BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois	)	
Complainant,	)	
v.	)	PCB 04-9 (Enforcement - Air)
AARGUS PLASTICS, INC., an Illinois corporation,	)	
Respondent.	)	

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on May 14, 2004, the People of the State of Illinois filed with the Illinois Pollution Control Board a Reply to Respondent's Response to Complainant's Motion to Strike or Dismiss Respondent's Defenses, true and correct copies of which are attached and hereby served upon you.

Respectfully submitted,

LISA MADIGAN
Attorney General
State of Illinois

BY: Joel J. Sternstein

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois Complainant, v. AARGUS PLASTICS, INC., an Illinois corporation, Respondent.	)	PCB 04-9 (Enforcement - Air)

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

Complainant, PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois, pursuant to Section 101.506 of the Board's Procedural Regulations, Section 2-615 of the Illinois Code of Civil Procedure, and the April 26, 2004 Pollution Control Board Hearing Officer order granting Complainant's oral motion to file a Reply, hereby replies to Respondent AARGUS PLASTICS, INC.'s Response to Complainant's Motion to Strike or Dismiss Respondent's Defenses. In support of its Reply, Complainant states as follows:

INTRODUCTION

On February 3, 2004, Respondent filed its answer and thirteen affirmative defenses to the complaint. On March 5, 2004, Complainant filed a Motion to Strike all of Respondent's Affirmative Defenses ("Motion to Strike"). On April 2, 2004,

Respondent filed its Response to Complainant's Motion to Strike ("Response").

ARGUMENT

Sufficient Pleading of Affirmative Defenses

As Complainant stated in its Motion to Strike, the facts in an affirmative defense must be pled with the same specificity as required by Complainant's pleading to establish a cause of action. International Insurance Co. v. Sargent & Lundy, 242 Ill. App. 3d 614, 630, 609 N.E.2d 842, 853 (1st Dist. 1993). Complainant stated that Respondent's affirmative defenses 1 and 3 were deficient because, among other reasons, they lacked the requisite specificity to be considered valid.

Respondent cites Section 2-612(b) of the Illinois Code of Civil Procedure which provides that no pleading is "bad in substance" if it "reasonably informs" the opposite party of the defense. Under Section 2-612(b), the first and third affirmative defenses must fail. Complainant is not "reasonably informed" by the first or third affirmative defense; the first affirmative defense is an extremely general statement alleging that Complainant has not stated a claim but does not provide the rationale behind the statement. The third affirmative defense states that the Complaint is barred by the applicable statute of limitations but neglects to explain which statute of limitations applies (most likely because there is no applicable statute of

limitations). Pursuant to Section 2-612(b), the first and third affirmative defenses are bad in substance and must fail.

Respondent then cites Section 2-607(a) of the Illinois Code of Civil Procedure and suggests that Complainant should request a bill of particulars from Respondent. Although Complainant is willing to request a bill of particulars from Respondent if ordered to do so by the Board, Complainant deems such a request as an unnecessary step: In its Response, Respondent could have simply added details to the first and third affirmative defenses to make them more specific but chose not to. Granted, it would likely be impossible for Respondent to add such details given the fact that the Complaint stated a claim upon which relief can be granted (thereby negating the first affirmative defense) and the fact that there is no applicable statute of limitations (thereby negating the third affirmative defense).

According to the holding in International Insurance, the Board should strike or dismiss the first and third affirmative defenses for lack of specificity.

Affirmative Defense 2 (Section 31 of the Act/Jurisdiction)

Respondent's arguments regarding the Board's lack of jurisdiction in this matter directly conflict with Board precedent that holds otherwise. Respondent relies on outdated case law to support its argument. Respondent even admits in a footnote that the Board's current position with respect to

Section 31 of the Illinois Environmental Protection Act ("Act"), (415 ILCS 5/31 (2004)) is contrary to Respondent's position. See Response at 6, footnote 2.

