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
Eight South Michigan Avenue
Suite 3400
Chicago, Illinois 60603

Bradley P. Halloran, Esq.
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
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 FIRST AMENDED AFFIRMATIVE DEFENSES, a copy of which is attached and hereby served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General of the
State of Illinois

BY: _____

VANESSA A. VAIL
Assistant Attorney General
Environmental Bureau
100 W. Randolph Street, 11th Floor
Chicago, Illinois 60601
(312) 814-5361

DATE: March 14, 2007

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

MOTION TO STRIKE FIRST AMENDED 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 striking Respondent SHERIDAN SAND & GRAVEL CO.'s First Amended 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"). On November 13, 2006, the State filed its Motion to Strike Affirmative Defenses. On November 27, 2006, Sheridan filed its First Amended Answer and Affirmative Defenses.

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).

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 conclusion 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) is unavailable as an affirmative defense. As already discussed above, Section 55.5(c) of the Act does not apply in this matter.

Additionally, where Section 31 applies to the Agency but not the Attorney General, Respondent's argument that the Attorney General is prohibited from filing a Complaint against Sheridan because of "Illinois EPA's failure to fulfill the requirements of Sections 31(a) and 31(b) of the Act, 415 ILCS 5/31(a) and (b) (2004), as well as Section 55.5(c) of the Act, 415 ILCS 5/55.5(c) (2004)" is without merit. ¶19 Affirmative Defense. 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. Thus, Respondent's argument that compliance with Section 55.5(c) of the Act, 415 ILCS 5/55.5(c) (2004) is a jurisdictional condition precedent to the State bringing an enforcement action is erroneous and must be stricken.

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.

As clearly demonstrated above, 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 stricken. Respondent does not, and cannot possibly, plead any set of facts that would support this defense to the allegations in the Complaint. Therefore, the defense must be stricken 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 this second affirmative defense. Thus, Respondent's argument that "completion of corrective action under Section 55.5(c) of the Act" precludes the Agency or the Attorney General from proceeding with enforcement action is irrelevant. ¶18 Affirmative Defense. Again, where Section 55.5(c) is inapplicable in this matter, subsequent compliance with this provision of the Act is meaningless, and this defense should be stricken.

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 stricken.

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 stricken with prejudice, as a matter of law.

Furthermore, 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.

In addition, Respondent's argument that "Sheridan's completion of corrective action

under Section 55.5(c) of the Act precludes the Board from holding a hearing" is inappropriate since Section 55.5(c) does not apply. ¶19 Affirmative Defense. Thus, Respondent's second affirmative defense should be stricken.

C. Respondent's Third Affirmative Defense.

Respondent's third affirmative defense to all five counts is that because the Illinois EPA "failed to fulfill the provisions of 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." ¶17 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.

In accordance with 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." ¶8 Affirmative Defense. "Illinois EPA did hold a purported meeting with Sheridan at the offices of Illinois EPA on September 27, 2006. ...None of the alleged violations set forth in the Violation Notice, Narrative Inspection Report and Notice of Intent was resolved." ¶10 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 third 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.

As plainly stated under Section 31(b) of the Act, before the Agency can refer violations to the Attorney General, the Agency must indicate in its written notice to "the person complained 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." 415 ILCS 5/31(b) (2004). Despite this plain directive under the statute, Respondent argues that Section 31(b) of the Act additionally "imposes upon Illinois EPA thereby a statutory obligation of, alternatively, making an effort ...of good faith negotiation" and that "[i]f and only if Illinois EPA meets that statutory obligation may it request legal representation by the Office of the Illinois Attorney General pursuant to Section 31(c) of the Act, 415 ILCS 5/31(c) or refer alleged violations to the Office of the Illinois Attorney General for settlement." ¶4 Affirmative Defense. Simply stated, Section 31(b) of the Act does not require a "good faith" standard.

Be that as it may, Respondent proceeds to colorfully claim in its affirmative defense that "it was the practice of Illinois EPA to hold the meeting as a mere formality prior to a referral to the Office of the Attorney General," that "[a]t the meeting Sheridan made efforts to resolve such alleged violations by Sheridan's own good faith negotiating not reciprocated by Illinois EPA," that "in accordance with its practice, Illinois EPA made no effort to resolve any alleged violations," that "the meeting held between the Illinois EPA and Sheridan on September 27, 2006 was a mere pretense" and a "mere formality," and that Illinois EPA "made no effort to resolve any of the alleged violations set forth in the Violation Notice." ¶¶9-11 Affirmative Defense. These repetitive 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 an additional 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. Moreover, simply repeating something does not make it true. In other words, Respondent's repeated contention that it was the Agency's policy to never really make an effort to resolve alleged violations is merely a biased and baseless assertion, and not the foundation for an affirmative defense.

