ILLINOIS POLLUTION CONTROL BOARD
March 3, 2016

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 16-61
	)	(Enforcement-Air)
AMSTED RAIL COMPANY, INC.,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (By J.A. Burke):

The People of the State of Illinois (People) initiated this enforcement case against Amsted Rail Company (Amsted) pursuant to Section 31 of the Illinois Environmental Protection Act (Act). 415 ILCS 5/31 (2014). The People's thirteen counts against Amsted allege air emission regulation and permit violations. The complaint concerns Amsted's steel foundry in Granite City, Madison County. Amsted moves to dismiss six of the thirteen counts—counts I through VI. For the reasons discussed below, the Board denies Amsted's motion and orders Amsted to answer counts I through VI of the complaint by May 2, 2016. The Board does not rule on the People's motion to strike affirmative defenses.

PROCEDURAL HISTORY AND PRELIMINARY MATTERS

On November 16, 2015, the People filed a thirteen-count complaint against Amsted. On January 15, 2016, Amsted filed its motion to dismiss counts I through VI of the complaint (Mot.). On the same day, Amsted answered the complaint, asserting affirmative defenses to the remaining counts—counts VII through XIII. The People filed their opposition to Amsted's motion (Resp.) on January 29, 2016. Amsted filed a reply in support of its motion together with its request for leave to file such a reply (Mot. Leave) on February 9, 2016. The People responded on February 11, 2016, urging the Board to deny Amsted leave to file a reply or, alternatively, seeking to file a surreply.

Amsted requests leave to reply because the People cite irrelevant or distinguishable cases in its response. Mot. Leave at 1. The Board's procedural rules bar replies except to prevent material prejudice. 35 Ill. Adm. Code 101.500(e). The Board finds that barring Amsted the right to reply may result in material prejudice. The Board therefore grants the motion. Additionally, the Board allows the People's surreply. The Board considers both the reply and the surreply below.

DISCUSSION

Amsted contends that counts I through VI should be dismissed because they accrued more than five years before the filing of the complaint and, therefore, are time-barred. Mot. at 1.

The Board looks to Illinois civil practice law for guidance when considering motions to dismiss. 35 Ill. Adm. Code 101.100(b). The Illinois Supreme Court directs that, as to motions to dismiss, "the proper inquiry is whether the well-pleaded facts of the complaint, taken as true and construed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted." Loman v. Freeman, 229 Ill.2d 104, 109 (2008). "It is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief." Smith v. Central Illinois Regional Airport, 207 Ill. 2d 578, 584-85 (2003).

Counts I through VI

The first four counts of the complaint each allege violations occurred at an August 2008 inspection. Count I alleges that Amsted failed to maintain and inspect ductwork from August 27, 2008 through December 28, 2008, in violation of 35 Ill. Adm. Code 212.324(f)(1-3). Count II alleges that Amsted failed to keep maintenance records, in violation of 35 Ill. Adm. Code 212.324(g)(1). Count III alleges that Amsted failed to keep records of road sweeping, in violation of 35 Ill. Adm. Code 212.316(g)(1), (2)(C). Count IV alleges that Amsted failed to adhere to its fugitive emissions program, in violation of 35 Ill. Adm. Code 212.309(a). The People also allege in each count a violation of Section 9(a) of the Act.

Counts V and VI relate to construction of a sand screen, which received a permit in 2009. Count V alleges that Amsted constructed a sand screen without obtaining a construction permit, in violation of 35 Ill. Adm. Code 201.142 and Section 9(b) of the Act. Count VI alleges that Amsted did not pay a fee for the sand screen construction permit, in violation of Section 9.12(a) of the Act.

Statute of Limitation

Amsted argues that a five-year statute of limitation bars counts I through VI because they arose before November 16, 2010, which is five years before the People filed their complaint on November 16, 2015. Mot. at 4. Amsted recognizes that neither the Act nor any Board regulation provides a limitation period for enforcement actions under the Act. *Id.* However, Amsted contends that, under the Illinois Code of Civil Procedure, all civil actions, other than those with a specifically provided limitation period, must be brought within five years. *Id.*, citing 735 ILCS 5/13-205 (2014). The People disagree and argue that Section 13-205 does not bar counts I through VI. Resp. at 2.

Amsted argues that the Board in Union Oil Company of California v. Barge-Way Oil Company, PCB 98-169 (Jan. 7, 1999), accepted that the five-year statute of limitation may apply to an enforcement case. Mot. at 4. However, the Board did not apply the five-year limitation to bar that case. *Id.* at 8.

Amsted also notes barring this enforcement action based on the statute of limitation will not harm the public interest. Mot. at 4. Amsted identifies three factors used to determine whether a governmental entity is protecting a public interest: (1) the effect of the interest on the public; (2) the obligation of the governmental unit to act on behalf of the public; and (3) the extent to which public revenues are expended. *Id.* at 5, citing Champaign County Forest Preserve District v. King, 281 III.App.3d 197, 200 (4th Dist. 1997), citing Board of Education v. A, C, & S, Inc., 131 111.2d 428, 476 (1989). Amsted and the People agree that the third factor is not relevant to this case. Mot. at 7; Resp. at 6.

