BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SUSAN M. BRUCE, Complainant, v. HIGHLAND HILLS SANITARY DISTRICT, Respondent.	))))))	PCB # 2015-139 (Citizens - Water Enforcement)

NOTICE OF FILING

To: Lawrence A. Stein
Aronberg Goldgehn Davis & Garmisa
330 N. Wabash Avenue
Suite 1700
Chicago, Illinois 60611

PLEASE TAKE NOTICE that I have today filed with the Pollution Control Board the following document:

RESPONDENT'S MOTION FOR RECONSIDERATION AND CLARIFICATION OF THE POLLUTION CONTROL BOARD'S JUNE 2, 2016 ORDER REGARDING AFFIRMATIVE DEFENSES

a copy of which is hereby served upon you.

Respectfully submitted,

Heidi E. Hanson

Dated: August 24, 2016

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SUSAN M. BRUCE	)	
	)	
Complainant,	)	PCB # 2015-139
v.	)	(Citizens - Water Enforcement)
HIGHLAND HILLS SANITARY DISTRICT,	)	
	)	
Respondent.	)	

RESPONDENT'S MOTION FOR RECONSIDERATION AND CLARIFICATION OF THE POLLUTION CONTROL BOARD'S JUNE 2, 2016 ORDER REGARDING AFFIRMATIVE DEFENSES

Respondent, HIGHLAND HILLS SANITARY DISTRICT ("District"), by and through its attorneys PODLEWSKI & HANSON P.C., respectfully requests that the Board reconsider and clarify its order of June 2, 2016, regarding the affirmative defenses, as certain of those ruling appear to have been based on misunderstandings of law and fact. The District also asks that the Board rule on certain matters raised in the motions that were not addressed in its order, give it guidance on how it may correctly replead, and grant permission to replead on certain issues.

STANDARDS FOR RECONSIDERATION AND CLARIFICATION

Illinois Pollution Control Board Procedural Rule 101.902 (35 Ill. Adm. Code 101.902) provides that "[i]n ruling upon a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law." However, the Board has broad authority. It "is not limited to these factors and can take up a motion to reconsider on the basis that the Board erred in applying existing law." *People v. Amsted Rail Company*, PCB 16-61 (May 19, 2016), slip op. at 1. See also *Chatham BP, LLC v. IEPA*, PCB 15-173 (Nov. 5, 2015), slip op. at 2. In addition, a "motion to reconsider may also specify 'facts in the record which were overlooked.'" *Id,* at 2, citing *Wei Enterprises v. IEPA,* PCB 04-23 (Feb. 19, 2004), slip op. at 3.

"The Board's rules and the Illinois Code of Civil Procedure do not explicitly allow for a motion for clarification. However, decisions in Illinois courts and before the Board…have recognized motions for clarification." *Sierra Club et al. v. Illinois EPA et al.*, PCB 15-189 (June 16, 2016), slip op. at 2.

RULINGS ON MOTION TO STRIKE AFFIRMATIVE DEFENSES

The Board's June 2, 2016 Opinion Appears to Conflict with its March 17, 2016 Opinion.

The Board followed an unusual and unprecedented procedure in its treatment of the affirmative defenses ("A. D.s"). This procedure has resulted in what appears to be a conflict between two of the Board's orders in this case.

The District filed its Answer and Affirmative Defenses on November 3, 2015. Bruce filed a general denial of all affirmative defenses, which also denied facts essential to her own case. The Board analyzed the situation and found that if it were to deem all factual allegations as denied the internal contradictions in Ms. Bruce's case would cause it to fail. Instead, the Board noted that she could still state a claim if the Board were to consider her reply to the affirmative defenses to be insufficient which would cause the factual allegations to be admitted rather than denied. Accordingly, the Board's March 17, 2016 order (slip op. at 2) deemed the factual allegations in the affirmative defenses to be admitted in order to allow her to salvage her case:

> "Ms. Bruce's broad, general reply does not specifically deny or assert knowledge of anything, so instead the Board would deem all the allegations admitted. Under this approach, Ms. Bruce's complaint continues to state a valid claim."

