



offensive odors and by causing or allowing those odors to interfere with the use and enjoyment of the neighbors' property.

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) and 580.105 of the Board's agriculture regulations. 415 ILCS 5/9(a) and 12(a), (d), and (f); 35 Ill. Adm. Code 501.405(a), 580.105. 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 water pollution and 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 on October 8, 2002.

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.

On February 18, 2004, the People moved the Board for leave to file a second amended complaint, accompanied by a second amended complaint (comp.). The second amended complaint alleged new repeat violations resulting from an Agency inspection of the Highland facility on November 18, 2003. The Board accepted the second amended complaint on May 6, 2004. The hearing officer granted Murphy three motions for extension of time to answer the second amended complaint.

Murphy filed a motion to dismiss the second amended complaint against it on October 18, 2004. The People replied on December 1, 2004. Murphy replied on December 22, 2004. The People moved the Board to allow a sur-reply, but the motion was denied by hearing officer order on January 4, 2005. To date, Murphy has not answered the complaint.

### **LEGAL FRAMEWORK**

Section 9(a) of the Act states that no person shall:

Cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois . . . or so as to violate regulations or standards adopted by the Board under this Act. 415 ILCS 5/9(a) (2002).

Section 12 of the Act provides:

No person shall:

- (a) Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or

so as to violate regulations or standards adopted by the Pollution Control Board under this Act.

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- (f) Cause, threaten or allow the discharge of any contaminant into the waters of the State . . . . 415 ILCS 5/12(a), (f) (2002).

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).

Section 580.105 of the Agency's regulations requires an owner or operator to report any release of livestock waste greater than 25 gallons from the facility to the Agency within 24 hours of discovering the release. 35 Ill. Adm. Code 580.105.

### **BACKGROUND**

At the time the original complaint was filed, Murphy Farms, Inc., was a North Carolina corporation registered to do business in the State of Illinois in good standing. Comp. at 2. Since then, Murphy Farms has been acquired by Smithfield Foods, Inc. of Smithfield Virginia. Murphy Farms is now a division of Murphy-Brown, LLC, the hog production group for and a division of Smithfield Foods, Inc. Murphy-Brown is located at 2822 Highway 24 West, Warsaw, North Carolina. Comp. at 2.

In 1996, Murphy and Highlands entered into an agreement under which Highlands agreed to raise pigs at its farm near Williamsfield, in rural Knox County. Murphy agreed to pay Highlands a specified amount for each pig raised at Highlands' farm. Mot. at 1. The agreement identifies Murphy as "owner" and the Highlands is "producer." Resp. at 2. Under the agreement, the Highlands agreed "to house the breeding stock delivered by Owner only for the purposes of producing weaned pigs for Owner and to own no swine." Murphy supplied all of the 3,650 sows at the facility. Comp. at 3. The Highlands did not agree to own or possess any of the pigs. Resp. at 2; citing Exh. 1, pg. 3. Murphy states it owned the pigs, but had no ownership interest in the Highlands' farm. Mot., Exh. 1, para. 4. Murphy claims the Highlands controlled the operation of the farm, including animal waste disposal. *Id.* The weaned pig production agreement between the parties states that in operating the farm, Highlands must "provide the proper husbandry for maximum productivity by following the management's procedures specified by Owner." Resp. Exh. 1 at 2.

According to Murphy, the parties terminated their relationship in December 2002. Mot. at 2. Since that date, Highlands continues to raise pigs, but Murphy has had no involvement.

Murphy admits that it supplied feed, medication, and veterinary services. Mot. at 2. However, Murphy states that Highlands employed no Murphy personnel. *Id.* Murphy states that it made recommendations to Highlands regarding animal care, but Highlands ultimately controlled all aspects of the operation of its farm. *Id.* Specifically, Murphy contends that Highlands controlled the land application of waste process and that under the contract, Highlands agreed to dispose of all animal waste according to federal, state and county requirements. Mot. at 3; Exh. 1 at 3.

The parties agree that the Highlands used two waste treatment systems at its farm during the period of time when it raised pigs for Murphy: Bion Technologies and BioSun. Mot. Exh. 1 at 3. According to the People, Murphy was involved in selecting the Bion system as the means of handling and treating waste at the facility. Comp. at 5.

