RECEIVED
CLERK'S OFFICE
APR 0 4 2007
STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

SHERIDAN SAND & GRAVEL CO.'s
RESPONSE TO MOTION TO STRIKE
FIRST AMENDED AFFIRMATIVE DEFENSES

Respondent, SHERIDAN SAND & GRAVEL CO. ("SHERIDAN"), by its attorney, Kenneth Anspach, pursuant to 35 Ill.Adm.Code 101.500(d), for its response to the Motion to Strike First Amended Affirmative Defenses of complainant, PEOPLE OF THE STATE OF ILLINOIS (the "STATE" or "State"), states as follows:

I. The Legal Standard Applicable to SHERIDAN's First Amended Affirmative Defenses Indicate that SHERIDAN has Alleged Well Pleaded New Facts that Will Defeat the STATE's Claim.

The standard the Board applies to determine the sufficiency of an affirmative defense is set forth in *People v. The Highlands, L.L.C.*, PCB No. 00-104. There, the Board described the function of an affirmative defense:

> The Board's procedural rules provide that "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 have been known before hearing." 35 Ill. Adm. Code 103.204(d). In a valid affirmative defense, the respondent alleges "new facts or arguments that, if true, will defeat . . . the government's claim even if all allegations in the complaint are true." People v. Community Landfill Co., PCB 97-193, slip op. at 3 (Aug. 6, 1998).
>
> The Board has also defined an affirmative defense as a

> "response to a plaintiff's claim which attacks the plaintiff's legal right to bring an action, as opposed to attacking the truth of claim." Farmer's State Bank v. Phillips Petroleum Co., PCB 97-100, slip op. at 2, n. 1 (Jan. 23, 1997) (quoting *Black's Law Dictionary*). Furthermore, if the pleading does not admit the opposing party's claim, but instead attacks the sufficiency of that claim, it is not an affirmative defense. *Warner Agency v. Doyle*, 121 Ill. App. 3d 219, 221, 459 N.E.2d 663, 635 (4th Dist. 1984).

Thus, an affirmative defense alleges new facts that defeat the government's legal right to bring an action. Additionally, in *People v. The Highlands, L.L.C.*, PCB No. 00-104, the Board set forth the following standard pertaining to a motion to strike an affirmative defense:

> A motion to strike an affirmative defense admits well-pled facts constituting the defense, only attacking the legal sufficiency of the facts. *Int. Ins. Co. v. Sargent and Lundy*, 242 Ill. App. 3d 614, 630-31, 609 N.E.2d 842, 853-54 (1st Dist. 1993); citing *Raprager v. Allstate Ins. Co.*, 183 Ill. App. 3d 847, 854, 539 N.E.2d 787 (1989). "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." *Int. Ins.*, 609 N.E.2d at 854.

Thus, a motion to strike an affirmative defense admits well-pleaded facts constituting the defense, only attacking the legal sufficiency of the facts. In view of these requirements, the Board should find that SHERIDAN's affirmative defenses sufficiently allege new, well pleaded, facts that defeat the government's legal right to bring this action. These facts certainly "raise the possibility that [SHERIDAN] will prevail," and "should not be stricken."

II. The First Affirmative Defense Sufficiently Alleges that the STATE was Barred from Bringing the Complaint for Failing to Serve a Written Warning Notice and Provide An Opportunity to Cure Pursuant to Section 55.5(c) of the Act, 415 ILCS 5/55.5(c).

SHERIDAN has set forth three affirmative defenses in its Answer. In the First Affirmative Defense, SHERIDAN alleges that on or about May 4, 2005, the Illinois Environmental Protection Agency ("Illinois EPA") sent SHERIDAN a violation notice ("Violation Notice") pursuant to Section 31(a)(1) of Title VIII the Act, 415 ILCS 5/31(a). The Violation Notice included allegations of violations under Sections 55(a)-(c) of the Act, 415 ILCS 5/55(a)-(c), as well as those which were alleged under other provisions of Title XIV of the Act. (First Affirmative Defense, par. 3). SHERIDAN further alleged that, pursuant to Section 55.5(c) of the Act, 415 ILCS 5/55.5(c), where the offending party has violated Sections 55(a)-(c) of Title XIV of the Act, 415 ILCS 5/55(a)-(c), Illinois EPA must serve upon the offending party a written warning notice specifying the alleged violation, describing the corrective action which should be taken, and providing a period of 30 or 45 days in which the party may initiate and complete the corrective action. (First Affirmative Defense, par. 2). Only if the party fails to take or complete the corrective action or if there are no violations of Sections 55(a)-(c) of Title XIV of the Act[1], 415 ILCS 5/55(a)-(c), may Illinois EPA proceed with enforcement under Title VIII[2] pursuant to Section 55(b) of the Act, 415 ILCS 5/55(b), for any violations of Title XIV of the Act. *Id.* Yet, in the instant case, despite Illinois EPA having asserted in the Violation Notice that SHERIDAN violated Sections 55(a)-(c) of Title XIV of the Act, 415 ILCS 5/55(a)-(c), Illinois EPA never sent SHERIDAN a written warning notice pursuant to Section 55.5(c) of the Act, 415 ILCS 5/55.5(c). (First Affirmative Defense, par. 3).

The First Affirmative Defense further alleges that, before Illinois EPA can serve a written notice that it intends to pursue legal action pursuant to Section 31(b) of the Act,

---

[1] Sections 53-55.5 of the Act, 415 ILCS 5/53-5/55.5.

[2] Sections 30-33 of the Act, 415 ILCS 5/30-33.

415 ILCS 5/31(b), it must have fulfilled all of the requirements of Section 31(a) of the Act, 415 ILCS 5/31(a). (First Affirmative Defense, par. 5). Yet, compliance with the requirements of Section 31(a) of the Act, 415 ILCS 5/31(a) is conditioned by statute upon compliance with Section 55.5 of the Act, 415 ILCS 5/55.5. (First Affirmative Defense, par. 6). Of course, the STATE failed to comply with Section 55.5 of the Act, 415 ILCS 5/55.5. Because Illinois EPA failed to fulfill the requirements of Section 31(a), it also violated 31(b) of the Act, 415 ILCS 5/31(b). (First Affirmative Defense, pars. 7-15). These cumulative violations resulted in the Attorney General being barred from filing a complaint against SHERIDAN with the Board pursuant to Section 31(c)(1) of the Act, 415 ILCS 31(c)(1). (First Affirmative Defense, par. 16). Moreover, these violations by Illinois EPA also preclude the Board from holding a hearing pursuant to Section 32 of the Act, 415 ILCS 5/32, or from issuing any order pursuant to such hearing under Section 33 of the Act, 415 ILCS 5/33, because the Board is without subject matter jurisdiction in this cause. (First Affirmative Defense, par. 17).

Illinois EPA did, in fact, request the representation of the Office of the Attorney General for all violations set forth in the Violation Notice and Notice of Intent. (First Affirmative Defense, par. 18). That fact is also confirmed in the letter dated January 3, 2006 from the Office of the Illinois Attorney General to the undersigned attorney for SHERIDAN ("1/3/06 Attorney General Letter"), a copy of which is attached to the First Amended Answer and Affirmative Defenses as Exhibit "D," which states, in pertinent part, "The Illinois Environmental Protection Agency ("EPA") has referred the above-referenced matter to the Office of the Attorney General for the initiation of legal enforcement action." The First Affirmative Defense further alleges that, based solely

upon the referral of the Illinois EPA for enforcement, as described in the 1/3/06 Attorney General Letter, the Attorney General filed the within Complaint against SHERIDAN pursuant to Section 31(c)(1) of the Act, 415 ILCS 31(c)(1). (First Affirmative Defense, par. 19).

