

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE

MAY - 9 2006

STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS)	
)	
Complainant,)	
v.)	PCB No. 00-104
)	(Enforcement)
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.)	

**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

THIS FILING IS SUBMITTED ON RECYCLED PAPER

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.

Complainant indicated during a telephonic status conference on February 16, 2005, that it would file a response to Murphy's amended affirmative defense -- yet it waited more than an additional two months to do so. As such, the Board should deny Complainant's Motion based on Complainant's complete disregard for the deadlines imposed by the Board's procedural rules.

III. COMPLAINANT'S MOTION ERRONEOUSLY ASKS THE BOARD TO CONSIDER MATERIALS THAT WERE SUBMITTED OUTSIDE THE PLEADINGS AND WHICH ADDRESS THE MERITS OF THIS CASE

Complainant's Motion lists various reasons why the Illinois Environmental Protection Agency could not have acted earlier to prevent or mitigate prejudice to Murphy caused by the underlying action. In addition to substantively denying portions of Murphy's Amended Affirmative Defense (e.g. Complainant's Motion Paragraph 12, stating that "Respondent's claim that the Illinois EPA did not conduct an inspection of the facility until April 23, 1998, is false"), which is more properly done by way of a reply,¹ Complainant attached an affidavit and 19 pages of exhibits in order to attempt to prove its various points. The Board should not consider these extraneous materials because a motion to strike should only address the sufficiency of the allegations that appear on the face of the pleadings.

Laches is an equitable doctrine that bars relief where a defendant has been misled or prejudiced because of a delay in asserting a right. *Skokie Valley Asphalt*, 2003 WL 21405849 at

¹ Murphy acknowledges that although S. Ct. Rule 182(a) requires that a party must negatively reply to factual allegations in affirmative defenses within 21 days in order to prevent them from being deemed admitted, the Board has held that such assertions may be addressed at hearing if no response is filed. *People v. Chiquita Processed Foods, LLC*, PCB 02-56, 2002 WL 2012425 at *2 (Aug. 22, 2005).

*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 Kammueler'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.

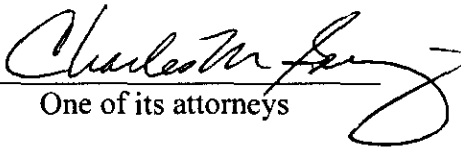
V. CONCLUSION

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: 
One of its attorneys

Charles M. Gering
Foley & Lardner LLP
321 North Clark
Suite 2800
Chicago, Illinois 60610
Phone: 312-832-4500
Fax: 312-832-4700

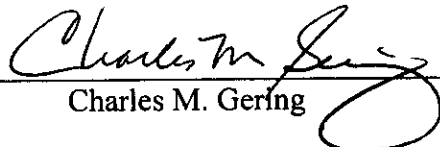
CERTIFICATE OF SERVICE

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:

Bradley Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 West Randolph
Chicago, Illinois 60601
Phone: 312.814.8917
Fax: 312.814.3669

Jane E. McBride
Assistant Attorney General
Environmental Law Bureau
Office of the Illinois Attorney General
500 South Second Street
Springfield, Illinois 62706
Phone: 217.782.9033
Fax: 217.524.7740

Jeffrey W. Tock
Harrington & Tock
Suite 601
Huntington Towers
201 West Springfield Avenue
P.O. Box 1550
Champaign, Illinois 61824-1550
Phone: 217.352.4167
Fax: 217.352.8707


Charles M. Gering