ILLINOIS POLLUTION CONTROL BOARD
July 8, 2004

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 01-7
	)	(Enforcement - Air)
QC FINISHERS, INC., an Illinois corporation,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by A.S. Moore):

Today the Board rules on complainant's motion to strike affirmative defenses that respondent has asserted in this enforcement action. On behalf of complainant, the People of the State of Illinois (People), the Attorney General's Office filed a seven-count complaint against respondent QC Finishers, Inc. (QC Finishers). QC Finishers operates a facility in Franklin Park, Cook County, at which it coats metal and plastic parts for various industries, including automotive, medical, military, computer, and government.

The People's complaint alleges that QC Finishers violated air pollution control provisions of the Environmental Protection Act (Act) (415 ILCS 5 (2002)) and the Board's regulations at the Franklin Park facility. QC Finishers asserts numerous affirmative defenses, some of which are general because they relate to all seven counts of the complaint and some of which are specific because they relate only to a particular count of the complaint. For the reasons below, the Board grants in part and denies in part the People's motion to strike affirmative defenses.

In this order, the Board first sets forth the procedural background of this case. Next the Board summarizes the counts of the complaint and gives an overview of the affirmative defenses alleged by QC Finishers. Next, in ruling on the People's motion to strike, the Board discusses the affirmative defenses alleged, the motion, and QC Finishers' response to the motion.

PROCEDURAL BACKGROUND

On July 14, 2000, the People filed a complaint against QC Finishers. QC Finishers filed an answer setting forth 14 purported affirmative defenses on March 3, 2003.[1] On April 25, 2003, the People filed a motion to strike 11 of the 14 affirmative defenses, to which QC Finishers responded. In a June 19, 2003 order, the Board granted the People's motion to strike 8 of the 11 affirmative defenses, but denied the motion to strike the other three affirmative defenses. The Board denied QC Finishers' motion to reconsider in a September 18, 2003 order.

[1] The Board cites the People's complaint as "Comp. at _."

Numerous additional related pleadings followed, which the Board addressed in a January 8, 2004 order. In that order, to expedite this proceeding, the Board gave QC Finishers 21 days to file a supplemental answer setting forth any affirmative defenses. On February 4, 2004, QC Finishers filed "supplemental affirmative defenses." The People moved to strike the supplemental affirmative defenses, which is the motion the Board rules on today. QC Finishers filed a response to the motion to strike on March 17, 2004.[2]

COUNTS OF THE COMPLAINT

The People's complaint has seven counts, each of which is summarized below.

Count I: Constructing Without a Permit

In count I of the complaint, the People allege that QC Finishers, some time after April 14, 1972, installed spray booths, drying ovens, sanding and polishing units, a solvent distiller, and silk screening equipment at the facility that emit or are capable of emitting to the atmosphere volatile organic material (VOM) or particulate matter. Comp. at 3. According to the complaint, this equipment constitutes "new emission sources" and "new air pollution control equipment." *Id*. at 4. The People also assert that after installing the equipment, QC Finishers began using over 5,000 gallons of paint, including thinner, per year at the facility. *Id*. at 3-4.

The People allege that QC Finishers violated Section 9(b) of the Act (415 ILCS 5/9(b) (2002)) and Section 201.142 of the Board air pollution control regulations (35 Ill. Adm. Code 201.142) by constructing "new emission sources" and "new air pollution control equipment" without first obtaining a construction permit from the Illinois Environmental Protection Agency (Agency). Comp. at 4. The People also maintain that QC Finishers did not qualify for an exemption (35 Ill. Adm. Code 201.146(g)) from the construction permit requirement available to painting operations that use less than 5,000 gallons of paint per year. *Id*. at 3-4.

Count II: Operating Without a State Permit

The People allege in count II of the complaint that QC Finishers violated Section 9(b) of the Act (415 ILCS 5/9(b) (2002)) and Section 201.143 of the Board's air pollution control regulations (35 Ill. Adm. Code 201.143) by operating the equipment described above without first obtaining an operating permit from the Agency. Comp. at 6. The People allege that the violations began when the facility started using more than 5,000 gallons of paint per year and continue to the present. *Id*. at 6.

[2] The Board cites QC Finishers' supplemental affirmative defenses as "Supp. AD at _"; the People's motion to strike as "Mot. at _"; and QC Finishers' response to the motion as "Resp. at _."

Count III: Failing to Comply with Emission Limitations

In count III of the complaint, the People allege that the equipment at QC Finishers' facility constitutes one or more "coating lines." Comp. at 9. According to the complaint, from July 1, 1991, to the present, QC Finishers violated Section 9(a) of the Act (415 ILCS 5/9(a) (2002)) and Section 218.204 of the Board's air pollution control regulations (35 Ill. Adm. Code 218.204) by using coatings for miscellaneous metal parts that emit VOM in excess of the emission limitations of Section 218.204(j) (35 Ill. Adm. Code 218.204(j)). The People further allege that from March 15, 1996, to the present, QC Finishers violated the same provisions by using coatings for plastic automotive parts that emit VOM in excess of the emission limitations of Section 218.204(n) (35 Ill. Adm. Code 218.204(n)). *Id*. at 9-10.

Count IV: Failing to Timely Develop and Submit Fugitive Matter Emission Program

Count IV of the complaint alleges that QC Finishers violated Section 9(a) of the Act (415 ILCS 5/9(a) (2002)) and Section 212.309 of the Board's air pollution control regulations (35 Ill. Adm. Code 212.309) by not timely submitting a "Fugitive Dust Program" for the parking lots at the Franklin Park facility. Comp. at 11. The People maintain that "parking lots are regulated emission sources pursuant to 35 Ill. Adm. Code 212.316." *Id*. According to the People, the program was due by May 22, 1996, but QC Finishers did not submit the program to the Agency until December 18, 1998. *Id*.

Count V: Failing to Timely File an ERMS Application

The People allege in count V of the complaint that QC Finishers was a "participating source" with baseline emissions of at least 10 tons of VOM per year, and accordingly was required to submit an Emissions Reduction Market System (ERMS) application to the Agency by March 1 1998. Comp. at 13. According to the complaint, QC Finishers did not submit the application until December 22, 1998. The People therefore allege that QC Finishers violated Section 9(a) of the Act (415 ILCS 5/9(a) (2002)) and Section 205.310 of the Board's air pollution control regulations (35 Ill. Adm. Code 205.310) by not timely submitting an ERMS application to the Agency. *Id*.

