



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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JUN 28 2006
STATE OF ILLINOIS
Pollution Control Board

Lisa Madigan
ATTORNEY GENERAL

June 23, 2006

The Honorable Dorothy Gunn
Illinois Pollution Control Board
State of Illinois Center
100 West Randolph
Chicago, Illinois 60601

Re: ***People v. The Highlands, LLC., et al.***
PCB No. 00-104

Dear Clerk Gunn:

Enclosed for filing please find the original and ten copies of a NOTICE OF FILING and REPLY TO RESPONDENT MURPHY'S AMENDED AFFIRMATIVE DEFENSE in regard to the above-captioned matter. Please file the original and return a file-stamped copy of the document to our office in the enclosed, self-addressed envelope.

Thank you for your cooperation and consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jane E. McBride", is written over a horizontal line.

Jane E. McBride
Environmental Bureau
500 South Second Street
Springfield, Illinois 62706
(217) 782-9031

JEM/pp
Enclosures

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE

JUN 28 2006

STATE OF 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)

NOTICE OF FILING

To: Mr. Jeffrey W. Tock
Harrington, Tock & Royse
201 W. Springfield Avenue, Ste. 601
P.O. Box 1550
Champaign, IL 61824-1550

Mr. Charles M. Gering
Foley & Lardner
321 N. Clarke St.
Suite 2800
Chicago, IL 60610-4764

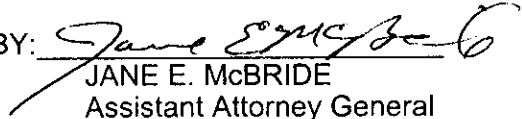
PLEASE TAKE NOTICE that on June 23, 2006, I mailed for filing with the Clerk of the Pollution Control Board of the State of Illinois, a REPLY TO RESPONDENT MURPHY'S AMENDED AFFIRMATIVE DEFENSE, copies of which are attached hereto and herewith served upon you.

Respectfully submitted,

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

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY:


JANE E. McBRIDE
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: June 23, 2006

CERTIFICATE OF SERVICE

I hereby certify that I did on June 23, 2006, send by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box a true and correct copy of the following instruments entitled NOTICE OF FILING and REPLY TO RESPONDENT MURPHY'S AMENDED AFFIRMATIVE DEFENSE

To: Mr. Jeffrey W. Tock
Harrington, Tock & Royse
201 W. Springfield Avenue, Ste. 601
P.O. Box 1550
Champaign, IL 61824-1550

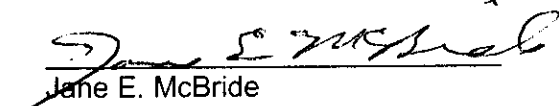
Mr. Charles M. Gering
Foley & Lardner LLP
321 N. Clarke St.
Suite 2800
Chicago, IL 60610-4764

and the original and ten copies by First Class Mail with postage thereon fully prepaid of the same foregoing instrument(s)

To: Dorothy Gunn, Clerk
Illinois Pollution Control Board
State of Illinois Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

A copy was also sent by First Class Mail with postage thereon fully prepaid

To: Mr. Brad Halloran, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Ste. 11-500
100 West Randolph
Chicago, IL 60601


Jane E. McBride
Assistant Attorney General

This filing is submitted on recycled paper.

JUN 28 2006

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS

Complainant,

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THE HIGHLANDS, LLC, an Illinois limited
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FOODS, INC., a Virginia corporation).

Respondents.

PCB No. 00-104
(Enforcement)

REPLY TO RESPONDENT MURPHY'S AMENDED AFFIRMATIVE DEFENSE

NOW COMES, Complainant, PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* Lisa Madigan, Attorney General of the State of Illinois, and replies as follows to Respondent Murphy Farms, Inc's ("Respondent Murphy" or "Murphy Farms, Inc.") Amended Affirmative Defense:

Background

1. On April 26, 2006, Complainant moved to strike Murphy Farms' amended affirmative defense.
2. On May 9, 2006, Respondent Murphy responded.
3. On May 26, 2006, Complainant filed a reply to Respondent's response, and filed a motion to file the motion to strike *instantly*.
4. On June 15, the Board denied Complainant's motion to strike. Complainant received said order on June 21, 2006.
5. In that the Board has denied the motion to strike, Complainant herein files its reply to the amended affirmative defense.

