ILLINOIS POLLUTION CONTROL BOARD
May 18, 2000

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 97-103
	)	(Enforcement - Land, Water)
STATE OIL COMPANY, WILLIAM ANEST f/d/b/a S & S PETROLEUM PRODUCTS, PETER ANEST f/d/b/a S & S PETROLEUM PRODUCTS, CHARLES ABRAHAM, JOSEPHINE ABRAHAM, and MILLSTREAM SERVICES, INC.,	)	
	)	
Respondents.	)	

CHARLES ABRAHAM, JOSEPHINE ABRAHAM, and MILLSTREAM SERVICES, INC.,	)	
	)	
Cross-Complainants,	)	
	)	
v.	)	PCB 97-103
	)	(Enforcement - Land, Water)
WILLIAM ANEST and PETER ANEST,	)	(Cross-Complaint)
	)	
Cross-Respondents.	)	

ORDER OF THE BOARD (by M. McFawn):

Two motions are before the Board in this case: a "Motion to Strike Affirmative Defense of Laches" filed by complainant the People of the State of Illinois, directed at an affirmative defense raised by respondents Charles Abraham, Josephine Abraham, and Millstream Services, Inc. (the Abraham respondents), and a "Motion to Strike and Dismiss" filed by William Anest and Peter Anest, directed at the "Second Amended Cross Complaint" filed by the Abraham respondents. Complainant's motion was filed on March 27, 2000. The Anests' motion, along with a brief in support, was filed on April 4, 2000. On May 2, 2000, the Abraham respondents filed a motion for leave to file replies to the two motions *instanter*, and proposed replies to the motions. The Abraham respondents' motion for leave to file is granted, and their responses to the motions are accepted.

After considering the arguments of the parties, the Board denies complainant's "Motion to Strike Affirmative Defense of Laches." The Board grants the Anests' "Motion to Strike and Dismiss" in part and denies it in part: the Board grants the request to strike count III of the "Second Amended Cross Complaint," certain specific allegations in the cross-complaint, and that portion of the prayer for relief seeking witness and attorney fees, but denies the request to strike other specific allegations in the cross-complaint, and denies the request to dismiss the cross-complaint in its entirety.

MOTION TO STRIKE AFFIRMATIVE DEFENSE

Complainant has moved to strike the Abraham respondents' affirmative defense 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). 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 & Police Commissioners, 158 Ill. 2d 84, 89, 630 N.E.2d 830, 833 (1994). Complainant argues two bases for striking the *laches* defense: (1) that the doctrine does not apply, both generally as a matter of law and specifically because there is no applicable statute of limitations; and (2) that the Abraham respondents did not plead facts sufficient to establish the defense.

Applicability of *Laches* Doctrine

General Principles of Application of *Laches* to the State

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 case:

> 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. 35 Ill.2d at 447-48, 220 N.E.2d at 425-26 (citations omitted).

The Supreme Court reaffirmed its holding in Hickey in Van Milligan. Thus, the State is not immune from application of *laches* in exercise of its governmental functions, at least not under "compelling circumstances."

The Abraham respondents argue that "compelling circumstances" need not be shown in order for *laches* to apply in this case because the State seeks merely to collect money, rather than to discharge its regulatory duties. Response to motion to strike at 5-6. The Board disagrees. Under Hickey, the heightened level of justification applies in cases where the State is acting in a governmental, rather than a proprietary, capacity. The State's role, rather than the nature of the case, determines whether compelling circumstances must be shown in order for *laches* to apply. The nature of the case may, of course, impact whether circumstances are compelling or not. In any event, we need not resolve this question to rule on complainant's motion to strike.

