ILLINOIS POLLUTION CONTROL BOARD
September 4, 2014

JOHNS MANVILLE, a Delaware Corporation	)	
Petitioner,	)	
v.	)	PCB 14-3 (Enforcement)
ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by J.A. Burke):

Johns Manville (JM) brought a complaint against the Illinois Department of Transportation (IDOT) pursuant to Section 31(d) of the Illinois Environmental Protection Act (Act). The complaint alleges IDOT caused violations of Sections 21(a) and 21(e) of the Act by improper disposal of asbestos pipe and other waste at a site in Waukegan, Lake County. JM now seeks to file an amended complaint, and IDOT moved to dismiss the amended complaint. For the reasons below, the Board denies the motion to dismiss, finds the amended complaint neither duplicative nor frivolous, and accepts the amended complaint for hearing.

PROCEDURAL HISTORY

On July 8, 2013, JM filed a complaint against IDOT. On September 27, 2013, IDOT moved to dismiss the complaint. JM objected to the motion to dismiss on October 11, 2013. On November 7, 2013, the Board denied the motion to dismiss and accepted the complaint for hearing. IDOT filed its answer and affirmative defenses to the complaint on December 23, 2013, and JM replied to the affirmative defenses on January 13, 2014.

On March 12, 2014, JM filed a motion for leave to file an amended complaint (Mot. for Leave), accompanied by the amended complaint. The Board was informed on April 1, 2014, that IDOT's lead counsel had died, and the parties agreed to postpone the discovery schedule and answer due date. On July 15, 2014, IDOT filed a motion to dismiss the amended complaint (Mot.). Accompanying the motion was a request for judicial notice (Req.) and a demand for a bill of particulars (Demand). JM filed its response to the motion (Resp.) on July 29, 2014. On August 12, 2014, IDOT filed a motion for leave to file its reply *instanter* (Mot. Leave) accompanied by its reply (Reply). Also on August 12, 2014, JM filed its response to IDOT's demand for a bill of particulars (Demand Resp.). On August 15, 2014, JM filed its response to the motion for leave to file a reply (Mot. Resp.).

PRELIMINARY MATTERS

Motion for Leave to File Amended Complaint

On March 12, 2014, JM filed its motion for leave to file an amended complaint on March 12, 2014. At a May 27, 2014 status conference with the Board's hearing officer, IDOT stated that it had no objection to JM's motion for leave to file an amended complaint. Hearing Officer Order (May 27, 2014). The Board grants JM's motion for leave to file an amended complaint.

IDOT Request for Judicial Notice

IDOT requests that the Board take judicial notice of the following three documents: (1) In the Matter of Johns Manville Southwestern Site Area including Sites 3, 4, 5, and 6, Waukegan, Lake County, Illinois, Administrative Settlement Agreement and Order on Consent for Removal Action (AOC); (2) Certification of Death Record for Duane L. Mapes; and (3) Certified Copy of Dissolution of Domestic Corporation, Eric Bolander Construction Company, Inc. Req. at 1-2, citing 35 Ill. Adm. Code 101.630. Pursuant to Section 101.630 of the Board's regulations, "[o]fficial notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge and experience of the Board." JM has not objected to IDOT's request.

IDOT Motion for Leave to File Reply

IDOT filed a motion for leave to file a reply to JM's response to IDOT's motion to dismiss on August 12, 2014. IDOT states that JM's response "contains multiple factual and legal misrepresentations of IDOT's position" and that "these misrepresentations could result in material prejudice." Mot. Leave at 1. IDOT therefore requests leave to file its reply. *Id.* JM objects to the motion for leave, stating that IDOT "has failed to show that its interests will be materially prejudiced." Mot. Resp. at 1. JM argues that "it is evident from the proposed Reply that [IDOT] merely disagrees with JM's legal arguments and seeks an opportunity to rebut them." *Id.* at 2.

The Board's procedural rules state a moving party "will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice." 35 Ill. Adm. Code 101.500(e). The Board finds that material prejudice may result to IDOT. The Board therefore grants the motion for leave to file a reply and considers the reply in its decision below. *See* People v. NACME Steel Processing, LLC, PCB 13-12, slip op. at 2 (June 6, 2013) (Board granted leave to file reply where People argued NACME's response contained factual and legal misrepresentations of the People's position).