Thus, as of March 17, 2016 all of the factual allegations in the affirmative defenses (but not the legal ones) were deemed admitted. At that time Board had all of the affirmative defenses before it and if it had found any flaws in them it could, *sua sponte,* have stricken them. Instead, it found the affirmative defenses as a matter of law to be sufficient to form the basis for its

detailed and careful analysis of the impact of Bruce's general denials. It further found that that the affirmative defenses were sufficient to support its striking of Bruce's pleading.

The Board allowed Bruce to amend her reply and also gave her the opportunity to file a motion to strike.[1] Bruce did not amend her reply but did file a motion to strike. The District countered all of Bruce's arguments and ultimately the Board did not accept any of the arguments that Bruce had made in its motion to strike. However, in an unprecedented action, the Board struck all of the affirmative defenses, using reasons different than the ones argued by Bruce.

The table below lists the affirmative defenses, grounds put forward in Bruce's Motion to Strike Affirmative Defenses, and reasons the Board gave for striking the affirmative defenses.

Affirmative Defense Table

Affirmative Defenses	**Bruce's Motion to Strike**	**PCB June 2, 2016 Order**
1 – Act of God	Facts do not support defense	Factual allegations not admitted by District
2 – Act of 3rd Party - Flagg Creek Water Reclamation District	Agency theory / contract with Flagg Creek Water Reclamation District	Factual allegations not admitted by District
3 – Act of 3rd Party – Mrs. Bruce and other residents	Use of "information and belief" pleading	Factual allegations not admitted by District
4 – Interpretation of *Travieso*[2] order	Disagree with interpretation	A. D. attacks legal sufficiency, A. D. already addressed
5 – General Equity – alleged violations unlike Travieso violations and staleness	Insufficient allegations – Bruce has not heard of defense	Lacks legal basis
6 – Board jurisdiction – retroactive application of 2003 legislation	A. D. denies allegations of amended complaint	A. D. attacks legal sufficiency, A. D. already addressed
7 – Impossibility - physical and regulatory	Same as Act of God defense	Lacks legal basis
8- Reservation of right	Insufficiently pled	A. D. is null

[1] Bruce initially declined to move to strike the A.D.s and filed a reply. Having chosen her path by filing a reply, any objection to the affirmative defenses could have been considered waived. Bruce never requested a second opportunity to attack the District's affirmative defenses.

[2] *Travieso v. Highland Hills Sanitary District*, PCB 79-72 (Nov. 1, 1979).

Rather than the usual procedure of a complainant objecting to any flawed A. D. s and answering the rest, Bruce answered all of them on December 22, 2015 and then, at the Board's invitation, over three months later, she objected to all of them. The Board apparently agreed that her objections were without merit (by not accepting or even discussing any of the arguments in her motion to strike) but still the Board struck all of the affirmative defenses.

Clearly, the Board's decision was not informed by Bruce's motion or any of the arguments in it, so why did the Board change its position upon its second reading of the affirmative defenses? The Board may *sua sponte* strike affirmative defenses but it did not do so when it had those defenses before it in March of 2016. The Board's odd and untimely re-review of the affirmative defenses raises many questions. Was the June 2, 2016 Board order intended to be a reconsideration of any part of the Board's March 17, 2016 order? Why were the affirmative defenses which were deemed sufficient to support the District's motion to strike the response to them in March, suddenly deemed to be fatally flawed in June? At what point may we consider a Board decision to be its final word on a subject? In essence, the Board has gone back in time to strike affirmative defenses, the facts of which it has deemed to be admitted in order to preserve Bruce's case from her own denials, thus severing (and striking) the legal arguments of the affirmative defenses from the facts alleged in them.

The Board gives no explanation for this unprecedented procedure. Once the Board had the affirmative defenses before it in March of 2016 and it had used them as the basis for other rulings it should not have, *sua sponte,* stricken them later. The District asks the Board to reconsider its June 2, 2016 ruling and reinstate the affirmative defenses. [3] Should the Board allow its June 2, 2016 ruling to stand, alternatively, the District requests clarification of that

[3] The Interpretation (#4) and Jurisdiction/Retroactivity (#6) affirmative defenses were also raised as grounds for partial summary judgment. Respondent is separately requesting that the Board reconsider that motion and grant summary judgment. If it does so the need for reconsideration of the affirmative defenses will have been mooted.

order, including an explanation of how the June 2, 2016 order is to be read in accord with the March 17, 2016 order.

