

ILLINOIS POLLUTION CONTROL BOARD  
January 7, 1993

CITY OF DES PLAINES, GAIL )  
PAPASTERIADIS, and GABRIEL AND )  
LINDA GULO, )

Complainants, )

v. )

SOLID WASTE AGENCY OF NORTHERN )  
COOK COUNTY, )

Respondent. )

PCB 92-127  
(Enforcement)

ORDER OF THE BOARD (by R.C. Flemal):

On September 1, 1992, complainants filed this action alleging violation by respondent of Section 22.14 of the Illinois Environmental Protection Act (Ill. Rev. Stat. 1991, ch. 111½, par. 1022.14)(Act). On December 18, 1992, respondent filed a document entitled "Affirmative Defenses". On December 21, hearing commenced on this proceeding. At hearing, respondent presented the document entitled "Affirmative Defenses" to the complainants. Complainants moved orally at hearing and in writing by motion filed December 28, 1992 to strike the affirmative defenses document based on the fact that the document was not served on complainants prior to hearing. Respondent filed a response to the motion with a motion to file the affirmative defenses *nunc pro tunc* on January 4, 1993.

Section 103.122(d) allows the filing of an affirmative defense with the answer or supplemental answer prior to hearing:

Respondent may file an answer within 30 days of receipt of the complaint. All material allegations of the complaint shall be taken as denied if not specifically admitted by answer, or if no answer is filed. 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 supplemental answer filed pursuant to section 103.210(b).

Section 103.210(b) allows for supplemental pleadings as follows:

At any time prior to commencement of hearing and prior to the close of hearing, the Hearing Officer may upon motion of a party permit a supplemental pleading setting forth continuing transactions or occurrences which have continued or occurred subsequent to the date of filing of the initial pleading or any amendment

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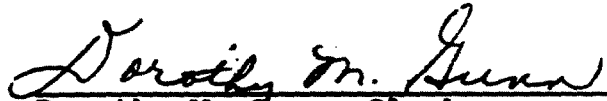
thereto, so long as no undue surprise results that cannot be remedied by a continuance.

The Board finds that complainants did not receive the affirmative defenses prior to hearing. However, the Board's rules allow for supplemental pleading so long as no undue surprise that cannot be remedied by a continuance would result. Here the matter is continued until January 11, 1993, and complainants have not presented any evidence that any alleged surprise could not be remedied at that time. Complainants may present answers to the affirmative defenses at that time. Furthermore, the hearing officer is authorized to further continue the January 11, 1993 hearing should that prove necessary for the parties to remedy any surprise to complainants.

Complainants' motion to strike is denied. Respondent's motion to file *nunc pro tunc* is granted.

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 7<sup>th</sup> day of January, 1993, by a vote of 5-0.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board