Count VI: Operating Without a CAAPP Permit

In count VI of the complaint, the People allege that QC Finishers violated Sections 9 and 39.5 of the Act (415 ILCS 5/9, 39.5 (2002)) and Section 270.201 of the Agency's regulations (35 Ill. Adm. Code 270.201) by not timely submitting a complete initial Clean Air Act Permit Program (CAAPP) application and by operating without a CAAPP permit. Comp. at 15-17. The complaint states that QC Finishers began operating its facility before the March 7, 1995 effective date of the CAAPP, and therefore owns and operates an "existing CAAPP source." *Id*. at 15. The People assert that QC Finishers was required to submit its complete initial CAAPP application no later than nine months after the effective date of the CAAPP or by December 7, 1995. QC Finishers, however, did not submit its initial CAAPP application until March 23, 1999, according to the complaint. The People further allege that QC Finishers does not currently have a CAAPP permit. *Id*. at 16-17.

Count VII: Making a Major Modification Without a Permit

According to count VII of the complaint, QC Finishers by 1985 had the "potential to emit" over 100 tons of VOM per year from its Franklin Park facility and therefore was a "major source." QC Finishers in 1988 added a fourth spray booth to the facility that increased its "potential to emit" VOM by over 40 tons per year, according to the complaint. Comp. at 19. The People allege that this increase constituted a "major modification" to the facility for which QC Finishers failed to obtain a permit, thereby violating Section 9(a) of the Act (415 ILCS 5/9(a) (2002)) and Section 203.201 of the Board's air pollution control regulations (35 Ill. Adm. Code 203.201). *Id*.

AFFIRMATIVE DEFENSES

QC Finishers' answer set forth 14 alleged affirmative defenses. The People previously moved to strike 11 of the 14 affirmative defenses. In its June 19, 2003 order, the Board granted the motion in part and denied it in part—striking eight affirmative defenses, but declining to strike three affirmative defenses. Of the eight stricken affirmative defenses, QC Finishers has since abandoned one and, with the Board's leave, "revised" the seven others. Those seven are the subject of today's order.

The seven revised affirmative defenses are set forth in QC Finishers' filing captioned "supplemental affirmative defenses." The People have moved to strike those seven affirmative defenses. Of these seven revised affirmative defenses, three affirmative defenses are "general" in that each responds to all counts of the complaint (*e.g.*, "*Laches*"), while the other four affirmative defenses are "specific" in that each responds to an individual count of the complaint (*e.g.*, "First Affirmative Defense to Count III").

The table below provides the identity (as given by QC Finishers) and the status (before today's rulings) of all 14 affirmative defenses, including the seven revised affirmative defenses at issue today. Only those affirmative defenses indicated with an asterisk (*) (*i.e.*, the revised affirmative defenses) are the subject of the People's pending motion to strike.

Affirmative Defense	Status
General: *Laches**	Revised
General: Estoppel*	Revised
General: Failure to Minimize Damages	Abandoned
General: Waiver*	Revised
Specific: First Affirmative Defense to Count I	Motion to strike denied 6/19/03
Specific: Second Affirmative Defense to Count I	No motion to strike
Specific: Third Affirmative Defense to Count I	No motion to strike
Specific: First Affirmative Defense to Count II	Motion to strike denied 6/19/03
Specific: Second Affirmative Defense to Count II	No motion to strike
Specific: First Affirmative Defense to Count III*	Revised
Specific: First Affirmative Defense to Count IV*	Revised

Specific: Second Affirmative Defense to Count IV*	Revised
Specific: First Affirmative Defense to Count VI*	Revised
Specific: Second Affirmative Defense to Count VI	Motion to strike denied 6/19/03

DISCUSSION

Below the Board discusses, in turn, the pleadings and the Board's ruling on the People's motion to strike each of the seven revised affirmative defenses. Accordingly, in ruling on the motion, the Board addresses each affirmative defense, the People's motion to strike, and QC Finishers' response to the motion. The Board first sets forth the standard that applies when considering a motion to strike affirmative defenses.

Standard

An affirmative defense is a "response to a [complainant's] claim which attacks the [complainant's] *legal* right to bring an action, as opposed to attacking the truth of claim." Farmers State Bank v. Phillips Petroleum Co., PCB 97-100, slip op. at 2 n.1 (Jan. 23, 1997), (emphasis in original) (quoting *Black's Law Dictionary*); *see also* Worner Agency v. Doyle, 121 Ill. App. 3d 219, 221, 459 N.E.2d 633, 635 (4th Dist. 1984) (if the pleading does not admit the opposing party's claim but rather attacks the sufficiency of that claim, it is not an affirmative defense). In an affirmative defense, respondent alleges "new facts or arguments that, if true, will defeat . . . [complainant's] claim even if all allegations in the complaint are true." People v. Community Landfill Co., PCB 97-193 (Aug. 6, 1998). Stated another way, a valid affirmative defense gives color to complainant's claim, but then asserts new matter that defeats an apparent right of complainant. *See* Condon v. American Telephone and Telegraph Co., 210 Ill. App. 3d 701, 569 N.E.2d 518, 523 (2d Dist. 1991), citing Doyle, 121 Ill. App. 3d at 222, 459 N.E.2d at 635.

Under the Board's procedural rules, "[a]ny facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing." 35 Ill. Adm. Code 103.204(d). A motion to strike an affirmative defense admits well-pled facts constituting the defense, and attacks only the legal sufficiency of the facts. "Where the well-pleaded facts of an affirmative defense raise the possibility that the party asserting them will prevail, the defense should not be stricken." International Insurance Co. v. Sargent and Lundy, 242 Ill. App. 3d 614, 630-631, 609 N.E.2d 842, 853-54 (1st Dist. 1993), citing Raprager v. Allstate Insurance Co., 183 Ill. App. 3d 847, 854, 539 N.E.2d 787, 791 (2d Dist. 1989).

General Affirmative Defenses to All Counts

Laches

QC Finishers' Affirmative Defense of *Laches*. QC Finishers argues that the People's complaint is barred by the doctrine of *laches*. QC Finishers quotes the Board's decision in People v. John Crane, Inc., PCB 01-76, slip op. at 8 (May 17, 2001), describing the doctrine of *laches* as "an equitable doctrine that bars relief when a defendant has been misled or prejudiced

due to a plaintiff's delay in asserting a right. *** There are two principal elements of *laches*: lack of due diligence by the party asserting the claim; and prejudice to the opposing party. " Supp. AD at 8.

