BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
- vs -	)	PCB No. 06-177
	)	(Enforcement - Used Tires)
SHERIDAN SAND & GRAVEL CO., an Illinois corporation,	)	
	)	
	)	
Respondent.	)	

NOTICE OF FILING

TO: Kenneth Anspach
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Suite 3400
Chicago, Illinois 60603

Bradley P. Halloran, Esq.
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
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Chicago, Illinois 60601

(VIA ELECTRONIC FILING)

PLEASE TAKE NOTICE that today I have filed with the Office of the Clerk of the Illinois Pollution Control Board by electronic filing the attached MOTION TO STRIKE AFFIRMATIVE DEFENSES, a copy of which is attached and hereby served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN
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BY: _____
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DATE: November 13, 2006

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MOTION TO DISMISS AFFIRMATIVE DEFENSES

Now comes Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, pursuant to Section 101.506 of the Illinois Pollution Control Board's Procedural Regulations and Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615 (2004), for an order dismissing Respondent SHERIDAN SAND & GRAVEL CO.'s Affirmative Defenses to the Complaint, and states as follows:

I. INTRODUCTION

On May 22, 2006, Complainant, People of the State of Illinois ("State" or "People"), filed a five-count Complaint against Sheridan Sand & Gravel Co. ("Sheridan" or "Respondent") alleging violations of the Illinois Environmental Protection Act, 415 ILCS 5/1 *et seq.* ("Act") and the Illinois Pollution Control Board's ("Board") regulations thereunder.

On September 7, 2006, the Board denied Sheridan's Motion to Dismiss Complaint. On October 13, 2006, Sheridan filed its Answer and Affirmative Defenses to the Complaint ("Answer").

II. LEGAL STANDARD

Under Illinois case law, the test for whether a defense is affirmative and must be pled by the defendant is whether the defense gives color to the opposing party's claim and then asserts

new matter by which the apparent right is defeated. Condon v. American Telephone and Telegraph Company, Inc., 210 Ill.App.3d 701, 709, 569 N.E.2d 518, 523 (2nd Dist. 1991); Vroegh v. J & M Forklift, 165 Ill.2d 523, 651 N.E.2d 121, 126 (1995); People v. Community Landfill Co., PCB 97-193 (August 6, 1998). In other words, an affirmative defense confesses or admits the allegations in the complaint, and then seeks to defeat a plaintiff's right to recover by asserting new matter not contained in the complaint and answer.

Where the defect complained about appears from the allegations of the complaint, it is not an affirmative defense and would be properly raised by a motion to dismiss. Corbett v. Devon Bank, 12 Ill.App.3d. 559, 569-570, 299 N.E.2d 521, 527 (1st Dist. 1973). An affirmative defense must do more than offer evidence to refute properly pleaded facts in a complaint. Pryweller v. Cohen, 282 Ill.App.3d 89, 668 N.E.2d 1144, 1149 (1st Dist. 1996), appeal denied, 169 Ill.2d 588 (1996); Heller Equity Capital Corp. v. Clem Environmental Corp., 272 Ill. App. 3d 173, 178, 596 N.E.2d 1275, 1280 (1st Dist. 1993); People v. Wood River Refining Company, PCB 99-120 at 6 (August 8, 2002); Farmer's State Bank v. Phillips Petroleum Co., PCB 97-100 (January 23, 1997) (affirmative defense does not attack truth of claim, but the right to bring a claim). A simple refutation of allegations in the complaint fails to establish an affirmative defense. Id.

Thus, the issue raised by an affirmative defense must be one outside of the four corners of the complaint. The Board rule regarding affirmative defenses provides, in pertinent part, that:

> Any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before the hearing.

35 Ill. Adm. Code 103.204(d). In addition, Section 2-613(d) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-613(d) (2004), is instructive, providing that "[t]he facts constituting any

affirmative defense...must be plainly set forth in the answer or reply." The facts establishing an affirmative defense must be pled with the same degree of specificity required by a plaintiff to establish a cause of action. International Insurance Co. v. Sargent & Lundy, 242 Ill.App.3d 614, 609 N.E.2d 842, 853 (1st Dist. 1993).

Dismissal for failure to state a cause of action is appropriate only where it clearly appears that no set of facts can be proven under the pleadings that will entitle the pleader to recovery. Douglas Theater Corporation v. Chicago Title & Trust Company, 288 Ill.App.3d 880, 681 N.E.2d 564, 566 (1st Dist. 1997). As with a Section 2-615 motion, a dismissal based on certain defects or defenses is proper if no set of facts may be proven by which the pleader can recover. Griffin v. Fluellen, 283 Ill.App.3d 1078, 670 N.E.2d 845, 849 (1st Dist. 1996).

A pleading must be dismissed for failure to state a cause of action if the facts alleged, when taken as true, do not set forth a legally recognized claim upon which relief can be granted. Kirchner v. Greene, 294 Ill.App.3d 672, 691 N.E.2d 107, 112 (1st Dist. 1998).

