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
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Chicago, Illinois 60601

Mr. Bradley Halloran
Hearing Officer
Illinois Pollution Control Board
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Clerk, Illinois Pollution Control Board
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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 of QC Finishers, Inc., RESPONSE TO MOTION TO DISMISS SUPPLEMENTAL AFFIRMATIVE DEFENSES a copy of which is hereby served upon you.

Respectfully submitted,

Heidi E. Hanson

Dated March 15, 2004

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	)	
QC FINISHERS, INC., an Illinois Corporation,	)	
	)	
Respondent.	)	

RESPONSE TO MOTION TO DISMISS SUPPLEMENTAL AFFIRMATIVE DEFENSES

NOW COMES QC Finishers, Inc. by and through its attorney, H. E. HANSON ESQ. P.C. pursuant to 35 Ill Adm. Code 101.500(d) and in response to Complainant's Motion to Dismiss Supplemental Affirmative Defenses which was received on March 1, 2004, states as follows:

INTRODUCTION

As an initial matter Complainant's Motion (page 1) appears to take issue with the fact that Respondent did not file a full, restated, Supplemental Answer but instead revised and supplemented only those affirmative defenses that remained at issue at this point of the proceedings. As explained in paragraph 4 of the Supplemental Affirmative Defenses, no other part of the Answer was at issue and a repetitive refiling of the entire Answer would have been a wasteful exercise and was neither necessary nor required.

STANDARD

Standard for Pleading Affirmative Defenses

The Board's procedural rules require that "any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer...." 35 Ill. Adm. Code 103.204(d), eff. January 1, 2001. This standard is similar, but not identical to, a provision in the Code of Civil Procedure. 735 ILCS 5/2-613(d).

The Board's standard for a valid affirmative defense is that it must allege "new facts or arguments that, if true, will defeat...the government'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).

Complainant also states in its motion (page 3) that an affirmative defense must be "pled with the same degree of specificity as required by a plaintiff to establish a cause of action". Complainant fails to cite to any Board rule or case that has adopted this criteria. Instead Complainant cites to the Code of Civil Procedure, and case which construes that Code.

The Board has stated that the Code of Civil Procedure does "not expressly apply to proceedings before the Board". 35 Ill Adm. Code 101.100 (2001). "While the Board may look to the Code of Civil Procedure for guidance when the Board's procedural rules do not address a particular issue, the Board's current [referring to rules in effect after January 1, 2001] and former procedural rules address how to plead facts constituting affirmative defenses". People v. John Crane, PCB 01-76 slip op page 2, May 17, 2001.

"Pleading rules are different in cases before the Board than in cases before the circuit courts." People v. State Oil et.al. PCB 97-103, 2000 Ill ENV LEXIS 326 *8 (May 18, 2000). In People v. Douglas Furniture, PCB 97-133, 1997 Ill. ENV LEXIS 221 *13 (May 1, 1997) the Board found that it was not necessary for the Respondent to allege each of the facts necessary to prevail on the defense. See also People v. Chiquita Processed Foods, L.L.C., PCB 02-56, 2002 Ill. ENV. LEXIS 244 (April 18, 2002). In each of the Chiquita, State Oil, and Douglas Furniture, cases, the Attorney General moved to dismiss the affirmative defenses alleging lack of specificity and the Board the denied the motions to dismiss.

There is a significant difference between Board rule 103.204(d) and the applicable code provision as they relate to affirmative defenses. The Code of Civil Procedure, in a section labeled "Pleading to be Specific", provides that "every Answer and subsequent pleading shall contain an explicit admission or denial of the pleading to which it relates" otherwise it is assumed to be admitted. 735 ILCS 5/2-610. The Code requires an answer to affirmative defenses. No corresponding provision exists in the Board rules.

Affirmative defenses raised in circuit court, unlike affirmative defenses raised before the Board, must be specifically plead so as to be answerable. If the affirmative defenses are not answered then the failure to answer acts as an admission, therefore it must be clear what specific facts have been admitted to. Board affirmative defenses merely must be sufficiently specific to "place the People on notice of the affirmative defense". People v. Van Melle U.S.A. PCB 02-186, slip op. page 7 (March 4, 2004).

Because the purpose and effect of affirmative defense pleading is different in Board and Code practice there is no rationale for applying Code precedents to Board practice in this area. Complainant wants to have its cake and eat it too. It is not required to answer the affirmative defenses in Board proceedings, but, it wants the Board to dismiss any affirmative defenses that are not pled with the same specificity as pleadings which would have to be answered.

