ILLINOIS POLLUTION CONTROL BOARD
June 7, 2007

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 06-177
	)	(Enforcement - Public Water Supply)
SHERIDAN SAND & GRAVEL CO.,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by G.T. Girard):

The People of the State of Illinois (People) filed a motion to strike affirmative defenses filed by Sheridan Sand & Gravel Company (Sheridan). The Board grants the motion and strikes the affirmative defenses. The following order begins with the procedural background, followed by relevant statutory provisions. The order then summarizes the affirmative defenses, the motion to strike, the response and the reply. Finally, the order sets forth the Board discussion and findings regarding the arguments.

BACKGROUND

On May 22, 2006, the People filed a complaint against Sheridan (Comp.). On June 1, 2006, the Board accepted the complaint for hearing. On July 7, 2006, Sheridan filed a motion to dismiss challenging the legal sufficiency of the complaint. On July 28, 2006, the People filed a response in opposition to the motion. The Board denied the motion to dismiss on September 7, 2006.

On October 13, 2006, Sheridan filed an answer and affirmative defenses (Answer) to the five-count complaint. Sheridan set forth five affirmative defenses in the answer. *See generally* Answer at 17-33. On November 13, 2006, the People filed a motion to strike affirmative defenses. On November 27, 2006, Sheridan filed a motion for leave to amend the answer and affirmative defenses (Amend Ans.). The People filed a response objecting to the motion to amend on December 11, 2006. On December 28, 2006, Sheridan replied to the People's response. On January 26, 2007, the Board granted the motion to amend the answer and affirmative defenses and denied the motion to strike affirmative defenses as moot. However, the Board allowed the People to refile the motion to strike based on the amended defenses.

On March 13, 2007, the People filed a motion to strike the first amended affirmative defenses (Mot.). On April 4, 2007, Sheridan filed a response (Resp.) to the motion. On April 17, 2007, the People filed a reply (Reply).

The complaint concerns Sheridan's 291.56-acre sand and gravel mine at 2679 North 4201 Road, Sheridan, LaSalle County. Count I of the complaint alleges that Sheridan violated Section

55(d)(1) of the Environmental Protection Act (Act) (415 ILCS 5/55(d)(1) (2004)) by operating a tire storage facility and failing to register the site with the Illinois Environmental Protection Agency (Agency). Comp. at 3. Count I further alleges that Sheridan failed to certify the site's compliance with standards, to report the number of tires accumulated, and the vector controls used at the site. Comp. at 4. Finally, Count I alleges that Sheridan failed to pay the fees required by the Act and Board regulations to the Agency. *Id*.

Count II of the complaint alleges that Sheridan violated Section 55(e) of the Act (415 ILCS 5/55(e) (2004)) by storing or disposing of used and/or waste tires in violation of the Board's rules. Comp. at 6. Count III also alleges violations of Section 55(e) of the Act as well as violations of the Board's rules at 35 Ill. Adm. Code 848.304(a), (c) and 848.305. Comp. at 7-8. Count III alleges that these violations occurred because Sheridan failed to maintain and submit annual tire summaries or to maintain records at the site. *Id*.

Count IV alleges that Sheridan violated Sections 55(d)(1), 55.6(b), and 21(k) of the Act (415 ILCS 5/21(k), 55(d)(1), and 55.6(b) (2004)). Count IV alleges that these violations occurred because Sheridan was operating a tire storage site that contained more than 50 used tires and Sheridan failed to pay the required registration fee. Comp. at 9.

Count V alleges that Sheridan violated Section 55(g) of the Act (415 ILCS 5/55(g) (2004)) by transporting used or waste tires to the site. Comp. at 10.

LEGAL BACKGROUND ON AFFIRMATIVE DEFENSES

The Board's procedural rules provide 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 hearing." 35 Ill. Adm. Code 103.204(d). If a pleading does not admit the opposing party's claim, but instead attacks the sufficiency of that claim, it is not an affirmative defense. Worner Agency v. Doyle, 121 Ill. App. 3d 219, 222-23, 459 N.E.2d 633, 636 (4th Dist. 1984). In a valid affirmative defense, the respondent alleges "new facts or arguments that, if true, will defeat . . . the government's claim even if all allegations in the complaint are true." People v. Community Landfill Co., PCB 97-193, slip op. at 3 (Aug. 6, 1998). The Board has also defined an affirmative defense as a "response to a plaintiff's claim which attacks the plaintiff's legal right to bring an action, as opposed to attacking the truth of claim." Farmer's State Bank v. Phillips Petroleum Co., PCB 97-100, slip op. at 2 n.1 (Jan. 23, 1997) (quoting *Black's Law Dictionary*). Furthermore, "[t]he Board has previously held that affirmative defenses that concern factors in mitigation are not an appropriate affirmative defense to a claim that a violation has occurred." People v. Texaco Refining and Marketing, Inc., PCB 02-3, slip op. at 5 (Nov. 6, 2003); citing People v. Geon Co., Inc., PCB 97-62 (Oct. 2, 1997); People v. Midwest Grain Products of Illinois, Inc., PCB 97-179 (Aug. 21, 1997).

