ILLINOIS POLLUTION CONTROL BOARD
June 18, 2009

INDIAN CREEK DEVELOPMENT COMPANY, an Illinois partnership, individually as beneficiary under trust 3291 of the Chicago Title and Trust Company, dated December 15, 1981, and the CHICAGO TITLE AND TRUST COMPANY, as trustee under title 3291, dated December 15, 1981,	)	
Complainant,	)	
v.	)	PCB 07-44
	)	(Citizen's Enforcement – Land, Water)
BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY, a Delaware corporation,	)	
Respondent.	)	

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

The Board today does not decide the merits of this citizen's enforcement action, but instead rules on several procedural matters. Indian Creek Development Company and the Chicago Title and Trust Company (collectively, Indian Creek) filed a three-count complaint against Burlington Northern Santa Fe Railway Company (BNSF) on December 4, 2006 (Comp.). The case, which has not been to hearing, concerns a 1993 release of diesel fuel at the BNSF property in Kane County.

In the complaint, Indian Creek alleges that BNSF violated Sections 12(a), 12(d), and 21(e) of the Environmental Protection Act (Act) (415 ILCS 5/12(a), 12(d), 21(e) (2006)). Comp. at 7, 10, 14. According to Indian Creek, BNSF violated these provisions by (1) threatening and eventually causing and allowing the ongoing discharge of diesel fuel contaminants onto the soil and into the groundwater on and under Indian Creek's property so as to cause and tend to cause water pollution; (2) depositing diesel fuel contaminants upon the land so as to create a water pollution hazard on the BNSF and Indian Creek properties; and (3) abandoning and disposing of diesel fuel and diesel fuel contaminants under the BNSF property and the Indian Creek property, neither of which meets the requirements for a waste disposal site. *Id*. Indian Creek seeks an order from the Board requiring, among other things, that BNSF cease and desist from further violations, that remediation be performed at the BNSF and Indian Creek properties, and that BNSF reimburse Indian Creek for past and future costs and expenses related to the alleged contamination. *Id*. at 8-10, 11-13, 14-16.

On March 15, 2007, the Board accepted the complaint for hearing, denying BNSF's motion to dismiss the complaint as duplicative. *See* Indian Creek Development Co. v.

Burlington Northern Santa Fe Railway Co., PCB 07-44, slip op. at 6 (Mar. 15, 2007). BNSF filed an answer to the complaint on May 17, 2007, raising six purported "affirmative defenses" (Ans.). Indian Creek filed a motion to strike the affirmative defenses on June 25, 2007 (Mot.). BNSF filed a response to the motion on July 9, 2007, which includes a request for leave to amend the affirmative defenses in the event Indian Creek's motion to strike is granted (Resp.). With the hearing officer's leave, Indian Creek filed a reply to the response on July 19, 2007 (Reply). The hearing officer has since conducted 11 telephonic status conferences, most recently on April 30, 2009, while the parties have discussed settlement and outstanding issues.

For the reasons below, the Board grants Indian Creek's motion to strike all six alleged affirmative defenses. Two of the purported affirmative defenses are not affirmative defenses, while the other four have not been pled with adequate factual specificity. The Board grants in part and denies in part BNSF's unopposed request for leave to file a supplemental answer remedying the factual deficiencies. To that end, BNSF has until July 20, 2009, to plead with sufficient facts the affirmative defenses of the five-year statute of limitations, waiver, estoppel, and laches.

In this opinion, the Board first provides the claimed affirmative defenses as set forth in the answer. The Board then describes the motion to strike affirmative defenses and the responsive pleadings, after which the Board discusses and rules on the motion to strike and the request for leave to file a supplemental answer. The Board's order follows the opinion.

BNSF "AFFIRMATIVE DEFENSES"

BNSF asserts six "affirmative defenses" in the answer:

> First Affirmative Defense. Complainant knew or reasonably should have known of the alleged contamination on its property more than five years prior to filing the complaint. Accordingly, complainant's claims must be dismissed pursuant to the applicable statute of limitations. 735 ILCS 5/13-205.
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> Second Affirmative Defense. Complainant has failed to mitigate its damages.
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> Third Affirmative Defense. Complainant knew or reasonably should have known of the alleged contamination on its property many years ago. Complainant chose not to bring this lawsuit for many years after having such knowledge. As such, Complainant has waived its rights to make claims against BNSF based on the alleged contamination.
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> Fourth Affirmative Defense. Complainant knew or reasonably should have known of the alleged contamination on its property many years ago. Complainant chose not to bring this lawsuit for many years after having such knowledge. As such, Complainant is estopped from asserting claims against BNSF based on the alleged contamination.

