BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB No. 13-28
	)	
ATKINSON LANDFILL CO.,	)	
	)	
Respondents.	)	

REPLY IN SUPPORT OF MOTION TO STRIKE AND DISMISS
FIRST AMENDED COMPLAINT

Respondent, ATKINSON LANDFILL CO. ("ALC"), has moved the Pollution Control Board (the "Board"), pursuant to § 2-615 of the Code of Civil Procedure, 735 ILCS 2-615(a), § 2-619((a)(9) of the Code of Civil Procedure, 735 ILCS 2-619((a)(9), and §§ 101.100, 101.500 and 101.506 of the General Rules of the Pollution Control Board, 35 Ill. Adm. Code 101.100, 101.500 and 101.506, to strike and dismiss (the "Motion to Dismiss") the First Amended Complaint (the "Complaint") of complainant, PEOPLE OF THE STATE OF ILLINOIS ("the STATE"). The STATE, in response, submitted Complainant's Response to Respondent's Motion to Strike and Dismiss First Amended Complaint ("Complainant's Response"). Complainant's Response is directed only to that portion of the Motion to Dismiss under § 2-615 of the Code of Civil Procedure, 735 ILCS 2-615(a). The STATE has thereby waived objections to the granting of the Motion to Dismiss under § 2-619((a)(9) of the Code of Civil Procedure, 735 ILCS 2-619((a)(9).[1] The within Reply (the "Reply") is submitted by ALC in support of the Motion to Dismiss.

[1] It is duly noted that the STATE purported to file a so-called Motion to Strike Respondent's Section 2-619(a)(9) Motion to Dismiss and Affidavits of Gary Hull and Erik Vardijan ("the STATE's Motion to Strike") under the purported authority of, *inter alia*, 735 ILCS 2-615 and §101.506 of the General Rules of the Pollution Control Board, 35 Ill. Adm. Code 101.506 ("§101.506"). Yet, both 735 ILCS 2-615 and §101.506, only authorize the striking of "*pleadings*." (Emphasis added.) ALC hardly needs to point out that motions and affidavits are not

I. COUNTS I-IV RELATING TO ALLEGED DISCHARGES INTO THE VILLAGE STP AND GALVA WWTF AND ARE SUBSTANTIALLY INSUFFICIENT IN LAW AND MUST BE DISMISSED PURSUANT TO § 2-615 OF THE CODE OF CIVIL PROCEDURE, 735 ILCS 5/2-615.

A. The STATE Admits That ALC Was Lawfully Operating Under A Lawfully Issued Permit In The Instances Of Both Sets Of Alleged Discharges at the Village STP and Galva WWTF.

As set forth more fully below, Counts I and II of the Complaint allege that ALC allegedly disposed of leachate at the Village of Atkinson sewage treatment plant (the "Village STP") in purported excess of the purported limits imposed by Permit No. 2008-E0-0331 ("Permit No. 2008-E0-0331"), a copy of which is attached to the Complaint as Exhibit 1, and thereby in violation of §§ 12(a) and (b) of the Illinois Environmental Protection Act (the "Act"), 415 ILCS 5/12(a) and (b). Similarly, Counts III and IV allege that ALC allegedly disposed of leachate at the City of Galva wastewater treatment facility ("Galva WWTF") without a permit and thereby in violation of §§ 12(a) and (b) of the Act, 415 ILCS 5/12(a) and (b).

Yet, the STATE admits that ALC was lawfully operating under a lawfully issued permit in the instances of both sets of alleged discharges. As set forth in the Motion to Dismiss at Part I(B), pages 5-6, Paragraph 4 of Counts I and II alleges that ALC is operating a municipal solid waste landfill under a permit issued by the Illinois Environmental Protection Agency ("Illinois EPA"), as follows:

> At all times relevant to this Complaint, Respondent owned and operated, and continues to own and operate, an active municipal solid waste landfill located at 1378 Commercial Drive, Atkinson, Henry County, Illinois. *Respondent operates the landfill under*

"pleadings." It is well settled in this State that "Section 2-615 applies only to the dismissal of pleadings." *In re Marriage of Sutherland*, 251 Ill. App. 3d 411, 414 (2nd Dist. 1993). The STATE also cites Section 101.500 in purported support of the filing of the STATE's Motion to Strike, which merely allows the filing of "any motion the parties wish to file that is permissible under the Act or other applicable law." Given that the STATE's Motion to Strike is not permissible under 735 ILCS 2-615 and §101.506, Section 101.500 does *not* authorize the filing of a motion that is, itself, impermissible. Accordingly, the STATE's Motion to Strike is a nullity. *See* ALC'S Objections to Motion to Strike Respondent's Section 2-619(a)(9) Motion to Dismiss and Affidavits of Gary Hull and Erik Vardijan.