Standard for a Motion to Dismiss An Affirmative Defense

The Board has also set forth the standard for a motion to dismiss an affirmative defense. The motion must admit well pleaded facts constituting the defense, only attacking the legal sufficiency of the facts. People v. Skokie Valley Asphalt et al., PCB 96-98, 2003 Ill. ENV LEXIS *7-9, (June 5, 2003) . When the party alleging the affirmative defense has raised the possibility that it will prevail, the defense should not be stricken. Cole Taylor Bank v. Rowe Industries, PCB 01-173, slip op. at 3 (June 6, 2002). People v. Wood River, PCB 99-120, 2002 Ill. ENV LEXIS 437 * 6 (August 8, 2002).

This standard is also similar to the standard articulated by the circuit court. International Insurance Co v. Sargeant and Lundy, 242 Ill. App. 3d 164, 609 N.E.2nd 842, (1st Dist. 1993).

SPECIFIC AFFIRMATIVE DEFENSES

First Supplemental Affirmative Defense to Count III

In Count III Respondent alleged violations of 35 Ill Adm. Code 218.204 that continue "to the present." As stated in the Supplemental Affirmative Defenses, noncompliance with Rule 218.204 does continue to the present however it does not constitute a violation in the present because the another Board rule provides an alternative means of compliance.

Board rule 35 Ill. Admin. Code 218.207 "Alternative Emission Limitation" provides that an owner or operator of a coating line subject to 218.204 may choose to install controls, rather than comply with 218.204. Thus Respondent was able to use, and did use, coatings in the two controlled booths which exceeded the 218.204 limits but because of 218.207 use of those coatings did not constitute violations.

Respondent's compliance with 218.207 in lieu of 218.204 constitutes new information which can be pled through an affirmative defense and will serve to defeat the allegation of a violation of 218.204 for the period of time during which coatings that exceeded the limits of 218.204 were controlled pursuant to 218.207.

Respondent's previous attempt to plead this defense was apparently not clear with regard to its scope. The Board interpreted the defense as Respondent's attempt to use the fact of current compliance to excuse past noncompliances. The Board then dismissed the defense, citing 33(a) of the Act (415 ILCS 5/33(a)) which states that "it shall not be a defense to findings of violations... that the person has come into compliance subsequent to the violation. "

Respondent appreciated the opportunity that the Board gave it to replead this defense and has endeavored to make clear the fact that it is not pleading that subsequent

compliance should excuse previous violations. Respondent is instead pleading that although it is not now in compliance with 218.204 it has been in compliance with an alternative standard for a period of four years and for those four years it has not been violating the Board's rules. The affirmative defense, as pled in the Supplemental Affirmative Defenses does not address the period before 2000.

Respondent does not argue that its compliance with 218.207 makes it "less liable for its earlier violations." Respondent argues that its compliance with 218.207 makes it not liable for violating 218.204 during the time that it was complying with an alternative rule - 218.207.

It should be noted that Complainant's February 26, 2004 Motion to Dismiss Supplemental Affirmative Defenses is identical to its April 25, 2003 Motion to Dismiss Affirmative Defenses with regard to the First Defense to Count III, so it takes no account of the revisions to Respondent's defense and does not address those revisions.

Respondent could not have given Complainant notice of its defense through its Answer to the Complaint. Respondent ultimately achieved compliance, not by ceasing to use the coatings, but by adding controls - a fact outside of the Complaint. Thus in this case, unlike People v Draw Drape, PCB 03-51 (Feb. 20, 2003), Respondent could not simply deny the alleged violation for the time period in which it was in compliance.

The Complaint left Respondent no other options for presenting this defense because it drew no distinction between the alleged violations prior to installation of controls and the alleged violations after controls were installed. Respondent was required to answer to and admit the allegations of noncompliance with 218.204 "through the present." This included admitting to noncompliance with 218.204 (from 2000 to 2004) which did not constitute a violation because of 218.207. QC Finishers had not stopped the conduct that was being complained of instead it substituted other conduct which caused to be in compliance with the law. Because it had used alternative means to achieve compliance, it was required to use an affirmative defense in order to allege the new facts.