Complainant's Reply

6. The first paragraph of Respondent's Amended Affirmative Defense is:

1. On July 5 and August 14, 1996, Doug Lenhart, the Director of Illinois Operations for Murphy, contacted Eric Ackerman of the Illinois Environmental Protection Agency ("IEPA") to discuss Highlands' plans to construct a new hog farm. On May 6, 1997, James Baird of Highlands contacted Mr. Ackerman regarding the same proposed farm. During these conversations, Messrs. Lenhart and Baird provided a description of the new farm to Mr. Ackerman, including its proposed locations and operations.

Reply

Complainant admits that Doug Lenhart, the Director of Illinois Operations for Murphy, contacted Eric Ackerman of the Illinois Environmental Protection Agency ("IEPA") on July 5 and August 14, 1996 to discuss proposed construction of a swine facility. Complainant denies that the topic of those discussions was the Highlands. As set forth in Exhibit 1 attached to the Affidavit of James Kammuehler attached to and filed in support of Complainant's Motion to Strike Respondent's Amended Affirmative Defense, the Illinois EPA's documentation of the calls indicates that Mr. Lenhart called to discuss a swine production facility proposed for a site in Peoria County near Elmwood. The Highlands is located near Williamsfield in Knox County. Complainant affirmatively states that prior to entering into a working arrangement with Doug Baird, upon information and belief Murphy Farms was considering entering into a working relationship with David Inskeep to construct a swine facility in conjunction with or instead of the dairy facility that was eventually constructed and became known as Inwood Dairy, located near Elmwood in Peoria County. At the time of the July 5 and August 14, 1996 calls, Mr. Lenhart was calling about a proposed facility near Elmwood, not the Highlands.

Complainant admits that James Baird had a phone conversation with Eric Ackerman on May 6, 1997, but denies that the topic of that conversation was "the same proposed farm". James Baird did not call to discuss the swine facility proposed for a site near Elmwood in Peoria County.

The last sentence of Respondent's first paragraph is "During these conversations, Messrs. Lenhart and Baird provided a description of the new farm to Mr. Ackerman, including its proposed location and operations." Complainant neither admits or denies this statement in that it is unclear as to which "new farm" is the subject of this statement.

7. The second paragraph of Respondent's Amended Affirmative Defense is:

2. On September 4, 1996, James Kammuehler, Manager of the IEPA's Peoria Regional Office, wrote a letter to Mr. Lenhart regarding the proposed farm. The letter stated that "[t]he description you provided of the new facility indicates that a potential for possible odor problems does exist." Mr. Kammuehler wrote a letter to Mr. Baird on May 20, 1997 and similarly stated that "[t]he description provided of your proposed new swine facility indicates that a potential for possible odor problems does exist." However, Mr. Kammuehler did not state in either letter that the new farm, as proposed, would violate the Illinois Environmental Protection Act (the "Act"). Furthermore, Mr. Kammuehler did not object to the proposed location or operations of the new farm.

Reply

Complainant admits James Kammuehler wrote a letter to Doug Lenhart dated September 4, 1996, but neither admits or denies the letter concerns "the proposed farm" because it is unclear from the Respondent's statement what farm and location constitute the subject of this statement. Complainant neither admit or denies the exact wording of the content of the referenced letters, but rather affirmatively states the documents speak for themselves. Both documents are attached, as Exhibits 1 and 2, to the Affidavit of James Kammuehler filed in this matter with Complainant's Motion to Strike this amended affirmative defense. Complainant neither admits nor denies the last two sentences of Paragraph 2 of Respondent's Amended Affirmative Defense, but rather affirmatively states the language of the documents speak for itself.

8. The third paragraph of Respondent's Amended Affirmative Defense is:

3. The Complainant may reasonably be imputed to have the knowledge of IEPA employees regarding communications between members of the

public and IEPA employees relating to matters regulated by the IEPA.
[Cite omitted].

Reply

The third paragraph is a legal conclusion. No reply is required.

