

ILLINOIS POLLUTION CONTROL BOARD
August 6, 1998

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 comes before the Board on a motion to strike affirmative defenses (motion to strike) filed by the Illinois Attorney General's Office on behalf of the People of the State of Illinois (complainant) on June 26, 1998. On July 7, 1998, Community Landfill Company, Inc. (CLC) filed a response in opposition to complainant's motion to strike.

On May 1, 1997, complainant filed a six-count complaint alleging that respondent, owner of a permitted sanitary landfill in Grundy County, violated various sections of the Environmental Protection Act (the Act) (415 ILCS 5/1 *et seq.* (1996)) and the Board's waste disposal regulations. In response to the complaint, on June 2, 1997, CLC filed its answer and affirmative defenses. On April 3, 1998, complainant filed an amended complaint (complaint) adding four additional counts. On June 5, 1998, CLC filed an amended answer and amended affirmative defenses (answer).

For the reasons stated below, the Board grants complainant's motion to strike the first, third, and fourth affirmative defenses. Also, on its own motion, the Board strikes the second affirmative defense.

BACKGROUND¹

CLC's landfill (landfill) is located at 1501 Ashley Road in Morris. Counts I through III and VI in the complaint arose from inspections by the Illinois Environmental Protection Agency (Agency). The inspections took place on August 18, 1993, April 7, 1994, March 22, 1995, and May 22, 1995. Complaint at 4. The remaining counts pertain to financial assurance, failure to timely file a significant modification application, and overweight, among other things, as discussed below. In each of the counts I through X, complainant alleged that CLC had violated various sections of the Act and/or the Board's waste disposal regulations.

¹ The information here has been taken from the allegations in the amended complaint. CLC has denied most of the allegations. In reciting this narrative, the Board makes no finding as to the validity of the allegations.

Complainant requested that the Board order CLC to cease and desist from further violations and to pay civil penalties and costs.

Count I

During one or more of three inspections, the Agency alleged that litter was in the landfill's perimeter drainage ditch, landfill perimeter ditches, and eroded areas where leachate seeps had exposed previously covered landfill areas. Complaint at 4-5.

Count II

During three inspections, the Agency alleged that leachate was seeping from various parts of the landfill. Complaint at 8.

Count III

During two inspections, the Agency alleged that landscape waste was deposited in the landfill. Complaint at 11.

Count IV

Complainant alleged that CLC did not provide sufficient financial assurance for the landfill. Complaint at 13-14.

Count V

Complainant alleged that CLC neglected to timely file the required significant modification application for Parcel B of the landfill. Complaint at 16-17.

Count VI

During the May 22, 1995 inspection, the Agency inspector alleged that leachate was in a landfill ditch that eventually drains into the Illinois River. Complaint at 18-19.

Counts VII, VIII, IX, and X

Complainant alleged that CLC deposited waste in Parcel B of the landfill to a height of 590 feet above sea level. However, CLC's existing permit only allows for deposits up to 580 feet above sea level. CLC did not request a significant modification to its permit until after the waste had already been deposited. Complaint at 21-30.

ARGUMENTS

First Affirmative Defense

CLC argues that there are no ongoing violations at the landfill, with the exception of those alleged in counts VII through X. CLC states that all of the alleged violations in counts I through VI were corrected prior to the filing of the complaint in this matter. Answer at 40. Regarding counts VII through X, CLC has proposed to voluntarily address the overfill. *Id.* CLC claims that there is no need for a cease and desist order and that the order would be illegal as a prior restraint against activities at the landfill. *Id.*

Second Affirmative Defense

CLC next argues that complainant is not entitled to attorney fees, costs, or expert witness fees. Answer at 40. Complainant has not moved to strike this affirmative defense.

Third Affirmative Defense

CLC states that complainant's proposed civil penalties are excessive and do not take into account mitigation factors such as CLC's diligence in attempting to correct the alleged violations and the lack of economic benefits for CLC as a result of the delay in compliance. Answer at 40-41.

Fourth Affirmative Defense

CLC's last defense is that the proposed civil penalties are disproportionate with Board and Illinois appellate court precedent on the failure to file significant landfill permit modification applications. Answer at 41. In addition, CLC alleges that the Agency pursued civil penalties for the failure to file the significant permit application in response to an earlier appellate court ruling (Community Landfill Co. v. Illinois Environmental Protection Agency and Illinois Pollution Control Board, No. 3-96-0182 (1996) (unpublished order under Illinois Supreme Court Rule 23)) in favor of CLC and against the Board and the Agency. *Id.*

Complainant's Motion to Strike

Complainant argues that CLC's first, third, and fourth affirmative defenses are improper because these affirmative defenses do not avoid the legal effect or defeat the cause of action set forth in the complaint. Motion to Strike at 3.