IDOT MOTION TO DISMISS AMENDED COMPLAINT

The Board previously summarized the factual background and alleged violations of this case. *See* Johns Manville v. IDOT, PCB 14-3, slip op. at 1-4 (Nov. 7, 2013). As previously stated, JM entered into an AOC with the United States Environmental Protection Agency (USEPA) whereby JM agreed to perform removal action at four specific off-property areas. *Id.*

at 2. These four areas were designated as site 3, site 4/5 and site 6. *Id.* Site 3 was the focus of the original complaint. *Id.* JM now seeks leave to amend its complaint "to add claims against IDOT alleging violations of Section 21 of the [Act] by dumping and disposing of asbestos-containing wastes on and under an area designated as 'Site 6'". Mot. for Leave at 1. IDOT has moved to dismiss or strike portions of the amended complaint.

IDOT contends the amended complaint should be dismissed for three reasons: (1) the Board lacks authority to grant the relief requested; (2) JM is barred by the applicable statute of limitations; and (3) JM is barred by laches. Mot. at 1. Alternatively, IDOT asks that the Board strike certain paragraphs of JM's amended complaint. *Id.* The Board discusses each argument below.

As previously stated by the Board in this case, the Board looks to Illinois civil practice law for guidance when considering motions to dismiss or strike pleadings. 35 Ill. Adm. Code 101.100(b); s*ee also* United City of Yorkville v. Hamman Farms, PCB 08-96, slip. Op. at 14-15 (Oct. 16, 2008). In ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See e.g.*, Beers v. Calhoun, PCB 04-204, slip op. at 2 (July 22, 2004); *see also* In re Chicago Flood Litigation, 176 Ill. 2d 179, 184, 680 N.E.2d 265, 268 (1997); Board of Education v. A, C & S, Inc., 131 Ill. 2d 428, 438, 546 N.E.2d 580, 584 (1989). "[I]t is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief." Smith v. Central Illinois Regional Airport, 207 Ill. 2d 578, 584-85, 802 N.E.2d 250, 254 (2003).

"Illinois is a fact-pleading state which requires the pleader to set out the ultimate facts which support his cause of action." Loschen v. Grist Mill Confections, Inc., PCB 97-174, slip op. at 4 (June 5, 1997), citing LaSalle National Trust, N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297, 1303 (2d Dist. 1993). "[L]egal conclusions unsupported by allegations of specific facts are insufficient." Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303, citing Estate of Johnson v. Condell Memorial Hospital, 119 Ill. 2d 496, 509-10, 520 N.E.2d 37 (1988). A complaint's allegations are "sufficiently specific if they reasonably inform the defendants by factually setting forth the elements necessary to state a cause of action." People *ex rel.* William J. Scott v. College Hills Corp., 91 Ill. 2d 138, 145, 435 N.E.2d 463, 467 (1982).

Law of the Case Doctrine

As a preliminary matter, JM contends that IDOT's motion should be dismissed "for the simple reason that the Board has already denied one motion to dismiss in this case, and nothing has changed since that motion was denied that would warrant a different outcome." Resp. at 9. JM states that its new allegations "are largely identical to JM's allegations in its original Complaint" and that IDOT now "takes this opportunity to rehash old arguments previously rejected by the Board and to raise new arguments that it neglected to raise in its first Motion to Dismiss and which it easily could have raised at that time." *Id.*

JM states that, under the law of the case doctrine, "generally, a rule established as controlling in a particular case will continue to be the law of the case, as long as the facts remain the same." Resp. at 10, citing People v. Patterson, 154 Ill.2d 414, 468 (Ill. 1992); Elmhurst Memorial Healthcare and Elmhurst Memorial Hospital v. Chevron U.S.A. Inc. and Texaco Inc., PCB 09-66, slip op. at 27 (July 7, 2011). JM argues that "no facts have changed that would impact the three arguments IDOT has now raised in its second Motion to Dismiss." *Id.*

IDOT distinguishes the present case from Elmhurst Memorial Healthcare because, in that case, the respondent raised affirmative defenses in response to an amended complaint identical to what it had previously raised in a motion to dismiss. Reply at 3. IDOT notes that here, none of the grounds which IDOT raised in its motion to dismiss were previously raised. *Id.* at 3.

