ILLINOIS POLLUTION CONTROL BOARD
April 18, 2002

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 02-1
	)	(Enforcement - Air)
STEIN STEEL MILLS SERVICES, INC., an Illinois corporation,	)	
	)	
	)	
Respondent.	)	

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

On January 7, 2002, the People of the State of Illinois (complainant) filed a motion to strike respondent's affirmative defenses (Mot. Str.). On January 18, 2002 respondent Stein Steel Mills Services, Inc. (Stein) filed a response to the motion to strike (Resp.).

For the reasons outlined below, the Board grants the motion to strike in part and denies it in part. The Board grants the motion to strike Stein's first, second, fourth, and sixth affirmative defenses. The Board denies the motion with respect to the third, fifth, and seventh affirmative defenses.

PROCEDURAL HISTORY

On July 2, 2001, complainant filed a two-count complaint against Stein. On July 30, 2001, Stein filed a motion to dismiss that the Board denied on November 15, 2001. Complainant filed its first amended complaint (Am. Comp.) on September 4, 2001. Stein filed its answer and seven affirmative defenses on December 4, 2001 (Ans.).

BACKGROUND INFORMATION

Stein's facility at issue herein is located at 5250 Millet Road, Granite City, Madison County. Stein's facility is primarily engaged in the crushing and screening of slag from National Steel Corp. Am. Comp. at 1-2.

Count I

Complainant alleged that Stein generally emitted dust, kish, metallic particles, and other fugitive particulate matter from its facility. The alleged violations occurred at various times from 1997 to 2000 and on other dates. Complainant alleged that the emissions resulted in the deposition of particulate matter in nearby residential properties that unreasonably interfered

with the use and enjoyment of real and personal property. Complainant alleged that, as a result, Stein caused air pollution in violation of Section 9(a) of the Environmental Protection Act (Act) (415 ILCS 5/9(a) (2000)) and Section 201.141 of the Board's regulations (35 Ill. Adm. Code 201.141). Am. comp. at 2-3.

Count II

Stein has a federally enforceable state operating permit (FESOP) allowing it to operate its facility. Complainant alleged that Stein ran its facility with an inadequate operating program to control fugitive particulate matter in violation of Section 9(b) of the Act (415 ILCS 5/9(b) (2000)) and Section 212.309(a) of the Board's regulations (35 Ill. Adm. Code 212.309(a)).[1] In addition, complainant alleged that Stein failed to maintain written records of control measures in violation of Special Condition 8(b) of Stein's FESOP, Section 9(b) of the Act, and Section 212.316(g)(4) of the Board's regulations (35 Ill. Adm. Code 212.316(g)(4)). Complainant cited two separate 1997 Illinois Environmental Protection Agency (Agency) inspections in which Stein did not have the proper records. Am. comp. at 4-7.

AFFIRMATIVE DEFENSES

Standard

The Board's procedural rules specify that "[a]ny 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). In an 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) (citation omitted).

The Code of Civil Procedure gives additional guidance on pleading affirmative defenses. Section 2-613(d) provides, in part:

> The facts constituting any affirmative defense . . . and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint, . . . in whole or in part, and any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply." 735 ILCS 5/2-613(d) (2000).

[1] The amended complaint states that Stein allegedly violated Section 9(a) of the Act. However, the nature of the alleged violation, the fact that a similar paragraph in the original complaint alleged a violation of Section 9(b), and the fact that the language of Section 9(b) is quoted immediately after the allegation in the amended complaint leads the Board to believe that complainant meant to allege a violation of Section 9(b).

A valid affirmative defense gives color to the opposing party's claim but then asserts new matter which defeats an apparent right. Condon v. American Telephone and Telegraph Co., 210 Ill. App. 3d 701, 709, 569 N.E.2d 518, 523 (2nd Dist. 1991), citing The Worner Agency Inc. v. Doyle, 121 Ill. App. 3d 219, 222, 459 N.E.2d 633, 635 (4th Dist. 1984).

A motion to strike an affirmative defense admits well-pleaded facts constituting the defense, and attacks only the legal sufficiency of the facts. "Where the well-pleaded facts of an affirmative defense raise the possibility that the party asserting them will prevail, the defense should not be stricken." International Insurance Co. v. Sargent and Lundy, 242 Ill. App. 3d 614, 630-31, 609 N.E.2d 842, 853-54 (1st Dist. 1993), citing Raprager v. Allstate Insurance Co., 183 Ill. App. 3d 847, 854, 539 N.E.2d 787, 791 (2nd Dist. 1989).

Complainants contended that none of Stein's affirmative defenses are properly classified as affirmative defenses. Mot. Str. at 1.

First Affirmative Defense

In its first affirmative defense, Stein claimed that complainant has failed to state a cause of action against Stein. Ans. at 8.

Complainant contended that the first affirmative defense is just a restatement of the denial in Stein's answer. Complainant stated that Stein raises no new matters as a defense to the allegations. Mot. Str. at 2. Stein responded that failure to state a cause of action is a common affirmative defense and that it advances the argument beyond a denial of the allegation. Resp. at 3.