> Fifth Affirmative Defense. Complainant knew or reasonably should have known of the alleged contamination on its property many years ago. Complainant chose not to bring this lawsuit for many years after having such knowledge. As such, the doctrine of laches prohibits complainant from asserting claims against BNSF based on the alleged contamination.
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> Sixth Affirmative Defense. Complainant's purported damages have not been identified with sufficient particularity, to the extent such damages even exist. Ans. at 11-12.

INDIAN CREEK MOTION TO STRIKE

Indian Creek argues that BNSF's "alleged affirmative defenses are wholly conclusory and not pled with sufficient particularity." Mot. at 3. Noting that "[n]ot even the elements of the alleged affirmative defenses have been pled," Indian Creek asserts that it is "not entirely possible to assess whether all of the alleged affirmative defenses are actually affirmative defenses at all!" *Id*. Because Illinois is a fact-pleading jurisdiction, continues Indian Creek, a claim or defense "must allege sufficient ultimate facts to satisfy each element of a cause of action or affirmative defense." *Id*. Indian Creek argues that with BNSF's claimed affirmative defenses, BNSF has "completely failed to plead other than sheer conclusions" and therefore the affirmative defenses must be stricken. *Id*. at 5.

BNSF RESPONSE

BNSF acknowledges that Illinois is a fact-pleading rather than a notice-pleading jurisdiction, but argues that "only ultimate facts need b[e] pled, not evidence." Resp. at 2. BNSF states that its affirmative defenses are "based, in part, on the extensive allegations made in the Complaint." *Id*. at 1. BNSF further argues that Indian Creek does not claim to be uninformed of the substance of the defenses or unable to reasonably determine the nature and basis for the defenses. *Id*. at 3. Finally, BNSF requests leave to "amend the affirmative defenses to include additional facts" should the Board decide to grant Indian Creek's motion to strike. *Id*. at 4.

INDIAN CREEK REPLY

Indian Creek counters that BNSF's approach to pleading affirmative defenses here "is no accident," but rather "gamesmanship" that is "intended to unduly broaden discovery, the scope of the hearing, keep Indian Creek in the dark and increase the time as well as the expense of these proceedings." Reply at 2. Indian Creek maintains that its effort to respond to BNSF's affirmative defenses is "substantially hampered by the lack of factual allegations." *Id*. at 3. According to Indian Creek, if BNSF's "deliberately vague and unclear" affirmative defenses are allowed to stand, the facts can be "shifted to whatever suits the BNSF at whatever point in time it ultimately chooses to state those facts," the scope of discovery is "pretty much whatever the BNSF wants it to be at any point in time," and the affirmative defenses are "virtually immune from motions such as summary judgment." *Id*. Further, Indian Creek takes issue with BNSF purportedly relying on facts alleged in the complaint, all while BNSF's answer denies some of

those very facts and BNSF's affirmative defenses fail to even reference any facts from the complaint. *Id*. at 5-6.

DISCUSSION

Below, the Board discusses and rules upon, in turn, Indian Creek's motion to strike affirmative defenses and BNSF's request for leave to file a supplemental answer.

Indian Creek Motion to Strike

The Board first sets forth the standards it applies when ruling on a motion to strike affirmative defenses, after which the Board addresses BNSF's two purported affirmative defenses relating to damages. The Board then analyzes BNSF's four claimed affirmative defenses that share the allegation that Indian Creek knew or reasonably should have known of the alleged contamination long ago and yet failed to timely bring this action.

Standards

An affirmative defense is a "response to a [complainant's] claim which attacks the [complainant's] *legal* right to bring an action, as opposed to attacking the truth of claim." Farmers State Bank v. Phillips Petroleum Co., PCB 97-100, slip op. at 2, n.1 (Jan. 23, 1997), (emphasis in original) (quoting *Black's Law Dictionary*); *see also* Worner Agency v. Doyle, 121 Ill. App. 3d 219, 221, 459 N.E.2d 633, 635 (4th Dist. 1984) (if the pleading does not admit the opposing party's claim but rather attacks the sufficiency of that claim, it is not an affirmative defense). In an affirmative defense, respondent alleges "new facts or arguments that, if true, will defeat . . . [complainant'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). Stated another way, a valid affirmative defense gives color to complainant's claim, but then asserts new matter that defeats an apparent right of complainant. *See* Condon v. American Telephone and Telegraph Co., 210 Ill. App. 3d 701, 569 N.E.2d 518, 523 (2nd Dist. 1991).

