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. 12-035 (Enforcement – LUST/Water)
SIX M. CORPORATION INC., an Illinois, corporation, and THOMAS MAXWELL, an individual,	)	
Respondents,	)	
and	)	
JAMES MCILVAIN,	)	
Necessary Party.	)	

NOTICE OF FILING COMPLAINANT'S MOTION TO STRIKE RESPONDENTS' AFFIRMATIVE DEFENSE

PLEASE TAKE NOTICE that on January 8, 2019, I caused to be filed with the Clerk of the Illinois Pollution Control Board via "COOL" System the attached Motion to Strike Respondents' Affirmative Defense.

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:/s/ Elizabeth Dubats
Elizabeth Dubats
Environmental Bureau
Assistant Attorney General
69 West Washington Street, 18th Floor
Chicago, Illinois 60602
(312) 814-2069
edubats@atg.state.il.us

CERTIFICATE OF SERVICE

I, Elizabeth Dubats, do certify that I caused to be served this 8th day of January, 2019, Complainant's Motion to Strike Respondents' Affirmative Defense upon persons listed below via electronic mail with return receipt:

Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
Springfield, Illinois 62794-9274
Carol.Webb@illinois.gov

Philip R. Van Ness
Webber & Thies, P.C.
202 Lincoln Square
P.O. Box 189
Urbana, Illinois 61801
pvanness@webberthies.com

Patrick D. Shaw
Law Offices of Patrick D. Shaw
80 Bellerive Road
Springfield, Illinois 60704
Pdshaw1@gmail.com

/s/ Elizabeth Dubats
Elizabeth Dubats
Environmental Bureau
Assistant Attorney General
69 West Washington Street, 18th Fl.
Chicago, Illinois 60
(312) 814-2069
edubats@atg.state.il.us

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois Complainant, v. SIX M. CORPORATION INC., an Illinois, corporation, and THOMAS MAXWELL, an individual, Respondents, and JAMES MCILVAIN, Necessary Party.	)	PCB No. 12-035 (Enforcement – LUST/Water)

COMPLAINANT'S MOTION TO STRIKE RESPONDENTS' AFFIRMATIVE DEFENSE

NOW COMES the Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, and hereby moves, pursuant to Section 101.500 of the Illinois Pollution Control Board ("Board") regulations, 35 Ill. Adm. Code 101.500, and Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615(2016) to strike Respondents SIX M. CORPORATION INC. and THOMAS MAXWELL's Affirmative Defense to the First Amended Complaint. In support of its motion, the Complainant states as follows:

I. INTRODUCTION

On September 20, 2018, the Board accepted for filing Complainant's First Amended Complaint ("Amended Complaint") against Respondents. On November 26, 2018, Respondents

Six M. Corporation Inc. ("Six M. Corp.") and Thomas Maxwell filed their Answer. Along with the Answer, the Respondents plead the Affirmative Defense of Impossibility. However, the defense of "impossibility" is only a potential defense to performance under contract law, and is inapplicable to this statutory enforcement action. Further, as admitted in the affirmative defense, the Respondents have voluntarily declined to resolve the violations through use of the statutory and regulatory relief provisions of the Illinois Environmental Protection Act, 415 ILCS 5/1 *et seq.* (2016) ("Act") and Leaking Underground Storage Tank ("LUST") regulations. Accordingly, the Respondents' failure to comply with the statutory and regulatory provisions is not 'impossible' but rather voluntary. The Respondents' affirmative defense of impossibility is therefore both legally and factually insufficient and should be stricken.[1]

Furthermore, throughout its Answer to First Amended Complaint, Respondents have pleaded other affirmative matters in response to many of Complainant's allegations. Such other affirmative matters are prefaced by "Defendant affirmatively states that . . ." and includes explanations of Respondents' theory of the case or makes arguments in defense or mitigation of Complainant's claims. None of these affirmative matters are set forth separately as clearly identified affirmative defenses, as required by Sections 2-603, 2-613, and 2-610 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-603, 2-613, and 2-610. These statutory provisions provide for a concise manner by which parties can advocate for their version of events. They also aid in the creation of a clear record that minimizes future confusion over, or the muddling of, attorneys' words and meanings over the course of litigation. In addition, the required format

