

ILLINOIS POLLUTION CONTROL BOARD

November 1, 2007

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 07-133
	)	(Enforcement - Water)
THOMAS P. MATHEWS,	)	
	)	
Respondent.	)	

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

This action is a two-count water pollution complaint. The People of the State of Illinois (People) filed a motion to strike affirmative defenses included in the answer filed by Thomas P. Mathews (Mathews or respondent). Mathews has filed no response to the People’s motion.

The Board grants the People’s motion in large part, and strikes the first four purported affirmative defenses. The Board denies the People’s motion to strike the fifth affirmative defense of laches. The Board allows Mathews to proceed to develop and prove his laches defense.

The following order begins with the procedural background. The order then summarizes the affirmative defenses, and the motion to strike. The Board makes a ruling on each affirmative defense immediately following the recitation of the defense and the People’s objections to it. The Board then summarizes the order’s findings in a brief conclusion.

**BACKGROUND**

On June 8, 2007, the People filed a two-count complaint (Complaint) against Mathews. On June 21, 2007, the Board accepted the complaint for hearing. On August 31, 2007, Mathews filed an answer and affirmative defenses (Answer) to the two-count complaint. Mathews set forth five purported affirmative defenses in the answer. *See generally* Answer at 17-33. On September 12, 2007, the People filed a motion to strike affirmative defenses (Motion)<sup>1</sup>. Mathews has filed no response. Under Section 101.500(d) of the Board’s procedural rules, Mathews is deemed to have waived objection to the granting of the motion. But, the Board will proceed to discuss the issues presented by the People’s motion.

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<sup>1</sup>The Complaint is cited as “Comp.” the Answer and affirmative defenses as “Ans.”, and the People’s motion to strike as “Mot.”. When citing the Complaint, this order cites to the 2004 edition of the Illinois Compiled Statutes, as do the People. Otherwise, the order cites the 2006 edition.

## **LEGAL BACKGROUND ON AFFIRMATIVE DEFENSES**

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). If a pleading does not admit the opposing party's claim, but instead attacks the sufficiency of that claim, it is not an affirmative defense. Worner Agency v. Doyle, 121 Ill. App. 3d 219, 222-23, 459 N.E.2d 633, 636 (4th Dist. 1984). 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 the 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, "[t]he Board has previously held that affirmative defenses that concern factors in mitigation are not an appropriate affirmative defense to a claim that a violation has occurred." People v. Texaco Refining and Marketing, Inc., PCB 02-3, slip op. at 5 (Nov. 6, 2003), citing People v. Geon Co., Inc., PCB 97-62, (Oct. 2, 1997); People v. Midwest Grain Products of Illinois, Inc., PCB 97-179 (Aug. 21, 1997).

## **THE COMPLAINT'S COUNTS**

The complaint concerns respondent's property bordering a small unnamed stream that leads to Wonder Lake, located at the intersection of Westmoor Drive and East Oakwood Drive in Wonder Lake, McHenry County. The People allege that respondent violated Sections 12(a) and 12(d) of the Environmental Protection Act (Act) (415 ILCS 12(a) (2004)) in 2005 by (1) causing, allowing or threatening to cause water pollution, and (2) depositing large piles of fill material on his property in such place and manner so as to create a water pollution hazard. For the alleged violations in the two-count complaint, the People seek a cease and desist order and civil penalties of not more than the statutory maximum.

Count I of the complaint alleges that Mathews caused or tended to cause water pollution in violation of Section 12(a) of the Act, 415 ILCS 5/12(a) (2004). In summary, the People allege that:

From at least April 22, 2005 through May 11, 2007, or on dates better known to Respondent Mathews, the Respondent deposited large piles of Fill Material onto the Site in a manner that allowed Fill Material and silt-laden storm water to flow into the stream that leads to Wonder Lake. Such contaminants altered, or threatened to alter, the physical, chemical, thermal, or biological properties of the stream at the Site, and created, or were likely to create, a nuisance.

