BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

OBJECTIONS TO COMPLAINANT'S MOTION FOR LEAVE TO FILE SURREPLY TO RESPONDENT'S 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 also 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").

On July 18, 2013 ALC submitted its Reply in Support of Motion to Strike and Dismiss First Amended Complaint ("ALC's Reply Memorandum") and its Objections to Motion to Strike Respondent's Section 2-619(a)(9) Motion to Dismiss and Affidavits of Gary Hull and Erik

Vardijan ("ALC's Objections to the STATE's Motion to Strike"). On July 23, 2013 the STATE submitted Complainant's Motion for Leave to File Surreply to Respondent's Reply in Support of Motion to Strike and Dismiss First Amended Complaint (the "STATE's Motion for Leave to File Surreply"). Pursuant to the within objections ("ALC's Objections to the STATE's Motion for Leave to File Surreply"), ALC requests that this Board deny the STATE's Motion for Leave to File Surreply for the reasons set forth below. In the event the Board grants the STATE's Motion for Leave to File Surreply, then ALC requests that leave be granted to ALC to file a surrebuttal.

I. NONE OF THE PURPORTED REASONS SET FORTH IN THE STATE'S MOTION FOR LEAVE TO FILE SURREPLY, PARAGRAPH 5 AT 2-3, JUSTIFY THE FILING OF A SURREPLY.

A. The Argument that ALC is Lawfully Operating its Landfill under Permit No. 2001-021-LFM pursuant to 35 Ill. Adm. Code 309.204(a) is Made Originally in the Motion to Dismiss and Properly Made Again, in Accordance With Ill. Sup. Ct. Rule 341(j), in ALC's Reply Memorandum.

A host of purported reasons for the STATE's seeking leave to file proposed Complainant's Surreply to Respondent's Reply in Support of Motion to Strike and Dismiss First Amended Complaint ("Proposed Surreply") are set forth in the STATE's Motion for Leave to File Surreply, par. 5 at 2-3. The first such purported reason is:

> In the Objections.[1] Respondent (a) argues for the first time that its landfill operation pursuant to Permit No. 2001-021-LFM satisfies 35 Ill. Adm. Code 309.204(a).

First of all, as set forth in ALC's Reply Memorandum, Part I(A) at 2, the argument to which this purported reason refers is set forth in the Motion to Dismiss, Part I(b) at 5-6. There, the Motion to Dismiss states, *inter alia*, as follows:

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[1] ALC is confused by the reference here to "the Objections." The STATE's Motion for Leave to File Surreply says that it is addressed at ALC's Reply Memorandum. Yet, here, its comments appear to be addressed at ALC's Objections to the STATE's Motion to Strike. For purposes of the within ALC's Objections to the STATE's Motion for Leave to File Surreply, ALC will assume that the reference to "the Objections" is a scrivener's error.

> 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")…Thus, paragraph 4 alleges that ALC operates under authority of Illinois EPA Permit No. 2001-021-LFM, Modification No. 5, Log No. 2010-068 (the "Operating Permit"). While not set forth in the Complaint, presumably the Operating Permit was issued under authority of 35 Ill. Adm. Code 309.204(a)…No allegation is made that ALC is operating in violation of the Operating Permit.

Thus, the argument that appears in ALC's Reply Memorandum was made initially in the Motion to Dismiss. Therefore, the STATE's first purported reason for justifying the purported need to file a the Proposed Surreply is misplaced.

Moreover, even *arguendo* if the argument in ALC's Reply Memorandum was entirely new, it would not necessarily be barred. The Board Rules are silent regarding any standard for what may be set forth in the reply brief in support of a motion. Accordingly, pursuant to § 101.100(b) of the General Rules of the Pollution Control Board, 35 Ill. Adm. Code 101.100(b), "the Board may look to …the Supreme Court Rules for guidance." Specifically, Ill. Sup. Ct. Rule 341(j) discusses the standards for reply briefs on appeal, as follows:

> *Reply Brief.* The reply brief, if any, shall be confined strictly to replying to arguments presented in the brief of the appellee and need contain only Argument.

