ILLINOIS POLLUTION CONTROL BOARD
August 21, 1997

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | PCB 97-179 |
| v. | ) | (Enforcement - Air) |
| | ) | |
| MIDWEST GRAIN PRODUCTS OF ILLINOIS, INC., an Illinois corporation, | ) | |
| | ) | |
| Respondent. | ) | |

ORDER OF THE BOARD (by M. McFawn):

This case is before the Board on the "Motion to Strike Respondent's Affirmative Defenses" filed by the Attorney General on May 23, 1997. On April 7, 1997, the Attorney General, on behalf of the people of the State of Illinois, filed a complaint against respondent Midwest Grain Products of Illinois, Inc. (Midwest Grain), alleging violations of air pollution provisions of the Environmental Protection Act, 415 ILCS 5/1 *et seq*. (1996) (Act), as well as the federal Clean Air Act and Prevention of Significant Deterioration (PSD) regulations. Midwest Grain filed its "Answer" on May 7, 1997, interposing four affirmative defenses to the Attorney General's claims. The Attorney General asks that each affirmative defense be stricken as substantially insufficient at law. The Board denies the Attorney General's motion with respect to Midwest Grain's first and third affirmative defenses and grants the Attorney General's motion with respect to Midwest Grain's second and fourth affirmative defenses.

## ALLEGATIONS[1]

At all times relevant to this case, Midwest Grain has operated a facility in Pekin, Illinois, that produces ethyl alcohol, anhydrous fuel alcohol, wheat gluten and distiller's feed. In 1993, Midwest Grain applied to the Illinois Environmental Protection Agency (Agency) for a construction permit in order to replace two existing feed dryers with new dryers (dryers 651 and 661). In May of 1993, the Agency issued construction permit number 93020061 to Midwest Grain. In December of 1993, the Agency issued construction permit number 93080045 to Midwest Grain. Permit 93020061 limits particulate matter emissions from dryer 651 to 1.1 pounds per hour. Permit 93080045 limits total particulate matter emissions from both dryers to 3.2 pounds per hour. Both permits require secondary scrubbers after both feed dryers.

[1] The information set forth here has been taken from the allegations in the Attorney General's complaint. Some of the allegations have been denied by Midwest Grain. The Board does not, by setting forth this narrative, make any finding as to the truth of any allegation.

After receiving the permits, Midwest Grain commenced construction of the new dryers. Stack testing conducted on one of the dryers in May of 1995 indicated actual emissions of 17.1 pounds per hour. On September 21, 1995, the Agency inspected Midwest Grain's facility. The Agency inspector determined that Midwest Grain operated the dryers unpermitted, operated the dryers in excess of the particulate matter emission standards in the construction permits, operated the dryers without secondary scrubbers, and constructed a major modification without applying for and obtaining a PSD construction permit.

Application of the federal PSD regulations is triggered when a "major source" undergoes a modification resulting in a "significant" net emissions increase. Midwest Grain's facility was considered a major source for particulate matter at the time it constructed a fluidized bed boiler in 1982. A net particulate matter emissions increase is "significant" if it results in an increase of 25 tons or more of particulate matter emissions per year. PSD regulations require the use of the "best available control technology" (BACT) in any modification to a major source.

The Attorney General claims, in count I of the complaint, that Midwest Grain violated PSD regulations, specifically, 40 CFR 52.21(j), by constructing the dryers without conducting a BACT analysis and obtaining a PSD permit, and consequently Section 9.1(d) of the Act, which prohibits any person from violating regulations adopted under the federal Clean Air Act. The Attorney General also claims that Midwest Grain has violated Section 9(a) of the Act and 35 Ill. Adm. Code 201.141 by causing or tending to cause air pollution (count II), Section 9(b) of the Act by operating in violation of construction permit conditions (count III), and Section 9(b) of the Act and 35 Ill. Adm. Code 201.143 by operating without an operating permit after expiration of the construction permits.

