BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, LISA MADIGAN, Attorney General of the State of Illinois,	)	
Complainant,	)	
v.	)	No. 07-133 (Enforcement-Water)
THOMAS P. MATHEWS, an individual,	)	
Respondent.	)	

NOTICE OF FILING

TO: James A. Campion
Campion, Curran, Dunlop & Lamb, P.C.
8600 U.S. Highway 14, Suite 201
Crystal Lake, IL 60012

Mr. Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, IL 60601

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board a copy of Complainant's Motion to Strike Affirmative Defenses, a copy of which is attached and herewith served upon you.

By: Katherine Hausrath Dated: 9/12/2007
Katherine M. Hausrath

PEOPLE OF THE STATE OF ILLINOIS
LISA MADIGAN
Attorney General of the State of Illinois
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COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, pursuant to Section 101.506 of the Illinois Pollution Control Board's Procedural Regulations and Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 2-615 (2004), and hereby moves for an order striking Respondent's, THOMAS P. MATHEWS ("Mathews"), affirmative defenses to Complainant's Complaint. In support thereof, Complainant states as follows:

INTRODUCTION

On June 8, 2007, Complainant, People of the State of Illinois ("State"), filed a two-count complaint against Respondent, Mathews. The Complaint alleges that Mathews committed violations of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/1 *et seq.* (2006). Count I of Complainant's Complaint is titled *Water Pollution* and Count II is titled *Creating a Water Pollution Hazard.*

On August 31, 2007, Mathews filed his Answer and Affirmative Defenses of: (1) No Contamination; (2) Act of God; (3) Third Party Intervention; (4) Mitigation; and (5) Laches.

STANDARD

Under Illinois case law that interprets the pleading standards forth in the Illinois Code of Civil Procedure and Supreme Court Rules[1], the test for whether a defense is affirmative and must be pled by the Respondent is whether the defense gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated. *See, e.g., Ferris Elevator Company, Inc. v. Neffco, Inc.*, 285 Ill. App. 3d 350, 354, 674 N.E.2d 449, 452 (3rd Dist. 1996); *Condon v. Am. Tel. & Telegraph Co., Inc.*, 210 Ill. App. 3d 701, 709, 569 N.E.2d 518, 523 (2nd Dist. 1991). Accordingly, an affirmative defense confesses or admits the cause of action alleged by the Complainant, but seeks to avoid it by asserting new matter not contained in the complaint and answer. Where the defect complained about appears from the allegations of the complaint, it is not an affirmative defense and instead should be raised by a motion to dismiss. *Corbett v. Devon Bank*, 12 Ill. App. 3d. 559, 569-570, 299 N.E.2d 521, 527 (1st Dist. 1973). Thus, the issue raised by an affirmative defense must be one outside of the four corners of the complaint.

An affirmative defense should be stricken where the well-pleaded facts do not raise the possibility that the party asserting them will prevail. *Int'l Ins. Co. v. Sargent & Lundy*, 242 Ill. App.3d 614, 609 N.E.2d 842, 853 (1st Dist. 1993). Facts establishing an affirmative defense must be pled specifically, in the same manner as facts in a complaint. *Id.* at 854. Further, the facts constituting any affirmative defense must be plainly set forth in the answer. *See* Section 2-613(d) of the Illinois Code of Civil Procedure, 735 ILCS

[1] "The provisions of the Code of Civil Procedure [735 ILCS 5] and the Supreme Court Rules [Ill. S. Ct. Rules] do not expressly apply to proceedings before the Board. However, the Board may look to the Code of Civil Procedure and the Supreme Court Rules for guidance where the Board's procedural rules are silent." Illinois Pollution Control Board Procedural Regulations, Section 101.100(b).

5/2-613(d) (2004).

ARGUMENT

Respondent's First Affirmative Defense: No Contamination

Mathews raises the general affirmative defense of "No Contamination" to Counts I and II. First Affirmative Defense, ¶ 1. This assertion falls well short of constituting a legally sufficient affirmative defense since it is simply a denial of the facts alleged in the Complaint and provides no statute or case law to support it. It is nothing more than Mathews' attempt to rely on a conclusion as his defense, and this assertion should be stricken.

It is well settled that a simple denial of a fact pleaded in the Complaint is not a sufficient affirmative defense. *Pryweller v. Cohen*, 282 Ill.App.3d 899, 907, 668 N.E.2d 1144, 1149 (1st Dist. 1996), *appeal denied*, 169 Ill.2d 588 (1996); *see also Heller Equity Capital Corp.*, *People v. Wood River Ref. Co*, and *Farmers State Bank.* An affirmative defense must raise *new matter* that, if true, somehow defeats a complainant's claim. *Vanlandingham v. Ivanow*, 246 Ill. App. 3d 348, 615 N.E. 2d 1361 (4th Dist. 1993).

