UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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| In the Matter of | ) | |
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| Franklin and Leonhardt Excavating Company, Inc., | ) | Docket No. CAA-98-011 |
| | ) | |
| Respondent | ) | |
| | ) | |

**Order Denying Complainant's Motion to Strike Affirmative Defenses**

**1. Background**

The Amended Administrative Complaint (Complaint) in this proceeding was filed on September 23, 1998, alleging that Respondent, Franklin and Leonhardt Excavating Company, Inc., violated the federal regulations promulgated under the Clean Air Act, namely the National Emissions Standards for Asbestos, at 40 C.F.R. Part 61 Subpart M. The Complaint alleged that after Respondent demolished an elementary school building, inspectors from the local Air Pollution Control District found regulated asbestos containing material (RACM) at the site. The Complaint alleged three counts of violation, namely that Respondent failed to inspect the school building for the presence of asbestos, failed to remove all RACM prior to demolition, and failed to adequately wet the asbestos at all times until disposal. Respondent filed an Answer to the Complaint, denying the allegations of violation and asserting four affirmative defenses.

On November 13, 1998, Complainant submitted a Motion to Strike Affirmative Defenses (Motion), requesting that all four of Respondent's affirmative defenses be stricken as insufficient, frivolous, redundant, and/or immaterial. Respondent filed a written Response opposing the Motion on November 30, 1998.

**II. Arguments of the Parties**

Complainant cites to federal caselaw interpreting the standard for striking defenses under Federal Rule of Civil Procedure (FRCP) 12(f), which provides that a "court may order stricken from any pleading any insufficient defense or any

redundant, immaterial, impertinent or scandalous matter."

Respondent's Affirmative Defense labeled "A" in its Answer states as follows:

> The conduct of the Air Pollution Control District, as agent for Environmental Protection agency, as hereinafter set out, constitute a Waiver of any duty, contractual or legal, to inspect or remove RACM material (sic).

Respondent explains in its Answer that it performed the demolition of the Lowell Elementary School pursuant to contract for the Regional Airport Authority, site owner, and pursuant to directions from Coradino Group, the managers of the demolition project. Respondent asserts that it relied upon the issuance of a Demolition Permit from the City of Louisville, which stated, "See Air Pollution Control approval in file," which had been attached to its application for the permit. According to Respondent, it relied also upon facts stated in certain documents, such as a Jefferson County Air Pollution Control District memorandum which stated, "On November 8, 1993 no residue of asbestos containing material was found during a visual inspection of the house, where Dore and Associates[(1)] abated asbestos containing material from Lowell Elementary School." (Respondent's Answer, Exhibit 2). Respondent argues that the Air Pollution Control District issued the permit approving demolition and represented to Respondent that the building was free of RACM, so EPA waived its right to assert the charges in the Complaint.

Complainant asserts that this defense is insufficient as a matter of law and frivolous, on grounds that the federal regulations include requirements of inspection for asbestos and removal of asbestos prior to demolition of a building (see, 40 C.F.R. § 61.145), and that the Air Pollution Control District as a matter of law cannot absolve or excuse a person from performing those requirements. Complainant points out that subsection 112(*l*) of the Clean Air Act, which governs State programs for hazardous air pollutants, states in paragraph (7), "Nothing in this subsection shall prohibit the Administrator from enforcing any applicable emission standard or requirement under this section." Complainant points out additionally that the regulations at 40 C.F.R. Part 61 Subpart M have no provision for waiver.

Respondent's Affirmative Defense "B" states as follows:

> F&L [Respondent] relies on the conduct of Air Pollution Control District, as agent of [EPA], as hereinafter set out, in approving demolition and Complainant is thereby estopped from asserting the allegations in the [Complaint].

Respondent explains that a demolition permit is not issued until the building is safe for demolition, including removal of asbestos. According to Respondent, the Regional Airport authority employed Doerr & Associates, a certified asbestos removal contractor, which reported to the Air Pollution Control District its intent to conduct asbestos abatement starting August 2, 1993 (Response, Exhibit B-2). Respondent was not licensed for asbestos removal; thus, Doerr & Associates had the duty to remove asbestos rather than Respondent, it asserts. After Doerr completed its work, the owner, Doerr, Respondent and the Air Pollution Control District inspected the building and found all asbestos containing material had been removed, Respondent asserts. As a result of relying on issuance of the permit, approval by the Air Pollution Control District and the inspection, Respondent believed that all RACM had been removed from the school building and that it was free to perform the demolition without being in violation of air pollution laws.

Complainant argues that the affirmative defense is insufficient as a matter of law and redundant. Complainant points out that to apply the doctrine of estoppel against the Government, "affirmative misconduct" must be demonstrated. Respondent has not alleged facts which show "affirmative misconduct," according to Complainant.

Respondent's Affirmative Defense labeled "C" states:

> An unreasonably long time passed between the alleged act and the commencement of this action, F&L relying on failure to notice F&L and the occurrence of events as hereinafter set out, pleads laches as a bar to the claims set out against F&L.

