

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
)
 v.)
)
 PROFESSIONAL SWINE MANAGEMENT,)
 LLC, an Illinois limited liability corporation,)
 HILLTOP VIEW, LLC, an Illinois limited)
 liability corporation, WILDCAT FARMS, LLC,)
 an Illinois limited liability corporation,)
 HIGH-POWER PORK, LLC, an Illinois limited)
 liability corporation, EAGLE POINT FARMS,)
 LLC, an Illinois limited liability corporation,)
 LONE HOLLOW, LLC, an Illinois limited liability)
 corporation, TIMBERLINE, LLC, an Illinois)
 limited liability corporation, PRAIRIE STATE)
 GILTS, LTD, an Illinois corporation, LITTLE)
 TIMBER, LLC, an Illinois limited liability)
 corporation,)
 Respondents.)

PCB NO. 10-84
(Enforcement)

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on August 2, 2013, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, a MOTION TO STRIKE RESPONDENTS HIGH-POWER PORK, LLC'S, LONE HOLLOW, LLC'S, PRAIRIE STATE GILTS, LLC'S AFFIRMATIVE DEFENSES, a copy of which is attached hereto and herewith served upon you.

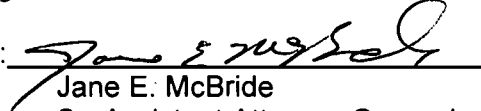
Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
State of Illinois

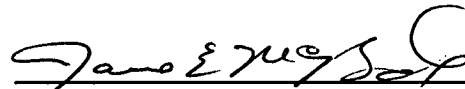
MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

500 S. Second St.
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BY: 
Jane E. McBride
Sr. Assistant Attorney General
Environmental Bureau

CERTIFICATE OF SERVICE

I hereby certify that I did on August 2, 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 MOTION TO STRIKE RESPONDENTS HIGH-POWER PORK, LLC'S, LONE HOLLOW, LLC'S, PRAIRIE STATE GILTS, LLC'S AFFIRMATIVE DEFENSES upon the persons listed on the Service List.


JANE McBRIDE
Sr. Assistant Attorney General

This filing is submitted on recycled paper.

SERVICE LIST

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Facility Respondents' affirmative defenses in this single filing.

Standard

2. The Board's procedural rules provide that "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" 35 Ill. Adm. Code 103.204(d).

3. The standard for affirmative defenses that has been established by the Board was set forth as follows in the matter of *People v. Heritage Coal Company, LLC (f/k/a Peabody Coal Company)*, PCB 99-134, slip op at 4 (June 5, 2003):

In a valid affirmative defense, the respondent alleges "new facts or arguments that, if true, will defeat . . . the government's claim even if all allegations in the complain are true." *People v. Community Landfill Co.*, PCB 97-193, slip op at 3 (Aug 6, 1998). The Board has also defined an affirmative defense as a "response to a plaintiff's claim which attacks the plaintiff's legal right to bring an action, as opposed to attacking the truth of claim." *Farmer's State Bank v. Phillips Petroleum Co.*, PCB 97-100 slip op at 2 n. 1 (January 23, 1997) (quoting Black's Law Dictionary). Furthermore, if the pleading does not admit the opposing party's claim, but instead attacks the sufficiency of that claim, it is not an affirmative defense. *Warner Agency v. Doyle*, 121 Ill. App. 3d 219, 221, 459 N.E. 2d 663, 635 (4th Dist. 1984).

4. The Code of Civil Procedure provides the following guidance regarding pleading affirmative defenses. Section 2-613 (d), 735 ILCS 5/2-613(d), provides in part:

The facts constituting any affirmative defense . . . 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, . . . in whole or in part, and any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, should 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) (2008).

The purpose of the above-quoted language is to specify the disputed legal issues before trial.

Handelman v. London Time, Ltd., 124 Ill. Ap. 3d 318, 320, 464 N.E.2d 710, 712 (1st Dist. 1984).

The parties are to be informed of the legal theories which will be presented by their respective opponents. *Id.* This is a prime function of pleading. *Id.*

5. Further guidance is available in Section 2-612 of the Code of Civil Procedure, 735 ILCS 5/2-612, which provides:

Insufficient pleadings. (a) If any pleading is insufficient in substance or form the court may order a fuller or more particular statement. If the pleadings do not sufficiently define the issues the court may order other pleadings prepared.

(b) No pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet.

(c) All defects in pleadings, either in form or substance, not objected to in the trial court are waived.

6. A valid affirmative defense gives color to the opposing party's claim but then asserts new matter which defeats an apparent right. *Condon v. American Telephone and Telegram Co.*, 210 Ill. App. 3d 701, 709, 569 N.E.2d 518, 523 (2d Dist. 1991), citing *The Worner Agency Inc. v. Doyle*, 121 Ill. App. 3d 219, 222, 459 N.E.2d 633 (4th Dist 1984).

