BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB No. 06-177
)
SHERIDAN SAND & GRAVEL CO.,)
)
Respondent.)

MOTION TO DISMISS AND SUPPORTING MEMORANDUM

Respondent, SHERIDAN SAND & GRAVEL CO. ("SHERIDAN"), by his attorney, Kenneth Anspach, pursuant to 735 ILCS 2-615(a), 35 Ill.Adm.Code 101.100, 101.500 and 101.506, hereby moves the Pollution Control Board to dismiss the Complaint (the "Complaint") of complainant, PEOPLE OF THE STATE OF ILLINOIS ("the STATE"), because the Complaint is substantially insufficient in law, and in support thereof states as follows:

SHERIDAN has moved the Pollution Control Board (the "Board") to dismiss the Complaint on the basis that it is substantially insufficient in law. For purposes of ruling on a motion to dismiss, all well-pled facts contained in the pleading must be taken as true, and all inferences from them must be drawn in favor of the non-movant. *People v. Stein Steel Mills Services, Inc.*, PCB 02-1 (Nov. 15, 2001). A complaint should not be dismissed for failure to state a claim unless it clearly appears that no set of facts could be proven under the pleadings that would entitle the complainant to relief. *Shelton v. Crown*, PCB 96-53 (May 2, 1996). Accepting only all well-pled facts as true, there is no set of facts that could be proven under the pleadings that would entitle the STATE to relief.

I. UNDER COUNTS I AND II, SHERIDAN DID *NOT* OPERATE A TIRE STORAGE SITE.

The central allegation of Count I is set forth at paragraph 18, as follows:

> Respondent operated a tire storage site in violation of Section 55(d)(1) of the [Illinois Environmental Protection] Act, 415 ILCS 5/55(d)(1)(2004).

"Tire storage site" is defined in Section 54.12 of the Act, 415 ILCS 5/54.12, in pertinent part as "a site where used tires are stored or processed... " While the word "stored" is not defined in the Act, the word "storage" is defined at Section 54.09 of the Illinois Environmental Protection Act (the "Act"), as follows:

> "Storage" means any accumulation of used tires that does not constitute disposal. *At a minimum, such an accumulation must be an integral part of the systematic alteration, reuse, reprocessing or conversion of the tires in the regular course of business.* (Emphasis added.)

Thus, for used tires to be deemed subject to "storage" under the Act, such tires must be (1) accumulated, *but not disposed of*; and (2) *an integral part of the systematic alteration, reuse, reprocessing or conversion of the tires in the regular course of business.*

Nowhere in Count I does the State allege that there were used tires on the SHERIDAN site (the "Site") that were accumulated but not disposed of. On the contrary, Count I, paragraph 4 alleges that the tires were *both* "used and waste tires." A "waste tire" is defined at Section 54.16 of the Illinois Environmental Protection Act (the "Act"), as follows:

> "Waste tire" means a used tire *that has been disposed of.* (Emphasis added.)

Thus, since these used tires are alleged by the STATE to have been "waste tires", they, *ipso facto*, cannot have been the subjects of storage, which only applies to used tires that have *not* been disposed of.

Furthermore, nowhere in Count I does the STATE allege that the tires were "an integral part of the systematic alteration, reuse, reprocessing or conversion of the tires in the regular course of business." In fact, rather than alleging that SHERIDAN is in the business of altering, reusing, reprocessing or converting tires, the STATE alleges at paragraph 3 that SHERIDAN "owns and operates a sand and gravel mine."

Furthermore, the STATE fails to allege that SHERIDAN meets the second criteria of the definition of "tire storage site" under 415 ILCS 5/54.12, *i.e.*, "a site where used tires are ...processed." While the word "processed" is not defined under the Act, the word "processing" is defined pursuant to 415 ILCS 5/54.06 as "the altering, converting or reprocessing of used or waste tires." While a conclusory allegation that "tires were...processed" at the Site is set forth in Count I, paragraph 16, the facts of such processing, *i.e.* the altering, converting or reprocessing, are not alleged. A motion to dismiss only admits "well-pled facts." *People v. Stein Steel Mills Services, Inc., supra.* If a motion to dismiss admits only facts well pleaded and not conclusions, then, in considering the motion, if after deleting the conclusions that are pleaded there are not sufficient allegations of fact which state a cause of action against the defendant, the motion must be granted regardless of how many conclusions the count may contain and regardless of whether or not they inform the defendant in a general way of the nature of the claim against him. *Knox College v. Celotex Corporation*, 88 Ill.2d 407, 426 (1981). Deleting the conclusion that "tires were...processed" at the Site renders the allegation that the Site was a tire storage site insufficient.