The People state that under the agreement, Murphy had sole control of the management of all supplies and feed and procedures for the care and productivity of the hogs. The People also contend that Murphy retained the right to change the management of these procedures from time to time. Resp. at 3; Exh. 1, pg. 1. The People assert that in summary, Murphy farms was required to provide the following under the agreement: feed, breeding, stock, training of employees, transportation of pigs, medication and veterinary service, and anything that goes on or in the animal such as syringes, needles, marking sticks, etc. Resp. at 3, Exh. 4. Further, the People state that Highlands paid the employees, but that Murphy trained the employees in Murphy's management procedures. Resp. at 4; Exh. 2 and 3.

## **SUMMARY OF VIOLATIONS ALLEGED IN COUNTS I AND II**

### **Odor and Air Pollution**

Count I of the complaint alleges that Highlands and Murphy caused air pollution in violation of Section 9(a) of the Act by "causing or allowing strong, persistent and offensive hog odors to emanate from the facility that unreasonably interfere with the use and enjoyment of the neighbors' property." Comp. at 17. Count I further states that by failing to employ adequate odor control methods and technology at the facility, the respondents caused air pollution in violation of Section 501.402(c)(3) of the Board's regulations. Comp. at 17-18.

The People state that the respondents have caused offensive hog odors on numerous occasions, causing physical gagging, nausea, sore and/or burning nose and throat, and headache. The People state that the Agency received approximately 110 complaints of odor coming from the facility submitted by neighbors of the facility in 1998, and approximately 120 in 1999. Comp. at 7.

According to the People, the Agency issued the Highlands a Noncompliance Advisory Letter on May 29, 1998, citing violations of Section 9(a) of the Act and Section 501.402(c)(3) of the Board's regulations for failure to employ adequate odor control methods and technology.

Comp. at 9. Agency inspectors experienced strong swine waste odors several times at the facility and several times outside of the facility, and up to one and a quarter miles away. Comp. at 10-11.

On July 14, 1998, the Agency sent both Highlands and Murphy a Notice of Violation letter again citing violations of 9(a) of the Act and Section 501.402(c)(3) of the Board's regulations. Comp. at 11. Subsequent to the notice of violations letter, the Agency again inspected the site on December 22, 1998, and took dissolved oxygen measurements and temperature readings from each of the four lagoons. Comp. at 13. The People state that the sample results showed that the first three lagoons of the system were in an anaerobic state. *Id.* At that inspection, the Agency also tested for biochemical oxygen demand and ammonia and noted very strong swine waste odors at all of the lagoons. *Id.* at 14.

The People state the strong waste odor existed during a July 30, 1999 investigation. Comp. at 15. The People state that the Agency continued to receive complaints from neighbors regarding offensive odors from the facility as of the filing date of the amended complaint. Comp. at 17.

### **Water Pollution**

Count II alleges that on June 18, 2002, the Highlands land applied hog waste that entered an unnamed tributary of French Creek in the vicinity of the Highlands' farm. The People state the discharge into the creek alone caused a violation of Section 12(a) of the Act and Section 302.203 of the Board's regulations. Because the discharge caused total ammonia levels to exceed 15 mg/L and unionized ammonia levels to exceed the acute standard of 0.33 mg/L, the People contend that respondents violated Sections 302.212(a) and (b) of the Board's regulations. Comp. at 24. The People assert that by depositing livestock waste on the land so as to create a water pollution hazard, the respondents violated Section 12(d) of the Act and Section 501.405(a) of the Board's regulations. Finally, the People allege that because the respondents did not have an NPDES permit, the respondents discharged in violation of Section (f) of the Act. Comp. at 25.

The People state that the waste management system used at the facility consists of four lagoons operated in a series. Wastewater in the third and fourth lagoons was land applied via a traveling gun irrigation unit. The People state that solid swine waste sludge that accumulated in the second lagoon was land applied. Comp. at 19.

The People state that the Highlands and Murphy reported the release of livestock waste to the Illinois Emergency Management Agency on June 19, 2002. Comp. at 21. The People state that upon inspection, the Agency inspector observed an eroded wet channel in the soybean field that extended south in the cornfield where inspectors observed that surface runoff had recently flowed. Comp. at 23. The People state that the Illinois Department of Natural Resources conducted a fish kill investigation and estimated that approximately 6,600 fish were killed by the release. *Id.* The People also state that samples taken at the June 19, 2002 inspection demonstrated an exceedence of the acute standard for unionized ammonia. *Id.* at 24.

