ILLINOIS POLLUTION CONTROL BOARD
June 5, 2003

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	PCB 99-134
PEABODY COAL COMPANY, a Delaware corporation,	)	(Enforcement – Water)
	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by N.J. Melas):

On October 24, 2002, complainant, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a third amended three-count complaint against Peabody Coal Company (Peabody), operator of an underground coal mining facility about a mile northwest of Shawneetown in Gallatin County. On December 20, 2002, Peabody filed an answer in this matter along with 16 affirmative defenses. On February 5, 2003, the People filed a motion to strike all 16 of Peabody's affirmative defenses (mot. to strike). On April 14, 2003, Peabody filed a response to the People's motion to strike (response). On April 29, 2003, the People filed a motion for leave to reply to Peabody's response, attaching the reply.

On May 12, 2003, Peabody objected to the People's motion for leave to reply and also filed a motion to file a surreply. In an order dated May 20, 2003, the hearing officer assigned to this matter granted the People's motion for leave to file a reply and denied Peabody's motion to file a surreply. Peabody filed a renewed motion to file a surreply on June 4, 2003. Section 101.500(e) of the Board's procedural rules provides that the moving party "will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice." 35 Ill. Adm. Code 101.500(e). Peabody's motion is untimely and Peabody has not sufficiently demonstrated it will suffer material prejudice if the Board does not accept this surreply. The Board denies Peabody's renewed motion.

For the reasons stated below, the Board grants the People's motion to strike in part and denies the motion in part. The Board grants the motion to strike 12 alleged affirmative defenses raised by Peabody. Peabody has withdrawn another of its purported affirmative defenses. The Board denies the People's motion to strike three alleged affirmative defenses raised by Peabody. Accordingly, the three remaining affirmative defenses may be addressed by the parties at hearing or in further pleadings before the Board.

PROCEDURAL HISTORY

On March 25, 1999, the People filed a complaint with the Board. The Board accepted the People's third amended complaint on November 21, 2002 (Am. Comp.).

Peabody filed an answer that included 16 affirmative defenses on December 23, 2002. The People responded with a motion to strike all 16 of Peabody's affirmative defenses on February 5, 2003.

PRELIMINARY MATTERS

The Board will address two preliminary matters before discussing the substance of Peabody's answer and affirmative defenses. First, when alleging the affirmative defenses, Peabody alleges each one of them to counts I, II, and III.

Second, in Peabody's affirmative defenses and response, Peabody defines the People as "the State." Ans. at 1; Resp. at 1. However, Peabody uses the term "the State" throughout both the affirmative defenses and the response to describe conduct of both the Attorney General and the Environmental Protection Agency (Agency). Therefore, the Board assumes Peabody is referring to the Agency when discussing the initiation of the enforcement process, issuing permits, and failure to comply with notice and referral requirements of the Environmental Protection Act (Act). The Board assumes Peabody is referring to the Attorney General when discussing the "State's claims." In the following pages, the Board refers to the Attorney General as "the State" when paraphrasing Peabody's arguments, and the People elsewhere in the body of this order as defined above.

BACKGROUND

The Site

Peabody Coal Company is a Delaware corporation authorized to do business in the State of Illinois. In its answer, Peabody states the company is a subsidiary of Interior Holdings Corporation, which is a subsidiary of Peabody Holding Company, Inc. Ans. at 2. The complaint involves the Peabody Coal Eagle No. 2 Mine Site in Gallatin County near Shawneetown. The mine site covers approximately 250 acres and Peabody operated the site as an underground coal mine from 1968 to July 1993. Ans. at 2. Peabody operated six refuse disposal areas at the mine site. Am. Comp. at 2.

The People allege that the mine site is located at the eastern edge of the Henry Aquifer, a Class 1 groundwater resource. The People further allege that the Saline Valley Conservancy District (SVCD) public water supply wells are located to the southwest and hydraulically downgradient from the mine site. Am. Comp. at 2. Peabody disputes this statement. Ans. at 2. There are five wells in the SVCD well field and the wells supply 27,814 people. Am. Comp. at 2.

The People state Peabody disposed 12.76 million tons of coal-related wastes in the refuse disposal areas and that none of the disposal areas have liners or other barriers to prevent leaching of contaminants into the underlying aquifer. Am. Com. at 2-3. Peabody denies this allegation

but admits that its operations included disposing of "substantial quantities of gob and slurry" in the areas indicated. Additionally, Peabody states the refuse contained inorganic chemicals and that Peabody's groundwater quality data shows that sulfates leached into on-site groundwater. Ans. at 3.

The People allege that inorganic chemicals from the coal-related wastes (such as chlorides, manganese, total dissolved solids, sulfates, and iron) at the mine have contaminated the groundwater both at the site of the mine and off-site. The People also allege that the inorganic chemicals from the coal-related wastes are the cause of deteriorating water quality at the SVCD wells. Am. Comp. at 3. Peabody denies these allegations. Ans. at 3. Peabody also denies that the Agency's secondary maximum contaminant level for sulfate is 250 mg/l. *Id*.

