ILLINOIS POLLUTION CONTROL BOARD
January 8, 1998

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 97-217
	)	(Enforcement - Land)
THE BIGELOW GROUP, INC., an Illinois corporation,	)	
	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by M. McFawn):

This case is before the Board on the "Motion to Dismiss" (Motion) filed on August 27, 1997, by respondent The Bigelow Group, Inc. (Bigelow). On December 3, 1997, the Attorney General on behalf of the People of the State of Illinois filed a "Motion for Leave to File Response to Motion to Dismiss Instanter" seeking leave to file a response to the Motion. (By an order entered by the hearing officer on September 30, 1997, complainant's response to the motion was due on November 26, 1997; the Attorney General seeks leave to file a response late.) The Board grants the Attorney General's motion and accepts the "Response to Motion to Dismiss" (Response) for filing.

On December 17, 1997, Bigelow filed a "Reply Memorandum of Respondent in Support of its Motion to Dismiss" (Reply) with the clerk of the Board. Under 35 Ill. Adm. Code 101.241(c), a moving party has no right to reply to a response to a motion, except as permitted by the Board or hearing officer to prevent material prejudice. Bigelow did not obtain leave of the Board to file its reply. Furthermore, all arguments raised by Bigelow in its Reply pertain to issues which do not impact the Board's ruling on this motion. Accordingly the Board finds no material prejudice which would justify allowing a reply. Bigelow's Reply is rejected and ordered stricken.

The basis of Bigelow's motion is the doctrine of *laches*. *Laches* is an equitable doctrine which bars relief where a defendant has been misled or prejudiced because of a plaintiff's delay in asserting a right. City of Rochelle v. Suski, 206 Ill.App.3d 497, 501, 564 N.E.2d 933, 936 (2nd Dist. 1990). In this case, Bigelow claims prejudice because for nearly two years prior to filing of this enforcement action the Attorney General did not respond to Bigelow's settlement proposal. Mot. at 3-4.

The Attorney General argues that *laches* cannot be applied in this case because the petitioner is the State, discharging its governmental functions. Although application of *laches* to public bodies is disfavored, it has nevertheless been clear at least since the Supreme Court's opinion in Hickey v. Illinois Central Railroad Co., 35 Ill.2d 427, 220 N.E.2d 415 (1966) that

the doctrine can apply to governmental bodies under "compelling circumstances." The court stated in that opinion:

> It is, of course, elementary that ordinary limitations statutes and principles of *laches* and estoppel do not apply to public bodies under usual circumstances, and 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. * * * [A]pplication of *laches* or estoppel doctrines may impair the functioning of the state in the discharge of its government functions, and [] valuable public interests may be jeopardized or lost by the negligence, mistakes or inattention of public officials.
>
> But it seems equally true that the reluctance to apply equitable principles against the State does not amount to absolute immunity of the State from *laches* and estoppel under all circumstances. The immunity is a qualified one and the qualifications are variously stated. It is sometimes said *laches* and estoppel will not be applied against the state in its governmental, public or sovereign capacity, and it cannot be estopped from the exercise of its police powers or in its power of taxation or the collection of revenue.
>
> It has, however, been stated with frequency that the State may be estopped when acting in a proprietary, as distinguished from its sovereign or governmental, capacity and even, under more compelling circumstances, when acting in its governmental capacity. Hickey, 35 Ill.2d at 447-48, 220 N.E.2d at 425-26 (citations omitted).

The Supreme Court recently reaffirmed its holding in Hickey in Van Milligan v. Board of Fire & Police Commissioners, 158 Ill.2d 84, 630 N.E.2d 830 (1994).

Thus, the State is not immune from application of *laches* in exercise of its governmental functions, at least not under "compelling circumstances." However, we do not need to determine whether the circumstances here are compelling or not, because the Board concludes that even if they are, Bigelow has not made the necessary demonstration of prejudice.

There are two principal elements of *laches*: lack of due diligence by the party asserting the claim and prejudice to the opposing party. Van Milligan, 158 Ill.2d at 89, 630 N.E.2d at 833. To establish prejudice, Bigelow states that it has lost track of a number of potential witnesses. Bigelow also suggests that the memories of witnesses have likely faded with time, resulting in further prejudice.

The principal evidence in support of Bigelow's claims is an affidavit of Perry Bigelow, president of Bigelow. (Bigelow also submitted an affidavit of Michael Quinn, attorney for Bigelow, establishing the dates of various enforcement conferences and settlement offers.) In his affidavit, Mr. Bigelow identifies 17 people who may have information regarding events and circumstances relating to the violations alleged in the complaint filed by the Attorney General. Mr. Bigelow states that he "is no longer aware of the location and employment of all of the listed individuals," and that Bigelow has therefore been prejudiced by the Attorney General's delay in filing this case.

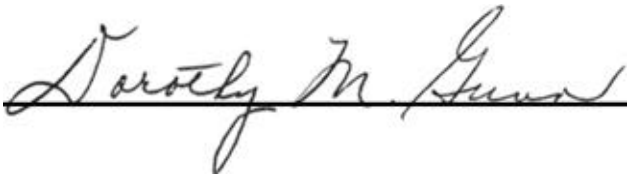
The Board finds that Mr. Bigelow's statements do not establish prejudice to Bigelow. The fact that Mr. Bigelow is not aware of the location or employment of potential witnesses does not necessarily mean that those witnesses are unavailable or could not be located with a reasonable investigation. Since there is no other evidence of prejudice, the Board concludes that this action is not barred under the doctrine of *laches*. In making this ruling, the Board is not ruling on whether the State exercised due diligence in its prosecution of this case. The Board further is not ruling on whether, assuming lack of diligence and prejudice were established, the circumstances of this case are sufficiently compelling to justify invoking the doctrine against the State in the performance of its governmental functions.

For the foregoing reasons, Bigelow's "Motion to Dismiss" is denied.

IT IS SO ORDERED.

Board Member K.M. Hennessey abstained.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 8th day of January 1998, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board