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 therefore 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 stricken.

The second portion of Respondent's third 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 stricken as a matter of law, with prejudice. ¶17 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.

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 because the Illinois EPA failed to fulfill the requirements of Section 31(b) of the Act 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, and should therefore be stricken.

Moreover, and as already discussed in Section A of this motion, 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). The State realleges and incorporates by reference herein its argument to Respondent's first affirmative defense as its argument to this third affirmative defense. Thus, Therefore, Respondent's argument that the Attorney General is prohibited from bringing an action on her own behalf because the Illinois EPA failed to fulfill the requirements of Section 31(b) of the Act is invalid.

For all the reasons cited above, Respondent's Third Affirmative Defense should be stricken as a matter of law, 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 stricken, with prejudice.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
LISA MADIGAN, Attorney General
of the State of Illinois

BY: _____

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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276, 217-782-3397
JAMES R. THOMPSON CENTER, 100 WEST RANDOLPH, SUITE 11-300, CHICAGO, IL 60601, 312-814-6026

ROD R. BLAGOJEVICH, GOVERNOR RENEE CIPRIANO, DIRECTOR

815/987-7760
Fax #815/987-7005

May 4, 2005

CERTIFIED MAIL #7002 2030 0001 8572 1303
RETURN RECEIPT REQUESTED

Sheridan Sand & Gravel
2679 N. 4201 Road
Sheridan, Illinois 60551

Re: **Violation Notice, L-2005-01188**
LPC #0998215024 -- LaSalle County
Sheridan (Mission Twp.)/Sheridan Sand & Gravel
Compliance File

Dear Mr. Vardijan:

This constitutes a Violation Notice pursuant to Section 31(a)(1) of the Illinois Environmental Protection Act, 415 ILCS 5/31(a)(1), and is based **an inspection** completed on **April 19, 2005** by representatives of the Illinois Environmental Protection Agency ("Illinois EPA").

The Illinois EPA hereby provides notice of alleged violations of environmental statutes, regulations, or permits as set forth in the attachment to this notice. The attachment includes an explanation of the activities that the Illinois EPA believes may resolve the specified alleged violations, including an estimate of a reasonable time period to complete the necessary activities. Due 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.

A written response, which may include a request for a meeting with representatives of the Illinois EPA, must be submitted via certified mail to the Illinois EPA within 45 days of receipt of this notice. The response must address each alleged violation specified in the attachment and include for each an explanation of the activities that will be implemented and the time schedule for the completion of that activity. If a meeting is requested, it shall be held within 60 days of receipt of this notice. The written response will constitute a proposed Compliance Commitment Agreement ("CCA") pursuant to Section 31 of the Act. The Illinois EPA will review the proposed CCA and will accept or reject it within 30 days of receipt.

EXHIBIT
tabbies
A

If a timely written response to this Violation Notice is not provided, it shall be considered to be a waiver of the opportunity to respond and to meet provided by Section 31(a) of the Act, and the Illinois EPA may proceed with a referral to the prosecutorial authority.

Written communications should be directed to:

Illinois EPA – Bureau of Land
Attn: Shaun Newell
4302 North Main Street
Rockford, Illinois 61103

All communications must include reference to your **Violation Notice L-2005-01188.** If you have questions regarding this matter, please contact **Shaun Newell** at **815/987-7760.**

Sincerely,

David S. Retzlaff
Manager – Region 1
Field Operations Section
Bureau of Land

DSR:SN:tl

Enclosure

bcc: Division File
Rockford Region

Attachment

1. Pursuant to Section 21(k) of the [Illinois] Environmental Protection Act (415 ILCS 5/21(k)), no person shall fail or refuse to pay any fee imposed under this Act.

A violation of Section 21(k) of the [Illinois] Environmental Protection Act (415 ILCS 5/21(k)) is alleged for the following reason: **Failure to pay the required $100.00 Annual Tire Storage fee for 2005.**

2. Pursuant to Section 55(a)(4) of the [Illinois] Environmental Protection Act (415 ILCS 5/55(a)(4)), no person shall cause or allow the operation of a tire storage site except in compliance with Board regulations.

