

ILLINOIS POLLUTION CONTROL BOARD
September 8, 2016

JOHNS MANVILLE,)
)
Complainant,)
)
v.) PCB 14-3
) (Enforcement)
ILLINOIS DEPARTMENT OF)
TRANSPORTATION,)
)
Respondent.)

ORDER OF THE BOARD (by J.A. Burke):

Johns Manville (JM) alleges that the Illinois Department of Transportation (IDOT) violated Section 21 of the Environmental Protection Act (Act) by disposing asbestos waste at a site in Waukegan, Lake County. 415 ILCS 5/21 (2014). The Board conducted five days of hearing on May 23-25 and June 23-24, 2016. JM moves to file a third amended complaint to conform the pleadings to proof introduced at hearing. IDOT contends that the motion is untimely and that, by bringing the motion after hearing, JM has denied IDOT the opportunity to fully and adequately defend itself against the allegations.

The Board's procedural rules do not directly address motions to conform the pleadings. The Board therefore looks to the Illinois Code of Civil Procedure for guidance. 415 ILCS 5/101.100(b). Under the Code of Civil Procedure, a pleading may be amended at any time before or after judgment to conform the pleadings to the proof. 735 ILCS 5/2-616(c). Amendments to pleadings to conform to the proof submitted are to be liberally allowed within the sound discretion of the hearing body. Knox v. Turriss Coal Co. and AEI Resources, Inc., PCB 00-140, slip op. at 6 (Jan. 9, 2003). The Board previously allowed such motions where the allegation is "a natural outgrowth of the hearing and discovery process and . . . comes as no surprise." People v. ESG Watts, Inc., PCB 96-107, slip op. at 4 (Feb. 5, 1998).

JM seeks to clarify allegations that IDOT violated Section 21 of the Act as to rights-of-way on both Site 3 and Site 6. IDOT contends that JM's motion is untimely because JM had information relating to IDOT's interest in the rights-of-way possibly even before this action was filed, and that bringing the motion now prejudices IDOT. The Board finds that the allegations are a natural outgrowth of the hearing and IDOT will not be materially prejudiced by allowing the amendments. JM's prior complaint includes allegations relating to IDOT activities on the north side of Greenwood Avenue (which passes through Site 6). *See, e.g.*, Second Amended Complaint at ¶¶67, 73. At hearing, IDOT's witness discussed asbestos-containing-material found on the north side of Greenwood Avenue. Transcript at 178 (May 25, 2016). Later, JM's witness described how IDOT's witness superimposed additional asbestos locations on a JM exhibit, showing the presence of asbestos-containing-material along the right-of-way north of Greenwood Avenue. Tr. at 197 (June 29, 2016). Conforming the pleadings to these facts is a

natural outgrowth of the hearing and discovery in this case. Further, the proof required to defend the alleged violation is not materially different from defending the previously alleged violations. Knox, PCB 00-140, slip op. at 6.

JM also seeks to allege that IDOT violated both the current version of Section 21 of the Act and the version that was in place in 1970 (and subsequent versions thereafter). JM seeks these amendments “out of an abundance of caution” because IDOT, through affirmative defense, contends that its actions were not a violation of the Act at the time they occurred. Allegations relating to historic versions of the Act are not new and have previously been discussed by both parties. *See* JM’s Partial Motion to Strike Respondent’s Affirmative Defenses, pages 11-12 (April 20, 2016) (asking the Board to allow JM, in the alternative, to argue that IDOT violated historic versions of the Act); IDOT Response to Motion for Leave to File Reply in Support of Partial Motion to Strike Affirmative Defenses, page 2 (May 10, 2016) (stating that it is a “fair and equitable solution” for the Board to view JM’s second amended complaint as conforming to the evidence and incorporating allegations that in the alternative IDOT violated prior versions of the Act and Board regulations). The Board sees this allegation as a natural outgrowth of the case and one that IDOT was already prepared to respond to, and therefore the amendment regarding historic versions of the Act is appropriate.

The Board therefore grants JM’s motion to file a third amended complaint to conform the pleadings, and accepts JM’s third amended complaint.

Finally, IDOT moves to toll briefing while the Board makes a determination on the motion to file a third amended complaint. IDOT contends that it requires a Board determination on the third amended complaint so that it has a complete understanding of the issues to be addressed in its post-hearing brief. JM objects to the motion, stating that IDOT is well aware of the issues raised in the third amended complaint and that additional time is not necessary.

The Board agrees with IDOT that a ruling on the motion to file a third amended complaint requires a Board determination, and that IDOT should have the opportunity to review the newly amended complaint in light of the Board’s decision. The current filing date for IDOT’s response brief is September 16, 2016. The Board grants IDOT an additional four weeks to file its brief, corresponding to the nearly four weeks between August 12 when JM filed its motion and September 8 when the Board adopted this order. IDOT’s post-hearing brief is due October 14, 2016. Subsequently, JM’s reply brief is now due by November 4, 2016.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 8, 2016, by a vote of 4-0.



John T. Therriault, Clerk
Illinois Pollution Control Board