BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB No. 11-79
	)	
INVERSE INVESTMENTS L.L.C., an Illinois limited liability company,	)	
	)	
Respondent.	)	**(VIA ELECTRONIC FILING)**
	)	

NOTICE OF FILING

TO: Jennifer T. Nijman
Nijman Franzetti LLP
10 S. LaSalle Street, Suite 3600
Chicago, Illinois 60603

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601

PLEASE TAKE NOTICE that on March 30, 2012, the Complainant, PEOPLE OF THE STATE OF ILLINOIS, filed before the Illinois Pollution Control Board, its Motion To Strike Affirmative Defenses, a true and correct copy of which is attached hereto and hereby served upon you.

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

By: _____

Krystyna Bednarczyk
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DATE: March 30, 2012

THIS FILING IS SUBMITTED ON RECYCLED PAPER

CERTIFICATE OF SERVICE

I, Krystyna Bednarczyk, an Assistant Attorney General in this case, do certify that I caused to be served electronically this 30th day of March, 2012, the foregoing Notice of Filing and Complainant's Response In Opposition To Respondent's Motion To Dismiss, upon the following person:

John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601

and to the following persons, by depositing same in an envelope, first class postage prepaid, with the United States Postal Service at 100 West Randolph Street, Chicago, Illinois, at or before the hour of 5:00 p.m.

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Krystyna Bednarczyk

KRYSTYNA BEDNARCZYK

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INVERSE INVESTMENTS L.L.C.,	)	
An Illinois limited liability company,	)	
	)	
Respondent.	)	

COMPLAINANT'S MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS, and hereby moves, pursuant to Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615 (2010), for an order striking and/or dismissing with prejudice the Defenses to Complaint filed by Respondent, INVERSE INVESTMENTS L.L.C., and states as follows:

INTRODUCTION

On May 4, 2011, Complainant, People of the State of Illinois ("State" or "People"), filed a one-count complaint against Respondent, Inverse Invesments LLC ("Inverse"). In the Complaint, the State alleges that Inverse committed violations of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/1 *et seq.* (2010), and regulations thereunder. On September 21, 2011, Inverse filed its Motion to Dismiss and Memorandum in Support of Its Motion to Dismiss. On February 16, 2011 the Board issued its Opinion and Order, wherein the Respondent's Motion to Dismiss was denied. On March 9, 2012, Respondent filed its Answers and Defenses to Complaint for Injunction and Civil Penalties ("Defenses to Complaint").

As discussed in further detail below, Inverse purports to assert one affirmative defense entitled "Respondent did not cause or allow water pollution."

STANDARD

Under Illinois case law, the test for whether a defense is affirmative and must be pled by the Respondent is whether the defense gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated. People v. Community Landfill Co., PCB 97-193, (Aug. 6, 1998); Ferris Elevator Company, Inc. v. Neffco, Inc., 285 Ill. App. 3d 350, 354, 674 N.E.2d 449, 452 (3rd Dist. 1996); Condon v. American Telephone and Telegraph Company, Inc., 210 Ill. App. 3d 701, 709, 569 N.E.2d 518, 523 (2nd Dist. 1991). In other words, an affirmative defense confesses or admits the cause of action alleged by the Complainant, then seeks to avoid it by asserting new matter not contained in the complaint and answer. Where the defect complained about appears from the allegations of the complaint, it is not an affirmative defense and would be properly raised by a motion to dismiss. Corbett v. Devon Bank, 12 Ill. App. 3d. 559, 569-570, 299 N.E.2d 521, 527 (1st Dist. 1973). 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. Section 2-613(d) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-613(d)(2010). Finally, the facts establishing an affirmative defense must be pled with the same degree of specificity required by a Complainant to establish a cause of action. International Insurance Co. v. Sargent & Lundy, 242 Ill. App. 3d 614, 609 N.E.2d 842, 853 (1st Dist. 1993).