Under the Board's procedural rules, "[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). The "facts establishing an affirmative defense must be pleaded with the same degree of specificity required by a plaintiff to establish a cause of action." International Insurance Co. v. Sargent and Lundy, 242 Ill. App. 3d 614, 630, 609 N.E.2d 842, 853 (1st Dist. 1993). A complaint's allegations are "sufficiently specific if they reasonably inform the defendants by factually setting forth the elements necessary to state a cause of action." People *ex rel*. William J. Scott v. College Hills Corp., 91 Ill. 2d 138, 145, 435 N.E.2d 463, 467 (1982)).

Illinois requires fact-pleading, not the mere notice-pleading of federal practice. *See* Adkins v. Sarah Bush Lincoln Health Center, 129 Ill. 2d 497, 518, 544 N.E.2d 733, 743 (1989); College Hills, 91 Ill. 2d at 145, 435 N.E.2d at 466-67. Fact-pleading does not require a pleader to set out its evidence: "'To the contrary, only the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts.'" People *ex rel*. Fahner v. Carriage

Way West, Inc., 88 Ill. 2d 300, 308, 430 N.E.2d 1005, 1008-09 (1981), quoting Board of Education v. Kankakee Federation of Teachers Local No. 886, 46 Ill. 2d 439, 446-47 (1970). "[L]egal conclusions unsupported by allegations of specific facts are insufficient." LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297, 1303 (2nd Dist 1993). To set forth:

> a good and sufficient claim or defense, a pleading must allege ultimate facts sufficient to satisfy each element of the cause of action or affirmative defense pled. *** In determining the sufficiency of any claim or defense, the court will disregard any conclusions of fact or law that are not supported by allegations of specific fact. Richco Plastic Co. v. IMS Co., 288 Ill. App. 3d 782, 784-85, 681 N.E.2d 56, 58 (1st Dist. 1997).

A motion to strike an affirmative defense admits well-pled facts constituting the defense, as well as all reasonable inferences that may be drawn therefrom, and attacks only the legal sufficiency of the facts. *See* Raprager v. Allstate Insurance Co., 183 Ill. App. 3d 847, 854, 539 N.E.2d 787, 791 (2nd Dist. 1989); *see also* International Insurance, 242 Ill. App. 3d 614, 630, 609 N.E.2d 842, 853-54. Where the well-pled facts of an affirmative defense and reasonable inferences drawn therefrom raise the possibility that the party asserting them will prevail, the defense should not be stricken. *See* Raprager, 183 Ill. App. 3d at 854, 539 N.E.2d at 791.

Damages

BNSF raised two "affirmative defenses" concerning damages:

> Second Affirmative Defense. Complainant has failed to mitigate its damages.
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> ***
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> Sixth Affirmative Defense. Complainant's purported damages have not been identified with sufficient particularity, to the extent that such damages even exist. Ans. at 11-12.

Neither of these responses attacks Indian Creek's legal right to bring the cause of action for alleged violations of the Act. *See* Farmers State Bank, PCB 97-100, slip op. at 2, n.1. BNSF does not raise new matter that, if true, would defeat Indian Creek's claims that BNSF violated the Act. *See* Community Landfill, PCB 97-193, slip op. at 3. Instead, the two purported affirmative defenses relate to remedy. *See* People v. Texaco Refining and Marketing, Inc., PCB 02-3, slip op. at 6 (Nov. 6, 2003) (alleged affirmative defense "pertains to remedy, not the cause of action" and therefore "does not defeat the People's claims of water pollution or open dumping"); People v. Geon Co., Inc., PCB 97-62, slip op. at 4 (Oct. 2, 1997) (mitigation factor is not an affirmative defense to claim that violation occurred); People v. Midwest Grain Products of Illinois, Inc., PCB 97-179, slip op. at 5 (Aug. 21, 1997) ("mitigation issues are only considered once a violation of the Act has been found").

To the extent BNSF does not admit Indian Creek's claim but instead attacks the sufficiency of that claim, BNSF has not pled an affirmative defense. *See* Doyle, 121 Ill. App. 3d at 221, 459 N.E.2d at 635. Further, within 30 days after service, BNSF could have, but did not,

file a motion to "challenge the sufficiency" of Indian Creek's complaint. 35 Ill. Adm. Code 101.506.

