ILLINOIS POLLUTION CONTROL BOARD
June 19, 2003

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

ORDER OF THE BOARD (by M.E. Tristano):

On July 14, 2000, the People of the State of Illinois (complainant), filed a seven-count complaint against QC Finishers, Inc. (respondent). The complainant alleged that respondent violated various provisions of the Environmental Protection Act (Act), and the Board's air pollution regulations. On March 3, 2003, the respondent filed an answer to the complaint and affirmative defenses. On April 25, 2003, the complainant filed a motion to strike or dismiss respondent's affirmative defenses.

For the reasons stated below, the Board grants the complainant's motion to strike all of respondent's affirmative defenses except for the specific affirmative defenses to count I, and count II and one specific affirmative defense to count VI.

BACKGROUND

Respondent is an Illinois corporation located at 10228-10244 Franklin Avenue, Franklin Park, Cook County. Respondent's operations at its facility include the coating of miscellaneous metal and plastic parts for various industries including the automotive, medical, military, computer and governmental industries. The seven-count complaint against respondent alleged various violations of Section 9(a) and (b) of the Act; and Sections, 201.142, 201.143, 218.204, 212.309, 205.310, 270.201, and 203.201 of the Board's air pollution regulations. Briefly the seven counts include:

Count I: Construction without a state permit: Complainant alleged that respondent constructed 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.

Count II: Operating without a state permit: From the time that respondent's facility began using more than 5000 gallons of paint per year, respondent operated facility and equipment without obtaining an operating permit from the Agency. Comp. at 6.

Count III Failure to comply with emission limitations: From July 1, 1991 through the present, respondent used coatings for miscellaneous metal parts whose volatile organic material emissions exceeded the emission limitations set forth in 218.204(j). From March 15, 1996 through the present, respondent used coatings for plastic automotive parts whose Volatile Organic Material (VOM) emissions exceeded the emission limitations set forth in 35 Ill. Adm. Code 218.204(n). Comp. at 9.

Count IV: Failure to timely develop and submit fugitive matter emission program: As parking lots are regulated emission sources pursuant to 212.316, respondent was required to submit to the State a Fugitive Dust Program by May 22, 1996, for its parking lots. Respondent did not submit a Fugitive Dust Program until December 18, 1998. Comp. at 11.

Count V: Failure to timely file an ERMS application: As respondent was a participating source with baseline emissions of at least 10 tons of VOM per year, it was required to submit an ERMS application to the Agency by March 1 1998. Respondent submitted its application on December 22, 1998. Comp. at 13.

Count VI: Operating without a Clean Air Act Permit Program (CAAPP) permit: Respondent commenced operation of its facility before March 7, 1995 and owns and operates an existing CAAPP source. Respondent was required to submit its initial complete CAAPP application no later than nine months from the effective date of the CAAPP, December 7, 1995. Respondent did not submit its initial CAAPP application until March 23, 1999. Respondent does not currently have a CAAPP permit. Comp. at 15-16.

Count VII: Making a major modification without a permit: There was an increase in potential to emit created by the installation of a fourth spray booth that constituted a major modification to the respondent's facility. Respondent did not have a permit for the major modification of the facility. Comp. at 19.

STANDARD

In an affirmative defense, the 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). The Code of Civil Procedure gives additional guidance on pleading affirmative defenses. Section 2-613(d) provides, in part:

> 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).

A valid affirmative defense gives color to the opposing party's claim but then asserts new matter which defeats an apparent right. Condon v. American Telephone and Telegraph Co., 210 Ill. App. 3d 701, 569 N.E.2d 518, 523 (2d Dist. 1991), citing The Worner Agency Inc. v. Doyle, 121 Ill. App. 3d 219, 222, 459 N.E.2d 633, 635 (4th Dist. 1984). A motion to strike an affirmative defense admits well-pleaded 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).

AFFIRMATIVE DEFENSES

On March 3, 2003, the respondent filed an answer to the complaint and affirmative defenses. The affirmative defenses included four general affirmative defenses to all counts and nine affirmative defenses specific to five of the seven counts in the complaint. On April 25, 2003, the complainant filed a motion to strike or dismiss respondent's affirmative defenses. The following gives the arguments of the respondent and complainant and the Board's decision.

