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STATE OF ILLINOIS
Pollution Control Board

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

June 30, 2005

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 MOTION TO STRIKE RESPONDENT MURPHY'S AFFIRMATIVE DEFENSES 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, stamped envelope.

Thank you for your cooperation and consideration.

Very truly yours,

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

JEM/pp
Enclosures

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STATE OF ILLINOIS
Pollution Control Board

BEFORE THE 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.	)	

NOTICE OF FILING

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

Mr. Charles M. Gering
McDermott, Will & Emery
227 West Monroe Street
Chicago, IL 60606-5096

PLEASE TAKE NOTICE that on June 30, 2005, I mailed for filing with the Clerk of the Pollution Control Board of the State of Illinois, a MOTION TO STRIKE RESPONDENT MURPHY'S AFFIRMATIVE DEFENSES, a copy of which is 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 30, 2005

CERTIFICATE OF SERVICE

I hereby certify that I did on June 30, 2005, 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 MOTION TO STRIKE RESPONDENT MURPHY'S AFFIRMATIVE DEFENSES

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
McDermott, Will & Emery
227 West Monroe Street
Chicago, IL 60606-5096

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.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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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.	)	

MOTION TO STRIKE RESPONDENT MURPHY'S AFFIRMATIVE DEFENSES

NOW COMES, Complainant, PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* Lisa Madigan, Attorney General of the State of Illinois, and moves the Board, pursuant to Section 101.506 of the Board's Procedural Rules, 35 Ill. Adm. Code 101.506, to strike Respondent Murphy Farms, Inc's ("Respondent Murphy" or "Murphy Farms, Inc.") Affirmative Defenses on the following grounds and for the following reasons:

Standard

1. Pursuant to Section 103.204(d) of the Board's Procedural Rules, 35 Ill. Adm. Code 103.204(d), any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before the hearing.

2. In an affirmative defense, the respondent alleges "new" facts or arguments that, if true, will defeat . . . the government's claim even if all allegations in the complaint are true. *People v. Community Landfill Co.*, PCB 97-193, slip op. at 3 (August 6, 1998), cited in *People v. Wood River Refining Company*, PCB 99-120, slip op. at 3-4 (August 8, 2002), and *People v. Stein Steel Mills Services*, PCB 02-1, slip op. at 1-2 (April 18, 2002).

3. The Board has also defined an affirmative defense as a "response to a plaintiff's claim which attacks the plaintiff's legal right to bring an action, as opposed to attacking the truth of claim." *People v. Peabody Coal Company*, PCB 99-134, slip op. at 4 (June 5, 2003), citing *Farmer's State Bank v. Phillips Petroleum Co.*, PCB 97-100, slip op. at 2n. 1(Jan. 23, 1997) (quoting *Black's Law Dictionary*). If the pleading does not admit the opposing party's claim, but instead attacks the sufficiency of that claim, it is not an affirmative defense. *People v. Peabody Coal Company*, PCB 99-134, slip op. at 4 (June 5, 2003), citing *Warner Agency v. Doyle*, 121 Ill. App. 3d 219, 221, 459 N.E.2d 663, 635 (4th Dist. 1984).

4. The Code of Civil Procedure gives additional guidance on pleading affirmative defenses. Section 2-613 (d), 735 ILCS 5/2-613(d), provides in part:

> 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, should be likely to take the opposite party by surprise, must be plainly set forth in the answer of reply. 735 ILCS 5/2-613(d) (2000).

cited in *People v. Wood River Refining Company*, PCB 99-120, slip op. at 3-4 (August 8, 2002), and *People v. Stein Steel Mills Services*, PCB 02-1, slip op. at 1-2 (April 18, 2002). In a ruling on Complainant's motion to strike affirmative defenses in the case of *People v. Midwest Grain*, PCB 97-179, slip op. at 3 (August 21, 1997), the Board stated that Section 2-613(d) provides guidance regarding the pleading of defenses and, relying on the case of *Handelman v. London Time, Ltd.*, 124 Ill. Ap. 3d 318, 320, 464 N.E.2d 710, 712 (1st Dist. 1984), stated that 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. *Id.* This is a prime function of pleading. *Id.* Further guidance is available in Section 2-612 of the Code of Civil Procedure, 735 ILCS 5/2-612, which provides:

> Insufficient pleadings. (a) If any pleading is insufficient in substance or form the

court may order a fuller or more particular statement. If the pleadings do not sufficiently define the issues the court may order other pleadings prepared.
(b) No pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet.
(c) All defects in pleadings, either in form or substance, not objected to in the trial court are waived.

5. A valid affirmative defense gives color to the opposing party's claim but then asserts new matter which defeats an apparent right. *Condon v. American Telephone and Telegram Co.*, 210 Ill. App. 3d 701, 709, 569 N.E.2d 518, 523 (2d Dist. 1991), citing *The Warner Agency Inc. v. Doyle*, 121 Ill. App. 3d 219, 222, 459 N.E.2d 633, 635 (4th Dist. 1984).

6. A motion to strike an affirmative defense admits well-pleaded facts constituting the defense, and attacks only the legal sufficiency of the facts. "Where the well-pleaded facts of an affirmative defense raise the possibility that the party asserting them will prevail, the defense should not be stricken." *International Insurance Co. v. Sargent and Lundy*, 242 Ill. App. 3d 614, 630-31, 609 N.E.2d 842, 853-54 (1st Dist. 1993), citing *Raprager v. Allstate Insurance Co.*, 183 Ill. App. 3d 847, 854, 539 N.E. 2d 787, 791 (2nd Dist. 1989).

7. Affirmative defenses that are totally conclusory in nature and devoid of any specific facts supporting the conclusion are inappropriate and should be stricken. See *International Ins. Co.*, 242 Ill. App. 3d at 635, cited in *Glave v. Harris et al, Village of Grayslake v. Winds Chat Kennel, Inc*, PCB 02-11, PCB 02-32 (Consolidated), slip op. at 2 (January 24, 2002). An asserted affirmative defense is not, by definition, an affirmative defense, even if proven true at hearing, if it is an assertion that will not impact the complainant's legal right to bring the action. *Glave v. Harris et al, Village of Grayslake v. Winds Chat Kennel, Inc*, PCB 02-11, PCB 02-32 (Consolidated), slip op. at 2 (January 24, 2002), citing *People v. Crane*, PCB 01-76 (May 17, 2000).

Affirmative Defenses

First Affirmative Defense

8. Respondent Murphy's first affirmative defense was pled, in its entirety, as follows:

> The Complaint must be dismissed because Complainant's claims against Murphy are barred by the doctrine of laches.

9. Respondent Murphy has failed to plead any facts in this affirmative defense. Pursuant to Section 103.204, the Board's procedural rules, "any facts constituting an affirmative defense must be plainly set forth before hearing in the answer . . . " Respondent's first affirmative defense is devoid of any facts. Thus, it fails on two grounds: (1) it is insufficiently pled and thus does not meet the standard of pleading, and (2) it fails to assert affirmative matter that avoids the legal effect of or defeats a cause of action set forth in the Third Amended Complaint.

