ILLINOIS POLLUTION CONTROL BOARD
May 20, 2004

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 04-09
	)	(Enforcement – Air)
AARGUS PLASTICS, INC.,	)	
	)	
Respondent.	)	

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

The Board today addresses a motion to strike affirmative defenses filed by the Office of the Attorney General, on behalf of the People of the State of Illinois (complainant). Aargus Plastics, Inc. (respondent) responded to the motion to strike and, for the reasons discussed below, the Board grants the motion to strike the second, twelfth, thirteenth and fourteenth affirmative defenses. Further the Board denies the motion to strike the fourth, fifth, sixth, and eleventh affirmative defenses.

The Board will first summarize procedural background and the affirmative defenses. Next the Board will summarize the complainant's motion to strike and the response to the motion. Finally, the Board will elaborate on the Board reasons for today's decision.

PROCEDURAL BACKGROUND

On July 17, 2003, the complainant filed an eight-count complaint (Comp.) against respondent. The complaint alleges violations of Sections 9(a), 9(b), and 39.5(b)(6) of the Environmental Protection Act (Act) (415 ILCS 5/9(a), 9(b), and 39.5(b)(6) (2002)). The complaint also alleges violations of 35 Ill. Adm. Code 201.302(a), 201.303, 201.150(c)(1), 205.300(b)(1), and 218.401(a), as well as conditions 5.5.1, 5.7.1, 6.7(a)(i), 7.1.3(b), (c), and (d), 7.1.6, 9.2.1, and 9.8 of Clean Air Act Permit Program operating permit number 95110088. The Board accepted the complaint for hearing on July 24, 2003.

The complaint alleges that respondent violated the Act, Board regulations, and permit conditions by using flexograph printing inks that exceeded the maximum allowable volatile organic material content after the deadline for using compliant inks. Comp. at 5-7. The complaint further alleges that respondent failed to submit reports as required by permit conditions, submitted false reports, and operated the facility in violation of permit conditions. Comp. at 10, 13, 18. The complaint concerns respondent's facility at 1415 Redeker Road, Des Plaines, Cook County. Comp. at 2.

On February 3, 2004, respondent filed an answer to the complaint which included 14 alleged affirmative defenses (Ans.) On March 5, 2004, the complainant filed a motion to strike

or dismiss all fourteen affirmative defenses (Mot.). On April 2, 2003, the respondent filed a response (Resp.) to the complainant's motion. In that response, respondent withdraws affirmative defenses one, three, seven, eight, nine and ten. Resp. at 9. On April 22, 2004, the hearing officer allowed a motion for leave to file a reply and granted the complainant until May 14, 2004 to file a reply. On May 14, 2004, the complainant filed a reply (Reply).

AFFIRMATIVE DEFENSES

As stated above, the respondent has withdrawn six of the fourteen affirmative defenses raised in the answer. Resp. at 9. The remaining eight affirmative defenses will be summarized below and will be referred to by the number given by the defense in the answer.

The second affirmative defense alleged by respondent is that the Illinois Environmental Protection Agency (Agency) did not issue and serve a violation notice on respondent within 180 days after the Agency became aware of the violation. Ans. at 20. Respondent alleges that such failure by Agency violates Section 31(a)(1) of the Act (415 ILCS 5/31(a)(1) (2002)) and therefore, the Board lacks jurisdiction over this matter. Ans. at 20.

The fourth affirmative defense alleges that the claims are barred by the doctrine of *laches*. Ans. at 20. The fifth affirmative defense is similar in that respondent asserts the claims have been waived because the complainant knew or should have known of the complainant's right to file an action. *Id*.

The sixth affirmative defense alleges that the claims are barred by the doctrine of estoppel because the Agency regularly inspected respondent's facility and knew or should have known of the alleged violations but did not inform the respondent. Ans. at 21. As a consequence, respondent asserts that the Agency authorized the respondent's practices and operations. *Id*.

The eleventh affirmative defense alleges that the Agency failed to "fairly advise" respondent of the applicable requirements and did not provide "fair" notice of the applicable requirements. Ans. at 21.

