BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainants,	)	
	)	PCB # 01-07
vs.	)	(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

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 persons listed above a copy of **RESPONDENT'S RESPONSE TO MOTION TO QUASH SUBPOENA** on behalf of QC Finishers, Inc., a copy of which is hereby served upon you.

Respectfully submitted,

Heidi E. Hanson

Dated August 15, 2003

Heidi E. Hanson
H. E. Hanson, Esq. P.C.
4721 Franklin Ave, Suite 1500
Western Springs, IL 60558-1720
(708) 784-0624

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RESPONDENT'S RESPONSE TO MOTION TO QUASH SUBPOENA

NOW COMES Respondent, QC Finishers, Inc. by and through its attorney, H. E. HANSON ESQ. P.C. and for its RESPONSE TO MOTION TO QUASH SUBPOENA states as follows:

1. On July 25, 2003 Complainant filed a Motion to Quash a subpoena for deposition directed to Ms. Crystal Myers-Wilkins.

2. Pursuant to the July 17, 2003 Hearing Officer order in this case the date for filing a response to that Motion was extended until August 15, 2003.

3. Ms. Myers-Wilkins has been involved in discussions and correspondence regarding Q C Finishers, Inc. beginning on or before February of 2000. She has been involved in permit and technical issues as well as being the IEPA attorney assigned to this matter. (See Attachment 1, Ms. Myers-Wilkins Affidavit, Attachment 2, a letter from Ms. Myers-Wilkins regarding calibration of emission monitors, and Attachment 3, a "sign-in" sheet for a meeting on a monitoring issue which involved three unrelated companies.)

4. The basis for Complainant's motion is that because Ms. Myers-Wilkins is an attorney and is employed by the Illinois Environmental Protection Agency all of her knowledge regarding this case is either irrelevant, attorney-client privileged, or subject to the work product doctrine.

5. Complainant offers no evidence whatsoever, for its assertion that Ms. Myers-Wilkins knows nothing that would be discoverable.

6. The Illinois Pollution Control Board rejected the Illinois Attorney General's previous attempt to insulate state attorneys from the Board's discovery process. In Theresa Castellari et al v. John Prior, PCB 86-79, 1987 Ill. ENV LEXIS 311 (May 28, 1987), then Assistant Attorney General, Joe Madonia, was subpoenaed to a Board Hearing. He moved to quash on the grounds that he had no personal knowledge of the violations and that any other relevant knowledge was privileged under the attorney-client

privilege, work product doctrine or as part of settlement discussions. The Hearing Officer denied the motion to quash stating that "Madonia could make specific objections to questions dealing with privileged information when he testified." Madonia then walked out of the hearing in apparent defiance of the Hearing Officer's order. Respondent made an offer of proof "as to what he had expected Madonia to testify to", which offer was accepted by the Hearing Officer and later by the Board. Castellari, at *38-42.

7. With regard to the relevance of Ms. Myers-Wilkins testimony the Complainant has asserted (Motion, para. 9), that "Crystal Myers-Wilkins is not a expert in the areas alleged as violations in the complaint therefore any testimony by her to this issue would be irrelevant."

8. This misstates the applicable standard in a number of respects.

a. Nowhere in the Board rules, or the applicable court rules, does it state that only the knowledge of experts can be relevant or that discovery must be limited to expert knowledge.

b. Even if her testimony were shown to be irrelevant that alone would not provide support to quash a subpoena for deposition. Board rule, 35 Ill. Adm. Code 101.616(e) states that "...it is not a ground for objection that the testimony of a deponent or person interrogated will be inadmissible at hearing, if the information sought is reasonably calculated to lead to relevant information."

c. The "areas alleged as violations" are not the only matters at issue in this proceeding. The Board will also consider the factors listed in 415 ILCS 5/33(c) and 42(h) at the hearing, therefore information relating to those issues will also be relevant.

9. Ms. Myers-Wilkins knowledge of the circumstances of Q C Finishers is clearly relevant for purposes of discovery in that:

a. She has been involved in a variety of issues relating to Q C Finishers, including technical and permit issues. (See Attachments 2 and 3).

b. She signed the affidavit supporting Complainant's response to the Request for Production stating that "to the best of my knowledge and belief, that Plaintiff's [sic] responses to the Respondent's Request for Production are responsive and complete. I can further state that, to the best of my knowledge and belief, that the facts set forth in the responses to the Respondent's Interrogatories are true, accurate and complete." (Attachment 1). Ms. Myers-Wilkins was the only affidavit supporting the responses relating to the underlying issues. (Another affidavit was offered to support penalty calculations only.)

c. In Complainant's Response to Interrogatories and Request for Production Ms. Myers-Wilkins' was the only IEPA employee listed as having been involved in responses to Interrogatories 1 through 24. (See pages 7 and 8 of the Complainant's Response to Interrogatories and Request for Production, attached hereto as Attachment 4). If she in fact had no relevant knowledge the Complainant's response to interrogatories would be grossly inadequate and improper pursuant to 35 Ill Adm. Code 101.620(b).

