ILLINOIS POLLUTION CONTROL BOARD
October 16, 2003

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	PCB 03-191
COMMUNITY LANDFILL COMPANY, INC., an Illinois corporation, and the CITY OF MORRIS, an Illinois municipal corporation,	)	(Enforcement – Land)
	)	
Respondents.	)	

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

On April 17, 2003, the People of the State of Illinois (People) filed a one-count complaint against Community Landfill Company, Inc. and the City of Morris (respondents) alleging failure to provide adequate financial assurance. Community Landfill Company, Inc. (CLC) is the operator, and the City of Morris (the City) the owner, of the Morris Community Landfill, a special waste and municipal solid waste landfill located at 1501 Ashley Road, Morris, Grundy County.

The Board accepted the complaint for hearing on May 1, 2003. On June 13, 2003, the City of Morris filed an "Answer and Affirmative Defenses (Morris Ans.)." Since the filing contained no affirmative defenses, the Board will not discuss the City's pleading in this order.

On June 16, 2003, CLC filed an answer along with four affirmative defenses (CLC Ans.). On July 16, 2003, the People filed a reply and a motion to strike the affirmative defenses alleged by CLC (Mot. to Strike). On August 1, 2003, CLC responded to the People's motion to strike (Resp.).

For the reasons stated below, the Board grants the People's motion to strike CLC's alleged affirmative defenses in part and denies the motion in part. The Board grants the People's motion to strike estoppel as an affirmative defense. The Board also grants the People's motion to strike CLC's second, third and fourth alleged affirmative defenses. The Board denies the People's motion to strike *laches*.

BACKGROUND

The Site

The Morris Community Landfill is approximately 119 acres in area, and is divided into two parcels, designated parcel "A," consisting of approximately 55 acres, and parcel "B," consisting of approximately 64 acres. Comp. at 2. CLC operates the Morris Community

Landfill and manages the day-to-day operations of both parcels at that site. The respondents have arranged for and supervised the deposit of waste, including municipal solid waste, garbage, and special waste, into waste cells at the Morris Community Landfill since at least June 1, 2000 on parcels "A" and "B" of the landfill. Comp. at 2.

The Agency issued Significant Modification Permit Numbers 2000-155-LFM, covering Parcel A, and 2000-156-LFM, covering Parcel B, on August 4, 2000. Comp. at 3. On June 29, 2001, the Agency issued Permit Modification Number 2 for parcels A and B. On January 8, 2002, the Agency issued Permit Modification Number 3 for Parcel A. *Id*.

The respondents provided the Agency financial assurance of closure and post closure costs by way of three separate performance bonds underwritten by The Frontier Insurance Company. Comp. at 3. On June 1, 2000, the United States Treasury Department removed Frontier Insurance Company from the list of acceptable surety companies listed in the United States Department of Treasury publication "Circular 570." Comp. at 3.

REGULATORY FRAMEWORK

Rather than setting forth the relevant statutes and rules verbatim, a short summary follows. Section 21 of the Act is a prohibition against any waste storage, treatment, or disposal operation in violation of the Act or any Board regulation. 415 ILCS 5/21 (2002). Section 811.700 of the Board's financial assurance regulations requires any person that conducts disposal operations at a municipal solid waste landfill unit that requires a permit under Subsection (d) of Section 21.1 of the Act (415 ILCS 5/21.1) to comply with the Board's financial assurance requirements. 35 Ill. Adm. Code 811.700. Under Section 811.712, the surety company issuing the bond must be licensed by the Department of Insurance, pursuant to the Illinois Insurance Code, or at least licensed by the insurance department of one or more states and approved by the U.S. Department of the Treasury as an acceptable surety. 35 Ill. Adm. Code 811.712. Section 811.712 also provides that the U.S. Department of the Treasury lists acceptable sureties in its "Circular 570." *Id*.

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

The People allege that parcels A and B of the Morris Community Landfill are municipal solid waste landfill units as defined by Section 3.85 of the Act. Comp. at 6; *citing* 415 ILCS 5/3.85 (2002). The People further allege that because the respondents' sole closure and post-closure financial assurance is in the form of three performance bonds from Frontier Insurance Company, a company not listed in the United States Department of Treasury "Circular 570" since June 1, 2000. As a result, the People allege, respondents have violated Sections 811.700(f) and 811.712 of the Board financial assurance regulations, as well as Section 21(d)(2) of the Act. 35 Ill. Adm. Code 811.700(f), 811.712; 415 ILCS 5/21(d)(2) (2002). Comp. at 7.

