

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF 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

NOTICE OF FILING

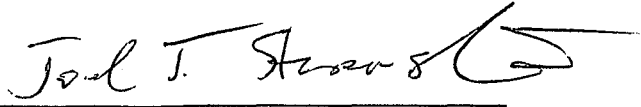
TO: See Attached Service List

PLEASE TAKE NOTICE that on February 6, 2004 Complainant filed with the Pollution Control Board the following Motion for Leave to File a Reply to Respondent's Response to Complainant's Motion to Strike or Dismiss Respondent's Affirmative Defenses and Complainant's Reply to Respondent's Response to Complainant's Motion to Strike or Dismiss Respondent's Affirmative Defenses, true and correct copies of which is attached and hereby served upon you.

Respectfully submitted,

LISA MADIGAN
Attorney General
State of Illinois

BY:


JOEL J. STERNSTEIN
Assistant Attorney General
Environmental Bureau
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THIS DOCUMENT SUBMITTED ON RECYCLED PAPER

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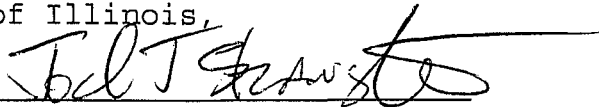
COMPLAINANT'S MOTION FOR LEAVE TO FILE A REPLY
TO RESPONDENT'S RESPONSE TO
COMPLAINANT'S MOTION TO STRIKE OR DISMISS
RESPONDENT'S AFFIRMATIVE DEFENSES

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, pursuant to Section 101.500(e) of the Board's Procedural Regulations, hereby requests that the Board allow it leave to file a reply to Respondent's Response to Complainant's Motion to Strike or Dismiss Respondent's Affirmative Defenses. Complainant will suffer material prejudice if not allowed to file its reply.

Respectfully submitted,

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

By:


JOEL J. STERNSTEIN
Assistant Attorney General
Environmental Bureau
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VAN MELLE U.S.A., INC.,)
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Respondent.)

No. PCB 02-186
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COMPLAINANT'S REPLY TO RESPONDENT'S RESPONSE TO
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 hereby replies to Respondent VAN MELLE U.S.A., INC. ("Van Melle") Response to Complainant's Motion to Strike or Dismiss Respondent's Affirmative Defenses. In support of its reply, Complainant states as follows:

INTRODUCTION

1. On December 24, 2003 Complainant filed its Motion to Strike or Dismiss Respondent's Affirmative Defenses. On January 21, 2004, Respondent filed its Response to Complainant's Motion to Strike or Dismiss Respondent's Affirmative Defenses. Complainant's reply is as follows:

LEGAL STANDARD FOR MOTION TO STRIKE OR DISMISS

2. Complaint agrees with Respondent's assertion that in a Section 2-615 motion, a court must accept all well-pleaded facts as true. American National Bank & Trust Co. v. City of Chicago, 192 Ill. 2d 274, 279, 735 N.E.2d 551, 554 (2000). Complainant also agrees with Respondent's assertion 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 Co. v. Sargent and Lundy, 242 Ill. App. 3d 614, 631, 609 N.E.2d 842, 854 (1st dist 1993). However, Respondent's affirmative defenses herein are such that none of the facts that Respondent pleaded would entitle Respondent to any relief. Thus, the affirmative defenses should be stricken.

COMPLETE AFFIRMATIVE DEFENSE
AND FIRST PARTIAL AFFIRMATIVE DEFENSE

3. Respondent claims that the allegations in the complaint are barred by laches.

4. Respondent is correct that, should complainant prevail at trial, Complainant is entitled to penalties that are based in part on the number of days that Respondent has been out of compliance with the Illinois Environmental Protection Act ("Act") and the Pollution Control Board's ("Board") regulations. See 415 ILCS 5/42(a) (2004).

5. Respondent then contends that its claim of laches must

succeed since Complainant cannot pinpoint the exact date or dates that Respondent's alleged violations of the Act and the Board's regulations began. This argument is wholly without merit. An exact pinpointing of Respondent's first dates of noncompliance will be better established during discovery and/or at hearing and should not serve as a reason to justify Respondent's affirmative defense of laches. Respondent's initial dates of noncompliance have absolutely nothing to do with Respondent's claim of laches.

6. Complainant did not delay filing this matter; any "delay" occurred due to Illinois EPA following the dictates of Section 31 of the Act (415 ILCS 5/31 (2004)) prior to referring the case to the Attorney General's Office for prosecution. The Board has held that delays subject to the Section 31 pre-referral process may be explored by the parties to an enforcement case during discovery, but has struck affirmative defenses alleging Section 31 delays. See People v. John Crane Inc., PCB 01-176 (May 17, 2001).

7. Respondent contends that Complainant's "delay" in filing this matter before the Board could result in an award of a larger penalty. Respondent cites Section 42 of the Act which sets a calculation for penalties based on the number of days that a respondent is not compliant with the Act and the Board's regulations (See 415 ILCS 5/42 (2004)). The Board has held that

penalties are not an appropriate topic for affirmative defenses:

The appropriate penalty to be imposed for a violation of the Act is a separate inquiry from whether a violation of the Act has occurred, and mitigation issues are only considered once a violation of the Act has been found. An affirmative defense is a response to a claim which attacks the complainant's right to bring an action. Farmers' State Bank v. Phillips Petroleum Co. (Jan. 23, 1997), PCB 97-100, slip op. at 2 n.1. Accordingly, as the Board recently ruled in People v. Douglas Furniture of California, Inc. (May 1, 1997), PCB 97-133, slip op. at 6, a defense which speaks to imposition of a penalty rather than the underlying cause of action is not an "affirmative defense" to that cause of action. People v. Midwest Grain Products of Illinois Inc. PCB 97-179 (August 21, 1997).