Discussion

Stein's first affirmative defense does not give color to complainant's allegations nor does it assert any new matters to defeat complainant's claims. In addition, the Board recently struck an affirmative defense in which a respondent claimed that complainant failed to state a cause of action. *See* People v. Royster-Clark, Inc., PCB 02-08, slip op. at 6 (Jan. 24, 2002). The Board accordingly strikes Stein's first affirmative defense.

Second Affirmative Defense

In its second affirmative defense, Stein claimed that the alleged violations are not willful, knowing or repeated violations. As a result, Stein claimed, there was no statutory basis for the complaint, and complainant is not entitled to request attorney fees. Ans. at 8.

Arguments

Complainant contended that the second affirmative defense "is nothing more than a general denial of the alleged violations." Mot. Str. at 2. As it did for its first affirmative defense, Stein responded that failure to state a cause of action is a common affirmative defense and that it advances the argument beyond a denial of the allegation. Resp. at 3.

Discussion

Stein's second affirmative defense is actually two affirmative defenses: (a) Stein did not willfully, knowingly, or repeatedly violate the statutory and regulatory provisions at issue, and (b) complainant is not entitled to request attorney fees. The Board addresses each one separately.

The Board finds that willfulness, knowledge, and repetition are not elements of those Sections of the Act, the Board's regulations, and Stein's FESOP that Stein allegedly violated. There is no possibility that Stein will prevail on this defense and, accordingly, the Board strikes the first part of the second affirmative defense.

Imposing attorneys' fees for a violation of the Act is a separate inquiry from whether a violation of the Act has occurred. Issues such as attorney fees and penalties are only considered once a respondent has been found in violation of the Act or the Board's regulations. Since the second part of the second affirmative concerns the imposition of attorneys' fees and not the cause of action, it is not a proper affirmative defense. *See* People v. Midwest Grain Products of Illinois, PCB 97-179, slip op. at 5 (Aug. 21, 1997); People v. Douglas Furniture of California, PCB 97-133, slip op. at 4, 6 (May 1, 1997). Thus, the Board also strikes the second part of the second affirmative defense.

Third Affirmative Defense

In its third affirmative defense, Stein invoked the doctrine of *laches*. Stein stated that complainant waited four years to file the first amended complaint after the events at issue occurred. Ans. at 9.

Complainant contended that *laches* is not an affirmative defense to alleged violations of the Act or the Board's regulations. Complainant stated that *laches* is an affirmative defense only to actions in equity, not enforcement actions before the Board. Mot. Str. at 2-3.

Stein argued that, although the application of *laches* to government bodies is generally disfavored, the State does not have absolute immunity from *laches*. Resp. at 4-5. Stein also pointed to People v. State Oil Co. *et al*, PCB 97-103, slip op. at 3-4 (May 18, 2000) as proof that the Board has refused to strike *laches* as an affirmative defense.

Stein claimed that the *laches* defense is appropriate where there has been a substantial delay between the occurrence and the filing of the complaint. Stein also claimed that witnesses to the alleged facts would no longer be available or would have faded memories due to the lapse of time. Ans. at 9; Resp. at 4, citing Bultas v. Board of Fire and Police Commissioners of the City of Berwyn , 171 Ill. App. 3d 189, 195, 524 N.E.2d 1172, 1176 (1st Dist 1988).

Discussion

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). 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 v. Board of Fire and Police Commissioners, 158 Ill. 2d 85, 89, 630 N.E.2d 830, 833 (1994).

The Illinois Supreme Court has held:

> 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 that *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 v. Illinois Central Railroad Co., 35 Ill. 2d 427, 447-448, 220 N.E.2d 415, 425-426 (1966) (citations omitted).

The Court reaffirmed Hickey more recently in Van Milligan. *See* Van Milligan, 158 Ill. 2d 85, 90-91, 630 N.E.2d 830, 833.

The Board has held that *laches* may apply to the Board in its governmental capacity which would mean that a respondent must prove that "compelling circumstances" warrant the application of the doctrine. *See* State Oil, PCB 97-103, slip op. at 3 (May 18, 2000).

The Board has struck the affirmative defense of *laches* in the past. *See, e.g.,* People v. Big O, Inc., PCB 97-130 (Apr. 17, 1997), slip op. at 1. However, as Stein cited, the Board did not strike the affirmative defense of *laches* in State Oil. Nor did the Board strike the affirmative defense of *laches* in Royster-Clark. *See* Royster-Clark, PCB 02-08, slip op. at 5-6 (Jan. 24, 2002). The Board finds that Stein has pleaded sufficient facts to raise the affirmative defense of *laches* and that there may be a possibility that Stein will prevail. However, the Board need not discuss the merit of the defense at this point, and concludes only that the alleged defense should not be stricken.

