ILLINOIS POLLUTION CONTROL BOARD
March 17, 2016

| | | |
|---|---|---|
| SUSAN M. BRUCE, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | PCB 15-139 |
| | ) | (Citizen's Enforcement – Water) |
| HIGHLAND HILLS SANITARY DISTRICT, | ) | |
| | ) | |
| Respondent. | ) | |

OPINION AND ORDER OF THE BOARD (by G.M. Keenan):

Susan M. Bruce's amended complaint alleged that the Highland Hills Sanitary District caused sewage discharges to flood Ms. Bruce's property. The Board accepted that complaint and rejected Highland Hills' motion to dismiss it on September 3, 2015. Susan M. Bruce v. Highland Hills Sanitary Dist., PCB 15-139 (Sept. 3, 2015) (September Order). Highland Hills' answer, filed November 3, 2015, asserted eight affirmative defenses. On December 14, 2015, Ms. Bruce filed a reply to these defenses (Reply). The succinct reply states that "Affirmative defense number [one through eight, separately] is denied" without additional detail. Reply at 1.

Highland Hills, alleging deficiencies in Ms. Bruce's reply, filed another motion to dismiss the complaint or, in the alternative, strike Ms. Bruce's reply to the affirmative defenses (Mot.) on January 12, 2016. The Board should dismiss Ms. Bruce's complaint, argued Highland Hills, because her reply denied all facts that the defenses asserted—including the assertion that flooding took place at all. Mot. at 2. Ms. Bruce did not respond to the motion within 14 days (as required by 35 Ill. Adm. Code 101.500(d)). But on February 24, 2016, she requested more time to respond, and also filed her response (Resp.). The Board construes paragraphs 7 and 8 of Highland Hills' original motion as its reply, as outlined in the Hearing Officer's March 10, 2016 order.

Highland Hills' motion to dismiss is denied. Ms. Bruce's reply did not deny her complaint's core facts, because her reply did not specifically deny anything at all. In the alternative, Highland Hills asked the Board to strike the reply because it lacks sufficient specificity. Mot. at 2–3. This motion is granted. The Board cannot discern which specific allegations Ms. Bruce's reply admits or denies, so it is not a sufficient pleading. However, the Board grants Ms. Bruce leave to file an amended reply.

## PLEADING REQUIREMENTS FOR A REPLY TO AN AFFIRMATIVE DEFENSE

The Board's rules on pleadings in a citizen's enforcement action discuss affirmative defenses, but do not list standards that apply to Ms. Bruce's reply. 35 Ill. Adm. Code 103.204(d) (2015). However, they do contain a gap-filling provision: when the Board's procedural rules are silent, it may look to the Illinois Code of Civil Procedure and Supreme Court Rules for guidance.

35 Ill. Adm. Code 101.100(b) (2015). Notably, the Board uses these outside procedural rules for *guidance*; they do not *control* proceedings before the Board. *See* People v. Chiquita Processed Foods, L.L.C., PCB 02-56 (Aug. 22, 2002) (declining to apply Supreme Court Rules when a complainant did not respond to allegations in affirmative defenses).

The Illinois Code of Civil Procedure provides standards for a reply to defenses: "[e]very answer *and subsequent pleading* shall contain an explicit admission or denial of each allegation of the pleading to which it relates" and "[e]very allegation, except allegations of damages, not explicitly denied is admitted[.]" 735 ILCS 5/2-610 (2014) (emphasis added). To paraphrase, the Illinois Code of Civil Procedure requires that a reply to defenses explicitly admit or deny each allegation of the affirmative defense; allegations not explicitly denied are admitted. This comports with the Board's requirements for the answer to a complaint, where all material allegations are admitted unless specifically denied. 35 Ill. Adm. Code 103.204(d) (2015).

A reply to affirmative defenses resembles an answer to a complaint. Both types of pleadings respond to alleged facts. Section 2-610 of the Illinois Code of Civil Procedure applies the same standards to an answer and a reply to an affirmative defense. Furthermore, the Board requires respondents to plead affirmative defenses with the same specificity as a complaint. Sierra Club v. Midwest Generation, PCB 13-27, slip op. at 13–15 (Jan. 8, 2015). Therefore, the Board will analyze Ms. Bruce's reply to Highland Hills' defenses under an adapted version of the Board's rules on answers: all material allegations of an affirmative defense will be taken as admitted if not specifically denied by the reply, unless respondent asserts a lack of knowledge sufficient to form a belief (adapting 35 Ill. Adm. Code 103.204(d) (2015)).