The Board agrees with IDOT that the grounds raised in its second motion to dismiss were not raised in its first motion, and therefore the law of the case doctrine does not apply to those arguments. Additionally, JM amended its complaint and IDOT is entitled to respond to the complaint in its new form. The Board's ruling on IDOT's motion to dismiss "was not intended to finally dispose of those matters contained in the motion to dismiss." *See* IEPA v. Heckett and Interlake, Inc., PCB 85-38, slip op. at 1 (Sept. 5, 1985). The Board therefore considers each ground in its discussion below.

Board Authority to Grant Requested Relief

IDOT Motion

IDOT contends the amended complaint should be dismissed because JM seeks an "order compelling equitable relief." Mot. at 5, citing Am. Compl. at 1. Specifically, JM seeks a Board order "[r]equiring Respondent to participate in the future response action on [the former Construction Site] – implementing the remedy approved or ultimately approved by [USEPA]." Mot. at 6. IDOT contends that relief that requires parties to cooperate in some sort of undertaking "has been found to be equitable and injunctive in nature," and that it is "well-established that the Board does not possess any equitable powers." *Id.* at 6, 7, citing Leib v. Toulin, Inc., 113 Ill.App.3d 707, 720 (1st Dist. 1983); Jansen v. IPCB, 69 Ill.App.3d 324, 327 (3rd Dist. 1979) ("The Board has no authority to issue or enforce injunctive relief as requested in the circuit court . . . ."). IDOT contends that a citizen seeking equitable relief must, by statute, bring an action in circuit court seeking that relief. Mot. at 7, citing 415 ILCS 5/45 (2012). Section 45 of the Act states:

> Any person adversely affected in fact by a violation of this Act or of regulations adopted thereunder may sue for injunctive relief against such violation. However, no action shall be brought under this Section until 30 days after plaintiff has been denied relief by the (Pollution Control) Board under paragraph (b) of Section 31 of this Act. Mot. at 7, citing 415 ILCS 5/45 (2012).

JM Response

JM states that the Board is required to schedule a hearing "unless the Board determines that such complaint is duplicative or frivolous." Resp. at 10, citing 415 ILCS 5/31(d)(1) (2012). JM contends that IDOT does not argue that the amended complaint is duplicative or frivolous. *Id.* JM further contends that the Board has already made a final determination on its authority to grant the requested relief. *Id.* at 11. JM states that the Act "grants the Board broad authority to issue orders 'as it shall deem appropriate under the circumstances.'" *Id.*, citing 415 ILCS 5/33(b) (2012). JM also notes that the Board has granted relief in previous cases that includes "orders requiring a party to conduct remediation and investigation." *Id.* at 12, citing Lake County Forest Preserve Dist. v. Ostro, PCB 92-80, slip op. at 12-13 (March 31, 1994); Mather Inv. Prop., L.L.C. v. Ill. State Trapshooters Ass'n, Inc., PCB 05-29, slip op. at 4 (July 21, 2005).

IDOT Reply

IDOT contends "[w]hile the Board has the authority under the Act to grant certain forms of relief, it does not have the authority to grant injunctive relief." Reply at 4. IDOT argues that nothing in Section 5(d) of the Act provides the Board authority to grant injunctive relief and, similarly, nothing in Section 31 of the Act provides the Board with authority to grant injunctive or equitable relief. *Id.*, citing 415 ILCS 5/5(d) (2012), 415 ILCS 5/31 (2012). IDOT argues that the legislature would have needed to vest the Board with authority to grant injunctive relief by specifically providing for it in the Act. *Id.*, citing Rudolph v. State of Illinois, 53 Ill.Ct.Cl. 58, 2000 WL 34447702, *3 (2000), Chemetco, Inc. v. PCB, 140 Ill.App.3d 283, 285 (5th Dist. 1986).

