ILLINOIS POLLUTION CONTROL BOARD
October 6, 2011

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 11-68
	)	(Citizens Enforcement - Water)
TRADITION INVESTMENTS, LLC, an Illinois limited liability company,	)	
	)	
	)	
Respondent.	)	

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

The People of the State of Illinois (People) filed a five-count complaint against Tradition Investments, LLC (Tradition Investments), alleging that Tradition Investments violated provisions of the Illinois Environmental Protection Act (Act) (415 ILCS 5/1 *et. seq*. (2010)) and the Board's Water Pollution Regulations. The complaint concerns Tradition Investments' proposed dairy operations in Jo Daviess County. On June 15, 2011, Tradition Investments answered the complaint and alleged five affirmative defenses. On July 18, 2011, the People moved to strike all five affirmative defenses. For the reasons below, the Board grants the People's motion to strike the second, third, fourth and fifth affirmative defenses and denies the People's motion to strike the first affirmative defenses of laches.

In the order below, the Board first sets forth the procedural history, addresses a preliminary matter and sets forth the statutory and regulatory background. Next, the Board summarizes the People's complaint and Tradition Investments' answer and affirmative defenses. The Board next summarizes the People's motion to strike the affirmative defenses and Tradition Investments' response to the motion to strike. The Board then outlines the standard of review applicable to motions to strike affirmative defenses. Finally, the Board discusses each of the defenses raised by Tradition Investments.

PROCEDURAL BACKGROUND

On April 20, 2011, the People filed a five-count complaint (Comp.) against Tradition Investments. The complaint alleges that Tradition Investments violated Sections 12(a), 12(d), and 12(f) of the Act (415 ILCS 5/12(a), 12(d), 12(f) (2010)) and Sections 302.203 and 304.106 of the Board's Regulations (35 Ill. Adm. Code 302.203, 304.106).

On June 15, 2011, Tradition Investments filed its answer (Ans.) raising five affirmative defenses. On July 18, 2011, the People filed a motion to strike (Mot. Strike) all five affirmative defenses raised by Tradition Investments. On August 19, 2011, Tradition Investments filed its response to the motion to strike (Resp. Mot.).

On August 24, 2011, the People filed a motion for leave to file a reply (Mot. Reply) and on September 2, 2011, Tradition Investments filed a response in opposition to the motion for leave to file a reply (Resp. Reply).

PRELIMINARY MATTER

The People seek to file a reply to "the interpretation Respondent gives to the law" as the case requires the application of new law. Mot. Reply at 1. The People argue that allowing the reply will assist in narrowing issues in this proceeding. *Id*.

Tradition Investments argues that the Board rules allow for a reply only to "prevent material prejudice" and the People have failed to argue that material prejudice will result if a reply is not allowed. Resp. Reply at 1. Tradition Investments further argues that there is no basis for a reply and the proposed reply is "inappropriate on a number of grounds". Resp. Reply at 1-2. Tradition Investments asserts that the People have improperly attached excerpts from arguments in a different proceeding, the People attempt to offer new material in the reply, and the People are attempting to argue the merits of the complaint. Resp. Reply at 2-3.

The Board's rules provide that: "[t]he moving person will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice." 35 Ill. Adm. Code 101.500(e). The People's motion does not assert that material prejudice will occur if the People are not allowed to file a reply, but rather argues that a reply will help to narrow issues and allow for a response to Tradition Investments' interpretation of the law. The Board finds that these are insufficient grounds to allow a reply when an objection has been raised. Therefore, the Board denies the motion to file a reply.

STATUTORY AND REGULATORY BACKGROUND

Section 12 of the Act states:

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, . . . without an NPDES permit for point source discharges issued by the Agency . . ., or in violation of any term or condition imposed by such permit, or in violation of any NPDES permit filing requirement . . ., or in violation of any regulations adopted by the Board or of any order adopted by the Board with respect to the NPDES program. 415 ILCS 5/12(a), (d) and (f) (2010).

Section 302.203 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 304.120 of the Board's Water Pollution Regulations, provides as follows:

> Except as provided in 35 Ill. Adm. Code 306, Subpart C, all effluents containing deoxygenating wastes shall meet the following standards:
>
> a) No effluent shall exceed 30 mg/L of five day biochemical oxygen demand (BOD_5) (STORET number 00310) or 30 mg/L of suspended solids (STORET number 00530), except that treatment works employing three stage lagoon systems which are properly designed, maintained and operated, and whose effluent has a dilution ratio no less than five to one or who qualify for exceptions under subsection (c) shall not exceed 37 mg/L of suspended solids. Compl. at 8-9; citing 35 Ill. Adm. Code 304.120.