Agency Action

Peabody agrees that it received a violation notice letter, labeled M-1997-00010, from the Agency dated January 28, 1997, but denies that the notice concerned inorganic chemical groundwater quality violations at the Eagle No. 2 site. Ans. at 3. In response to the notice of violation (NOV), Peabody sent a letter to the Agency disputing the Agency's characterization of the groundwater quality violations at Eagle No. 2 and claimed there were no violations of groundwater quality on or off-site at Eagle No. 2. Ans. at 3. Peabody admits that it met with the Agency on March 13, 1997, but denies that the meeting was held pursuant to Section 31(a)(4) of the Act. Ans. at 3-4.

The parties agree that Peabody requested an extension of time to respond to the alleged violations on March 17, 1997, and that the Agency denied the request. The parties agree that Peabody responded timely and that the Agency responded on April 23, 1997. Ans. at 4. However, Peabody disputes that the Agency rejected Peabody's compliance commitment agreement. The parties also agree that the Agency sent a notice of intent to pursue legal action on October 6, 1997. Ans. at 4.

The parties agree that the Agency sent a second NOV on December 23, 1997, labeled M-1997-00133, but again Peabody denies the NOV concerned inorganic chemical Class 1 groundwater quality violations at the mine site. Ans. at 4. Again, the parties met on January 28, 1998, and the Agency sent a second notice of intent to pursue legal action on April 21, 1998, regarding the second NOV. Ans. at 4.

REGULATORY FRAMEWORK

Section 302.208 of the Board's regulations contains the Board's numeric general use water quality standards while Section 302.304 contains the Board's limits for public and food processing water supplies. 35 Ill. Adm. Code 302.208, 302.304. Section 620.301 is a general prohibition against use impairment of resource groundwater. 35 Ill. Adm. Code 620.301. Section 620.405 is a general prohibition against violations of groundwater quality standards while Section 620.410 are the numeric groundwater quality standards for Class I potable resource groundwater. 35 Ill. Adm. Code 620.405, 620.410.

STANDARD

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). 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 complaint 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 (Jan. 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).

DISCUSSION

Counts I and II

In counts I and II, the People allege that by allowing the discharge of inorganic chemicals into the groundwater, Peabody has caused or tended to cause water pollution in violation of Section 12(a) of the Act (415 ILCS 5/12(a) (2000)). Peabody denies these allegations. Specifically, Peabody denies the alleged violations of groundwater quality and water quality standards found in count I (Am. Comp. at 10) and count II (Am. Comp. at 28). Ans. at 5, 8. The People also allege that by allowing the deposit of coal mine refuse and related waste, Peabody has created a water pollution hazard in violation of Section 12(d) of the Act (415 ILCS 5/12(d) (2000)). Am. Comp. at 23-24, 47. Peabody denies these allegations. Ans. at 6, 9.

Count III

In count III, the People incorporate by reference the alleged violations in counts I and II. The complainant further alleges that by causing or allowing the discharge or release of inorganic chemicals to groundwater at the mine Peabody has violated Section 12(a) of the Act. Am. Comp. at 50. In alleging violations of Section 12(a), the People state that Peabody has violated and continues to violate various Board regulations. Am. Comp. at 50-52. The People refer to Peabody's noncompliance with Sections 302.208 (1982), 302.304, 620.410(a) of the Board rules and allege that Peabody is in violation of these regulations. 35 Ill. Adm. Code 302.208 (1982), 302.304 (1982), 302.304 (1996), 620.410(a) (1992). Am. Comp. at 47. Peabody denies these allegations. Ans. at 9. Complainant also alleges that Peabody has violated 35 Ill. Adm. Code 620.301 (1996), 620.405 (1996), and 620.410(a) (1996). Peabody also denies these allegations. Ans. at 11.

Affirmative Defenses

After its admissions and denials, Peabody presented sixteen affirmative defenses to the alleged violations. The People have moved to strike all sixteen affirmative defenses. First the

Board will address the affirmative defenses alleged by Peabody, the arguments presented by both parties, and then strike allegations that have no merit. The affirmative defenses are as follows:

1. The Board has no jurisdiction to hear the State's claims because the State violated the 180-day notice requirement pursuant to Section 31(a)(1) of the Act (415 ILCS 5/31(a)(1));

2. The State's claims are barred pursuant to Section 31(a)(1) because the State initiated this action more than 180 days after the State knew of the alleged violation;

3. The five-year statute of limitations found in 735 ILCS 5/13-205 bars the State's claims in counts I through III;

4. The State's claims are barred by *laches*;

5. The State's claims are barred by waiver;

6. The State's claims are barred by estoppel;

7. The State failed to join the Saline Valley Conservancy District, a necessary party to this action;

8. Pursuant to Section 12(f) of the Act, Peabody did not violate applicable groundwater quality standards or cause water pollution because Peabody discharged in accordance with the terms of NPDES permits;

9. The State's claims violate due process because they attempt to impose retroactive liability upon Peabody for activities that were lawful at the time they occurred;

10. The State's claims deny Peabody of equal protection under the United States and Illinois constitutions because the State enforced certain statutes and regulations discriminatorily against Peabody as compared to other similarly situated parties;

11. The State failed to fulfill the procedural prerequisites of Section 31(a) and (b) of the Act (415 ILCS 5/31(a) and (b));

12. The State's claims are duplicative and therefore barred by the doctrine of *res judicata*;

13. The State's claims are barred because the Board exceeded its authority in promulgating 35 Ill. Adm. Code 620.410(a);

14. The State's claims are barred because the Board exceeded its authority in promulgating 35 Ill. Adm. Code, Part 620;

15. The State's claims violate the due process clauses of the United States and Illinois constitutions because Peabody's allegedly unlawful activity was not unlawful at the time the State initiated this proceeding; and

16. The State's claims are barred because the Agency failed to establish a groundwater management zone with respect to groundwater located in and around Eagle Mine No. 2, as required by 35 Ill. Adm. Code 620.250.