## MOTION TO DISMISS

Highland Hills argues that the Board should broadly interpret Ms. Bruce's general denials of the entire defenses. That is, the Board should interpret the reply as denying every fact that the defenses allege. The defenses reiterate facts alleged in the complaint, so this interpretation means Ms. Bruce denies that her property is located within the Highland Hills Sanitary District, denies that sewer pipes on her property connect to the District, and denies that any flooding occurred on her property. Mot. at 2. Under this interpretation, Ms. Bruce could not state a claim. Ms. Bruce stated that she did not intend to deny her claim's essential elements; instead she intended to argue that the defenses do not preclude her claim. Resp. at 1.

The Board cannot adopt Highland Hills' interpretation of Ms. Bruce's reply. Under the adapted rule discussed above, Highland Hills' factual allegations are taken as admitted if not specifically denied (unless Ms. Bruce asserts a lack of knowledge). Ms. Bruce's broad, general reply does not specifically deny or assert lack of knowledge of anything, so instead the Board would deem all the allegations as admitted. Under this approach, Ms. Bruce's complaint continues to state a valid claim.

## MOTION TO STRIKE

Highland Hills also asked, in the alternative, that the Board strike Ms. Bruce's reply due to its lack of specificity. Mot. at 2. Highland Hills argues that Ms. Bruce's failure to specifically

address each separate fact alleged in the defenses violates the pleading standards set forth in the Illinois Code of Civil Procedure and in past Board orders. *Id.* at 3–4. Ms. Bruce argues that the Board's procedural rules do not require that a reply to defenses be pled with specificity. Resp. at 2.

Again applying the adapted requirements under 35 Ill. Adm. Code 103.204(d), Ms. Bruce's reply is insufficient. A reply to affirmative defenses must specifically admit or deny each factual allegation in the defenses, unless Ms. Bruce asserts lack of sufficient knowledge to form a belief. Ms. Bruce's reply denies entire defense counts at a time and fails to describe her disagreement with the allegations in the defenses. The Board grants the January 12, 2016 motion to strike Ms. Bruce's reply to the affirmative defenses.

## LEAVE TO FILE AMENDED REPLY

However, the Board also grants Ms. Bruce leave to file an amended reply. In this reply, Ms. Bruce must specifically address the facts that Highland Hills alleged in its affirmative defenses. If the reply is not sufficiently specific, the allegations in the defenses will be deemed admitted. If Ms. Bruce wishes to argue that the defenses are insufficiently pled, as she indicated in her response, she may file a motion to strike. Resp. at 1.

However, Ms. Bruce's amended reply does not have to specifically address every statement in the defenses, many of which are not factual allegations. For instance, the defenses make statements of law when discussing Board regulations, Board orders, or cases. The Board will not deem these legal arguments admitted if not addressed in an amended reply. Neither will the Board require the reply to address allegations that dispute facts asserted in the amended complaint. Lastly, conclusory characterizations of fact in the defenses need not be addressed in the amended reply.

This mirrors how Illinois courts assess replies to affirmative defenses under section 2-610(b) of the Illinois Code of Civil Procedure. Under that rule, even when no reply to an affirmative defense is filed, the legal conclusions in the defense are not admitted. Andrews v. Cramer, 629 N.E.2d 133, 136, 256 Ill.App.3d 766, 769–70 (1st Dist. 1993). Illinois courts also do not deem as admitted those facts alleged in a defense that contradict facts alleged in the complaint. State Farm Mutual Automobile Ins. Co. v. Haskins, 574 N.E.2d 1231, 1234, 215 Ill.App.3d 242, 246 (2d Dist. 1991).

Ms. Bruce's reply also lacked either a notarized affidavit of service or a certificate of service signed by an attorney. The Board requires one of these when documents are served by U.S. Mail under 35 Ill. Adm. Code 103.304(d)(5). Ms. Bruce must include this documentation in her amended reply if filed by U.S. Mail.

## CONCLUSION

The Board denies Highland Hills' motion to dismiss and grants its motion to strike Ms. Bruce's reply to Highland Hills' affirmative defenses. The Board grants Ms. Bruce leave until

March 31, 2016 to file an amended reply to the affirmative defenses. The Board again directs the hearing officer to proceed expeditiously to hearing, as detailed in the September Order.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 17, 2016, by a vote of 5-0.

John T. Therriault, Clerk
Illinois Pollution Control Board