ILLINOIS POLLUTION CONTROL BOARD
June 5, 2003

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 96-98
	)	(Enforcement – Water)
SKOKIE VALLEY ASPHALT, CO., INC., EDWIN L. FREDERICK, JR., individually and as owner and president of SKOKIE VALLEY ASPHALT, CO., INC., and RICHARD J. FREDERICK, individually and as owner and vice president of SKOKIE VALLEY ASPHALT, CO., INC.	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by T.E. Johnson):

On July 26, 2002, the Office of the Attorney General, on behalf of the People of the State of Illinois, (complainant) filed a second amended complaint against Skokie Valley Asphalt Co., Inc., Edwin L. Frederick, Jr., and Richard J. Frederick (respondents). The complaint alleges that respondents violated Sections 12 (a) and (f) of the Environmental Protection Act (Act) (415 ILCS 5/12(a), (f) (2002)), as well as 35 Ill. Adm. Code 302.203, 304.105, 304.106, 305.102(b), 309.102(a), and 309.104(a). The complaint alleges that the violations concern respondents' facility at Grayslake Village, Lake County.

On April 18, 2003, the complainant filed a motion to strike or dismiss respondents' affirmative defenses. The respondents filed a response to the motion to strike or dismiss affirmative defenses on April 30, 2003. On April 23, 2003, Skokie Valley Asphalt Co. (Skokie Valley) filed a motion to dismiss Edwin L. Frederick, Jr. and Richard J. Frederick (collectively Fredericks). On May 7, 2003, the complainant filed a motion for leave to file a reply to the response to the motion to strike or dismiss affirmative defenses, along with a reply. Also on May 7, 2003, the complainant filed a motion to strike Skokie Valley's motion to dismiss or, in the alternative, a response to the motion to dismiss.

For the reasons articulated below, the Board strikes the first and second affirmative defenses, but will allow the third affirmative defense to stand. Further, the Board denies Skokie Valley's motion to dismiss Edwin L. Frederick, Jr. and Richard J. Frederick from the complaint.

BACKGROUND

On July 26, 2002, the complainant filed a second amended complaint. That complaint added the Fredericks as respondents. The second amended complaint alleged that the Fredericks

violated Sections 12(a) and (f) of the Environmental Protection Act (Act) (415 ILCS 5/12(a), (f) (2002)), as well as Sections 302.203, 304.105, 304.106, 305.102(b), 309.102(a), and 309.104(a) of the Board's regulations. The complaint alleged that the Fredericks falsified discharge monitoring reports, submitted a late application for a National Pollutant Discharge Elimination System (NPDES) permit, failed to comply with sampling and reporting requirements in their NPDES permits, discharged oil into a drainage ditch, and violated NPDES permit effluent limits.

On October 17, 2002, the Board accepted the People's second amended complaint. People v. Skokie Valley Asphalt, Co., PCB 96-98, slip op. at 3 (Oct. 17, 2002). The final sentence of that order read: "The respondents may file an answer as provided in Section 103.204(d) of the Board's rules using October 17, 2002 as the date the complaint was received." People v. Skokie Valley Asphalt, Co., PCB 96-98, slip op. at 3 (Oct. 17, 2002). The respondents hand-delivered their answer to the second amended complaint, including the affirmative defenses in question, on December 20, 2002. On that same day, the complainant filed a motion to deem facts admitted and for summary judgment. On January 3, 2003, the respondents filed a response to the motion to deem facts admitted and for summary judgment. The complainant filed a reply on January 17, 2003.

On March 20, 2003, the Board issued an order that denied the complainant's motion for summary judgment, accepted the respondents' answer into the record, and directed the hearing officer to proceed to hearing. People v. Skokie Valley Asphalt, Co., PCB 96-98 (Mar. 20, 2003). Complainant's April 18, 2003 motion to strike or dismiss respondents' affirmative defenses was filed within 30 days after the Board accepted the respondents' answer and affirmative defenses, and was, therefore, timely pursuant to Section 101.506 of the Board's procedural rules. *See* 35 Ill. Adm. Code 101.506.

The affirmative defenses to the second amended complaint in question are:

1. The complainant was not diligent in pursuing the filing of a claim against respondents Edwin L. Frederick, Jr. and Richard J. Frederick.

