BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS Complainant, v. THE HIGHLANDS, LLC, an Illinois limited liability corporation, and MURPHY FARMS, INC., (a division of MURPHY BROWN, LLC, a North Carolina limited liability corporation, and SMITHFIELD FOODS, INC., a Virginia corporation). Respondents.	)	PCB No. 00-104 (Enforcement)

RESPONDENT MURPHY FARMS, INC.'S RESPONSE TO COMPLAINANT'S MOTION TO STRIKE RESPONDENT MURPHY'S AMENDED AFFIRMATIVE DEFENSE

Respondent Murphy Farms, Inc. ("Murphy"), through its attorneys, Foley & Lardner LLP, states as follows in response to Complainant's Motion to Strike Respondent Murphy's Amended Affirmative Defense ("Motion"):

I. BACKGROUND

Complainant filed this enforcement action against Murphy and The Highlands, LLC ("Highlands") alleging that they violated the air and water pollution provisions of the Illinois Environmental Protection Act (the "Act") and its implementing regulations. These allegations arose out of Highlands' operation of a hog farm in rural Knox County. On October 20, 2005, the Board allowed Murphy to withdraw its affirmative defense based on statute of limitations, granted Complainant's Motion to Strike Murphy's affirmative defense based on unconstitutional vagueness, and granted Murphy's leave to file an amended affirmative defense based on laches. Murphy filed its amended affirmative defense based on laches on October 31, 2005. Nearly six

months later, on April 21, 2006, Complainant filed a Motion to Strike that amended affirmative defense. Complainant's motion is untimely, it impermissibly asks the Board to consider materials outside the pleadings, and even if the merits of the defense could be considered at this stage, Complainant's arguments are self-defeating.

II. THE COMPLAINANT'S MOTION, BROUGHT SIX MONTHS AFTER THE AMENDED AFFIRMATIVE DEFENSE WAS FILED, IS NOT TIMELY

In bringing its Motion six months after Murphy filed its amended affirmative defense, Complainant blatantly ignores the Board's rules of procedure. *See* 35 Ill. Admin. Code §101.506 ("All motions to strike, dismiss, or challenge the sufficiency of any pleading filed with the Board must be filed within 30 days after the service of the challenged document, unless the Board determines that material prejudice will result."). *See also People v. Skokie Valley Asphalt Co.*, PCB 96-98, 2003 WL 21405849 at *6 (June 5, 2003). Complainant has offered no reason why the Board should allow the Motion, no excuse for bringing it at this late stage, and no indication that material prejudice would result if the Board did not consider it.

In *Skokie Valley,* the Board denied Respondent's motion to dismiss two named individuals because it was filed approximately six months after the complaint and thus was in violation of § 101.506. *Id.* at *6 (complaint was filed on October 17, 2002, and motion to dismiss was filed on April 23, 2003). In the very same opinion, the Board reasoned that because Complainant had filed a motion to strike affirmative defenses within 30 days of the affirmative defenses being filed, it was timely under Section 101.506 and would be considered. *Id.* at *2.

*3. The two principal elements are 1) lack of due diligence by the party asserting the claim, and 2) prejudice to the opposing party. *Id.* What facts will combine to constitute laches is to be determined in light of the circumstances of each case. *Smith v. Intergovernmental Solid Waste Disposal Assoc.*, 239 Ill. App. 3d 123, 135 (4th Dist. 1992).

A motion to strike an affirmative defense admits well-pled facts constituting the defense, only attacking the legal sufficiency of the facts. *Skokie Valley,* 2003 WL 21405849 at *3 (*citing Int'l Ins. Co. v. Sargent & Lundy,* 242 Ill. App. 3d 614, 630-31 (1st Dist. 1993). All well-pleaded facts are taken as true. *Am. Mutual Reins. Co. v. Calvert Fire Ins. Co.*, 52 Ill. App. 3d 922, 925 (1st Dist. 1977). The disposition of a motion to strike must be made upon a consideration of the allegations contained in the respondent's pleadings. *Id.* at 925 (holding that affidavits submitted in support of a motion to strike or dismiss "cannot properly be considered in determining the sufficiency of the pleadings."). Although Complainant has not identified it as such, if it had brought this Motion in an Illinois civil court, it generally would have done so pursuant to 735 ILCS 5/2-615 (motions with respect to pleadings), and "a section 2-615 motion may not be supported by any evidentiary material." *Anderson v. Anchor Org. for Health Maint.*, 274 Ill. App. 3d 1001, 1010 (1st Dist. 1995) (holding that if the defendant wanted to contest allegations in the plaintiff's complaint, he should have filed a summary judgment motion, not a motion containing arguments going to the truth of the allegations, and that "although not always fatal, the type of motion practice that occurred in this action should not be countenanced.").

