

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
vs.)	PCB No. 10-61
)	(Water - Enforcement)
FREEMAN UNITED COAL MINING)	
COMPANY, LLC, a Delaware limited)	
liability company, and SPRINGFIELD)	
COAL COMPANY, LLC, a Delaware)	
limited liability company,)	
)	
Respondents.)	

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

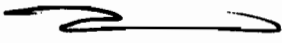
PLEASE TAKE NOTICE that on July 29, 2010, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, PEOPLE'S RESPONSE TO AFFIRMATIVE DEFENSES BY FREEMAN UNITED COAL MINING COMPANY, LLC and PEOPLE'S RESPONSE TO AFFIRMATIVE DEFENSES BY SPRINGFIELD COAL, LLC, copies of which are attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: 
THOMAS DAVIS, Chief
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: July 29, 2010

CERTIFICATE OF SERVICE

I hereby certify that I did on July 29, 2010, cause to be served by United States Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instruments entitled NOTICE OF ELECTRONIC FILING, PEOPLE'S RESPONSE TO AFFIRMATIVE DEFENSES BY FREEMAN UNITED COAL MINING COMPANY, LLC and PEOPLE'S RESPONSE TO AFFIRMATIVE DEFENSES BY SPRINGFIELD COAL, LLC, upon the Respondents listed on the Service List.



Thomas Davis, Chief
Assistant Attorney General

This filing is submitted on recycled paper.

SERVICE LIST

E. Lynn Grayson
Bill S. Forcade
James A. Vroman
Jenner & Block LLP
353 N. Clark Street
Chicago, IL 60654-3456

Dale Guariglia
Bryan Cave LLP
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, MO 63102-2750

Jessica Dexter
Environmental Law and Policy Center
35 East Wacker Drive, Suite 1300
Chicago, IL 60601

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
Springfield, IL 62794

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
)
 ENVIRONMENTAL LAW AND)
 POLICY CENTER, on behalf of PRAIRIE)
 RIVERS NETWORK and SIERRA CLUB,)
 ILLINOIS CHAPTER,)
)
 Intervenor,)
)
 v.)
)
 FREEMAN UNITED COAL MINING)
 COMPANY, LLC,)
 a Delaware limited liability company, and)
 SPRINGFIELD COAL COMPANY, LLC,)
 a Delaware limited liability company,)
)
 Respondents.)

**PCB No. 2010-061
 (Water-Enforcement)**

**PEOPLE'S RESPONSE TO AFFIRMATIVE DEFENSES
 BY FREEMAN UNITED COAL MINING COMPANY, LLC**

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, hereby responds to the affirmative defenses pleaded by this Respondent in its Answer filed on July 23, 2010, and states as follows:

1. Section 103.204(d) of the Board's procedural rules provides in pertinent part as follows: "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." Section 101.100(b) provides that the Supreme Court Rules and the Code of Civil Procedure do not expressly apply to Board proceedings; however, the Board may look to these legal requirements "for guidance where the Board's procedural rules are silent." The Board

has noted that its procedural rules contain provisions for the filing of affirmative defenses and that the parties are expected to present arguments regarding the applicability of the Code of Civil Procedure if the Board is to consider such other requirements. See, e.g., *People v. Belden Tools et al.*, PCB 96-208 (August 1, 1996). The People respectfully suggest that Section 2-613(d) of the Code of Civil Procedure [735 ILCS 5/2-613(d)], which pertains to affirmative defenses in civil actions, and more particularly the appellate opinions thereunder regarding the adequacy of pleading affirmative defenses, are useful to the Board's consideration of such issues.

