BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois	)	
Complainant,	)	
v.	)	No. PCB 04-9
AARGUS PLASTICS, INC., an Illinois corporation,	)	
Respondent.	)	

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on March 5, 2004, the People of the State of Illinois filed with the Illinois Pollution Control Board Complainant's Motion to Strike or Dismiss Respondent's Defenses, true and correct copies of which are attached and hereby served upon you.

Respectfully submitted,

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois Complainant, v. AARGUS PLASTICS, INC., an Illinois corporation, Respondent.	)	No. PCB 04-9

COMPLAINANT'S MOTION TO STRIKE OR DISMISS RESPONDENT'S DEFENSES

Complainant, PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois, pursuant to Section 101.506 of the Board's Procedural Regulations and Section 2-615 of the Illinois Code of Civil Procedure, moves for an order striking or dismissing the defenses of Respondent, AARGUS PLASTICS, INC. In support of its motion, Complainant states as follows:

INTRODUCTION

On July 17, 2003 Complainant, the People of the State of Illinois, filed an eight-count complaint against Respondent AARGUS PLASTICS, INC. alleging violations of the Illinois Environmental Protection Act ("Act"), Pollution Control Board ("Board") regulations, Illinois Environmental Protection Agency ("Illinois EPA") regulations, and Respondent's operating permits concerning Respondent's polyethylene bag manufacturing plant

located at 1415 Redeker Road, Des Plaines, Cook County, Illinois ("facility").

Specifically, Complainant alleged that Respondent has been applying inks to polyethylene bags at its facility that contain over 40% VOM by volume (Count I); failing to use compliant ink and failing to submit progress reports in a timely manner (Count II); violating volatile organic material emission standards (Count III); submitting inaccurate and incomplete annual emissions reports (Count IV); violating Emission Reduction Market System regulations (Count V); failing to submit annual compliance certifications (Count VI); failing to notify Illinois EPA of noncompliance with its Clean Air Act Permit Program ("CAAPP") permit (Count VII); and failing to comply with terms and conditions of its CAAPP permit (Count VIII).

On February 3, 2004, Respondent filed its answer and thirteen affirmative defenses to the complaint. Complainant moves herein to strike or dismiss all of the defenses for the reasons outlined below.

LEGAL STANDARD

An affirmative defense is a

> matter to be asserted by (respondent) which, assuming the complaint to be true, constitutes a defense to it. An affirmative defense is a response to a (complainant's) *legal* right to bring an action, as opposed to attacking the truth of the claim. Black's Law Dictionary at 60 (6th Ed. 1990).

An affirmative defense gives color to the opposing party's claim and then asserts a new matter by which the apparent right is defeated. Ferris Elevator Company, Inc. v. Neffco, Inc., 285 Ill.App.3d 350, 354, 674 N.E.2d 449, 452 (3rd Dist. 1996). In other words, an affirmative defense confesses or admits the cause of action alleged by Complainant, then seeks to avoid it by asserting a new matter not contained in the complaint and answer. Worner Agency, Inc. v. Doyle, 121 Ill.App.3d 219, 222-223, 459 N.E.2d 633, 635-636 (4th Dist. 1984).

None of Complainant's defenses attack the truth of the allegations in the complaint. Thus, Respondent's defenses are all affirmative defenses, even though some are not properly pled and none are legally valid.

The facts in an affirmative defense must be pled with the same specificity as required by Complainant's pleading to establish a cause of action. International Insurance Co. v. Sargent & Lundy, 242 Ill. App. 3d 614, 630, 609 N.E.2d 842, 853 (1st Dist. 1993).

ARGUMENT

Affirmative Defense 1

Affirmative defense 1 states:

> Complainant's complaint fails to state a claim upon which relief can be granted.

This affirmative defense has no merit. In each count of the complaint, Complainant alleges violations of the Act, the

regulations promulgated thereunder, or Respondent's CAAPP permits. If the Board subsequently finds that Respondent has committed any of the violations alleged in the Complaint, the Board can award relief in the form of civil penalties to Complainant pursuant to Section 42(h) of the Act, 415 ILCS 5/42(h) (2004). Respondent's first affirmative defense is extremely premature and assumes that the Board would decide in Respondent's favor with respect to every allegation in the complaint.

In addition, the first affirmative defense is not pled with the same degree of specificity as the complaint. Respondent fails to state *why* Complainant fails to state a claim upon which relief can be granted. For these reasons, Respondent's first affirmative defense should be stricken.

Affirmative Defense 2

Affirmative defense 2 states:

> The IEPA did not issue and serve a violation notice upon Aargus within 180 days after it became aware of the alleged violations, as required by Section 31(a)(1) (of the Act). Accordingly, the Board lacks jurisdiction over this matter.

