ILLINOIS POLLUTION CONTROL BOARD
March 19, 1998

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 97-207
	)	(Enforcement - Air - Land)
INSPIRATION DEVELOPMENT	)	
COMPANY, a Delaware corporation,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by C.A. Manning):

On May 20, 1997, the Illinois Attorney General (complainant) filed this complaint for enforcement on behalf of the People of the State of Illinois and the Illinois Environmental Protection Agency (Agency) against the respondent, Inspiration Development Company (respondent), pursuant to Section 31 of the Environmental Protection Act (Act) (415 ILCS 5/31 (1996)). The complaint alleges various violations of the Act related to respondent's activities at a mining facility in Jo Daviess County, Illinois.

On June 30, 1997, respondent filed a motion to dismiss (Mot.) the complaint, arguing that the provisions in Section 31(a) of the Act (415 ILCS 5/31(a) (1996)) were not complied with and that all five counts of the complaint are barred in total or in part by the doctrines of *res judicata* or collateral estoppel. In the motion, respondent also requests that the time for filing an answer to the complaint be extended until 20 days after resolution of its motion.

On July 1, 1997, respondent filed a brief in support (Resp. Br.) of its motion. On July 3, 1997, complainant filed its response to the respondent's motion to dismiss (Resp.). In its response, complainant argues that the motion to dismiss should be stricken because the motion was untimely. The Board denies that request. See People v. Clark Refining & Marketing, Inc. (December 20, 1995), PCB 95-165; see also 35 Ill. Adm. Code 101.243(b). On July 10, 1997, respondent filed a motion for leave to file a reply to complainant's response to respondent's motion to dismiss and its reply (Reply). The Board grants respondent's motion for leave to file its reply.

For the reasons that follow, the Board denies respondent's motion to dismiss and orders this case to hearing on the merits of the allegations contained in the complaint.

BACKGROUND

The parties do not dispute the following facts. On May 22, 1985, the Attorney General filed a complaint in the Circuit Court of the Fifteenth Judicial District in Jo Daviess County, Illinois, docket number 85 CH 8. The complaint named respondent as a co-defendant and alleged violations of the Act and nuisance related to respondent's activities at the same mining

facility alleged in the complaint before the Board. The case remained pending in the circuit court for 11 years before being dismissed for want of prosecution. Respondent initially sought to have the matter dismissed with prejudice; however, the judge specifically denied the "with prejudice" aspect of the motion and reserved ruling on all other aspects of the motion. Thereafter, respondent filed a second motion to dismiss for want of prosecution. The circuit court eventually granted this motion and judgment was entered in April 1997. On May 20, 1997, complainant filed this enforcement action with the Board.

NON-COMPLIANCE WITH SECTION 31 OF THE ACT

Argument

In its motion to dismiss, respondent argues that section 31(a)(1) of the Act requires that a complaint be filed within 180 days after the Agency becomes aware of an alleged violation of the Act. Mot. at 1; Resp. Br. at 14-15. Respondent maintains that complainant did not comply with this mandatory requirement and can no longer do so. 415 ILCS 5/31(a)(1) (1996). Therefore, respondent argues that the complaint should be dismissed.

Complainant acknowledges that it did not comply with this provision, but argues that the requirements of Section 31 as it now exists does not apply to this proceeding. Citing Maiter v. Chicago Board of Education, 82 Ill. 2d 373, 415 N.E.2d 1034 (1980), Valdez v. Zollar, 281 Ill. App. 3d 329, 665 N.E.2d 560 (1st Dist. 1996), and First of America Trust Co. v. Armstead, 171 Ill. 2d 282, 664 N.E.2d 36 (1996), complainant argues that Section 31(a) cannot be applied in this case because the present case is a continuing enforcement action and was referred to the Attorney General in approximately 1985. Thus, complainant asserts that the obligations that Section 31 now imposes were not created until 1996 and to impose those duties and obligations would have retroactive impact if applied in the present case. Resp. at 4-5. Alternatively, even if Section 31 does apply, complainant asserts that it is only a precondition to the Agency's referral of a case to the Illinois Attorney General for enforcement, not to the Attorney General's filing of an enforcement action. Resp. at 3-6. Complainant argues that pursuant to Section 42 of the Act it has the authority to bring actions for violations of the State's environmental laws on its own motion and that the present case was brought, in part, by the Attorney General's own motion. Resp. at 4-5.