> *Permit No. 2001-021-LFM, Modification No. 5, Log No. 2010-068, issued by the Illinois EPA on April 21, 2010.*

Thus, paragraph 4 alleges that ALC lawfully operates under authority of Illinois EPA Permit No. 2001-021-LFM, Modification No. 5, Log No. 2010-068 (the "Operating Permit"). Given that that is so, there is simply no basis for the allegations in Counts I-IV that ALC discharged leachate into the Village STP and the Galva WWTF, either in violation of any permit (Counts I and II) or in the absence of a permit (Counts III and IV).

Complainant's Response argues that ALC "was required to obtain an operating permit pursuant to 35 Ill. Adm. Code 309.204(a)." In point of fact, 35 Ill. Adm. Code 309.204(a), does provide, in pertinent part, that:

> No person shall cause or allow the use or operation of any...wastewater source without an operating permit issued by the Agency.

Yet, as set forth above the STATE has *admitted* that ALC *was operating pursuant to a validly issued operating permit, i.e.*, the Operating Permit. In fact, no allegation is made in the Complaint that ALC is operating in violation of the Operating Permit.

A judicial admission is a formal admission in the pleading that has the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. *Lawlor v. North American Corporation of Illinois*, 2012 IL 112530 at 52, n. 7, 983 N.E.2d 414 (2012). Accordingly, here, given that ALC was lawfully operating under its Operating Permit, the allegations in Counts I-IV that ALC discharged leachate into the Village STP and the Galva WWTF, either in violation of any permit (Counts I and II) or in the absence of a permit (Counts III and IV), and thereby in violation of §§ 12(a) and (b) of the Act, 415 ILCS 5/12(a) and (b), must be stricken and dismissed.

B. Complainant's Response Fails to Address the Complaint's Failure to Allege Any Statutory

Basis for the Issuance of Multiple Operating Permits.

Also as set forth in the Motion to Dismiss at Part I(B), pages 5-6, ALC Paragraph 5 of Counts I and II alleges that Permit No. 2008-E0-0331 was also issued to ALC by Illinois EPA. No allegation is made either in Count I or Count II setting forth the statutory basis for the requiring by Illinois EPA or the purported issuance by Illinois EPA of multiple operating permits for the same landfill. While Complainant's Response, as set forth in Part I(A) of this Reply, argues that ALC "was required to obtain an operating permit pursuant to 35 Ill. Adm. Code 309.204(a)." Complainant's Response wholly fails to address the lack statutory basis for Illinois EPA's issuance of permit upon permit covering the same matter.

Moreover, Permit No. 2008-E0-0331 was not of some different permit category, such as an NPDES permit, as opposed to simply another operating permit. In fact, Complainant's Response at 9-10 takes great pains to point out that §12(f) of the Act, 415 ILCS 5/12(f), which the STATE argues is *only* applicable to NPDES permits, does *not* apply to Permit No. 2008-E0-0331. In that regard Complainant's Response asserts that "Respondent confuses a NPDES permit with a Section 309.204(a) operating permit." Accordingly, one must conclude, as the Motion to Dismiss indicated at 3, that "The issuance of Permit No. 2008-E0-0331 to ALC was, at best, superfluous."

As set forth in the Motion to Dismiss at 6, Section 31(c)(1) of the Act, 415 ILCS 5/31(c)(1) requires that any complaint filed by the Attorney General thereunder "shall specify the provision of the Act, rule, regulation, permit, or term or condition thereof under 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, rule, regulation, permit, or term or condition thereof." By failing to allege the provision of the Act authorizing the issuance of this superfluous permit, the

Complaint cannot be deemed to have met the requirement of § 31(c)(1) of the Act, 415 ILCS 5/31(c)(1), that the "provision of the Act…under which such person is said to be in violation" be specified. Charges in an administrative proceeding need not be drawn with the same refinements as pleadings in a court of law, but the charges must be sufficiently clear and specific to allow preparation of a defense, and § 31 of the Act, 415 ILCS § 5/31 requires notice of a specific violation charged and notice of the specific conduct constituting the violation. *Lloyd A. Fry Roofing Co. v. Pollution Control Board ("Lloyd A. Fry Roofing Co.")*, 20 Ill. App. 3d 301, 305 (2nd Dist. 1974).

C. Complainant's Response Wholly Fails to Refute that the Allegations of Counts I And II are Vague And Ambiguous, as are the Terms of Permit No. 2008-E0-0331 Upon Which They Are Based, and Thereby Fail to Provide Notice of a Specific Violation Charged and Notice of the Specific Conduct Constituting the Violation.