The Board has recognized that if Respondent has an affirmative defense that covers some of the time period of the allegation it may raise that affirmative defense. The Code of Civil Procedure (735 ILCS 5/2-613(d) (2000)) quoted with approval by the Board in Cole Taylor Bank v. Rowe, PCB 01-173 (June 6, 2002) states that "....facts constituting an affirmative defense...and any defense which by other affirmative matter seeks to avoid or defeat the legal cause of action set forth in the complaint...in whole or in part, ...must be plainly set forth in the answer or reply." (emphasis added). See also People v. Wood River Refining Company, PCB 99-120, 2002 ILL ENV LEXIS 437..* 17, 18, discussion of Count III Second Affirmative Defense, (August 8, 2002). People v. Midwest Grain Products of Illinois, (97-179) 1997 Ill. Env. Lexis 493 *10 (August 21, 1997).

The Affirmative Defense is valid and appropriate for the period from 2000 to 2004 because it addresses new facts outside the Complaint, specifically that Respondent is now exempt from 218.204 because it is now regulated by 218.207. The Attorney General's motion to dismiss has misread the Affirmative Defense and states no valid cause for dismissing that defense, therefore the motion should be denied.

First Supplemental Affirmative Defense to Count IV

Count IV alleges that Q C Finishers needed, and failed to have, an operating program for its parking lot and that this failure constituted a violation of 35 Ill Adm. Code 212.309. Section 212.309 of the Board's air rules state that "the emission units described in 212.304 through 212.308 and Section 212.316 ....shall be operated under the provisions of an operating program".

The issue here is whether Complainant has connected the requirements for an operating plan (212.309) with a provision that would make the requirements applicable to Q C Finishers parking lot.

Count IV of the Complaint also states that "parking lots are regulated emissions sources pursuant to 35 Ill. Adm. Code 212.316." Paragraph 9. This is correct but only as to parking lots located in certain geographical areas. Section 212.316, which is headed "Emissions Limitation for Emissions Units in Certain Areas" states "this Section shall apply to those operations specified in Section 212.302 and that are located in areas that are defined in section 212.324(a)(1) of this Part." (emphasis added). Thus by referencing the entire section 212.316, instead of specific subsections the Board clearly indicated its intent to include the entire section with all of its applicable provisions. If it had intended to refer to specific units regardless of where they were located, it would have referred to the specific subsections of 212.316 that described those units.

Respondent stated as it affirmative defense that it was not located in an area defined in 212.324(a)(1). Thus Respondent raised a new fact and its affirmative defense was responsive to the allegations made in the complaint.

Through its Motion to Dismiss Supplemental Affirmative Defenses, Complainant made another attempt to find a provision that would make the operating plan applicable to Q C Finishers parking lot. This time Complainant is arguing that Section 212.302 makes the operating plan applicable to Q C Finishers parking lot.

This is objectionable for two reasons. First, it is not responsive to the affirmative defense and seeks to rewrite and change the Complaint. A motion to dismiss affirmative defenses is not the appropriate time or place to plead new theories of liability. Second, the statement in the motion that "Section 212.309 refers to emission units described in Section 212.302 which includes parking lots" is simply incorrect. Section 212.309 refers to "units

described in 212.304 through 212.308 and Section 212.316". It does not refer to 212.302.

The motion to dismiss has no basis and must fail. Complainant's motion to dismiss this defense should be denied.

Second Supplemental Affirmative Defense to Count IV

Count IV, paragraph 9, of the Complaint alleges that "as parking lots are regulated emission sources pursuant to 35 Ill. Adm. Code 212.316, Respondent was required to submit to the state a Fugitive Dust Program" pursuant to 212.309. Respondent's Second Supplemental Affirmative Defense to Count IV states that 212.309 only applies to "emission units" and then raises a new fact that will defeat the allegation - that its parking lot is paved and therefore not capable of emitting.

Complainant's Motion to Dismiss this affirmative defense argues that "because of the nature of the business on the premises, particulate matter could still be emitted by the activity of trucks driving on or off the parking area or other activities occurring on the lot." Motion page 5.

Complainant has alleged that there is a factual issue, interestingly arguing that the fact that a mobile source drives over it might make Q C Finishers parking lot into an emission unit. But the fact that a factual issue has been raised does not provide a reason for the Board to dismiss the affirmative defense. Complainant's argument fails to admit the well-pleaded facts of the affirmative defense and thereby fails to meet the standard for a motion to dismiss the affirmative defense. People v. Skokie Valley Asphalt et al., PCB 96-98, 2003 Ill. ENV LEXIS *7-9, (June 5, 2003).

In addition, when the party alleging the affirmative defense has raised the possibility that it will prevail, the defense should not be stricken. Cole Taylor Bank v. Rowe Industries, PCB 01-173 slip op. at 3 (June 6, 2002). People v. Wood River, PCB 99-120, 2002 Ill. ENV LEXIS 437 * 6 (August 8, 2002). Complainant does not argue that the particulate matter will be emitted. Instead Complainant's argument, that "particulate matter could be emitted" admits the possibility that it could also, not be emitted and therefore admits the possibility that Respondent will prevail.