[1] Complainant notes that Respondents' affirmative defense is substantially identical to the affirmative defense stricken by the Board in this matter on February 12, 2012. The record in this case indicates that former counsel for Complainant subsequently represented that the Board's action was in error and the Board reinstated the affirmative defense to "…give effect to the parties' desire to litigate the issues presented by the affirmative defense" on May 12, 2012. Because Respondents have re-pleaded essentially the same affirmative defense 6 years later, it is clear that the parties have not resolved the effect of the affirmative defense and Complainant now requests that this defense be stricken. Complainant apologizes for the confusion created by its prior filings on this issue.

makes it possible for parties, such as Complainant, to properly respond and protect any objections they may have to affirmative defenses. Therefore, in the interest of following the statutory dictates, providing for a clear record, and protecting Complainant from inadvertently waiving any objections it may have to any affirmative defenses, all the affirmative statements scattered throughout Respondents' Answer should also be stricken and/or dismissed, with prejudice, from the Answer to First Amended Complaint.

II. ARGUMENT

A. Legal Standards for Motions to Strike Affirmative Defenses

An affirmative defense is "[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true." Black's Law Dictionary (9th ed. 2009). Under Illinois law, "[t]he criteria to be applied in determining if a defense is or is not of an affirmative nature is whether, by the raising of it, a defendant gives color to his opponents claim and then asserts new matters by which the apparent right is defeated." *Horst v. Morand Bros. Beverage Co*., 96 Ill. App. 2d 68, 80 (1st Dist. 1968), citing *Cunningham v. City of Sullivan*, 15 Ill. App. 2d 561, 567 (3rd Dist. 1958).

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). Where the well-pleaded facts of an affirmative defense do not raise the possibility that the party asserting

them will prevail, the affirmative defense should be stricken. *See Raprager v. Allstate Ins. Co.*, 183 Ill. App. 3d 847, 854 (2d Dist. 1989).

B. Respondent's First Affirmative Defense Must be Dismissed because it is Legally Insufficient

Impossibility of performance is a contract doctrine with no applicability to this enforcement action. The Board has explicitly refused to recognize "impossibility" as a valid affirmative defense to an environmental enforcement action, and stricken attempts to raise it as an affirmative defense as baseless. *See e.g. Bruce v. Highland Hills Sanitary Dist.*, PCB 15-139, Slip op. at 3 (June 2, 2016) ("Highland Hills did not show that these affirmative defenses have any legal basis—it provided no statute, regulation, or case law establishing general equity or impossibility as valid affirmative defenses.").

To the extent that Respondents seek to affirmatively assert that the violations were the result of circumstances outside of their control, it still fails as a matter of law. Illinois courts have ruled, specifically, lack of intention or conditions beyond the defendant's control are not available as defenses to overcome prohibitions against causing, allowing, or threatening discharges into waters of the State. *See e.g. Perkinson v. Illinois Pollution Control Bd.*, 187 Ill. App. 3d 689, 694 (3d Dist. 1989), discussing *Freeman Coal Mining Corp. v. Illinois Pollution Control Bd.*, 21 Ill. App. 3d 157 (5th Dist. 1974) ("It was ***no defense*** that the discharges were accidental and not intentional or that they were result of … (rain) beyond [defendant's] control") (emphasis added). As the impossibility doctrine is not an available affirmative defense in an environmental enforcement action such as this, Respondents' affirmative defense should be dismissed with prejudice.

C. Respondents fail to plead the necessary elements of impossibility, and therefore their affirmative defense should be stricken.

Even if the Board were to entertain the unprecedented application of the contract "impossibility" doctrine to an environmental enforcement action, Respondents do not and cannot plead the required elements of impossibility of performance. Impossibility of performance requires 1) that the circumstances rendering performance impossible were not and could not have been anticipated by the parties; 2) that the party raising the defense did not contribute to the impossible circumstances; and 3) the party raising the defense exhausted its reasonable options in pursuit of performance. *Illinois-Am. Water Co. v. City of Peoria*, 332 Ill. App. 3d 1098, 1106 (3d Dist. 2002). Respondents' affirmative defense fails to allege facts supporting these factors.

In this instance, the only circumstance alleged to have rendered performance impossible is that Necessary Party James McIlvain denied Respondents access to his adjacent property. *See* Affirmative Defense, pp. 21-22, ¶¶16, 26-28. Denial of off-site access is a circumstance so thoroughly anticipated that the Board adopted regulatory procedures specifically to address it. Section 734.325(b) of the Board Underground Storage Tank Regulations provides:

> The owner or operator is not required to perform remedial action on an off-site property, even where complete performance of a corrective action plan would otherwise require such off-site action, if the Agency determines that the owner or operator is unable to obtain access to the property despite the use of best efforts in accordance with the requirements of Section 734.350 of this Part.