PEOPLE'S FORMAL COMPLAINT

Historical Background

According to the complaint, Tradition Investments holds title to two parcels of land in Jo Daviess County, Tradition North and Tradition South. Compl. at 2. The People state in the complaint that A.J. Bos, the managing partner of Tradition Investments, submitted two Notices of Intent to Construct dairy operations, pursuant to the Illinois Livestock Management Facilities Act (510 ILCS 77/1 *et seq*. (2010)), which would house approximately 5,464 cows at Tradition North and Tradition South facilities. *Id.* The complaint also states that A.J. Bos additionally submitted a proposal to construct a methane digester at the Tradition South facility with the Illinois Department of Agriculture (IDOA). *Id.* The complaint also points out that the methane digester proposal "was the subject of a public informational meeting requested by the Jo Daviess County Board conducted by the IDOA on July 29, 2008." *Id*. The People acknowledge that the

IDOA approved A.J. Bos's Notice of Intent to Construct at the Tradition South facility on January 26, 2009. *Id.*

The complaint next asserts that the Tradition South site began construction in 2008 of a concrete slab for the purpose of storing corn and other feeds, also known as a feed storage area. Compl. at 3. The People then allege that in August or September of 2008, the respondent began filling the feed storage area with corn silage. *Id.* According to the complaint, the feed storage area is approximately six acres in size and has a concrete catch basin to collect surface water flow and silage leachate from the slab. *Id.*

The complaint then alleges, "[s]tarting a time better known to the Respondent, construction of the facility was stalled." Compl. at 4. The complaint claims that, during the stalling of construction, the catch basin was diverted to a "temporary waste silage leachate holding cell located directly south of the southwest part of the slab and catch basin." *Id.* According to the complaint, the temporary silage leachate holding cell "serves as containment structure for runoff that drains from the feed storage area and the adjacent construction materials storage area." *Id.* The complaint also describes the size of temporary leachate holding cell as "approximately 115 feet by 230 feet with an average depth of about 5.8 feet." *Id.*

According to the complaint, on October 1, 2010, the Illinois Environmental Protection Agency (Agency) investigated a complaint that a tributary of the South Fork of the Apple River that flows along the south side of East Canyon Road was exhibiting a pink/purple coloration. Compl. at 5. The People assert that, at this section of the tributary, there exists a confluence between the east and west branches of the river. *Id.* As alleged in the complaint, the east branch of the river was clear and the west branch of the river contained a pink/purple discoloration. *Id.* The People claim that an Agency "inspector collected a water sample from the contaminated tributary from a location that is outside the boundaries of the facility and downstream of the facility boundary." *Id.* The complaint claims that the sampled water's analytical results indicated "a five day biochemical oxygen demand (BOD_5) of 153 mg/L." *Id.* The complaint also alleges that during this inspection, the Agency's inspector observed a discharge from Tradition South's field tile into the tributary. *Id.* The complaint claims that the tile discharged into the tributary at a rate of 40 gallons per minute and, as analytical results indicated, had a BOD_5 of 119 mg/L and total suspended solids (TSS) of 670 mg/L. *Id.*

The complaint further claims that on October 1, 2010, the Agency contacted Tradition Investment's contract land applicator, Justin Peterson, who told the Agency that he applied 320,000 gallons from the silage leachate holding cell onto five acres of the Tradition South facility. Compl. at 6. The complaint also notes that during the October 1, 2010 inspection, the Agency inspector observed dry soil conditions. *Id.* The complaint also acknowledges that the Agency inspector observed "pink/purple wastewater pooled in tire tracks on the application field." *Id.* According to the complaint, during an October 4, 2010 re-inspection of the Tradition South facility, the Agency inspector noted that the pink/purple discharge remained pooled in the tire tracks. *Id.* at 7.