Respondent, by informing opposing counsel that it intends to argue that the road is paved and therefore not an emission source, has meet its pleading obligations. It has plainly set forth its defense and has avoided surprise to the opposing counsel.

Complainant also argues "that the defense is argumentative" but gives no further information. Nor does it explain why an "argumentative" defense would provide any basis for dismissal.

Complainant further argues that the defense "raises an interpretation of the law" but again gives no explanation of how it does so or why this would merit dismissal of the defense.

Complainant may disagree with Respondent's factual assertions but Complainant has raised no basis on which this Affirmative Defense could be stricken and Respondent should be allowed to present its defense to the Board. The Complainant has simply not provided any reason to dismiss this defense and so its Motion should be denied.

First Supplemental Affirmative Defense to Count VI

In Count IV, paragraph 18 of Complaint, the State alleged that Respondent does not have a CAAPP permit. This continues to be the case. However since May 3, 2002 it has had a federally enforceable state operating permit ("FESOP") permit so it is no longer necessary for it to have a CAAPP permit pursuant to 415 ILCS 5/39.5(2)(e).

The Respondent's obtaining of a FESOP and its resulting exclusion from the CAAPP program are new facts which can be pled through an affirmative defense. As in the First Supplemental Affirmative Defense to Count III, above, an alternative means was used to achieve compliance with a rule so that a cessation of noncompliance with the rule could not be plead by any means other than an affirmative defense. Put differently QC Finishers could not answer the Complaint by alleging that it had a CAAPP because it did not have a CAAPP. However, through an affirmative defense, it could indicate that it did not need CAAPP.

Again, Respondent appreciates the fact that the Board allowed it to replead its affirmative defense to clarify that the defense did not seek to excuse past noncompliance and instead was intended to inform the opposing counsel that from May 3, 2003 to the present it is complying with a provision that is an alternative to the provisions it is alleged to be violating.

Complainant states (Motion page 5) that "compliance at a later date does not excuse violations from 1995 until May of 2002. Since Respondent has now clarified that the affirmative defense applies to the period after May 3, 2002 (Supplemental Affirmative Defenses First Affirmative Defense to Count VI, paragraph 9) Complainant's statement has no relevancy.

Complainant also argues that Respondent has not alleged any new facts or arguments, apparently ignoring the fact that Complainant has alleged that it has a FESOP and therefore does not require a CAAPP.

The Supplemental Affirmative Defenses clearly states (paragraph 9) that it is an affirmative defense for the period of time only from May 3, 2002 to the present. The fact

that compliance has been achieved is not being offered in mitigation of the entire violation. It is being offered as an absolute defense for part of the allegation.

Complainant does not specifically ask for dismissal of this count and gives no basis on which it could be dismissed. This Affirmative Defense is properly pled and valid for the time period for which it was plead, that is, May 3, 2002 to the present. It addresses new facts outside the Complaint, specifically that Respondent is now not required to obtain a CAAPP because it has obtained a FESOP. The Attorney General's motion to dismiss has given no valid cause for dismissing the repled Supplemental Affirmative Defense, therefore the Respondent should be allowed to present its defense to the Board.

GENERAL AFFIRMATIVE DEFENSES

First Supplemental Affirmative Defense to All Counts of the Complaint (Laches)

Respondent pled laches as its first general affirmative defense and set forth in great detail the facts and circumstances surrounding the unfortunate and unusual situation that led to Respondent's unintentional and unknowing violations.

The Motion to Dismiss Supplemental Affirmative Defenses ("Motion") seriously mischaracterizes Respondent's laches argument. Contrary to the Motion's assertion, Respondent did not argue that the State was responsible for the confusion surrounding the similarity between the Board's rules and the Cook County ordinance, (Motion page 5) nor did Respondent argue that the State was liable for Respondent's noncompliance (Motion pages 6) and it did not argue that, as a general matter, the State is responsible for educating emission sources. (Motion page 10).

"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." People v. John Crane, Inc. PCB 01-76, slip op. at 8 (May 17, 2001). The affirmative defense pled that Q C Finishers was both misled and prejudiced by the fact that the Illinois EPA waited too long to contact it to assert its "rights".