Board Discussion

JM requests that the Board find that IDOT violated Sections 21(a) and 21(e) of the Act. Am. Comp. at 16. When ruling on a motion to dismiss, the Board takes all well-pled allegations in the complaint as true and draws all reasonable inferences from them in favor of the complainant. JM has provided sufficient facts to set forth a scenario which, if proven, may establish a violation of the Act. The Board is authorized to find violations of the Act, and the complaint is therefore not frivolous in this regard. Johns Manville, PCB 14-3, slip op. at 12 (Nov. 7, 2013).

Further, JM seeks a Board order requiring IDOT to participate in the future response action at sites 3 and 6 and granting "such other and further relief as the Board deems appropriate." Am. Comp. at 16. Section 33(a) of the Act grants the Board the authority to "issue and enter such final order, or make such final determination, as it shall deem appropriate under the circumstances." 415 ILCS 5/33(a) (2012). This includes, for example, the awarding of cleanup costs to private parties. *See* Union Oil Company of California d/b/a UNOCAL v. Barge-Way Oil Company, Inc., PCB 98-169, slip op. at 3 (Jan. 7, 1999). Section 33(b) of the Act states in part that Board orders "may include a direction to cease and desist from violations of this Act." 415 ILCS 5/33(b) (2012). Section 33(b) also authorizes the Board to require the posting of a performance bond or other security to assure correction of a violation of the Act if the Board order includes a period of time to correct the violation. *Id.*

The Board finds, however, that this is not the appropriate stage of the proceeding to determine what remedies would be available to complainants if they prevailed on the allegations in the complaint. While it may be possible that the Board is unauthorized to grant all of the relief sought, Section 33 of the Act gives the Board "wide discretion in fashioning a remedy." Roti v. LTD Commodities, 355 Ill. App. 3d 1039, 1053, 823 N.E.2d 636, 647 (2d. Dist. 2005); *see also* Discovery South Group, Ltc. V. PCB, 275 Ill. App. 3d 547, 557-561, 656 N.E.2d 51, 58-61 (1st Dist. 1995). The Board may also issue a final order "as it shall deem appropriate under the circumstances." 415 ILCS 5/33(a) (2012). The relief sought by JM in this case is therefore not necessarily outside the Board's authority to impose. For these reasons, the Board finds that the amended complaint is not frivolous.

Statute of Limitations

IDOT Motion

IDOT contends that JM's action is untimely and barred by the five year statute of limitations under 735 ILCS 5/13-205 (2012). Mot. at 7. That section states in part:

> Five year limitation. . . . actions . . . to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention of conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued. 735 ILCS 5/13-205 (2012).

IDOT states that the Board has acknowledged that the five year statute of limitations "applies to actions which are not being brought by the State on behalf of the People of this State, in order to enforce a violation of the Act." *Id.*, citing Caseyville Sport Choice, LLC v. Seiber, PCB 08-30, 2008 WL 5716999, *2 (Oct. 16, 2008). IDOT acknowledges that, under the discovery rule, the relevant statute of limitations "only begins to run when plaintiff is put on inquiry notice." *Id.* at 9 (citations omitted).

IDOT argues three scenarios where the statute of limitations would apply to this case. Mot. at 9. First, IDOT argues that the limitation period began running in 1976 when the construction project ended. *Id.* Alternatively, IDOT argues that the limitation period began running in 1998, when JM knew that asbestos containing materials (ACM) waste was present on and beneath the site, as set forth in the AOC. *Id.* at 10. Lastly, IDOT argues that the limitation period at the latest started running on June 17, 2007, when JM entered the AOC setting out all of the facts necessary for JM to allege the claims in its amended complaint. *Id.* at 10-11.

JM Response

JM contends that the Act "does not impose any statute of limitation on citizen enforcement actions under Section 31(d)." Resp. at 13. JM cites Lake County Forest Preserve Dist., stating that the Board held that the citizen complainant "was acting in the capacity of a 'private attorney general' in asserting the public's right to a clean environment on behalf of all

people of the State and, therefore, the five-year statute of limitations did not apply." Resp. at 13-14, citing Lake County Forest Preserve Dist., PCB 92-80, slip op. at 2. (July 30, 1992). JM notes that this is a citizen enforcement action under Section 31(d). Resp. at 14.

