ILLINOIS POLLUTION CONTROL BOARD
February 19, 2009

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 07-70
	)	(Enforcement - Water)
J.B. TIMMERMANN FARMS, LTD.,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by G.T. Girard):

The People of the State of Illinois (People) filed a motion to strike affirmative defenses filed by J.B. Timmermann Farms, LTD (respondent). The Board grants the motion and strikes the affirmative defenses. The following order begins with the procedural background, followed by relevant statutory and regulatory provisions. The order then summarizes the affirmative defenses and the motion to strike. Finally, the order sets forth the Board discussion and findings regarding the arguments.

BACKGROUND

On January 29, 2007, the People filed a three-count complaint (Comp.) against respondent. On February 1, 2007, the Board accepted the complaint for hearing. On October 17, 2008, respondent filed an answer and affirmative defenses (Answer) to the three-count complaint. Respondent set forth three affirmative defenses in the answer. *See* Answer at 5-6. On October 29, 2008, the People filed a motion to strike affirmative defenses (Mot.). On December 17, 2009, respondent filed a response (Resp.) to the motion to strike. On December 24, 2008, the People filed a reply (Reply).

The complaint concerns respondent's dairy operation that houses approximately 675 milking cows, located on the north side of Highline Road, in Section 28 of Breese Township, Clinton County. Count I of the complaint alleges that respondent violated Section 12(a) of the Environmental Protection Act (Act) (415 ILCS 5/12(a) (2006)) and Section 302.203 of the Board's regulations, 35 Ill. Adm. Code 302.203. Comp. at 5. Count I alleges that respondent violated these provisions by allowing a livestock waste lagoon to overflow into Shoal Creek. *Id*.

Count II alleges that respondent violated Section 12(f) of the Act (415 ILCS 5/12(f) (2006)) and Section 309.102(a) of the Board's regulations, 35 Ill. Adm. Code 309.102(a). Comp at 6. Count II alleges that respondent violated these provisions because respondent did not have a National Pollutant Discharge Elimination System (NPDES) permit for the site. *Id*.

Count III alleges that respondents violated Section 12(d) of the Act (415 ILCS 5/12(d) (2006)). Comp. at 8. Count III alleges that respondent violated Section 12(d) by depositing

contaminants on land in a manner that created a water pollution hazard because respondent failed to keep livestock waste levels at adequate levels to prevent excessive outside surface water flow. *Id.*

LEGAL BACKGROUND ON AFFIRMATIVE DEFENSES

The Board's procedural rules provide 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 hearing." 35 Ill. Adm. Code 103.204(d). If a pleading does not admit the opposing party's claim, but instead attacks the sufficiency of that claim, it is not an affirmative defense. Worner Agency v. Doyle, 121 Ill. App. 3d 219, 222-23, 459 N.E.2d 633, 636 (4th Dist. 1984). In a valid 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 Co., PCB 97-193, slip op. at 3 (Aug. 6, 1998). The Board has also defined an affirmative defense as a "response to a plaintiff's claim which attacks the plaintiff's legal right to bring an action, as opposed to attacking the truth of claim." Farmer's State Bank v. Phillips Petroleum Co., PCB 97-100, slip op. at 2 n.1 (Jan. 23, 1997) (quoting *Black's Law Dictionary*). Furthermore, "[t]he Board has previously held that affirmative defenses that concern factors in mitigation are not an appropriate affirmative defense to a claim that a violation has occurred." People v. Texaco Refining and Marketing, Inc., PCB 02-3, slip op. at 5 (Nov. 6, 2003); citing People v. Geon Co., Inc., PCB 97-62 (Oct. 2, 1997); People v. Midwest Grain Products of Illinois, Inc., PCB 97-179 (Aug. 21, 1997).

STATUTORY AND REGULATORY BACKGROUND

Section 12 of the Act provides that no person shall:

(a) Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act

(d) Deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard.

(f) Cause, threaten or allow the discharge of any contaminant into the waters of the State, as defined herein, including but not limited to, waters to any sewage works, or into any well or from any point source within the State, without an NPDES permit for point source discharges issued by the Agency under Section 39(b) of this Act, ... 415 ILCS 5/12 (2006).

Section 302.203 of the Board's regulations provides:
Waters of the State shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, color or turbidity of other than natural

origin. The allowed mixing provisions of Section 302.102 shall not be used to comply with the provisions of this Section. 35 Ill. Adm. Code 302.203.

Section 309.102(a) provides:

Except as in compliance with the provisions of the Act, Board regulations, and the CWA, and the provisions and conditions of the NPDES permit issued to the discharger, the discharge of any contaminant or pollutant by any person into the waters of the State from a point source or into a well shall be unlawful. 35 Ill. Adm. Code 309.102(a).

AFFIRMATIVE DEFENSES

The respondent asserts three affirmative defenses in the answer. Answer at 5-6. First, respondent asserts that the lagoon overflow occurred subsequent to a heavy rainfall. Answer at 5. Therefore, respondent argues the overflow was an "Act of God" and outside the control of respondent. *Id*. Second, respondent claims that several other landowners in the area had water and water retention systems fail at the same time as respondent. *Id*. Third, respondent alleges that respondent has acted to rectify the situation and to prevent further overflows. Answer at 6.