The Board Should Grant This Motion for Reconsideration of the Affirmative Defenses Because it has Never Heard Argument on the Grounds on Which it Struck Them.

The Board did not adopt Bruce's objections to the affirmative defenses, instead finding its own reasons to strike the affirmative defenses. The grounds the Board used were never argued before the Board and so this Motion for Reconsideration and Clarification will be the District's first opportunity to address those grounds. The District did not have an opportunity to argue or present a case in rebuttal. Therefore, because the Board did not hear argument or have the opportunity to fully explore the issues on first consideration, the Board's striking of the affirmative defenses presents a particularly strong case for reconsideration.

The District Asks that the Board Respond to its April 18, 2016 Request for Permission to Replead, Explain How the Affirmative Defenses Might Be Better Pled, and/or Clarify That They May Be Raised as Defenses at Hearing.

The District notes that it has often been the Board's practice, when striking an affirmative defense, to explain that the same argument in defense is not precluded and may be raised later at hearing. The Board also often explicitly provides guidance on, and permission to, replead. "Even though the argument concerning the Section 33(c) criteria is not an affirmative defense, the parties are still free to address this issue at hearing. *Cole Taylor Bank v. Rowe Industries*, PCB 01-173 (June 6, 2002), slip op. at 7. "Although the Board struck several affirmative defenses Rowe and Chapco may address the issues raised in their answers and subsequent filings, including those in its stricken affirmative defenses, in future motions and flings." *Id.* at 10. See also *Johns Manville v. IDOT*, PCB 14-03 (May 19, 2016), slip op. at 2. "Justice would be furthered by allowing respondents to amend their affirmative defenses" *Schilling et al. v. Hill et al.*, PCB 10-100 (April 7, 2011), slip op.at 9.

The District requested leave to amend its affirmative defenses in its April 19, 2016 Response to Motion to Strike Affirmative Defenses (page 12) but the Board did not respond to the request in its June 2, 2016 order. If the Board does not reinstate the affirmative defenses the District asks that it clarify the impact of striking them and grant Respondent permission to replead them, or clarify that they may be raised as standard defenses. Also, the Board has extended the courtesy of pleading suggestions to the Complainant on several occasions. The Respondent asks that it do the same for Respondent here.

Affirmative Defenses #1, #2, and #3, Acts of God and Third Parties, Should Not Have Been Stricken Because Respondent's Pleading Admitted the Pertinent Allegations.

The Board struck affirmative defenses #1, #2, and #3 on the basis that they "do not admit the allegations in the complaint." June 2, 2016 order, slip op. at 2. The District's answers and affirmative defenses were submitted as part of a single pleading. Admissions were made in the "Answer" section of the pleading, (pages 2, 3, and 4 of the Answer to Amended Formal Complaint and Affirmative Defenses). The admissions apply to all of the affirmative defenses. There is no requirement in the procedural rules that the admissions must be repeated in each separate section of the pleading.

Furthermore, the facts alleged in the first three affirmative defenses establish that the District "lacked the capability to control the source of the pollution" which is the test the Board articulated for such affirmative defenses in *People v Chiquita Processed Foods*, PCB 02-56 (April 18, 2002), slip op. at 4.

It is unclear whether the Board did not consider the answers on pages 2, 3, and 4 or whether it considered them, but found them to be insufficient. The District asks the Board to reconsider its ruling to include consideration of the admissions in the Answer section of its pleading if it has not already done so. If upon reconsideration the Board finds them, or has

already found them, to be insufficient, then alternatively, the District asks the Board to provide it guidance so that it may replead the defenses properly or that it clarify that these three arguments may still be raised as defenses later in the case.

Affirmative Defense #4, Interpretation of the *Travieso* Cease and Desist Order, Was Not Previously Addressed as An Affirmative Defense and Does Not Attack Legal Sufficiency.