Additionally, in Count II, which is not alleged in the alternative to Count I, the STATE actually contradicts what it alleged in Count I.[1] In Count II, the STATE alleges that (1) the tires *were disposed of*; and (2) the tires *were not an integral part of the systematic alteration, reuse,*

reprocessing or conversion of the tires in the regular course of business. In Count II, paragraph 20, the STATE alleges that the tires at the Site were "waste tires" that "were not part of a systematic reuse or conversion in the regular course of business and, therefore, constituted disposal..." Thus, both of the prerequisites for the statutory definition of "storage", *i.e.*, that such tires must be (1) accumulated, *but not disposed of*; and (2) *an integral part of the systematic alteration, reuse, reprocessing or conversion of the tires in the regular course of business*, are expressly controverted by the STATE's own allegations in Count II. In turn, both required components of a "tire storage site," *i.e.*, "a site where used tires are stored or processed," are also lacking or contradicted. Accordingly, the central allegation in Count I, that SHERIDAN "operated a tire storage site in violation of Section 55(d)(1) of the Act, 415 ILCS 5/55(d)(1)" is not only *not* supported by the allegations of Count I, but it is expressly controverted by the allegations of Count II.

II. UNDER COUNT II, SHERIDAN WAS NOT REQUIRED TO FOLLOW REQUIREMENTS FOR SITES WHERE TIRES ARE STORED.

Count II alleges that SHERIDAN violated the Management Standards set forth in Subpart B of Part 848. Specifically, Count II, paragraphs 21-22, alleges that SHERIDAN ran afoul of 35 Ill.Adm.Code 848.202(b)(4) and (5). These provisions state, in pertinent part, as follows:

> 4) Used or waste tires shall be drained of water on the day of generation or receipt.
> 5) Used or waste tires received at the site shall not be stored unless within 14 days after the receipt of any used tire the used tire is altered, reprocessed, converted, covered or otherwise prevented from accumulating water.

Thus, first of all, the STATE alleges that SHERIDAN violated the requirement at 35 Ill.Adm.Code 848.202(4) that water be drained from the tires at the Site on the day of generation or receipt. Yet, nowhere does the STATE allege when the tires at the Site were "generated or

[1] Additionally, Count II incorporates the first sixteen paragraphs of Count I.

received," that the tires actually contained water on the date they were "generated or received" or even that SHERIDAN failed to drain water from the tires on that date. Thus, this allegation is a mere conclusion that must be disregarded under *People v. Stein Steel Mills Services, Inc., supra* and *Knox College v. Celotex Corporation, supra.*

Secondly, the STATE alleges that SHERIDAN violated the requirement at 35 Ill.Adm.Code 848.202(5) that used or waste tires not be stored at a site unless within 14 days of receipt such tires are altered, reprocessed, converted or covered. Yet, the STATE *does* allege that SHERIDAN's tires were altered, reprocessed or converted. In Count I, paragraph 16, incorporated into Count II, the STATE alleges that the tires were "processed at the Site." As set forth above, the term "processing" is defined at Section 54.06 of the Act, 415 ILCS 5/54.06, as follows:

> "Processing" means the altering, converting or reprocessing of used or waste tires.

Thus, according to the Complaint, the STATE admits that the tires actually *were* "altered, reprocessed, [or] converted." Accordingly, contrary to the allegations in Count II, paragraph 22, SHERIDAN cannot have violated, and actually complied with, the terms of 35 Ill.Adm.Code 848.202(b). Moreover, since the parallel allegation of the violation of at Section 55(e) of the Act, 415 ILCS 5/55(e) is based upon the "violation of any regulation...adopted by the Board," there can be no violation of Section 55(e) of the Act, 415 ILCS 5/55(e), because no regulation was violated.

