

ILLINOIS POLLUTION CONTROL BOARD

April 18, 2002

PEOPLE OF THE STATE OF ILLINOIS, )  
)  
Complainant, )  
)  
v. ) PCB 02-56  
) (Enforcement - Water)  
CHIQUITA PROCESSED FOODS, L.L.C., )  
a Wisconsin limited liability corporation, )  
)  
Respondent. )

ORDER OF THE BOARD (by T.E. Johnson):

On February 11, 2002, the complainant filed a motion to strike affirmative defenses. On February 22, 2002, Chiquita Processed Foods, L.L.C., a Wisconsin limited liability corporation (Chiquita) filed a response to the motion to strike. The complainant filed a request for permission to reply to the response on March 11, 2002. Chiquita filed a response to the request for permission to reply on March 22, 2002.

This matter is before the Board on a complaint filed on November 9, 2001, alleging that Chiquita caused or allowed water pollution in violation of the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (2000)) and the associated regulations at its pumpkin processing facility located in Princeville, Peoria County. On January 7, 2002, Chiquita filed an answer to the complaint that set forth four affirmative defenses.

For the reasons outlined below, the Board denies the motion to strike affirmative defenses.

**AFFIRMATIVE DEFENSES**

In its answer, Chiquita asserts a number of facts in support of each affirmative defense and the defense. The defenses themselves are referenced in more than one paragraph, and a summary of the contested affirmative defenses follows:

**Defense I to Counts I, II, and III: Satisfaction and Discharge**

Chiquita contends that to the extent that any contaminants were discharged into the environment, the discharge was not caused by Chiquita but by a rupture to a pipeline due to vibrations from trains passing above. Chiquita also contends by taking all prudent measures to prevent discharges or deposition of contaminants, it satisfied and discharged its duties under Section 12(a) of the Act. 415 ILCS 5/12(a) (2000).

**Defense II to Counts I, II, and III: Uncontrollable Circumstances**

Chiquita asserts that the rupture of the forcemain that resulted to contaminants being discharged into the environment was the result of vibrations caused by trains passing above, and caused by circumstances beyond Chiquita's control.

**Defense I to Count V: Satisfaction and Discharge**

Chiquita contends that to the extent that any contaminants were discharged into the environment so as to cause or tend to cause water pollution, the discharge was not caused by Chiquita but by heavy rains and rapid snow melt which necessitated emergency discharges. Chiquita also contends by taking all prudent measures to prevent discharges or deposition of contaminants, it satisfied and discharged its duties under Section 12 of the Act. 415 ILCS 5/12 (2000).

**Defense II to Count V: Uncontrollable Circumstances**

Chiquita asserts that the emergency discharges were necessitated by uncontrollable circumstances including rainfalls and rapid snow melt placing Chiquita's lagoons and storm water retention basin under extreme stress, and that Chiquita therefore satisfied and discharged its duties under Section 12 of the Act. 415 ILCS 5/12 (2000).

**MOTION TO STRIKE AFFIRMATIVE DEFENSES**

**Complainant's Motion**

The complainant moves to strike each affirmative defense. The complainant asserts that the first affirmative defense to counts I, II, and III does not avoid the legal effect or defeat the causes of action set forth in the complaint even if true. Mot. at 2.<sup>1</sup> The complainant maintains that a long line of precedent holds that the owner of the source of pollution causes or allows the pollution within the meaning of the statute, is responsible for that pollution, and that the test to apply is whether or not an alleged polluter exercised sufficient control over the source of the pollution. See People v. A.J. Davinroy Contractors, 618 N.E. 2d 1282, 1286 (5th Dist. 1993) citing People v. Fiorini, 574 N.E. 2d 612, 623 (1991). The complainant argues that necessary precautions were not taken in this case and that the possibility that a sewer line may break due to outside forces is not unexpected. Mot. at 3. The complainant contends that as the NPDES

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<sup>1</sup> The complainant's motion to strike affirmative defenses will be cited as "Mot. at \_\_\_"; Chiquita's response to the motion to strike will be cited as "Resp. at \_\_\_"; the complainant's request for permission to reply will be cited as "Reply at \_\_\_."; Chiquita's response to the complainant's request for permission to reply will be cited as "Resp. to reply at \_\_\_."

permittee, the liability of the forcemain rupture and its subsequent fish kill falls on Chiquita. Mot. at 4.