Specifically, QC Finishers alleges that it began operations at its Franklin Park site in 1985, and has since then been subject to the "Cook County Environmental Control Ordinance," which requires operators of "combustion or process equipment to obtain Certificates of Operation." Supp. AD at 6. QC Finishers states that it has, and at all relevant times had, Cook County Certificates of Operation, and that it was unaware it required to obtain State permits for the same operation and equipment. *Id*.

QC Finishers argues that the State may be imputed with knowledge of the Cook County ordinances and knowledge that the "Cook County Environmental Control Ordinance created a situation that was confusing and misleading for Cook County sources" complying with County requirements but also subject to separate State permitting for the same operations. Supp. AD at 6. QC Finishers quotes from Section 4(b) of the Act (415 ILCS 5/4(b) (2002)), providing that the Agency "shall have the duty to collect and disseminate such information . . . as may be required to carry out the purposes of this Act." *Id*. QC Finishers then alleges that the State did not attempt to, or failed to effectively, inform emission sources holding Cook County Certificates of Operation, but not State permits, of the State's additional requirements. *Id*. at 6-7.

QC Finishers asserts that in concluding it was complying with all applicable environmental laws, it reasonably relied on the Cook County Environmental Ordinance, assurances of a Cook County Inspector that the company needed no State permits, and the lack of any contact from the State. Supp. AD at 7. QC Finishers characterizes itself as a "small company with no more than 47 employees at any time" and asserts that it did not have "any reason to believe that it had to further investigate its compliance status." *Id*. According to QC Finishers, the failure to satisfactorily inform small businesses of their State environmental obligations was a problem acknowledged publicly by the State in a 1994 Governor's Task Force report published by the Agency and in a 1997 rulemaking public comment filed with the Board by the Agency. *Id*. QC Finishers argues that the State could have easily identified this small group of businesses by reviewing the Cook County Certificates of Operation, and in turn notified them of the need for further permitting and emission controls. *Id*.

QC Finishers concludes that both elements of *laches* are present. First, QC Finishers asserts that the State failed to exercise due diligence: QC Finishers "was part of a small, easily identifiable group of sources," yet the Agency "did not contact [QC Finishers] to assert [the Agency's] right to permits, to inspect its air emission units or to initiate the inquiries that led to the instant Complaint, from 1985 until 1998." Supp. AD at 8. Second, QC Finishers argues that it was prejudiced by:

> 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, [QC Finishers] will show that if it had 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. *Id*. at 8-9.

People's Motion to Strike. The People argue that QC Finishers has failed to adequately plead "key elements of a *laches* defense." Mot. at 7. The People assert that QC Finishers' allegations lack sufficient specificity and fail to allege any "delay in bringing the suit." *Id*. at 6-7.

Even if QC Finishers has properly pled laches, the People argue that Illinois courts have been "reluctant to apply *laches* when it might impair the State in the discharge of its government function" and in "protecting a substantial public interest." Mot. at 7 (citing Cook County v. Chicago Magnet Wire Corp., 152 Ill. App. 3d 726, 727-28, 504 N.E.2d 904, 905 (1st Dist. 1987)). The People assert that, with the complaint, the State seeks to exercise its government function, namely "the enforcement of environmental statutes and regulations." *Id*. Further, the People state that "the enforcement of standards relating to air quality is a substantial and vital public interest." *Id*. at 9.

According to the People, "[l]ooking behind the '*laches*' label, [QC Finishers] is really alleging that it is the State's responsibility to educate [QC Finishers] on the requirements of the law." Mot. at 10. The People assert, however, that 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." *Id*. The People conclude that the defense of *laches* is unavailable to QC Finishers and therefore should be stricken. *Id*. at 9-10.

QC Finishers' Response to the Motion. QC Finishers' responds that, contrary to the People's suggestion, QC Finishers "is not trying to assert that ignorance of the law is an excuse." Resp. at 8. Rather, according to QC Finishers, "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 QC Finishers for the violations that occurred as a result of that delay." *Id*.

QC Finishers reiterates that the State, in 1994 and 1997, "made public statements bemoaning the fact that information was not being disseminated to 'smaller users.'" Resp. at 8-9. QC Finishers argues that it was such a "smaller user" and was "making reasonable attempts to ensure that it was in compliance by contacting its local inspector" and "was misadvised." *Id*. According to QC Finishers, the State, besides publicly acknowledging that the compliance information needed to be provided, had the information and had a duty under the Act to disseminate the information, and yet delayed. QC Finishers characterizes the State's enforcement action "for [QC Finishers] not acting on the information that the Agency was withholding from it" as "uniquely unfair." *Id*.

QC Finishers also argues that, in pleading the affirmative defense of *laches*, it is not necessary to plead a delay in "bringing a suit," but rather only a delay in "asserting a right." Resp. at 9. According to QC Finishers, the "right" asserted in a particular instance may be a "suit," but need not be. QC Finishers states that it was harmed not by delay in filing the complaint but instead by delay in being contacted by the Agency about the State's permitting

and emission controls. The harm, QC Finishers asserts, was caused in the years before the delayed initial contact—the Agency inspector's first site visit took place in 1998 and was followed shortly by a Notice of Violation. *Id.*

According to QC Finishers, it was harmed by the State's delay and lack of diligence. QC Finishers argues that the State's failure to fulfill its "duty to disseminate information" by asserting its "right to permitting and emission controls" with an "easily identifiable group of sources" gave "rise to many years of unknowing and unintentional violations." Resp. at 10-11.

Board Ruling on the People's Motion to Strike *Laches*. *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. *See* City of Rochelle v. Suski, 206 Ill. App. 3d 497, 501, 564 N.E.2d 933, 936 (2d Dist. 1990); Crane, PCB 01-76; People v. State Oil Co., PCB 97-103 (May 18, 2000). There are two principal elements of *laches*: lack of due diligence by the party asserting the claim; and prejudice to the opposing party. *See* Van Milligan v. Board of Fire & Police Commissioners, 158 Ill. 2d 84, 89, 630 N.E.2d 830, 833 (1994); State Oil, PCB 97-103, slip op. at 2. Although applying *laches* to public bodies is disfavored, the Illinois Supreme Court held in Hickey v. Illinois Central Railroad Co., 35 Ill. 2d 427, 220 N.E.2d 415 (1966), that the doctrine can apply to governmental bodies under compelling circumstances.