The meaning of this standard was discussed in *People v. Whitfield*, 228 Ill. 2d 502, 513 (2007). There the Court held that a party's initial failure to raise an argument on appeal does not automatically preclude its consideration. As the Court stated:

> We take judicial notice of the arguments raised in the parties' respective briefs below, and acknowledge that *defendant did not raise a double jeopardy claim in his opening brief. However, defendant's initial failure to raise this argument does not automatically preclude its consideration. Supreme Court Rule 341(j) permits appellants to reply to arguments presented in the brief of the appellee. 210 Ill. 2d R. 341(j). A review of the briefs filed below demonstrates that defendant's double jeopardy*

> *argument was presented in reply* to the State's assertion that defendant would not be entitled to any credit for the time he spent on probation towards his prison sentence under any circumstances, even if defendant served his entire two-year probation sentence. *It would be unfair for us to require an appellant, when writing his or her opening brief, to anticipate every argument that may be raised by an appellee.* (Emphasis added.)

Thus, Ill. Sup. Ct. R. 341(j) permits appellants to reply to arguments presented in the brief of the appellee, even if the reply argument is a new one. Under the parlance of the Board Rules, Ill. Sup. Ct. R. 341(j) permits a respondent to reply to arguments presented in the response brief of the STATE, even if the reply argument is a new argument.

Here ALC's Reply Memorandum, Part I(A) at 3 actually quoted the argument in Complainant's Response, Part III at 9, in reply to which the argument in ALC's Reply Memorandum that ALC's landfill operation pursuant to Permit No. 2001-021-LFM satisfies 35 Ill. Adm. Code 309.204(a) was made, as follows:

> Complainant's Response argues that ALC "was required to obtain an operating permit pursuant to 35 Ill. Adm. Code 309.204(a)."

Thus, not only was the argument in ALC's Reply Memorandum that ALC's landfill operation pursuant to Permit No. 2001-021-LFM satisfies 35 Ill. Adm. Code 309.204(a) originally set forth in the Motion to Dismiss, even if *arguendo* it is a new argument, it is authorized under Ill. Sup. Ct. R. 341(j) as having been made in reply to an argument made in Complainant's Response. Accordingly, leave should not be granted to file a Proposed Surreply for the purported reason that this argument was made "for the first time."

B. The Argument that the STATE Failed to Set Forth the Statutory Basis for the Illinois EPA's Issuance of Permit No. 2008-EO-0331 is not "Incorrect" and Fully Complies with Ill. Sup. Ct. R. 341(j).

The second purported reason for seeking leave to file the Proposed Surreply is, as follows:

> In the Objections, Respondent…(b) incorrectly asserts that Complainant did not respond to Respondent's argument regarding the statutory basis for the Illinois Environmental Protection Agency's (Illinois EPA") issuance of certain permits;[2]

First of all, there was nothing "incorrect" about the argument. ALC's Reply Memorandum pointed out that no statutory basis for the issuance of Permit No. 2008-EO-0331 was set forth in the Complaint. The Proposed Surreply at 3 admits that no such statutory basis was set forth, stating, as follows:

> In its Motion to Strike and Dismiss First Amended Complaint…Responded Asserted that Complainant was required to allege in its First Amended Complaint the statutory basis for the issuance of [Permit No. 2008-EO-0331]. (Motion to Dismiss at p. 5-6.) In its Reply, Respondent asserts that Complainant failed to address this argument in [Complainant's Response]. (Reply at pp. 3-5). Yet, Complainant addressed the argument in footnote 3 of [Complainant's Response]. (Response to Motion to Dismiss at p. 11, fn.3.) *Specifically, Section 31(c)(1) of the [Illinois Environmental Protection] Act does not state that the statutory provision authorizing the issuance of a permit must be alleged in the complaint. Complainant has satisfied the requirements of Section 31(c)(1) of the Act…* (Emphasis added.)

In other words, not only did the Complaint and Complainant's Response fail to set forth the statutory basis for the issuance of Permit No. 2008-EO-0331, but neither does the Proposed Reply!

