BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, Complainants,	)	
vs.	)	PCB # 01-07 (Enforcement-Air)
QC FINISHERS, INC., an Illinois Corporation, Respondent.	)	

NOTICE OF FILING

To:
Ms. Paula Becker Wheeler
Assistant Attorney General
Office of the Attorney General
188 West Randolph Street, 20th Floor
Chicago, Illinois 60601

Clerk, Illinois Pollution Control Board
100 W. Randolph Street
State of Illinois Center
Suite 11-500
Chicago, Illinois 60601

Mr. Bradley Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the original and nine copies of a MOTION FOR RECONSIDERATION OF BOARD ORDER on behalf of QC Finishers, Inc., a copy of which is hereby served upon you.

Respectfully submitted,

Heidi E. Hanson

Dated July 29, 2003
Heidi E. Hanson
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	PBC # 01-07
vs.	)	(Enforcement-Air)
	)	
Q C FINISHERS, INC., an Illinois Corporation,	)	
	)	
Respondent.	)	

MOTION FOR RECONSIDERATION OF BOARD ORDER

NOW COMES Respondent, QC Finishers, Inc., by and through its attorney, H. E. Hanson Esq. P.C. and moves the Board for reconsideration of its June 19, 2003 order in this matter pursuant to 35 Ill. Adm. Code 101.520. In support thereof Respondent states as follows:

The Board's order granted in part Complainant's Motion to Strike several of Respondent's Affirmative Defenses. Respondent received the Board's order on June 24, 2003.

First General Affirmative Defense - Laches

Respondent's affirmative defense of laches sets forth in 26 paragraphs that the state had failed to exercise due diligence in pursing its right to enforce the Act. In addition, special circumstances existed in that Respondent was part of a small, easily discernible, group that the IEPA had a duty to communicate with. IEPA was aware that such communication would aid the in enforcement of the Act and yet delayed in such communication - to Respondent's detriment.

The Board dismissed the affirmative defense on the ground that Respondent had "not sufficiently pled that the People unreasonably delayed in bringing this action." and that respondent did not allege that there was a delay in bringing the suit".

The two elements of laches as stated in the Board's order are lack of due diligence by the party asserting the claim and prejudice to the opposing party. The first element has also been described by the Board as "delay in asserting a right". People v. Stein Steel Mills Service, Inc.,. PCB 02-1 page 5 (April 18, 2002). People v. John Crane, Inc. PCB 01-76 page 8 (May 17, 2001).

A "right" may be broader than a lawsuit. The state has a right to require permits. It has the right to require emission controls. It can assert those rights in ways other than

bringing suit. It can assert them through oral or written communications. (See People v. John Crane, PCB 01-76 in which the Board sustained an affirmative defense that plead laches in the basis that of the Agency's "failure to file its NOV on a timely basis.")

It is the delay in such communication that is complained of in paragraphs 6 through 13, 16 through 21, and 24 through 26 of the defense. Failure to plead a late lawsuit should not defeat this affirmative defense. Respondent has pled that the People delayed in asserting a right.

WHEREFORE Respondent requests that this affirmative defense be reinstated.

Second General Affirmative Defense - Estoppel

The Board struck the affirmative defense of estoppel citing the fact that respondent had not alleged that any individual acting on behalf of the state misrepresented or concealed a material fact and that there must be an affirmative act by the state to induce reliance. The authority cited was a 1998 case in the First District. Elson v. State farm Fire and Casualty Company 295 Il. App. 3d 1, 691, N. E. 2d 807, (1st Dist.. 1998).

The Illinois Supreme Court had recently discussed estoppel in Geddes et al v. Mill Creek Country Club, Inc. etal. 196 Ill. 2d 302,751 N. E. 2d 1150, 256 Ill. Dec. 313 (IL S. Ct. May 24, 2001. It cited with approval the statement in an earlier case that "estoppel may arise from silence as well as words...It is the duty of a person having a right and seeing another about to commit an act infringing on it to assert its right." The Geddes case is discussed in greater detail in the Response to Motion to Dismiss Affirmative Defenses pages 3 and 4.

The Supreme Court has found in essence that the elements of estoppel cited in Elson no longer represent the law in Illinois.

Analyzing Q C Finishers defense against the standard articulated in Geddes will reveal that Respondent has sufficiently pled the relevant elements of estoppel. The state by its silence induced Respondent to rely on the statements of the Cook County inspector who told Q C Finishers that it was in compliance. Q C Finishers additionally relied on the silence of the state and took no further action and was thereby prejudiced. Therefore as matter of equity the state should not be heard to complain of the noncompliance that was caused in part by its own silence in the face of its duty to act.

WHEREFORE the Board should reinstate this affirmative defense.

Fourth General Affirmative Defense - Waiver

The board struck Respondent's fourth general defense on two grounds.

