BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	No. PCB 02-03
v.	)	
	)	
TEXACO REFINING & MARKETING, INC.,	)	
	)	
	)	
Respondent.	)	

NOTICE OF FILING

To: Barbara Magel
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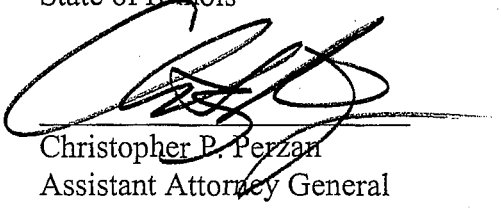
PLEASE TAKE NOTICE that I have on July 25, 2003 filed with the Office of the Clerk of the Pollution Control Board the attached MOTION TO STRIKE AFFIRMATIVE DEFENSES, a copy of which is hereby served on you.

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General
State of Illinois



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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.	)	

MOTION TO STRIKE AFFIRMATIVE DEFENSES

NOW COMES the Complainant, PEOPLE OF THE STATE OF ILLINOIS, through LISA MADIGAN, Attorney General of the State of Illinois, and for its Motion to Strike Affirmative Defenses pursuant to 35 Ill. Adm. Code 101.500 and 101.506 states and alleges as follows:

I. INTRODUCTION

On July 12, 2001, the Complainant filed its Complaint in this matter. Plaintiff's Complaint alleges that the Defendant violated provisions of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/1 et seq., and the rules of the Illinois Pollution Control Board ("Board") by causing, threatening or allowing water pollution by discharging contaminants into waters of the State (Count I) and that the Respondent caused or allowed the open dumping of waste (Count II). On July 9, 2003 the Respondent filed its Answer on Behalf of Chevron Environmental Services Co. ("Answer"). The Answer contains thirteen purported affirmative defenses. A copy of the affirmative defenses is attached and incorporated as Exhibit 1.

II. LEGAL STANDARDS

The Board rule regarding affirmative defenses provides, in pertinent part, that:

> 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 the hearing.

35 Ill. Adm. Code 103.204(d). In addition, Section 2-613(d) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-613(d) (2002), is instructive, providing that "[t]he facts constituting any affirmative defense . . . must be plainly set forth in the answer or reply."

An affirmative defense essentially admits the allegations in the complaint, and then asserts a new matter which defeats a plaintiff's right to recover. Vroegh v. J & M. Forklift, 165 Ill.2d 523, 651 N.E.2d 121, 126 (1995); People v. Community Landfill Co., PCB 97-193 (August 6, 1998). An affirmative defense must do more than offer evidence to refute properly pleaded facts in a complaint. Pryweller v. Cohen, 282 Ill.App.3d 89, 668 N.E.2d 1144, 1149 (1st Dist. 1996), appeal denied, 169 Ill.2d 588 (1996); Heller Equity Capital Corp. v. Clem Environmental Corp., 272 Ill. App. 3d 173, 178, 596 N.E.2d 1275, 1280 (1st Dist. 1993); People v. Wood River Refining Company, PCB 99-120 at 6 (August 8, 2002); Farmer's State Bank v. Phillips Petroleum Co., PCB 97-100 (January 23, 1997) (affirmative defense does not attack truth of claim, but the right to bring a claim). A simple refutation of allegations in the complaint fails to establish an affirmative defense. *Id.* Facts establishing an affirmative defense must be pled specifically, in the same manner as facts in a complaint. International Ins. Co. v. Sargent & Lundy, 242 Ill.App.3d 614, 609 N.E.2d 842, 853 (1st Dist. 1993).

III. RESPONDENT'S AFFIRMATIVE DEFENSES ARE FACTUALLY INSUFFICIENT

Illinois is a fact pleading, not a notice pleading, jurisdiction. Teter v. Clemens, 112 Ill.2d 252, 492 N.E.2d 1340 (1986). It is not sufficient to merely state conclusions of law and conclusions of fact. Knox College v. Celotex, 88 Ill.2d 407, 430 N.E.2d 976 (1981). The Board has specifically adopted fact pleading requirements for affirmative defenses in 35 Ill. Adm. Code 101.204(d). A party is therefore required to allege enough facts to establish the affirmative defense.