JM further argues that the limitation period set forth at Section 13-205 of the Code of Civil Procedure "applies only to actions seeking to 'recover damages' for an injury done to property or for 'civil actions.'" Resp. at 14, citing Meyers v. Kissner, 149 Ill.2d 1, 12 (1992). JM states that, even if this case were construed as a cost recovery action, the claim would still not be barred by the statute of limitations. *Id.* First, the material remains on site and therefore the violations are continuing in nature. *Id.* at 15. Second, JM filed this action within five years of the applicable discovery date, which JM contends began on November 30, 2012, *i.e.*, the date when JM learned it was obligated to clean up ACM waste abandoned by IDOT on Site 3 and Site 6. *Id.* Alternatively, JM argues that the statute would only begin running on July 8, 2008, when JM received notice "of the actual presence of Transite materials in the Greenwood Avenue ramp area at a location at least one foot higher than the adjacent ground surface where ACM was known to exist on the Facility property." *Id.* at 16. Prior to that time, JM states USEPA "took the position that there was insufficient evidence that IDOT contributed ACM to the Southwestern Sites." *Id.*

IDOT Reply

IDOT states that JM's "equating its efforts in this case as being those of a private attorney general are unavailing" because "this action was not instituted to vindicate any important public right." Reply at 5. Rather, what JM seeks here "is to defray the very substantial costs it has incurred under the AOC." *Id.* at 6. IDOT argues that, where a plaintiff is alleging a direct, substantial economic injury, they are clearly not acting in the capacity of a private attorney general. *Id.*, citing DiSanto v. City of Warrenville, 59 Ill.App.3d 931, 936 (2d Dist. 1978).

IDOT states that the Board previously noted "that the five year statute of limitations applied to actions which are brought alleging violations of the Act which are not brought by either the Attorney General or a States Attorney." Reply at 6, citing Caseyville Sport Choice, LLC v. Seiber, PCB 08-30, 2008 WL 5716999, *2 (Oct. 16, 2008). IDOT argues that JM's position that this case does not involve a claim for property damage is unavailing because Section 13-205 "provides that it applies to host of enumerated types of claims, as well as 'all civil actions not otherwise provided for.'" *Id.* at 6-7.

IDOT also argues that "it is not necessary for a plaintiff to have fully ascertained the full extent of their injuries before the clock will start to run under the discovery rule." Reply at 7, citing Khan v. Deutsche Bank, 2012 IL 112219, ¶45 (2012). Applying this language, IDOT contends that the statute of limitations began to run in this case after JM entered into the AOC in June 2007, "because it was clearly on notice at that point in time that it would have to undertake investigation and cleanup activities on Areas 3 and 6 at the Site." *Id.* Further, IDOT states that JM's reference to its July 8, 2008 notice of site conditions is unavailing because this fact was not pled in the amended complaint and is without evidentiary foundation. *Id.*, citing Fellhauer v. City of Geneva, 142 Ill.2d 496, 516 (1991).

Board Discussion

IDOT contends that JM's action is untimely and barred by the five year statute of limitations under 735 ILCS 5/13-205 (2012). Mot. at 7. IDOT cites Caseyville Sports Choice in support of its position that the Board "has acknowledged that the five year statute of limitations provided for under 735 ILCS 5/13-205 applies to actions which are not being brought by the State on behalf of the People of this State." *Id.* at 8, citing Caseyville Sports Choice, PCB 08-30, 2008 WL 5716999, *2 (Oct. 16, 2008). What the Board specifically stated in that decision was

> [a]s the Board stated in UNOCAL, "the Board has consistently held that a statute of limitations bar will not preclude any action seeking enforcement of the Act, if brought by the State on behalf of the public's interest. *See* Pielet Bros. Trading, Inc. v. PCB, 110 Ill. App. 3d 752, 758, 442 N.E.2d 1374 (5th Dist. 1982)." The Board then noted that "the instant case, however, does not fall under this exception." UNOCAL, PCB 98-169, slip op. at 5, n.1 (Jan. 7, 1999). As in UNOCAL, the complainant here has brought a private cost recovery action. Thus, pursuant to the Board's decisions in UNOCAL, an argument can be made that the statute of limitations in Section 13-205 of the Code (735 ILCS [5/13-205] (2006)) applies in this context. Caseyville Sports Choice, PCB 08-30, slip op. at 3.

