ILLINOIS POLLUTION CONTROL BOARD
October 20, 2005

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

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

On June 7, 2005, Murphy Farms, Inc. (Murphy Farms), filed an answer accompanied by three affirmative defenses to the violations alleged in all three counts of the People's second amended complaint. On July 5, 2005, the People moved to strike the affirmative defenses. Murphy Farms responded on July 21, 2005. Today the Board allows Murphy Farms to withdraw the second alleged affirmative defense and grants the People's motion to strike Murphy Farms' third alleged affirmative defense. The Board reserves ruling on the alleged defense of *laches*, allowing Murphy Farms to amend the pleadings regarding that affirmative defense.

Count I of the People's second amended complaint alleges air and odor pollution in violation of Section 9(a) of the Environmental Protection Act (Act) and Section 501.402(c)(3) of the Board's regulations. 415 ILCS 5/9(a) (2004); 35 Ill. Adm. Code 402(c)(3). Count II alleges water pollution in violation of Sections 12(a) and (f) of the Act and Sections 302.212(a) and (b), 501.405(a) of the Board's regulations, and Section 580.105 of the Environmental Protection Agency's (Agency) rules. 415 ILCS 5/12(a), (f) (2004); 35 Ill. Adm. Code 302.212(a), (b), 501.405(a), 580.105. Count III alleges water pollution by causing or allowing the ponding and accumulation of livestock waste so as to cause or tend to cause water pollution in violation of Section 12(a) of the Act and Section 501.405(a) of the Board's regulations. 415 ILCS 5/12(a) (2004); 35 Ill. Adm. Code 501.405(a). The complaint concerns respondents' swine facility located just south of Williamsfield in Elba Township, Knox County.

On June 7, 2005, Murphy Farms moved the Board for a one-day extension and answered the People's second amended complaint. On the same day, Murphy Farms also alleged three affirmative defenses to the alleged violations. Murphy Farms claimed all of the violations alleged in the complaint are be barred by the doctrine of *laches* as well as the applicable statutes of limitation. Murphy Farms also alleged the alleged odor violations must be dismissed as unconstitutionally vague. The People moved the Board to strike all three of the affirmative defenses. In its response, Murphy Farms withdraws the statutes of limitations defense. After considering the parties arguments, the Board grants the People's motion to strike the remaining

two defenses, yet allows Murphy Farms to re-plead the defense of *laches* in an amended or supplemental answer.

LEGAL FRAMEWORK

Section 3.115 of the Act defines "air pollution" as:

> presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property. 415 ILCS 5/3.115 (2004).

Section 3.165 of the Act defines "contaminant" as:

> any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source. 415 ILCS 5/3.165 (2004)

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) (2004).

MOTION TO STRIKE AFFIRMATIVE DEFENSES

Standard of Review

The Board's procedural rules provide that "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 hearing." 35 Ill. Adm. Code 103.204(d). In a valid 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 (Aug. 6, 1998).

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." Farmer's State Bank v. Phillips Petroleum Co., PCB 97-100, slip op. at 2, n. 1 (Jan. 23, 1997) (quoting *Black's Law Dictionary*). Furthermore, 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. Warner Agency v. Doyle, 121 Ill. App. 3d 219, 221, 459 N.E.2d 663, 635 (4th Dist. 1984).

A motion to strike an affirmative defense admits well-pled facts constituting the defense, only attacking the legal sufficiency of the facts. Int. Ins. 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 Ins. Co.,

183 Ill. App. 3d 847, 854, 539 N.E.2d 787 (1989). "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." Int. Ins., 609 N.E.2d at 854.

Affirmative Defenses

In its answer, Murphy Farms alleged that the second amended complaint must be dismissed in its entirety because the claims against Murphy Farms are barred by laches and the applicable statues of limitation or other applicable limitations periods. Further, Murphy Farms claimed the alleged odor violations must be dismissed as unconstitutionally vague because the allegations do not provide adequate notice of the conduct required to comply with the Act and that odors are variable and cannot be controlled. In its response, Murphy Farms withdraws the alleged statute of limitations affirmative defense. Therefore, the Board will only discuss and analyze the two remaining affirmative defenses below.

Laches

Murphy Farms states the complaint must be dismissed because the People's claims against Murphy are barred by the doctrine of *laches*. Ans. at 34.

