

ILLINOIS POLLUTION CONTROL BOARD

March 19, 1998

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
)
 v.) PCB 98-37
) (Enforcement - Land)
 AMERICAN WASTE PROCESSING LTD.,)
 an Illinois Corporation,)
)
 Respondent.)

ORDER OF THE BOARD (by R.C. Flegal):

This matter comes before the Board on a complaint filed September 8, 1997, by the Illinois Attorney General, on behalf of the People of the State of Illinois (complainant), on his own motion and at the request of the Illinois Environmental Protection Agency (Agency). The six-count complaint alleges respondent, operator of a hazardous waste transfer station, violated various sections of the Board's waste disposal regulations. In response to the complaint, American Waste Processing, Ltd. (American) filed an answer and affirmative defenses (defenses). The complainant filed a motion to strike and/or dismiss respondent's affirmative defenses (motion to strike). American responded with a motion to dismiss the complaint (motion to dismiss). For the reasons stated below, the Board grants the complainant's motion to strike and denies American's motion to dismiss.

MOTION TO DISMISS

American's motion to dismiss, filed March 4, 1998, asserts the complainant's claims are barred by the statute of limitations under 735 ILCS 5/13-205 (1995). Specifically, American alleges that the statute applies to bar any action commenced five years after the commission of the alleged violation. The complainant cites Pielet Bros. Trading Co. v. Pollution Control Board, 110 Ill. App. 3d 752, 757, 442 N.E.2d 1374, 1378 (1982) for the proposition that the statute of limitations does not apply if the state is asserting a public right to a clean and healthy environment on behalf of all the people of the State. We find that the instant action is being brought on behalf of the public, and therefore that the statute of limitations does not apply. American's motion to dismiss is denied. See People v. Inspiration Development Co., (March 19, 1998), PCB 97-207.

MOTION TO STRIKE

The complainant's motion to strike and/or dismiss respondent's affirmative defenses, filed February 20, 1998, generally asserts that American failed to allege facts constituting any of the affirmative defenses, and failed to allege any affirmative defenses as a matter of law.

Arguments**First Affirmative Defense**

In its first affirmative defense, American argues the complaint is barred because the Board lacks jurisdiction. Answer at 2. The complainant argues that this affirmative defense is not factually or legally sufficiently pled, lacks specificity, fails to "give color" to American's claim and that the Board previously found this claim lacked merit. February 20, 1998, Memorandum in Support of Motion to Strike and/or Dismiss Respondent's Affirmative Defenses at 4 (hereinafter Memorandum.)

Second Affirmative Defense

American argues in its second affirmative defense that the Illinois Environmental Protection Act (Act) bars the relief sought by the complaint because the Agency failed to follow the jurisdictional requirements set forth by the Act. Answer at 2. The complainant argues that this affirmative defense is not factually or legally sufficiently pled, lacks specificity, fails to "give color" to American's claim and that the Board previously found this claim lacked merit. Memorandum at 4-5.

Third Affirmative Defense

American next argues that doctrine of laches bars the relief sought. Answer at 2. The complainant responds that this affirmative defense is not factually or legally sufficiently pled, lacks specificity, fails to "give color" to American's claim and notes laches is disfavored when the defense is raised against a complainant who is the State and is discharging its governmental functions. Memorandum at 4-5. The complainant also asserts that the Board has held that laches does not normally apply to enforcement actions brought pursuant to the Act. Memorandum at 5.

Fourth Affirmative Defense

In its fourth affirmative defense American alleges relief is barred by an accord and satisfaction which existed between the parties because a Part B Permit was issued to American and because of the joint dismissal of the permit appeal pending before the Board, PCB 91-38. Answer at 2. The complainant responds that this affirmative defense is not factually or legally sufficiently pled, lacks specificity, fails to "give color" to American's claim and that the Board previously found this claim lacked merit. Memorandum at 4, 6.

Fifth Affirmative Defense

In its fifth affirmative defense, American alleges that relief is barred by the statute of limitations. Answer at 2. The complainant responds that this affirmative defense is not factually or legally sufficiently pled, lacks specificity, fails to "give color" to American's claim and argues that a statute of limitations does not apply where the State brings the matter on behalf of the people and asserts a public right to a clean and healthy environment. Memorandum at 4, 6.

Sixth Affirmative Defense

American asserts as its sixth and final affirmative defense that the penalties proposed in the complaint are excessive. Answer at 2. The complainant responds that this is argumentative and does not constitute a valid affirmative defense. Memorandum at 4. Also, the complainant notes that the Illinois General Assembly has determined both that the penalties requested are the statutory maximum and that violations of the Act and the Regulations promulgated thereunder pose an environmental risk and/or danger. Memorandum at 7.

Discussion

Board Jurisdiction Exists

In its order in this matter issued October 16, 1997, the Board rejected American's assertion that the Board lacked jurisdiction in this matter. The Board will not reconsider the claim. American's first and second affirmative defenses are stricken.

Doctrine of Laches Inapplicable

American has failed to establish the two principal elements of laches: (1) lack of due diligence of the party asserting the claim, and (2) prejudice. See VanMilligan v. Board of Fire and Police Commissioners, 158 Ill.2d 84, 630 N.E.2d 830 (1994). Moreover, although laches can apply to governmental bodies under compelling circumstances, American has not alleged that compelling circumstances exist. The Board does not find that such circumstances exist. See Hickey v. Illinois Central Railroad Co., 35 Ill.2d 427, 447-48, 220 N.E.2d 415, 425-26 (1996) ("[T]he 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."). American's third affirmative defense is stricken.

Accord and Satisfaction Inapplicable

In its order issued August 1, 1996, the Board rejected American's assertion that the alleged violations were compromised, settled and merged into a Part B permit, because American failed to provide any documentation of the terms of that agreement. The Board also found the Part B permit alone did not impede the Agency from bringing an enforcement action for past violations. The Board will not reconsider the claim. American's fourth affirmative defense is stricken.

Statute of Limitations Inapplicable

As discussed above, no statute of limitations applies in this action. American's fifth affirmative defense is stricken.

Penalty Issues Improper as Affirmative Defenses

American's affirmative defense that the penalties proposed in the complaint are excessive is improper. An affirmative defense is a response to a claim which attacks the complainant's right to bring an action. See Farmer's State Bank v. Phillips Petroleum Co. (1/23/97) PCB 97-100, slip op. at 2 n.1. Accordingly, as the Board ruled in People v. Douglas Furniture of California, Inc., (5/2/97), PCB 97-133, slip op. at 6, a defense which speaks to imposition of a penalty rather than the underlying cause of action is not an "affirmative defense" to that cause of action. The sixth affirmative defense is stricken. Pursuant to Sections 33(c) and 42(h) of the Act, American may argue and address at hearing the appropriateness of imposing any penalty in this matter.

CONCLUSION

For the reasons set forth herein, American's motion to dismiss is denied, and American's six affirmative defenses are stricken.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 19th day of March 1998, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board