BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	PCB No. 2011-067
v.	)	(Enforcement-Water)
	)	
TOWN OF CORTLAND,	)	
an Illinois municipal corporation,	)	
	)	
Respondent.	)	

NOTICE OF FILING

TO: Roy M. Harsch, Esq.
Drinker Biddle & Reath LLP
191 North Wacker Drive, Suite 3700
Chicago, Illinois 60606

Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph Street, Ste. 11-500
Chicago, Illinois 60601

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601

PLEASE TAKE NOTICE that on September 23, 2011, I filed with the Office of the Clerk of the Illinois Pollution Control Board People's Motion to Strike and Dismiss Defendant's Affirmative Defenses, Notice of Filing, and a Certificate of Service on behalf of the People of the State of Illinois, a copy of which is attached and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General
State of Illinois

BY: _____

ZEMEHERET BEREKET-AB
Assistant Attorney General
Environmental Bureau
69 W. Washington St., 18th Flr.
Chicago, IL 60602
(312) 814-3816

DATE: September 23, 2011

THIS FILING IS SUBMITTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
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	)	(Enforcement – Water)
TOWN OF CORTLAND,	)	
an Illinois municipal corporation,	)	
	)	
Respondent.	)	

PEOPLE'S MOTION TO STRIKE AND DISMISS RESPONDENT'S AFFIRMATIVE DEFENSES

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS ("People" or "State"), and pursuant to Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615 (2010), moves the Board for an order to strike and dismiss Respondent's, TOWN OF CORTLAND'S ("Cortland"), Affirmative Defenses. In support thereof, the People states as follows:

INTRODUCTION

On April 7, 2011, the People filed a three-count Complaint for Civil Penalties against Respondent. In the Complaint, the People alleged violations of Section 12(a), 12(b) and 12(d), of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/12(a), 12(b) and 12(d) (2010).

On June 3, 2011, Cortland filed its Answer and Affirmative Defenses to the Complaint. The People move the Board to strike and dismiss Cortland's Affirmative Defenses, for the reasons outlined below.

LEGAL STANDARD

The Illinois Supreme Court has interpreted the pleading standards for affirmative defenses as follows:

> An affirmative defense does not negate the essential elements of the plaintiff's cause of action. To the contrary, it admits the legal sufficiency of that cause of action. It assumes that the defendant would otherwise be liable, if the facts alleged are true, but asserts new matter by which the plaintiff's apparent right to recovery is defeated.

Vroegh v. J & M Forklift, 165 Ill.2d 523, 530 (1995) (internal citations omitted).

If the pleading does not admit the apparent right to the claim and instead merely attacks the sufficiency of the claim, it is not a valid affirmative defense. Worner Agency, Inc. v. Doyle, 121 Ill.App.3d 219, 222-223 (4th Dist. 1984). Affirmative defenses differ from counterclaims in that counterclaims seek affirmative relief, whereas affirmative defenses seek to defeat a cause of action. Dudek, Inc. v. Shred Pax, Corp., 254 Ill.App.3d 862, 871 (1st Dist. 1993).

Thus, the issue raised by an affirmative defense must be one outside of the four corners of the complaint. Further, the facts constituting any affirmative defense "must be plainly set forth in the answer," 735 ILCS 5/2-613(d) (2010), and must be pleaded specifically, in the same manner as facts in a complaint. Int'l Ins. Co. v. Sargent & Lundy, 242 Ill. App. 3d 614, 630 (1st Dist. 1993) citing Kermeen v. City of Peoria, 65 Ill.App.3d 969, 973 (3rd Dist. 1978).

A 2-615 motion to strike and/or dismiss an affirmative defense admits all well-pleaded facts constituting the defense, together with all reasonable inferences which may be drawn therefrom, and raises only a question of law as to the sufficiency of the pleading. Raprager v. Allstate Ins. Co., 183 Ill.App.3d 847, 854 (2nd Dist. 1989) (internal citations omitted).