ALC's Reply Memorandum, Part I (A) and (B) at 4 pointed out that the issuance of Permit No. 2008-EO-0331 was "superfluous." Since an administrative agency is a creature of statute, any power or authority claimed by it must find its source within the provisions of the statute by which it is created. *Granite City Division of National Steel Company v. Illinois Pollution Control Board*, 155 Ill. 2d 149, 171 (1993). The STATE has now flubbed two opportunities to provide a statutory basis warranting issuance of a totally superfluous permit for

[2] The STATE's Motion for Leave to File Surreply, paragraph 5 at 2-3.

operation of the ALC landfill. Why would this Board deign to give it a third such opportunity by allowing the filing of the Proposed Surreply?

It is noted that the Proposed Surreply, Part I at 2 now, for the first time, asserts that ALC's operating permit, Permit No. 2001-021-LFM, under which the STATE has admitted that ALC is lawfully operating,[3] was issued under authority of § 21(d)) of the Illinois Environmental Protection Act, 415 ILCS 5 21(d), while Permit No. 2008-EO-0331 was issued under authority of § 39 of the Illinois Environmental Protection Act, 415 ILCS 5/39 and 35 Ill. Adm. Code 309.204(a). No authority is cited for these propositions, other than the judicial notice provision of the Board Rules, § 101.630 of the General Rules of the Pollution Control Board, 35 Ill. Adm. Code 101.630. In actuality, § 21(d)) of the Illinois Environmental Protection Act, 415 ILCS 5 21(d), while prohibiting the "[c]onduct [of] any waste-storage, waste-treatment, or waste-disposal operation…without a permit," does not authorize the issuance of any such permit. Moreover, 35 Ill. Adm. Code 309.204(a) is also merely prohibitory in nature and does not specifically authorize the issuance of any permit. Further, 35 Ill. Adm. Code 309.204(a) is not issued under authority of either §§ 21 or 39 of the Illinois Environmental Protection Act, 415 ILCS 5 21 or 5 39 and also . Finally, none of the citations cited in the Proposed Surreply expressly authorize the issuance of multiple permits for the same landfill, as the Complaint alleges was done here.[4]

Moreover, even if *arguendo* ALC's argument that the STATE had failed to allege a statutory basis for the issuance of Permit No. 2008-EO-0331 was somehow deemed "incorrect," how would making an "incorrect" argument justify the filing of the Proposed Surreply? The Proposed Surreply admits that the argument was first made by ALC in the Motion to Dismiss.

[3] Complaint, Count I, par. 4
[4] Complaint, Count I, pars. 4-5

addressed in Complainant's Response, and repeated in ALC's Reply Memorandum. Therefore, the argument cannot have run afoul of Ill. Sup. Ct. Rule 341(j), the only applicable standard for judging the contents of a reply brief, because the argument, even if purportedly incorrect, responded to an argument set forth in Complainant's Response. As set forth above, Ill. Sup. Ct. R. 341(j), as applied to the Board Rules, permits a respondent to reply to arguments presented in the response brief of the STATE. The Proposed Surreply admits that ALC's Reply Memorandum did just that.

C. ALC Does not "Misconstrue" *Harris v. American General Finance Corp. ("Harris")*, 54 Ill. App. 3d 835, 840 (3rd Dist. 1977) and Fully Complies with Ill. Sup. Ct. R. 341(j).

The third purported reason for the STATE's seeking leave to file the Proposed Surreply is that:

> In the Objections, Respondent...(c) misconstrues the analysis of *Harris v. American General Finance Corp.*, 54 Ill. App. 3d 835, 840 (3rd Dist. 1977) and mischaracterizes that reason that Complainant attached Respondent's Application for Permit or Construction Approval WPC-PS-1 to its response;[5]

Of course, ALC did not "misconstrue the analysis of *Harris v. American General Finance Corp.*, 54 Ill. App. 3d 835, 840 (3rd Dist. 1977)." ALC's Reply Memorandum, Part I(c) at 6 merely points out that the assertion in Complainant's Response at that "*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" is simply not so.

On the other hand, so what if *arguendo* ALC misconstrued *Harris*? Nothing in Ill. Sup. Ct. Rule 341(j) prohibits ALC from purportedly misconstruing a case in a reply brief, so long as that argument is made in response to an argument in the STATE's response brief.