The Agency had the duty to disseminate information "as may be required to carry out the purposes of the Act." This need not be read broadly, as Complainant apparently has done. Motion page 10. Respondent is not trying to assert that ignorance of the law is an excuse, but given this particular and extraordinary set of facts it is possible that the Board will find as a matter of equity that the Agency's delay should foreclose it from punishing Q C Finishers for the violations that occurred as a result of that delay.

Respondent began operations in 1985. It applied for Cook County permits and on several occasions made contact with its Cook County Environmental inspector. The Illinois Environmental Protection Agency, which was charged with the duty to disseminate

information necessary to carry out the Illinois Environmental Protection Act's purposes, in 1994, and again in 1997, made public statements bemoaning the fact that information was not being disseminated to "smaller users." Q C Finishers, with at most 47 employees, was such a smaller user and was making reasonable attempts to ensure that it was in compliance by contacting its local inspector. It was given bad advice but it heard nothing from the state that would have given it any indication that it needed to inquire further. In short the state had information that QC Finishers needed. The state publicly acknowledged that the information was needed. The state had the duty to disseminate it, and the state delayed.

The Agency now seeks to punish Respondent for not acting on the information that the Agency was withholding from it. This is a uniquely unfair situation especially given Q C Finishers size and its reasonable attempts to learn what it needed to do to achieve compliance. Respondent never tried to avoid complying with the law, rather it sought to do so and was misadvised.

"There are two principal elements of laches: lack of due diligence by the party asserting the claim and prejudice to the opposing party. (Citations omitted)" People v. John Crane, slip op. at 8. Both elements have been pled. The Motion argues that the defense has not set forth the key elements of a laches defense, but other than the argument regarding a delay in bringing suit the Motion gives no specifics regarding any other alleged deficiencies.

Respondent Need Only Allege a Delay in Asserting A Right

The Complainant begins by arguing that Respondent did not "allege that there was a delay in bringing the suit." This is too narrow a reading of Board precedent. It is not necessary that Respondent plead a delay in bringing a suit, only that it plead a 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, (May 17, 2001.) Although the "right" asserted, may in a particular case be a suit, the assertion of the "right" may occur in other ways. For example in John Crane, the Board sustained an affirmative defense that pled the Illinois Environmental Protection Agency's "failure to file its NOV [notice of violation] on a timely basis." John Crane, slip op at 8.

Respondent had made substantial steps toward compliance by applying for a permit in March of 1999 (see Complaint Count VI, para 17), and had begun installing controls in 1999 (First Affirmative Defense to Count III, para 5). See also First General Affirmative Defense, para. 21. All of this was accomplished before the Complaint was filed in July of 2000, so the delay in filing the suit was not what caused the harm to Respondent. In this case it was the delay in contacting Respondent as pled in the Supplemental Affirmative Defense paragraphs 24 through 28 and 30 that cause the harm. The initial contact took the form of the state inspector's first visit in 1998 followed shortly by a Violation Notice. Compliance efforts began immediately with the first contact, and continued diligently, so it was in the years before that contact that the harm was done.

Complainant Seeks to Attack the Board's Ability to Recognize and Hear a Laches Defense

The Complainant also asserts that several courts have held that the doctrine of laches does not apply to the exercise of a governmental function. Motion pages 7 and 8. To support this statement it cites two estate cases. Since the Board is not a probate court is it is unclear how these cases would have any precedential value. Curiously, Complainant then goes on to cite Hickey v. Illinois Central R. R. Co. 35 Ill 2d 427, 220 N.E.2d 415 (1996) in which Illinois Supreme Court clarified 1966 that laches can be applied to the state when acting in its governmental capacity.

Complainant cited no Board cases in the section on laches even though the Board has, in a long line of recent cases, dealt with the laches issue. The Board has held that laches may apply to the State in its governmental capacity and has denied the motions to strike that defense. People v. Stein Steel Mills Services, (PCB 01-2, slip op. at 4-6 (April 18, 2002). People v. State Oil Co. *et al*, PCB 97-103, slip op. at 3-4 (May 18, 2000). People v Royster Clark, PCB 02-08, slip op. at 5-6 (Jan. 24, 2002). People v. John Crane Inc., PCB 01-76, (May 17, 2001). Although all of the cases were previously cited to Complainant (Response to Motion to Dismiss Affirmative Defenses, May 21, 2003) Complainant has not addressed them.