The Board agrees with QC Finishers that *laches* may apply when there has been delay in asserting a "right," not solely delay in bringing a "suit." For example, in Crane, the Board denied a motion to strike an affirmative defense of *laches* that was pled based on alleged Agency delay in issuing a Notice of Violation, which precedes a suit under the Act. Crane, PCB 01-76. The Board also finds that QC Finishers has adequately pled an affirmative defense of *laches*. QC Finishers alleged harm resulting from delay in asserting a right, and the facts constituting the defense are plainly set forth in a "response to a [complainant's] claim which attacks the [complainant's] *legal* right to bring an action, as opposed to attacking the truth of claim." Farmers State Bank, PCB 97-100, slip op. at 2 n.1 (emphasis in original) (quoting *Black's Law Dictionary*).

A motion to strike an affirmative defense must admit the well-pled facts constituting the defense, and attack only the facts' legal sufficiency. "Where the well-pleaded facts of an affirmative defense raise the possibility that the party asserting them will prevail, the defense should not be stricken." International Insurance, 242 Ill. App. 3d at 630-31, 609 N.E.2d at 853-54. The Board has many times denied motions to strike the affirmative defense of *laches*. *See* People v. Stein Steel Mills Services, PCB 01-2 (Apr. 18, 2002); State Oil, PCB 97-103; Crane, PCB 01-76. Here, the Board finds that QC Finishers has raised the possibility of prevailing on *laches*.

While the affirmative defense of *laches* carries an elevated standard of proof when applied to the State, the Board is now ruling on a motion to strike an affirmative defense, not deciding the merits of the defense. *See* People v. Panhandle Eastern Pipe Line Co., PCB 99-191 (Nov. 15, 2001) (Board held respondent failed to prove *laches* where respondent argued Agency failed to exercise due diligence by not discovering violations when inspecting and permitting facility, allegedly resulting in "undue delay" of the enforcement action). The Board denies the

State's motion to strike this affirmative defense. *See* Crane, PCB 01-76 (denying motion to strike *laches* from answer under similar circumstances).

Equitable Estoppel

QC Finishers' Affirmative Defense of Equitable Estoppel. QC Finishers argues that the People should be estopped from bringing this enforcement action because elements of the doctrine of equitable estoppel are present: the company reasonably and detrimentally relied on the conduct of another. Supp. AD at 9. QC Finishers maintains that the Agency's "failure to disseminate information and address 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." *Id*. According to QC Finishers, its 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." *Id*. at 10.

QC Finishers quotes from the Illinois Supreme Court's decision in Geddes v. Mill Creek Country Club, Inc., 196 Ill. 2d 302, 751 N.E.2d 1150, 1157 (2001), for the proposition that silence can amount to misrepresentation:

> [T]he 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." Supp. AD at 9 (Geddes quoting Bondy v. Samuels, 333 Ill. 535, 546, 545, 165 N.E. 181 (1929)).

QC Finishers asserts that the Agency'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." Supp. AD at 9.

QC Finishers reiterates that the Agency's "statements to the Board and the Governor's office" show that the State was aware that "distribution of information to certain small sources was necessary to obtain compliance." Supp. AD at 10. QC Finishers argues that it can therefore be inferred that the State "expected that its failure to distribute the information would result in those sources being in noncompliance." *Id*. The State's conduct, concludes QC Finishers, "encouraged the creation and continuance of a noncompliance situation." *Id*.

People's Motion to Strike. In characterizing this purported affirmative defense, the People state that QC Finishers "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." Mot. at 11. The People assert a respondent must show the six elements of the defense of equitable estoppel:

> (1) words or conduct by the party against whom the estoppel is alleged constituting either a misrepresentation or concealment of material facts; (2) knowledge on the part of the party against whom the estoppel is alleged that representations made were untrue; (3) the party claiming the benefit of an estoppel must have not known the representations to be false either at the time they were made or at the time they were acted upon; (4) the party estopped must either intend or expect that his conduct or representations will be acted upon by the party asserting the estoppel; (5) the party seeking the estoppel must have relied or acted upon the representations; and (6) the party claiming the benefit of the estoppel must be in a position of prejudice if the party against whom the estoppel is alleged is permitted to deny the truth of the representation made. Mot. at 11-12 (citing Vaughn v. Speaker, 126 Ill. 2d 150, 533 N.E.2d 885, 890 (1989); Elson v. State Farm Fire and Casualty Co., 295 Ill. App. 3d 1, 691 N.E. 2d 807, 817 (1st Dist. 1998)).

The People allege that 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." Mot. at 12-14 (citing Pavlakos v. Dept. of Labor, 111 Ill. 2d 257, 265, 489 N.E.2d 1325, 1328 (1985) ("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"; citing Hickey); 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 People argue that QC Finishers has failed to plead the first of the six elements against the State—namely, any positive or affirmative act by the State. *Id*. at 12-13.

The People further assert that QC Finishers has failed to plead the necessary "exceptional circumstances" that must exist before the estoppel doctrine can be invoked against the government. Mot. at 14. The People therefore move to strike this affirmative defense.

QC Finishers' Response to the Motion. QC Finishers insists that its case is "uniquely compelling" and that Geddes, recognizing silence as sufficient for the defense, is a more recent Illinois Supreme Court statement of what may constitute a misrepresentation for purposes of estoppel. Resp. at 13-14. QC Finishers also argues that the case law suggests an affirmative act by the government may be required to establish estoppel *only* when the government, unlike here, has no duty to act, and further that an affirmative act may be found from "maintaining the status quo." *Id*. at 13. Moreover, QC Finishers argues that its reliance Cook County inspector's advice and the Agency's silence was reasonable for a "small and unsophisticated company." *Id*. at 14.

Board Ruling on the People's Motion to Strike Equitable Estoppel. The doctrine of equitable estoppel may be applied when a party reasonably and detrimentally relies on the words or conduct of another. *See* Brown's Furniture, Inc. v. Wagner, 171 Ill. 2d 410, 431, 665 N.E.2d 795, 806 (1996); Crane, PCB 01-76; People v. Chemetco, Inc., PCB 96-76, slip op. at 10 (Feb. 19, 1998); White & Brewer Trucking, Inc. v. IEPA, PCB 96-250, slip op. at 10 (Mar. 20, 1997). However, the doctrine "should not be invoked against a public body except under

compelling circumstances, where such invocation would not defeat the operation of public policy." Gorgees v. Daley, 256 Ill. App. 3d 514, 518, 628 N.E.2d 721, 725 (1st Dist. 1993).