This is simply not true. Illinois EPA issued two violation notices ("VNs") on Aargus within 180 days after becoming aware of the alleged violations. The Illinois EPA issued the first VN on September 13, 2001 regarding failure to submit an annual compliance certification. Illinois EPA issued the second VN on

January 31, 2002 regarding other violations after a review of its files.

The Board has struck identical and/or similar affirmative defenses in the past in holding that the 180 day requirement is directory rather than mandatory in nature. Facts regarding the date that Illinois EPA became aware of the alleged violation do not affect the Board's jurisdiction over an enforcement matter. See People v. Peabody Coal Co., PCB 99-134 (June 5, 2003), citing People v. Crane, PCB 01-176 (May 17, 2001).

Any attempts by Respondent to argue lack of jurisdiction based on when Illinois EPA became aware of the violations alleged in the Complaint must fail. The Board has proper jurisdiction over this matter. Therefore, Respondent's second affirmative defense should be stricken.

Affirmative Defense 3

Affirmative defense 3 states:

> Complainant's claims are barred, in whole or in part, by the applicable statute of limitations.

For starters, this affirmative defense must fail due to lack of specificity; Respondent does not even bother to indicate which statute of limitations is applicable or provide any legal citation to it.

Simply put, there is no statute of limitations for violations of the Act, the regulations promulgated thereunder, or

violations of permits issued pursuant to the Act. See Pielet Brothers Trading, Inc. v. Pollution Control Board, 110 Ill. App. 3d 752, 757-758, 442 N.E.2d 1374, 1378-1379 (5th Dist. 1982); People v. State Oil *et al*, PCB 97-103 (May 18, 2000). Therefore, Respondent's third affirmative defense should be stricken.

Affirmative Defenses 4 and 5

Affirmative defenses 4 and 5 state:

> Complainant's claims are barred, in whole or in part, by the doctrine of laches because the Agency had known of the alleged violations for years, but waited until January 31, 2002 to issue and serve a Violation Notice upon Aargus.
>
> Complainant's claims have been waived, in whole or in part, because Complainant knew or should have known of its rights to take enforcement action against Aargus, but relinquished those rights by failing to take action.

To begin with, the fourth affirmative defense is only partially accurate since Illinois EPA issued its first VN on Aargus on September 13, 2001.

Affirmative defenses 4 and 5 concern laches. Laches assumes that due to Complainant's delay in asserting a right, Respondent is prejudiced. City of Rochelle v. Suski, 206 Ill. App. 3d 497, 501, 504 N.E.2d 933, 936 (2nd Dist 1990).

It is well settled in the law that laches may not be invoked against a governmental body which is attempting to perform its governmental function, or in actions involving public rights.

Laches should only be invoked in "extraordinary circumstances". Cook County v. Chicago Magnet Wire Corp., 152 Ill. App.3d 726, 727-28, 504 N.E.2d 904, 905 (1st Dist. 1987). In Pielet, 110 Ill. App. 3d at 758, 442 N.E. 2d at 1379, the Court found that the public has a right to a healthy and safe environment. This is also consistent with language found in Article XI of the Illinois Constitution and Section 2(b) of the Act, 415 ILCS 5/2(b)(2002).

There are no extraordinary circumstances in this matter, and Complainant is performing its governmental function of protecting the environment. There was no unreasonable delay on the part of Complainant with respect to pursuing the alleged violations against Respondent. Respondent has not demonstrated any prejudice due to any supposed delay on Complainant's part in serving Respondent with a VN. See People v. QC Finishers, Inc., PCB 01-7 (June 19, 2003). Respondent cannot sustain an affirmative defense of laches, and thus the fourth and fifth affirmative defenses must be stricken.

Affirmative Defenses 6 and 11

Affirmative defenses 6 and 11 state:

> Complainant's claims are barred, in whole or in part, by the doctrine of estoppel because the Agency regularly inspected the Aargus facility, knew or should have known of the alleged violations, yet did not inform Aargus that it was allegedly violating applicable requirements. Consequently, the Agency authorized Aargus's practices and operations.

> The IEPA failed to fairly advise Aargus of the applicable requirements and did not provide fair notice of those requirements.

Although affirmative defense 6 is clearly estoppel, affirmative defense 11 is also estoppel, even though Respondent does not label it as such.

The estoppel defense is similar to the laches defense: Respondent is claiming that Complainant's action or inaction, upon which Respondent relied, has prejudiced Respondent.

Estoppel

> applies to preclude a party from asserting a right which might otherwise have existed as against another person when the other person relies in good faith on the party's conduct and is led thereby to change its position for the worst. Hartford Accident and Indemnity Co., v. D.F. Bast, Inc., 56 Ill. App. 3d 960, 962, 372 N.E.2d 829, 832 (1st Dist 1977).

