ILLINOIS POLLUTION CONTROL BOARD
May 17, 2001

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 01-76
	)	(Enforcement - Air)
JOHN CRANE, INC., an Illinois corporation,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by C.A. Manning):

John Crane, Inc. (Crane) owns and operates a manufacturing plant in Morton Grove, Cook County, Illinois. Crane manufactures automotive and packing seals. On October 31, 2000, the Illinois Attorney General, on behalf of the People of the State of Illinois (State), filed a complaint alleging that Crane's operations at the Morton Grove facility violated statutory and regulatory requirements for limiting emissions of contaminants into the air.

Crane filed its answer to the complaint on December 1, 2000. In its answer, Crane asserts four affirmative defenses to the State's allegations. On December 21, 2000, the State moved the Board to strike the affirmative defenses. Crane filed a response to the motion on January 12, 2001, and the State filed a reply to the response on March 7, 2001. For the reasons stated below, the Board grants the State's motion to strike two of the alleged affirmative defenses, but otherwise denies the motion.

BACKGROUND

The parties agree that the Illinois Environmental Protection Agency (Agency) inspected Crane's Morton Grove facility on February 14, 1997, March 11, 1997, and May 12, 1997. The parties do not dispute that the Agency sent a Notice of Violation (NOV) to Crane on September 3, 1997, or that representatives of Crane and the Agency met on October 2, 1997.

The parties agree that Crane later submitted a Compliance Commitment Agreement to the Agency, which the Agency rejected in November 1997. The parties also agree that on December 15, 1997, the Agency issued to Crane a Notice of Intent to pursue legal action, and that representatives of Crane and the Agency met on January 26, 1998. Finally, the parties do not dispute that the Agency subsequently referred the matter to the Attorney General for enforcement.

In its complaint, the State alleges that Crane violated Section 9(a) of the Environmental Protection Act (Act) (415 ILCS 5/9(a) (1998)) and Board regulations at 35 Ill. Adm. Code

201.141, 218.204(j)(2)(A), and 218.946. The State asks the Board to order Crane to cease and desist from further violations and to pay civil penalties and costs.

DISCUSSION

Crane asserts four affirmative defenses:

1. The complaint fails to state a cause of action;

2. The State's action is barred by the "applicable statute of limitations, including but not limited to, the limitations set forth in Section 31 of the Act";

3. The State's action is barred by the equitable doctrine of *laches*; and

4. The State's action is barred by the equitable doctrine of waiver or estoppel. Ans. at 5.[1]

The Board will address each of these alleged affirmative defenses in turn. First, however, the Board turns to a challenge that the State raises with each of the four asserted affirmative defenses—specifically, that Crane failed to set forth any facts in its answer to support its affirmative defenses.

Facts to Support Affirmative Defenses

The State argues that the Board should strike the affirmative defenses raised because Crane failed to set forth any facts in its answer to support the alleged affirmative defenses. Mot. at 4, 6, 9, 10. The State asserts that the Board, for guidance, should look to the Code of Civil Procedure, which provides that the "facts constituting any affirmative defense . . . must be plainly set forth in the answer or reply." Mot. at 4 (quoting 735 ILCS 5/2-613(d) (1998)).

While the Board may look to the Code of Civil Procedure for guidance when the Board's procedural rules do not address a particular situation, the Board's current and former procedural rules address how to plead facts constituting affirmative defenses. See People v. State Oil Co. (May 18, 2000), PCB 97-103, slip op. at 4 (refusing to look to Section 2-613(d) of the Code of Civil Procedure because the Board's procedural rules provide requirements for pleading facts constituting affirmative defenses). Crane filed its answer before the January 1, 2001 effective date of the Board's current procedural rules. The Board therefore will apply the procedural rule in effect at the time Crane filed the answer—former Section 103.122(d). See People v. Panhandle Eastern Pipeline Co. (February 1, 2001), PCB 99-191, slip op. at 2 n.2.

