

ILLINOIS POLLUTION CONTROL BOARD  
August 22, 2002

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 02-56
	)	(Enforcement - Water)
CHIQUITA PROCESSED FOODS, L.L.C.,	)	
a Wisconsin limited liability corporation,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by T.E. Johnson):

On June 5, 2002, the complainant filed a motion to strike Chiquita Processed Foods, L.L.C., a Wisconsin limited liability corporation's (Chiquita) objections to the request for the admission of facts. On June 17, 2002, Chiquita filed a response to the motion to strike, and a memorandum in support of its response.

For the reasons outlined below, the Board finds the motion to strike objections to the request to admit facts moot, and accepts complainant's response to affirmative defense.

**PROCEDURAL BACKGROUND**

This matter is before the Board on a complaint filed on November 9, 2001, alleging that Chiquita caused or allowed water pollution in violation of the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (2000), *as amended by* P.A. 92-0574, eff. June 26, 2002, and the associated regulations at its pumpkin processing facility located in Princeville, Peoria County. On January 7, 2002, Chiquita filed its answer to the complaint. The answer contained a number of affirmative defenses that were the subject of a motion to strike by the complainant. On April 18, 2002, the Board issued an order denying complainant's motion to strike affirmative defenses in its entirety.

On April 18, 2002, the complainant served a request for admissions of fact on Chiquita. On May 16, 2002, Chiquita responded to the request, objecting that, *inter alia*, they were improper because they were prematurely served. Chiquita's response resulted in complainant's instant motion to strike filed on June 5, 2002, and Chiquita's subsequent response of June 17, 2002. On July 25, 2002, Board hearing officer requested and received a copy of Chiquita's amended response to complainant's request for admission of facts.

**COMPLAINANT'S MOTION TO STRIKE AND  
CHIQUITA'S OBJECTIONS TO THE REQUEST TO ADMIT**

On May 16, 2002, Chiquita initially objected to complainant's entire request for admission of fact. Chiquita asserted that the request was served before the pleadings had been joined because the complainant had not yet admitted or denied the affirmative defenses contained in Chiquita's January 4, 2002 answer to the complaint. Resp. to Req. at 1. Chiquita argued that the law clearly requires complainant to submit a response or the allegations in the affirmative defenses are admitted. *Id.* Chiquita contended that until the complainant responded to the affirmative defenses, the request to admit is premature.

Chiquita further argued that it was unable to evaluate the relevancy of the request to admit until the affirmative defenses were answered, and that it could not be known which facts are in dispute until the complainant answers. Resp. to Req. at 2.

Finally, Chiquita objected to the request to admit to the extent an answer was already set forth in Chiquita's answer or affirmative defenses as unduly burdensome for Chiquita to respond to requests to admit regarding issues not in dispute based on the pleadings. Resp. to Req. at 2-3.

On June 5, 2002, Chiquita amended its response to the request to admit. Chiquita asserted that all facts contained in its affirmative defenses are deemed admitted because complainant did not admit or deny them. Am. Resp. to Req. at 2. Chiquita admitted, denied or objected to each request. Chiquita did not object to the request to admit on the basis that the pleadings had not yet been joined.

**DISCUSSION**

In light of Chiquita's amended response to the request to admit facts, the motion to strike objections is moot and the Board will not address the arguments contained therein. However, issues regarding the procedure and necessity of responding to affirmative defenses have arisen, and Chiquita requests that if the Board agrees that factual allegations in affirmative defenses that are not specifically denied are admitted, the Board clarify whether the reply must be served within 21 or 30 days of the affirmative defenses.

Accordingly, before the Board are the following issues: what are the consequences, if any, of not responding to affirmative defenses, and what is the deadline by which a response must be filed?

The Board's procedural rules are silent on these issues, providing no guidance for responding to affirmative defenses. The Board addressed this issue prior to the Board's adoption of new procedural rules on January 1, 2001, and relied on the fact that the allegations in a complaint before the Board were deemed denied if no answer was filed. *See IEPA v. Louis Di Ciccio*, PCB 73-493 (May 23, 1974). Under the new procedural rules, all material

allegations of the complaint will be taken as admitted if no answer is filed or if not specifically denied by answer. *See* 35 Ill. Adm. Code 103.204(d).

Pursuant to 35 Ill. Adm. Code 101.100(b), the Illinois Code of Civil Procedure and the Supreme Court Rules do not expressly apply to proceedings before the Board, but may be used for guidance where the Board's procedural rules are silent.

Illinois Supreme Court Rule 182(a) provides that replies to answers shall be filed within 21 days after the last day allowed for the filing of the answer. Although the Board's procedural rules do not address the consequences of not filing a response to answers or affirmative defenses, caselaw provides that if no reply to an answer or affirmative defenses is timely filed the allegations asserting an affirmative defense are admitted. *See Lundberg v. Gage*, 22 Ill. 2d 249, 251, 174 N.E.2d 845 (1961).

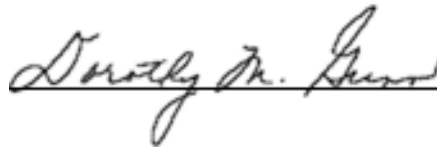
In this instance, the Board declines to adopt the procedures outlined by the Supreme Court Rules and relevant Illinois caselaw for practice before the Board. Factual assertions contained in an affirmative defense filed with the Board may be addressed at hearing if no response is filed. Accordingly, the complainant's June 24, 2002 response is accepted because no time for filing a response to an answer or affirmative defenses is contained in the Board's procedural rules. The factual allegations in the affirmative defenses are not deemed admitted.

### CONCLUSION

Complainant's motion to strike Chiquita's response to the request to admit facts is moot, and will not be decided. Complainant's response to affirmative defenses is accepted.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 22, 2002, by a vote of 7-0.



Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board