ILLINOIS POLLUTION CONTROL BOARD
January 24, 2002

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 02-8
	)	(Enforcement – Water)
ROYSTER-CLARK, INC.,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by S.T. Lawton, Jr.):

A complaint in the above-captioned matter was filed on July 23, 2001. The complaint alleges that respondent, Royster-Clark, Inc. (Royster-Clark) discharged anhydrous ammonia in excess of its National Pollutant Discharge Elimination System (NPDES) permit limits into the Illinois River at its distribution facility located at 2100 East Broadway, Marseilles, LaSalle County. The complaint further alleges that this discharge was in violation of Sections 12(a) and (f) of the Environmental Protection Act (Act) (415 ILCS 5/12(a), (f) (2000)) and Sections 304.125(a), 304.141(a), 306.102(a) and (b) of the Board's regulations (35 Ill. Adm. Code 304.125(a), 304.141(a), 306.102(a) and (b)). Royster-Clark filed an answer to the complaint and eleven affirmative defenses on September 17, 2001. Complainant filed a motion to strike the affirmative defenses on October 18, 2001. Respondent did not file a response to complainant's motion. For the reasons stated below, the Board grants complainant's motion to strike 10 of 11 affirmative defenses, but denies complainant's motion to strike Royster-Clark's fourth affirmative defense concerning laches.

STANDARD

The Board's procedural rules specify that "[a] ny 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). In an affirmative defense, the respondent alleges '" new facts or arguments that, if true, will defeat . . . the government's claim even if all allegations in the complaint are true." People v. Community Landfill Company, PCB 97-193, slip op. at 3 (Aug. 6, 1998) (citation omitted).

The Code of Civil Procedure gives additional guidance on pleading affirmative defenses. Section 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, would

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) (2001).

When asserting an affirmative defense, "the test is whether the defense gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated." Condon v. American Telephone and Telegraph Company, Inc., 210 Ill. App. 3d 701, 709, 569 N.E.2d 518, 523 (2nd Dist. 1991), citing Worner Agency v. Doyle, 121 Ill. App. 3d 219, 222, 459 N.E.2d 633, 635 (4th Dist. 1984).

A motion to strike an affirmative defense admits well-pleaded facts constituting the defense, only attacking the legal sufficiency of the facts. International Insurance Company 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 (1989). "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, 242 Ill. App. 3d at 631, 609 N.E.2d at 854 (citation omitted).

DISCUSSION

Royster-Clark alleges eleven affirmative defenses that fall under three categories: Royster-Clark's culpability, type and extent of the relief sought by the complainant, and legal arguments. The Board addresses the alleged defenses and complainant's arguments to strike each defense below.

Culpability

Royster-Clark alleges in affirmative defenses 1 and 11 that it should not be found in violation of the Act and Board regulations because it could not have known that the anhydrous ammonia release would occur, and it took reasonable steps prior to the release that were beyond its legal obligation in an effort to prevent the release from occurring. Complainant argues that lack of knowledge is not a defense, and that Royster-Clark is not immune to liability because it allegedly operated a state-of-the-art system prior to the anhydrous ammonia spill.

Knowledge

Royster-Clark alleges in its first affirmative defense that it "did not cause, threaten, allow, or control the alleged violation [of Section 12(a) of the Act, if one is found to exist,] and could not, with reasonable diligence, have known of the potential for such violation to occur." Ans. at 11. Complainant states that this alleged defense is "factually and legally insufficient and should be stricken as a matter of law." Mot. at 5. Complainant specifically states that the lack of knowledge that Royster-Clark violated Section 12(a) of the Act (415 ILCS 5/12(a) (2000)) is not a defense because the Act is malum prohibitum. Mot. at 5.

"Knowledge is not an element of a violation of Section 12(a), and lack of knowledge is not a defense." People v. A.J. Davinroy Contractors, 249 Ill. App. 3d 788, 618 N.E.2d 1282 (Aug. 12, 1993) (citations omitted). Moreover, the alleged defense does not state that Royster-

Clark was incapable of exercising control over the pollution or was not in control of the premises where the pollution occurred. *Id.* It merely denies that it violated Section 12(a) of the Act (415 ILCS 5/12(a) (2000)) and that it could not have known that the violation would occur. The Board accordingly strikes Royster-Clark's first affirmative defense.