III. RECORDKEEPING AND REPORTING REQUIREMENTS ALLEGED IN COUNT III DO NOT APPLY TO SHERIDAN.

Count III, paragraphs 21-24, alleges the violation of Recordkeeping and Reporting requirements of Part 848, Subpart C, requiring at 35 Ill.Adm.Code 848.304 of the keeping of an

"Annual Tire Summary" and requiring at 35 Ill.Adm.Code 848.305 that copies of such records be maintained at the site. Yet, the STATE admits that these requirements do not apply to SHERIDAN. Pursuant to 35 Ill.Adm.Code 848.301, these recordkeeping requirements of Subpart C are only applicable to the owners or operators of sites subject to the management standards of Subpart B of the regulations. As set forth in 35 Ill.Adm.Code 848.301:

> The requirements of this Subpart shall apply to an owner or operator of a tire storage site or a tire disposal site who is required by the management standards of Subpart B to maintain records in accordance with this Subpart.

Thus, pursuant to 35 Ill.Adm.Code 848.301, the recordkeeping and reporting requirements of 35 Ill.Adm.Code 848.304 and 848.305, only apply to site owners or operators subject to the management standards of Part 848, Subpart B. Those management standards are set forth at Part 848, Subpart B, 35 Ill.Adm.Code 848.202(c), which states in pertinent part, as follows:

> In addition to the requirements set forth in subsection (b), the owner or operator shall comply with the following requirements at *sites at which more than 500 used or waste tires are located*:
> 1) ***
> *2) The recordkeeping and reporting requirements of Subpart C shall be met.* (Emphasis added.)

In other words, the recordkeeping and reporting requirements of Subpart C, which include those of which the STATE alleges violations at Count III, *i.e.*, 35 Ill.Adm.Code 848.304 and 848.305, only apply to the "*sites at which more than 500 used or waste tires are located.*" Yet, the STATE fails to allege that SHERIDAN maintained "more than" 500 tires at the Site. Instead, the STATE merely alleges, at Count I, paragraph 4 that "EPA inspectors observed *approximately 500* used and waste tires at the Site." The phrase "approximately 500" is not equivalent to "more than 500." The word "approximately" is defined in Black's Law Dictionary, Fifth Edition, as follows:

> "Approximately" is very nearly synonymous with "proximately", meaning very nearly, but not absolutely."

Thus, an allegation that there were "very nearly" 500 tires is not the same as an allegation that there were "more than" 500 tires. Since the STATE admits there were not more than 500 tires, the recordkeeping and reporting requirements of 35 Ill.Adm.Code 848.304 and 848.305 do not apply to SHERIDAN. Accordingly, Count III fails to allege a violation of such regulations.

IV. UNDER COUNT IV, SHERIDAN WAS NOT REQUIRED TO PAY AN ANNUAL FEE.

Count IV, paragraphs 21-24, alleges SHERIDAN failed to comply with the provisions of Section 55(d)(1) of the Act, 415 ILCS 5/55(d)(1) (and the parallel violations of Sections 55.6(b) and 21(k) of the Act, 415 ILCS 5/55.6(b) and 415 ILCS 21(k)) in that "Respondent operated a tire storage site that contained more that 50 used tires, and [was] therefore, required to pay an annual fee" of $100, but failed to do so. As set forth in Section 55(d)(1) of the Act, 415 ILCS 5/55(d)(1), the requirement of the payment of a fee pursuant to Section 55.6(b) of the Act, 415 ILCS 5/55.6(b), applies to persons who operate "a tire storage site which contains more than 50 used tires." The term "tire storage site" is defined at Section 54.12 of the Act, 415 ILCS 5/54.12, in pertinent part as "a site where used tires are stored or processed." Yet, as set forth in Part I of this Memorandum with respect to Count I, the allegations in Count II expressly contradict that SHERIDAN operated a "tire storage site." Therefore, no annual fee was due.

V. THE REGULATION THAT SHERIDAN IS ALLEGED TO HAVE VIOLATED AS AN ALLEGED TIRE TRANSPORTER, 35 Ill. Adm.Code 848.601(a)(1), IS UNFINISHED AND INCOMPLETE, RENDERING IT UNENFORCEABLE.

In Count V, paragraphs 23, the STATE alleges as follows:

> Respondent transported used or waste tires to the Site, and is therefore a tire transporter as defined in Section 54.12(b) of the Act, 415 ILCS 5/54.12(b) (2004)."