STATUTORY BACKGROUND

Section 31 of the Act (415 ILCS 5/31 (2004)) provides:

(a)

(1) Within 180 days of becoming aware of an alleged violation . . ., the Agency shall issue and serve, . . . upon the person complained against a written notice informing that person that the Agency has evidence of the alleged violation.

* * *

(2) A written response to the violations alleged shall be submitted to the Agency, by certified mail, within 45 days of receipt of notice by the person complained against, unless the Agency agrees to an extension. The written response shall include:

* * *

(3) If the person complained against fails to respond in accordance with the requirements of subdivision (2) of this subsection (a), the failure to respond shall be considered a waiver of the requirements of this subsection (a) and nothing in this Section shall preclude the Agency from proceeding pursuant to subsection (b) of this Section.

(4) A meeting requested pursuant to subdivision (2) of this subsection (a) shall be held without a representative of the Office of the Illinois Attorney General or the State's Attorney of the county in which the alleged violation occurred, within 60 days of receipt of notice by the person complained against, unless the Agency agrees to a postponement. At the meeting, the Agency shall provide an opportunity for the person complained against to respond to each alleged violation, suggested resolution, and suggested implementation time frame, and to suggest alternate resolutions.

* * *

(8) Nothing in this subsection (a) is intended to require the Agency to enter into Compliance Commitment Agreements for any alleged violation that the Agency believes cannot be resolved without the involvement of the Office of the Attorney General or the State's Attorney of the county in which the alleged violation occurred, for, among other purposes, the imposition of statutory penalties.

* * *

(b) 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 or the State's Attorney of the county in which the alleged violation

occurred 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. Nothing in this subsection is intended to preclude the Agency from following the provisions of subsection (c) or (d) of this Section or from requesting the legal representation of the Office of the Illinois Attorney General or the State's Attorney of the county in which the alleged violations occurred for alleged violations which remain the subject of disagreement between the Agency and the person complained against after the provisions of this subsection are fulfilled.

(c)

(1) For alleged violations which remain the subject of disagreement between the Agency and the person complained against following . . . fulfillment of the requirements of subsections (a) and (b) of this Section, the Office of the Illinois Attorney General . . . shall issue and serve upon the person complained against a written notice, together with a formal complaint . . .. 415 ILCS 5/31 (2004)

Section 55.5 of the Act (415 ILCS 5/55.5 (2004)) provides:

(a) The Agency shall investigate alleged violations of this Title XIV, or of any regulation promulgated hereunder, or of any approval granted by the Agency, and may cause such other investigations to be made as it may deem advisable.

(b) If an investigation discloses that a violation may exist, the Agency shall take action pursuant to Title VIII of this Act in a timely manner.

(c) 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 . . . shall issue and serve upon the person complained against a written warning notice informing such person that the Agency . . . intends to take such action. Such written warning notice shall specify the alleged violation, describe the corrective action

> which should be taken, and provide a period of 30 days in which one of the following response actions may be taken by such person:
>
> (1) initiation and completion of the corrective action, and notification of the Agency or unit of local government in writing that such action has been taken; or (2) notification of the Agency or unit of local government in writing that corrective action will be taken and completed within a period of 45 days from the date of issuance of the warning notice.
>
> In the event that the person fails to take a response action, initiates but does not adequately complete a response action, or takes other action in contravention of the described corrective action, the Agency or unit of local government may proceed pursuant to subsection (b) of this Section. If the same person has been issued 2 written warning notices for similar violations in any calendar year, thereafter the Agency or unit of local government may proceed pursuant to subsection (b) without first following the provisions of this subsection for the remainder of such calendar year with respect to such person. 415 ILCS 5/55.5 (2004).

AFFIRMATIVE DEFENSES

Sheridan set forth three affirmative defenses, each in the alternative. Amend. Ans. at 17-33. Generally, each alleged affirmative defense relates to the Agency's actions prior to the filing of the enforcement action and a claim that the Agency's failure to follow statutorily prescribed procedures bars a finding against Sheridan on the allegations in the complaint. The following discussion will set forth the each alleged affirmative defense and summarize the reasoning of Sheridan.