The District gave notice of its intent to affirmatively defend against the allegations relating to the *Travieso* cease and desist order on the ground that the Bruce had misinterpreted the language of the order. The order applied to "Complainant's residence" and should be interpreted to apply only to Mr. Travieso (the "complainant" at the time the Board wrote the cease and desist order.) Consequently, the cease and desist order would have been fulfilled and would have expired by its own terms when Mr. Travieso (the complainant) no longer resided there. The Board stated that A. D. #4 had been previously addressed in its September 3, 2015 order, slip op. at 3-5, and that it attacked the legal sufficiency of Bruce's claim. The ruling on this affirmative defense should be reconsidered because it contains factual and legal errors.

a) The Interpretation Argument Has Not Been Previously Addressed As a Basis for an Affirmative Defense.

In its June 2, 2016 order the Board stated that it had addressed the District's argument on the *Travieso* order interpretation in its September 3, 2015 order. The September 3rd order was a ruling on a motion for reconsideration of the Board's denial of the District's motion to dismiss Bruce's amended complaint. The September 3, 2015 order contained no reference to, or discussion of, the proper interpretation of the *Travieso* cease and desist order. The Board's statement that it had already addressed this issue appears to stem from confusion with other issues relating to the *Travieso* cease and desist order. The status of each of the different issues the District has raised on that order is set out in the table below:

Travieso Issues Table

Travieso Issue	District's Argument	First Brought Before the Board / Type of Pleading	Decision
Enforceability Issue	The cease and desist order cannot be enforced under 415 ILCS 5/45(e).	April 15, 2015 motion to dismiss initial complaint.	Decided in the District's favor. June 4, 2015.
Jurisdiction/ Retroactivity Issue	Board lacks jurisdiction to decide *Travieso* allegations under 415 ILCS 5/31(d)(1).	November 3, 2015 as A.D #6.	**
		May 19, 2016 decision on merits requested in motion for partial summary judgment ("MPSJ").	*
Interpretation Issue	The cease and desist order was fulfilled when Mr. Travieso ceased residing at the property.	July 15, 2015 in motion to dismiss amended complaint.	Sept. 3, 2015 order found complaint factually sufficient but this issue was not addressed.
		November 3, 2015 as A.D #4.	**
		May 19, 2016 decision on merits requested in MPSJ.	*
General Equity Issue	*Travieso* order is stale and unrelated to current alleged facts.	November 3, 2015 as A.D #5.	June 2, 2016 order A. D. #5 stricken for no legal basis – reconsideration requested.
		May 19, 2016 decision on merits requested in MPSJ.	*

* The June 2, 2016 order states that these issues had already been discussed or decided.
** June 2, 2016 order found that the A. D. attacks the complaint's legal sufficiency – reconsideration requested.

On July 15, 2015 the District filed a Motion to Dismiss the Amended Formal Complaint which stated in paragraphs 7 and 8:

> …there is an additional ground for dismissal…
>
> 8….Paragraph 7 of the Amended Complaint asserts that the order in Travieso, required respondent to "cease and desist from causing sewer backups at the complainant's location" and "complainant's property" (presumably referring to Mrs. Bruce as the complainant) whereas the Travieso, order provides that Respondent shall cease and desist from violations of specific rules "in causing

> sewer backups at Complainant's residence" (presumably referring to Mr. Travieso as the Complainant). As in the earlier complaint, the amended complaint fails to 'allege what relationship, if any, there is between complainant [Susan M. Bruce] and Mr. Travieso.' June 4, 2015 PCB Order, page 8 (emphasis added.)
>
> On page 5 of its September 3, 2015 order the Board stated
>
> As the Board discussed in June, a Board order may only be enforced by parties to that proceeding. See *supra* p. 3. However, any person may allege a violation of a Board order. *Id.* Mrs. Bruce's relationship to the parties to Travieso is not relevant to the revised claim which is adequately pled.

The Board never addressed the Interpretation argument (underlined above) in its order, instead focusing only on the last sentence of the District's paragraph 8. Based on its statement in the September 3, 2015 order the Board apparently misread the last sentence as relating to the one of the other *Travieso* arguments.[4]

Even if the Board had ruled on the Interpretation argument, that would provide no reason for striking the affirmative defense. The Board found the amended complaint to be "sufficiently clear and specific to allow for the preparation of a defense" (slip op. at 5). The Board was then ruling on the sufficiency of Bruce's complaint. It could not have ruled on the sufficiency of the District's affirmative defense in September 3, 2015 because that affirmative defense was not raised until November of 2015.