2. It is well settled in the case law that the facts of an affirmative defense must be alleged with particularity. Whether a defense is an affirmative defense turns on whether the defense "gives color to the opposing party's claim and thus asserts a new matter by which the apparent right is defeated." *Ferris Elevator Co. v. Inc. v. Neffco, Inc.*, 285 Ill. App. 3d 350, 354 (3rd Dist. 1996). An affirmative defense that lacks a factual basis is inadequately pled. *Estate of Wrage v. Tracey*, 194 Ill. App. 3d 117, 122 (1st Dist. 1990). The facts establishing the defense must be pleaded by the defendant with the same degree of specificity as is required of a plaintiff alleging the essential elements of a cause of action. *Goldman v. Walco Tool & Engineering Co.*, 243 Ill. App. 3d 981, 989 (1st Dist. 1993), appeal denied 152 Ill.2d 558 (1993). An exception to this rule applies where the facts constituting the defense are already pleaded in the complaint.

3. The burden of proof as to any particular affirmative defense is upon the party asserting the defense. *Pascal P. Paddock, Inc. v. Glennon*, 32 Ill.2d 51, 54 (1965). What must be proven must first be pleaded.

4. The Complainant first objects generally to the manner in which this Respondent pleads its purported defenses. Freeman United prefaces its assertion of affirmative defenses with

a denial of all “alleged wrongdoing” and all allegations not expressly admitted and with a disclaimer of any assumption of “the burden of proof on these defenses where substantive law provides otherwise.” Answer at pages 18-19. By these statements, the Respondent neither acknowledges or admits the claims of violation that the Respondent seeks to defeat by asserting new matters nor assumes the burden of proving such new matters. As will be seen from addressing each purported defense, the Respondent also fails to plead facts sufficient to support such new matters.

First Affirmative Defense

5. The Respondent contends that the claims “are barred in whole or in part by the applicable statute of limitations and by the doctrine of laches.” However, the Respondent pleads no allegations of fact to which the Complainant must respond.

6. The Complainant objects to the first contention because the Respondent fails to identify what state of limitations is purportedly “applicable” to this matter. The Respondent’s contention is both legally and factually insufficient.

7. The Complainant objects to the second contention because the Respondent fails to describe any alleged delay in bringing this enforcement case, to explain how any such delay may have been “unreasonable” in light of the circumstances, and to assert that the Respondent is somehow “prejudiced” by any such delay. *Laches* is an equitable doctrine which precludes the assertion of a claim by a litigant whose unreasonable delay in raising that claim has prejudiced the opposing party. *People ex rel. Daley v. Strayhorn* (1988), 121 Ill.2d 470, 482. In order to properly plead this affirmative defense, a litigant must allege the two elements necessary for a finding of *laches*: 1) lack of diligence by the party asserting the claim, and 2) prejudice to the

opposing party resulting from the delay. *Tully v. State* (1991), 143 Ill.2d 425, 432. As a creature of statute, the Board has no explicit grant of equitable powers and cannot properly entertain such a defense. This second contention is also both legally and factually insufficient.

Second Affirmative Defense

8. The Respondent pleads herein allegations of fact to which the Complainant will respond directly: The Complainant admits that the Illinois EPA issued a notice of violation to Freeman United in March 2005. The Complainant admits that the Illinois EPA accepted a compliance commitment agreement on June 16, 2005. The Complainant admits that the Respondent fully complied with the terms of the compliance commitment agreement; however, the Complainant is without knowledge or information to admit or deny that Freeman United “*believed* that it was taking all actions IEPA deemed to be necessary. . . .” The Complainant admits that the Respondent sought to extend the compliance commitment agreement. The Complainant admits that the Illinois EPA rejected the initial request to extend the compliance commitment agreement. The Complainant admits that on August 30, 2007 Freeman United submitted a revised proposal for extending the compliance commitment agreement. The Complainant admits that the Illinois EPA did not respond in writing to the August 30, 2007 revised proposal. The two remaining statements regarding the application of provisions of Section 31(a) of the Act are legal conclusions and merit no response.

Third Affirmative Defense

9. The Respondent’s contentions herein are legal conclusions and merit no response.

Fourth Affirmative Defense

10. The Respondent pleads herein an allegation of fact to which the Complainant will respond directly: The Complainant admits that the Illinois EPA proposed in April 2010 that Grindstone Creek be de-listed from the Section 303(d) Report.