First Affirmative Defense (Section 55.5(c) of the Act)

Sheridan argues as a first affirmative defense that the complaint is barred because of the Agency's failure to comply with the requirements of Sections 31(b), 31(c) and 55.5(c) of the Act (415 ILCS 5/31(b), (c), and 55.5(c) (2004)) and that the Board is without subject matter jurisdiction. Amend. Ans. at 17. Sheridan asserts that pursuant to these sections of the Act, the Board is without subject matter jurisdiction. *Id.* Sheridan opines that Section 55.5(c) of the Act (415 ILCS 5/55.5(c) (2004)) requires the Agency to take certain steps before pursuing an enforcement action for violations of Section 55(a), (b), or (c) of the Act (415 ILCS 5/55(a), (b), and (c) (2004)). Amend. Ans. at 19. Sheridan states that Section 55.5(c) requires the Agency to serve a warning notice detailing the corrective action that must be taken within 30 to 45 days of receipt of the notice. *Id.* If the party fails to undertake the corrective action, Sheridan argues that only then may an enforcement action proceed pursuant to Section 55.5(c) of the Act (415 ILCS 5/55.5(c) (2004)). *Id.*

Sheridan asserts that, "despite there being alleged violations of Sections 55(a)-(c) of Title XIV of the Act" the Agency never sent Sheridan a written warning. Amend. Ans. at 19. Sheridan notes that instead, on May 4, 2005, the Agency sent a "violation notice" pursuant to Section 31(a)(1) of the Act (415 ILCS 5/31(a)(1) (2004)). Sheridan indicates that the violation

notice included allegations of violations of Sections 55(a)-(c) of the Act (415 ILCS 5/55(a)-(c) (2004)) as well as alleged violations of other provisions of the Act. Sheridan asserts that the violation notice was illegal and barred by the provisions of Section 55.5(c) of the Act (415 ILCS 5/55.5(c) (2004)). *Id*.

Sheridan argues that the statutory scheme requires the Agency to comply with Section 55.5(c) of the Act (415 ILCS 5/55.5(c) (2004)) before proceeding under Section 31 of the Act (415 ILCS 5/31 (2004)). Amend. Ans. at 20. Sheridan asserts that the plain language of Section 31(b) requires compliance with Section 31(a) before a referral to the Attorney General's Office may occur. *Id*. Further, Sheridan argues that Section 31(a) requires compliance with Section 55.5(c) before proceeding under Section 31. *Id*. Sheridan maintains that the Agency sending of the violation notice, pursuant to Section 31 was "in direct contravention of the requirements of Section 55.5(c) of the Act" and the Agency therefore did not fulfill the requirements of Section 31. *Id*. Sheridan argues that because the Agency did not fulfill the statutory requirements, the Agency was barred from sending a notice of intent to pursue legal action under Section 31(b). *Id*.

Sheridan notes that the Agency did send a notice of intent on August 26, 2005, pursuant to Section 31(b) of the Act (415 ILCS 5/31(b) (2004)). Amend. Ans. at 20-21. However, Sheridan reiterates that the notice of intent was barred and illegal because of the Agency's failure to comply with Sections 31 and 55.5(c) of the Act (415 ILCS 5/31 and 55.5(c) (2004)). Amend. Ans. at 21. Furthermore, Sheridan argues that pursuant to Section 31(c)(1) of the Act (415 ILCS 5/31(c)(1) (2004)), before the Attorney General may proceed with a complaint, there must be a waiver by the person complained against, compliance with a compliance commitment agreement, or the Agency's compliance with Sections 31(a) and (b) of the Act (415 ILCS 5/31(a) and (b) (2004)). *Id*. Sheridan asserts that there has not been a waiver of the requirements. *Id*.

Sheridan maintains that the Agency's failure to fulfill the requirements of Section 55.5(c) of the Act (415 ILCS 5/55.5(c) (2004)) precludes enforcement by the Agency or the Attorney General. Amend. Ans. at 22. Sheridan further maintains that the Agency's failure also precludes the Board from holding a hearing or from issuing an order pursuant to such a hearing because the Board is without subject matter jurisdiction. *Id*.

Second Affirmative Defense (Compliance)

In the alternative, Sheridan argues as an affirmative defense that the Board is without subject matter jurisdiction because of the Agency's failure to comply with the requirements of Sections 31(b), 31(c) and 55.5(c) of the Act (415 ILCS 5/31(b), (c), and 55.5(c) (2004)). Amend. Ans. at 23-24. More specifically, Sheridan asserts that pursuant to Section 31(a)(1)(C) of the Act (415 ILCS 5/31(a)(1)(C) (2004)) the violation notice contained "Suggested Resolutions" of the alleged violations. Amend. Ans. at 24. Sheridan states that on June 13, 2005, Sheridan informed the Agency that Sheridan had completed the "Suggested Resolutions" in its entirety and the letter was sent within 45 days of receipt of the violation notice. *Id*. Sheridan asserts that by law the violation notice constituted a written warning notice and the suggested resolution constituted corrective action under the provisions of Section 55.5(c). Amend. Ans. at 25. Therefore, Sheridan maintains that the completion of the suggested

resolution constitutes a timely completion of corrective action under Section 55.5(c) (415 ILCS 5/55.5(c) (2004)) and precludes enforcement under Section 31 of the Act (415 ILCS 5/31 (2004)). *Id.*

Third Affirmative Defense (Section 31(b) of the Act)