## **MOTION TO DISMISS**

### **Standard of Review**

Murphy states that in considering a motion to dismiss, the Board may consider pleadings as well as affirmative matter not contained in the pleadings, including affidavits. Mot. at 4; citing Zedella v. Gibson, 165 Ill. 2d 181, 185, 650 N.E.2d 1000, 1002 (1995).

The People state that in deciding the merits of a motion to dismiss, if the Board cannot determine disputed factual issues solely upon affidavits and counter-affidavits, the parties must go to hearing. Resp. at 13-14; citing Consumer Electric Co. v. Cobelcomex, Inc., 149 Ill. App. 3d 699, 703-704 (1st Dist. 1986).

For purposes of ruling on a motion to dismiss, all well-pled facts contained in the pleading must be taken as true and all inferences from them must be drawn in favor of the non-movant. People v. Stein Steel Mills Services, Inc., PCB 02-1 (Nov. 15, 2001). A complaint should not be dismissed for failure to state a claim unless it clearly appears that no set of facts could be proven under the pleadings that would entitle the complainant to relief. Shelton v. Crown, PCB 96-53 (May 2, 1996)

Section 101.504 of the Board's procedural rules regarding the content of motions and responses states:

All motions and responses must clearly state the grounds upon which the motion is made and must contain a concise statement of the position or relief sought. Facts asserted that are not of record in the proceeding must be supported by oath, affidavit, or certification in accordance with Section 1-109 of the Code of Civil Procedure [734 ILCS 5/1-109]. A brief or memorandum in support of the motion or response may be included.

Both parties submitted affidavits in support of new facts asserted.

### **Murphy Farms' Arguments**

Murphy Farms' over-arching argument is that it did not cause or allow the alleged violations because it neither owned nor controlled operations at the Highlands' Farm. Murphy states that counts I and II of the complaint relate to both Highlands and Murphy and that count III applies to Highlands alone. Mot. at 3. Accordingly, Murphy moves the Board to dismiss counts I and II of the complaint with prejudice as they relate to Murphy. Mot. at 3-4.

### **Air and Odor Pollution**

Murphy Farms contends that to prevail on a claim under Section 9(a) of the Act, the complainant must show that the alleged polluter was either capable of controlling the pollution or was in control of the premises on which the pollution occurred. Mot. at 6; citing Philips Petroleum Co. v. PCB, 72 Ill. App. 3d 217, 220-21, 390 N.E.2d 620, 623 (2nd Dist. 1979).

Murphy Farms argues that, likewise, in nuisance claims the complainant must show that the respondent's activity interfered with the use and enjoyment of the complainant's property. Mot. at 6; citing In re: Chicago Flood Litigation, 176 Ill. 2d 179, 204, 680 N.E.2d 265, 277 (1997). Murphy Farms states that Illinois courts have held that the mere introduction of livestock into an area does not establish the requisite conduct to support a nuisance claim. Mot. at 7; citing Village of Goodfield v. Jamison, 188 Ill. App. 3d 851, 544 N.E.2d 1229 (4th Dist. 1989).

Murphy states it does not own any part of the Highlands' farm and did not control any aspect of the operation of the farm. Mot. at 7. According to Murphy, Highlands operated the farm with its own management personnel and employees, decided where to locate the farm, and owned and maintained the land, buildings, and waste treatment systems. Mot. at 7-8. For these reasons, Murphy contends it cannot be found liable for causing air pollution in violation of Section 9(a) of the Act or for any failure to control odor under Section 501.402(c)(3).

### **Water Pollution**

Murphy states the allegations in count II of the complaint surround an incident that occurred on June 18, 2002. Murphy contends it was not involved with the land application of waste from the Highlands' Farm and, accordingly, the Board should dismiss count II against it.

