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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

FEB - 4 2004

PEOPLE OF THE STATE OF ILLINOIS,)

Complainants,)

vs.)

QC FINISHERS, INC., an Illinois Corporation,)

Respondent.)

PCB # 01-07

(Enforcement-Air)

STATE OF ILLINOIS
Pollution Control Board

NOTICE OF FILING

To:

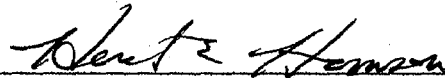
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PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the original and nine copies of SUPPLEMENTAL AFFIRMATIVE DEFENSES on behalf of QC Finishers, Inc., a copy of which is hereby served upon you.

Respectfully submitted,



Heidi E. Hanson

Dated February 2, 2004
Heidi E. Hanson
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SUPPLEMENTAL AFFIRMATIVE DEFENSES

NOW COMES QC Finishers, Inc. by and through its attorney, H. E. HANSON ESQ. P.C., pursuant to the January 8, 2004 Board Order, which was received by Respondent on January 12, 2004, and for its Supplemental Affirmative Defenses states as follows:

STATUS OF AFFIRMATIVE DEFENSES

1. Of the ten specific, and four general, affirmative defenses ("ADs") set forth in the Answer and Affirmative Defenses dated February 28, 2003, all but three specific Affirmative Defenses (Count I 2nd AD, Count I 3rd AD and Count II 2nd AD) were the subject of a Motion to Dismiss filed by the Complainant on April 25, 2003.
2. The Board ruled on the Motion to Dismiss on June 19, 2003, denying the Motion to Dismiss as to three specific ADs (Count I 1st AD, Count II 1st AD, and Count VI 2nd AD).
3. On July 31, 2003 Respondent filed a Motion for Reconsideration asking the Board to reconsider its ruling on seven of the eight ADs that had been stricken. (The Respondent did not ask the Board to reconsider its ruling on the Third General Affirmative Defense.)
4. On January 8, 2004 the Board allowed Respondent to file a supplemental answer setting forth its affirmative defenses. As a result of the previous rulings only seven of the original fourteen ADs are still at issue. In the interest of administrative economy Respondent reaffirms the affirmative defenses which were not stricken and will not repeat them here. Respondent will revise and supplement, below, only those affirmative defenses which are still at issue. A summary of the status of the defenses is given below:

Specific Affirmative Defenses

Count I, 1st	motion to strike denied
Count I, 2nd	no move to strike
Count I, 3rd	no move to strike
Count II, 1st	motion to strike denied
Count II, 2nd	no move to strike
Count III	revised
Count IV, 1st	revised
Count IV, 2nd	revised
Count VI, 1st	revised
Count VI, 2nd	motion to strike denied

General Affirmative Defenses

1st - Laches	revised
2nd - Estoppel	revised
3rd - Failure to Minimize	abandoned
4th - Waiver	revised

REVISED AFFIRMATIVE DEFENSES**COUNT III - FAILURE TO COMPLY WITH EMISSION LIMITATIONS****FIRST AFFIRMATIVE DEFENSE TO COUNT III**

1. Count III of the Complaint (paragraphs 11 and 12) alleges that Respondent has used and continues to use "to the present" coatings which exceed the limits set forth in 35 Ill. Adm. Code 218.204.
2. In its February 28, 2003 Answer, Respondent admitted to such use in paragraph 12. (Paragraph 11 was not plead with sufficient specificity to be answerable.)
3. The use of coatings that do not comply with 218.204 does necessarily constitute a violation of the Board's rules because the Board has provided an alternative to 218.204.
4. 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 comply with section 218.207 rather than 218.204. Therefore section 218.207 provides an alternative to 218.204 because a facility is permitted to continue to use coatings which do not comply with 218.204 if it controls the emissions from those coatings pursuant to 218.207.

