

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

PEOPLE OF THE STATE OF ILLINOIS, )

Complainant, )

v. )

PCB NO. 12-21 )

ALTIVITY PACKAGING, LLC, )  
a Delaware limited liability company, )  
INTRA-PLANT MAINTENANCE CORPORATION, )  
an Illinois corporation, )  
IRONHUSTLER EXCAVATING, INC., )  
an Illinois corporation, and )  
RON BRIGHT, d/b/a Quarter Construction, )

Respondents. )

**NOTICE OF ELECTRONIC FILING**

To: See Attached Service List

PLEASE TAKE NOTICE that on January 23, 2012, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, c/o John T. Therriault, Assistant Clerk, James R. Thompson Center, 100 W. Randolph St., Ste. 11-500, Chicago, IL 60601, a MOTION TO STRIKE CERTAIN AFFIRMATIVE DEFENSES FILED BY ALTIVITY and RESPONSE TO CERTAIN AFFIRMATIVE DEFENSES ASSERTED BY ALTIVITY, copies of which are attached hereto and herewith served upon you.

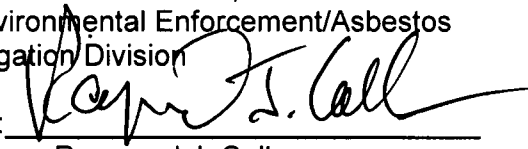
Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,  
Attorney General of the  
State of Illinois

MATTHEW J. DUNN, Chief  
Environmental Enforcement/Asbestos  
Litigation Division

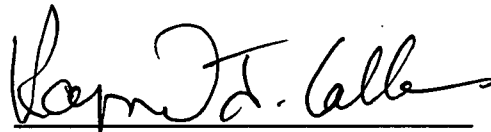
BY:

  
Raymond J. Callery  
Assistant Attorney General  
Environmental Bureau

500 South Second Street  
Springfield, Illinois 62706  
217/782-9031  
Dated: January 23, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that I did on January 23, 2012, cause to be served by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instruments entitled NOTICE OF ELECTRONIC FILING and MOTION TO STRIKE CERTAIN AFFIRMATIVE DEFENSES FILED BY ALTIVITY and RESPONSE TO CERTAIN AFFIRMATIVE DEFENSES ASSERTED BY ALTIVITY upon the persons listed on the Service List.



Raymond J. Callery  
Assistant Attorney General

This filing is submitted on recycled paper.

**SERVICE LIST**

Intra-Plant Maintenance Corporation  
c/o Charles M. Rock  
Hasselberg Rock Bell & Kuppler LLP  
Suite 200 Associated Bank Building  
4600 North Brandywine Drive  
Peoria, IL 61614

Altivity Packaging, L.L.C.  
c/o Eleni Kouimelis  
Winston & Strawn LLP  
35 W. Wacker Dr.  
Chicago, IL 60601

Ironhustler Excavating, Inc., & Ron Bright, d/b/a Quarter Construction  
c/o Thomas J. Immel  
Feldman Wasser Draper & Cox  
PO Box 2418  
1307 South Seventh Street  
Springfield, IL 62705

Carol Webb  
Hearing Officer  
Illinois Pollution Control Board  
1021 N. Grand Avenue East  
Springfield, IL 62794

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB No. 12-21
	)	
ALTIVITY PACKAGING, L.L.C.,	)	
a Delaware limited liability company,	)	
INTRA-PLANT MAINTENANCE CORPORATION,	)	
an Illinois corporation,	)	
IRONHUSTLER EXCAVATING, INC.,	)	
an Illinois corporation, and	)	
RON BRIGHT, d/b/a Quarter Construction,	)	
	)	
Respondents.	)	

**MOTION TO STRIKE CERTAIN AFFIRMATIVE DEFENSES FILED BY ALTIVITY**

Complainant, the PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois, moves the Board pursuant to Section 101.506 of the Board's Procedural Rules, 35 Ill. Adm. Code 101.506, to strike certain affirmative defenses asserted in the December 30, 2011 Answer to the Complaint filed by Respondent, ALTIVITY PACKAGING, L.L.C. ("ALTIVITY"), and in support of this motion states as follows:

- A. Complainant moves to strike the following affirmative defenses:
  - 1. The Complaint fails to State a claim upon which relief can be granted.
  - 2. The Complaint is barred, in whole or in part, by the applicable statute of limitations and laches, waiver, estoppel or unclean hands.
  - 3. The State's damages, if any, are due solely to the acts or omissions of other parties or individuals for which Altivity has no responsibility.
  - 4. The State's claims are barred, in whole or part, for lack of proximate causation between Altivity's actions and the State's injuries, which followed, if at all from other superseding and/or intervening causes.
  - 7. The native soil at the Wastewater Plant was not contaminated to unsafe levels.
  - 9. Altivity hereby incorporates by reference, as set forth fully herein, all other defenses and affirmative defenses to the Complaint alleged by

any other Defendant.

10. Altivity reserves the right to assert other defenses or affirmative defenses as this action proceeds.

B. Pursuant to Section 103.204(d) of the Board's Procedural Rules, 35 Ill. Adm. Code 103.204(d), any facts constituting an affirmative defense must be plainly set forth before hearing in the answer. Illinois is a fact-pleading jurisdiction, rather than a notice-pleading jurisdiction as is the federal court system. *Adkins v. Sarah Bush Lincoln Health Center*, 129 Ill.2d 497, 518, 544 N.E.2d 733, 743 (1989). Legal conclusions unsupported by allegations of specific facts are insufficient. *LaSalle National Trust N.A. v. Village of Mettawa*, 249 Ill.App.3d 550, 557, 616 N.E.2d 1297, 1303 (2nd Dist. 1993). Affirmative Defenses 1, 2, 3, 4, 7, 9 and 10 must be stricken for factual insufficiency.