Immunity Due to Prior Reasonable Efforts to Prevent Spills

Royster-Clark alleges in its 11th affirmative defense that it should not be found in violation of the Act and Board regulations because it took reasonable measures to prevent spills. Ans. at 13. Royster-Clark alleges that, "during all relevant time periods in the [c]omplaint, Royster-Clark maintained and operated a state-of-the-art system to prevent spillage of anhydrous ammonia to waters of the State. . . ." Ans. at 13. Royster-Clark cites to IEPA v. Cabot Corporation, PCB 81-27, (Jan. 9, 1986), in support of this premise.

Complainant distinguishes Cabot on the grounds that Cabot only failed to contain a small part of a spill in its diking system, rather than failing to contain the entire spill, as in this case. Mot. at 19. When a tank containing silicon tetrachloride and methyl trichlorosilane collapsed due to an unknown change in pressure, a small amount of the liquid was splashed or thrown over the top of the dike, which contained the main part of the spill. Cabot, PCB 81-27, slip op. at 2. Immediately after the spill, Cabot proceeded in accordance with its emergency response plan. *Id.* In this case, the system employed by Royster-Clark allegedly failed to contain the entire release of anhydrous ammonia, and Royster-Clark was only allegedly aware of the spill days after the release. Mot. at 3; Ans. at 2-4.

The Board finds that Cabot does not provide Royster-Clark immunity from liability under the Act for previously attempting to prevent spills with an alleged state-of-the-art system. The Board in Cabot held that, despite the company's efforts to contain the entire spill, it still violated Sections 9(a), 12(a) and 12(d) of the Act (415 ILCS 5/9(a), 12(a), 12(d) (2000)), and 35 Ill. Adm. Code 201.141, 302.203, 302.204, and 302.208. Cabot, PCB 81-27, slip op. at 8. The Board did find that it could not determine whether Cabot violated Section 306.102 of the Board's regulations (35 Ill. Adm. Code 306.102) for failing to contain the entire spill with its diking system. However the Board decided that it could not assess a violation because no facts were provided to allow the Board to form a judgment as to whether the diking system was a reasonable measure. *Id.* This differs greatly from the conclusion that the Board granted Cabot immunity for violations of the Act and Board regulations because it took reasonable measures to contain spills with its diking system. *See* Ans. at 13. The 11th alleged affirmative defense, as written by Royster-Clark, is overly broad in trying to extend the holding in Cabot concerning Section 306.102 of the Board's regulations to other sections of the Act and Board regulations.

The alleged affirmative defense also attacks the sufficiency of the claim rather than the complainant's legal right to bring a cause of action. People v. John Crane, Inc., PCB 01-76, slip op. at 3 (May 17, 2001), citing Farmers State Bank v. Phillips Petroleum Co., PCB 97-100, slip op. at 2, n.1 (Jan. 23, 1997). "An affirmative defense is a response to a claim which attacks the complainant's right to bring an action." People v. Midwest Grain Products of Illinois, PCB 97-179, slip op. at 5 (Aug. 21, 1997) (citations omitted). For these reasons, the Board strikes Royster-Clark's 11th affirmative defense.

Type and Extent Relief

Royster-Clark alleges four affirmative defenses concerning the type of relief and extent of civil penalties that may be imposed if it is found in violation of the Act and Board regulations. Royster-Clark alleges in its third affirmative defense that the complainant is not entitled to attorney's fees because the alleged violations in the complaint are not willful, knowing or repeated acts. Ans. at 11. Royster-Clark alleges in its seventh and eighth affirmative defenses that, if the Board finds it violated the Act, that the cease and desist order requested by the complainant would not be warranted or necessary, and that the complainant seeks inappropriate civil penalties in light of the facts of this case. Royster-states that the alleged anhydrous ammonia release was "an accidental event that occurred two years ago, no other similar incident has occurred since that time period, and Royster-Clark, on its own initiative and long prior to the time any enforcement action was taken, instituted responsible steps above and beyond its legal obligations, in the form of an industry-leading release detection and response system, to ensure that the event will not recur." Ans. at 12. Royster-Clark alleges in its ninth affirmative defense that the Board should not impose a civil penalty in this case because the release was an isolated incident and Royster-Clark took steps to ensure that future releases would not occur. Ans. at 13, citing IEPA v. Maplehurst Farms, Inc., PCB 85-69 (Feb. 19, 1987); IEPA v. McLean County Service Company, PCB 80-177 (Sept. 3, 1981).