[5] The STATE's Motion for Leave to File Surreply at 5.

Yet, the arguments pertaining to *Harris* set forth in the Proposed Surreply at 2-3 are simply a rehash of the arguments set forth in Complainant's Response at 16-17. Is the STATE really "materially prejudiced" if it is not allowed to present these warmed over arguments in a surreply?

Similarly, while ALC's Reply Memorandum did not "mischaracterize that reason that Complainant attached Respondent's Application for Permit or Construction Approval WPC-PS-1 to its response," so what if *arguendo* it did? Nothing in Illinois S. Ct. Rule 341(j) prohibits ALC from purportedly mischaracterizing the STATE's purported reason for attaching the Application for Permit or Construction Approval WPC-PS-1 (the "Permit Application") to Complainant's Response.

D. ALC Did not "Impermissibly Argue" that its Motion to Dismiss under § 2-619((a)(9) of the Code of Civil Procedure, 735 ILCS 2-619((a)(9) is not Dependent upon the Affidavits of Gary Hull and Erik Vardijan and Such Argument Fully Complies with Ill. Sup. Ct. R. 341(j).

The fourth purported reason for the STATE's seeking leave to file the Proposed Surreply is that:

> In the Objections, Respondent...(d) impermissibly argues for the first time that it need not rely on the affidavits of Gary Hull and Erik Vardijan to support its Section 2-619(a)(9) motion to dismiss, and that the Village of Atkinson sewage treatment plant and the City of Galva wastewater treatment facility have been delegated the authority to regulate discharges of landfill leachate into their systems. [6]

Thus, the STATE herein contends that ALC made "impermissible" arguments apparently because they were purportedly made "made for the first time." These arguments concerned the viability of the affidavits of Gary Hull and Erik Vardijan and the lack of authority of the STATE over the Village of Atkinson sewage treatment plant ("Village STP") and the City of Galva wastewater treatment facility ("Galva WWTF"). As set forth above, the standard under which

[6] The STATE's Motion for Leave to File Surreply at 5-6.

any argument in a reply brief would be deemed permissible or not is Ill. Sup. Ct. R. 341(j), as applied to the Board Rules. That rule permits a respondent to reply to arguments presented in the Complainant's Response. So the issue is not whether the argument was "made for the first time," but whether the arguments responded to arguments made in the Complainant's Response. In that regard, the argument in ALC's Reply Memorandum at 17 that ALC's motion under § 2-619((a)(9) of the Code of Civil Procedure, 735 ILCS 2-619((a)(9) ("2-619"), is not dependent upon the viability of the Gary Hull and Erik Vardijan affidavits was made directly in response to arguments set forth in the STATE's Motion to Strike at 2-4, incorporated by reference into Complainant's Response at 4, n. 1, that those affidavits contained "inadmissible hearsay statements."

Further, the STATE's Motion for Leave to File Surreply argues that another reason that the Board should allow leave to file the Proposed Surreply is to respond to an argument purportedly raised for the first time in ALC's Reply Memorandum "that the Village of Atkinson sewage treatment plant and the City of Galva wastewater treatment facility have been delegated the authority to regulate discharges of landfill leachate into their systems." This argument, made in ALC's Reply Memorandum, Part II(A) at 14-18, was, as set forth in ALC's Reply Memorandum at 14, first made in the Motion to Dismiss, Part II(A) at 18-21 and Part IV(A) at 25-27.[1] Further, it was made again and expanded upon in ALC's Reply Memorandum in response to the argument set forth in the STATE's Motion to Strike at 2-4, incorporated by reference into Complainant's Response at 4, n. 1, that:

> ...Respondent's Section 2-619(a)(9) argument within its Motion to Dismiss is based solely on the Hull Affidavit and the Vardijan Affidavit and the inadmissible hearsay statements contained therein...

[1] In the STATE's Motion to Strike at 4, the STATE acknowledged that this argument was made by moving to strike Respondent's Section 2-619(a)(9) argument within its Motion to Dismiss at pages 18-21 and 25-27.