Mathews' first affirmative defense does not meet the standard of pleading required for an affirmative defense, and should be stricken. In the Complaint, Complainant relies upon the definition of "contaminant" contained within Section 3.165 of the Act, 415 ILCS 5/3.165 (2006). A contaminant is defined in the Act as "any solid, liquid or gaseous matter, any odor or any form of energy, from whatever source." 415 ILCS 5/3.165 (2006). Mathews' affirmative defense is simply a denial that "soil and stone" falls into the definition of a "contaminant." Respondent's assertion is not only incorrect, but is also an improper affirmative defense and should be stricken.

Respondent's Second Affirmative Defense:
Act of God

Mathews raises the general affirmative defense of "Act of God" to Counts I and II. Second Affirmative Defense, ¶ 1. This affirmative defense has no legal merit, and should be stricken. Respondent offers no legal or factual support for the contention that Complainant must allege that "Respondent had altered the Site in a way that channeled or forced water or any 'stone or soil' into any stream, any storm ditch, or Wonder Lake." Second Affirmative Defense, ¶ 3.

An "Act of God" is not a defense to an enforcement action under the Act. *Perkinson v. Illinois Pollution Control Bd.*, 187 Ill.App.3d 689, 694, 543 N.E.2d 901, 904, 135 Ill.Dec. 333, 336 (3rd Dist. 1989) (citing *Freeman Coal Mining Corp. v. Illinois Pollution Control Bd.*, 21 Ill.App.3d 157, 313 N.E.2d 616 (5th Dist.1974). In *Freeman,* the court found that a discharge in violation of the Act occurred when pollution seeped off of the owner's land. *Id.* The court held that "it was no defense that the discharges were accidental and not intentional or that they were the result of an "*Act of God*" (rain) beyond [the owner's] control." *Id* (emphasis added).

Therefore, Respondent's second affirmative defense is not a valid affirmative defense to an enforcement action under the Act, and should be stricken.

Respondent's Third Affirmative Defense:
Third Party Intervention

Mathews raises the general affirmative defense of "Third Party Intervention" to Counts I and II. Third Affirmative Defense, ¶ 1. This third affirmative defense is legally and factually insufficient and should be stricken.

Respondent provides no legal support for his allegation that a third party is

responsible for the run-off of silt-laden stormwater from Respondent's Site. Instead, Respondent's argument appears to be a litany of complaints about Wonder Lake's prior sedimentation. Third Affirmative Defense, ¶¶ 406, 8-10. These allegations are in no way related to Complainant's Complaint against Respondent, which alleges counts of Water Pollution and Water Pollution Hazard from the run-off of silt-laden stormwater from Respondent's property into waters of the State. Respondent appears to be arguing that he should not be held liable for the pollution he caused, because Wonder Lake is already polluted. This argument is specious and unsupported by any law.

Even if Respondent were able to show that all of the run-off from Respondent's property was caused by a third party, an owner can be found to be liable even where a third party caused or contributed to the contamination. *See Perkinson*, 187 Ill.App.3d 689 at 694 (citing *Hindman v. Entl.Prot. Agency* 42 Ill.App.3d 766, 1 Ill.Dec. 481, 356 N.E.2d 669 (5th Dist.1976)). In *Hindman*, the operator of a landfill was held liable for a fire that was not started by either the operator or his employees. *Id.*

Therefore, Mathews, as the owner of the property at issue, is the proper respondent and can make no claim that the State is prohibited from holding him liable for the contamination. Accordingly, Mathews' third affirmative defense of "third party intervention" should be stricken.

Respondent's Fourth Affirmative Defense:
Mitigation

Mathews raises the general affirmative defense of "Mitigation" to Counts I and II. Fourth Affirmative Defense, ¶ 1. Again, this affirmative defense is unsupported by any law and should be stricken.

Present compliance is not an affirmative defense to allegations of past violations

of the Environmental Protection Act. *See* 415 ILCS 5/1 *et seq.* (2006). Mathews' fourth affirmative defense of "mitigation" lacks the factual allegations requisite to the pleading of affirmative defenses, is irrelevant, improperly pled and does not defeat the State's underlying cause of action. The entirety of Mathews' purported defense is legally and factually insufficient, and as such, should be stricken.

Respondent's Fifth Affirmative Defense:
Laches

Mathews raises laches as a general affirmative defense to Counts I and II. Fifth Affirmative Defense, ¶ 1. Respondent's affirmative defense of laches is legally and factually insufficient and should be stricken.

Laches is an equitable principle that bars an action where: (1) one party has delayed unreasonably in bringing a lawsuit (*City of Rolling Meadows v. Nat'l Adver. Co.*, 228 Ill. App.3d 737, 593 N.E.2d 551, 557 (1st Dist. 1992)); and (2) because of the delay, the Respondent has been misled or prejudiced, or has taken a different course of action than it might otherwise have taken absent the delay. *Patrick Media Group, Inc. v. City of Chicago*, 255 Ill. App.3d 1, 626 N.E.2d 1066, 1071 (1st Dist. 1993).