Respondent also argues that the Board has misinterpreted Section 31 of the Act and ignored principles of statutory construction. Respondent's argument is flawed as Respondent clearly ignores the Board's well-reasoned and thorough analysis of Section 31 in People v. Crane, PCB 01-176 (May 17, 2001). In Crane, the Board stated that the 180-day time period proscribed in Section 31 is not a statute of limitations. In examining the legislative intent, the Board in Crane reasoned that Section 31 is instead a tool which allows potential violators of the Act an opportunity to meet with Illinois EPA to discuss and negotiate the alleged violations of the Act prior to referral to the Attorney General's Office ("AGO"). See also People v. Eagle-Picher-Boge, PCB 99-152 (July 22, 1999).

The decision in Eagle-Picher-Boge is very similar to the holding in Crane. In its Response, Respondent misstates the Board's holding in the Eagle-Picher-Boge decision. Nowhere in Eagle-Picher-Boge does the Board hold that it is divested of jurisdiction for Illinois EPA's failure to adhere strictly to the 180 day deadline set in Section 31. In fact, the Board held that it did have jurisdiction over the counts in that case that were referred by the Illinois EPA, much as the Board has jurisdiction

over the Illinois EPA-referred Counts in this matter.

If Illinois EPA and the parties cannot agree to settle the matter between themselves, the Illinois EPA may then refer the matter to the AGO for prosecution. Pursuant to Section 31 of the Act, representatives of Respondent and Illinois EPA met in May and August of 2002 to discuss this matter prior to referral of this matter to the AGO.

Respondent also argues that the deadlines set forth in Section 31 are mandatory rather than directory. In Crane the Board held that while the process between Illinois EPA and Respondent prior to referral of the matter to the AGO is mandatory, the 180-day time frame is directory. The Board presented a detailed analysis of its interpretation. Notably, the Board quoted the U.S. Supreme Court in holding that the government's failure to meet a specified deadline in a particular matter does not divest the government of jurisdiction in that matter if there is no consequence for failure to comply with the deadline. Crane citing Brock v. Pierce County, 476 U.S. 253, 259, 106 S.Ct. 1834, 1838-1839 (1986).[1] There is no consequence in the Act for failure to comply with the 180-day deadline in Section 31.

Neither the Illinois EPA nor the AGO has violated Section

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[1] In Brock, the Court also holds that the term "shall" in the statute at issue is directory rather than mandatory.

31. Accordingly, the Board has jurisdiction over this matter. Following the Board's decision in Crane and other recent cases, Respondent's second affirmative defense must be stricken or dismissed.

Affirmative Defenses 4 (Laches)

The Board struck an affirmative defense of laches in People v. Big O Inc., PCB 97-130 (April 17, 1997) for the following reason:

> In assessing the period in which claims will be barred by laches, equity follows the law, and generally courts of equity will adopt the period of limitations established by statute. (Citations omitted.) Thus if the right to bring a lawsuit is not barred by the statute of limitations, unless conduct or special circumstances make it inequitable to grant relief, the equitable doctrine of laches does not bar a lawsuit either.

As stated above, there is no statute of limitations which applies to the Act. Furthermore, there is no conduct nor special circumstances in this matter which would lend itself to laches. Laches cannot be a bar to the Complaint.

In both People v. QC Finishers, Inc., PCB 01-7 (June 19, 2003) and People v. Douglas Furniture of California, Inc., PCB 97-133 (May 1, 1997), the Board held that an affirmative defense which concerns the imposition of a penalty as opposed to the underlying cause of action is not an affirmative defense to that cause of action. Respondent's argument concerning laches centers on the potential imposition of penalties, not on the underlying

cause of action.

The Board should therefore strike or dismiss Respondent's fourth affirmative defense.

Affirmative Defense 5 (Waiver)

Complainant finds no merit in Respondent's waiver argument. Respondent claims that Complainant relinquished its right to file an enforcement action in this matter because the State inspected Respondent's facility in the past and at some point assured Respondent that it was "taking appropriate action".

Complainant finds no correlation between Respondent's argument and the doctrine of waiver. Waiver is "when a party intentionally relinquishes a known right or his conduct warrants an inference to relinquish the right." Crane; see also Hartford Accident and Indemnity Co. v. D.F. Bast, Inc., 56 Ill. App. 3d 960, 962, 372 N.E.2d 829, 831 (1st Dist. 1977); People v. Panhandle Eastern Pipeline Co., PCB 99-191 (Nov. 15, 2001); Douglas Furniture, slip op. at 5.