As a remedy, the People ask the Board to order the respondents to immediately obtain and provide to the Agency landfill closure and post-closure financial assurance meeting the requirements of the Act and Board regulations. Comp. at 7. The People ask the Board to order respondents to cease and desist from any further violations of the Act or Board regulations. Finally, the People ask the Board to assess a civil penalty of $50,000 against respondents for each violation of the Act and regulations, an additional $10,000 per each day the violation continues, and all costs, including attorney, expert witness, and consultant fees, expended by the State in its pursuit of this action. Comp. at 8.

Affirmative Defenses

After its admissions and denials, CLC presented four "additional defenses" to the alleged violations. In their reply, the People moved to strike the first two alleged affirmative defenses, denied the allegations in respondent's third alleged affirmative defense, and claimed the fourth alleged affirmative defense is not an affirmative defense and, therefore, requires no response from the People. First the Board will address the affirmative defenses alleged by CLC, the arguments presented by both parties, and then reach a discussion on the issues presented. The alleged affirmative defenses are as follows:

1. The People's claims are barred by the doctrine of *laches* and *estoppel* since the Agency accepted the Frontier bonds and issued a significant modification permit on August 4, 2000, knowing that Frontier had been delisted;

2. The Frontier Insurance bonds complied with all applicable regulations at the time they were issued, and were accepted as such by the Agency;

3. CLC did not act willfully, knowingly, or repeatedly; therefore, any award of cost and attorney fees would be inappropriate; and

4. The Board should consider all of the factors set forth in Section 42(h)(1)-(5) as factors in mitigation of any penalty that might be imposed;

First Alleged Affirmative Defense: *Laches* and Estoppel

The People's Arguments

The People assert that the defenses of equitable estoppel and *laches* have already been adjudicated and resolved between the parties on the merits (Community Landfill Company *et al.* v. EPA, PCB 01-170 (Dec. 6, 2001) (Community Landfill 1), and that the Board's rejection of these defenses was upheld by the Appellate Court. Mot. to Strike at 3; Community Landfill Company *et al*. v. PCB, 331 Ill. App. 3d 1056 (3d Dist. 2002) (Community Landfill 2). The People contend that Community Landfill 1, concerning the Agency's denial of a supplemental permit for the Morris Community Landfill, involved the same Frontier surety bonds, the same site, and the same respondents. The People contend that in that proceeding, the Board refused to apply estoppel to the issue of financial assurance, and refused to apply *laches* to the Agency's claims. In doing so, the Board affirmed the Agency's denial of CLC and the City of Morris' supplemental permit application on the basis of failing to comply with the Board's financial assurance requirements.

The People conclude that because the issues of estoppel and *laches* have already been resolved, collateral estoppel prevents the respondents from raising them here. Accordingly, the People move the Board to strike CLC's first affirmative defense.

CLC's Response

CLC argues that nothing precludes CLC from asserting its first affirmative defense. Resp. at 5. CLC contends that the People's arguments amount to allegations of offensive collateral estoppel; a doctrine that precludes parties from re-litigating issues that were resolved adversely against them in prior proceedings. Resp. at 2; *citing* Marshall v. Metropolitan Water Reclamation District Retirement Fund, 298 Ill. App. 3d 66 (1st Dist. 1998). CLC contends the People misapply the doctrine of collateral estoppel in this proceeding for two reasons: (1) the burdens of proof in the prior permit appeal, a civil proceeding, and in this action, a quasi-criminal proceeding, are different (Resp. at 4; *citing* U.S. v. One Assortment of 89 Firearms, 465 U.S. 354, 360, 104 S.Ct. 1099, 1104 (1984)); and (2) even assuming the elements of collateral estoppel are met, the application of offensive collateral estoppel here is improper because Illinois courts caution against its use. Resp. at 4-5; *citing* Van Milligan v. Bd. Of Fire and Police Comm'rs of the Vill. Of Glenview, *et al.*, 158 Ill. 2d 85, 95, 630 N.E.2d 830, 835 (1994).

The Board's Analysis

The Board finds that both equitable estoppel and *laches* may be valid affirmative defenses in some situations. The Board further finds that in this proceeding the application of equitable estoppel is barred by the doctrine of collateral estoppel. However, collateral estoppel does not bar the application of *laches* and accordingly denies the People's motion to strike *laches* as an affirmative defense.

The Illinois Supreme Court has set three minimum threshold requirements for applying collateral estoppel: (1) the issue decided in the prior adjudication is identical with the one presented in the instant matter; (2) there was a final judgment on the merits in the prior adjudication; and (3) the party against whom estoppel is asserted was a party or a party in privity

with a party to the prior adjudication. ESG Watts, Inc. v. IEPA, PCB 96-181 and 97-210, slip op. at 2-3 (July 23, 1998), *citing* Talarico v. Dunlap, 177 Ill. 2d 185, 191; 685 N.E. 2d 325, 328 (1997).

