BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB No. 06-177
	)	
SHERIDAN SAND & GRAVEL CO.,	)	
	)	
Respondent.	)	

REPLY IN SUPPORT OF
MOTION FOR LEAVE TO FILE FIRST AMENDED ANSWER
AND AFFIRMATIVE DEFENSES

Respondent, SHERIDAN SAND & GRAVEL CO. ("SHERIDAN"), by its attorney, Kenneth Anspach, pursuant to 735 ILCS 5/2-616(a) and 35 Ill.Adm.Code 101.100(b) hereby files its Reply in Support of Motion for Leave to File to First Amended Answer and Affirmative Defenses ("Reply"). This Reply is being filed pursuant to Hearing Officer Order dated December 14, 2006.

SHERIDAN filed its Answer and Affirmative Defenses on October 13, 2006. Thereafter, on November 13, 2006, the STATE filed a so-called Motion to Dismiss Affirmative Defenses.[1] On November 27, 2006, within the time allowed under 35 Ill.Adm.Code 101.100(b) for filing a response to the Motion to Dismiss Affirmative Defenses, SHERIDAN filed its Motion for Leave to File to First Amended Answer and Affirmative Defenses ("Motion for Leave to File"). Attached to the Motion for Leave to File was the First Amended Answer and Affirmative Defenses.

[1] Both the Notice of Filing and the Certificate of Service refer to this filing as a Motion to *Strike* Affirmative Defenses, rather than a Motion to *Dismiss* Affirmative Defenses. The title "Motion to Strike" is the appropriate designation, since, assuming *arguendo* the presence of a defective pleading, leave to amend pursuant to 735 ILCS 5/2-615(d) would generally be granted following striking it. *Sinclair v. State Bank of Jerseyville*, 226 Ill. App. 3d 909, 910 (4th Dist. 1992).

On December 11, 2006, the STATE filed a Response in Opposition to Respondent's Motion for Leave to File First Amended Answer and Affirmative Defenses ("Response to Motion for Leave to File"). In the Response to Motion for Leave to File, the STATE objects to the Motion for Leave to File on five purported bases. The STATE makes these five arguments without a single citation of case authority supporting its positions. First, the STATE argues that by seeking leave to file an amended answer and affirmative defenses, SHERIDAN has "conced[ed]" the STATE's Motion to Dismiss Affirmative Defenses, which should be granted as purportedly being unopposed. The STATE's second argument is the same as the first, *i.e.*, that SHERIDAN's filing of its Motion for Leave to File "should be deemed a consent" to the STATE's Motion to Dismiss Affirmative Defenses. The third argument is that purportedly SHERIDAN has "granted itself permission to amend its Answer and affirmative defenses." The fourth argument is that SHERIDAN gave no reason for granting the Motion for Leave to File. The fifth and final argument is that the filing of the Motion for Leave to File is "procedurally premature" because it "preempt[s]" any ruling on the STATE's Motion to Dismiss Affirmative Defenses, upon which the STATE is "entitled" to a ruling, and subject to prejudice if none is forthcoming.[2]

These arguments, as stated above, are made without the benefit of legal authority. What, then, is the legal standard applicable to the amendment of pleadings? First of all, the applicable statute, 735 ILCS 5/2-616(a), provides, in pertinent part, as follows:

> At any time before final judgment amendments may be allowed on just and reasonable terms...changing the cause of action or defense or adding new causes of action or defenses, and in any matter, either of form or substance, in any process, pleading, bill of

[2] The STATE asserts that SHERIDAN should not "be permitted...to substitute a First Amended Answer for its earlier admission to the allegations in the Complaint." This assertion is not only inapposite, but also incorrect. SHERIDAN has never admitted any material allegations in the complaint and the First Amended Answer and Affirmative Defenses does not change to a denial any admission to any non-material allegation.

> particulars or proceedings, which may enable...the defendant to make a defense or assert a cross claim.

Historically, the Illinois courts have given a liberal interpretation to this provision and its predecessors. For example, in *Delfosse v. Kendall*, 283 Ill 301, 305 (1918), the Illinois Supreme Court stated:

> Section 1 of the statute on amendments...provides that the courts "shall have power to permit amendments in any process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before judgment rendered therein." *While a discretion is vested in the courts, under this section, to allow such amendments, it is a judicial discretion, which is subject to review, and one which should be exercised liberally in favor of the allowance of such amendments whenever essential to the proper presentation of a party's cause of action or defense. * * * To hold otherwise would be practically to defeat the object of this statute.* (Emphasis added; citations omitted.)