The allegations of Counts I and II of the Complaint concern alleged violations of the terms of Permit No. 2008-E0-0331. Yet, Part I(C) of the Motion to Dismiss at 6-11 points out, the terms of Permit No. 2008-E0-0331 are unintelligible, vague and ambiguous. In this respect, the Motion to Dismiss pointed out the following: (1) Permit No. 2008-E0-0331, which purports to authorize ALC to "operate…facilities described as…[t]he hauling of approximately 12,000 gpd" is unintelligible, ambiguous and vague; (2) Permit No. 2008-E0-0331, which refers to "approximately 12,000 gpd" is ambiguous and vague; (3) the use of the phrase "Head works" renders Permit No. 2008-E0-0331 unintelligible, ambiguous and vague. The Motion to Dismiss cites *Harris v. American General Finance Corp. ("Harris")*, 54 Ill. App. 3d 835, 840 (3rd Dist. 1977) for the well settled proposition that where there is any ambiguity as to the meaning of the language used in a document it should be construed most strongly against the drafter under the doctrine of *contra proferentem*. That Permit No. 2008-E0-0331 has multiple ambiguities requires that it must be construed against the drafter, i.e., the STATE. The Motion to Dismiss

further cites *Citizens Utilities Company of Illinois v. Illinois Pollution Control Board* ("*Citizens Utilities*"), 127 Ill. App. 3d 504, 507 (3rd Dist. 1984) as an example of an instance where the court reversed the Board's finding of violations of permit with terms "too vague for rational enforcement."

Complainant's Response does not even attempt to defend the ambiguities in Permit No. 2008-E0-0331. Instead, Complainant's Response asserts at 16 that "discovery is required before considering Respondent's argument that certain terms of the 2008 Water Pollution Control Permit are ambiguous."[2] In support of this assertion, Complainant's Response makes the following statement:

> Yet, *Harris v. American General Finance Corp.*, 54 Ill. App. 3d 835 (3rd Dist. 1977) and *Citizens Utilities* on which Respondent relies, require that discovery be conducted and the Board, as the trier of fact, determine whether such terms are ambiguous and if so, the meaning of such terms.

That statement is incorrect. Neither the word "discovery," nor the subject of discovery, was ever discussed in either *Harris* or *Citizens Utilities*. The assertion to the contrary in Complainant's Response is simply baffling.

Equally baffling is the STATE's attempt to buttress the vague and ambiguous terms of Permit No. 2008-E0-0331 by attaching to Complainant's Response a purported copy of ALC's "Application for Permit or Construction Approval WPC-PS-1" (the "Permit Application"). The STATE undertakes this gambit in order to purportedly demonstrate that "Respondent's understanding of the terms 'DMF,' 'hauling' and 'approximately' 12,000 gpd is arguably set forth in its Application for Permit or Construction Approval WPC-PS-1." Yet, the STATE's attempted attachment of the Permit Application to its response to a Motion to Dismiss brought under 735 Il CS 2-615(a) asserting that the Complaint is substantially insufficient in law must

[2] Title case in original changed to lower case.

fail for four fundamental reasons, set forth below.

First of all, "[i]t is axiomatic that, in ruling on a 2-615 motion, the trial court may consider only the allegations of the pleading that is the subject of the motion and may not consider other supporting material." *Becker v. Zellner*, 292 Ill. App. 3d 116, 124 (2nd Dist 1997). Accordingly, the Board may not consider the Permit Application.

Secondly, assuming *arguendo* that the Board may consider the Permit Application, the STATE does not even offer the Permit Application to demonstrate that the terms of Permit No. 2008-E0-0331 are not vague and ambiguous. Indeed, as set forth above, Complainant's Response makes no attempt to defend the ambiguous terminology in Permit No. 2008-E0-0331, whatsoever. Instead, the STATE attaches the Permit Application in a purported attempt to demonstrate that ALC "arguably" understood its terms. That the STATE uses the word "arguably" demonstrates that not even the STATE is willing to stand behind this assertion. Regardless, the issue is not what ALC did or did not understand. The issue is whether the permit was ambiguous *as a matter of law*. An ambiguous contract as a matter of law must be construed against the drafter of the contract. *Bishop v. Lakeland Animal Hospital., P.C.*, 268 Ill. App. 3d 114, 117 (2nd Dist. 1994). As set forth in *Citizens Utilities*, the same is true of an ambiguous permit.