As to the first factor, Amsted contends that counts I through VI have no impact on a public interest. Mot. at 5. Amsted argues that there is no effect on the public from punishing alleged past violations that have since been corrected *Id.* at 5-6.

As to the second factor, Amsted argues that the People have no obligation to pursue counts I through VI. Mot. at 6. Amsted describes the allegations as "seven-year-old document violations" long-since corrected which the People have no obligation to enforce. *Id.* Amsted distinguishes three environmental cases where the government acted in the public interest on the basis that the three cases involved harm to the environment. *Id.* Here, by contrast, the violations were corrected and were document-type violations. *Id.*

The People argue for a bright line rule that no statute of limitation applies when the People bring an enforcement action pursuant to Section 31. Resp. at 3, 5. The People maintain that enforcement of the Act to protect the environment is necessarily protecting a public interest, as provisions of the Illinois Constitution and the Act illustrate. *Id.* at 3-4, citing 415 ILCS 5/2(a)(ii) (2014), Ill. Const. 1970, art. XI, § 1. The People also note that Section 4(e) of the Act requires the Illinois Environmental Protection Agency (IEPA) to investigate violations of the Act and bring enforcement actions. *Id.* at 6, citing 415 ILCS 5/4(e) (2014). The People argue that the passage of time after a violation is discovered does not remove its obligation to enforce the violation. *Id.*

Board Decision

The parties correctly note that neither the Act nor any Board regulation imposes a statute of limitation to bring an enforcement action under Section 31 of the Act. In previous environmental enforcement claims brought under Section 31 of the Act, the Board has ruled on motions concerning the Illinois Code of Civil Procedure's five-year limitation period. For example, in Caseyville Sport Choice v. Seiber, *et al.*, the Board denied a motion to dismiss finding that, when taking allegations pled in the complaint as true (such as the date complainant became aware of the alleged violations), the Board was unconvinced that the five-year statute of limitation barred the case. PCB 08-30, slip op. at 3-4 (Oct. 16, 2008). In Union Oil Co. of California v. Barge-Way Oil Co., *et al.*, the Board analyzed the five-year statute of limitation, but denied both a motion to dismiss and a motion for summary judgment based on the five-year statute of limitation due to insufficient information on when complainant should have been aware of the alleged violations. PCB 98-169, slip op. at 4 (Feb. 15, 2001); PCB 98-169, slip op. at 5 (January 7, 1999). More recently, the Attorney General argued that Section 13-205 should bar the enforcement action in Johns Manville v. IDOT, however the Board declined to dismiss

the case. PCB 14-3, slip op. at 8 (Sept. 4, 2014). In sum, on motions for dismissal and summary judgment, the Board to date has declined to bar a claim under the five-year statute of limitation based on the circumstances of the individual cases.

The Illinois Supreme Court has held that a statute of limitation is not applicable to the State when it is asserting a public right, as distinguished from a private right, unless the terms of a statute of limitation expressly include the State. Clare v. Bell, 378 Ill. 128, 130-131 (1941). Section 13-205 of the Illinois Code of Civil Procedure does not expressly include the State. Therefore, the question is whether the State, here represented by the Attorney General and IEPA, is asserting a public right on behalf of all people of the State or private rights on behalf of a limited group. *See* Pielet Bros. Trading, Inc. v. PCB, 110 Ill. App. 3d 752, 758 (5th Dist. 1982).

This complaint does not concern any private right. To the contrary, counts I through VI identify specific violations of Board air emission regulations and the Act. Further, the People request statutory penalties authorized by Section 42 of the Act for violations of the Act payable to the Environmental Protection Trust Fund. Section 42 of the Act further provides that such funds are only to be used in compliance with the Environmental Protection Trust Fund Act, which requires that funds be used for purposes of environmental protection and related enforcement programs. 30 ILCS 125/1 (2014).

Through these allegations, the Attorney General and IEPA claim they are protecting the public's right to a clean environment, not to protect private rights of a limited group or the State acting in a self-interested capacity. Amsted argues that these counts are not serving a public interest because they allege wholly-past document violations; however, these aspects do not lead to the conclusion that the People are not seeking to protect a public interest. Recordkeeping, maintenance, and permit requirements are integral to the Act and to protecting public health and the environment. Furthermore, the lack of allegations of substantial environmental harm does not negate that the People are serving the public interest in ensuring compliance with the Act as alleged in counts I through VI.

CONCLUSION

The Board denies Amsted's motion to dismiss. Section 13-205 does not time-bar the People in bringing counts I through VI before the Board. The Board orders Amsted to answer counts I through VI of the complaint by May 2, 2016.

IT IS SO ORDERED.

I, Don A. Brown, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 3, 2016, by a vote of 5-0.

Don A. Brown, Assistant Clerk
Illinois Pollution Control Board