ILLINOIS POLLUTION CONTROL BOARD
August 8, 2013

PEOPLE OF THE STATE OF ILLINOIS, Complainant, v. SHERIDAN-JOLIET LAND DEVELOPMENT, LLC, an Illinois limited liability company, and SHERIDAN SAND & GRAVEL CO., an Illinois corporation, (4201 Road Site) Respondents.	)	PCB 13-19 (Enforcement - Land)

PEOPLE OF THE STATE OF ILLINOIS, Complainant, v. SHERIDAN-JOLIET LAND DEVELOPMENT, LLC, an Illinois limited liability company, and SHERIDAN SAND & GRAVEL CO., an Illinois corporation, (Wiensland Site) Respondents.	)	PCB 13-20 (Enforcement - Land) (Consolidated)

ORDER OF THE BOARD (by J.D. O'Leary):

Today the Board consolidates these two enforcement actions brought by the Office of the Attorney General on behalf of the People of the State of Illinois (People) and denies the motions of Sheridan-Joliet Land Development, LLC (SJLD) and Sheridan Sand & Gravel Co. (SSG) (collectively, respondents) to strike or dismiss the People's complaints. The Board also rules upon all other motions pending before it. Respondents have 60 days from the date of this order to file any answers to the complaints.

The nine-count complaint in PCB 13-19 concerns SJLD's clean construction or demolition debris (CCDD) facility, which is operated by SSG and located at 2679 North 4201 Road, Sheridan, LaSalle County (4201 Road site). The four-count complaint in PCB 13-20 involves a second SJLD-owned and SSG-operated CCDD facility, located at 105 S. Wiensland Road, Sheridan, LaSalle County. The People allege respondents have violated various

provisions of Section 22.51 and other sections of the Environmental Protection Act (Act) (415 ILCS 5/22.51 (2010), and the Board's CCDD rules codified at 35 Ill. Adm. Code Parts 1100 and 1150.

This order has five main sections. First, the Board addresses procedural matters, including ruling upon respondents' motions to consolidate the two actions. Second, the Board describes the complaints. Third, the Board discusses and rules upon respondents' motions to strike or dismiss the People's complaints. Fourth, the Board discusses and rules upon respondents' motions to strike the People's amended notices of filing the complaints. Fifth and finally, the Board addresses the deadline for any answers from respondents to the complaints.

PROCEDURAL MATTERS

Procedural History of Both Enforcement Actions

With differences that are not material, the proceedings in PCB 13-19 and PCB 13-20 have followed identical paths. On October 31, 2012, the People filed the complaints, which the Board accepted for hearing on November 15, 2012.

Respondents' Motions to Strike or Dismiss Complaints

On November 30, 2012, respondents filed motions to strike or dismiss the complaints (Mot. Dis.), as well as motions to consolidate PCB 13-19 and PCB 13-20 (Mot. Cons.).[1] With leave of the hearing officer, on February 27, 2013, the People filed their responses to the motions to strike or dismiss (Resp. Dis.). On April 12, 2013, respondents, with the hearing officer's leave, filed their replies in support of the motions to strike or dismiss the complaint (Reply Dis.). The People filed motions for leave to file surreplies to the replies (Mot. File Surreply Dis.) on April 17, 2013, to which respondents, on April 26, 2013, filed "Objections" (Obj. Surreply).

Respondents' Motions to Strike Amended Notices of Filing

On February 27, 2013, the People filed amended notices of filing of the complaint (Not.). On March 29, 2013, pursuant to an agreed briefing schedule, respondents filed motions to strike the amended notice of filing (Mot. Str. Not.), to which the People filed responses on April 12, 2013 (Resp. Str. Not.). On April 26, 2013, respondents, pursuant to order of the hearing officer, filed their replies in support of the motions to strike the amended notices (Reply Str. Not.). On May 1, 2013, the People filed motions for leave to file surreplies to respondents' replies in support of the motions to strike the amended notices of filing (Mot. File Surreply Str.), to which respondents filed no responses.

[1] Citations to motions and other filings include the case number (PCB 13-19, denoted as "19," or PCB 13-20, identified as "20") in parentheses to distinguish filings in the two proceedings, *e.g.*, "Mot. Dis. (19) at __."

People's Motions to Strike "Objections"

On May 10, 2013, the People filed motions to strike respondents' objections to the motions for leave to file surreplies concerning the motions to strike or dismiss the complaint (Mot. Str. Obj.). On May 23, 2013, respondents filed "Objections" to the People's motions to strike respondents' objections to the motions for leave to file surreplies (Obj. Str.).

Respondents' Motion to Consolidate

Respondents seek consolidation of PCB 13-19 and PCB 13-20 on the ground that the complaint in each case charges respondents with "record keeping violations" of the Environmental Protection Act (Act) (415 ILCS 5 (2010)) and the Board's CCDD regulations—with no allegations of "any impact to the environment," according to respondents. Mot. Cons. at 2. Respondents add that although separate CCDD permits were required for the two sites because they are not contiguous, they nonetheless are located less than two miles apart in Sheridan. *Id.* The People stated to the hearing officer that they do not object to the motion to consolidate. Amended Hearing Officer Order (Jan. 15, 2013).

These cases have the same parties and similar alleged violations. The sites at issue are both CCDD facilities located near each other in Sheridan, LaSalle County. The People have the burden of proof in each case and represent that they do not oppose consolidation. Under these circumstances, the Board finds that consolidation would facilitate the convenient, expeditious, and complete determination of the People's claims, and that consolidation would not prejudice any party. *See* 35 Ill. Adm. Code 101.406. The Board grants the motions to consolidate PCB 13-19 and PCB 13-20 for purposes of hearing and decision. Future filings must reflect the caption of this order.

Other Preliminary Motions

People's Motions to Strike Objections

The People move to strike as procedurally improper respondents' objections to their motions for leave to file a surreply to the replies in support of the dismissal motions. Mot. Str. Obj. (19) at 1-3; Mot. Str. Obj. (20) at 1-3. According to the motion, the Board procedural rule cited in the objections, Section 101.100 (35 Ill. Adm. Code 101.100) does not address the filing of "objections" to a motion for leave to file a surreply. Mot. Str. Obj. (19) at 2; Mot. Str. Obj. (20) at 2. According to the People, the objections impermissibly restate arguments in the reply to the motion to strike or dismiss and, without basis, "accuse" the People of "failing to make certain arguments in [their] proposed Surreply." *Id.*

Respondents counter that the objections simply pointed out that the People's surreply addressed "an argument that was never made." Obj. Str. (19) at 2; Obj. Str. (20) at 2. In addition, according to respondents, the objections are a response to the motions for leave to file, authorized under Section 101.500(d) of the Board's procedural rules (35 Ill. Adm. Code 101.500(d))—the rule that should have been, but was inadvertently not, cited in the objections. *Id.*

Given respondents' explanation that they meant to cite Section 101.500(d) of the procedural rules, it is clear that the "objections" were procedurally proper. As to their contents, while the objections do reiterate reply arguments, their thrust is that the People mischaracterize as a new argument the replies' reliance on Section 49(e) of the Act (415 ILCS 5/49(e) (2010)). That purported argument is the basis for the People's motions for leave to file a surreply and is thus a proper subject for a response to those motions. The Board denies the People's motions to strike respondents' objections.

People's Motions for Leave to File Surreplies

Regarding Dismissal Motion. In both cases, the People seek leave to file *instanter* identical surreplies to respondents' replies in support of the motion to strike or dismiss, claiming that respondents argue for the first time in the replies that Section 49(e) of the Act (415 ILCS 5/49(e) (2010)) supports dismissal of the complaint. Mot. File Surreply Dis. (19) at 2; Mot. File Surreply Dis. (20) at 2.

In their objections to the motions for leave to file, respondents maintain that the People mischaracterize the replies' argument based on Section 49(e). Obj. Surreply (19) at 3; Obj. Surreply (20) at 3. Respondents state that although they would not object to a surreply that responds to a genuinely "new" argument, they do object to "a Surreply to an argument [they] did not make." Obj. (19) at 5; Obj. (20) at 5.

Under Section 101.500(e) of the Board's procedural rules, the moving party has no right to file a reply in support of a motion except as permitted by the Board or the hearing officer to prevent "material prejudice." 35 Ill. Adm. Code 101.500(e). The Board has applied this rule to surreplies as well as replies. *See, e.g.*, City of Quincy v. IEPA, PCB 08-86, slip op. at 3 (June 17, 2010). Here, the replies raise a new argument: that respondents are in compliance with the current CCDD regulations and therefore have a defense to this action under Section 49(e) of the Act (415 ILCS 5/49(e) (2010)). Reply Dis. (19) at 4; Reply Dis. (20) at 4. While respondents dispute that this is in fact a new argument, the replies unquestionably add Section 49(e) to the picture for the first time. The People are entitled to address the applicability of that provision in a surreply. The Board grants the People's motions for leave to file a surreply concerning the motion to strike or dismiss in each case.

Regarding Motion to Strike Amended Notice. The People seek leave to file surreplies regarding the motions to strike on the ground that the replies mischaracterize the responses and "case law." Mot. File Surreply Str. at 3.

Respondents' replies in both actions address for the first time People v. City of Herrin, PCB 95-158 (July 7, 1995), in response to the People's citation to it in their responses to the motions to strike the amended notices. The replies also argue for the first time that the People have waived any objection to arguments in the motions to strike the amended notices. Accordingly, the Board grants the motions for leave to file surreplies concerning the motions to strike the amended notices.

COMPLAINTS

PCB 13-19 Complaint

The complaint in PCB 13-19 includes, under count I, the following background allegations regarding the 4201 Road site. On June 30, 2008, the Illinois Environmental Protection Agency (Agency) issued permit No. CCDD2007-040-DE/OP to SJLD as owner and SSG as operator to "develop a new CCDD fill operation" at the 4201 Road site (4201 permit). Comp. (19) at 2. The permit expires on June 15, 2018. *Id.* On September 15, 2010 and June 1, 2011, the Agency inspected the 4201 Road site to "determine regulatory status and compliance with the Act, Board regulations," and the 4201 permit. *Id.*

Count I—Load Checking Program

In count I of the complaint, the People allege that during the September 15, 2010 and June 1, 2011 inspections, Agency personnel "observed that Respondents did not implement and document a load checking program" at the 4201 Road site. Comp. (19) at 6. The People claim that by failing to do these things, respondents violated Sections 22.51(a), 22.51(b)(3)(i), and 22.51(b)(3)(ii) of the Act (415 ILCS 5/22.51(a), 22.51(b)(3)(i), 22.51(b)(3)(ii) (2010)); Sections 1100.201(a) and "1100.205(a)(b)(c)" of the Board's CCDD regulations (35 Ill. Adm. Code 1100.201(a), 1100.205(a), 1100.205(b), 1100.205(c)); and condition I.1 of the 4201 permit.[2] *Id.* at 7-8.