Since Respondent has tied the amount of penalty in this matter to laches, the affirmative defense of laches must fail.

8. Respondent also attempts to distinguish this case from Cook County v. Chicago Magnet Wire Corp. - but to no avail. In that case Cook County sued Chicago Magnet Wire Corp. for violations of the Cook County Environmental Control Ordinance. In finding that the application of laches to governmental entities is disfavored, the Appellate Court found that

The record does not reveal any prejudice to defendant brought about by the delay. Defendant either sought or agreed to the delays. If anything, the delay seems to have benefitted defendant because it continued to operate its business in the usual manner. Cook County v. Chicago Magnet Wire Corp., 152 Ill. App.3d 726, 728, 504 N.E.2d 904, 906 (1st Dist. 1987).

There are no extraordinary circumstances in this matter nor is Respondent prejudiced due to any "delay" on Complainant's part. Although laches was argued in the Chicago Magnet Wire case, Van Melle's affirmative defense of laches is not legally sufficient herein and therefore should be stricken or dismissed.

SECOND PARTIAL AFFIRMATIVE DEFENSE

9. Respondent alleges that a third party is responsible for the allegations in the complaint.

10. As Complainant stated in its Motion to Strike, the second affirmative defense is extremely non-specific and fails to identify the responsible third party. In its Response, Respondent again failed to identify a third party. Thus, the second affirmative defense remains non-specific.

11. If Respondent believes that a third party is responsible for the alleged violations, then Respondent should file a third party claim, not raise the issue as an affirmative defense. In addition, if, during discovery, it becomes apparent that a third party is responsible for the alleged violations in the complaint, Complainant may add that third party as a Respondent.

12. Respondent claims that the Complaint contains allegations related to the construction of Respondent's candy manufacturing facility in Buffalo Grove, Illinois ("facility"). This is simply not true. All of the counts in the complaint

pertain to the operation of the facility.

13. Respondent then states that the second part of its second affirmative defense is for contributory negligence. Obviously, Respondent may plead any affirmative defense that it chooses to. However, the Board may strike the affirmative defense if it is not valid.

THIRD PARTIAL AFFIRMATIVE DEFENSE

14. In their third affirmative defense, Respondent claims that Illinois EPA failed to issue a "Wells Letter" and thus wrongfully denied the Respondent's permit appeals for the facility. See Wells Manufacturing vs. Illinois EPA, 195 Ill.App.3d 593, 552 N.E.2d 1074 (1st Dist. 1990). Those permit appeals are not at issue in this matter but are instead the subject of permit appeal currently pending before the Board. See Perfetti Van Melle USA, Inc. v. Illinois EPA, PCB 02-215.

15. In the Motion to Strike, Complainant described a limitation of the "Wells Letter" doctrine from another Board case West Suburban Recycling and Energy Center v. Illinois EPA, PCB 95-119 and 95-125 (October 17, 1996) ("WSREC").

16. The permit applicants in both Wells and WSREC were applying for renewal permits. Van Melle is applying for an initial Clean Air Act Permit Program (CAAPP) permit.

17. Van Melle substantially increased the emissions from the facility compared to the past operator of the facility and

in turn was required to apply for its first CAAPP permit. Respondent did not previously have a CAAPP permit and thus had no existing property interest in the CAAPP permit. Pursuant to the holding in WSREC, Illinois EPA is not legally obligated to send a "Wells Letter" to Respondent prior to denying its CAAPP permit application.

18. Respondent mistakenly contends that in the Motion to Strike, Complainant stated that the doctrine from the Wells decision is limited solely to solid waste permitting decisions. Complainant did not make this argument. Complainant was merely reciting the holding from WSREC, a decision involving a solid waste management permit. The holdings in both Wells and WSREC are at issue when various types of permit applications are pending with Illinois EPA, including CAAPP permits. In addition, the "Wells Letter" requirement is limited by the holding in WSREC no matter what type of permit is at issue.

19. 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 applications.

20. Finally, Complainant stresses to the Board that the third affirmative defense is applicable to the pending permit

appeal before the Board in docket PCB 02-215. The defense has no bearing on the alleged violations in this docket. The third affirmative defense is both irrelevant and not valid. It should be stricken.


CONCLUSION

21. 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:



JOEL J. STERNSTEIN
Assistant Attorney General
Environmental Bureau
188 W. Randolph St. - 20th Fl.
Chicago, IL 60601
(312) 814-6986

CERTIFICATE OF SERVICE

I, JOEL J. STERNSTEIN, an Assistant Attorney General, certify that on the 6th day of February 2004, I caused to be served by First Class Mail the foregoing Motion for Leave to File a Reply to Respondent's Response to Complainant's Motion to Strike or Dismiss Respondent's Affirmative Defenses and Complainant's Reply to Respondent's Response to 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