BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, Complainant,	)	
v.	)	PCB No. 17 – 45 (Enforcement – Land)
MAGNA TAX SERVICE CO., INC., Respondent.	)	

NOTICE OF FILING

PLEASE TAKE NOTICE that today I have filed with the Office of the Clerk of the Pollution Control Board the Response to Complainant's Motion for Leave to Reply of Respondent and hereby serve the same upon you.

To: Pollution Control Board, Attn: Clerk
100 West Randolph Street
James R. Thompson Center, Suite 11-500
Chicago, Illinois 60601-3218
(via electronic filing)

Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, Illinois 62794-9274
(Via Email: carol.webb@illinois.gov)

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Respectfully submitted,
MAGNA TAX SERVICE CO., INC.

Dated: July 19, 2017

By: /s/William D. Ingersoll
One of its Attorneys

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, Complainant, v. MAGNA TAX SERVICE CO., INC., Respondent.	)))))))))	PCB No. 17 – 45 (Enforcement – Land)

RESPONSE TO COMPLAINANT'S MOTION FOR LEAVE TO REPLY

Respondent, MAGNA TAX SERVICE CO., INC., by its attorneys Brown, Hay & Stephens, LLP, pursuant to Section 101.500(d) of the Board's Procedural Rules (35 Ill. Adm. Code 101.500(d)) and consistent with the Hearing Officer Order of July 10, 2017, hereby files its Response to Complainant's Motion for Leave to Reply in this matter as follows:

I. INTRODUCTION

1. The Complaint in this matter was filed on February 2, 2017.

2. Respondent filed its Answer and Affirmative Defenses on April 7, 2017.

3. The Hearing Officer issued a scheduling order on May 2, 2017 regarding the filing of amended affirmative defenses, a motion to strike and any response to that motion. Instead of just describing the terms of the order, the Complainant characterizes the order as granting Respondent an extension of time. There was no extension of time requested or granted by the order. The filings covered by the scheduling order were timely made.

4. On July 5, 2017, Complainant filed a motion for leave to reply to Respondent's Response to the Complainant's Motion to Strike Affirmative Defenses. With the motion for leave, the Complainant included its proposed reply. Complainant's motion alleges that Respondent's response: "incorrectly presents the circumstances …;" "omitted relevant

background information;" inaccurately portrays communications; and, "mischaracterizes facts alleged in the Complaint." None of these allegations include citations to anything in the record. Complainant then argues that these unsupported claims will cause material prejudice to the Agency if a reply is not allowed.

5. Section 101.500(e) of the Board's Procedural Rules provides that "(t)he moving person will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice."

6. Instead of alleging sufficient facts to justify its claim of material prejudice in its motion, Complainant just makes the bald assertion that such prejudice would exist and then adds its proposed reply. The proposed reply expands on the allegations made in the Motion for Leave to Reply and then attempts to rehash the arguments Complainant made in the Motion to Strike., even including some new factual allegations regarding activities supposedly within the Section 31 pre-enforcement steps. If the Complainant needs to amend the Complaint to incorporate allegations about a proposed Compliance Commitment Agreement, it should do so. If it wishes to seek summary judgment, with adequate evidence attached, it should do so. We are now dealing with a complaint, an answer and affirmative defenses and a motion to strike the affirmative defenses and a response. The Complainant should not expand the discussion beyond that. The Complainant also seeks to argue the merits of the Affirmative Defenses rather than why they should be stricken. At this point, we are only here to determine whether the Respondent should be allowed to present the Affirmative Defenses. The merits of those will be determined after hearing or other pleadings (*e.g.,* summary judgment).

II. THE RESPONSE TO THE MOTION TO STRIKE DID NOT INCORRECTLY PRESENT, INACCURATELY PORTRAY OR MISCHARACTERIZE ANY CIRCUMSTANCES, FACTS OR AGENCY POSITION.

7. The inclusion of a copy of the May 2, 2012 Violation Notice could hardly be an attempt to mislead by providing some facts and leaving out others. Rather, it was included as documentary evidence that as of May 2, 2012, the IEPA believed the site eligible for entry into the Site Remediation Program, which is a point contrary to what Complainant argues in its Motion to Strike. It is not a new fact and does not mislead about anything in the Complaint. The Complaint itself even alleges that the Violation Notice instructed the Respondent to enroll the site into the Site Remediation Program. Complaint, Count I, ¶9. The inclusion of the Violation Notice is clearly part of a rebuttal to claims in the Motion to Strike Affirmative Defenses that the matter was not eligible for the Site Remediation Program. It was not a new fact or issue being raised for the first time in the Response. Complainant apparently believes that leaving out a proposed Compliance Commitment Agreement ("CCA"), as it attached to its proposed reply, was somehow misleading. Note that while the Complaint alleged that the following of Section 31 procedures (at Count I, ¶¶1 and 3), neither the CCA, nor any other Section 31 activity besides the Violation Notice, was mentioned in the Complaint.