III. RESPONDENT'S AFFIRMATIVE DEFENSES ARE LEGALLY INSUFFICIENT

A. Respondent's First Affirmative Defense.

Respondent's First Affirmative Defense to all five counts of the Complaint claims that because the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency") failed to comply with Section 55.5(c) of the Act, 415 ILCS 5/55.5(c) (2004), the Agency thereby failed to comply with the requirements of Sections 31(a) and (b) of the Act, 415 ILCS 5/31(a) and (b) (2004). Based upon these assertions, Respondent concludes that this matter has been improperly brought before the Board because the Illinois EPA has failed to fulfill the requirements of Sections 31(a) and (b) pursuant to Section 31(c)(1) of the Act, 415 ILCS 5/31(c)(1) (2004).

This affirmative defense has no legal merit because Section 55.5(c) of the Act does not apply in the present case. As part of its affirmative defense, Respondent claims that "Illinois EPA never sent Sheridan a written warning notice pursuant to Section 55.5(c) of the Act, 415 ILCS 5/55.5(c)." ¶3 Affirmative Defense. Respondent's argument raises a completely irrelevant issue in response to the State's Complaint because none of the violations that Section 55.5(c) specifically applies to are alleged in the Complaint.

Section 55.5(c) provides, in pertinent part, as follows:

> Notwithstanding the provisions of subsection (b) of this Section, *prior to taking action pursuant to Title VIII for violation of subsection (a), (b) or (c) of Section 55 of this Act*, the Agency or unit of local government shall issue and serve upon the person complained against a written warning notice informing such person that the Agency or unit of local government intends to take such action.

415 ILCS 5/55.5(c) (2004) (emphasis provided). Thus, only before the Illinois EPA may refer violations of *Section 55(a), (b) or (c) of the Act* to the Attorney General for enforcement, is the Agency required to comply with the notice provision of Section 55.5(c). Otherwise, for any other alleged violation of Title XIV of the Act, the Illinois EPA is required to comply with Title VIII, i.e., Section 31 of the Act, as the Agency has done.

In the Complaint, and as confirmed by the Board in its Order accepting the Complaint for hearing, "the People allege that Sheridan Sand & Gravel Company violated Section 21(k); 55(d)(1), (e), and (g); and 55.6(b) of the Act (415 ILCS 5/21(k); 55(d)(1), (e), and (g); and 55.6(b) (2004)) and 35 Ill. Adm. Code 848.202(b)(4) and (b)(5), 848.305, and 848.601(a)." People of the State of Illinois v. Sheridan Sand & Gravel Co., PCB 06-177 (June 1, 2006) at 1; *see also* Complaint. Ergo, the Complaint contains no alleged violations of Section 55(a), (b) or (c) of the Act whatsoever. Similarly, Respondent points to no allegation in the Complaint in this matter which seeks to impose liability for a violation of 55(a), (b) or (c) of the Act.

Respondent's argument does not address the State's underlying cause of action, rather it argues the notification procedure pertaining to violations of Section 55(a), (b) and (c) of the Act, none of which have been alleged in the State's Complaint. Indeed, where no such allegations of Section 55(a), (b) and (c) of the Act are contained in the Complaint, Illinois EPA is not required to comply with Section 55.5(c) of the Act, and Respondent's First Affirmative Defense should be dismissed. Respondent does not, and cannot possibly, plead any set of facts that would support this defense to the allegations in the complaint. Therefore, the dismissal must be with prejudice.

B. Respondent's Second Affirmative Defense.

Respondent's second affirmative defense alleges that because Sheridan took certain actions to address violations at the Site, the State's Complaint is barred by reason of Section 55.5(c) of the Act. ¶18 Affirmative Defense. Firstly, for reasons already discussed above in Section A of this motion, Respondent's argument is without merit since Section 55.5(c) of the Act does not apply in this matter. Section 55.5(c) applies only to "violation of subsection (a), (b) or (c) of Section 55 of this Act," and no such violations have been alleged in the Complaint. 415 ILCS 5/55.5(c) (2004). The State realleges and incorporates by reference herein its argument to Respondent's first affirmative defense as its argument to the second affirmative defense. Secondly, subsequent compliance is not a legally recognized defense. An affirmative defense must raise a defense to liability to be proper.

Respondent argues as part of its second affirmative defense that "the Violation Notice contained an explanation, styled as 'Suggested Resolutions,' of two alternative actions, either one of which Illinois EPA informed SHERIDAN would resolve the alleged violations," and that "Sheridan's completion of the Suggested Resolution constituted a timely completion of corrective action under Section 55.5(c) of the Act, 415 ILCS 5/55.5(c), precluding any

enforcement action by the Illinois EPA under Sections 31(a) and (b) of the Act, 415 ILCS 31(a) and (b), or by the Attorney General under Section 31(c)(1) of the Act, 415 ILCS 31(c)(1)." ¶¶12, 18 Affirmative Defense. Respondent's position is directly contradicted by Section 33(a) of the Act.