## AFFIRMATIVE DEFENSES

Against the foregoing alleged violations, Midwest Grain asserts, at pages 6-7 of its "Answer," the following affirmative defenses:

A. Midwest Grain discontinued use of its fluidized bed coal boiler in 1994. At the time the coal boiler use was discontinued, Midwest Grain ceased its status as a "major stationary source" and the PSD program requirements were no longer applicable to Midwest Grain.

B. Midwest Grain acted in good faith and built an emission control system for its grain dryers which was designed to restrict emissions from the dryers to a level below the level for a "major modification" subject to PSD program requirements. This emission control system was reviewed and approved by the [Agency] as part of Midwest Grain's construction permit application. Through no fault of Midwest Grain, the system did not function as designed and has had difficulty in restricting the emission of very small particles. Midwest Grain has worked steadily to improve upon the emission control system. Midwest Grain has been in frequent contact with [the Agency] regarding its difficulties with the system. To

the extent Midwest Grain is in violation of PSD regulations, the Act or its permit terms, if at all, the violation is due to an unavoidable mistake in that its emission control equipment has failed to live up to its design specifications.

C. Pursuant to discussions with [the Agency], Midwest Grain has agreed to purchase and install additional emission control equipment, at substantial expense. Midwest Grain's commitment to [the Agency] to install new emission control equipment constitutes a Compliance Commitment Agreement. Midwest Grain is in compliance with the Compliance Commitment Agreement, therefore, these allegations should not have been brought.

D. Midwest Grain filed an application for an operating permit on March 16, 1995. To date, [the Agency] has not acted upon the operating permit application, although Midwest Grain has extended the review period for the operating permit application three times (the last time for an indefinite period). Midwest Grain has also filed an application for a Clean Air Act Permit. Midwest Grain has been in frequent contact with [the Agency] and [the Agency] has not alleged that an operating permit is required at this time. At no time has Midwest Grain disregarded the provisions of the Board's air permit regulations and it has worked steadily with [the Agency] to remedy the difficulties it has had as a result of the unexpected difficult engineering for its emissions.

## ANALYSIS

### Affirmative Defenses Stating Legal Conclusions

The Attorney General has challenged all of Midwest Grain's affirmative defenses on the grounds that they state legal conclusions. The Attorney General has provided minimal arguments in support of this assertion, and inasmuch as each of the defenses quoted above includes factual assertions, the Board concludes that this objection is not valid. Many affirmative defenses (i.e., waiver, estoppel, laches, statute of limitations) may involve, ultimately, a conclusion of law. Any such conclusion, however, must be predicated on facts, and as long as the requisite facts are set forth as required by 35 Ill. Adm. Code 103.122(d)[2] then the defense is properly pleaded, notwithstanding that the resolution of the defense may involve a conclusion of law, and that the defense may be couched in terms of a legal theory.

[2] 35 Ill. Adm. Code 103.122(d) provides:

Respondent may file an answer within 30 days of receipt of the complaint. All material allegations of the complaint shall be taken as denied if not specifically admitted by answer, or if no answer is filed. Any facts constituting an affirmative defense which would be likely to take the complainant by surprise must be plainly set forth prior to hearing in the answer or in a supplemental answer filed pursuant to Section 103.210(b).

Although the provisions of the Code of Civil Procedure do not apply to proceedings before the Board, parties may, in the absence of a specific provision in the Board's procedural rules to govern a specific situation, argue that a particular provision of the Code of Civil Procedure provides guidance to the Board. 35 Ill. Adm. Code 101.100(b). Both the Attorney General, in the "Motion to Strike Respondent's Affirmative Defenses," and Midwest Grain in its response, have cited to the Board Section 2-613(d) of the Code of Civil Procedure (735 ILCS 5/2-613(d) (1997)), which provides:

> The facts constituting any affirmative defense, . . . 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, . . . 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.

The Board believes that this section of the Code of Civil Procedure does provide guidance regarding the pleading of defenses, but does not, contrary to the Attorney General's interpretation, preclude pleading of a defense which may include a legal conclusion. We note the discussion of this section by the appellate court in Handelman v. London Time, Ltd., 124 Ill.App.3d 318, 320, 464 N.E.2d 710, 712 (1st Dist. 1984):

> Clearly the purpose of the above-quoted language is to specify the disputed legal issues before trial. The parties are to be informed of the legal theories which will be presented by their respective opponents. This is a prime function of pleading.