This affirmative defense meets all of the Board's standards for a valid affirmative defense. The facts of the First Affirmative Defense are plainly set forth pursuant to 35 Ill. Adm. Code 103.204(d). Moreover, SHERIDAN has alleged "new facts or arguments that, if true, will defeat . . . the government's claim even if all allegations in the complaint are true." *People v. The Highlands, L.L.C.*, PCB No. 00-104 quoting *People v. Community Landfill Co.*, PCB 97-193, slip op. at 3 (Aug. 6, 1998). These new facts concern the STATE's failure to send SHERIDAN a written warning notice for the alleged violations of Sections 55(a)-(c) of Title XIV of the Act, 415 ILCS 5/55(a)-(c), specifying the alleged violation, describing the corrective action which should be taken, and providing a period of 30 or 45 days in which the party may initiate and complete the corrective action. These new facts defeat the government's claim, because *inter alia*, Section 55.5(c) of the Act, 415 ILCS 5/55.5(c), gives a party respondent an opportunity to cure. As set forth in that statute:

Section 55.5 provides as follows:

> § 415 ILCS 5/55.5. [Investigation of violations; warning notice]
>
> Sec. 55.5. (a) The Agency shall investigate alleged violations of this Title XIV, or of any regulation promulgated hereunder, or of any approval granted by the Agency, and may cause such other investigations to be made as it may deem advisable.
>
> (b) If an investigation discloses that a violation may exist,

> the Agency shall take action pursuant to Title VIII of this Act in a timely manner.
>
> (c) Notwithstanding the provisions of subsection (b) of this Section, prior to taking action pursuant to Title VIII for violation of subsection (a), (b) or (c) of Section 55 of this Act, the Agency or unit of local government shall issue and serve upon the person complained against a written warning notice informing such person that the Agency or unit of local government intends to take such action. Such written warning notice shall specify the alleged violation, describe the corrective action which should be taken, and provide a period of 30 days in which one of the following response actions may be taken by such person:
>
> (1) initiation and completion of the corrective action, and notification of the Agency or unit of local government in writing that such action has been taken; or
>
> (2) notification of the Agency or unit of local government in writing that corrective action will be taken and completed within a period of 45 days from the date of issuance of the warning notice.
>
> *In the event that the person fails to take a response action, initiates but does not adequately complete a response action, or takes other action in contravention of the described corrective action, the Agency or unit of local government may proceed pursuant to subsection (b) of this Section.* If the same person has been issued 2 written warning notices for similar violations in any calendar year, thereafter the Agency or unit of local government may proceed pursuant to subsection (b) without first following the provisions of this subsection for the remainder of such calendar year with respect to such person. (Emphasis added.)

In other words, where the party does take the necessary response action pursuant to a written warning notice sent under Section 55.5(c) of the Act, 415 ILCS 5/55.5(c), the STATE is barred from further enforcement under Title VIII of the Act pursuant to Section 55.5(b) of the Act, 415 ILCS 5/55.5(b). Thus, where the respondent takes advantage of that opportunity to cure, the STATE is barred from further enforcement.

Here, SHERIDAN was never given that opportunity to cure. The STATE's failure to provide that opportunity to cure renders any subsequent enforcement of any of the violations in the Violation Notice barred. Accordingly, the First Affirmative Defense meets squarely the Board's requirement that it be a "response to a plaintiff's claim which attacks the plaintiff's legal right to bring an action, as opposed to attacking the truth of claim." ." *People v. The Highlands, L.L.C.*, PCB No. 00-104 quoting Farmer's State Bank v. Phillips Petroleum Co., PCB 97-100, slip op. at 2, n. 1 (Jan. 23, 1997). Thus, the First Affirmative Defense would result in a defeat of the STATE's Complaint.

The STATE, in its Motion to Strike, *admits* that Section 55.5(c) of the Act, 415 ILCS 5/55.5(c) bars the Illinois EPA from referring any case for enforcement to the Attorney General unless Illinois EPA has first complied with that provision. In this regard, the Motion to Strike at 4 states:

> Thus, only before the Illinois EPA may refer violations of *section 55(a), (b) or (c) of the Act* to the Attorney General for enforcement, is the Agency required to comply with the notice provision of Section 55.5(c). (Emphasis in original.)

Yet, in this instance, the Illinois EPA did, in fact, "refer violations of section 55(a), (b) or (c) of the Act to the Attorney General for enforcement" without complying with what the Attorney General refers to as "the notice provision of Section 55.5(c)." As set forth in paragraphs 9 and 10 of the First Affirmative Defense, Illinois EPA sent "Notice of Intent" dated August 25, 2005, a copy of which is attached to the Answer as Exhibit "B", stating that it intended to refer such violations for enforcement to the Attorney General. The Notice of Intent states, in pertinent part, as follows:

> The Illinois Environmental Protection Agency ("Illinois EPA") is providing this notice because it is the belief of the Illinois EPA that the alleged violations which are set forth

> in Attachment A cannot be resolved without the involvement of the Office of the Attorney General...

Attachment A to the Notice of Intent includes 17 paragraphs of violations, including that at paragraph 2, which states:

> Pursuant to Section 55(a)(4) of the [Illinois] Environmental Protection Act (415 ILCS 5/55(a)(4)), no person shall cause or allow the operation of a tire storage site except in compliance with Board regulations. *A violation of Section 55(a)(4) of the [Illinois] Environmental Protection Act, (415 ILCS 5/55(a)(4)), is alleged* for the following reason: **Waste tires have accumulated on site for longer than a year.** (Emphasis added; bold in original).

Thus, the Notice of Intent in this case unequivocally stated Illinois EPA's intent to refer to the Attorney General a list of alleged violations including an alleged violation of Section 55(a) of the Act, 415 ILCS 5/55(a). Yet, even the Attorney General now admits Illinois EPA could not make a referral to the Attorney General of an alleged violation under Section 55(a) of the Act, 415 ILCS 5/55(a) without first being "required to comply with ...Section 55.5(c)." (Motion to Strike at 4.)

The STATE does not dispute that the STATE failed to comply with Section 55.5(c) of the Act, 415 ILCS 5/55.5(c), but seeks to rationalize that failure. That rationalization is based upon an argument that the absence of any allegations under Section 55(a)-(c) of the Act, 415 ILCS 5/55(a)-(c) in the *Complaint* somehow whitewashes the prior *Notice of Violation* and *Notice of Intent*, which *did* contain such allegations. Yet that argument misses the obvious point that no Complaint would have been filed in the first instance had Illinois EPA afforded SHERIDAN its statutory opportunity to cure pursuant to Section 55.5(c) of the Act, 415 ILCS 5/55.5(c).

The Notice of Violation and Notice of Intent contain a list of 17 alleged violations, all arising out of a single set of operative facts. That list included a purported violation set forth at paragraph 2 of each the Notice of Violation and Notice of Intent of Section 55(a) of the Act, 415 ILCS 5/55(a). The inclusion of that violation in the list triggered operation of Section 55.5(c) of the Act, 415 ILCS 5/55.5(c). The language of that statute is clear that "notwithstanding" Illinois EPA's ability to enforce other violations under Title VIII of the Act, an alleged violation under Section 55(a) of the Act, 415 ILCS 5/55(a), triggers the requirement that the Illinois EPA afford SHERIDAN an opportunity to cure the alleged violation. The word "notwithstanding" has been defined as meaning "in spite of". *Davis v. Toshiba Machine Company*, 186 Ill. 2d 181, 185 (1999). Thus, *in spite of* the statutory authorization to enforce other violations under Title VIII of the Act pursuant to Section 55.5(b) of the Act, 415 ILCS 5/55.5(b), Illinois EPA must *first* provide an opportunity to cure where there is an alleged violation under Section 55(a) of the Act, 415 ILCS 5/55(a). Once the violation is cured, no further enforcement may occur under Title VIII pursuant to Section 55.5(b) of the Act, 415 ILCS 5/55.5(b). The statute is very specific in that only where "the person fails to take a response action," or does not complete or acts in contravention to a response action, may the "government...proceed pursuant to subsection (b) of this Section." It makes no sense, whatsoever, for the legislature to afford an opportunity to cure a violation, only to turn around and authorize the Illinois EPA to conjure up, out of the same set of operative facts, a host of other supposed violations that result in throwing that individual right back into the Act's enforcement mechanism.[3] It is well settled that courts will not interpret a

[3] In certain instances, such as in the case at bar, the statutory right to cure under Section 55.5(c) of the Act, 415 ILCS 5/55.5(c) operates much like the doctrine of *res judicata*. Given a set of operative facts out of

statute to "produce the anomalous result of a legislative intent to take away with one hand what it expressly gives with the other." *People ex rel. Euziere v. Rice*, 356 Ill. 373, 376 (1934). Not only does the Attorney General's interpretation of Section 55.5(c) of the Act, 415 ILCS 5/55.5(c) result in giving with one hand while taking away with the other, it totally eviscerates that subsection of the statute. It is axiomatic that statutes must be read as a whole and should be construed, if possible, so that no term is rendered superfluous or meaningless. *In re Marriage of Kates*, 198 Ill. 2d 156, 166 (2001).