First Affirmative Defense – Section 31 180-day Jurisdictional Prerequisite

Peabody argues that compliance with Section 31(a)(1) is a jurisdictional condition precedent to the State bringing an enforcement action. Peabody claims that the State did not issue and serve notice upon Peabody within 180 days after the State possessed knowledge of the alleged violations. Ans. at 12. Accordingly, Peabody argues that the Board lacks jurisdiction over this matter. Peabody further contends that Board cases decided otherwise were decided incorrectly. Resp. at 11. Peabody emphasizes that the Illinois appellate courts have not addressed this issue, and therefore, preserves this position for future proceedings in this action. *Id*.

The Board has held that the People do not have to plead in the complaint or prove at hearing that the Agency complied with Section 31 of the Act. People v. Crane, PCB 01-76, slip op. at 7-8 (May 17, 2001); *see also* People v. Panhandle Eastern Pipe Line Co., PCB 99-191, slip op. at 3 (Nov. 16, 2000). The Board held in Crane that the 180-day timeframe within which the Agency must issue a notice of violation, thereby beginning the pre-referral process, is directory rather than mandatory in nature. Crane, PCB 01-76 at 12. In striking the respondent's affirmative defense alleging lack of jurisdiction for failure to comply with Section 31, the Board concluded "any facts about when the Agency became aware of the alleged violations have no bearing on the Board's jurisdiction over this matter." *Id*. at 17.

The Board has further held the notice and meeting requirements of Section 31 apply only to the Agency, not to the Attorney General. People v. Eagle-Picher-Boge, L.L.C., PCB 99-152, slip op. at 8 (July 22, 1999). In Eagle-Picher-Boge, the Board denied the respondent's motion to dismiss for lack of jurisdiction in which the respondent alleged the Agency failed to comply with the procedural requirements of Section 31 of the Act. *Id*. The Board reasoned that Section 31 contains no restriction on the Attorney General's authority to proceed with an enforcement case and file a complaint on his own initiative. *Id*. The Board notes that lack of jurisdiction can be a valid affirmative defense when properly pled. However, Peabody has not properly pled lack of jurisdiction in this proceeding. Accordingly, the Board grants the People's motion to strike Peabody's first affirmative defense.

Second Affirmative Defense – Section 31 180-day Statute of Limitations

Peabody claims that Section 31(a)(1) of the Act establishes a period of limitations. Ans. at 12. Peabody further alleges that because the State did not initiate enforcement within 180

days after the State was aware of the alleged violations, as provided by Section 31(a)(1) of the Act, the State's claims are barred. Resp. at 12.

The People argue Peabody's second affirmative defense is insufficiently pled because the terms it uses to state the defense, "limitations provision" and "enforcement process," are vague. Mot. to Strike at 6. The People further argue that this affirmative defense lacks facts sufficient to support Peabody's claim that the Agency failed to meet the 180-day time frame set forth by statute. *Id*. at 7. The People therefore ask the Board to strike this affirmative defense.

The Board had held that Section 31 of the Act does not operate as a limitation on the People's right to file a complaint with the Board after that right accrues. Crane, PCB 01-76, at 10-11. Rather Section 31 is an administrative tool meant to trigger a pre-referral negotiation process between the Agency and potential violators. Eagle-Picher-Boge, PCB 99-152, at 6, 14. It is well-settled that "there is no statute of limitations that applies to enforcement actions brought by the State pursuant to Section 31 of the Act." Crane, PCB 01-76 at 11; citing Pielet Bros. Trading, Inc. v. PCB, 110 Ill. App. 3d 752, 758, 442 N.E.2d 1374, 1379 (5th Dist. 1982); People v. American Disposal Co. & Consolidated Rail Corp., PCB 00-67, slip op. at 2-3 (May 18, 2000).

The Board emphasizes that a violation of the statute of limitations can be a valid affirmative defense when properly pled. However, statute of limitations as an affirmative defense does not apply to this proceeding. Accordingly, the Board grants the People's motion to strike Peabody's second affirmative defense.

Third Affirmative Defense – General Statute of Limitations

Peabody withdraws this affirmative defense. Resp. at 12.

