ILLINOIS POLLUTION CONTROL BOARD
March 4, 2004

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 02-186
	)	(Enforcement – Air)
VAN MELLE U.S.A. INC.,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by G.T. Girard):

On April 23, 2002, the Office of the Attorney General, on behalf of the People of the State of Illinois (People) filed a five-count complaint (Comp.) against Van Melle U.S.A., Inc. (Van Melle). The complaint alleges violations of Sections 9(a), 9(b), 9.8(b), and 35.5(6)(b) of the Environmental Protection Act (Act) (415 ILCS 5/9(a), 9(b), 9.8(b), and 35.5(6)(b) (2002)) as well as 35 Ill. Adm. Code 201.141, 201.143, 203.201, 205.150(c)-(e), 218.986,205.300(a), 205.310(a), and 270.301(b). The Board accepted the complaint for hearing on November 2, 2002.

Pursuant to hearing officer order, on November 21, 2003, Van Melle timely filed an answer which included three affirmative defenses (Ans). On December 14, 2002, the People filed a motion to strike the affirmative defenses (Mot.). On January 26, 2004, Van Melle responded to the motion (Resp.). On February 6, 2004, the People filed a motion for leave to file a reply and a reply to the response (Reply).

The Board grants the motion for leave to file a reply. The Board grants in part and denies in part the motion to strike. First, the Board reserves ruling on the motion to strike the first affirmative defense of *laches* for 30 days. Second, the Board denies the motion to strike the second affirmative defenses. Finally, the Board grants the motion to strike the third affirmative defense. The Board will briefly summarize the relevant background information for this proceeding and follow with a summary of the alleged affirmative defenses. The Board will next provide a synopsis of the motion to strike, the response and the reply. The Board will then elaborate on the decision and the reasons for the decision.

BACKGROUND

Van Melle operates a candy manufacturing facility located in Buffalo Grove, Lake County. Ans. at 2. The process involves cooking raw ingredients and placing the ingredients through an extruder that separates candy. Comp. at 2. The strips are then passed through a dip tank containing capol to harden the candy. *Id*. The product is cooled in a cooling tunnel and sugar and flavoring is added to the candy in a steaming sander. *Id*.

The complaint alleges that Van Melle has operated the facility from "at least November 1999 and May 2000" continuing until June 29, 2001. Comp. at 2. Van Melle denies the allegation. Ans. at 3.

Count I of the complaint alleges that Van Melle discharged or emitted volatile organic materials (VOM) into the atmosphere. Comp. at 2. The alleged violations occurred "since at least November 1999 and May 2000, respectively, and continuing until June 29, 2001." *Id*. The complaint alleges that the emissions of VOM constitute a violation of Section 9(b) of the Act (415 ILCS 5/9(b) (2002)) and 35 Ill. Adm. Code 201.143. Comp. at 6.

Count II of the complaint alleges that Van Melle was required to submit a Clean Air Act Permit Program (CAAPP) permit by November 2000 and Van Melle has failed to do so. Comp. at 11. The complaint alleges that the failure to submit a CAAPP permit results in the violation of Section 39.5(6)(b) of the Act (415 ILCS 5/39.5(6)(b) (2002)) and 35 Ill. Adm. Code 301(b). Comp. at 12.

Count III alleges that Van Melle was required to submit an Emissions Reduction Market System (ERMS) baseline application by the time construction of the facility commenced and has not done so. Comp. at 14. The complaint alleges that the failure to timely submit the ERMS baseline application results in the violation of Section 9.8(b) of the Act (415 ILCS 5/9.8(b) (2002)) and 35 Ill. Adm. Code 205.310(a), 205.300(a), and 205.150(c)-(e).

Count IV alleges that Van Melle constructed the facility without complying with 35 Ill. Adm. Code 203.201. Comp. at 19. The failure to demonstrate compliance with Section 203.201, results in an alleged violation for causing or allowing air pollution in violation of Section 9 of the Act (415 ILCS 5/9(b) (2002)) and 35 Ill. Adm. Code 201.141. *Id*.

Count V alleges that Van Melle failed to use compliant coatings and reduce VOM at the facility. Comp. at 22-23. The complaint alleges that this failure results in violations of Section 9(a) of the Act (415 ILCS 5/9(a) (2002)) and 35 Ill. Adm. Code 201.141 and 218.986. Comp. at 23.