---

[1] References to the complaint are cited as "Comp. at ___"; references to Crane's answer are cited as "Ans. at ___"; references to the State's motion to strike are cited as "Mot. at ___"; references to Crane's response are cited as "Resp. at ___"; references to the State's reply are cited as "Reply at ___."

Section 103.122(d) provided that "[a]ny facts constituting an affirmative defense which would be likely to take the complainant by surprise must be plainly set forth prior to hearing in the answer or in a supplemental answer . . . ." 35 Ill. Adm. Code 103.122(d), repealed January 1, 2001. Crane argues that, under former Section 103.122(d), it was not required to identify facts to support the affirmative defenses: "Because the facts that John Crane believes will support its affirmative defenses constitute actions and/or inactions of Complainant and Complainant's alter ego, IEPA, Complainant cannot claim that those actions would take it by surprise at hearing." Resp. at 5. In addition, Crane describes, in its response, the evidence it intends to introduce to support its affirmative defenses and concludes that the State "cannot now argue that it will be surprised if those facts are brought up during the hearing." Resp. at 19.

The Board will not strike Crane's affirmative defenses for failure to include factual support in its answer. If Crane asserts new facts at hearing that take the State by surprise, the State may move to exclude that evidence from the record. See State Oil, PCB 97-103, slip op. at 4 (applying former Section 103.122(d) to deny a motion to strike an affirmative defense for lack of factual support, noting that "[i]f every fact necessary to establish a defense is not pled, then a respondent risks having its evidence excluded at hearing if the complainant is taken by surprise . . . .").

The First Alleged Affirmative Defense: Failure to State a Cause of Action

Crane, in its response, argues that the State has not stated a cause of action because the complaint "fails to even allege that IEPA complied with Section 31 [of the Act (415 ILCS 5/31 (1998))]." Resp. at 6. As the Board has discussed many times, the General Assembly amended Section 31 in 1996 to provide an opportunity for the Agency and an alleged violator to meet to resolve alleged violations before the Agency refers the matter to the Attorney General for enforcement. See Pub. Act 89-596 (eff. August 1, 1996).

Initially, the Board finds that Crane's assertion that the State failed to state a cause of action because it did not allege the Agency's compliance with Section 31 is itself not an affirmative defense. An affirmative defense is 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." Farmers State Bank v. Phillips Petroleum Co. (January 23, 1997), PCB 97-100, slip op. at 2 n.1 (emphasis in original) (quoting *Black's Law Dictionary*); see also Worner Agency v. Doyle, 121 Ill. App. 3d 219, 221, 459 N.E.2d 633, 635 (4th Dist. 1984) (if the pleading does not admit the opposing party's claim but rather attacks the sufficiency of that claim, it is not an affirmative defense).

Crane alternatively asks the Board to treat this purported affirmative defense as a motion to dismiss or to grant Crane leave to file a motion to dismiss on this ground. Resp. at 7. Under the procedural rules then in effect, a respondent had to file a motion to dismiss within 14 days after receiving the complaint. See 35 Ill. Adm. Code 103.140(a),

repealed January 1, 2001. However, in the interest of administrative economy, the Board will consider this challenge as a motion to dismiss.

The Board has held that Agency compliance with Section 31 is not an element of the State's burden of proof at hearing to establish a *prima facie* case. See People v. Panhandle Eastern Pipe Line Co. (November 16, 2000), PCB 99-191, slip op. at 3. If the State does not have to prove at hearing that the Agency complied with Section 31, it does not have to plead it in its complaint. The Agency's compliance with Section 31 is not an element of the State's cause of action. The Board therefore denies Crane's motion to dismiss on this ground and grants the State's motion to strike this first alleged affirmative defense.

The Second Alleged Affirmative Defense: Statute of Limitations

Crane's Position and the 180-Day Time Period of Section 31(a)(1)

Crane argues that the State is barred from bringing this action by "the applicable statute of limitations, including but not limited to, the limitations set forth in Section 31 . . . ." Ans. at 5. Neither Crane's answer nor its response identifies any purported statute of limitations other than the 180-day time period of Section 31(a)(1) of the Act. Section 31(a)(1) reads in part as follows:

> Within 180 days of becoming aware of an alleged violation of the Act or any rule adopted under the Act or of a permit granted by the Agency or condition of the permit, the Agency shall issue and serve, by certified mail, upon the person complained against a written notice informing that person that the Agency has evidence of the alleged violation. 415 ILCS 5/31(a)(1) (1998).