Each of the Respondent's affirmative defenses is pled as a notice pleading, with simple legal conclusions and no, or very few, accompanying facts. As a result, all of the affirmative defenses are factually insufficient.

The Respondent's Second, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth and Thirteenth Affirmative Defenses assert no facts whatsoever. They merely state generalized legal conclusions. These affirmative defenses are factually insufficient on their face and should be stricken.

The remaining affirmative defenses attempt to allege some facts, but fall entirely short of establishing affirmative defenses. A properly pled affirmative defense would establish the defense if all of the facts are ultimately proven. If the facts as pled and taken as true would not establish the defense, the affirmative defense has not been sufficiently pled. The affirmative defenses filed by the Respondent fall short of this requirement, and should be stricken.

IV. RESPONDENT'S AFFIRMATIVE DEFENSES ARE LEGALLY INSUFFICIENT

A. Respondent's First Affirmative Defense is Insufficient

The First Affirmative Defense claims that the Complaint makes a request for injunctive relief and that the request for relief is moot. The Complainant agrees with the Respondent to the extent that the Respondent did ultimately receive, after the initial filing of this matter, a RCRA Part B post closure permit that, as modified, contains groundwater monitoring, reporting and corrective action components.

However, the mootness claim does not constitute an affirmative defense to the violations cited in the Complaint. An affirmative defense must raise a defense to liability, not a defense solely to some portion of requested relief, which is determined after liability is established. Since it seeks to defend against relief sought and not liability, this defense is really an attempt to raise a mitigation factor, which the Board has previously determined is not an affirmative defense. People v. Geon Co., Inc., PCB No. 97-62 (October 2, 1997). Therefore, the First Affirmative Defense is not an affirmative defense.

Moreover, as part of its ultimate relief, the Complainant may seek from the Board an order that the Respondent cease and desist from violations pursuant to Section 33(b) of the Act, 415 ILCS 5/33(b)(2002). An appellate court has held that the argument that an illegal activity has stopped is not a defense to a request for injunctive relief when a party is seeking a statutorily authorized injunction. Village of Riverdale v. Allied Waste Transportation, Inc., 334 Ill.App.3d 224, 231, 777 N.E.2d 684, 690 (1st Dist. 2002). Therefore, under the same analysis, mootness would be insufficient as a defense to a request for a cease and desist order.

For these reasons, the First Affirmative Defense is not a proper affirmative defense and

should be stricken.

B. Second Affirmative Defense Is Improper

The Second Affirmative Defense denies that Complainant is entitled to an award of costs. It is well settled that a mere denial of well pleaded facts does not constitute an affirmative defense. *See* Pryweller, Heller Equity Capital Corp., People v. Wood River Refining Co., Farmer's State Bank, *supra*. An affirmative defense must raise a **new matter** that, if true, somehow defeats a complainant's claim. It is not simply the restatement of a denial or other response made in the body of the answer.

The Respondent's Second Affirmative Defense merely denies the availability of costs under 415 ILCS 5/42(f)(2002). Since that Section of the Act clearly provides for the availability of costs under certain conditions, the affirmative defense is a simple denial and is legally insufficient to state an affirmative defense.

C. Subsequent Compliance Attempts Do Not Constitute Affirmative Defenses

The Respondent's Third and Fifth Affirmative Defenses allege that the Respondent took certain voluntary actions to address violations at the Site and that these actions render any penalty inappropriate. An affirmative defense must raise a defense to liability to be proper. These defenses do not meet that standard. The Respondent's position is squarely contradicted by the Act. Section 33 of the Act plainly states that "[i]t shall not be a defense to findings of violations of the provisions of the Act or Board regulations or a bar to the assessment of civil penalties that the person has come into compliance subsequent to the violation" except where an applicable statute of limitations bars the action. 415 ILCS 5/33(a)(2002).