Section 33(a) of the Act provides, in relevant part, as follows:

> *It shall not be a defense* to findings of violations of the provisions of the Act or Board regulations or a bar to the assessment of civil penalties *that the person has come into compliance subsequent to the violation*, except where such action is barred by any applicable State or federal statute of limitation.

415 ILCS 5/33(a) (2004)(emphasis provided). As Section 33(a) explicitly sets forth restrictions on what may constitute a defense to violations of the Act, subsequent compliance is not an affirmative defense. Therefore, Respondent's second affirmative defense is legally insufficient and as such, should be dismissed.

Alternatively, Respondent's purported defense, that Sheridan "had completed the requested Suggested Resolution in its entirety," may be more properly characterized as a response to the penalty factors set forth under Section 33(c) of the Act. ¶14 Affirmative Defense. Section 33(c) sets forth the factors that the Board shall consider in determining whether a civil penalty is appropriate in a particular case:

> (c) In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved including, but not limited to:
>
> (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
>
> (ii) the social and economic value of the pollution source;
>
> (ii) the suitability or unsuitability of the pollution source to the area in

which it is located, including the question of priority of location in the area involved;

(iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and

(v) any *subsequent compliance.*

415 ILCS 5/33(c) (2004)(emphasis provided). Consequently, Respondent's use of the Section 33(c) factors as an affirmative defense is entirely inappropriate. Section 33(c) sets forth factors which, if proven, could only affect the imposition of a monetary penalty. These aggravating and mitigating factors do not address whether or not the alleged violations of the Act have occurred. Not only is "subsequent compliance" listed as a factor that might mitigate any penalty in Section 33(c)(v), it is explicitly rejected as a defense to a violation by Section 33(a) of the Act.

Further, the Board has consistently held that a purported defense, which speaks to the imposition of a penalty and not the cause of action, is not an affirmative defense to that cause of action. People of the State of Illinois v. Midwest Grain Products of Illinois, Inc., PCB 97-179 (August 21, 1997) (*citing* People of the State of Illinois v. Douglas Furniture of California, Inc., PCB 97-133 (May 1, 1997); *see also* People of the State of Illinois v. Geon Corporation, PCB No. 97-62 (October 2, 1997). As demonstrated above, Respondent's second affirmative defense actually attempts to raise a mitigation factor, and does not defeat the State's underlying cause of action. Therefore, Respondent's purported defense is legally insufficient and should be dismissed with prejudice, as a matter of law.

Respondent's purported affirmative defense is nothing more than an argument. *See especially* ¶¶17, 18 Affirmative Defense. Respondent attempts to argue that the "Illinois EPA informed Sheridan" that completion of either of the Suggested Resolutions "would resolve the alleged violations," and that "[b]y operation of law, the Violation Notice constituted a written

warning notice and the Suggested Resolution constituted a corrective action under the provisions of Section 55.5(c) of the Act, 415 ILCS 5/55.5(c)." ¶¶12, 17 Affirmative Defense. Respondent, however, provides no statutory authority and cites to no affirmative statement proffered by Illinois EPA to support its purported defense. Rather, the facts are that Illinois EPA explicitly stated in the Violation Notice that, "[d]ue to the nature and seriousness of the alleged violations, please be advised that resolution of the violations may require the involvement of a prosecutorial authority for purposes that may include, among others, the imposition of statutory penalties." *See* Exhibit A.

The Second District Appellate Court has held that argumentative matters contained in an affirmative defense do not require a reply. In re Marriage of Sreenan, 81 Ill.App.3d 1025, 402 N.E.2d 348, 351 (2nd Dist. 1980); Korleski v. Needham, 77 Ill.App.2d 328, 222 N.E.2d 334, 339 (2nd Dist. 1966. As clearly demonstrated above, Respondent's purported affirmative defense is merely unsupported argument, to which the State, however, has a counterargument. Under Sreenan and Korleski, Respondent's purported defense does not require a reply and is not a proper affirmative defense as a matter of law. Therefore, Respondent's argument that subsequent completion of corrective actions renders cessation of prosecutorial activities by the Agency is a misstatement of facts and an erroneous attempt at establishing an affirmative defense, and should be stricken.

B. Respondent's Third Affirmative Defense.

Respondent's third affirmative defense to all five counts is not an affirmative defense but rather a bare assertion that "each of the allegations set forth in the Violation Notice were made without reasonable cause." ¶27 Affirmative Defense. This assertion falls well short of constituting a legally sufficient affirmative defense.

