

ILLINOIS POLLUTION CONTROL BOARD  
November 20, 2003

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

ORDER OF THE BOARD (by M.E. Tristano):

On November 19, 2002, the People of the State of Illinois (People), filed a two-count complaint against Riverdale Recycling, Inc. and Tri-State Disposal, Inc. (respondents). The complaint alleged that respondents committed open dumping of waste and operated a waste storage facility without a permit. On July 11, 2003, the respondents filed an answer to the complaint and asserted affirmative defenses. On August 12, 2003, the People filed a motion to dismiss respondents' affirmative defenses. On September 18, 2003, the Board granted the People's motion to dismiss the respondents' affirmative defense at the time but allowed the respondents 30 days from the date of the order to provide the Board with a supplemental answer outlining additional facts in support of each affirmative defense asserted.

For the reasons stated below, the Board denies the People's motion to dismiss the respondents' affirmative defenses.

**BACKGROUND**

Respondents own and operate a waste transfer recycling business located at 13901 South Ashland Avenue, Riverdale, Cook County. On June 24, 1998, the Illinois Environmental Protection Agency (Agency) issued a permit to respondents authorizing them to operate a waste transfer station for general municipal refuse and construction and demolition debris, and to engage in recycling activities. The two-count complaint alleged violations of Section 21(a) and 21(d) of the Environmental Protection Act (Act). Briefly the two counts include:

- Count I: Open dumping of waste: People alleged that respondents consolidated waste from one or more sources at the site that did not fulfill the requirements of a sanitary landfill, and respondents caused or allowed the open dumping of waste.
- Count II: Conducting a waste storage operation without a permit: People alleged that respondents conducted a waste storage operation outside of the permitted area, and therefore, in violation of their permit.

## STANDARD

In an affirmative defense, the respondents allege “new facts or arguments that, if true, will defeat... [complainant’s] claim even if all allegations in the complaint are true.” People v. Community Landfill Co., PCB 97-193 (Aug. 6, 1998). The Code of Civil Procedure (Code) gives additional guidance on pleading affirmative defenses. Section 2-613(d) provides, in part:

The facts constituting any affirmative defense... and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint,... in whole or in part, and any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply. 735 ILCS 5/2-613(d)(2002).

The Board’s procedural rules state the need for a factual basis to assert an affirmative defense. Section 103.204:

Any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not be known before hearing.

A valid affirmative defense gives color to the opposing party’s claim but then asserts new matter which defeats an apparent right. Condon v. American Telephone and Telegraph Co., 210 Ill. App. 3d 701, 569 N.E.2d 518, 523 (2d Dist. 1991), citing The Worner Agency Inc. v. Doyle, 121 Ill. App. 3d 219, 222, 459 N.E.2d 633, 635 (4th Dist. 1984). A motion to strike an affirmative defense admits well-pleaded facts constituting the defense, and attacks only the legal sufficiency of the facts. “Where the well-pleaded facts of an affirmative defense raise the possibility that the party asserting them will prevail, the defense shall not be stricken.” International Insurance Co. v. Sargent and Lundy, 242 Ill. App. 3d 614, 630-631, 609 N.E.2d 842, 853-54 (1st Dist. 1993), citing Raprager v. Allstate Insurance Co., 183 Ill. App. 3d 847, 854, 539 N.E.2d 787, 791 (2d Dist 1989).

## AFFIRMATIVE DEFENSES

On July 11, 2003, the respondents filed an answer to the complaint and affirmative defenses. On August 12, 2003, the People filed a motion to dismiss respondents’ affirmative defenses. On September 18, 2003, the Board granted, however, the People’s motion to dismiss the respondents’ affirmative defense at the time. The Board allowed the respondents’ 30 days from the date of the order to provide the Board with a supplemental answer outlining additional facts in support of each affirmative defense asserted. On October 17, 2003, the respondents filed a supplemental answer and affirmative defenses. On October 29, 2003, the People filed their response to affirmative defenses. The following gives the arguments of the respondents and the People’s, and the Board’s decision.