As the Illinois Supreme Court explained:

> This 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, 171 Ill. 2d at 431-32, 665 N.E.2d at 806, citing Hickey, 35 Ill. 2d at 447-48, 220 N.E.2d at 426; *see also* Chemetco, PCB 96-76, slip op. at 11; White & Brewer Trucking, PCB 96-250, slip op. at 10.

Consistent with this reluctance, parties seeking to estop the government must demonstrate that their reliance was reasonable and that they incurred some detriment as a result of the reliance. A party seeking to estop the government also must show that the government made a misrepresentation with knowledge that the misrepresentation was untrue. *See* Medical Disposal Services, Inc. v. IEPA, 286 Ill. App. 3d 562, 677 N.E.2d 428, 433 (1st Dist. 1997); Chemetco, PCB 96-76, slip op. at 11; White & Brewer Trucking, PCB 96-250, slip op. at 10. Additionally, the courts have required that the governmental body must have taken some affirmative act. Hickey, 35 Ill. 2d at 448-49, 220 N.E.2d at 426; Gorgees, 256 Ill. App. 3d at 518, 628 N.E.2d at 725.

QC Finishers cites the Illinois Supreme Court's decision in Geddes to argue that silence alone may constitute a sufficient misrepresentation for purposes of estoppel. However, the Board notes that the Geddes case, though recent, did not involve a government plaintiff or expressly overrule the court's holding in Hickey that some affirmative act must have been taken by the government. The Illinois Supreme Court stated in Hickey:

> While situations may arise which justify invoking the doctrine of estoppel even against the State when acting in its governmental capacity, [citation] we have always adhered to the rule that mere nonaction of governmental officers is not sufficient to work an estoppel and that before the doctrine can be invoked against the State or a municipality there must have been some positive acts by the officials which may have induced the action of the adverse party under circumstances where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had previously done. Hickey, 35 Ill. 2d at 448-49, 220 N.E.2d at 426 (quoting City of Quincy v. Sturhahn, 18 Ill. 2d 604, 614).

The Board is not persuaded that the Illinois Supreme Court in Geddes, without mention, swept away decades of precedent requiring an affirmative act *by the government* as a precondition to estopping the government. It is true that "[w]here the well-pleaded facts of an affirmative defense raise the possibility that the party asserting them will prevail, the defense should not be stricken." International Insurance, 242 Ill. App. 3d at 630-31, 609 N.E.2d at 853-54. Here, however, QC Finishers has not raised that possibility because it has not pled an

affirmative act by the State. The Board accordingly grants the People's motion to strike the affirmative defense of estoppel. QC Finishers still may introduce evidence related to the elements of estoppel, not as a defense, but as it may be relevant to any remedy. *See* 415 ILCS 5/33(c), 42(h) (2002).

Waiver

QC Finishers' Affirmative Defense of Waiver. Building upon the allegations of the two prior general affirmative defenses, QC Finishers argues that the Agency's conduct also "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." Supp. AD at 11. QC Finishers adds that the State "chose knowingly, and for its own purposes not to pursue contacts with small, county permitted sources . . . while also being fully aware that such contacts could have averted noncompliance." *Id*. By doing so, according to QC Finishers, the State waived its right to pursue this complaint "for past violations during the period that it refrained from contacting QC Finishers and allowed it to continue in unknowing violations." *Id*.

People's Motion to Strike. The People argue that waiver is an intentional relinquishment of a known right. According to the People, the State, while "certainly aware of its right to pursue violators of environmental statutes and regulations," has not, "explicitly or implicitly," waived any rights to pursue these alleged violations against QC Finishers. Mot. at 15. The People accordingly move to strike this affirmative defense. *Id*.

QC Finishers' Response to the Motion. QC Finishers asserts that, on the contrary, the People have implicitly waived their right to pursue this cause of action as inferred from the State's conduct. Resp. at 15. Further, QC Finishers argues that whether waiver may be implied here is a question of fact, and contrary to the law on considering motions to strike, the People do not admit the well-pled facts of the affirmative defense. *Id*.

Board Ruling on the People's Motion to Strike Waiver. Waiver is "the intentional relinquishment of a known right." Ryder v. Bank of Hickory Hills, 146 Ill. 2d 98, 104 585 N.E.2d 46, 49 (1991). "There must be both knowledge of the existence of the right and an intention to relinquish it." Pantle v. Industrial Commission, 61 Ill. 2d 365, 372, 335 N.E. 2d 491, 496 (1975). "Waiver may be made by an express agreement or it may be implied from the conduct of the party who is alleged to have waived a right." Ryder, 146 Ill. 2d at 105, 585 N.E.2d at 49. The doctrine of waiver applies "when a party intentionally relinquishes a known right or his conduct warrants an inference to relinquish the right." 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) (*citing* Pantle); *see also* Crane, PCB 01-76; People v. Douglas Furniture of California, Inc., PCB 97-133, slip op. at 5 (May 1, 1997).

At this point in the proceeding, the Board is ruling on a motion to strike an affirmative defense, not deciding the parties' ultimate dispute over whether the facts justify implying waiver by the State. The Board finds that QC Finishers has adequately pled an affirmative defense of

waiver. QC Finishers alleges that the State, as inferred by its conduct, has intentionally relinquished the known right to pursue this enforcement action. QC Finishers has pled "new facts or arguments that, if true, will defeat . . . [complainant's] claim even if all allegations in the complaint are true." Community Landfill, PCB 97-193.

A motion to strike an affirmative defense admits well-pled facts constituting the defense, and attacks only the legal sufficiency of the facts. "Where the well-pleaded facts of an affirmative defense raise the possibility that the party asserting them will prevail, the defense should not be stricken." International Insurance, 242 Ill. App. 3d at 630-31, 609 N.E.2d at 853-54. The Board finds that QC Finishers has raised the possibility of prevailing on waiver. The Board accordingly denies the People's motion to strike this affirmative defense.