Count II—Site of Origin Documentation

Count II of the complaint alleges that on September 15, 2010, when the Agency inspected the 4201 Road site, respondents had accepted ten loads of soil. Comp. (19) at 8. According to count II, on that date, Agency personnel "observed" that the paperwork for these loads "did not document the name of the hauler, the address of the site of origin or the name of the owner and operator of the site of origin" of the soil. *Id.* at 8-9. By failing to document this information, the complaint continues, respondents violated Sections 22.51(a) and 22.51(f)(2)(A)(i) of the Act (415 ILCS 22.51(a), 22.51(f)(2)(A)(i) (2010)) and Section 1100.201(a) of the Board's CCDD regulations (35 Ill. Adm. Code 1100.201(a)). *Id.* at 9-10.

Count III—Soil Certification

In count III, the People allege that on September 15, 2010, Agency inspectors "observed" that for the ten loads of soil accepted at the 4201 Road site that day, respondents did not provide either (1) a certification from the owner or operator of the site from which the soil originated that

[2] The Board assumes that by "35 Ill. Adm. Code 1100.205(a)(b)(c)" in both complaints, the People are referring to subsections (a), (b), and (c) of 35 Ill. Adm. Code 1100.205. Further, as discussed below, the references in the PCB 13-19 and PCB 13-20 complaints to subsections (a) through (i) of 35 Ill. Adm. Code 1100.205 are not to current Section 1100.205, but to the version in effect before August 27, 2012, when the Board's amendments to the CCDD regulations went into effect. Comp. (19) at 4-7, 15-16, 17-18.

the site had never been used for commercial or industrial purposes and that the soil is presumed to be uncontaminated, or (2) a certification from a licensed professional engineer that the soil is uncontaminated. Comp. (19) at 11. According to count III, the failure to provide this certification violated Sections 22.51(a) and 22.51(f)(2)(B) of the Act (415 ILCS 5/22.51(a), 22.51(f)(2)(B) (2010)) and Section 1100.201(a) of the CCDD regulations (35 Ill. Adm. 1100.201(a)). *Id.*

Count IV—Confirmation that Soil not from Cleanup

According to count IV, Agency personnel observed at the September 15, 2010 inspection that for the ten loads of soil accepted that day at the 4201 Road site, respondents did not have any documentation confirming that the accepted soil was not removed from a site "as part of a cleanup or removal of contaminants." Comp. (19) at 13. Count IV charges that by failing to maintain such documentation, respondents violated Sections 22.51(a) and 22.51(f)(2)(C) of the Act (415 ILCS 5/22.51(a), 22.51(f)(2)(C) (2010)) and Section 1100.201(a) of the CCDD regulations (35 Ill. Adm. Code 1100.201(a)). *Id.* at 13.

Count V—Daily Discharge Inspection

Count V of the complaint alleges that during the September 15, 2010 inspection, Agency personnel "observed" that respondents produced no documentation to show that a random daily discharge inspection took place on September 2, 2010. Comp. (19) at 15. And, according to count V, respondents did not, during the Agency's inspection, produce documentation of the results of a random daily discharge inspection on September 2, 2010. *Id.* By failing to conduct a random daily discharge inspection for September 2, 2010, and to document its results for that date, count V continues, respondents violated Sections 22.51(a) and 22.51(b)(3)(ii) of the Act (415 ILCS 5/22.51(a), 22.51(b)(3)(ii) (2010)) and Sections 1100.201(a), 1100.205(b)(1), and 1100.205(c)(3) of the Board's CCDD regulations (35 Ill. Adm. Code 1100.201(a), 1100.205(b)(1), 1100.205(c)(3)). *Id.*

Count VI—Photoionization Device Calibration

In count VI, the People allege that at the September 15, 2010 inspection, Agency inspectors "observed" that respondents did not maintain and calibrate the photoionization device, an instrument used to detect contaminant levels of fill material accepted at the 4201 Road site. Comp. (19) at 17. By not maintaining and calibrating the photoionization device, count VI continues, respondents violated Sections 22.51(a) and 22.51(b)(3)(ii) of the Act (415 ILCS 5/22.51(a), 22.51(b)(3)(ii) (2010)) and Sections 1100.201(a) and 1100.205(h) of the CCDD regulations (35 Ill. Adm. Code 1100.201(a), 1100.205(h)). *Id.*

Count VII—Monthly Fill Records

Count VII alleges that during a "document review and physical inspection" of the 4201 Road site on April 5, April 22, and June 1, 2011, Agency personnel "observed" that respondents did not submit: (1) by October 15, 2010, monthly fill records for July, August, and September 2010; (2) by January 15, 2011, monthly fill records for October, November, and December 2010;

and (3) by April 15, 2011, monthly fill records for January, February, and March 2011. Comp. (19) at 19. According to count VI, by failing to timely submit monthly fill records, respondents violated Sections 22.51(a) and 22.51(b)(3)(ii) of the Act (415 ILCS 5/22.51(a), 22.51(b)(3)(ii) (2010)) and Sections 1100.201(a), 1150.210(b), and 1150.210(c) of the CCDD regulations (35 Ill. Adm. 1100.201(a), 1150.210(b), 1150.210(c)). *Id.* at 19-20.

Count VIII—Quarterly Fill Summaries

According to count VIII, during the April 5, April 22, and June 1, 2011 inspections, Agency inspectors "observed" that respondents did not submit to the Agency quarterly fill summaries by the October 5, 2010, January 15, 2011, and April 15, 2011 deadlines. Comp. (19) at 21. By failing to meet these deadlines, the People maintain, respondents violated Sections 22.51(a) and 22.51(b)(3)(ii) of the Act (415 ILCS 5/22.51(a), 22.51(b)(3)(ii) (2010)) and Sections 1100.201(a), 1150.215(b), and 1150.215(c) of the CCDD regulations (35 Ill. Adm. Code 1100.201(a), 1150.215(b), 1150.215(c)). *Id.* at 21-22.

Count IX—Quarterly Fees

In count IX of the complaint, the People allege that, during the April 5, April 22, and June 1, 2011 inspections, Agency employees "observed" that fees required for permitted facilities under Section 22.51b of the Act (415 ILCS 5/22.51b (2010)) were not paid when due on October 15, 2010, January 15, 2011, and April 15, 2011. Comp. (19) at 24. By failing to timely pay such fees, according to count IX, respondents violated Sections 21(k), 22.51(a), and 22.51(b)(3)(ii) of the Act (415 ILCS 5/21(k), 22.51(a), 22.51(b)(3)(ii) (2010)) and Sections 1100.201(a) and 1150.300(a) of the CCDD regulations (35 Ill. Adm. Code 1100.201(a), 1150.300(a)). *Id.*

Relief Requested

For each of the nine counts of the PCB 13-19 complaint, the People ask the Board to order respondents to: (1) cease and desist from further violations; (2) pay a civil penalty of $50,000 for each violation and an additional civil penalty of $10,000 for each day during which each such violation continued; and (3) operate the 4201 Road site in compliance with applicable provisions of the Act, the CCDD regulations, and the 4201 permit. Comp. (19) at 7-8, 9-10, 12, 14, 16, 18, 20-21, 22-23, 24-25. The People also ask that the Board award them the costs of bringing this action, including attorney, expert witness, and consultant fees. *Id.*

PCB 13-20 Complaint

Count I of the PCB 13-20 complaint includes the following background allegations. On November 18, 2008, the Agency issued permit No. CCDD2007-042-DE/OP to SJLD as owner and SSG as operator to "develop a new CCDD fill operation" at the Wiensland site (Wiensland permit). Comp. (20) at 2. The permit expires on November 1, 2018. *Id.* On March 18, 2011, the Agency inspected the Wiensland site to "determine regulatory status and compliance with the Act, Board regulations" and the Wiensland permit. *Id.* at 6.

Count I—Load Checking Program

In count I of the complaint, the People allege that during the March 18, 2011 inspection, Agency personnel "observed that Respondents did not implement and document a load checking program" at the Wiensland site. Comp. (20) at 7. The People charge that this omission violated Sections 22.51(a), 22.51(b)(3)(i), and 22.51(b)(3)(ii) of the Act (415 ILCS 5/22.51(a), 22.51(b)(3)(i), 22.51(b)(3)(ii) (2010)); Sections 1100.201(a) and "1100.205(a)(b)(c)" of the Board's CCDD regulations (35 Ill. Adm. Code 1100.201(a), 1100.205(a), 1100.205(b), 1100.205(c)); and condition I.1 of the Wiensland permit. *Id.*

Count II—Soil Certification

In count II, the People allege that at the March 28, 2010 inspection, Agency inspectors observed a pile of soil at the Wiensland site and asked for certification forms showing that the soil was uncontaminated. Comp. (20) at 8. Respondents did not provide either (1) a certification from the owner or operator of the soil's site of origin that the site had never been used for commercial or industrial purposes and that the soil is presumed to be uncontaminated, or (2) a certification from a licensed professional engineer that the soil is uncontaminated. *Id.* at 9. According to count II, the failure to provide such a certification violated Sections 22.51(a), 22.51(f)(2)(B)(i), and 22.51(f)(2)(B)(ii) of the Act (415 ILCS 5/22.51(a), 22.51(f)(2)(B)(i), 22.51(f)(2)(B)(ii) (2010)) and Section 1100.201(a) of the CCDD regulations (35 Ill. Adm. 1100.201(a)). *Id.*

Count III—Recordkeeping Violations

Count III of the complaint alleges that during the March 18, 2011 inspection of the Wiensland site, Agency personnel "observed" that respondents maintained neither the daily fill record—recording the date and day of the week, along with the quantity in tons or cubic yards of CCDD or uncontaminated soil accepted for use as fill material—nor the monthly fill record, which was not submitted to the Agency on or before October 15, 2010, January 15, 2011, and April 15, 2011; nor the quarterly fill summary, which was not submitted to the Agency by October 15, 2010, January 15, 2011, and April 15, 2011. Comp. (20) at 14. By failing to adhere to these recordkeeping requirements, the complaint continues, respondents violated Sections 22.51(a), 22.51(b)(3)(ii), and 22.51(f)(3) of the Act (415 ILCS 5/22.51(a), 22.51(b)(3)(ii), 22.51(f)(3) (2010)) and Sections 1100.201(a), 1100.205(i), 1150.110, 1150.205, 1150.210, and 1150.215 of the CCDD regulations (35 Ill. Adm. Code 1100.201(a), 1100.205(i), 1150.110, 1150.205, 1150.210, 1150.215). *Id.*

Count IV—Quarterly Fees

In count IV of the complaint, the People allege that, during the March 18, 2011 inspection, Agency employees "observed" that fees required for permitted facilities under Section 22.51b of the Act (415 ILCS 5/22.51b (2010)) were not paid by October 15, 2010, January 15, 2011, and April 15, 2011, as required. Comp. (20) at 17. By failing to timely pay such fees, according to count IV, respondents violated Sections 21(k), 22.51(a), and 22.51(b)(3)(ii) of the Act (415 ILCS 5/21(k), 22.51(a), 22.51(b)(3)(ii) (2010)) and Sections

1100.201(a) and 1150.300(a) of the CCDD regulations (35 Ill. Adm. Code 1100.201(a), 1150.300(a)). *Id.*

Relief Requested

For each of the four counts of the PCB 13-20 complaint, the People ask the Board to order respondents to: (1) cease and desist from further violations; (2) pay a civil penalty of $50,000 for each violation and an additional civil penalty of $10,000 for each day during which each such violation continued; and (3) operate the Wiensland site in compliance with applicable provisions of the Act, the CCDD regulations, and the Wiensland permit. Comp. (20) at 7-8, 10, 15, 17-18. The People also ask that the Board award them the costs of bringing the action, including attorney, expert witness, and consultant fees. *Id.*

RESPONDENTS' MOTIONS TO STRIKE OR DISMISS THE COMPLAINTS

In this section, the Board summarizes the filings relating to respondents' motions to strike or dismiss the complaints, after which the Board analyzes and rules upon the motions.