Fifth Affirmative Defense

11. The Respondent pleads herein an allegation of fact to which the Complainant will respond directly: The Complainant admits that levels of sulfates and manganese in surface water runoff from the site have been documented through sampling and analyses prior to mining activities at the site and that some levels of sulfates and manganese exceeded some of the NPDES permit limits.

Sixth Affirmative Defense

12. The Respondent's contentions herein are legal conclusions and merit no response.

Seventh Affirmative Defense

13. The Respondent contends that the claims "are barred by the doctrine of waiver." Waiver is an affirmative defense which is itself waived if not specifically pleaded. *Dragon Construction, Inc. v. Parkway Bank & Trust*, 287 Ill. App. 3d 29, 34 (1st Dist. 1997). However, the Respondent pleads no allegations of fact to which the Complainant must respond.

Eighth Affirmative Defense

14. The Respondent contends that the claims "are barred by the doctrine of estoppel." Estoppel is an affirmative defense and facts asserting it must be pleaded and proved by the party relying on it by clear, precise and unequivocal evidence. *Forest Inv. Corp. v. Chaplin*, 55 Ill. App. 3d 429, 434 (4th Dist. 1965). However, the Respondent pleads no allegations of fact to which the Complainant must respond.

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, hereby responds and objects to the affirmative defenses suggested by this Respondent.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,

LISA MADIGAN,
Attorney General
of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: 

THOMAS DAVIS, Chief
Environmental Bureau
Assistant Attorney General

Attorney Reg. No. 3124200
500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: 7/28/10

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
)
 ENVIRONMENTAL LAW AND)
 POLICY CENTER, on behalf of PRAIRIE)
 RIVERS NETWORK and SIERRA CLUB,)
 ILLINOIS CHAPTER,)
)
 Intervenor,)
)
 v.)
)
 FREEMAN UNITED COAL MINING)
 COMPANY, LLC,)
 a Delaware limited liability company, and)
 SPRINGFIELD COAL COMPANY, LLC,)
 a Delaware limited liability company,)
)
 Respondents.)

PCB No. 2010-061
(Water-Enforcement)

PEOPLE'S RESPONSE TO AFFIRMATIVE DEFENSES
BY SPRINGFIELD COAL, LLC

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, hereby responds to the affirmative defenses pleaded by this Respondent in its Answer filed on July 23, 2010, and states as follows:

1. Section 103.204(d) of the Board's procedural rules provides in pertinent part as follows: "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." Section 101.100(b) provides that the Supreme Court Rules and the Code of Civil Procedure do not expressly apply to Board proceedings; however, the Board may look to these legal requirements "for guidance where the Board's procedural rules are silent." The Board

has noted that its procedural rules contain provisions for the filing of affirmative defenses and that the parties are expected to present arguments regarding the applicability of the Code of Civil Procedure if the Board is to consider such other requirements. See, e.g., *People v. Belden Tools et al.*, PCB 96-208 (August 1, 1996). The People respectfully suggest that Section 2-613(d) of the Code of Civil Procedure [735 ILCS 5/2-613(d)], which pertains to affirmative defenses in civil actions, and more particularly the appellate opinions thereunder regarding the adequacy of pleading affirmative defenses, are useful to the Board's consideration of such issues.

2. It is well settled in the case law that the facts of an affirmative defense must be alleged with particularity. Whether a defense is an affirmative defense turns on whether the defense "gives color to the opposing party's claim and thus asserts a new matter by which the apparent right is defeated." *Ferris Elevator Co. v. Inc. v. Neffco, Inc.*, 285 Ill. App. 3d 350, 354 (3rd Dist. 1996). An affirmative defense that lacks a factual basis is inadequately pled. *Estate of Wrage v. Tracey*, 194 Ill. App. 3d 117, 122 (1st Dist. 1990). The facts establishing the defense must be pleaded by the defendant with the same degree of specificity as is required of a plaintiff alleging the essential elements of a cause of action. *Goldman v. Walco Tool & Engineering Co.*, 243 Ill. App. 3d 981, 989 (1st Dist. 1993), appeal denied 152 Ill.2d 558 (1993). An exception to this rule applies where the facts constituting the defense are already pleaded in the complaint.