The notice must include, among other things, a detailed explanation of the violations alleged and an option to meet with the Agency to try to resolve the alleged violations. See 415 ILCS 5/31(a)(1) (1998).

Crane states that it expects the evidence to demonstrate that the Agency "was aware of the alleged violations set forth in the Complaint more than 180 days prior to the issuance of the NOV . . . ." Resp. at 13. Crane asserts that Section 31(a)(1) "functions as a statute of limitations that imposes time constraints upon IEPA's ability to seek enforcement of the Act." Resp. at 8-9. Crane argues that, because the evidence will show that the State brought this enforcement action based only on the Agency's referral, the Agency's failure to notify Crane before the "expiration of the 180-day Section 31(a) statute of limitations" bars the State from bringing the action. Resp. at 12. Crane maintains that allowing the State to proceed with an enforcement action in this situation places "no compulsion [on the Agency] to follow the procedural mandates of Section 31" and "would render Section 31 of the Act a nullity." Resp. at 10-11.

Crane alternatively asserts, in its response, that Section 31(a)(1) "operates as a limitation on the Board's authority to hear this matter." Resp. at 12. If the Agency "fails to comply with

the mandatory 180-day deadline," Crane argues that "the Board lacks the authority to hear the enforcement matter." Resp. at 13.

Board Analysis

The 180-Day Time Period of Section 31(a)(1) as a Statute of Limitations. The Board has held that Section 31 is not a statute of limitations:

> Statutes of limitations discourage the filing of stale, old claims, by restricting a person's ability to bring a complaint or petition for relief before a court or administrative agency after a certain period of time has expired. See generally Tom Okesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc., 61 Ill. 2d 129, 334 N.E.2d 160 (1975). Section 31 is not a statute of limitations, but an administrative tool that ensures potential violators have an opportunity to negotiate an alleged violation with the Agency prior to initiation of formal enforcement proceedings. People v. Eagle-Picher-Boge, L.L.C. (July 22, 1999), PCB 99-152, slip op. at 6.

By its terms, the 180-day language of Section 31(a)(1) does not prescribe a time period within which the State must file a complaint with the Board after the right accrues—instead, it provides for the beginning of a pre-referral negotiation process. Thus, the language does not meet the definition of a statute of limitations. Moreover, there is no statute of limitations that applies to enforcement actions brought by the State pursuant to Section 31 of the Act. See Pielet Bros. Trading, Inc. v. Pollution Control Board, 110 Ill. App. 3d 752, 758, 442 N.E.2d 1374, 1379 (5th Dist. 1982); People v. American Disposal Co. and Consolidated Rail Corp. (May 18, 2000), PCB 00-67, slip op. at 2-3.

The 180-Day Time Period of Section 31(a)(1) as a Jurisdictional Prerequisite. Crane argues that the Agency failed to issue the NOV within 180 days of "becoming aware" of the alleged violations. Crane asserts that the 180-day timeframe set forth in Section 31(a)(1) is a mandatory provision and that Agency compliance with it is a prerequisite to the Agency's referral of an enforcement matter to the Attorney General. Accordingly, Crane argues that the Board lacks jurisdiction over this matter.

The Board disagrees. Section 31 of the Act provides all respondents in State enforcement actions with notice and opportunity to meet with the Agency before the Agency refers the matter to the Attorney General for enforcement. In considering the legislative history of the 1996 amendments to Section 31, the Board, on a number of occasions, has found that the amendments were not intended to bar the Attorney General from prosecuting an environmental violation. See Eagle-Picher-Boge, PCB 99-152; People v. Geon (October 2, 1997), PCB 97-62; People v. Heuermann (September 18, 1997), PCB 97-92.

