BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
	)	
Complainant,	)	
	)	PCB No. 02-3
v.	)	(RCRA - Enforcement)
	)	
TEXACO REFINING & MARKETING, INC., a Delaware Corporation,	)	
	)	
	)	
Respondent.	)	

NOTICE OF FILING

TO: ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on August 20, 2003, we filed with the Illinois Pollution Control Board a MOTION FOR LEAVE TO FILE REPLY TO RESPONDENT'S RESPONSE TO MOTION TO STRIKE AFFIRMATIVE DEFENSES, a true and correct copy of which is attached and hereby served upon you.

Respectfully submitted,

LISA MADIGAN
Attorney General
State of Illinois

BY: _____

Christopher P. Perzan
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Environmental Bureau
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Respondent.	)	

MOTION FOR LEAVE TO FILE REPLY TO RESPONDENT'S RESPONSE TO MOTION TO STRIKE AFFIRMATIVE DEFENSES

NOW COMES the Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, and pursuant to 35 Ill. Adm. Code 101.500, requests leave to file a Reply to Respondent's Motion to Strike Affirmative Defenses and in support thereof, states as follows:

1. Many of the affirmative defenses filed by the Respondent were, as argued in the Motion to Strike Affirmative Defenses, quite vague as to their basis. As a result, the Complainant was forced to assume the meaning of the affirmative defenses in its Motion to Strike Affirmative Defenses.

2. On August 7, 2003, the Respondent filed a Response wherein it attempts to further explain some of its affirmative defenses.

3. Because the Response clarifies the meaning of the affirmative defenses, the Complainant requests leave to file a brief Reply to Respondent's Response to Motion to Strike Affirmative Defenses, attached to this Motion.

4. Allowing the Complainant to file the Reply would avoid the material prejudice

that would result if the Respondent is able to file vague affirmative defenses and then clarify them after the Complainant is forced to respond to the initial vague pleading, with the result that the Complainant is then foreclosed from addressing what the Respondent really meant by the affirmative defenses.

WHEREFORE, the Complainant, PEOPLE OF THE STATE OF ILLINOIS, requests leave to file the attached Reply to Response to Motion to Strike Affirmative Defenses.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
ex rel., LISA MADIGAN, Attorney General
of the State of Illinois

By: _____

Christopher P. Perzan
Assistant Attorney General
Environmental Bureau
188 W. Randolph Street, 20th Floor
Chicago, Illinois 60601
312 814-3532

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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	)	
	)	
Respondent.	)	

REPLY TO RESPONSE TO MOTION TO STRIKE AFFIRMATIVE DEFENSES

NOW COMES the Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, and for its Reply to Response to Motion to Strike Affirmative Defenses, states as follows:

I. AFFIRMATIVE DEFENSES REMAIN INSUFFICIENT

A. Seventh Affirmative Defense

The Respondent argues that because its affirmative defenses attack allegations in the Complaint, they are thus adequate affirmative defenses. However, there must be some factual and legal validity to the underlying defense. For instance, in the Respondent's attempt to justify its seventh affirmative defense, the Respondent states that it posed a "legal question": If a facility is complying with one regulatory program, can it be held liable for violations under Section 12(a) of the Act? The Respondent then concludes that it may not, but offers no further support or rationale. Response at 7. There is no basis for the Respondent's conclusion. It cannot be disputed that facilities are often regulated by more than one regulatory program. Why is it that

somehow Section 12(a) is preempted by this other program? Certainly there is nothing within the Act or Board regulations that creates such an exemption. Apparently the Respondent believes that there is something, somewhere, that creates an exemption from liability under Section 12(a) of the Act. However, it must let the Complainant and the Board know what that is before it can claim it as an affirmative defense.