35 Ill. Adm. Code 734.345(b). Board regulations provide procedural requirements that constitute "best efforts to obtain off-site access". Section 734.350 of the Board Underground Storage Tank Regulations provides:

> a) An owner or operator seeking to comply with the best efforts requirements of Section 734.345(b) of this Part must demonstrate compliance with the requirements of this Section.
> b) In conducting best efforts to obtain off-site access, an owner or operator must, at a minimum, send a letter by certified mail to the owner of any off-site property to which access is required, stating:

> 1) Citation to Title XVI of the Act stating the legal responsibility of the owner or operator to remediate the contamination caused by the release;
> 2) That, if the property owner denies access to the owner or operator, the owner or operator may seek to gain entry by a court order pursuant to Section 22.2c of the Act;
> 3) That, in performing the requested investigation, the owner or operator will work so as to minimize any disruption on the property, will maintain, or its consultant will maintain, appropriate insurance and will repair any damage caused by the investigation;
> 4) If contamination results from a release by the owner or operator, the owner or operator will conduct all associated remediation at its own expense;
> 5) That threats to human health and the environment and diminished property value may result from failure to remediate contamination from the release; and
> 6) A reasonable time to respond to the letter, not less than 30 days.
>
> c) An owner or operator, in demonstrating that the requirements of this Section have been met, must provide to the Agency, as part of the corrective action completion report, the following documentation:
>
> > 1) A sworn affidavit, signed by the owner or operator, identifying the specific off-site property involved by address, the measures proposed in the corrective action plan that require off-site access, and the efforts taken to obtain access, and stating that the owner or operator has been unable to obtain access despite the use of best efforts; and
> > 2) A copy of the certified letter sent to the owner of the off-site property pursuant to subsection (b) of this Section.
> >
> > ***

35 Ill. Adm. Code 734.350.

By their own allegations, Respondents have not pursued all reasonably available compliance options. At paragraph 28 of the alleged affirmative defense, Respondents allege:

> While the Board regulations do not require performance of corrective action on an adjoining or off-site property where access is denied, 35 Ill. Adm. Code § 732.404(c), Six M hopes that access will eventually be provided and therefore ***has so far declined to use the available procedure***.

(Emphasis added). "Hope" unaccompanied by concrete action is not a legally cognizable compliance plan for the purposes of a LUST remediation. As the Board noted in its February 12, 2012 order in this matter, "the respondents' preference not to use the procedure of 35 Ill. Adm.

Code 732.411[2] does not mean that performance of remediation activities is 'impossible.'" Slip op. at p. 6. Any affirmative defense of impossibility that openly admits the respondent has elected to not utilize the very procedure designed to address the allegedly "impossible" situation of denial of off-site access must fail on its face.

Respondents also fail to allege any legal action brought pursuant to Section 22.2c of the Act, 415 ILCS 5/22.2c (2016), which provides:

> Adjacent site remediation; injunction. If remediation of real property contaminated by hazardous substances or petroleum products cannot be reasonably accomplished without entering onto land adjoining the site from which those substances were released, and if the owner of the adjoining land refuses to permit entry onto the adjoining land for the purpose of effecting remediation, then the owner or operator of the site may bring an action to compel the owner of the adjoining land to permit immediate entry for purposes relating to the remediation of the site, the adjoining land, and any other real property that may be contaminated with the hazardous substances or petroleum products. The court shall prescribe the conditions of the entry and shall determine the amount of damages, if any, to be paid to the owner of the adjoining land as compensation for the entry. The court may require the owner or operator who is seeking entry to give bond to the owner of the adjoining land to secure performance and payment.

As a Section 22.2c suit would provide a means of resolving an access dispute, and Respondents do not allege that they pursued this available option, it cannot be said that Respondents exhausted their options for performance. As such, Respondents' affirmative defense should be stricken as factually insufficient pursuant to Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615 (2016).