This affirmative defense merely denies the facts as alleged in the Complaint. Respondent's argument that the "allegations set forth in the Complaint were made without reasonable cause" is not an affirmative defense. ¶27 Affirmative Defense. The assertions that the State's allegations were made without reasonable cause is solely a conclusion proffered by Respondent. An affirmative defense essentially admits the allegations in the complaint, and then asserts a new matter which defeats a plaintiff's right to recover. Vroegh v. J & M Forklift, 165 Ill.2d 523, 651 N.E.2d 121, 126 (1995). An affirmative defense must do more than offer evidence to refute properly pleaded facts in a complaint. Pryweller v. Cohen, 282 Ill.App.3d 89, 668 N.E.2d 1144, 1149 (1st Dist. 1996), appeal denied, 169 Ill.2d 588 (1996). Facts establishing an affirmative defense must be pled specifically, in the same manner as facts in a complaint. International Insurance Co. v. Sargent & Lundy, 242 Ill.App.3d 614, 609 N.E.2d 842, 853 (1st Dist. 1993). Where the Board has specifically adopted fact pleading requirements for affirmative defenses in 35 Ill. Adm. Code 101.204(d), a party is required to allege enough facts to establish the affirmative defense. Therefore, it is not sufficient to merely state conclusions of law and conclusions of fact. *See* Knox College v. Celotex, 88 Ill.2d 407, 430 N.E.2d 976 (1981).

Furthermore, the allegations in this so-called defense are the same as those in its two previous affirmative defense, only this time accompanied with the conclusion that the "Complaint is contradicted by Illinois EPA's own Narrative Inspection Report, which, in turn, is contradicted by Sheridan's affidavits." ¶26 Affirmative Defense. It is well settled that a simple denial of a fact pleaded in the Complaint is not a sufficient affirmative defense. Pryweller at 1149; *see also* Heller Equity Capital Corp., People v. Wood River Refining Co, and Farmers State Bank. An affirmative defense must raise new matter that, if true, somehow defeats a complainant's claim. It is not simply the restatement of a denial or other response made in the body of the answer.

In support of its affirmative defense, Respondent cites to affidavits it presented to "Illinois EPA stating that no more than 175-180 tires had been present at the Site." ¶24 Affirmative Defense. Respondent's assertion merely refutes and denies the amount of tires recorded by the Illinois EPA. As stated above, the facts establishing an affirmative defense must be pled with specificity. Consequently, this assertion falls well short of constituting a legally sufficient affirmative defense. Presenting affidavits to contradict what has been alleged against it is not an affirmative defense, but rather a denial of the State's allegations that goes to the merits. This purported defense is merely Respondent's analysis of the facts, or more accurately, the representation of Respondent's selective version of facts versus the State's set of facts, which is not an affirmative defense but rather only pure legal argument, and wholly improper as an affirmative defense.

Notwithstanding the third affirmative defense's insufficiency, and without waiving its argument on this point, the State finds Respondent's basis for its defense somewhat confusing since it appears to support the Complaint's causes of action. Respondent's affidavits attesting to no more than 175-180 tires at the site, only provide further support to the violations alleged in the Complaint.

For example, Respondent specifically cites to Count I of the Complaint as part of its basis for its defense, which alleges violation of Section 55(d)(1) of the Act. ¶25 Affirmative Defense. Count I is based on the presence of at least 50 used tires at the Site. Section 55(d) of the Act, 415 ILCS 5/55(d) (2004), provides, in pertinent part, as follows: "Beginning January 1, 1992, no person shall cause or allow the operation of: (1) a tire storage site which contains more than *50* used tires..." ¶12 Complaint. Similarly, Count II alleges violations of Section 55(e) of the Act and sections 848.202(b)(4) and (b)(5) of the Board regulations, which are based on sites "at which more than 50 used or waste tires." 415 ILCS 5/55(e) (2004), 35 Ill. Adm. Code 848.202(b)(4) and (b)(5). ¶¶17, 21 Complaint. Thus, even taking as true Respondent's allegations in this defense, no legally

recognized defense would be available. Respondent's purported affirmative defense is illogical since Respondent contends that at least 175 tires were at the Site, and the violations alleged in the Complaint are based upon more than fifty (50) used tires being present at the Site. *See* ¶24 Affirmative Defense. An affirmative defense admits the claim and raises a defense which defeats it. By providing facts that support causes of action in the Complaint, Respondent has again failed to meet the requirements for proper pleading and its third Affirmative Defense must be dismissed.

Respondent's purported affirmative defense that "the allegations set forth in the Complaint were made without reasonable cause" also does not meet the fundamental requirement that an affirmative defense gives color to a plaintiff's claim and asserts new matter that defeats it. ¶29 Affirmative Defense. In fact, this purported affirmative defense does not assert any new matter, much less new matter that might defeat the State's claim. Respondent does not give color to the State's cause of action by merely stating an unsupported conclusion and then requesting expenses. Respondent's affirmative defense is legally insufficient and should be dismissed as a matter of law.