10. Laches is an equitable doctrine that bars relief when a defendant has been misled or prejudiced due to a plaintiff's delay in asserting a right. *People v. Crane*, PCB 01-76, slip op. at 7 (May 17, 2001), *City of Rochelle v. Suski*, 206 Ill. App. 3d 497, 501, 564 N.E.2d 933, 936 (2d Dist. 1990); *People v. State Oil Co.*, PCB 97-103, slip op. at 2 (May 18, 2000). There are two principal elements of laches: lack of due diligence by the party asserting the claim; and prejudice to the opposing party. See *Van Milligan v. Board of Fire & Police Commissioners*, 158 Ill. 2d 84, 610 N.E.2d 830, 833 (1994); *State Oil*, PCB 97-103, slip op. at 2. Although applying laches to public bodies is disfavored, the Illinois Supreme Court held in *Hickey v. Illinois Central Railroad Co.*, 35 Ill. 2d 427, 220 N.E. 2d 415 (1966), that the doctrine can apply to governmental bodies under compelling circumstances. There are very few cases in which there has been a finding of "compelling circumstances". The court in the *Hickey* case relied on both laches and estoppel. In the case of *People v. Big O, Inc.*, PCB 97-130, slip op. at

1-2 (April 17, 1997), the Board followed the courts' holdings that if the right to bring a lawsuit is not barred by the statute of limitations, unless conduct or special circumstances make it inequitable to grant relief, then the equitable doctrine of laches does not bar a lawsuit either, when it struck Respondent Big O's affirmative defense that relied on the doctrine of laches. In *Big O*, the Board relied on the case of *Beynon Building Corp. v. National Guardian Life Ins. Co*, 118 Ill. App. 3d 754, 45 N.E.2d 246, 253 (2d Dist. 1983). As in the case of *People v. Big O, Inc.*, PCB 97-130, slip op. at 1-2 (April 17, 1997), the doctrine of laches is not applicable to the instant case. In that Respondent's first affirmative defense is devoid of any fact and fails to assert any affirmative matter that avoids the legal effect of or defeats a cause of action set forth in the Third Amended Complaint, Respondent Murphy's first affirmative defense is totally conclusory in nature and thus is inappropriate and should be struck.

11. Further, in that Respondent Murphy's first affirmative defense is devoid of facts, it fails because it is insufficiently pled. Respondent has failed to reasonably inform, in fact, not just "reasonably" but inform at all, the Complainant of the specific allegation and nature of this defense. It has completely failed to sufficiently define the issue. Respondent Murphy must be held to the appropriate standard of pleading. It has failed to plead facts as to the alleged lack of due diligence on the part of the Complainant and it has failed to plead facts that form the basis of any claim it might have as to prejudice. Further, it has failed to plead facts as to how this case qualifies as one exhibiting exceptional circumstances. Respondent asserts only a legal conclusion, which is inappropriate. Respondent Murphy's first affirmative defense should be struck.

Second Affirmative Defense

12. Respondent Murphy's second affirmative defense was pled, in its entirety, as follows:

> The Complaint must be dismissed to the extent that Complainant's claims against Murphy are barred by applicable statutes of limitation or other applicable limitations periods.

13. Respondent Murphy's second affirmative defense must be struck because (1) it fails to meet the standard of pleading, and (2) the Board has held no statute of limitations is applicable to public rights, and thus, Respondent Murphy's second affirmative defense does not constitute the assertion of an affirmative matter that avoids the legal effect of or defeats a cause of action pled in the Third Amended Complaint.

14. Respondent Murphy's second affirmative defense is conclusory in nature and devoid of any facts that constitute the defense and support the conclusion. Further, the defense includes the following language which is unacceptably vague and non-specific: "". . . by applicable statutes of limitation or other applicable limitation periods." An affirmative defense must be specifically pled. This non-specific, broad reference fails to meet the standard of pleading. The Respondent must identify and cite to the limitation it is asserting to reasonably inform the Complainant of the nature of the defense and sufficiently define the issue. It is Complainant's contention that no statute of limitation or "other limitation period" exists that would defeat the cause of action. This contention is soundly supported in the case law. Thus, it is incumbent upon the Respondent, and required by the standards of pleading, that the Respondent specifically identify and cite to the limitation it is asserting, in order to reasonably inform the Complainant of the nature the defense. In that Respondent's second affirmative defense is insufficiently pled, it should be struck.