C. If a pleading does not admit the opposing party's claim, but instead attacks the sufficiency of that claim, it is not an affirmative defense. *Worner Agency, Inc. v. Doyle*, 121 Ill.App.3d 219, 222-23, 459 N.E.2d 633, 635-36 (4th Dist. 1984). 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 Company, Inc.*, PCB 97-193, slip op. at 3 (August 6, 1998). Furthermore, the Board has previously held that affirmative defenses that concern factors in mitigation are not appropriate affirmative defenses to a claim that a violation has occurred. *People v. Texaco Refining and Marketing, Inc.*, PCB 02-03, slip op. at 6 (November 6, 2003). ALTIVITY's Affirmative Defenses 1, 7, 9 and 10 do not admit the Complainant's claims and assert new matters which would defeat the claims. Affirmative Defenses 1, 7, 9 and 10 must be stricken.

D. Section 2-613(a) of the Code of Civil Procedure, 735 ILCS 5/2-613(a) (2010), provides, in pertinent part: "Parties may plead as many . . . defenses, and matters in reply as they may have, and each shall be separately designated and numbered." Affirmative Defense 2 must be

stricken because it improperly groups multiple alleged defenses into one affirmative defense.

E. There is no statute of limitations contained in, or that specifically applies to the Illinois Environmental Protection Act, 415 ILCS 5/1 *et seq.* (2010). Furthermore, in *Pielet Brothers Trading, Inc. v. Pollution Control Board*, 110 Ill.App.3d 752, 758, 442 N.E.2d 1374, 1379 (5th Dist. 1982), the court specifically held that the statute of limitations does not apply when the Illinois EPA is seeking to protect the public's right to a clean environment. The affirmative defense of statute of limitations included in Affirmative Defense 2 must be stricken with prejudice.

F. The Complainant is not required to establish that the soil at the "source site" was "contaminated" to "unsafe levels." The "miscellaneous material" is "waste" as defined by the Act and no statutory exception applies which would exclude it from that definition. *People v. Lincoln, Ltd.*, 383 Ill.App.3d 198, 208, 890 N.E.2d 975, 983 (1st Dist. 2008). ALTIVITY's Affirmative Defense 7 does not assert a valid affirmative defense and must be stricken with prejudice.

WHEREFORE, the Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board strike Affirmative Defenses 1, 2, 3, 4, 7, 9 and 10 asserted by Respondent, ALTIVITY PACKAGING, L.L.C., and grant it such other relief as the Board deems appropriate.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS  
ex rel. LISA MADIGAN,

Attorney General  
Of the State of Illinois

MATTHEW J. DUNN, Chief  
Environmental Enforcement Division

BY: 

RAYMOND J. CALLERY  
Assistant Attorney General  
Environmental Bureau

500 South Second Street  
Springfield, Illinois 62706  
(217) 782-9031  
Date: January 23, 2012.

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 Respondents. )

**RESPONSE TO CERTAIN AFFIRMATIVE DEFENSES ASSERTED BY ALTIVITY**

Complainant, the PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois, in response to Affirmative Defenses 5, 6 and 8 asserted in the December 30, 2011 Answer to the Complaint filed by Respondent, ALTIVITY PACKAGING, L.L.C. ("ALTIVITY"), states as follows:

5. The native soil removed from the Wastewater Plant does not constitute "waste" as defined by 415 ILCS 5/3.305 and 3.535 (2010).

Response: Complainant denies that "miscellaneous material" which originated at the "source site" is not "waste" and for authority cites *People v. Lincoln, Ltd.*, 383 Ill.App.3d 198, 208, 890 N.E.2d 975, 983 (1st Dist. 2008) ("The accumulated clean construction or demolition debris at issue is waste unless [the respondent] shows it comes within a statutory exception, and [the respondent] has not made this showing.").

6. Altivity has not caused or allowed the open dumping of "waste" as defined by 415 ILCS 5/3.305 and 3.535 (2010).

Response: Complainant denies that ALTIVITY has not caused or allowed the open dumping of "waste" and for authority cites *People v. McFalls*, 313 Ill.App.3d 223, 227, 728

N.E.2d 1152, 1155 (3rd Dist. 2000) (“ . . . neither ownership, nor control, of an allegedly illegal disposal site is necessary to effect the consolidation of refuse there. Therefore, an offsite generator, as a ‘person,’ may ‘cause’ ‘open dumping’ within the plain meaning of subsections 21(a) and 21(p)(1)”).

8. The standards set forth in the TACO Tier 1 Remediation Objectives for Concentration of Chemicals in Background Soils Within MSA’s, 35 Ill. Adm. Code Part 742, Appendix A, Table G are not applicable to the native soil removed from the Wastewater Plant.

Response: Complainant denies that the TACO standards are not relevant to disputed issues in this case.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS  
*ex rel.* LISA MADIGAN,  
Attorney General  
of the State of Illinois

MATTHEW J. DUNN, Chief  
Environmental Enforcement Division/Asbestos  
Litigation Division

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