The Attorney General would render meaningless the statutory opportunity to cure under Section 55.5(c) of the Act, 415 ILCS 5/55.5(c), by allowing Illinois EPA to refer cases to the Attorney General where that opportunity was required by the unambiguous language of the statute, but not provided. That is so, regardless of whether or not the complaint ultimately filed discloses the referral of alleged violations to which that right to cure attaches. Otherwise, the Illinois EPA would be free to evade the requirement of granting a potential offender an opportunity to cure under Section 55.5(c) of the Act, 415 ILCS 5/55.5(c) in *every instance* where the Illinois EPA asserts even a single violation of Title XIV of the Act outside of those violations proscribed under Section 55(a)-(c) of the Act, 415 ILCS 5/55(a)-(c). In fact, that is exactly the position asserted here by the Attorney General:

> Indeed, where no...allegations of Section 55(a), (b) and (c) of the Act are contained in the Complaint, *Illinois EPA is*

---

which arises an allegation of violation under Section 55(a)-(c) of the Act, 415 ILCS 5/55(a)-(c), the statute operates to bar enforcement of that and any other violation arising thereunder when the statutory right of curing the violation is exercised. As set forth in *River Park v. City of Highland Park*, 184 Ill. 2d 290, 318 (1998), "The purpose of *res judicata* is to promote judicial economy by requiring parties to litigate, in one case, all rights arising out of the same set of operative facts and also [to] prevent the unjust burden that would result if a party could be forced to relitigate what is essentially the same case." (Citations omitted). SHERIDAN is unjustly burdened by the STATE's attempt to litigate matters that are subject to a statutorily imposed, rather than a judicially imposed, bar.

> *not required to comply with Section 55.5(c) of the Act*...(Emphasis added). (Motion to Strike at 5).

Is it "indeed" so, that the STATE is free to disregard a statutory jurisdictional requirement simply by virtue of the whim of the Attorney General in determining what allegations are ultimately included in the complaint? Section 55.5(c) of the Act, 415 ILCS 5/55.5(c) specifically states "prior to taking *action* pursuant to Title VIII for violation of subsection (a), (b) or (c) of Section 55 of this Act, the Agency or unit of local government shall issue and serve upon the person complained against a written warning notice..." (Emphasis added.) Note that this statute does *not* state that the requisite written warning notice must be sent "prior to filing a complaint" as the Attorney General would have the Board believe, but, instead, states that the statutory requirement of a written warning notice and opportunity to cure must be provided "prior to taking *action* pursuant to Title VIII." Such an action was taken here with the sending of a Violation Notice and Notice of Intent that included an allegation under Section 55.5(a) of the Act, 415 ILCS 5/55.5(a). That the final version of the complaint ultimately filed herein by the Attorney General omitted that allegation is irrelevant. Accordingly, the assertion at page 5 of the Motion to Strike that "where no...allegations of Section 55(a), (b) and (c) of the Act are contained in the Complaint, Illinois EPA is not required to comply with Section 55.5(c) of the Act" is not only contrary to the plain language of Sections 31(a) and (b) and section 55.5(c) of the Act, 415 ILCS 31(a) and (b) and 5/55.5(c),[4] but is contrary to the Attorney General's own admission that Illinois EPA *is* required to follow the dictates of Section 55.5(c) of the Act, 415 ILCS 5/55.5(c) whenever it makes a referral to the Attorney General, as set forth hereinabove quoting from the Motion to Strike at 4:

---

[4] See First Affirmative Defense, paragraphs 7 and 8.

> Thus, only before the Illinois EPA may refer violations of *section 55(a), (b) or (c) of the Act* to the Attorney General for enforcement, is the Agency required to comply with the notice provision of Section 55.5(c). (Emphasis in original.)

Thus, the Attorney General admits that Section 55.5(c) of the Act, 415 ILCS 5/55.5(c) operates to bar the *referral* of allegations under Section 55.5(a) of the Act, 415 ILCS 5/55.5(a), regardless of whether such allegations are ultimately excised from the complaint.

In short, there is no dispute that the process under Section 55.5(c) of the Act, 415 ILCS 5/55.5(c) was not followed. The STATE merely seeks to justify its failure to follow that provision by arguing that doing so was unnecessary where no allegations under Section 55.5(a)-(c) of the Act, 415 ILCS 5/55.5(a)-(c) were ultimately included in the complaint, *i.e.*, a "no harm, no foul" approach to statutory construction. The problem with that argument is that the warning notice and opportunity to cure under Section 55.5(c) of the Act, 415 ILCS 5/55.5(c) are plainly jurisdictional. The pertinent language of Section 55.5(c) of the Act, 415 ILCS 5/55.5(c) states that Illinois EPA may only proceed with enforcement of alleged violations under Title XIV, Sections 53-55.5 of the Act, 415 ILCS 5/53-5/55.5 under Title VIII, Section 31 of the Act, 415 ILCS 5/31 if the "the Agency...issue[s] and serve[s] upon the person complained against a written warning notice" and "the person fails to take a response action, initiates but does not adequately complete a response action, or takes other action in contravention of the described corrective action." Moreover, the Illinois EPA is required to give two such warning notices for similar violations in any calendar year if the person, in fact, takes the requisite response action. Thus, the Illinois EPA plainly cannot proceed with enforcement or subsequent referral to the Attorney General without doing what it

undisputedly did not do here, *i.e.*, send SHERIDAN, pursuant to Section 55.5(c) of the Act, 415 ILCS 5/55.5(c), a written warning notice and afford it an opportunity to cure the alleged violations.

These requirements under Section 55.5(c) of the Act, 415 ILCS 5/55.5(c), in particular the sending of a written warning notice and providing an opportunity to cure, which must be undertaken prior to enforcement are not dissimilar in their import from the condition precedent of sending notice under Section 31(a)(1) of the Act, 415 ILCS 31(a)(1). With respect to such a condition precedent for enforcement under Section 31(a)(1) of the Act, 415 ILCS 31(a)(1), the Board stated in *People v. Chiquita Processed Foods, L.L.C. ("Chiquita")*, PCB 02-56 (Nov. 21, 2002), 2002 Ill. ENV LEXIS 648, as follows:

> *[T]he written notice required by Section 31(a)(1) is a precondition to the Agency's referral of the alleged violations to the Attorney General.* People v. Chemetco, PCB 96-76 (July 8, 1998). The legislative history of Section 31 indicates that the legislature did not intend to prevent the Attorney General from bringing enforcement actions that are not based on an Agency referral. *Id. In this case, however, the Attorney General is bringing a complaint not on its own, but pursuant to a referral containing information provided by the Agency. It is undisputed that the Section 31 process was not followed*...The complainant has admitted in a discovery response that the violations...were referred to the Attorney General by the Agency.... *In People v. Crane, PCB 01-76 (May 17, 2001) the Board found that while the 180 day time period of Section 31(a)(1) is directory, the substance of the Section 31 referral process is mandatory.* Crane, PCB 01-76, slip op. at 17. Here the Agency never issued or served a written notice of violation – either before or after the 180-day time period – as required by Section 31(a)(1) of the Act. (Emphasis added).