The fact that Illinois EPA or some other arm of State government told Respondent that it was "taking appropriate action" should not give rise to an affirmative defense based on waiver. Although a representative of the State may have assured Respondent at some point in the past that it was taking appropriate action, Respondent cannot now argue that such conduct amounts to the State intentionally relinquishing its right to

bring an enforcement action against Respondent. In addition, the State's conduct does not amount to an interference which relinquishes a right to bring an enforcement action.

According to Respondent's argument, the State could conduct an inspection at a facility and give that facility a passing grade at that inspection. At a subsequent inspection where the State finds new violations of the Act (or violations of the Act that were not readily apparent during the first inspection) Respondent's logic would dictate that the State be barred from bringing an enforcement action against the facility solely based on representations made at the first inspection. Such an absurd result would severely hamper the efforts of the State to protect human health and the environment. See Panhandle Eastern, *supra*.

Furthermore, Respondent's only argument for asserting waiver pertains to penalties. According to the holdings in both Douglas Furniture and QC Finishers a defense that concerns a penalty and not the underlying cause of action is not an affirmative defense to that cause of action.

Pursuant to the Board holdings in QC Finishers, Douglas Furniture, and Panhandle Eastern, Respondent cannot hide behind the affirmative defense of waiver, and the Board should accordingly strike or dismiss it.

Affirmative Defenses 6 and 11 (Estoppel)

In the Response, Respondent applies the three-part test for

estoppel to this matter and concludes that it has a valid affirmative defense. However, Respondent never states that Illinois EPA made representations that it knew were untrue (second prong of the estoppel test), nor does Respondent state that Illinois EPA engaged in an affirmative act (third prong of the estoppel test). Respondent's claim that Illinois EPA waited to issue violation notices does not constitute an affirmative act.

The Illinois Supreme Court has held that

> The Court's reluctance to apply the doctrine of estoppel against the State has been motivated by the concern that doing so may impair the functioning of the State in the discharge of its government functions, and that valuable public interests may be jeopardized or lost by the negligence, mistakes, or inattention of public officials. Brown's Furniture Inc. v. Wagner, 171 Ill.2d 410, 431-432, 665 N.E.2d 795, 806 (1996) citing Hickey v. Illinois Central Railroad, 35 Ill. 2d 427, 447-48, 220 N.E.2d 415, 426 (1966); see also Panhandle Eastern; People v. White & Brewer Trucking, PCB 96-250 (March 20, 1997), slip op. at 10.

If the Board refuses to strike or dismiss Respondent's estoppel defenses, the Board will not address the Illinois Supreme Court's concern. The ability of Illinois EPA to carry out its duties may be compromised merely because (as Respondent alleges) it waited to issue Violation Notices. In order to address the Illinois Supreme Court's concern, the Board should strike Respondent's sixth and eleventh affirmative defenses.

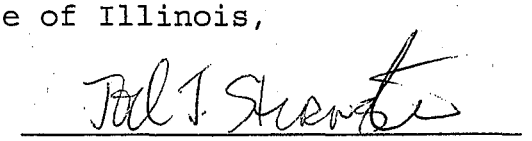
Affirmative Defenses 12 and 13

Respondent basically admits that its twelfth and thirteenth affirmative defenses should be stricken or dismissed when it stated that the allegations from the Complaint recited in those affirmative defenses are valid. See Response at 10.

CONCLUSION

As states in the Motion to Strike, all of Respondent's affirmative defenses have serious flaws which render them invalid. All of Respondent's affirmative defenses should therefore be stricken or dismissed.

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

By: 

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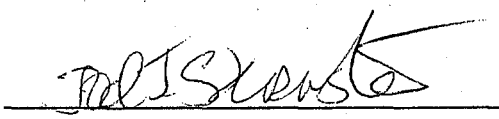
CERTIFICATE OF SERVICE

I, JOEL J. STERNSTEIN, an Assistant Attorney General, certify that on the 14th day of May 2004, I caused to be served by First Class Mail the foregoing Reply to Respondent's Response to Complainant's Motion to Strike or Dismiss Respondent's Defenses to the parties named on the attached service list, by depositing same in postage prepaid envelopes with the United States Postal Service located at 100 West Randolph Street, Chicago, Illinois 60601.



JOEL J. STERNSTEIN