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JUL 21 2005

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

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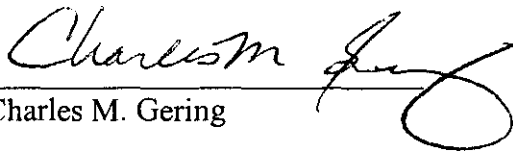
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PLEASE TAKE NOTICE that on July 21, 2005, I filed with the Office of the Clerk of the Illinois Pollution Control Board the original and nine copies of RESPONDENT MURPHY FARMS, INC.'S RESPONSE TO COMPLAINANT'S MOTION TO STRIKE RESPONDENT MURPHY'S AFFIRMATIVE DEFENSES, a copy of which is hereby served upon you.

Respectfully submitted,


Charles M. Gering

(THIS FILING IS MADE ON RECYCLED PAPER)

Dated: July 21, 2005

Charles M. Gering
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PCB No. 00-104
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**RESPONDENT MURPHY FARMS, INC.'S RESPONSE TO COMPLAINANT'S
MOTION TO STRIKE RESPONDENT MURPHY'S AFFIRMATIVE DEFENSES**

Respondent Murphy Farms, Inc. ("Murphy"), through its attorneys, McDermott Will & Emery LLP, states the following in response to Complainant's Motion to Strike Affirmative Defenses ("Motion"):

I. BACKGROUND

Complainant, People of the State of Illinois ("Complainant"), filed this enforcement action against Murphy alleging that Murphy violated the air and water pollution provisions of Illinois Environmental Protection Act (the "Act") and its implementing regulations. These allegations arose out of the operation of a hog farm by Respondent The Highlands, LLC ("The Highlands"). In Murphy's Answer and Affirmative Defenses to Second Amended Complaint, Murphy alleged three affirmative defenses:

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

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2. 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.

3. 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.

The Complainant now moves to strike Murphy's affirmative defenses. Murphy hereby withdraws its second affirmative defense. However, for the reasons discussed below, the Complainant's Motion should be denied with respect to Murphy's first and third affirmative defenses.¹

II. MURPHY'S FIRST AFFIRMATIVE DEFENSE SHOULD NOT BE STRICKEN BECAUSE THE FACTS GIVING RISE TO MURPHY'S LACHES DEFENSE WOULD NOT TAKE THE COMPLAINANT BY SURPRISE, AND BECAUSE MURPHY HAS RAISED THE POSSIBILITY OF PREVAILING ON LACHES.

The Complainant asserts in its Motion that Murphy's first affirmative defense 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 Complainant's complaint. (Motion at 4.) With these arguments, the Complainant misstates the pleading standard applicable to this case and improperly asks the Board to decide

¹ Alternatively, in the event that the Board determines that either Murphy's first or third affirmative defense should be stricken, Murphy respectfully requests leave to amend its answer or to otherwise re-plead the stricken affirmative defense. See 735 ILCS 5/2-616 (providing that amendments to pleadings "may be allowed on just and reasonable terms"). Given the early stage of this litigation, permitting Murphy to re-plead its affirmative defenses would not prejudice the Complainant and would be just and reasonable.

the merits of the affirmative defense. Therefore, the Board must deny the Complainant's Motion to Strike with respect to Murphy's first affirmative defense.

Murphy has sufficiently pled its affirmative defense based on laches. The Board has stated that section 2-613(d) of the Code of Civil Procedure provides guidance regarding the pleading of affirmative defenses. *People v. Midwest Grain*, PCB 97-179 (Aug. 21, 1997), slip op. at 3. This section provides, in relevant part, that "[t]he facts constituting any affirmative defense . . . 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." 735 ILCS 5/2-613(d). The Illinois Supreme Court has interpreted this provision to mean that a defendant is not required to restate facts already adequately pled in the complaint in order to raise an affirmative defense based thereon. *Fitzpatrick v. City of Chicago*, 112 Ill. 2d 211, 217-19, 492 N.E.2d 1292, 1294-95 (1986).

In this case, Murphy pled in its answer that the Complainant's complaint must be dismissed because the Complainant's claims against Murphy are barred by the doctrine of laches. 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. QC Finishers, Inc.*, PCB 01-7 (July 8, 2004), slip op. at 8. There are two principal elements of laches: lack of due diligence by the party asserting the claim, and prejudice to the opposing party. *Id.*

The Complainant's Second Amended Complaint alleges that the Illinois Environmental Protection Agency ("IEPA") received letters from Doug Lenhart, Director of Illinois Operations for Murphy Family Farms, and James Baird, a member of The Highlands, which provided descriptions of the proposed new swine production facility. (Second Am. Compl. at ¶¶ 33-34.)

