

ILLINOIS POLLUTION CONTROL BOARD

May 6, 2004

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 00-104
)	(Enforcement – Air, Water)
THE HIGHLANDS, LLC, and MURPHY)	
FARMS, INC. (a division of MURPHY)	
BROWN, LLC, a North Carolina limited)	
liability corporation, and SMITHFIELD)	
FOODS, INC., a Virginia corporation),)	
)	
Respondents.)	

ORDER OF THE BOARD (by N.J. Melas):

Today's order accepts the People's second amended complaint for hearing. On February 18, 2004, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), moved the Board for leave to file a second amended complaint against The Highlands, LLC (Highlands), and Murphy Farms, Inc.¹ (Murphy Farms) (collectively, respondents). *See* 35 Ill. Adm. Code 101.516. Along with the motion, the People filed a second amended complaint.

Respondent Highlands answered the second amended complaint on March 17, 2003. Respondent Murphy Farms did not respond to the motion for leave to file a second amended complaint, but has requested and received extensions of time to file an answer. Hearing Officer Brad Halloran granted Murphy Farms an extension of time until April 29, 2004, to file a response. As discussed below, the Board grants the People's motion for leave and accepts the second amended complaint for hearing. This order reflects the necessary amendments to the case caption.

BACKGROUND

On December 21, 1999, the People filed a two-count complaint against respondents. *See* 415 ILCS 5/31(c)(1) (2002). The People alleged that respondents violated Sections 9(a) of the Environmental Protection Act (Act) and Section 501.402(c)(3) of the Board's agriculture regulations. 415 ILCS 5/9(a) (2002); 35 Ill. Adm. Code 501.402(c)(3). The People further alleged that respondents violated these provisions by causing or allowing the emission of offensive odors and by causing or allowing those odors to interfere with the use and enjoyment of the neighbors' property.

¹ Murphy Farms, Inc. is a division of Murphy Brown, LLC, a North Carolina limited liability corporation, and Smithfield Foods, Inc., a Virginia corporation.

The People filed an amended two-count complaint on August 20, 2002. The People allege in the amended complaint that respondents violated Sections 9(a) and 12(a), (d), and (f) of the Act and Section 501.405(a) of the Board's agriculture regulations. 415 ILCS 5/9(a) and 12(a), (d), and (f) (2002); 35 Ill. Adm. Code 501.405(a). The People further allege that respondents violated these provisions by causing or allowing the emission of offensive odors, and causing or allowing the discharge of livestock waste to a tributary of French Creek without a National Pollutant Discharge Elimination System (NPDES) permit so as to create a water pollution hazard. The complaint concerns respondents' swine facility located just south of Williamsfield in Elba Township, Knox County. The Board accepted the amended complaint pursuant to hearing officer order on October 8, 2002. Both the complaint and the amended complaint concern respondents' swine facility located just south of Williamsfield in Elba Township, Knox County.

On June 16, 2003, the respondent Highlands, LLC filed a motion for summary judgment on count I of the amended complaint. The People responded on July 28, 2003. On September 4, 2003, the Board denied the motion for summary judgment.

On February 18, 2004, the People moved the Board for leave to file a second amended complaint, accompanied by a second amended complaint. Neither respondent responded to the motion. Highlands answered the second amended complaint on March 17, 2004.

APPLICABLE STATUTES AND BOARD REGULATIONS

Section 501.402(c)(3) of the Board rules provides:

Adequate odor control methods and technology shall be practiced by operators of new and existing livestock management facilities and livestock waste-handling facilities so as not to cause air pollution. 35 Ill. Adm. Code 501.402(c)(3).

Section 501.405(a) provides that operators of livestock waste handling facilities must factor in the proximity to surface waters and the likelihood of reaching groundwater when determining the practical limit of livestock waste that may be applied to soils in the field. 35 Ill. Adm. Code 501.405(a).

A short summary of the relevant statutes follows. Section 9(a) of the Act is a prohibition against causing or allowing air pollution in violation of any Board regulation or standard. 415 ILCS 5/9(a) (2002). Section 12(a) is a prohibition against water pollution. 415 ILCS 5/12(a) (2002). Section 12(d) is a prohibition against creating a water pollution hazard. 415 ILCS 5/12(d) (2002). Section 12(f) is a prohibition against discharging any contaminants into Illinois waters without an NPDES permit issued by the Illinois Environmental Protection Agency (Agency). 415 ILCS 5/12(f) (2002).