As to the second defense to counts I, II, and III, the complainant argues that by having control of the forcemain and its contents, Chiquita had the capability of controlling the source of the pollution, and that by not controlling the source of the pollution has violated Section 12 of the Act. Mot. at 4.

The complainant contends that Chiquita's defenses to count V should be stricken because Chiquita did control the source of the discharge – the lagoon system – and has not sufficiently alleged that it took precautions to prevent the discharge. Mot. at 5. Finally, the complainant notes that Chiquita had the opportunity to seek a provisional variance but chose not to do so. Mot. at 6.

### Chiquita's Response

In response, Chiquita asserts that 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. Resp. at 2. Chiquita next contends that Board procedural rules provide that facts asserted that are not of record in the proceeding must be supported by oath, affidavit or certification in accordance, and that the complainant has not complied with this requirement in its motion to strike which asserts numerous facts that are not of record in this proceeding. *Id.* Chiquita requests that these facts be stricken, and that the motion must be denied because it is based on unsupported facts not of record in this proceeding.

Chiquita asserts that it is recognized that the Act does not impose strict liability, and that the owner of the source of pollution is not responsible for that pollution if the facts establish that the owner either lacked the capability to control the source or has undertaken extensive precautions to prevent vandalism or other intervening causes. Resp. at 5-6, *citing* People v. A.J. Davinroy Contractors, 618 N.E. 2d 1282, 1286-1287 (5th Dist. 1993).

Chiquita contends that if the affirmative defenses are accepted as true, as they must be for purposes of the complainant's motion, the facts alleged defeat the complainant's claims in the complaint. Resp. at 6. Finally, Chiquita concludes that the motion to strike must be denied because the facts asserted, if proven, raise the possibility that Chiquita will prevail. Resp. at 7.

Chiquita also makes three alternative requests for relief. First, that if the Board finds that insufficient facts have been alleged in support of the affirmative defenses that the Board provide guidance on the level of specificity required of respondents when pleading and grant Chiquita leave to amend its affirmative defenses in a supplemental answer. Resp. at 8.

Second, that if the Board strikes the affirmative defenses as insufficient as a matter of law, the Board either expressly reverse its prior holding that the Act does not require strict

liability or expressly distinguish the elements of *malum prohibitum* as applied by the Board from the elements of strict liability so the regulated community may better understand how the Board differentiates between these two concepts. Resp. at 8.

Third, if the Board strikes the affirmative defenses as insufficient as a matter of law that the Board find the affirmative defenses, if proven, are mitigating factors that could affect the penalty, and that Chiquita be allowed to introduce such facts at hearing. Resp. at 8.

### **Complainant's Request for Permission to Reply**

In its request for permission to reply, the complainant asserts that Chiquita seriously mischaracterizes the complainant's motion to strike and that a reply is necessary to clarify the misleading statements made by Chiquita so the Board will be fully and accurately informed when it rules on the motion. Reply at 1. The complainant disagrees that its motion relies on unsupported factual allegations not of record. *Id.* The complainant argues that the facts of an affirmative defense must be pled with the same specificity as required by the complainant's pleading. Reply at 2. The complainant contends that, in its motion, it clearly articulated that Chiquita did not set forth the necessary facts to establish the affirmative defenses. *Id.*

The complainant asserts that Chiquita has not alleged facts that would establish a lack of control over the pollution, and that Chiquita's efforts to manufacture unsupported factual allegations ignore what was pled in the complaint and what Chiquita admitted in its answer. Reply at 3-4. Complainant continues that Chiquita tries to further mislead the Board by stating that the complainant does not support the assertion that necessary precautions were not taken by Chiquita. Reply at 4. The complainant concludes that by dispelling the smoke screen covering the holes in Chiquita's affirmative defenses, the Board will accelerate resolution of this case. *Id.* Accordingly, the complainant requests the Board grant complainant leave to reply.