In point of fact, ALC's Reply Memorandum, Part II(A) at 17 states:

> 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.

It is the provisions of 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 under which this delegation occurred. Accordingly, under the standard set forth in Ill. Sup. Ct. R. 341(j), as applied to the Board Rules, ALC may reply to arguments presented in the Complainant's Response. Therefore, contrary to the representations made to this Board in the STATE's Motion for Leave to File Surreply, no grounds exist for the STATE to foist its Proposed Surreply upon the Board.

II. THE STATE'S MOTION FOR LEAVE TO FILE SURREPLY FAILS TO DISCLOSE THAT ATTACHED TO THE PROPOSED SURREPLY IS THE AFFIDAVIT OF DARIN LECRONE, TO WHICH IS ATTACHED THE PERMIT APPLICATION, BOTH OF WHICH ARE BARRED.

A. The LeCrone Affidavit and Permit Application May Not be Considered in Connection with a Motion to Dismiss Under 2-615.

Attached to the Proposed Surreply is the Affidavit of Darin LeCrone (the "LeCrone Affidavit"). That the LeCrone Affidavit is attached to the Proposed Surreply and the purpose of attaching the LeCrone Affidavit are nowhere disclosed in the body of the STATE's Motion for Leave to File Surreply, itself. Nowhere does the STATE even seek leave of this Board to file the LeCrone Affidavit. Moreover, even if leave were to be sought, it should not be granted.

Attached to the LeCrone Affidavit is a purported copy of the Permit Application. This same Permit Application was attached to Complainant's Response. Nowhere does the STATE even seek leave of this Board to file the Permit Application. Moreover, even if leave were to be sought, it should not be granted.

ALC pointed out in ALC's Reply at 6-7 that '[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 could not consider the purported Permit Application on a motion under a § 2-615 of the Code of Civil Procedure, 735 ILCS 2-615(a) ("2-615 motion"). Apparently, the STATE thought it could cure the problem of attempting to have this Board to consider the purported Permit Application by attempting to have this Board consider even *more* material outside of the pleadings, *i.e.*, the LeCrone Affidavit. This attempt cannot be sanctioned. As the court stated in *Elson v. State Farm Fire & Casualty Company ("Elson")*, 295 Ill. App. 3d 1, 6 (1st Dist. 1998),

> A § 5/2-615 motion attacks only defects apparent on the face of the complaint and is based on the pleadings rather than the underlying facts. *** *The court, in ruling on a § 5/2-615 motion, may not consider affidavits, the products of discovery, documentary evidence not incorporated into the pleadings as exhibits*, testimonial evidence or other evidentiary materials. *** (Citations omitted; emphasis added.)

Thus, the STATE's Motion for Leave to File Surreply must be denied because it attempts to have this Board consider both affidavits and documentary evidence when ruling on a 2-615 motion.

B. The STATE Waived the Opportunity to File the LeCrone Affidavit Under § 101.500(d) of the General Rules of the Pollution Control Board, 35 Ill. Adm. Code 101.500(d).

ALC notes that the Proposed Surreply at 6 appears to assert that the LeCrone Affidavit is being attempted to be submitted in response to the Motion to Dismiss under 2-619. Yet, that

assertion is suspect given that the Permit Application which the LeCrone Affidavit purports to authenticate was expressly submitted in opposition to the Motion to Dismiss under 2-615.

If, assuming *arguendo*, the LeCrone Affidavit and attached Permit Application are now being attempted to be submitted in response to the Motion to Dismiss under 2-619, that is problematic, as well. Pursuant to § 101.500(d) of the General Rules of the Pollution Control Board, 35 Ill. Adm. Code 101.500(d), the LeCrone Affidavit should have been submitted in response to the Motion to Dismiss under 2-619. That affidavits must either be submitted in support of the initial motion or the response thereto is further set forth in § 101.504 of the General Rules of the Pollution Control Board, 35 Ill. Adm. Code 101.504. However, the STATE passed on the opportunity to submit the LeCrone Affidavit in response to the Motion to Dismiss under 2-619. Accordingly, pursuant to § 101.500(d) of the General Rules of the Pollution Control Board, 35 Ill. Adm. Code 101.500(d), that opportunity was "waived." The STATE is now attempting to sandbag ALC with this late filing. It would materially prejudice ALC for this Board to allow the STATE to forego the requirements of §§ 101.500(d) and 101.504 of the General Rules of the Pollution Control Board, 35 Ill. Adm. Code 101.500(d) and 101.504, and allow the filing of the LeCrone Affidavit at this late stage of the motion cycle.

