BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS Complainant, vs- QC FINISHERS, INC., an Illinois corporation, Respondent.	)	PCB No. 01-7 (Enforcement - Air)

NOTICE OF FILING

TO: Heidi Hanson
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Western Springs, Illinois 60558-1720

Mr. Bradley Halloran, Hearing Officer
Illinois Pollution Control Board
100 W. Randolph, 11th flr.
Chicago, Illinois 60601

PLEASE TAKE NOTICE that we have today filed with the Office of the Clerk of the Pollution Control Board the original and nine copies of Complainant's Motion to Dismiss Supplemental Affirmative Defenses on behalf of the People of the State of Illinois, copies of which are attached herewith and served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
LISA MADIGAN, Attorney General
State of Illinois

BY: Paula B. Wheeler

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DATED: February 26, 2004

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	
Complainant,	)	
	)	
vs-	)	PCB No. 01-7
	)	(Enforcement - Air)
QC FINISHERS, INC., an Illinois corporation,	)	
	)	
	)	
Respondent.	)	

MOTION TO DISMISS SUPPLEMENTAL AFFIRMATIVE DEFENSES

Now comes Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, pursuant to the January 8, 2004 Board Order, and in response to Respondent's Affirmative Defenses received by this Office on February 5, 2004, moves to strike all Supplemental Affirmative Defenses, and in support thereof, states as follows:

INTRODUCTION

The Board's January 8, 2004 Order gave Respondent leave to file a supplemental answer setting forth any affirmative defenses. Respondent has not filed a supplemental answer but instead has filed Supplemental Affirmative Defenses. Respondent's Supplemental Affirmative Defenses properly state the current status of the Respondent's various affirmative defenses. This Motion will address the seven "Revised" Affirmative Defenses that are the subject of Respondent's February 2004 filing. Three of the "Revised" affirmative defenses are general affirmative defenses based on laches, estoppel, and waiver. The other four

"Revised" affirmative defenses are to specific counts in the Complaint. Complainant contends that none of these "Revised" Affirmative Defenses offers any new arguments or facts that were not previously argued in its initial Answer and Affirmative Defenses filed on March 1, 2003. Nonetheless, the Complainant will respond to each one.

By way of background, on July 14, 2000, Complainant, People of the State of Illinois ("State"), filed a seven-count complaint against Respondent, QC Finishers, Inc. ("QC"). The complaint alleges that QC committed numerous violations of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/1 *et seq.* (2002), and regulations thereunder.

Count I is titled *Construction Without a State Permit,* Count II *Operating Without a State Permit,* Count III *Failure to Comply With Emission Limitations,* Count IV *Failure to Timely Develop and Submit Fugitive Matter Emission Program,* Count V *Failure to Timely File an ERMS Application,* Count VI *Operating Without a CAAPP Permit,* and Count VII *Making a Major Modification Without a Permit.* As stated, on March 1, 2003, QC filed its original Answer and Affirmative Defenses.

STANDARD

Under Illinois case law, the test for whether a defense is affirmative and must be pled by the defendant is whether the defense gives color to the opposing party's claim and then

asserts new matter by which the apparent right is defeated. *Ferris Elevator Company, Inc. v. Neffco, Inc.*, 285 Ill. App. 3d 350, 354, 674 N.E.2d 449, 452 (3rd Dist. 1996); *Condon v. American Telephone and Telegraph Company, Inc.*, 210 Ill. App. 3d 701, 709, 569 N.E.2d 518, 523 (2nd Dist. 1991). *Worner Agency, Inc. v. Doyle*, 121 Ill. App. 3d 219, 222, 459 N.E.2d 633, 635-636 (4th Dist. 1984). In other words, an affirmative defense confesses or admits the cause of action alleged by the plaintiff, then seeks to avoid it by asserting new matter not contained in the complaint and answer. Where the defect complained about appears from the allegations of the complaint, it is not an affirmative defense and would be properly raised by a motion to dismiss. *Corbett v. Devon Bank*, 12 Ill. App. 3d. 559, 569-570, 299 N.E.2d 521, 527 (1st Dist. 1973).

Thus, the issue raised by an affirmative defense must be one outside of the four corners of the complaint. Further, the facts constituting any affirmative defense must be plainly set forth in the answer. Section 2-613(d) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-613(d)(2002). Finally, the facts establishing an affirmative defense must be pled with the same degree of specificity required by a plaintiff to establish a cause of action. *International Insurance Co. v. Sargent & Lundy*, 242 Ill. App. 3d 614, 609 N.E.2d 842, 853 (1st Dist. 1993).