The twelfth, thirteenth, and fourteenth affirmative defenses all allege deficiencies in the Agency's notice of violation. Ans. at 21. More specifically, under the twelfth affirmative defense, respondent asserts that the Agency did not include allegations that respondent violated the 1994 permit. *Id*. Under the thirteenth affirmative defense, respondent argues that the notice of violation did not include references to respondent's alleged failure to hold the appropriate number of allotment trading units at the end of the reconciliation period. *Id*. Regarding the fourteenth affirmative defense, respondent claims that the notice of violation did not include any allegation regarding the failure on the part of respondent to timely submit the annual compliance certification for 2000. Ans. at 22.

MOTION TO STRIKE AND REPLY

The following discussion will summarize the complainant's general legal argument on affirmative defenses and then summarize the more specific arguments for striking each of the alleged affirmative defenses. The Board will also briefly summarize, in each section, the arguments set forth in complainant's reply.

General Legal Argument

The complainant set forth the legal standard for affirmative defenses and then argues that all three alleged affirmative defenses should be stricken. Mot. at 2-3. Specifically, the complainant argues that an affirmative defense is a matter which assuming the complaint to be true constitutes a defense to the complaint. Mot. at 2, citing *Black's Law Dictionary* (6th Edition 1990). Further the complainant asserts that an affirmative defense "gives color to the opposing party's claim" and asserts a new matter which defeats the claim. Mot. at 3, citing Ferris Elevator Company v. Neffco, Inc., 285 Ill. App. 3d 350, 354, 674 N.E.2d 449, 452 (3rd Dist. 1996). Also, the complainant states that 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).

The complainant argues that none of respondent's defenses attack the truth of the allegations in the complaint. Mot. at 3. Therefore, the complainant concedes that all the defenses pled are affirmative defenses; however, the complainant asserts none are legally valid. *Id*.

Second Affirmative Defense (Jurisdiction)

The complainant asserts that the allegations in the second affirmative defense are not true. Mot. at 4. The complainant maintains that the Agency issued two notices of violation to respondent within 180 days after being made aware of alleged violations. *Id*. Specifically, the complainant argues that the Agency issued a notice of violation for failure to submit an annual compliance certification on September 13, 2001, and Agency issued a second notice of violation on January 31, 2002. Mot. at 4-5.

In any event, the complainant argues that the Board has found the requirements of Section 31(a)(1) of the Act (415 ILCS 5/31(a)(1) (2002)) to be directory and not mandatory. Mot. at 5, citing People v. Peabody Coal Co., PCB 99-134 (June 5, 2003) and People v. Crane, PCB 01-176 (May 17, 2001). The complainant asserts that facts regarding the date that Agency became aware of alleged violations do not affect the Board's jurisdiction over an enforcement matter. *Id*. The complainant maintains that any argument by the respondent that the Board lacked jurisdiction based on this affirmative defense must fail and the second affirmative defense should be stricken. Mot. at 5.

In the reply, complainant asserts that the arguments of respondent are flawed and directly contradict Board precedent. Reply at 3. Complainant reiterates the Board's precedent from Crane and Eagle-Pricher. Reply at 3-6. Based on the Board's prior decisions, complainant argues the Board does have jurisdiction to hear this matter. Reply at 6.

Fourth and Fifth Affirmative Defenses (*Laches* and Waiver)

The complainant argues that both affirmative defenses four and five deal with *laches* and *laches* assumes that due to the complainant's delay in asserting a right, the respondent is prejudiced. Mot. at 6. The complainant asserts that the law is well settled that *laches* may not be invoked against a government body performing a governmental function or protecting a public right absent extraordinary circumstances. Mot. at 6-7, citing Cook County v. Chicago Magnet Wire Corp., 152 Ill. App. 32d 726, 727-28, 504 N.E.2d 904, 905 (1st Dist. 1987). The complainant maintains that there are no extraordinary circumstances in this matter, no unreasonable delay on the part of complainant, and respondent has not demonstrated prejudice. Mot. at 7. Therefore, the complainant argues the defenses should be stricken.