Respondent explains that EPA failed to prosecute for four years after knowing the facts described in the Complaint and that during that time persons with knowledge of the facts alleged in the Answer have died, moved, decreased in memory and are no longer available as witnesses, and that documents have been lost, mislaid or destroyed.

Complainant asserts that Affirmative Defense "C" is legally insufficient, redundant and frivolous. Complainant points out that, as stated in its Answer, Respondent knew of the violations when the Air Pollution Control District discovered asbestos at the site three months after demolition of the school building.

Respondent argues that Respondent only received notice of one alleged violation, failure to wet the asbestos. Respondent asserts that two of the firms involved in the demolition no longer exist and a bonding firm is in receivership, and that it has been unable to obtain records of those firms.

Respondent's final Affirmative Defense, labeled "D," states as follows:

> License, Authority, Justification - Issuance by Complainant through its agent, Air Pollution Control District, of a certificate for demolition of the Lowell School Building, authorized F&L to demolish without inspection and/or removal of RACM before demolition. . . . Receipt by F&L of an Order from [Regional Airport Authority] to vacate the premises, required F&L to vacate.

Respondent asserts that Complainant is barred from enforcing the allegations of the Complaint, because the Air Pollution Control District certified that the building is free from asbestos. The Air Pollution Control District's approval for demolition in the permit, and its memorandum report that Doerr and Associates had abated asbestos containing material from the school building, was a license and authority for Respondent to demolish and that Respondent was justified in relying on these documents. Respondent asserts that upon its employee's report to the Regional Airport Authority of his suspicion that a pile of debris contained asbestos, Respondent was instructed by the Regional Airport Authority to leave the site and not contact the suspected substances. Respondent states that it was forbidden by its contract from removing RACM.

Complainant asserts that no action of the Air Pollution Control District can serve to give Respondent authority to ignore the requirements of the Federal regulations at 40 C.F.R. Part 61 Subpart M. Complainant asserts further that the Answer indicates that Respondent was legally and contractually responsible for the demolition debris, so the "Order"to vacate is immaterial.

**III. Discussion**

The Federal courts assert principles which discourage application of affirmative defenses, such as laches and estoppel, against the Government when acting to protect the public interests:

> The Government, which holds its interests in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes . . . [and] . . . cannot . . . lose its valuable rights by . . . acquiescence, laches, or failure to act.

*United States v. California,* 332 U.S. 19, 40 (1947); *Nevada v. United States,* 463 U.S. 110, 141 (1983); *Heckler v. Community Health Services of Crawford County, Inc.,* 467 U.S. 51, 59-61 (1984)(the Government may not be estopped on the same terms as any other litigant; official misconduct and detrimental reliance must be shown); *United States v. Administrative Enterprises, Inc.,* 46 F.3d 670 (7th Cir. 1995)(discussing availability of laches as a defense against the Government). Similarly, a waiver of enforcement of a statute or its requirements to protect public health and the environment is not easily construed against the Government.(2) *See, United States v. Noble Oil Co.,* 28 ERC 1460, 1469, 1988 U.S. Dist LEXIS 11526 (D. N.J. 1988).

Nevertheless, the facts in this proceeding have not yet been developed, as the prehearing exchange has not yet been completed. It is observed that subsection 112(*l*) of the Clean Air Act provides that "A program submitted by a State . . . may provide for partial or complete delegation of the Administrator's authorities and responsibilities to implement and enforce emissions standards and prevention requirements . . . ." Paragraph (8) of that subsection provides that "The Administrator may . . . approve a program developed and submitted by a local air pollution control agency . . . and any such agency implementing an approved program may take any action authorized to be taken by a State under this section." The Jefferson County Air Pollution Control District's authority in relation to EPA is not clear from the record as it now stands.

Where the case record is largely undeveloped and any evidence relating to the defenses may be relevant to the determination of a penalty, such evidence should be heard. Motions to strike are not favored and will be denied "unless the legal insufficiency of the defense is 'clearly apparent' . . . the underpinning of this principle rests on a concern that a court should refrain from evaluating the merits if a defense where . . . the background of a case is largely undeveloped." *Cipollone v. Liggett Group, Inc.,* 789 F.2d 181, 188 (3rd Cir. 1988), *on remand,* 649 F. Supp. 238, *motion denied,* 802 F.2d 658, *on remand,* 649 F. Supp. 644, *cert. denied,* 107 S.Ct. 907. The Motion to Strike Affirmative Defenses will be denied.

**Order**

Accordingly, Complainant's Motion to Strike Affirmative Defenses is **DENIED.**

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Stephen J. McGuire
Administrative Law Judge

Dated: December 7, 1998
Washington, D.C.

1. The memorandum refers to the company "Dore & Associates," but Respondent spells

the company name as "Doerr & Associates Contracting, Inc."

2. Waiver means an intentional relinquishment or abandonment of a known right or privilege. *Groves v. Prickett,* 420 F.2d 1119, 1125 (9th Cir. 1970). Any waiver to be implied from conduct must be "clear, decisive and unequivocal of purpose." *Id.*