5. In 1999 and continuing into 2000 QC Finishers installed control equipment, and two of its six coating booths were ducted to the control equipment. The controls were operational in 2000 and have continued to be used to the present. The remaining four booths were to be used solely for coatings which did not exceed the limits in 218.204.
6. Thus Respondent was able to use, and did use, coatings in the two controlled booths which exceeded the 218.204 limits without violating Board rules.
7. Respondent's use of coatings which exceed the limits in 218.204 in the controlled booths, does not constitute a violation of 218.204, pursuant to 218.207.
8. Respondent's compliance with 218.207 in lieu of 218.204 constitutes new information which can be pled through an affirmative defense.
9. Even assuming that the facts pled in the Complaint are correct, the new facts (use of controls) pled in this affirmative defense, will serve to defeat the allegation of a violation of 218.204 for the period of time during which all of the coatings that exceeded the limits of 218.204 were controlled pursuant to 218.207.

COUNT IV - FAILURE TO TIMELY DEVELOP AND SUBMIT FUGITIVE MATTER EMISSION PROGRAM

FIRST AFFIRMATIVE DEFENSE TO COUNT IV

1. Count IV, paragraphs 8 and 11, alleges that Q C Finishers violated 35 Ill Adm. Code 212.309 by failing to have a fugitive dust operating program.
2. 35 Ill Admin Code 212.309 states in pertinent part as follows:

The emission units described in Sections 212.304 through 212.308 and Section 212.316 of this Subpart shall be operated under the provisions of an operating program...
3. The Complaint, paragraph 9, alleges that "[a]s 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..."
4. 35 Ill. Admin. Code 212.316 subsection (a) provides as follows:

Emissions Limitation for Emissions Units in Certain Areas a)
Applicability. 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*).

5. QC Finishers is not and was not at any time relevant to this count, located in the geographical areas described in 35 Ill. Adm. Code 212.324(a)(1), which geographical areas are comprised of areas in the vicinity of McCook in Cook County, and Lake Calumet in Cook County and Granite City in Madison County.
6. Even assuming, *arguendo*, that Q C Finishers parking lot is an emission unit, it is not a regulated emission source pursuant to 212.316 because it is not located in a geographical area described in 212.324(a)(1).
7. The Complaint alleges no other basis for considering the parking lot to be a source that would require an operating plan.
8. As a result while Complainant's statement that 212.316 regulates parking lots is correct, QC Finishers parking lot does not meet the second test of 212.316. It is not located in an area defined by 212.324(a)(1) and that fact will defeat the allegation.

SECOND AFFIRMATIVE DEFENSE TO COUNT IV

1. Count IV alleges that QC Finishers violated 35 Ill Adm. Code 212.309 by failing to have a fugitive dust operating program for its parking lot.
2. That section by its terms applies only to "emission units".
3. An "emission unit" is defined by 35 Ill Adm Code 211.1950 as "any part or activity at a stationary source that emits or has the potential to emit".
4. QC Finishers parking lot is paved and has been paved at all times relevant to this count.
5. Because it is paved it does not generate dust. Any dust appearing on the parking lot surface would necessarily have been generated by some actual emission unit or mobile source.
6. Therefore QC Finishers paved parking lot does not emit or have the potential to emit.
7. QC Finishers parking lot is not an emission unit and therefore the fact that it is paved will defeat the allegation that it requires an operating program.

COUNT VI - OPERATING WITHOUT A CAAPP PERMIT

FIRST AFFIRMATIVE DEFENSE TO COUNT VI

1. In Count VI, paragraph 18, of the Complaint, the People allege that " Respondent does not currently have a CAAPP [Clean Air Act Permit Program] permit."
2. Respondent admitted the allegation in Count IV, paragraph 18.
3. The fact that Respondent does not currently have a CAAPP permit does not mean that a violation is occurring because pursuant to 415 ILCS 5/39.5(3)(c) the Illinois Environmental Protection Agency can exclude a source from the requirement that it obtain a CAAPP.
4. Section 5/39.5(3)(c) states, in pertinent part, as follows:

The Agency shall have the authority to issue a State operating permit for a source under Section 39(a) of this Act...which includes federally enforceable conditions limiting the "potential to emit" of the source to a level below the major source threshold of that source described in paragraph 2(c) of this Section, thereby excluding the source from the CAAPP....
5. In essence section 5/39.5(3)(c) provides an exception to Section 5/39.5(6) of the Act.
6. On May 3, 2002 Respondent was granted state operating permit #99030080 which contained federally enforceable conditions limiting its potential to emit to a level below the major source threshold described in 5/39.5(2)(c) of the Illinois Environmental Protection Act, thus excluding Respondent from the Clean Air Act Permit Program.
7. Thus, Respondent was able to operate and continues to operate without a CAAPP permit and without violating the Illinois Environmental Protection Act.
8. Respondents possession of the state operating permit #99030080 and its resulting exclusion from the CAAPP, constitutes new information which can be pled through an affirmative defense.
9. Even assuming that the facts and law pled in the Complaint are correct, the new facts (the granting of the state operating permit) pled in this affirmative defense, will serve to defeat the allegation of a violation of sections 39.5(6) and 9 for the period of time, May 3, 2002 to the present, during which Respondent has had the state operating permit.

FIRST AFFIRMATIVE DEFENSE TO ALL COUNTS OF THE COMPLAINT - LACHES

1. From 1985 to the present Respondent's site has been located in Franklin Park, in Cook County, Illinois.
2. Respondent's operations are subject to the Cook County Environmental Ordinance.
3. The Cook County Environmental Control Ordinance, Section 5-4 effective April 16, 1973 to the present, requires operators or users of combustion or process equipment to obtain Certificates of Operation.
4. Respondent has, and at all relevant times had, Cook County Certificates of Operation for its Franklin Park operations.
5. The standards for issuance of such Certificates are substantially the same as the standards for issuance of Illinois operating permits as originally adopted in PCB R71-23, Illinois Pollution Control Board Rule 103(b)(6).
6. Respondent was not aware that it was required, at such time as its use of coatings exceeded 5,000 gallons per year, to obtain State of Illinois operating permits for the same operation and equipment for which it already had a Cook County Certificate of Operation, nor was it aware of the other requirements that it is alleged to have violated.
7. The State of Illinois may reasonably be imputed with the knowledge of the ordinances of Illinois most heavily populated county; Cook County.
8. The State of Illinois may further be imputed with the knowledge that existence of the Cook County Environmental Control Ordinance created a situation that was confusing and misleading for Cook County sources which were complying with the Cook County requirements but which were also required to be separately permitted by the State of Illinois for the same operations.
9. The Illinois Environmental Protection Act Section 4(b) (415 ILCS 5/4(b) provides that the "Illinois Environmental Protection Agency shall have the duty to collect and disseminate such information as may be required to carry out the purposes of this Act".
10. The State of Illinois did not attempt to contact emission sources that held Cook County Certificates of Operation, but not state permits, to inform them that state or federal permits might be required for the same activities for which they were already permitted by Cook County, or in the alternative, such contacts that may have been made were not sufficient or effective.

11. The State of Illinois did not attempt to contact emission sources described in paragraph 10 above, to inform them that on numerous occasions between 1973 and the present the State of Illinois had adopted more stringent emission rules than were in effect under the Cook County Environmental Control Ordinance, or in the alternative, such contacts that may have been made were not sufficient or effective.
12. On several occasions, occurring after its use of coatings had exceeded 5,000 gallons per year, Respondent received assurances from its Cook County Inspector that it did not need any state permits.
13. Respondent reasonably relied on the Cook County Environmental Ordinance, the assurances of the Cook County inspector and the lack of any contact by the State of Illinois in its belief that it was in compliance with all applicable environmental law.
14. Respondent, a small company with no more than 47 employees at any time, had no reasonable way of knowing the true facts nor did it have any reason to believe that it had to further investigate its compliance status.
15. The "Governors Small Business Environmental Task Force Report and Recommendations" published by the Illinois Environmental Protection Agency in March of 1994 stated that "a fundamental problem in the current system with respect to regulation of small business is a lack of satisfactory means for disseminating information to small businesses". Page 6.
16. The Illinois Pollution Control Board also observed in R 96-17 (June 5, 1997) 1997 Ill. Env. LEXIS 326 *7, in specific reference to coaters, that in a comment filed in that rulemaking "the [Illinois Environmental Protection] Agency agreed that distribution of information regarding compliance requirements to the individual smaller users is necessary to obtain greater compliance by these emission sources."
17. Complainant knew or should have known that the existence of the Cook County Environmental Ordinance requirements created a confusing situation for Cook County sources who believed that they were fully permitted and it further knew that this situation would be exacerbated for small businesses and in particular small coating operations.
18. Complainant could easily have identified members of this class by reviewing the Cook County Certificates of Operation and it could have notified the members of the class of the need for further permitting and emissions control.
19. Complainant was aware or should have been aware that dissemination of information to such class of persons would aid in enforcement of the Act.
20. During all relevant times prior to the summer of 1998, when it first learned of the state requirements, Respondent was in compliance with all of the environmental laws of which it was aware.