MOTION TO FILE SECOND AMENDED COMPLAINT

The People argue that the Board should accept the second amended complaint for hearing for two reasons. First, the People argue the motion and complaint are timely filed. The People contend that although all parties have submitted discovery requests, the parties have not yet answered or responded to any of the requests. Further, the hearing officer, together with the parties, have stayed the discovery schedule to allow the parties to discuss the possibility of settlement and technical compliance options. Mot. at 1-2. Accordingly, the People maintain there is time and opportunity to conduct additional discovery based on the new water pollution claim included in the second amended complaint. Mot. at 2. In support of its motion to accept the amended complaint for hearing, the People cite to Section 2-616(a) of the Illinois Code of Civil Procedure, stating that amendments adding a new cause of action may be allowed on just and reasonable terms any time before final judgment. Mot. at 2; citing 735 ILCS 5/2-616(a).

Second, the People contend the new alleged claim concerns the same matter that the Board has already accepted for hearing. The People contend the claim arises out of a visit by Agency inspectors to the Highland facility on November 18, 2003. The People allege that during the visit, the inspectors found ponding of wastewater in a wastewater application field resulting from leaks in the wastewater application equipment. The People explain that the day before, on November 17, 2003, respondents had applied swine wastewater from the swine waste lagoon to the Highlands' irrigation field. The People contend that a PVC pipe runs from the field tile where the Agency observed ponded wastewater and discharges into an unnamed tributary to French Creek. The People allege that the inspector observed a reddish-colored discharge with foam coming from the PVC pipe.

The People seek to amend the complaint to include allegations that the discharge violated the water pollution provisions of the Act and the Board's agricultural-related pollution regulations. The People allege that by causing water pollution by allowing ponding and accumulation of livestock waste on the land and in the irrigation field, Highlands has violated Section 12(a) of the Act and Section 501.405(a) of the Board regulations.

DISCUSSION

The Board grants the People's motion for leave and accepts the second amended complaint. The People seek to add a new count III to the complaint alleging violations of Section 12(a) of the Act, a prohibition against causing or allowing water pollution, and Section 501.405(a) of the Board regulations concerning agricultural-related pollution regulations. The People already plead violations of the same sections of the Act and Board regulations in count II of the existing amended complaint. The allegations in count II of the amended complaint arose out of a June 19, 2002 Agency investigation of the Highlands facility. Like the facts set forth in count III, the release of livestock waste that occurred in 2002 also discharged into the unnamed tributary of French Creek.

First, neither respondent has objected to the filing of the amended complaint. If a party does not respond to a motion, that party is deemed to have waived any objection to the granting of the motion. 35 Ill. Adm. Code 101.500(d). Second, the Board is persuaded that the allegations in count III arise from the same matter the Board has already accepted for hearing. Third, the amendment is timely since the Agency discovered the newly alleged violations on

November 17, 2003 and the People sought leave to amend the complaint on February 18, 2004. Finally, because the parties have not yet responded to the respective requests for discovery, the Board finds that accepting the second amended complaint at this time will not prejudice the respondents.

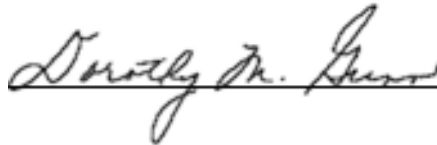
A respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if respondents fail within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider respondents to have admitted the allegation. 35 Ill. Adm. Code 103.204(d). The Board notes that Highlands answered the People's second amended complaint on March 17, 2004. By a hearing officer order dated April 26, 2004, the hearing officer and Murphy Farms set July 15, 2004 as the deadline by which Murphy Farms must answer the People's second amended complaint.

CONCLUSION

The Board grants the People's motion for leave and accepts the People's second amended complaint for hearing. The Board further directs this matter to hearing expeditiously.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 6, 2004, by a vote of 5-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board