Specific Affirmative Defenses to Particular Counts

First Affirmative Defense to Count III on Failing to Comply with Emission Limitations

The People allege in count III of the complaint that, from dates in 1991 and 1996 to the present, QC Finishers violated Section 9(a) of the Act and Section 218.204 of the Board's air pollution control regulations by using coatings that emit VOM in excess of the emission limitations of Sections 218.204(j) and (n). Section 9(a) of the Act provides that "[n]o person shall . . . [c]ause or threaten or allow the discharge or emission of any contaminant into the environment . . . so as to violate regulations or standards adopted by the Board under the Act." 415 ILCS 5/9(a) (2002).

QC Finishers' Affirmative Defense of Alternative Compliance. In its first affirmative defense to count III, QC Finishers states that it admitted to using coatings that exceed the Section 218.204 emission limitations, but maintains that it can use these coatings because it is complying with the "alternative emission limitation" of another provision of the regulations—Section 218.207 (35 Ill. Adm. Code 218.207). Supp. AD at 2. According to QC Finishers, an owner or operator of a coating line subject to Section 218.204 may choose to comply instead with Section 218.207. QC Finishers argues that a facility can use coatings that do not comply with Section 218.204 by controlling the emissions from those coatings pursuant to Section 218.207. *Id.*

QC Finishers states that it installed emission control equipment and two of its six coating booths were ducted to the control equipment. Supp. AD at 3. According to QC Finishers, the control equipment began operating in 2000 and has been used to the present. QC Finishers argues that under Section 218.207, the company "was able to use, and did use, coatings in the controlled booths which exceeded the [Section] 218.204 [emission] limits without violating Board rules." *Id*. QC Finishers further states that the "remaining four booths were to be used solely for coatings which did not exceed the limits in [Section] 218.204." *Id*.

According to QC Finishers, even if the facts pled in the complaint are correct, the use of emission controls constitutes "new facts" that "will serve to defeat the allegation of a violation of [Section] 218.204 for the period of time during which all of the coatings that exceeded the limits of [Section] 218.204 were controlled pursuant to [Section] 218.207." Supp. AD at 3.

People's Motion to Strike. The People argue that under Section 33(a) of the Act (415 ILCS 5/33(a) (2002)), subsequent compliance is not an affirmative defense. Motion at 4. The People concede that subsequent compliance "may be used for other purposes but it certainly does not make the Respondent less liable for its earlier violations." *Id*.

QC Finishers' Response to the Motion. QC Finishers emphasizes that the People alleged in Count III that the violations of Section 218.204 continue "to the present." Resp. at 3. QC Finishers again concedes that "noncompliance with [Section] 218.204 does continue to the present however it does not constitute a violation in the present because [Section 218.207] provides an alternative means of compliance." *Id*.

QC Finishers maintains that its compliance with Section 218.207 in lieu of Section 218.204 constitutes "new information" outside of the complaint that will defeat the alleged violation of Section 218.204 "for the period of time" it controlled emissions pursuant to Section 218.207 when using coating that exceeded the limits Section 218.204. Resp. at 3. QC Finishers clarifies that it "is not pleading that subsequent compliance should excuse previous violations" and that this affirmative defense "does not address the period before 2000," when the company allegedly began using emission controls. *Id*. at 3-4.

Board Ruling on the People's Motion to Strike the First Affirmative Defense to Count III. For the following reasons, the Board denies the People's motion to strike the first affirmative defense to count III. Initially, the Board notes, and the People do not dispute, that Section 218.207, entitled "Alternative Emission Limitations," does provide an alternative to complying with the emission limitations of Section 218.204, the provision allegedly violated. Section 218.207(a) states:

> a) Any owner or operator of a coating line subject to Section 218.204 of this Subpart may comply with this Section, rather than with Section 218.204 of this Subpart, if a capture system and control device are operated at all times the coating line is in operation and the owner or operator demonstrates compliance [with this Section] . . . . 35 Ill. Adm. Code 218.207(a).

Section 33(a) of the Act makes clear that it "shall not be a defense to findings of violations . . . that the person has come into compliance subsequent to the violation . . . ." 415 ILCS 5/33(a) (2002). It is also true that the Board considers proof of subsequent compliance a mitigating factor in determining the appropriate civil penalty for a violation. *See* 415 ILCS 5/33(c) (2002)). QC Finishers, however, concedes that its alleged subsequent compliance through the use of emission controls does not excuse violations before the controls were operating. Nor does QC Finishers merely seek to introduce evidence of subsequent compliance to mitigate penalty, though it may do so. Rather, QC Finishers argues that the alternative compliance it allegedly achieved in 2000 defeats the People's claim *for part of the time period* of alleged violations in the complaint. In count III of the complaint, the People allege violations of Section 218.204 from dates in 1991 and 1996 "through the present." Comp. at 9.

The issue then is not whether subsequent compliance excuses prior violations. It does not. *See* 415 ILCS 5/33(a) (2002). Instead, the issue is whether a respondent can allege a valid affirmative defense that defeats *part, but not all,* of a claim. Here the Board looks to the Code of Civil Procedure "for guidance" because "the Board's procedural rules are silent." 35 Ill. Adm. Code 101.100(b). Section 2-613(d) of the Code of Civil Procedure provides:

> The facts constituting any affirmative defense . . . and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint . . . *in whole or in part*, and any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply. 735 ILCS 5/2-613(d)(2002) (emphasis added).

Consistent with this provision of the Code of Civil Procedure, the Board finds that an affirmative defense may be properly pled to defeat either all or part of a claimed violation. QC Finishers' affirmative defense of alternative compliance through Section 218.207, if true, would defeat part of the People's claim of violations as alleged in count III "even if all allegations in the complaint are true." Community Landfill, PCB 97-193. QC Finishers would not be liable for violating Section 218.204, and in turn Section 9(a) of the Act, during the time it was complying with Section 218.207. The alleged use of emission controls for alternative compliance constitutes "new facts or arguments" not set forth in the complaint. *Id*. Additionally, as an affirmative defense must, QC Finishers' pleading admits the complaint's claim of noncompliance with Section 218.204. The Board therefore finds that QC Finishers has properly pled an affirmative defense and denies the People's motion to strike this affirmative defense.

First Affirmative Defense to Count IV on Failing to Timely Develop and Submit Fugitive Matter Emission Program

The People allege in count IV of the complaint that QC Finishers violated Section 9(a) of the Act and Section 212.309 of the Board's air pollution control regulations by submitting a "Fugitive Dust Program" for the parking lots at the Franklin Park facility over two and a half years late. Section 212.309 provides in part:

> a) 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 . . . and prepared by the owner or operator and submitted to the Agency for its review. Such operating program shall be designed to significantly reduce fugitive particulate matter emissions. 35 Ill. Adm. Code 212.309(a) (emphasis added).