Thus, in *Chiquita* the Board distinguished between the timing of notice, which is "directory" and the notice and referral process, itself, which is "mandatory." The Board ruled that the substance of the Section 31(a)(1) notice process is mandatory, *i.e.*, jurisdictional. It further held that, regardless of the existence of statutory authority allowing the Attorney General to bring actions on her own, where the complaint was brought upon a referral from the Illinois EPA, the Attorney General is not free to bring an action if Illinois EPA did not abide by the substantive provisions of Section 31(a)(1) of the Act, 415 ILCS 31(a)(1). Thus, in *Chiquita* Illinois EPA's undisputed failure to send notice under Section 31(a)(1) of the Act, 415 ILCS 31(a)(1) resulted in the Board's dismissing the pertinent counts of the Attorney General's complaint.

Similarly, here, Illinois EPA's failure to send the requisite written warning notice and provide an opportunity to cure under Section 55.5(c) of the Act, 415 ILCS 5/55.5(c), must result in a barring of the Attorney General's Complaint. Illinois EPA did, in fact, request the representation of the Office of the Attorney General for all violations set forth in the Violation Notice and Notice of Intent. (First Affirmative Defense, par. 18). That fact is also confirmed in 1/3/06 Attorney General Letter, which states, in pertinent part, "The Illinois Environmental Protection Agency ("EPA") has referred the above-referenced matter to the Office of the Attorney General for the initiation of legal enforcement action." Based solely upon the referral of the Illinois EPA for enforcement, as described in the 1/3/06 Attorney General Letter, the Attorney General filed the within Complaint against SHERIDAN pursuant to Section 31(c)(1) of the Act, 415 ILCS 31(c)(1). (First Affirmative Defense, par. 19). As in *Chiquita*, where the jurisdictional notice and referral requirements were not complied with, and the complaint was filed

solely based upon an Agency referral, the Board must find that the First Affirmative Defense is sufficient to defeat the government's claim under the standard set forth in *People v. The Highlands, L.L.C.*, PCB No. 00-104 that "[w]here the well pleaded facts of an affirmative defense raise the possibility that the party asserting them will prevail, the defense should not be stricken." *Id.*

The STATE further argues at page 5, that even if Illinois EPA failed to comply with its admitted statutory duty under Section 55.5(c) of the Act, 415 ILCS 5/55.5(c), that failure does not prevent the Attorney General from filing a complaint "on her own motion" under Section 42(e) of the Act, 415 ILCS 5/42(e). Of course, that the Attorney General could theoretically bring a hypothetical action under Section 42(e) of the Act, 415 ILCS 5/42(e), is irrelevant. The STATE brought *this* action exclusively "pursuant to the terms and conditions of Section 31 of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/31 (2004)." (Complaint, Count I, par. 1). There is no reference in the Complaint to Section 42(e) of the Act, 415 ILCS 5/42(e), whatsoever! In conclusion, the First Affirmative Defense must stand.

I. The Second Affirmative Defense Sufficiently Alleges that SHERIDAN's Completion of Illinois EPA's Suggested Resolution Constituted, By Operation of Law, a Timely Completion of Corrective Action under Section 55.5(c) of the Act, 415 ILCS 5/55.5(c), Precluding Any Enforcement Action by the Illinois EPA or the Attorney General under Section 31 of the Act, 415 ILCS 5/31.

The Second Affirmative Defense is alleged in the alternative to the First. It repeats the first eleven paragraphs of the First Affirmative Defense. The difference between the Second Affirmative Defense and the First Affirmative Defense lies in paragraphs 12-24, which allege that the Violation Notice, sent on May 4, 2005, acted, by operation of law, as a written warning notice pursuant to Section 55.5(c) of the Act, 415

ILCS 5/55.5(c) and contained Suggested Resolutions, one of which (the "Suggested Resolution"), was as follows:

> **Suggested Resolutions**
>
> Immediately complete the attached Notification/Registration form and pay the required tire storage fee for 2005. By June 19, 2005, dispose of all used/waste tires on site using an Illinois registered tire transporter. (Bold and underlining in original). (Second Affirmative Defense, par. 12).

The Suggested Resolution was the same both for SHERIDAN's alleged violations under Sections 55(a)-(c) of Title XIV of the Act, 415 ILCS 5/55(a)-(c), and for those under the other provisions of Title XIV of the Act. SHERIDAN completed the requested Suggested Resolution in its entirety by June 6, 2006, and so informed Illinois EPA by letter dated June 13, 2006. (Second Affirmative Defense, pars. 14-15). The STATE apparently does not dispute that the Suggested Resolution was timely completed. (Motion to Strike at 6-10). SHERIDAN thereby satisfied all conditions of the Violation Notice. (Second Affirmative Defense, par. 16).

The Second Affirmative Defense further alleges that, by operation of law, the Violation Notice constituted a written warning notice and the Suggested Resolution constituted a corrective action under the provisions of Section 55.5(c) of the Act, 415 ILCS 5/55.5(c). (Second Affirmative Defense, par. 17). SHERIDAN's completion of the Suggested Resolution, by operation of law, constituted a timely completion of corrective action under Section 55.5(c) of the Act, 415 ILCS 5/55.5(c), precluding any enforcement action by the Illinois EPA under Sections 31(a) and (b) of the Act, 415 ILCS 31(a) and (b), or by the Attorney General under Section 31(c)(1) of the Act, 415 ILCS 31(c)(1). (Second Affirmative Defense, par. 18).

"Operation of Law" is defined as:

> "This term expresses the manner in which rights, and sometimes liabilities, devolve upon a person by the mere application to the particular transaction of the established rules of law, without the act or co-operation of the party himself." *Kaszubowski v. Board of Education of the City of Chicago*, 248 Ill. App. 3d 451, 459 quoting Black's Law Dictionary 985 (5th ed. 1979).

Thus, the term "by operation of law" means that rights may devolve upon a person without the cooperation of the parties to that particular transaction. Here, SHERIDAN's rights under Section 55.5(c) of the Act, 415 ILCS 5/55.5(c) devolved upon SHERIDAN without the cooperation of the Illinois EPA *by operation of law.* Thus, the Violation Notice that Illinois EPA illegally sent SHERIDAN pursuant to Section 31(a)(1) of the Act, 415 ILCS 5/31(a), *by operation of law*, without the cooperation of Illinois EPA, became the written warning notice that SHERIDAN was legally entitled to receive pursuant to Section 55.5(c) of the Act, 415 ILCS 5/55.5(c). The Suggested Resolution, *by operation of law*, without the cooperation of Illinois EPA, became the corrective action, *i.e.*, the opportunity to cure under Section 55.5(c) of the Act, 415 ILCS 5/55.5(c). The completion of that corrective action, *by operation of law* pursuant to Section 55.5(c) of the Act, 415 ILCS 5/55.5(c), without the cooperation of Illinois EPA, became a bar to enforcement action against SHERIDAN under Title VIII, precluding any enforcement action by the Illinois EPA under Sections 31(a) and (b) of the Act, 415 ILCS 5/31(a) and (b), or by the Attorney General under Section 31(c)(1) of the Act, 415 ILCS 5/31(c)(1). (Second Affirmative Defense, par. 18).

The Illinois EPA did, in fact, request the representation of the Office of the Attorney General for all violations set forth in the Violation Notice and Notice of Intent,

referring all the said violations to the Office of the Illinois Attorney General for enforcement. (Second Affirmative Defense, par. 22). The Office of the Illinois Attorney General accepted said referral for enforcement as set forth in the 1/3/06 Attorney General Letter. *Id.* Despite SHERIDAN's completion of the Suggested Resolution, constituting a timely completed corrective action under Section 55.5(c) of the Act, 415 ILCS 5/55.5(c), and barring the filing of a complaint by the Attorney General under Section 31(c)(1) of the Act, 415 ILCS 5/31(c)(1), the Attorney General, based solely upon said referral for enforcement, as described in the 1/3/06 Attorney General Letter, illegally filed the within Complaint against SHERIDAN pursuant to Section 31(c)(1) of the Act, 415 ILCS 5/31(c)(1). (Second Affirmative Defense, par. 23). For these reasons, this Board is without subject matter jurisdiction in this cause. (Second Affirmative Defense, par. 24). As with respect to the First Affirmative Defense, in *Chiquita*, where the jurisdictional notice requirements were not complied with, and the complaint was filed solely based upon an Agency referral, the Board must find that the Second Affirmative Defense is sufficient to defeat the government's claim under the standard set forth in *People v. The Highlands, L.L.C.*, PCB No. 00-104 that "[w]here the well pleaded facts of an affirmative defense raise the possibility that the party asserting them will prevail, the defense should not be stricken." *Id.*