Fourth Affirmative Defense

In its fourth affirmative defense, Stein claimed that the statutory and regulatory violations that it allegedly violated in count I (Section 9(a) of the Act and Section 201.141 of the Board's regulations) are identical and duplicitous. Stein claimed that the alleged violation of Section 201.141 should be dismissed or that the alleged violations in count I should be pleaded as alternatives. Ans. at 9.

Complainant contended that the identical nature of Section 9(a) of the Act and Section 201.141 of the Board's regulations does not constitute an affirmative defense. Mot. Str. at 3. Stein claimed that it is being prosecuted twice for one violation. Resp. at 5.

Discussion

Section 9(a) of the Act and Section 201.141 of the Board's procedural regulations are similar. Both provisions generally state that no person shall cause, threaten, or allow the emission of any contaminant into the environment so as to cause air pollution. Section 9(a) of the Act states that it is a violation to violate any regulations adopted by the Board, such as 35 Ill. Adm. Code 201.141.

The Board has routinely found parties to be in violation of both Section 9(a) of the Act and Section 201.141 of the Board's regulations. *See, e.g.,* People v. Aabott Asbestos, PCB 99-189, slip op. at 4, 13 (Apr. 5, 2001); People v. Fults, PCB 96-118, slip op. at 5, 9 (Mar. 20, 1997). Furthermore, in Royster-Clark the Board struck an affirmative defense citing the identical and duplicitous nature of Section 12(f) of the Act and Section 304.141(a) of the Board's regulations - both of which prohibit water pollution in excess of limits in an NPDES permit. *See* Royster-Clark, PCB 02-08, slip op. at 5 (Jan. 24, 2001). The Board accordingly strikes Stein's fourth affirmative defense.

Fifth Affirmative Defense

In its fifth affirmative defense, Stein claimed that it did not cause, threaten, or allow the alleged violations in the complaint. Ans. at 9. As with the second affirmative defense, complainant contended that the fifth affirmative defense is merely a restatement of Stein's denial in its answer. Mot. Str. at 3.

Discussion

The facts that Stein alleged in its fifth affirmative defense could defeat part of the complaint. Causing, allowing, or threatening air pollution are elements of Section 9(a) of the Act and Section 201.141 of the Board's regulations, which Stein allegedly violated. Stein could possibly prevail on count I of the complaint if it is able to prove that it did not cause, threaten, or allow air pollution. The Board finds that the fifth affirmative defense should not be stricken.

Sixth Affirmative Defense

In its sixth affirmative defense, Stein claimed that complainant did not allege facts to show that particulate matter emissions from the Stein facility violated applicable regulatory standards. Ans. at 9.

Arguments

Complainant contended that it is not required to prove an emission of a particulate emission standard in order to prove a violation of Section 9(a) of the Act or Section 201.141 of the Board's regulations. Mot. Str. at 3-4. Stein responded that failure to allege proper facts is a common affirmative defense and that it advances the argument beyond a denial of the allegation. Resp. at 3.

Discussion

Stein's sixth affirmative defense gives color to complainant's allegation and asserts a new matter. However, complainant's motion to strike correctly and accurately attacks the legal sufficiency of the defense. The Board finds that the motion to strike is persuasive. Complainant need not allege violations of particulate matter emission standards in order to prove violations of the cited provisions of the Act, the Board's regulations, and Stein's FESOP. The Board strikes Stein's sixth affirmative defense.

Seventh Affirmative Defense

In its seventh affirmative defense, Stein claimed that it had submitted at least three operating programs to the Agency that complied with applicable regulatory requirements. Ans. at 10.

Arguments

Complainant contended that the seventh affirmative defense is not a defense to allegations in the complaint and therefore not an affirmative defense. Mot. Str. at 4. Stein claimed that the seventh affirmative defense adds new information defeating the portion of the complaint regarding Stein's alleged inadequate operating program. Resp. at 5.

Discussion

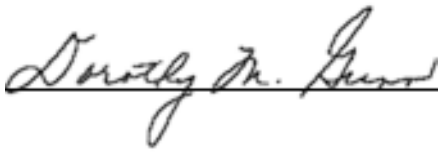
Like the fifth affirmative defense, the facts that Stein has alleged in its seventh affirmative defense could defeat part of the complaint. The existence of a valid operating program is at the heart of the alleged violations of Section 212.309(a) of the Board's regulations and Section 9(b) of the Act. Stein could possibly prevail on part of count II of the complaint if it is able to prove that it was operating according to a valid operating program. The Board finds that the seventh affirmative defense should not be stricken.

CONCLUSION

The Board grants the motion to strike in part and denies it in part. The Board grants the motion to strike Stein's first, second, fourth, and sixth affirmative defenses. The Board denies the motion with respect to Stein's third, fifth, and seventh affirmative defenses. In so ruling, the Board makes no finding as to the merits of the complaint. Stein will have the opportunity to address the issues raised in its answer, including the issues raised in the stricken affirmative defenses, at hearing. The Board directs the hearing officer to proceed expeditiously to hearing in this matter.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 18, 2002, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board