Effect of Statute of Limitations

The People's complaint alleges a variety of violations of the Environmental Protection Act (Act), 415 ILCS 5 (1998), by the Abraham respondents. None of the alleged violations is subject to a statute of limitations. See Pielet Brother Trading, Inc. v. Pollution Control Board, 110 Ill. App. 3d 752, 442 N.E.2d 1374 (5th Dist. 1982). Complainant argues that the lack of an applicable statute of limitations renders the *laches* doctrine inapplicable to this case. Complainant bases this position on the following statement by the court in Beynon Building Corp. v. National Guardian Life Ins. Co., 118 Ill. App. 3d 754, 455 N.E.2d 246 (2d Dist. 1983):

> In fixing the period in which rights and claims will be barred by laches, equity follows the law, and generally courts of equity will adopt the period of limitations fixed by statute. Thus, where a party's rights are not barred by the statute of limitations, unless his conduct or special circumstances make it inequitable to grant him relief, he is not barred by laches. *Id.* at 764, 455 N.E.2d at 253.

We do not believe that this statement operates to render *laches* inapplicable in this case as a matter of law. The court in Beynon acknowledged an exception for "special circumstances." As discussed by the court in Hickey, *supra*, special circumstances must be present for *laches* to apply at all to the State in its governmental capacity. Thus, if the Abraham respondents establish that *laches* is otherwise applicable to the State in this case, the absence of a statute of limitations on the alleged violations would not necessarily preclude the Abraham respondents' defense.

Factual Sufficiency of Pleading

Complainant's final argument for striking the *laches* defense is that the defense as pled is not factually sufficient. Specifically, complainants argue that statements in the Abraham respondents' affirmative defense are conclusions rather than facts, and thus cannot support the affirmative defense. Complainants also argue that the Abraham respondents have not alleged facts establishing that extraordinary circumstances exist or that the alleged delay by the State was unreasonable. While these objections might be valid in a case governed by the Code of Civil Procedure, 735 ILCS 5 (1998), the Board concludes that they do not constitute fatal defects in a case before the Board, governed by the Board's procedural rules at 35 Ill. Adm. Code 103.

Pleading rules are different in cases before the Board than in cases before the circuit courts. The Code of Civil Procedure and Supreme Court Rules do not expressly apply to proceedings before the Board. 35 Ill. Adm. Code 101.100(b). In the absence of a provision of the Board's procedural rules to govern a specific situation, the parties may argue that the Code of Civil Procedure or Supreme Court Rules provide guidance for the Board. *Id.* In this situation, however, there is an applicable Board procedural rule. Responsive pleadings before the Board are governed by 35 Ill. Adm. Code 103.122(d), which provides:

> Respondent may file an answer within 30 days of receipt of the complaint. All material allegations of the complaint shall be taken as denied if not specifically admitted by answer, or if no answer is filed. Any 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 filed pursuant to Section 103.210(b).

Filing of any answer in a case before the Board is discretionary, not mandatory. Consequently, there is no obligation to plead affirmative defenses at all; rather, the only obligation is that facts constituting an affirmative defense that might take the complainant by surprise must be set forth prior to hearing. This is in contrast to practice under the Code of Civil Procedure, which requires pleading of all facts constituting an affirmative defense. See 735 ILCS 5/2-613(d) (1998).

Thus, failure of the Abraham respondents to set forth specifically every fact necessary to establish their defense does not render the pleading of that defense defective. If 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, and in that circumstance exclusion of the evidence is the complainant's remedy. But if the facts constituting the defense are known to the complainant, there is no requirement that they be specifically set forth in a pleading.

It is therefore unnecessary for us to undertake a detailed review of the Abraham respondents' *laches* defense. If that defense has been insufficiently pled, that insufficiency will be revealed in the course of the hearing, and complainant's remedy for the pleading deficiency would be exclusion of evidence at that time. For the present, however, complainant's motion is denied.

MOTION TO STRIKE AND DISMISS CROSS-COMPLAINT

The Abraham respondents' four-count "Second Amended Cross Complaint," filed on January 27, 2000, and accepted by the Board in an order adopted on March 16, 2000, alleges violations of various provisions of the Act (described more particularly below) arising out of the Anests' ownership and operation of several underground storage tanks (USTs) at the site of a gas station, which the Abraham respondents purchased from the Anests in 1986. The Abraham respondents are potentially liable for costs incurred by the State remediating contamination at the site due to gasoline leaking from the USTs. The Abraham respondents ask that the Anests be ordered to remediate any contamination at the site; the Abraham respondents also ask that the Anests be required to pay any amounts for which they (the Abraham respondents) are found liable under the People's complaint here. Finally, the Abraham respondents seek their fees, including attorney fees and witness fees, from the Anests.