Fourth Affirmative Defense – *Laches*

Peabody argues the State's claims are barred by the doctrine of *laches* because the State knew of Peabody's conduct at the Eagle No. 2 mine yet failed to address the conduct in a timely fashion. Ans. at 12. Peabody contends the State has condoned Peabody's activities because for nearly 30 years the State issued permits authorizing Peabody's disposal practices. Resp. at 12-13. Peabody also states that the State did nothing to prohibit Peabody from continuing its disposal practices. *Id*. at 13. Peabody alleges that because of the State's inaction, Peabody is prejudiced because the amount, duration, and magnitude of potential penalties to be assessed have increased significantly compared to what they would have been had the State taken action diligently. Peabody therefore claims the affirmative defense of *laches* applies to some or all of the State's claims. *Id*. at 14.

The People cite Board precedent for the principle that applying laches to public bodies is disfavored, but that the doctrine can apply under compelling circumstances. Crane, PCB 01-76 at 18; citing Hickey v. Illinois Central Railroad Co., 35 Ill. 2d 427, 220 N.E. 2d 415 (1966). The People acknowledge there are two principle elements of *laches*: lack of due diligence by the party asserting the claim; and prejudice to the opposing party. Crane, PCB 01-76, slip op. at 18;

citing Van Milligan v. Board of Fire & Police Commissioners, 158 Ill. 2d 84, 89, 630 N.E.2d 830, 833 (1994).

The People allege first that *laches* does not qualify as an affirmative defense. Mot. to Strike at 10. Alternatively, the People contend Peabody has failed to plead its fourth affirmative defense with sufficient specificity. *Id*. In particular, Peabody has failed to show that the People lacked due diligence, failed to show how Peabody was prejudiced, and failed to plead facts showing exceptional circumstances. Consequently, the People state, Peabody's fourth affirmative defense is insufficiently pled and should be struck. *Id*. at 11.

Pursuant to Section 103.204 of the Board's procedural rules, "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). The Board finds that while not specific, Peabody has pled sufficient facts to raise the affirmative defense of *laches* and that there is a chance Peabody may prevail. In this proceeding, Peabody must also meet the burden of proving that "compelling circumstances" warrant application of *laches*. The Board denies the People's motion to strike this affirmative defense.

Fifth Affirmative Defense – Waiver

Peabody alleges that the State agencies should have been aware of their right to take enforcement against Peabody ever since disposal at the mine began. Ans. at 14. Additionally, Peabody argues that State agencies have addressed environmental conditions at the mine site by means other than enforcement action. Resp. at 15. Peabody also states it was prejudiced by the State's action after an inordinate amount of time. *Id*. As a result, Peabody contends, the State has waived some or all of the claims stated in the complaint. *Id*.

The People assert that Peabody has not sufficiently pled the elements of waiver. Mot to Strike. at 12. The People claim Peabody failed to plead that the People knew a right existed, failed to plead the People intentionally relinquished that known right, and failed to show the People intended to relinquish the right. *Id*. at 11. The People also assert that Peabody failed to plead the affirmative defense with sufficient factual specificity. The People claim Peabody failed to specifically state what right the People relinquished, facts that support the element of intention, or facts showing the People intentionally relinquished a known right. *Id*. at 12.

The Board notes that waiver applies when a party intentionally relinquishes a known right or his conduct warrants an inference to relinquish the right. Crane, PCB 01-76 at 20; citing Hartford Accident and Indemnity Co. v. D.F. Bast, Inc., 56 Ill. App. 3d 960, 962, 372 N.E.2d 829, 831 (1st Dist. 1977). Peabody alleges it will show that by continually issuing permits to Peabody, the People relinquished their right to bring the claims alleged in the amended complaint. Furthermore, Peabody states it will show it has been prejudiced. The Board will allow Peabody the opportunity to meet the burden of establishing waiver against People. The Board denies the People's motion to strike this affirmative defense.

Sixth Affirmative Defense – Estoppel

Peabody alleges that the People's claims are barred by the doctrine of estoppel. Ans. at 13. Peabody contends it relied to its detriment on the State's authorization of its disposal practices. Resp. at 16. Peabody further alleges that the State both intended Peabody to so rely, and knew that Peabody would then cause the violations alleged in the People's complaint. *Id*. at 17. Peabody alleges these facts establish the elements of estoppel adequate to bar some or all of the State's claims in this proceeding. *Id*.

The People assert the defense of equitable estoppel requires a showing of six elements by the respondent:

> (1) words or conduct by the party against whom the estoppel is alleged constituting either a misrepresentation or concealment of material facts; (2) knowledge on the part of the party against whom the estoppel is alleged that representations made were untrue; (3) the party claiming the benefit of an estoppel must not have known the representations to be false either at the time they were made or at the time they were acted upon; (4) the party estopped must either intend or expect that his conduct or representations will be acted upon by the party asserting the estoppel; (5) the party seeking the estoppel must have relied or acted upon the representations; and (6) the party claiming the benefit of the estoppel must be in a position of prejudice if the party against whom the estoppel is alleged is permitted to deny the truth of the representation made. Mot. to Strike at 13; Reply at 11; citing People v. Environmental Control and Abatement, Inc., PCB 95-170, slip op. at 7 (Jan. 4, 1996).