ARGUMENT

I. First Affirmative Defense

Respondent's first affirmative defense is that the "Illinois EPA did not provide the Town of Cortland with a notice of violation, as required by 415 ILCS 5/31(a)(1), for all of the alleged violations contained in this complaint and therefore did not give the Town of Cortland the

opportunity to respond to Illinois EPA regarding the alleged violations." This alleged defense is a denial of an allegation made in the Complaint. The Complaint states that on "September 24, 2009, the Illinois EPA sent a Violation Notice to Cortland for failure to comply with its State Operating Permit and unlawful discharge of wastewater." Respondent's alleged affirmative defense is a denial of the allegation and fails to set forth new facts or arguments which will defeat the claim. This is not an affirmative defense. Therefore, the first affirmative defense should be stricken and dismissed with prejudice, as a matter of law.

II. Second Affirmative Defense

Respondent's second affirmative defense is a failure to "state a cause of action." This alleged defense is legally insufficient, and it should be dismissed as a matter of law. It does not meet the fundamental requirement that an affirmative defense give color to a complainant's claim and assert new matter that defeats it. If the pleading does not admit the apparent right to the claim and instead merely attacks the sufficiency of the claim, it is not a valid affirmative defense. Worner Agency, Inc. v. Doyle, 121 Ill. App. 3d 219, 222-23, 459 N.E. 2d 633 (4th Dist. 1984). By contending that the complaint fails to state a claim for which relief can be granted, Respondent fails to admit the apparent right to the claim. Respondent cannot establish in the same defense that there is an apparent right to a claim and no claim for which relief can be granted.

Dismissal for failure to state a cause of action is appropriate only where it clearly appears that no set of facts can be proven under the pleadings that will entitle the pleader to recovery. Douglas Theater Corporation v. Chicago Title & Trust Company, 288 Ill. App. 3d 880, 681 N.E. 2d 564, 566 (1st Dist. 1997). As with a Section 2-615 motion, a dismissal based on certain defects or defenses is proper if no set of facts may be proven by which the pleader can recover.

Griffin v. Fluellen, 283 Ill. App. 3d 1078, 670 N.E. 2d 845, 849 (1st Dist. 1996). Respondent cannot possibly allege any facts to remedy or cure its purported affirmative defense. Respondent's second affirmative defense is legally insufficient and should be stricken and dismissed as a matter of law.

III. Third Affirmative Defense

Respondent's third affirmative defense is that the "cited State Operating Permit throughout the relevant time period for this complaint was not the most currently issued Operating Permit issued by the Illinois EPA as they had issued two permits since the cited permit was issued." Even if this defense is assumed to be true, it does not support an affirmative defense to the Complaint and should therefore be dismissed as a matter of law.

Respondent alleges the existence of two subsequent State Operating Permits issued to Cortland, but has not provided the details of those permits and whether those permits significantly altered any of the requirements under the original permit. According to the original State Operating Permit, the conditions set forth in the original State Operating Permit were in effect until June 30, 2010. Since the alleged violations occurred before the expiration of the original State Operating Permit, and the Respondent has not put forth any new facts to defeat the State's claim, Respondent fails to state a legally recognized defense or theory on which it can prevail.

Moreover, Respondent's third affirmative defense is in the nature of a denial of the allegations in the complaint, which state that Cortland violated the requirements of the original State Operating Permit. Respondent fails to meet the requirements for proper pleading of affirmative defenses and fails to admit the State's claim and set forth new facts or arguments

which will defeat it. Therefore, the third affirmative defense should be dismissed, with prejudice, as a matter of law.

IV. Fourth Affirmative Defense

Respondent's fourth affirmative defense is that the "Town of Cortland has never had a surface discharge of treated wastewater prior to the issuance of a NPDES Permit authorizing such discharge." Even if this defense is assumed to be true, it does not support an affirmative defense to the Complaint and should therefore be dismissed as a matter of law.