Furthermore, Respondent's allegations do not appear to raise a new matter that, if true, would defeat the claims in the Complaint. The Complaint alleges that "Illinois EPA inspectors observed approximately 500 used and waste tires at the Site." *See* Complaint; *see also* ¶25 Affirmative Defense. Respondent denies this in its response to paragraph 4 of Count I. Raising this denial again as an affirmative defense, assuming that this is what the third affirmative defense is attempting to do, is not proper. As cited above, an affirmative defense must do more than simply deny well-pleaded facts. Moreover, Respondent previously attempted to dismiss the Complaint based on a similar argument in its Motion to Dismiss, but that entire motion was denied by the Board. Simple denials of allegations made in the Complaint cannot also be affirmative defenses. Moreover, the exact number of used tires at the Site, is an issue for the trier of fact to determine.

In addition, Respondent's demand for expenses and attorney's fees is not a basis for an affirmative defense and is inappropriate to raise under an affirmative defense. ¶30 Affirmative Defense. Such a demand does not go to the claim but is rather a form of relief that is inconsequential to a finding of Respondent's liability. Again, an affirmative defense is one that gives color to the claim of the opposing party and then asserts new matter by which the apparent right is defeated. Condon v. American Telephone and Telegraph Company, Inc., 210 Ill.App.3d 701, 709, 569 N.E.2d 518, 523 (2nd Dist. 1991). Respondent's demand does not assert matter by which the State's causes of action are defeated. Rather, its purported affirmative defense seeks specific relief in the form of expenses and attorney's fees. The matter of fees and expenses is properly addressed following, and pursuant to findings contained within, a final order. To raise this issue at the pleading stage is premature, illogical and clearly improper. Respondent's affirmative defense does not defeat nor even address the State's underlying causes of action as it does not go to liability.

Notwithstanding the inappropriateness of its affirmative defense, Respondent's misplaced demand for expenses has also been made in the wrong forum. Pursuant to the Illinois Administrative Procedure Act, the same provision Respondent cites, such a request is to be made to the Agency, not the Board. ¶28 Affirmative Defense.

This affirmative defense, like the others raised by Respondent, is merely argument. As previously pointed out above, the Appellate Court has held that argumentative matters contained in an affirmative defense do not require a reply. In re Marriage of Sreenan, 81 Ill. App. 3d 1025, 402 N.E.2d 348, 351 (2nd Dist. 1980); Korleski v. Needham, 77 Ill. App. 2d 328, 222 N.E.2d 334, 339 (2nd Dist. 1966). Applying another fundamental principle governing the pleading of affirmative defenses, Respondent can plead no set of facts that would entitle it to a defense of "allegations

without reasonable cause" because that is not a legally recognized defense. For all of the foregoing reasons, Respondent's purported Third Affirmative Defense does not require a reply, and should be dismissed with prejudice.

C. Respondent's Fourth Affirmative Defense.

Respondent's fourth affirmative defense to all five counts is that because the Illinois EPA "failed to fulfill its statutory obligation" under Section 31(b) of the Act, "the Attorney General was barred from filing a complaint against Sheridan with the Board pursuant to Section 31(c)(1) of the Act." ¶¶34, 38 Affirmative Defense. This purported defense is a self-serving analysis of the facts and an erroneous interpretation of the Act by Respondent, and as such, is not an affirmative defense. It does not contain allegations of fact but rather is pure legal argument, and is wholly improper as an affirmative defense.

Without waiving its claim that Respondent's Section 31 defense is legally deficient, the State contends that, contrary to what Respondent claims, Illinois EPA fulfilled its statutory obligations under Section 31 of the Act. Section 31(b) of the Act provides, in relevant part, as follows:

> For alleged violations that remain the subject of disagreement between the Agency and the person complained against following fulfillment of the requirements of subsection (a) of this Section, and as a precondition to the Agency's referral or request to the Office of the Illinois Attorney General ... for legal representation regarding an alleged violation that may be addressed pursuant to subsection (c) or (d) of this Section or pursuant to Section 42 of this Act, the Agency shall issue and serve, by certified mail, upon the person complained against a written notice informing that person that the Agency intends to pursue legal action: Such notice shall notify the person complained against of the violations to be alleged and offer the person an opportunity to meet with appropriate Agency personnel in an effort to resolve any alleged violations that could lead to the filing of a formal complaint. The meeting with Agency personnel shall be held within 30 days of receipt of notice served pursuant to this subsection upon the person complained against, unless the Agency agrees to a postponement or the person notifies the Agency that he or she will not appear at a meeting within the 30 day time period.

415 ILCS 5/31(b) (2004). Thus, as a precondition to Illinois EPA's referral under Section 31, the Agency must provide notice and the opportunity for the violator to meet to discuss the violations.