ARGUMENT

Respondent's affirmative defense to the Complaint, entitled "Respondent Did Not Cause or Allow Water Pollution" is composed of eleven paragraphs that purport to present an affirmative defense. Answer, pp.12-13, ¶¶43-53. Rather than present valid affirmative defenses, Inverse merely restates its previously presented arguments for the Board's consideration. The

Board was not persuaded by these arguments and denied Inverse's Motion to Dismiss in its February 16, 2011 Opinion and Order. As a whole, the purported affirmative defense asserted in paragraphs 43-53 of the Answer is factually and legally insufficient and should be stricken with prejudice as a matter of law.

First, the asserted defense is in the nature of a denial. As such, it is legally insufficient and must be stricken as a matter of law. Furthermore, numerous of Paragraphs 47-53 fail due to one of several deficiencies. Paragraphs 44-49 are irrelevant to the underlying cause of action. They neither give color to nor defeat the State's Section 12(a) count; thus, these statements are insufficiently pleaded as a matter of law and must be stricken. Additionally, Paragraph 50 contains pure legal argument previously rejected by the Board in its February 16, 2012 Opinion and Order. Finally, Paragraphs 49 and 51 through and including 53 fail to plead with any specificity any facts, as required under Section 2-613(d), but are legal conclusions.

I. BECAUSE INVERSE'S AFFIRMATIVE DEFENSE THAT IT DID NOT CAUSE OR ALLOW WATER POLLUTION IS LEGALLY AND FACTUALLY INSUFFICIENT, IT MUST BE STRICKEN.

Inverse purports to assert one affirmative defense entitled "Respondent did not cause or allow water pollution." The affirmative defense is supported by eleven paragraphs which raise a multitude of other potential but ultimately deficient affirmative defenses. The State will first discuss the reasons the one alleged defense is insufficient before addressing each paragraph's deficiency.

A. The Defense is Merely in the Nature of a Denial and Should be Stricken

The Illinois Code of Civil Procedure clearly sets forth the requirement of a well-pleaded, valid affirmative defense. Section 2-613(d) provides, in pertinent part, as follows:

Sec. 2-613. Separate counts and defenses.

* * *

> (d) The facts constituting any affirmative defense, such as payment, release, satisfaction, discharge, license, fraud, duress, estoppel, laches, statute of frauds, illegality, that the negligence of a complaining party contributed in whole or in part to the injury of which he complains, that an instrument or transaction is either void or voidable in point of law, or cannot be recovered upon by reason of any statute or by reason of nondelivery, want or failure of consideration in whole or in part, 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, counterclaim, or third-party complaint, in whole or in part, and any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, would 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) (emphasis added).

"The facts establishing an affirmative defense must be pleaded with the same degree of specificity required by a plaintiff to establish a cause of action." Sargent & Lundy, 242 Ill App.3d at 630; see also Richco Plastic Co. v. IMS Co., 288 Ill App. 3d 782, 784, 681 N.E.2d 56, 58 (1st Dist. 1997) (pleading must allege ultimate facts sufficient to satisfy each element of the affirmative defense pled); People v. Hicks Oil & Hicksgas, Inc., PCB10-12 slip op. at pp. 6-7 (Dec. 17, 2009) (affirmative defenses struck from answer where defenses contained legal conclusions unsupported by allegations of specific facts). Any facts constituting a defense must be plainly set forth in the answer. Kermeen, 65 Ill App.3d at 973 (citing People ex rel Shell Oil Co. v. City of Chicago, 9 Ill App.3d 242, 292 N.E.2d 84 (1st Dist. 1972).

Here, Inverse restated its denial of the State's water pollution claim in a series of statements identified as Respondent's Defense to the Complaint. Inverse's defense is insufficient because it fails to admit the truth of the claim asserted by the State and then pleading new facts that give color to the underlying claim. Furthermore, it has failed to plead with specificity any facts in support of its legal conclusions that it has "not caused or allowed the discharge of contaminants into the water." See Answer, p. 13. ¶¶51-53.

Inverse's defense carries no legal merit and should be stricken as a matter of law, because the civil penalties and injunctive relief sought in the People's Complaint are not defeated or excused by Inverse's enrollment in the State's Site Remediation Program ("SRP") (Paragraph 44) and undertaking of a remedial response (Paragraph 45). Even if Inverse's claims in paragraph 49 that it "actively participat[ed] in the SRP... [took] extensive precautions at the Site to prevent other intervening causes of any discharge" are assumed to be true, they are deficient and should be stricken.