Respondent distinguishes the cases cited by the complainant and argues that the amendments to Section 31 deal with procedures and remedies and do not adversely impact any vested legal rights of the Agency. Respondent further argues that Section 31 does apply because it was in effect well before this complaint was filed before the Board and no provision exists within Section 31 exempting proceedings referred to the Attorney General prior to its effective date. Reply at 5-9.

Analysis

In People v. Heuermann (September 18, 1997), PCB 97-92, the Board determined that Section 31(a) applied prospectively to cases referred to the Attorney General by the Agency after August 1, 1996, the effective date of the amendments to Section 31. In reaching this conclusion, the Board found that to apply these provisions to cases that were referred prior to August 1, 1996, would improperly impose new requirements and duties on transactions already past, that being the referral of a case to the Attorney General for enforcement. It is undisputed that this matter was referred to the Attorney General by the Agency before August 1, 1996. Therefore, Section 31(a) does not apply to the instant matter, and complainant's failure to adhere or comply with the requirements therein do not constitute a basis for dismissal of the present complaint. See also People v. Amsted Industries, Inc. (October 16, 1997), PCB 97-38; People v. Geon Co. (October 2, 1997), PCB 97-62.

RES JUDICATA and COLLATERAL ESTOPPEL

Argument

Respondent next argues that all five counts alleged in the complaint before the Board are barred in total or in part by the doctrines of *res judicata* and collateral estoppel. Mot. at 1. The respondent contends that the order dismissing the circuit court action for lack of prosecution constitutes an adjudication upon the merits pursuant to Illinois Supreme Court Rule 273. Resp. Br. at 2-14. Respondent also cites amendments to Section 13-217 of the Illinois Code of Civil Procedure (Code) effective March 9, 1995, which no longer allow proceedings dismissed for want of prosecution to be automatically reinstated within one year from the date of dismissal. Mot. at 1. Thus, respondent urges the Board to dismiss this action.

Complainant responds that the circuit court order entered in April 1997 does not constitute an adjudication upon the merits, but only an order dismissing the case without prejudice. Resp. at 2. Complainant emphasizes that the circuit court judge specifically denied a motion to dismiss for want of prosecution with prejudice in a written order on May 3, 1996, and that the second motion to dismiss for want of prosecution merely granted the relief specifically requested by respondent, a dismissal for want of prosecution without prejudice. Resp. at 6-9.

Moreover, citing O'Reilly v. Gerber, 95 Ill. App. 3d 947, 420 N.E.2d 425 (1st Dist. 1981) and Wold v. Bull Valley Management Co., Inc., 97 Ill. App. 3d 516, 423 N.E.2d 201, (2nd Dist. 1981), complainant argues that it is well established that Illinois Supreme Court Rule 273 is inapplicable to a dismissal for want of prosecution and that a dismissal for want of prosecution does not act as a bar to a subsequent suit on the same issues. Complainant also states that the amendments of Section 13-217 of the Code do not affect the proceeding before the Board. Complainant argues that there is no statute of limitations upon actions brought by the State to enforce a public right, unless specifically provided by statute. See Pielet Bros. Trading, Inc. v. Pollution Control Board, 110 Ill. App. 3d 752, 442 N.E.2d 1374 (5th Dist. 1982).

Respondent replies that any actions stemming from respondent's activities at the mining facility in Jo Daviess County are now time barred by Section 31 of the Act and Section 13-205 of the Code. Reply at 5-13. Respondent argues Section 31(a)(1) mandates that the complaint be filed by the State within 180 days after it first becomes aware that there might be violations of

the Act by the respondent, and that Section 13-205 of the Code places a five-year statute of limitations upon all actions including the action presently before the Board.

Analysis

The doctrine of *res judicata* provides that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action. See Torcasso v. Standard Outdoor Sales, Inc., 157 Ill. 2d 484, 626 N.E.2d 225 (1993); Rodney B. Nelson, M.D. v. Kane County Board *et al.* (May 18, 1995), PCB 95-56.

Illinois Supreme Court Rule 273 provides that "[u]nless the order of dismissal or a statute of this State otherwise specifies, an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits." Respondent argues that under Rule 273, the circuit court's dismissal for want of prosecution is an adjudication on the merits.

The Board disagrees. Until 1995, the courts held that Section 13-217 of the Code of Civil Procedure is a statute that precludes cases dismissed for want of prosecution from being considered an adjudication on the merits. That section then provided in part:

> In the actions specified in . . . this Act . . . where the time for commencing an action is limited, if . . . the action is dismissed for want of prosecution, . . . then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff . . . may commence a new action within one year or within the remaining period of limitation, whichever is greater, after . . . the action is dismissed for want of prosecution. 735 ILCS 5/13-217 (1994).