The fact that a complaint has been properly pled does not mean that the District cannot raise an affirmative defense against that complaint. Similarly, a finding that a complaint has been properly pled is not a decision on the merits of a defense. Put differently, the fact that the

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[4] The Board stated that the relationship between Bruce and Travieso would not be relevant to the Board's authority to hear a violation of a the cease and desist order under 415 ILCS 5/31(d)(1) (which would be true for post 2003 orders) . However, the last sentence of the District's paragraph 8 related to the Interpretation argument, as set forth in the rest of paragraph 8. For that argument it is relevant that Mr. Travieso is not still residing at the house – a fact that was not established at the time the District's motion to strike the amended complaint was filed. If both Mr. Travieso and Mrs. Bruce were residing at the house at the time of the amended complaint the District's Interpretation argument would fail because it would still be "Complainant's residence" in both interpretations of the phrase.

Board found that Bruce did not have to address a particular issue to have sufficiently pled her complaint should not preclude the District from raising the same issue as an affirmative defense.

b) The Interpretation Argument Attacks Bruce's Legal Right to Bring Her Claim and Therefore it is an Appropriate Affirmative Defense.

The Board's June 2, 2016 order, slip op. at 2 and 3, states that the affirmative defense #4 attacks the complaint's "legal sufficiency" and therefore is not an affirmative defense. The term "legal sufficiency" is confusing because it can refer to either the legal right to bring a claim or the elements necessary to succeed on the claim. In *People v. QC Finishers*, PCB 01-7 (June 19, 2003), slip op. at 9, the Board found that an attack on "legal sufficiency" (used in the sense of legal right to bring a claim) was not a reason to strike an affirmative defense and stated that

> ... this affirmative defense addresses the legal sufficiency of the underlying cause action. In effect the respondent argues that the Board cannot hear an alleged violation of an Agency rule. The Board denies the complainant's motion to strike because even accepting the complainant's allegation QC Finishers asserts that the Board lacks the authority to entertain an alleged violation of an Agency rule. (emphasis added).

Similarly, the Board has generally allowed affirmative defenses which attack claims on the ground that they are not legally cognizable. For purposes of an affirmative defense, all allegations can be taken as true, but Respondent may still raise the Complainant's right and ability to pursue its claim as a valid affirmative defense. "An affirmative defense is a "response to a plaintiff's claim which attacks the plaintiff's legal right to bring an action, as opposed to attacking the truth of the claim." *People v John Crane*, PCB 01-76 (May 17, 2001), slip op. at 2, quoting *Farmers State Bank v. Philips Petroleum,* PCB 97-100 (January 23, 1997), slip op. at 2. "An affirmative defense is a response to a claim which attacks the complainant's right to bring an action." *Cole Taylor Bank v. Rowe Industries*, PCB 01-173 (June 6, 2002), slip op. at 7 (citations omitted). [5]

[5] The Illinois Supreme Court has also held that arguments that attack the right to bring an action can be raised as affirmative defenses. See *Lebron v Gottleib Memorial Hospital*, 237 Ill. 2d 217, 252-53 (2010) (finding standing is an affirmative defense.)

In contrast, and using the same term, "legal sufficiency" (but in the sense of elements necessary to succeed on a claim) the Board held that "by stating that all necessary parties to this action have not been named, IDOT's defense attacks the legal sufficiency of the complaint..." *Johns Manville v. IDOT,* PCB 14-3 (May 19, 2016) slip op. at 2. In *Manville*, *Id.* affirmative defenses relating to remedy and denial of the allegations in the complaint, were also struck for failing to admit the claim's legal sufficiency. See also *Cole Taylor, Id.* at 7 regarding penalty criteria (415 ILCS 5/33(c)) as attacking legal sufficiency.