Complainant asserts, in the reply, that the Board has struck the affirmative defense of *laches* where there is "no conduct nor special circumstance" which would lend itself to *laches*. Reply at 6. Complainant argues that *laches* cannot apply in this matter because no conduct or special circumstance exists. *Id*. Furthermore, complainant asserts that the claims in the sixth affirmative defense relate to possible imposition of penalties and the Board has consistently struck such alleged affirmative defenses. Reply at 6, citing People v. QC Finishers, Inc., PCB 01-7 (June 19, 2003) and People v. Douglas Furniture of California, Inc. PCB 97-133 (May 1, 1997). Thus, the complainant argues the Board should strike the fourth affirmative defense.

As to the fifth affirmative defense, complainant states that "[c]omplainant finds no merit in Respondent's waiver argument." Reply at 7. Complainant argues that even if the Agency or some other representative of the State assured respondent that appropriate action was being taken, respondent can not now argue such conduct amounts to relinquishing the State's right to bring an action. Reply at 7. Complainant asserts that respondent is arguing that if the State conducts an inspection and gives a "passing grade" any violations at subsequent inspections would be waived. Reply at 8. Finally, complainant argues that the only argument for waiver relates to potential penalties and pursuant to QC Finishers and Douglas Furniture, the fifth affirmative defense should be stricken.

Sixth Affirmative Defense and Eleventh Affirmative Defense (Estoppel)

The complainant argues that both the sixth and eleventh alleged affirmative defenses are asserting estoppel as a defense. Mot. at 7-8. The complainant opines that the respondent is asserting that the "complainant's action or inaction" upon which respondent relied has prejudiced respondent. Mot. at 8. The complainant asserts that to prove the affirmative defense of estoppel respondent must demonstrate that respondent relied on actions of the Agency, that the reliance was reasonable, and that the reliance resulted in some prejudice to respondent. Mot. at 8, citing People v. Skokie Valley Asphalt Co., Inc., PCB 96-98 (June 5, 2003).

The complainant argues that the complainant clearly informed respondent of the alleged violations and respondent has not shown that the complainant made any knowing misrepresentations. Mot. at 9. The complainant also argues that respondent has not alleged any affirmative act on the part of complainant that prejudiced respondent. *Id*. The complainant

asserts that there are no "extraordinary circumstance in the instant matter" and the government is trying to protect the public's right to a healthy environment. *Id*. Therefore, the complainant maintains affirmative defenses six and eleven must be stricken. *Id*.

Complainant asserts that estoppel does not apply in this case and if the Board fails to strike these affirmative defenses, the Board could "compromise" the Agency's ability to perform the Agency's duties. Reply at 9. Therefore, complainant argues the Board should strike the affirmative defense. *Id.*

Twelfth Affirmative Defense and Thirteenth Affirmative Defense (Improper Notice)

The complainant concedes that these alleged violations were not included in the notice of violations; however, the complainant argues that there is no prohibition in the Act barring the complainant from alleging violations on the complainant's own motion. Mot. at 11. The complainant asserts that in the first paragraph on each count of the complaint, the complaint states that the action is brought "by the Attorney General on her own motion and upon the request of the" Agency. Mot. at 11. The complainant maintains that Section 31 of the Act (415 ILCS 5/31 (2002)) allows the complainant to bring an action referred to the complainant by Agency or on the complainant's own motion. Mot. at 11, citing Peabody Coal and People v. Eager-Picher-Boge, PCB 99-152 (July 22, 1999). The complainant asserts that the allegations referenced in affirmative defenses twelve and thirteen are brought by the complainant on the complainant's own motion and therefore the alleged affirmative defense should be stricken. Mot. at 11.

In the reply, complainant argues that respondent "basically admits" that the twelfth and thirteenth affirmative defenses should be stricken. Reply at 10. The complainant asserts respondent has done so by acknowledging that the allegations are valid. *Id*.