B. Eighth Affirmative Defense

The Respondent defends its eighth affirmative defense by arguing that it is analogous to one upheld in People v. Stein Steel Mills Services, Inc., PCB 02-1 (April 18, 2002). It then argues that its alleged compliance with interim status requirements and a permit shield it from liability under Section 12(a) and Part 620. The Stein Steel Mills case involved an enforcement action based, in part, on an alleged failure to have an adequate operating program to control fugitive air emissions. In that case the respondent raised an affirmative defense claiming that it had, in fact, submitted compliant operating programs to the Illinois EPA. The case, therefore, involved opposing allegations in the context of a single regulatory requirement.

The Stein Steel Mills case is in no way analogous to the present case. In this case, the Respondent is attempting to allege that somehow alleged compliance with *another* regulatory program, the Resource Conservation and Recovery Act ("RCRA"), excuses it from violations of Section 12(a) and Part 620 of the Board rules. The Stein Steel Mills case does not stand for the proposition that it is an acceptable defense that compliance with one regulatory program automatically excuses noncompliance with another, separate program, or with an overarching statutory prohibition such as that in Section 12(a) of the Act.

The question here is simple: Did the Respondent cause, threaten or allow water pollution?

The question is not whether the Respondent complied with RCRA requirements. This affirmative defense is insufficient.

C. Ninth Affirmative Defense

The Respondent now also refines its ninth affirmative defense. The Respondent argues that because the releases that led to the groundwater contamination at the facility and the groundwater contamination itself may have predated the Part 620 rules, that, therefore, any regulation is retroactive. This is a novel, but incorrect, theory. The Part 620 rules do not regulate releases as such, but groundwater conditions. It is utterly irrelevant to Part 620 when a release may have occurred. Similarly, it is not relevant that groundwater contamination may have predated Part 620 standards. The relevant consideration is the condition of the groundwater from the time the regulations were effective and thereafter.

The Board and the Illinois courts have repeatedly held that liability may arise when one maintains a condition after a prohibition of that condition becomes effective. Freeman Coal Mining Corp. v. Illinois Pollution Control Board, 21 Ill.App.3d 157, 313 N.E.2d 616 (5th Dist. 1974); Meadowlark Farms, Inc. v. Illinois Pollution Control Board, 17 Ill. App. 3d 851, 308 N.E.2d 829 (5th Dist. 1974); People of the State of Illinois v. Peabody Coal Company, PCB 99-134 at 11-12 (June 5, 1999). The Respondent's argument is not supported by the law. This affirmative defense should, therefore, be stricken.

D. Eleventh Affirmative Defense

The Respondent argues in support of the eleventh affirmative defense that a claim of an exceedance of a TACO or PQL standard cannot form the basis for a Section 12(a) violation. TACO standards are set to give guidelines as to when a level of a particular contaminant may

pose a risk to human health. One of the ways to establish "water pollution" as defined at Section 3.545 of the Act is to show that the contaminant discharge created a nuisance or rendered waters harmful, detrimental or injurious to public health, safety or welfare. One may certainly conclude that the fact that contaminant levels in groundwater exceeds TACO standards may support a case for water pollution under Section 12(a).

The Complainant, however, is not seeking to impose penalties for an exceedance of any TACO standard in and of itself. TACO is not an enforceable limit in that one could seek penalties for the exceedance of its standards, but a set of risk-based remedial standards (unlike the Part 620 standards and Section 12(a), which are enforceable). However, that in no way means that an exceedance of a TACO standard isn't relevant evidence that water pollution has occurred. There is absolutely no support for the Respondent's assertion that one is forced to disregard evidence of TACO exceedances when making a case for water pollution under Section 12(a). The gist of this argument seems to be that one is safe from enforcement under Section 12(a) as long as one has created and allowed groundwater contamination that exceeds TACO standards, or, at a minimum, that one could never cite the fact that contaminant levels exceed TACO standards in a complaint or present such evidence at a hearing on a Section 12(a) violation. There is simply no basis for this argument.

The presence of contaminants at levels above TACO standards is not the sole basis for the water pollution allegation of the Complaint, but it certainly supports that allegation. The affirmative defense is deficient and should be stricken.