In Caseyville Sports Choice, the Board denied a respondent's motion to dismiss based on statute of limitations, finding that, when taking all well-pled allegations as true and drawing all inferences from them in favor of the complainant, "the Board is unconvinced that the statute of limitations bars the action in the instant case." Caseyville Sports Choice, PCB 08-30, slip op. at 3. In the UNOCAL case, the Board denied a motion for summary judgment based on statute of limitations "because inferences drawn from the allegedly undisputed facts can support" either of two conclusions. UNOCAL, PCB 98-169, slip op. at 4 (Feb. 15, 2001).

In this case, IDOT argues alternative arguments as to how the statute of limitations could apply to bar this case. Mot. at 9. First, IDOT argues that the limitation period began running in 1976 when the construction project ended. *Id.* Alternatively, IDOT argues that the limitation period began running in 1998, when JM knew that ACM waste was present on and beneath the site, as set forth in the AOC. *Id.* at 10. Lastly, IDOT argues that the limitation period at the latest started running on June 17, 2007, when JM entered the AOC setting out all of the facts necessary for JM to allege the claims in its amended complaint. *Id.* at 10-11. In its response, JM argues that the statute could only begin running at the earliest on July 8, 2008, when JM received notice "of the actual presence of Transite materials in the Greenwood Avenue ramp area at a location at least one foot higher than the adjacent ground surface where ACM was known to exist on the Facility property." Resp. at 16. Prior to that time, JM states, USEPA "took the position that there was insufficient evidence that IDOT contributed ACM to the Southwestern Sites." *Id.* JM argues alternatively that the discovery period only began running on November 30, 2012, the date when JM learned it was obligated to clean up ACM waste abandoned by IDOT on Site 3 and Site 6. *Id.* at 15. IDOT states that JM's reference to its July 8, 2008 notice of site conditions is unavailing because this fact was not pled in the amended complaint and is without evidentiary foundation. Reply at 7.

While IDOT is correct that the precise July 8, 2008 date was not pled in the amended complaint, JM did plead that "subsequent investigations" following the 2007 AOC revealed the buried Transite pipe in the area. Am. Comp. at 5. JM contends that it was through these investigations that it became aware that IDOT may have contributed ACM to the Southwestern Sites. Resp. at 16. Further, the amended complaint sets forth the November 30, 2012 date on which JM learned it was obligated to clean up the ACM waste on Site 3 and Site 6. Am. Comp. at 7. These facts, taken in a light most favorable to JM, indicate a plausible scenario that JM did not discover the alleged culpability of IDOT until a time period wherein the statute of limitations has not run. *See* Caseyville Sports Choice, PCB 08-30, slip op. at 4.

The Board notes, however, that this ruling does not preclude IDOT from raising a statute of limitations argument as an affirmative defense to the amended complaint. *See* United City of Yorkville, PCB 08-96, slip op. at 9 (Nov. 4, 2010).

Laches

IDOT Motion

IDOT contends that JM is barred by laches, an equitable doctrine "where the plaintiff's delay in commencing the action is prejudicial to the defendant's ability to assert their rights." Mot. at 12 (citations omitted).

IDOT states that several facts support its position. Mot. at 12. IDOT's work at the site took place almost forty years ago. *Id.* An IDOT engineer identified by IDOT as the only witness who oversaw the construction project (and who JM alleges provided certain statements about the movement of asbestos pipe during the construction activities), died over ten years ago. *Id.* Lastly, the general contractor for the construction project went out of business in 2001. *Id.*

IDOT argues that the IDOT engineer's death and the closing of the contractor's business "means that IDOT does not have the ability to defend itself against certain allegations within the Amended Complaint." Mot. at 12-13. JM has prejudicially impaired IDOT's ability to defend itself "by failing to act with the requisite degree of diligence." *Id.* at 13.

