

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)

Complainant,)

v.)

ILLINOIS FUEL COMPANY, LLC,)

a Kentucky limited liability company,)

Respondent.)

**PCB No. 10-86
(Water-Enforcement)**

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

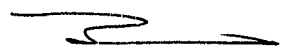
PLEASE TAKE NOTICE that on October 29, 2010, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, PEOPLE'S RESPONSE TO AFFIRMATIVE DEFENSES, a copy of which is attached hereto and herewith served upon you.

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

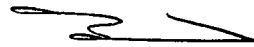
BY: 

Thomas Davis, Chief
Assistant Attorney General
Environmental Bureau

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

CERTIFICATE OF SERVICE

I hereby certify that I did on October 29, 2010, cause to be served by First Class 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 and PEOPLE'S RESPONSE TO AFFIRMATIVE DEFENSES upon the persons listed on the Service List.



Thomas Davis, Chief
Assistant Attorney General

This filing is submitted on recycled paper.

SERVICE LIST

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)

Complainant,)

v.)

**ILLINOIS FUEL COMPANY, LLC,)
a Kentucky limited liability company,)**

Respondents.)

**PCB No. 10-086
(Water-Enforcement)**

PEOPLE'S RESPONSE TO AFFIRMATIVE DEFENSES

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 October 25, 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 contends that it "is not, nor was it ever, the permittee of what is being called the Gallatin County Mine, and accordingly cannot have violated it's [sic] NPDES permit, nor violated water pollution standards premised on it." The Complainant admits that NPDES Permit No. IL0061166 was neither issued or transferred to the Respondent by the Illinois EPA. However, the Respondent pleads no additional allegations of fact to which the Complainant must respond.

Second Affirmative Defense

5. The Respondent pleads herein that it “was engaged in lawful reclamation activities pursuant to permits, approvals and directions from the Illinois Department of Natural Resources . . . and consequently, the standards being urged against it are inapplicable, and such activities cannot constitute water pollution.” These statements are legal conclusions and merit no response.

Third Affirmative Defense

6. The Respondent makes the following claim: “Any concentration limits in any referenced NPDES permit should not be construed as applying to reclamation, but solely as to active mining operations.” These statements 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: “Prior to any mining activities at the mines, naturally occurring constituents, including sulfates and manganese, were present. . . .” The Complainant admits that sulfates and manganese were present prior to mining operations. The remainder of claim is that the presence of these naturally occurring constituents “prevent technically and economically reasonable methods for controlling alleged exceedances;” these legal conclusions and merit no response.

8. The Complainant objects that none of the affirmative defenses is pleaded with the necessary legal and factual sufficiency to actually constitute a valid bar to liability. More importantly, a litigant cannot guess at what the opposing party is asserting as a potential defense; the lack of factual specificity violates Section 103.204(d).

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 the 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
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Dated: 10/29/10