Respondents' Motions to Strike or Dismiss the Complaints

The motions to strike or dismiss rely on Section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (2010) as to some claims, and Section 2-619 of the Code (735 ILCS 5/2-619 (2010)) as to others. A Section 2-615 motion tests the legal sufficiency of the complaint and asserts defects on its face. *See, e.g.*, City of Chicago v. Beretta U.S.A. Corp., 213 Ill. 2d 351, 364, 821 N.E.2d 1099, 1110 (2004). In contrast, a motion to dismiss under Section 2-619 admits the "legal sufficiency of the claim but asserts affirmative matters outside of the pleading that defeats the claim." Wallace v. Smyth, 203 Ill. 2d 441, 447, 786 N.E.2d 980, 984 (2002). Section 2-619(a)(9), the particular subsection of Section 2-619 on which the dismissal motions rely, authorizes motions to dismiss on the ground that claims are "barred by other affirmative matter avoiding the legal effect of or defeating" them. 735 ILCS 2-619(a)(9) (2010).[3]

This section summarizes, first, the Section 2-619 ground for dismissal of the entire complaint, after which the Board turns to the Section 2-615 grounds. The summary concludes with the other Section 2-619 grounds for dismissal of various counts of each complaint.

[3] While the provisions of the Code of Civil Procedure do not expressly apply to Board proceedings (35 Ill. Adm. Code 101.100(b)), the Board may entertain any motion that is permissible under the Code of Civil Procedure (*id.* at 101.500(a)). Moreover, the Board has often looked to Illinois civil practice law for guidance when considering motions to strike or dismiss pleadings. *See, e.g.*, People v. The Highlands, LLC, PCB 00-104, slip op. at 4 (Oct. 20, 2005); Sierra Club and Jim Bensman v. City of Wood River and Norton Environmental, PCB 98-43, slip op. at 2 (Nov. 6, 1997); Loschen v. Grist Mill Confections, Inc., PCB 97-174, slip op. at 3-4 (June 5, 1997).

Financing Notification

In their motions to strike or dismiss (Mot. Dis.), respondents move to dismiss the complaint in each case (citing 735 ILCS 5/2-619(a)(9) (2010)) for failure to comply with the requirement of Section 31(c)(1) of the Act (415 ILCS 5/31(c)(1) (2010)) that the Attorney General file and serve with an enforcement complaint a notification that financing may be available, through the Illinois Environmental Facilities Financing Act, 20 ILCS 3515/1 *et seq.* (Financing Act), to correct the alleged violations (financing notification). Mot. Dis. (19) at 17; Mot. Dis. (20) at 14. Respondents note that "no notification regarding the availability of financing" was filed with the complaint in either case. *Id.*

Respondents also move to strike or dismiss as substantially insufficient in law counts I-VI of the complaint in PCB 13-19, and counts I-III of the complaint in PCB 13-20, citing 735 ILCS 5/2-615 (2010) (Mot. Dis. (19) at 1-10; Mot. Dis. (20) at 1-10), and to strike or dismiss counts VII-IX in PCB 13-19, and count IV in PCB 13-20, citing 735 ILCS 5/2-619(a)(9) (2010) (Mot. Dis. (19) at 10-17; Mot. Dis. (20) at 11-14).

Violations of Superseded 35 Ill. Adm. Code 1100.205

Respondents ask the Board to dismiss counts I, V and VI of the complaint in PCB 13-19, and counts I and III of the complaint in PCB 13-20, on the ground that "35 Ill. Adm. Code 1100.205(a)(b)(c)," on which the counts are based, does not "exist[ ]." Mot. Dis. (19) at 2-3, 9-10; Mot. Dis. (20) at 2-5. Respondents add that because the alleged violations of these provisions are the predicate for the violations of Sections 22.51(a), (b)(3)(i) and (ii) of the Act (415 ILCS 5/22.51(a), 22.51(b)(3)(i), (b)(3)(ii) (2010)) and Section 1100.201(a) of the CCDD regulations (35 Ill. Adm. Code 1100.201(a)) alleged in the same counts—I, V and VI in PCB 13-19, and count I in PCB 13-20—these alleged statutory and regulatory violations as well as the claims for violation of the permits are also unsustainable. Mot. Dis. (19) at 3, 10; Mot. Dis. (20) at 3.

Further, as to count I of each complaint, respondents argue that they are insufficiently pled because they rest entirely on the "legal conclusion" that the Agency "'observed that Respondents did not implement and document a load checking program'" at each site. Mot. Dis. (19) at 4; Mot. Dis. (20) at 4-5. And, respondents add, the factual aspects of this allegation are not "clear and specific," and do not "provide notice of any specific conduct constituting the violation." Mot. Dis. (19) at 3-4; Mot. Dis. (20) at 3-4. Moreover, according to respondents, alleging that the Agency "observed" something is "not equivalent to alleging that a violation of law has *occurred*," and such an allegation does not specify the "manner . . . and the extent to which, [respondents] . . . [are] said to have violated the law." Mot. Dis. (19) at 5; Mot. Dis. (20) at 5 (emphasis in original), quoting 415 ILCS ILCS 5/31(c)(1) (2010).

Violations of 415 ILCS 5/22.51(f)(2) (2010)

Respondents argue that counts II, III and IV of the complaint in PCB 13-19, and counts II and III in PCB 13-20, fail to state a claim because they allege violations of various subsections of Section 22.51(f)(2) of the Act that were no longer in effect when the complaints were filed. Mot.

Dis. (19) at 5-9; Mot. Dis. (20) at 5-10. (In addition, as to count II of the complaint in PCB 13-20, respondents maintain that Section 22.51(f)(2) was not yet in effect when the Agency conducted the "March 18, 2010" inspection of the Wiensland site. Mot. Dis. (20) at 5.) Respondents note that Section 22.51(f)(1) of the Act (415 ILCS 5/22.51(f)(1) (2010)) provides that within one year after the effective date of Public Act 96-1416 (July 30, 2010), the Agency shall propose to the Board, and within a year after Board receipt of that proposal, the Board shall adopt, rules for the use of CCDD and uncontaminated soil as fill material. Mot. Dis. (19) at 5-6; Mot. Dis. (20) at 5-6. Respondents add that the Board did adopt such regulations, which amended the prior CCDD regulations, in docket R12-9 (36 Ill. Reg. 13892),[4] and that those amended regulations went into effect on August 27, 2012. Mot. Dis. (19) at 6-7; Mot. Dis. (20) at 8. In turn, Section 22.51(f)(2) (415 ILCS 5/22.51(f)(2)(2010)) provides, in relevant part, as follows:

> Until the effective date of the Board rules adopted under subdivision (f)(1) of this Section, and in addition to any other requirements, owners and operators of [CCDD] fill operations must do all of the following in subdivisions (f)(2)(A) through (f)(2)(D) of this Section for all [CCDD] and uncontaminated soil accepted for use as fill material. Mot. Dis. (19) at 6; Mot. Dis. (20) at 6 (quoting 415 ILCS 5/22.51(f)(2) (2010) (emphasis omitted).

Thus, respondents continue, owners and operators of CCDD fill operations had to comply with the specified provisions of subdivisions (f)(2)(A) through (f)(2)(D) only until August 27, 2012, the effective date of the amended CCDD regulations. Mot. Dis. (19) at 6-7; Mot. Dis. (20) at 6-7. Respondents argue that these provisions do not apply to the violations alleged in counts II, III, and IV of the PCB 13-19 complaint or the violations alleged in counts II and III of the PCB 13-20 complaint because the complaints were not filed until October 31, 2012, after Sections 22.51(f)(2)(A) through (D) had ceased to apply. Mot. Dis. (19) at 6-7; Mot. Dis. (20) at 7. Nor, respondents add, are the amended CCDD regulations enforceable against them because those regulations were not in force when the alleged violations occurred. Mot. Dis. (19) at 7-8; Mot. Dis. (20) at 7. Respondents liken the expiration of Sections 22.51(f)(2)(A) through (D) to repeal of a statute, and assert that those statutory provisions are no more enforceable post-expiration than they would be had they been repealed. Mot. Dis. (19) at 8-9; Mot. Dis. (20) at 8-9, citing Wall v. Chesapeake & O.R. Co., 290 Ill. 227, 232-33 (1919).

Issuance of Violation Notices

Respondents seek dismissal (citing 735 ILCS 2-619(a)(9) (2010)) of counts VII, VIII and IX of the complaint in PCB 13-19, and of count IV of the complaint in PCB 13-20, based upon the Agency's purported failure to serve them with a "violation notice," including a "detailed explanation setting forth a violation" for each violation alleged in those counts. Mot. Dis. (19) at 11-12, 14-15, 16-17; Mot. Dis. (20) at 11-14, citing 415 ILCS 5/31(a) (2010). Respondents ask the Board to take judicial notice of the Violation Notices attached as Exhibit A to each dismissal motion, which, respondents continue, do not give notice of violations of the provisions cited in

[4] Proposed Amendments to Clean Construction or Demolition Debris Fill Operations (CCDD): Proposed Amendments to 35 Ill. Adm. Code 1100, R12-9 (Aug. 23, 2012).

counts VII-IX in PCB 13-19 or in count IV in PCB 13-20. Mot. Dis. (19) at 12, 14-15, 16; Mot. Dis. (20) at 12. Respondents argue that compliance by the Agency with the notice requirements of Section 31(a) of the Act is a "condition precedent" to the Attorney General's filing of an enforcement action. Mot. Dis. (19) at 12-14; Mot. Dis. (20) at 12-14, citing Skillet Fork River Outlet Union Drainage District v. Fogle, 382 Ill. 77, 83 (1943).