C. The LeCrone Affidavit Must be Disallowed as Containing Conclusions of Law Both Violative of Ill. Sup. Ct. Rule 191(a) and which Misstate the Applicable Law.

That the LeCrone Affidavit may not be considered on a 2-615 motion and because the STATE previously waived the opportunity to submit it is bad enough. Yet, the STATE compounds this problem by including in the Affidavit at paragraph 5 the following statement:

> The Village of Atkinson sewage treatment plant and the City of Galva wastewater treatment facility were authorized to impose only more stringent conditions on Atkinson Landfill Co. regarding its discharge of landfill leachate into their systems.

This is not a statement of fact, but, rather, a conclusion of law. Ill. Sup. Ct. Rule 191(a) states, in pertinent part, that affidavits "shall not consist of conclusions but of facts admissible in evidence."

Not only is this statement in the LeCrone Affidavit a conclusion of law, but it is inaccurate and misleading. A correct statement of the applicable law in relation to local standards under the Clean Water Act ("CWA") pretreatment program, 33 U.S.C. § 1317(b), is set forth at 40 C.F.R. § 403.4, "State or local law," which states:

> Nothing in this regulation is intended to affect any Pretreatment Requirements, including any standards or prohibitions, established by State or local law as long as the State or local requirements are *not less stringent than* any set forth in National Pretreatment Standards, or any other requirements or prohibitions established under the Act or this regulation. States with an NPDES permit program approved in accordance with section 402 (b) and (c) of the Act, or States requesting NPDES programs, are responsible for developing a State pretreatment program in accordance with § 403.10 of this regulation.

Thus, states and municipalities may establish standards and prohibitions "*not less stringent than* any set forth in National Pretreatment Standards." Being "not less stringent than" is distinct from being "more stringent than," because it allows for the enforcement of both any standard which may have been promulgated by the federal government, or no standard, in the absence of any applicable standard. In point of fact, as ALC pointed out in ALC's Reply Memorandum, Part I(D) at 9-10, 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..."[8] Accordingly, only the national general and specific discharge prohibitions or local requirements developed by POTWs exist. However, nowhere in the entirety

[8] 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).

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*. Not only are there no such alleged violations, but, as set forth in the Motion to Dismiss, Part II(A) at 18-21 and Part IV(A) at 25-27 and in ALC''s Reply Memorandum, Part II(A) at 14-15, the Atkinson STP and Galva WWTF, are authorized under both 35 Ill. Adm. Code 307.1101 and 40 C.F.R. § 403.5 to accept and administer to the discharge of "[a]ny trucked or hauled pollutants" from landfills such as ALC. Therefore, the LeCrone Affidavit must also be barred as containing a legal conclusion violative of Ill. Sup. Ct. R. 191(a), and is an incorrect statement of law, at that.

III. THE STATE IS ENGAGING IN A NEEDLESS MULTIPLICATION OF THESE PROCEEDINGS, MUCH TO THE DETRIMENT OF ALC.

The STATE's Motion for Leave to File Surreply is the latest round in a seeming never-ending battle to determine the sufficiency and lawfulness of the STATE's First Amended Complaint (the "Complaint"), which began with ALC filing its Motion to Dismiss pursuant to, *inter alia*, § 101.100 of the General Rules of the Pollution Control Board, 35 Ill. Adm. Code 101.100. The general rule is that during the progress of an action, the movant bears the burden of sustaining the grounds of his motion. *Bright v. Dicke*, 166 Ill. 2d 204, 210 (1995). In accordance with that general rule, § 101.100(a) of the General Rules of the Pollution Control Board, 35 Ill. Adm. Code 101.100(a), allows the filing of motions before the Pollution Control Board, § 101.100(d) of the General Rules of the Pollution Control Board, 35 Ill. Adm. Code 101.100(d), allows for the filing of a response, and § 101.100(e) of the General Rules of the Pollution Control Board, 35 Ill. Adm. Code 101.100(e), allows for the filing of a reply, but only "to prevent material prejudice." Under that procedural framework, the movant, if allowed the

opportunity to reply, would have the last word in the motions process, in order to afford him the opportunity to meet his burden.