Today, the Board further finds that while the substance of the Section 31 pre-referral process is a mandatory precondition to the Agency's referral of a matter to the Attorney General, the specific 180-day timeframe set forth in Section 31(a)(1) is directory. Accordingly,

the Board is not divested of jurisdiction to hear this complaint if the Agency failed to issue the NOV, and thereby begin the pre-referral process, within 180 days of "becoming aware" of the alleged violations.

It is a well-recognized rule of statutory construction that unless the legislature prescribes a consequence for the government's failure to act within a specified timeframe, the failure to meet the timeframe does not divest a governmental body of jurisdiction over the matter. In Brock v. Pierce County, 476 U.S. 253, 106 S. Ct. 1834 (1986), the United States Supreme Court quoted from a line of precedent in the Court of Appeals to the effect that:

> Government agencies do not lose jurisdiction for failure to comply with statutory time limits unless the statute "'both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision.'" Brock, 476 U.S. at 259, 106 S. Ct. at 1839 (quoting St. Regis Mohawk Tribe, New York v. Brock, 769 F.2d 37, 41 (2d Cir. 1985) (quoting Fort Worth National Corp. v. Federal Home Loan Bank Board, 469 F.2d 47, 58 (5th Cir. 1972))).

The Supreme Court in Brock stated that it "would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake." Brock, 476 U.S. at 260, 106 S. Ct. at 1839. After discussing Congress' intent in enacting the provision at issue, the Supreme Court held that statutory language providing that the Secretary of Labor "shall" take action within 120 days does not "divest the Secretary of jurisdiction to act after that time." Brock, 476 U.S. at 265-266, 106 S. Ct. at 1841-1842 (noting that the "120-day provision was clearly intended to spur the Secretary to action, not to limit the scope of his authority").

With similar reasoning, Illinois courts have established a distinction between statutory provisions that are mandatory in nature and those that are directory in nature. As the appellate court said in *In re* Disconnection of Certain Territory from the Village of Machesney Park, 122 Ill. App. 3d. 960, 461 N.E.2d 1019 (2d Dist. 1984):

> A mandatory provision in a statute is one which renders the proceeding to which the provision relates void and illegal if the provision is omitted or disregarded. When a statute prescribes performance of an act by a public official or a public body, the question of whether it is mandatory or directory depends upon its purpose. [citing Andrews v. Foxworthy, 71 Ill. 2d. 13, 21, 373 N.E.2d 1332, 1336 (1978).] If the provision merely directs the conduct for guidance of officials or specifies time for performance of an official duty, it is directory, absent negative language denying performance after the specified time. [citing Andrews, 71 Ill. 2d at 21, 373 N.E.2d at 1336.] If the conduct is prescribed in order to safeguard someone's rights, which may be injuriously affected by failure to act within the specified time, the provision is mandatory. [citing Andrews, 71 Ill. 2d at 21, 373 N.E.2d at 1336.] Machesney Park, 122 Ill. App. 3d. at 966, 461 N.E.2d at 1024.

To determine whether a statutory provision is directory or mandatory, Illinois courts look to the legislative purpose behind the provision and construe the statute in a way that avoids an absurd result or hardship. See Presley v. P & S Grain Co., 289 Ill. App. 3d 453, 683 N.E.2d 901 (5th Dist. 1997); Szpila v. Burke, 279 Ill. App. 3d 964, 665 N.E.2d 357 (1st Dist. 1996). In Presley, the appellate court held that the word "cannot" is directory and not mandatory, and the failure to arbitrate under the Seed Arbitration Act does not divest the court of subject matter jurisdiction. See Presley, 289 Ill. App. 3d at 453, 683 N.E.2d at 909-10.

In previous cases, the Board has fully examined the legislative purpose of the 1996 amendments to Section 31. See, *e.g.*, Eagle-Picher-Boge, PCB 99-152; Heuermann, PCB 97-92. That purpose is to provide an alleged violator with an opportunity to meet and resolve differences with the Agency before the Agency refers the matter to the Attorney General for litigation. Clear from the facts already established in this case is that this purpose has been fulfilled. Upon receiving the NOV, Crane was fully afforded the Section 31 pre-referral meeting and negotiating process. Only after completion of this process did the Agency refer the matter to the Attorney General for enforcement.

