BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois,	)	
Complainant,	)	
v.	)	PCB No. 16-61
AMSTED RAIL COMPANY, INC., A Delaware Corporation.	)	
Respondent.	)	

NOTICE OF FILING

TO: Please see attached Service List

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board by electronic filing COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES, a copy of which is attached and hereby served upon you.

Respectfully submitted,

LISA MADIGAN
Attorney General
State of Illinois

Jamie D. Getz

Dated: February 11, 2016

Jamie D. Getz
Assistant Attorney General
Environmental Bureau
Illinois Attorney General's Office
69 W. Washington Street, Suite 1800
Chicago, Illinois 60602
(312) 814-6986
jgetz@atg.state.il.us

THIS FILING IS SUBMITTED ON RECYCLED PAPER

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served via electronic mail on the date of February 11, 2016 the attached NOTICE OF FILING and COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES to the addresses listed on the attached Service List.

Jamie D. Getz
Assistant Attorney General
Environmental Bureau
Illinois Attorney General's Office
69 W. Washington Street, Suite 1800
Chicago, Illinois 60602
(312) 814-6986

Date: February 11, 2016

SERVICE LIST

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, IL 62794
Carol.Webb@illinois.gov

Elizabeth S. Harvey, Esq.
Swanson, Martin & Bell, LLP
330 N. Wabash, 33rd Floor
Chicago, IL 60611
eharvey@smbtrials.com

Michael L. Maher, Esq.
Swanson, Martin & Bell, LLP
330 N. Wabash, 33rd Floor
Chicago, IL 60611
mmaher@smbtrials.com

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois,	)	
Complainant,	)	
v.	)	No. 16-61 (Enforcement – Air)
AMSTED RAIL COMPANY, INC., a Delaware corporation,	)	
Respondent.	)	

COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, pursuant to Section 101.506 of the Illinois Pollution Control Board ("Board") Procedural Rules, 35 Ill. Adm. Code 101.506, and hereby moves for an order striking Respondent's, AMSTED RAIL COMPANY, INC., Affirmative Defenses. In support thereof, Complainant states as follows:

I. INTRODUCTION

On November 16, 2015, Complainant filed its Complaint against Respondent. In the Complaint, Complainant alleged violations of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/1 *et seq.*, the Illinois Pollution Control Board ("Board") Air Pollution Regulations, 35 Ill. Adm. Code Subtitle B, and conditions of various permits Illinois EPA issued to Respondent for operation of its steel manufacturing foundry and roadways located at 1700 Walnut Street, Granite City, Madison County, Illinois ("Facility").

On January 15, 2016, Respondent filed its Answer and Affirmative Defenses ("Answer"), which listed five purported affirmative defenses ("Affirmative Defenses").

For the reasons set forth herein, Respondent's Affirmative Defenses are legally insufficient and should be stricken.

II. ARGUMENT

A. Standard of Review

The Board defines a properly asserted affirmative defense as "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). 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). 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, (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.

B. Affirmative Defenses

1. First Affirmative Defense: Illinois Statute of Limitations

Respondent's First Affirmative Defense is legally insufficient because the violations alleged in the Complaint[1] are not subject to any statute of limitations. The parties agree that the

[1] Respondent alleges that its First Affirmative Defense is applicable to Counts VII, VIII, X, XI, and XII of the Complaint. *Answer* pp. 62-64. Separately, Respondent filed a Motion to Dismiss Counts I, II, III, IV, V, and VI on January 15, 2016 ("Motion to Dismiss"). Complainant filed its response opposing the Motion to Dismiss on January

Act and the Board's procedural rules do not contain any statute of limitations for enforcement actions, such as this enforcement matter presently before the Board. Answer p. 62. Moreover, as the Board has held, "[T]here is no statute of limitations that applies to enforcement actions brought by the State pursuant to Section 31 of the Act." *People of the State of Ill. v. John Crane Inc.* (May 17, 2001), PCB 01-76, slip op. at 5; *see also Pielet Bros. Trading, Inc. v. Pollution Control Bd.*, 110 Ill. App. 3d 752, 758 (5th Dist. 1982); *People v. Am. Disposal Co. and Consol. Rail Corp.* (May 18, 2000), PCB 00-67, slip op. at 3.

