UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
THE LANDMARK PROPERTIES, L.C.,	**)**	**DOCKET NO. TSCA-07-2002-0220**
	)	
RESPONDENT.	**)**	

ORDER ON RESPONDENT'S REQUEST FOR DISMISSAL OR IN THE ALTERNATIVE SUMMARY JUDGMENT

On September 16, 2002, the captioned action was initiated by the filing of a Complaint against the Respondent, The Landmark Properties, L.C. The Complaint alleges in two Counts that the Respondent, a leasing agent, violated the Lead-Based Paint Disclosure requirements set forth in 40 C.F.R. 745.100 *et seq*., by failing to provide two tenants with a lead disclosure pamphlet prior to the time they entered into their leases for target housing. The Complaint seeks a total penalty of $4,950.

On October 17, 2002, Respondent, *pro se*, filed an Answer to the Complaint which contained therein a "Request for Dismissal of Matter," as well as a plea for "summary judgment. " The stated basis for the request was that -

> the government has acted irresponsibly. The "audit" [on which the alleged violations are based] was done on March 4, 2002 according to the Government, yet we were not served notice of the action until September 18, 2002. We believe that waiting six months in order to serve us the notice is irresponsible and limits our ability to provide a defense.

On November 5, 2002, Complainant filed a Response to the Request for Dismissal asserting that the request should be denied on the basis that (1) it does not meet the requirements for a motion under the Consolidated Rules in that Respondent fails to state the grounds upon which the request is based or style it as a motion; and (2) the Complaint establishes a *prima facie* case against Respondent.

A. Sufficient of form of "Request"

Section 22.16(a) of the Consolidated Rules provides that:

> All motions . . . shall:
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> (1) Be in writing;
> (2) State the grounds therefor, with particularity;
> (3) Set forth the relief sought; and
> (4) Be accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon.

40 C.F.R. § 22.16.

While typically, experienced counsel title their requests for the relief of the type sought by Respondent as a "motion," the Consolidated Rules do not require that they do so to be considered, and some counsel, including Agency counsel, do not. Moreover, a prayer for relief as dismissal contained within an Answer, but not titled as a "motion," is not uncommon. To refuse to entertain such a prayer for relief where a *pro se* Respondent has titled it as a "Request," rather than a Motion would be simply unjust.[1]

Second, Respondent has stated grounds for his request for relief with sufficient particularity in that Respondent has asserted that the six month delay between the audit revealing the violation and the instituting of the Administrative Complaint based upon the audit has negatively impacted the defense. Such negative impact is apparently that Respondent could not at the time it prepared its Answer locate a copy of the disclosure form evidencing that Mr. Mockmore received the lead disclosure pamphlet, but has confirmed with him that that is the case and offered an affidavit from him in support thereof.

Therefore, I find the form of Respondent's request for dismissal or summary judgment sufficient under the circumstances.

B. Standards for Dismissal/Accelerated Decision

Rule 22.20(a) of the Consolidated Rules provides with regard to accelerated decision *(i.e.*, summary judgment) and dismissal that -

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[1] In its Answer, Respondent notes that it "prepared this response by ourselves without the assistance of an attorney due to the costs involved. We ask that procedural errors in this response be ignored."

> The Presiding Officer may at any time render an accelerated decision in favor of party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

20 C.F.R. §22.20(a).

Thus, accelerated decision is authorized "upon proper showing of the lack of a genuine, triable issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). The issue that defeats summary judgment must be one that requires further proceedings to find facts; "[a]n issue of law is no barrier to a summary judgment." *Agustin v. Quern*, 611 F.2d 206, 209 (7th Cir. 1979). In determining whether to dismiss a complaint, "all factual allegations in the complaint should be presumed true, and all reasonable inferences therefrom should be made in favor of the complainant." *Commercial Cartage Company, Inc.*, 5 E.A.D. 112, 117 (EAB, Feb. 22, 1994).

C. Validity of Respondent's Defense

By its allegations of delay, Respondent essentially raises the affirmative defenses of laches or estoppel.[2] An abundance of case law evidences that such defenses can rarely, if ever, be successfully asserted against "the federal government when it is acting in its sovereign capacity to protect the public welfare."[3] *United States v. CPS Chem. Co.*, 779 F. Supp. 437, 451 (E.D. Ark. 1991) (citing *United States v. California*, 332 U.S. 19, 40 (1947)). *See also, Tennessee Valley Authority*, 9 E.A.D. __, 2000 EPA App. LEXIS 25, n. 56 (EAB 2000)(noting laches and estoppel defenses against the Agency typically fail as a matter of course)(citing *FDIC v. Husey*, 22 F.3d 1472, 1490 (10th Cir. 1994) (the general rule is that the United States is not subject to the defense of laches); *Bostwick Irrigation Dist. v. United States*, 900 F.2d 1285, 1291

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[2] Respondent does not appear to have grounds for raising a statute of limitations defense. Administrative civil penalty actions of this type are subject to a five year statute of limitations set out in 28 U.S.C. § 2462. *See, 3M Company v. Browner*, 17 F.3d 1453,1457 (D.C. Cir., 1994). The violations are alleged to have occurred on January 16, 1999 and December 21, 2001, and the Complaint was filed on September 16, 2002, well within the five year period.

