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STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
vs.	)	PCB No. 02-03
	)	(RCRA – Enforcement)
TEXACO REFINING & MARKETING, INC., a Delaware Corporation,	)	
	)	
Respondent.	)	

NOTICE OF FILING

To: Christopher P. Perzan
Assistant Attorney General
Environmental Bureau
188 W. Randolph Street
20th Floor
Chicago, Illinois 60601

Bradley P. Halloran, Esq.
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601

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 September 2, 2003 filed with the Office of the Clerk of the Pollution Control Board the attached OPPOSITION FOR LEAVE TO FILE REPLY TO RESPONDENT'S RESPONSE TO MOTION TO STRIKE AFFIRMATIVE DEFENSES, a copy of which is hereby served on you.

Chevron Environmental Services Company

BY: Barbara A. Magel
Their Attorney

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS
Pollution Control Board

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

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

NOW COMES RESPONDENT, Chevron Environmental Service, Inc. ("CESC"), for its predecessor Texaco Refining & Marketing, Inc., by its attorneys and pursuant to 35 Illinois Administrative Code ("IAC") 101.500 hereby responds in opposition to Complainant's Motion for Leave:

1) 35 IAC 101.500(e) provides that a moving party, in this case the Complainant, will not have the right to file a reply, except as permitted by the Board or hearing officer to prevent material prejudice. (emphasis added). In this instance, no prejudice, material or otherwise, exists and therefore Complainant's Motion must be denied.

2) In order to overcome the explicitly stated filing limitation in the Board's procedural rules, Complainant asserts in its Motion for Leave that it was somehow surprised, and therefore materially prejudiced by Respondent's Response to the Motion to Strike. However, once CESC's Response to the Motion to Strike and Complainant's proffered Reply are examined, it is clear that no surprise in fact occurred. Complainant is simply looking for an extra opportunity to again present its Motion to Strike arguments to the Board. In promulgating 35 IAC 101.500(e), this is just the type of repetitive pleading which the Board sought to avoid.

3) Board precedent has established that the party wishing to file a reply must demonstrate that it will suffer material prejudice if its filing is not permitted. *Illinois v. Peabody Coal Company* PCB 99-134 (June 5, 2003). A mere assertion that such prejudice will occur is insufficient. *Illinois v. Skokie Asphalt Co. Inc., et al.* PCB 96-98 (June 5, 2003) and *City of Kankakee v. County of Kankakee, et al.* PCB 03-125, 03-133, 03-134, 03-135 (May 1, 2003). In this instance, Complainant has not offered any explanation as to how it will be prejudiced. Instead Complainant has merely stated it was surprised by CESC's Response to the Motion to Strike. However, as shown herein, that assertion of surprise is groundless. Further the arguments presented in Complainant's proffered Reply were included in its Motion to Strike so no prejudice will result in denying leave to file here. *Young v. Gilster-MaryLee Corp.*, PCB 00-90 (June 21, 2001). Complainant has failed to meet its burden to demonstrate that any material prejudice would occur in this instance, and therefore its Motion for Leave must be denied.

4) As a basis for asserting it was somehow prejudiced, Complainant attempts to make one point – that is that in its Response, CESC supposedly somehow clarified the meaning of its affirmative defenses and Complainant was surprised. However, CESC did not present any new material in its Response to the Motion to Strike, but merely placed its Affirmative Defenses in the context of the Answer. Complainant is basically asserting that it was somehow surprised that the entire Answer would be used in evaluating the adequacy of defensive pleadings. Yet, that is precisely what Board precedent contemplates. Under these circumstances, Complainant will suffer no prejudice due to denial of its Motion for Leave. *Illinois v. Poland, et al.*, PCB 98-145 (May 3, 2001). Clarification does not constitute material prejudice.

5) For purposes of trying to show surprise, Complainant assumes that its improperly focused reading of the Affirmative Defenses will be accepted by the Board as appropriate. Complainant simply chose to read the Defenses independently of the Complaint and Answer, in spite of clear Board precedent to the contrary. *Illinois v. QC Finishers, Inc.* PCB 01-7 (June 19, 2003). In contrast, in its Response to the Motion to Strike, CESC demonstrated, that once read in context as required, the Affirmative Defenses are adequately pled. No novel material was presented in CESC's Response to

the Motion to Strike, as Complainant now argues. The pleadings on file were simply presented as a whole as required by previous Board decisions.

6) In attempting to support a need to re-present its arguments, Complainant has done nothing more than say its speculation as to the possible meanings of CESC's Affirmative Defenses created by reading these Defenses in isolation didn't prove to be entirely correct. To allow Complainant to file a Reply here condones the technique of misinterpreting pleadings in order to get an extra opportunity to have the last word; an opportunity the Board has generally eliminated. The fact that Complainant guessed wrong is because it declined to read the Answer as a whole, is not an adequate grounds for a finding material prejudice.