By their "Motion to Strike and Dismiss," the Anests seek dismissal of the cross-complaint in its entirety. In the alternative, the Anests ask the Board to strike certain claims and allegations in the cross complaint. Specifically, the Anests move to strike (1) count III of the cross complaint in its entirety; (2) 17 specific paragraphs of the cross complaint, based on the character of the allegations; and (3) the portions of the prayers for relief seeking witness and attorney fees.

Dismissal of Second Amended Cross-Complaint

The Anests argue that dismissal is appropriate because the Abraham respondents did not have standing to bring an action against them. In making this argument, the Anests rely on NBD Bank v. Krueger Ringier, Inc., 292 Ill. App. 3d 691, 686 N.E.2d 704 (1st Dist. 1997), citing NBD Bank for the proposition that the Abraham respondents can only recover if they were part of the class of persons the Act was designed to protect. (The Anests further argue that the Abraham respondents were not members of that class.) The Board concludes that this argument mischaracterizes both the court's statements in NBD Bank and the nature of the Abraham respondents' claims in this case.

By their citation to NBD Bank, the Anests are, presumably, referring to the court's discussion wherein it stated:

> A private right of action exists where (1) the alleged violation of the statute contravenes public policy, (2) the plaintiff is a member of the class the statute is designed to protect, (3) the injury is one the statute was designed to prevent, (4) the need for civil actions under the statute is clear, and (5) there is no indication that the remedies articulated in the statute are the only remedies available. NBD Bank, 292 Ill. App. 3d at 697, 686 N.E.2d at 709.

The Anests focus on the second criterion, arguing that that criterion is not met here and consequently the Abraham respondents have no right of action. The court in NBD Bank, however, was setting forth the test for determining whether a statute creates a private right of action in the nature of a tort claim, *i.e.*, an action by which a party injured by another party's violation of a statute could recover damages directly from that party. The court concluded that there was no private cause of action under the Act. The

Abraham respondents' cross-complaint, however, is not asserting a private cause of action; it is rather a citizen's enforcement action under Section 31(d) of the Act, 415 ILCS 5/31(d) (1998). Section 31(d) provides that "[a]ny person may file with the Board a complaint . . . against any person allegedly violating this Act or any rule or regulation thereunder or any permit or term or condition thereof." Each of the Abraham respondents falls within the definition of "any person." See 415 ILCS 5/3.26 (1998). Thus, the Abraham respondents had standing to bring the statutorily-authorized action asserted in their cross complaint.

Among the Abraham respondents' goals in their enforcement action is, ultimately, recovery of costs (if any are charged to them) from the Anests. As a result, the claim asserted in their cross complaint resembles the private cause of action discussed by the court in NBD Bank. There is an important distinction, however, between a direct action for costs and an enforcement action that requests costs as the discretionary remedy for a violation of the Act. Under Section 33(a) of the Act, the Board is authorized to "enter such final order . . . as it shall deem appropriate under the circumstances." 415 ILCS 5/33(a) (1998). Among the orders the Board may enter is an order directing a respondent to pay costs incurred by another party. See Dayton Hudson Corp. v. Cardinal Industries, Inc. (August 21, 1997), PCB 97-134, slip op. at 5-7, and cases cited therein. The Abraham respondents may request such an order from the Board, and argue that such an order is appropriate in response to a finding of the alleged violations. The end result, if the Abrahams prevail, may be the same as one would expect in a direct action for costs. The natures of the two actions, however, are different. While under NBD Bank there is no direct action for costs, the same end may be pursued by means of a statutorily-authorized enforcement action under Section 31(d).

The Board thus concludes that the court's ruling in NBD Bank does not preclude the action brought by the Abraham respondents in their cross complaint. The Anests' motion to dismiss is therefore denied.

