

ILLINOIS POLLUTION CONTROL BOARD  
June 21, 2012

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 11-79
	)	(Enforcement - Water)
INVERSE INVESTMENTS L.L.C., an Illinois	)	
limited liability company,	)	
	)	
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by D. Glosser):

On May 4, 2011, the People of the State of Illinois (People) filed a one-count complaint (Compl.) against Inverse Investments L.L.C. (Inverse), alleging that Inverse violated Section 12(a) of the Illinois Environmental Protection Act (Act) (415 ILCS 5/12(a) (2010)). The complaint concerns a mixed-use commercial, residential and recreational area in McHenry that is owned by Inverse and managed by Richard A. Adams II. On March 9, 2012, Inverse answered the complaint and alleged one defense, which is the subject of controversy (Answer). On March 30, 2012, the People filed a motion to strike the affirmative defense (Motion). On April 18, 2012, Inverse requested that the Board deny the People’s motion to strike the affirmative defense (Resp.). For the reasons below, the Board denies the People’s motion to strike the affirmative defense.

**PROCEDURAL HISTORY**

The People filed the complaint on May 4, 2011, and the Board accepted the complaint for hearing on May 19, 2011. Inverse filed a motion to dismiss on September 21, 2011, and the People responded on November 7, 2011. On February 16, 2012, the Board denied Inverse’s motion to dismiss.

On March 9, 2012, Inverse filed answers and defenses to the complaint. The People filed a motion to strike the affirmative defense on April 10, 2012, to which Inverse filed a response on April 18, 2012.

**STATUTORY BACKGROUND**

Section 12(a) of the Act states in part:

No Person shall:

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.

Section 101.100(b) of the Board's Procedural Rules states:

The provisions on the Code of Civil Procedure [735 ILCS 5] and the Supreme Court Rules [Ill. S. Ct. Rules] do not expressly apply to proceedings before the Board. However, the Board may look to the Code of Civil Procedure and the Supreme Court Rules for guidance where the Board's procedural rules are silent. 35 Ill. Adm. Code 101.100(b)

Section 2-613(d) of the Illinois Code of Civil Procedure (Code) states:

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).

### **COMPLAINT**

According to the complaint, Inverse owns and operates a mixed-use commercial, residential and recreational area located at 3004 W. Route 120, McHenry (Site). On May 4, 2012, the People filed a complaint against Inverse. The complaint alleges that Inverse violated Section 12(a) of the Act (415 ILCS 5/12(a) (2010)) by causing, threatening, or allowing, the migration of chlorinated volatile organic compounds (VOCs) into soils and groundwater on the site, as well as groundwater offsite, which "caused, threatened, or allowed water pollution." Compl. at ¶¶ 40-42.

### **INVERSE'S ANSWER AND DEFENSE**

Inverse's answer raised one defense and stated that it did so "without waiving Complainant's obligation to meet its burden of proof and without assuming any burden of proof not otherwise imposed by law". Answer at 12. In the answer, Inverse admits to some facts, denies others, and states that there is insufficient information to either admit or deny other facts. The Board summarizes the eleven paragraphs Inverse raised to support its defense.

Inverse first states that it “acquired the property through inheritance in June 2005”. Answer at ¶43. Inverse alleges that businesses that were previously located on the Site, but have terminated their operations prior to 2005, “discharged or contributed to any contamination at the Site,” such that any “contaminant of concern found in the soil and groundwater . . . are from historical conditions.” Answer at ¶¶46-47. Based on Inverse’s alleged timeline, Inverse states that it “had no control over the migration of the contaminants through the groundwater prior to its inheritance in 2005,” so that Inverse has “not caused or allowed the discharge of contaminants into the water.” Answer at ¶¶48, 51.

Additionally, Inverse states that “prior to 2005, the Site has been enrolled in the Site Remediation Program (SRP) under Section 58 of the Act, 415 ILCS 5/58,” and that since June 2005, Inverse has engaged in “remedial response activities at the Site under the supervision and approval of the Illinois [Environmental Protection Agency].” Answer at ¶¶44-45. Inverse alleges that by “actively participating in the SRP since inheriting the property, Respondent has taken extensive precautions at the Site to prevent other intervening causes of any discharge of contaminants into the environment.” Answer at ¶¶49, 52.