Yet nowhere in Count V does the STATE allege when such tires were transported, who transported them, how many such tires were transported, or how such tires were transported. Moreover, the definition of "tire transporter" at Section 54.12(b) of the Act, 415 ILCS 5/54.12(b), states that a "tire transporter" means "a person who transports used or waste tires in a vehicle." Nowhere in Count V does the STATE allege that such tires were transported in a vehicle. Count V is wholly lacking in the facts to support that SHERIDAN is a tire transporter. Thus, the allegation that SHERIDAN is a tire transporter is a mere conclusion that must be disregarded under *People v. Stein Steel Mills Services, Inc., supra* and *Knox College v. Celotex Corporation, supra.*

Further, the STATE alleges at Count V, paragraphs 24-26 that SHERIDAN failed to display a placard when allegedly transporting tires, purportedly in violation of 415 ILCS 5/55(g) and 35 Ill. Adm. Code 848.601(a)(1). 415 ILCS 5/55(g), not set forth in the Complaint, states that:

> No person shall engage in any operation as a used or waste tire transporter except in compliance with Board regulations.

The regulation that the STATE alleges SHERIDAN violated in its alleged capacity as a used or waste tire transporter is 35 Ill. Adm. Code 848.601(a)(2). That regulation states, in its entirety, as follows:

> Section 848.601 Tire Transportation Prohibitions
>
> a) *Except as provided in subsection (c),* no person shall transport more than 20 used or waste tires in a vehicle unless the following requirements are met.
>
> 1) The owner or operator has registered the vehicle with the Agency in accordance with this Subpart, received approval of such registration from the Agency, and such registration is current, valid and in effect.

2) The owner or operator displays a placard on the vehicle, issued by the Agency following registration, in accordance with the requirements of this Subpart.

b) No person shall provide, deliver or transport used or waste tires to a tire transporter for transport unless the transporter's vehicle displays a placard issued by the Agency under this Subpart identifying the transporter as a registered tire hauler. (Emphasis added.)

Thus, 35 Ill. Adm. Code 848.601(a) provides that, "*except as provided in subsection (c)*" one may not haul more than 20 tires without being registered and displaying a placard. Yet, the Complaint fails to state a violation of this regulation. First, nowhere in Count V does the STATE allege that "more than 20 tires" were hauled. Secondly, 35 Ill. Adm. Code 848.601 is unfinished and incomplete, and, therefore, unenforceable. As stated in preface to 35 Ill. Adm. Code 848.601(a), there is an exception at subsection "c" of 35 Ill. Adm. Code 848.601. *Yet, there is no subsection "c"*. It is clear that the Board intended to provide an exception to the registration and placarding requirement, but, through apparent error or omission, the exception is missing. If SHERIDAN qualified for this exception, it may not be subject to enforcement. However, as the regulation stands, it is impossible to determine whether SHERIDAN is thusly exempt. For this reason, the regulation is inherently unenforceable. Thus, because Count V fails to allege that more than 20 tires were transported and alleges that SHERIDAN violated an unenforceable regulation, *i.e.*, 35 Ill. Adm. Code 848.601, Count V fails to allege a violation of that regulation, and, hence, of 415 ILCS 5/55(g).

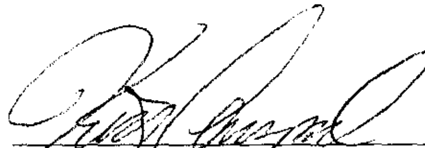
VI. CONCLUSION

The Complaint is substantially insufficient in law for, *inter alia*, the following reasons: (1) Under Counts I And II, SHERIDAN did *not* operate a tire storage site; (2) under Count II, SHERIDAN was not required to follow requirements for sites where tires are stored; (3)

recordkeeping and reporting requirements alleged in Count III do not apply to SHERIDAN; (4) under Count IV, SHERIDAN was not required to pay an annual fee; and (5) the regulation that SHERIDAN is alleged to have violated as an alleged tire transporter, 35 Ill. Adm. Code 848.601(a)(1) is unfinished and incomplete, rendering it unenforceable. Accordingly, the Complaint must be dismissed.

Respectfully submitted,

Respondent, SHERIDAN SAND & GRAVEL CO.



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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I have served the attached Motion to Dismiss and Supporting Memorandum by _**X**_ personal delivery, __ placement in the U. S. Mail, with first class postage prepaid, ___ sending it via facsimile and directed to all parties of record at the address(es) set forth below on or before 5:00 p.m. on the 7th day of July, 2006.

Vanessa Vail
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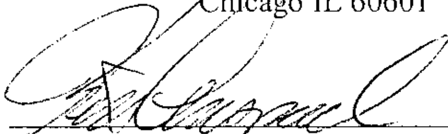

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