9. The fourth paragraph of Respondent's Amended Affirmative Defense is:

4. Construction of Highlands' farm began in the fall of 1997. Highlands' farm was constructed in the same location and with the same operations as was described to the Complainant by Messrs. Lenhart and Baird.

Reply

Complainant neither admits or denies whether construction of Highlands' farm began in the fall of 1997. Complainant affirmative states that reports documenting Illinois EPA inspections conducted during construction of the Highlands Farm, indicate construction was underway on August 26, 1997, October 16, 1997 and April 23, 1998. Said reports are attached to the affidavit of James Kammueler, as Exhibits 3, 4 and 5 respectively, filed in support of Complainant's Motion to Strike this affirmative defense. Complainant neither admits or denies that Highland's farm was constructed in the same location and with the same operations as described by Doug Lenhart and Jim Baird in the referenced phone conversations in that it is unclear as to which location and operation is the subject of this statement.

10. The fifth paragraph of Respondent's Amended Affirmative Defense is:

5. Complainant did not conduct an inspection of Highlands' farm until April 23, 1998, after the farm was fully constructed and operational.

Reply

Complainant denies paragraph 5.

11. The sixth paragraph of Respondent's Amended Affirmative Defense is:

6. The Act provides that the IEPA "shall have the duty to collect and disseminate such information . . . as may be required to carry out the purposes of this Act." 415 ILCS 5/4(b).

Reply

Complainant neither admits nor denies the allegations contained in paragraph 6, but rather affirmatively states that the language of the Act speaks for itself.

12. The seventh paragraph of Respondent's Amended Affirmative Defense is:

7. The Complainant did not attempt to contact Highlands or Murphy before or during the construction of Highlands' farm to inform Highlands or Murphy that the farm's location or operations would violate the Act.

Reply

Complainant denies that Complainant did not attempt to contact Highlands or Murphy before or during construction of the Highlands' farm. Complainant affirmatively states that the true nature of the communication is evident in inspection reports and letters sent to the Respondent, and these documents speak for themselves.

13. The eighth paragraph of Respondent's Amended Affirmative Defense is:

8. Highlands and Murphy reasonably relied on the fact that Complainant did not object to the proposed location and operations of Highlands' farm in their belief that the farm was in compliance with the Act.

Reply

Paragraph 8 is a legal conclusion. No reply is required.

14. The ninth paragraph of Respondent's Amended Affirmative Defense is:

9. Highlands and Murphy had no reasonable way of knowing at the time of construction that the Complainant believed that the proposed location and/or operations violated the Act. Furthermore, Highlands and Murphy did not have any reason to believe that further investigation of the compliance status of the farm was necessary.

Reply

To the extent paragraph 9 consists of legal conclusions, no reply is required.

Complainant denies paragraph 9.

15. The tenth paragraph of Respondent's Amended Affirmative Defense is:

10. The Complainant could easily have informed Highlands and Murphy

before or during construction of the farm that it believed that the proposed location and operations of the farm would violate the Act.

Reply

The Complainant neither admits or denies the allegations contained in paragraph 10, and affirmatively states the Illinois EPA only has the authority granted to it by the General Assembly pursuant to the Illinois Environmental Protection Act, and the Act does not give the agency authority to stop someone from doing something prior to the action being a violation of the Act except in the permitting authority. The siting permit authority for livestock management facilities does not lie with the Illinois EPA but with the Illinois Department of Agriculture pursuant to the Illinois Livestock Management Facility Act. As stated in Mr. Kammuehler's letters, "As we discussed, the Agency does not presently issue construction permits for livestock waste handling facilities and cannot give formal siting approval for livestock management or waste handling facilities." The state would not proceed with any form of common law cause of action or statutory authority for immediate injunctive relief, in a situation such as this, where there is yet no actual violation or imminent threat of substantial danger to the environment or public health because it is yet to be seen if the owners and operators can locate, build and manage the facility in a manner that will comply with the Act.

16. The eleventh paragraph of Respondent's Amended Affirmative Defense is:

11. Complainant was aware or should have been aware that dissemination of this information to Highlands and Murphy would aid in enforcement of the Act.