The respondent argues that the affirmative defenses as plead are sufficient and the details missing are issues for discovery. Resp. at 1. Respondent maintains that the affirmative defenses are legally relevant as the complaint seeks a civil penalty. Resp. at 1. Respondent states that the affirmative defense are "relevant and material to the issue of possible imposition of a penalty" if a violation is found. Resp. at 2.

MOTION TO STRIKE

The People argue that the affirmative defenses should be stricken as the defenses are not factually sufficient. Mot. at 1. For example, the People argue that respondent merely states that there was an unusually heavy rainfall, but does not plead when, for how long, or even how much rain was received. Mot. at 3. The People further maintain that the respondent gives no factual detail about the neighbors' overflows or how those would defeat the claims against respondent. *Id*. The People also claim that respondent gives no facts on what work was done or when. Mot. at 4.

The People opine that the law in Illinois is clear that the facts in the pleadings must be specific. Reply at 2, citing Int'l Ins. Co. v. Sargent & Lundy, 242 Ill. App. 3d 614, 609 N.E.2d 842, 853 (1st Dist. 1993). The People argue that respondent's affirmative defenses are lacking in detail and the facts plead are insufficient. Reply at 2.

The People also assert that the affirmative defenses must be struck as the defenses are legally insufficient. Mot. at 4. More specifically, the People maintain that "Act of God" is not a defense against water pollution. *Id*., citing Perkinson v. PCB, 187 Ill. App. 3d 689, 543 N.E.2d 901, 904 (3rd Dist. 1989); Freeman Coal Mining Corp. v. PCB, 21 Ill. App. 3d 157, 313 N.E.2d 616 (5th Dist. 1974). The People state that the Freeman court ruled that accidents or "Acts of

God" were not a defense to a discharge. *Id*. The People further state that unintentional discharges are not a defense. *Id*. The People argue that to constitute a proper affirmative defense, an allegation must be capable of defeating the complaint's claim. Mot. at 5; Reply at 3. As case law establishes that an "Act of God" is not defense, the People assert that the first affirmative defense should be stricken. *Id*.

The People argue that the remaining affirmative defenses are also legally insufficient. Mot. at 5-6. The People opine that the alleged facts that others also had problems and that respondent has reached compliance do not alleviate the respondent's legal obligations. Mot. at 6. Therefore, the People maintain the affirmative defenses should be stricken. *Id*.

DISCUSSION

In Freeman, the court reiterates that the Act is "*malum prohibitum*, no proof of guilty knowledge or *mens rea* is necessary to a finding of guilt." Freeman, 313 N.E.2d 621, citing Meadowlark Farms, Inc. v. PCB, 17 Ill. App. 3d 851, 308 N.E.2d 829 (5th Dist. 1974). The Freeman court ruled that a defense that the discharges were accidental, unintentional, and occurred despite the best efforts of the respondent were not defenses. *Id*. Freeman looked to other cases for support of this decision and noted that even an "Act of God" was not a defense. Freeman, 313 N.E.2d 621. The Perkinson court noted the decisions in both Freeman and Meadowlark Farms in finding that the respondent had caused of allowed the pollution. Perkinson, 543 N.E.2d 904.

Based on the pleadings and the case law, the Board finds that the affirmative defense alleging an "Act of God" was responsible for the spill must be stricken. The Board and the courts have long held that *mens rea* is not required to prove that a respondent "caused or allowed" a violation of the Act (415 ILCS 5/12 (2006)). Therefore, the Board strikes the first affirmative defense.

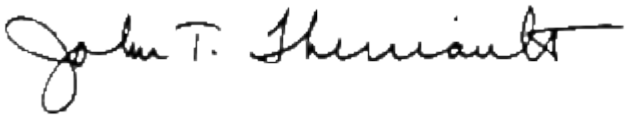
The Board has determined that an affirmative defense concerning factors in mitigation with regard to any penalty that may be assessed in this matter, is not an appropriate affirmative defense to a claim that a violation has occurred. People v. Texaco Refining and Marketing, Inc., PCB 02-3, slip op. at 5 (Nov. 6, 2003); citing People v. Geon Co., Inc., PCB 97-62 (Oct. 2, 1997) People v. Midwest Grain Products of Illinois Inc., PCB 97-179, slip op. at 5(Aug, 21, 1997); People v. Douglas Furniture of California, Inc., PCB 97-133, slip op. at 6(May 1, 1997). By respondent's own admission the remaining two affirmative defenses are pled because they are "relevant and material to the issue of the possible imposition of a penalty" if the Board finds a violation. *See* Resp. at 2. Therefore, the Board finds that the second and third affirmative defenses must be stricken. The Board strikes the second and third affirmative defenses.

CONCLUSION

The Board strikes the three alleged affirmative defenses set forth by respondent in the answer. None of the alleged defenses appropriately attack complainant's legal right to bring an action. Therefore the Board finds that all three alleged affirmative defenses are not proper affirmative defenses and the defenses must be stricken.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 19, 2009, by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board