7. "To 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. . . . In determining the sufficiency of any claim or defense, the court will disregard any conclusions of fact or law that are not supported by allegations of specific fact." *Richco Plastic Co. v. IMS Co.*, 288 Ill. App.3d 782, 784-85, 681 N.E.2d 56, 58 (1st Dist. 1997),

8. A motion to strike an affirmative defense admits well-pleaded facts constituting the defense, and attacks only the legal sufficiency of the facts. "Where the well-pleaded facts of an affirmative defense raise the possibility that the party asserting them will prevail, the defense

should not be stricken.” *International Insurance Co. v. Sargent and Lundy*, 242 Ill. App. 3d 614, 630-31, 609 N.E.2d 842, 853-54 (1st Dist. 1993), citing *Raprager v. Allstate Insurance Co.*, 183 Ill. App. 3d 847, 854, 539 N.E. 2d 787, 791 (2nd Dist. 1989).

9. Affirmative defenses that are totally conclusory in nature and devoid of any specific facts supporting the conclusion are inappropriate and should be stricken. See *International Ins. Co.*, 242 Ill. App. 3d at 635.

First Affirmative Defense

10. Respondents High-Power Pork, LLC’s, Lone Hollow, LLC’s, and Prairie State Gilts, LLC’s first affirmative defense reads as follows

The Complaint, which alleges a discrete discharge which occurred in 2008 (Count V, 2007; Count VII 2008), is defective in that it has not been properly filed or processed pursuant to the Act’s relevant enforcement mechanism, contained in Title VII of the Act. Count III (V, VII) is filed pursuant to Section 42(d) and (e) of Act, not Section 31, where the Board derives its enforcement authority. Any references to Title VII and Section 31 are noticeably absent from Count III (V, VII), and as Section 31 is expressly relevant to the Board’s enforcement authority, the failure to properly plead and meet the requirements of Section 31 is a fatal flaw that requires dismissal.

11. Counts III, V, and VI are brought solely on the Attorney General’s own motion. Based on the applicable case law, Respondents High-Power’s, Lone Hollow’s and Prairie State Gilts’ first affirmative defense is not affirmative matter that avoids the legal effect of or defeats the cause of action pled in Counts III, V and VI.

12. The Illinois Pollution Control Board has extensively addressed the requirements of Section 31 of the Act, 415 ILCS 5/31. In considering the legislative history of the 1996 amendments to Section 31 the Board has repeatedly found that they were not intended to bar the Attorney General from prosecuting an environmental violation. See *People v. Chiquita*

Processed Foods, LLC, PCB 02-56 (November 21, 2002), *People v. Eagle-Picher-Boge*, PCB 99-152 (July 22, 1999); *People v. Geon*, PCB 97-62 (October 2, 1997); and *People v. Heuermann*, PCB 97-92 (September 18, 1997).

13. Rather, the written notice required by Section 31(a)(1) is a precondition to the Illinois EPA's referral of the alleged violations to the Attorney General. *People v. Chemetco*, PCB 96-76 (July 8, 1998). The legislative history of Section 31 indicates that the legislature did not intend to prevent the Attorney General from bringing enforcement actions that are not based on an agency referral. *Id.* Respondents High-Power, Lone Hollow and Prairie State Gilts, in their first affirmative defense, have not alleged that the count is based on a referral to the Attorney General from the Illinois EPA, and, in fact, these counts are not.

Second Affirmative Defense

14. Respondent High-Power Pork, LLC's, Lone Hollow, LLC's, and Prairie State Gilts, LLC's second affirmative defense reads as follows

The alleged discharge described in Count III (V, VII) occurred because of a discrete incident that occurred in 2008 (Count V 2007, Count VII 2008). There have been no discharges from the facility following this singular incident, thus there is no duty to apply for an NPDES permit

15. Respondents second affirmative defense is solely a legal conclusion and as such is not affirmative matter that will defeat the claim. Further the question raised in Respondents assertion is the exact same question that served as the basis of Respondents' motion to strike a portion of the second amended complaint's request for relief, which was denied in the Board's Order dated May 2, 2013.

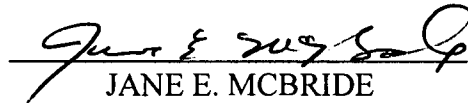
WHEREFORE, on the foregoing grounds and for the foregoing reasons, Complainant

respectfully requests that the Board strike the affirmative defenses asserted by Respondents High-Power Pork LLC (for Count III), Lone Hollow, LLC (for Count V), Prairie State Gilts, LLC (for Count VII).

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

MATTHEW J. DUNN, Chief
Environmental Enforcement Division

BY:



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