Accordingly, pursuant to Section 31 Illinois EPA provided notice of the violations that form the basis of every count of the Complaint, and held a meeting with the Respondent. Similarly, Respondent does not contest that notice was provided, nor does it contest that a prefiling meeting was held between the Agency and Respondent. Indeed, Respondent confirms these facts in its affirmative defense. "Following the receipt of the Notice of Intent (which incorporated the alleged violations set forth in the Violation Notice), Sheridan requested a meeting with Illinois EPA pursuant to Section 31(b) of the Act, 415 ILCS 5/31(b). That meeting was scheduled for September 27, 2005 at the offices of Illinois EPA in Des Plaines, Illinois." ¶31 Affirmative Defense. "Sheridan did, in fact, meet with Illinois EPA at the offices of Illinois EPA on September 27, 2006. None of the alleged violations set forth in the Violation Notice was resolved." ¶32 Affirmative Defense. Therefore, in accordance with Section 31(b) of the Act, and as Respondent confirms in its affirmative defense, Respondent indisputably issued the August 26, 2005 Notice of Intent to Pursue Legal Action prefiling correspondence and met with Respondent. Hence, in light of the statutory authority, and the Agency's uncontested compliance with the requisite prefiling conditions, Respondent's fourth affirmative defense must be seen for what it is, namely, a non sequitur, which therefore, should be appropriately stricken by this Board.

The facts as pled by Respondent, *i.e.*, detailing the actions of the Agency as it went through the Section 31 process in this case, taken as true, quite obviously do not and cannot support a defense that the Agency failed to comply with Section 31.

Despite the plain language of the statute, Respondent proceeds to argue that Section 31(b) of the Act "imposes upon Illinois EPA thereby a statutory obligation of good faith negotiation" and that "[i]f and only if Illinois EPA meets that statutory obligation may it request legal representation by the Illinois Attorney General pursuant to Section 31(c) of the Act." ¶29 Affirmative Defense. Simply stated, Section 31(b) of the Act does not say this.

Be that as it may, Respondent proceeds to colorfully claim in its affirmative defense that "it was the policy of Illinois EPA not to resolve any alleged violations," that "no such resolution occurred despite Sheridan's efforts to resolve such alleged violations by Sheridan's own good faith negotiation, not reciprocated by Illinois EPA," and that Illinois EPA "made no effort to resolve any of the alleged violations." ¶¶31-33 Affirmative Defense. These allegations constitute nothing more than a self-serving narration by the Respondent, and do not constitute an affirmative defense.

Through this defense, Respondent seeks to invent a requirement of "good faith," which when applied to the Agency evidently means doing whatever Respondent requests, not what the Agency in its discretion deems appropriate. Even if the facts as Respondent has attempted to lay out are true, the Act does not mandate the Agency's conduct. Nowhere in the Act or Board regulations does it state that the Illinois EPA must act in "good faith" at a meeting with the offending party before it can refer alleged violations to the Attorney General.

Indeed, Respondent provides no statutory authority or case law that conveys such a standard, simply because, none exists. Respondent purely interjects this "good faith" standard into the Section 31(b) process, then weakly argues that the Agency has violated this nonexistent standard. However, Respondent does not give color to the State's causes of action by attacking the conduct of the Agency, and pleads an improper affirmative defense.

Moreover, even if an affirmative defense based on this so-called "good faith" standard was available to Respondent, Respondent fails to allege in detail facts relative to specific procedural requirements with which the Illinois EPA failed to comply. As stated above, Respondent must plead an affirmative defense with the same degree of specificity required in order to allege a cause of action. Respondent merely asserts the conclusion that the Agency failed to conduct its meeting with "good faith" and that Section 31(b) provides for this standard. The defense is completely devoid of factual allegations, and thus clearly lacks the specificity required for pleading a claim or a defense.

As stated above, this affirmative defense is merely argument by Respondent. An argument is not an affirmative defense. *See* Sreenan and Korleski. Since Respondent's affirmative defense does not defeat the State's underlying causes of action, the defense is legally insufficient and should be dismissed.

The second portion of Respondent's fourth affirmative defense, which alleges that because "Illinois EPA failed to fulfill the requirements of Section 31(b) of the Act, 415 ILCS 5/31(b), the Attorney General was barred from filing a complaint against Sheridan with the Board pursuant to Section 31(c)(1) of the Act, 415 ILCS 31(c)(1)," should be dismissed as a matter of law, with prejudice. ¶38 Affirmative Defense. Under Section 31, the Illinois EPA may refer violations to the Attorney General for enforcement which it believes cannot be resolved without the involvement of the Attorney General. Where Section 31(b) of the Act provides that a precondition to Illinois EPA's referral to the Attorney General for enforcement under Section 31 is to provide notice and the opportunity for the violator to meet to discuss the violations, this precondition *does not* apply to the Attorney General's own filing of a complaint.

Where a regulation is clear on its face, the court must give effect to the language in the

provision. Dean Foods Co. v. Illinois Pollution Control Board, 143 Ill.App.3d 322, 334, 492 N.E.2d 1344, 1353 (2nd Dist. 1986). There is no language in the Act that subjects the Attorney General to the Section 31 requirements. Nowhere in Section 31 are any restrictions placed on the Attorney General's authority to proceed with an enforcement case and file a complaint on her own initiative. People of the State of Illinois v. Eagle-Picher-Boge, L.L.C., PCB 99-152 (July 22, 1999), slip op. at 4.

