ILLINOIS POLLUTION CONTROL BOARD September 18, 2003

PEOPLE OF THE STATE OF ILLINOIS,)	
Complainant,)	
Complainaily)	
V.)	PCB 03-73
)	(Enforcement - Land)
RIVERDALE RECYCLING, INC., and)	
TRI-STATE DISPOSAL, INC.,)	
)	
Respondents.)	

DISSENTING OPINION (by T.E. Johnson):

I respectfully dissent from the Board's order issued today in this matter. I believe the Board should have accepted the affirmative defenses in question as pled. As the Board has previously held, where the well-pleaded facts of an affirmative defense raise the possibility that the party asserting them will prevail, the defense should not be stricken. *See* People v. Chiquita, PCB 02-56 (Apr. 18, 2002). Further, when asserting an affirmative defense, the test is whether the defense gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated. *Id*.

At issue here is a two-count open dumping case that alleges violations of 21(a) and (d) of the Environmental Protection Act (Act). I believe that the respondents' assertions that the agency told them it was acceptable to store the debris in an unpermitted area, and that the debris was authorized for storage without a permit constitute properly pled affirmative defenses. Section 22.38 of the Act was not referenced until raised by the respondents as an affirmative defense. Both the first and second affirmative defenses are new and, if true, will defeat the government's claim.

Although I am heartened that the majority is not granting the motion to dismiss, I do not believe that any additional pleading is necessary.

For these reasons, I respectfully dissent.

Thomas E. Johnson Chairman of the Board

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the above dissenting opinion was submitted on September 23, 2003.

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Dorothy M. Gunn, Clerk Illinois Pollution Control Board