

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, )  
)  
Complainant, )  
)  
v. )  
)  
APLENA VISION RESOURCES, LLC, )  
a Michigan limited liability company, )  
)  
Respondent. )

PCB No. 13-16  
(Enforcement - Water)

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on January 10, 2013, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, c/o John T. Therriault, Assistant Clerk, James R. Thompson Center, 100 W. Randolph St., Ste. 11-500, Chicago, IL 60601, PEOPLE'S RESPONSE TO AFFIRMATIVE DEFENSE BY ALPENA VISION RESOURCES, LLC, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,  
Attorney General of the  
State of Illinois

MATTHEW J. DUNN, Chief  
Environmental Enforcement/Asbestos  
Litigation Division

BY: 

MICHAEL D. MANKOWSKI  
Assistant Attorney General  
Environmental Bureau

500 South Second Street  
Springfield, Illinois 62706  
217/782-9031  
Dated: January 10, 2013

**CERTIFICATE OF SERVICE**

I hereby certify that I did on January 11, 2013, cause to be served by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instruments entitled NOTICE OF ELECTRONIC FILING and PEOPLE'S RESPONSE TO AFFIRMATIVE DEFENSE BY ALPENA VISION RESOURCES, LLC upon the persons listed on the Service List.



Michael D. Mankowski  
Assistant Attorney General

This filing is submitted on recycled paper.

**SERVICE LIST**

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**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

<b>PEOPLE OF THE STATE OF ILLINOIS,</b>	)	
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<b>Complainant,</b>	)	
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<b>v.</b>	)	<b>PCB No. 13-16</b>
	)	<b>(Enforcement)</b>
<b>ALPENA VISION RESOURCES, LLC,</b>	)	
<b>a Michigan limited liability company,</b>	)	
	)	
<b>Respondent.</b>	)	

**PEOPLE'S RESPONSE TO AFFIRMATIVE DEFENSE  
BY ALPENA VISION RESOURCES, LLC**

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, hereby responds to the affirmative defenses pleaded by this Respondent in its Answer filed on December 24, 2012, and states as follows:

1. Section 103.204(d) of the Board's procedural rules provides in pertinent part as follows: "Any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing." Section 101.100(b) provides that the Supreme Court Rules and the Code of Civil Procedure do not expressly apply to Board proceedings; however, the Board may look to these legal requirements "for guidance where the Board's procedural rules are silent." The Board has noted that its procedural rules contain provisions for the filing of affirmative defenses and that the parties are expected to present arguments regarding the applicability of the Code of Civil Procedure if the Board is to consider such other requirements. See, e.g., *People v. Belden Tools et al.*, PCB 96-208 (August 1, 1996). The People respectfully suggest that Section 2-613(d) of the Code of Civil Procedure [735 ILCS 5/2-613(d)], which pertains to affirmative defenses in civil actions, and more particularly the appellate opinions thereunder regarding the adequacy of pleading affirmative defenses, are useful to the Board's consideration of such issues.

2. It is well settled in the case law that the facts of an affirmative defense must be alleged with particularity. Whether a defense is an affirmative defense turns on whether the defense "gives color to the opposing party's claim and thus asserts a new matter by which the apparent right is defeated." *Ferris Elevator Co. v. Inc. v. Neffco, Inc.*, 285 Ill. App. 3d 350, 354 (3<sup>rd</sup> Dist. 1996). An affirmative defense that lacks a factual basis is inadequately pled. *Estate of Wrage v. Tracey*, 194 Ill. App. 3d 117, 122 (1<sup>st</sup> Dist. 1990). The facts establishing the defense must be pleaded by the defendant with the same degree of specificity as is required of a plaintiff alleging the essential elements of a cause of action. *Goldman v. Walco Tool & Engineering Co.*, 243 Ill. App. 3d 981, 989 (1<sup>st</sup> Dist. 1993), appeal denied 152 Ill.2d 558 (1993). An exception to this rule applies where the facts constituting the defense are already pleaded in the complaint.

3. The burden of proof as to any particular affirmative defense is upon the party asserting the defense. *Pascal P. Paddock, Inc. v. Glennon*, 32 Ill.2d 51, 54 (1965). What must be proven must first be pleaded.

#### **Affirmative Defense**

4. The Respondent contends that: "Naturally occurring background constituents present in the soil and groundwater in and around the said Murdock Mine prevent Respondent from technically and economically avoiding any of the water-related exceedances claimed in the Complaint to have been discovered." However, the Respondent pleads no allegations of fact to which the Complainant must respond.

5. The Respondent fails to identify what background constituents, if any, are naturally occurring in the soil and groundwater in and around the Murdock Mine. The Respondent's contention is both legally and factually insufficient.

6. The Respondent's contention that background constituents prevent Respondent from technically and economically avoiding any of the water-related exceedances claimed in the Complaint to have been discovered is a legal conclusion and merits no response.

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, hereby responds and objects to the affirmative defenses suggested by this Respondent.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,

LISA MADIGAN,  
Attorney General  
of the State of Illinois

MATTHEW J. DUNN, Chief  
Environmental Enforcement/Asbestos  
Litigation Division

BY: 

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