BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB No. 13-19
	)	
SHERIDAN-JOLIET LAND DEVELOPMENT, LLC, an Illinois limited-liability company, and SHERIDAN SAND & GRAVEL CO.,	)	
	)	
Respondents.	)	

REPLY IN SUPPORT OF MOTION TO STRIKE
AMENDED NOTICE OF ELECTRONIC FILING

Respondents, SHERIDAN-JOLIET LAND DEVELOPMENT, LLC, an Illinois limited-liability company, and SHERIDAN SAND & GRAVEL CO. (collectively "SHERIDAN"), by their attorney, Kenneth Anspach, pursuant to § 2-615(a) of the Code of Civil Procedure, 735 ILCS 2-615(a), § 2-616 of the Code of Civil Procedure, 735 ILCS 2-616, and §§101.100, 101.500 and 101.506 of the General Rules of the Pollution Control Board ("Procedural Rules"), 35 Ill. Adm. Code 101.100, 101.500 and 101.506, file the instant Reply memorandum ("Reply") in support of SHERIDAN's Motion to Strike Amended Notice of Electronic Filing ("Motion to Strike Amended Notice") and in reply to the Complainant's Response to Respondents' Motion to Strike Amended Notice of Electronic Filing and Supporting Memorandum (the "STATE's Response") filed by complainant, PEOPLE OF THE STATE OF ILLINOIS (the "STATE").

I. THE STATE HAS WAIVED ANY OBJECTIONS TO DISMISSAL OF THIS CASE FOR WANT OF JURISDICTION.

The primary basis for the Motion to Strike Amended Notice is that the STATE's failure to comply with the requirement under § 31(c)(1) of the Act, 415 ILCS 5/31(c)(1), that any complaint filed by the STATE be accompanied by a notice that financing may be available,

which resulted in an absence of subject matter jurisdiction. Furthermore, the STATE's attempted filing of a so-called Amended Notice of Electronic Filing could not, and did not, cure that defect. Specifically, § 31(c)(1) of the Act, 415 ILCS 5/31(c)(1), requires that the:

> *complaint **shall be** accompanied by a notification to the defendant that financing may be available, through the Illinois Environmental Facilities Financing Act [20 ILCS 3515/1 et seq.] to correct such violation.* (Bold and Emphasis added.)

(This notification is hereinafter referenced as a "Notice That Financing May Be Available.") In *Illinois EPA v. Production Finishers and Fabricators, Inc. ("Production Finishers and Fabricators, Inc.")*, PCB No. 85-31, 1986 Ill. ENV LEXIS 8 (January 9, 1986), this Board held that "compliance with the requirement of [§ 31(c)(1) of the Act, 415 ILCS 5/31(c)(1)]" that a Notice That Financing May Be Available must accompany the complaint "is a jurisdictional prerequisite for the proper filing of an enforcement case before the Board." Because it is a jurisdictional prerequisite and none accompanied the filing of the complaint therein, the Board dismissed the action. On that basis, since no Notice That Financing May Be Available accompanied the Complaint in the case at bar, the Board must dismiss the Complaint herein.

The STATE's Response purposely declines to address the lack of jurisdiction resulting from its failure to accompany the Complaint with a Notice That Financing May Be Available. In the STATE's Response, note 1, the STATE purportedly "reserves the right to argue the financing notification is not a jurisdictional requirement." When? Where? In a Sur-Reply? The Procedural Rules make no provision for reserving the right to argue something later. In fact, §101.500(d) of the Procedural Rules, 35 Ill. Adm. Code 101.500(d), is quite specific that failure to respond is deemed a waiver:

> Within 14 days after service of a motion, a party may file a response to the motion. *If no response is filed, the party will be deemed to have waived objection to the granting of the*

motion...(Emphasis added.)

The "jurisdictional requirement" is the primary basis upon which the Motion to Strike Amended Notice is made. By Hearing Officer Order dated March 26, 2013 the STATE was obliged to file its response to the Motion to Strike Amended Notice by April 12, 2013, and it seemingly did so. Given that the STATE chooses to forego the opportunity to respond the argument that the Board lacks jurisdiction over this cause, then the Procedural Rules require a finding that the STATE waives any objection thereto.

Moreover, the STATE's Response also fails to distinguish, deny or object to the application of *Production Finishers and Fabricators, Inc.*, the only case directly on point with the case at bar. Thus, the STATE waives any objection to a dismissal of the Complaint for want of jurisdiction. Accordingly, the so-called Amended Notice of Electronic Filing should be stricken and the Complaint dismissed.

