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DEC 24 2003

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,
by LISA MADIGAN, Attorney
General of the State of Illinois

Complainant,

v.

VAN MELLE U.S.A., INC.,
an Illinois corporation,

Respondents.

No. PCB 02-186
Enforcement - Air

STATE OF ILLINOIS
Pollution Control Board

NOTICE OF FILING


TO: See Attached Service List

PLEASE TAKE NOTICE that on December 24, 2003 we filed with the Pollution Control Board the following **Complainant's Motion to Strike or Dismiss Respondent's Affirmative Defenses**, a true and correct copy of which is attached and hereby served upon you.

Respectfully submitted,

LISA MADIGAN
Attorney General
State of Illinois

BY:


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Dated: December 24, 2003

THIS DOCUMENT SUBMITTED ON RECYCLED PAPER

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**COMPLAINANT'S MOTION TO STRIKE OR DISMISS
RESPONDENT'S AFFIRMATIVE DEFENSES**

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, pursuant to Section 101.506 of the Board's Procedural Regulations and Section 2-615 of the Illinois Code of Civil Procedure moves for an order striking or dismissing all of the affirmative defenses of Respondent VAN MELLE U.S.A., INC. ("Van Melle"). In support of its motion, Complainant states as follows:

INTRODUCTION

1. On April 23, 2002 Complainant filed a five-count complaint against Respondent Van Melle alleging violations of the Illinois Environmental Protection Act ("Act") and Pollution Control Board regulations concerning Respondent's candy manufacturing facility located at 152 North Hastings Lane, Buffalo Grove, Lake County, Illinois.

2. Specifically, Complainant alleged that Respondent

operated a source emitting volatile organic material ("VOM") without a permit (Count I), failed to timely submit a Clean Air Act Permit Program ("CAAPP") application to the Illinois Environmental Protection Agency ("Illinois EPA") (Count II), failed to timely submit an Emission Reduction Market System application to Illinois EPA (Count III), caused or allowed air pollution in violation of New Source Review requirements (Count IV), and failed to reduce uncontrolled VOM emissions (Count V).

3. On November 21, 2003, Respondent filed its answer and affirmative defenses to the complaint. Complainant moves herein to strike or dismiss the affirmative defenses for the reasons outlined below.

LEGAL STANDARD FOR AFFIRMATIVE DEFENSES

4. Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615 (2002), provides in pertinent part: "All objections to pleadings shall be raised by motion. The motion shall point out specifically the defects complained of and shall ask for appropriate relief, such as: that a pleading or portion thereof be stricken because substantially insufficient in law"

5. Section 2-613(d) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-613(d) (2002), sets forth the requirements for all Affirmative Defenses. It provides, in pertinent part:

The facts constituting any affirmative defense, such as payment, release, satisfaction, discharge, license, fraud, duress, estoppel, laches, statute of frauds, illegality, that the negligence of a complaining party contributed in whole or in part to the injury of which he complains, that an instrument or transaction is either void or voidable in point of law, or cannot be recovered upon by reason of any statute or by reason of nondelivery, want or failure of consideration in whole or in part, 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, counterclaim, third party 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. (emphasis added).

6. An affirmative defense is a "matter asserted by (respondent) which, assuming the complaint to be true, constitutes a defense to it." BLACK'S LAW DICTIONARY (6th ed. 1990). In other words, an affirmative defense must give color to the opposing party's claim and then assert a new matter by which the apparent right is defeated. Ferris Elevator Company, Inc. v. Neffco, Inc., 285 Ill.App.3d 350, 354, 674 N.E.2d 449, 452 (3rd Dist. 1996). An affirmative defense confesses or admits the cause of action alleged by the Complainant, then seeks to avoid it by asserting a new matter not contained in the complaint and answer. Worner Agency, Inc. v. Doyle, 121 Ill. App. 3d 219, 222-223, 459 N.E.2d 633, 635-636 (4th Dist. 1984). In addition, the

facts in an affirmative defense must be pled with the same specificity as required by Complainant's pleading to establish a cause of action. International Insurance Co. v. Sargent & Lundy, 242 Ill. App. 3d 614, 630, 609 N.E.2d 842, 853 (1st Dist. 1993).