8. The Respondent's Response to the Motion to Strike did argue that the Complaint omitted background relevant to the site – at the beginning of a discussion of the site's involvement in the Site Remediation Program. The Complainant and its client agency were quite aware of this history as said agency issued a No Further Remediation Letter to the site and it was discussed in the Motion to Strike. Was the Site Remediation Program history included in the Complaint? No. Then it was fair for the Respondent to point that out. Pointing out the omission of known site information in the Complaint is not mischaracterizing or

incorrectly presenting anything. And, since the Site Remediation Program activities were discussed in the both the affirmative defenses and the Motion to Strike Respondent's Affirmative Defenses commenting on it in the response was fair.

9. The Complainant argues that The Response to the Motion to Strike incorrectly claimed that the Complaint does not allege any time period during which Respondent refused to act. The Response to the Motion to Strike was quite correct on this point. The Complaint alleges a series of activities. In Count I, ¶¶11 and 12, site activities are alleged on September 5, 2012. Then at ¶13, site activities are alleged on September 13, 2013. There is no allegation regarding the intervening time, either describing activity or the lack thereof. The Complainant continues to argue its conclusion that nothing occurred, but there is no allegation in the Complaint to that effect. Just hopping from the 2012 date to the 2013 date in the successive paragraphs in the Complaint does not by itself allege the absence of activity. If the Complainant wants to keep hammering that point at every chance, maybe it should amend the Complaint to allege a lack of activity during that time, but consultation with the client agency and a review of its files would be advised before making such an amendment.

10. The Response to the Motion to Strike did not concede any point as to applicability of Section 58.9 ***to the site*** as it existed at the time the Violation Notice was issued. The Agency had issued a No Further Remediation Letter absolving the Respondent from further liability for a lengthy list of chemicals. The Respondent's contention was and is that the mere existence of these chemicals at the site does not constitute waste dumping, storage, disposal, etc. The No Further Remediation Letter authorized the continued presence of these chemicals. The Complainant continues to argue the merits of the Affirmative Defenses, which is a different issue than whether the Affirmative Defenses can be used. The merits can be

dealt with through a hearing or by proper pre-hearing dispositive motions.

11. The Complainant then makes a factual argument in its proposed reply about the sufficiency or insufficiency of Affirmative Defense II. This is little more than another argument of the same claim made in Section III.B (pages 8 – 11) of Complainant's Motion to Strike. Like in the Motion to Strike, factual arguments are presented about the scope of the investigation that lead to the 2008 No Further Remediation Letter, but it seems clear that the arguments were made without reading the hundreds of pages of the administrative record of that matter. This is surely not the legitimate use of a reply to a response.

III. CONCLUSION

11. The Complainant has made several claims that the Response to the Motion to Strike made new incorrect statements and mischaracterized facts alleged in the Complaint. We believe the discussion above shows this to not be correct. The Response did not go outside the Motion to Strike or the record before the Board. Further, the Motion for Leave to Reply seems really an excuse to make a reply to have another opportunity to work on arguments already made in the motion. This is not a basis for finding that material prejudice would occur. Compare the Complainant's Motion for Leave to Reply here with the successful one filed by the IEPA in *City v. Quincy v. IEPA*, PCB 08-86. In its April 7, 2010 Motion for Leave to Reply, IEPA alleged a very specific example of a mischaracterization – *i.e.*, the City claimed that the IEPA contended that "summary judgment motions are not allowed in NPDES permit appeals." That was apparently not a fair reading of the pleadings. The Board concluded that this was a serious enough mischaracterization that a reply would be allowed to prevent material prejudice. No such specific citation to any actual mischaracterization was offered in the

Motion for Leave to Reply. In addition, the Complainant's attempts to make such claims in its proposed reply are rebutted above. The Response to the Motion to Strike Affirmative Defenses did not make any of the mischaracterizations alleged by the Complainant.

WHEREFORE, Respondent Magna Tax respectfully requests that the Complainant's Motion for Leave to Reply be denied and the reply that accompanied the motion be stricken.

Respectfully submitted,
MAGNA TAX SERVICE CO., INC.

Dated: July 19, 2017

By: ___/s/William D. Ingersoll_____
One of its Attorneys

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CERTIFICATE OF E-MAIL SERVICE

I, William D. Ingersoll, certify that I have this date served the attached Notice of Filing and Response to Complainant's Motion for Leave to Reply by e-mail as described below and from my e-mail address as indicated below, upon the following persons:

To: Carol Webb
Hearing Officer
Illinois Pollution Control Board
carol.webb@illinois.gov

Rachel Medina
Assistant Attorney General
Environmental Bureau
rmedina@atg.state.il.us

The number of pages in this e-mail transmission is eight (8).

Dated: July 19, 2017

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