The rationale behind the *John Crane* ruling is that no statute of limitations applies where the State is asserting a public right to a clean and healthy environment on behalf of the public. *People v. Am. Waste Processing Ltd.* (Mar. 19, 1998), PCB 98-37, slip op. at 1, *see also Pielet Bros.* at 757. "The Board has consistently held that a statute of limitations bar will not preclude any action seeking enforcement of the Act, if brought by the State on behalf of the public's interest." *Caseyville Sport Choice, LLC v. Erma I. Sieber et. al.* (Oct. 16, 2008), PCB 08-30, slip op. at 3, *citing Union Oil Co. of Cal. d/b/a UNOCAL v. Barge-Way Oil Co., Inc.* (Jan. 7 1999), PCB 98-169, slip op. at 5, footnote 1; *Pielet Bros.* at 758.

The Board, in holding that no statute of limitations applies to enforcement actions brought by the State under Section 31, has equated the State's enforcement of the Act with the enforcement of a public right. This conclusion is supported by the Act. Section 2(a)(ii) of the Act codifies the General Assembly's finding "that environmental damage seriously endangers the public health and welfare..." 415 ILCS 5/2(a)(ii) (emphasis added). Likewise, the Constitution of the State of Illinois provides that it is "[t]he public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future

---

29, 2016. As of the time of filing of this Motion, the Board has yet to rule on Respondent's Motion to Dismiss. Complainant asserts that no statute of limitations applies to *any* of the allegations in the Complaint.

generations." Const. of the State of Ill., Art. XI, Sec. 1 (emphasis added). Our lawmakers have legislated that environmental protection is a public matter that affects the People of the State of Illinois as a whole.

Respondent's argument that the Complainant is not enforcing a public right (Answer p. 63) not only directly contradicts legislative mandates, but also does not comport with applicable Board findings. As the Board has held, the Attorney General's role in protecting the public interest clearly extends to environmental matters. *Land & Lakes Co., JMC Operations, Inc. and NBD Trust Co. Of Ill., As Tr. Under Trust No. 2624EG v. Vill. of Romeoville* (Feb. 7, 1991), PCB 91-7, slip op. at 2. The Attorney General has the duty and authority, as the State's chief legal officer, to represent the people for the protection of that interest. *Id; see also Pioneer Processing, Inc. v. EPA*, 102 Ill.2d 119, 137 (1984).

By Respondent's own admission, permit requirements and proper recordkeeping are essential parts of a regulatory scheme. Motion to Dismiss, p. 5, footnote 1. Respondent fails to support its proposition that the violations alleged in the Complaint are not brought on behalf of the public interest. Answer p. 63. Complainant, by enforcing recordkeeping and permit violations, is seeking to ensure that Respondent and other parties similarly situated are incentivized to comply with the Act in the future. Civil penalties are necessary for deterrence and the enhancement of voluntary compliance. *People v. State Oil Company et. al* (Mar. 20, 2003), PCB 97-103, slip op. at 16. Recordkeeping and permit violations are regularly enforced by the Complainant before the Board in cases brought pursuant to Section 31. *See e.g., People v. Packaging Personified, Inc.* (Sept. 8, 2011), PCB 04-16. The Board's authority to rule on such violations, in tandem with the regulatory scheme created by the Act to prevent air pollution, demonstrates that penalizing of recordkeeping violations is well within the public's interest.

The Board has held the five-year limitation that Section 13-205 of the Illinois Code of Civil Procedure, 735 ILCS 5/13-205, may be applicable to actions between private parties. *See Caseyville*, *Pielet Bros.* However, the Board has declined, upon due consideration, to adopt Section 13-205, or any other statute of limitations, in cases brought pursuant to Section 31 of the Act. *See John Crane*.

No statute of limitations applies to the violations alleged in the Complaint. Because no statute of limitations applies to the alleged violations, the First Affirmative Defense does not satisfy the requirements that an affirmative defense assert a new matter by which the asserted right is defeated. *Worner* at 222. Respondent's First Affirmative Defense is therefore legally insufficient and should be stricken.

2. Second Affirmative Defense: Federal Statute of Limitations

Respondent's Second Affirmative Defense is legally insufficient because the violations alleged in Counts XI and XII are not subject to any statute of limitations. As described at length above in response to Respondent's First Affirmative Defense, no statute of limitations applies in cases brought by the State pursuant to Section 31 of the Act. *See John Crane*. The Complaint in this matter was filed by the State pursuant to Section 31 of the Act.

Respondent's Second Affirmative Defense asserts that Counts XI and XII are subject to a federal five-year statute of limitations because those counts seek to enforce the terms of Respondent's Clean Air Act Permit Program ("CAAPP") permit, which is administered by the Illinois EPA under authority granted to it by the United State Environmental Protection Agency ("US EPA"). Answer p. 64. However, violations of a CAAPP permit are not subject to a federal statute of limitations when they are being enforced by the State pursuant to the Act. In order to implement Illinois EPA's delegated authority to operate the CAAPP, the Act provides for the

CAAPP permitting process for emission sources in Illinois. 415 ILCS 5/39.5. Specifically, the Act provides that "The Agency shall issue CAAPP permits under this Section consistent with the Clean Air Act and regulations promulgated thereunder and this Act and regulations promulgated thereunder." 415 ILCS 5/39.5(3).