In this instance, the Respondent does not even go so far as to allege that it came into

compliance. It merely argues that it attempted to address some violations. If complete compliance cannot serve as a bar to civil penalties, mere attempts to comply certainly cannot. Therefore, such allegations are not defenses to liability, are not proper affirmative defenses, and should be stricken.

These defenses may be more properly characterized as raising mitigation factors. Taken at their most favorable to the Respondent, these allegations are assertions that the Respondent exercised due diligence in addressing violations. Due diligence in attempting to comply with the Environmental Protection Act and Board regulations is one of the factors to be examined by the Board when considering an appropriate penalty amount after a finding of liability. 415 ILCS 5/42(h)(2). The Board has, however, found that penalty mitigation factors are not proper affirmative defenses and are appropriately stricken when raised as an affirmative defense. People v. QC Finishers, Inc., PCB 01-7 at 5 (June 19, 2003); People v. Geon Co., Inc., PCB No. 97-62 (October 2, 1997). The conclusion is inescapable that since there must be a finding of liability prior to the consideration of a penalty and any appropriate mitigating factors, a penalty mitigation factor is not an appropriate affirmative defense against liability itself. However one characterizes the Third and Fifth Affirmative Defenses, they do not constitute proper affirmative defenses and should be stricken.

D. Fourth Affirmative Defense is Vague and Insufficient

The Fourth Affirmative Defense states that the coke fines at the site were the product of an independent contractor held for sale and did not constitute waste and that their presence did not constitute open dumping on the part of the Respondent. It is unclear whether the Fourth Affirmative Defense is attempting to raise some argument as to causation (i.e., the independent

contractor did it), simply denying that the materials deposited were wastes (despite the fact that CESC admits that the materials were left on the site at least from 1981 until 1999 in its response to paragraphs 9 and 10 of Count II), or raise some other defense or combination of defenses. This affirmative defense is overly vague.

Furthermore, these allegations do not appear to raise a new matter that, if true, would defeat the claims in the Complaint. The Complaint alleges that the materials were wastes open dumped on the Site. The Respondent denies this in its response to paragraph 21 of Count II. Raising this denial again as an affirmative defense, assuming that this is what the Fourth Affirmative Defense is attempting to do, is not proper. As cited above, an affirmative defense must do more than simply deny well-pleaded facts. The Fourth Affirmative Defense should be stricken.

E. Sixth Affirmative Defense Does Not Adequately State Estoppel

It is extremely well established that, when raised against the State, estoppel requires some positive act by state officials that induced action by an adverse party in circumstances where it would be inequitable to hold that party responsible for the action. Pavlakos v. Department of Labor, 111 Ill.2d 257, 489 N.E.2d 1325 (1985). Mere inaction by the State does not rise to estoppel against a governmental entity. *Id.* Estoppel is only applied against the State in the most extraordinary circumstances. Monat v. County of Cook, 322 Ill. App. 3d 499, 750 N.E. 2d 260 (1st Dist. 2001).

If one takes all of the Respondent's factual assertions as true, that the State knew of groundwater and coke conditions at the site for years without asserting that any violation existed, it still would not give rise to estoppel against the State. At best, those allegations would show

inaction, which the Illinois Supreme Court has clearly stated in the Pavlakos case, cited above, is insufficient to give rise to estoppel against the State. The Board has found that when an affirmative defense fails to establish estoppel against the state by alleging mere inaction, it is properly stricken. People v. QC Finishers, Inc., PCB 01-7 at 4 (June 19, 2003). Because the estoppel defense as alleged could not give rise to a defense even if the facts as stated were true, this affirmative defense is insufficient and should be stricken.