7) Having disregarded the appropriate manner of reviewing affirmative defenses, Complainant now states it is surprised by Respondent's use of the entire Answer in its Response and therefore entitled to try again. Complainant's approach is merely a ruse to obtain another chance to present arguments it could, and in many cases did, present in its original Motion to Strike. The Board has rejected such arguments as allowable bases for extra pleadings. *Illinois v. Poland, et al., supra.* Complainant simply finds itself confronted with a stronger demonstration of the adequacy of the Affirmative Defenses than it anticipated, and seeks another chance to bolster its case through its Motion for Leave to File a Reply. Under such circumstances, the Motion for Leave to File must be denied in accordance with 35 IAC 101.500(e).

8) The Reply included with Complainant's Motion for Leave clearly demonstrates the lack of material prejudice here. Complainant's proposed Reply is nothing more than repetition of arguments presented in its original Motion to Strike, in a few instances, with added citations to bolster those arguments. Rule 101.500(e) was promulgated to preclude such attempts by moving parties to get the last word.

9) Reviewing Complainant's Reply arguments it is clear that Complainant is trying to side-step the limitation of 35 IAC 101.500(e) with groundless assertion of surprise to shore-up its Motion to Strike arguments.

a) ***Seventh and Eighth Affirmative Defenses*** - With these two Defenses, Respondent has presented a legal question as to whether a violation of Section 12(a) may be asserted despite compliance with regulations and permit provisions which speak specifically to the conditions underlying the allegation of violation. Again, this is a legal question of first impression for the Board and it merits consideration in its full factual context at hearing.[1] In its proffered Reply, Complainant merely asserts that these Defenses may not prevail, but offers no reason or precedent in support of that conclusion. Further no new argument, other than that asserted in the original Motion to Strike is presented.

In defending its right to present this Defense in the face of the Motion to Strike, no new information was provided in the Response to the Motion to Strike which could be the basis of Complainant's surprise with respect to these Defenses. In its Response to the Motion to Strike, CESC simply reviewed the allegations already on file and provided supportive legal precedent and Complainant does not assert any surprise or prejudice in its Reply attached to its Motion for Leave. No material prejudice has occurred and the Motion for Leave must be viewed as unfounded.

b) ***Ninth Affirmative Defense*** - In its Answer and Response, Respondent has argued that 35 IAC 620 may not be applied retroactively to demonstrate a violation of Section 12(a) of the Environmental Protection Act ("Act"). Nothing new was added to that statement of defense in the Response to the Motion to Strike. Simply put, Section 12(a) presents a two part prohibition on contamination of waters of the State; risk to health or the environment must be shown, or a violation of some regulation or

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1 Complainant's argument as to the *People v. Stein Steel Mills Services, Inc.*, PCB 02-1 (April 8, 2002) in their proposed Reply is not relevant to the argument CESC presented in its Response to the Motion to Strike. In its Response, *Stein Steel, supra* was cited as support for allowing an affirmative defense premised in compliance with regulations and permit requirements to go forward. Under *Stein Steel,*

standard. Here, no allegation of risk or damage has been made. Instead, the Complainant has chosen to reply upon alleged violations of regulations or standards which had not been promulgated at the time of the alleged violation, as its basis for its claim.

In its proffered Reply, Complainant cites to two cases as supposed support for its conclusion that the Ninth Affirmative Defense is without legal basis. In *Meadowlark Farms, Inc. v. Illinois Pollution Control Board*, 17 Ill. App. 3d 851 (February 22, 1974) the question was one of ownership of minerals held on a property and responsibility for discharge therefrom. The instant factual situation is readily distinguishable. As stated in the Answer, the coke material here was the property of an independent contractor and no discharge has been alleged. Therefore *Meadowlark Farms, supra* provides no precedent for a decision on the Affirmative Defense at issue here.

Similarly the other case cited by Complainant offers no support to its legal argument. Finally, these arguments on legal adequacy were included in the Motion to Strike and there is no reason to allow Complainant to re-argue them through a specially allowed reply.

The question presented by the Affirmative Defense then becomes, can a regulation, *i.e.* 35 IAC 620 which was not promulgated at the time of the alleged violations be used as a basis for a finding of violations or does that constitute retroactive application of a regulation. This is a legal question of first impression for the Board, although precedent has denied retroactive application of other regulations in similar contexts, Illinois v. Peabody Coal, PCB 99-134 (June 5, 2003). Again no new information was provided in CESC's Response to the Motion to Strike with respect to this Defense, so no surprise or resultant prejudice can be shown. In its Reply,

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supra, the Board decided that under appropriate circumstances, such compliance may constitute an affirmative defense.

