

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,)	
<i>ex rel.</i> LISA MADIGAN, Attorney General)	
of the State of Illinois,)	
)	
Complainant,)	PCB 08-7
)	(Enforcement – Water)
v.)	
)	
UNION PACIFIC RAILROAD COMPANY,)	<u>VIA ELECTRONIC FILING</u>
a Delaware corporation,)	
)	
Respondent.)	

NOTICE OF FILING

John Therriault
Illinois Pollution Control Board
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Union Pacific Railroad Company
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Bradley P. Halloran
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Please take notice that on August 9, 2010, I have filed with the Office of the Clerk of the Illinois Pollution Control Board by electronic filing Complainant's Motion to Strike and Dismiss Respondent's Affirmative Defenses, along with Notice of Filing and Certificate of Service, a copy of which is attached hereto and served upon you.

Respectfully submitted,

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

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and was subsequently discharged into Mud Creek. On January 8, 2010, the Respondent Union Pacific Railroad Company filed its answer and three Affirmative Defenses. The Respondent's Affirmative Defenses are insufficient as a response to Complainant's allegations, and should therefore be stricken.

II. LEGAL STANDARD FOR AFFIRMATIVE DEFENSES

An affirmative defense is "A defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true." Blacks Law Dictionary (9th edition, 2009). In addition, "The facts constituting an affirmative defense . . . must be plainly set forth in the answer," 735 ILCS 5/2-613(d) (2009), and must be pled with the same degree of specificity required by a plaintiff to establish a cause of action. International Insurance Co. v. Sargent & Lundy, 242 Ill. App.3d 614, 630, 609 N.E.2d 842, 853 (1st Dist. 1993). An affirmative defense which must be plead gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated. Ferris Elevator Company, Inc. v. Neffco, Inc., 285 Ill. App.3d 350, 354, 674 N.E.2d 449, 452 (3rd Dist. 1996). In other words, an affirmative defense confesses or admits the opposing party's cause of action, but seeks to avoid it by asserting new matter not contained in the complaint and answer. Worner Agency, Inc. v. Doyle, 121 Ill. App.3d 219, 222, 459 N.E.2d 633, 635 (4th Dist. 1984).

III. RESPONDENT'S AFFIRMATIVE DEFENSES ARE INSUFFICIENT

First Affirmative Defense

Respondent's First Affirmative Defense is:

Plaintiff's claims for injunctive relief are moot.

Respondent asserts mootness without citing to a single fact that supports its defense.

Courts have held that an NPDES permit holder's *substantial subsequent compliance* with its

NPDES permit does not automatically render action against it moot. Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc., ("Laidlaw") 528 U.S. 167, 174, 120 S.Ct. 693, 700 (2000). A claim for injunctive relief may become moot based on a defendant's voluntary conduct if subsequent events make it absolutely clear that the allegedly wrongful behavior *could not reasonably be expected to recur*. Friends of the Earth, Inc. v. Chevron Chem. Co., ("Chevron") 900 F.Supp. 67, 71 (E.D. TX 1995) (emphasis added).

The Court *In re Lenz Oil Service, Inc.*, 65 B.R. 292, 295 (Bankr. N.D. IL 1986) while addressing the debtor's environmental liability under the Act, held that a bankrupt debtor's cessation of business operations did not render the State's environmental enforcement claim against it moot. The Lenz Oil court further held that "... Debtor by continuing to permit the source of contamination to exist, is further polluting the area." Id. at 294. Respondent has not terminated its NPDES permit. It continues to operate under the same NPDES permit. By continuing to permit the source of contamination to exist, Respondent will continue to pollute.

Respondent in this case continues to own the Site where the pollution occurred and continues to operate on the Site. As long as Respondent continues to conduct the same business at the Site that was the cause of the pollution, it is likely that pollution will occur. The burden is on Respondent to convince the Board that the "... *challenged conduct cannot reasonably be expected to start up again...*" (emphasis added). Chevron, 900 F.Supp. 67, 71 (E.D. TX 1995). Respondent has not met this burden. Respondent has not asserted an iota of fact to show that the challenged conduct cannot be reasonably expected to recur at the Site. Therefore, Respondent's First Affirmative Defense must be stricken and dismissed as being insufficient in fact and in law.

Second Affirmative Defense

Respondent's Second Affirmative Defense is:

Union Pacific lacked the capability to control the alleged releases that are the subject matter of plaintiff's complaint and, therefore, did not cause or allow or threaten the alleged releases in violation of the Illinois Environmental Protection Act or other law.