15. There is no statute of limitation applicable to the allegations of violation contained in the Third Amended Complaint. There is no statute of limitation contained in the Illinois Environmental Protection Act applicable to the violations alleged in the Third Amended Complaint. Respondent has failed to identify or cite to a specific limitation, and thus has failed

to plead and assert applicability of a limitation. Unless the terms of a statute of limitations expressly include the State, county, municipality or other governmental agencies, the statute, so far as public rights are concerned, as distinguished from private and local rights, is inapplicable to them. *Pielet Bros. Trading, Inc. v. The Pollution Control Board*, 110 Ill. App. 3d 752, 442 N.E.2d 1374 (5th Dist. 1982); *Clare v. Bell*, 378 Ill. 128 (1941). The question is whether the State (or its agency or subdivision) is asserting public rights on behalf of all the people of the State or private rights on behalf of a limited group. *Id., In re Estate of Bird*, 410 ILL 390, 394 (1951). The Complainant in the instant matter is the People of the State of Illinois, and all three counts of the Third Amended Complaint concern public rights. All three counts assert allegations of violations of statutory protections. Thus, Respondent, in its second affirmative defense, has failed to plead affirmative matter that avoids the legal effect of or defeats a cause of action pled in the Third Amended Complaint. Therefore, Respondent's second affirmative defense should be struck.

Third Affirmative Defense

16. Respondent Murphy's third affirmative defense was pled as follows:

> The Complaint must be dismissed because the Act, as applied to alleged odor violations, is unconstitutionally vague in that it does not provide adequate notice of the conduct required to comply with the Act and that certain factors affecting the propagation of odors are variable and cannot reasonably be controlled.

17. Illinois courts have thoroughly reviewed the question of the constitutionality of Section 9(a) of the Act, "as applied to odor violations", and have repeatedly held that the Act contains sufficient standards for determining what constitutes air pollution. The initial Illinois Supreme Court decision, directly on point, was issued in 1974. As such, Respondent has had more than sufficient notice of "the conduct required to comply with the Act". Further, each and every one of the cases cited below addressing odor were decided in the context of cases and

controversies that included a factual setting concerning questions of the source of the odor, factors pertinent to the odors generation and dissemination as well as the technical practicability of controlling the odor. The technical practicability of control was addressed at length in the decision of *Wells Mfg. Co. v. Pollution Control Board*, 73 Ill.2d 226, 233, 383 N.E.2d 148 (1978). Thus, it is apparent, that since the 1970s, Respondent has been on notice as to the standards applicable to a finding of odor air pollution in Illinois. Respondent's third affirmative defense is not affirmative matter that will avoid the legal effect of or defeat Count I of the Third Amended Complaint.

18. Further, Respondent Murphy's third affirmative defense is devoid of facts pertinent to the case at bar. It is nothing but a legal conclusion. It provides no facts that would serve to reasonably inform the Complaint of the nature of the defense in the context of the case. As such, it is insufficiently pled and should be struck.

19. It is well-settled that the laws of the General Assembly are presumed to be constitutional and valid and must be shown to be invalid beyond reasonable doubt before they will be so construed. *People v. Sprinkle*, 4 Ill. App. 3d 6, 15 (3rd Dist. 1972), 280 N.E.2d 29. In that case, the Court relied on the following established test:

> The defendant further asserts that Section 702-7(3) of the Juvenile Court Act violates the constitutional guarantees of due process and equal protection because of vagueness and ambiguity and that there is a delegation of legislative power without adequate standards relating to its application. In considering these contentions we are mindful of the rule consistently applied by courts of review in our state that laws of the General Assembly are presumed to be constitutional and valid and must be shown to be invalid beyond a reasonable doubt before they will be so construed. (See *Liberty Foundaries Co. v. Industrial Com.*, 373 Ill.146 (1940), 25 N.E.2d 790; *People Gas Light & Coke Co. v. Slattery*, 373 Ill. 31 (1939), 25 N.E.2d 482; *People v. Board of Education*, 393 Ill. 345 (1946), 65 N.E.2d 825; *North Shore Post No. 21 v. Karzen*, 38 Ill.2d 231 (1967), 230 N.E.2d 833.) The proper test to be applied when the constitutionality of a statute is challenged on the grounds of vagueness and ambiguity is set forth in the case of *People v. Board of Education, supra*, when our Supreme Court stated:
>
> "The omission in the statute to specify every detail step by step, and