People's Responses to Motions to Strike or Dismiss the Complaints

The People's responses open by contending that while respondents seek dismissal of the entire complaints, they make no argument concerning the claims in count I of the complaints for violation of the 4201 and Wiensland permits, which "independently required" implementation of a load checking program, and the associated statutory violation—Section 22.51(b)(3)(i) of the Act (415 ILCS 22.51(b)(3)(i)(2010)). Resp. Dis. (19) at 3 n.1; Resp. Dis. (20) at 3 n.1. Further, the People continue, also not addressed in the PCB 13-19 dismissal motion is the claim in count V that respondents violated Section 1100.205(c)(3) of the Board's CCDD regulations, requiring "documentation of inspection results," and, thus, the associated violations of Sections 22.51(a) and (b)(3)(ii) of the Act (415 ILCS 5/22.51(a), (b)(3)(ii) (2010)). Resp. Dis. (19) at 3 n.1. In PCB 13-20, the People argue that the dismissal motion makes no argument concerning the claim in count III for violation of various CCDD regulations regarding recordkeeping—35 Ill. Adm. Code 1150.110, 1150.200, 1150.205, 1150.210 and 1150.215— and the associated violations of Sections 22.51(a) and (b)(3)(ii) of the Act (415 ILCS 5/22.51(a), (b)(3)(ii) (2010)). Resp. Dis. (20) at 3 n.1.

Financing Notification

The People claim no financing notification was required here because the Financing Act does not "provide financing for the payment of a civil penalty." Resp. Dis. (19) at 14; Resp. Dis. (20) at 15. That is the only relief sought in the complaints, according to the People, because the alleged violations were corrected before each complaint was filed. Resp. Dis. (19) at 15; Resp. Dis. (20) at 15. In any event, the People continue, respondents clearly had notice of the availability of financing under the Financing Act through Section 31(c)(1) of the Act (415 ILCS 5/31(c)(1) (2010)), which refers to the Financing Act. In addition, according to the People, any deficiency was cured by the February 27, 2013, filing of the amended notice of filing of the complaint (amended notice), which provides the missing financing notification. Resp. (19) at 15 n.5; Resp. (20) at 15 n.5.

Violations of Superseded 35 Ill. Adm. Code 1100.205

The People argue that the Board's CCDD regulations—specifically, those concerning a load checking program, random inspections of loads, documentation of inspections, calibration of the photoionization device, and retention of documentation—were amended but not substantively modified effective August 27, 2012. Resp. Dis. (19) at 12; Resp. Dis. (20) at 12-13. As a result, the People explain, owners and operators of CCDD fill operations were required to comply with the "old" CCDD regulations until August 27, 2012, and, thereafter, with the amended CCDD regulations. *Id.* The People claim that counts I, V, and VI of the complaint (in PCB 13-19) properly seek to enforce "old" 35 Ill. Adm. Code 1100.205(a), (b), (c), and (h)

because the violations alleged in those counts occurred on September 15, 2010, before the effective date of the amended CCDD regulations. Resp. Dis. (19) at 12. Likewise, the People continue, counts I and III of the PCB 13-20 complaint properly seek to enforce "old" 35 Ill. Adm. Code 1100.205(a), (b), (c), and (i) because respondents' alleged violations occurred on March 18, 2011, also before the amended regulations took effect. Resp. Dis. (20) at 13.

The People further contend that count I of the complaints includes sufficient factual allegations to support the legal conclusion that there were statutory and regulatory violations at the sites. Resp. Dis. (19) at 13; Resp. Dis. (20) at 13-14. According to the People, count I's allegation that the Agency discovered the violations during inspections of both sites – and, therefore, that the claimed violations occurred—meets the requirement to set forth "specific ultimate facts supporting the cause of action, as opposed to legal conclusions." Resp. Dis. (19) at 13-14 & n.4; Res. Dis. (20) at 13-14 & n.3. The People also argue that by alleging respondents failed to implement *any* load checking program at either site, the complaints impliedly allege that respondents failed to "implement each required component of a loading checking program," obviating specific allegations about the failure to implement particular components of a load checking program, such as use of an elevated structure and a flame ionization detector and visual inspection. Resp. Dis. (19) at 13; Resp. Dis. (20) at 14.

Violations of 415 ILCS 5/22.51(f)(2) (2010)

Regarding counts II, III and IV of the PCB 13-19 complaint and counts II and III of the PCB 13-20 complaint, the People maintain that Section 22.51(f)(2) of the Act (415 ILCS 5/22.51(f)(2) (2010)) sets forth requirements for owners and operators of CCDD fill operations, including to: (a) document information for each load of CCDD or uncontaminated soil received; (b) obtain a soil certification; (c) confirm that the CCDD or uncontaminated soil was not removed from a site as part of a cleanup or removal of contaminants; and (d) document these activities. Resp. Dis. (19) at 6-7; Resp. Dis. (20) at 6, citing 415 ILCS 5/22.51(f)(2)(A)-(D) (2010). According to the People, CCDD fill owners or operators were required to comply with these statutory provisions until August 27, 2012, when the Board's amended Section 1100.205 of the CCDD regulations (35 Ill. Adm. Code 1100.205) went into effect; thereafter, owners and operators had to follow the amended regulations. Resp. Dis. (19) at 6; Resp. Dis. (20) at 7. The People add that the amended CCDD regulations are more stringent than the subsections of Section 22.51(f)(2) of the Act. Resp. Dis. (19) at 8; Resp. Dis. (20) at 8. Because the amended CCDD regulations did not exist when the alleged violations occurred, the People maintain, counts II-IV of the complaint in PCB 13-19 and counts I and III of the complaint in PCB 13-20 properly allege violations of Sections 22.51(f)(2)(A) through (C) of the Act (415 ILCS 5/22.51(f)(2)(A)-(C) (2010)), rather than of amended Section 1100.205 of the CCDD regulations (35 Ill. Adm. Code 1100.205). Resp. Dis. (19) at 7-8; Resp. Dis. (20) at 7.

Further, the People note that respondents "do not contest that they violated" Sections 22.51(f)(2)(A)-(C) of the Act, but argue that "their violations were only enforceable until August 27, 2012," when the CCDD regulations went into effect. Resp. at 9; Resp. Dis. (20) at 8. That is incorrect, the People argue, because Section 22.51(f)(2) of the Act has not been expressly or impliedly repealed or preempted. Resp. Dis. (19) at 9-10; Resp. Dis. (20) at 8-9. According to the People, the amended CCDD regulations are entirely consistent with Section 22.51(f)(2) of

the Act, and the Board's regulations could not preempt or repeal the statute in any event. *Id.* The People also distinguish Wall on the basis that there, unlike here, the statute was repealed and was a remedial provision; according to the People, Section 42 (415 ILCS 5/42 (2010)), not Section 22.51(f)(2), is the Act's remedial provision. Resp. Dis. (19) at 10; Resp. Dis. (20) at 9-10. The People further argue that Section 22.51(f)(2) does not include a "sunset" or statute of limitations, and even if it did, the limitations period would not apply to the People in an "environmental enforcement case[ ]." Resp. Dis. (19) at 10-11; Resp. Dis. (20) at 10-11. It would be contrary to legislative intent and would produce an "absurd result," according to the People, if neither Section 22.51(f)(2) nor the amended CCDD regulations applied to respondents' violations. Resp. Dis. (19) at 11-12; Resp. Dis. (20) at 11.

The People also maintain that the violation of Section 22.51(f)(3) of the Act (415 ILCS 5/22.51(f)(3) (2010)) alleged in count III of the PCB 13-20 complaint is enforceable whether or not Section 22.51(f)(2) is. Resp. Dis. (20) at 11. This is so, the People maintain, because Section 22.51(f)(3), like amended 35 Ill Adm. Code 1100.205(c), requires retention for three years of documentation that CCDD owners and operators must maintain under Section 22.51(f)(2). *Id.* at 12. Indeed, the People continue, Section 22.51(f)(3) contains duties "independently enforceable from those set forth" in Section 22.51(f)(2) of the Act. *Id.* The People add that Section 22.51(f)(3) has not been repealed and contains no restriction on its enforcement against "violators of the statute prior to August 27, 2012." *Id.*

Issuance of Violation Notices

Regarding counts VII-IX of the PCB 13-19 complaint, and count IV of the PCB 13-20 complaint, the People state that the Board has "'repeatedly found'" that the requirements of Section 31 of the Act (415 ILCS 5/31 (2010)) are "'not intended to bar the Attorney General from prosecuting an environmental violation.'" Resp. Dis. (19) at 5; Resp. Dis. (20) at 4-5, quoting People v. Sheridan Sand & Gravel Co., PCB 06-177, slip op. at 14 (June 7, 2007). The People add that this decision governs here rather than Skillet Fork, which was not an environmental enforcement action. *Id.*

Further, the People assert that respondents "misstate the record" in asserting they were not notified of certain alleged violations. Resp. Dis. (19) at 6; Resp. Dis. (20) at 5. According to the People, the Agency served violation notices on respondents in addition to those attached to the motions to strike or dismiss, and that those notices charged respondents with the violations at issue. Resp. Dis. (19) at 6 & Exh. B; Resp. Dis. (20) at 5 & Exh. A.

Respondents' Replies in Support of Motions to Strike or Dismiss the Complaints

Financing Notification

Respondents insist that the requirement to file and serve a financing notice is "not only mandatory, but jurisdictional." Reply Dis. (19) at 12; Reply Dis. (20) 13-14. Further, according to the replies, unlike the requirements that apply to the Agency under Section 31(a) and (b) of the Act (415 ILCS 5/31(a), (b) (2010)), the financing notification requirement expressly applies to the Attorney General. Reply Dis. (19) at 13; Reply Dis. (20) at 14. In support, respondents cite

IEPA v. Production Finishers & Fabricators, Inc., PCB 85-31 (Jan. 8, 1986), in which the Board dismissed an enforcement action without prejudice because the Agency did not file a financing notification with the complaint. Reply Dis. (19) at 12-13; Reply Dis. (20) at 14. The replies also incorporate by reference the arguments in respondents' motions to strike the amended notice in each case. Reply Dis. (19) at 13; Reply Dis. (20) at 14.

