, slip op. at 7 (July 22, 1999); *People v. Heuermann*, PCB 97-92, slip op. at 7 (Sept. 18, 1997). In *Sheridan Sand & Gravel*, the Board went on to find, consistent with longstanding authority, that because the Attorney General brought the complaint on her own motion, “whether or not the Agency complied with Section 31.

... has no bearing on the allegations in the complaint.” *Sheridan Sand & Gravel*, PCB 06-177, slip op. at 15.

The Second Affirmative Defense also fails for lack of factual specificity and legal support. This claim is that since the Respondent is permitted to operate by the Illinois Department of Natural Resources, that agency and not the Illinois EPA must enforce violations, and is based upon an “information and belief” that the Illinois Department of Natural Resources investigated the releases that are the subject of the 61 counts in the Complaint and “either (a) fined Respondent (and Respondent paid) or (b) determined that Respondent was not in violation (or was no longer in violation) and declined to pursue any administrative enforcement.” These factual allegations are not pleaded with any particularity. The Respondent must identify the factual basis for this dubious claim of “double jeopardy”.

Lastly, the Third Affirmative Defense is that “any release that has occurred despite Respondent’s best efforts under the prior orders cannot appropriately be alleged to be a violation. . . .” This is an extraordinary claim and is founded more on hubris than any applicable law. The statutory prohibition against water pollution is not subject to a “best efforts” standard of compliance. The enforcement of such violations is not impeded by existence of the court-ordered preventative maintenance plan(s).

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, hereby responds and objects to the affirmative defenses suggested by this Respondent.

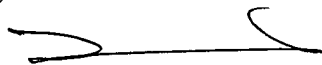
Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,

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BY: _____


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CERTIFICATE OF SERVICE

I hereby certify that I did on December 16, 2013, cause to be served by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box a true and correct copy of the foregoing instruments entitled entitled NOTICE OF ELECTRONIC FILING and PEOPLE'S RESPONSE TO AFFIRMATIVE DEFENSES upon the following:

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This filing is submitted on recycled paper.