The complaint then discusses the October 6, 2010 follow-up inspection of the Tradition South facility. Compl. at 7. The complaint states that "[a]t the time of the October 6, 2010 inspection, respondent's personnel excavated a three foot wide trench on the downstream side of the application field and located a single five to six inch clay tile line extending into the leachate application area." *Id.* The complaint further describes the physical description as follows: "[t]he trench extended 400-500 feet north and south along the east side of the application field." *Id.* The complaint finally points out that, once the tile was exposed, it "was flushed to confirm the connection between the upper end of the application field tile and lower discharge end." *Id.* The complaint alleges that the water flushed through to the discharge end, which confirms that the application field tile is connected to the downstream tile discharge. *Id.*

Count I

Count I of the complaint alleges that Tradition Investments violated Section 12(a) of the Act (415 ILCS 5/12(d) (2010)) by "causing or allowing the discharge of silage leachate" with an obvious unnatural color and with BOD_5 and TSS exceeding the State's effluent limits from a land application into a tributary of the South Fork of the Apple River. Compl. at 9.

Count II

Count II alleges that Tradition Investments violated Section 12(d) of the Act (415 ILCS 5/12(d) (2010)) by causing or allowing leachate to remain pooled on the land with an obvious unnatural color and with BOD_5 and TSS that exceeded the State's effluent limits and thus existed as a water pollution hazard. Compl. at 10.

Count III

Count III alleges that Tradition Investments violated Section 12(f) of the Act (415 ILCS 5/12(f) (2010)) by causing or allowing the discharge of silage leachate from a land application without an National Pollution Discharge Elimination System (NPDES) permit. Compl. at 15.

The complaint alleges that on October 1, 2010, "Tradition [Investments] had neither applied for nor had it obtained NPDES permit coverage for point source discharges for the Tradition South Facility." Compl. at 14. Additionally, the complaint characterizes the tributary to the South Fork of the Apple River as a "navigable water that exists as waters of the United States." *Id.* at 15.

Count IV

Count IV alleges that Tradition Investments violated Section 12(a) of the Act (415 ILCS 5/12(a) (2010)) and Section 302.203 of the Board's Water Pollution Regulation (35 Ill. Adm. Code 302.203) by applying silage leachate wastewater on the land containing field tile to which allowed a discharge and caused unnatural pink/purple coloration in a tributary of the South Fork of the Apple River. Compl. at 17. More specifically, the complaint alleges that the "October 1, 2010 discharge from the Respondent's Tradition South facility land application field turned a

tributary to the South Branch of the Apple River to an unnatural pink/purple color." Compl. at 17.

Count V

Count V alleges that Tradition Investments violated Section 12(a) of the Act (415 ILCS 5/12(a) (2010)) and Section 304.106 of the Board's Water Pollution Regulations (35 Ill. Adm. Code 304.106) by causing or allowing a point source discharge exhibiting a pink/purple color that resulted in the receiving body to exhibit the same pink/purple color. Compl. at 18-19. More specifically, the complaint alleges that "a discharge from a land application field through a field tile is a point source discharge." Compl. at 18.

TRADITION INVESTMENTS' ANSWER AND AFFIRMATIVE DEFENSES

Tradition Investments' answer raised five affirmative defenses. In the answer, Tradition Investments admits to some facts, denies others, and states that there is insufficient information to either admit or deny other facts. The Board summarizes each of the five affirmative defenses raised by Tradition Investments.

Affirmative Defense I: Laches

Tradition Investments states that the "[c]omplainant is guilty of laches by reason of its failure to assert or allege a purported obligation on the part of Respondent to seek or obtain an NPDES permit prior to the filing of this action." Ans. at 21. Additionally, Tradition Investments alleges that the IDOA "received, processed and approved the Notice of Intent to Construct for Tradition South based upon application materials submittals dated as early as 2007." *Id.* Tradition Investments further alleges that the "[c]omplainant was aware at all times beginning in 2007 of the specific plans for Tradition South and failed to contend or allege that an NPDES permit was required." *Id.* Tradition Investments claims that the "[r]espondent has been prejudiced by the complainant's stale claim . . . [and] has incurred in excess of $22,000,000 in reliance of complainant's finding . . .." *Id.*

Affirmative Defense II: Estoppel

The second affirmative defense raised by Tradition Investments asserts that the complainant is estopped from requiring an NPDES permit for Tradition South facility. Ans. at 21. Tradition Investments' answer states:

> Beginning not later than Spring, 2008, Complainant approved the construction of the facility, and not later than June, 2008, and through Spring 2011, Complainant participated as a co-defendant of Respondent in certain litigation then pending as Case No. 2008 CH 42, previously pending in the Circuit Court of the 15th Judicial Circuit of Jo Daviess County, in which the Complainant and Respondent together defended the legality and enforceability of Complainant's approval of Respondent's Tradition South facility. At no point in the above described

litigation did Complainant contend that NPDES permit is required, despite claims by the Plaintiffs in that case that such a permit is required. Complainant is thus estopped to change its legal position to claim or contend that an NPDES permit is now required for their facility. *Id.*

Affirmative Defense III: Issue Preclusion and Claim Preclusion

The third affirmative defense states that the complainant is "barred by the doctrines of issue preclusion and claim preclusion from now asserting that an NPDES permit is required for the facility." Ans. at 21. Tradition Investments reasons that the complainant's position and participation in the previous litigation is binding. *Id.*

Affirmative Defense IV: Federal Preemption of the State's Water Pollution Regulation

Tradition Investments stated that "[c]omplainant's claim that an NPDES permit is required for this facility is preempted by federal law and is barred by the same." Ans. at 22. Tradition Investments set forth four reasons for federal preemption of the State's water pollution regulations. First, Tradition Investments' answer states, "the Tradition South facility is a construction site, not a CAFO, in connection with which no animals have been populated." *Id.* Second, the answer states, "even accepting the allegation of a discharge, respondent is not obligated by reason thereof to seek or obtain an NPDES permit." Third, the answer states, "there is no duty to apply for an NPDES unless the operation is actually discharging, which is not the case under the facts alleged . . .." *Id.* Fourth, the answer states, "there is no liability for a failure to apply for an NPDES permit."

Affirmative Defense V: Absence of Any Environmental Harm

Tradition Investments raised a fifth affirmative defense, by stating that: "[c]omplainant has not alleged, nor has there been any environmental harm or damage by reason of the allegations set forth in the complaint." Ans. at 17.

PEOPLE'S MOTION TO STIKE

The People filed a motion to strike all five affirmative defenses. The Board will briefly summarize the People's general arguments on affirmative defenses and then summarize the specific arguments on each affirmative defense.

General Arguments

The People note that Section 103.204(d) of the Board's Rules (35 III. Adm. Code 103.204(d)) requires that any facts constituting an affirmative defense must be plainly set forth before hearing in the answer. Mot. Strike at 1. The People state that an affirmative defense is a "response to a claim which attacks the legal right to bring an action, as opposed to attacking the truth of the claim." *Id.*, *citing* Indian Creek Development Company and the Chicago Title and Trust Company v. BNSF, PCB 07-44 slip op. at 3 (June 18, 2009). The People further state that

"[i]f the pleading does not admit the opposing party's claim but rather attacks the sufficiency of that claim, it is not an affirmative defense." *Id*. Furthermore, in an 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. *Id*, *citing* People v. Community Landfill Co., PCB 97-193, slip op. at 3 (Aug. 6, 1998); People v. Wood River Refining Company, PCB 99-120, slip op. at 3-4 (Aug. 8, 2002); People v .Stein Steel Mills Services, PCB 02-1, slip op. at 1-2 (Apr. 18, 2002); and Indian Creek Development Company, PCB 07-44, slip op. at 3.

The People maintain that an asserted affirmative defense is not an affirmative defense if the assertion will not impact the complainant's legal right to bring the action. Mot. Strike at 2, citing to Glave v. Harris *et al*, Village of Grayslake v. Winds Chant Kennel, Inc, PCB 02-11, PCB 02-32 (Consld.), slip op. at 2 (Jan. 24, 2002), citing People v. Crane, PCB 01-76 (May 17, 2000). Rather, the People argue an affirmative defense is 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." *Id.*, *citing* Farmers State Bank v. Phillips Petroleum Co., PCB 97-100, slip op. at 2 n.1 (quoting Black's Law Dictionary) (Jan. 23, 1997).

The People point out that the Board has looked to the Code of Civil Procedure (Code) for additional guidance on pleading affirmative defenses. Mot. Strike at 2, *citing* People v. Wood River Refining Company, PCB 99-120, slip op. at 3-4 (Aug. 8, 2002), and Stein Steel, PCB 02-1, slip op. at 1-2 (Apr. 18, 2002). The People note that in those cases the Board looked to Section 2-613 (d), (735 ILCS 5/2-613(d) (2010)) which provides in part:

> The facts constituting any affirmative defense . . . and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint, . . . in whole or in part, and any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, should be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply. 735 ILCS 5/2-613(d) (2010).

