

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.)

OBJECTIONS TO THE STATE'S
MOTION FOR LEAVE TO FILE SURREPLY

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 §§ 101.100 of the General Rules of the Pollution Control Board, 35 Ill. Adm. Code 101.100, hereby object to the Motion for Leave to File Surreply (the "STATE's Motion for Leave to File Surreply") and attached draft Complainant's Surreply to Respondents' Reply in Support of Motion to Strike and Dismiss (the "Surreply") of complainant, PEOPLE OF THE STATE OF ILLINOIS (the "STATE"), on the basis that it is an attempt to reply to an argument never made by SHERIDAN, and in support thereof states as follows:

1. The STATE filed its Complaint herein (the "Complaint") on October 31, 2012. SHERIDAN timely filed a Motion to Strike and Dismiss ("SHERIDAN's Motion to Dismiss"), and has filed a Reply in Support of Motion to Strike and Dismiss ("SHERIDAN's Reply").
2. Among other things, SHERIDAN's Reply at 2-4 pointed out that that Counts I, V and VI of the Complaint alleged violations of various purported provisions of the Illinois

Environmental Protection Act (the "Act"), 415 ILCS 5/1 *et seq.* and, specifically, 415 ILCS 5/22.51, entitled Clean Construction or Demolition Debris Fill Operations ("CCDD"). Counts I, V and VI alleged that these purported violations, in turn, stemmed from alleged violations of purported "Section 1100.205(a)(b)(c) of the Board CCDD Regulations, 35 Ill. Adm. Code 1100.205(a)(b)(c), [and (h)]."¹ SHERIDAN's Reply at 2 further pointed out that *there is no* "Section 1100.205(a)(b)(c) [and (h)] of the Board CCDD Regulations, 35 Ill. Adm. Code 1100.205(a)(b)(c) [and (h)]." It is elementary that no cause of action exists for violation of a non-existent regulation.

3. In response, Complainant's Response to Respondents' Motion to Strike and Dismiss (the "STATE's Response") at 12 argued the Board's amendments to the Board CCDD Regulations became effective as of August 27, 2012. The Complaint, the STATE's Response noted, had been brought under the previous set of Board CCDD Regulations. *Id.*

4. SHERIDAN's Reply at 3 pointed out that that the Board CCDD Regulations have been amended as of August 27, 2012 is exactly the root of the matter. Once the new rules became effective they supplanted and superseded the previous rules, including those under which Counts I, V and VI were brought, purported §§ 1100.205(a)(b)(c) and (h) of the Board CCDD Regulations, 35 Ill. Adm. Code 1100.205(a)(b)(c) and (h).

4. Accordingly, SHERIDAN'S Reply at 4 pointed out that, when the Complaint, which was filed subsequent to August 27, 2012, sought to charge SHERIDAN with purported violations of Board CCDD Regulations, such Complaint could only allege violations of regulations that actually appear "on the books." Yet, it patently did not do so.

5. Moreover, with respect to Board CCDD Regulations, as Amended, that are actually "on the books," SHERIDAN's Reply at 4 pointed out that even the STATE admits that

¹ Complaint, Count I, par. 15, Count V, pars.15-16, and Count VI, pars. 15-16.

SHERIDAN is in compliance with these regulations. Neither the STATE's Motion for Leave to File Surreply, nor the attempted Surreply, dispute that SHERIDAN is in compliance with the Board CCDD Regulations, as Amended.

6. SHERIDAN's Reply at 4 then pointed out that pursuant to § 49(e) of the Act, 415 ILCS 49(e) that because SHERIDAN is already in compliance, SHERIDAN has "a prima facie defense to any action, legal, equitable, or criminal, or an administrative proceeding for a violation of this Act."

7. Now, in the STATE's Motion for Leave to File Surreply and in the attempted Surreply at 2, the STATE argues that "subsequent compliance with the Act and the [Board] regulations does not preclude the Board's assessment of civil penalties against the Respondents."