RESPONSE TO MOTION

The following discussion will summarize the respondent's general legal argument on affirmative defenses and then summarize the more specific arguments in response to the motion to strike for each of the remaining alleged affirmative defenses. As noted above respondent withdraws affirmative defenses one, three, seven, eight, nine and ten. Resp. at 9. The remaining alleged defenses are the second, fourth, fifth, sixth, eleventh, twelfth, thirteenth, and fourteenth.

General Legal Argument

Respondent argues that to the extent the complainant seeks to have a defense stricken because respondent has not sufficiently pled facts, the complainant is not entitled to have those defenses stricken. Resp. at 2. Respondent maintains that complainant may seek discovery on the defenses and the Board has refused to strike many of the defenses asserted by Respondent because the Board cannot decide the merits of the defense before hearing evidence. Resp. at 2, citing People v. John Crane, Inc., PCB 01-76, slip op. at 8 (May 17, 2001).

Respondent points to the Board rules which require that "facts constituting an affirmative defense must be plainly set forth before hearing in the answer . . .". Resp. at 2. Respondent notes that the Board rules do not explain what is a sufficient statement of facts but the Code of Civil Procedure (Code) (735 ILCS 5/1-101 *et seq*. (2002)) does offer guidance. *Id*. The Code provides that no "pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet." Resp. at 2, citing 735 ILCS 5/2-612(b) (2002). Respondent asserts that the purpose of the pleading rules is to inform the complainant of the legal theories of the defense and respondent maintains that the defenses are sufficiently plead. Resp. at 3.

Second Affirmative Defense (Jurisdiction)

Respondent argues that the alleged jurisdictional arguments are supported by the plain language of Section 31(a) of the Act (415 ILCS 5/31 (2002)). Resp. at 3. Respondent points out that in 1996, the legislature amended the language of Section 31 of the Act (415 ILCS 5/31 (2002)) and prior to those amendments the Board had held that noncompliance with Section 31 divested the Board of jurisdiction . Resp. at 3-4. Respondent argues that the 1996 amendments did not overrule or otherwise affect the line of Board cases holding that Section 31 compliance was necessary to vest jurisdiction with the Board. Resp. at 4.

Respondent further argues that the legislature used the word "shall" to require Agency to provide a pre-enforcement opportunity at resolution. Resp. at 5. Respondent argues that "shall" is generally interpreted to mean that something is mandatory. *Id*. Respondent maintains that complainant would read "shall" under the new language as "directory" and under the old as "mandatory" and those two readings are inconsistent. Resp. at 5.

Respondent asserts that complainant's reliance on Eagle-Picher is misplaced in this case. Resp. at 6. Respondent argues that the facts in Eagle-Picher are distinguishable from the facts of this case. *Id.* Therefore, respondent does not agree the holding in Eagle-Picher is controlling. Resp. at 6-7.

Fourth and Fifth Affirmative Defenses (*Laches* and Waiver)

Respondent argues that complainant mistakenly claims the respondent must demonstrate that respondent will prevail on the defenses when asserting the defense of *laches* and waiver. Resp. at 7. Respondent asserts that respondent need only allege facts that if true will defeat the claim. *Id*., citing People v. Community Landfill Company, PCB 97-193, slip. op. at 3 (Aug. 6, 1998). Respondent argues that the facts necessary to establish the *laches* and waiver defenses are clear on the face of the complaint. Resp. at 8. Respondent argues that as the Board did in Peabody Coal and Crane, the Board should not decide the merits of the defense before hearing the evidence.

Sixth Affirmative Defense and Eleventh Affirmative Defense (Estoppel)

Respondent agrees with complainant that a party asserting estoppel must demonstrate that the party relied on the government agency, that the reliance was reasonable, and that such

reliance led to prejudice. Resp. at 9, citing Mot. at 8. Respondent argues that like the Peabody Coal and Crane cases, respondent will demonstrate that the Agency was aware of the alleged violations for years and that by waiting, Agency intended to relinquish the claims. Resp. at 9. Respondent asserts that respondent relied on Agency assertions and would suffer prejudice if the Agency is allowed to withdraw the representations. *Id*. For these reasons, respondent argues the Board should deny the motion to strike. *Id*.