Also in the alternative, Sheridan asserts that the Board is without subject matter jurisdiction because of the Agency's failure to properly proceed under Sections 31(a) and (b) of the Act (415 ILCS 5/31(a) and (b) (2004)). Amend. Ans. at 27. Sheridan asserts that pursuant to Section 31(b) of the Act (415 ILCS 5/31(b) (2004)) the Agency is required to meet with the party and make an effort to resolve any allege violations. Amend. Ans. at 28. Sheridan maintains that "if and only if" the Agency meets the statutory obligation may the Agency refer enforcement to the Attorney General. *Id.*

Sheridan argues that there has been no waiver of the requirements of Section 31 of the Act (415 ILCS 5/31 (2004)). Amend. Ans. at 29. Further, Sheridan requested a meeting with the Agency and the Agency indicated that it was not the Agency's practice to resolve alleged violations at that meeting. Amend. Ans. at 30. According to Sheridan, the Agency indicated that the meeting was a mere formality prior to referral to the Attorney General. *Id*. Sheridan asserts that a meeting was held and Sheridan attempted to resolve the alleged violations and provided affidavits contradicting the allegations. Amend. Ans. at 30-31. Sheridan asserts that the meeting was a pretense and the Agency thereby failed to fulfill the requirements of Section 31(b) of the Act (415 ILCS 5/31(b) (2004)). Amend. Ans. at 31. Because the Agency failed to comply with the statutory requirements, Sheridan maintains that the Agency was barred from referring the enforcement action to the Attorney General. *Id.*

MOTION TO STRIKE

The People argue that the alleged affirmative defenses are legally insufficient. Mot. at 3. The following section will summarize the People's arguments on each of the alleged affirmative defenses.

First Affirmative Defense (Section 55.5(c) of the Act)

The People argue that the first alleged affirmative defense has no basis because Section 55.5(c) of the Act (415 ILCS 5/55.5(c) (2004)) does not apply in this case. Mot. at 3. The People maintain that Section 55.5(c) of the Act applies only when violations of Section 55(a), (b), or (c) are alleged and in this case the complaint does not include allegations of violations of Section 55(a), (b), or (c) of the Act (415 ILCS 5/55(a), (b), (c) (2004)). *Id*. The People further argue that for alleged violations of any other section of Section 55, the proper enforcement is pursuant to Section 31 of the Act (415 ILCS 5/31 (2004)). *Id*.

The People assert that Sheridan's claims that the Agency failed to comply with the provisions of Section 31 of the Act (415 ILCS 5/31 (2004)) are also improperly raised. Mot. at 4. First complaint argues that because Section 55.5(c) of the Act does not apply, the assertion of the affirmative defense must fail. Mot. at 4-5. Secondly, the People note that the complaint in

this proceeding is filed also on behalf of the Attorney General and the provisions of Sections 31(a) and (b) of the Act do not limit the Attorney General's ability to bring an enforcement action on her own motion. Mot. at 5.

The People assert that Sheridan's arguments do not address the State's underlying cause of action, but instead argue the notification procedures for alleged violations of Sections 55(a)-(c) of the Act (415 ILCS 5/55(a)-(c) (2004)) were not properly followed. Mot. at 5-6. However, the People maintain that no allegations of violations of Section 55(a)-(c) of the Act (415 ILCS 5/55(a)-(c) (2004)) are included in the complaint. Mot. at 6. Therefore, the People argue that Sheridan cannot plead any set of facts to support the alleged affirmative defense. *Id*.

Second Affirmative Defense (Compliance)

As to the second affirmative defense, the People reiterate the arguments concerning the applicability of Section 55.5(c) of the Act (415 ILCS 5/55.5(c) (2004)) and further maintain that subsequent compliance is not a legally recognized affirmative defense. Mot. at 6. The People maintain that Section 33(a) of the Act (415 ILCS 5/33(a) (2004)) specifically states that subsequent compliance is not a defense to a violation. Mot. at 7. The People opine that the alleged affirmative defense of compliance is more appropriately considered in response to the penalty factors of Section 33(c) of the Act (415 ILCS 5/33(c) (2004)). The People point out that the Board has consistently held that an alleged affirmative defense, which speaks to the imposition of penalties, is not an affirmative defense. Mot. at 8, citing People v. Midwest Grain Products, PCB 97-179 (Aug. 21, 1997). Based on these arguments, the People assert that the second affirmative defense should be stricken.

The People further assert that the second alleged affirmative defense is nothing more than an argument for which Sheridan provides no statutory authority or affirmative statement by the Agency to support the alleged defense. Mot. at 9. The People argue that Sheridan's argument that completion of corrective action usurps the Agency's ability to prosecute an alleged violation is a "misstatement of facts and an erroneous attempt at establishing an affirmative defense." *Id*.

Third Affirmative Defense (Section 31(b) of the Act)

The People assert that the third alleged affirmative defense is a "self-serving analysis of the facts and an erroneous interpretation of the Act" by Sheridan. Mot. at 10. The People maintain that the third affirmative defense does not contain allegations of fact but rather is pure legal argument and is therefore not an affirmative defense. *Id*. The People argue that the Agency did fulfill the requirements of the statute by providing notice and opportunity for Sheridan to discuss the violations prior to referring the alleged violations to the Attorney General. Mot. at 10-11.