Violations of Superseded 35 Ill. Adm. Code 1100.205

Respondents argue that once the amendments to the CCDD regulations went into effect on August 27, 2012, they "supplanted and superseded the previous rules," including those cited in the complaints here. Reply Dis. (19) at 3; Reply Dis. (20) at 3. According to the replies, this means the complaints had to allege violations of the "regulations that actually appear 'on the books'" rather than the superseded ones. Reply Dis. (19) at 4; Reply Dis. (20) at 4. Reciting the People's statement that the violations were corrected before the complaint was filed, respondents insist they are "in compliance with the [amended] Board CCDD Regulations," and therefore have a *prima facie* defense to the regulation-based counts of each complaint under Section 49(e) of the Act (415 ILCS 5/49(e) (2010)). Reply Dis. (19) at 4; Reply Dis. (20) at 4. Respondents add that there is no statutory savings clause for the "old" CCDD regulations, as there was for the regulations adopted by the Board's pre-1970 predecessors. Reply Dis. (19) at 4-5; Reply Dis. (20) at 4-5, citing Mystik Tape Division of Borden, Inc. v. PCB, 60 Ill. 2d 330 (1975). If the Agency and the Board intend to enforce the "old" regulations, respondents add, prior notice to the regulated community was required. Reply Dis. (19) at 5; Reply Dis. (20) at 5. Respondents also argue that the regulation-based counts of both complaints are flawed because they "speak[ ] of" the superseded regulations in the "present tense," as if they were still in force. *Id.* To state a proper cause of action, according to respondents, the complaints would at a minimum have to distinguish the "dead and discarded regulations" from the "regulations that actually, currently apply." Reply Dis. (19) at 6; Reply Dis. (20) at 6.

Respondents also argue that the People's "no harm no foul" claim, *i.e.*, that which version of the regulations applies is immaterial because the amendments made no substantive changes, "simply begs the question" why the People did not charge respondents with violating the regulations currently in effect. Reply Dis. (19) at 6; Reply Dis. (20) at 6. According to respondents, the People effectively admit they are "barred" from charging respondents under the amended regulations; but, respondents add, that problem was not grounds for the People to seek enforcement of "regulations that have been amended out of existence." Reply Dis. (19) at 7; Reply Dis. (20) at 7. Respondents maintain that the statutory and other regulatory violations alleged in counts I, V and VI of the complaint in PCB 13-19 and counts I and II of the PCB 13-20 complaint, as well as the permit-related violations, are predicated on the violations of superseded subsections of 35 Ill. Adm. Code 1100.205, and are similarly unsustainable. Reply Dis. (19) at 7 & n.6; Reply (20) at 7 & n.6.

Violations of 415 ILCS 5/22.51(f)(2) (2010)

Respondents argue that by its terms Section 22.51(f)(2) of the Act (415 ILCS 5/22.51(f) (2010)) "expire[d]" after the Board promulgated the amended CCDD regulations, so counts II, III, and IV of the PCB 13-19 complaint, and counts II and III of the PCB 13-20 complaint, must

fail. Reply Dis. (19) at 9-11; Reply Dis. (20) at 9-12. Respondents further contend that expiration of a statute, as occurred with Section 22.51(f)(2), is distinct from implied repeal or preemption of a statute, agreeing with the People that neither repeal nor preemption occurred here. Reply Dis. (19) at 10; Reply Dis. (20) at 10. Finally, respondents characterize as "another straw man argument" the People's claim that respondents maintain Section 22.51(f)(2) includes a statute of limitations. Reply Dis. (19) at 10; Reply Dis. (20) at 11.

Issuance of Violation Notices

Respondents withdraw "without prejudice" to reasserting them as "subsequently warranted by the evidence" their arguments that counts VII-IX of the PCB 13-19 complaint and count IV of the complaint in PCB 13-20 should be dismissed for lack of Agency notice of the violations. Reply Dis. (19) at 11; Reply Dis. (20) at 12.

People's Surreplies to Replies in Support of Motions to Strike or Dismiss the Complaints

The People maintain that respondents argue, incorrectly and for the first time in the replies, that Section 49(e) of the Act (415 ILCS 5/49(e) (2010)) supports dismissal. Surreply (19) at 1; Surreply (20) at 1. Contrary to respondents' implication, the People contend, compliance with the Board's regulations is a prima facie, not a complete, defense; and, under Section 33(a) of the Act (415 ILCS 5/33(a) (2010)), subsequent compliance with the Board's regulations is not a defense to liability under the Act. *Id.* at 2, citing Sheridan Sand & Gravel, PCB 06-177, slip op. at 14. Rather, the People continue, subsequent compliance is relevant to the Board's determination of the appropriate penalty once the Board has found a violation. *Id.*

Board Analysis and Rulings

For the reasons given below, the Board denies respondents' motions to strike or dismiss the complaints. The Board first addresses the grounds for dismissal based on affirmative matter, *i.e.*, those in the nature of a motion under Section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619). Next, the Board turns to respondents' challenges to the legal sufficiency of the complaints, analogous to a motion under Section 2-615 of the Code (735 ILCS 2-615 (2010)).

Affirmative Grounds for Dismissal

Financing Notification. Section 31(c)(1) of the Act provides that a complaint filed by the Attorney General or the State's Attorney "must be accompanied by a notification to the defendant that financing may be available, through the Illinois Environmental Facilities Financing Act, to correct" the alleged violations. 415 ILCS 5/31(c)(1) (2010). It is undisputed that such notification did not accompany the complaints filed by the Attorney General in PCB 13-19 and PCB 13-20. The People have sought to remedy those omissions, however, with the amended notices, filed months after the complaints. The question for the Board is whether the amended notices could and did cure the financing notification deficiency in each case.

At the outset, the Board declines the People's invitation to rule that financing under the Illinois Environmental Facilities Financing Act is not available when the violations have already

been corrected and the complaint seeks only the imposition of civil penalties. This would require delving into the interpretation of the Financing Act—a matter the parties do not fully address. More important, Section 31(c)(1) of the Act is unequivocal: it states that a complaint in an enforcement action "shall" be accompanied by a financing notification. 415 ILCS 5/31(c)(1) (2010). Nowhere does this statute qualify the plain requirement based upon the nature of relief sought in a particular enforcement action, and the Board cannot read any exceptions into the statute.

The Board turns to whether the financing notification requirement is jurisdictional. As the parties note, the Board has addressed the nature of the requirement in two prior decisions, the most recent of which is City of Herrin. There, the Board stated as follows:

> Next, Herrin's Motion Attacking Jurisdiction states that the Board lacks jurisdiction to entertain the State's complaint because the complaint fails to comply with the financing notification requirement of Section 31(a) of the Act. . . .
>
> Specific notice as delineated in Section 31(d) [*sic*] is required in conjunction with serving the complaint on Herrin. The State failed to send notice in compliance with Section 31(d) of the Act to the City of Herrin in its May 30, 1995 complaint.
>
> The Board nonetheless accepts the State's June 27, 1995 amended notice of filing and interprets it as an amended complaint curing the financing notification deficiency. The Board therefore denies Herrin's Motion Attacking Jurisdiction. City of Herrin, PCB 95-158, slip op. at 2.[5]

The Board reached a different result in Production Finishers & Fabricators, where the Agency, the complainant in that case, did not file and serve a financing notification with the complaint. Finding the financing notification requirement jurisdictional, the Board dismissed the case, but the Board did so without prejudice. Production Finishers & Fabricators, PCB 85-31at 1.

Given this authority addressing the specific statutory requirement at issue here, the Board need not look to the civil litigation context for guidance, and respondents' reliance upon cases from that context is misplaced. *See* Westcott v. Kinney, 120 Ill. 564, 566, 12 N.E. 81, 82 (1887) (tax deed proceeding); Floto v. Floto, 213 Ill. 438, 442-43, 72 N.E. 1092, 1094 (1904) (probate of a will); Figueroa v. Deacon, 404 Ill. App. 3d 48, 52-53, 935 N.E.2d 1080, 1083-84 (1st Dist. 2010) (forcible detainer action). The proper categorization of the financing notification requirement turns on the Act itself and relevant Board decisions.

Consistent with City of Herrin—the most recent relevant decision—the Board finds that the requirement to file a financing notification with the complaint does not affect the Board's subject matter jurisdiction over an enforcement proceeding. As the People state, the Board has statutory authority, and thus jurisdiction, to entertain complaints alleging violations of the Act,

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[5] At the time the Board issued this order, the financing notification requirement was contained in Section 31(a) of the Act (415 ILCS 5/31(a) (1994)) rather than Section 31(c).

the Board's regulations, a permit, or a Board order. *See* 415 ILCS 5/5(d) (2010). The Act does not make compliance with Section 31(c)(1) (415 ILCS 5/31(c)(1) (2010)) a prerequisite to the Board's exercise of this jurisdiction. In instances where a statutory requirement is jurisdictional, the Act spells that out. For example, under Section 31.1(d) of the Act (415 ILCS 5/31.1(d) (2010)), which respondents cite, where a respondent to an administrative citation does not file a petition to contest the citation within 35 days after service of the citation, the Board "shall adopt a final order" finding the alleged violations and imposing specified penalties. *See* 415 ILCS 5/31.1(d) (2010).

Further, the Board disagrees with respondents that City of Herrin is distinguishable in any meaningful sense. That the respondent there did not object to the People's amended notice is inconsequential; if the requirement were jurisdictional, the filing of an amended notice, even if unopposed, could not supply jurisdiction where it otherwise did not exist. *See* *In re* Marriage of Brown, 225 ill. App. 3d 733, 737-38, 587 N.E.2d 648, 652 (4th Dist. 1992) (subject matter jurisdiction cannot be conferred by parties' consent or agreement). Although City of Herrin did not explicitly hold the financing notification requirement non-jurisdictional, that is implicit in the Board's ruling that the amended notice cured the notification deficiency. And in City of Herrin, as much as in this case, the respondent put squarely before the Board the question whether the financing notification requirement is jurisdictional.

Finally, the Board disagrees with respondents that the failure to respond to a specific argument in a motion waives any objection to the argument under Section 101.500(d) of the Board's procedural rules (35 Ill. Adm. Code 101.500(d)). That rule applies to the failure to timely file a response to a motion, not to the omission of a responsive argument in a properly filed response to a motion.

The Board holds that Section 31(c)(1)'s financing notification requirement is not jurisdictional and thus not a basis for dismissal of a complaint.

Issuance of Violation Notices. As noted above, respondents purport to withdraw "without prejudice" their arguments for dismissal based on lack of administrative notice of the violations alleged in counts VII, VIII, and IX of the PCB 13-19 complaint, and in count IV of the PCB 13-20 complaint. Reply Dis. (19) at 11; Reply Dis. (20) at 12. However, the Board cannot accept withdrawal of these arguments on such terms without taking up the People's claim that the Attorney General may on her own motion bring enforcement actions under the Act despite the Agency's noncompliance with the pre-referral procedures of Section 31 of the Act (415 ILCS 5/31 (2010)).