The Board finds that BNSF's "Second Affirmative Defense" and "Sixth Affirmative Defense" are not affirmative defenses at all. The Board therefore grants Indian Creek's motion to strike these two alleged affirmative defenses. Nothing in this order precludes BNSF from presenting evidence or arguments concerning these matters for any remedy analysis by the Board. *See* Texaco, PCB 02-3, slip op. at 6; *see also* 415 ILCS 5/33(c), 42(h) (2006), 35 Ill. Adm. Code 741.

Knew or Reasonably Should Have Known

Four of the affirmative defenses pled by BNSF are based on the allegation that Indian Creek knew or reasonably should have known of the claimed contamination some time ago and was too late in thereafter filing the complaint.

Five-Year Statute of Limitations. With the "First Affirmative Defense," BNSF states:

> First Affirmative Defense. Complainant knew or reasonably should have known of the alleged contamination on its property more than five years prior to filing the complaint. Accordingly, complainant's claims must be dismissed pursuant to the applicable statute of limitations. 735 ILCS 5/13-205.

The statute of limitations cited by BNSF reads as follows:

> Five year limitation. Except as provided in Section 2-725 of the "Uniform Commercial Code", approved July 31, 1961, as amended, and Section 11-13 of "The Illinois Public Aid Code", approved April 11, 1967, as amended, actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued. 735 ILCS 5/13-205 (2006).

An answer must plainly set forth the facts constituting an affirmative defense. *See* 35 Ill. Adm. Code 103.204(d). This entails alleging ultimate facts sufficient to satisfy each element of the affirmative defense pled. *See* Richco Plastic, 288 Ill. App. 3d at 784-85, 681 N.E.2d at 58. BNSF has not specifically alleged when Indian Creek's cause of action accrued. The "discovery rule" provides that a statute of limitations begins to run not on the date that an injury actually occurred, but on the date that the injured person knew or reasonably should have known of the injury and that the injury was wrongfully caused. *See* Caseyville Sport Choice, LLC v. Seiber, PCB 08-30, slip op. at 3-4 (Oct. 16, 2008) and Union Oil Company of California v. Barge-Way Oil Company, Inc., PCB 98-169, slip op. at 4-5 (applying discovery rule to statute of limitations in citizen enforcement actions), each citing Hermitage Corp. v. Contractors Adjustment Co., 166 Ill. 2d 72, 651 N.E.2d 1132 (1995). BNSF states that Indian Creek "knew or reasonably

should have known" of the claimed contamination of the Indian Creek property more than five years before Indian Creek filed the complaint, but BNSF alleges no specific facts to support this assertion.

The Board finds that BNSF has not sufficiently pled the ultimate facts on this affirmative defense and therefore grants Indian Creek's motion to strike the "First Affirmative Defense." For purposes of this ruling, the Board need not determine whether the five-year statute of limitations is applicable to the instant action. *See* Caseyville, PCB 08-30, slip op. at 3-4 (applied statute of limitations to citizen enforcement action seeking only cost recovery as remedy); Union Oil, PCB 98-169, slip op. at 2 (same); Lake County Forest Preserve District v. Ostro, PCB 92-80, slip op. at 2-3 (July 30, 1992) (found statute of limitations inapplicable to enforcement action brought by citizen complainant acting in the nature of a "'private attorney general'" to protect the public's rights); Landfill Emergency Action Committee v. McHenry County Sanitary Landfill and Recycling Center, Inc., PCB 85-9, slip op. at 1-2 (Mar. 22, 1985) (same).

Waiver, Esoppel, and Laches. BNSF asserts alternately that Indian Creek has "waived" its right to make claims against BNSF ("Third Affirmative Defense"), is "estopped" from asserting claims against BNSF ("Fourth Affirmative Defense"), and is prohibited by "the doctrine of laches" from asserting claims against BNSF ("Fifth Affirmative Defense"), all because Indian Creek:

> knew or reasonably should have known of the alleged contamination on its property many years ago, [and] [c]omplainant chose not to bring this lawsuit for many years after having such knowledge. Ans. at 10.