The People cite Illinois caselaw for the principle that applying the doctrine of estoppel against public bodies is not favored and that a public body cannot be estopped for an act performed by its agent that exceeds the authority given to him. Citing County of Cook v. Patka, 85 Ill. App. 3d 5, 12-13, 405 N.E.2d 1376 (1st Dist. 1980).

The People contend that Peabody has failed to plead the elements of this defense with requisite specificity. Mot. to Strike at 16. Additionally, the People argue that Peabody has not plead sufficient facts in support of its allegation. *Id*. at 17. The People allege that for these reasons Peabody's sixth affirmative defense should be struck.

The Board finds that Peabody has adequately pled estoppel as an affirmative defense. Without making a determination on the merits of the parties' assertions at this juncture, the Board will allow Peabody the opportunity to meet the substantial burden of establishing estoppel against the People at hearing or in future pleadings. Accordingly, the Board does not strike this affirmative defense.

Seventh Affirmative Defense – Failure to Join a Necessary Party

Peabody contends that the Saline Valley Conservancy District (District) is a necessary party to this proceeding. Peabody alleges that because the District caused excessive groundwater concentration levels of sulfates and contaminants of concern as alleged by the People, a complete determination of the controversy cannot be made without the District. 35 Ill. Adm. Code 101.403(a); Resp. at 20. Peabody requests that the Board direct the State to file an amended complaint naming the District as a party. Resp. at 20.

The People assert that pursuant to Section 101.403(b) of the Board's rules, the Board will not dismiss an adjudicatory proceeding for failure to name a necessary party without first providing a reasonable opportunity to add the persons as parties. Mot. to Strike at 17; 35 Ill. Adm. Code 101.403(b). The People also assert that pursuant to Section 101.403(a), Peabody itself should move the Board for joinder of the District. *Id*. at 18; 35 Ill. Adm. Code 101.403(a). Finally, the People argue that failure to join a necessary party is not an affirmative defense because it is not an affirmative matter that avoids the legal effect or defeats a cause of action. *Id*. Accordingly, the People request the Board to strike the Peabody's seventh affirmative defense.

The Board finds that failure to join a necessary party is not an affirmative defense. As noted by the People, the Board's procedural rules provide Peabody the opportunity to move the Board to join the District as a co-respondent or to ask the Board for leave to file a third-party complaint. 35 Ill. Adm. Code 101.403, 103.206. The Board need not discuss whether the District is a necessary party because the Board finds that failure to join a necessary party is not an affirmative defense and grants the People's motion to strike this alleged affirmative defense.

Eighth Affirmative Defense – NPDES Permit Shield

Peabody argues that because it has always complied with any National Pollutant Discharge Elimination System (NPDES) permit issued to it by the Agency, it is shielded from the alleged water pollution violations. Ans. at 13-14. Pursuant to Section 12(f) of the Act, compliance with an NPDES permit issued by the Agency shall be deemed compliance with the effluent discharge provisions of Section 12(f) of the Act. Resp. at 18; 415 ILCS 5/12(f). Peabody contends the People have alleged violations of Sections 12(a) and (d) of the Act, but that those violations arose out of a discharge from the mine pursuant to an NPDES permit issued by the Agency. Resp. at 19. Peabody contends that because its discharges have complied with the terms and conditions of an NPDES permit, Section 12(f) of the Act dictates that Peabody is therefore "shielded" from other water pollution violations of Section 12. Resp. at 19. In its response to the People's motion to strike, Peabody also alleges new facts disputing that Peabody caused groundwater contamination downgradient from the mine and instead alleges that the Saline Valley Conservancy District caused the contamination. Resp. at 17-18.

The People argue that not only is the District not responsible for the high sulfate levels found in the groundwater, but the NPDES permit shield is not an affirmative defense. Reply at 13-14. The People argue that while the permit shield allegation may be a mitigating factor to the water pollution violations and exceedences of the Board's groundwater standards alleged in the amended complaint, it is not an affirmative defense that avoids the legal effect of or defeats a cause of action. *Id*. at 14; Mot. to Strike at 19. The People conclude that Peabody's eighth affirmative defense, therefore, should be struck. *Id*.

Section 12(f) of the Act provides a permit shield only from subsection (f) regarding effluent limitations. 415 ILCS 5/12(f). The People have alleged violations of Sections 12(a) for creating water pollution, and (d) for creating a water pollution hazard of the Act. 415 ILCS 5/12(a) and (d). Therefore, Peabody has not alleged new facts or arguments that would shield it from liability under Sections 12(a) and (d) of the Act. The Board finds that Peabody's permit shield argument is not a valid affirmative defense. The Board strikes this affirmative defense.

Ninth Affirmative Defense – Due Process

Peabody alleges that the People's claims against it are barred by the due process clauses of the United States Constitution (U.S. Const. amend. V, Ill. Const. art. 1, §2) and the Illinois Constitution because the claims attempt to impose liability upon Peabody for conduct that was lawful at the time it occurred. Ans. at 14; Resp. at 21. Peabody claims that the People's attempt to impose retroactive liability violates Peabody's substantive due process rights and constitutes a taking in violation of the takings clause of the Fifth Amendment of the U.S. Constitution. Eastern Enterprises v. Apfel, 524 U.S. 498, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998). Resp. at 22. Peabody alleges all of its conduct was lawful at the time it occurred pursuant to permits issued by the State, and that the Board should only require the prospective application of the Groundwater Protection Act and the Board's water quality standards. Resp. at 24.