Complainant also argues that "courts have consistently refused to allow the defense of laches when the plaintiff...seeks to protect a public interest. Motion page 9-10. In effect this argues that the Board, which is charged with protecting the public interest, should never accept a defense of laches. Complainant cites no Board cases or Illinois court cases in support of its argument. In fact that argument ignores the Board cases cited in the previous paragraph. The only two cases Complainant cites are federal court cases. Lake Michigan Federation v. Army Corps of Engineers, 742 Fed. Supp. 441 * 448 (1990) is cited for the proposition that courts refuse to allow laches in matters of public interest, but a close reading of the case will reveal that the court says only that courts are "extremely reluctant" to apply the doctrine. This statement is at best only dicta, as the court goes on to make its decision on laches on other grounds.

Complainant's last attack on the use of a laches defense before the Board (Motion page 10) appears to be that section 2(b) of the Act precludes the laches defense. Not only does the language of 2(b) not support this interpretation but the Complainant again ignores all of the Board precedent to the contrary. Stein Steel Mills Services, State Oil Co., Royster Clark, John Crane Inc. (*all supra*)

The Board can, and has, heard laches defenses in environmental cases, clearly recognizing that it may consider the element of fairness inherent in that equitable doctrine.

In this case the Agency's failure to take the simple step of contacting an easily identifiable group of sources and informing them of the need for permits and emission

controls gave rise to many years of unknowing and unintentional violations. It would be unfair for the state to pursue its claims now for the very violations that it could and should have avoided years ago. Had the state asserted its right to permitting and emissions controls years earlier, merely by fulfilling its duty to disseminate information, the state, the environment and Q C Finishers would all be in a better position now.

Respondent has pled that it was harmed by Complainant's delay and lack of due diligence. It has shown that unusual circumstances exist here. It has raised the possibility that it can prevail. It should be allowed to go forward and to present its defense to the Board.

Second Supplemental Affirmative Defense to All Counts of the Complaint (Estoppel)

Respondent pleads estoppel as its second affirmative defense. Estoppel may be applied when a party reasonably and detrimentally relies on the conduct of another. People v Douglas Furniture, PCB 97-133, 1997 Ill ENV LEXIS 221 (1997). Or, as more recently expressed when the conduct or statements lull a person "into a false sense of security" Brian Tegeler v. Industrial Commission 173 Ill 2d 498 at 506, 672 N.E.2d 1126 at 1129, 1996 Ill LEXIS 110* 11, 220 Ill Dec. 114 (Il S. Ct October 18, 1996)

As an initial matter it should be noted that Complainant misstates Respondent's defense. Respondent does not allege that its duty to comply with the law was conditional. Respondent believed that it was in compliance until the summer of 1998. Its belief was reasonable and was based on both IEPA's failure to act and the Cook County inspectors uncontradicted statement as to the law. Upon learning that it had been misled, QC Finishers acknowledged the law and promptly complied with it.

Respondent also does not, contrary to Complainant's assertion seek to "relieve the Respondent from knowing or following the law". Motion page 11. Respondent merely seeks to, in the interest of fairness, disallow Respondent's claim for past violations. Last, it should be noted that contrary to Complainant's statement, Respondent did not allege that the Cook County inspector was incompetent.

Respondent is not alleging that the IEPA must identify and contact every emission source prior to obtaining penalties, but Q C Finishers case is unique. It had Cook County permits and was complying with an older version of the Board's rules which had been codified into law at the county level. Certainly informing Q C Finishers that it needed more permits and controls would have fit within the purview of information that was "required to carry out the purposes of the Act." 415 ILCS 5/4(b). The IEPA had acknowledged that it needed to disseminate information to small sources and to coaters. As a matter of equity it would be unfair for the state to pursue a claim against Q C Finishers.

Complainant's Motion to Dismiss is predicated on two bases. First, that "estoppel may not be asserted in matters involving a public right" and second, that QC Finishers has failed to allege the elements of estoppel.

Complainant Seeks to Attack the Board's Ability to Recognize and Hear an Estoppel Defense

Complainant argues that "it is a well-established rule of law that the doctrine of estoppel may not be asserted against the State in actions involving public rights." Motion pages 12 and 13. However the case that Complainant cites for this proposition is distinguishable. Tri County Landfill v. PCB, 41 Ill App.3d 249, 353 N.E. 2d 316 (2nd Dist. 1976). dealt with landfill operators who sought to avoid responsibility for continuing leachate problems by claiming that the IEPA's predecessor agency had approved the operation. Finding that the IEPA was estopped would also have permitted the pollution to continue. That is not the case here. Respondent does not seek to avoid complying with the law and has spent considerable time and effort in doing so. Respondent simply seeks to avoid being punished for a noncompliance situation fostered by Complainant and which Respondent could not reasonably have avoided.