Enforcement of CAAPP permits is subject to applicable provisions of the Act. Section 31 of the Act authorizes the Attorney General to file a formal complaint specifying "....the provision of the Act or the rule or regulation or *permit or term or condition thereof* under which such person is said to be in violation...." 415 ILCS 5/31(c)(1) (emphasis added). Additionally, the Act specifies that "[a]ny person who violates....any CAAPP permit, or any term or condition thereof, or any fee or filing requirement, or any duty to allow or carry out inspection, entry or monitoring activities, or any regulation or order relating to the CAAPP shall be liable for a civil penalty not to exceed $10,000 per day of violation." 415 ILCS 5/42(a)(5). No statute of limitations is included in either of these provisions, or anywhere else in the Act.

Respondent does not cite to a provision of the Clean Air Act or regulation adopted thereunder in support of its Second Affirmative Defense, but instead suggests 28 U.S.C. § 2462 is applicable. Answer p. 64. Section 2462 provides, in relevant part, "[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine.... shall not be entertained unless commenced within five years from the date when the claim first accrued...." 28 U.S.C. § 2462. Section 2462 is a part of United States Code Title 28 - "Judiciary and Judicial Procedure" and is wholly separate from the Clean Air Act, 42 U.S.C. §7401 *et. seq.* and any regulations promulgated thereunder, i.e. 40 C.F.R. Subchapter C ("Air Programs"). Section 2462, a judicial procedural rule, is thus not a part of the CAAPP program as implemented by the State of Illinois, nor is it incorporated by Section 39.5(3) of the Act.

The Board has specifically rejected statute of limitations as an affirmative defense to violations of a CAAPP permit. *See People of the State of Ill. v. Panhandle E. Pipe Line Company* (Nov. 15, 2001), PCB 99-191, slip. op. at 21.[2]

Complainant filed the Complaint in the present matter before the Board, which is subject to its own procedural rules, and may also look to the Illinois Code of Civil Procedure and the Illinois Supreme Court Rules for guidance where the Board's procedural rules are silent. 35 Ill. Adm. Code 101.100. The Board has not, however, adopted any rules that permit it to apply federal rules of judicial procedure. Furthermore, "federal administrative rules do not bind state courts." *Wenig v. Lockheed Envtl. Sys. and Technologies Co.*, 312 Ill.App.3d 236, 241 (5th Dist. 2000).[3] The federal statute of limitation is therefore inapplicable to the alleged violations in Counts XI and XII of the Complaint. As the Second Affirmative Defense relies wholly upon an inapplicable rule of federal judicial procedure, and for the reasons outlined in response to Respondent's First Affirmative Defense (that no statute of limitations applies when the State enforces the Act pursuant to Section 31), Respondent's Second Affirmative Defense should be stricken.

3. Third Affirmative Defense: Error in Permit Terms

Respondent's Third Affirmative Defense, which contests the terms of its CAAPP permit, must fail because Respondent cannot raise a challenge to the validity of a permit's emission limits as a defense to an enforcement action. Respondent asserts in its Third Affirmative Defense

[2] The respondent in *Panhandle* asserted Section 13-205 of the Illinois Code of Civil Procedure as the applicable statute of limitations for alleged violations of its CAAPP permit. The respondent in that case did not assert, and the Board did not consider, the applicability of 28 U.S.C. § 2462. Complainant is unaware of any Board cases that consider or rule on the applicability of 28 U.S.C. § 2462.

[3]. The Board has concurrent jurisdiction with state courts to hear enforcement actions for violations of the Act. *People v. NL. Indus.*, 152 Ill. 2d 82, 93 (1992). Had Complainant filed this matter in state court, the federal statute of limitation would not bar the Complainant from enforcing permit violations in that venue. Although the present matter is before the Board, the maxim that federal rules do not bind state courts can logically be extended to a Board proceeding in this case.

that the Facility's emission limitations contained in its CAAPP permit are "clearly in error, perhaps typographical." Answer p. 65. Without providing any legal basis for its assertion, Respondent states that "[i]ncorrect and illogical permit emissions limits cannot be the basis for alleged violations of those limits." Answer p. 65. Respondent directs its Third Affirmative Defense to the alleged violations of its CAAPP permit pertaining to emissions from two emission units known as MSS-6 and SB-7. *Id.* Respondent admitted to the factual allegations put forth by Complainant that support the alleged emission limit violations. Answer pp. 26-27.