The People note that Sheridan does not contest that a notice of violations was provided nor does Sheridan argue that a meeting did not occur. Mot. at 11. The People further point out that Sheridan specifically acknowledges in the alleged affirmative defense that notice was given and a meeting held with the Agency. *Id*. Therefore, the People assert Sheridan confirms in the pleadings on the third affirmative defense that the Agency did comply with Section 31 of the Act

(415 ILCS 5/31 (2004)). *Id*. The People argue that based on this, the third affirmative defense is a "*non sequiter*" and should be stricken by the Board. *Id*.

The People maintain that Sheridan is arguing that Section 31(b) of the Act (415 ILCS 5/31(b) (2004)) imposes upon the Agency a statutory obligation to make a "good faith" effort at negotiation before proceeding with enforcement. Mot. at 12. The People assert that Section 31(b) of the Act (415 ILCS 5/31(b) (2004)) does not impose such an obligation. *Id*. Further, the People categorize the arguments of Sheridan, concerning the Agency's comments about the meetings, as "repetitive allegations" that constitute a "self-serving narration" by Sheridan. *Id*. The People assert that these "allegations" do not constitute an affirmative defense and should be stricken. *Id*.

The People argue that Sheridan has provided no statutory authority or case law that supports the proposition that the Agency must act in "good faith" under the provisions of Section 31 of the Act (415 ILCS 5/31 (2004)). Mot. at 13. The People maintain that Sheridan has inserted the "good faith" standard into the Section 31 process and then argues the Agency did not comply. *Id*. The People assert that Sheridan fails to allege facts specific to the procedural requirements with which the Agency failed to comply. *Id*. The People opine that the pleading is "devoid of factual allegations" and lacks the specificity required for pleading an affirmative defense. *Id*.

The People also point out that regardless of the Agency's actions under Section 31 of the Act (415 ILCS 5/31 (2004)), that provision does not limit the Attorney General's ability to bring an enforcement action on her own motion. Mot. at 14. The People note that whether the Attorney General may prosecute an action if the Agency fails to comply with Section 31 is not an issue of first impression for the Board. *Id*. The People argue that the Board previously decided that Section 31 does not apply to the Attorney General. Mot. at 15, citing People v. Eagle-Picher-Boge, PCB 99-152 (July 22, 1999); People v. Heuerman, PCB 97-92 (Sept. 18, 1997); and Geon. Based on these decisions, the People maintain Section 31 does not prevent the Attorney General from bringing an enforcement action on her own behalf. Mot. at 15.

RESPONSE TO MOTION

Generally, Sheridan argues that the affirmative defenses are legally sufficient and the Board must deny the motion to strike. Resp. at 1-2. Sheridan asserts that a motion to strike an affirmative defense "admits well-pleaded facts constituting the defense, only attacking the legal sufficiency of the facts. Resp. at 2. Sheridan maintains that based on that standard the Board should deny the motion to strike. The following paragraphs summarize the more detailed response on each of the affirmative defenses.

First Affirmative Defense (Section 55.5(c) of the Act)

Sheridan argues that this alleged affirmative defense meets all of the Board's standards for an alleged affirmative defense. Resp. at 5. Further, Sheridan maintains that the affirmative defense includes allegations of new facts or arguments that if proven defeat the claim of the People. *Id*.

Sheridan asserts that the State is barred from bringing an enforcement action because the State failed to serve notice pursuant to Section 55.5(c) of the Act (415 ILCS 5/55.5(c) (2004)). Resp. at 2. Sheridan maintains that the violation notice served on Sheridan included allegations that Sections 55(a)-(c) of the Act had been violated. Resp. at 3. Therefore, Sheridan asserts that the provisions of Section 55.5(c) were required to be followed and in the instant case the Agency did not do so. *Id*. Sheridan maintains that the Agency's failure to proceed pursuant to Section 55.5(c) of the Act defeats the claimed allegations brought by the Attorney General. Resp. at 4.

Sheridan asserts that the People do not dispute that Section 55.5(c) was not followed, but instead argues that there is no allegation of a violation of Sections 55(a)-(c) in the complaint. Resp. at 8. Sheridan opines that the argument "somehow whitewashes" the notice of violation and notice of intent which did contain allegations of violation of Sections 55(a)-(c). *Id*. Sheridan argues that this misses the point that if Section 55.5(c) had been followed, no complaint would have been filed. *Id*. Sheridan also asserts that the warning notice and opportunity to cure included in Section 55.5(c) are clearly jurisdictional and failure to follow bars the claim. Resp. at 12-13.

Furthermore Sheridan maintains that compliance with Section 55.5(c) is a precondition for enforcement under Section 31 of the Act (415 ILCS 5/31 (2004)). Resp. at 4. Sheridan asserts that Section 31(a) requires compliance with Section 55.5(c) as a precondition to enforcement under Section 31. *Id*. Sheridan opines that these "cumulative violations" of statutory procedures result in the Attorney General being barred from filing a complaint against Sheridan. *Id*.