JM Response

JM argues "[t]he fact that certain witnesses may be unavailable does not prevent IDOT from mounting a defense in this case." Resp. at 17 (citation omitted). Further, "the fact that the Bolander Company is out of business, assuming that is true, does not mean that they have no records and that all of their employees are dead." *Id.*

JM contends that the Board "has repeatedly held that laches is not a proper grounds for dismissal and, moreover, that laches does not apply to enforcement actions under the Act." Resp. at 17, citing People v. Big O, Inc., PCB 97-130, slip op. at 1 (Apr. 17, 1997); People v. Community Landfill Co., Inc., *et al.*, PCB 97-193 and 04-207, slip op. at 6 (Apr. 20, 2006). JM further contends that the Board "has previously acknowledged that if the right to bring a lawsuit

is not barred by statute of limitations, then the equitable doctrine of laches also will not bar the lawsuit." *Id.*, citing Big O, Inc., PCB 97-130, slip op. at 1.

IDOT Reply

IDOT contends that laches should apply in this case because "the lynchpin to [JM's] case against IDOT concerns statements purportedly made by Duane Mapes, a deceased IDOT engineer." Reply at 8. IDOT continues that JM's "categorical reliance on this statement, and IDOT's inability to question its former employee Mr. Mapes, poses a very significant, and indeed prejudicial, problem to [IDOT's] ability to adequately defend itself in the present action." *Id.*

IDOT argues that JM's assertion that laches does not apply to enforcement actions under the Act misstates the law "because it mistakes the application of the doctrine where a state actor is bringing suit against a private party, and assumes that laches would therefore not be available to a respondent in a citizen suit." Reply at 8. IDOT states "[t]he considerations that have led Illinois courts to place a very high bar for asserting laches against a governmental plaintiff simply do not apply in the present case." *Id.* at 9.

Board Discussion

"Laches is an equitable doctrine that bars relief when a defendant has been misled or prejudiced due to a plaintiff's delay in asserting a right." Elmhurst Memorial Healthcare, PCB 09-066, slip op. at 26 (March 18, 2010), *citing* Indian Creek Development Co. v. Burlington Northern Santa Fe Railway Co., PCB 07-44 slip op. at 18-19 (June 18, 2009). There are two principle elements of laches: (1) lack of due diligence by the party asserting the claim; and (2) prejudice to the opposing party as a result of the delay." *Id.*

Taking the facts in a light most favorable to the plaintiff, the Board finds that laches does not apply to this case. IDOT has not shown a lack of due diligence on JM's part. The Board found above that a factual scenario exists where JM only became aware of IDOT's alleged violations following "subsequent investigations" after 2007, and both the IDOT engineer's death and the dissolution of the general contractor occurred prior to that date. Under the favorable facts, JM diligently pursued the violations in its amended complaint upon their discovery. *See* People v. ESG Watts, Inc., PCB 96-107, slip op. at 6 (Feb. 5, 1998). The Board is also not convinced that IDOT is materially prejudiced by the death of IDOT's engineer or the dissolution of the project's general contractor. *See, e.g.*, People v. The Bigelow Group, Inc., PCB 97-217, slip op. at 2 (Jan. 8, 1998) (lack of awareness of potential witness location did not mean witness could not be located with a reasonable investigation).

IDOT MOTION TO STRIKE PORTIONS OF THE AMENDED COMPLAINT

IDOT Motion

IDOT requests that the Board strike paragraphs 11, 19, 35 through 54, 71 (partial), and 72 of JM's amended complaint "because they are immaterial to the two statutory violations alleged

therein." Mot. at 13. IDOT contends that "[t]he Amended Complaint need only allege sufficient facts to state all of the elements of [JM]'s asserted causes of action." *Id.* at 14-15, citing Schiller v. Mitchell, 357 Ill.App.3d 435, 439 (2nd Dist. 2005). However, the amended complaint "contains a substantial number of allegations regarding matters that are unnecessary and immaterial to its pleading and encumber it with extraneous material." *Id.* at 15.