> action by action, will not render a law vague, indefinite or uncertain from a constitutional standpoint. In *Husser v. Fouth*, 386 Ill 188 (1944), 53 N.E.2d 949, 954, we said: "to establish the principle that whatever the Legislature shall do it shall do in every detail or else it will go undone, would, in effect, destroy the government. The government could not be carried on if nothing could be left to the judgment and discretion of the administrative officers. 'The true distinction is between the delegation of power to make the law, which involves a discretion as to what the law shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no objection can be made.'" To the same effect is *Department of Finance v. Cohen*, 369 Ill. 510 (1938), 17 N.E.2d 327. Its only when the legislative act is so indefinite and uncertain that the courts are unable, by accepted rules of construction, to determine with any reasonable degree of certainty what the legislature intended, or when it is so incomplete and inconsistent that it cannot be executed, that constitutes such indefiniteness and uncertainty that will invalidate the law. *Mayhew v. Nelson*, 346 Ill. 381 (1931), 178 N.E. 921."

4 Ill. App.3d at 16-17

"It is our duty to construe acts of the legislature so as to affirm their constitutionality and validity, if it can be reasonably done, and further, if their construction is doubtful, the doubt will be decided in favor of the validity of the law challenged." *Harris v. Manor Healthcare Corp.*, 111 Ill. 2d 350, 363 (1986), 489 N.E.2d 1374; *Sayles v. Thompson*, 99 Ill. 2d. 122, 125 (1983), 457 N.E.2d 440. See also *Continental Illinois National Bank & Trust Co. v. Illinois State Toll Highway Com.*, 42 Ill. 2d 385, 389 (1969), 251 N.E.2d 253.

20. "When a statute employs words having a well-known legal significance, courts will, in the absence of any expression to the contrary, assume that the legislature intended the words to have that meaning." 111 Ill. 2d at 364; *Department of Public Works & Buildings v. Wishnevsky*, 51 Ill. 2d 550, 552 (1972), 283 N.E.2d 872; *People ex rel Mayfield v. City of Springfield*, 16 Ill. 2d 609, 614-15 (1959), 158 N.E.2d 582.

21. In *City of Monmouth v. PCB*, 57 Ill.2d 482, 485-487 (1974), 313 N.E.2d 161, 163-164, the Illinois Supreme Court held that Section 9 of the Act is not unconstitutional because Section 9(a), when read in conjunction with Sections 3(b) [now Section 3.02 of the Act, the

definition of "air pollution"], 3(d) [now Section 3.06 of the Act, the definition of "contaminant"] and Section 33(c), contains sufficient standards for determining what constitutes air pollution. The Supreme Court then went on to hold that upon proof that odors existed, [i]t is plain that air pollution, as defined in the statute, was shown to exist . . . " 313 N.E.2d at 165.

22. The issue has been further reviewed by the Illinois Supreme Court in the cases of *Incinerator, Inc. v. PCB*, 59 Ill.2d 290, 300 (1974), 319 N.E.2d 794. *Processing & Books v. Pollution Control Board*, 64 Ill.2d 68 (1976), 351 N.E.2d 865, and *Wells Mfg. Co. v. Pollution Control Board*, 73 Ill.2d 226, 233, 383 N.E.2d 148 (1978).

In *Incinerator*, the court stated: "We agree with appellant that the EPA had the burden of proving all essential elements of the type of air-pollution violation charged, and the Board must then assess the sufficiency of such proof by reference to the section 33(c) criteria, basing thereon its findings and orders. 59 Ill.2d at 300. (Emphasis added).