Illinois courts have repeatedly held that “. . . the analysis applied by courts in Illinois for determining whether an alleged polluter has violated the Act is whether the alleged polluter exercised sufficient control over the source of the pollution.” People of the State of Illinois v. A.J. Davinroy Contractors (“Davinroy”) 249 Ill. App.3d 788, 618 N.E.2d 1282, 1286 (5th Dist. 1993).

Further, Illinois courts have found environmental liability even if the “. . . discharges were accidental and not intentional or that they were the result of an “Act of God,” or beyond (defendant’s) control.” Freeman Coal Mining Corporation v. Pollution Control Board, 21 Ill. App.3d 157, 163, 313 N.E.2d 621 (1974).

In Bath, Inc. v. Pollution Control Board, 10 Ill. App.3d 507, 510, 294 N.E.2d 778 (4th Dist. 1973), the alleged polluter was the owner of a landfill and therefore in control of the premise on which the pollution occurred. Bath, Inc. argued that it did not know the cause of the pollution, but was nevertheless held responsible for it. In Davinroy, the Court held that since the pumps which caused the pollution events were under the control of Davinroy, the owner of the premise, had the capacity to control the source of the pollution and therefore should be held liable for a violation of the Act. Davinroy, 618 N.E.2d at 1287.

In this case, the Respondent had the capability of controlling the source of the pollution, specifically the Proviso Yard, Global II intermodal, and oil water separator in question. The Respondent admits in its answer that it operates a rail yard and intermodal facility at the Proviso Yard and Global II locations. Def.’s Ans. ¶ 4 (Jan. 8, 2010). The Respondent also admits that it retains an ND PES permit for a discharge point at Proviso Yard where water flows over several

weirs in an oil water separator and then is released into Mud Creek. Def.'s Ans. ¶ 5 (Jan. 8, 2010). There is no doubt that Respondent owns and operates the property where both fuel releases occurred, and therefore had the capability to control the source of the 2005 and 2006 pollution. Therefore, Respondent's second Affirmative Defense should be dismissed as being insufficient in fact and in law.

Third Affirmative Defense

Respondent's Third Affirmative Defense is:

Union Pacific undertook extensive precautions to prevent the intervening causes of the alleged releases that are the subject matter of plaintiff's complaint and, therefore, did not cause or allow or threaten the alleged release of diesel fuel in violation of the Illinois Environmental Protection Act or other law.

As stated above, the owner of the source of pollution causes or allows the pollution within the meaning of the statute and is responsible for that pollution unless the facts establish that the owner either lacked the capacity to control the source, or had undertaken extensive precautions to prevent vandalism or other intervening causes. Davinroy, 249 Ill. App.3d at 794, 618 N.E.2d at 1287.

Perkinson v. Illinois Pollution Control Board, 187 Ill. App.3d 689, 691, 543 N.E.2d 901, 902 (3rd Dist. 1989), is a case that deals with the extent of precautions that must be undertaken to shield a polluting property owner from liability. In Perkinson, the Pollution Control Board ("Board") considered whether the owner of a swine farm should be held responsible for a violation of the Act where a trench, dug by an unknown person, resulted in the release of liquid swine waste into a nearby creek. The Board held that since there was nothing to indicate that Perkinson had taken any precautions against vandalism or other intervening causes, he was liable


for the pollution originating on his property. Perkinson, 187 Ill. App.3d at 693, 543 N.E.2d at 903.

In this case, the 2006 diesel fuel incident occurred when a third party entered the Respondent's property and proceeded to spill fuel from a broken fuel line on its mobile storage tank onto the pavement below. The Respondent's level of precautions is closer to the level seen in Perkinson. The Respondent did not show what precautions it took to prevent a third party from spilling contaminants on the premises it owns and operates. The Respondent's third Affirmative Defense is insufficient in fact and in law and must therefore be stricken and dismissed.

IV. CONCLUSION

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that this Court enter an order striking and dismissing all of Respondent, UNION PACIFIC RAILROAD COMPANY'S affirmative defenses.

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

By: 
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CERTIFICATE OF SERVICE

I, Zemeheret Bereket-Ab, an attorney, hereby certify that I caused a copy of Complainant's Motion to Strike and Dismiss Respondent's Affirmative Defenses, along with a Notice of Filing and a Certificate of Service, to be served upon the persons listed on the Notice of Filing, via electronic and regular mail.



ZEMEHERET BEREKET-AB