COMPLETE AFFIRMATIVE DEFENSE
AND FIRST PARTIAL AFFIRMATIVE DEFENSE

7. Respondent's first complete affirmative defense and first partial affirmative defense is as follows:

Respondent alleges that Complainants' (sic) claims are barred by the equitable doctrine of laches.

8. Laches assumes that due to passage of time, Respondent is prejudiced and, as a result, the penalties that Complainant seeks are prohibited. BLACK'S LAW DICTIONARY 875 (6th ed. 1990). Respondent provides no facts to support this defense.

9. Moreover, it is well settled in the law that laches may not be invoked against a governmental body which is attempting to perform its governmental function, or in actions involving public rights. Laches should only be invoked in "extraordinary circumstances". Cook County v. Chicago Magnet Wire Corp., 152 Ill. App.3d 726, 727-28, 504 N.E.2d 904, 905 (1st Dist. 1987). In Pielet Bros. Trading Inc. v. Illinois Pollution Control Board, 110 Ill. App. 3d 752, 758, 442 N.E. 2d 1374, 1379 (5th Dist. 1982), the Court found that the public has a right to a healthy and safe environment. This is also consistent with language found in Article XI of the Illinois Constitution and Section 2(b)

of the Act, 415 ILCS 5/2(b) (2002). There are no extraordinary circumstances in this matter, and Complainant is performing its governmental function of protecting the environment. Respondent cannot sustain an affirmative defense of laches, and this defense must be stricken.

10. In addition, the laches affirmative defense does not give color to any of the allegations in the complaint. It does not confess or admit the cause of action alleged in the complaint. Furthermore, it does not assert new matters which defeat any of the allegations in the complaint.

SECOND PARTIAL AFFIRMATIVE DEFENSE

11. Respondent's second partial affirmative defense is as follows:

Respondent alleges that if there were actions or conditions giving rise to one or more of the Complainant's claims or causes of action, those actions were taken or conditions created by the negligence or intentional conduct of some third person, firm or corporation, their agents, servants or employees over whom Respondent had no control and for whose negligence or intentional conduct Respondent is not and was not responsible.

12. Respondent's second partial affirmative defense should also fail. Although the second partial affirmative defense admits the underlying cause of action, it does not avoid or defeat Respondent's liability for the violations in the Complaint. As operator of the candy manufacturing facility,

Respondent is responsible for all of the violations in the complaint. Respondent does not name any other owners or operators of the facility in the second partial affirmative defense.

13. The second partial affirmative defense should also fail because it is not as specific as the complaint. Complainant named Respondent Van Melle as the party responsible for the alleged violations in the Complaint. In its second partial affirmative defense, Respondent fails to name another specific entity that is responsible for the violations in the complaint. Placing the blame on "some third person, firm or corporation..." is extremely non-specific and could implicate any person as being responsible for the violations.

THIRD PARTIAL AFFIRMATIVE DEFENSE

14. Respondents third partial affirmative defense is as follows:

For a third defense, Respondent alleges that the Illinois Environmental Protection Agency, acting as an administrative agency of the State of Illinois, failed to comply with the requirements of the Illinois Environmental Protection Act, 415 ILCS 5/1, et seq., in that on three occasions, specifically May 7, 2002, October 13, 2000, and June 30, 2000, the Illinois Environmental Protection Agency improperly and unlawfully denied permit applications submitted by Respondent for its Buffalo Grove, Illinois facility. The Agency's failure to contact respondent prior to denying the permit applications effected a violation of the Petitioner's due process rights. Board and Illinois Court decisions