The People contend Murphy Farms has failed to plead its first affirmative defense with any facts. Mot. at 4. The People cite to Section 103.204 of the Board's procedural rules, stating "any facts constituting an affirmative defense must be plainly set for the before hearing in the answer . . ." Mot. at 4; citing 35 Ill. Adm. Code 103.204. Because the *laches* defense is devoid of a single fact, the People argue, the defense must fail because it is insufficiently pled and also fails to assert any affirmative matter that would avoid the legal effect or defeat a cause of action set forth in the complaint. Mot. at 4. Consequently, the People state, Murphy Farms' first affirmative defense is insufficiently pled and should be struck. Mot. at 5.

In response, Murphy Farms states that it properly pled the defense of *laches* and has raised the possibility that Murphy Farms will prevail on this defense. Resp. at 3-4. Murphy Farms contends that when Murphy Farms and the Highlands presented the Agency with the proposal for the new swine production facility, the Agency's failure to object to the proposed location at that time prejudiced Murphy Farms. Resp. at 3. According to Murphy Farms, the Agency intentionally waited until The Highlands constructed and began operating the farm to "complain" about the location and operation of the farm. Resp. at 4.

The Board finds that *laches* may be valid affirmative defenses in some situations, but here the defense was insufficiently pled. *Laches* is a doctrine that bars relief to a plaintiff where, because of the plaintiff's delay in asserting a right, the defendant has been misled or prejudiced. People v. Crane, PCB 01-76, slip op. at 7 (May 17, 2001); People v. State Oil Co., PCB 97-103, slip op. at 2 (May 18, 2000). However, where the circumstances indicate that the party knowingly violated a restriction or a right and pressed ahead, suggesting a purpose to proceed regardless of the consequences, *laches* may not be used as an affirmative defense. Pettey v. First Nat. Bank, 225 Ill. App. 3d 539, 545, 167 Ill. Dec. 771, 588 N.E.2d 412 (1992).

Pursuant to Section 103.204 of the Board's procedural rules, "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 hearing." 35 Ill. Adm. Code 103.204(d). Illinois is a fact-pleading state and does not require the petitioner to plead all facts in the petition specifically, but at a minimum set out ultimate facts that support the cause of action. LaSalle Nat. Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297 (2nd Dist. 1993); People ex. Rel. Fahner v. Carriage Way West, Inc., 88 Ill.2d 300, 430 N.E.2d 1005, 58 Ill. Dec. 754 (1981), Bernice Loschen v. Grist Mill Confections, Inc., PCB 97-174 (Sept. 18, 1997).

Here, the Board finds that devoid of even a single fact, the defense of *laches*, as alleged in Murphy Farms' answer, is insufficiently pled. The Board agrees with Murphy Farms that it is not required to prove the merits of the affirmative defense in the answer. However, Illinois is a fact-pleading state and here, Murphy Farms has pled no "facts constituting an affirmative defense."

In a footnote to Murphy Farms' response to the motion to strike, Murphy Farms asks for leave to amend its answer or otherwise re-plead the stricken affirmative defense. Resp. at 4. Murphy Farms states that amending its answer at this stage in the proceeding would not prejudice the People and would be just and reasonable. No hearing has yet been held and Murphy Farms indicates in its response that facts and "compelling circumstances" support the alleged defense of *laches. Id*. Further, the Board has permitted respondents to amend pleadings to re-plead affirmative defenses in the past. *See* People v. Van Melle U.S.A., Inc., PCB 02-186, slip op. at 15-16 (Mar. 4, 2004); People v. Riverdale Recycling, Inc. and Tri-State Disposal, PCB 03-73 (Sept. 18, 2003). Thus, the Board reserves ruling on the motion to strike this affirmative defense to allow Murphy Farms leave of 30 days to amend its pleadings in accordance with the Board's procedural rules.

Unconstitutional Vagueness

As a third defense, Murphy Farms claims that the alleged odor violations are unconstitutionally vague because the allegations do "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." Ans. at 34-35.