Respondent, Mathews, by his actions and omissions as alleged herein, caused, threatened, or allowed contaminants consisting of Fill Material and silt-laden storm water to enter the waters of the State, the stream that runs into Wonder

Lake, thereby causing water pollution. Comp.at 5, paras. 28-29 (capitalization in original).

Count II of the complaint alleges that Mathews created a water pollution hazard in violation of Section 12(d) of the Act, 415 ILCS 5/12 (d) (2004):

From at least April 22, 2005 through at least May 11,2007, on dates better known to Respondent, Respondent Mathews deposited contaminants, consisting of Fill Material, onto land near the stream and storm ditch that lead to Wonder Lake.

By placing these contaminants near the stream and storm ditch where they could be exposed to storm water and run off into waters of the State, Respondent Mathews created a water pollution hazard and thereby violated Section 12(d) of the Act, 415 ILCS 5/12(d) (2004). Comp. at 6, paras. 28-29 (capitalization in original).

### **AFFIRMATIVE DEFENSES**

#### **First Affirmative Defense: “No Contamination”**

Mathews’ first affirmative defense is that there is no contamination alleged, since “soil and stone” are naturally occurring and not contaminants. Since there is no allegation that Mathews placed either substance in the stream adjoining the site, respondent contends the complaint fails to state a cause of action for either water pollution or creation of a water pollution hazard. Ans. at 5.

The People contend that Mathews’ assertion should be stricken as an improper affirmative defense “as it is a simply a denial of the facts alleged in the Complaint and provides no case law to support it”, explaining that an “affirmative defense must raise new matter that, if true, somehow defeats complainant’s claim.” Mot. at 3, and cases cited therein.

The Board is persuaded by the People’s arguments, agreeing that Mathews has improperly characterized a denial as an affirmative defense. In striking this contention as an affirmative defense, the Board in no way precludes the respondent from presenting any relevant evidence and argument that no pollution occurred.

#### **Second Affirmative Defense: Act of God**

Mathews next argues, “storm waters are an act of God, and not within the control of respondent.” Ans. at 6. Mathews’ defense is that since he had not altered the site in any way to force “stone or soil” into water, the complaint fails to state a cause of action. *Id.*

The People respond that an “act of God” is not an affirmative defense under the Act, and request that the invalid affirmative defense be stricken. Mot. at 6, citing, Perkinson v. IPCB, 187 Ill. App. 3d 689, 694, 543 N. E.2d 901, 904 (3rd Dist. 1989) (citing Freeman Coal Mining Corp v. IPCB, 21 Ill. App. 3d 157, 313 N.E.2d 616 (5th Dist. 1974).

The Board strikes this second defense; Mathews fails to cite any precedent in support of his contention in an area where case law is long established. But, in so holding, the Board does not preclude Matthews from attempting to properly present relevant evidence and arguments concerning weather or other “acts of God” as mitigating evidence. Section 33(c) of the Act charges the Board to “take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits”, and lists various specific factors as among those for consideration. 415 ILCS 5/33(c) (2006). Section 42(h) also directs the Board to consider specific aggravating and mitigating factors when determining the amount of any civil penalties to be imposed once violations are found. 415 ILCS 5/42(h) (2006).

### **Third Affirmative Defense: Third Party Intervention**

Mathews argues that the complaint fails to allege “any measurement of ‘silt-laden storm water’ actually entering any water as a result of his onsite placement of “soil and stone”. Ans. at 6. Stating that “sedimentation in Wonder Lake is a natural occurrence, not attributable to any action of respondent”, Matthews argues this count should be dismissed. *Id.*

The People contend that the third affirmative defense is legally and factually insufficient, arguing that any existing pollution of Wonder Lake is irrelevant to the complaint. Moreover, the People argue, even if Mathews could prove that all run off from the site was caused by a third party, he could still be found liable under the Act. *See* Mot. at 4-5, citing, *inter alia*, Perkinson, 187 Ill. App. 3d at 694.