The People contend the Board should strike Peabody's ninth affirmative defense because: (1) Peabody has failed to plead any facts in support of its claim; and (2) because the affirmative defense is not an affirmative matter that attacks the legal sufficiency of the facts alleged. Reply at 16. The People also contend that Peabody's ninth affirmative defense should be struck because it does not request relief from the People's allegations. Reply at 15-16. The People do not allege that Peabody's *disposal practices* were unlawful, rather the People allege that Peabody has caused water pollution and water pollution hazards at the Eagle No. 2 mine. *Id*. at 16.

The Board again assumes that Peabody is referring to the Agency when stating that its "Disposal Practices were expressly authorized by permits issued to PCC by the State." Resp. at 23. The Board assumes that elsewhere in its response brief Peabody is referring to the Attorney General when discussing "the State" as it defines the term on page one. Resp. at 1. The Board finds that while retroactive liability may be a valid affirmative defense, Peabody misapplies the doctrine here and accordingly strikes this affirmative defense.

The Board has held "an *ex post facto* law is '[a] law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such act or deed.'" Shephard v. Northbrook Sports Club, PCB 96-206, slip op. at 7 (Sept. 5, 1996) (citing to *Black's Law Dictionary*). Illinois courts have upheld the principle that merely maintaining a legal situation prior to the passage of prohibitive legislation could give rise to liability after it. Freeman Coal Mining Corp., v. PCB, 21 Ill. App. 3d 157, 165-165, 313 N.E.2d 616, 622 (1974); citing People v. Jones, 329 Ill. App. 503, 69 N.E.2d 522 (4th Dist. 1946); *see also* Meadowlark Farms, Inc. v. PCB, 17 Ill. App. 3d 851, 308 N.E.2d 829 (5th Dist. 1974). In Meadowlark Farms, the petitioner could not persuade the court that the Act was retroactive and an *ex post facto* law. The court in that case held that because the petitioner was guilty of

violations of the Act that took place after the effective date of the Act, the Act was not retroactive as applied to the petitioner. *Id*. at 862.

Here, the People do not allege any retroactive application of the Act or any Board regulation. Each count alleged violations of the Act or Board regulations in effect at the time each individual discharge occurred. Neither the Groundwater Protection Act nor the water quality standards violate Peabody's substantive due process rights under the U.S. or Illinois constitutions because they are not retroactively applied as alleged. Accordingly, the Board grants the People's motion to strike Peabody's ninth affirmative defense.

Tenth Affirmative Defense – Equal Protection

In summary, Peabody asserts that because its disposal practices are substantially similar to those of other coal mine operators, yet the State has not taken enforcement action against the operators of other mines, the People have violated Peabody's right to equal protection under the law. Resp. at 24. Peabody therefore alleges that the People's claims are barred by the equal protection clauses of the U.S. and Illinois constitutions. Ans. at 14.

In their motion to strike, the People set forth the general legal principles that apply to claims of equal protection. Mot. to Strike at 23-24. Furthermore, the People emphasize that Illinois caselaw provides "the application of the equal protection clause is limited to instances of purposeful or invidious discrimination rather than erroneous or even arbitrary administration of state powers." Mot. to Strike at 24; citing Summers v. Illinois Commerce Comm'n, 58 Ill. App. 3d 933, 936, 374 N.E.2d 1111, 1113 (1978). The People again allege that Peabody failed to plead an adequate factual basis for its assertions and failed to plead an affirmative matter that defeats any cause of action set forth in the People's complaint. Mot. to Strike at 26. For these reasons, the People argue, this affirmative defense should be struck.

Peabody has alleged no facts showing that the People purposely and invidiously discriminated against Peabody in bringing this action. The Board finds Peabody has not met the Board's minimum requirement of plainly setting forth facts establishing this affirmative defense. 35 Ill. Adm. Code 103.204(d). The Board grants the People's motion to strike this affirmative defense.

Eleventh Affirmative Defense – Failure to Comply with Section 31(a) and (b)

Count I Claims. Peabody claims that the State failed to comply with Section 31(a) and (b) because the violations described in the two NOV's differ from the claims the State asserted in count I of the amended complaint. Resp. at 28. Peabody contends the State issued NOVs alleging violations of "the regulations and standards" clause of Section 12(a) of the Act, while count I of the State's complaint alleges violations of the "water pollution" clause of Section

12(a) and of Section 12(d) of the Act.[1] *Id.* Peabody concludes that as a result, Peabody was deprived of the Section 31 process with respect to the State's claims as set forth in count I.

Count II and III Claims. Peabody also claims that the State did not comply with Section 31 with respect to counts II and III. Resp. at 29. Peabody states that according to Board precedent, if the State independently developed the claims set forth in counts II and III, Section 31 does not apply. *Id*. However, Peabody does not believe the State developed these claims independently. Peabody believes the Agency assisted the People in developing the claims, and this constitutes a *de facto* referral of those claims by the Agency to the People. Resp. at 30. Consequently, Peabody argues the People, by referral of claims, are subject to the requirements of Section 31 of the Act.