GENERAL AFFIRMATIVE DEFENSES

Laches

Respondent argues the State's claims are barred by the doctrine of laches. Respondent argues that its operations are subject to the Cook County Environmental Ordinance and had at all relevant times Cook County Certificates of Operation. Respondent states that it was not aware that it was required to obtain State of Illinois operating permits for the same operation and equipment for which it already had a Cook County Certificate of Operation. QC Finishers further states that it is reasonable to conclude that the State may 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 such as itself. Nor did the State contact emission sources to inform them they may need state or federal permits. Respondent concludes that it relied on the Cook County Environmental Ordinance, assurances of the Cook County inspector, and the lack of contact by the State in its belief that it was in compliance with all environmental laws. Ans. at 10-12.

The People cite Board precedent for the principle that applying laches to public bodies is disfavored, but that the doctrine can apply under compelling circumstances. Hickey v. Illinois Central Railroad Co., 35 Ill. 2d 427, 220 N.E. 2d 415 (1966). The People acknowledge there are two elements of *laches*: lack of due diligence by the party asserting the claim; and prejudice to the opposing party. The facts establishing an affirmative defense must be pleaded with the same degree of specificity required by a plaintiff to establish a cause of action. Van Milligan v. Board of Fire & Police Commissioners, 158 Ill. 2d 84, 89, 630 N.E.2d 830, 833 (1994).

The People argue that respondent's argument fails to set forth key elements of a *laches* defense. The People state that respondent did not allege there was a delay in bringing the suit.

Respondent alleged no facts showing any delay on the part of the State in bringing the suit, only that the State took no action to inform respondent of its permitting and emission requirements. Mot. to Dismiss at 4.

Pursuant to Section 103.204 of the Board's procedural rules, "any 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. 103.204(d). Respondent has not sufficiently pled that the People unreasonably delayed bringing this action to the prejudice of QC Finishers, nor that special or unusual circumstances exist. Therefore, the Board finds that respondent has inadequately pled *laches* and strikes this affirmative defense.

Estoppel

Respondent also argues that the State's claims are barred by the doctrine of estoppel. QC Finishers argues that the State failed to use the list of permitted Cook County sources to advise small coating companies of changes in the law. The State also failed to address the confusion caused by the Cook County Environmental Ordinances and induced the respondent to rely on the county ordinance. Ans. at 13.

The People assert the defense of equitable estoppel requires a showing of six elements by the respondent:

> (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. to Strike at 8, citing Elson v. State Farm Fire and Casualty Company, 295 Ill. App. 3d 1, 691 N.E. 2d 807, 817 (1st Dist. 1998).

The People contend that respondent failed to plead the elements of this defense with requisite specificity. Mot. to Strike at 11. Additionally, the People argue that respondent has not plead sufficient facts in support of its allegation. Mot. to Dismiss at 7-10.

The Board finds that the respondent has not sufficiently pled the elements of estoppel. The respondent made no allegation that any individual acting on behalf of the State misrepresented any material fact to or concealed a material fact from the respondent. To establish estoppel against the State there must be an affirmative act by the State inducing reliance on the part of the respondent to its detriment. The second through sixth elements of the defense

assume that a misrepresentation or concealment occurred. Nor does respondent make any factual allegations relative to the second through sixth elements of estoppel.

The respondent has only pled inaction on the State's part for failing to notify it of what permits are required. Respondent's pleading of estoppel is insufficient and therefore the Board strikes this affirmative defense.

Third General Affirmative Defense

Respondent alleges that by the complainant being aware of the need to disseminate information to a small and specific class of persons and by failing to do so in a sufficient, effective or timely manner, it encouraged the creation and continuance of a noncompliance situation. Therefore, according to respondent, complainant failed to minimize the damages that resulted from that situation and it would be unfair to allow it to seek legal costs, expert witness, consultant fees or penalties or any other relief against the respondent. Ans. at 13.

The complainant argues that this is not an affirmative defense since it does not contain allegations of fact but rather is legal argument. The complainant points out that the Board has previously ruled that a defense which speaks to the imposition of a penalty and not the cause of action is not an affirmative defense to that cause of action. People of the State of Illinois v. Douglas Furniture of California, Inc., PCB 97-133 (May 1, 1997). Mot. to Dismiss at 11-12.

The Board agrees with the complainant that respondent's affirmative defense here speaks to the issue of penalty and not the cause of action. Therefore the Board strikes this affirmative defense.

Forth General Affirmative Defense

The respondent's final general affirmative defense is that complainant's failure to take action in this case constitutes a waiver of its right to pursue penalties and costs. Ans. at 13.

