BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
vs.	)	**No. 97-179**
	)	
MIDWEST GRAIN PRODUCTS OF ILLINOIS, INC., an Illinois corporation,	)	**(Enforcement)**
	)	
Respondent.	)	

NOTICE OF FILING

To: Dorothy M. Gunn, Clerk
Pollution Control Board
State of Illinois Center
100 West Randolph
Suite 11-500
Chicago, Illinois 60601

Jane E. McBride, Esq.
Assistant Attorney General
500 South Second Street
Springfield, IL 62706

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board Respondent Midwest Grain Products of Illinois, Inc.'s Response to Complainant's Motion to Strike Respondent's Affirmative Defenses, copies of which are herewith served upon you.

Dated this 2nd day of June, 1997.

HUSCH & EPPENBERGER

By Tracy S. Menges

Charles E. Merrill #06211606
Amy L. Wachs, *Pro hac vice*
Tracy S. Menges #06231131
100 North Broadway, Suite 1300
St. Louis, MO 63102
(314) 421-4800

THIS FILING IS SUBMITTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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Complainant,	)	
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RESPONSE TO COMPLAINANT'S MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES

Respondent Midwest Grain Products of Illinois, Inc. ("Midwest Grain") submits this Response to Complainant's Motion to Strike Respondent's Affirmative Defenses.

1. Paragraph A.

Complainant argues that Midwest Grain's first affirmative defense, set forth in Paragraph A of its Answer, states a legal conclusion and should therefore be stricken. This argument is incorrect; Paragraph A states not only a legal conclusion, but the fact on which that legal conclusion is based: "Midwest Grain discontinued use of its fluidized bed coal boiler in 1994."

Clearly, whether and when Midwest Grain discontinued use of its coal boiler is a fact. Midwest Grain will offer evidence as to the decrease in emissions resulting from the shut-down of the boiler, and evidence comparing its emissions to the threshold for applicability of the PSD regulations. The allegations in Paragraph A thus bear on whether Midwest Grain was a major stationary source subject to PSD regulations under the Clean Air Act, and directly controvert the allegations set forth in paragraphs 22 to 27 of Count I. If the Board finds that Midwest Grain was

not a major stationary source subject to PSD regulations, Complainant's cause of action in Count I will be defeated. Thus, the fact that Midwest Grain discontinued use of its fluidized bed boiler in 1994 constitutes an affirmative defense that may defeat the cause of action in the Complaint. Midwest Grain should therefore be allowed to plead this fact in its Answer.

The Illinois Code of Civil Procedure, which Complainant cites in its motion, supports Midwest Grain's right to plead facts which will defeat Complainant's cause of action, even if such facts do not constitute a traditional affirmative defense.

> The facts constituting any affirmative defense ... and **any defense which by other affirmative matters 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, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply.

735 ILCS 5/2-613(d)(Smith-Hurd 1993)(emphasis added). A true affirmative defense-such as the statute of limitations- defeats a cause of action even if the claimant's prima facie case is incontroverted. But the rule is broader; it permits pleading of any matters which may defeat the cause of action. Midwest Grain's position that it ceased to be a major source subject to PSD regulations at the time use of its coal-fired boiler was discontinued is not a traditional affirmative defense; rather, it really relates to Complainant's ability (or lack thereof) to prove a prima facie case of liability. However, it is a fact which, if true, will defeat Complainant's cause of action. Thus, to avoid surprising Complainant at the hearing of this matter, Midwest Grain has chosen to raise this ground in its Answer, as it is required to do under the Rule cited above. Midwest Grain should therefore be allowed to plead Paragraph A in its Answer.

should be determined at the hearing of this matter upon a full record, not at the pleading stage. *See Raprager v. Allstate Ins. Co.*, 183 Ill. App. 3d 847, 539 N.E.2d 787, 792 (1989)("A motion to strike an affirmative defense admits all well-pleaded facts constituting the defense together with all reasonable inferences which may be drawn therefrom.")(internal citations omitted.) Midwest Grain should therefore be allowed to plead this fact as an affirmative defense.

3. Paragraphs B and D.

Midwest Grain should be allowed to plead in Paragraphs B and D, facts in support of penalty mitigation. In determining the appropriate penalty, if any, to impose upon a respondent, the Board is authorized to consider any matters of record in mitigation or aggravation of a penalty, including but not limited to the following factors:

> (1) the duration and gravity of the violation;
> (2) the presence or absence of due diligence on the part of the violator in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by the Act;
> (3) any economic benefits accrued by the violator because of delay in compliance with the requirements;
> (4) the amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with this Act by the violator and other persons similarly subject to the Act; and
> (5) the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator.

415 ILCS 5/42 (Smith-Hurd Supp. 1997). In addition to defeating some or all of Complainant's claims, the facts alleged in Paragraphs B and D are also relevant to penalty mitigation.

Paragraph B of Midwest Grain's Answer, states:

> Midwest Grain acted in good faith ... Midwest Grain has worked steadily to improve upon the emission control system. Midwest Grain has been in frequent contact with IEPA regarding its difficulties with the system. ...