Sheridan maintains that Section 55.5(c) allows an opportunity to "cure" violations and that opportunity was not given to Sheridan in this case. Resp. at 5-7. Thus, Sheridan argues the affirmative defense squarely meets the definition of an affirmative defense and should not be stricken. Resp. at 7.

Sheridan also relies on People v. Chiquita Processed Foods, L.L.C., PCB 02-156 (Nov. 21, 2002), in arguing that the written notice requirements of Sections 31 and 55.5(c) of the Act (415 ILCS 5/31 and 55.5(c) (2004)) must be followed as a precondition to enforcement. Resp. at 13. Sheridan argues that under Chiquita, the Attorney General is not free to bring an enforcement action where the Agency failed to follow Section 31 of the Act before referring the case to the Attorney General. Resp. at 14. Sheridan asserts that the provisions of Section 55.5(c) are analogous to the requirements of Section 31 and therefore the Attorney General cannot bring an action against Sheridan. *Id*.

Second Affirmative Defense (Compliance)

Sheridan argues that the second affirmative defense differs from the first in that Sheridan is claiming that the May 4, 2005 notice acted by operation of law as a warning notice pursuant to Section 55.5(c) of the Act (415 ILCS 5/55.5(c) (2004)). Resp. at 15. Sheridan argues that the "suggested resolution" was completed in a timely manner and the "conditions of the Violation Notice" were satisfied. Resp. at 16. Sheridan opines that the completion of the suggested

resolutions bars the claims in the complaint pursuant to Section 55.5(c) of the Act. *Id*. Sheridan maintains that this alleged affirmative defense is not a response to the penalty factors; but rather argues that enforcement is barred by Sheridan's actions. Resp. at 18-19.

Third Affirmative Defense (Section 31(b) of the Act)

Sheridan argues that the third affirmative defense is that the claims are barred because the Agency failed to comply with Section 31(b) of the Act (415 ILCS 5/31(b) (2004)). Resp. at 19. Sheridan argues that Section 31(b) requires the Agency to meet with the alleged violator and to make an effort to resolve the violations and the Agency did not do so here. Resp. at 19-20. Sheridan concedes that a meeting was held but alleges that the Agency did not attempt to resolve the violations and thereby failed to comply with Section 31(b). Resp. at 22.

Sheridan maintains that the People dispute the facts alleged in the affirmative defense and this is not a proper response to an affirmative defense. Resp. at 24-25. Sheridan asserts that a motion to strike an affirmative defense "admits well-pleaded facts constituting the defense" and attacks the legal sufficiency of the facts. Resp. at 25. Sheridan maintains that the People's "disputation and derision of the facts" is inappropriate and only an argument attacking the sufficiency of the facts is appropriate. *Id*. Sheridan opines that such an argument is absent here. *Id*.

Sheridan notes that the People admit Section 31(b) imposes a duty on the Agency; however, the People disputes that the Agency must negotiate in good faith. Resp. at 27. Sheridan maintains that given the People's admission, "then it follows, *ipso facto*, that allegations of a violation of that duty state a legally sufficient affirmative defense." Resp. at 28. Sheridan argues that the facts are plainly set forth in the answer and the alleged affirmative defenses must not be stricken. *Id*.

Sheridan responds to the People's argument that the Attorney General need not follow Section 31(b) by relying on People v. Chiquita Processed Foods, L.L.C., PCB 02-156 (Nov. 21, 2002). Sheridan asserts that the cases relied upon by the People predate the Board's decision in Chiquita and that decision provides that the Section 31 requirements are mandatory. Resp. at 34.

REPLY

The People reiterate that the three alleged affirmative defenses should be stricken and offer specific arguments to each. The following paragraphs will summarize the reply to each affirmative defense.

First Affirmative Defense (Section 55.5(c) of the Act)

The People assert that Sheridan's defense under Section 55.5(c) of the Act (415 ILCS 5/55.5(c) (2004)) is inappropriate as the complaint does not include allegations of any violation of Sections 55(a)-(c) of the Act (415 ILCS 5.55(a)-(c) (2004)). Reply at 2. Because the complaint does not allege violations under Sections 55(a)-(c), the People maintain whether the Agency complied with Section 55.5(c) is irrelevant in deciding whether Sheridan committed the

alleged violations. *Id*. The People assert that the affirmative defense is therefore legally insufficient and should be stricken. *Id*.

The People also argue that the Agency did comply with the notice and referral process of Sections 31 and 55.5(c) of the Act (415 ILCS 5/31 and 55.5(c) (2004)). Reply at 2. The People opine that since the Agency complied with the statute and the defense does not attack the truth of that allegation, the defense must be stricken. Reply at 3. The People also opine that even if the Agency had not complied with the provisions of Section 31, the Attorney General is authorized to bring the enforcement action on her own motion and the defense should be stricken. *Id*.