Complainant's affidavit and exhibits should not be considered in support of its Motion because such a motion may not be supported by evidentiary material, and must rest only on the allegations in the pleadings. Moreover, none of the three grounds on which Complainant seeks

to have Murphy's Amended Affirmative Defense stricken addresses the legal sufficiency of Murphy's defense – they all point to whether the defense of laches has merit. In paragraph 6 of its motion, Complainant asserts that 1) Murphy had notice and knowledge that the Illinois EPA believed that proposed swine production facilities should be carefully monitored for odor emissions, 2) the Complainant could not have done anything before a violation occurred, and 3) Respondent proceeded at its own peril. Complainant's allegations do not address the *legal* sufficiency of Murphy's affirmative defense. Instead, they address facts and make arguments based on those facts.

Murphy's amended affirmative defense properly and adequately pleads both the delay and the prejudice that has resulted from Complainant's action, and such well-pled facts must be taken as true for the purposes of this Motion. Complainant does not argue that Murphy has failed to plead the elements necessary to constitute laches, but merely contests their validity and does so by improperly attaching an affidavit and exhibits to its Motion. Whether Murphy's defense has merit should be determined at the hearing, not during the pleading stage. Because Murphy's amended affirmative defense is legally sufficient, and because Complainant may not bolster a motion with extrinsic material, the Board should deny Complainant's Motion.

IV. COMPLAINANT'S MOTION TO STRIKE SHOULD BE DENIED BECAUSE IT MERELY LENDS CREDENCE TO MURPHY'S AFFIRMATIVE DEFENSE OF LACHES

Even if the Board determines that Complainant did not err in filing its Motion six months after the Amended Affirmative Defense was filed, and even if the Board determines that extrinsic materials going to the merits of the defense may be evaluated at this stage of litigation,

Complainant's Motion nevertheless should be denied because it underscores the prejudice that Murphy suffered as a result of Complainant's delay in bringing this action.

James Kammueller's affidavit and its supporting exhibits indicate that the Illinois EPA learned about the Highlands' facility during the summer of 1996. In August 1997, Eric Ackerman submitted an inspection report. On October 16, 1997, and April 23, 1998, Todd Huson submitted inspection reports. The April 23, 1998, report, written when a "majority of the new buildings" had been constructed, discusses odors emanating from the farm, but it does not indicate that any warning was given on that date, or prior to that date, to owner/operator Douglas Baird that he might be violating the Illinois Environmental Protection Act.

These reports, in effect, show that the Illinois EPA sat back and watched as the alleged violations were occurring, waited until the operation was fully functional, and finally brought this action in early 2000 when the time suited them. These reports also necessarily contradict Complainant's allegation in paragraph 14 of its motion that Murphy "proceeded at its own peril" and pressed ahead, knowingly violating a right or a restriction, such that laches would not be available as an affirmative defense. In fact, the reports illustrate that Complainant could have taken steps to enforce the Act earlier, but instead delayed this action, resulting in prejudice to Murphy. Consequently, even if the Board does not reject Complainant's Motion because it was filed long after the applicable deadline and/or because it impermissibly relies on material outside the pleadings, the Board should deny Complainant's Motion on the merits.

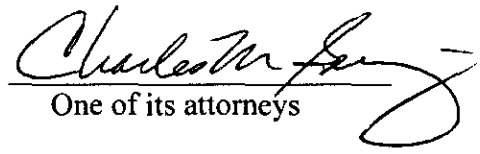
V. CONCLUSION

For the foregoing reasons, Murphy respectfully requests that the Board deny the Complainant's Motion to Strike Murphy's amended affirmative defense.

Dated: May 9, 2006

Respectfully submitted,

MURPHY FARMS, INC.

By: 
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CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that on May 9, 2006, I served the foregoing Respondent Murphy Farms, Inc.'s Response to Complainant's Motion to Strike Respondent Murphy's Amended Affirmative Defense by U.S. Mail with proper postage prepaid upon:

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