Complainant responded that "a defense which speaks to the imposition of a penalty and not the cause of action is not an affirmative defense to that cause of action." Mot. at 8, quoting Midwest Grain, PCB 97-179, slip op. at 5. It also stated that "the affirmative defense must attack the basis of the opponent's claim, not attack the relief requested by that claim." Mot. at 15.

The Board finds that the four defenses concerning relief sought are not proper affirmative defenses. Affirmative defenses eight and nine directly concern the extent of civil penalties to be assessed in this matter. "The appropriate penalty to be imposed for a violation of the Act is a separate inquiry from whether a violation of the Act has occurred, and mitigation issues are only considered once a violation of the Act has been found." Midwest Grain, PCB 97-179, slip op. at 5, citing Farmers State Bank, PCB 97-100, slip op. at 2, n.1. Since the alleged affirmative defenses eight and nine concern the imposition of a penalty and not the cause of action, they are not proper affirmative defenses. *See* Midwest Grain, PCB 97-179, slip op. at 5, citing People v. Douglas Furniture of California, PCB 97-133, slip op. at 6 (May 1, 1997).

Royster-Clark similarly alleges in affirmative defenses three and seven that the relief sought by complainant is either not supported by statute or has no value or necessity. The arguments that the complainant cannot prove scienter to collect attorney's fees, or that a cease and desist order may be unnecessary after Royster-Clark has self-imposed measures to prevent a future spill still concern the type of relief rather than the cause of action at issue in this case. Neither affirmative defense avoids the legal effect or defeats the cause of action in this matter. *See* People v. Community Landfill Company, PCB 97-193, slip op. at 5 (Aug. 6, 1998). Since these defenses do not impact the question of whether a violation of the Act has taken place, the Board strikes affirmative defenses three and seven.

Legal Arguments

Royster-Clark alleges five affirmative defenses containing legal arguments: (1) the alleged violations under the Act and Board regulations are identical and duplicitous; (2) the doctrine of laches applies due to the two year lapse in time before complainant filed this case; (3) complainant failed to state a cause of action; (4) allegations concerning the fish kill should be struck as prejudicial and irrelevant; and (5) the alleged violation of 35 Ill. Adm. Code 306.102(a) should be dismissed because the subject facility is not a "treatment works." Each of these alleged affirmative defenses and the corresponding responses by the complainant are addressed in turn.

Identical and Duplicitous

Royster-Clark alleges in its second affirmative defense that the statutory and regulatory violations under Section 12(f) of the Act (415 ILCS 5/12(f) (2000)) and 35 Ill. Adm. Code 304.141(a) are identical and duplicitous. Section 12(f) in relevant part states that no person shall:

> Cause, threaten or allow the discharge of any contaminant into the waters of the State . . . without an NPDES permit for point source discharges issued by the Agency under Section 39(b) of this Act, or in violation of any term or condition imposed by such permit . . . or in violation of any regulations adopted by the Board or of any order adopted by the Board with respect to the NPDES program. 415 ILCS 5/12(f) (2000).

Section 304.141(a) of the Board regulations states that "[n]o person to whom an NPDES permit has been issued may discharge any contaminant in his effluent in excess of the standards and limitations for that contaminant which are set forth in his permit. 35 Ill. Adm. Code 304.141(a).

The Act itself states that it is a violation of Section 12(f) of the Act (415 ILCS 5/12(f) (2000)) to violate any regulations adopted by the Board, such as 35 Ill. Adm. Code 304.141(a). The Board has also routinely found parties to be in violation of both the Act and regulation at issue. *See* People v. ESG Watts, Inc., PCB 96-107, slip op. at 2, 54 (Feb. 5, 1998); Fredette v. Village of Beecher, PCB 89-61, slip op. at 12 (Jan. 24, 1990); IEPA v. Village of Glen Carbon, PCB 85-105, slip op. at 6 (Dec. 20, 1985). The Board accordingly strikes Royster-Clark's second affirmative defense.

Doctrine of Laches

Royster-Clark in its fourth affirmative defense alleges that the equitable doctrine of laches bars this cause of action because the complainant waited to file the complaint in this matter until approximately two years after the events at issue. Ans. at 11. Consequently, Royster-Clark states that witnesses to the alleged facts are no longer available and others cannot clearly remember the facts in this case. Ans. at 11.

Complainant responded that the doctrine laches does not bar this action because "there is no applicable statute of limitations or special circumstances which would make it inequitable to grant relief." Mot. at 11. "Laches is an equitable doctrine which bars relief where a defendant has been misled or prejudiced because of a plaintiff's delay in asserting a right." People v. Bigelow Group, Inc., PCB 97-217, slip op. at 1 (Jan. 8, 1998), citing City of Rochelle v. Suski, 206 Ill. App. 3d 497, 501, 564 N.E.2d 933, 936 (2nd Dist. 1990).