The legislative timeframe contemplated for the beginning of the pre-referral process (180 days from the Agency "becoming aware" of an alleged violation) specifies no consequence for the Agency's failure to issue an NOV within the 180-day time period. For the Board to declare that consequence to be the inability of the State to move forward on an alleged environmental violation would be an absurd interpretation—indeed one not contemplated by Illinois law or the legislative history underlying the Section 31 amendments. This is especially so here where Crane has, in fact, enjoyed the benefits of the Section 31 pre-referral process. Adopting Crane's interpretation would come at the expense of the State's ability "to protect the public's right to a clean environment." Pielet Bros., 110 Ill. App. 3d at 758, 442 N.E.2d at 1379. Thus, the Board finds that the 180-day timeframe in Section 31(a)(1) is directory.

The Board therefore strikes Crane's second alleged affirmative defense. Accordingly, any facts about when the Agency became aware of the alleged violations have no bearing on the Board's jurisdiction over this matter. Nonetheless, to the extent any Agency delay in proceeding with the Section 31 pre-referral process may be relevant to the penalty factors under Section 42(h) of the Act (415 ILCS 5/42(h) (1998)), Crane remains free to discover and argue such facts for that purpose.

Conclusion. For the reasons stated above, the Board finds that the 180-day time period of Section 31(a)(1) is not a statute of limitations. While the substance of the Section 31 pre-referral process is mandatory, the 180-day time period of Section 31(a)(1) is directory. Hence, any failure of the Agency to issue an NOV within 180 days of becoming aware of an alleged violation does not preclude the Agency from referring the matter to the Attorney General, nor does it divest the Board of jurisdiction. Accordingly, the Board strikes Crane's asserted affirmative defense based on the 180-day time period of Section 31(a)(1) of the Act.

The Third Alleged Affirmative Defense: *Laches*

Crane asserts that *laches* bars the State's claim. Ans. at 5. *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. See City of Rochelle v. Suski, 206 Ill. App. 3d 497, 501, 564 N.E.2d 933, 936 (2nd Dist. 1990); State Oil, PCB 97-103, slip op. at 2. There are two principal elements of *laches*: lack of due diligence by the party asserting the claim; and prejudice to the opposing party. See Van Milligan v. Board of Fire & Police Commissioners, 158 Ill. 2d 84, 89, 630 N.E.2d 830, 833 (1994); State Oil, PCB 97-103, slip op. at 2.

Although applying *laches* to public bodies is disfavored, the Illinois Supreme Court held 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 State argues that Crane has not demonstrated a lack of due diligence by the State or any resulting prejudice to Crane. Mot. at 9. The State asserts moreover that *laches* does not apply because there is no applicable statute of limitations and no special circumstances making it inequitable to grant relief. Reply at 15.

Crane contends that it will be able to demonstrate that the Agency lacked due diligence because the Agency was aware, or should have been aware, of the alleged violations many years before it issued the September 1997 NOV. Resp. at 15. Crane asserts that the Agency's "unreasonable and unjustified delay in issuing the NOV will satisfy the first element of *laches*." Resp. at 16. Crane also contends that the Agency's "failure to file its NOV on a timely basis" prejudiced Crane by subjecting it to greater penalty amounts—$10,000 per day of violation. *Id*.

The Board has held that the lack of an applicable statute of limitations does not render *laches* inapplicable as a matter of law. See State Oil, PCB 97-103, slip op. at 3. While the affirmative defense of *laches* carries an elevated standard of proof when applied to the State, the Board cannot decide the merits of the defense before hearing the evidence. Therefore, the Board denies the State's motion to strike this affirmative defense.