AFFIRMATIVE DEFENSES

Van Melle alleges three affirmative defenses. First, Van Melle alleges that the People's claims are barred by the equitable doctrine of *laches*. Ans. at 28. Second, Van Melle asserts that if the claims are true, the claims arose from the negligence or intentional conduct of some third person over whom Van Melle has no control. *Id*. Third, Van Melle alleges that the Illinois Environmental Protection Agency (Agency) unlawfully denied permits sought by Van Melle. Ans. at 28-29. Van Melle alleges that the Agency failed to comply with the law in denying permits sought by Van Melle. *Id*. Specifically, Van Melle asserts that the Agency should have notified Van Melle of deficiencies in the permit application prior to denying the permits. *Id*.

MOTION TO STRIKE

The following discussion will summarize the People's general argument on affirmative defenses and then summarize the more specific arguments for striking each of the alleged affirmative defenses.

General Legal Argument

The People set forth the legal standard for affirmative defenses and then argue that all three alleged affirmative defenses should be stricken because the alleged affirmative defenses do not meet that legal standard. Mot. at 2-4. Specifically, the People point to the Illinois Code of Civil Procedure (735 ILCS 5/1-101 *et seq*. (2002)) (Code) and the requirements for pleading an affirmative defense. Mot. at 2. Section 2-613(d) of the Code requires that the facts constituting an affirmative defense must be set forth in the pleading. 735 ILCS 5/2-613(d) (2002).

The People also argue that an affirmative defense is a matter which assuming the complaint to be true constitutes a defense to the complaint. Mot. at 3, citing *Black Law Dictionary* (6th Edition 1990). An affirmative defense confesses or admits the cause of action but then seeks to avoid the cause of action by asserting a new matter not contained in the complaint and answer. Mot. at 3, citing Worner Agency, Inc. v. Doyle, 121 Ill. App. 3d 219, 22-223; 459 N.E.2d 633, 635-636. (4th Dist. 1984).

First Affirmative Defense: *Laches*

Regarding the first alleged affirmative defense (*laches*), the People argue that Van Melle does not provide any facts to support the defense and the pleadings do not admit the cause of action in the complaint. Mot. at 4, 5. Further, the People assert that the law is well settled that *laches* may not be invoked against a governmental body attempting to perform a governmental function. Mot. at 4, citing Cook County v. Chicago Magnet Wire Corp., 152 Ill. App. 3d 726, 727-28; 504 N.E.2d 904, 905 (1st Dist. 1987).

Second Affirmative Defense: Third Party Responsible

The People argue that the second alleged affirmative defense (third party responsible) should also be stricken. Mot. at 5. The People concede that the second affirmative defense does admit the underlying cause of action; however the alleged defense does not avoid or defeat Van Melle's liability. Mot. at 5. The People argue that Van Melle, as operator of the candy manufacturing facility, is responsible for the alleged violations and Van Melle does not name any other owners or operators in the second alleged affirmative defense. Mot. at 5-6.

Third Affirmative Defense: Agency Actions

The People maintain that the third affirmative defense (Agency actions) should also be stricken. The People argue that the third affirmative defense is not a defense to the alleged violations but rather a part of Van Melle's legal strategy in a related permit appeal (Perfetti Van Melle USA, Inc. v. IEPA, PCB 02-215). Mot. at 7.

RESPONSE TO MOTION TO STRIKE

In the paragraphs below, the Board will summarize Van Melle's argument on the legal standard for affirmative defenses and motions to strike. Next, the Board will summarize the specific responses to the People's motion to strike.

Van Melle agrees with the People that Section 2-613(d) of the Code (735 ILCS 5/2-613(d) (2002)) sets forth the requirements for pleading an affirmative defense. Resp. at 2. Van Melle asserts that Illinois law developed pursuant to Section 2-613(d) of the Code (735 ILCS 5/2-613(d) (2002)) requires a respondent to plead an affirmative defense in the answer. Resp. at 2. Further, Van Melle maintains that the burden of proving an affirmative defense is on the respondent. The complainant is not required to put on any evidence to counter an affirmative defense plead by respondent until respondent presents evidence to substantiate the affirmative defense. *Id*.