Striking of Specific Provisions of Complaint

Count III

Count III of the Abraham respondents' cross complaint asserts a claim under Section 57.12 of the Act, 415 ILCS 5/57.12 (1998). Section 57.12 provides in relevant part,

> (a) Notwithstanding any other provision or rule of law, the owner or operator, or both, of an underground storage tank shall be liable for all costs of investigation, preventative action, corrective action and enforcement action incurred by the State of Illinois resulting from an underground storage tank.

In an order adopted on August 19, 1999, the Board struck count III of the Abraham respondents' "First Amended Cross-Complaint", asserting the same claim, concluding that only the State could seek costs under Section 57.12. See People v. State Oil Co. (August 19, 1999), PCB 97-103, slip op. at 5. In their "Motion for Leave to File Second Amended Cross-Complaint," the Abraham respondents

acknowledge the Board's earlier action, and state that they have re-pled this claim so that subsequently they cannot be found to have waived it.

The Abraham respondents' purpose is noted; however, the Board adheres to its earlier conclusion, that count III does not state a valid claim. Accordingly, the Anests' motion to strike is granted with respect to count III.

Specific Paragraphs of Cross-Complaint

The Anests have identified a number of allegations in the cross-complaint that they argue are not relevant to the alleged violations of the Act. A motion to strike is an appropriate vehicle to address immaterial matter in a complaint. Browning v. Heritage Ins. Co., 33 Ill. App. 3d 943, 948, 338 N.E.2d 912, 916-17 (2d Dist. 1975) ("If the necessary facts appear in the complaint but are encumbered with unnecessary matter . . . the motion should ask for a correction of the pleading by striking out specified immaterial matter[.]") "A fact is material to the claim in issue when the success of the claim is dependent upon the existence of that fact." Lindenmier v. City of Rockford, 156 Ill. App. 3d 76, 88, 508 N.E.2d 1201, 1209 (2d Dist. 1987). To evaluate whether allegations in the Anests' motion are immaterial, we first examine the alleged violations, and then determine whether the specific paragraphs at issue allege facts upon which the success of a claim depends.

Count I. Count I of the cross-complaint alleges a violation of Section 21(a) of the Act, 415 ILCS 5/21(a) (1998), which provides:

> No person shall:
>
> a. Cause or allow the open dumping of any waste.

The central allegations establishing this violation are found at paragraphs 33, 34 and 39 of count I, which allege:

> 33. The Anests were legal owners of the Site and the USTs at the Site until September, 1986, and were the operators of the USTs at the Site until August, 1985.
>
> 34. Releases of gasoline and waste oil occurred from the USTs at the Site while the Anests were the owners of the Site and the owners and operators of the USTs at the site.
>
> * * *
>
> 39. The Anests, in allowing gasoline and waste oil to leak from the USTs at the Site while the Anests were owners and operators of the Site and/or the USTs at the Site, violated [Section 21(a)].

The Abraham respondents have also alleged that the Anests should be held responsible for releases that may have taken place after the Anests no longer owned the site. This allegation is found in paragraph 43 of count I, one of the paragraphs that the Anests seek to have stricken. Paragraph 43 provides:

> 43. If and to the extent that any releases of gasoline took place after the Abrahams took legal title to the Site, those releases were in legal effect caused by the Anests, and in particular by the Anests' fraud and breach of contract, in that the Anests misrepresented the true nature of the work done at the Site, the true condition of the USTs at the Site, and who would be responsible for leaks from the USTs at the Site, thereby preventing and deterring the Abrahams from responding to the possibility that the USTs could be leaking. In this way the Anests further violated 415 ILCS 5/21(a), which provides that: "No person shall: (a) Cause of allow the open dumping of any waste."

In Paragraph 43, the Abraham respondents assert that any violation that occurred during their ownership of the site in question occurred as a result of misrepresentations made by the Anests, which "prevented and deterred" the Abraham respondents from responding to the possibility that the USTs could be leaking. The Board concludes that these paragraphs could support the allegations that the Anests caused the open dumping of waste. This paragraph will not, therefore, be stricken.