The Board finds that the issue of whether the Frontier bonds complied with Board regulations has already been adjudicated and resolved by the same parties before the Board. In Community Landfill 1, the Board affirmed the Agency's decision denying CLC's significant modification (sigmod) permit request, finding that because Frontier was removed from the Circular 570 list on June 1, 2000, the Agency properly denied CLC's permit application on May 11, 2001. Community Landfill 1, slip op. at 13. The Agency's denial letter identified its reason for denying the permit with respect to financial assurance as CLC's noncompliance with Sections 811.700(f) and 811.712(b). Community Landfill 1, slip op. at 9. The Board also rejected CLC's argument that estoppel precludes the Agency's ruling. The Board accepted the Agency's claim that an Agency employee made a mistake in finding the Frontier bonds acceptable on August 4, 2000, yet found the mistake did not estop the Agency from denying the permit. Community Landfill 1, at 14. The outcome, that estoppel did not apply, was affirmed by the Appellate court.

Next, CLC argued that the doctrine of *laches* prevents the Agency from raising Mr. Pruim's eight-year-old conviction as a reason to deny the permit under Section 39(i) of the Act. Community Landfill 1, slip op. at 17. Section 39(i) provides:

> Before issuing any RCRA permit or any permit for a waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility, waste incinerator, or any waste-transportation operation, the Agency shall conduct an evaluation of the prospective owner's or operator's prior experience in waste management operations. The Agency may deny such a permit if the prospective owner or operator or any employee or officer of the prospective owner or operator has a history of: (1) repeated violations of federal, State, or local laws, regulations, standards, or ordinances in the operation of waste management facilities or sites; or (2) conviction in this or another State of any crime which is a felony under the laws of this State, or conviction of a felony in a federal court; or (3) proof of gross carelessness or incompetence in handling, storing, processing, transporting or disposing of waste. 415 ILCS 5/39(a).

In Community Landfill 1, the Board never discussed the issue of *laches* on the merits. The Board found that the Agency properly conducted a Section 39(i) evaluation, yet improperly denied the permit based on Mr. Pruim's conviction. Community Landfill 1, slip op. at 21. On appeal the court declined to address the issue of *laches* because the Board had agreed with CLC in Community Landfill 1 that the Agency improperly considered Mr. Pruim's felony conviction. Community Landfill 2, 331 Ill. App. 3d at 1063*; citing* Illinois Central R.R. Co. v. Accident & Casualty Co. of Winterthur, 317 Ill. App. 3d 737, 739 N.E.2d 1049, 251 Ill. Dec. 116 (2000). Accordingly, the Board finds that collateral estoppel does not bar CLC from raising *laches* as an affirmative defense.

The Board finds that with respect to estoppel, all three minimum requirements have been met here. First, the same disputed issue of financial assurance regarding the Frontier bonds in Community Landfill 1 is at issue here. Second, there was a final judgment on the merits in Community Landfill 1, affirmed by the appellate court. Third, estoppel is being asserted against the People in the instant matter, who are in privity with the Agency, the party opposing CLC in Community Landfill 1.

In People v. Jersey Sanitation Corp., PCB 97-2 (Apr. 4, 2002) the Board found collateral estoppel applied where an issue had been raised and adjudicated on the merits in a permit appeal and then raised again in a subsequent enforcement action. The Board held that collateral estoppel applied because: (1) the three threshold issues were met; and (2) there was no burden shift from the party against whom the doctrine was applied to its adversary. In applying collateral estoppel, the Board found that the decision in the former permit appeal applied to the subsequent enforcement action.

CLC had the burden of proof when it raised the issues of estoppel in the Community Landfill 1 permit appeal. CLC again has the burden of proof in this enforcement proceeding, having raised the issue of estoppel as an affirmative defense to the People's claim of failure to provide adequate financial assurance. Like in Jersey Sanitation, the Board finds that the People have met all three threshold issues and the burden shifting exception does not apply here. Accordingly, the Board finds that collateral estoppel bars CLC from raising estoppel as an affirmative defense since this issue has already been litigated and resolved in the Community Landfill 1 permit appeal. The Board grants the People's motion to strike estoppel as an affirmative defense, yet denies the People's motion to strike *laches*.

Second Alleged Affirmative Defense: CLC's Bonds Complied With the Law at the Time They Were Issued, and the Agency Accepted Them

The People argue that the appellate court also rejected CLC's second affirmative defense on the merits so that, similarly, collateral estoppel bars CLC from raising its second affirmative defense. The People contend that the Board, affirmed by the appellate court, found that the Frontier bonds did *not* comply with applicable Board regulations at the time Frontier issued the bonds. Mot. to Strike at 4.