### **First Affirmative Defense**

Respondents argue that the waste observed on December 2, 1999 and March 12, 2001, outside of the permitted area was general construction and demolition debris which was authorized for storage without a permit pursuant to Section 22.38 of the Act. Respondents, therefore, argue that it is in compliance with the Act pursuant to Section 22.38 of the Act. Supp. Ans. at 9-10. In its supplemental answer and affirmative defenses, respondents' assert that the debris is sorted within 48 hours of receipt; all non-recyclable general construction and demolition debris is transported off site in accordance with all applicable federal, State and local requirements within 72 hours of its receipt; the percentage of incoming non-recyclable general construction and demolition debris is less than 25% of the total incoming material; all non-putrescible recyclable general construction and demolition debris is transported for recycling or disposal within six months of its receipt; the facility does not accept putrescible or combustible material; and the facility keeps adequate record keeping procedures that demonstrate compliance with Section 22.38 of the Act. Supp. Ans. at 10.

The People argue that respondents' affirmative defense contains only a broad assertion without supporting facts. To come under Section 22.38 of the Act, the People argue there are a number of requirements which include: (1) the facility accept exclusively general construction or demolition debris; (2) within 48 hours of the receipt of the debris that they be stored; (3) that the debris be transported off-site within 72 hours; (4) that all the sources and transporters of the accepted materials are identified; (5) access to the facility is controlled; and (6) proper documentation and record keeping is provided to the Agency. The People argue that respondents did not allege that they complied with any of the requirements under Section 22.38. Complainant, therefore, argues respondents affirmative defense fails to specify facts or arguments required for pleading a claim or a defense, and should be dismissed. Mot. to Dismiss at 2-4. The People's October 29, 2003, response to affirmative defenses reiterates its arguments.

The facts that respondents' have alleged in this affirmative defense could defeat part of the complaint. The waste observed on December 2, 1999 and March 12, 2001, outside of the permitted area could have been general construction and demolition debris which was authorized for storage without a permit pursuant to Section 22.38 of the Act. Respondents could possibly prevail if it is able to prove that it was in compliance with Section 22.38 of the Act. The Board finds that this affirmative defense should not be stricken.

### **Second Affirmative Defense**

Respondents state that a pre-enforcement conference was held on September 15, 1999. At the conference, respondents state that they were advised by Cliff Gould and James Haennicke of the Agency that it was acceptable for respondents to store general construction and demolition debris in any unpermitted area of the site pursuant to Section 22.38 of the Act as long as proper notice was given to the Agency and proper procedures were followed. Respondents, therefore, argue that its actions were both in compliance with Section 22.38 of the Act and were undertaken in a manner specifically suggested and approved by the Agency. Ans. at 10. In its Supplemental Answer and Affirmative Defenses, respondents argue that they provide information to Agency personnel when requested regarding the acceptance of general construction or demolition debris.

When requested, they provide the Agency with the name, address and telephone number of the facility, the street address and location of the facility, the date, truck number, the name of the hauler, and the quantity of debris. Respondents argue that these procedures were approved by Mr. Gould and Mr. Haennicke. Supp. Ans. At 10-11.

The People argue that the respondents did not allege they have taken any of the steps required by Section 22.38 and that this affirmative defense does not contain any new facts or arguments. The People argue that respondents merely allege they gained the knowledge of a section of the Code and through virtue of this knowledge, they are in compliance. The People, therefore, argue that this affirmative defense does not rise to the level of a new fact or argument and as a result it should be dismissed. Mot. to Dismiss at 4-5. The People's October 29, 2003 response to affirmative defenses reiterates their arguments.

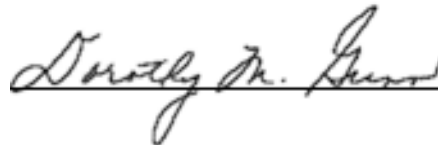
The activities undertaken by the respondents could defeat the complaint. The activities by the respondents could have been in compliance with Section 22.38 of the Act and undertaken in a manner specifically suggested and approved by personnel in the Agency's enforcement division. Respondents could possibly prevail if it is able to prove these actions. The Board finds that this affirmative defense should not be stricken.

### CONCLUSION

The Board denies the People's motion to dismiss respondents' affirmative defenses. The Board directs the hearing officer to proceed expeditiously to hearing in this matter.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the Board adopted the above order on November 20, 2003, by a vote of 4-0.

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

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board