The application of laches to public bodies is disfavored. Bigelow Group, PCB 97-217, slip op. at 1. The Board previously held that laches generally does not apply to enforcement actions brought under the Act. People v. Big O, Inc., PCB 97-130, slip op. at 1. However, the doctrine of laches "can apply to governmental bodies under "compelling circumstances." People v. ESG Watts, PCB 96-107, slip op. at 6 (Feb. 5, 1998), citing Hickley v. Illinois Central R.R. Co., 35 Ill.2d 427, 447, 220 N.E.2d 415 (1966); *see also* Van Milligan v. Board of Fire & Police Commissioners, 158 Ill.2d 84, 630 N.E.2d 830 (1994).

"There are two principal elements of laches: lack of due diligence by a party asserting a claim and prejudice to the opposing party." Bigelow Group, PCB 97-217, slip op. at 2, citing Van Milligan, 158 Ill.2d at 89, 630 N.E.2d at 833. Royster-Clark alleges that complainant lacked due diligence by failing to file this cause of action for two years after the alleged violation. To establish prejudice, Royster-Clark states that it lost track of potential witnesses and that witnesses that are available cannot clearly remember facts at issue in this case. The Board finds that the alleged facts assert a valid affirmative defense to be raised at hearing. The Board declines to discuss the merit of the defense, and only concludes that the alleged defense should not be struck as requested in complainant's motion.

Failure to State a Cause of Action

Royster-Clark, in its fifth affirmative defense, alleges that the complainant failed to state a cause of action upon which relief can be granted. Ans. at 12. Complainant states that the defense is legally insufficient and should be stricken as a matter of law. Mot. at 11. Complainant points to the fact that Royster-Clark did not provide any factual or legal explanation concerning the alleged failure, and merely attacks the sufficiency of the claim rather than the apparent right to it. Mot. at 11-12. "An affirmative defense is 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 the claim." People v. John Crane, Inc., PCB 01-76, slip op. at 3 (May 17, 2001), citing Farmers State Bank, PCB 97-100, slip op. at 2 n.1 (citations omitted). The Board accordingly strikes this defense as an improper affirmative defense.

Fish Kill Allegations

Royster-Clark alleges in its sixth affirmative defense that the Board should strike allegations in paragraph 8 of the complaint concerning an alleged fish kill because it has no apparent connection to other factual allegations or alleged violations in the complaint, and are prejudicial and irrelevant. Ans. at 12. Complainant responds that "an appropriate affirmative defense does not seek to strike a particular factual allegation of a complaint," and that the defense is "legally insufficient as (sic) should be stricken as a matter of law." Mot. at 13. The

Board finds that this defense does not attack the complainant's right to bring an action, and strikes it as an affirmative defense.

Facility is not a "Treatment Works"

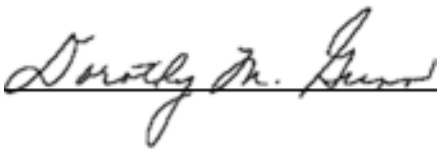
Royster-Clark alleges in its tenth affirmative defense that Section 306.102(a) of the Board regulations (35 Ill. Adm. Code 306.102(a)) is not applicable to subject facility because it is not a "treatment works" under that section. Ans. at 13. Complainant states that this affirmative defense is legally and factually insufficient, setting forth a bare legal conclusion that does not give color to the State's cause of action alleged in Count IV of its complaint. Mot .at 18. The Board finds that the defense again attacks the truth of the claim rather than the complainant's right to bring a cause of action, and strikes it as an affirmative defense. *See* John Crane, PCB 01-76, slip op. at 3, citing Farmers State Bank, PCB 97-100, slip op. at 2 n.1 (citations omitted).

CONCLUSION

The Board grants complainant's motion to strike 10 of the 11 affirmative defenses raised by Royster-Clark. However, the Board denies the complainant's motion to strike Royster-Clark's fourth affirmative defense concerning laches. Although ten of Royster-Clark's defenses are stricken, it will have an opportunity to address the issues raised in its answer, including those in its stricken affirmative defenses, at hearing. The Board directs the hearing officer to proceed expeditiously to hearing in this matter.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on January 24, 2002, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board