We turn then to the remaining paragraphs of count I to which the Anests have objected. The other paragraphs of count I to which the Anests object provide:

> 14. The Illinois Environmental Protection Agency ("IEPA") opened a file on the release that was reported to the IEPA in December, 1984. In December, 1984, IEPA instructed the Anests to test the USTs at the Site for leaks, assess the geology and hydrology of the Site, and submit a plan to clean up the release. Neither the IEPA nor the Anests have any record that the Anests complied with these instructions.
>
> 15. On January 10, 1985, the McHenry County Health Department issued a notice to the Anests informing them that the presence of gasoline on the stream was a violation of the Health Ordinance in McHenry County. That notice also ordered the Anests to start corrective measures to stop gasoline from seeping into the stream. No actions were taken by the Anests in response to this notice of violation.
>
> 16. In 1985, the Abrahams started discussions with the Anests for the possible purchase of the Site by the Abrahams. The Anests told the Abrahams that there had been a leak of gasoline from the USTs at the station in January 1984, that the leak had been repaired, and that the gasoline that was seeping out of the ground into the stream in late 1984 and 1985 was gasoline that was left over from the earlier repaired leak. The Anests further told the Abrahams that the USTs had been recently tested and were in good condition. The Anests also

told the Abrahams that any problems with the USTs and the environmental condition of the premises had been resolved, that the actions taken had been approved by the IEPA, and that product recover wells dug at the Site by the Anests' agents had been inspected by and approved by IEPA.

17. In the course of discussions concerning the sale of the Site, the Anests did not tell the Abrahams that the wells that the Anests had excavated were too shallow to intercept any gasoline. The Anests did not tell the Abrahams that gasoline had been absent from the stream for ten months before reappearing, or that the IEPA and the McHenry County Health Department had both ordered response action to be taken in response to the December, 1984 release, or that the response actions ordered by the IEPA and the McHenry County Health Department had not been taken.

18. In reasonable reliance upon the representations and non-disclosures by the Anests, in June, 1985 the Abrahams entered into a real estate purchase contract to buy the Site from the Anests. In that contract, the Anests represented to the Abrahams that they had "received no notices from any city, village or other governmental authority of zoning, building, fire or health code violations in respect to the real estate that have not been heretofore corrected."

***

20. The Articles of Agreement also contained a warranty and representation from the Anests to the Abrahams that all equipment and appliances on the Site were "in operating condition."

21. In February, 1986, the McHenry County Health Department reported gasoline leaking from the bank near the Site into a stream and contacted Mr. Abraham. Mr. Abraham contacted the Anests and informed them of the problem. The Anests' agent then, notwithstanding the fact that the site was in the possession of the Abrahams, put new booms into the stream to capture this seepage.

***

23. At a September 5, 1986 closing to conclude the transfer of title contemplated in the Articles of Agreement, the Anests tendered a bill of sale to the Abrahams for all the equipment at the Site which would have, among other things, made the Abrahams responsible for the USTs. The Abrahams refused to sign the bill of sale. Peter Anest then asked who would be responsible for the tank leaks. He was told by his counsel, in the presence of the Abrahams, that the Anests would be responsible. Thereafter, the Abrahams paid the balance due on the Articles of Agreement and the Anests conveyed title to the Site to the Abrahams.

24. On two occasions in 1987, Mr. Abraham was informed in writing by IEPA of the existence of an alleged seepage of gasoline into the stream. The Abrahams informed IEPA that, pursuant to the representations made by the Anests at the time the Abrahams contracted to purchase the Site, the alleged problem was the responsibility of, and was to be resolved by, the Anests.

25. According to the Complaint in this matter, in 1987 and 1988 the IEPA contacted Mr. Abraham concerning the gasoline seeping into the stream near the Site. Mr. Abraham continued to indicate that the problem was the responsibility of the Anests.

* * *

28. In 1990, the Abrahams filed suit against the Anests in McHenry County Circuit Court for (among other things) fraud and breach of contract relating to the sale of the Site, and particularly fraud and breach of contract with regard to the representations made by the Anests concerning the releases, the condition of the USTs, the regulatory status of the leaks and the Site, and who was to be responsible for leaks from the USTs. The suit was assigned case number 90 L 0354.