Furthermore, Inverse states that causing or allowing the “migration of contaminants is not a ‘discharge’ according to the law. Answer at ¶50. Therefore, Inverse alleges that it “has not caused or allowed the discharge of contaminants into the water because migration of contaminants is not a discharge under the Act.” Answer at ¶53.

### **MOTION TO STRIKE AND RESPONSE**

The People have set forth three arguments. The first is that the affirmative defense is legally and factually insufficient. Next, the People argue that legal arguments are not an affirmative defense. Third, the People assert legal conclusions are not sufficient to constitute an affirmative defense. The Board will summarize each argument and then Inverse’s response.

#### **Affirmative Defense is Legally and Factually Insufficient**

##### **People’s Argument**

The People contend that Inverse’s defense entitled “Respondent did not cause or allow water pollution” is a legally and factually insufficient affirmative defense that should be stricken. Motion at 3. The People claim that Inverse’s defense fails to admit the truth of the complaint, and also fails to assert any new specific facts to defeat the People’s legal right to bring the action. Motion at 4. The People argue that such deficiencies violate Section 2-613(d) of the Code, which requires “[t]he facts constituting any affirmative defense . . . [to] be plainly set forth in the answer or reply.” Motion at 4, *citing* 735 ILCS 5/2-613(d) (2010). Furthermore, the People argue that the facts used to support the affirmative defense must be presented with the same degree of particularity used by the complainant to establish the cause of action. Motion at 4, *citing* International Insurance Co. v. Sargent & Lundy, 242 Ill. App. 3d 614, 609 N.E.2d 842, 853 (1st Dist. 1993).

The People support this claim by arguing that Inverse's claim that Inverse participated in the State's SRP, and undertook a remedial response does not excuse the alleged violation and is not relevant to the alleged violation. Motion at 5, 8. Further, Inverse's defense is not pled with specificity and the People discuss examples from Inverse's pleading. Motion at 4-6. The People also argue that Inverse's defense does not plead new, specific facts and merely states that the contaminants at issue are all attributable to either historical conditions or previous businesses that have ceased operation prior to Inverse's ownership. Motion at 6, 7. The People argue that Inverse's defense "simply denies the facts as alleged in the Complaint and only points the finger at a third party," and such denial does not constitute an affirmative defense. *Id.* Lastly, the People argue that that Inverse's assertion that it "had no control over the contaminants through the groundwater prior to its inheritance in 2005," does not defeat the People's right to bring the complaint against Inverse, even if the statement is deemed true. Motion at 7.

### **Inverse's Response**

Inverse argues that its defense meets the requirements of Section 2-613(d) of the Code as a defense, rather than an affirmative defense. Resp. at 3. Inverse alleges facts specifying the disputed issues "in order to avoid taking the Complainant or the Board by surprise" at any later hearing "and to avoid any argument of waiver". Resp. at 3. Inverse argues that the Board has supported this type of liberal pleading of defenses because it provides transparency as to whether a defense has been waived and clarifies the legal theories to be presented. *Id. citing People of the State of Illinois v. Midwest Grain Products of Illinois, Inc.*, PCB 97-179, slip op. at p. 3 (Aug 21, 1997). Thus, Inverse argues that the Board should summarily deny the People's motion to strike the defense because it properly and sufficiently pled its defense. *Id.* at 4.

### **Legal Arguments are not Affirmative Defenses**

### **People's Argument**

The People argue that Inverse's defense is not an affirmative defense, but a legal argument that has already been considered and denied by the Board in Inverse's motion to dismiss. Motion at 9. The People note that Inverse states that the alleged act of allowing contaminants to migrate through the groundwater is not a "discharge" as defined by the Federal Clean Water Act (CWA), and the CWA enforcement authority is delegated to the State of Illinois. Answer at ¶ 50. The People claim that the defense is legally insufficient as an affirmative defense because the Board has already found the argument to be unpersuasive as seen by the Board's denial of Inverse's motion to dismiss. Motion at 10.