Any facts constituting an affirmative defense are required to be plainly set forth before hearing in an Answer. 35 Ill. Adm. Code 103.204(d). Such responses must "attack[] the legal right to bring an action." Indian Creek Development Company and the Chicago Title and Trust Company v. BNSF, PCB 07-44, slip op. at pp. 3 (June 18, 2009). If, as is the case here, respondent's pleading does not assert any facts that attack the State's legal right to bring an action, it is not an affirmative defense. Id. Paragraphs 44, 45, and 49 fail to meet this standard.

i. Introductory sentence – no assumption of burden of proof

Without identifying whether it was asserting an affirmative defense, Inverse stated that it "asserts the following defense without waiving Complainant's obligation to meet its burden of proof and without assuming any burden of proof not otherwise imposed by law." Answer, p. 12, "Respondent's Defense to Complaint." If Inverse intended this statement to serve as an independent affirmative defense, it has failed to clearly designate it as one. Furthermore, it is a well-established legal principle that the party raising an affirmative defense bears the burden of proof. Paddock v. Glennon, 32 Ill.2d 51, 54 (1965), Cordeck Sales v. Construction Systems, 382 Ill. App. 3d 334, 366 (1st Dist 2008), See also e.g., Wright v. Pucinski, 352 Ill. App. 3d. 769, 772 (2004). To the extent that Inverse attacks the State's ability to meet its burden of proof under

Section 12(a), the purported defense fails to assert a recognized affirmative defense under Section 2-613(d). By virtue of presenting a recognized affirmative defense, the State's burden of proof is not relieved. Rather, if the defense is recognized as affirmative matter, the State must then prove its claim and disprove the defense.

ii. Paragraphs 46 – historic contamination

Paragraph 46 alleges that "any contaminants of concern ...are from historical conditions." This facts of this allegation are not plead with specificity and fail to defeat the People's claim under Section 12(a) of the Illinois Environmental Protection Act, 415 ILCS 5/12(a) (2010). Rather, the statement shifts the blame elsewhere by alluding to the fact that Inverse "did not cause . . . water pollution." See Answer, p. 12, ¶46. This assertion does not constitute a sufficient affirmative defense since it simply denies the facts as alleged in the Complaint and only points the finger at a third party.

It is no defense to a property owner's liability under the Act that contamination of concern is historic. A.J. Davinroy, 249 Ill. App. 3d at 795, 618 N.E.2d at 1287-1288, Perkinson v. Pollution Control Board, 187 Ill. App. 3d 689, 695, 543 N.E.2d 901 (1989) (property owners are responsible for pollution on their land unless the facts establish the owners either "lacked the capability to control the source" or "had undertaken extensive precautions to prevent vandalism or other intervening causes."). If Inverse believes it has a defense, it must set forth – with specificity – the facts to support such a defense. 735 ILCS 5/2-613(d). A mere denial of the State's claim is not enough to assert an affirmative defense. Farmer's State Bank, BCP 97-100. As it has not done so, Inverse's purported defense is legally insufficient and should be stricken and/or dismissed with prejudice.

iii. Paragraph 47 - Shifting Blame to Pre-2005 Businesses

Paragraph 47 asserts that "all businesses that may have discharged or contributed to contamination at the Site ceased operating prior to 2005." Paragraph 47 is similar to Paragraph 46 in that this statement does not assert an affirmative defense, but rather a bare assertion that Inverse "did not cause . . . water pollution" while pointing the finger elsewhere. See Answer, p. 12, ¶47. This assertion does not constitute a sufficient affirmative defense since it simply denies the facts as alleged in the Complaint.