II. THE ATTEMPTED FILING OF THE SO-CALLED AMENDED NOTICE OF ELECTRONIC FILING IS A NULLITY.

In the face of this statutory jurisdictional prerequisite, the STATE on February 27, 2013 attempted the filing of a so-called "Amended Notice of Electronic Filing." The Motion to Strike Amended Notice pointed out that this attempted filing was a nullity. It is a nullity for the following reasons.

A. *City Of Herrin* Is Not Precedential.

The sole basis upon which the STATE relies for support of its attempted filing of the so-called Amended Notice of Electronic Filing is *People v. City of Herrin ("City of Herrin")*, PCB No. 95-158, 1995 Ill. ENV LEXIS 676 (July 7, 1995). In *City of Herrin* the respondent raised lack of jurisdiction by motion when the STATE failed to accompany its complaint with a Notice That Financing May Be Available. Subsequent to the filing of respondent's motion the STATE

filed a purported Amended Notice of Filing that included the financing notification. *The respondent failed to object to the filing of the purported Amended Notice of Filing. The respondent failed to move to strike the purported Amended Notice of Filing.* In the face of no objection the Pollution Control Board (the "Board") accepted the Amended Notice of Filing "and interprets it as an amended complaint curing the financing notification deficiency."

A final administrative decision usually follows from some sort of adversarial process involving the parties affected. *Fields v. Schaumburg Firefighters' Pension Board*, 383 Ill. App. 3d 209, 217 (2008). The adversarial nature of the process is important because it subjects the STATE's case to "'meaningful adversarial testing.'" *People v. Hampton*, 149 Ill. 2d 71, 115 (1992) (citations omitted). In *City of Herrin*, there was no such meaningful adversarial testing of the legal propriety of the filing of the Amended Notice of Filing because respondents simply acquiesced in its filing by the STATE. The situation in *City of Herrin* is akin to one where a party waives his statutory rights by stipulation. It is well settled that a party to a pending litigation may waive, by stipulation, his statutory or constitutional rights and the court will hold him bound by such stipulation. *People ex rel. Stead v. Spring Lake Drainage & Levee District*, 253 Ill. 479, 492 (1912). In *City of Herrin* respondent waived its statutory right that the complaint be accompanied by a Notice That Financing May Be Available. In the face of that waiver the Board said it "interprets [the amended notice of filing] as an amended complaint curing the financing notification deficiency." Significantly, due to respondent's failure to object, the Board never even reached the jurisdictional issue upon which *Production Finishers and Fabricators, Inc.* was decided. Here, by contrast, SHERIDAN moved to strike the so-called Amended Notice of Electronic Filing. Accordingly, *City of Herrin* is inapposite and of no precedential import here.

B. This Board Cannot Extend Its Subject Matter Jurisdiction to a Cause of Action Where It Lacks The Jurisdiction to Act.

The Motion to Strike Amended Notice at 4-5 pointed out that this Board simply cannot extend its authority to a cause of action where it lacks the jurisdiction to act. The STATE's Response does not dispute the application of this legal principle to the case at bar. In fact, such was the holding in *Illinois EPA v. Busby ("Busby")*, AC No. 01-6, 2000 Ill. ENV LEXIS 757 (December 7, 2000), where the Board held that a 35-day time period for the filing of petitions for administrative review of administrative citations under § 31.1(d) of the Act, 415 ILCS 5/31.1(d) was a jurisdictional requirement. Instead of disputing the application of the legal principle of *Busby* to the case at bar, the STATE's Response at 3-4 attempts to distinguish *Busby* by noting that the 35-day time period for the filing of petitions for administrative review of administrative citations is not at issue in this case. Obviously, the circumstances under which *Busby* arose are different than those in the case at bar. For that matter, the circumstances of one case will virtually always be different than the next.[1] However, the principal of law applied in *Busby* is equally applicable here, which the STATE's Response does not dispute. Accordingly, for that reason and pursuant to §101.500(d) of the Procedural Rules, 35 Ill. Adm. Code 101.500(d), the STATE waives any objection to the principle that the Board cannot expand its authority beyond that which was granted to it by the legislature.