21. Upon becoming aware of the additional permitting requirements and emission limits, Respondent retained a consultant, submitted permit applications, installed controls and otherwise exhibited due diligence in complying with those requirements that applied to it.

22. Had the State of Illinois or the Illinois Environmental Protection Agency acted with due diligence by disseminating information on state permit and emission requirements to the class of small Cook County coating sources which hold Certificates of Operations, it could have prevented QC Finishers noncompliance with Illinois law, thus decreasing harm to both the environment and to QC Finishers.

23. The doctrine of laches, as recognized by the Board, 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).

24. "There are two principal elements of laches: lack of due diligence by the party asserting the claim and prejudice to the opposing party." People v. John Crane, slip op. at 8.

25. Complainant can be reasonably imputed with the knowledge that the substantially similar Cook County regulatory scheme created confusion for Cook County sources and Complainant failed to take action to dispel this confusion.

26. In addition Complainant has shown lack of due diligence in that the Illinois Environmental Protection Agency (Agency") which was charged with the duty to disseminate information regarding the Board's requirements failed to do so adequately and both the Governor and the Agency specifically acknowledged a failure to do so with regard to small businesses.

27. Even though QC Finishers had held Cook County permits since it began operations and therefore Respondent was part of a small, easily, identifiable group of sources, the Agency did not contact it to assert its right to permits, to inspect its air emission units or to initiate the inquiries that led to the instant Complaint, from 1985 until 1998, thus the Agency did not demonstrate due diligence.

28. Complainant could easily have identified Respondent and informed it of its obligations however, Complainant chose to expend its resources on other, presumably larger, sources and delayed in asserting those rights through contacts, notices of violation and this suit.

29. Respondent will suffer, and has suffered, prejudice and injury as a result of Complainant's failure to act in a timely manner in that it was not given information that would have enabled it to achieve compliance earlier and as a result it is incurring legal costs and is being pursued for penalties. In addition, it will show that if had it known of

the regulations and permit programs that were applicable to it, it could have approached the growth and direction of its business differently, enabling it to use less expensive controls or eliminating the need for controls.

30. By the actions and inactions described above 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 and Respondent will affirmatively defend against this Complaint by showing the application of the doctrine of laches.

SECOND AFFIRMATIVE DEFENSE TO ALL COUNTS OF THE COMPLAINT - ESTOPPEL

1.-22. Respondent realleges and incorporates by reference paragraphs 1-22 of its First Affirmative Defense to All Counts of the Complaint as paragraphs 1-22 of its Second Affirmative Defense to All Counts of the Complaint.

23. The Board has found that 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).

24. The State of Illinois by its own failure to disseminate information and address the confusion caused by the Cook County Environmental Ordinances, induced Respondent to rely on the Cook County Inspector's erroneous assessment of Respondent's compliance status.

25. The Illinois Supreme Court has stated 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).

...the representation need not be fraudulent in the strict legal sense or done with an intent to mislead or deceive... '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....He cannot by his silence induce or encourage commission of the act and then be heard to complain.'

26. Q C Finishers has alleged facts to show that the IEPA's silence in the face of its duty to disseminate, its acknowledgment that such dissemination was needed and its awareness of particular problems in Cook County amounts to a misrepresentation.