First, it held that, based on the same 1975 court case cited by Complainant, that waiver requires an intentional relinquishment of a known right. The Board however has held, much more recently in People v. Douglas Furniture, PCB 97-133, Ill ENV LEXIS 22 *10 (May 1, 1997) that "the doctrine of waiver applies when a party intentionally relinquishes a known right or conduct warrants an inference of such relinquishment" (emphasis added). Q C Finishers defense invoked the second clause. In Q C Finishers case the conduct of the IEPA warranted the inference that it did not intend to pursue Q C Finishers. It knew that "distribution of information to the individual smaller users was necessary to obtain greater compliance" and it did nothing. (See Answer and Affirmative Defenses paragraphs 10, 11 and 16 through 18).

Second, with regard to the issue of whether this defense speaks to penalties, the Respondent respectfully directs the Board to the first affirmative defense raised in Douglas Furniture. In that defense Douglas Furniture pled that the penalty sought was "unreasonably high". Q C Finishers defense is distinguishable from the defense raised in Douglas Furniture. Q C Finishers defense goes not to the magnitude of the penalty but to Complainant's right to pursue it. The defense, paragraph 26, states that "Complainant's failure to take action in the above-referenced circumstances constitutes a waiver of its right to pursue penalties and costs." (emphasis added). Because it goes to the right to pursue the cause of action, rather than the amount of penalty, it is an appropriate affirmative defense.

WHEREFORE Respondent asks the Board to reinstate this affirmative defense.

Specific Affirmative Defense to Count III

Count III, paragraphs 11 & 12, alleges violations beginning in 1991 and continuing through the present. Complainant alleged that Respondent used coatings that exceeded the emission limits of 35 Ill Adm. Code 218.204.

Respondent's affirmative defense pled that it had installed control equipment and thereby was no longer subject to 218.204. Notably it did not plead that it had stopped using coatings that exceeded the emission limits.

In its Response to the Motion to Strike, Respondent noted (pg. 7) that the fact that compliance had been achieved was not being offered to mitigate a violation. It was being offered to show that during the last four years of the alleged violation, use of coatings that exceeded the emission limits was not a violation because the emissions were being controlled.

In this analysis it is instructive to consider the allegation in two parts:
1) Period One, (before controls were used) and
2) Period Two (from the use of controls to the present).

Both the Motion to Dismiss and the Board's Order assumed that the affirmative defense was applicable only to Period One. While the fact that compliance was ultimately achieved can, and will, be raised in mitigation if the Board finds violations in Period One, that is not the issue here.

Respondent's Affirmative Defense is a defense only to Period Two.

The Affirmative Defense is valid and appropriate for Period Two because it addresses new facts outside the Complaint, specifically that Respondent is exempt from the emissions limits of 218.204 because it is now regulated by 35 Ill Adm. Code 218.207.

Respondent could not have conveyed this information simply by responding to the alleged violation of 218.204. Since this information was outside the scope of the Complaint it was properly raised as an affirmative defense for Period Two.

The fact that compliance with the Boards' rules was achieved by a mechanism other than stopping the conduct complained of in Count III, brings out "new facts or arguments that, if true, will defeat [Complainants] claim even if all allegations in the complaint are true." People v. Community Landfill Co., PCB 97-193, (Aug. 6, 1998).

WHEREFORE Respondent asks the Board to reconsider its order striking the affirmative defense or in the alternative to clarify that Respondent is not foreclosed from raising the fact that its compliance with 35 Ill. Adm. Code 218.207 can be used to prove that there was no violation of 218.204 from the date controls were installed to the present.

First Affirmative Defense to Count IV

The issue here is not whether 35 Ill. Adm. Code 212.302 regulates parking lots. The issue is whether 35 Ill. Adm. Code 212.316 regulates parking lots.

In Count IV of the Complaint, paragraph 9, the People state that "as parking lots are regulated emissions sources pursuant to 35 Ill. Adm. Code 212.316, Respondent was required to submit a fugitive dust program."

Thus the theory, as expressed in the Complaint, was that 212.316 regulated parking lots. Respondent's affirmative defense states that 212.316 regulates only "operations" (for example, manufacturing) that are specified in 312.302 "and that are located in areas defined in 212.324(a)(1)". (emphasis added). Thus 212.316 only applies to manufacturing in those geographic areas that are specified by 212.324(a)(1).

In its Motion to Dismiss Affirmative Defenses, Complainant raised, for the first time - the theory that parking lots were regulated through a clause of 212.302 which states "section 212.304 through 212.310... shall apply to manufacturing operations [in] Cook County". The new theory makes no reference to 212.316. While the new theory may be arguably more compelling than the theory that was plead, this is not an acceptable time or way to raise it. Nor is the existence of a better, but never pled, theory, a reason to dismiss an affirmative defense to the theory that has been pled.

The fact remains that the affirmative defense addresses the theory pled in the Complaint and the theory pled in the Complaint has not been withdrawn.

WHEREFORE Respondent asks the Board to reconsider its order and to reinstate this affirmative defense.

Second Affirmative Defense to Count IV

Count IV alleged a violation of 35 Ill. Adm. Code 212.309 in that Respondent did not timely submit a fugitive dust program for its parking lot. Section 212.309 applies only to emission units. 35 Ill Adm. Code .