Regarding the standard for ruling on a motion to dismiss, Van Melle argues that as a general rule the Board must accept as true all well-pled facts and all reasonable inferences that may be drawn from those facts. Resp. at 2. Van Melle asserts that the Board should not grant a motion to strike unless no set of facts can be proved under the pleadings that will entitle the party to recover. Resp. at 2, citing American National Bank & Trust Company v. City of Chicago, 192 Ill. 2d 274, 735 N.E.2d 551 (2000). Van Melle maintains that the People's motion admits the truth of all well-pled facts constituting the alleged affirmative defenses and attacks only the legal sufficiency of the facts. Resp. at 3, citing International Insurance Co. v. Sargent & Lundy, 242 Ill. App. 3d 614, 609 N.E.2d 842 (1st Dist. 1993).

Van Melle also argues that as a general rule where a pleading has been dismissed on a motion brought pursuant to Section 2-613(d) of the Code (735 ILCS 5/2-613(d) (2002)), leave to amend the pleading is granted as a matter of course. Resp. at 3, citing Sinclair v. State Bank of Jerseyville, 226 Ill. App. 3d 909; 589 N.E.2d 862 (4th Dist. 1992). Van Melle asks that if the Board should find the pleadings lack specificity or well-pled facts to support the affirmative defenses, the Board allow Van Melle to amend the pleadings. Resp. at 3.

First Affirmative Defense: *Laches*

Specifically regarding the affirmative defense of *laches*, Van Melle argues that the People seek findings of violations and civil penalties for each day that the alleged violations occurred. Resp. at 4. Van Melle points out that the complaint in several instances alleges that the violations have been committed since 1999. Resp. at 4. Van Melle argues that clearly the complaint has raised the issue of date or dates upon which alleged violations occurred and seeks to impose civil penalties for the duration of each alleged violation. *Id*. Further, Van Melle maintains that the People have made the passage of time an element in the enforcement action. *Id*.

Van Melle asserts that an unreasonable delay by the People in pursuing this enforcement action against Van Melle or unreasonable delay in taking action that prevented Van Melle from correcting such alleged violations would prejudice Van Melle. Resp. at 5. Van Melle argues

that the affirmative defense of *laches* should not be stricken because the People seek civil penalties that are time dependant and any delay would prejudice Van Melle in the amount of civil penalties assessed. *Id*.

Van Melle further argues that *laches* may be applied to a governmental body and distinguishes the case relied upon by the People. Resp. at 5.

Second Affirmative Defense: Third Party Responsible

Van Melle argues that the second affirmative defense should not be stricken because the alleged violations do not only concern the operations of the facility but also the construction of the facility. Resp. at 6. Van Melle argues that during the time periods relevant to the alleged violations, Van Melle has not been the sole operator of the facility. Resp. at 6. Van Melle asserts that the second affirmative defense is in the nature of a claim for contributory negligence and as such must be plead in the answer. Resp. at 6, citing Carlson v. City Construction Company, 239 Ill. App. 3d 211, 606 N.E.2d 400 (1st Dist. 1992).

Van Melle maintains that the facts to be presented at trial will establish that Van Melle acquired ownership of the facility as an ongoing concern a significant amount of time after the facility had been constructed and the facility was being operated by another company. Resp. at 6. Van Melle cannot be found liable for alleged violations based on construction because Van Melle did not construct the facility, asserts Van Melle. Resp. at 6. Similarly, Van Melle cannot be held liable for not complying with regulatory obligations that should have been met prior or at the time the facility was constructed. Resp. at 6-7. Van Melle asserts that the second affirmative defense informs the People that a third party may be responsible for the alleged violations and the People should look elsewhere for liability on those alleged violations. Resp. at 8.

Third Affirmative Defense: Agency Actions

Van Melle claims that this affirmative defense should not be stricken because certain of the alleged violations would have been cured by the issuance of a permit. Resp. at 8. The Agency's "unlawful" denial of permits resulted in violation of longer duration and therefore potentially higher civil penalties asserts Van Melle. Resp. at 8-9. Van Melle goes on to argue the merits of this issue regarding the alleged "unlawful" actions by the Agency. Resp. at 8-10.

REPLY

The Board will briefly summarize each of the People's arguments in the reply to the three alleged affirmative defenses.

First Affirmative Defense: *Laches*

The People reply that the Board has held that potential penalties are not topics for affirmative defenses and Van Melle has linked the defense of *laches* with penalty in this matter. Reply at 4, citing People v. Midwest Grain Products of Illinois, PCB 97-179 (Aug. 21, 1997). Therefore, the People argue the affirmative defense must fail. Reply at 4.