A violation of Section 55(a)(4) of the [Illinois] Environmental Protection Act (415 ILCS 5/55(a)(4)) is alleged for the following reason: **Waste tires have accumulated on site for longer than a year.**

3. Pursuant to Section 55(d)(1) of the [Illinois] Environmental Protection Act (415 ILCS 5/55(d)(1)), beginning January 1, 1992, no person shall cause or allow the operation of a tire storage site which contains more than 50 used tires, unless the owner or operator, by January 1, 1992 (or the January 1 following commencement of operation, whichever is later) and January 1 of each year thereafter, (i) registers the site with the Agency, (ii) certifies to the Agency that the site complies with any applicable standards adopted by the Board pursuant to Section 55.2, (iii) reports to the Agency the number of tires accumulated, the status of vector controls, and the actions taken to handle and process the tires, and (iv) pays the fee required under subsection (b) of Section 55.6.

A violation of Section 55(d)(1) of the [Illinois] Environmental Protection Act (415 ILCS 5/55(d)(1)) is alleged for the following reason: **Failure to register as a tire storage site.**

4. Pursuant to Section 55(e) of the [Illinois] Environmental Protection Act (415 ILCS 5/55(e)), no person shall cause or allow the storage, disposal, treatment or processing of any used or waste tire in violation of any regulation or standard adopted by the Board.

A violation of Section 55(e) of the [Illinois] Environmental Protection Act (415 ILCS 5/55(e)) is alleged for the following reason: **Failure to prevent the waste tires from accumulating water.**

5. Pursuant to Section 55(g) of the [Illinois] Environmental Protection Act (415 ILCS 5/55(g)), no person shall engage in any operation as a used or waste tire transporter except in compliance with Board regulations.

A violation of Section 55(g) of the [Illinois] Environmental Protection Act (415 ILCS 5/55(g)) is alleged for the following reason: **Waste tires were transferred to the site and transporter was not permitted to haul tires.**

6. Pursuant to Section 55.6(b) of the [Illinois] Environmental Protection Act (415 ILCS 5/55.6(b)), beginning January 1, 1992, in addition to any other fees required by law, the owner or operator of each site required to be registered under subsection (d) of Section 55 shall pay to the Agency an annual fee of $100. Fees collected under this subsection shall be deposited into the Environmental Protection Permit and Inspection Fund.

A violation of Section 55.6(b) of the [Illinois] Environmental Protection Act (415 ILCS 5/55.6(b)) is alleged for the following reason: **Failure to pay the required tire storage fee by January 1 of each year.**

7. Pursuant to Section 55.8(b) of the [Illinois] Environmental Protection Act (415 ILCS 5/55.8(b)), a person who accepts used tires for recycling under subsection (a) shall not allow the tires to accumulate for periods of more than 90 days.

A violation of Section 55.8(b) of the [Illinois] Environmental Protection Act (415 ILCS 5/55.8(b)) is alleged for the following reason: **Waste tires have accumulated on site longer than 90 days.**

8. Pursuant to 35 Ill. Adm. Code 848.202(b)(4), at sites at which more than 50 used or waste tires are located the owner or operator shall comply with the following requirement: Used or waste tires shall be drained of water on the day of generation or receipt.

A violation of 35 Ill. Adm. Code 848.202(b)(4) is alleged for the following reason: **Failure to drain the water from used/waste tires stored inside the box trailer.**

9. Pursuant to 35 Ill. Adm. Code 848.202(b)(5), at sites at which more than 50 used or waste tires are located the owner or operator shall comply with the following requirement: 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.

A violation of 35 Ill. Adm. Code 848.202(b)(5) is alleged for the following reason: **Failure to prevent water from accumulating inside waste tires that have been stored on site longer than 14 days.**

10. Pursuant to 35 Ill. Adm. Code 848.202(c)(1), in addition to the requirements set forth in subsection [848.202] (b), the owner or operator shall comply with the following requirement at sites at which more than 500 used or waste tires are located. A contingency plan, which meets the requirements of Section 848.203 shall be maintained.

A violation of 35 Ill. Adm. Code 848.202(c)(1) is alleged for the following reason: **There were more than 500 tires on site and no Contingency Plan on site.**

11. Pursuant to 35 Ill. Adm. Code 848.202(c)(2), in addition to the requirements set forth in subsection [848.202] (b), the owner or operator shall comply with the following requirement at sites at which more than 500 used or waste tires are located. The recordkeeping and reporting requirements of [35 Ill. Adm. Code 848] Subpart C shall be met.