The Fourth Alleged Affirmative Defense: Waiver or Estoppel

Crane asserts that the State's claim is barred by waiver or estoppel. Ans. at 5. The doctrine of waiver applies when a party intentionally relinquishes a known right or his conduct warrants an inference to relinquish the right. See Hartford Accident and Indemnity Co. v. D.F. Bast, Inc., 56 Ill. App. 3d 960, 962, 372 N.E.2d 829, 831 (1st Dist. 1977); People v. Douglas Furniture of California, Inc. (May 1, 1997), PCB 97-133, slip op. at 5.

The doctrine of equitable estoppel may be applied when a party reasonably and detrimentally relies on the words or conduct of another. See Brown's Furniture, Inc. v. Wagner, 171 Ill. 2d 410, 431, 665 N.E.2d 795, 806 (1996); People v. Chemetco, Inc. (February 19, 1998), PCB 96-76, slip op. at 10; White & Brewer Trucking, Inc. v. IEPA (March 20, 1997), PCB 96-250, slip op. at 10. However, the doctrine "should not be invoked against a public body except under compelling circumstances, where such invocation would not

defeat the operation of public policy." Gorgees v. Daley, 256 Ill. App. 3d 514, 518, 628 N.E.2d 721, 725 (1st Dist. 1993).

As the Illinois Supreme Court explained:

> This court's reluctance to apply the doctrine of estoppel against the State has been motivated by the concern that doing so 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 the negligence, mistakes or inattention of public officials. Brown's Furniture, 171 Ill. 2d at 431-32, 665 N.E.2d at 806, citing Hickey, 35 Ill. 2d at 447-48, 220 N.E.2d at 426; see also Chemetco, PCB 96-76, slip op. at 11; White & Brewer Trucking, PCB 96-250, slip op. at 10.

Consistent with this reluctance, parties seeking to estop the government must demonstrate that their reliance was reasonable and that they incurred some detriment as a result of the reliance. A party seeking to estop the government also must show that the government made a misrepresentation with knowledge that the misrepresentation was untrue. See Medical Disposal Services, Inc. v. IEPA, 286 Ill. App. 3d 562, 677 N.E.2d 428, 433 (1st Dist. 1997); Chemetco, PCB 96-76, slip op. at 11; White & Brewer Trucking, PCB 96-250, slip op. at 10. Additionally, the courts require that the governmental body must have taken some affirmative act. Gorgees, 256 Ill. App. 3d at 518, 628 N.E.2d at 725; Brown's Furniture, 171 Ill. 2d at 431, 665 N.E.2d at 806.

The State argues that it has not waived its right to bring this claim against Crane, nor exhibited conduct from which waiver of this right could be inferred. Reply at 17. With respect to estoppel, the State asserts that there was no reasonable reliance by Crane or misrepresentation by the Attorney General or the Agency, nor any compelling circumstances to justify estoppel against the State. Reply at 17.

Crane contends that it will demonstrate that the Agency was aware of the alleged violations and that, by failing to issue the NOV before September 1997, the Agency intended to relinquish its claim. Resp. at 17-18. Crane further seeks to prove that the State is estopped from bringing this claim because Crane relied on the Agency's representations that Crane's facility was in compliance, and Crane will suffer a substantial loss in penalties if the State is allowed to withdraw those representations. Resp. at 18.

At this point in the proceeding, the Board cannot make a factual determination on the merits of Crane's assertions. Crane should have the opportunity, however, to try to meet the considerable burden of establishing waiver or estoppel against the State. The Board accordingly denies the State's motion to strike this fourth alleged affirmative defense.

ORDER

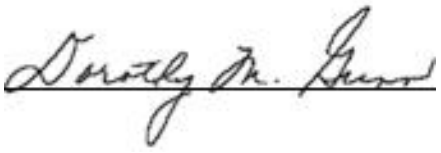
1. The Board grants the State's motion to strike Crane's purported affirmative defenses of failure to state a cause of action and failure to comply with any applicable statute of limitations.

2. The Board denies the State's motion to strike Crane's affirmative defenses of *laches* and waiver or estoppel.

IT IS SO ORDERED.

Board Members R.C. Flemal and E.Z. Kezelis concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 17th day of May 2001 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board