29. Following discovery, the case was tried to a jury. The jury awarded the Abrahams judgment in an amount equal to all the costs that the Abrahams had incurred and paid up to the date of the trial in testing and repairing the USTs and in addressing the environmental problems at the Site.

30. The costs allegedly incurred by the State of Illinois in constructing interceptor trenches had not at that time been the subject of a claim by the State of Illinois, and those costs were consequently not presented to the jury or otherwise addressed in the McHenry County litigation between the Abrahams and the Anests.

31. The Anests appealed the jury's award to the Second Judicial Circuit Appellate Court. The appeal was assigned Case Number 2-94-1062. The appeal was resolved in the Abrahams' favor, and the award against the Anests was upheld without published opinion in 1995. The judgment was then satisfied by the Anests.

Paragraph 14 has no apparent relation to the alleged violation of Section 21(a). What the Illinois Environmental Protection Agency (Agency) may have told the Anests, and what they may or may not have done in response, would not impact whether or not the Anests caused or allowed the open dumping of waste. Paragraph 15 is likewise not material to count I. The actions of the McHenry County Health Department do not impact whether the violation occurred. Nor does the Anests' response have any relevance; at the time of the Anests' alleged inaction, disposal of the waste identified

by the McHenry County Health Department would have already occurred. For the same reason, paragraph 21 is not material.

Paragraphs 16, 17, 18, 20, and 23, however, are material. Paragraph 43 alleges that omissions and misrepresentations by the Anests prevented the Abraham respondents from responding to the leaking USTs. Paragraphs 16, 17, 18, 20 and 23 detail the alleged misrepresentations and omissions. These paragraphs will not be stricken.

Paragraphs 24 and 25 are not material to count I. Communications between the Agency and the Abraham respondents have no bearing on whether the Anests violated Section 21(a). Nor are paragraphs 28 through 31 material. The circuit court action between the Abraham respondents and the Anests involved different claims than those presented here. See People v. State Oil Co. (August 19, 1999), PCB 97-103, slip op. at 3.

Based on this analysis of count I, the Board will not strike paragraphs 16, 17, 18, 20, 23 or 43. The remaining paragraphs to which the Anests object are not material to count I, but because they are realleged in counts II and IV we must evaluate their materiality to the violations charged in those two counts.

Count II. Count II of the cross-complaint alleges a violation of Section 21(d)(2) of the Act, 415 ILCS 5/21(d)(2) (1998), which provides:

> No person shall:
>
> * * *
>
> d. Conduct any waste-storage, waste-treatment, or waste-disposal operation:
>
> ***
>
> 2. in violation of any regulations or standards adopted by the Board under this Act[.]

The central allegations establishing this violation are found at paragraphs 43 and 44 of count II of the cross-complaint, which allege

> 43. The Anests did not comply and have not complied with the orders of the IEPA, issued in 1984 and thereafter, to respond to releases at the Site.
>
> 44. The Anests have therefore violated applicable statutory and regulatory reporting and response requirements, and have thereby violated [Section 21(d)(2)].

Reviewing the remaining paragraphs to which the Anests have objected, the Board concludes that paragraph 14 is relevant to count II. Paragraph 14 specifies Agency orders with the Anests allegedly have not complied. Paragraph 14 will not be stricken. Once again, however, paragraphs 15

and 21 are not material to the alleged violation. The McHenry County health ordinance and the directives of the McHenry County Health Department are not "regulations or standards adopted by the Board," and the Anests' alleged failure to comply with them thus cannot support a violation of Section 21(d)(2). Neither are paragraphs 24 and 25 material to the alleged violation. Communications between the Abraham respondents and the Agency are not relevant to whether the Anests violated regulations. Likewise, the subsequent litigation between the Abraham respondents and the Anests has no bearing on this alleged violation; paragraphs 28 through 31 are again not material.

Count IV. Count IV of the cross-complaint alleges a violation of Sections 12(d) and 12(f) of the Act, 415 ILCS 5/12(d), (f) (1998), which provide:

> No person shall:
>
> * * *
>
> d. Deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard.
>
> * * *
>
> f. Cause, threaten or allow the discharge of any contaminant into the waters of the State . . . without [a National Pollutant Discharge Elimination System (NPDES)] permit for point source discharges issued by the [Illinois Environmental Protection] Agency under Section 39(b) of this Act[.]