To establish a water pollution violation, Murphy claims the complainant must show that the respondent could control the source of the pollution. Mot. at 9; citing Perkinson v. PCB, 187 Ill. App. 3d 689, 694-95, 543 N.E.2d 901, 904 (3rd Dist. 1989); People v. A.J. Davinroy Contractors, 249 Ill. App. 3d 788, 793, 618 N.E.2d 1282, 1286 (5th Dist. 1993). Murphy asserts that here the People cannot show Murphy had the requisite control. As stated above, Murphy claims it did not own the Highlands' Farm, did not operate the farm, and did not control the handling or land application of waste material

### **The People's Arguments**

The People oppose Murphy's motion to dismiss because, according to the People, under the terms of the agreement, the facility would not be a swine production facility, and the waste would not be at the site, but for Murphy. Resp. at 11. According to the People, caselaw requires that Murphy need only have control over the source of pollution to establish potential liability under the Act and Board regulations. Resp. at 14; citing Perkinson v. PCB, 187 Ill. App. 3d 689, 693 (3rd Dist. 1989); Sierra Club v. Tyson Foods, 299 F. Supp. 2d 693 (W.D. Ky. 2003). The People state that "Murphy had sufficient ownership and control in The Highlands facility and sufficient participation in the operation, siting, design, and establishment of both the facility and the waste management system" to cause or allow both air pollution and water pollution under the allegations set forth in counts I and II of the complaint. Resp. at 23-24.

### **Air and Odor Pollution**

The People argues that Murphy's attempt to apply nuisance principles to an allegation of Section 9(a) is improper and incorrect. Rather, the appropriate analysis is whether the respondent's conduct unreasonably interfered with the complainant's enjoyment of life or

property. Resp. at 18; citing City of Monmouth v. PCB, 57 Ill. 2d 482, 313 N.E.2d 1 (1972); Incinerator, Inc. v. PCB, 59 Ill. 2d 290, 319 N.E.2d 794 (1974); Mystic Tape v. PCB, 60 Ill. 2d 330, 328 N.E.2d 5 (1975); Wells Manufacturing Co. v. PCB, 73 Ill. 2d 226, 383 N.E.2d 148 (1978).

Nonetheless, the People dispute Murphy's contention that the mere introduction of livestock into an area does not establish the requisite conduct to support a nuisance claim. Resp. at 19. For support, the People state an Illinois court recently upheld a grant of injunctive relief prohibiting the construction and operation of a hog facility. Resp. at 20; citing Nickels v. Burnett, 343 Ill. App. 3d 654, 798 N.E.2d 817 (2nd Dist. 2003). The People state that in Nickels, the court found that the plaintiffs had presented adequate evidence of the potential harms to their health and to the values of their lands should the hog facility begin to operate. In Nickels, state the People, the court found a prospective private and public nuisance. Resp. at 20.

The People reiterate that Murphy has alleged an affirmative defense and that Murphy must prove that the alleged defense exists with reasonable certainty, or the motion should not be allowed. Resp. at 21; citing Consumer Electric Co. v. Cobelcomex, Inc., 149 Ill. App. 3d 699, 703, 501 N.E.2d 156 (1st Dist. 1986).

The People state that the terms and conditions of the operating agreement demonstrate that Murphy exerts sufficient ownership and control to meet the standards of a finding of liability under the Act. Resp. at 21. The People further contend that because Murphy owns and controls the source of the pollution, *i.e.* the hogs, Murphy caused or allowed air pollution as alleged in the complaint. Resp. at 22.

### **Water Pollution**

Likewise, the People argue that because Murphy owns and controls the source of the pollution, Murphy had sufficient ownership and control in the facility to meet the standards for a finding of liability under the Act. Resp. at 22. The People state that Murphy and the Highlands land applied waste via a traveling gun irrigation unit on June 18, 2002. The People claim that Murphy had as much of an interest, if not more than Highlands, in land applying the facility's waste as part of the waste management system at the facility. Resp. at 22-23. The People state that Murphy "owned and controlled the very source of the pollution" and is, therefore, liable for the alleged violations of the Act and Board regulations. Resp. at 23.

The People state that overall, it is clear from the contract and Murphy's actions that Murphy had sufficient ownership and control in the Highlands facility and sufficient participation in the operation, siting, design, and establishment of both the facility and the waste management system to qualify as having caused or allowed air and water pollution under the standards applicable to the allegations in counts I and II of the complaint.

The People state that the record shows that Murphy had the right and ability to make recommendations concerning management procedures for the care and productivity of the breeding herd or measures deemed necessary by respondent Murphy to provide for the herd. Along those lines, the People argue that because Murphy could choose to enforce the contract or

end the contract, which it eventually did, Murphy exercised sufficient control over the operation of the Highlands facility.