Second Affirmative Defense: Third Party Responsible

The People argue that the second affirmative defense is non-specific and fails to identify a third party. Reply at 5. The People assert that if Van Melle believes a third party is responsible, Van Melle should file a third party complaint. *Id*. The People also argue that the complaint does not allege construction violations but pertain only to the operation of the facility. Reply at 5-6. Therefore, the People believe that the second affirmative defense should be stricken. Reply at 6.

Third Affirmative Defense: Agency Actions

The People reiterate in the reply that the permits allegedly "unlawfully" denied by the Agency are at issue in a permit appeal pending before the Board. Reply at 6. The People argue that the alleged third affirmative defense is irrelevant and should be stricken. Reply at 8.

DISCUSSION

The Board first enunciates the standard for what constitutes an affirmative defense. Then the Board addresses the merits of each alleged affirmative defense.

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).

First Affirmative Defense*: Laches*

The Board finds that the affirmative defense of *laches* has not been sufficiently plead. In asserting the affirmative defense, Van Melle merely states that "[c]omplainant's claims are barred by the equitable doctrine of laches." Ans. at 28. Van Melle provides no additional factual allegations in support of the affirmative defense. In response to the motion to strike, Van Melle argues that the People have made an issue of dates or dates upon which the alleged violations occurred. However, Van Melle then relates time of noncompliance to the issue of penalty calculation.

The People correctly point out that the Board has found that factors such as the duration of the violation which relate to civil penalties are not appropriate topics for affirmative defenses. People v. Midwest Grain Products of Illinois, PCB 97-179 (Aug. 21, 1997); People v. QC Finishers, Inc., PCB 01-7 (June 19, 2003). The pleadings in this case seem to indicate that Van Melle is asserting *laches* to mitigate any potential penalties; however, the pleadings are not clear. Therefore, the Board finds that the affirmative defense of *laches* has not been sufficiently plead. The Board will not however strike the affirmative defense at this time. Instead the Board grants the request of Van Melle to amend the answer to sufficiently plead the alleged affirmative defense of *laches*, consistent with the Board's decision in People v. Riverdale Recycling Inc. and Tri-State Disposal, PCB 03-73 (Sept. 18, 2003). The Board directs Van Melle to file an amended response by April 5, 2004, or the Board will strike the affirmative defense.

Second Affirmative Defense: Third Party Responsible

The Board finds that Van Melle has sufficiently asserted and pled the second affirmative defense. Van Melle specifically denies in the answer that Van Melle owned and operated the facility during the times the violations are alleged to have occurred. *See e.g.*, Ans. at 3. Van Melle alleges in the pleading that even if the claims are true, the alleged violations occurred as a result of a third person. Ans. at 28. Furthermore, in the response to the motion to strike, Van Melle points out that certain of the alleged violations relate to construction of the facility and Van Melle did not construct the facility. The Board agrees that the complaint plainly alleges violations relating to construction at the facility (*see* counts III and IV) and the Board is not convinced that Van Melle must name the alleged third party. The pleading sufficiently places the People on notice of the affirmative defense. Therefore, the Board denies the motion to strike the second affirmative defense.

Third Affirmative Defense: Agency Actions

The Board is not convinced that the Agency's actions in the issuance of permits are relevant in this proceeding. The alleged violations relating to permits in the complaint all center around the failure to apply for a permit. Thus, whether or not the Agency has issued a permit is irrelevant to the alleged violations in this matter and is more appropriately a part of the permit appeal. Therefore, the Board finds that the alleged affirmative defense that the Agency unlawfully denied permits sought by Van Melle is not an affirmative defense and the Board strikes that alleged defense.

Van Melle is free to introduce any evidence which would relate to the due diligence of Van Melle in applying for permits as well as any proof of compliance at the time of hearing. Such evidence will be considered by the Board in assessing a civil penalty under Section 42(h) of the Act (415 ILCS 5/42(h) as amended by P.A. 93-575, eff. Jan. 1, 2004), if a violation is found by the Board.

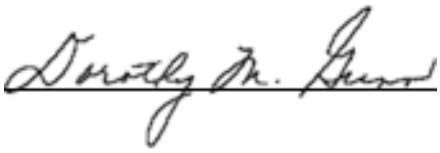
CONCLUSION

The Board has reviewed the arguments of the parties and relevant law on affirmative defenses. Based on that review, the Board reserves ruling on the first affirmative defense of

laches for 30 days. In addition, the Board denies the motion to strike the second affirmative defense alleging that a third party is responsible for the alleged violations. Finally, the Board strikes the third affirmative defense alleging that the Agency's actions in denying permits were "unlawful".

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 4, 2004, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board