The STATE's Motion for Leave to File Surreply cites as the sole authority for allowing the filing of the Proposed Surreply as § 101.100(e) of the General Rules of the Pollution Control Board, 35 Ill. Adm. Code 101.100(e). Yet, § 101.100(e) of the General Rules of the Pollution Control Board, 35 Ill. Adm. Code 101.100(e), makes no provision for the filing of a surreply. The word *surreply* does not even appear there.

The lack of authority to file a surreply is consistent with the procedural framework set forth in the design of § 101.100 of the General Rules of the Pollution Control Board, 35 Ill. Adm. Code 101.100 of affording the movant the final say in meeting his burden under his motion. If the STATE doesn't like the rules as written, it certainly has the option of petitioning this Board for a change thereto. However, unless and until such a change is made, we all, including the STATE and its legal representative, the Attorney General, have to live within them as actually written, not as imagined.

The STATE's Motion for Leave to File Surreply, if granted, would have a severely prejudicial impact upon ALC. The Complaint avers that the STATE has a right to collect its attorney's fees and expenses in this proceeding from ALC pursuant to § 42(h) of the Illinois Environmental Protection Act, 415 ILCS 5/42(f).[9] ALC disputes the legality of such a purported right. However, even the possibility that such an attorney's fees award may be entered against ALC emboldens the STATE to multiply these proceedings *ad infinitum*, at seemingly no cost to itself. A primary example of this needless and unlawful multiplication of proceedings is the STATE's Motion for Leave to File Surreply. Another is the STATE's Motion to Strike, for

[9]No reciprocal right exists under § 42(h) of the Illinois Environmental Protection Act, 415 ILCS 5/42(f), for ALC to collect attorney's fees from the STATE.

which there is no authority under the Board Rules. (See ALC's Objections to the STATE's Motion to Strike.) Not only do the STATE's actions in this regard burden a small business like ALC with excessive attorney's fees and expenses in an effort to lawfully defend itself, but the threat of having to pay the STATE's fees and expenses, as well, operates to bludgeon small businesses like ALC into submission, regardless of the legal validity of the charges against it and of STATE's motion *du jour*. No doubt, operating with the same impunity, the STATE will move to strike the within ALC's Objections to the STATE's Motion for Leave to File Surreply, as well.

ALC would simply ask this Board to require the STATE to operate within the Board Rules and to deny the STATE's Motion for Leave to File Surreply, accordingly. If that means that the STATE is denied the opportunity to fulfill a seemingly overarching need to always have the final say, so be it. All good things, even the Hundred Years' War, must end. In the event the Board grants the STATE's Motion for Leave to File Surreply, then ALC requests that leave be granted to ALC to file a surrebuttal.

WHEREFORE, ALC requests that this Board deny the STATE's Motion for Leave to File Surreply.

Respondent, ATKINSON LANDFILL CO.,

By: _____
Its attorney

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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 Complainant's Motion for Leave to File Surreply to Respondent's Reply in Support of Motion to Strike and Dismiss First Amended Complaint was __ personally delivered, _X_ placed in the U. S. Mail, witb 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 6th day of August, 2013.

Katbryn A. Pamenter
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Environmental Bureau
69 West Washington Street
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Chicago, IL 60602

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
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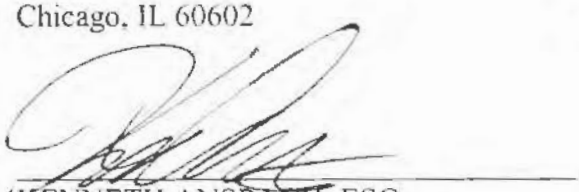

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