In short, the Board has drawn a distinction between proper affirmative defenses that attack the legal right to bring a claim, (jurisdiction, standing, lack of underlying statutory authority) and improper affirmative defenses that attack some aspect of a claim (remedy, parties, factors in mitigation). The Board has used the term legal sufficiency to refer to both types of attack.[6]

Here, the Interpretation affirmative defense did not deny any facts but argued that first, as a new matter, the property where the backups occurred is no longer Mr. Travieso's residence[7]; and second that as a result, the correct interpretation of the Board's order in *Travieso* would not support Bruce's legal right to bring this action, as the cease and desist order was fulfilled and no longer effective after Mr. Travieso ceased residing at the property.

Attacking the legal interpretation upon which the ability to pursue the claim rests, as the District is doing in A.D. #4, is an attack on the complainant's "legal right to bring an action". (Similarly attacking the subject matter jurisdiction claims of complainant, as the District is doing in

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[6] The Board cites *Worner Agency v Doyle,* 121 Ill. App 3d 219, 459 N.E.2d 633 (1984) in support of its striking the affirmative defense. *Worner* involved a distinction between want of consideration (which in effect denies that a contract existed) and failure of consideration (which admits the contract but offers an excuse for failure to perform.) The court held that failure of consideration qualifies as an affirmative defense but want of consideration, because it denies the contract, does not qualify. Nothing in *Worner* addresses a defense relating to the legal right to bring an action, which is the argument made in affirmative defense #6.

[7] The June 2, 2016 order slip op. at 2, states that "Bruce stated that she now resides at that property." Complt at 2. She did not state so in either her complaint or the amended complaint. She referred to the property as her "location" and her "property." In response to the Request to Admit she admitted residing there during some of the dates alleged in the complaint but denied that she resided there at the time of the complaint, the amended complaint or at the present.

A. D. #6 is attacking the "legal right to bring an action.") Thus this affirmative defense is proper as acknowledged by the Board in its past rulings. The District asks that the Board reconsider its order striking this affirmative defense and conform its ruling to its past practice by reinstating the affirmative defense.

Affirmative Defense #6, Jurisdiction / Retroactivity, Has Not Been Previously Decided and Does Not Attack Legal Sufficiency.

The District's affirmative defense argued that Bruce could not pursue her allegations of violations of the 1979 *Travieso* order pursuant to 415 ILCS 5/31(d)(1) because the grant of authority for a nonparty to pursue a violation of a Board order did not occur until 2003. For the Board to find that it had jurisdiction to hear such an allegation would require it to find that the grant of authority was retroactive which would be impermissible under a recent Illinois Supreme Court case[8]. The Board's June 2, 2016 order stated that it had already ruled and that the affirmative defense attacked the legal sufficiency of the complaint.

a) The Board Could Not Have Previously Ruled on the Jurisdiction / Retroactivity Issue on September 3, 2015 Because the Issue Was Not Raised Until November 3, 2015.

The June 2, 2016 order (slip op. at 3, and footnote 10) states that this argument was addressed in the September 3, 2015 order. However, this argument was raised for the first time on November 3, 2015 as affirmative defense #6, therefore, could not have been addressed in the Board's September 3, 2015 order. See Travieso Issues Table above. The District asks the Board to reconsider its June 2, 2016 ruling and to allow the District to maintain this affirmative defense.

b) The Jurisdiction / Retroactivity Defense Questions the Board's Jurisdiction Over Bruce's *Travieso* Claims and Therefore it is an Appropriate Affirmative Defense.

The Board's June 2, 2016 order, slip op. at 2 and 3, also states that affirmative defense #6 attacks the complaint's legal sufficiency and therefore is not an affirmative defense. As

[8] *People v. J. T. Einoder*, 2015 IL 117193.

described above in reference to affirmative defense #4, the Board has held that an affirmative defense may attack the legal basis for a claim. In this affirmative defense, the District alleges that the Board does not have jurisdiction to entertain Bruce's *Travieso*-based claims based on the limitations of the Board's statutory authority and a recent Illinois Supreme Court ruling on retroactive applicability. The District respectfully requests that the Board reconsider its order striking this affirmative defense.

The Illinois Code of Civil Procedure and the Board's Past Practice Provide Legal Basis for Affirmative Defenses #5 and #7.