27. QC Finishers' noncompliance with the Board rules demonstrates its actual reliance on the conduct of the state and county, in that QC Finishers made affirmative efforts to learn about the requirements applicable to it and that it complied with those requirements upon becoming aware of them.

28. QC Finishers reliance on the state's silence and the county's incorrect information was reasonable given the circumstances and the small size and lack of sophistication of the company.

29. The state was aware that distribution of information to certain small sources was necessary to obtain compliance. IEPA's statements to the Board and to the Governor's office show awareness of its failing at the state's policymaking level.

30. Therefore it can be inferred that Complainant expected that its failure to distribute the information would result in those sources being in noncompliance.

31. Respondent will suffer, and has suffered, prejudice and injury as a result of Complainant's failure to act in a timely manner in that it was not given information that would have enabled it to achieve compliance earlier and as a result it is incurring legal costs, time and effort to defend against this action. In addition, Respondent will show that if had it known of the regulations and permit programs that were applicable to it, it could have approached the growth and direction of its business differently, enabling it to use less expensive controls or eliminating the need for controls.

32. Respondent sought to avoid being in noncompliance and made several efforts to discover its obligations to ensure that it was not in noncompliance. Respondent was hindered in its efforts by the county's error and the state's silence.

33. Complainant's conduct encouraged the creation and continuance of a noncompliance situation.

34. It would be unfair to allow Complainant to pursue this cause of action for that noncompliance situation.

35. Respondent will show that as a matter of equity, Complainant should be estopped from pressing its claim for past violations because Respondent reasonably and detrimentally relied on Complainants' conduct.

FOURTH AFFIRMATIVE DEFENSE TO ALL COUNTS OF THE COMPLAINT - WAIVER

1.-22. Respondent realleges and incorporates by reference paragraphs 1-22 of its First Affirmative Defense to All Counts of the Complaint as paragraphs 1-22 of its Fourth Affirmative Defense to All Counts of the Complaint.

23. "[W]aiver applies when a party intentionally relinquishes a known right or his conduct warrants an inference to relinquish that right." People v. Peabody Coal Company, PCB 99-134 (June 5, 2003) 2003 Ill ENV LEXIS 314 ,*18

24. The conduct of the Agency warrants an inference that the State relinquished its right to pursue a cause of action for past violations, by not making such efforts as were required by statute and principles of equity to better serve small, known Cook County sources by making contact with them through notices and inspections.

25. The State of Illinois was aware that the "distribution of information regarding compliance requirements to the individual smaller users was necessary to obtain greater compliance by these emission sources", that a lack of satisfactory means for disseminating information to small businesses was a fundamental problem, and further that the problem was exacerbated by the confusion regarding the interconnection of the Cook County and state requirements. Therefore the noncompliance by the small Cook County coating sources was expected but the Illinois EPA failed to contact even the limited universe of known, Cook County-permitted sources.

26. Respondent will show that QC Finishers, believed that it was in compliance, held Cook County permits, and made no effort to disguise its operations or hide itself from regulators and made diligently progress toward compliance when it became aware of its obligations.

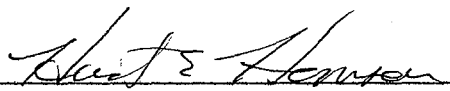
27. The Agency did not give the facility any warnings or opportunity to take action avoid this lawsuit.

28. 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 contacts could have averted noncompliance.

29. By so doing it has waived its right to pursue a cause of action for past violations during the period that it refrained from contacting QC Finishers and allowed it to continue in unknowing violations.

30. Respondent will affirmatively defend against all of the counts in the Complaint by demonstrating the application of the equitable affirmative defense of waiver.

Respectfully submitted,
QC FINISHERS, INC.



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

Heidi E. Hanson

Date January 30, 2004
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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached SUPPLEMENTAL AFFIRMATIVE DEFENSES by deposit in a U. S. Mailbox before 4:00 p.m. on February 2, 2004 upon the following persons:

One copy:

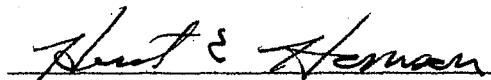
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Dated: February 2, 2004



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This filing is submitted on recycled paper.