### **Murphy's Reply**

Murphy claims the State has not demonstrated that Murphy has acted in any way that caused the pollution at issue. Reply at 3. Murphy asserts that Murphy's alleged "theoretical right" to control Highlands' operations is insufficient, as a matter of law, to establish Murphy's liability for the pollution. *Id.* Rather, asserts Murphy, the People must identify specific conduct that caused the alleged pollution. *Id.*; citing Philips Petroleum Co. v PCB, 72 Ill. App. 3d 217, 220-21, 390 N.E.2d 620, 623 (2nd Dist. 1979). Murphy contends the State has offered no factual basis establishing the Murphy controlled the acts that resulted in the alleged pollution.

Illustrating the point, Murphy disputes the various examples that the People provide are evidence that Murphy had control or the ability to control the source of the alleged pollution. First, Murphy replies that even if it provided management procedures, the People have not identified how any management procedures have caused or allowed pollution at the Highlands facility. Reply at 4. Second, Murphy states that the training to which the People refer is "farrowing training" that is related to the birth of young pigs, not to waste treatment or management. Third, Murphy claims that the financial management agreements between Murphy and Highlands do not necessarily indicate that Murphy controlled the operation of the farm. *Id.*

Fourth, Murphy states that most of the alleged communications with regulators concerned the siting of a facility in Peoria County, not the Highlands facility in Knox County. Reply at 5. Murphy further contends that the inquiries do not indicate, as the People argue, that Murphy controlled or had the ability to control, the siting of the Highlands farm. *Id.* Finally, in response to the People's argument that Murphy contributed to the selection of the waste treatment system, Murphy states that the People fail to provide any factual support for this conclusion. Reply at 6.

Murphy also disputes that it had "sole control of the management of all procedures for the care and productivity of the hogs . . ." Murphy states that this conclusion by the People is not supported by the facts and is inconsistent with the Lenhart affidavit. Reply at 6. Murphy maintains that the Lenhart affidavit establishes that Highlands selected the waste treatment system used at the farm and controlled the land application process, and that the State has not contradicted these statements. Reply at 7-8.

Murphy agrees that the applicable standard of review is whether the People can demonstrate that Murphy actually controlled the acts that caused the pollution or at least controlled the premises where the pollution occurred. Reply at 10; citing Philips Petroleum Co., 72 Ill. App. 3d at 220-21. Murphy disputes that the caselaw cited by the People supports the People's position. According to Murphy, McFalls is not applicable because that case addressed findings of open dumping that resulted in pollution on the property. In contrast, here, argues Murphy, the People have not established that Murphy acted in any way to cause pollution in violation of Section 9(a) of the Act. Reply at 11.

Murphy also states that Perkinson does not apply. While in Perkinson, it was undisputed that the defendant controlled the lagoons and land from which the pollution occurred, here the People have not proven that Murphy controlled the operations at the Highlands' farm. Reply at 11. Murphy continues that Tyson Foods is not supportive either because it did not involve violations of the Act. Reply at 11-12.

### **Air and Odor Pollution**

In response to the People's argument about the proper standard for a nuisance claim under the Act, Murphy maintains that its application of common law nuisance principles to the resolution of a Section 9(a) claim is accurate. Reply at 12. Murphy concludes that in count I of the complaint the People merely speculate and have provided no legal basis for the claims. Accordingly, Murphy states the count I claims should be dismissed with prejudice.

### **Water Pollution**

Regarding the count II allegations, Murphy states the People have presented no evidence that Murphy exercised any control over the land application of that waste. Accordingly, Murphy contends that the claims in count II of the complaint should be dismissed with prejudice. Reply at 14.

## **DISCUSSION**

For purposes of ruling on a motion to dismiss, all well-pled facts contained in the pleadings must be taken as true and all inferences from them must be drawn in favor of the non-movant. People v. Stein Steel Mills Services, Inc., PCB 02-1 (Nov. 15, 2001). A complaint should not be dismissed for failure to state a claim unless it clearly appears that no set of facts could be proven under the pleadings that would entitle complainant to relief. Shelton v. Crown, PCB 96-53 (May 2, 1996).

The Act clearly states it is a violation of the Act to:

cause or threaten or allow the discharge of any contaminants . . . so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources . . . . 415 ILCS 5/12(a) (2002).