In seeking to successfully prove the affirmative defense of estoppel against the government, Respondent must prove three factors. First, Respondent must prove that it relied on a government agency, the reliance was reasonable, and that such reliance led that party to suffer some prejudice. Second, Respondent must show that the government agency made a misrepresentation knowing that the misrepresentation was untrue. And third, Respondent must show that the government agency engaged in an affirmative act. People v. Skokie Valley Asphalt Co., Inc., PCB 96-98 (June 5, 2003), motion for reconsideration denied July 24, 2003.

Much like laches,

> Where governmental activities are concerned, the (estoppel) doctrine cannot be invoked except in extraordinary circumstances. . .The paramount consideration is the right of the people and estoppel will not be applied to defeat a policy adopted to protect the public. County of Cook v. Patka, 85 Ill. App.3d 5, 12, 405 N.E.2d 1376, 1380 (1980).

Complainant has clearly informed Respondent of its violations of the Act, regulations, and its permit via the Section 31 process and the filing of the complaint. Respondent has not shown that Complainant made any knowing misrepresentations. In addition, Respondent does not allege any affirmative act on the part of Complainant that prejudiced Respondent. There are no extraordinary circumstances in the instant matter. The government here is trying to protect the public's right to a healthy and safe environment by enforcing environmental laws and regulations against alleged violators such as Respondent. Respondent's affirmative defenses of estoppel, both labeled in affirmative defense 6 and unlabeled in affirmative defense 11, must therefore be stricken.

Affirmative Defenses 7 and 8

Affirmative defenses 7 and 8 state:

> The alleged violations did not result in any economic benefit to Aargus.
>
> The alleged violations did not result in any harm or threat of harm to the environment.

These affirmative defenses speak to the imposition of

penalties rather than the underlying allegations in the complaint. The Board has stricken such affirmative defenses in the past for this reason, and thus the Board should strike affirmative defenses 7 and 8 herein. See People v. Geon Co., Inc., PCB 97-62 (Oct. 2, 1997), citing People v . Midwest Grain Products of Illinois, Inc., PCB 97-179 (Aug. 21, 1997) and People v. Douglas Furniture Co. of California, Inc., PCB 97-133 (May 1, 1997).

Affirmative Defenses 9 and 10

Affirmative defenses 9 and 10 state:

> The alleged violations did not impair IEPA's administration of the air permit program.
>
> Water-based inks do not represent RACT for printers like Aargus.

Again, these affirmative defenses do not address the underlying allegations in the complaint. As in Geon, the Board should strike affirmative defenses 9 and 10 herein.

Affirmative Defenses 12 and 13

Affirmative defenses 12 and 13 state:

> The IEPA did not include in its Violation Notice any allegation that Aargus violated any requirement of the 1994 Permit. This portion of Count III is therefore barred by the Act.
>
> The IEPA did not include in its Violation Notice any allegation regarding a failure on the part of Aargus to hold the appropriate number of ATUs at the end of the reconciliation period in 2001. This portion of Count V is therefore barred by the Act.

Although these allegations in the Complaint were not included in the VNs, they are still valid allegations.

There is no prohibition anywhere in the Act barring the Attorney General from alleging violations against Respondent on her own. In the first paragraph of every count, Complainant states that the allegations of violations are brought "by the Attorney General *on her own motion*" (emphasis added) and upon the request of the Illinois EPA. Thus Illinois EPA may refer alleged violations of the Act, the regulations, and Respondent's permit to the Attorney General pursuant to Section 31 of the Act, 415 ILCS 5/31 (2002), and the Attorney General may allege violations of the Act on her own. See Peabody Coal (June 5, 2003) citing People v. Eager-Picher-Boge, PCB 99-152 (July 22, 1999). The allegations that Respondent refers to in affirmative defenses 12 and 13 were brought by the Attorney General on her own motion. For these reasons, affirmative defenses 12 and 13 must be stricken.

CONCLUSION

All of Respondent's affirmative defenses have serious flaws which render them invalid. All of Respondent's affirmative defenses should therefore be stricken or dismissed.

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. LISA MADIGAN,
Attorney General of the
State of Illinois,

By: Joel J. Sternstein

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CERTIFICATE OF SERVICE

I, JOEL J. STERNSTEIN, an Assistant Attorney General, certify that on the 5th day of March 2004, I caused to be served by First Class Mail the foregoing Complaint to the parties named on the attached service list, by depositing same in postage prepaid envelopes with the United States Postal Service located at 100 West Randolph Street, Chicago, Illinois 60601.

Joel J. Sternstein

JOEL J. STERNSTEIN