The defense is devoid of allegation of facts and has no legal merit. As previously discussed herein, and in the State's response to Inverse's Motion to Dismiss, it is no defense to liability under the Act that another party may have been partially or wholly responsible for the pollution at the time of its release. A.J. Davinroy, 249 Ill. App. 3d at 795, 618 N.E.2d at 1287-1288, Perkinson v. Pollution Control Board, 187 Ill. App. 3d at 695. If Inverse believes it has a defense, it must set forth – with specificity – the facts to support such a defense. 735 ILCS 5/2-613(d). A mere denial of the State's claim is not enough to assert an affirmative defense. Farmer's State Bank, BCP 97-100. As it has not done so, Inverse's purported defense is legally insufficient and should be stricken and/or dismissed with prejudice

iv. Paragraph 48 – No control over the migration of contaminants prior to its inheritance.

Paragraph 48 asserts that Inverse "had no control over the migration of the contaminants through the groundwater prior to its inheritance in 2005." See Answer, p. 13, ¶48. Even if this statement is deemed true, Paragraph 48 does not defeat the Section 12(a) claim in the People's well-plead Complaint. Accordingly, this assertion must be stricken as it does not constitute a sufficient affirmative defense.

B. Defenses Which Speak to the Imposition of a Penalty are Not Affirmative Defenses and should be stricken

The matters asserted in paragraphs 44, 45 and 49 of Respondent's Answers and Defenses allege certain facts which constitute the basis of Complainant's well-pled Complaint. Paragraphs 44 and 45 address the Site's enrollment and participation in the Site Remediation Program ("SRP") pursuant to Section 58 of the Act, 415 ILCS 5/58 (2010). Paragraph 49 contains vague factual allegations and legal conclusions. Yet, Inverse fails to plead with specificity any facts for its legal conclusion that it took "extensive precautions at the Site to prevent other intervening causes." None of these statements assert new matter by which the Complainant's underlying cause of action is defeated.

Paragraphs 44 and 45 address the Site's enrollment and participation in the Site Remediation Program ("SRP") pursuant to Section 58 of the Act, 415 ILCS 5/58 (2010). These statements are not relevant to the alleged violations of the Act and the Board's Groundwater Quality Regulations. Complaint, p. 9, ¶¶40-42. The State does not allege in its Complaint that Respondent violated any section of the Act related to its participation in the SRP which is a wholly voluntary program, so Respondent's purported affirmative defense is not a legally sufficient defense to the State's well-pled Complaint.

Furthermore, Section 42(h)(6) of the Act, 415 ILCS 5/42(h)(6) (2010), which deals with civil penalties provides that voluntary self-disclosure of non-compliance to the Illinois EPA can be considered in mitigation or aggravation of the civil penalty. Paragraph 44 does not reveal new facts that defeat the underlying cause of action. Rather, it goes directly to the civil penalty factors addressed in Section 42 of the Act.

Section 42(h)(2) of the Act, 415 ILCS 5/42(h)(2) (2010), which deals with civil penalties

provides that presence or absence of due diligence on the part of the respondent in attempting to comply with requirements of the Act can be considered in mitigation or aggravation of the civil penalty. Like paragraph 44, Respondent's argument in paragraph 45 does not address the State's underlying cause of action; rather it attacks the reasonableness of actions taken to secure relief from the Act, which goes directly to the civil penalty factors addressed in Section 42 of the Act.

As the Illinois Pollution Control Board has ruled, a defense which speaks to the imposition of a penalty and not the cause of action is not an affirmative defense to that cause of action. People of the State of Illinois v. Midwest Grain Products of Illinois, Inc., PCB 97-179 (August 21, 1997)(citing People of the State of Illinois v. Douglas Furniture of California, Inc., PCB 97-133 (May 1, 1997).

Whether the State is entitled to a civil penalty is inconsequential to a finding of Inverse's liability. Inverse is misguided by its use of a purported affirmative defense to argue matters which are at best mitigation factors for consideration when determining a reasonable civil penalty after liability is determined. The affirmative defense must attack the basis of the opponent's claim, not attack the relief requested from that claim. Since the Respondent's alleged affirmative defense does not defeat Complainant's underlying cause of action, the defense is legally insufficient and should be dismissed.