Murphy does not dispute the allegations of odor or discharges into the unnamed tributary of French Creek. Rather, Murphy argues the complaint must be dismissed against it because Murphy did not have sufficient control over the facility to be liable for the alleged violations. Therefore, in deciding whether to grant respondent Murphy's motion to dismiss, the Board must decide whether Murphy had sufficient control over the source of the pollution or the premises where the pollution occurred. People v. A.J. Davinroy Contractors, 249 Ill. App. 3d 788, 618 N.E.2d 1282 (5th Dist. 1993); citing Philips Petroleum Co. v. PCB, 72 Ill. App. 3d 217, 390 N.E.2d 620 (1979).

Though Murphy argues that McFalls does not apply because it concerns Section 21 of the Act, the Board finds the discussion of the phrase “cause or allow” applicable to Murphy’s motion to dismiss. In discussing how courts have interpreted what the phrase “cause or allow” means when used in the Act, McFalls made an important distinction. The court in McFalls held:

Rather than establishing ownership or control of the premises as a necessary condition to liability under the Act, the cases cited by appellees merely hold that ownership or control of the premises or control over the source of the pollution is a sufficient condition where an owner or operator is alleged to have passively permitted pollution to enter the environment. People v. McFalls, et al., 313 Ill. App. 3d 223, 728 N.E.2d 1152, 1156 (3rd Dist. 2000); citing Perkinson, 187 Ill. App. 3d 689; Phillips Petroleum Co., 72 Ill. App. 3d 217; Freeman Coal Mining Corp., 21 Ill. App. 3d 157; Meadowlark Farms, Inc., 17 Ill. App. 3d 851

The Board finds that even though the contract between the Highlands and Murphy states that Highlands is “to dispose of all animal waste according to federal, state and county regulations,” the Board cannot conclude there is no set of facts that could be proven under the pleadings that would entitle the People to relief. Resp. Exh. 1. Taking all well-pled facts as true and construing them in favor of the People, the Board denies Murphy’s motion to dismiss. Murphy had the obligation under its agreement with the Highlands to “provide management procedures for the care and productivity of the Breeding Herd which may change from time to time.” *Id.* Further, the Highlands was required by the agreement to “provide the proper husbandry for maximum productivity by following the management’s procedures specified by Owner.” It is not clear from the existing record whether Murphy provided any management procedures that gave Murphy the capacity to control the source of the pollution at the facility.

Murphy states the People have not provided evidence of specific conduct by Murphy that caused or allowed the alleged violations. However, the applicable standard does not require specific conduct. Rather the alleged polluter must have had: (1) the capability of control over the pollution; or (2) control of the premises where the pollution occurred. *See Davinroy*, 249 Ill. App. 3d at 793; citing Philips Petroleum, 72 Ill. App. 3d 217. In fact, in Perkinson, the Board found that since the record contained no evidence that the landowner had taken any precautions to prevent the actions of the vandals that caused the pollution, the landowner was in violation and properly fined. IEPA v. Russel Perkinson d/b/a Porkville, PCB 84-83 (Oct. 20, 1988); *aff’d by Perkinson*, 187 Ill. App. 3d at 695. In interpreting the word “allow,” the Board has found that one can allow a discharge by poor practices that contribute to the problem. IEPA v. Bath, Inc. et al., PCB 71-52; Bath, Inc. et al. v. IEPA, PCB 71-224, (consol.) (Sept. 16, 1971).

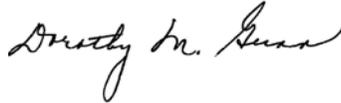
The Board finds that Murphy has not provided the Board with facts demonstrating that Murphy lacked control of the premises or the capacity to control the source of the pollution. The Board expects the parties to provide evidence and testimony at hearing that more clearly define the obligations, the ability to control, and the conduct of each party. Accordingly, the Board denies Murphy’s motion to dismiss.

A timely filed motion to dismiss under Section 103.212(b) or 101.506 stays the 60-day period to file an answer. 35 Ill. Adm. Code 103.204(e). Both sections require the respondent to

file the motion within 30 days of the date it is served with the complaint. Because it was granted several motions for extension of time, Murphy's motion, filed October 18, 2004, was timely under Section 101.506 of the Board's procedural rules. Thus, the motion to dismiss stayed the 60-day period to file an answer. See 35 Ill. Adm. Code 103.204(e). The stay is lifted as of the date of this order and Murphy has until June 4, 2005, or 30 days from the date of this order, to answer the complaint.

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 5, 2005, by a vote of 5-0.

A handwritten signature in cursive script, appearing to read "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board