D. Respondents Improperly Allege Affirmative Matters in their Answer.

Instead of separately pleading, designating and numbering as affirmative defenses its affirmative allegations in the Answer, as required by Sections 2-603 and 2-613 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-603 and 2-613 (2016), Respondents simply weave

[2] Section 732.411 is an older version of Section 734.350 of the Board Underground Storage Tank Regulations.

various assertions of factual and conclusory legal allegations and argument throughout their Answer to First Amended Complaint. Respondents pleaded these affirmative allegations without any basis as to how they may counter Complainant's allegations or what their legal significance might be. Respondents' manner of pleading places Complainant in a distinctly prejudiced position.

A plaintiff waives its objections to any affirmative defense when it fails to object in the trial court. *Fitzpatrick v. City of Chicago*, 112 Ill.2d 211, 219 (1986) (Section 2-612 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-612, provides that all defects in pleadings, either in form or substance, not objected to in the trial court are waived). In their Answer to First Amended Complaint, Respondents plead a separate Affirmative Defense, but they have also pleaded other affirmative matters throughout their Answer. Complainant is left in the precarious position of not knowing whether it is waiving its right to object to an affirmative defense, so styled or not, as to material in the Answer to First Amended Complaint.

The law is clear that affirmative defenses must be separately pleaded, designated and numbered. Respondents have not done that in its Answer to First Amended Complaint. The law is also equally clear that a plaintiff must be afforded the opportunity to reply to or seek to strike, as appropriate, a defendant's affirmative defenses. At this point, Complainant cannot adequately determine whether Respondents' additional allegations in its Answer to First Amended Complaint constitute any valid affirmative defenses requiring objection or argument not requiring a reply. *See In re Marriage of Sreenan*, 81 Ill.App.3d 1025, 1028 (2nd Dist. 1980). With the exception of its Affirmative Defense, Respondents' Answer to First Amended Complaint is not consistent with the statutory provisions for clear and concise answers and separately designated affirmative defenses, which can result in confusion of the record and will

result in prejudice to Complainant because its ability to review and properly respond to the Answer to First Amended Complaint is limited.

Furthermore, Sections 2-610(a) and (c) of the Code of Civil Procedure require that every answer contain "an explicit admission or denial of each allegation of the pleading" and that "[d]enials must not be evasive…." 735 ILCS 5/2-610(a) and (c) (2016). By adding additional affirmative allegations to their Answer, Respondents obfuscate their otherwise properly pleaded responses to each allegation in the First Amended Complaint. Such formatting prejudices Complainant by preventing it from responding to any potential affirmative defenses. Complainant therefore respectfully requests that this Court strike and/or dismiss, with prejudice, all such non-responsive affirmative matters from the Answer to First Amended Complaint pursuant to Section 2-610 of the Illinois Code of Civil Procedure.

Moreover, the affirmative allegations incorporated within the Answer do not constitute valid affirmative matters. For example, Respondents "affirmatively state" in multiple paragraphs that "Thomas Maxwell is not an owner or operator under Title XVI of the Act." Count IV, ¶¶25, 26, 27, 33, and 34. This mere denial does not constitute a valid affirmative defense. *Vroegh*, 165 Ill.2d at 530. Respondents also affirmatively allege throughout their Answer that "access to neighboring property has been denied." Count I, ¶33; Count II, ¶36; Count III, ¶¶22, 23, and 24; and Count IV, ¶¶25, 26, 27, 32, 33, and 34. These are the same allegations alleged in their "impossibility" affirmative defense, which, as discussed in detail above, is not a valid affirmative defense in an environmental enforcement action.

III. CONCLUSION

Impossibility is not a legally cognizable affirmative defense to an environmental enforcement action. Furthermore, as detailed above, Respondents' allegations do not meet the essential elements for a defense of impossibility of performance, nor could Respondents do so given the facts currently pleaded. As such, Respondents' affirmative defense should be dismissed with prejudice.

In addition, Complainant respectfully requests that the Board strike and/or dismiss, with prejudice, all of Respondents' non-responsive allegations in its Answer to First Amended Complaint pursuant to Section 2-615(a) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615(a), including but not limited to: Count I, ¶¶4, 17, 19, 21, 26, 27, and 33; Count II, ¶¶33 and 36; Count III, ¶¶21, 22, 23, and 24; and Count IV, ¶¶24, 25, 26, 27, 32, 33, and 34.

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:/s/ Elizabeth Dubats
Elizabeth Dubats
Office of the Illinois Attorney General
69 West Washington Street, Suite 1800
Chicago, Illinois 60602
312.814.2069
edubats@atg.state.il.us