2. The respondents Edwin W. Frederick, Jr. and Richard J. Frederick have been misled and prejudiced in their ability to respond to the complaint by the complainant's unjustifiable delay in adding them as respondents.

3. Under the doctrines of *laches* and equitable estoppel, the complainants should not be allowed to amend its complaint to include respondents Edwin L. Frederick, Jr. and Richard J. Frederick, as respondents and these respondents should not be required to respond to said complaint.

All three affirmative defenses have been challenged by the complainant in its motion to strike. On March 28, 2003, the hearing officer set a discovery schedule that ends on September 22, 2003. No hearing is currently scheduled.

PRELIMINARY MATTERS

On May 7, 2003, the complainant filed a motion for leave to file reply to respondents' response to the motion to strike or dismiss. The complainant contends that it will suffer material prejudice if the Board does not grant it leave to file a reply. However, the complainant does not indicate how it will be prejudiced if not granted leave to file a reply. No response to the motion for leave to file a reply has been received by the Board.

The Board's procedural rules provide that a movant will not have the right to reply except as permitted by the Board in order to prevent material prejudice. 35 Ill. Adm. Code 101.500(e). The complainant asserts that material prejudice will result if the motion for leave to file is not granted, but provides no further information. A bald assertion that material prejudice will result is not sufficient for the Board to grant a motion for leave to file. Accordingly, the motion is denied, and the reply will not be accepted.

MOTION TO STRIKE AFFIRMATIVE DEFENSES

Complainant's Arguments

In its motion, the complainant asserts that the second amended complaint differs from the first only in the addition of the Fredericks as respondents. Mot. at 2. The complainant argues the first two affirmative defenses do not raise new matters that would defeat the second amended complaint, and should be stricken. Mot. at 7. The complainant asserts that the Fredericks were added in order to hold the proper parties responsible, and that its diligence in adding the Fredericks as respondents does not constitute an affirmative defense. Mot. at 6. The complainant contends that no description of how or why the Fredericks were misled and prejudiced in their ability to respond to the complaint was made. *Id*. The complainant asserts that a hearing date in this matter has not been set and that a hearing is not anticipated until the fall of 2003. Mot. at 7.

The complainant argues that respondents have not pled facts sufficient to establish the affirmative defense of estoppel. Mot. at 7. Specifically, the complainant argues that respondents have not shown how the complainant has benefited or how the Fredericks have changed their position to their detriment based on complainant's conduct. Mot. at 7-8. The complainant contends that no extraordinary circumstances exist in this matter, so the defense of *laches* as applied to a governmental entity performing its function correctly must be stricken. Mot. at 8-9.

Respondents' Arguments

The respondents argue that the rules and case law cited by the complainant are not relevant to this matter and the respondents cannot be held to such standards. Resp. at 2. Further, the respondents assert that the failure of the complainant to state a relevant legal basis for its motion results in a motion that need not be countered by the respondents nor granted by the Board. *Id*. The respondents contend that Section 103.204(d) of the Board's rules provides that any affirmative defenses must be plainly set forth prior to hearing in the answer or in a supplemental answer, and that the affirmative defenses in question are sufficiently presented

under this standard. *Id*. Finally, the respondents contend that they have alleged new facts sufficient to defeat the claims of the complainants. *Id.*

Discussion

A motion to strike an affirmative defense admits well-pled facts constituting the defense, only attacking the legal sufficiency of the facts. International Insurance Company 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 (1989). "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, 242 Ill. App. 3d at 631, 609 N.E.2d at 854 (citation omitted).

The Board has addressed *laches* as an affirmative defense in the past, both striking the affirmative defense (*see, e.g.*, People v. Big O, Inc., PCB 97-130, slip op. at 1.), (Apr. 17, 1997) and allowing the affirmative defense (*see* State Oil and Royster-Clark, PCB 02-08, slip op. at 5-6 (Jan. 24, 2002)).