The central allegations establishing this violation are found at paragraphs 36 and 37 of count IV of the cross-complaint, which allege:

> 36. The Anests did not have an NPDES permit allowing them to discharge contaminants into waters of the State of Illinois, and in particular did not have an NPDES permit allowing them to discharge contaminants from the Site into the waters of the State of Illinois.
>
> 37. By allowing the discharge of oil and gasoline into the waters of the State, and by allowing oil and gasoline to remain in the waters of the State and in soils adjacent to waters of the State, the Anests have violated [Section 12(d) and Section 12(f)].

As in count I, the Abraham respondents have also alleged that the Anests should be held responsible for releases that may have taken place after the Anests no longer owned the site. This allegation is found in paragraph 38 of count IV, one of the paragraphs that the Anests seek to have stricken. Paragraph 38 provides:

> 38. If and to the extent that any violations of 415 ILCS 5/12(d) and 5/12(f) took place after the Abrahams became the owners and/or operators of the Site,

> those violations were in legal effect caused by the Anests' fraud and breach of contract, in that the Anests misrepresented the true nature of the work done at the Site, the true condition of the USTs at the Site, and who would be responsible for leaks from the USTs at the Site, thereby preventing and deterring the Abrahams from responding to the possibility that the USTs could be leaking. As a consequence, the Anests should be found liable under 415 ILCS 5/12(d) and 5/12(f) for the costs which the State of Illinois seeks to recover from the Abrahams in this action.

For the same reasons as paragraph 43 of count I, the Board concludes that paragraph 38 of count IV is material to the alleged violation of Section 12(f); *i.e.*, if proven, the allegations in paragraph 38 could support a finding that the Anests caused the discharge of contaminants into waters of the State without an NPDES permit.

Turning to the remaining paragraphs to which the Anests have objected, the Board concludes that paragraph 15 is material to the alleged violation of Section 12(d). The Anests' alleged failure to take action in response to the McHenry County Health Department's directions is relevant to the duration of the water pollution hazard the Anests are alleged to have created. For the same reason, paragraph 14 is also material to count IV, as well as count II. We also note that paragraphs 16, 17, 18, 20, and 23 are material to count IV, for the same reason that they are material to count I.

The remaining paragraphs to which the Anests object, however, are not material to count IV. Once again, conversations between the Abraham respondents and the Agency, and litigation between the Abraham respondents and the Anests, have nothing to do with the violations alleged in count IV. Consequently, paragraphs 24, 25, 28, 29, 30 and 31 will be stricken because they are not material to any claim alleged in the cross-complaint.

Prayer for Witness and Attorney Fees

Like count III, the portions of the cross complaint seeking witness and attorney fees mirror provisions in the "First Amended Cross-Complaint" that were stricken by the Board. See People v. State Oil Co. (August 19, 1999), PCB 97-103, slip op. at 5-6. The Board's position regarding these claims for relief has not changed. For the reasons stated in its order of August 19, 1999, the Board grants the Anests' motion to strike the provisions of the complaint seeking witness and attorney fees.

CONCLUSION

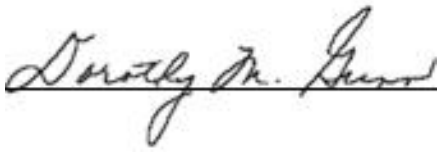
For the foregoing reasons, complainant's "Motion to Strike Affirmative Defense of Laches" is denied.

For the foregoing reasons, the Anests' "Motion to Strike and Dismiss" is granted in part and denied in part. Count III of the "Second Amended Cross Complaint" is stricken in its entirety. The following other paragraphs of the cross-complaint are stricken: 24, 25, 28, 29, 30 and 31 of count I

and realleged in counts II and IV. Those portions of the prayers for relief seeking witness and attorney fees are stricken. The cross-complaint in its entirety, however, is not dismissed.

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 18th day of May 2000 by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board