Thirdly, the STATE's assertion that "the terms 'DMF' and 'hauling' are those at issue is misplaced. The term "DMF" was never raised as an issue, although if the STATE deems it ambiguous, ALC will certainly not dispute the point. Regardless, the term does not appear in the Permit Application. The word "hauling" is not, in and of itself, an issue. Yet, as set forth in the Motion to Dismiss at 6-11 and hereinabove, the manner in which Permit No. 2008-E0-0331 employs the word "hauling" in the phrase "operate…facilities described as…[t]he hauling of

approximately 12,000 gpd" is unintelligible, ambiguous and vague. That phrase appears nowhere in the Permit Application, either. Additionally, while the phrase "'approximately' 12,000 gpd" was identified in the Motion to Dismiss as being ambiguous, it does not appear in the Permit Application, either. Also absent from the Permit Application is the ambiguous term "Head works." How, then, the Permit Application is supposed to have contributed to ALC's so-called "understanding" of these terms and phrases is a mystery.

Fourthly, that the STATE feels a need to buttress the terms of Permit No. 2008-E0-0331 with the Permit Application is a judicial admission that the terms of the Permit Application are, indeed, ambiguous. 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). Here, that the STATE attached the Permit Application to Complainant's Response in a deliberate act is clear. Further, that the Permit Application was attempted to be filed following ALC having pointed out in its Motion to Dismiss that Permit No. 2008-E0-0331 was ambiguous is an unequivocal statement about a concrete fact, *i.e.*, that the terms of Permit No. 2008-E0-0331 are, indeed, ambiguous and need to be somehow justified or explained.

Even if attaching the Permit Application to Complainant's Response does not constitute a judicial admission, it certainly constitutes an implied admission that the terms of Permit No. 2008-E0-0331 are ambiguous. 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. *See also Keen v. Bump*, 310 Ill. 218, 220 (1923). Accordingly, the act of attempting to buttress Permit No. 2008-E0-0331 constitutes an implied admission that that the terms of Permit No. 2008-E0-0331 are ambiguous.

Certainly, if the terms were unambiguous, the STATE would not have bothered to attach the Permit Application to Complainant's Response.

Moreover, as set forth in the Motion to Dismiss at 14 and not disputed by the STATE, charges in an administrative proceeding must be sufficiently clear and specific to allow preparation of a defense. *Lloyd A. Fry Roofing Co.*, 20 Ill. App. 3d at 305. Because the charges in the Complaint rely upon the unintelligible, vague and ambiguous language of Permit No. 2008-E0-0331, the allegations of Counts I and II fail to meet this minimal standard.

D. Complainant's Response Fails to Address the Complaint's Failure to Allege Specific Violations of Pretreatment Standards Under 40 C.F.R. 403.5(B)(1)-(8) and 35 Ill. Adm. Code 307.1101(B)(1)-(13).

Industrial discharges that do not discharge directly into waters of the United States but instead discharge into a POTW are regulated under the Clean Water Act ("CWA") pretreatment program, 33 U.S.C. § 1317(b). The pretreatment program involves a three-part system: (1) national general and specific discharge prohibitions, (2) national categorical standards, and (3) local limits developed by Publicly Owned Treatment Works ("POTW"). With respect to landfills, the U.S. Environmental Protection Agency specifically declined to "establish [national categorical] pretreatment standards for the introduction of pollutants into Publicly Owned Treatment Works (POTW) from the operation of new and existing landfills..."[3] Accordingly, only the national general and specific discharge prohibitions or local requirements developed by POTWs exist. *See* Part II(A) of this Reply, *infra*.

As discussed in the Motion to Dismiss at 11-14 and 23-24, paragraph 16 of Counts I and II and paragraph 18 of Counts III-IV allege that leachate "*may cause* serious harm to the Village STP [and Galva WWTF] by upsetting the treatment process, interfering with the normal

[3] EPA Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards for the Landfills Point Source Category, 65 Fed. Reg. 3008 (2000) (to be codified at 40 CFR Parts 136 and 445).

operation of the STP[and Galva WWTF], or causing conditions at the STP which may be harmful to STP [and Galva WWTF] workers." No *actual* upset, pass through, interference harm to workers or damage to the Village STP and Galva WWTF is alleged. If actual upset, interference, pass through, harm or damage to the Village STP and Galva WWTF had been alleged there would have been a violation of the general prohibition against pollutants that cause pass through or interference.[4] Similarly, if actual harm to workers had been alleged there would have been a violation of specific prohibitions against discharges into a POTW of pollutants which result in the presence of toxic gasses, vapors, or fumes within the POTW in a quantity that may cause acute worker health and safety problems.[5] Yet, nowhere in tbe entirety of the Complaint are actual violations of the above-cited federal and state regulations constituting the general and specific discharge prohibitions of the pretreatment program *actually alleged*. In point of fact, no violation of any statute or regulation is set forth in paragraph 16 of Counts I and II and paragraph 18 of Counts III-IV. That absence is nowhere addressed in Complainant's Response. Accordingly, those paragraphs, as well as the balance of the Complaint, must be deemed insufficient.