Courts consistently held that this statute provided an exception to Rule 273, and that a dismissal for want of prosecution was therefore not an adjudication on the merits. See, *e.g.*, Walton v. Throgmorton, 273 Ill. App. 3d 353, 355, 652 N.E.2d 803, 805 (5th Dist. 1995) ("Section 13-217 . . . permits a case to be dismissed for want of prosecution but does not allow a dismissal for want of prosecution to be with prejudice."); Purcell & Wardrope v. Hertz Corporation, 279 Ill. App. 3d 16, 664 N.E.2d 166 (1st Dist. 1996) (same holding). If this version of the statute applies, the Jo Daviess County Circuit Court's dismissal of complainant's case was not an adjudication on the merits, and *res judicata* is inapplicable.

However, Section 13-217 was amended effective March 9, 1995. The amendments deleted the statute's prior references to dismissal for want of prosecution and added the following sentence: "No action which is . . . dismissed for want of prosecution by the court may be filed where the time for commencing the action has expired." 735 ILCS 5/13-217 (1996). The amendments apply only "to causes of action accruing on or after [the amendments'] effective date." 735 ILCS 5/13-217 (1996).

These amendments do not apply unless complainant's claims arose on or after March 9, 1995. The complaint alleges, however, that all of the counts arose in the 1980s. Furthermore, even if the amendments did apply, they simply preclude the re-filing of an action dismissed for want of prosecution "where the time for commencing the action has expired." 735 ILCS 5/13-217 (1996). As explained below, there is no statute of limitations in this case. Therefore, *res judicata* does not apply.

STATUTE OF LIMITATIONS

As already stated, Section 31(a) does not operate as a time bar to the instant action. Moreover, respondent's reliance upon the five-year limitation found in the Code 735 ILCS 5/13-205 (1996) is similarly misplaced. Unless the terms of a statute of limitations expressly include the State, county, municipality, or other governmental agencies, the statue, so far as public rights are concerned, is not applicable to the State. Clare v. Bell, 378 Ill. 128, 130-131, 37 N.E.2d 812, 814 (1941); Pielet Bros., 110 Ill. App. 3d at 756, 442 N.E.2d at 1374. Section 13-205 of the code fails to expressly include the State. Therefore, the question is whether the State is asserting public rights on behalf of all people of the State or private rights on behalf of a limited group. The Board has previously determined that statute of limitations contained in the code does not apply if the State is asserting a public right on behalf of the people of the State. See People v. American Waste Processing Ltd. (March 19, 1998), PCB 98-37; People v. Bentronics Corp. (October 17, 1997), PCB 97-20; see also Pielet Bros., 110 Ill. App. 3d at 756, 442 N.E.2d at 1379.

The Board finds that the Attorney General and the Agency are not seeking to protect the rights of a limited group, but are acting on behalf of the State of Illinois and the public's right to a clean environment. Therefore Section 13-205 does not limit the Attorney General in bringing this action before the Board and cannot act as a limitation contemplated by the Code.

LACHES

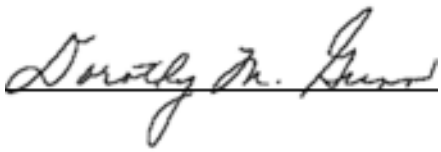
In its reply brief, respondent raises for the first time the argument that if no statute of limitations is applicable to this action, that the principles of *laches* and estoppel would still be applicable and bar the complainant's claims. Respondent asserts that "the first order of business for any evidentiary hearing on this proceeding would be to determine whether any such bar exists in this 1997 Agency proceeding." Based on this sentence, it appears that respondent is not asking the Board to find that this complaint or any portion thereof is barred by the common law principle of *laches*, but rather seems to be attempting to reserve its rights to raise that equitable relief at a later time. Reply at 12. Consequently, the Board makes no findings in this matter related to the doctrine of *laches* as that relief is not requested at this time and no sufficient demonstration of the prerequisites necessary to make such a finding has been provided by the respondent and the complainant would be deprived of the opportunity to address those issues. The Board does, however, grant the respondent's request to extend the filing of any answer in this matter for a period of 20 days from the effective date of this order.

CONCLUSION

For the foregoing reasons, the Board denies respondent's motion to dismiss and orders this case to hearing on the merits of the allegations contained in the complaint. The Board also grants the respondent's request to file its answer to the complaint within 20 days of the effective date of this order.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 19th day of March 1998 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board