Respondent argued that its parking lot was paved and therefore is not an emission unit because it is not a "part or activity at a stationary source that emits or has the potential to emit any air pollutant." 35 Ill. Adm. Code 211.1950. If a paved parking lot is not an emission unit no fugitive dust plan is required.

The Board's grant of the motion to strike this affirmative defense has raised several questions and Respondent would appreciate a clarification of the issues.

Has the Board found that the only issue raised is one of fact - specifically whether Q. C. Finishers paved parking lot can emit dust? If this is the case then the question of whether a parking lot can emit or is capable of emitting is an element of proof and Complaint will have to meet its burden of so proving.

Alternatively, is the Board suggesting that a paved parking lot is an emission unit as a matter of law? If this is the case is a paved parking lot being regulated as an "activity?" While particulate matter may be emitted by activities occurring on the parking lot, that would not seem to make the parking lot itself an activity within the common meaning of the term. Furthermore the activities that would be occurring would be occurring as a result of mobile sources, but Part 212 regulates only stationary sources. (See 35 Ill. Adm. Code 212.100.) If the Board is finding that a paved parking lot is an emission unit as a matter of law due to the fact that mobile source activity can occur in the same location then its ruling will have great significance to the regulated community and Respondent respectfully suggests that such a decision is more appropriately left for a notice and comment rulemaking proceeding.

The Board also based its order dismissing the affirmative defense on a finding that it was "argumentative and raises an interpretation of the law." There appears to be no other authority for the proposition that because an affirmative defense raises an interpretation of the law it must be stricken. The Board has held in People v. Midwest Grain Products, PCB 97-179, 1997 Ill. ENV LEXIS 493 (August 21, 1997), that the Code of Civil Procedure does not "contrary to the Attorney General's interpretation preclude pleading a defense which may include a legal conclusion...the parties are to be informed of the legal theories of their opponents. This is a prime function of pleading." Id 1997, 493Ill. ENV LEXIS at *8)

Q C Finishers affirmative defense met the standard of Midwest Grain. It informed the other party of its legal theory. Respondent would appreciate guidance from the Board on whether it was its intent to reverse its position in Midwest Grain or whether it is distinguishable from Q C Finishers case.

WHEREFORE Respondent asks the Board to reinstate the affirmative defense.

First Affirmative Defense to Count VI

The Complaint alleges in Count VI, paragraph 18 that "Respondent does not currently have a CAAPP permit," and, in paragraph 19, that "by the actions described herein Respondent has violated [cited sections]." The Complaint also demands that the Board order Respondent "cease and Desist from any future violations [of the cited sections]." Page 17 of the Complaint.

Similar to the situation posed in Affirmative Defense to Count III it is instructive to view this allegation as two time periods:

1) failure to have a CAAPP from December 7, 1995 to May 2, 2002, and
2) failure to have a CAAPP from May 3, 2002 until the present.

The Complainant, the Respondent, and the Board agree that compliance at a later date would not excuse alleged violations from the first time period.

However the affirmative defense that Respondent raised addressed the second time period - from May 3, 2002 to the present.

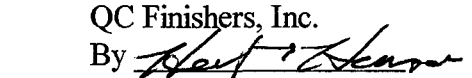
Respondent has alleged as its affirmative defense that it has had a federally enforceable state operating permit (FESOP) effective May 3, 2002, therefore it did not require a CAAPP for the period from that date to the present.

While admitting that it does not have a CAAPP permit, Q C Finishers is introducing a new fact, one that will defeat the claim even if all allegations (for the applicable time period) in the Complaint are true. The new fact introduced is that Q C

Finishers has a FESOP therefore pursuant to 415 ILCS 5/39.5(3)(c) it does not also need a CAAPP permit. Therefore Q C Finishers has met the standard for affirmative defenses.

As was the case in the affirmative defense for Count III, Q C Finishers did not achieve compliance by ceasing the complained-of conduct, but by using an alternative means to achieve compliance. Therefore it was unable to simply admit the violation for one time period and deny it for the second time period. It had never "ceased and desisted" from the failure to have a CAAPP permit, but instead it alleged, through its affirmative defense, that it no longer needs a CAAPP permit.

WHEREFORE Respondent asks the Board to reconsider its order striking the affirmative defense or in the alternative to clarify that it is not foreclosed from raising the fact that its FESOP can be used to prove that there was no violation of the requirement that it have a CAAPP permit from May 3, 2002 to the present.

Respectfully Submitted,
QC Finishers, Inc.
By 
Its attorney

Dated: July 27, 2003

Heidi E. Hanson
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(708) 784-0624

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached MOTION FOR RECONSIDERATION OF BOARD ORDER by deposit in a U. S. Mailbox before 4:00 p.m. on July 29, 2003 upon the following persons:

One copy:

Paula Becker Wheeler
Assistant Attorney General
Office of the Attorney General
188 West Randolph Street, 20th Floor
Chicago, Illinois 60601

Mr. Bradley Halloran
Hearing Officer
Illinois Pollution Control Board
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100 W. Randolph Street
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Original and nine copies:

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Dated: July 29, 2003

Heidi E. Hanson

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This filing is submitted on recycled paper.