8. Yet, SHERIDAN has never argued that it has come into "subsequent" compliance. Quite to the contrary, as set forth in paragraph 5, above, SHERIDAN is *already in compliance*. Moreover, it is apparent that SHERIDAN is in compliance with the *current* Board CCDD Regulations, as Amended August 27, 2012.

9. It is the *STATE*, who, *subsequent* to SHERIDAN being in compliance, sought to resurrect outdated pre-August 27, 2012 regulations and use them to persuade this Board that SHERIDAN's present state of compliance with Board CCDD Regulations, as Amended, should be disregarded and, instead, SHERIDAN's status of compliance should be judged through the prism of long-past and discarded rules.²

10. Thus, it was the *STATE's* "subsequent" actions, not those of SHERIDAN, that have brought the parties and the Board to this present state of affairs.

² The STATE's Response at 12 asserted that the Complaint seeks to apply these superseded regulations to alleged violations that occurred on September 15, 2010. Yet, neither the STATE's Response, the STATE's Motion for Leave to File Surreply, nor the Surreply address why it should now be SHERIDAN's problem that the STATE failed to take any action under the now superseded regulations during the interim almost two-year period until the regulations were amended out of existence on August 27, 2012.

11. Not a scintilla of legal authority has been provided by the STATE authorizing the application of superseded Board regulations in the case at bar. Not even in the attempted Surreply is any such authority cited.

12. The only cases cited in the STATE's Response at 12 in its discussion of this matter, *Commonwealth Edison Company v. Will County Collector*, 196 Ill. 2d 27, 34 (2001), and *Caveney v. Bower*, 207 Ill. 2d 82, 91 (2003), concern whether a statute may be applied retroactively. This issue has nothing whatsoever to do with whether a statute may be applied retroactively. See SHERIDAN's Reply at 6-7. It does have to do with whether a regulation, once superseded, may thereafter be enforced as if it had never been amended out of existence.

13. The only instance that SHERIDAN's research has uncovered where the Board was allowed to apply otherwise moribund regulations in an enforcement action was in *Mystik Tape, Div. of Borden, Inc. v. Pollution Control Board*, 60 Ill. 2d 330, 339-340 (1975), a case cited in SHERIDAN's Reply at 4.³ In that case, the Board was able to enforce regulations of a predecessor enforcement board because only because it was specifically authorized to do so by statute. Former § 49(c) of the Act, Ill. Rev. Stat. 1971, ch. 111 1/2, par. 1049(c), provided that "all rules and regulations" of such predecessor boards "shall remain in full force and effect until repealed, amended, or superseded by regulations under this Act." Here, to the contrary, no such statutory provision authorizes the Board to enforce superseded regulations.

14. As further pointed out in SHERIDAN's Reply at 5, even assuming, *arguendo*, the Board had the authority to apply such superseded regulations, it needed to provide notice to the regulated community. Fair notice encapsulates "the principle that agencies must provide regulated parties 'fair warning of forbidden conduct or requirements.'" *Christopher v.*

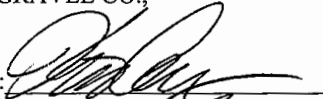
³ Curiously, the attempted Surreply does not even attempt to respond to, distinguish, or provide alternative case authority to *Mystik Tape*.

SmithKline Beecham Corp., 132 S. Ct. 2156, 2167 (2012) (internal quotation marks and citations omitted.) No notice that these superseded requirements purportedly still remain in force was ever provided.

15. Sheridan has no objection to the STATE filing a Surreply to any new argument that SHERIDAN made. SHERIDAN does, however, have an objection to a Surreply to an argument it did not make.

WHEREFORE, SHERIDAN moves that the STATE's Motion for Leave to File Surreply be denied and, as requested in SHERIDAN's Motion to Dismiss, that the Complaint be dismissed with prejudice.

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

By: 
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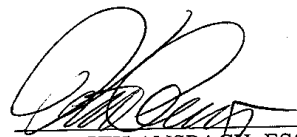
THIS FILING IS SUBMITTED ON RECYCLED PAPER.

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 Objections to the State's Motion for Leave to File Surreply 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 29th day of April, 2013.

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