After the *Incinerator* decision, the Supreme Court addressed the question of plaintiff's burden to prove Section 33(c) factors for an allegation of the violation of Section 9(a) in the case of *Processing & Books v. Pollution Control Board*, 64 Ill.2d 68 (1976), 351 N.E.2d 865 at 869. *Processing Books* was a case before the Illinois Pollution Control Board. In *Processing Books*, the court held as follows:

> In [*Incinerator*] we noted that a complainant bears the burden of persuasion on the essential elements of the offense charged (59 Ill.2d 290,300, 319 N.E.2d 794.) The offense charged in *Incinerator* and in this case is one of the two types of air pollution defined by section 3(b): that which "unreasonably interferes with the enjoyment of life or property." (59 Ill.2d 290, 295, 319 N.E.2d 794, 797; *Mystik Tape v. Pollution Control Board* (1975), 60 Ill.2d 330, 335, 328 N.E.2d 5.) The problem stems from the use of the word unreasonably." Each of the four criteria mentioned in section 33(c) bears upon the reasonableness of the conduct involved, and so it might be argued that, in order to established the type of section 3(b) [now 3.02] offense that is here involved, the complainant bears the burden of proof with respect

> to each of those criteria. But this interpretation of the word "unreasonably" as used in section 3(b) would appear to place upon the complainant a burden more stringent than he would bear in a common law nuisance action, and thus to frustrate the purpose of the Act "to establish a unified, state-wide program supplemented by private remedies, to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them." (Ill. Rev. State. 1973, ch/ 111 ½, par 1002(b) [now section 2(b)]. It would also render redundant or contradict the allocation of the burdens of proof in Section 31(c). See Currie, *Enforcement Under the Illinois Pollution Law*, 70 Nw.U.L.Rev. 389, 460-63 (1975).
>
> There is little that any person can do which does not in some degree "interfere with the enjoyment of life or property" of other persons. The very act of breathing consumes oxygen. In our opinion the word "unreasonably" as used in section 3(b) [now section 3.02] was intended to introduce into the statute something of the objective quality of the common law, and thereby exclude the trifling inconvenience, petty annoyance or minor discomfort. (See. e.g. *Gardner v. International Shoe Co.* (1944), 386 Ill 418, 429, 54 N.E.2d 482.) The word is used in a similar sense in the disorderly conduct statute (Ill. Rev. Stat. 1967, ch. 38, par. 26-1(a)). "As used in this statute it removes the possibility that a defendant's conduct may be measured by its effect upon those who are inordinately timorous or belligerent." (*People v. Raby* (1968), 40 Ill.2d 392, 395, 240 N.E.2d 595, 598.) This is the meaning that was given to the word "unreasonably" in the *Incinerator* case when the court referred to "a substantial interference with the enjoyment of life and property." *Incinerator, Inc. v. Pollution Control Board* (1974), 59 Ill.2d 290, 297, 319 N.E.2d 794, 797.)

As stated above, in *Wells Mftg*, another Board case, the Illinois Supreme Court held that:

> As to technical practicability, we believe the legislature's use of the word "unreasonable" in the statute clearly places the burden on the Agency to come forward with evidence that emission reduction is practicable. (Ill. Rev. Stat. 1971, ch. 111 ½ par. 103(c) [now Section 31(c)]; see Currie, *Enforcement Under the Illinois Pollution Law*, 70 Nw.U.L.Rev. 389, 460-63 (1975).) However, the lack of available technology is not an absolute defense to a claim of air pollution but rather is one of the factors to be considered by the Board. See *Chicago Magnesium Casting*

Co. v. Pollution Control Board (1974), 22 Ill.App.3d 489, 493, 317 N.E.2d 689.