Section 212.309 refers to emission units described in Section 212.316. The People assert "parking lots are regulated emission sources pursuant to 35 Ill. Adm. Code 212.316." Comp. at 11. Section 212.316 provides in part:

a) Applicability. This Section shall apply to those operations specified in Section 212.302 of this Subpart *and that are located in areas defined in Section 212.324(a)(1)* of this Part.

***

c) Emission Limitations for Roadways or Parking Areas. No person shall cause or allow fugitive particulate matter emissions from any roadway or *parking area* to exceed an opacity of 10 percent, except that the opacity shall not exceed 5 percent at quarries with a capacity to produce more than 1 million T/yr of aggregate. 35 Ill. Adm. Code 212.316(a), (c) (emphasis added).

QC Finishers' Affirmative Defense Based on Geographic Applicability. In its first affirmative defense to count IV, QC Finishers concedes the complaint is correct that parking lots are regulated by Section 212.316. Supp. AD at 4. However, QC Finishers argues that Section 212.316 is further limited to operations located in areas defined in Section 212.324(a)(1) (35 Ill. Adm. Code 212.324(a)(1)). QC Finishers maintains that Section 212.324(a)(1) describes locations "comprised of areas in the vicinity of McCook in Cook County, Lake Calument in Cook County, and Granite City in Madison County." *Id*. QC Finishers states that even if its Franklin Park parking lot is an emission unit, it is not regulated under Section 212.316 because it is not located in any of these geographical areas. *Id*.

People's Motion to Strike. The People argue that Section 212.309 "refers to emission units described in Section 212.302, which includes parking lots." Motion at 4. According to the People, "Section 212.302 states that all manufacturing operations located in any townships of Cook County are subject to Section 212.309." *Id*. The People then move to strike this affirmative defense because it "does not allege any new facts or arguments." *Id*.

QC Finishers' Response to the Motion. QC Finishers maintains that Section 212.316, by its terms, applies only to operations that are *both* specified in Section 212.302 *and* located in geographic areas identified in Section 212.324(a)(1). Resp. at 5. QC Finishers emphasizes that the provision allegedly violated, Section 212.309, refers to all of Section 212.316. According to QC Finishers, because Section 212.309 refers to the entire Section 212.316 and not to specific subsections of Section 212.316 that describe particular types of emission units, the Board must have intended to include the geographical limits of Section 212.316: "If [the Board] had intended to refer to specific units regardless of where they were located, it would have referred to the specific subsections of [Section] 212.316 that described those units." *Id*. at 5.

Board Ruling on the People's Motion to Strike the First Affirmative Defense to Count IV. The parties disagree over the scope of applicability of Section 212.309. QC Finishers interprets geographical limits on the Section's applicability that the People do not. At this juncture, however, the Board is not considering a motion for summary judgment or other final disposition of this legal question on the merits after full briefing. Rather, the Board is ruling on a motion to strike affirmative defenses.

For the following reasons, the Board denies the People's motion to strike this affirmative defense. QC Finishers has pled a valid affirmative defense by admitting the complaint's

assertion that parking lots are regulated under Section 212.316, but raising the new argument that Section 212.316 is limited geographically and does not cover its Franklin Park location. Because Section 212.316 is the complaint's basis for applying Section 212.309 to QC Finishers, QC Finishers raises the possibility of defeating the People's claim. "Where the well-pleaded facts of an affirmative defense raise the possibility that the party asserting them will prevail, the defense should not be stricken." International Insurance, 242 Ill. App. 3d at 630-31, 609 N.E.2d at 853-54, citing Raprager, 183 Ill. App. 3d at 854, 539 N.E.2d at 791. Accordingly, the Board finds that QC Finishers has properly pled an affirmative defense and denies the People's motion to strike this affirmative defense.

Second Affirmative Defense to Count IV on Failing to Timely Develop and Submit Fugitive Matter Emission Program

As discussed, the People allege in count IV of the complaint that QC Finishers violated Section 9(a) of the Act and Section 212.309 of the Board's regulations by not timely submitting a "Fugitive Dust Program" for the company's parking lots.

QC Finishers' Affirmative Defense Based on Parking Lot Not Being an Emission Unit. In its second affirmative defense to count IV, QC Finishers argues that the Section 212.309 requirement for submittal of a fugitive dust operating program, by its terms, applies only to "emission units." Supp. AD at 4. According to QC Finishers, its parking lot is not an "emission unit." An "emission unit" is defined in Board regulations (35 Ill. Adm. Code 211.1950) as "any part or activity at a stationary source that emits or has the potential to emit." *Id*.

QC Finishers states that its parking lot has been paved at all times relevant to this count of the complaint, and that because it is paved, it does not generate dust. Supp. AD at 4. QC Finishers argues that the paved parking lot "does not emit or have the potential to emit" and accordingly is not an "emission unit" subject to the fugitive dust program requirement allegedly violated. *Id*.

People's Motion to Strike. The People state that even if the parking lot is paved, because of the nature of the business on the premises, particulate matter could still be emitted by activities on the lot such as trucks driving. Mot. at 5. The People conclude that this affirmative defense should be dismissed because it is "argumentative, and merely raises an interpretation of the law." *Id*.

QC Finishers' Response to the People's Motion. QC Finishers responds that it has "raised a new fact that will defeat the allegation"—namely, that its "parking lot is paved and therefore not capable of emitting." Resp. at 6. QC Finishers further states that the People give no reason for why a defense should be dismissed for being "argumentative" or for raising an "interpretation of the law." *Id*. at 6-7.

Board Ruling on People's Motion to Strike the Second Affirmative Defense to Count IV. The Board grants the People's motion to strike because QC Finishers' assertion that its parking lot is not an emission unit is not an affirmative defense. An affirmative defense is a

"response to a [complainant's] claim which attacks the [complainant's] *legal* right to bring an action, as opposed to attacking the truth of claim." Farmers State Bank, PCB 97-100, slip op. at 2 n.1 (emphasis in original) (quoting *Black's Law Dictionary*).