E. Complainant's Response Fails to Refute that Counts I-IV Fail to Sufficiently Allege That ALC Caused or Contributed to Water Pollution in Violation of §12(a) and (b) of the Act, 415 ILCS 5/12(a) and (b).

As set forth in the Motion to Dismiss at 14-17 and 21-23, Counts I-IV fail to allege *actual* violations of the statutory prohibition of water pollution at §12(a) of the Act, 415 ILCS 5/12(a), and § 12(b) of the Act, 415 ILCS 5/12(b). In support of the requirement that there be an allegation of actual pollution in order for there to be a violation of §12(a) of the Act, 415 ILCS 5/12(a), and § 12(b) of the Act, 415 ILCS 5/12(b), the Motion to Dismiss cited *Citizens Utilities*,

[4] 40 C.F.R. 403.5(a)(1); 35 Ill. Adm. Code 307.1101(a) and 310.201(a).
[5] 40 C.F.R. 403.5(b)(7); 35 Ill. Adm. Code 307.1101(b)(12).

supra. In *Citizens Utilities* the respondent permittee appealed an order of the Board which assessed a penalty against the respondent upon a complaint brought by Illinois EPA that charged violations of the permit, Rule 601(a) of the Board's rules and §§ 12(a) and (f) of the Act.[6] The permit provided that the respondent's facilities should be operated as "efficiently as possible" and that the respondent was required to provide "optimum operation and maintenance" of its waste treatment facility prior to discharge into Lily Cache Creek. *Citizens Utilities*, 127 Ill. App. 3d at 505-506. Several of the agency's investigators visited the respondent's facility and found, among other things, poor scum removal, a dark chlorine tank, and excessive foam. The Board determined that the facility's conditions amounted to a violation of the permit and the Act and, thus, assessed a penalty against the respondent.

In reversing, the court held that although the operation and maintenance of the facility was unsatisfactory in several respects, it did not follow that the respondent had violated its permit or the Board's rules. Additionally, the court found that the Board had failed to establish "a causal link between unsatisfactory operation and maintenance and any improper discharges into the creek." *Citizens Utilities*, 127 Ill. App. 3d at 507. The evidence presented before the Board was insufficient to support the assessment of a penalty. Specifically, the court found that the permit conditions were too vague for rational enforcement, that neither the Board's rules nor the permit outlined unacceptable operation and maintenance practices with any specificity, and that there was not "actual pollution caused." *Citizens Utilities*, 127 Ill. App. 3d at 508. As such, the Board's findings of violations of §§ 12(a) and (f) of the Act, the Board rule and the permit were reversed.

Complainant's Response at14-15 attempts to distinguish *Citizens Utilities* by asserting that only the language of the permit and Rule 601(a) were alleged to have been the subject of

[6] Currently, §§12(a) and (f) of the Act, 415 ILCS 5/12(a) and (f).

violations, neglecting to mention that the Board had found that the violations of permit and rule had resulted in violations of §§ 12(a) and (f) of the Act. Specifically, Complainant's Response at 15 states "Unlike in *Citizens Utilities*, neither Section 12(a), nor Section 12(b) of the Act require a showing of an actual violation." Yet, *Citizens Utilities was* decided under "Section 12(a)" and did "require a showing of actual violation."

F. Complainant's Response Fails to Refute that No Authority Exists Under § 31 of the Act, 415 ILCS 5/31, for the Attorney General to Bring an Action on Her Own Motion.

The STATE alleges that Counts I and II are "brought…by LISA MADIGAN…on her own motion… pursuant to Section 31 of the Act, 415 ILCS 5/31 (2010)…" ALC pointed out in Part I(F) of the Motion to Dismiss at 17-18 that there is no provision in § 31 of the Act authorizing the Attorney General to bring an action "on her own motion." The only authority for the Attorney General to bring an action "on his own motion" lies in § 42(e) of the Act, 415 ILCS 5/42(e).

In Complainant's Response, the STATE argues that the Board has found that the Attorney General is permitted to file a complaint pursuant to § 31(d)(1) of the Act, 415 ILCS 5/31(d)(1), citing *People v. Waste Hauling Landfill, Inc. et al.*, PCB 10-9, 2009 WL 6506855, slip op. *12 (December 3, 2009), which references other Board decisions. ALC respectfully suggests that the holdings of *People v. Waste Hauling Landfill, Inc.* and these other Board decisions be reconsidered and reversed based upon the ruling in *People v. N L Industries ("NL Industries")*, 152 Ill. 2d 82, 103 (1992), also cited in Complainant's Response at 7. *N L Industries* held:

> *Where the statute neglects to specify which party is to file a certain action*, it must be recognized that the State's Attorney of the county in which the violation occurred or the Attorney General is allowed to do so.