on this issue are clear that the Agency is obligated to issue a "Wells Letter" under the circumstances that existed. [See Wells Manufacturing vs. IEPA, 195 Ill.App.3d 593, 552 N.E.2d 1074 (1st Dist. 1990); West Suburban Recycling and Energy Center, LP, (October 17, 1996), PCB 95-119 and 95-125]. The permit application denials were made in violation of the obligation imposed by Section 39(a) of the Act to identify each section of the Act or regulations that would be violated if the permit were to issue with sufficient information for the Petitioner to determine the bases for the Agency's determination. [See Grigolet vs. IEPA (November 29, 1990) PCB 89-184.] The permit applications contained all of the information required by 35 Ill. Adm. Code §201.152, §201.157 and the applicable provisions of the Act and therefore it was a violation of the Act and the implementing regulations for the agency to deny the Respondent's permit applications. It was a violation of the Act and the implementing regulations for the agency to consider "historical application data" or some other unidentified facts in its decisions to deny the permit applications submitted by Respondent particularly when the agency failed to ask for any additional information or questions concerning the facts which were outside the scope of the permit application under review.

15. Respondent's third partial affirmative defense is not a proper affirmative defense but instead part of its legal strategy in a related permit appeal now pending before the Board (see Perfetti Van Melle USA, Inc. v. Illinois EPA, PCB 02-215).

16. Even if the Board were to consider the third partial affirmative defense as plausible in this enforcement action, that defense must fail because it is legally insufficient. Respondent provides only part of the "Wells Letter" doctrine. The Board

limits the requirement for Wells Letters in this manner:

WSREC filed an application for a solid waste management development permit with the Agency. WSREC did not hold a prior solid waste management development permit, so this was not an application for an operating permit where WSREC already had the developmental permit, nor a renewal permit application. Therefore, within the meaning of Martell or Wells, WSREC did not hold any property interest in the solid waste management development permit which would assure the accompanying heightened due process rights. (footnote omitted) WSREC merely held an expectation to a property interest in the solid waste management development permit. . . .

Even though the Board believes that in the interest of judicial economy the Wells Letters, or some other pre-denial notification, should have been sent to WSREC prior to the land application denial, we do not find that such omission results in the violation of any due process rights so as to require the permit to issue by operation of law.

From another perspective, the Board notes that any applicant who wishes to obtain a permit personally bears the burden of submitting a meritorious application. To affirmatively require that the Agency seek from the applicant any and all information necessary to make an initial application successful would be tantamount to shifting the applicant's burden to the Agency; this the Board will not do. West Suburban Recycling and Energy Center ("WSREC") v. Illinois EPA, PCB 95-119 and 95-125 (October 17, 1996).

17. The situation in WSREC is analogous to the situation herein. Respondent Van Melle substantially increased its emissions and in turn was required to apply for its first CAAPP

permit. Van Melle did not previously have a CAAPP permit and thus had no existing property interest in the CAAPP permit. The burden was on Van Melle, not Illinois EPA, to submit the CAAPP permit application. As a result, Illinois EPA was not legally obligated to send a Wells Letter prior to denying Van Melle's CAAPP permit application. Illinois EPA did not deny due process to Van Melle.

18. Furthermore, in all of the permit application denial letters that Illinois EPA sent to Respondent Van Melle, Illinois EPA clearly explained which Sections of the Act might be violated if the requested CAAPP permit were issued. In addition, Illinois EPA also identified the information that Van Melle failed to provide in its permit application.

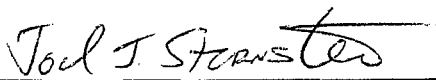
CONCLUSION

19. For the reasons set forth above, all of Respondent's affirmative defenses should be stricken or dismissed.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. LISA MADIGAN,
Attorney General of the
State of Illinois,

By:


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CERTIFICATE OF SERVICE

I, JOEL J. STERNSTEIN, an Assistant Attorney General, certify that on the 24th day of December 2003, I caused to be served by First Class Mail the foregoing Complainant's Motion to Strike or Dismiss Respondent's Affirmative Defenses to the parties named on the attached service list, by depositing same in postage prepaid envelopes with the United States Postal Service located at 100 West Randolph Street, Chicago, Illinois 60601.

A handwritten signature in cursive script, reading "Joel J. Sternstein", written over a horizontal line.

JOEL J. STERNSTEIN