The People move to strike the defense of unconstitutional vagueness because "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." Mot. at 7. The People contend that Board precedent has addressed factors that contribute to odor generation and dissemination as well as the technical practicability of controlling odor. Mot. at 8; citing Wells Mfg. Co. v. PCB, 73 Ill. 2d 226, 233, 383 N.E.2d 148 (1978). The People state that the Illinois Supreme Court has held that Section 9 of the Act is not unconstitutional, because when read together with the Act's definitions of "air pollution" and "contaminant," as well as Section 33(c), the Act contains sufficient standards for what constitutes air pollution. Mot. at 9-10; citing City of Monmouth, v. PCB, 57 Ill. 2d 482, 485-487, 313 N.E.2d 161, 163-164 (1974). The People raise additional

cases in which the Illinois Supreme Court has addressed the issue of odor air pollution: Incinerator, Inc. v. PCB, 59 Ill.2d 290, 300 (1974), Processing and Books v. PCB, 64 Ill.2d 68, 351 N.E.2d 865 (1976), Wells Mfg. Co., 383 N.E.2d 148. Thus, the People contend, Murphy Farms has been on notice since the 1970s of the standards the Board uses to in determining odor air pollution in Illinois. For this reason, the alleged defense of unconstitutional vagueness is not an affirmative matter that will defeat the People's legal right to bring an action for odor air pollution.

The People further state that Murphy Farms' third affirmative defense lacks facts specific to this case. Mot. at 8. The People state that the unconstitutional vagueness defense is merely a legal conclusion and provides no facts that would inform the People of the nature of the defense. Accordingly, the People argue the defense of unconstitutional vagueness is insufficiently pled, is a legal conclusion that is contrary to long-standing caselaw, and must be struck.

The Board grants the People's motion to strike the third alleged affirmative defense. The board agrees with the People that the proof necessary to establish all the essential elements of an air pollution violation is well-established by Board precedent and Illinois law. The Supreme Court of Illinois in Monmouth was faced with the question of whether Section 9 of the Act is unconstitutional because it lacks sufficient standards for determining what constitutes air pollution and because the Board has not adopted regulations and standards as contemplated by that section. The Monmouth Court held it was not. The Court held that "section 9(a), when read in conjunction with sections 3(b), 3(d) and 33(c), contains sufficient standards." As the People note, Sections 3(b) and 3(d) define "air pollution" and "contaminant," respectively. Monmouth v. PCB, 313 N.E.2d at 164. Section 33(c) lists factors the Board must consider in arriving at its decisions. The court in Processing and Books clarified that the complainant does not bear the burden of proof with respect to each of those factors. Processing and Books, 351 N.E.2d at 869. Rather reference to the statutory criteria insures that the Board considers those criteria in its review of the record. Wells Mfg. Co., 383 N.E.2d at 151. The Act defines the term "air pollution" as:

> the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property. 415 ILCS 5/3.115 (2004).

The Illinois Supreme Court has interpreted the term "unreasonably" as it is used in the Act's definition of "air pollution" as "excluding the trifling inconvenience, petty annoyance or minor discomfort." Processing and Books, 351 N.E.2d at 869.

The Board agrees with the People that the Illinois Supreme Court has clearly answered the question of constitutionality surrounding claims of odor air pollution, thus eliminating the claim of unconstitutional vagueness as a possible defense here. A review of the complaint shows that the allegations of odor pollution are numerous and plead with detail. The Board also notes that apart from its validity, Murphy Farms pled the affirmative defense without reference to any facts in support. For these reasons, the Board grants the People's motion and strikes the alleged affirmative defense of unconstitutional vagueness.

Conclusion

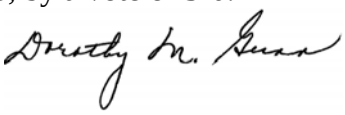
The Board allows Murphy Farms to withdraw the alleged statute of limitations affirmative defense. Further, the Board grants the People's motion and strikes the third affirmative defense of unconstitutional vagueness, as applied to the alleged odor air pollution violations. The Board will not strike the first alleged affirmative defense at this time. Rather, the Board grants Murphy Farms leave to re-plead the defense of *laches* as that defense applies to all of the alleged violations in the complaint.

ORDER

The Board allows Murphy Farms to withdraw the alleged statutes of limitations defense. The Board grants the People's motion to strike Murphy Farms' alleged affirmative defense that the odor air pollution claims in count III are unconstitutionally vague. Finally, the Board directs Murphy Farms to file an amended pleading by November 19, 2005, which is the 30th day from the date of this order, or the Board will strike the affirmative defense of *laches*.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 20, 2005, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board