Persuaded by the People’s argument, the Board strikes this improper defense.

### **Fourth Affirmative Defense: Mitigation**

Mathews argues that:

issues complained of by Complainant have thus been ameliorated by Respondent and there is no evidence of past water pollution and no probability of future water pollution, so the case should be dismissed. Ans. at 7.

Mathews does not cite to specific paragraphs of the complaint or to precedent to support his contentions. The factual basis for this defense appears to be portions of the complaint alleging that improperly maintained silt fencing had been installed by someone in 2006, and that in 2007 the site had been graded by someone and had significant weed cover. Comp. at 3, paras. 16-19.

The People suggest that this defense should be stricken as unsupported, and legally and factually insufficient. Mot. at 5-6. The People note that, under the Act, present compliance is not an affirmative defense to enforcement for past violations. *Id.*

The Board strikes the fourth purported affirmative defense. Mathews is free to properly present any mitigating evidence or arguments relevant to the factors of Sections 33(c) and 42(h) of the Act. 415 ILCS 5/33(c) and 42(h) (2006).

### **Fifth Affirmative Defense: Laches**

Mathews poses laches as his last affirmative defense. Mathews states that the complaint recites that complainant first knew of the presence of the onsite “silt and stone” on April 22, 2005. Mathews states that the Illinois Environmental Protection Agency (Agency) and/or the McHenry County Soil and Water Conservation District conducted 4 more site investigations on specific dates between April and August 2005, and that during that time respondent installed silt fencing and graded portions of his property. Respondent notes that the next Agency inspections were August 30, 2006 and May 11, 2007, and that the complaint was not filed until June 2007. Ans. at 8. Mathews contends that the lengthy time between the first site inspection and the filing of the action prevents him from proving that the “soil and stone” on his property did not violate the Act as alleged in the complaint so that he “is now impaired in defending this action through the long delays by Complainant”. *Id.* at 8-9. Mathews accordingly believes that the People “should be barred by the doctrine of laches from proceeding in this matter”. *Id.* at 9.

The People assert that Mathews’ laches defense should also be stricken as legally and factually deficient. The People review the definition of laches:

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). Ans. at 6 (italics in original).

Complainant asserts that Mathews has failed to plead specific facts that the State has unreasonably delayed, that any delay has prejudiced respondent, or that Mathews has taken a different course of action as a result of any actions by complainant. The People characterize the answer as listing a series of conclusory statements that lack the specificity necessary in a pleading, and urge that the laches defense be stricken. Alternatively, the People argue that laches should not be applied in this action by the People to enforce the environmental laws, in the absence of “unusual or extraordinary circumstances”. Mot. at 7-8, and cases cited therein.

The Board declines to strike the laches defense, the only true affirmative defense raised by Mathews’ Answer. While finding that the defense is not as well pled factually or legally as might be preferable, Mathews’ Answer raises the issue sufficiently to allow Mathews to attempt to develop and plead a case at hearing. But, the Board cautions, as the People correctly point out, that laches is not often found to apply in environmental enforcement actions.

### **CONCLUSION**

For the reasons stated, the Board grants the People’s motion in part, and strikes the first four of the five alleged affirmative defenses set forth in Mathews’ Answer. None of the first four alleged defenses appropriately attack complainant’s legal right to bring an action, and the Board accordingly finds that all four purported affirmative defenses are not actually proper affirmative

defenses. But, on the issues concerning the stricken defenses, Mathews is free to properly present any mitigating evidence or arguments relevant to the factors of Sections 33(c) and 42(h) of the Act. 415 ILCS 5/33(c) and 42(h) (2006).

However, the Board denies the People's motion to strike Mathews' asserted laches defense. While reminding respondent of the difficulty of proving such an affirmative defense in an environmental enforcement action, the Board allows Mathews to develop and attempt to prove this affirmative defense.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 1, 2007, by a vote of 4-0.



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John T. Therriault, Assistant Clerk  
Illinois Pollution Control Board