Complainant's Motion also ignores the Illinois Supreme Court's statements that it will "hold the public estopped or not as right and justice require" and that "the reluctance to apply equitable principles against the State does not amount to an absolute immunity of the state from laches and estoppel under all circumstances." Hickey v. Illinois Central Railroad, 35 Ill. 2nd at 448-49, 220 N. E. 2d at 426 (IL S.Ct.1996) (rehearing denied.)

Complainant also ignores the Board cases which have dealt with this argument. The Board has found that estoppel can be asserted and has refused to strike affirmative defenses that allege it. John Crane, *supra*. People v. Douglas Furniture, PCB 97-133, (May 1, 1997).

The Board's recent decision in Illinois EPA v. Charles Goodwin, (AC 02-17, 2003 Ill ENV LEXIS 429 (July 11, 2002) reconsideration denied, 2002 Ill ENV LEXIS 576 (October 3, 2002)) is of interest here. In that case Mr. Goodwin was given contradictory directions from two bureaus of the Agency. The Board found that as a result the administrative citation was improperly issued. In its reasoning, the Board applied an estoppel-like theory without labeling it as estoppel.

In QC Finishers' case instead of being given contradictory advice, which might have prompted it to inquire further, QC Finishers was given only bad advice, thus Q C Finishers case for estoppel is even more compelling that Mr. Goodwin's.

Respondent has Pled the Elements of Estoppel

Complainant also argues that Q C Finishers has failed to allege the elements of estoppel, in particular that it has failed to show a misrepresentation. Complainant quotes

(Motion, page 11) the six elements listed in Vaughn v. Speaker, 126, Ill.2d 150, 533 N.E.2d 885, 890 (1989).

With regard to the first two factors however, the Illinois Supreme Court recently spoke to what is necessary to establish a misrepresentation.

> ...regarding the first two [Vaughn] elements the representation need not be fraudulent in the strict legal sense or done with an intent to mislead or deceive. Ceres Illinois Inc. v. Illinois Scrap Processing Inc. 114 Ill. 2d 133, 148, 102 Ill Dec. 379, 500 N. E. 2d 1 (1986)...The following corollary must be remembered: 'Estoppel may arise from silence as well as words. It may arise where there is a duty to speak and the party on whom the duty rests has an opportunity to speak, and, knowing the circumstances, keeps silent. [Citations]. It is the duty of a person having a right, and seeing another about to commit an act infringing on it, to assert his right. He cannot by his silence induce or encourage commission of the act and then be heard to complain.' [quoting Bondy v. Samuels, 333 Ill. 535, 546 , 165 N. E. 181 (1929)]...
>
> Geddes et al v. Mill Creek Country Club, Inc. et al, 196 Ill 2d 302, 751 N. E. 2d 1150, 256 Ill Dec. 313 (IL S. Ct. May 24, 2001).

Geddes, was decided long after the cases cited in Complainant's brief and represents the Illinois Supreme Court's most recent pronouncement on what constitutes a misrepresentation.

Complainant also cites to Pavlakos v. Department of Labor, 111 Ill 2d 257, 489 N.E. 2d 1325 (1985) for the proposition that a misrepresentation must be an affirmative act. In that case the Illinois Supreme Court found that there was no estoppel where the Department of Labor failed to record a lien, but had no duty to record it. That is not the case here. The Act provides that the IEPA has a duty. It should also be noted that Pavlakos was decided before the Illinois Supreme Court adopted a broader definition of misrepresentation in Geddes. See also Forest Preserve of Cook County v. Illinois Local Labor Relations Board et al, 546 NE 2d 675 (October 27, 1989) where the maintaining the status quo, by not firing temporary workers who had held their jobs for 12 years, was held to be an affirmative act and to work an estoppel.

In alleging a misrepresentation Q C Finishers does not rely solely on the mistake of the Cook County Inspector but also upon the IEPA's statements to the Board and to the Governor's office which show awareness of its failing at the state's policymaking level. They also indicate that the state for many years was not interested in contacting these small businesses presumably because they would have only a minor impact on the environment. IEPA chose to disregard its duty to disseminate information and to use its resources in some more pressing area. As a matter of equity Complainant should not be

allowed to press its claim for the years in which Respondent reasonably and detrimentally relied on Complainants' silence.

Respondent's affirmative defense as pled, meets the elements of an estoppel defense as set forth in Geddes. It has pled that the Agency had a duty to speak, and opportunity to speak and being well aware of the circumstances as evidenced by its public statements - kept silent.
As set forth in Geddes, this allegation will satisfy the first two Vaughn elements.