The complainant asserts again that the Board ruled in People v. Douglas Furniture of California, Inc., PCB 97-133 (May 1, 1997) that a defense which speaks to the imposition of a penalty and not the cause of action is not an affirmative defense to that cause of action. The complainant adds that the affirmative defense of waiver is unavailable to respondent because a waiver is an intentional relinquishment of a known right. Pantle v. Industrial Commission, 61 Ill. 2d 365, 372, 335 N.E.2d 491 (1975). There must be both knowledge of the existence of the right and an intention to relinquish it. While the State is aware of its right to pursue violators of environmental statutes and regulations and obtain penalties against them, it has not waived any rights. Mot. to Dismiss at 12-13.

The Board agrees with the complainant that respondent's affirmative defense here speaks to the issue of the penalty and not the cause of action. Therefore, the Board strikes this affirmative defense.

SPECIFIC AFFIRMATIVE DEFENSES TO COUNT I

First Specific Affirmative Defense

Respondent argues that its silk screening operation involves the application of words, designs, pictures or images onto metal or plastic using ink, and therefore, it constitutes "printing" as defined by 211.5150. QC Finishers states that its silk screening operation has never, at any time, exceeded 750 gallons of organic solvent usage per year and therefore is exempt from Sections 201.142 and 201.143 pursuant to Section 201.146(m). Ans. at 2-3.

Complainant states that the violation alleged in count I is that the respondent used over 5000 gallons of paint including thinner each year and therefore needed a construction permit for its emission sources or air pollution control equipment. Therefore, the complainant argues that this affirmative defense should be dismissed because it does not speak to the allegations in count I of the complaint. Mot. to Dismiss at 13-14.

The Board finds that respondent's affirmative defense does allege "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). Section 201.146(m) is an exemption from construction permits for printing operations with aggregate organic solvent usage that never exceeds 750 gallons per year. As a result, the Board denies complainant's motion to strike this affirmative defense.

Second Specific Affirmative Defense

Respondent states that the sanding and polishing equipment is exempt because at all times it was vented outside the building through a filter, and therefore, it is exempt from Sections 201.142 and 201.143 pursuant to Section 201.146(aa)(4). QC Finishers also states that the sanding and polishing equipment is exempt because it was manually operated, and therefore, is exempt from Sections 201.142 and 210.143 pursuant to Section 201.146(aa)(2). Ans. at 3.

Complainant states that the regulation cited by respondent relates to equipment for polishing ceramic artwork, which neither party alleges is part of the respondent's operation. Complainant argues that the sanding equipment assertion may give rise to a question of fact and should be denied. Mot. to Dismiss at 14.

The Board finds that respondent's affirmative defense here does allege "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). The exemptions at Sections 201.146(aa)(4) and 201.146(aa)(2) are not limited to ceramic artwork. They include sanding and polishing metals and plastics and other materials. As a result, the Board denies complainant's motion to strike this affirmative defense.

SPECIFIC AFFIRMATIVE DEFENSES TO COUNT II

First Specific Affirmative Defense

Respondent realleged and incorporated by reference its first affirmative defense to count I as its first affirmative defense to count II. Ans. at 4. The complainant realleged and incorporated by reference its argument to the first affirmative defense for count I as its argument to the first affirmative defense for count II. Mot. to Dismiss at 14.

As with the first affirmative defense to count I, the Board finds that respondent's affirmative defense 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). The Board therefore denies complainant's motion to strike this affirmative defense.

Second Specific Affirmative Defense

Respondent realleged and incorporated by reference its second affirmative defense to count I as its second affirmative defense to count II. Ans. at 5. The complainant realleged and incorporated by reference its argument to the second affirmative defense to count I as its argument to the second affirmative defense for count II. Mot. to Dismiss at 14-15.

As with the second affirmative defense to count I, the Board finds that respondent's affirmative defense alleges "new facts or arguments that, if true, will defeat… [complainant's] claim even if all allegation in the complaint are true." People v. Community Landfill Co. PCB 97-193 (Aug. 6, 1998). The Board therefore denies complainant's motion to strike this affirmative defense.

SPECIFIC AFFIRMATIVE DEFENSE TO COUNT III

Respondent states that it installed control equipment pursuant to permit 99030043 in November 1999, and the equipment was fully operational in January of 2000. Respondent used the control equipment to control emissions from those of its coatings that exceeded the limits of 218.204. Ans. at 6.

Complainant states that respondent's argument does not address any new facts outside the complaint. Count III alleges violations since 1991 and 1996. Subsequent compliance, if true, is not an affirmative defense. It may be used for other purposes but it does not make the respondent less liable for its earlier violations and this affirmative defense should be dismissed. Mot. to Dismiss at 15.

