



Second, complainant requests leave to reply to Panhandle's June 6, 2000 response to its Motion to Strike. That request is found at the conclusion of its June 19, 2000 Motion for Leave to File. Motion for Leave to File at 6. In its June 28, 2000 response, Panhandle characterized complainant's Motion for Leave to File as a reply to Panhandle's response, but otherwise it does not directly respond to complainant's request. The Board agrees that complainant has included arguments in reply to Panhandle's June 6, 2000 response in its Motion for Leave to File, and has also incorporated new legal arguments in support of its motion to strike. See Motion for Leave to File at 2-6. As explained below, complainant must first demonstrate material prejudice before it will be allowed to file its Motion to Strike. Since it fails to do so, the Board denies complainant leave to file a reply addressing the merits of its Motion to Strike. Leave to file a reply is discretionary to the Board. 35 Ill. Adm. Code 103.140(c).

MOTION FOR LEAVE TO FILE A  
MOTION TO STRIKE AFFIRMATIVE DEFENSES

Section 101.243(a) of the Board's procedural rules requires that all motions to strike be filed within 21 days of service of the challenged document unless the Board determines that material prejudice would result. In our order of June 22, 2000, the Board denied the motion to strike the affirmative defenses because complainant had not identified any prejudice that would justify the Board entertaining that motion that was filed ten months late. 35 Ill. Adm. Code 101.243(a).

The affirmative defenses that complainant seeks to strike were included in Panhandle's Answer to the complaint filed on July 27, 1999. Now, in its belated Motion for Leave to File, complainant claims that it inadvertently neglected to file such a motion in its attempt to get its motion to strike filed before the impending deadline for dispositive motions of May 30, 2000. In further support of its Motion for Leave to File, complainant argues that it will suffer an undue waste of time and resources if the motion for leave is not granted. Complainant then immediately uses that same argument to support its claim that the motion to strike must be granted. Motion for Leave to File at 2. In response, Panhandle argues that complainant did not identify any new reason or prejudice to justify filing the Motion For Leave To File ten months late. Response to Motion for Leave to File at 2.

Originally complainant identified no reason for allowing the Motion to Strike. People v. Panhandle, (June 22, 2000), PCB 99-191, slip op at 1. Now, complainant simply alleges that it will suffer an undue waste of time and resources if the motion is not granted. Motion for Leave to File at 2. This is not sufficient to justify the Board granting leave to file nearly a year after such a motion was due and during which time substantial discovery occurred. Therefore, the Motion for Leave to File is denied. Panhandle will have the opportunity to present evidence in support of its affirmative defenses. However, we reiterate that the Board is not ruling on the merits of any of Panhandle's affirmative defenses. Panhandle is still required to present its evidence and arguments in support of its affirmative defenses, and complainant may, of course, still argue that any given defense is invalid.

AMENDED MOTION TO INCORPORATE

In our June 22, 2000 order, the Board denied complainant's request that the entire record of Panhandle's permit appeal be incorporated into the record of this enforcement action. The Board explained that complainant did not demonstrate the relevance of the entire record to this proceeding "at least in the face of Panhandle's objection," as required by the Board's procedural rule governing motions to incorporate, 35 Ill. Adm. Code 101.106. People v. Panhandle, (June 22, 2000), PCB 99-191, slip op at 2.

In its support of its original motion, complainant had argued that witnesses from Panhandle's permit appeal as well as other witnesses would be testifying. Motion to Incorporate at 2. With its amended motion, complainant adds only that "at least two of the Complainant's witnesses who testified for the Illinois EPA (sic) in Panhandle's permit appeal are scheduled to provide limited testimony in this enforcement proceeding," and that it anticipates relying upon certain underlying facts supported by these witnesses' testimony in its case in chief. Amended Motion to Incorporate at 3. Even when taken together, these facts do not demonstrate the relevance of incorporating the entire record in Panhandle's permit appeal as requested by complainant.

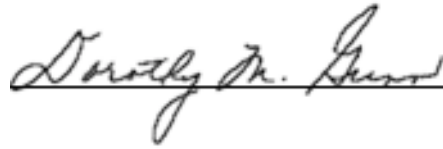
Complainant also asks for alternative relief should the Board deny its motion to incorporate the entire record in Panhandle's permit appeal. Complainant asks that the Board allow select portions of that record to be incorporated into this enforcement action. Specifically, complainant asks that the hearing transcripts, the Illinois Environmental Protection Agency's (Agency) Administrative Record, the supplement to the Agency's Administrative Record, and the exhibits admitted at hearing be incorporated into this record. We have examined these four groups of material and find them to be a substantial portion of the entire record in Panhandle's permit appeal. Complainant's arguments in support of incorporation still do not explain why these portions of Panhandle's permit appeal are relevant to this proceeding. Accordingly, complainant's Amended Motion to Incorporate is denied.

The parties may, of course, work with the hearing officer to reach an agreement about which specific portions of Panhandle's permit appeal should be incorporated. If that undertaking is not successful, pursuant to 35 Ill. Adm. Code 101.106(a), complainant may renew its request to incorporate provided it is supported by the requisite demonstration of why specific portions of the record are relevant to this proceeding.

In summary, the Board grants Panhandle's Motion for Leave to File its responses to complainant's June 19, 2000 motions. The Board denies complainant's request for leave to reply to Panhandle's June 6, 2000 response. Finally, the Board also denies complainant's Motion for Leave to File its motion to strike Panhandle's affirmative defenses and complainant's Amended Motion to Incorporate.

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 27th day of July 2000 by a vote of 6-0.

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

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board