Here, QC Finishers is disputing the truth of the People's claim that the parking lot is an emission unit. Because QC Finishers does not admit the People's claim, but instead attacks the sufficiency of that claim, the company's argument is not an affirmative defense. *See* Worner Agency, 121 Ill. App. 3d at 221, 459 N.E.2d at 635. QC Finishers may nevertheless introduce evidence probative of whether the parking lot is an emission unit in trying to defend against this alleged violation.

First Affirmative Defense to Count VI on Operating Without a CAAPP Permit

In count VI of the complaint, the People allege that QC Finishers violated Sections 9 and 39.5 of the Act and Section 270.201 of the Agency's regulations by not timely submitting a complete initial CAAPP application and by operating without a CAAPP permit. Comp. at 15-17.[3] The complaint states that QC Finishers was required to submit its complete initial CAAPP application by December 7, 1995, but did not submit its initial CAAPP application until March 23, 1999. The People further allege that QC Finishers does not currently have a CAAPP permit. *Id*. at 16-17.

QC Finishers' Affirmative Defense Based on FESOP. QC Finishers concedes that it does not have a CAAPP permit but argues that it is exempt from the requirement because it has a federally enforceable State operating permit (FESOP). Supp. AD at 5. QC Finishers states that Section 39.5(3)(c) of the Act (415 ILCS 5/39.5(3)(c) (2002)) authorizes the Agency to exclude a source from the CAAPP permit requirement. According to QC Finishers, Section 39.5(3)(c) is "[i]n essence . . . an exception" to the prohibition of Section 39.5(6)(b) (415 ILCS 5/39.5(6)(b) (2002)), the provision allegedly violated. *Id*.

Section 39.5(6)(b) states:

> After the applicable CAAPP permit or renewal application submittal date, . . . no person shall operate a CAAPP source without a CAAPP permit unless the complete CAAPP permit or renewal application for such source has been timely submitted to the Agency. 415 ILCS 5/39.5(6)(b) (2002)).

Section 39.5(3)(c) provides:

> The Agency shall have the authority to issue a State operating permit for a source under Section 39(a) of the Act, . . . which includes federally enforceable conditions limiting the "potential to emit" of the source to a level below the major

[3] In its June 19, 2003 order, the Board denied the People's motion to strike QC Finishers' second affirmative defense to count VI, which asserts that the Board lacks the authority to hear an alleged violation of 35 Ill. Adm. Code 270.201 because it is an Agency rule, not a Board rule.

> source threshold for that source as described in paragraph 2(c) of this Section, thereby excluding the source from the CAAPP . . . . 415 ILCS 5/39.5(3)(c) (2002).

QC Finishers asserts that it was granted a FESOP on May 3, 2002—State operating permit #99030080 containing federally enforceable conditions limiting its "potential to emit" to a level below the "major source" threshold described in Section 39.5(2)(c) of the Act (415 ILCS 5/39.5(2)(c) (2002)). Supp. AD at 5. QC Finishers maintains that it is accordingly excluded from the CAAPP and "was able to operate and continues to operate without a CAAPP permit and without violating the Illinois Environmental Protection Act." *Id*.

QC Finishers states that "[e]ven assuming that the facts and law pled in the Complaint are correct," the granting of the FESOP is new information that defeats the alleged violations "for the period of time, May 3, 2002 to the present," during which QC Finishers has had the FESOP. Supp. AD at 5.

People's Motion to Strike. The People assert that any "compliance at a later date [by obtaining the FESOP] does not excuse violations from 1995 until May of 2002." Mot. at 5. According to the People, QC Finishers "has not alleged any new facts or arguments." *Id*.

QC Finishers' Response to the People's Motion. QC Finishers argues that the FESOP is an alternative means of compliance so that its continuing failure to have a CAAPP permit is irrelevant. Resp. at 7. QC Finishers emphasizes that by raising this affirmative defense, it does "not seek to excuse past noncompliance" and that the defense applies "for the period of time only from May 3, 2002 to the present." *Id*. In other words, the FESOP information "is being offered as an absolute defense for *part* of the allegation." *Id*. at 8 (emphasis in original). QC Finishers also reiterates that, contrary to the People's statement, the allegation of the FESOP is new information outside of the complaint. *Id*. at 7.

Board Ruling on the People's Motion to Strike the First Affirmative Defense to Count VI. For the following reasons, the Board denies the People's motion to strike the FESOP affirmative defense. QC Finishers argues that the alternative compliance it allegedly achieved in May 2002 defeats the People's claim *for part of the time period* of alleged violations in the complaint. As the Board held above, subsequent compliance does not excuse prior violations, but a respondent can allege a valid affirmative defense that defeats either all or part of a claimed violation.

QC Finishers' affirmative defense of alternative compliance through a FESOP, if true, would defeat part of the People's claim of violations as alleged in count VI "even if all allegations in the complaint are true." Community Landfill, PCB 97-193. The alleged FESOP constitutes "new facts or arguments" not set forth in the complaint. *Id*. Additionally, as an affirmative defense must, QC Finishers' pleading admits the complaint's claim that the company lacks a CAAPP permit. The Board therefore finds that QC Finishers has properly pled an affirmative defense and denies the People's motion to strike this affirmative defense.

CONCLUSION

For the reasons above, the Board grants in part and denies in part the People's motion to strike QC Finishers' seven revised affirmative defenses. The Board strikes two of the seven revised affirmative defenses. Specifically, the Board grants the People's motion to strike (1) the affirmative defense of equitable estoppel as to all counts of the complaint and (2) the second affirmative defense to count IV. The Board denies the People's motion to strike (1) the affirmative defense of *laches* as to all counts, (2) the affirmative defense of waiver as to all counts, (3) the first affirmative defense to count III, (4) the first affirmative defense to count IV, and (5) the first affirmative defense to count VI. The Board directs the parties and the hearing officer to proceed expeditiously to hearing or with any dispositive motions.

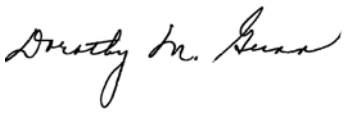
ORDER

1. The Board grants the People's motion to strike the affirmative defense of equitable estoppel as to all counts of the complaint and the second affirmative defense to count IV of the complaint.

2. The Board denies the People's motion to strike the affirmative defense of *laches* as to all counts of the complaint, the affirmative defense of waiver as to all counts of the complaint, the first affirmative defense to count III of the complaint, the first affirmative defense to count IV of the complaint, and the first affirmative defense to count VI of the complaint.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 8, 2004, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board