### **Inverse's Response**

Inverse argues that its defense is a valid defense that can be raised in a subsequent motion because the Board's denial of Inverse's motion to dismiss was not a decision on the merits of the defense. Resp. at 4 *citing Makowski v. City of Naperville*, 249 Ill. App.3d 110, 117, 617 N.E.2d 1251, 1257 (2nd Dist. 1993). Inverse argues that the Board only considered whether the People sufficiently established the facts alleged in the complaint to justify the People's Section 12(a)

claim, but did not opine on the merits of the defense presented by Inverse in its Motion to Dismiss. *Id.* at 4.

### **Legal Conclusions are not Affirmative Defenses**

#### **People's Arguments**

Lastly, the People argue that the defense is a legal conclusion, not an affirmative defense, because the statements lack the requisite support to defeat the People's Section 12(a) claim. Motion at 10-11 *citing* Huszagh v. City of Oak Brook Terrace, 41 Ill.2d 387 (1968). The People claim that the lack of specific details to describe the type of actions undertaken as remedial response activities and to describe the type of business operations previously engaged in at the site, including precise closure dates, reduces Inverse's defense to a legal conclusions, rather than a valid affirmative defense. Motion at 10. Similarly, the People argue that Inverse's general allegations regarding: 1) Inverse's lack of control over the migration of contaminants prior to its inheritance; 2) Inverse's inability to cause or allow the discharge of contaminants into the water because of the extensive precautions it has taken to prevent such a violation; and, 3) the mischaracterization of Inverse's alleged act of causing or allowing the migration of contaminants as a discharge under the Act, do not raise new facts with particularity to defeat the People's cause of action. Motion at 10. Therefore, the People claim that the defense is a legal conclusion because none of these allegations contain "any new facts defeating the State's claim, [and therefore,] these paragraphs are not appropriate defenses." *Id.*

#### **Inverse's Response**

Inverse contends that it sufficiently pled facts in its defense to provide notice to the People to enable them to respond and the defense should not be stricken. Resp. at 4- 5. Since the Board's rules are silent on this matter, Inverse argues that following the Code is appropriate. Resp. at 4, fn 2. Based on the Code, Inverse did not need to prove the merits of its defense at the time of the answer, but only needed to reasonably inform the People of the nature of its defense. Resp. at 4 *citing* 735 ILCS 5/2-612(b), 35 Ill. Adm. Code 101.100(b).

### **DISCUSSION**

Pursuant to the Board's procedural rules, "[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 an affirmative defense, a respondent alleges "new facts or arguments that, if true, will defeat . . . [a complainant's] claim even if all allegations in the complaint are true." People v. Community Landfill Co., PCB 97-193, slip op. at 3 (Aug. 6, 1998). "[T]o 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." Richco Plastic Co. v. IMS Co., 288 Ill. App. 3d 782, 784, 681 N.E.2d 56, 58 (1st Dist. 1997). The facts of an affirmative defense must be pled with the same degree of specificity necessary for establishing a cause of action. International Ins. Co. v. Sargent & Lundy, 242 Ill. App. 3d 614, 630, 609 N.E. 2d 842, 853 (1st Dist. 1993).

A motion to strike an affirmative defense admits the 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. Rapraeger 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-pled facts [of an affirmative defense] . . . raise the possibility that the party asserting the defense will prevail . . .” *Id.*

Inverse argues that the People’s motion to strike is “inapplicable and should be denied” because the answer it filed March 9, 2012 pled “a ‘defense,’ which Respondent specifically captioned as a ‘defense’ and not an ‘affirmative defense.’” Resp. at 2. Inverse maintains that it “properly included the defense in its Answer to specify the disputed legal issues and inform the Complainant and the Board of the legal theories that will arise.” Resp. at 2 *citing* Handelman v. London Time Ltd., 124 Ill. App.3d 318, 464 N.E.2d 710 Ill. Dec. 806 (1st Dist. 1984).

The Board’s procedural rules do not define a substantively adequate defense, but Section 101.100(b) allows the Board to look to the the Code when the Board’s rules are silent. 35 Ill. Adm. Code 101.100(b). Section 2-613(d) of the Code states “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). The Board finds that Inverse has asserted a defense in the Answer, not an “affirmative defense”. Therefore, the Board denies the People’s motion to strike.

### CONCLUSION

After reviewing the answer, the motion to strike, and the response to the motion to strike, the Board denies the People’s motion to strike.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on June 21, 2012, by a vote of 5-0.




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John T. Therriault, Assistant Clerk  
Illinois Pollution Control Board