JM Response

JM states that "[t]he allegations IDOT seeks to strike go directly to the scope of the remedy JM has requested from the Board." Resp. at 18. Further, these allegations "are key to understanding the scope and cost of the remedy JM is required to perform, which is necessary in order for the Board to fashion an order that appropriately reflects IDOT's relative contribution to the performance of that remedy." *Id.* at 19. Lastly, JM "emphasizes that these allegations are by no means new to IDOT." *Id.*

IDOT Reply

IDOT reincorporates its previous arguments and directs the Board's attention to one part of JM's response. Reply at 9. JM stated that it rebuts the motion to strike because the facts IDOT seeks to challenge are "key to understanding the scope and cost of the remedy JM is required to perform . . . ." *Id.* at 9, citing Resp. at 19. IDOT argues that this statement "is essentially an admission of the unique financial harm that [JM] is concerned about, and is attempting to use the citizens suit mechanism to remedy." *Id.* at 9-10.

Board Discussion

The Board finds that the portions of the amended complaint that IDOT seeks to strike are neither unnecessary nor immaterial to the violations alleged therein or the remedy sought by JM. The Board therefore denies IDOT's request to strike portions of the amended complaint.

IDOT DEMAND FOR A BILL OF PARTICULARS

IDOT demands a bill of particulars, pursuant to Section 2-607 of the Illinois Code of Civil Procedure, with respect to paragraphs 33 and 34 of the amended complaint. Demand at 1. IDOT contends both paragraphs are wanting in details because the paragraphs refer to "IDOT engineering drawings" but don't specify what IDOT engineering drawings JM makes reference to. *Id.* at 2. IDOT states it is unable to identify what JM is referring to and that this lack of detail is important because "they relate to critical allegations" in the amended complaint. *Id.*

JM objects to IDOT's demand because IDOT "makes no attempt to explain why it is entitled to a Bill of Particulars under these circumstances." Demand Resp. at 1. JM contends that "no attempt is made to explain why" the allegations "Are vague and lacking in detail," and that the demand "is essentially a discovery request." *Id.* at 2. JM states this discovery request "is premature because discovery has not yet begun in this case." *Id.* Without waiving its objection, JM identifies the IDOT engineering drawings as "the plans for the proposed highway

at F.A. Route 437 – Section 8-HB & 8-VB Lake County, which are included as Exhibit 1 to IDOT's CERCLA Section 104(e) Response." *Id.*

The Board finds that a ruling on IDOT's demand is not necessary because JM has identified the documents sought by IDOT.

DUPLICATIVE OR FRIVOLOUS

Section 31(d)(1) of the Act provides "[u]nless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing." 415 ILCS 5/31(d)(1) (2012); *see also* 35 Ill. Adm. Code 103.212(a). A complaint is duplicative if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. A complaint is frivolous if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *Id.*

IDOT does not contend that the amended complaint is duplicative and the Board previously found the original complaint not to be duplicative. *See* Johns Manville v. Illinois Department of Transportation, PCB 14-3, slip op. at 9-11 (Nov. 7, 2013). For the reasons discussed above, the Board finds that the amended complaint is not frivolous.

CONCLUSION

The Board denies IDOT's motion to dismiss the amended complaint. The Board finds that the amended complaint is neither duplicative nor frivolous, and accepts the amended complaint for hearing.

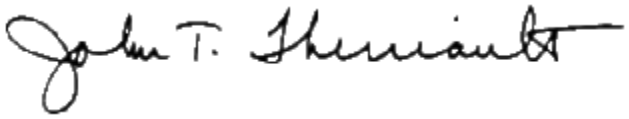
Typically, in an enforcement action, a respondent is allowed sixty days following receipt of a complaint to file an answer to that complaint. 35 Ill. Adm. Code 103.204(d). However, the filing of a motion to dismiss stays the sixty day answer period. 35 Ill. Adm. Code 103.204(e). The Board grants IDOT until Monday, October 6, 2014, which is the first business day following the thirtieth day from the date of this order, to file an answer, if it so chooses.

ORDER

The Board denies the Illinois Department of Transportation's motion to dismiss the amended complaint. The Board finds that the amended complaint is neither duplicative nor frivolous, and accepts the amended complaint for hearing. IDOT has until Monday, October 6, 2014, to file an answer to the amended complaint, if it so chooses.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 4, 2014, by a vote of 4-0.



John T. Therriault, Clerk
Illinois Pollution Control Board