SPECIFIC AFFIRMATIVE DEFENSES

A. Affirmative Defense to Count III.

Respondent states that under an alternative Board regulation it was in compliance by January of 2000. This affirmative defense does not address any new facts outside the complaint. Count III alleges violations since 1991 and 1996. Subsequent compliance, if true, is not an affirmative defense. See Section 33(a) of the Act, 35 ILCS 5/33(a). It may be used for other purposes but it certainly does not make the Respondent less liable for its earlier violations. This defense should be dismissed.

B. Affirmative Defenses to Count IV.

1st Affirmative Defense

Respondent argues in this defense that it was not at any time located in the geographical areas described in 35 Ill. Adm. Code 212.324(a)(1). Section 212.309 refers to emission units described in Section 212.302, which includes parking lots. Section 212.302 states that all manufacturing operations located in any townships of Cook County are subject to 212.309. This affirmative defense does not allege any new facts or arguments. Accordingly, this affirmative defense should be dismissed.

2nd Affirmative Defense

Respondent's argument on this defense is that because a parking lot is paved, it cannot be an emission unit. The

definition of an emission unit as stated by Respondent is 'any part or activity at a stationary source that emits or has the potential to emit.' Even if a parking lot is paved, because of the nature of the business on the premises, particulate matter could still be emitted by the activity of the trucks driving on or off the parking area or other activities occurring on the lot. Because this defense is argumentative, and merely raises an interpretation of the law, it should be dismissed as an affirmative defense.

C. Affirmative Defense to Count VI.

Respondent states in the argument that it received a FESOP in May of 2002 which excluded it from the Clean Air Act Program. As stated previously, compliance at a later date does not excuse violations from 1995 until May of 2002. It has not alleged any new facts or arguments.

GENERAL AFFIRMATIVE DEFENSES TO ALL COUNTS

A. Laches

QC raises an affirmative defense to all Counts that it pleads as laches but which, in substance, contends that the Illinois Environmental Protection Agency ("Illinois EPA") failed to notify QC what the statutes and regulations required. The specious argument continues stating that the State is responsible for any confusion that arises because of Cook County's permitting

requirements, and that a Cook County inspector allegedly informed the Respondent that it did not need a State permit.

QC's so-called laches defense further alleges failure to exercise due diligence on the part of the State by failing to inform QC what the state permit and emission requirements were. Thus, QC contends that the State is liable for Respondent's non-compliance.

The defense of laches does not apply to the allegations made in the first general affirmative defense. Viewing this affirmative defense as a laches defense results in the conclusion that it should be stricken for the following reasons.

Laches is an equitable principle that bars an action where, because of delay in bringing suit, a party has been misled or prejudiced, or has taken a course of action different from that which it might have otherwise taken absent the delay. *Patrick Media Group, Inc. v. City of Chicago*, 255 Ill.App.3d 1, 626 N.E.2d 1066, 1071 (1st Dist. 1993). The delay must have been unreasonable. *City of Rolling Meadows v. National Advertising Company*, 228 Ill.App.3d 737, 593 N.E.2d 551, 557 (1st Dist. 1992).

As stated above, 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. QC does not even allege that there was a delay in bringing the suit. QC

alleges no facts showing any delay on the part of the State in bringing suit, only that the State took no action to inform QC of its permitting and emission requirements. QC merely states, in abbreviated fashion, that "Complainant failed to exercise due diligence and thereby caused prejudice to Respondent, as a result it would be inequitable to allow Complainant to pursue this cause of action..."

This defense fails to set forth key elements of a laches defense. Rather, the defense is a series of statements that lack the specificity required for pleading a claim or a defense, and should be dismissed.

Assuming that the defense of laches was properly pled, the State argues that the doctrine of laches is disfavored when the defense is raised against a plaintiff who is exercising its government function and protecting a substantial public interest. Illinois courts have been reluctant to apply laches when it might impair the State in the discharge of its government function. *Cook County v. Chicago Magnet Wire Corp.*, 152 Ill.App.3d 726, 727-28, 504 N.E.2d 904, 905 (1st Dist. 1987). As a general proposition, the doctrine of laches does not apply to the exercise of governmental functions. *Hickey v. Illinois Central R.R. Co.*, 35 Ill.2d 427, 447, 220 N.E.2d 415 (1966).

Several courts have explicitly held that the doctrine of laches does not apply to the exercise of a governmental function.

See e.g. In re Vandeventer's Estate, 16 Ill.App.3d 163, 165, 305 N.E.2d 299, 301 (4th Dist. 1973); *In re Grimley's Estate*, 7 Ill.App.3d 563, 566, 288 N.E.2d 66, 67 (4th Dist. 1972); *Shoretime Builder Co. v. City of Park Ridge*, 60 Ill.App.2d 282, 294, 209 N.E.2d 878, 884-885 (1st Dist. 1965).