Recent Board decisions have decided the issue of whether a cause of action is defeated by the Illinois EPA's failure to comply with Section 31 procedural requirements, and whether the Attorney General may prosecute a case exclusive of procedural requirements prescribed by Section 31. This issue is not one of first impression in Illinois, and has been previously decided during administrative enforcement actions brought before the Board. Numerous Board decisions have held that Section 31 does not apply to the Attorney General. *See,* Eagle-Picher-Boge, L.L.C., PCB 99-152 (July 22, 1999), slip op. at 6 (stating that the notice requirements of Section 31 do not apply to the Attorney General); *see also,* People v. Heuerinann, PCB 97-92 (Sept. 18, 1997) (stating that the notice requirements were not intended to bar the Attorney General from prosecuting an environmental violation). Respondent simply ignores or dismisses this well-established rule in its affirmative defense.

In People v. Geon Corporation., PCB 97-62, 1997 WL 621493 (October 2, 1997), the Board denied the Defendant's motion to dismiss the State's complaint on the basis, in part, that Section 31 did not apply to the Attorney General's Office filing on its own motion. Thus, Illinois EPA may refer alleged violations of the Act and the regulations to the Attorney General pursuant to Section 31 of the Act, 415 ILCS 5/31 (2004), and the Attorney General may allege violations of the Act and regulations on her own. *See* People v. Peabody Coal Co., PCB 99-134, (June 5,

2003) *citing* Eager-Picher-Boge, PCB 99-152.

Moreover, Section 42(e) of the Act grants the Attorney General independent authority to bring an action alleging violations of the Act on her own motion or at the request of the Illinois EPA. *See* 415 ILCS 5/42(e) (2004). A review of the State's complaint reveals that this action was brought by the Attorney General *on her own motion*, as well as at the request of the Illinois EPA. *See,* ¶ 1 Complaint. In each Count of the Complaint filed herein, the allegations are that "this Complaint is brought on behalf of the People of the State of Illinois, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois, on her own motion and at the request of the Illinois Environmental Protection Agency ("Illinois EPA"), against Sheridan." *Id.* The State made the decision to style her pleadings in the fashion indicated to identify a filing both by the Attorney General on her own motion and at the request of the Agency.

Section 31 applies to the Illinois EPA but not the Attorney General. Accordingly, Section 31 does not prevent the Attorney General from maintaining an action on her own behalf, and she may do so on her own initiative, without a request by the Illinois EPA. Therefore, Respondent's argument that the Attorney General is prohibited from bringing an action on her own behalf and at the request of the Illinois EPA is invalid. The plain language of the Act, legislative history and legal precedent directly contradict Respondent's affirmative defense based on Section 31 of the Act. For all the reasons cited above, Respondent's Fourth Affirmative Defense should be dismissed as a matter of law, with prejudice.

D. Respondent's Fifth Affirmative Defense.

Respondent argues in its fifth affirmative defense to Count V that Section 848.601(a)(1) of the Board regulations is "inherently unenforceable and invalid." 35 Ill. Adm. Code

848.601(a)(1); ¶3 Affirmative Defense. As demonstrated above, simply stating a legal conclusion is not an affirmative defense. *See* Knox College.

Respondent does not have the authority to unilaterally deem an Agency's rule "invalid." Administrative interpretations of a statute made by an agency charged with administering that statute are entitled to considerable deference unless clearly *erroneous, arbitrary or unreasonable.* Winnetkans Interested in Protecting the Env't. v. Illinois Pollution Control Bd., 55 Ill.App.3d 475, 479-80, 370 N.E.2d 1176, 1179 (1st Dist. 1977) (emphasis provided); *see also* Church v. State, 164 Ill.2d 153, 162, 646 N.E.2d 572, 577 (Ill. 1995) (Illinois Supreme Court held "A court will not substitute its own construction of a statutory provision for a reasonable interpretation by the agency charged with the statute's administration"). Thus, where a party is required to allege enough facts to establish the affirmative defense, Respondent's bare assertion that Section 848.601(a) of the Board's rules is invalid fails as an affirmative defense, and should be dismissed.

Moreover, Respondent's defense, that Section 848.601 is "unfinished and incomplete, and, therefore, invalid," mirrors the argument, verbatim, that Respondent provided in its Motion to Dismiss. Complaint; ¶3 Affirmative Defense. "In arguing that dismissal of Count V is appropriate, the respondent alleges that the allegations are unfinished and incomplete, rendering the allegations unenforceable." People v. Sheridan Sand and Gravel, PCB 06-177, slip. op at 4 (Sept. 7, 2006). The Board found "[t]he complainant asserts that the respondent's objections are unfounded, as the complaint need not set forth the evidence of alleged violation. *The Board agrees with the complainant.* " Sheridan Sand and Gravel, PCB 06-177, slip. op at 4. (emphasis provided). Thus, where the Board has previously dismissed the same argument alleged by Respondent in its Motion to Dismiss, Respondent's Fifth Affirmative Defense should be dismissed here as well.