Furthermore in People v. Midwest Grain, PCB 97-179, slip op. at 3 (Aug. 21, 1997), the Board stated that Section 2-613(d) provides guidance regarding the pleading of defenses. Mot. Strike at 2. The People claim that in Midwest Grain, the Board relied on Handelman v. London Time, Ltd., 124 Ill. App. 3d 318, 320, 464 N.E.2d 710,712 (1st Dist. 1984) and stated that clearly the purpose of the Section 2-613 of the Code is to specify the disputed legal issues before trial. Midwest Grain, slip op. at 2-3. The People maintain that the parties are to be informed of the legal theories which will be presented by their respective opponents. *Id.*

The People look for further guidance in Section 2-612 of the Code (735 ILCS 5/2-612 (2010)) that provides:

> Insufficient pleadings.
>
> (a) If any pleading is insufficient in substance or form the court may order a fuller or more particular statement. If the pleadings do not

sufficiently define the issues the court may order other pleadings prepared.

(b) No pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet.

(c) All defects in pleadings, either in form or substance, not objected to in the trial court are waived. 735 ILCS 5/2-612 (2010)

The People argue that a valid affirmative defense gives color to the opposing party's claim but then asserts new matter which defeats an apparent right. Mot. Strike at 3, citing Condon v. American Telephone and Telegram Co., 210 III. App. 3d 701, 709, 569 N.E.2d 518,523 (2d Dist. 1991), The People maintain that to set forth a good and sufficient claim or defense, a pleading must allege ultimate facts sufficient to satisfy each element of the cause of action or affirmative defense pled. Mot. Strike at 3. The People assert the court will disregard any conclusions of fact or law that are not supported by allegations of specific fact. *Id*., *citing* Richco Plastic Co. v. IMS Co., 288 III. App.3d 782, 784-85, 681 N.E.2d 56,58 (1st Dist. 1997), cited in Indian Creek, PCB 07-44, slip op. at 4 (June 18, 2009). Further, the People claim that affirmative defenses that are totally conclusory in nature and devoid of any specific facts supporting the conclusion are inappropriate and should be stricken. *See* Winds Chant Kennel, PCB 02-11, PCB 02-32 (Consld.), slip op. at 2 (Jan. 24, 2002).

The People assert that a motion to strike an affirmative defense admits well-pleaded facts constituting the defense, and attacks only the legal sufficiency of the facts. Mot. Strike at 4. "Where the well-pleaded facts of an affirmative defense raise the possibility that the party asserting them will prevail, the defense should not be stricken." *Id*., *citing* International Insurance Co. v. Sargent and Lundy, 242 Ill. App. 3d 614, 630-31, 609 N.E.2d 842, 853-54 (1st Dist. 1993), citing Raprager v. Allstate Insurance Co., 183 III. App. 3d 847, 854, 539 N.E. 2d 787, 791 (2nd Dist. 1989).

Affirmative Defense I: Laches

The People state that the "[c]omplainant has jurisdiction to bring these allegations pursuant to the Illinois Environmental Protection Act and the federal Clean Water Act and regulations promulgated thereunder." Mot. Strike at 4. The People claim that, in Tradition Investments' first affirmative defense , Tradition Investments "asserts that the activity it undertook in 2007 relevant to requirements of the Illinois Livestock Management Facilities Act ("LMFA"), 510 ILCS 70/1 *et. seq.*, . . . allegedly defeats the complainant's right to assert NPDES violations." *Id.* at 4-5. The People then clarify that the current allegations of violations only pertain to the "factual allegations associated with a October 1, 2010 discharge." *Id.* at 5.