Laches is an equitable doctrine that 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 respondents' third affirmative defense also contains an assertion of equitable estoppel. A party may invoke the doctrine of equitable estoppel when it "reasonably and detrimentally relies on the words or conduct of another." Brown's Furniture v. Wagner, 171 Ill. 2d 410, 432, 665 N.E.2d 795, 806 (1996) (citation omitted). The doctrine of estoppel "should not be invoked against a public body except under compelling circumstances, where such invocation would not defeat the operation of public policy." People v. Chemetco, PCB 96-76, slip op. at 10 (Feb. 19, 1998) (quoting Gorgess v. Daley, 256 Ill. App. 3d 143, 147, 628 N.E.2d 721, 725 (1st Dist. 1993)). The Illinois Supreme Court is reluctant to apply the doctrine of estoppel against the State because it "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 (citation omitted); *see also* Chemetco, PCB 96-76, slip op. at 10-11(Feb. 19, 1998).

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

A party seeking to estop the government must prove three factors. First, it must prove that it relied on a government agency, its reliance was reasonable, and that it incurred some detriment as a result of the reliance. Chemetco, PCB 96-76, slip op. at 11(Feb. 19, 1998). Second, the party "must show that the government agency made a misrepresentation with knowledge that the representation was untrue." *Id.*; *see also* Medical Disposal Services v. PCB, 286 Ill. App. 3d 562, 677 N.E.2d 428 (1st Dist. 1997). Third, "the government body must have taken some affirmative act; the unauthorized or mistaken act of a ministerial officer will not estop the government." Chemetco, PCB 96-76, slip op. at 11 (Feb. 19, 1998); *see also* Brown's Furniture, 171 Ill. 2d at 431, 665 N.E.2d at 806.

Although listed as separate affirmative defenses, affirmative defenses one and two are essentially the basis for the third affirmative defense. Accordingly, respondents' first two affirmative defenses do not allege new facts or arguments that, if true, will defeat complainant's claim even if all allegations in the complaint are true. If the allegations in affirmative defenses one and two are accepted as true, *laches*, as asserted in the third affirmative defense, may be a defense available to the respondents. Accordingly, the Board will strike affirmative defenses one and two, but will consider them solely as part of affirmative defense number three.

In its third affirmative defense**,** respondents invoked the doctrines of *laches* and equitable estoppel. The complainant argues that respondents have not pled facts sufficient to establish the affirmative defense of estoppel. Specifically, the complainant argues that respondents have not shown how the complainant has benefited or the Fredericks have changed their position to their detriment based on complainant's conduct.

The Board finds that respondents have pleaded sufficient facts to raise the affirmative defense of *laches* and equitable estoppel. Respondents have alleged, 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.

MOTION TO DISMISS EDWIN L. FREDERICK, JR. AND RICHARD J. FREDERICK

Skokie Valley's Arguments

Skokie Valley moves to dismiss the Fredericks, individually and as officers of Skokie Valley Asphalt Co., Inc., under the doctrines of *laches* and equitable estoppel. Mot. at 1. Skokie Valley argues that *laches* precludes the assertion of a claim by a litigant whose unreasonable delay in raising that claim has prejudiced the opposing party. Mot. at 1-2. Skokie Valley asserts that it is unquestionable that the complainant has not been diligent in bringing its allegation against the Fredericks. Mot. at 3. As a result, contends Skokie Valley, the Fredericks have been prejudiced in their ability to produce records, recall witnesses and remember events relevant to their defense. *Id.*

Skokie Valley argues that *laches* can be applied to a state under compelling circumstances, even when the state is acting in a governmental capacity. Mot. at 4. Skokie Valley asserts that the compelling circumstances in this matter include the fact that the Fredericks would be required to defend themselves against charges of alleged incidents that

occurred up to 17 yeas ago, five years after the Fredericks terminated their employment with the entity involved and three years after discovery related to the liability of the parties was completed. Mot. at 5. Skokie Valley states further that compelling circumstances include the fact that a party in its position should have "every right to rely on the representations and actions of the State to conclude that it will not be required to defend itself against allegations raised well after their retirement and after it had justifiably determined that it had completed its responses to discovery requests." Mot. at 5.

Skokie Valley argues that the complainant's amendment of the complaint to include the Fredericks without adding allegations is an attempt to extend discovery in this matter, increase the respondents' cost and effort in countering the complainant's procedural maneuvering, and further delay the hearing and final determination by the Board. Mot. at 5. Skokie Valley attaches separate affidavits by the Fredericks to support its position.