Reply

Complainant neither admits nor denies paragraph 11, but rather affirmative states, given the letters and inspections reply to paragraph 4, stated in paragraph 9 above, that Respondent had notice and knowledge, well in advance of commencing construction of the facility, that the

Illinois EPA believed that the location and operation of the proposed swine production facilities must be carefully evaluated due to the potential for odor emissions to result in violations of the Illinois Environmental Protection Act

17. The twelfth paragraph of Respondent's Amended Affirmative Defense is:

12. Had the Complainant acted with due diligence by disseminating this information prior to or during the construction of Highlands' farm, the Complainant could have prevented Highlands' and Murphy's alleged noncompliance with Illinois law, thus preventing the harm alleged to the environment.

Reply

Complainant denies the allegations contained in paragraph 12, and affirmatively re-states as this reply the replies provided in paragraphs 15 and 16 above. To the extent that paragraph 12 consists of legal conclusions, no reply is required.

18. The thirteenth paragraph of Respondent's Amended Affirmative Defense is:

13. Complainant may reasonably be imputed to have knowledge of the details of the proposed location and operations fo Highlands' farm approximately a year before construction of the farm begin.

Reply

Complainant neither admits nor denies the allegations contained in paragraph 13. Complainant does not have complete knowledge at this time of all verbal undocumented communications concerning the proposed facility. Complainant affirmatively states that the Illinois EPA's letter to James Baird was dated May 20, 1997 in response to Mr. Baird's May 6, 1997 phone call, and construction was underway at the site at the time of an August 1997 Illinois EPA inspection – a period of 3 months.

19. The fourteenth paragraph of Respondent's Amended Affirmative Defense is:

14. Even though Complainant had this knowledge and believed that the proposed location and operations would violate the Act, the Complainant did not contact Highlands or Murphy to assert its right to inspect the farm or to initiate inquiries that led to the instant Complaint until April 23, 1998.

Therefore, the Complainant did not demonstrate due diligence.

Reply

Complainant denies the allegations contained in the first sentence of paragraph 14, and affirmatively re-states as this reply the replies provided in paragraphs 15 and 16 above. The second sentence of paragraph 14 is a legal conclusion. No reply is required.

20. The fifteenth paragraph of Respondent's Amended Affirmative Defense is:

15. Complainant could easily have informed Highlands and Murphy of the violations perceived by the Complainant; however, Complainant chose to expend its resources on other sources and delayed in asserting its rights.

Reply

Complainant denies the allegations contained in paragraph 15.

21. The sixteenth paragraph of Respondent's Amended Affirmative Defense is:

16. Highlands and Murphy have suffered, and will suffer, prejudice and injury as a result of the Complainant's failure to act in a timely manner in that Highlands and Murphy were not given information that would have enabled them to achieve compliance earlier. As a result, they are incurring legal costs and are being pursued for penalties. In addition, if Highlands and Murphy had known prior to or during the construction of the farm that the IEPA would later claim that the farm's proposed location and operations would violate the Act, Highlands could have changed the location and operations of the farm.

Reply

To the extent that the first sentence of paragraph 16 contains legal conclusions, Complainant makes no reply. Complainant denies any factual allegations contained in the first sentence. Complainant neither admits nor denies whether Respondents are incurring legal costs. Whether or not either Respondent is incurring legal costs is not within the personal knowledge of the Complainant. Complainant admits that it seeks penalties in the prayer for relief for each count of the Second Amended Complaint. Complainant neither admits or denies whether any set of facts would have caused Highlands to have changed the location and operations of the farm. Such is not within the personal knowledge of the Complainant and only

known to Respondent Highlands.

22. The seventeenth paragraph of Respondent's Amended Affirmative Defense is:

17. By the actions and inactions described above, Complainant failed to exercise due diligence and thereby caused prejudice to Highlands and Murphy. As a result, it would be inequitable to allow Complainant to pursue the cause of action alleged in the Second Amended Complaint.

Reply

Complainant denies paragraph 17. To the extent paragraph 17 contains legal conclusions, no reply is required.

Respectfully submitted,

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

MATTHEW J. DUNN, Chief
Environmental Enforcement Division

BY:


JANE E. MCBRIDE
Assistant Attorney General

500 South Second Street
Springfield, Illinois 62706
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