[3] This doctrine is based on the premise that it is good public policy to protect the common rights vested in the government from the inadvertent actions of the government's agents. *U.S. v. City of Palm Beach Gardens*, 635 F.2d 337, 339-40 (5th Cir. 1981).

(8th Cir. 1990) ("We have recognized the long-standing rule that laches does not apply in actions brought by the United States."); *B.J. Carney Indus.*, 7 E.A.D. 171, 197 (EAB 1997) ("the Region's conduct [of a five-year delay initiating its enforcement action] did not rise to the level of 'affirmative misconduct' necessary to meet the heavy burden of estopping the government, and hence it must fail"), 192 F.3d 917 (9th Cir. 1999), vacated as moot, 200 F.3d 1222 (9th Cir. 2000); *and Newell Recycling Co.*, 8 E.A.D. 598, 632 (EAB 1999) (Region's commencement of enforcement action after a period of inaction (argued to be 6-10 years) did not give rise to an estoppel against the government)). *See further, Industrial Waste Cleanup, Inc*., EPA Docket No. CAA-5-99-019, 2000 EPA ALJ LEXIS 65 (ALJ, August 30, 2000)(Complainant's delay in filing the Complaint, two years after the inspection, does not alone warrant dismissal of the Complaint in this matter).

In order to prevail on an estoppel defense, the Respondent would have to show not only the typical elements of such a defense, but also affirmative misconduct on the part of the Agency.[4] Mere delay in initiation of an action is not sufficient to establish misconduct. *Id.* Respondent does not allege any other facts in its Answer in support of its assertion of its defense which could be characterized as "affirmative misconduct" on the part of the Agency. Therefore, based upon the assertions proffered in the Answer, Respondent's Request for Dismissal or in the alternative for Summary Judgment on the basis of the six month period between the audit and initiation of the action, is hereby **DENIED**.[5]

As to Complainant's assertion that the Complaint, standing alone, establishes a *prima facie* case against Respondent sufficient to ward off dismissal, it is observed that Respondent's Answer contains the factual assertions that "[t]he property was completely rehabilitated in 1986 and all lead paint removed" and that "we request the opportunity to provide appropriate documentation that the target housing is certified to be lead-based paint free by a certified inspector." The violations charged all arose after the date such alleged renovations occurred.

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[4] "Affirmative misconduct" in this context refers to "an affirmative misrepresentation or affirmative concealment of a material fact by the government." The four "traditional elements" of estoppel which must be proven in addition to the affirmative misconduct are: "(1) that the party to be estopped was aware of the facts, and (2) intended his act or omission to be acted upon; [and] (3) that the party asserting estoppel did not have knowledge of the facts, and (4) reasonably relied on the conduct of the other to his substantial injury." *See, Newell*, 8 E.A.D. at 631, n.24 (citing *Linkous v. United States*, 142 F.3d 271, 277-78 (5th Cir. 1998) and *United States v. Bloom*, 112 F.3d 200, 205 (5th Cir. 1997)). Similarly, laches, which is not available generally against the government, requires a showing of unreasonable delay and of harm or prejudice to the defendant. *Martin v. Consultants & Administrators, Inc*., 966 F.2d 1078, 1091 (7th Cir. 1992).

[5] In the event that Respondent subsequently discovers additional evidence in support of a laches or estoppel defense during the course of this proceeding, it is, of course, free to again raise the issue at that time. Moreover, Respondent may raise the issue of delay as affecting its ability to defend this matter in regard to the penalty to be imposed in this case.

The Subpart containing the regulations on which the violations are based, provides that it is ***not*** applicable to:

> Leases of target housing that have been found to be lead-based paint free by an inspector certified under the Federal certification program or under a federally accredited State or tribal certification program. Until a Federal certification program or a federally accredited State certification program is in place within the State, inspectors shall be considered qualified to conduct an inspection for this purpose if they have received certification under any existing State or tribal inspection certification program.

40 C.F.R. § 745.101(b).

Complainant, in its Response to the Request for Dismissal, has not addressed this issue and Respondent has not proffered any evidence in support of its allegations in this regard. Thus, it is premature at this point in time to determine whether dismissal or accelerated decision on this basis is appropriate.

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Susan L. Biro
Chief Administrative Law Judge

Dated: November 19, 2002
Washington, D.C.