The Board struck affirmative defenses #7 (Impossibility) and #5 (General Equity) stating that the District did not show any legal basis and "provided no statute, regulation, or case law establishing general equity or impossibility as valid affirmative defenses." As explained in the District's Response to Motion to Strike Affirmative Defenses (pages 7 and 8) the Illinois Code of Civil Procedure Section 2-613(d) provides two "generic" affirmative defense categories: "any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action," 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." No legal basis other than compliance with Section 2-613(d) and the Board's rules should be necessary.

Affirmative defense #7 fits into under both of the Code of Civil Procedure's generic categories. As explained in the District's response to motion to strike, A. D #7 has introduced affirmative matter which seeks to avoid the legal effect of or defeat the cause of action by its argument that a regulatory and physical situation outside of its control has caused it to be unable to avoid the backups Bruce alleges. Furthermore, this defense would likely have taken Bruce by surprise.

Affirmative defense #5 also fits into both generic categories. It pled that as a matter of general fairness and reasonableness, given the passage of time and the particular circumstances and age of the *Travieso* order the Board ought to exercise its authority and discretion to deem it moot or vacate it. It sets forth affirmative matter, for example that Bruce's alleged backups are unlike the backups that Mr. Travieso experienced and which gave rise to the cease and desist order, and that defense would also likely have come as a surprise to Bruce.

The fact that a new type of affirmative defense is being pled for the first time should not be relevant as long as it complies with the Board's rules and fits within the generic categories.

CONCLUSION

The Board has used an unprecedented and confusing procedure in striking the affirmative defenses. It has stricken them on new grounds that were never argued before it, so this motion for reconsideration and clarification will be the District's only opportunity to be heard on those grounds. Its June 2, 2016 order did not discuss its rulings on the affirmative defenses in depth which left Respondent puzzled as to the basis for those rulings. For example, did the Board consider the answers to the amended complaint in arriving at its conclusion that the first three affirmative defenses were not acceptable? The Board also, with no discussion, appears to sharply depart from its past rulings in stating that lack of jurisdiction and lack of statutory authority cannot be raised as affirmative defenses. Without any illuminating discussion, it has rejected two affirmative defenses for lack of legal basis even though they fit under the generic provisions of the Illinois Code of Civil Procedure section 2-613(d). Last, the Board claims that it has addressed some arguments (before they were even raised) and therefore it now refuses to consider them in any context.

The purpose of affirmative defenses was articulated by the Board in *People v. Geon Company*, PCB 97-62 (October 2, 1997), slip op. at 3, citing *People v. Midwest Grain*. PCB 97-179 (August 21, 1997), slip op. at 4.

> "As the Board has previously stated, allowance of liberal pleading of defenses serves to inform the parties of the legal theories to be presented by their opponents, prevents confusion as to whether a defense has been waived as not timely raised, and avoids taking an opponent by surprise later in the proceedings."

The Board has not allowed liberal pleading here and it has not prevented confusion. The District asks that the Board reconsider its grounds for striking the affirmative defenses and let the affirmative defenses stand. Alternatively the District asks that the Board clarify that each of the affirmative defenses may still be raised as defenses or may be better pled if they are found to be insufficient and last, grant Respondent's request to replead them.

WHEREFORE, for the reasons stated above, Respondent prays that the Board reconsider and clarify its June 2, 2016 order.

Respectfully submitted,

Heidi E. Hanson

Dated: August 24, 2016

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CERTIFICATE OF SERVICE

I, the undersigned attorney, certify that I have served on this date the attached:

RESPONDENT'S MOTION FOR RECONSIDERATION AND CLARIFICATION OF THE POLLUTION CONTROL BOARD'S JUNE 2, 2016 ORDER REGARDING AFFIRMATIVE DEFENSES

upon the Clerk's Office On-Line, Illinois Pollution Control Board by electronic filing this day before 4:30, and

upon the following, by email transmission before 4:30:

Bradley Halloran, Hearing Officer at the email address of Brad.Halloran@illinois.gov. (pursuant to 35 Ill Adm. Code 101.1060(d)),

Lawrence A. Stein at the email address of lstein@agdglaw.com (pursuant to April 5, 2016 consent).

The number of pages in the email equals seventeen (17) pages (including this Certificate).

My email address is heh70@hotmail.com.

Heidi E. Hanson

Dated: August 24, 2016

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