10. Complainant failed to show that Ms. Myers-Wilkins possesses no relevant knowledge, instead her long term involvement with the Q C Finishers matter and permits, and her answers in support of discovery, mandate the opposite conclusion.

11. Complainant has also asserted that Respondent has other potential witnesses available. Motion para. 8. The fact that other witnesses are later made available for deposition does not serve as a reason to quash a subpoena., especially given the fact that it was Ms. Myers-Wilkins who provided discovery responses.

12. The argument that all of Ms. Myers-Wilkins knowledge is attorney-client privileged and/or subject to the work product doctrine, is also unsupported.

13. In May of this year the Illinois Supreme Court reiterated the elements of attorney client privilege as "(1) where legal advice of any kind is sought, (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are permanently protected, (7) from disclosure by himself or the legal advisor, (8) except protection be waived." Illinois Education Association v. Illinois State Board of Education, 791 N. E 2d 522, 2003 Ill Lexis 783 at *17-18, 274 Ill Dec. 430 (May 22, 2003).

14. The work product doctrine as codified in Supreme Court Rule 201(b)(2) requires that to qualify as work product, material must be prepared by or for a party in preparation for trial and must contain or disclose the theories, mental impressions or litigation plans of the party's attorney.

15. Neither description of the necessary elements support the inference that Complainant tries to draw - that all knowledge and communications by an attorney are automatically privileged.

16. Complainant has simply not shown that the necessary elements of the privilege and doctrine have been met. It has also failed to support its claim as required by Supreme Court Rule 201(n).

17. The Illinois Supreme Court, in Illinois Education Association, 2003 Ill. LEXIS 783 at *22, in the context of a FOIA request, recently, and vehemently, dealt with a similar attempt to invoke the attorney-client privilege by name only.

"...the burden is on the public body to demonstrate that the attorney- client exemption of section 7(1)(b) is applicable. But in meeting its burden the public body may not simply treat the words "attorney-client privilege" or "legal advice" as some talisman, the mere utterance of which magically cast a spell of secrecy over the documents at issue. Rather the public body can meet its burden only by providing some *objective* indicia that the exemption is applicable under the circumstances."

18. The court went on to state that affidavits supporting a claim of the privilege should "show with reasonable specificity why the documents fall within the claimed exemption and are sufficient to allow adversarial testing." Id at *22.

19. The attorney-client privilege and the work product doctrine also presume as an essential element that confidentiality has been maintained and not waived, but the fact that Ms. Myers Wilkins has been personally involved in discussions and correspondence with Q C Finishers and other parties on related matters (attachments #2 and #3) shows that she must possess at least some knowledge that is not confidential, or for which confidentiality has been waived, because she has already shared her knowledge with Q C Finishers.

20. The fact alone that Ms. Myers-Wilkins' affidavit was offered in support of discovery responses will also serve to illustrate the absurdity of the allegation that she knew nothing of relevance and that anything that she does know is confidential.

21. In conclusion, Complainant's argument that Ms. Myers-Wilkins has no discoverable knowledge must fall in light of the fact that her knowledge has already been offered in support of discovery and has been shown to cover areas other than litigation plans and legal advice. Complainant has failed to support, or prove the elements of, the privileges that it has asserted. Both the Board and the Supreme Court have rejected attempts to assert similar, blanket, unsupported privileges.

WHEREFORE, Respondent respectfully requests that the Motion to quash be denied and that the deposition of Ms. Myers Wilkins be allowed to proceed.

Respectfully submitted,
QC FINISHERS, INC.

Heidi Hanson

By: its attorney, H. E. Hanson Esq. P.C.
Heidi E. Hanson

Date August 15, 2003
Heidi E. Hanson
H. E. Hanson, Esq. P.C.
4721 Franklin Ave, Suite 1500
Western Springs, IL 60558-1720
(708) 784-0624

STATE OF ILLINOIS
COUNTY OF SANGAMON

Attachment 41

AFFIDAVIT

I, Crystal Myers-Wilkins, being first duly sworn, depose and state that the following statements set forth in this instrument are true and correct, except as to matters therein stated to on information and belief and, as to such matters, the undersigned certifies that she believes the same to be true:

1. I am an Assistant Counsel employed with the Illinois Environmental Protection Agency's ("Illinois EPA") Division of Legal Counsel. My work responsibilities are primarily devoted to enforcement-related tasks and assignments relating to air pollution enforcement cases initiated by the Illinois EPA's Bureau of Air/Division of Air Pollution Control.

2. As part of my responsibilities as an enforcement attorney, I am familiar with the matter involving the PEOPLE OF THE STATE OF ILLINOIS vs. QC FINISHERS, INC., an Illinois Corporation, PCB No. 01-07, filed before the Illinois Pollution Control Board and, further, I assisted in the related preparation of the Illinois EPA's formal enforcement referral to the Office of the Illinois Attorney General.

3. I have read the Respondent's Interrogatories and Request for Production that was served upon the State of Illinois on or about May 15, 2003.