F. Seventh Affirmative Defense is Vague

The Seventh Affirmative Defense states that "the detection of constituents in groundwater at a facility complying with interim status and regulatory groundwater requirements does not constitute a violation of the [Act]." The Complainant must admit that it has no idea what the Respondent means by this affirmative defense. To what specific interim status and regulatory groundwater requirements is the Respondent referring? How would its compliance with those requirements excuse it from liability for a water pollution violation under Section 12(a) of the Act? The Respondent does not state that it was in specific compliance with the requirements or identify those requirements, but couches the statement in general, almost hypothetical terms. Such a vague and nonspecific allegation cannot stand and must be stricken.

G. Eighth Affirmative Defense is Vague, Contradictory and Insufficient

The Eighth Affirmative Defense contains an unsupported legal conclusion that the standards of 35 Ill. Adm. Code 620 "are not applicable to a site complying with interim status ground water regulatory requirements, and later a permitted groundwater management zone" and thus do not apply to the contaminants cited in the Complaint. The first part of this allegation is incorrect. There is no portion of the Act or regulations which excuses compliance with the

standards of Part 620 if one complies with the interim status standards of Part 725. This affirmative defense is nothing more than an incorrect, unsupported legal conclusion and should be stricken.

The second portion of the Eighth Affirmative Defense claims that the standards of Part 620 do not apply to a site complying with a ground water management zone ("GMZ"). This is a strange assertion, since a GMZ is a standard under Part 620, specifically 35 Ill. Adm. Code 620.250. The Respondent alleges that it has a GMZ but then states it is not subject to Part 620. Authority for establishment of GMZs exists at two places in the Board regulations, in 35 Ill. Adm. Code 620.250 and 35 Ill. Adm. Code 740.530. Part 740 allows the establishment of GMZs for sites in the Site Remediation Program ("SRP"). Since the Respondent's site clearly is not in the SRP, and would not be eligible for entry into the SRP per 415 ILCS 5/58.1(a)(2), it is not covered by Part 740. Therefore, the Respondent's GMZ must be a Part 620 GMZ. If the Respondent's GMZ is a Part 620 GMZ, then the Respondent's affirmative defense makes utterly no sense. Perhaps the Respondent is arguing that the establishment of a GMZ retroactively excuses it from groundwater violations that preceded the establishment of the GMZ. This also is completely unsupported and a flatly incorrect reading of the law.

For these reasons, the Eighth Affirmative Defense is vague and without legal basis and, therefore, should be stricken.

H. Ninth and Tenth Affirmative Defense Due Process Allegations Are Legally Insufficient

The Respondent's Ninth and Tenth Affirmative Defenses assert that the violations of 35 Ill. Adm. Code 620 and the 415 ILCS 5/21(a) alleged in the Complaint constitute retroactive

regulation in violation of the Respondent's due process rights. As noted, these affirmative defenses contain no facts whatsoever that would support these allegations and are thus factually insufficient. These affirmative defenses are also legally insufficient.

In People of the State of Illinois v. Peabody Coal Company, PCB 99-134 at 11-12 & 15 (June 5, 2003), the Board struck affirmative defenses which attempted to raise due process claims based on an allegation that a complaint sought to impose retroactive liability for groundwater violations. The Board found that the complaint in that matter did not contain any allegations that sought to impose retroactive liability. Similarly, the Respondent points to no allegation in the complaint in this matter which seeks to impose retroactive liability. Indeed, no such allegation exists and these affirmative defenses should be stricken.

The Complaint states claims under the Act. However, if facts develop giving rise to causes of action that predate the enactment of the Act, the Complainant reserves the right to amend its Complaint or otherwise pursue any applicable statutory or common law claim.