E. Fourth Affirmative Defense

The Respondent also seeks to bolster its independent contractor fourth affirmative

defense in the Response. However, one case the Respondent offers in support of its independent contractor defense actually struck similar affirmative defenses. Cole Taylor Bank v. Rowe Industries, Inc., PCB 01-173 at 5-6 (June 6, 2003). That case offers the Respondent no support. The other cited case cast extreme doubt as to the respondent's ability to prevail on such a defense, due to the fact that one can be held liable for allowing an independent contractor to violate the Act, but nonetheless allowed the defense to stand under the facts as pled in that case. People v. Wood River Refining Company, PCB 99-120 (August 8, 2002).

The Board's standard for an independent contractor defense has been whether one could reasonably control the actions of the independent contractor in order to prevent the pollution. *See. e.g.*, Roy K. Johnson v. ADM-Demeter, Hoopeston Div., PCB 98-31 at 10-11 (January 7, 1999). That being the standard, it follows that the Respondent must plead sufficient facts that would demonstrate that it could not reasonably control the actions of the independent contractor in order to have any chance at prevailing on that defense. Respondent does not plead sufficient facts. Respondent argues that the sole fact that the wastes were produced by an independent contractor sufficiently alleges a defense. That does not meet the standard because, even if true, that allegation would not show that the actions of the independent contractor were beyond the control of the Respondent. Similarly, it does not address the fact that the Respondent clearly allowed the materials to remain on the land *at least eighteen years* after the independent contractor ceased operations, a fact the Respondent has admitted. Response at 9-10 and Answer at 16. That alone would give rise to liability. In this case, the Respondent has simply failed to sufficiently allege a defense based on the actions of an independent contractor.

F. Factual Insufficiency

As a final matter, the Complainant appreciates the Respondent's willingness to highlight its admissions as to the presence of numerous contaminants in the groundwater at the facility in excess of TACO standards. Response at 3-5. How the Respondent believes that this bolsters its defenses remains somewhat of a mystery. They certainly do not provide the factual basis for the affirmative defenses as the Respondent claims. Possibly, the Respondent feels that a combination of the fact that the groundwater contaminants at the facility exceed TACO standards and the Respondent's incorrect theory that one can never look at TACO standards when evaluating a case under Section 12(a) somehow shields the Respondent from liability. To the Complainant, however, the exceedances only demonstrate the extent, though not the full extent, of the water pollution violations attributable to the Respondent.

II. CONCLUSION

As for the remaining affirmative defenses and issues, the Complainant rests on its Motion to Strike Affirmative Defenses. Because none of these affirmative defenses suffices to state an adequate defense, they should be stricken.

WHEREFORE, the Complainant, PEOPLE OF THE STATE OF ILLINOIS, requests that the Board issue an order striking the Respondent's affirmative defenses.

Respectfully submitted,

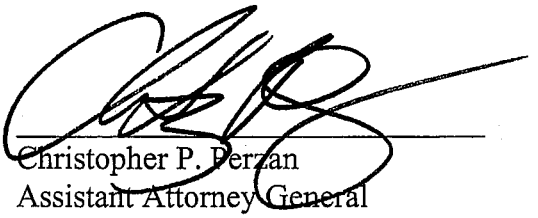
PEOPLE OF THE STATE OF ILLINOIS,
ex rel., LISA MADIGAN, Attorney General
of the State of Illinois

By: _____

Christopher P. Perzan
Assistant Attorney General
Environmental Bureau
188 W. Randolph Street, 20th Floor
Chicago, Illinois 60601
312 814-3532

CERTIFICATE OF SERVICE

I, the undersigned, certify that on August 20, 2003 I have served the attached MOTION FOR LEAVE TO FILE REPLY TO RESPONDENT'S RESPONSE TO MOTION TO STRIKE AFFIRMATIVE DEFENSES by United States mail, postage prepaid, or hand delivery, upon the attached Service List.



Christopher P. Perzan
Assistant Attorney General