4. Having assisted the attorney of record for the People, Paula Becker Wheeler, Assistant Attorney General, in responding to the aforementioned discovery responses, I can state, to the best of my knowledge and belief, that the Plaintiff's responses to the Respondent's Request for Production are responsive and complete. I can further state, to the best of my knowledge and belief, that the facts set forth in the responses to the Respondent's Interrogatories are true, accurate and complete. Due to my limited role in this enforcement proceeding, I cannot attest to the objections identified in the discovery responses.

Further affiant sayeth not.

Crystal Myers-Wilkins

Subscribed and Sworn
To Before Me this 20 Day of June 2003

Cynthia L. Wolfe

OFFICIAL SEAL
CYNTHIA L. WOLFE
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 3-20-2007

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276

THOMAS V. SKINNER, DIRECTOR

Attachment #2

April 12, 2001

Heidi Hansen
4721 Franklin Avenue, Suite 1500
Western Springs, Illinois 60558-1720

Re: Daily calibration of continuous Emissions monitor

Dear Heidi:

In response to our conversation on April 12, 2001, regarding daily calibration of the continuous emissions monitor, please refer to the letter addressed to you of October 18, 2000, for a review of the Illinois Environmental Protection Agency's position and USEPA's concurrence on continuous emissions monitoring. That letter expounds on factors the continuous emissions monitor must achieve, daily calibration being one of them. Daily calibration is essential for proper tracking of emissions to assist in determining whether or not the system is properly functioning. To this end this factor cannot be relaxed. Any further questions regarding this matter should be directed to Crystal Myers-Wilkins.

Sincerely,

Crystal Myers-Wilkins

Crystal Myers-Wilkins
Assistant Counsel
Division of Legal Counsel

QCF

Attachment #3

Sign- In

7/27/00

Name	Co.	Phone
Kevin Mattison	IEPA	708/338-7872
Pat Layman	Illinois EPA	217/524-3907
Val Brodsky	IEPA	217/782-2113
Crystal Myers-Wilkins	IEPA/OLC	217/782-5544
Rebb Layman	IEPA/Legal	217/524-9137
Mike Wentzel	E/M Coatings	770/261-4818
Chuca Meyer	Winthrop Stimson	202/775-9827
Paul Gratchis	QC Finishes	847-678-2660
Michael Caruso	M+W Industries	727-372-5046
Heidi E. Hanson	H.E Hanson P.C	708-784-0624
Steve Anderson	Admiral Env.	847-228-5355
GARY BECKSTEAD	IEPA/AQPS	217.524.4883

overbroad, unduly burdensome, and apparently calculated to harass, cause unnecessary delay and needlessly increase the cost of litigation. Without waiving said objection, please see attached documents.

Attachment #4

16. **Request**

All Documents and Communications regarding the ozone air quality for Cook County for the years from 1985 to 2000, including but not limited to the "Illinois Annual Air Quality Report."

Response:

Complainant objects to this request as irrelevant, overbroad, unduly burdensome, and apparently calculated to harass, cause unnecessary delay and needlessly increase the cost of litigation. Without waiving said objection, please see attached documents.

INTERROGATORIES

1. **Question**

Identify each Person who will testify for Complainant at hearing and for each Person state each of the subject(s) of their testimony.

Answer:

Gary Styzens, IEPA, Chief Auditor, will testify about the economic benefit of noncompliance and related issues.

Dr. Nosari, Consultant, will testify about ability to pay and related issues.

Complainant has not yet identified other witnesses to render

testimony at trial. Complainant reserves the right to supplement its response to this question request as additional information becomes available. Investigation continues.

Attachment #4 continued

2. **Question**

Identify all Persons including experts and consultants, having knowledge of the facts, circumstances, or other matters alleged in the Complaint.

Answer:

See answer to Interrogatory No. 1.

3. **Question**

Identify each Person including but not limited to past and present employees of Complainant who provided information and/or drafted the answers to each of Respondent's interrogatories and state the number of the interrogatory for which they provided information or responded.

Answer:

Gary Styzens provided assistance with Nos. 25,26,27,28 and 29.

Dr. Nosari provided assistance with No. 27.

Crystal Myers-Wilkins, Assistant Legal Counsel of the Illinois EPA, and Paula Becker Wheeler, Assistant Attorney General, provided legal assistance with regard to all interrogatories and objections.

4. **Question**

State in detail each fact on which complainant bases its allegation that Respondent has violated 35 Illinois Administrative Code Part 203.

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served copies of the attached **RESPONDENT'S RESPONSE TO MOTION TO QUASH SUBPOENA** upon the following persons by placing said document in the U. S. Mail with postage prepaid before 4: 00 p.m. on August 15, 2003 :

Original and four (4) copies

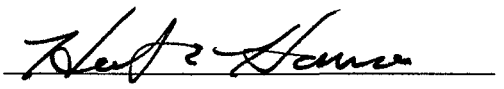
Clerk, Illinois Pollution Control Board
100 W. Randolph Street
State of Illinois Center
Suite 11-500
Chicago, Illinois 60601

One copy each to:

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

Dated: August 15, 2003



Heidi E. Hanson
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This filing is submitted on recycled paper.