The People argue that the LMFA is "irrelevant to Clean Water Act jurisdiction." Mot. Strike at 5. The People then cite to Section 100 of the LMFA, which states: "[n]othing in this

Act shall be construed as a limitation or preemption of any statutory or regulatory authority under the Illinois Environmental Protection Act." *Id.*

The People also argue that laches is an equitable claim and "the defense of *laches* requires a showing that (1) a litigant has exhibited unreasonable delay in asserting a claim; and (2) the opposing party suffered prejudice as a result of the delay." *Id.* at 6; citing Monson v. County of Grundy, 394 Ill. App. 3d 1091, 1094 (2009). Furthermore, the People argue that Tradition Investments has not alleged any facts to show that the "activity undertaken under the LMFA is one and the same cause of action as NPDES requirements that are authorized under the federal Clean Water Act and the Illinois Environmental Protection Act." *Id.* at 11.

Affirmative Defense II: Estoppel

The People allege that Tradition Investments' second affirmative defense does not assert either an affirmative matter or new facts that defeat the People's right to bring the cause of action or that void the legal effect of the claim. Mot. Strike at 13. The People assert that six elements must be shown in order for the doctrine of equitable estoppel to apply. Those elements are:

1) Words or conduct by the party against whom the estoppel is alleged constituting either a misrepresentation or concealment of material facts;

2) knowledge on the part of the party against whom the estoppel is alleged that representations made were untrue;

3) the party claiming the benefit of an estoppel must not have known the representations to be false either at the time they were made or at the time they were acted upon;

4) the party estopped must either intend or expect that his conduct or representations will be acted upon by the party asserting the estoppel;

5) the party seeking the estoppel must have relied or acted upon the representations; and

6) the party claiming the benefit of the estoppel must be in a position of prejudice if the party against whom the estoppel is alleged is permitted to deny the truth of the representation made. Mot. Strike at 12, citing People v. Environmental Control and Abatement, Inc., PCB 95-170, slip op. at 7 (Jan. 4, 1996), citing City of Mendota v. IPCB, 161 III.App.3d 203, 209 514 N.E.2d 218)3rd Dist 1987),

The People assert that Tradition Investments cannot meet the pleading requirements to establish estoppel. *Id.* at 12.

Affirmative Defense III: Issue Preclusion and Claim Preclusion

The People argue that the third affirmative defense should be stricken, because the "[r]esondent's third affirmative defense fails to assert [an] affirmative matter that will impact the complainant's legal right to bring the action that is the subject of Count II of the complaint . . .." Mot. Strike at 13. The People reason that:

> Neither the October 1, 2010 discharge of process wastewater from Respondent's facility to waters of the United States, being the factual basis for the allegation of NPDES liability in this matter, nor the Illinois EPA were included in the subject matter of the "above described litigation." Thus, it is patently impossible for there to be any means to successfully plead issue or claim preclusion. *Id.*

Affirmative Defense IV: Federal Preemption of the State's Water Pollution Regulation

The People argue that the "[r]espondent's fourth affirmative defense does not assert [an] affirmative matter that would defeat complainant's allegation of violation or demand for permit coverage." Mot. Strike at 14. The People claim that the "[r]espondent's assertion that it is not a CAFO is a legal conclusion," which is unsupported by law." *Id.* at 14. Further, the People claim that Tradition Investments has provided no factual basis for the assertion that an NPDES permit is not needed. *Id*.

Affirmative Defense V: Absence of Any Environmental Harm

The People finally move to strike the fifth affirmative defense on the basis that it is a "denial." Mot. Strike 18. The People reason that "the fifth affirmative defense contains no affirmative matter that would void or defeat Complainant's allegation of exceedance and violation of the State's effluent and water quality standards." *Id.*

TRADITION INVESTMENTS' RESPONSE

Tradition Investments first responds generally to the motion to strike and then offers more specific arguments as to each affirmative defense. The Board will summarize each in turn.

General Response

Tradition Investments argues that the People have admitted three crucial points in the motion to strike. Resp. Mot. at 1. Tradition Investments asserts those points are:

1. a property that does not discharge pollutants in fact is not obligated to apply for or obtain an NPDES permit;

2. there is no remedy available to the complainant to seek relief against a property that "proposes" to discharge; and

3 the purported basis for an NPDES permit here arises solely from an alleged 2010 discharge. *Id.*

Tradition Investments maintains that by admitting these three points, the People "concede[] that it has no actionable claim regarding an NPDES permit based upon pre-October 1, 2010 facts." Resp. Mot. at 2.