383 N.E.2d at 153.

That holding was met with a strong dissent by Justice Clark, joined by Justice Goldenhersh:

> . . . Accordingly, under the theory pursued in this case, complainants' burden was to show that the odors emitted by Wells' facility unreasonably interfered with the enjoyment of life or property. (See *Processing & Books, Inc. v. Pollution Control Board* (1976), 64 Ill.2d 68, 75-77, 351 N.E.2d 865.) The majority apparently holds that the term "unreasonably" in section 3(b) of the Act (defining air pollution) means that the complainant must "come forward with evidence that emission reduction is practicable." (See 73 Ill.2d at 237, 22 Ill.Dec. at 677, 383 N.E.2d at 153, accord Currie, Enforcement Under the Illinois Pollution Law, 70Nw.U.L.Rev. 389, 461) Certainly, the majority cannot contend that the use of the word "unreasonable" in defining the respondent's burden of proof somehow defines the complainant's burden of proof. See Ill. Rev. State. 1971, ch. 111 ½, par. 1031(c) (Section 31(c)).
>
> In my opinion, this holding both misconstrues the Act and directly contradicts the unanimous decision of this court in *Processing & Books, Inc. v. Pollution Control Board* (1976), 64 Ill.2d 68, 75-77, 351 N.E.2d 865. Section 33(c) of the Act (Ill.Rev.Stat. 1971, ch. 111 ½, par. 1033©)) requires that, "in making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved," and goes on to list several such factors, including "the technical practicability . . . of reducing or eliminating the emissions, discharges or deposits" (Ill.Rev.Stat.1971, ch. 111 ½, par. 1033(c)(iv)). In *Processing & Books*, the appellate court had reversed an order of the Board on the ground that the complainant had failed to meet its burden of proof on the question of the unreasonableness of the odor involved in that case, because the complainant had failed to introduce evidence on several factors stated in section 33(c) of the Act, including the factor which is involved in this case, the technical practicability of reducing or eliminating the odor. See 28 Ill.App.3d 115, 118-19, 328 N.E.2d 79.
>
> This court unanimously reversed, holding that the word "unreasonable" in section 3(b) of the Act does not include the

technical practicability of abatement. Rather, the court unanimously held that the word "unreasonably" was intended only to "exclude the trifling inconvenience, petty annoyance or minor discomfort." (64 Ill.2d 68, 77 351 N.E.2d 865, 869.) The majority's opinion in the instant case silently overrules the foregoing unanimous holding of this court. Even if it were to do so expressly, however, I would not concur, because I believe that *Processing & Books* was correctly decided and should not be overruled.

Section 33(c) does not purport to, nor ought it be construed to, allocate burdens of proof. The only provision of the Act relevant to this case which does purport to allocate burdens of proof is section 31(c), which states that a complainant must show that the respondent has caused or threatened to cause air pollution, and which, in this case, means that the complainants were required to demonstrate that Wells' release of contaminants unreasonably interfered with the enjoyment of life or property. (See Ill.Rev.Stat. 1971, ch. 111 ½, par. 1003(b).) Contrary to what the majority apparently assumes, the factors listed in section 33(c) as being relevant to the "*reasonableness of the emissions, discharges or deposits involved*" do not (with the exception of (I) "the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people") further define the term "air pollution" and therefore are not elements of the complainant's burden of proof.

Rather, that these factors (as well as "all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits") must be considered by the Board means only that these factors are available as affirmative defenses in actions before the Board. Thus, not all those factors which the Board must consider in determining the reasonableness of respondent's conduct need be shown to demonstrate the unreasonableness of the harm caused by that conduct. As a general rule, in an action to enforce a right conferred by statute a complainant's burden normally is only to demonstrate the injury and its cause (cf. *e.g., Calvetti v. Seipp* (1967), 37 Ill.2d 596, 598-99, 227 N.E.2d 758; see generally, W. Prosser, Torts 190, 198-99 (4th ed. 1971)) – in this case, that the odor unreasonably interfered with the enjoyment of life or property, and that Wells caused the odor. Matters within the peculiar knowledge of the respondent, e.g. reasons why it ought not be punished for or prevented from causing the odor, such as the impossibility of profitably operating its business otherwise, or, as in this case, the alleged physical impossibility of significantly reducing or eliminating the odor, normally are not elements of a complainant's burden of proof. Even a massive and highly intrusive amount of discovery