Moreover, Respondent's fourth affirmative defense is in the nature of a denial of the allegations in the complaint, which state that Cortland violated the conditions of its State Operating Permit when it allowed a surface discharge of wastewater. Respondent fails to meet the requirements for proper pleading of affirmative defenses and fails to admit the State's claim and set forth new facts or arguments which will defeat it. Therefore, the fourth affirmative defense should be dismissed, with prejudice, as a matter of law.

V. Fifth Affirmative Defense

Respondent's fifth affirmative defense is that the Town of Cortland was issued "NPDES Permit No. IL0079065 authorizing the surface discharge of treated waste water to Union Ditch #1 on December 22, 2009." Even if this defense is assumed to be true, it does not support a defense to the Complaint and should therefore be dismissed as a matter of law.

Complainant alleged in Count I of the Complaint that on July 17, 2009, the Illinois EPA was notified of surface discharge of wastewater from the northwest corner of a designated spray field. On July 24, 2009, the Illinois EPA was notified that Cortland's spray irrigation system was spraying wastewater directly onto Airport Road for approximately thirty minutes. Cortland's State Operating Permit does not allow for the surface discharge of wastewater from a

spray field and further, does not allow for wastewater to be sprayed on land other than the permitted spray fields.

Respondent's fifth affirmative defense alleges that Cortland was issued a permit authorizing surface discharge of wastewater on December 22, 2009. However, even taking this allegation as true, the permit was issued after the two July incidents detailed above. Thus, Respondent fails to state a legally recognized defense or theory on which it can prevail. As such, Respondent's fifth affirmative defense should be dismissed, with prejudice, as a matter of law.

VI. Sixth Affirmative Defense

Respondent's sixth affirmative defense states that the "July 17, 2009 alleged event was due to an Act of God beyond the control of the Town of Cortland." Whether or not the event was due to an Act of God, Respondent fails to state a legally recognized claim which defeats Claimant's allegations. As such, Respondent's sixth affirmative defense should be dismissed, with prejudice, as a matter of law.

VII. Seventh Affirmative Defense

Respondent's seventh affirmative defense states that the "July 24, 2009 alleged event was due to a malfunction caused by an act of sabotage or vandalism by an unknown third party and beyond the reasonable control of the Town of Cortland." This allegation fails to qualify as an affirmative defense. This defense does not defeat Claimant's allegations. As such, Respondent's seventh affirmative defense should be dismissed, with prejudice, as a matter of law.

VIII. Additional Affirmative Defenses

Finally, Respondent's last affirmative defense is a reservation of the right to add further affirmative defenses in the future as they become available. This defense is legally insufficient

and should be dismissed as a matter of law. As stated above, the test for whether a defense is affirmative is whether the defense gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated. Further, the facts constituting any affirmative defense must be plainly set forth and pled with the same degree of specificity required by a complainant to establish a cause of action. Respondent's final affirmative defense obviously does none of this. Respondent's so-called Additional Affirmative Defenses should be dismissed, with prejudice.

CONCLUSION

For all the reasons set forth above in this Motion to Strike and Dismiss Respondent's Affirmative Defenses, the People respectfully request that this Board enter an order to strike and dismiss Respondent's, Town of Cortland's Affirmative Defenses as being legally insufficient.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,

BY: _____

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CERTIFICATE OF SERVICE

I, ZEMEHERET BEREKET-AB, an Assistant Attorney General, do certify that I caused to be served on this 23rd day of September, 2011, the foregoing Notice of Filing, People's Motion to Strike and Dismiss Defendant's Affirmative Defenses, and a Certificate of Service, upon the persons listed on said Notice by placing same in an envelope bearing sufficient postage with the United States Postal Service located at 100 West Randolph Street, Chicago, Illinois.

ZEMEHERET BEREKET-AB