The elements of the affirmative defenses of waiver, estoppel, and laches are well established. Waiver is "the intentional relinquishment of a known right." Ryder v. Bank of Hickory Hills, 146 Ill. 2d 98, 104, 585 N.E.2d 46, 49 (1991). "There must be both knowledge of the existence of the right, and an intention to relinquish it." Pantle v. Industrial Commission, 61 Ill. 2d 365, 372, 335 N.E.2d 491, 496 (1975). "Waiver may be made by an express agreement or it may be implied from the conduct of the party who is alleged to have waived a right." Ryder, 146 Ill. 2d at 105, 585 N.E.2d at 49. A party claiming estoppel must demonstrate that:

> (1) the other person misrepresented or concealed material facts; (2) the other person knew at the time he or she made the representations that they were untrue; (3) the party claiming estoppel did not know that the representations were untrue when they were made and when they were acted upon; (4) the other person intended or reasonably expected that the party claiming estoppel would act upon the representations; (5) the party claiming estoppel reasonably relied upon the representations in good faith to his or her detriment; and (6) the party claiming estoppel would be prejudiced by his or her reliance on the representations if the other person is permitted to deny the truth thereof. Geddes v. Mill Creek Country Club, Inc., 196 Ill. 2d 302, 313-14, 751 N.E.2d 1150, 1157 (2001).

Laches is an equitable doctrine that bars relief when a defendant has been misled or prejudiced due to a plaintiff's delay in asserting a right. *See* 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. *See* Van Milligan v. Board of Fire & Police Commissioners, 158 Ill. 2d 84, 89, 630 N.E.2d 830, 833 (1994).

The facts constituting an affirmative defense must be plainly set forth in the answer. *See* 35 Ill. Adm. Code 103.204(d). Therefore, the ultimate facts sufficient to satisfy each element of the affirmative defense must be alleged. *See* Richco Plastic , 288 Ill. App. 3d at 784-85, 681 N.E.2d at 58. The Board finds that BNSF has not sufficiently pled the ultimate facts on waiver, estoppel, or laches. Accordingly, the Board grants Indian Creek's motion to strike the "Third Affirmative Defense," the "Fourth Affirmative Defense," and the "Fifth Affirmative Defense."

BNSF Request for Leave to Amend

BNSF's response states that if the Board "is inclined to grant the Motion to Strike," BNSF "requests leave to amend the affirmative defenses to include additional facts." Resp. at 4. Indian Creek's reply did not address BNSF's request. The Board denies BNSF's request as to the alleged affirmative defenses concerning damages because, as found above, they are not affirmative defenses.

The Board grants BNSF's request for leave to amend the affirmative defenses of the five-year statute of limitations, waiver, estoppel, and laches. *See* City of Yorkville v. Hamman Farms, PCB 08-96, slip op. at 8 (Apr. 2, 2009) (granting leave for the filing of amendment to remedy factual deficiencies of dismissed count); People v. Riverdale Recycling, Inc., PCB 03-73, slip op. at 3-4 (Sept. 18, 2003) (after dismissing affirmative defenses, allowed 30 days' leave to file "a supplemental answer outlining additional facts in support of each affirmative defense asserted"). At this juncture of the proceeding, the filing of these amendments is timely and should not result in prejudice or surprise. *See* Marsh v. Nellessen, 235 Ill. App. 3d 998, 1001-03, 602 N.E.2d 90, 92 (2nd Dist. 1992). By July 20, 2009, BNSF may file a supplemental answer to plead these four affirmative defenses with sufficient allegations of ultimate facts. *See* 35 Ill. Adm. Code 103.204(d). Indian Creek may file a motion responsive to the supplemental answer in accordance with 35 Ill. Adm. Code 101.506.

CONCLUSION

For the reasons above, the Board grants Indian Creek's motion to strike BNSF's six alleged affirmative defenses, and grants in part and denies in part BNSF's request for leave to amend the affirmative defenses.

ORDER

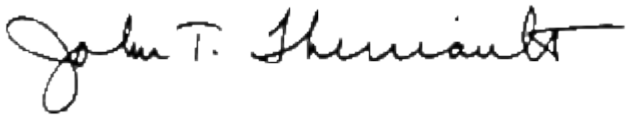
1. The Board grants Indian Creek's motion to strike the affirmative defenses pled in BNSF's answer.

2. The Board grants in part and denies in part BNSF's request for leave to amend the answer. By July 20, 2009, which is the first business day following the 30th day

after the date of this order, BNSF may file a supplemental answer to plead the affirmative defenses of the five-year statute of limitations, waiver, estoppel, and laches.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on June 18, 2009, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board