

ILLINOIS POLLUTION CONTROL BOARD

January 26, 2007

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 06-177
	)	(Enforcement - Public Water Supply)
SHERIDAN SAND & GRAVEL CO.,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by G.T. Girard):

In this order the Board grants the motion for leave to amend the answer and affirmative defenses filed by Sheridan Sand & Gravel Company (respondent). The granting of the motion renders the motion to strike affirmative defenses filed by People of the State of Illinois (complainant) moot. The Board will allow complainant to renew the motion to strike based on the amended answer and affirmative defenses.

**BACKGROUND**

On May 22, 2006, complainant filed a complaint against respondent. On June 1, 2006, the Board accepted the complaint for hearing. On July 7, 2006, respondent filed a motion to dismiss challenging the legal sufficiency of the complaint. On July 28, 2006, the complainant filed a response in opposition to the motion. The Board denied the motion to dismiss on September 7, 2006.

On October 13, 2006, respondent filed an answer and affirmative defenses (Answer) to the five-count complaint. Respondent set forth five affirmative defenses in the answer. *See generally* Answer at 17-33. On November 13, 2006, complainant filed a motion to strike affirmative defenses (Mot. Strike). On November 27, 2006, respondent filed a motion for leave to amend the answer and affirmative defenses (Mot. Amend). The complainant filed a response objecting to the motion to amend on December 11, 2006 (Resp.). On December 28, 2006, respondent replied to the complainant's response (Reply).

**DISCUSSION**

Because the complainant's motion to strike argues that the original affirmative defenses should be struck; if the Board grants the motion to amend the answer and affirmative defenses, the Board need not rule on the motion to strike. The motion to strike will be moot. Therefore, the following discussion will first address the arguments presented by the parties on the motion to amend the answer and affirmative defenses. Then the Board will address the motion to strike.

**Respondent's Motion to Amend**

The Board will first summarize the argument made in the motion and then summarize complainant's response. The Board will then summarize the arguments in the reply. Lastly the Board will set forth a ruling on the motion and the Board's reasoning for the ruling.

### **Motion**

Respondent cites Section 2-616(a) of the Code of Civil Procedure (Code) (735 ILCS 5/2-616(a) (2004)) in support of the motion to amend the answer and affirmative defenses. Section 2-616(a) of the Code allows amendments of pleadings on just and reasonable terms before final judgment. 735 ILCS 5/2-616(a) (2004); Mot. Amend at 1. Respondent asserts that because final judgment has not been entered, the amendment must be allowed. Mot. Amend at 1.

### **Response**

Complainant argues in response that respondent has "speciously granted itself permission" to amend the answer and affirmative defenses and offers no argument as to why the respondent should be permitted to amend the answer and affirmative defenses. Resp. at 2. Complainant maintains that the motion merely cites to a provision that gives the Board the discretion to allow a motion to amend, not granting respondent a right to file an amendment. *Id.* Complainant asserts that the respondent has offered no new information or position that would support the motion to amend the answer and affirmative defenses. Resp. at 3. Therefore, complainant opines the motion should be denied.

Complainant argues that the motion to amend the answer and affirmative defenses is premature while the motion to strike is pending. Resp. at 3. Complainant asserts that the motion to amend asks the Board to take action that the Board cannot take without first ruling on complainant's motion. *Id.* Complainant maintains the respondent seeks to preempt an unfavorable ruling by amending the answer and affirmative defenses which respondent might not be able to amend if the complainant's motion is granted. *Id.* Complainant opines that the respondent's filing of the motion is procedurally inappropriate and improper. *Id.*

### **Reply**

Respondent asserts that complainant's arguments are made without citation to any legal authority. Reply at 2. Respondent however has cited Section 2-616(a) of the Code (735 ILCS 5/2-616(a) (2004)) and case law interpreting that section. Reply at 2-3. Respondent assert that Section 2-616(a) of the Code (735 ILCS 5/2-616(a) (2004)) and case law interpreting that section supports the granting of the motion to amend the answer and affirmative defenses. The cases cited by respondent date back to 1918 and in those cases the courts have indicated that the amendment of pleadings should be exercised liberally in favor of the amendments. Reply at 3, citing Delfosse v. Kendall, 283 Ill. 301, 305 (1918); Goldstein v. Chicago 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). Respondent argues that the principal was reiterated in 2000 in Savage v. Pho, 312 Ill. App. 3d 553, 556-57 (5th Dist. 2000). The respondent points out that in Savage, 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 to the allowance of the amendment. Reply at 3, citing Savage 312 Ill. App. 3d 556-57.

Thus, respondent argues under the liberal standards enunciated by the courts, the Board “should, without question” grant the motion to amend the answer and affirmative defenses. Reply at 3.