Tradition Investments also argues that the motion to strike is procedurally defective for several reasons. Resp. Mot. at 2. Tradition Investments asserts that the People's reliance on Section 101.506 of the Board's rules for the motion is misplaced as "that section merely provides the timing for the filing of motions attacking a pleading." *Id*. Further, Tradition Investments claims that if the People bring the motion under the Code, such a motion may only attack the sufficiency of a claim and the People's motion goes beyond that. *Id*.

Affirmative Defenses: Laches, Estoppel and Preclusion

Tradition Investments first claims that if the Board enters a clarifying order that the People's claim arises solely from events after October 1, 2010, the first three affirmative defenses are moot. Resp. Mot. at 4. However, if the defenses are not moot, Tradition Investments maintains that the People's motion goes beyond the issue of whether or not the defenses are appropriate and instead argue the merits of the case. *Id*. Tradition Investments claims that such arguments should be stricken. *Id*.

Affirmative Defense IV: Federal Preemption of the State's Water Pollution Regulation

Tradition Investments argues that the People's motion goes beyond the issue of whether or not the defenses are appropriate and instead argues the merits of the case. Resp. Mot. at 4. Further, Tradition Investments argues that the People attach the fourth affirmative defense with materials from outside the pleadings and argues the merits of the claim. Resp. Mot. at 5.

Affirmative Defense V: Absence of Any Environmental Harm

Tradition Investments argues that the fifth affirmative defense should not be stricken as under any theory for relief actual environmental harm must be considered. Resp. Mot. at 12.

Standard of Review

The Board defines an affirmative defense as the "respondent's allegation of 'new facts or arguments that, if true, will defeat . . . the government's claim even if all allegations in the complaint are true.'" Community Landfill, PCB 97-193, slip op. at 3 (quoting *Black's Law Dictionary*). A defense that merely attacks the sufficiency of a claim fails to be an affirmative defense. Worner Agency v. Doyle, 121 Ill. App. 3d 219, 222-223, 459 N.E.2d 633, 636 (4th Dist. 1984). The Illinois Appellate Court stated that "[t]he test of whether a defense is affirmative and must be pleaded by a defendant is whether the defense gives color to the opposing party's claim

and then asserts new matter by which the apparent right is defeated." Worner, 121 Ill. App. 3d at 222, 459 N.E.2d at 636.

The Board's procedural rules for affirmative defenses state that "[a]ny 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). In addition, the party asserting the affirmative defense must plead it with the same degree of specificity necessary for establishing a cause of action. International Insurance, 242 Ill. App. 3d 614, 630, 609, N.E. 2d 842, 853 (1st Dist. 1993). The party pleading an affirmative defense need not set out evidence, so long as the party alleges the ultimate facts to be proven. People v. Carriage 5 Way West, Inc., 88 Ill. 2d 300, 308, 430 N.E. 2d 1005, 1008-09 (1981). However, legal conclusions that are not supported by allegations of specific facts are insufficient. LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297.

The Board previously held that "[a] motion to strike an affirmative defense admits well-pled facts constituting the defense, as well as all reasonable inferences that may be drawn therefrom, and attacks only the legal sufficiency of the facts." Elmhurst Memorial Healthcare and Elmhurst Memorial Hospital v. Chevron U.S.A., Inc. and Texaco, Inc, PCB 09-066, slip op. at 21 (March 18, 2010), *citing* Raprager v. Allstate Insurance Co., 183 Ill. App. 3d 847, 854, 539 N.E.2d 787, 791 (2nd Dist. 1989). An affirmative defense should not be stricken "[w]here the well-pleaded facts [of an affirmative defense] . . . raise the possibility that the party asserting the defense will prevail . . .." Raprager, 183 Ill. App. 3d at 854, 539 N.E.2d at 791.

DISCUSSION

The Board will address each of the five affirmative defenses below.

Affirmative Defense I Laches

Tradition Investments raises the defense of laches arguing that the People were aware from the beginning in 2007 of the plans for Tradition South and the People failed to contend or allege that an NPDES permit was required. Ans. at 21. The People maintain that the People have jurisdiction and that the alleged violations are associated with an October 1, 2010 discharge. Mot. Strike at 4. The defense of laches is an affirmative defense as the defense "gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated." Worner, 121 Ill. App. 3d at 222, 459 N.E.2d at 636. The issue then is whether the affirmative defense has been sufficiently pled.