The Second Amended Complaint further alleges that IEPA's responses "indicated a potential for possible odor problems" but did not state that the new facility, as proposed, would violate the Act or its implementing regulations. (*See Id.*) IEPA's failure to object to the proposed location of, or the proposed operation of The Highlands' farm resulted in prejudice to Murphy; if IEPA had advised Murphy and The Highlands that it objected to the proposed facility, Murphy and The Highlands would have had the opportunity to investigate options to address IEPA's objections. Instead, IEPA waited until The Highlands constructed and began operation of its farm, then complained about the location and operation of the farm consistent with The Highlands' proposal. The facts alleged in the Complainant's Second Amended Complaint provide the basis for Murphy's affirmative defense based on laches. Consequently, Complainant could not be surprised by the factual basis for Murphy's laches defense, and Murphy has sufficiently pled its affirmative defense.

Murphy has adequately pled an affirmative defense of laches and has therefore raised the possibility that Murphy will prevail on this defense. However, the Complainant argues that this affirmative defense must be stricken because "Murphy has failed to plead facts as to how this case qualifies as one exhibiting exceptional circumstances" required to apply laches to a public body. (Motion at 4-5.) The Complainant improperly asks the Board to decide the merits of the affirmative defense because Murphy does not have to prove, at this stage of the proceeding, that there are compelling circumstances in this case for the application of laches.

III. MURPHY'S THIRD AFFIRMATIVE DEFENSE SHOULD NOT BE STRICKEN BECAUSE MURPHY IS NOT REQUIRED TO PROVE THE MERITS OF ITS AFFIRMATIVE DEFENSE AT THIS TIME.

Murphy's third affirmative defense argues that the Complainant's 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." (Answer at 34-35.) The Complainant states that this affirmative defense should be stricken because "[t]he factors Respondent Murphy raised in its affirmative defense, [*sic*] are factors applicable to the standards identified in the case law pertinent to odor air pollution in Illinois." (Motion at 15.) More specifically, the Complainant argues that Murphy's affirmative defense was rejected by *City of Monmouth v. Pollution Control Board*, 57 Ill. 2d 482, 313 N.E.2d 161 (1974).

Complainants' response improperly puts the burden on Murphy to prove that its affirmative defense will be successful. However, Murphy is not required to prove the merits of its affirmative defense at this time. *See People v. Aargus Plastics, Inc.*, PCB 04-09 (May 20, 2004), slip op. at 9. Instead, Murphy is only required to "plead the defense in order to provide sufficient notice to the complainant to respond to the affirmative defense." *Id.* In its answer, Murphy has pled its affirmative defense regarding the unconstitutionality of the Act as applied to odor violations, and this pleading provides a sufficient basis to place the Complainant on notice of the affirmative defense. Therefore, the Board must deny the Complainant's Motion to Strike Murphy's third affirmative defense.

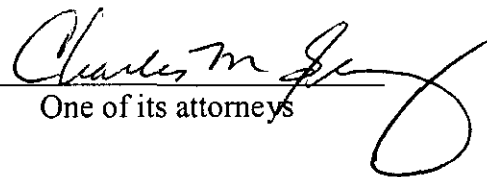
IV. CONCLUSION

For the foregoing reasons, Murphy respectfully requests that the Board deny the Complainant's Motion to Strike Murphy's first and third affirmative defenses.

Dated: July 21, 2005

Respectfully submitted,

MURPHY FARMS, INC.

By: 
One of its attorneys

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CERTIFICATE OF SERVICE

I, the undersigned attorney, certify that on July 21, 2005, I served the foregoing attached
RESPONDENT MURPHY FARMS, INC.'S RESPONSE TO COMPLAINANT'S MOTION
TO STRIKE RESPONDENT MURPHY'S AFFIRMATIVE DEFENSES, by U.S. Mail with
proper postage prepaid upon:

One copy:

Bradley Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 West Randolph
Chicago, IL 60601

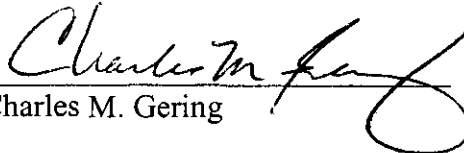
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Dated: July 21, 2005


Charles M. Gering

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