Complainant's Arguments

The complainant moves to strike or, in the alternative, dismiss Skokie Valley's motion. The complainant argues that the Board's procedural rules provide that all motions to dismiss any pleading filed with the Board must be filed within 30 days after the service of the challenged document, and that Skokie Valley should have filed the motion to dismiss by November 18, 2002, instead of April 23, 2003. Mot. at 2.

Next, the complainant contends that nothing in the Board's rules bars the complainant from adding additional respondents in an emended complaint, and that no statute of limitations on adding respondents exists. Mot. at 3. Further, the complainant asserts that this matter is still in the midst of discovery, and that a hearing date has not been set. *Id*. The complainant notes that only the Fredericks supplied information for the responses to interrogatories on Skokie Valley; only the Fredericks were identified as officers or members of Skokie Valley's Board of Directors; and only the Fredericks are listed to testify for Skokie Valley in this matter. Mot. at 4. Further, the complainant asserts that the response to interrogatories indicates that the Fredericks are "responsible for the entire [Skokie Valley] operation." Mot. at 4.

The complainant contends that as corporate officers responsible for the entire operation of the facility in question, and as those listed as witnesses to contest the alleged violations, neither of the Fredericks have been misled by being named as respondents in this cause. Mot. at 4.

The complainant argues that it is a public body attempting to perform its governmental function of protecting the environment, and that no compelling circumstances exist in this matter to invoke *laches* and estop the complainant from performing its function. Mot. at 7.

Discussion

For purposes of ruling on a motion to dismiss, all well pled facts contained in the pleading must be taken as true and all inferences from them must be drawn in favor of the nonmovant. People v. Stein Steel Mills Services, Inc., PCB 02-1 (Nov. 15, 2001). A complaint

should not be dismissed for failure to state a claim unless it clearly appears that no set of facts could be proven under the pleadings that would entitle complainant to relief. Shelton v. Crown, PCB 96-53 (May 2, 1996).

Skokie Valley's motion was untimely filed. In its October 17, 2002 order, the Board accepted the People's second amended complaint, and directed the respondents to file an answer as provided in Section 103.204(d) of the Board's rules using October 17, 2002 as the date the complaint was received. People v. Skokie Valley Asphalt, Co., PCB 96-98, slip op. at 3 (Oct. 17, 2002). The respondents properly filed their answer to the second amended complaint on December 20, 2002.

Section 101.506 of the Board's procedural rules provide that all motions to strike, dismiss or challenge the sufficiency of any pleading filed with the Board must be filed within 30 days after the service of the challenged document. 35 Ill. Adm. Code 101.506. In this case, the Board specifically ordered that October 17, 2002 be used as the date on which the complaint was received. Accordingly, any motion to dismiss should have been filed on or before November 18, 2002. The motion is, therefore, not timely and will not be accepted.

Furthermore, even if the motion were properly before the Board, the motion to dismiss would be denied. Considering the facts in the complaint as true and drawing all inferences from them in favor of the complainant, Skokie Valley has not proved the elements of *laches* or estoppel. Skokie Valley has not shown that the Fredericks reasonably and detrimentally relied on the words or conduct of the State, nor been misled or prejudiced because of the delay in adding the Frederick's to the complaint, nor has Skokie Valley provided the Board with any compelling circumstances in this matter.

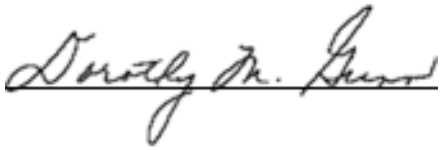
As the complainant asserts, the response to interrogatories indicates that the Fredericks are responsible for the entire Skokie Valley operation. Only the Fredericks are identified as officers of Skokie Valley, and only the Fredericks are supplied information for the responses to interrogatories on Skokie Valley.

CONCLUSION

The Board denies the complainant's motion for leave to file a reply to respondents' response to the motion to strike or dismiss. The complainant's motion to strike affirmative defenses is granted in part. The first two affirmative defenses are stricken, but the third affirmative defense remains. Skokie Valley's motion to dismiss the Fredericks from this cause is denied.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 5, 2003, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board