* * *

> The Attorney General should have the authority to file actions before both the Board and the circuit courts to redress violations of the Act, *wherever a specific party is not authorized by the Act*. (Emphasis added).

Section 31 of the Act, 415 ILCS § 5/31, under which the Attorney General asserts the right to bring an action "on her own motion," is *not* a "*statute* [that] neglects to specify which party is to file a certain action." (Emphasis added.) Indeed, § 31(b) of the Act, 415 ILCS § 5/31(b), is quite specific that the Attorney General may bring actions thereunder, but only on the basis of "the Agency's referral or request to the Office of the Illinois Attorney General or the State's Attorney of the county in which the alleged violation occurred for legal representation regarding an alleged violation that may be addressed pursuant to subsection (c) or (d) of this Section."

Complainant's Response attempts to equate the word "statute" in *People v. N L Industries*, 152 Ill. 2d at 103, with a *subsection* of the pertinent statute, § 31 of the Act, 415 ILCS § 5/31, *i.e.*, § 31(d)(1) of the Act, 415 ILCS § 5/31(d)(1). Complainant's Response at 7 thereby argues that "Section 31(d)(1) does not specify which party can file a lawsuit."

Yet, Complainant's Response, itself, asserted at 9 with respect to § 12(f) of the Act, 415 ILCS § 5/12(f), that there is difference between a statute and a "subsection" of a statute. The Motion to Dismiss, Part I(A) at 2-5, had pointed out that § 12(f) of the Act, 415 ILCS § 5/12(f), stated that no permit was required "under *this subsection*" for any discharge for which a permit is not required under the CWA. Complainant's Response argued that the word *subsection* in § 12(f) "applies only to 'subsection' 12(f)." However, if § 12(f) is only a *subsection*, then it follows that § 31(d)(1) is also only a *subsection*, not a statute. Accordingly, either the word "statute" in *N L Industries*, 152 Ill. 2d at 103 refers to the entirety of § 31 of the Act, 415 ILCS § 5/31 and not just subsection 31(d)(1) thereof, or the word "subsection" in § 12(f) of the Act, 415

ILCS § 5/12(f) refers to all of § 12 of the Act, 415 ILCS § 5/12, and not just to § 12(f). If the former is true, then the Attorney General may not bring an action "on her own motion" under § 31 of the Act, 415 ILCS § 5/31. If the latter is true, then no permit is required under § 12 of the Act, 415 ILCS § 5/12 (including under § 12(a) and (b) of the Act, 415 ILCS § 5/12(a) and (b), which the STATE accuses ALC of violating), for any discharge for which a permit is not required under the CWA. In that latter event, Permit No. 2008-E0-0331 was not required, *inter alia*, because ALC was not required to have a permit under the CWA. *See* Motion to Dismiss, Part I(A) at 2-5 and Part III(C) at 24-25.

II. THE STATE HAS WAIVED OBJECTIONS TO ALC's MOTION TO DISMISS COUNTS I-IV UNDER § 2-619(a)(9) OF THE CODE OF CIVIL PROCEDURE, 735 ILCS 2-619(a)(9).

The Motion to Dismiss is divided into two parts, one under § 2-615 of the Code of Civil Procedure, 735 ILCS 2-615 and one under § 2-619(a)(9) of the Code of Civil Procedure, 735 ILCS 2-619((a)(9). The STATE has elected to not file any response to the motion under 735 ILCS 2-619(a)(9). In this regard, §101.500(d) of the General Rules of the Pollution Control Board, 35 Ill. Adm. Code 101.500(d), states, in pertinent part:

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

Given that the STATE elected to not respond to the 735 ILCS 2-619(a)(9) motion, it has waived objection to the granting of the motion.

A. ALC'S Alleged Disposal of Leachate at the Village STP Was Authorized Under Special Conditions 2 And 3 of Permit No. 2008-E0-0331 and Pursuant to 35 Ill. Adm. Code 307.1101 and 40 CFR 403.5(S) as Discharges "at Discharge Points Designated by the POTW."

The argument at part I(B) of this Reply that Complainant's Response has failed to address the Complaint's failure to allege any statutory basis for the issuance of Permit No 2008-E0-0331 is not mere sophistry. The absence of such statutory basis demonstrates the STATE's

failure to recognize and adhere to applicable federal and state law under the pretreatment program delegating to the POTWs authority over the disposition of trucked leachate from landfill operations that are not the subject of general and specific discharge prohibitions, none of which are actually alleged here. *See* Part I(D) of this Reply, *supra*.

