ILLINOIS POLLUTION CONTROL BOARD
March 16, 2000

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 97-193
	)	(Enforcement - Land)
COMMUNITY LANDFILL COMPANY, INC., an Illinois corporation,	)	
	)	
	)	
Respondent.	)	

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

This matter is before the Board on a motion for leave to file a second amended complaint and a second amended complaint filed on November 24, 1999, by complainant, the Illinois Attorney General's Office, on behalf of the People of the State of Illinois. On December 20, 1999, respondent Community Landfill Company (CLC) filed a response in opposition to complainant's motion to file a second amended complaint (response). On December 27, 1999, complainant filed a motion for leave to file a reply which was granted in a hearing officer order on January 21, 2000. On January 28, 2000, complainant filed a reply in support of its motion for leave to file an amended complaint. On February 1, 2000, CLC filed its motion for leave to file a surreply brief. On February 4, 2000, complainant filed a response in opposition to CLC's motion to file a surreply brief. On February 9, 2000, the hearing officer granted complainant's motion to file a surreply brief. On February 14, 2000, respondent filed its surreply brief.[1]

In the response, respondent takes issue with substantive matters in the second amended complaint. As a result, the Board construes the response as a motion to dismiss the second amended complaint. Respondent claims that the second amended complaint violates Section 31 of the Act and the "just and reasonable" standard at Section 616(a) of the Illinois Code of Civil Procedure. 415 ILCS 5/31 (1998); 735 ILCS 5/2-616(a) (1998).

For the reasons stated below, the Board declines to dismiss the second amended complaint.

[1] CLC's response in opposition to the second amended complaint will be cited as "Resp. at _". Complainant's reply will be cited as "Reply at _". CLC's surreply will be cited as "Surreply at _".

BACKGROUND[2]

CLC operates a permitted landfill (landfill) located at 1501 Ashley Road in Morris, Grundy County, Illinois. On May 1, 1997, complainant filed an initial six-count complaint in this matter. Complainant alleged that CLC violated various Sections of the Illinois Environmental Protection Act (Act) and the Board's regulations with respect to managing waste and controlling pollution at the landfill. Many of the allegations arose from inspections that the Illinois Environmental Protection Agency (Agency) conducted at the landfill at various times from 1993 to 1996. The other allegations related to financial assurance and failure to timely file a significant modification application.

On April 3, 1998, complainant filed a motion for leave to file its first amended complaint and its first amended complaint. Complainant reiterated the allegations from the initial complaint and added new allegations. Complainant additionally alleged that CLC violated its permit and engaged in open dumping.

CLC filed an answer and four affirmative defenses to the first amended complaint on June 5, 1998. On June 26, 1998, complainant filed a motion to strike three of CLC's four affirmative defenses. On July 6, 1998, CLC filed a response opposing complainant's motion. On August 6, 1998, the Board issued an order striking all four of CLC's affirmative defenses.

In the second amended complaint, complainant reiterated the allegations from the first amended complaint and added new allegations. Complainant further alleged that CLC improperly disposed asbestos and used tires, and complainant alleged that CLC conducted waste disposal operations without a permit. Complainant also alleged additional violations of permits and financial assurance regulations.

This matter has not yet proceeded to hearing nor have any future hearing dates been set.

PRE-ENFORCEMENT NOTICE: SECTION 31 OF THE ACT

Within 180 days of the alleged violation, the Agency must serve the alleged violator with an "evidence of violation notice". This written notice must contain information specified in Section 31(a) of the Act. 415 ILCS 5/31(a) (1998). The alleged violator may request a meeting with the Agency to respond to the alleged violations and to try and resolve them. If the alleged violator waives the meeting or if the Agency and the alleged violator are not able to resolve all of the alleged violations, the Agency must notify the alleged violator that it intends to pursue legal action. 415 ILCS 5/31(b) (1998). The Agency must again describe the alleged violations and offer the alleged violator another opportunity to meet with the Agency to resolve the allegations. This second notification must occur before the Agency refers the matter to complainant or a local State's Attorney for prosecution. *Id*. The law provides that these

[2] The information here has been taken from the second amended complaint. CLC has denied many of the allegations. In reciting this narrative, the Board makes no finding as to the validity of the allegations.

exchanges and or meetings prior to referral are not to be held in the presence of complainant or a State's Attorney. People v. Geon (October 2, 1997), PCB 97-62, slip op. at 9.

