

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.))	

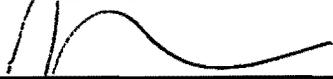
NOTICE OF FILING

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 RESPONSE TO RESPONDENT AMSTED RAIL COMPANY, INC.'S MOTION TO DISMISS COUNTS I, II, III, IV, V, AND VI, a copy of which is attached and hereby served upon you.

Respectfully submitted,

LISA MADIGAN
Attorney General
State of Illinois



JAMIE/D. GETZ, AAG

Dated: January 29, 2016

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THIS FILING IS SUBMITTED ON RECYCLED PAPER

SERVICE LIST

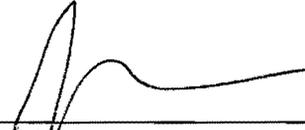
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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served via electronic mail on the date of January 29, 2016 the attached NOTICE OF FILING and COMPLAINANT'S RESPONSE TO RESPONDENT AMSTED RAIL COMPANY, INC.'S MOTION TO DISMISS COUNTS I, II, III, IV, V, AND VI to the addresses listed on the attached Service List.



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Date: January 29, 2016

415 ILCS 5/9(a) and 35 Ill. Adm. Code 212.324(g)(1). Count III alleges the failure to maintain emission unit records, in violation of 415 ILCS 5/9(a) and 35 Ill. Adm. Code 212.324(g)(1) and 212.316(g)(1) and (2)(C). Count IV alleges the violation of Respondent's Fugitive Particulate Matter Operating Program, in violation 415 ILCS 5/9(a) and 35 Ill. Adm. Code 212.309(a) and 212.312. Count V alleges the construction of an emission source without a permit, in violation of 415 ILCS 5/9(b) and 35 Ill. Adm. Code 201.142. Count VI alleges the failure to submit a construction permit fee, in violation of 415 ILCS 5/9.12(a).

Section 42 of the Act, entitled "Civil Penalties", provides that any person that violates any provision of the Act or regulation adopted by the Board is liable for civil penalties for each violation. 415 ILCS 5/42(a).

The Attorney General is authorized to enforce violations of the Act before the Board. 415 ILCS 5/31. Complainant has brought this action pursuant to Section 31. Complaint p. 1.

The Act does not contain a statute of limitations.

On January 15, 2016, Respondent filed its Motion to Dismiss. In its Motion to Dismiss, Respondent wholly relies on the application of a catch-all provision in the Illinois Code of Civil Procedure which establishes a five-year statute of limitations in certain civil actions. *See* 735 ILCS 5/13-205; Motion to Dismiss p. 4. As Complainant sets forth below, Section 13-205 does not apply to the alleged violations in Count I through VI of the Complaint.

For the reasons set forth in this Response, the Respondent's Motion to Dismiss should be denied because there is no statute of limitations that applies to enforcement actions brought by the State pursuant to Section 31 of the Act.

ARGUMENT

The violations alleged in the Complaint are not subject to any statute of limitations. The parties agree that the Act and the Board's procedural rules do not contain a statute of limitations for enforcement actions, such as this enforcement matter presently before the Board. Motion to Dismiss p. 4. 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 Piolet 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 Piolet 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; *Piolet 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 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 not only directly contradicts with 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. See Motion to Dismiss p. 5, footnote 1. Respondent fails to support its proposition that “more is needed to establish a public interest.” Motion to Dismiss pp. 5-6. 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.

Respondent asserts that the Board has previously accepted that Rule 13-205 may be applicable to enforcement cases, relying on the holding in *Union Oil*, where both parties to the suit were private entities. Motion to Dismiss p. 4. However, Respondent's reliance on *Union Oil* is misplaced. The key distinction between *Union Oil* and the matter presently before the Board is that this matter is an enforcement action brought on behalf of the People of the State of Illinois, and not on behalf of a private entity. The Board has cited to *Union Oil* only for the proposition that the Rule 13-205 may be applicable to actions between private parties. See *Caseyville, Piolet Bros.* However, the Board has clearly declined to adopt Rule 13-205, or any other statute of limitations, in cases brought on pursuant to Section 31 of the Act. See *John Crane*.

The Board need not consider the common law standard cited by the Respondent for determining whether the Attorney General is protecting a public interest in this matter because the Board has already adopted the bright line rule that no statute of limitations applies when the State brings an enforcement action pursuant to Section 31. See *John Crane*. Nevertheless, the Respondent cites a three-factor test for determining whether a governmental entity is protecting a public interest by a legal action: 1) the effect of the interest on the public; 2) the obligation of the governmental unit to act on behalf of the public; and 3) the extent to which public revenues are expended. *Champaign County Forest Preserve District v. King*, 291 Ill.App.3d 197, 200 (4th Dist. 1997); Motion to Dismiss p. 5. Even if the Board were to apply the three-factor test described in *King*, the matter presently before the Board would still satisfy the test. As described at length above, protection of the environment is a constitutionally and statutorily recognized public interest. The first factor, effect of the interest on the public, is clearly satisfied.

Complainant also meets the second factor of the *King* test because the State is statutorily obligated to act on behalf of the public. As Section 4(e) of the Act provides: “The Agency shall have the duty to investigate violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order.... and to take summary enforcement action...” 415 ILCS 5/4(e). The Illinois EPA is tasked with the duty of enforcing the Act and the terms of permits it issues. The mere passage of time since a violation was discovered does not nullify the Illinois EPA’s obligation to enforce such violations. The conspicuous absence of any statute of limitations in the Act further demonstrates that Respondent’s proposition that the passage of time lessens or removes the State’s obligation to enforce to provisions of the Act is without statutory support.

The third factor, which was developed by courts in cases involving the loss of funds expended by the public entity, is irrelevant to the Complaint in the present matter which seeks civil penalties and does not involve a controversy pertaining to the expenditure of public revenues.

CONCLUSION

The Complaint alleges violations of the Act and regulations promulgated thereunder. The Board has consistently held that where the Attorney General seeks to enforce the Act on behalf of the public via Section 31 of the Act, no statute of limitations applies. Therefore, as there is no applicable statute of limitations to Counts I through VI of the Complaint, Respondent’s Motion to Dismiss should be denied.

WHEREFORE, Complainant, People of the State of Illinois, respectfully requests the Board to deny Respondent's Motion to Dismiss.

Respectfully submitted,

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by LISA MADIGAN
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