

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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OCT 31 2005

STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
v.)
)
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.)

PCB No. 00-104
(Enforcement)

NOTICE OF FILING

To:

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

Jane E. McBride
Assistant Attorney General
Environmental Law Bureau
Office of the Illinois Attorney General
500 South Second Street
Springfield, IL 62706

Jeffrey W. Tock
Harrington & Tock
Suite 601
Huntington Towers
201 West Springfield Avenue
P.O. Box 1550
Champaign, IL 61824-1550

PLEASE TAKE NOTICE that on October 31, 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 AMENDED AFFIRMATIVE DEFENSE BASED ON LACHES TO ALL COUNTS OF THE SECOND AMENDED COMPLAINT, a copy of which is hereby served upon you.

Respectfully submitted,


Charles M. Gering

(THIS FILING IS MADE ON RECYCLED PAPER)

Dated: October 31, 2005

Charles M. Gering
McDermott Will & Emery LLP
227 West Monroe Street
Chicago, IL 60606
Phone: 312-372-2000
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**RESPONDENT MURPHY FARMS, INC.'S
AMENDED AFFIRMATIVE DEFENSE BASED ON LACHES
TO ALL COUNTS OF THE SECOND AMENDED COMPLAINT**

Respondent Murphy Farms, Inc. ("Murphy"), by and through its attorneys,
MCDERMOTT WILL & EMERY LLP, pursuant to the October 20, 2005 Board Order, hereby
states as its amended affirmative defense based on laches as follows:

1. On July 5 and August 14, 1996, Doug Lenhart, the Director of Illinois Operations
for Murphy, contacted Eric Ackerman of the Illinois Environmental Protection Agency ("IEPA")
to discuss Highlands' plans to construct a new hog farm. On May 6, 1997, James Baird of
Highlands contacted Mr. Ackerman regarding the same proposed farm. During these
conversations, Messrs. Lenhart and Baird provided a description of the new farm to Mr.
Ackerman, including its proposed location and operations.

2. On September 4, 1996, James Kammuller, Manager of the IEPA's Peoria
Regional Office, wrote a letter to Mr. Lenhart regarding the proposed farm. The letter stated that

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“[t]he description you provided of the new facility indicates that a potential for possible odor problems does exist.” Mr. KammueLLer wrote a letter to Mr. Baird on May 20, 1997 and similarly stated that “[t]he description provided of your proposed new swine facility indicates that a potential for possible odor problems does exist.” However, Mr. KammueLLer did not state in either letter that the new farm, as proposed, would violate the Illinois Environmental Protection Act (the “Act”). Furthermore, Mr. KammueLLer did not object to the proposed location or operations of the new farm.

3. The Complainant may reasonably be imputed to have the knowledge of IEPA employees regarding communications between members of the public and IEPA employees relating to matters regulated by the IEPA. *See Metro. Sanitary Dist. of Greater Chicago v. Anthony Pontarelli & Sons, Inc.*, 7 Ill. App. 3d 829, 840 (1st Dist. 1972) (notice to the agent of facts learned by him while actually engaged in the business of the principal is notice to the principal).

4. Construction of Highlands’ farm began in the fall of 1997. Highlands’ farm was constructed in the same location and with the same operations as was described to the Complainant by Messrs. Lenhart and Baird.

5. Complainant did not conduct an inspection of Highlands’ farm until April 23, 1998, after the farm was fully constructed and operational.

6. The Act provides that the IEPA “shall have the duty to collect and disseminate such information . . . as may be required to carry out the purposes of this Act.” 415 ILCS 5/4(b).

7. The Complainant did not attempt to contact Highlands or Murphy before or during the construction of Highlands' farm to inform Highlands or Murphy that the farm's location or operations would violate the Act.

8. Highlands and Murphy reasonably relied on the fact that Complainant did not object to the proposed location and operations of Highlands' farm in their belief that the farm was in compliance with the Act.

9. Highlands and Murphy had no reasonable way of knowing at the time of construction that the Complainant believed that the proposed location and/or operations violated the Act. Furthermore, Highlands and Murphy did not have any reason to believe that further investigation of the compliance status of the farm was necessary.

10. The Complainant could easily have informed Highlands and Murphy before or during construction of the farm that it believed that the proposed location and operations of the farm would violate the Act.

11. Complainant was aware or should have been aware that dissemination of this information to Highlands and Murphy would aid in enforcement of the Act.

12. Had the Complainant acted with due diligence by disseminating this information prior to or during the construction of Highlands' farm, the Complainant could have prevented Highlands' and Murphy's alleged noncompliance with Illinois law, thus preventing the harm alleged to the environment.

13. Complainant may reasonably be imputed to have knowledge of the details of the proposed location and operations of Highlands' farm approximately a year before construction of the farm began.

14. Even though Complainant had this knowledge and believed that the proposed location and operations would violate the Act, the Complainant did not contact Highlands or Murphy to assert its right to inspect the farm or to initiate the inquiries that led to the instant Complaint until April 23, 1998. Therefore, the Complainant did not demonstrate due diligence.

15. Complainant could easily have informed Highlands and Murphy of the violations perceived by the Complainant; however, Complainant chose to expend its resources on other sources and delayed in asserting its rights.

16. Highlands and Murphy have suffered, and will suffer, prejudice and injury as a result of Complainant's failure to act in a timely manner in that Highlands and Murphy were not given information that would have enabled them to achieve compliance earlier. As a result, they are incurring legal costs and are being pursued for penalties. In addition, if Highlands and Murphy had known prior to or during the construction of the farm that the IEPA would later claim that the farm's proposed location and operations would violate the Act, Highlands could have changed the location and operations of the farm.

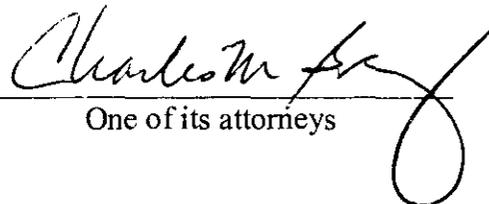
17. By the actions and inactions described above, Complainant failed to exercise due diligence and thereby caused prejudice to Highlands and Murphy. As a result, it would be

inequitable to allow Complainant to pursue the causes of action alleged in the Second Amended Complaint.

Dated: October 31, 2005

Respectfully submitted,

MURPHY FARMS, INC.

By: 
One of its attorneys

Charles M. Gering
McDermott Will & Emery LLP
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Chicago, Illinois 60606
Phone: 312-372-2000
Fax: 312-984-7700

CERTIFICATE OF SERVICE

I, the undersigned attorney, certify that on October 31, 2005, I served the foregoing attached RESPONDENT MURPHY FARMS, INC.'S AMENDED AFFIRMATIVE DEFENSE BASED ON LACHES TO ALL COUNTS OF THE SECOND AMENDED COMPLAINT, 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

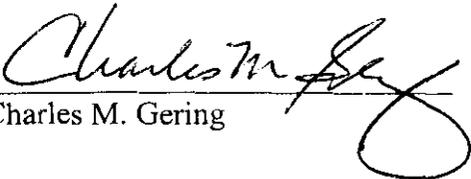
Jane E. McBride
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Dated: October 31, 2005


Charles M. Gering

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