The People point out that in each count, the complaint specifically states that the count is brought on behalf of the People by the Attorney General on her own motion and at the request of the Agency. Reply at 4. The People argue that while Chiquita held that Section 31 procedures are a precondition for a referral by the Agency, Section 31 is not a limitation on the Attorney General. Reply at 4, citing People v. Barger Engineering, Inc., PCB 06-82 (Mar. 16, 2006). The People concede that the Board did dismiss certain counts in Chiquita because the Agency failed to follow the Section 31 procedures before referral to the Attorney General. Reply at 4. The People maintain that in Chiquita, the Attorney General was not bringing a complaint on her own motion but rather pursuant to a referral. *Id*. The People point out that Chiquita was therefore factually distinguishable. Reply at 4-5.

Second Affirmative Defense (Compliance)

The People assert that the second affirmative defense speaks to penalty and not the cause of action. Reply at 5. The People argue that compliance does not mean that enforcement automatically ceases upon correction of the violation. Reply at 5-6. The People assert that the Board has never interpreted the Act in a manner that would support respondent's claim and respondent's claim is a factor in mitigation of penalty. Reply at 6, citing People v. Texaco Refining and Marketing, Inc., PCB 02-3 (Nov. 6, 2003).

The People note that the Board has repeatedly held that a defense, which speaks to the imposition of a penalty rather than the underlying cause of action, is not an affirmative defense. Reply at 6, citing People v. Community Landfill Co., Inc., PCB 97-193 (Aug. 6, 1998); Geon; People v. Douglas Furniture of California, Inc., PCB 97-133 (May 1, 1997). Thus, the People maintain that the Board has "made it abundantly clear" that an alleged affirmative defense of compliance is not an affirmative defense and must be stricken. Reply at 7.

Third Affirmative Defense (Section 31(b) of the Act)

The People argue that the third affirmative defense should be stricken because not only did the Agency comply with Section 31 of the Act (415 ILCS 5/31 (2004)), but the provisions of Section 31 do not apply to the Attorney General. Reply at 7. The People note that the Board has consistently affirmed the Attorney General's authority to bring an action on her own motion. *Id*. The People assert that Sheridan argues through 15 pages of the response how the Agency failed to follow the dictates of Section 31. *Id*. The People state: "[i]n addition to this defense being irrelevant and a waste of the Board's time, the alleged actions of the Illinois EPA do not affect

whether the alleged violation occurred or not." Reply at 8. The People maintain that Section 31 is a precondition only to the Agency's referral of an action and not a precondition for the Attorney General to file an action on her own motion. *Id.*

DISCUSSION

In essence, the alleged affirmative defenses all relate to statutory provisions and Sheridan's claims that those provisions were not followed by the Agency. As a result of the Agency's failure, Sheridan argues that the Board cannot hear the complaint. Because the alleged affirmative defenses are related, the Board will not discuss them separately and instead in the following paragraphs will set forth the Board's analysis and findings on the arguments.

Section 55.5(c) of the Act

Section 55.5(c) of the Act (415 ILCS 5/55.5(c) (2004)) requires that, prior to taking action pursuant to the enforcement provisions of the Act for violation of Section 55(a), (b) or (c) of the Act, the Agency "shall issue and serve upon the person complained against a written warning notice informing such person that the Agency intends to take such action." 415 ILCS 5/55.5(c) (2004). Thus, as a precondition to the Agency pursuing enforcement for alleged violations of Section 55(a), (b), or (c) of the Act (415 ILCS 5/55(a), (b), or (c) (2004)), the Agency must follow specified procedures outlined in Section 55.5(c) of the Act (415 ILCS 5/55.5(c) (2004)).

Sheridan argues that because the Agency did notify Sheridan of potential violations of Sections 55(a)-(c) of the Act (415 ILCS 5/55(a)-(c) (2004)) prior to referring the case to the Attorney General, then Section 55.5(c) applies to the complaint. The Board is not persuaded by this argument. The plain language of Section 55.5(c) limits the applicability of the procedures in that section to alleged violations of Section 55(a), (b), or (c). The complaint as filed with the Board does not include any allegations of violations of Section 55(a), (b), or (c) of the Act (415 ILCS 5/55(a), (b), or (c) (2004)). Thus, by the terms of Section 55.5(c) of the Act (415 ILCS 5/55.5(c) (2004)), the Agency was not required to follow the procedures outlined in that section prior to proceeding with enforcement.

Furthermore, the Board is not convinced that the Agency by including allegations of potential violations of Section 55(a), (b), or (c) of the Act (415 ILCS 5/55(a), (b), or (c) (2004)) in the May 4, 2005 notice of violations, triggers the requirements of Section 55.5(c) of the Act (415 ILCS 5/55.5(c) (2004)). Certainly, any complaint referred by the Agency to the Attorney General that includes allegations of violations of Section 55(a), (b), or (c) of the Act (415 ILCS 5/55(a), (b), or (c) (2004)) could only be brought if the Agency followed the procedures of Section 55.5(c). However, the Board does not read Section 55.5(c) of the Act (415 ILCS 5/55.5(c) (2004)) to be a limitation on any enforcement action for any section of the Act merely because the Agency is investigating potential violations of Section 55(a), (b), or (c). Such an interpretation would expand dramatically the plain terms of Section 55.5(c) and limit enforcement pursuant to the Act in a manner contrary to the plain language of the Act. Therefore, the Board finds that Section 55.5(c) of the Act (415 ILCS 5/55.5(c) (2004)) does not apply and thus does not defeat the People's claim.