Respondent's affirmative defense is also irrelevant and improperly pled. Sections 29 and 41 of the Act (415 ILCS 5/29, 41 (2004)) prohibit challenges of rules in enforcement proceedings of issues "that could have been raised in a timely petition for review" under those sections. 415 ILCS 5/41(c) (2004). Section 41 of the Act provides, in pertinent part in subsections (a) and (c):

> a) Any party to a Board hearing, . . . [and] any party adversely affected by a final order or determination of the Board . . . may obtain judicial review, by filing a petition for review within 35 days from the date that a copy of the order or other final action sought to be reviewed was served upon the party affected . . . under the provisions of the Administrative Review Law . . . except that review shall be afforded directly in the Appellate Court . . . *Review of any rule or regulation promulgated by the Board shall not be limited by this section but may also be had as provided in Section 29 of this Act.*
>
> ***
>
> c) No challenge to the validity of a Board order shall be made in any enforcement proceeding under Title XII of this Act [penalties] as to any issue that could have been raised in a timely petition for review under this Section. 415 ILCS 5/41(a), (c) (2004) (emphasis provide).

Section 29 of the Act addresses judicial review of regulations adopted by the Board:

> a) Any person adversely affected or threatened by any rule or regulation of the Board may obtain a determination of the validity or application of such rule or regulation by petition for review under Section 41 of this Act.
>
> b) Action by the Board in adopting any regulation for which judicial review could have been obtained under Section 41 of this Act shall not be subject to review regarding the regulation's validity or application in any subsequent proceeding under Title VIII [enforcement], Title IX [variances] or Section 40 [permit appeals] of this Act. 415 ILCS 5/29(a), (b) (2004).

According to these provisions of the Act, Respondent is precluded from attacking the validity of the Board's regulation in its affirmative defense. However, from the pleadings it is apparent that Respondent is not seeking a declaration of the validity or applicability of the

regulation; Respondent is seeking to have the regulation declared invalid as applied to Respondent. Notwithstanding Respondent's irrelevant defense, the Act directs "any person adversely affected or threatened by any rule or regulation of the Board" to file a petition for review under Section 41 of the Act. 415 ILCS 5/29(a) (2004). Consequently, the time, if at all, for Respondent to raise objections about the validity or application of Section 848.601(a) is through this mechanism, not by way of an affirmative defense.

Lastly, Respondent's demand for expenses pursuant to Section 10-55(c) of the Illinois Administrative Procedure Act ("APA"), is not a basis for an affirmative defense and is inappropriate to raise at this juncture. ¶4-5 Affirmative Defense. Such a demand does not go to the claim but is instead a form of relief that has no bearing on a finding of Respondent's liability. Further, Respondent's purported affirmative defense seeks specific relief in the form of expenses, which is dependent on a court's order, rather than another administrative agency. Under the APA:

> In any case in which a party has any administrative rule *invalidated by a court* for any reason, including but not limited to the agency's exceeding its statutory authority or the agency's failure to follow statutory procedures in the adoption of the rule, the court shall award the party bringing the action the reasonable expenses of the litigation, including reasonable attorney's fees. 5 ILCS 100/10-55(c) (emphasis added) .

Here, no court has invalidated the Board's rule. To raise this issue at the pleading stage is clearly improper. Respondent's affirmative defense does not defeat nor even address the State's underlying causes of action as it does not go to liability. Thus for the reasons stated above, Respondent's Fifth Affirmative Defense is legally insufficient, and as such, should be dismissed with prejudice.

IV. CONCLUSION

WHEREFORE, for the reasons stated, the Complainant, PEOPLE OF THE STATE OF ILLINOIS, requests that the affirmative defenses of the Respondent be dismissed, with prejudice.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
LISA MADIGAN, Attorney General
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BY: _____

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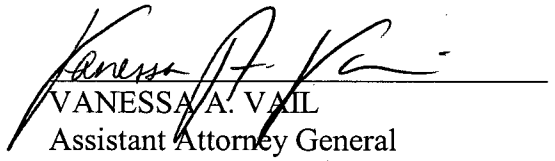
CERTIFICATE OF SERVICE

I, VANESSA A. VAIL, an Assistant Attorney General, do certify that I caused to be mailed this 13th day of November 2006, a true and correct copy of the attached MOTION TO STRICK AFFIRMATIVE DEFENSES and Notice of Filing by certified mail with return receipt requested to the persons listed on the said Notice of Filing, and depositing same with the United States Postal Service located at 188 West Randolph Street, Chicago, Illinois, 60601.



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