Thus, as early as 1918, the Illinois Supreme Court recognized that the discretion regarding the amendment of pleadings would "practically...defeat the object of this statute" were it not exercised "liberally in favor of the allowance of such amendments." *Accord, Goldstein v. Chicago City Railway Company*, 286 Ill. 297, 301 (1918); *Davidson v. Olivia*, 18 Ill. App. 2d 149, 152 (2nd Dist. 1958); *Martin v. Kozjak*, 5 Ill. App. 2d 390, 393 (4th Dist. 1955). This principle was echoed as recently as 2000 in *Savage v. Pho*, 312 Ill. App. 3d 553, 556-557 (5th Dist. 2000), where the court construed 735 ILCS 5/2-616(a) in the context of the filing of an amended complaint. The court stated: "The most important consideration is whether the allowance of the amendment furthers the ends of justice. *Any doubts as to whether leave to file an amended complaint should be granted should be decided in favor of the allowance of the amendment.*" Under these liberal standards, SHERIDAN should, without question, be allowed to amend its Answer and Affirmative Defenses.

The five purported bases the STATE argues in opposition to SHERIDAN's Motion for Leave to File form a single thesis. Essentially, the STATE argues that it is entitled to a ruling on its Motion to Dismiss Affirmative Defenses and that SHERIDAN's Motion for Leave to File somehow presents a purportedly illegal and prejudicial end-run around this entitlement, made without any stated reason. Moreover, according to the STATE's thesis not only is the STATE entitled to a ruling on its motion, but a favorable ruling, because the very act of SHERIDAN's moving to amend amounts to a concession of the STATE's motion. The logical conclusion to be drawn from the STATE's thesis is that one may never amend a pleading in the face of a motion to dismiss. Yet, that conclusion flies directly in the face of *Delfosse v. Kendall, supra*, 283 Ill at 305, and the legion of other Illinois court decisions favoring the liberal allowance of the exercise of the right to amend. No wonder, then, that the STATE has elected not to share the legal basis for its thesis.

Moreover, the STATE's argument also contradicts the only two known decisions of the Illinois Pollution Control Board on this subject. In *Veach Oil Company & Lake of Egypt Water District v. Illinois EPA*, PCB No. 92-202 (January 7, 1993), 1993 Ill. ENV LEXIS 27, the Board denied as moot Illinois EPA's motion to dismiss a petition for variance where the petitioner subsequently filed an amended petition. There, as here, no response to the motion to dismiss was filed. In *EPA v. Will County Produce Company*, PCB No. 77-133 (June 28, 1977), 1977 Ill. ENV LEXIS 427, respondent's motion to dismiss was also denied as moot where EPA had moved for leave to file an amended complaint. Thus, when previously confronted with cases where leave has been sought to amend a pleading in the face of a dismissal motion, the Board has, without known exception, always allowed the amendment of the pleading and denied the

motion to dismiss as moot. Moreover, it made no difference that the party amending the pleading did not respond directly to the dismissal motion.

Moreover, SHERIDAN need provide no reason for the amendment. In *Savage v. Pho*, *supra*, 312 Ill. App. 3d at 555, defendant's argument that the plaintiff "did not state the reason for the amendment" did not prevent the appellate court from finding that an *ex parte* order granting leave to amend was valid.

Furthermore, the STATE suffers no prejudice from the proposed amendment. In *Kupianen v. Village of Palos Park*, 107 Ill. App. 3d 373, 377 (1st Dist. 1982), the court ruled that "[n]o prejudice or surprise could have resulted" from the proposed amendment "since the case was still at the pleading stage." The case at bar is also in the pleading stage, and no prejudice will result to the STATE, notwithstanding its unsupported argument to the contrary.

In conclusion, the STATE argues vociferously that it is entitled to a ruling on its Motion to Dismiss Affirmative Defenses. Accordingly, in accordance with its prior practice, the Board should deny the Motion to Dismiss Affirmative Defenses as moot. SHERIDAN's Motion for Leave to File should be granted.

WHEREFORE, upon the above and foregoing, SHERIDAN's Motion for Leave to File First Amended Answer and Affirmative Defenses should be granted.

Respectfully submitted,

Respondent, SHERIDAN SAND & GRAVEL CO.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I have served the attached Reply in Support of Motion for Leave to File First Amended Answer and Affirmative Defenses by _**X**_ personal delivery, __ placement in the U. S. Mail, with first class postage prepaid, ___ sending it via facsimile and directed to all parties of record at the address(es) set forth below on or before 5:00 p.m. on the 28th day of December, 2006.

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