The People argue that the NOVs the Agency sent to Peabody clearly allege violations of Section 12 of the Act and the applicable water quality standards. Reply, Exh. 2, 3. The People claim that the NOVs made no distinction between the "regulations and standards" clause of Section 12 and the "water pollution" clause of Section 12. Therefore, the People allege Peabody was on notice and the NOVs do not limit the People to alleging only a violation of the "regulations and standards clause of Section 12 of the Act in count I. Reply at 19.

Regarding Counts II and III, the People argue that Board precedent clearly provides that the Attorney General's office is not subject to the requirements of Section 31 of the Act. People v. Geon Company, Inc., PCB 97-62, slip op. at 21 (Oct. 2, 1997). Alternatively, the People argue that Peabody's eleventh affirmative defense does not constitute an affirmative matter that defeats a cause of action set forth in the People's complaint. Reply at 21.

The Board finds, as discussed above, the People are not required to plead in the complaint or prove at hearing that the Agency complied with Section 31 of the Act. *See* Crane, PCB 01-76, at 7-8. In Crane, the Board stated that while the procedural requirements of Section 31(a)(1) of the Act are directory, "the substance of the Section 31 referral process is mandatory." Crane, PCB 01-76, slip op. at 17. Here, Peabody was given two notices of violations at Eagle No. 2 mine as well as an opportunity to meet with the Agency and negotiate a settlement. Finding Peabody was not denied the substance of Section 31 of the Act, the Board strikes Peabody's eleventh affirmative defense as to counts I, II, and III.

Twelfth Affirmative Defense – Duplicative/ Res judicata

Peabody claims that on at least two occasions in the past, in 1984 and 1992, the State alleged exactly the same violations of Illinois law against Peabody and thereafter addressed and resolved the allegations. Resp. at 32-33. Peabody alleges, therefore, that these issues have already been enforced, and the doctrine of *res judicata* bars the State's claims. Ans. at 15.

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[1] Peabody stated in the response that it attached copies of the NOVs as exhibits 1 and 2, but they were not attached. The People subsequently attached these NOVs as exhibits 2 and 3 to their reply brief. Reply Exh. 2, 3.

The People argue that the notifications that Peabody alleges are enforcement actions were not enforcement actions at all. The People state that in 1992, the Agency sent a request issued pursuant to a permitting process in attempt to achieve compliance at the mine. Reply, Exh. 1. The People contend that in 1992, the Agency considered an enforcement action initiated when an enforcement letter was issued pursuant to Section 31 of the Act. Reply at 22. The People further contend that the notification in 1984 was a permit application denial by the Illinois Department of Natural Resources (DNR). Resp. at 32. The People state that the DNR does not have enforcement authority with regard to the allegations in the People's complaint, and further, the action taken was a permit denial, not an enforcement action. The People claim, therefore, that the violations alleged in the People's complaint have not yet been enforced and/or resolved in a court of competent jurisdiction and the doctrine of *res judicata* does not apply here. Reply at 22. The People finally argue that Peabody's twelfth affirmative defense does not meet the standard of an affirmative defense and should be struck. *Id*.

The Board finds that the doctrine of *res judicata* may be a valid affirmative defense in some cases. Under the doctrine of *res judicata,* once a court decides a cause of action, it cannot be retried between the same parties. People v. Jersey Sanitation Corp., PCB 97-2, slip op. at 4 (Apr. 4, 2002). The bar extends to what was actually decided in the first action, as well as those matters that could have been decided in that suit. *See* River Park, Inc. v. City of Highland Park, 184 Ill. 2d 290, 302, 703 N.E.2d 883, 889 (1998). In general, *res judicata* applies when three elements are present: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of the parties or their privies; and (3) an identity of cause of action. Jersey Sanitation, PCB 97-2, slip op. at 4-5.

However, in this situation, Peabody has not alleged any new facts or arguments that if true will defeat the People's claim even if all allegations in the complaint are true. The assertions that the DNR issued a permit denial in 1984, and the Agency sent a request issued pursuant to a permitting process in 1992 do not qualify as final judgments on the merits rendered by a court of competent jurisdiction. Accordingly, the Board grants the People's motion to strike Peabody's twelfth affirmative defense.

Thirteenth and Fourteenth Affirmative Defenses – Board Authority (Health/Technical/Economic)

Peabody claims the Board exceeded its authority in promulgating Part 620 of the Board's rules. 35 Ill. Adm. Code 620; Ans. at 15. In its thirteenth affirmative defense, Peabody claims the Board's water quality standards for chlorides, sulfates, and total dissolved solids (35 Ill. Adm. Code 620.410(a)) are not "health-based" as mandated by the Groundwater Protection Act (415 ILCS 55/8(a). In its fourteenth affirmative defense, Peabody claims it is not technically feasible or economically reasonable for operators of coal mines to comply with these same standards. Resp. at 36.