Twelfth Affirmative Defense and Thirteenth Affirmative Defense (Improper Notice)

Respondent maintains that the complainant's assertions regarding striking these two defenses "does not respect the language of Section 31" of the Act (415 ILCS 5/31 (2002)). Resp. at 10. Respondent asserts that the principles of statutory construction do not allow the complainant to "pick" language favorable to complainant's position and disregard the remaining language. *Id*. Respondent argues that if the complainant is correct and the complainant may bring an action on the complainant's own motion, then the Agency must comply with the requirements of Section 31 of the Act (415 ILCS 5/31 (2002)) as well. Resp. at 10.

DISCUSSION

The Board first enunciates the legal standard concerning affirmative defenses. Then the Board addresses the merits of affirmative defenses two, twelve, thirteen, and fourteen. Finally, the Board will address the merits of affirmative defenses four, five, six, and eleven.

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. Van Melle, PCB 02-186 (Mar. 4, 2004), citing 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." Van Melle, PCB 02-186, citing 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).

Affirmative Defenses Two, Twelve, Thirteen, and Fourteen

Before proceeding with a discussion on the merits of the arguments, the Board notes that complainant did not present specific arguments on striking the fourteenth affirmative defense. However, the motion does ask generally that all the affirmative defenses be stricken. *See* Mot. at 1. Because the fourteenth affirmative defense is similar to the twelfth and thirteenth affirmative

defenses, the Board will consider the merits of the fourteenth affirmative defense when discussing the twelfth and thirteenth affirmative defenses.

The second, twelfth, thirteenth, and fourteenth affirmative defenses all relate to alleged deficiencies with the notice of violation or the failure to issue a notice of violation on an alleged violation. The Board has previously addressed these same issues. *See* Eagle-Picher, Peabody Coal, and Crane. As the Board stated in Peabody:

> 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. Peabody Coal, PCB 99-134, slip op. at 6.

The Board finds nothing in the arguments of respondent that convinces the Board that the facts of this case are sufficiently distinguishable from this line of cases to deviate from our prior decisions. Further, the Board finds that respondent has presented no new argument that would convince the Board to overrule these prior decisions. Therefore, consistent with the Board's prior decisions, the Board finds that the second, twelfth, thirteenth, and fourteenth affirmative defenses should be stricken.

Affirmative Defenses Four, Five, Six and Eleven

These four affirmative defenses relate to assertions of *laches*, estoppel, and waiver. As with the previous discussion, the Board has ruled on alleged affirmative defenses relating to *laches*, estoppel, and waiver in prior cases. The Board has held that application of these legal doctrines to actions by the Agency are a rarity and will be applied only in extraordinary

circumstances. *See* Crane, PCB 01-176, slip op. at 8-9; Peabody Coal PCB 99-134, slip op. at 7-9. However, the Board has also found that the Board will not rule on the merits of these defenses without hearing the evidence as long as the defense is sufficiently pled. *Id.*

The complainant, in the motion to strike, argues that respondent must establish certain facts to prevail on the defenses. The arguments in the reply also argue whether or not facts exist to support the defenses. However, the respondent need not prove the merits of the defense at this time. Rather, the respondent must plead the defense in order to provide sufficient notice to the complainant to respond to the affirmative defenses. Van Melle, PCB 02-186, slip op. at 4. The Board finds that the answer and complaint provide a sufficient factual basis to place complainant on notice of the affirmative defense. Furthermore, consistent with the Board's prior decision, the Board cannot determine the merits of the defenses without hearing evidence. *See* Crane, PCB 01-176, slip op. at 8-9; Peabody Coal PCB 99-134, slip op. at 7-9. Therefore, the Board denies the motion to strike the fourth, fifth, sixth, and eleventh affirmative defenses.

CONCLUSION

The Board has reviewed the arguments of the parties and relevant law on affirmative defenses. Based on that review, the Board grants the motion to strike the second, twelfth, thirteenth, and fourteenth affirmative defenses. Further, the Board denies the motion to strike the fourth, fifth, sixth, and eleventh 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 May 20, 2004, by a vote of 5-0.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board