### **Chiquita's Response to the Request for Permission to Reply**

Chiquita first asserts that the complainant has not alleged or demonstrated that material prejudice will result if the leave to reply is not granted. Resp. to reply at 2. Chiquita contends that complainant's request for permission to reply is actually a reply discussing case law relating to the underlying issues in the motion to strike. *Id.* Chiquita denies the allegations that it mischaracterized facts or attempted to mislead the Board, and asserts that the Board need only look at the record to find the allegations are without merit. Resp. to reply at 3. Finally Chiquita asks that, to the extent the request for permission to reply is actually a reply, it should be stricken. *Id.*

## **DISCUSSION**

### **Complainant's Request for Permission to Reply**

The complainant's request for permission to reply is, as argued by Chiquita, the equivalent of a reply. The Board's regulations provides that "the moving person will not have the right to reply, except as permitted by the Board or hearing officer to prevent material prejudice." 35 Ill. Adm. Code 101.500(e). Although not specifically alleging that material prejudice will occur if the reply is not accepted, the complainant does assert that the reply is necessary to clarify misleading statements. The Board infers that to deny the reply would result in material prejudice. Accordingly, the reply is accepted.

### **Complainant's Motion to Strike**

A motion to strike an affirmative defense admits well-pleaded facts constituting the defense, only attacking the legal sufficiency of the facts. International Insurance Company v. Sargent and Lundy, 242 Ill. App. 3d 614, 630-31, 609 N.E.2d 842, 853-54 (1st Dist. 1993), citing Raprager v. Allstate Insurance Co., 183 Ill. App. 3d 847, 854, 539 N.E.2d 787 (1989). "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." International Insurance, 242 Ill. App. 3d at 631, 609 N.E.2d at 854.

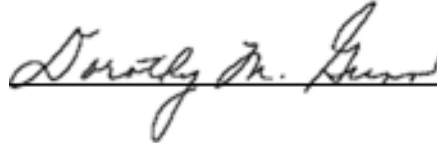
In an affirmative defense, the respondent alleges "new facts or arguments that if true, will defeat . . . the government's claim even if all allegations in the complaint are true." People v. Community Landfill Company, PCB 97-193, slip op. at 3 (Aug. 6, 1998). When asserting an affirmative defense, "the test is whether the defense gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated." Condon v. American Telephone and Telegraph Company, Inc. 210 Ill. App. 3d 701, 709, 569 N.E.2d 518, 523 (2nd Dist. 1991), citing Worner Agency v. Doyle, 121 Ill. App. 3d 219, 222, 459 N.E.2d 633, 635 (4th Dist. 1984).

The Board denies the complainant's motion to strike in its entirety. The complainant is correct in stating that the owner of the source of pollution causes or allows the pollution within the meaning of the statute. Further, the test to apply in determining whether an alleged polluter has violated that Act is whether or not an alleged polluter exercised sufficient control over the source of the pollution. *See* People v. A.J. Davinroy Contractors, 618 N.E. 2d 1282, 1286 (5th Dist. 1993) *citing* People v. Fiorini, 574 N.E.2d 612, 623 (1991). However, Davinroy also states that the owner of a pollution source is responsible for that pollution unless the facts establish that the owner either lacked the capability to control the source or had undertaken extensive precautions to prevent . . . other intervening causes. Davinroy, 618 N.E.2d at 1287.

The asserted affirmative defenses all present facts that, if proven true at hearing, could establish that Chiquita lacked the capability to control the source of the pollution. As stated, 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. *See* International Insurance, 242 Ill. App. 3d at 631. Accordingly, the motion to strike affirmative defenses is denied. As the motion is denied, the board will not address Chiquita's three alternative requests for relief.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 18, 2002, by a vote of 6-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", is written over a horizontal line.

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board