As the Illinois Supreme Court stated:

> . . . the reluctance of courts to hold governmental bodies estopped to assert their claims is particularly apparent when the governmental unit is the State. There are sound bases for such policy . . . More importantly perhaps is the possibility that application of laches or estoppel doctrines 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 mistakes or inattention of public officials.

Hickey, 35 Ill.2d at 447-448, 220 N.E.2d at 425-426.

With its complaint, the State seeks to exercise its government function -- the enforcement of environmental statutes and regulations. The State is charged with this function as is stated in the Act. Section 4(e) of the Act, 415 ILCS 5/4(e), charges the Illinois EPA with the duty to take summary action to enforce violations of the Act. Section 2 of the Act, 415 ILCS 5/2, states: "It is the purpose of this Act . . . to establish a unified, state-wide program . . . to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them."

This is precisely the government function the State's complaint serves. As such, the defense of laches is unavailable to QC.

Courts have consistently refused to allow the defense of laches when the plaintiff, even a private party plaintiff, seeks to protect a substantial public interest. *See Lake Michigan Federations v. U.S. Army Corps of Engineers*, 742 F.Supp. 441, 446-447 (the court denied the defense of laches against a private party seeking to protect the public right to a safe, healthful environment).

This is especially the case with environmental enforcement actions. *See Park City Resource Council, Inc. v. U.S. Department of Agriculture*, 817 F.2d 609, 617 (10th Cir. 1987)("Laches must be involved sparingly in environmental cases because ordinarily the plaintiff will not be the only victim of alleged environmental damage. A less grudging application of the doctrine might defeat Congress in environmental policy.")

Here, clearly, the enforcement of standards relating to air quality is a substantial and vital public interest. To allow QC to assert the defense of laches would impair the State in the exercise of its government function in seeking to protect a substantial public interest and, most important, would deprive the people of this State of a clean and healthful environment. This cause of action fits squarely with the courts' holdings of

the type of case where laches is disfavored.

Looking behind the "laches" label, QC is really alleging that it is the State's responsibility to educate QC on the requirements of the law. QC offers no authority for this assertion and cannot, because there is none. The Act and regulations place the responsibility for compliance on the business operating in the State and impose consequences on those who fail to comply. QC's absurd suggestion that its violation of environmental laws is excusable because of State actions or inactions is contrary to the plain language of the Act and its legislative purpose. Section 2(b) of the Act provides as follows;

> (b) It is the purpose of this Act, as more specifically described in later sections, to establish a unified, state-wide program supplemented by private remedies, to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them. 415 ILCS 5/2(b) (2002)

Even taking as true QC's allegations in this defense, no legally recognized defense would be available. QC's affirmative defense citing laches should be dismissed, with prejudice.

B. Estoppel

The next affirmative defense asserted by QC as to each count is that the State is equitably estopped from bringing the claim. The allegations in this so-called defense are the same as that in the laches argument but draws the conclusion that the State, by

failing to disseminate information and address confusion caused by Cook County ordinances, "induced Respondent to rely on the Cook County Inspector's erroneous assessment of Respondent's compliance status." Because of this, Complainant should be estopped from asserting the violations set forth in the Complaint. This argument seeks to relieve the Respondent from knowing and following the law and makes the alleged incompetence of a Cook County inspector the State's responsibility. As stated above, the facts establishing an affirmative defense must be pled with specificity.

The defense of equitable estoppel must be specifically pleaded or it is waived. *Hubble v. O'Connor*, 291 Ill.App.3d 974, 684 N.E.2d 816, 823 (1st Dist. 1997); *Dayan v. McDonald's Corporation*, 125 Ill.App.3d 972, 466 N.E.2d 958, 977 (1st Dist. 1984).

The elements of the defense are: 1) words or conduct by the plaintiff amounting to a misrepresentation or concealment of material facts; 2) the plaintiff must have had knowledge at the time the representations were made that they were untrue; 3) the defendant must not have known the truth respecting the representations when the representations were made and acted on by the defendant; 4) the plaintiff must intend or reasonably expect that its conduct or representations will be acted upon by the defendant; 5) the defendant must have in good faith relied

upon the misrepresentation to its detriment; and 6) the defendant must be prejudiced if the plaintiff is permitted to deny the truth of the representations or conduct. *Vaughn v. Speaker*, 126 Ill.2d 150, 533 N.E.2d 885, 890 (1989); *Elson v. State Farm Fire and Casualty Company*, 295 Ill.App.3d 1, 691 N.E.2d 807, 817 (1st Dist. 1998).

QC makes no allegation in its equitable estoppel defense that any individual acting for or on behalf of the State misrepresented any material fact to or concealed a material fact from any individual acting for or on behalf of QC.