In fact, the Board has previously stated that, after "'considering the legislative history of the 1996 amendments to Section 31 the Board has repeatedly found that they were not intended to bar the Attorney General from prosecuting an environmental violation.'" Sheridan Sand & Gravel, PCB 06-177, slip op. at 14 (June 7, 2007), quoting People v. Chiquita Processed Foods, L.L.C., PCB 02-156, slip op. at 4-5 (Nov. 21, 2002); *see also* People v. Freeman United Coal Mining Co., LLC, PCB 10-61 & 11-02 (cons.), slip op. at 31 (Nov. 15, 2012); People v. Eagle-Picher Boge, PCB 99-152, slip op. at 7 (July 22, 1999); People v. Heuermann, PCB 97-92, slip op. at 7 (Sept. 18, 1997). In Sheridan Sand & Gravel, the Board went on to find, consistent with

longstanding authority, that because the Attorney General brought the complaint on her own motion, "whether or not the Agency complied with Section 31 . . . has no bearing on the allegations in the complaint." Sheridan Sand & Gravel, PCB 06-177, slip op. at 15.

Against this established precedent, respondents cite Skillet Fork, a case that involved the authority of a drainage district under the Levee Act to foreclose a lien on delinquent assessments on property that had not been subject to an annual tax sale. *See* Skillet Fork, 382 Ill. at 83-86. That statutory context is entirely distinct from that at issue here. Thus, Skillet Fork has no bearing on the Attorney General's authority to bring an enforcement action under the Act. Consistent with Sheridan Sand & Gravel, the complaints in these cases state that they are brought on the Attorney General's own motion as well as at the Agency's request. Comp. (19) at 1; Comp. (20) at 1. As such, none of the complaints' claims would be subject to dismissal even if the Agency had not complied with Section 31. Accordingly, the Board denies the motions to dismiss counts VII, VIII, and IX of the PCB 13-19 complaint, and in count IV of the PCB 13-20 based on lack of administrative notice. To be clear, this disposition is with prejudice: respondents may not re-assert at a later stage of these proceedings that they lacked Agency notice of the violations asserted by the People in this case.

Grounds for Dismissal Based on Legal Sufficiency

Violations of 415 ILCS 5/22.51(f)(2) (2010). The complaint in PCB 13-19 alleges that respondents violated various subsections of Section 22.51(f)(2) of the Act (415 ILCS 5/22.51(f)(2)(2010)), as follows: Section 22.51(f)(2)(A)(i) (415 ILCS 5/22.51(f)(2)(A)(i) (2010)) (count II—site of origin documentation); Section 22.51(f)(2)(B) (415 ILCS 5/22.51(f)(2)(B) (2010)) (count III—soil certification); and Section 22.51(f)(2)(C) (415 ILCS 5/22.51(f)(2)(C) (2010)) (count IV—confirmation that soil not removed as part of cleanup). Comp. (19) at 8-14.

In PCB 13-20, the People allege, in count II (soil certification), a violation of Section 22.51(f)(2)(B) of the Act (415 ILCS 5/22.51(f)(2)(B) (2010)). Comp. (20) at 8-10. In addition, count III of the complaint (recordkeeping requirements) alleges respondents violated Section 22.51(f)(3) of the Act (*id.* at 10-15), which requires owners and operators of CCDD fill operations to maintain for a specified period "all documentation required under subdivision (f)(2)" of Section 22.51 (415 ILCS 22.51(f)(2) (2010)). Given that connection, whether count III states a cause of action also turns on the enforceability of Sections 22.51(f)(2)(A) through (f)(2)(C) of the Act.

Section 22.51(f)(2), which became effective on July 30, 2010 (P.A. 96-1416, § 5 (amended 415 ILCS 22.51 (2010)), provides that until the effective date of the Board's amended CCDD regulations, CCDD fill owners and operators "must do" all that is required by subsections (A) through (D) of that statute (415 ILCS 5/22.51(f)(2) (2010)). At the outset, the Board is not persuaded by respondents' claim that count II of the complaint in PCB 13-20 alleges a violation that occurred on March 28, 2010, *before* Section 22.51(f)(2) even went into effect. Although count II does refer to an inspection on March 28, 2010 (Comp. at 8, 9), other paragraphs of the complaint, including the first reference to the inspection, make clear that the People's allegation is that the inspection occurred on March 28, 2011, when Section 22.51(f)(2)

was in effect (*id.* at 6-7, 17; *see also* Resp. Mot. Dismiss (20) at 7). Accordingly, the Board deems count II's references to a March 28, 2010 inspection as mere scrivener's error.

The subsections of Section 22.51(f)(2) were thus in effect at the time respondents allegedly violated them – September 15, 2010 (Comp. (19) at 8, 11, 13), and March 18, 2011 (Comp. (20) at 6-7, 17). Nor have they been repealed or amended since taking effect; they are still "on the books." By the plain terms of Section 22.51(f)(2), subsections (A) through (D) applied to owners and operators of CCDD fill operations until August 27, 2012, the effective date of the CCDD regulations required by Section 22.51(f)(1) of the Act. *See* Proposed Amendments to Clean Construction or Demolition Debris Fill Operations (CCDD): Proposed Amendments to 35 Ill. Adm. Code 1100, R12-9 (Aug. 23, 2012); 36 Ill. Reg. 13892. Because the alleged violations occurred while Sections 22.51(f)(2)(A) through (f)(2)(D) still applied and before the Board's rules went into effect, to the extent proven, they were violations of Section 22.51(f)(2)'s subsections. The question is whether enforcement of those violations can be pursued after their expiration.

As discussed above, Section 22.51(f)(2) was not repealed, expressly or impliedly. Nor was there amendatory legislation. And the Board's amended CCDD regulations, in force as of August 27, 2012, apply prospectively; they did not purport to repeal or amend Section 22.51(f)(2), and could not have done so in any event. *E.g.*, Village of LaGrange v. McCook Cogeneration Station L.L.C., PCB 96-41, slip op. at 4 (Dec. 7, 1995) (Board has no authority to repeal legislation). Rather, the obligations imposed by Sections 22.51(f)(2)(A) through (f)(2)(D) simply expired, but remained part of the Act. *See* *In re* Petition for Detachment of Land from Morrison Community Hospital District, 318 Ill. App. 3d 922, 930, 741 N.E.2d 683, 689 (3rd Dist. 2000) (legislature may incorporate an "expiration date" into an amendment).

The Board is aware of no authority addressing the effect on claims under a statute brought after the statute has by its own terms expired. There is, however, precedent concerning the fate of claims under a statute that is repealed or amended, which is instructive. Statutory repeal or amendment is more drastic than expiration because it could be read as an indication that the prior statute should never have been enacted in the first place. Expiration, on the other hand, simply reflects that some provisions should not apply beyond a specified date, and perhaps that new laws will apply, prospectively thereafter. Accordingly, to the extent repeal does not expunge violations of the repealed statute, the same result should follow under a statute that expires by its own terms.

Absent a statutory provision calling for retroactive application, the Statute on Statutes (5 ILCS 70/4 (2010)), known as "the general savings clause of Illinois," preserves the enforceability of violations of a former law after the former law has been repealed or amended. People v. Glisson, 202 Ill. 2d 499, 504-05, 782 N.E.2d 251, 254-55 (2002). Section 4 of that statute provides as follows:

> No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect

> any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding. *Id.*

Under this provision, an outright repeal of a prior statute does not abate or prevent a prosecution for violation of the repealed statute. *E.g.*, People v. Glisson, 202 Ill. 2d 499, 508-09, 782 N.E.2d 251, 257 (2002); People v. Tanner, 27 Ill. 2d 82, 84-85, 188 N.E.2d 42, 43 (1963); People v. Bilderback, 9 Ill. 2d 175, 175-82, 137 N.E.2d 389, 390-93 (1956). This rule applies even if the prosecution does not commence until *after* the statute has been repealed (*see* People v. DeStefano, 64 Ill. App. 389, 397-98, 212 N.E.2d 357, 363 (1st Dist. 1965)), and whether or not the repealing statute refers to the Statute on Statutes (*see* Glisson, 202 Ill. 2d at 509, 782 N.E.2d at 257).[6] Moreover, Section 4 applies to statutory claims in civil cases as well as to criminal prosecutions. Caveney v. Bower, 207 Ill. 2d 82, 92-93, 797 N.E.2d 596, 602 (2003).

Here, Section 22.51(f)(2) does not include a saving clause, but it does spell out the temporal reach of its subsections: they govern until the CCDD regulations under Section 22.51(f)(1) go into effect. Nothing in the statute suggests those regulations are to be applied retroactively to violations that occurred before Sections 22.51(f)(2)(A) through (D) expired. Under the Statute on Statutes, if Section 22.51(f)(2) had been repealed or amended, there could still be enforcement against violations of Sections 22.51(f)(2)(A) through (D) after the effective date of the repeal or amendment. Statutory expiration, a less radical statutory change than repeal or amendment, should follow the same rules.

The Board draws guidance from the reasoning that led the Illinois Supreme Court to uphold the felony conviction of a defendant charged under a statute that was later amended to reduce the offense to a misdemeanor. *See* Bilderback, 9 Ill. 2d at 175-82, 137 N.E.2d at 390-93. There, the court stated that,

> [n]owhere in the combination of circumstances out of which this problem arose is there a suggestion that the legislature was expressing its purpose that conduct which took place before the statutory change should no longer be criminal. No thought of a general pardon for those who had committed the offense here involved can be distilled from the circumstances of this legislative change. Bilderback, 9 Ill. 2d at 181-82, 137 N.E.2d at 393.

Similarly, here, there is no hint in Section 22.51(f)(2) that the legislature intended to "pardon" violations that were not subject to enforcement until the applicable provisions had expired. Further, were the People unable to enforce the expired provisions, they would be without a remedy because Section 4 of the Statute on Statutes forbids the retroactive application of substantive statutory changes. *E.g.*, Caveney, 207 Ill. 2d at 95, 797 N.E.2d at 603. It would be contrary to the express purpose of the Act, to "assure that adverse effects upon the environment are fully considered and borne by those who cause them" 415 ILCS 5/2(b) (2010), to deny the

[6] Although the codifications of Section 4 have changed since it was first enacted in 1874, its language has not. *See* Caveney, 207 Ill. 2d at 94, 797 N.E.2d at 603.

People the right to seek enforcement of the expired statutory provisions *and* the amended regulations that took their place by statute.

The Board finds respondents' reliance on Wall misplaced. *See* Mot. Dis. (19) at 9; Mot. Dis. (20) at 9. In Wall, the court stated that "if a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them." Wall, 290 Ill. at 232, 125 N.E. at 23. As this recitation makes clear, the rule that a repeal abrogates enforcement of rights accrued under the former law applies only to special remedial statutes—that is, provisions that are "purely remedial or procedural in nature" and that "do not involve vested rights." Glisson, 202 Ill. 2d at 508; 782 N.E.2d at 257; *see also* Shelton v. City of Chicago, 42 Ill. 2d 468, 474, 248 N.E.2d 121, 124 (1969). Wall involved a special remedial statute, in particular, a provision conferring a private right of action, in Illinois courts, for "death by wrongful action" occurring outside Illinois; that provision was subsequently amended to remove Illinois courts' jurisdiction over such actions. 290 Ill. at 230-31, 125 N.E. at 22. Thus, the court ruled, the action, which was pending when the statute was amended, could not proceed. Wall, 290 Ill. at 233-34, 125 N.E. at 23.