These facts clearly bear upon Midwest Grain's due diligence in attempting to comply with

2. Paragraph C.

Midwest Grain maintains that its agreement with IEPA to purchase and install additional emission control equipment, at substantial expense, is a compliance commitment agreement within the meaning of 415 ILCS 5/31 (Smith-Hurd Supp: 1997). Complainant argues that this section applies prospectively only; however, Complainant cites no law supporting this proposition. On the contrary, if an amendatory act merely affects the remedy or law of procedure, all rights of action will be enforceable under the new procedure even if they accrued prior to the change in the law. *See e.g. Levy v. McKiel*, 185 Ill. App. 3d 240, 541 N.E.2d 242, 244 (1989)(amendment to Hospital Licensing Act precluding recovery of civil damages was remedial in nature; therefore, amendment applied retroactively); *see also Niven v. Siqueira*, 109 Ill. 2d 357, 487 N.E.2d 937, 941 (1985)("A new law which affects only procedure generally applies to litigation pending when the new law takes effect. The term 'procedure,' in this context, has a much broader meaning than solely pleading or practice, and generally can be said to include rules of discovery, evidence, and privilege.")(internal citations omitted); *Sostak v. Sostak*, 113 Ill. App. 3d 954, 447 N.E.2d 1345, 1349 (1983)("Where an amendment is remedial in nature, all rights of action thereunder will be enforceable under the new procedure without regard to whether they accrued before or after such change of law or whether the suit has been instituted or not, unless there is a savings clause as to existing litigation.")

Complainant argues that even if this law applies retrospectively, nothing exists which might be construed as a Compliance Commitment Agreement. Whether or not Midwest Grain has entered into a Compliance Commitment Agreement is a question of fact. Midwest Grain has raised the fact that it entered into such an agreement as a fact constituting a defense. This fact

requirements of the Illinois Environmental Protection Act. Paragraph D of the Answer states:

> Midwest Grain has been in frequent contact with IEPA ... At no time has Midwest Grain disregarded the air permit regulations and it has worked steadily with IEPA to remedy the difficulties it has had as a result of the unexpected difficult engineering for its emissions.

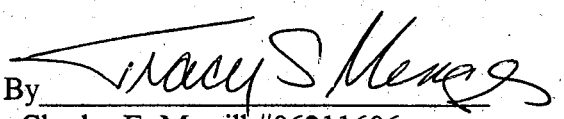
Likewise, these facts also bear upon Midwest Grain's due diligence in attempting to comply with the Act, and thus upon penalty mitigation. Even if these factual circumstances do not establish complete defenses to liability, Midwest Grain should be allowed to plead them in its Answer because of their relevance to the penalty issues.

As discussed above, Midwest Grain should be allowed to plead any grounds which will allow it to avoid, in whole or in part (*i.e.* in mitigation), Complainant's cause of action, and it is required to plead any grounds which might take Complainant by surprise. As facts relevant to penalty mitigation will help Midwest Grain to avoid the full amount of the penalty requested by Complainant, and they might take Complainant by surprise if not plead in the Answer, Midwest Grain should be allowed to plead them in its Answer.

WHEREFORE, Midwest Grain, by and through its attorneys, Husch & Eppenberger, respectfully requests an order denying Complainant's Motion to Strike Respondent's Affirmative Defenses, and granting such other relief as may be appropriate.

Respectfully submitted,

HUSCH and EPPENBERGER

By 

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100 N. Broadway, Suite 1300
St. Louis, Missouri 63102
(314) 421-4800

CERTIFICATE OF SERVICE

I hereby certify that I did on the 2nd day of June, 1997, send a true and accurate copy of the foregoing instrument by first class mail, postage prepaid to Complainant's attorney:

Jane E. McBride
Assistant Attorney General
Environmental Bureau
500 South Second Street
Springfield, IL 62706

and the originals and ten copies of the foregoing instrument by U.S. Mail, Express Mail Service, postage prepaid to:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
State of Illinois Center
Suite 11-500
100 West Randolph
Chicago, IL 60601

Tracy S. Mengel
Attorney

ORIGINAL

Husch & Eppenberger

Attorneys and Counselors at Law

100 N. Broadway
Suite 1300
St. Louis, Missouri 63102
fax: 314-421-0239
314-421-4800

June 2, 1997

VIA U.S. Mail -Express Mail Service

Ms. Dorothy M. Gunn, Clerk
Pollution Control Board
State of Illinois Center
100 West Randolph
Suite 11-500
Chicago, IL 60601

Re: **People of the State of Illinois v. Midwest Grain of Illinois, Inc.**
PCB No. 97-179

Dear Ms. Gunn:

Enclosed, for filing in the above-referenced matter, are an original and ten copies of Notice of Filing and Respondent Midwest Grain Products of Illinois's Response to Complainant's Motion to Strike Respondent's Affirmative Defenses.

Please file stamp the extra copy provided and return in the enclosed, self-addressed, stamped envelope.

Thank you for your assistance in this matter.

Very truly yours,

Tracy S. Menges

/ma

Encls.

STL-599363.01