C. Jurisdiction Failed to Attach to The Complaint and the Board Cannot Confer Jurisdiction Where It Never Existed.

The Motion to Strike Amended Notice at 5-6 pointed out, citing *Figueroa v. Deacon,* 404 Ill. App. 3d 48, 52 (1st Dist. 2010) and *Allord v. Municipal Officers Electoral Board*, 288 Ill. App. 3d 897, 902 (1st Dist. 1997), that jurisdiction will not attach in the face of a failure of strict

[1] One obvious exception to that observation is *Production Finishers and Fabricators, Inc.*, which, as is set forth in Part I of this Reply, is, in all respects, directly on point with the case at bar.

compliance with statutory jurisdictional prerequisites. The STATE's Response does not dispute the application of this legal principle. Instead, the STATE's Response again attempts to distinguish these cases based upon the circumstances under which the cases arose, *i.e.*, under different statutes with different statutory requirements than under § 31(c)(1) of the Act, 415 ILCS 5/31(c)(1). These are distinctions without a difference. Once again, for that reason and pursuant to §101.500(d) of the Procedural Rules, 35 Ill. Adm. Code 101.500(d), the STATE waives any objection to the application of the principle that jurisdiction will not attach in the face of a failure of strict compliance with statutory jurisdictional prerequisites.

D. The Attempted Filing of an Amended Pleading Without Leave of this Board is Void.

The Motion to Strike Amended Complaint at 7 pointed out that the STATE neither sought nor was granted leave by this Board to file the so-called Amended Notice of Electronic Filing. SHERIDAN further cited *Kohlhaas v. Morse*, 36 Ill. App. 2d 158, 161 (4th Dist. 1962) for the well-known principle that the filing of an amended pleading without leave of court is expressly prohibited and void. The STATE's Response at 4 attempts to distinguish *Kohlhaas v. Morse* on the purported basis that the facts of the case, *i.e.*, that the case concerned whether plaintiff had been diligent in effecting service, is not an issue here. How does that difference in how the case arose distinguish the application of the legal principle involved to the case at bar? It simply does not. Moreover, instead of disputing the legal principle involved, the STATE's Response at 4 argues that it actually never filed an amended pleading:

> In this case, the Complainant did not amend the complaint without leave of court. Rather, as was permitted in *City of Herrin*, it filed and served an Amended Notice of Electronic Filing.

Thus, the STATE asserts it did not amend the complaint without leave of court. Yet, the STATE's Response at 4 concedes that "in *City of Herrin,* the Board considers an amended notice

of electronic filing...to be an amended complaint." If the Board considers an amended notice of electronic filing to be an amended complaint, then pursuant to which order was leave granted to file such amended complaint? Simply stated, there is no such order. Regardless of whether the STATE's attempted filing was of an amended complaint or an amended notice, there is certainly no prior Board order authorizing such filing. Thus, under *Kohlhaas v. Morse* the attempted filing of the so-called Amended Notice of Electronic Filing without leave of this Board is void.

E. The State Has Admitted That It Failed to Comply With the Statutory Jurisdictional Prerequisite of Filing the Notice That Financing May Be Available Contemporaneously With the Complaint.

The Motion to Strike Amended Notice at 7-8 pointed out that that the STATE attempted the filing of the so-called Amended Notice of Electronic Filing is, in and of itself, a judicial admission that the STATE deviated from the procedure required by § 31(c)(1) of the Act, 415 ILCS 5/31(c)(1). Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge. *Furniss v. Rennick (In re Estate of Rennick)*, 181 Ill. 2d 395, 406 (1997). The STATE's Response did not dispute that the filing of the so-called Amended Notice of Electronic Filing is a judicial admission that the STATE deviated from the procedure required by § 31(c)(1) of the Act, 415 ILCS 5/31(c)(1). Instead, the STATE's Response at 4 merely argued that *Furniss v. Rennick*, the case cited in support of this principle, concerned a discovery dispute. How does that difference in how the case arose distinguish the application of the legal principle involved to the case at bar? It simply does not. Once again, for that reason and pursuant to §101.500(d) of the Procedural Rules, 35 Ill. Adm. Code 101.500(d), the STATE waives any objection to the application of the principle that the attempted filing of the so-called Amended Notice of Electronic Filing is a judicial admission that the STATE deviated from the procedure required by law.