Respondent takes issue with complainant’s argument that the complainant is entitled to a favorable ruling on the motion to dismiss and that the motion to amend is an illegal and prejudicial end-run around this entitlement. Reply at 4. Respondent asserts that the logical conclusion of the complainant’s argument is that amendment of a pleading may never be allowed in the face of a motion to dismiss.

Respondent points out that twice before the Board ruled on a motion to amend while a motion to dismiss was pending. Reply at 4, citing Veach Oil Company & Lake of Egypt Water District v. IEPA, PCB 92-202 (Jan. 7, 1993) and IEPA v. Will County Produce Company, PCB 77-133 (June 28, 1977). In Veach Oil, respondent indicates that the Board denied as moot the Illinois Environmental Protection Agency’s (Agency) motion to dismiss a petition for variance where petitioner subsequently filed an amended petition. Reply at 4. Likewise, in Will County, the Board denied respondent’s motion to dismiss as moot after the filing of an amended complaint. Reply at 4. Respondent asserts that the Board has thus granted the motion to amend while denying the motion to dismiss when presented with similar cases in the past. *Id.*

Respondent argues that there need not be a stated reason for the motion for leave to amend pursuant to Savage. Reply at 5. Further, respondent maintains that the granting of the motion does not prejudice the complainant. *Id.*

### **Board Discussion**

The Board procedural rules do not address the amendment of an answer or affirmative defenses. Therefore, pursuant to Section 101.100(b), the Board can look to the Code for guidance (*see* 35 Ill. Adm. Code 101.100(b)) and the Board will look for guidance in the Code. A review of Section 2-616(a) of the Code (735 ILCS 5/2-616(a) (2004)) and the case law interpreting that section indicates that while the provisions of Section 2-616(a) of the Code are discretionary, amendments of pleading should be liberally allowed. Savage, 312 Ill. App. 3d 556-57. Further, the courts have stated that Section 2-316(a) is to be “liberally construed so that cases are resolved on their merits.” *Id.* Therefore Section 2-616(a) of the Code (735 ILCS 5/2-616(a) (2004)) supports respondent’s argument.

In addition, the Board’s own practice is to allow amendments to complaints and petitions filed with the Board. *See generally* People v. The Highlands, L.L.C. and Murphy’s Farm, Inc., PCB 00-104 (May 6, 2004) and People v. 4832 Vincennes, LP and Batteast Construction Co., PCB 04-7 (Nov. 6, 2003). After the filing of an amended complaint or petition, the Board then allows for responses to be amended as well. The Board has also denied motions for leave to file

an amended complaint (*see* People v. Community Landfill Company, PCB 97-193 (Mar. 18, 2004). However, the Board specifically found in Community Landfill that the amended complaint would prejudice the parties, that the amended complaint was not timely filed, and that the complainant had the opportunity to amend the complaint. Community Landfill, PCB 97-193 *slip. op.* at 4. The Board finds that none of these factors are present in this matter, at this time.

The Board also finds nothing in the complainant's arguments that convinces the Board that the motion to amend the answer and affirmative defenses should be denied. The Board notes the absence of cited authority in the people's response, especially in contrast to the citation to Section 2-616(a) of the Code (735 ILCS 5/2-616(a) (2004)). Further, the Board finds that allowing the amendment of the answer and affirmative defenses, while granting complainant an opportunity to again file a motion to strike will not prejudice the complainant. The Board is also unconvinced by complainant's assertions that the filing of the motion to amend is procedurally improper or inappropriate. Therefore, the Board grants the motion to amend. The Board will allow complainant to respond to the amended answer and affirmative defenses, and directs the hearing officer to establish a timeframe for that response.

### **Complainant's Motion to Strike**

Complainant argues that by filing the amended answer and affirmative defenses, respondent has conceded the point raised in complainant's motion to strike. Resp. at 1-2. Complainant maintains that the Board should treat the motion to strike as being unopposed and dismiss the five affirmative defenses. Resp. at 2. Complainant further asserts that respondent has waived any objection to the Board's granting the motion to strike and cites Section 101.500 of the Board's rules for support (35 Ill. Adm. Code 101.500). Resp. at 2.

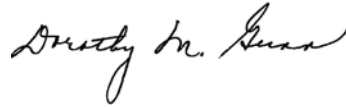
Because the Board has granted the motion to amend, the Board denies the motion to strike as moot. However, the complainant may revisit any arguments in the motion to strike currently before the Board in subsequent pleadings where appropriate.

### **CONCLUSION**

The Board grants the respondent's motion for leave to file an amended answer and affirmative defenses. Because the Board has granted that motion, the complainant's motion to strike affirmative defenses as plead in the first answer is moot. The Board will allow complainant to file a new motion to strike in response to the amended answer and affirmative defenses.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on January 26, 2007, by a vote of 4-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board