To establish estoppel against the State, there must be an affirmative act by the State inducing reliance on the part of the defendant to its detriment. *People ex rel. Northfield Park District v. Glenview Park District*, 222 Ill.App.3d 35, 582 N.E.2d 1272, 1280 (1st Dist. 1991).

The second through sixth elements of the defense assume that such a misrepresentation or concealment occurred. Thus, QC's failure to allege the first element means the entire defense must fail. Even so, QC makes no factual allegations relative to the second through sixth criteria. Having failed to plead the elements of equitable estoppel with specificity, this defense should be dismissed.

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. In *Tri-County Landfill v. Pollution Control Board*, 41 Ill.App.3d 249, 353 N.E.2d 316 (2nd Dist. 1976), the court held that estoppel would deny the people of Illinois their constitutional right to a healthful environment. In that case, the court reasoned that permitting estoppel would be permitting the denial of the public's right to a clean environment. *Id.* at 255, 353 N.E.2d at 322. The right to a clean environment has been held to be a public right. *Pielet Bros. Trading v. Pollution Control Board*, 110 Ill.App.3d 752, 758, 442 N.E.2d at 1379 (5th Dist. 1982).

The instant case is an action involving a public right. The People are seeking remediation of air emissions that are potentially injurious to the public health and the environment. The Attorney General has brought this action to protect the People of the State of Illinois' right to a clean and healthy environment. Consequently, the doctrine of estoppel is improper in this case.

Moreover, Illinois case law provides that ". . . the doctrine of estoppel applies against the State only when some positive acts by the State officials may have induced an action by the adverse party under circumstances where it would be inequitable to hold the adverse party liable for the act so induced; mere inaction by the State is not sufficient to invoke estoppel." *Pavlakos v. Department of Labor*, 111 Ill.2d 257, 265,

489 N.E.2d 1325, 1328 (1985)(*citing Hickey* at 447-449).

QC has not pled any positive acts of State officials that may have induced its actions, or how such acts induced its actions, nor has QC pled facts sufficient to establish that it would be inequitable to hold QC liable for environmental violations. It has only pled inaction on the State's part for failing to notify the Respondent of what permits are required, which is insufficient for the defense of estoppel.

Additionally, QC must plead exceptional circumstances before the doctrine can be invoked against a public body. *People ex rel. Brown v. State Troopers Lodge No. 41*, 7 Ill.App.3d 98, 104-105, 286 N.E.2d 524, 528-529 (4th Dist. 1972); *Monarch Gas v. Illinois Commerce Commission*, 51 Ill.App.3d 892, 898, 366 N.E.2d 945 (5th Dist. 1977). QC neglected to plead any exceptional circumstances in its affirmative defense of estoppel. Moreover, as with QC's so-called laches defense, the clear absence of any basis in law for QC's conditioning its duty to comply on State notification or clear explanation of such duty serves to illustrate the frivolous nature of this defense. It should be considered as such and promptly dismissed.

QC's purported defense of equitable estoppel is insufficient as a matter of law, and should be dismissed.

C. Waiver

QC's last affirmative defense to all Counts states the facts as previously alleged in the other general affirmative defenses, but concludes this time with "The State chose knowingly, and for its own purposes not to pursue contacts with small, county permitted sources such as QC Finishers, while also being fully aware that such could have averted noncompliance." Respondent argues that because of this, the State waived its right to pursue a cause of action against the Respondent. However, the affirmative defense of waiver is unavailable to Respondent because a waiver is an intentional relinquishment of a known right. *Pantle v. Industrial Commission*, 61 Ill.2d 365, 372, 335 N.E.2d 491 (1975). There must be both knowledge of the existence of the right and an intention to relinquish it. *Id.* While the State is certainly aware of its right to pursue violators of environmental statutes and regulations, it has not waived any rights, either explicitly or even implicitly. The Respondent is evidently confusing the defense of estoppel with the doctrine of waiver. For the reasons stated above, this argument asserted to be an affirmative defense should be dismissed with prejudice as a matter of law.

CONCLUSION

For the foregoing reasons, the Complainant respectfully requests that QC's Supplemental Affirmative Defenses be dismissed, with prejudice.

PEOPLE OF THE STATE OF ILLINOIS,

LISA MADIGAN, Attorney
General of the State of Illinois

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CERTIFICATE OF SERVICE

I, Paula Becker Wheeler, an Assistant Attorney General in this case, do certify that on this 26th day of February 2004, I caused to be served the foregoing Notice of Filing and Motion To Dismiss Supplemental Affirmative Defenses upon the persons named within by mail and depositing same in the U.S. Mail depository located at 188 West Randolph Street, Chicago, Illinois, in an envelope with sufficient postage prepaid

Paula Becker Wheeler

PAULA BECKER WHEELER