> frequently would not enable a diligent but inexpert complainant to meet its burden of proof on this question, thereby frustrating the purposes of the Act. I do not believe that the General Assembly intended the remedies provided by this Act to be so illusory; nor do I believe that the General Assembly thought it feasible for complainants to meet the burden of proof established by the majority.

383 N.E.2d at 149.

In the case of *People v. IBP, Inc.,* 309 Ill.App.3d 631, 639 (3rd Dist. 1999), 723 N.E.2d 370, the Court held as follows:

> The Act's express language directs the Board to consider the section 33©) factors in making its determinations. Further, section 33 is included in the enforcement section of the Act, which describes the procedures that the Agency and the Board are to follow from investigation of an alleged violation through hearings and determinations in a proceeding. We find no evidence in the statute's language or in the surrounding provisions that leads this court to conclude that the language is intended to apply to actions brought in the circuit court. Where it is clear from the statute's language that the legislature did not include such a requirement, we will not find such a requirement. Additionally, our Supreme Court's construction of the Act likewise addresses only Board actions. We agree with the first district's conclusions in *Environment Protection Agency v. Fitz-Mar, Inc.*, 178 Ill. App. 3d 555 (1st. Dist. 1988), 533 N.E.2d 524, that section 33(c) applies to Board hearings only. As the court therein stated:
>
> > "Section 33(c) addresses hearings before the Board only and has no bearing on plaintiff's complaint and motion for injunctive relief. * * * [S]ection 33(c)'s specificity arises from the composition of the Board itself; its members are 'technically qualified' individuals only and not required to have any legal training. [Citation.] The guidance provided by section 33(c) is intended to prevent arbitrary Board decisions. [Citation.] No such considerations are needed to guide the circuit court." *Fitz-Mar, Inc.*, 178 Ill.App.3d at 563, 533 N.E.2d at 529.
>
> We recognize that the *Fitz-Mar* court was addressing a water pollution claim that did not include a reasonableness determination; however, the court's interpretation of the Act correctly follows rules of statutory construction and case precedent. . . .

309 Ill.App.3d at 639.

23. The Court's decision in *IBP, Inc.* held that in an action brought in the circuit court alleging a section 9(a) violation, the State is not required to allege facts regarding technological practicability and economic feasibility. It did not preclude courts from considering the section

33(c) factors when making a determination of reasonableness.

24. The factors Respondent Murphy raised in its affirmative defense, are factors applicable to the standards identified in the case law pertinent to odor air pollution in Illinois. In the case at bar, Respondent Murphy can, and most likely will, raise questions and attempt to introduce evidence as to "variable" "factors affecting the propagation of odors" and "reasonableness" pertinent to its ability to control odors, because Respondent Murphy knows such evidence is pertinent under the standards set forth in the Illinois Supreme Court's determination that the Act's provisions are constitutional. It is obvious, from the crafting of this affirmative defense, that Respondent Murphy certainly has been and is on notice as to the applicable standards. Respondent Murphy's third affirmative defense is a ruse.

Respondent's third affirmative defense is insufficiently pled, and it is a legal conclusion that is contrary to long-standing case law . It is not affirmative matter that will avoid the legal effect of or defeat Count I of the Third Amended Complaint. It should be struck.

WHEREFORE, on the foregoing grounds and for the foregoing reasons, Complainant respectfully requests that the Board strike Respondent Murphy Farms, Inc.'s Affirmative Defenses.

Respectfully submitted,

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