II. CONTENTIONS THAT CONTAIN LEGAL ARGUMENT ARE NOT AFFIRMATIVE DEFENSES AND SHOULD BE STRICKEN AS A MATTER OF LAW

Paragraph 50 is purely argumentative. It merely restates Respondent's basis for dismissing the State's well-plead Complaint. See Respondent's Memorandum in Support of its Motion to Dismiss at pp. 5-6. The Board, in denying the Respondent's Motion to Dismiss, has previously considered the legal authority contained in Paragraph 50 and found it unpersuasive.

Illinois law does not require a reply where argumentative matters are contained in an affirmative defense. In re Marriage of Sreenan, 81 Ill. App. 3d 1025 (2nd Dist. 1980); Korleski v. Needham, 77 Ill. App. 2d. 328 (2nd Dist. 1966). Also, the State has a counter-argument to Inverse's purported affirmative defense, which it filed on November 7, 2011, in the State's Response to the Respondent's Motion to Dismiss. Accordingly, Paragraph 50 is not legally sufficient and should be stricken and/or dismissed with prejudice.

III. CONTENTIONS THAT CONTAIN LEGAL CONCLUSIONS ARE NOT AFFIRMATIVE DEFENSES AND SHOULD BE STRICKEN AS A MATTER OF LAW

Legal conclusions are not proper defenses. Kling v. Landry, 686 N.E. 2d 33, 38 (2nd Dist. 1997) (citing Estate of Johnson v. Condell Memorial Hospital, 119 Ill. 2d 496, 509-510) (1988) ("legal conclusions unsupported by allegations of specific facts are insufficient"); Kermeen v. City of Peoria, 65 Ill. App. 3d 969, 973 (1978) ("facts constituting an affirmative defense must be plainly set forth in the answer.")

Paragraph 45 wherein Inverse states that it "conducted remedial response activities" asserts a legal conclusion unsupported by specific facts.

Paragraph 47 wherein Inverse stated that "[a]ll businesses that may have discharged or contributed to any contamination at the Site ceased operating prior to 2005" asserts a legal conclusion unsupported by specific facts of which businesses operated prior to 2005, when these businesses ceased operating, or what actions these businesses took that resulted in a discharge of contamination or that contributed to pre-existing contamination.

Paragraph 48 wherein Inverse stated that it had "no control over the migration of the contaminants prior to its inheritance in 2005" asserts a legal conclusion that fails to assert any facts establishing a lack of control given the Adams family connection to the Site prior to

Inverse's inheritance.

Similarly, in Paragraphs 51-53, Inverse states legal conclusions when it asserts that it has not "caused or allowed the discharge of contaminants into the water" because it (i) did not have control over migration; (ii) took extensive precaution to prevent other intervening causes of further discharge, and (iii) migration of contaminants is not a discharge under the Act.

In each of these three paragraphs, Respondent made no effort to supports its general allegations. However, it is the facts of an affirmative defense that must be alleged with particularity, and not matters of law. Huszagh v. City of Oak Brook Terrace, 41 Ill.2d 387 (1968). Inverse's defense contains conclusions of law, not allegations of new facts that defeat the State's Section 12(a) claim. See Richco Plastic, 288 Ill. App. 3d at 784-85 (answer wholly conclusory and devoid of supporting factual allegations was insufficient to raise affirmative defenses); Hicks & Hicksgas, Inc., PCB 10-12, slip op. at 6-7 (striking affirmative defenses on the ground that respondent failed to plead specific facts as to any timeframes when third parties may have contaminated the site, how they did so, or any circumstances that indicated respondent lacked the capacity to control the pollution).

Because none of these paragraphs contain allegations of any new facts defeating the State's claim, these paragraphs are not appropriate defenses. 735 ILCS 5/2-613(d); see also e.g., Sargent & Lundy, 242 Ill.App.3d at 630. Accordingly, to the extent that paragraphs 45, 47, 48 51, 52, and 53 contain a legal conclusion, and are not supported by specific facts that defeat the People's claim, each should be stricken and/or dismissed with prejudice.

CONCLUSION

For the foregoing reasons, Complainant, People of the State of Illinois, requests that the

Defenses raised by Respondent, Inverse Investments L.L.C., be stricken.

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

BY: _____

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