Again, CLC contends nothing precludes its second affirmative defense. CLC contends it is inappropriate to apply offensive collateral estoppel here. CLC argues that because the burdens of proof differ between the prior permit appeal and this action, and because courts hesitate to apply the doctrine of offensive collateral estoppel, the Board should not grant the People's motion to strike this affirmative defense based on the People's collateral estoppel argument. Resp. at 5.

The Board finds that CLC's second alleged defense essentially realleges an affirmative defense of equitable estoppel as CLC did in the first affirmative defense. However, the Board grants the People's motion to strike CLC's second affirmative defense, finding it is also barred by collateral estoppel. In Community Landfill 1, CLC argued that the Agency found the bonds acceptable and in compliance with all relevant regulations before issuing the August 4, 2000

sigmod permits. CLC reasoned that the equitable estoppel doctrine, therefore, precludes the Agency from later denying the supplemental permit on the grounds that Frontier was removed from the Circular 570 list. Community Landfill 1, slip op. at 10.

The Board, however, affirmed the Agency's decision regarding financial assurance. The Board found that because Section 39(1) of the Act prohibits the Agency from issuing a permit if a violation of the Act or regulations would occur, the Agency did not properly grant the permit in May 11, 2001. The appellate court affirmed, holding the Agency was required to deny the permit application because the permit would have caused a violation of the Act. Community Landfill 2, 331 Ill. App. at 1061; *citing* Gersch v. Department of Professional Regulation, 308 Ill. App. 3d 649, 720 N.E.2d 672 (1999). Additionally, the Board rejected CLC's argument that estoppel precludes the Agency's ruling. Community Landfill 1, slip op. at 14; Community Landfill 2, 331 Ill. App. at 1061-1062. Accordingly, the Board grants the People's motion to strike CLC's second affirmative defense.

Third Alleged Affirmative Defenses: CLC Did Not Act Willfully, Knowingly, or Repeatedly Such that any Award of Cost and Attorney Fees Would be Inappropriate

The People deny the allegations in CLC's third affirmative defense. CLC does not respond to the People's motion to strike regarding the third affirmative defense.

As to CLC's third alleged affirmative defense, the Board finds that lack of willful, knowing, or repeated action is not an affirmative defense to the People's claims. Willfullness, knowledge, and repetition are not elements of those Sections of the Act or Board regulations. *See* People v. Stein Steel Mills Services, Inc., PCB 02-1 (Apr. 18, 2002). While the issue of whether CLC acted willful, knowing, or repeatedly may impact the Board's decision whether to award costs and attorney fees, it does not dispute the People's legal right to bring this action. The Board grants the People's motion to strike this affirmative defense. However, CLC is free to address this issue at hearing.

Fourth Alleged Affirmative Defense: The Board Should Consider all of the Factors in Section 42(h)(1)-(5) as factors in Mitigation of Any Penalty That Might Be Imposed

The People further argue that CLC's fourth alleged affirmative defense is not an affirmative defense because it does not plead facts or defend against of the allegations in the complaint. Mot. to Strike at 6. The People contend the alleged affirmative defense merely relates to the mitigation of any penalty the Board may impose. Accordingly, the People contend this defense requires no response. Mot. to Strike at 6. CLC did not respond to the People's motion to strike this defense.

The Board finds that CLC's fourth alleged affirmative defense, that the Board must consider the Section 42(h) factors, is also not an affirmative defense. As noted by the People, CLC's fourth defense does not plead facts and would not defeat the People's claims even if all allegations were proven true. Additionally, the Board notes that CLC did not respond to the People's motion to strike the third and fourth affirmative defenses. Accordingly the Board

grants the People's motion to strike CLC's third and fourth alleged affirmative defenses. However, CLC is free to address this issue at hearing.

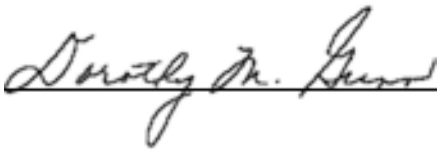
CONCLUSION

The Board grants the People's motion to strike affirmative defenses in part and denies the motion in part. Of the first alleged affirmative defense, estoppel is barred by the doctrine of collateral estoppel, but *laches* is not. The second alleged affirmative defense is also barred by collateral estoppel. The Board notes that nothing precludes CLC from discussing the information presented in the first two alleged affirmative defenses in a remedy analysis as that information relates to Section 33(c) and 42(h) factors. 415 ILCS 5/33(c), 42(h) (2002).

The Board finds that CLC's third and fourth alleged affirmative defenses are not affirmative defenses at all, but factors that may mitigate a finding of penalty or impact the Board's decision on whether to award costs and attorney fees. The Board directs the parties to proceed expeditiously to hearing.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 16, 2003, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board