If there is no referral from the Agency, complainant (or any other person) may also bring an action to enforce the Act without following the procedures in Sections 31(a) and 31(b). See 415 ILCS 5/31(d) (1998).

Arguments

CLC argues that the Agency did not follow the notice and hearing requirements set forth in Section 31 of the Act for the new allegations in the second amended complaint. CLC claims that it was neither offered an opportunity to respond to the new allegations in writing nor was it offered an opportunity to meet with Agency representatives to discuss the new counts. CLC also claims that the Agency did not notify CLC of its intention to pursue legal action on the new allegations. Resp. at 5; surreply at 1-2. CLC states that the Agency followed Section 31 requirements with respect to the new allegations in the first amended complaint and argues that that the Agency should have done the same for the new allegations in the second amended complaint. Surreply at 2-3, Exh. A.

Complainant replies that it drafted the new counts in the second amended complaint using "a request for continuing information" from the Agency. However, complainant maintains that the new allegations fall outside the Agency's referral process. Reply at 4. Complainant states that it brought the second amended complaint on its own motion, which is "separate and distinct" from its authority to bring an action on behalf of the Agency. Complainant contends that it can bring actions under its own motion and still comply with Section 31 of the Act. Reply at 4-5.

CLC replies that the "request for continuing information" amounts to complainant bringing the second amended complaint on behalf of the Agency. CLC cites Agency inspection reports as the source of all of the new allegations in the amended complaint. Surreply at 3, Exh. B. CLC also claims that "all matters of substance, including the authority to settle this matter, have been controlled by the IEPA's lawyers, not the Assistant Attorneys General assigned to this case." Surreply at 3.

Complainant could have made these new allegations in a new legal proceeding against CLC, but decided instead to amend the first amended complaint. Resp. at 2-3. CLC states that this line of argument is irrelevant. It states that complainant neglected to comply with Section 31 in the second amended complaint and that the Board should deny complainant's motion for leave to file the second amended complaint. Surreply at 4.

Discussion

If the Agency wishes to refer a case to complainant under Section 31(c) of the Act, then the Agency must follow the steps outlined in Sections 31(a) and 31(b) prior to referral. 415 ILCS 5/31(c) (1998). However, the Board acknowledges complainant's right to bring allegations on its own motion pursuant to Section 31(d) of the Act. 415 ILCS 5/31(d) (1998);

People v. Heuermann (September 18, 1997), PCB 97-92, slip op. at 7; Geon, slip op. at 9; People v. Chemetco (July 8, 1998), PCB 96-76.

Complainant admits that the new allegations in the second amended complaint come from information that it obtained from the Agency. Reply at 4. However, the Board finds that this process lies outside the Agency's referral process as it is described in Sections 31(a) through 31(c) of the Act. The Board finds that complainant brought the second amended complaint on its own motion pursuant to Section 31(d) of the Act. Even though it was using information from the Agency, complainant did not bring the new allegations on behalf of the Agency but solely on behalf of the people as stated on the face of the second amended complaint.

AMENDMENT OF PLEADINGS

CLC cites a provision in the Illinois Code of Civil Procedure which provides that "[a]t any time before final judgment amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or defendant, dismissing any party, changing the cause of action or defense or adding new causes of action or defenses . . ." 735 ILCS 5/2-616(a) (1998). The Illinois Supreme Court defines "just and reasonable" as "requiring the trial court to permit amendment if it will further the ends of justice". Loyola Academy v. S & S Roof Maintenance, Inc. 146 Ill. 2d 263, 272-273, 586 N.E.2d 1211, 1215 (1992); W.E. Erickson Construction, Inc. *et al.* v. Chicago Title Insurance Company, 266 Ill. App. 3d 905, 912, 641 N.E. 2d 861, 866 (1st Dist. 1994).