A violation of 35 Ill. Adm. Code 848.202(c)(2) is alleged for the following reason: There are no tire disposal records on site.

12. Pursuant to 35 Ill. Adm. Code 848.302(a)(1), the owner or operator shall keep a record of used and waste tires at the site. The owner and operator shall keep the following records:

1) Daily Tire Record
2) Annual Tire Summary

A violation of 35 Ill. Adm. Code 848.302(a)(1) is alleged for the following reason: **Tire storage sites that maintain more than 500 used/waste tires are required to keep a Daily Tire Record on site. There was no Daily Tire Record on site.**

13. Pursuant to 35 Ill. Adm. Code 848.302(a)(2), the owner or operator shall keep a record of used and waste tires at the site. The owner and operator shall keep the following records:

1) Daily Tire Record
2) Annual Tire Summary

A violation of 35 Ill. Adm. Code 848.302(a)(2) is alleged for the following reason: **Tire storage sites that maintain more than 500 used/waste tires are required to keep an Annual Tire Summary. There is no evidence that an Annual Tire Summary was submitted to Springfield Headquarters.**

14. Pursuant to 35 Ill. Adm. Code 848.304(c), the Annual Tire Summary shall be received by the Agency on or before January 31 of each year and shall cover the preceding calendar year.

A violation of 35 Ill. Adm. Code 848.304(c) is alleged for the following reason: **Failure to submit an Annual Tire Summary by January 31 of each year.**

15. Pursuant to 35 Ill. Adm. Code 848.305, copies of all records required to be kept under this [35 Ill. Adm. Code 848] Subpart [C] shall be retained by the owner and operator for three years and shall be made available at the site during the normal business hours of the operator for inspection and photocopying by the Agency.

A violation of 35 Ill. Adm. Code 848.305 is alleged for the following reason: **No tire records were found on site.**

16. Pursuant to 35 Ill. Adm. Code 848.601(a)(1), except as provided in subsection [848.601] (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 [35 Ill. Adm. Code 848] Subpart [F], 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 [35 Ill. Adm. Code 848] Subpart [F].

A violation of 35 Ill. Adm. Code 848.601(a)(1) is alleged for the following reason: **Failure to register as an Illinois registered tire transporter.**

17. Pursuant to 35 Ill. Adm. Code 848.601(a)(2), except as provided in subsection [848.601] (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 [35 Ill. Adm. Code 848] Subpart [F], 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 [35 Ill. Adm. Code 848] Subpart [F].

A violation of 35 Ill. Adm. Code 848.601(a)(2) is alleged for the following reason: **Failure to display an Illinois registered tire transporter placard on your vehicle.**

Suggested Resolutions

<u>Immediately</u> complete the attached Notification/Registration form and pay the required tire storage fee for 2005.

By June 19, 2005, dispose of all used/waste tires on site using an Illinois registered tire transporter.

Or

Immediately drain all water from the used/waste tires on site. Immediately store all the used tires in such a manner as to prevent them from accumulating water. Waste tires must be disposed using an Illinois registered tire transporter.

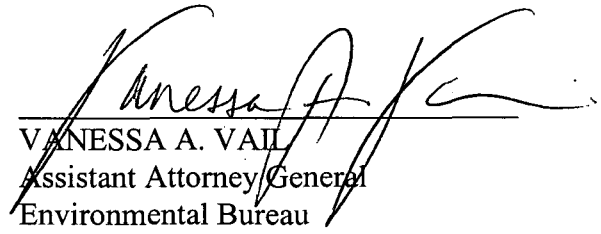
By June 19, 2005, complete the attached:

- **Contingency Plan – a sample plan was provided. Please modify this plan as needed.**
- **Annual Tire Summary. Please complete and submit this form to Springfield (Headquarters).**
- **Daily Tire Record. Immediately track the number of tires generated on your property. This form must be kept on site for IEPA review.**

The written response to this Violation Notice must include information in rebuttal, explanation, or justification of each alleged violation and must be submitted to the Illinois EPA by certified mail, within 45 days of receipt of this Violation Notice. The written response must also include a proposed Compliance Commitment Agreement that commits to specific remedial actions, includes specified times for achieving each commitment, and may include a statement that compliance has been achieved.

CERTIFICATE OF SERVICE

I, VANESSA A. VAIL, an Assistant Attorney General, do certify that I caused to be mailed this 14th day of March 2007, a true and correct copy of the attached MOTION TO STRIKE FIRST AMENDED 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.



VANESSA A. VAIL
Assistant Attorney General
Environmental Bureau