The Board finds that Sections 22.51(f)(2)(A) through (C) are enforceable as to respondents' alleged violations of those provisions. This disposes of the motions to dismiss counts II, III, and IV of the complaint in PCB 13-19 and count II of the complaint in PCB 13-20, to the extent those counts are based on Sections 22.51(f)(2)(A) through (C).

Violations of Superseded 35 Ill. Adm. Code 1100.205. The counts in the complaints that involve, alone or in combination, superseded 35 Ill. Adm. Code 100.205(a), (b), (c), (h), and (i) are counts I, V, and VI of the complaint in PCB 13-19 (Comp. (19) at 3-7, 15-18), and counts I and III in PCB 13-20 (Comp. (20) at 4-8,11-15). These counts allege that the Agency observed violations on September 15, 2010, June 1, 2011, and March 18, 2011. Respondents do not contest that the "old" subsections of 35 Ill. Adm. Code 1100.205 were not in effect on those dates. Rather, as with Section 22.51(f)(2) of the Act, respondents maintain that those provisions cannot be enforced against them after they were superseded on August 27, 2012.

The rules governing the effect of a statutory repeal guide the Board's resolution of that issue in the regulatory context. Principles of statutory interpretation generally apply to administrative regulations. *See*, *e.g.*, People ex rel. Madigan v. ICC, 231 Ill. 2d 370, 380, 899 N.E.2d 227, 232 (2008). For example, the principle that an amendment to a special remedial statute may be applied retroactively is "equally applicable" to statutorily-authorized regulations. *See* Itasca Public School Dist. No. 10 v. Ward, 179 Ill. App. 3d 920, 926, 535 N.E.2d 3, 7 (1st Dist. 1989). Again, absent statutory language to the contrary, repeal or amendment of a law is not to be construed as a repeal of the former law as to any offenses committed under the former law. *See* 5 ILCS 70/4 (2010).

Applying these standards to the CCDD regulations, the Board finds that nothing in the opinion adopting the amended regulations reveals an intent that the amendments apply other than prospectively, *i.e.*, to conduct occurring after they went into effect. In fact, that decision recognized that the amended rules would apply from their effective date forward. *See* Proposed Amendments to Clean Construction or Demolition Debris Operations (CCDD): Proposed

Amendments to 35 Ill. Adm. Code 1100, R12-9, slip op. at 18-24 (Aug. 23, 2012) (new rule "will require" soil testing and certification of soils deposited in CCDD or uncontaminated soil fill operations); 36 Ill. Reg. 13892 (effective date of amendments is August 27, 2012). In addition, the Board applies the presumption, as in the statutory context that new regulations apply prospectively only, such that claims accrued under a former regulation are not lost following the adoption of the new regulations. The Board finds that the superseded CCDD regulations may be enforced against the violations alleged here.

Contrary to respondents' contention, no statutory authorization is necessary for the Board to allow the People's claims to proceed. The Board does not find respondents' cited authority persuasive. The savings statute in Mystik Tape continued in effect, pending adoption of rules by the Board, the regulations adopted by the Board's predecessors—the Air Pollution Control Board, the Sanitary Water Board, and the Department of Public Health. Mystik Tape, 60 Ill. 2d at 339-40, 328 N.E.2d at 10. Nothing remotely like the transition in Illinois, following the Act's enactment, from multiple environmental boards to a single consolidated board occurred here.

The Board also disagrees with respondents that the Agency and the Board had to give prior notice to the regulated community that the pre-amendment CCDD regulations would be enforceable. Reply Dis. (19) at 5; Reply Dis. (20) at 5. The relevant period is when the alleged violations occurred, not when respondents were sued for enforcement. At that time, the pre-amendment CCDD regulations were still in effect and "on the books."[7] Respondents do not contend that the pre-amendment version of Section 1100.205 of the Board's CCDD regulations was ambiguous or that they did not understand it to apply to them at the time of the alleged violations. Moreover, respondents, like any citizen, are "presumptively charged with knowledge of the law." Atkins v. Parker, 472 U.S. 115, 130 (1985). Thus, at the relevant time, respondents, like any other entity regulated under the CCDD regulations, had "fair warning of the conduct" the CCDD rules then in effect required. Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2167 (2012) (internal quotation marks omitted).

Further, the Board finds that Section 49(e) of the Act (415 ILCS 5/49(e) (2010)) does not support dismissal of the counts predicated upon the superseded CCDD regulations. Section 49(e) affords a *prima facie* defense where a respondent is in compliance with the Board's regulations at the time of the violation, not where compliance follows the violation. *See* 415 ILCS 5/33(a) (2010) (subsequent compliance is not a defense to findings of violations of the Act). The Board has long held that subsequent compliance "speaks to the factors" of Section 33(c) of the Act (415 ILCS 5/33(c) (2010), which are relevant to determining the appropriate penalty. Sheridan Sand & Gravel Co., PCB 06-177, slip op. at 14.

Because the pre-amendment CCDD regulations are enforceable as to the alleged violations at issue, the statutory and other regulatory violations premised upon violation of the regulations under counts I and V of the PCB 13-19 complaint and count I of the PCB 13-20

[7] The pre-amendment version of Section 1100.205 of the CCDD regulations is available at 30 Ill. Reg. 14534, as well as Clean Construction or Demolition Debris Fill Operations Under P.A. 94-272 (35 Ill. Adm. Code Part 1100), R06-19, slip op. at 13-16 (Aug. 17, 2006).

complaint may also proceed to hearing. These are the alleged violations of Sections 22.51(a) and (b)(3)(ii) of the Act (415 ILCS 5/22.51(a), (b)(3)(ii) (2010)) and Section 1100.201(a) of the Board's CCDD regulations (35 Ill. Adm. Code 1100.201(a)) (Comp. (19) at 2-3, 7, 15-16; Comp. (20) at 2-3, 7-8). Similarly, the Board finds no basis to dismiss the violations of Sections 22.51(a) and 22.51(b)(3)(ii) of the Act, and of Section 1100.201(a) of the Board's CCDD regulations alleged in count III of the PCB 13-20 complaint, to the extent they are based upon the asserted violation of Section 1100.205(i) of the Board's CCDD regulations. The remaining statutory and regulatory violations alleged in these counts are not grounded in violation of the superseded CCDD regulations but in independent violations of respondents' CCDD permits to operate both sites (*see* Comp. (19) at 2-7; Comp. (20) at 2-8), and are also not subject to dismissal.

The Board turns next to respondents' contention that count I of both complaints is inadequately pled. In ruling on a motion to strike or dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See*, *e.g.*, Beers v. Calhoun, PCB 04-204, slip op. at 2 (July 22, 2004); *see also* *In re* Chicago Flood Litigation, 176 Ill. 2d 179, 184, 680 N.E.2d 265, 268 (1997). In assessing the adequacy of pleadings in a complaint, the Board has stated that "Illinois is a fact-pleading state which requires the pleader to set out the ultimate facts which support his cause of action." Loschen v. Grist Mill Confections, Inc., PCB 97-174, slip op. at 4 (June 5, 1997), citing Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303. "[L]egal conclusions unsupported by allegations of specific facts are insufficient." Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303, citing Estate of Johnson v. Condell Memorial Hospital, 119 Ill. 2d 496, 509-10, 520 N.E.2d 37 (1988). A complaint's allegations are "sufficiently specific if they reasonably inform the defendants by factually setting forth the elements necessary to state a cause of action." People *ex rel.* William J. Scott v. College Hills Corp., 91 Ill. 2d 138, 145, 435 N.E.2d 463, 467 (1982).

The Board is not persuaded that count I of either complaint is legally deficient. Count I alleges that during inspections of each site—in PCB 13-19, on September 15, 2010 and June 1, 2011, and, in PCB 13-20, on March 18, 2011—Agency personnel "observed" that respondents did not implement and document a load checking program. Comp. (19) at 6; Comp. (20) at 7. The import of these allegations is plain: respondents failed to implement and document a load checking program. The only other element of a violation of the pre-amendment CCDD regulations is that the respondent be an owner or operator of a CCDD fill operation. *See* 30 Ill. Reg. 14534; Comp. (19) at 4; Comp. (20) at 4. The complaints allege that SJLD is the owner, and SSG is the operator, of the CCDD fill operations at both sites. Comp. (19) at 2; Comp. (20) at 2.

Nor did the People have to allege that respondents did not implement and document *specific elements* of a load checking program, such as use of an elevated structure or a photo ionization detector. The clear inference from the complaints' allegations is that respondents allegedly did not implement and document *any* component of a load checking program at either site. Accordingly, count I of each complaint "reasonably inform[s] the defendants by factually setting forth the elements necessary to state a cause of action" (College Hills, 91 Ill. 2d at 145, 435 N.E.2d at 467), and also satisfies the requirement that a complaint filed by the Attorney General or State's Attorney include a "statement of the manner in and the extent to which"

respondents are alleged to have violated the Act, the Board's rules, and the permits for respondents' two facilities (415 ILCS 5/31(c)(1) (2010)).

Taking all well-pled allegations of the complaint as true and drawing all reasonable inferences from them in favor of the People, the Board denies the motions to strike or dismiss count I of each complaint as inadequately pled.

RESPONDENTS' MOTIONS TO STRIKE THE AMENDED NOTICES OF FILING COMPLAINTS

In this section, the Board summarizes the filings relating to respondents' motions to strike the People's amended notices of filing the complaints, after which the Board analyzes and rules upon the motions.

Motions to Strike Amended Notices of Filing

Respondents move to strike the People's amended notice, arguing that Section 31(c)(1) of the Act (415 ILCS 5/31(c)(1) (2010)) requires the People to file a notice of filing, "together with a formal complaint," and, contemporaneously, a financing notification. Mot. Str. Not. at 2-3.[8] Respondents insist that serving and filing a financing notice is "not only mandatory, but jurisdictional." *Id.* at 3-4, citing Production Finishers & Fabricators, PCB 85-31, slip op. at 1. The People's amended notice is a "nullity," respondents contend, both because it was filed without the Board's leave and because it cannot cure the failure to file and serve a financing notification simultaneously with the complaint. *Id.* at 4-7, 9.