Note that, contrary to the STATE's assertions in the Motion to Strike at 7, the Second Affirmative Defense does *not* allege, nor does SHERIDAN argue here, that SHERIDAN's completion of the Suggested Resolution constitutes a "defense to findings of violations of the provisions of the Act" as set forth in to Section 33(a) of the Act, 415 ILCS 5/33(a). Moreover, contrary to the STATE's assertions in the Motion to Strike at

7-10, the Second Affirmative Defense does *not* allege, nor does SHERIDAN argue here, that SHERIDAN's completion of the Suggested Resolution constitutes a "response to the penalty factors set forth under Section 33(c) of the Act." Rather, the completion of the Suggested Resolution constitutes, by operation of law, completion of a corrective action pursuant to Section 55.5(c) of the Act, 415 ILCS 5/55.5(c), and thereby has become a bar to enforcement action against SHERIDAN under Title VIII, precluding any enforcement action by the Illinois EPA under Sections 31(a) and (b) of the Act, 415 ILCS 5/31(a) and (b), or by the Attorney General under Section 31(c)(1) of the Act, 415 ILCS 5/31(c)(1). The STATE's four page argument under Sections 33(a) and (c) of the Act, 415 ILCS 5/33(a) and (c) is totally misplaced and is nothing but an extensive red herring. It should be ignored. Other than a blithe repetition of its assertion made with respect to the First Affirmative Defense that Illinois EPA's failure to comply with Section 55.5(c) of the Act, 415 ILCS 5/55.5(c) was whitewashed by the excision from the Complaint of the previous allegations under Section 55(a) of the Act, 415 ILCS 5/55(a), nowhere does the Motion to Strike address the allegations that the within enforcement action is barred by operation of law.

II. SHERIDAN's Third Affirmative Defense Sufficiently Alleges that the Board is Without Subject Matter Jurisdiction in this Cause Due to the Failure of Illinois EPA to Fulfill its Statutory Obligation Pursuant to Section 31(b) of the Act, 415 ILCS 5/31(b) of Making an "effort to resolve any alleged violations that could lead to the filing of a formal complaint."

In the alternative to the First and Second Affirmative Defenses, SHERIDAN's Third Affirmative Defense alleges that following the issuance of the Violation Notice, the Illinois EPA breached a requirement, pursuant to Section 31(b) of the Act, 415 ILCS 5/31(b), to make "an effort to resolve any alleged violations that could lead to the filing

of a formal compliant" or, in the alternative, to engage in good faith negotiations to resolve such violations, or both, as follows:

> For alleged violations that remain the subject of disagreement between the Agency and the person complained against following fulfillment of the requirements of subsection (a) of this Section, *and as a precondition to the Agency's referral or request to the Office of the Illinois Attorney General...for legal representation regarding an alleged violation that may be addressed pursuant to subsection (c)...of this Section*...the Agency shall issue and serve, by certified mail, upon the person complained against a written notice informing that person that the Agency intends to pursue legal Action. *Such notice shall notify the person complained against of the violations to be alleged and offer the person an opportunity to meet with appropriate Agency personnel in an effort to resolve any alleged violations that could lead to the filing of a formal compliant*...Nothing in this subsection is intended to preclude the Agency from following the provisions of subsection (c)...of this Section or from requesting the legal representation of the Office of the Illinois Attorney General...for alleged violations which remain the subject of disagreement between the Agency and the person complained against *after the provisions of this subsection are fulfilled.* (Emphasis added.) (Third Affirmative Defense, par. 3).

Thus, in order to comply with Section 31(b) of the Act, 415 ILCS 5/31(b), where the party complained against requests a meeting with Illinois EPA, Illinois EPA is required to meet with the party complained against and, there, Illinois EPA is required to make an "effort to resolve any alleged violations that could lead to the filing of a formal complaint." (Third Affirmative Defense, par. 4). Section 31(b) of the Act, 415 ILCS 5/31(b), thereby imposes upon Illinois EPA thereby a statutory obligation of, alternatively, making an "effort to resolve any alleged violations that could lead to the filing of a formal complaint" or of good faith negotiation, or of both. *Id.* If and only if Illinois EPA meets that statutory obligation may it request legal representation by the

Office of the Illinois Attorney General pursuant to Section 31(c) of the Act, 415 ILCS 5/31(c), or refer alleged violations to the Office of the Illinois Attorney General for enforcement. *Id.*

Included in the Violation Notice is an explanation of the violations alleged set forth in a Narrative Inspection Report ("Narrative Inspection Report") dated April 19, 2005 prepared by Shaun Newell, an inspector for Illinois EPA. The Narrative Inspection Report states, *inter alia*, that on April 19, 2005, while inspecting the Site, Mr. Newell "discovered approximately 2,000 waste semi, truck, car and tractor tires[5] inside seven roll-off boxes and two open top semi trailers." (Third Affirmative Defense, par. 7). Thereafter, Illinois EPA sent SHERIDAN the Notice of Intent (which incorporated the alleged violations set forth in the Violation Notice), and SHERIDAN requested a meeting with Illinois EPA pursuant to Section 31(b) of the Act, 415 ILCS 5/31(b). (Third Affirmative Defense, pars. 5-8). That meeting was scheduled for September 27, 2005 at the offices of Illinois EPA in Des Plaines, Illinois. (Third Affirmative Defense, par. 8).

In September, 2005, prior to the meeting between SHERIDAN and Illinois EPA, an official of Illinois EPA informed SHERIDAN that, notwithstanding that Illinois EPA was required by Section 31(b) of the Act, 415 ILCS 5/31(b), to meet with the offending party to make an effort to resolve the alleged violations that could lead to the filing of a formal complaint, it was the practice of Illinois EPA not to resolve any alleged violations at such a meeting. (Third Affirmative Defense, par. 9). Rather than meet to resolve such alleged violations, it was the practice of Illinois EPA to hold the meeting as a mere formality prior to a referral to the Office of the Illinois Attorney General. *Id.*

---

[5] The Complaint refers to "approximately 500...tires," not the "2000" set forth in the Narrative Inspection Report. (Complaint, Count I, par. 4).

Illinois EPA did hold a purported meeting with SHERIDAN at the offices of Illinois EPA on September 27, 2006. (Third Affirmative Defense, par. 10). At the meeting SHERIDAN made efforts to resolve such alleged violations by SHERIDAN's own good faith negotiation, not reciprocated by Illinois EPA, including, but not limited to, SHERIDAN's presentation of affidavits at the meeting that contradicted the allegations in the Violation Notice, the Narrative Inspection Report and Notice of Intent. *Id.* Illinois EPA made no effort to investigate or otherwise determine whether or not the matters set forth in those affidavits were, in fact, true, and made no effort to resolve the alleged violations set forth in the Violation Notice, the Narrative Inspection Report and Notice of Intent. *Id.* None of the alleged violations set forth in the Violation Notice, Narrative Inspection Report and Notice of Intent was resolved because, in accordance with its practice, Illinois EPA made no effort to resolve any alleged violations that could lead to the filing of a formal compliant. *Id.* Illinois EPA thereby failed to fulfill the provisions of Section 31(b) of the Act, 415 ILCS 5/31(b). (Third Affirmative Defense, par. 11).

Section 31(c)(1) of the Act, 415 ILCS 31(c)(1), states, in pertinent part, as follows:

> (1) For alleged violations which remain the subject of disagreement between the Agency and the person complained against following waiver, pursuant to subdivision (10) of subsection (a) of this Section, or fulfillment of the requirements of subsections (a) and (b) of this Section, the Office of the Illinois Attorney General...shall issue and serve upon the person complained against a written notice together with a formal complaint, which shall specify the provision of the Act or the rule or regulation...which such person is said to be in violation, and a statement of the manner in, and the extent to which such person is said to violate the Act or such rule or

> regulation...and shall require the person so complained against to answer the charges of such formal complaint at a hearing before the Board...