Allowing pleading of defenses which may include legal conclusions will serve to inform parties of the legal theories to be presented by their opponents, as well as preventing any confusion as to whether a defense has been waived by not having been raised. Given that the line between assertions of fact and conclusions of law can be blurry and that consequently it can be difficult to determine ahead of time whether a defense is grounded in facts or a conclusion of law, and given that the penalty for failure to assert facts constituting a defense is extreme, the Board believes the better route is to allow liberal pleading of defenses.

We turn then to the Attorney General's specific objections to each affirmative defense raised by Midwest Grain.

## Specific Affirmative Defenses

First Affirmative Defense. The Attorney General has not raised any substantial objection to Midwest Grain's first affirmative defense other than that it states a legal conclusion. Midwest Grain sets forth a fact in its defense which may have taken the Attorney General by surprise at hearing, namely, that it discontinued use of its fluidized bed coal boiler in 1994, and a theory of defense, i.e., that it is no longer a "major stationary source" subject to the PSD program. Since this, if true, would at least partially defeat the cause of action

underlying count I of the Attorney General's complaint, the Board concludes that Midwest Grain's first affirmative defense is properly pleaded, and it will not be stricken.

Third Affirmative Defense. The Attorney General objects to Midwest Grain's third affirmative defense, that it is in compliance with the terms of a Compliance Commitment Agreement, on the grounds that Section 31(a) of the Act, which deals with Compliance Commitment Agreements and which went into effect on August 1, 1996, applies only prospectively; that this case is based on a Compliance Inquiry Letter issued by the Agency in October of 1995; and that there can therefore be no Compliance Commitment Agreement between the Agency and Midwest Grain.

Whether there is a Compliance Commitment Agreement between the Agency and Midwest Grain involves questions of fact which cannot be answered with only the limited information in the pleadings in this case. At the very least, with no allegations as to the date on which the alleged Compliance Commitment Agreement was reached, the arguments of the parties as to the prospective or retroactive effect of the new Section 31(a) are premature. The Board concludes that Midwest Grain's third affirmative defense is properly pleaded; the validity of that affirmative defense cannot be tested without evidence not presently before the Board. The Board will not strike Midwest Grain's third affirmative defense.

Second and Fourth Affirmative Defenses. The Board concludes, however, that the Attorney General's objections to Midwest Grain's second and fourth affirmative defenses, that the defenses do not avoid the legal effect or defeat the causes of action set forth in the complaint, are well taken. Midwest Grain's second and fourth affirmative defenses set forth facts which, if proven, would be relevant to the issue of an appropriate penalty rather than the liability of Midwest Grain for the violations set forth in the complaint.

The Board disagrees with Midwest Grain's characterization of mitigation as avoidance in part of complainant's cause of action. 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. Midwest Grain's second and fourth affirmative defenses set forth mitigating factors which, if proven, would bear on the appropriate penalty to be imposed, but do not impact the question of whether a violation of the Act has taken place. The Board thus concludes that Midwest Grain's second and fourth defenses are not proper affirmative defenses, and they will be stricken.

A corollary of this ruling, however, is that since defenses to imposition of a penalty are not affirmative defenses, a respondent is not required to set forth in its answer facts relating only to the issue of imposition of a penalty which may take the opponent by surprise at

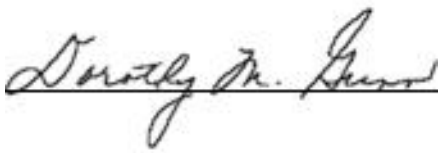
hearing. Consequently, even though these defenses are stricken, Midwest Grain is not precluded from introducing evidence supporting these defenses at hearing.

## CONCLUSION

For the reasons set forth herein, the motion of the Attorney General to strike Midwest Grain's affirmative defenses is granted as to Midwest Grain's second and fourth affirmative defenses and denied as to Midwest Grain's first and third affirmative defenses. Midwest Grain's second and fourth affirmative defenses are hereby stricken.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 21st day of August 1997, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board