Complainant has merely sought to reinforce the arguments made in its Motion to Strike. The Complainant's Reply represents precisely the type of repetitive pleading to be avoided under 35 IAC 101.500(e).

c) ***Eleventh Affirmative Defense*** - The Tenth Affirmative Defense also presents a legal question of first impression: may remedial objectives be taken from TACO and used as a basis for a Section 12(a) violation. As stated in the Answer, and again in the Response to the Motion to Strike, TACO remedial objectives are not regulatory standards for determining whether violative contamination exists, rather they are target values to be achieved in certain site-specific contexts. Further, the TACO standards cited in the Complaint and relied upon by Complainant are subject to modification under Tiers 2 and 3 of TACO itself, and therefore again, are not controlling standards or universally evidence that violative ground water pollution has occurred as Complainant argues. Under TACO it is possible that a Tier 1 exceedence would occur and no violation of Section 12(a) exists. The Affirmative Defense presents the basic question of whether such objectives may by themselves form the basis for a finding of a 12(a) violation as alleged in the Complaint.[2]

There is no new material presented in the Response to the Motion to Strike or Complainant's offered Reply with respect to this Defense. Again, Respondent has merely presented the Defense in light of the entire Answer. Apparently unhappy with Respondent's Response arguments, Complainant seeks to try again. Complainant can not have been surprised or prejudiced by that presentation.

d) ***Fourth Affirmative Defense*** - Complainant does not argue that it was surprised or that the Fourth Affirmative Defense was clarified in the Response in seeking to file its Reply to CESC's Response as to this

Defense. Instead, Complainant shows its actual purpose in filing its Motion for Leave, the desire to present additional arguments having seen the Response to its initial Motion to Strike. That is precisely what 35 IAC 101.500 seeks to preclude.

Complainant seeks to use its Motion for Leave as an opportunity to argue the factual elements underlying the Fourth Defense.[3] Implicitly agreeing that the Defense is legally viable, Complainant now asserts that Respondent has not demonstrated all of the facts as to control of the independent contractor to support a ruling in its favor on the Defense. However, such facts may be elicited at hearing. The Answer adequately raises the independent contractor issue for purposes of pleading the Affirmative Defense. Furthermore, Complainant's factual statements actually support allowing Respondent to proceed with the Fourth Affirmative Defense so that a full and fair hearing on the specific circumstances of the problem can be had.[4]

10) Complainant,s last section in its proposed Reply again aptly demonstrates its real reason for seeking to file despite the Board's rule. In that section, Complainant points out the admission of TACO exceedences and decries the lack of relationship between those admissions and the Affirmative Defense. These statements illustrate Complainant's failure to understand the way in which the adequacy of affirmative defenses is determined. Respondent admitted to the exceedences of the TACO levels in

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2 In the *Cole Taylor Bank v. Rowe Industries, Inc.*, PCB 01-173 (June 6, 2003) the Board found that such a defense might be sustainable.

3 Respondent has not taken issue with the *Roy K. Johnson v. ADM-Demeter Hoopeston Div.*, PCB 98-31 (January 7, 1999) holding that the question of control must be addressed to prevail on an affirmative defense based on the acts or omissions of an independent contractor. CESC understands that the question of control will have to be addressed in its factual presentation at hearing. However, the Affirmative Defense has been adequately pled in the Answer.

4 In its proposed Reply, Complainant states the materials were on the Site for at least eighteen years. The materials at issue were the product of an independent contractor and the Act does not speak to the presence of such product.

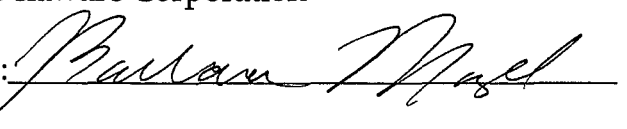
its Answer; that is not new information. For purposes of examining the Affirmative Defenses, those admissions are taken into consideration as was done in CESC's Response to the Motion to Strike. The Affirmative Defense is then viewed as a legal argument which precludes the imposition of liability despite those admitted exceedences. That Complainant is now attempting to cite the admission as the basis of surprise demonstrates that it never examined the Affirmative Defenses within the context of the Answer as a whole. Complainant can not assert material prejudice based on its own failure to follow Board precedent.

11) The Affirmative Defenses which Complainant has placed at issue present legal questions of first impression for the Board. Each merits providing an opportunity for examination in the fully presented factual context afforded at hearing and should not be stricken prematurely. The Affirmative Defenses have been adequately pled as demonstrated in the Response to the Motion to Strike. In the absence of any showing of material prejudice Complainant should not be granted opportunity to reiteratively attach such Affirmative Defenses.

WHEREFORE, Respondent respectfully requests that Complainant's Motion for Leave to File a Reply be denied. In the alternative, if Complainant is permitted to file a Reply, Respondent hereby requests leave to file a Sur-Reply.

RESPECTFULLY SUBMITTED,

TEXACO REFINING & MARKETING, INC.
a Delaware Corporation

By: 

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Smtex67.doc

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached OPPOSITION 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 following persons:

VIA HAND DELIVERY
Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
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VIA HAND DELIVERY
Bradley Halloran
Hearing Officer
Illinois Pollution Control Board
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VIA HAND DELIVERY
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VIA U.S. MAIL
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Barbara A. Magel
Attorney

Dated: September 2, 2003

sam/texfilg