STANDARD OF REVIEW

An affirmative defense is respondent's allegation of "new facts or arguments that, if true, will defeat . . . the government's claim even if all allegations in the complaint are true." Black's Law Dictionary 175 (6th ed. 1990).

35 Ill. Adm. Code 103.122(d) provides, in pertinent part, that:

Any facts constituting an affirmative defense which would be likely to take the complainant by surprise must be plainly set forth prior to hearing in the answer or in a supplemental answer filed pursuant to Section 103.210(b).

Other than Section 103.122(d), the Board's regulations give no further guidance on the pleading of affirmative defenses. However, 35 Ill. Adm. Code 101.100(b) provides, in pertinent part, that:

in any absence of a specific provision of the 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 provide guidance for the Board or hearing officer.

The Code of Civil Procedure gives additional guidance on the pleading of affirmative defenses. Section 2-613(d) (735 ILCS 5/2-613(d) (1996)) provides, in pertinent part:

The facts constituting any affirmative defense . . . and any defense which by other affirmative matter 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.

The Board finds that there are substantive reasons for striking the affirmative defenses as discussed in the ensuing sections.

DISCUSSION

First Affirmative Defense

CLC states that there are no ongoing (emphasis added) violations at the landfill with respect to counts I through VI. Answer at 40. However, CLC is silent about the alleged violations that the Agency observed during its inspections from 1993 through 1995, the alleged failure to provide and maintain financial assurance during 1993 and 1994, and the alleged failure to timely file the application for a significant modification permit. Thus, CLC does not address the alleged violations in the complaint.

CLC then states that it will (emphasis added) address Counts VII through X. Answer at 40. However, complainant alleges a violation of the permit which did not and does not allow for the overfill of the landfill. Again, CLC does not address the alleged violations in the complaint.

CLC's first affirmative defense sets forth mitigating factors which, if proven, could affect the appropriate penalty, if any, to be imposed, but these factors do not address whether or not an alleged violation of the Act has taken place. People v. Midwest Grain Products of Illinois, Inc. (August 21, 1997), PCB 97-179, slip op. at 5. In addition, the Act expressly

states that the Board should consider subsequent compliance when entering a final order and assessing penalties. See 415 ILCS 5/33(c)(v) and 5/42(h)(2)(1996). In the same affirmative defense, CLC states that there is no need for a cease and desist order and that any such order would be illegal as a prior restraint against activities at the landfill. Answer at 40. Complainant correctly assesses that:

[o]rdering Respondent to cease and desist from further violations of the enumerated sections of the Act and the Board regulations is, in effect, Ordering [sic] Respondent to comply with those laws. Respondent's assertion that a cease and desist order is illegal as a prior restraint against activities at the landfill, is not a valid affirmative defense, because the cease and desist orders prayed for by Complainant will merely require the Respondent to operate its landfill in accordance with the law, which Respondent is already required to do. Motion to Strike at 5.

The Board grants complainant's motion to strike the first affirmative defense because it does not avoid the legal effect or defeat the cause of action.

Second Affirmative Defense

The Board has the authority to impose attorney fees and other costs on a party. Whether or not the Board decides to impose such costs on CLC in this case will be decided after the hearing. The second affirmative defense does not avoid the legal effect or defeat the cause of action. Therefore, the Board, on its own motion, strikes CLC's second affirmative defense.

Third and Fourth Affirmative Defenses

CLC alleges that the penalties prayed for by complainant are either excessive or unwarranted. A defense which speaks to the imposition of a penalty, rather than the underlying cause of action, is not an "affirmative defense" to that cause of action. People v. American Waste Processing Ltd. (March 19, 1998), PCB 98-37, slip op. at 4; People v. Douglas Furniture of California, Inc. (May 1, 1997), PCB 97-133, slip op. at 6.

The underlying cause of action is the alleged violations of the Act and the Board's waste disposal rules at the landfill. Again, the third and fourth affirmative defenses do not avoid the legal effect or defeat the cause of action. As a result, CLC's third and fourth affirmative defenses are stricken.

CONCLUSION

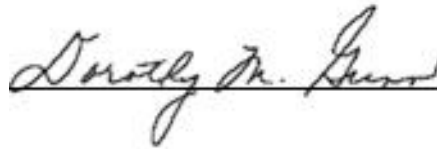
Again, the Board grants complainant's motion to strike the first, third, and fourth affirmative defenses, and the Board strikes the second affirmative defense on its own motion.

Accordingly, 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.

The Board notes that at hearing CLC will have the opportunity to address all issues raised in its response, including the affirmative defenses.

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 6th day of August 1998 by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", is written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board