Thus, before the Office of the Illinois Attorney General can file a complaint before the Board pursuant to Section 31(c)(1) of the Act, 415 ILCS 31(c)(1), Illinois EPA must have, *inter alia*, fulfilled the requirements of Section 31(b) of the Act, 415 ILCS 5/31(b). (Third Affirmative Defense, par. 14). However, as set forth above, Illinois EPA failed to fulfill the requirements of Section 31(b) of the Act, 415 ILCS 5/31(b), due to its failure to fulfill its statutory obligation of making an "effort to resolve any alleged violations that could lead to the filing of a formal complaint" or of good faith negotiation, or of both.

The Illinois EPA did, in fact, request the representation of the Office of the Attorney General for all violations set forth in the Violation Notice and Notice of Intent, referring all the said violations to the Office of the Illinois Attorney General for enforcement. (Third Affirmative Defense, par. 16). The Office of the Illinois Attorney General accepted said referral for enforcement as set forth in the 1/3/06 Attorney General Letter and filed the within Complaint. (Third Affirmative Defense, pars. 16 and 18.) The Complaint is illegal and barred by operation of the provisions of Sections 31(b) and 31(c)(1) of the Act, 415 ILCS 5/31(b) and 5/31(c)(1). (Third Affirmative Defense, par. 20). The Board is thereby without subject matter jurisdiction in this cause. *Id.*

The STATE makes three arguments in response to the Third Affirmative Defense. First, it disputes the facts that are alleged in the Third Affirmative Defense. Second, it *admits* that the statute, Section 31(b) of the Act, 415 ILCS 5/31(b), does impose a duty upon Illinois EPA to make "*an effort to resolve any alleged violations that could lead to the filing of a formal compliant*" as stated therein, and does not dispute that it breached

that statutory standard. However, the STATE does dispute that Illinois EPA must engage in good faith negotiation to resolve such violations, as alleged in the alternative to the statutory standard also alleged in the Third Affirmative Defense. Third, the STATE argues, that even if there is such a requirement and Illinois EPA fails to comply with it, that failure does not prevent the Attorney General from filing a complaint such as the one at bar under Section 42(e) of the Act, 415 ILCS 5/42(e).

As set forth above, the STATE first disputes the facts that are alleged in the Third Affirmative Defense. In that regard, the Motion to Strike, page 10, states that, "Without waiving its claim that Respondent's Section 31 defense is legally deficient, the State contends that, *contrary to what Respondent claims*, Illinois EPA fulfilled its statutory obligations under Section 31 of the Act." Thus, the STATE is contending a set of facts that is contrary to that alleged in the Third Affirmative Defense. Notably, the STATE fails to cite any legal authority justifying a disputation of facts in a Motion to Strike. Further, the Motion to Strike derides the allegations of fact in the Third Affirmative Defense as being "colorfully claim[ed]," a "self-serving narration," "a biased and baseless assertion," "not the foundation for an affirmative defense," "a non sequitur" and "repetitive." (Motion to Strike, pages 10-13). Yet, the STATE does not have the option of disputing or deriding facts in a motion to strike. As set forth above, in *People v. The Highlands, L.L.C.*, PCB No. 00-104, the Board set forth the following standard pertaining to a motion to strike an affirmative defense:

> A motion to strike an affirmative defense admits well-pled facts constituting the defense, only attacking the legal sufficiency of the facts. *Int. Ins. Co. v. Sargent and Lundy*, 242 Ill. App. 3d 614, 630-31, 609 N.E.2d 842, 853-54 (1st Dist. 1993); citing *Raprager v. Allstate Ins. Co.*, 183 Ill. App. 3d 847, 854, 539 N.E.2d 787 (1989). "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." *Int. Ins.*, 609 N.E.2d at 854.

Thus, a motion to strike an affirmative defense admits well-pleaded facts constituting the defense, only attacking the legal sufficiency of the facts. The STATE's vehement disputation and derision of the facts alleged here is inapposite to a motion to strike. Only an argument that those allegations are legally insufficient provides a basis for striking the affirmative defense. Yet, such an argument is curiously absent here.

A valid affirmative defense attacks the plaintiff's legal right to bring an action, as opposed to attacking the truth of claim." *People v. The Highlands, L.L.C.*, PCB No. 00-104, *supra*, quoting *Farmer's State Bank v. Phillips Petroleum Co.*, PCB 97-100, slip op. at 2, n. 1 (Jan. 23, 1997) (quoting *Black's Law Dictionary*). In that regard, the Motion to Strike contains the following assertion:

> The facts as plead by Respondent, *i.e.*, detailing the actions of the Agency as it went through the section 31 process in this case, taken as true, quite obviously do not and cannot support a defense that the Agency failed to comply with Section 31. (Motion to Dismiss, page 11).

Interestingly, this assertion contains no reference to any specific paragraph of the Complaint wherein that pleading was "detailing the actions of the Agency as it went through the section 31 process." In reality, outside of a general allegation in paragraph 1 of the Complaint that, "This complaint is brought...pursuant to the terms and conditions of Section 31 of the Illinois Environmental Protection Act...415 ILCS 5/31 (2004)," *nowhere in the Complaint is there any mention of Section 31 of the Act*! Thus, the STATE's assertion is simply wrong. The allegations in the Third Affirmative Defense do not attack the truth of any allegations actually set forth in the Complaint.

Yet another approach to the facts taken by the Motion to Strike, page 13, argues, without citation of authority, that the Third Affirmative Defense fails to allege facts with "specificity." Yet, the actual standard pertaining to such allegations of fact is that "any facts constituting an affirmative defense must be *plainly set forth* before hearing in the answer or in a supplemental answer..." (Emphasis added). 35 Ill. Adm. Code 103.204(d). The facts of the Third Affirmative Defense are plainly set forth. For example, the Third Affirmative Defense, paragraph 9 alleges that in September, 2005, prior to the meeting between SHERIDAN and Illinois EPA, an official of Illinois EPA informed SHERIDAN that, notwithstanding that Illinois EPA was required by Section 31(b) of the Act, 415 ILCS 5/31(b), to meet with the offending party to make an effort to resolve the alleged violations that could lead to the filing of a formal complaint, it was the practice of Illinois EPA not to resolve any alleged violations at such a meeting, but rather to hold the meeting as a mere formality prior to a referral to the Office of the Illinois Attorney General. How much more plainly do facts need to be set forth than these are?

Also plainly set forth are the allegations in paragraphs 10 and 11 of the Third Affirmative Defense that at the meeting with Illinois EPA on September 27, 2006 SHERIDAN made efforts to resolve such alleged violations by SHERIDAN's own good faith negotiation, not reciprocated by Illinois EPA, including, but not limited to, SHERIDAN's presentation of affidavits at the meeting that contradicted the allegations in the Violation Notice, the Narrative Inspection Report and Notice of Intent. Yet, Illinois EPA made no effort to investigate or otherwise determine whether or not the matters set forth in those affidavits were, in fact, true, and made no effort to resolve the alleged

violations in accordance with its stated practice to make no effort to resolve any alleged violations that could lead to the filing of a formal compliant.

The purpose of requiring that the facts of an affirmative defense be "plainly set forth" in the answer is to prevent unfair surprise at trial. *Salazar v. State Farm Mutual Automobile Insurance Company*, 191 Ill. App. 3d 871, 876 (1st Dist. 1989).[6] Certainly, these allegations of fact accomplish that purpose.

The second argument the STATE makes in regarding the Third Affirmative Defense admits that the statute, Section 31(b) of the Act, 415 ILCS 5/31(b), *does* impose a duty upon Illinois EPA to make "an effort to resolve any alleged violations that could lead to the filing of a formal compliant" as stated therein. However, the STATE disputes that Illinois EPA must engage in good faith negotiation to achieve that end. The pertinent allegation in the Third Affirmative Defense reads as follows:

> [W]here the party complained against requests a meeting with Illinois EPA, Illinois EPA is required to meet with the party complained against and, there, Illinois EPA is required to make an "effort to resolve any alleged violations that could lead to the filing of a formal complaint." *Section 31(b) of the Act, 415 ILCS 5/31(b), thereby imposes upon Illinois EPA thereby a statutory obligation of, alternatively, making an "effort to resolve any alleged violations that could lead to the filing of a formal complaint" or of good faith negotiation, or of both.* If and only if Illinois EPA meets that statutory obligation may it request legal representation by the Office of the Illinois Attorney General pursuant to Section 31(c) of the Act, 415 ILCS 5/31(c) or refer alleged violations to the Office of the Illinois Attorney General for enforcement. (Emphasis added). (Third Affirmative Defense, par. 4).