In accordance with this delegation of authority over trucked leachate from landfill operations, 35 Ill. Adm. Code 307.1101 provides, as follows:

> No person may introduce the following types of pollutants into a POTW:
> ***
> (13) *Any* trucked or hauled pollutants, *except at discharge points designated by the POTW*. (Emphasis added.)

Likewise, 40 CFR 403.5 provides, as follows:

> [T]he following pollutants shall not be introduced into a POTW:
> ***
> (8) *Any* trucked or hauled pollutants, *except at discharge points designated by the POTW*. (Emphasis added.)

Thus, a POTW, in this instance the Atkinson STP and Galva WWTF, has the authority under both 35 Ill. Adm. Code Part 307 and 40 CFR 403 to administer to the discharge of "[a]ny trucked or hauled pollutants." This argument was made in the Motion to Dismiss, Part II(A) at 18-21 and Part IV(A) at 25-27. Thus, the attempted causes of action in the Complaint both, in Counts I-II, that ALC violated the terms of Permit No. 2008-E0-0331 in allegedly making discharges of trucked leachate into the Village STP, and, in Counts III-IV, in allegedly making similar discharges into the Galva WWTF without a permit issued by the STATE, do not state claims because they are barred by the provisions of the pretreatment program, set forth above, delegating to the POTWs, not to the STATE, authority over such discharges. As further set forth above, the STATE has waived objection to the granting of the Motion to Dismiss under § 2-619((a)(9) of the Code of Civil Procedure, 735 ILCS 2-619((a)(9). Thus, the Complaint is barred

under § 2-619((a)(9) of the Code of Civil Procedure, 735 ILCS 2-619((a)(9) on the basis that it is "barred by other affirmative matter avoiding the legal effect of or defeating the claim." That "other affirmative matter" are, *inter alia*, the above cited provisions of the pretreatment program, 35 Ill. Adm. Code 307.1101 and 40 CFR 403.5(8).

In accordance with the regulatory framework of the pretreatment program, Permit No. 2008-E0-0331 pertaining to the Village STP specifically requires adherence to the dictates of 40 CFR 403, of which 40 CFR 403.5(8) is cited above, as follows:

> SPECIAL CONDITION 2: The issuance of this permit does not relieve the permittee of complying with 35 Ill. Adm. Code, Part 307 and or the General Pretreatment Regulations (40 CFR 403) and any guidelines developed pursuant to Section 301, 306, or 307 of the Federal Clean Water Act of 1977.
>
> SPECIAL CONDITION 3: The issuance of this permit does not relieve the permittee of the responsibility of complying with any limitations and provisions imposed by the City of Atkinson.

Thus, a POTW, in this instance the Village STP, has the authority under both 35 Ill. Adm. Code Part 307 and 40 CFR 403 to designate discharge points where "[a]ny trucked or hauled pollutants" may be discharged. In addition, 35 Ill. Adm. Code 307.1101(13) and 40 CFR 403.5(8), in referring to the word "*any*" trucked or hauled pollutants, authorizes the POTW to determine the *amount* of the discharge.[7] Permit No. 2008-E0-0331, at Special Condition 2, specifically states that ALC must comply with those provisions.

In addition, Special Condition 3 of Permit No. 2008-E0-0331 requires that ALC must "comply… with any limitations and provisions imposed by the City of Atkinson [sic]." This requirement is further acknowledgment of the POTW's authority over the discharge of trucked leachate. Thus, ALC was required to comply with any limitations or provisions imposed by the

[7] The word "any" is defined in pertinent part as: "Some; one out of many; an indefinite number." Black's Law Dictionary, 4th Ed.

Village STP with respect to the amount and location of leachate discharges into the Village STP.

Moreover, Special Conditions 2 and 3 are set forth in Permit No. 2008-E0-0331, attached to the Complaint and upon which Counts I and II are founded. To the extent that the allegations of Counts I and II conflict with such exhibits, the exhibits control. *Bajwa v. Metropolitan Life Insurance Company*, 208 Ill. 2d 414, 431-432 (2004).

ALC did, in fact, comply with both 35 Ill. Adm. Code Part 307 and 40 CFR 403, *i.e.*, specifically 35 Ill. Adm. Code 307.1101(13) and 40 CFR 403.5(8), at both the Village STP (and the Galva WWTF), and also complied with the limitations and provisions imposed by the Village STP with regard to the discharge of leachate. That compliance is set forth in the Affidavit of Gary Hull, a truck driver for ALC, attached to the Motion to Dismiss as Exhibit "A" and the Affidavit of Erik Vardijan, manager and tanker truck driver for ALC, attached to the Motion to Dismiss as Exhibit "B". Given that the STATE elected to not respond to the 735 ILCS 2-619(a)(9) motion, it has waived objection to the argument that ALC has complied with 35 Ill. Adm. Code 307.1101(13) and 40 CFR 403.5(8).[8]

Yet, ALC's motion under § 2-619((a)(9) of the Code of Civil Procedure, 735 ILCS 2-619((a)(9), is not dependent upon the viability of these affidavits. This Board has ample basis to dismiss the Complaint under § 2-619((a)(9) of the Code of Civil Procedure, 735 ILCS 2-619((a)(9) based upon the "other affirmative matter" of the above cited provisions of the pretreatment program, 35 Ill. Adm. Code 307.1101 and 40 CFR 403.5(8), as well as Special Conditions 2 and 3 of Permit No. 2008-E0-0331. Note that this affirmative matter is exclusive of any consideration of the Affidavits of Gary Hull and Erik Vardijan.