Applying the elements of laches to this case, Mathews fails to plead specific facts showing that the State has unreasonably delayed, and that the delay has resulted in prejudice to Mathews, or Mathews has taken a different cause of action than he otherwise would have taken. First, Mathews alleges that the Complaint is based upon facts that the State and Illinois EPA have known about since April 22, 2005. Fifth Affirmative Defense, ¶ 1. However, Mathews cannot provide any fact showing that this supposed delay on the part of the State was unreasonable.

Second, Mathews does not assert any facts that support a claim that Mathews was

misled or prejudiced, or changed his course of action because of the alleged delay. Instead, Mathews actually alleges that he installed silt fencing and graded portions of the property. Fifth Affirmative Defense, ¶ 3. Therefore, it is unclear what actions Mathews would have taken without any supposed delay.

This defense is factually insufficient—any supposed prejudice that Mathews experiences would be due to his own violations of the Act, and not any supposed delay by Complainant. Additionally, Mathews does not allege any specific facts in support of his claim of prejudice.

Mathews's affirmative defense fails to allege facts fulfilling the elements of laches. Instead, the affirmative defense is a series of conclusory statements that lack the specificity required for pleading a claim or a defense, and should be stricken.

Even if Mathews has sufficiently stated a claim of laches, the doctrine of laches is disfavored when the defense is raised against a Complainant that is exercising its government function and protecting a substantial public interest. Illinois courts have been reluctant to apply laches when it might impair the State in the discharge of its government function. *Cook County v. Chicago Magnet Wire Corp.*, 152 Ill. App.3d 726, 727-28, 504 N.E.2d 904, 905 (1st Dist. 1987).

The Illinois Supreme Court has explicitly held that the doctrine of laches does not generally apply to public entities unless "unusual or extraordinary circumstances are shown." *Van Milligan v. Bd. of Fire & Police Comm'rs of Vill. of Glenview*, 630 N.E.2d 830, 833 (1994); *Hickey v. Ill. Cent. R.R. Co.*, 35 Ill.2d 427, 447, 220 N.E.2d 415 (1966).

As the Illinois Supreme Court stated:

> . . . the reluctance of courts to hold governmental bodies estopped to assert their claims is particularly

> apparent when the governmental unit is the State. There are sound bases for such policy . . . More importantly perhaps is the possibility that application of laches or estoppel doctrines may impair the functioning of the State in the discharge of its government functions, and that valuable public interests may be jeopardized or lost by mistakes or inattention of public officials.

Hickey v. Ill. Cent. R.R. Co., 35 Ill. 2d 427, 447-448, 220 N.E.2d 415, 425-426 (1966). The right to a healthy and safe environment is a valuable public interest and a public right. *Pielet Bros. v. Illinois Pollution Control Board*, 100 Ill. App. 3d 752, 758, 442 N.E. 2d 1374, 1379 (5th Dist. 1982).

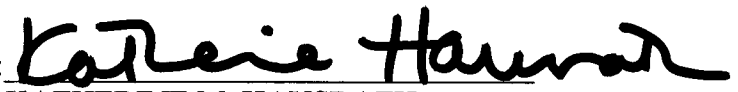
The theory of laches, which the Respondent relies on in this fifth affirmative defense, is generally subject to a higher standard when a Respondent attempts to use it against a governmental body or against a statute protective of the environment and public health. With its complaint, the State seeks to exercise its government function—the enforcement of environmental statutes and regulations. Section 4(e) of the Act, 415 ILCS 5/4(e) (2006), charges the Illinois EPA with the duty to take summary action to enforce violations of the Act. Section 2 of the Act, 415 ILCS 5/2 (2006), states: "It is the purpose of this Act . . . to establish a unified, state-wide program . . . to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them."

This is precisely the governmental function the State's Complaint serves. As such, Mathews has a higher burden for proving the defense of laches, and Mathews has not alleged a set of facts that support a claim of laches. Therefore, Mathews's affirmative defense of laches should be stricken.

CONCLUSION

WHEREFORE, the Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Illinois Pollution Control Board enter an order striking, with prejudice, Respondent Mathews's affirmative defenses of No Contamination, Act of God, Third Party Intervention, Mitigation, and Laches, and granting any other relief it deems appropriate and just.

PEOPLE OF THE STATE OF ILLINOIS *ex rel.* LISA MADIGAN, Attorney General of State of Illinois,

By: 

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CERTIFICATE OF SERVICE

I, KATHERINE M. HAUSRATH, an Assistant Attorney General, do certify that I caused to be mailed this 12 day of September, 2007, the foregoing Complainant's Motion to Strike Affirmative Defenses by first-class mail in a postage prepaid envelope to Mr. Halloran and by certified mail to Mr. Campion, and depositing same with the United States Postal Service located at 100 West Randolph Street, Chicago, Illinois, 60601.

It is hereby certified that a true copy of the foregoing Notice was electronically filed with the following on September 12, 2007:

Dorothy M. Gunn
Illinois Pollution Control Board
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Katherine Hausrath

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