I. Eleventh Affirmative Defense is Insufficient, Vague and Misstates Law

The first portion of the Eleventh Affirmative Defense asserts that TACO remediation objectives and Practical Quantitation Limitations ("PQLs") are not enforceable standards and cannot form the basis for a violation of the Act. This is a mischaracterization of the Complaint. The Complaint seeks, among other things, to establish a violation of the prohibition against water pollution of Section 12(a) of the Act. Exceedance of TACO remediation standards and other standards such as PQL are not cited as violations, but as factual allegations in support of the violation of Section 12(a). In other words, the Complaint is not necessarily saying that the Respondent violated TACO and PQL standards, but that the exceedances of those standards are

factual indications that the Respondent violated Section 12(a).

The second portion of the Eleventh Affirmative Defense claims that the objectives of 35 Ill. Adm. Code 742 are not applicable to a site subject to a federally delegated program. The Respondent's claim is overly vague in that it does not identify to which federally delegated program it refers (aspects of at least RCRA and the Clean Water Act programs would apply to the site, although both are federally authorized programs, not delegated ones) and does not explain how a defense would arise even if Respondent's allegation were true. It is also plainly wrong. First, as discussed, an exceedance of TACO standards can be used as evidence of violations of Section 12(a) in sites both covered by federally authorized programs and those not covered by federal authorized programs. Second, it is wholly incorrect to state that Part 742 by its terms cannot be used with federally delegated or authorized programs. Section 742.105(b)(3) states that:

> This Part is to be used in conjunction with the procedures and requirements applicable to the following programs:
> . . .
> 3) RCRA Part B Permits and Closure Plans (35 Ill. Adm. Code 724 and 725).

35 Ill. Adm. Code 742.105(b)(3). Since RCRA is a federally authorized program, it could not be more clearly stated that Part 742 can and does apply to sites in federally authorized programs in many instances. Even so, it is entirely unclear how, even if the Respondent was correct, their allegation would constitute a defense to a Section 12(a) violation.

Because the Eleventh Affirmative Defense is vague and misstates the Complaint and the law, it should be stricken.

J. Twelfth Affirmative Defense is Insufficient

The Respondent's twelfth defense states that 415 ILCS 5/49(c) provides a prima facie defense. However, 415 ILCS 5/49(c)(2002) literally states "(Blank)." Allowing the Respondent the assumption that Respondent meant 415 ILCS 5/49(e), the prima facie defense still does not apply. 415 ILCS 5/49(e) states that **compliance** with the rules constitutes a prima facie defense. Complainant alleges that the Respondent did not comply with the Act and the rules and regulations of the Board, thereby negating 415 ILCS 5/49(e) as a defense. The Complainant brought the allegations because of the Respondent's noncompliance. As noted above, simple denials of allegations made in a complaint cannot also be affirmative defenses. Therefore, neither 415 ILCS 5/49(c) nor 415 ILCS 5/49(e) are affirmative defenses.

K. A Reservation of Rights Is Not an Affirmative Defense

The Respondent's Thirteenth Affirmative Defense only seeks to reserve its right to assert future affirmative defenses. Clearly this does not raise a new matter that, if true, would defeat the claims in the Complaint and thus is not a proper affirmative defense. Moreover, the Board rules in Section 103.204(d) address when one may assert an additional affirmative defense after the time for answering the complaint, limiting it to instances where a respondent could not have known of the affirmative defense prior to hearing. The Respondent cannot seek to change that rule by asserting a reservation of rights. The Thirteenth Affirmative Defense is insufficient and should be stricken.

V. CONCLUSION

Many of the affirmative defenses filed by the Respondent require the Complainant and

the Board to guess at the precise factual or legal basis for the defense. Those that are clear are legally and factually deficient or are simply not affirmative defenses. For the reasons stated in this Motion, the affirmative defenses filed by the Respondent are each legally or factually deficient and should be stricken.

WHEREFORE, for the reasons stated, the Complainant, PEOPLE OF THE STATE OF ILLINOIS, requests that the Board issue an order striking all thirteen 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

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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached 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
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Christopher P. Berzan
Assistant Attorney General

Dated: July 25, 2003