Based on the plain language of Section 55.5(c) of the Act (415 ILCS 5/55.5(c) (2004)), Section 55.5(c) does not bar the claims of the complaint. Also, because the Board finds that Section 55.5(c) of the Act (415 ILCS 5/55.5(c) (2004)) is inapplicable in this proceeding, Sheridan's argument that Section 55.5(c) is a precondition to enforcement actions under Section 31 also must fail. Therefore, the Board strikes the first alleged affirmative defense because Sheridan has not alleged facts that if proven defeat the People's claim.

To the extent that the second alleged affirmative defense also relies on Agency's failure to comply with Section 55.5(c) of the Act (415 ILCS 5/55.5(c) (2004)), that defense too must be stricken. Further, to the extent that the second alleged affirmative defense alleges that there has been subsequent compliance, the Board also finds the defense must be stricken. The Board has long held that a defense of subsequent compliance speaks to the factors of Section 33(c) of the Act, which the Board considers when determining the appropriate penalty. *See, e.g.* People v. Community Landfill Co., Inc., PCB 97-193 (Aug. 6, 1998). More recently the Board has stated:

> The respondent's second alleged affirmative defense is not a valid affirmative defense because the defense does not attack complainant's legal right to bring an action. The Section 33(c) factor in respondent's second affirmative defense are considered by the Board in making final determinations as to whether a remedy is appropriate, but do not constitute an affirmative defense. People v. First County Homes, L.L.C., PCB 06-173, slip. op. at 4 (Sept. 21, 2006).

Therefore, the Board strikes the second affirmative defense.

Section 31

The third affirmative defense raised by Sheridan alleges that the Agency failed to comply with the requirements of Section 31 of the Act (415 ILCS 5/31 (2004)). Sheridan relies on Chiquita to support the argument. Sheridan's reliance on Chiquita is misplaced. In Chiquita. the Board stated:

> The Board has extensively addressed the requirements of Section 31 of the Act. In considering the legislative history of the 1996 amendments to Section 31 the Board has repeatedly found that they were not intended to bar the Attorney General from prosecuting an environmental violation. *See* People v. Eagle-Picher-Boge, PCB 99-152 (July 22, 1999); People v. Geon, PCB 97-62 (Oct. 2, 1997); and People v. Heuermann, PCB 97-92 (Sept. 18, 1997).
>
> Rather, the written notice required by Section 31(a)(1) is a precondition to the Agency's referral of the alleged violations to the Attorney General. People v. Chemetco, PCB 96-76 (July 8, 1998). The legislative history of Section 31 indicates that the legislature did not intend to prevent the Attorney General from bringing enforcement actions that are not based on an Agency referral. Chiquita, slip op 4-5.

The Board continued on to note that the Attorney General brought the complaint pursuant to a referral by the Agency and not on her own motion. Chiquita, slip op. 5. Therefore, the Board finds that the facts of Chiquita are distinguishable from this case where the complaint specifically indicates that the complaint is brought on the Attorney General's motion. Further, the Board finds that because the Attorney General brought the complaint on her own motion, whether or not the Agency complied with Section 31 of the Act (415 ILCS 5/31 (2004)) has no bearing on the allegations in the complaint.

The Board does note that in this case however, the Agency did comply with Section 31 of the Act (415 ILCS 5/31 (2004)). Sheridan concedes that the Agency issued a violation notice on May 4, 2005 (Resp. at 27). Sheridan further concedes that a meeting was held (Reply at 21-22). Sheridan argues however that the Agency did not make a "good faith effort" to resolve the issues with Sheridan. The Board has reviewed Section 31(a) of the Act (415 ILCS 5/31(b) (2004)) and in relevant part that section requires the Agency to "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 Board finds this language does not *require* that the Agency resolve any alleged violations; rather the language requires the Agency to offer an opportunity to meet with the person. The Agency did so here and in fact actually met with Sheridan.

Sheridan would have the Board read into the statute a requirement that the Agency negotiate in "good faith" to resolve the alleged violations. The Board is not convinced that the language provides for a "good faith" requirement. Therefore, the Board finds that the Agency did comply with Section 31 of the Act (415 ILCS 5/31 (2004)) and the third affirmative defense must be stricken.

CONCLUSION

The Board strikes the three alleged affirmative defenses set forth by Sheridan in the answer. None of the alleged defenses appropriately attack complainant's legal right to bring an action. Therefore the Board finds that all three alleged affirmative defenses are not proper affirmative defenses and the defenses must be stricken.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 7, 2007, by a vote of 4-0.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board