CLC also cites a test adopted by the Illinois Supreme Court in Loyola which determines if a trial court has abused its discretion in allowing an amended complaint pursuant to Section 2-616 of the Illinois Code of Civil Procedure. A court may allow an amended complaint only if such amendments cure defective pleading, do not prejudice or surprise other parties, and are timely. In addition, the moving party cannot have had previous opportunities to amend. Loyola, 146 Ill. 2d at 273-276, 586 N.E.2d at 1215-1217.

However, the Board's procedural rules provide that

> [t]he provisions of the Code of Civil Procedure . . . do not expressly apply to proceedings before the Board. However, in any absence of a specific provision in these procedural rules to govern a particular situation, the parties or participants may argue that a particular provision of the Code of Civil Procedure or the Illinois Supreme Court rules provides guidance for the Board or hearing officer." 35 Ill. Adm. Code 101.100(b).

Although the Board's procedural rules do not directly address the amendment of complaints, they do address the amendment of pleadings in general: "Proof may depart from pleadings and pleadings may be amended to conform to proof, so long as no undue surprise results that cannot be remedied by a continuance." 35 Ill. Adm. Code 103.210(a).

Thus, Section 103.210 of the Board's rules governs the amendment of complaints, and the Board need not look to Section 2-616 of the Illinois Code of Civil Procedure nor the Loyola test.

Arguments

CLC contends that the Board would abuse its discretion if it allows the second amended complaint under the circumstances of this case. CLC claims that complainant does not have an "absolute right" to amend a pleading at the pre-hearing stage in the proceedings. Resp. at 2-3. CLC also claims that the new allegations are prejudicial to CLC and that the new allegations will further delay discovery. Resp. at 3-4.

Complainant replies that the Board regularly allows the filing of amended complaints, including allowing the filing of the first amended complaint in this matter. Reply at 2. Complainant states that CLC is not prejudiced by the filing of the second amended complaint. Complainant also claims that CLC would not be prejudiced if the new allegations were filed as a separate complaint, so CLC can not be prejudiced by the new allegations added to the initial complaint. Complainant asserts that it filed a second amended complaint in the interests of judicial economy: The allegations in the second amended complaint (including the repeated initial allegations) involve the same site, the same parties, and several continuing alleged violations. Reply 2-3. Complainant also claims that CLC will not be prejudiced by the added discovery that will result from the new allegations. Reply at 3.

Discussion

Conforming Pleadings to Proof

The new allegations conform to new information that the Agency supplied to complainant from the Agency's recent inspections at the landfill. Complainant also added allegations about violations of permits, violations of financial assurance regulations, and improperly disposed asbestos and used tires. Complainant brought these new allegations against the same party (regarding the same landfill) that was the focus of the complaint and the first amended complaint. The Board finds that the second amended complaint conforms to proof.

Surprise

Complainant's new allegations concern the same party and the same landfill. Many of the new allegations in the second amended complaint are updates because the Agency observed the same alleged violations at each subsequent inspection. The parties are still engaged in discovery, and this matter has not yet progressed to hearing.

The Board has allowed amended complaints in similar circumstances and has found no undue surprise. Krautsack v. Patel (December 20, 1995), PCB 95-143; People v. Chemetco (May 7, 1998), PCB 96-76; Behrmann v. Okawville Farmers Elevator - St. Libory (September

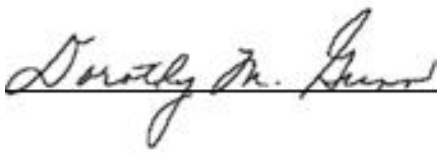
3, 1998) PCB 98-84. Likewise, the Board finds that CLC is not surprised by the motion to file the second amended complaint.

CONCLUSION

For the reasons above, the Board declines to dismiss the second amended complaint. This matter will proceed to hearing. The hearing must be scheduled and completed in a timely manner, consistent with Board practices. The assigned hearing officer shall inform the Clerk of the Board of the time and location of the hearing at least 30 days in advance of the hearing so that a 21-day public notice of hearing may be published.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 16th day of March 2000 by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board