The Motion to Strike Amended Notice at 8 further pointed out that even if the Amended Notice of Electronic Filing does not constitute a judicial admission, it certainly constitutes an implied admission that the STATE failed to file a Notice That Financing May Be Available. An implied admission is one which results from some act or failure to act of the party. *Black's Law Dictionary,* 4th Ed. at 44. In support of that legal principle, the Motion to Strike Amended Notice also cited *Keen v. Bump,* 310 Ill. 218, 220 (1923). The STATE's Response does not dispute that the act of attempting to file the so-called Amended Notice of Electronic Filing constitutes an implied admission that the STATE failed to file a Notice That Financing May Be Available contemporaneously with the Complaint. Instead, the STATE's Response at 4 merely argues that *Keen v. Bump*, the case cited in support of this principle, concerned whether to enjoin a person from utilizing a right of way. How does that difference in how the case arose distinguish the application of the legal principle involved to the case at bar? It simply does not. Once again, for that reason and pursuant to §101.500(d) of the Procedural Rules, 35 Ill. Adm. Code 101.500(d), the STATE waives any objection to the application of the principle that the act of attempting to file the so-called Amended Notice of Electronic Filing constitutes an implied admission that the STATE failed to file a Notice That Financing May Be Available contemporaneously with the Complaint.

F. Jurisdiction Is Never Supplied By The Knowledge Or Agreement Of A Party.

The Motion to Strike Amended Notice at 8-10 pointed out that jurisdiction is never supplied by the waiver or consent of the parties. And, in fact, the STATE's Response at 4, note 2, agreeing, states: "The Complainant acknowledges the well-accepted principle that the parties cannot confer jurisdiction through waiver or consent." Yet, once again, while not disputing and, in fact, agreeing with the legal principle involved, the STATE's Response still attempts to

distinguish the cited cases that stand for this proposition, *Floto v. Floto*, 213 Ill. 438, 442-443 (1904), because it involved the probate of a will, and *Westcott v. Kinney*, 120 Ill. 564, 566 (1887), because it involved a suit to set aside a tax deed. Given that the STATE has conceded the point, this exercise appears to be, at best, one more of form than substance.

Moreover, the point is especially pertinent to the case at bar. In *City of Herrin* the respondent *did* waive its jurisdictional objection by failing to object to the filing of the purported Amended Notice of Filing. Yet, despite that waiver, the Board, in accordance with the principle that jurisdiction is never supplied by the waiver or consent of the parties, as set forth in Part II of this Reply, never made a determination of the jurisdictional issue. Here, on the contrary, SHERIDAN has both moved to dismiss for want of jurisdiction and moved to strike the offending pleading that is a failed attempt to cure the jurisdictional defect. Accordingly, the Board cannot accept that attempted filing without running afoul of both State law, *i.e.*, § 31(c)(1) of the Act, 415 ILCS 5/31(c)(1), and its own holding in *Production Finishers and Fabricators, Inc.*

IV. CONCLUSION.

It is indeed curious that, while the STATE's Response attempts after a fashion to distinguish almost all the cases cited in the Motion to Strike Amended Notice, the one case it does not even attempt to distinguish is the case that matters most in this discussion, *i.e.*, *Production Finishers and Fabricators, Inc.* There, this Board held that "compliance with the requirement of [§ 31(c)(1) of the Act, 415 ILCS 5/31(c)(1)]" that a Notice That Financing May Be Available must accompany the complaint "is a jurisdictional prerequisite for the proper filing of an enforcement case before the Board." Because it is a jurisdictional prerequisite and none accompanied the filing of the complaint therein, the Board dismissed the action. On that basis,

since no Notice That Financing May Be Available accompanied the Complaint in the case at bar, the Board must dismiss the Complaint herein.

SHERIDAN, by contrast, has amply distinguished the one case relied upon by the STATE, *i.e.*, *City of Herrin*. In *City of Herrin*, by its failure to object to the filing of the purported Amended Notice of Filing, respondent waived its statutory right that the complaint be accompanied by a Notice That Financing May Be Available. On the other hand, here, SHERIDAN never waived that statutory right.

WHEREFORE, SHERIDAN moves that the Amended Notice of Electronic Filing be stricken and that this cause be dismissed for want of jurisdiction.

Respondents, SHERIDAN-JOLIET LAND DEVELOPMENT, LLC, an Illinois limited-liability company, and SHERIDAN SAND & GRAVEL CO.,

By: _____
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THIS FILING IS SUBMITTED ON RECYCLED PAPER.

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalties of perjury as provided by law pursuant to 735 ILCS 5/1-109, that the attached Reply in Support of Motion to Strike Amended Notice of Electronic Filing was ___ personally delivered, _X_ placed in the U.S. Mail, with first class postage prepaid, ___ sent 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 26th day of April, 2013.

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