The Act provides a mechanism to challenge the terms of a permit before the Board; but that the Respondent disagrees with the terms after the permit is final and then, later, fails to comply with them is not an affirmative defense. In *Panhandle*, an enforcement action, the Board struck Panhandle's affirmative defense claiming a permit limit was "illegal and unenforceable because the permit did not contain practicably enforceable conditions.... such as restrictions on hours of operation or fuel usage." *Panhandle* at 16. The Board struck the affirmative defense, stating:

> "....the Act has given permit applicants like Panhandle the right to appeal Agency permit decisions. Specifically, Section 40(a)(1) of the Act .... affords a permit applicant the opportunity to appeal an Agency permit decision to the Board within 35 days after the Agency's decision. Panhandle failed to do so. By failing to do so, the permit became final and binding. Panhandle cannot now, in an enforcement proceeding over ten years later, raise challenges to the validity of the permit's emission limit based on alleged deficiencies in the permit application process. To hold otherwise would render the 35-day appeal period of Section 40(a)(1) meaningless."

Panhandle at 15.

The Complaint alleged that the emissions from MSS-6 and SB-7 exceeded the limits provided for in its CAAPP permit. The assertion that Respondent is unwilling or unable to comply with the terms of a final and binding permit does not constitute an affirmative defense

because it does not assert a new matter that defeats Complainant's right to relief. *See Vroegh* at 530. As such, Respondent's Third Affirmative Defense should be stricken by the Board.

4. Fourth Affirmative Defense: Incorrect Testing Method

Respondent's Fourth Affirmative Defense asserting that Respondent has conducted required opacity testing is merely a denial of the violations alleged in the Complaint and thus does not constitute a valid affirmative defense. The Complaint alleges that "[f]rom 2010 through the date of filing of this Complaint, Respondent has failed to conduct opacity testing on all buildings or structures housing emission sources involved in the foundry operations at the Facility." Complaint Count XIII, ¶ 39. In its Fourth Affirmative Defense, Respondent asserts "[o]n the contrary, respondent has been conducting required opacity testing." Answer p. 65. A mere denial of well-pleaded facts does not constitute an affirmative defense. *People v. Wood River Refining Co.* (Aug. 8, 2012), PCB 99-120, slip op. at 4. Respondent's Fourth Affirmative Defense fails to give color to Complainant's claims and assert a new matter that defeats it. *See Vroegh* at 530. As such, Respondent's Fourth Affirmative Defense should be stricken by the Board.

5. Fifth Affirmative Defense: Additional Affirmative Defenses

Respondent's Fifth Affirmative Defense is legally insufficient and should be stricken because it does not satisfy the requirements that an affirmative defense assume the claims set forth in the Complaint and assert a new matter that defeats it. To that end, the Board has ruled that a so-called reservation of rights is not a valid affirmative defense. "A reservation of rights to assert additional defenses does nothing to attack the People's right to bring the claims it sets forth in the complaint. The Board grants the People's motion to strike this defense." *People of the State of Ill. v. Texaco,* Nov. 6, 2003, PCB 02-03, slip op. at 11. Furthermore, Respondent's

reservation of rights is meaningless as parties to a Board hearing are subject to the Board's Procedural Rules pertaining to the pleading of affirmative defenses. *See e.g.* 35 Ill. Adm. Code 103.204(d). Accordingly, Respondent's Fifth Affirmative Defense is legally insufficient and should be stricken.

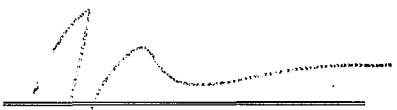
III. CONCLUSION

For the reasons stated above, Respondent's Affirmative Defenses are legally insufficient and should be stricken. The First and Second Affirmative Defenses rely on inapplicable statutes of limitation. The Third Affirmative Defense improperly challenges final and enforceable permit terms. The Fourth Affirmative Defense is merely a denial of the alleged violations in the Complaint. The Fifth Affirmative Defense is not a defense at all and is meaningless.

WHEREFORE, Complainant respectfully asks this Board to 1) grant Complainant's Motion to Strike Affirmative Defenses; 2) strike each of the Affirmative Defenses asserted by Respondent in this matter; and 3) grant such other relief as the Board deems appropriate and just.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
by LISA MADIGAN
Attorney General of the State of Illinois

BY: 

JAMIE D. GETZ
Assistant Attorney General
Environmental Bureau
69 W. Washington St., Suite 1800
Chicago, Illinois 60602
Tel: (312) 814-6986
jgetz@atg.state.il.us