[6] Referencing affirmative defenses under former Ill. Rev. Stat. Ch. 110, par. 2-613(d), currently 735 ILCS 5/2-613(d).

In commenting upon this allegation, the STATE admits that Illinois EPA must engage in an effort to resolve any alleged violations that could lead to the filing of a formal complaint. In that regard, the Motion to Strike at 12, states:

> As plainly stated under Section 31(b) of the Act, before the Agency can refer violations to the Attorney General, the Agency must indicate in its written notice to "the person complained of the violations to be alleged and offer the person an opportunity to meet with appropriate Agency personnel in an effort to resolve any alleged violations that could lead to the filing of a formal complaint." 415 ILCS 5/31(b) (2004).

The STATE refers to the statutory duty to make "an effort to resolve any alleged violations that could lead to the filing of a formal complaint" as a "plain directive." *Id.* Thus, the STATE admits the allegation of that duty is "plainly" set forth in paragraph 4 of the Third Affirmative Defense.

Given this admission, then it follows, *ipso facto*, that allegations of a violation of that duty state a legally sufficient affirmative defense. As discussed hereinabove, such allegations are *plainly set forth* in paragraphs 10-13 of the Third Affirmative Defense. Nowhere in the Motion to Strike does the STATE dispute that a violation of the statutory duty to make "an effort to resolve any alleged violations that could lead to the filing of a formal complaint" is plainly set forth. Thus, under the standard in 35 Ill. Adm. Code 103.204(d) and 735 ILCS 5/2-613(d) that facts constituting an affirmative defense be *plainly set forth* in the answer, the Third Affirmative Defense is legally sufficient.

In the alternative to the statutory duty to make "an effort to resolve any alleged violations," the Third Affirmative Defense alleges, at paragraph 4, that the STATE has a duty of undertaking "good faith negotiation" to resolve such violations. While a breach of the statutory standard under Section 31(b) of the Act, 415 ILCS 5/31(b), seems

undisputed, the STATE does vehemently dispute the *alternative* to the statutory duty alleged in paragraph 4. Certainly, SHERIDAN has a right to plead in the alternative regarding the STATE's duty to resolve violations. As set forth in 735 ILCS 5/2-613((b):

> When a party is in doubt as to which of two or more statements of fact is true, he or she may, regardless of consistency, state them in the alternative or hypothetically in the same or different counts or defenses. A bad alternative does not affect a good one.

In regard to this provision of the Code of Civil Procedure, Illinois courts have found that "even within the context of a single case, pleading in the alternative is permissible." *Board of Education v. The Du Page County Election Commission*, 341 Ill. App. 3d 327, 330 (2nd Dist. 2003).

Curiously, while the STATE admits that it has a statutory duty under Section 31(b) of the Act, 415 ILCS 5/31(b), to make "an effort to resolve any alleged violations that could lead to the filing of a formal complaint" and fails to dispute that a breach of that standard is "plainly set forth," the STATE devotes two full pages, 12-13, its Motion to Strike to a disputation of the alternative duty alleged in paragraph 4 of the Third Affirmative Defense, *i.e.*, that of "good faith negotiation" under Section 31(b) of the Act, 415 ILCS 5/31(b). For example, the STATE argues that, "Respondent provides no statutory authority or case law that conveys such a standard." Of course, citation of case law would be inappropriate in an affirmative defense, and the Third Affirmative Defense does, in fact, cite the statutory language, itself, at Section 31(b) of the Act, 415 ILCS 5/31(b). Moreover, there *is* case law authority supporting the allegation of a statutory duty of good faith negotiation. In that regard, Section 31(b) of the Act, 415 ILCS 5/31(b), which imposes a duty to make "an effort to resolve any alleged violations that

could lead to the filing of a formal complaint" is analogous to Sections 7-101 and 7-102 of the Eminent Domain Act, 735 ILCS 5/7-101 and 5/7-102, which provide that the government must attempt to reach an agreement with the property owner on the amount of compensation owed for the taking of his property. This requirement has been interpreted to impose a statutory duty of good faith negotiation upon the government in the taking of land. This obligation is described in *City of Naperville v. Old Second National Bank of Aurora*, 327 Ill. App. 3d 734, 739 (2nd Dist. 2002) as follows:

> Section 7--101 of the Code provides that private property shall not be taken or damaged for public use without just compensation." 735 ILCS 5/7-101 (West 1998). A condition precedent to the exercise of the power of eminent domain is an attempt to reach an agreement with the property owner on the amount of compensation. 735 ILCS 5/7-102 (West 1998) *** *In this regard, the acquiring authority must make a bona fide attempt to agree, and the attempt must be made in good faith.* *** (Citations omitted; emphasis added).

Thus, Illinois courts have found that the Eminent Domain Act, 735 ILCS 5/7-101 and 5/7-102, requires the government to "attempt to reach an agreement" with the property owner on the amount of compensation. Under those circumstances, Illinois courts find that, implied in that statutory obligation to attempt to reach an agreement is that the government "must make a bona fide attempt to agree, and the attempt must be made in good faith."

Here, where there is a similar requirement under Section 31(b) of the Act, 415 ILCS 5/31(b), that the STATE make "an effort to resolve any alleged violations that could lead to the filing of a formal complaint," there is also an implied requirement that the STATE "must make a bona fide attempt to agree, and the attempt must be made in good faith." It is simply a matter of statutory construction that such a duty is implied in

the Section 31(b) of the Act, 415 ILCS 5/31(b). As set forth in *Burger v. Lutheran General Hospital*, 198 Ill. 2d 21, 28-29 (2001):

> The fundamental rule of statutory construction is to ascertain and give effect to the legislature's intent. *** A court, therefore, first looks to the language of the statute, which is the most reliable indication of the objectives of the legislature in enacting a particular law...*Courts may presume that the Illinois General Assembly, in enacting legislation, did not intend absurdity, inconvenience, or injustice.* *** (Citations omitted; emphasis added).

When looking at the subject language of Section 31(b) of the Act, 415 ILCS 5/31(b), that the STATE make "an effort to resolve any alleged violations that could lead to the filing of a formal complaint," courts must "give effect to the legislature's intent." In particular, courts may presume that the legislature "did not intend absurdity, inconvenience, or injustice." In that regard, in order to give effect to the requirement that the STATE "make an effort to resolve any alleged violations," it would be absurd and unjust to the party alleged to have incurred such violations for there not to be a good faith standard by which to judge whether the STATE, in fact, made such an effort. That is certainly the conclusion of the Illinois courts which have interpreted the analogous provisions of the Eminent Domain Act, which interprets a statutory obligation to attempt to reach an agreement as requiring that the government "must make a bona fide attempt to agree, and the attempt must be made in good faith." Having such a good faith standard provides an additional protection from government officials who argue they have, in fact, made "an effort to resolve any alleged violations" where they have not. In fact, the Motion to Strike, pages 12-13, actually highlights this problem, where it states:

> Through this defense, Respondent seeks to invent an additional requirement of "good faith," which when applied to the Agency evidently means doing whatever Respondent

> requests, not what the Agency in its discretion deems appropriate.