In moving to strike these two affirmative defenses, the People respond that the Board's water quality standards were established pursuant to Board order. Furthermore, Section 41(c) of the Act precludes a challenge to any Board order in the context of an enforcement action under

Title XII of the Act as to any issue that could have been raised in a timely petition for review under this Section. *See* 415 ILCS 5/41(c) (2002); *see also* People v. Wood River Refining Company, PCB 99-120, slip op. at 16 (Aug. 8, 2002). Peabody responds that this enforcement proceeding was not brought under Title XII, but pursuant to Section 31, which is part of Title VIII. Resp. at 34. Peabody contends that accordingly, Section 41(c) is irrelevant on its face with respect to count I.

Pursuant to Section 29 of the Act, Board rules are not subject to review regarding their validity or application in any subsequent proceeding under Title VIII, Title IX, or Section 40 of the Act. 415 ILCS 5/29(b) (2002). Rather, a person adversely affected by any Board rule or regulation may challenge its validity under Section 41 of the Act. 415 ILCS 5/29(a) (2002). This action was brought pursuant to Section 31 of the Act. Am. Comp. at 1. Accordingly, the Board strikes Peabody's thirteenth and fourteenth affirmative defenses.

Fifteenth Affirmative Defense – Due Process

Peabody alleges the State's claims are barred by the due process clauses of the U.S. and Illinois constitutions. Ans. at 16. Peabody contends the People attempt to impose liability for conduct that was allegedly unlawful at the time the conduct occurred, but was lawful on the date this complaint was filed. Resp. at 37.

The People argue in turn that Peabody has failed to plead sufficient facts to support this defense. Mot. to Strike at 31. The People also argue Peabody has not plead an affirmative matter that avoids the effect of or defeats a cause of action in the People's complaint. Reply at 25.

The Board finds Peabody's fifteenth alleged affirmative defense is not a valid affirmative defense. Peabody's seems to argue that if the allegedly unlawful discharges would occur today they would be lawful under current law. Peabody contends that, as a result, due process of the law bars the State's claims in counts I, II, and III. Without discussing the truth of the matter, the Board finds this argument could not defeat the People's claims even if all the allegations in the complaint are true. The People allege the People violated the Act by discharging at the Eagle No. 2 mine site so as to cause water pollution and create a water pollution hazard. The applicable law in this proceeding is the law in force at the time of discharge. Therefore, Peabody's ninth alleged affirmative defense is not valid and the Board grants the People's motion to strike this defense.

Sixteenth Affirmative Defense – Failure to Establish a Groundwater Management Zone

Peabody argues that the Agency's failure to concur with Peabody's request to establish a groundwater management zone in accordance with Section 620.250 of the Board rules is the reason Peabody may be found liable for possibly hundreds of violations of the Act. Resp. at 40; 35 Ill. Adm. Code 620.250. Peabody alleges that were there a groundwater management zone at and around the mine site, no water quality standards regarding contaminants of concern would apply within that groundwater management zone. 35 Ill. Adm. Code 620.450(a)(3). Peabody further contends the Agency's refusal to accept Peabody's request for a groundwater

management zone at the mine is unlawful because the refusal is arbitrary, capricious, and contrary to law. Resp. at 39. Peabody concludes that the Agency's failure to concur with Peabody's plan for a groundwater management zone thereby bars the State's claims of continuing violations of Section 620.410(a) water quality standards.

The People argue that Section 620.250 of the Board rules does not mandate the Agency to establish a groundwater management zone as Peabody contends. The People further contend that Peabody's sixteenth alleged affirmative defense is not an affirmative defense but rather a factor that may, if anything, mitigate any imposed penalty. Reply at 26. The People claim that a defense that goes to the duration and gravity of the violation and due diligence of the respondent to correct the situation does not constitute an affirmative defense. People v. Midwest Grain, PCB 97-197, slip op. 4-5 (Aug. 21, 1997). Such a defense does not impact the question of whether the respondent has violated the Act. *Id*.

The Board finds that Peabody's sixteenth affirmative defense addresses information relevant to the amount of penalty, if any. As noted by the People, the Board has previously held that defenses that address mitigation factors are not affirmative defenses to an allegation that a violation has occurred. Here, Peabody argues that even if a violation occurred, the Agency's conduct is responsible for the violations to be continuing. This argument goes to the duration and gravity of the violation.

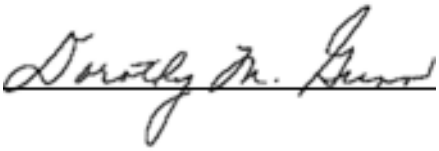
Additionally, Peabody could have appealed the Agency's denial of Peabody's request to establish a groundwater management zone to the Board at the time it occurred. However, Peabody failed to do so. The Board strikes Peabody's sixteenth alleged affirmative defense because it is not an affirmative defense. The Board notes that at hearing the parties may introduce evidence regarding factors that may mitigate an assessed penalty, if any.

CONCLUSION

The Board grants the People's motion to strike in part and denies the motion in part. The Board grants the motion to strike 12 of the 16 alleged affirmative defenses raised by Peabody. Peabody has withdrawn its third affirmative defense. The Board denies the People's motion to strike regarding 3 of the alleged affirmative defenses.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 5, 2003, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board