The People argue that for Tradition Investments to prevail on a defense of laches, Tradition Investments must establish that the People have exhibited unreasonable delay in asserting the claim and that Tradition Investments has been prejudiced. Mot. Strike at 11, citing Monson 394 Ill. App. 3d at 1094. Tradition Investments, in the answer, claims that the People have been aware of Tradition Investments' plans since 2007 and that Tradition Investments was prejudiced by the People's failure to raise the claim. Ans. at 21. The Board finds that Tradition

Investments has alleged sufficient facts to raise the affirmative defense of laches. Therefore, the motion to strike is denied.

Affirmative Defense II Estoppel

Tradition Investments' argument for estoppel is similar to the arguments for laches. Tradition Investments argues that because of actions taken by the People during the Jo Daviess County circuit court case beginning in 2008, the People are estopped from making the allegations in the complaint. Ans. at 21. Conversely, the People argue that Tradition Investments has not plead sufficient requirements to establish estoppel. Mot. Strike at 13. Like laches, the defense of estoppel is an affirmative defense as the defense "gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated." Worner, 121 Ill. App. 3d at 222, 459 N.E.2d at 636. The issue then is whether the affirmative defense has been sufficiently pled.

In this case, the Board finds that Tradition Investments has failed to properly plead the defense of estoppel. While Tradition Investments refers to actions taken by the People in the Jo Daviess County circuit court case, Tradition Investments fails to allege facts in the answer which support a claim of estoppel. Therefore, the Board grants the motion to strike the affirmative defense of estoppel.

Affirmative Defense III Issue Preclusion and Claim Preclusion

The third pled affirmative defense relates to the first two. Tradition Investments claims that the People's actions during the Jo Daviess County circuit court case preclude the People from alleging the violations in the complaint. Ans. at 21. The People argue that neither the alleged discharge into waters of the State or the Illinois Environmental Protection Agency are the subject of the Jo Daviess County circuit court case and thus the affirmative defense of preclusion has not been successfully plead. While an affirmative defense of preclusion might "give color to the opposing party's claim and then asserts new matter by which the apparent right is defeated" (Worner, 121 Ill. App. 3d at 222, 459 N.E.2d at 636); there are insufficient facts pled to establish a claim of preclusion. Therefore the Board grants the motion to strike the affirmative defense of preclusion.

Affirmative Defense IV Federal Preemption

Tradition Investments argues that federal law preempts the claim by the People that an NPDES permit is required for the facility at issue. Tradition Investments argues that the site is a construction site not a CAFO. Ans. at 22. The People claim that Tradition Investments has asserted a legal conclusion, not facts to establish an affirmative defense. Mot. Strike at 18. Whether or not the facility is required to have an NPDES permit is a question of law. Therefore, the Board finds that the fourth affirmative defense is not an affirmative defense and the Board grants the motion to strike the fourth affirmative defense.

Affirmative Defense V No Environmental Harm

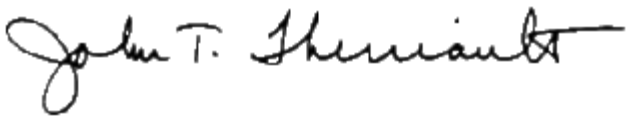
Tradition Investments asserts that there is no environmental harm as an affirmative defense. Ans. at 22. The People assert that the fifth affirmative defense is a denial and should be stricken. Existence of environmental harm is a question the Board examines when looking to appropriate penalties. *See* 415 ILCS 5/33(c)(i) and 42(h)(1) (2010). When a claimed affirmative defense relates solely to mitigation factors, the defense should be stricken as an improper affirmative defense. *See* People v. William Charles Real Estate Investment, PCB 10-108, slip op. at 12, (Mar. 17, 2011) (affirmative defense of "Act of God" allowed); *see also* People v. Texaco Refining and Marketing, Inc., PCB 02-3, slip op. at 6 (Nov. 6, 2003) (alleged affirmative defense "pertains to remedy, not the cause of action" and therefore "does not defeat the People's claims of water pollution or open dumping". Therefore the Board finds that a claim of no environmental harm is not an affirmative defense and the Board grants the motion to strike the fifth affirmative defense.

CONCLUSION

After reviewing the answer, the motion to strike and the response, the Board grants the People's motion to strike the second, third, fourth and fifth affirmative defenses and denies the People's motion to strike the first affirmative defenses of laches. In addition, the Board denies the People's motion to file a reply.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on October 6, 2011, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board