The Board finds that this affirmative defense does not allege "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). This affirmative defense sets forth mitigating factors which, if proven, could affect the appropriate penalty, if any to be imposed. These factors, however, do not address whether or not an alleged violation of the

Act has taken place**.** People v. Midwest Grain Products of Illinois PCB 97-179 (Aug. 21, 1997). In addition, the Act expressly states that "[i]t 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). The Board strikes this affirmative defense.

SPECIFIC AFFIRMATIVE DEFENSES TO COUNT IV

First Specific Affirmative Defense

Respondent argues that it was not at any time 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, and Lake Calumet in Cook County and Granite City in Madison County. Since it is not located in the areas described, respondent argues Section 212.316 is not applicable to QC Finishers' parking lot. Ans. at 7.

Complainant states in the complaint, Section 212.309 refers to emission units described in Section 212.316, which includes parking lots. Section 212.302 states that all manufacturing operations located in any township of Cook County are subject to Section 212.309. Therefore, the complainant states that the respondent needed to submit a Fugitive Dust Program for its parking lots. Mot. to Dismiss at 15-16.

The Board finds that this affirmative defense does not allege "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). The complainant misreads the law in this case. Section 212.309 refers to emission units described in Section 212.302, which includes parking lots. Section 212.302 states that all manufacturing operations located in any townships of Cook County are subject to Section 212.309. The Board strikes this affirmative defense.

Second Specific Affirmative Defense

Respondent states that its parking lot is paved and has been paved at all times relevant to this count. Since it was paved the parking lot does not emit or have the potential to emit. As a result, respondent argues that its parking lot is not an emission unit and therefore no operating program was required. Ans. at 7.

The Complainant argues that even if a parking lot is paved, because of the nature of the business on the premises, particulate matter could still be emitted by the activity of the trucks driving on or off the parking area or other activities occurring on the lot. Because this defense is argumentative and raises an interpretation of the law, the complainant argues it should be dismissed as an affirmative defense. Mot. to Dismiss at 16.

The Board finds that this affirmative defense does not allege "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). The complainant is correct in that because of the nature of the business, particulate matter could be emitted by

activity of the trucks driving on or off the parking area or other activities occurring on the lot. This defense is argumentative and raises an interpretation of the law. Therefore, the Board strikes this affirmative defense.

SPECIFICAFFIRMATIVE DEFENSES TO COUNT VI

First Specific Affirmative Defense

Respondent states that on May 3, 2002, it was granted a federally enforceable state operating permit #99030080 which excluded it from the Clean Air Act Permit Program. Ans. at 9.

Complainant states that compliance at a later date does not excuse violations from 1995 until May of 2002. Mot. to Dismiss at 16.

The Board finds that respondent's affirmative defense in this case does not allege "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). Whether the respondent had a federally enforceable state operating permit which excluded it from the Clean Air Act Permit Program is irrelevant on the issue of past noncompliance with the Act. The Board strikes respondent's affirmative defense.

Second Specific Affirmative Defense

Respondent states that 35 Ill. Adm. Code 270 was not adopted by the Board and the Board therefore has no authority to levy a penalty for a violation of Section 270.201, a rule of the Agency. Ans. at 9.

The complainant argues that the respondent misinterprets the statute and regulations governing violation of the Act. Complainant argues that an affirmative defense cannot go to penalties and should be addressing liability issues only. Therefore, because this defense is legally inadequate, it should be dismissed. Mot. to Dismiss at 16.

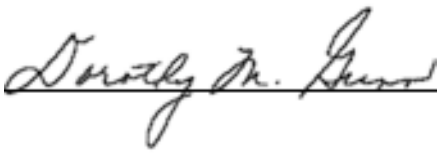
The Board finds that this affirmative defense addresses the legal sufficiency of the underlying cause of action. In effect, the respondent argues that the Board cannot hear an alleged violation of an Agency rule. The Board denies the complainant's motion to strike because, even accepting the complainant's allegation, QC Finishers asserts that the Board lacks the authority to entertain an alleged violation of an Agency rule.

CONCLUSION

The Board denies the complainant's motion to strike respondent's affirmative defenses specific to count I and count II and the second specific affirmative defense to count VI. The Board grants the motion to strike respondent's four general affirmative defenses as to all counts, respondent's affirmative defenses to counts III and IV, and the first specific affirmative defense to count VI. This case shall proceed expeditiously to hearing.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 19, 2003, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board