With regard to the third element of estoppel, that respondent must not have known the truth, Respondent has pled that it did not know that the representations were untrue in that it would have complied earlier had it been aware that it was not in compliance. With regard to the fourth element, that Respondent must reasonably expect that its conduct will be acted upon, the Respondent has pled that the Complainant knew that the dissemination of information was necessary to obtain compliance and made public statements to that effect. With regard to the fifth element, that Respondent in good faith relied on the misrepresentation, Respondent has pled that it would have complied earlier if it had been aware that it was not in compliance. With regard to the sixth element, that Respondent will be prejudiced, Respondent has plead that it has been harmed in that did not have the opportunity to avoid being in noncompliance and that had it known it could have made more approached the growth and direction of its business differently enabling it to use less expensive controls or lower VOM materials.

Last Complainant argues that Respondent has not shown compelling circumstances. However the totality of the circumstances alleged show that Q C Finishers case is uniquely compelling. Respondent has pled that it is a small and unsophisticated company, but it was very proactive in that it actively sought out compliance advice. It suffered bad advice from its Cook County inspector which was compounded by the fact that the IEPA neglected its statutorily-mandated duty to disseminate information, even though it knew that fulfilling its duty would lead to greater compliance by sources of Q C Finishers' size . Q C Finishers reliance on the inspectors advice and the IEPA's silence was reasonable. Yet the state wants to pursue Q C Finishers for past violations.

Q C Finishers case presents an unusual and compelling case for estoppel. Respondent should be permitted to allege and prove at hearing its estoppel defense

Fourth Supplemental Affirmative Defense to All Counts of the Complaint (Waiver)

As its fourth affirmative defense Respondent asserts that Complainant has waived its right to penalize Respondent. This is an equitable argument that goes to the implied relinquishment of a right. Respondent argues that the cause of action that would support it is unjust as a matter of equity.

The Complainant argues that "the defense of waiver is an intentional relinquishment of a known right, citing Pantle v. Industrial Commission, 61 Ill. 2d 365, 335 N.E.2d 491(1975). However in a more recent case the Illinois Supreme Court has stated that the waiver may be also implied. "An implied waiver may arise where a person against whom the waiver is asserted has pursued such a course as to sufficiently evidence an intention to waive a right or where his conduct is inconsistent with any other intention than to waive it." Andrew Ryder v. Bank of Hickory Hills et al, 146 Ill. 2d 98, 105, 585 N.E. 2d 46, 49, 1991 Ill LEXIS 86 *11, 165 Ill. Dec 650 (Il S. Ct, September 26, 1991) quoting with approval Kane v. American National Bank & Trust Co. 21 Ill. App 3d 1046, 1052 (1974)

The Board, too, has found that waiver applies when a party intentionally relinquishes a known right or his conduct warrants an inference to relinquish that right. (People v. Douglas Furniture of California, Inc. PCB 97-133 (May 1, 1997). People v. John Crane, (PCB 01-76 slip op. at 8 (May 17, 2001). It has also acknowledged ((John Crane *supra*, page 8) that such intent may be inferred. In this case the State's conduct warrants an inference to relinquish that right.

Whether or not a waiver may be implied here is a question of fact. Complainant argues that it does not agree that a waiver has occurred. It fails to admit the facts pled in the defense, and it has given no valid reason to dismiss this affirmative defense. The motion to dismiss should be denied and Respondent should be allowed to present its defense.

WHEREFORE Respondent respectfully requests that the Board deny Complainant's Motion to Dismiss Supplemental Affirmative Defenses in all of its parts.

Respectfully submitted,
QC FINISHERS, INC.

By: H. E. Hanson Esq. P.C.
Heidi E. Hanson

Date March 15, 2004
Heidi E. Hanson
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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached RESPONSE TO MOTION TO DISMISS SUPPLEMENTAL AFFIRMATIVE DEFENSES by deposit in a U. S. Mailbox before 4:00 p.m. on March 15, 2004 upon the following persons:

One copy:

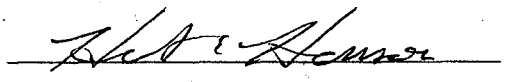
Paula Becker Wheeler
Assistant Attorney General
Office of the Attorney General
188 West Randolph Street, 20th Floor
Chicago, Illinois 60601

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

Original and nine copies:

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

Dated: March 15, 2004



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This filing is submitted on recycled paper.