3. The burden of proof as to any particular affirmative defense is upon the party asserting the defense. *Pascal P. Paddock, Inc. v. Glennon*, 32 Ill.2d 51, 54 (1965). What must be proven must first be pleaded.

First Affirmative Defense

4. The Respondent's contentions herein are legal conclusions and merit no response.

Second Affirmative Defense

5. The Respondent pleads herein allegations of fact to which the Complainant will respond directly: The Complainant admits that Freeman United submitted in August 2003 an application to renew the NPDES permit and that the Illinois EPA has presently not yet taken action. The Complainant objects to the speculation and conjecture in the last statement regarding what might have happened had a revised or renewed permit been timely issued.

Third Affirmative Defense

6. The Respondent's contentions herein are legal conclusions and merit no response.

Fourth Affirmative Defense

7. The Respondent pleads herein an allegation of fact to which the Complainant will respond directly: The Complainant admits that the Illinois EPA proposed in April 2010 that Grindstone Creek be de-listed from the Section 303(d) Report.

Fifth Affirmative Defense

8. The Respondent pleads herein an allegation of fact to which the Complainant will respond directly: The Complainant admits that levels of sulfates and manganese in surface water runoff from the site have been documented through sampling and analyses prior to mining activities at the site and that some levels of sulfates and manganese exceeded some of the NPDES permit limits.

Sixth Affirmative Defense

9. The Respondent contends that the claims "are barred by the statute of limitations and/or statute of repose." However, the Respondent pleads no allegations of fact to which the

Complainant must respond.

10. The Respondent fails to identify what state of limitations is purportedly applicable to this matter. The Respondent's contention is both legally and factually insufficient.

11. The Respondent fails to identify what state of repose is purportedly applicable to this matter. The Respondent's alternative contention is both legally and factually insufficient.

Seventh Affirmative Defense

12. The Respondent pleads herein an allegation of fact to which the Complainant will respond directly: The Complainant denies that Springfield Coal entered into a compliance commitment agreement with the Illinois EPA on August 30, 2007.

Eighth Affirmative Defense

13. The Respondent contends that the claims "are barred by the doctrines of laches, estoppel and/or waiver." However, the Respondent pleads no allegations of fact to which the Complainant must respond.

14. *Laches* is an equitable doctrine which precludes the assertion of a claim by a litigant whose unreasonable delay in raising that claim has prejudiced the opposing party. *People ex rel. Daley v. Strayhorn* (1988), 121 Ill.2d 470, 482. In order to properly plead this affirmative defense, a litigant must allege the two elements necessary for a finding of *laches*: 1) lack of diligence by the party asserting the claim, and 2) prejudice to the opposing party resulting from the delay. *Tully v. State* (1991), 143 Ill.2d 425, 432. As a creature of statute, the Board has no explicit grant of equitable powers and cannot properly entertain such a defense.

15. Estoppel is an affirmative defense and facts asserting it must be pleaded and proved by the party relying on it by clear, precise and unequivocal evidence. *Forest Inv. Corp. v.*

Chaplin, 55 Ill. App. 3d 429, 434 (4th Dist. 1965).

16. Waiver is an affirmative defense which is itself waived if not specifically pleaded.

Dragon Construction, Inc. v. Parkway Bank & Trust, 287 Ill. App. 3d 29, 34 (1st Dist. 1997).

Ninth Affirmative Defense

17. The Respondent's contentions herein are legal conclusions and merit no response.

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, hereby responds and objects to the affirmative defenses suggested by this Respondent.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,

LISA MADIGAN,
Attorney General
of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: 

THOMAS DAVIS, Chief
Environmental Bureau
Assistant Attorney General

Attorney Reg. No. 3124200
500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: 7/28/10