Regardless of whether the Board accepts these affidavits, the Board must find that the Complaint's attempted causes of action are barred. Otherwise, if the claims were allowed to go

[8] These affidavits are also the subject of the STATE's Motion to Strike.

forward, the STATE would be allowed to unlawfully insert itself into the regulatory relationships between both the Village STP and Galva WWTF, on the one hand, and ALC, on the other, whereby the POTWs had lawfully accepted trucked landfill leachate under Special Conditions 2 and 3 of Permit No. 2008-E0-0331 and under the CWA pretreatment program, 33 U.S.C. § 1317(b). That neither the Complainant's Response nor the STATE's Motion to Strike even attempts to explain to this Board how the STATE justifies a prosecution of what the STATE has admitted is a lawfully operating landfill that is in full compliance with applicable federal and state regulatory framework governing the disposal of trucked leachate pursuant 35 Ill. Adm. Code 307.1101(13) and 40 CFR 403.5(8) speaks volumes about the legal validity of its Complaint. Accordingly, the Complaint must be dismissed under § 2-619((a)(9) of the Code of Civil Procedure, 735 ILCS 2-619((a)(9).

V. CONCLUSION.

In summary, Counts I-IV relating to alleged discharges into the Village STP are substantially insufficient in law and must be dismissed pursuant to § 2-615 of the Code Of Civil Procedure, 735 ILCS 5 2-615. First of all, the STATE admits that ALC was lawfully operating under a lawfully issued permit in the instances of both sets of alleged discharges at the Village STP and Galva WWTF. Secondly, Complainant's Response fails to address the Complaint's failure to allege any statutory basis for the issuance of multiple operating permits. Thirdly, Complainant's Response wholly fails to refute that the allegations of Counts I and II are vague and ambiguous, as are the terms of Permit no. 2008-E0-0331 upon which they are based, and thereby fail to provide notice of a specific violation charged and notice of the specific conduct constituting the violation. Fourthly, Complainant's Response fails to address the Complaint's failure to allege specific violations of pretreatment standards under 40 C.F.R. 403.5(b)(1)-(8) and

35 Ill. Adm. Code 307.1101(b)(1)-(13). Fifthly, Complainant's Response fails to refute that Counts I-IV fail to sufficiently allege that ALC caused or contributed to water pollution in violation of §§ 12(a) and (b) of the Act, 415 ILCS 5/12(a) and (b). Sixthly, Complainant's Response fails to refute that no authority exists under § 31 of the Act, 415 ILCS 5/31, for the Attorney General to bring an action on her own motion.

Additionally, the STATE has waived any objections to ALC's motion to dismiss Counts I-IV under § 2-619(a)(9) of the Code of Civil Procedure, 735 ILCS 2-619(a)(9). In that regard, ALC's alleged disposal of leachate at the Village STP was authorized under Special Conditions 2 and 3 of Permit No. 2008-E0-0331 and pursuant to 35 Ill. Adm. Code 307.1101 and 40 CFR 403.5(8) as discharges "at discharge points designated by the POTW." Accordingly, the Complaint is barred under § 2-619((a)(9) of the Code of Civil Procedure, 735 ILCS 2-619((a)(9) on the basis that it is "barred by other affirmative matter avoiding the legal effect of or defeating the claim."

WHEREFORE, ALC requests that this Board strike and dismiss the Complaint.

Respondent, ATKINSON LANDFILL CO.,

By: _____
Its attorney

KENNETH ANSPACH, ESQ.
ANSPACH LAW OFFICE
111 West Washington Street
Suite 1625
Chicago, Illinois 60602
(312) 407-7888

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 and Dismiss First Amended Complaint 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 18th day of July, 2013.

Kathryn A. Pamenter
Assistant Attorney General
Environmental Bureau
69 West Washington Street
18th Floor
Chicago, IL 60602

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

KENNETH ANSPACH, ESQ.
ANSPACH LAW OFFICE
111 West Washington Avenue
Suite 1625
Chicago, Illinois 60602
(312) 407-7888