Plus, respondents continue, the amended notice is just a notice of filing, but the People already filed a notice of filing with the original complaint on October 30, 2012. According to respondents, both a notice of filing *and* a financing notification must accompany a complaint, and a second notice of filing cannot cure the failure to timely file a financing notification. Mot. Str. Not. at 7. Respondents characterize the filing of the amended notice as "a stab at conflating the two requirements": the requirement to file a notice of filing and a complaint, on the one hand, and, on the other, to file a financing notification with the complaint. *Id.* at 9. The Board lacks statutory authority to accept the amended notice, respondents add, just as, in the context of administrative citations, the Board lacks jurisdiction over a petition for review filed outside the statutory 35-day filing period for such petitions. *Id.* at 4-5. This jurisdictional defect cannot be cured, according to respondents, by an order accepting the amended notices *nunc pro tunc* October 30, 2012, when the complaints were filed. *Id.* at 6-7.

Respondents also argue that by filing the amended notice, the People have made a "judicial" or at least "implied," admission that the financing notification must but did not "accompany" the complaints. Mot. Str. Not. at 7-8. Respondents add that, contrary to the People's assertion, respondents' purported awareness of the financing provision in Section

[8] The motions to strike the amended notice, and the related filings, are identical in both cases. Accordingly, the Board refers to the filings in both cases as a single filing, *e.g.*, "Mot. Str. Not." rather than "Mot. Str. Not. (19)" or "Mot Str. Not. (20)."

31(c)(1) of the Act (415 ILCS 5/31(c)(1) (2010)) does not confer subject matter jurisdiction—Illinois courts have "long held" that jurisdiction is not conferred by "the knowledge or agreement of a party." *Id.* at 9-10.

Respondents conclude with a request that the Board dismiss the complaint *with* prejudice. Mot. Str. Not. at 10-11. Such relief is warranted, according to respondents, because the requirement to file and serve a financing notification has been in effect since before Production Finishers & Fabricators was decided, yet the People "persist[ ] in ignoring this requirement." *Id.* at 10. Respondents contrast the People's purported violation with respondents' alleged "technical violations" of a statute enacted a "mere" forty-six days previously, of which, respondents continue, the Agency gave respondents no notice. *Id.* at 10-11 n.5.

People's Responses to Motions to Strike Amended Notices

The People respond that Section 31(c)(1) of the Act (415 ILCS 5/31(c)(1) (2010)) does not require the Attorney General to serve a "stand-alone" financing notification with a complaint. Resp. Str. Not. at 2. According to the responses, the amended notice does exactly what Section 31(c)(1) requires: notify a respondent that public financing may be available to correct a violation. *Id.* at 2-3. In addition, the People maintain that Section 31(c)(1) does not preclude including the financing notification in the notice of filing of the complaint. *Id.* at 3. The People cite People v. City of Herrin, PCB 95-158 (July 7, 1995), where the Board accepted for filing an amended notice of filing providing the financing notification and construed the filing as "'an amended complaint curing the financing notification deficiency.'" *Id.* at 3, quoting City of Herrin, PCB 95-158, slip op. at 2. City of Herrin is consistent with Production Finishers & Fabricators, according to the People: the latter case had to be dismissed because unlike in City of Herrin, no filing, amended or otherwise, contained the requisite financing notification. *Id.* Here, the People continue, the original notice of filing of the complaint omitted the financing notification because the complaint seeks the imposition of a civil penalty, for which "financing is arguably not available" under the Financing Act. *Id.* at 5. However, according to the People, any deficiency was cured by the filing of the amended notices. *Id.*

Should the Board conclude that the amended notice does not cure the deficiency, the People "reserve the right" to argue that filing the financing notification is not a jurisdictional requirement. Resp. Str. Am. Not. at 3 n.1. The People add that the cases cited in the motion to strike are distinguishable because each addresses statutory provisions and issues not presented here. *Id.* at 3-4. Finally the People note their agreement with the "well-accepted principle" that parties cannot confer subject matter jurisdiction by waiver or consent. *Id.* at 4 n.2.

Respondents' Replies in Support of Motions to Strike Amended Notices

According to respondents, the People's response "purposely declines" to address respondents' jurisdictional argument. Reply Str. Not. at 2. Nor may the People reserve argument on that question, according to respondents, as the Board's procedural rules "make no provision" for doing so. *Id.* In fact, respondents argue, the People should be deemed to have waived any jurisdictional argument. *Id.* at 2-3, citing 35 Ill. Adm. Code 101.500(d). This is so, according to respondents, because although the People "seemingly" filed a response to the

motion to strike the amended notice, the response did not address respondents' jurisdictional argument.

Respondents attempt to distinguish City of Herrin on the ground that the respondent there did not object to or move to strike the amended notice, whereas here respondents have done so. Reply Str. Not. at 3-4, 9. Thus, according to respondents, the propriety of the amended notice was not subject to "meaningful adversarial testing" in City of Herrin, and the Board did not reach the dispositive jurisdictional issue in Production Finishers & Fabricators. *Id.* at 4. In this case, respondents insist, the Board cannot accept the filing of the amended notice "without running afoul of both State law, *i.e.*, [Section] 31(c)(1) of the Act . . . and its own holding" in Production Finishers & Fabricators, which respondents claim the People do not attempt to distinguish. *Id.* at 9. And, respondents add, they have "amply distinguished" City of Herrin. *Id.* at 10.

In addition, respondents argue that the People have not meaningfully distinguished the authority cited in the motions to strike, and should, therefore, be deemed to have waived any "objection" to the legal principles for which the cited authorities stand. Reply Str. Not. at 5-8. Moreover, respondents emphasize that the People concede jurisdiction cannot be supplied by waiver or agreement of the parties. *Id.* at 8-9.

People's Surreplies in Support of Motions to Strike Amended Notices

The surreplies argue that the People's responses did not "decline to address," or waive any objection to, respondents' jurisdictional argument. Surreply Str. Not. at 1. Rather, the People continue, the responses cited City of Herrin, the Board's "current decision" regarding the financing notification requirement, in which the Board held the requirement non-jurisdictional. *Id.* To the extent the Board "overrules" City of Herrin in this case, the People ask that the jurisdictional question be fully briefed by the parties. *Id.* at 2 n.1. According to the surreplies, City of Herrin is not distinguishable; the City of Herrin moved to dismiss for lack of jurisdiction there, and the Board therefore addressed jurisdiction and concluded it was not lacking even though the financing notification was not filed with the complaint. *Id.* at 2-3. Thus, the People explain, in this case, no "further motion to strike or objection was required" to put jurisdiction before the Board. *Id.*

Further, the People insist they did not "waive any objection" to respondents' contentions regarding jurisdiction, but, in fact, distinguished the "fact and holdings" of each of the cases cited in the motions to strike. Surreply Str. Not. at 3. According to the People, the responses did distinguish Production Finishers & Fabricators, on the ground that there, no filing provided the required financing notification. *Id.*

Board Analysis and Rulings: Motions to Strike Amended Notice

Having found the financing notification requirement non-jurisdictional, the Board rules, again consistent with City of Herrin, that the failure to file the notification with the complaint may be cured by a later filing of the financing notification. The Board counsels that simultaneous filing is the far better practice, both because that is what the statute prescribes—although it does not in terms bar cure by a subsequent filing—and because it gives the

respondent actual notice of the potential availability of public financing at the outset of an enforcement proceeding. However, the Board sees no reason not to treat the filing of the amended notice as remedying the failure to timely file the notification here. Respondents identify no prejudice caused by that failure; their objection is instead that the requirement is jurisdictional and that non-compliance with it is incurable.

Further, the Board finds, as the People note, respondents' familiarity with the notification requirement demonstrates that the failure to file the financing notification with the complaint was harmless error. The Board further finds, as a practical matter, allowing this case to proceed to hearing on the strength of the amended notice serves administrative economy of the parties and the Board. If the Board were to strike the amended notice and dismiss the complaint based on the financing notification deficiency, as respondents request, the People could simply re-file the complaint along with the notification, initiating a new enforcement proceeding based on the exact same allegations in this case. That outcome would merely delay unnecessarily adjudication of the People's claims.

Nor is the Board persuaded that the amended notice is a "nullity" because it was filed without leave of the Board. That filing did not attempt to do anything requiring the Board's leave, such as amend the complaint. It is true, as respondents stress, that in City of Herrin, PCB 95-158, slip op. at 2, the Board construed the amended notice of filing (which included the financing notification) as an amended complaint. However, to the extent this meant leave to file the amended notice was required, City of Herrin effectively granted leave to amend the complaint *instanter*. Here, there is no need to amend the complaint, as the amended notice provides the required notification and does not purport to amend the complaint in any respect.

The Board does not address respondents' remaining arguments for striking the amended notice because they rest upon the premise, which the Board has rejected, that the financing notification requirement is jurisdictional. Accordingly, the motion to strike the amended notice is denied.

DUE DATE FOR ANSWERS

Under the Board's procedural rules, a respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if a respondent fails within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider the respondent to have admitted the allegation. 35 Ill. Adm. Code 103.204(d). Here, respondents' filing of the motions to strike or dismiss the complaint stayed the 60-day period for filing an answer to the complaint, which stay ends today with the Board's ruling on the motions. *See* 35 Ill. Adm. Code 103.204(e). Respondents have 60 days from the date of this order to file any answers to the People's complaints, which accordingly must be filed on or before October 7, 2013.

CONCLUSION

For the reasons given above, the Board denies respondents' motions to strike or dismiss the complaints in the now-consolidated cases of PCB 13-19 and 13-20. In addition, respondents' motions to strike the amended notices of filing the complaints are denied. Any answers to the complaints must be filed on or before October 7, 2013, which is the 60th day after the date of this order. The Board directs the parties and hearing officer to proceed expeditiously to hearing pursuant to the Board's orders of November 15, 2012, in PCB 13-19 and PCB 13-20, except that hearing will be consolidated in accordance with today's order.

SUMMARY OF ORDER

1. The Board grants respondents' motions to consolidate PCB 13-19 and PCB 13-20 for purposes of hearing and decision. Future filings must reflect the caption of this order.

2. The Board denies the People's motions to strike respondents' "objections" to the People's motions for leave to file surreplies concerning the motions to strike or dismiss.

3. The Board grants the People's motions for leave to file surreplies to respondents' replies in support of the motions to strike or dismiss.

4. The Board grants the People's motions for leave to file surreplies to respondents' replies in support of the motions to strike the amended notices of filing of the complaints.

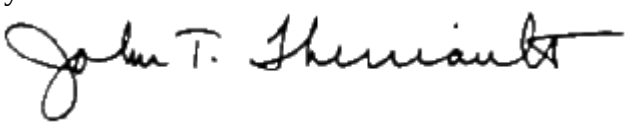
5. The Board denies respondents' motions to strike or dismiss the complaints.

6. The Board denies respondents' motions to strike the amended notices of filing of the complaints.

7. Any answers to the complaints must be filed by October 7, 2013, which is the 60th day after the date of this order.

IT IS SO ORDERED.

I, John Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 8, 2013, by a vote of 4-0.



John Therriault, Clerk
Illinois Pollution Control Board