In actuality, of course, "good faith" does not give either party a blank check to do as it pleases, as the Motion to Strike herein asserts. However, the duty of good faith calls forth a standard of behavior by which to judge the STATE's actions. As set forth in *City of Naperville v. Old Second National Bank of Aurora*, *supra*, 327 Ill. App. 3d at 739, good faith is associated with a "bona fide attempt to agree." In actuality, "[t]he term '*bona fide*' is a Latin phrase meaning 'good faith.' Black's Law Dictionary 168 (7th ed. 1999)." *People v. Mallek,* 348 Ill. App. 3d 1014, 1021 (3rd Dist. 2004) (Dissenting Opinion). Certainly, where the STATE argues that it has absolute discretion whether to resolve violations or not, the STATE is not impelled to make a "bona fide attempt to agree." Under those circumstances, Illinois EPA could easily, as alleged in paragraph 9 of the Third Affirmative Defense, have a practice of not resolving any alleged violations at a meeting under Section 31(b) of the Act, 415 ILCS 5/31(b), but rather of holding the meeting as a sham prior to a referral to the Office of the Illinois Attorney General. In effect, affording Illinois EPA absolute discretion guts the very provisions in the statute designed to protect citizens from governmental overreaching. Interestingly, a good faith standard of making a "bona fide attempt to agree" is hardly any different than the actual language of the statute itself, *i.e.*, that of making "an effort to resolve any alleged violations," which the Attorney General has *admitted* applies here. That the STATE so vehemently opposes the imposition of such a standard is reminiscent of the famous observation of Queen Gertrude to her son, Prince Hamlet, that "the lady doth protest too much."[7] Certainly, it is the very objections of the STATE to being judged by such a

---

[7] From *Hamlet* (III, ii, 239).

standard that highlight the need to do so. Of course, the Board will draw its own conclusions.

The STATE further argues at pages 15-16, that even if there is such a requirement and Illinois EPA fails to comply with its admitted statutory duty under Section 31(b) of the Act, 415 ILCS 5/31(b), to "make an effort to resolve any alleged violations," or to negotiate in good faith to resolve such violations, such failure does not prevent the Attorney General from filing a complaint "on her own motion" under Section 42(e) of the Act, 415 ILCS 5/42(e). As set forth in part II of this Response, that the Attorney General could theoretically bring a hypothetical action under Section 42(e) of the Act, 415 ILCS 5/42(e), is irrelevant. The STATE brought *this* action exclusively "pursuant to the terms and conditions of Section 31 of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/31 (2004)." (Complaint, Count I, par. 1).

The STATE also argues that, even if Illinois EPA failed to comply with its admitted statutory duty under Section 31(b) of the Act, 415 ILCS 5/31(b), to "make an effort to resolve any alleged violations," or to negotiate in good faith to resolve such violations, *not to worry,* the STATE is free to evade its statutory obligations:

> Where Section 31(b) of the Act provides that a precondition to Illinois EPA's referral to the Attorney General for enforcement under Section 31 is to provide notice and the opportunity for the violator to meet to discuss the violations, this precondition *does not* apply to the Attorney General's own filing of a complaint. (Motion to Strike, page 14).

In support of this assertion that the Attorney General is free to evade what the Attorney General termed on page 12 of the Motion to Strike as the "plain directive" of Section 31(b) of the Act, 415 ILCS 5/31(b), the STATE cites on pages 14-15 of the Motion to

Strike a plethora of Board cases that predate[8] the Board's holding in *Chiquita, supra.* That holding was as follows:

> *[T]he written notice required by Section 31(a)(1) is a precondition to the Agency's referral of the alleged violations to the Attorney General...In this case...the Attorney General is bringing a complaint not on its own, but pursuant to a referral containing information provided by the Agency. It is undisputed that the Section 31 process was not followed...In People v. Crane...the Board found that while the 180 day time period of Section 31(a)(1) is directory, the substance of the Section 31 referral process is mandatory...*Here the Agency never issued or served a written notice of violation – either before or after the 180-day time period – as required by Section 31(a)(1) of the Act. (Citations omitted; emphasis added.)

Thus, in *Chiquita* the Board ruled not that, "*the substance of the Section 31 referral process is mandatory.*" Illinois EPA's undisputed failure to abide by the notice requirement resulted in the Board's dismissing the pertinent counts of the Attorney General's complaint.

In the case at bar, as in *Chiquita*, there is a mandatory statutory duty under Section 31 of the Act, 415 ILCS 5/31 that is a "precondition" to enforcement. Here, that duty, set forth under Section 31(b) of the Act, 415 ILCS 5/31(b), is the mandatory duty to make "an effort to resolve any alleged violations" or of engaging in good faith negotiations to resolve such violations, or both. As in *Chiquita,* there is also no dispute that this mandatory duty was not complied with. As in *Chiquita*, where the mandatory

---

[8] The only cited case that does not predate *Chiquita* is that of People v. Peabody Coal Co., PCB 99-134 (June 5, 2003). There, the Board noted that respondent did not properly plead want of jurisdiction in its affirmative defense, as follows: "The Board notes that lack of jurisdiction can be a valid affirmative defense when properly pled. However, Peabody has not properly pled lack of jurisdiction in this proceeding. Accordingly, the Board grants the People's motion to strike Peabody's first affirmative defense." Peabody Coal, PCB 99-134, slip op. at 6. Here, lack of jurisdiction is properly pleaded in both the introductory paragraph and paragraph 20 of the Third Affirmative Defense, both of which allege want of "subject matter jurisdiction." Further, the sufficiency of SHERIDAN's allegations of lack of subject matter jurisdiction are not even raised as an issue in the Motion to Strike.

notice requirements were not complied with, and the complaint was also filed solely based upon an Agency referral, the Board must find that the Third Affirmative Defense is sufficient to defeat the government's claim.

V. SHERIDAN's Affirmative Defenses Sufficiently Allege New Facts That Defeat the Government's Legal Right to Bring this Action

In conclusion, the First Affirmative Defense sufficiently alleges that the STATE was barred from bringing the Complaint for failing to serve a written warning notice and provide an opportunity to cure pursuant to Section 55.5(c) of the Act, 415 ILCS 5/55.5(c). The Second Affirmative Defense sufficiently alleges that SHERIDAN'S completion of Illinois EPA's Suggested Resolution constituted, by operation of law, a timely completion of corrective action under Section 55.5(c) of the Act, 415 ILCS 5/55.5(c), precluding any enforcement action by the Illinois EPA or the Attorney General under Section 31 of the Act, 415 ILCS 5/31. SHERIDAN's Third Affirmative Defense sufficiently alleges that the Board is without subject matter jurisdiction in this cause due to the failure of Illinois EPA to fulfill its statutory obligation pursuant to Section 31(b) of the Act, 415 ILCS 5/31(b) of making an "effort to resolve any alleged violations that could lead to the filing of a formal complaint," or of engaging in good faith negotiations to resolve such violations, or both. In short, SHERIDAN's affirmative defenses sufficiently allege new facts that defeat the STATE's legal right to bring this action. Accordingly, the Motion to Strike should be denied.

Respectfully submitted,

Respondent, SHERIDAN SAND & GRAVEL CO.

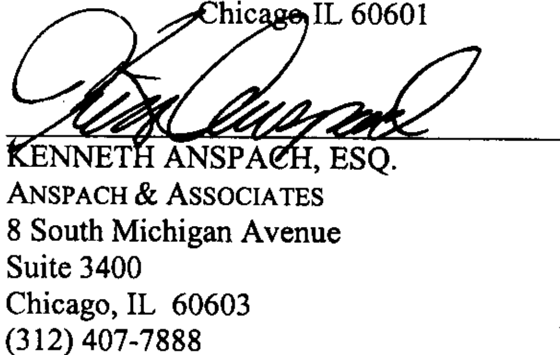
Kenneth Anspach, Esq.
ANSPACH & ASSOCIATES
8 South Michigan Avenue
Suite 3400
Chicago, IL 60603
(312) 407-7888

<u>CERTIFICATE OF SERVICE</u>

I, the undersigned, hereby certify that I have served the attached Sheridan Sand & Gravel Co.'s Response to Motion to Strike First Amended 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 24th day of April, 2007.

Vanessa Vail
Assistant Attorney General
Environmental Bureau
188 West Randolph Street
20th Floor
Chicago, IL 60601

Bradley P. Halloran, Esq.
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph Street
Chicago IL 60601



KENNETH ANSPACH, ESQ.
ANSPACH & ASSOCIATES
8 South Michigan Avenue
Suite 3400
Chicago, IL 60603
(312) 407-7888