BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB No. 13-19
	)	
SHERIDAN-JOLIET LAND DEVELOPMENT, LLC, an Illinois limited-liability company, and SHERIDAN SAND & GRAVEL CO.,	)	
	)	
Respondents.	)	

REPLY IN SUPPORT OF
MOTION TO STRIKE AND DISMISS

Respondents, SHERIDAN-JOLIET LAND DEVELOPMENT, LLC, an Illinois limited-liability company, and SHERIDAN SAND & GRAVEL CO. (collectively "SHERIDAN"), by their attorney, Kenneth Anspach, pursuant to § 2-615 of the Code of Civil Procedure, 735 ILCS 2-615(a), § 2-619((a)(9) of the Code of Civil Procedure, 735 ILCS 2-619((a)(9), and §§ 101.100, 101.500 and 101.506 of the General Rules of the Pollution Control Board, 35 Ill. Adm. Code 101.100, 101.500 and 101.506, have moved the Pollution Control Board (the "Board") to strike and dismiss the Complaint (the "Complaint") of complainant, PEOPLE OF THE STATE OF ILLINOIS (the "STATE"), with regard to alleged violations at the N 4201 Road Site, Sheridan, Illinois. On February 27, 2013 the STATE filed its Complainant's Response to Respondents' Motion to Strike and Dismiss (the "STATE's Response"). SHERIDAN hereby files its reply memorandum.

I. BASES FOR DISMISSAL OF THE COMPLAINT.

As set forth in the Motion to Strike and Dismiss and Supporting Memorandum ("Motion to Dismiss"), Counts I-VI of the Complaint are substantially insufficient in law and must be

stricken pursuant to 735 ILCS 5/2-615. In particular, Count I fails to state a cause of action in regards to load checking because it alleges a violation of a superseded and non-existent regulation. Counts II-IV each fail to state a cause of action because each alleges an offense based upon a statute no longer in effect. Counts V-VI each fail to state a cause of action because each alleges a violation of a superseded and non-existent regulation.

Additionally, the Complaint must be dismissed under § 2-619(a)(9) of the Code of Civil Procedure, 735 ILCS 2-619(a)(9), as it is barred by the Attorney General's failure to comply with the requirement under § 31(c)(1) of the Act, 415 ILCS 5/31(c)(1), that the Attorney General must serve upon SHERIDAN, with the Complaint, a Notice That Financing May Be Available.

A. COUNTS I, V AND VI FAIL TO STATE CAUSES OF ACTION BECAUSE THEY ALLEGE A VIOLATION OF NON-EXISTENT REGULATIONS.

The Motion to Dismiss at 1-5 pointed out that Counts I, V and VI allege violations of various purported provisions of the Illinois Environmental Protection Act (the "Act"), 415 ILCS 5/1 *et seq.* and, specifically, 415 ILCS 5/22.51, entitled Clean Construction or Demolition Debris Fill Operations ("CCDD") and of the Board CCDD Regulations, 35 Ill. Adm. Code 1100.101 *et seq.* and 35 Ill. Adm. Code 1150.100 *et seq.* Specifically, the Complaint alleged violations of purported "Section 1100.205(a)(b)(c) of the Board CCDD Regulations, 35 Ill. Adm. Code 1100.205(a)(b)(c), [and (h)]."[1]

The Motion to Dismiss further pointed out that "*there is no* 'Section 1100.205(a)(b)(c) [and (h)] of the Board CCDD Regulations, 35 Ill. Adm. Code 1100.205(a)(b)(c) [and (h)].'" A review of the Board CCDD Regulations discloses no regulations with these section numbers assigned to them. It is elementary that no cause of action exists for violation of a non-existent regulation. This Board has previously held that it will not enforce a wrongly alleged regulation

[1] Complaint, Count I, par. 15, Count V, pars.15-16, and Count VI, pars. 15-16.

against a party respondent. *People v. John Prior and Industrial Salvage, Inc.*, PCB No. 93-248, July 7, 1995, 1995 Ill. ENV LEXIS 662.

In the STATE's Response at 12 the STATE argues that:

> Originally enacted on August 24, 2006, Part 1100 of Title 35 of the Illinois Administrative Code sets forth rules for CCDD fill operations. 35 Ill. Adm. Code 1100 *et seq.*; 30 Ill. Reg. 14534 On August 27, 2012, the Board's amendments to the rules for CCDD fill and uncontaminated soil operations became effective. 36 Ill. Reg. 13892.
>
> The Respondents contend that "there is no" Section 1100.205(a), (b) (c) and (h) of Title 35 of the Illinois Administrative Code. (Motion at pp. 2-3, 10.) This argument ignores the express language of the CCDD Amendments which unambiguously provides an effective date of August 27, 2012. 36 Ill. Reg. 13892.

Actually, the STATE's argument that the Board's amendments to the rules for CCDD fill operations "unambiguously provides an effective date of August 27, 2012" is precisely the point SHERIDAN is making here. Once the new rules became effective they supplanted and superseded the previous rules, including those under which Counts I, V and VI were brought, purported §§ 1100.205(a)(b)(c) and (h) of the Board CCDD Regulations, 35 Ill. Adm. Code 1100.205(a)(b)(c) and (h). This is the only conclusion that may be derived from the Board's own description of the "Scope and Applicability" of 35 Ill. Adm. Code, Part 1100, "Clean Construction or Demolition Debris Fill Operations and Uncontaminated Soil Fill Operations" ("the Board CCDD Regulations, as Amended"), which states:

> § 1100.101 Scope and Applicability
>
> a) This Part applies to *all clean construction or demolition debris (CCDD) fill operations* that are required to be permitted pursuant to § 22.51 of the Act…(Emphasis added.)

In other words, the Board CCDD Regulations, as Amended apply to "*all* clean construction or demolition debris (CCDD) fill operations." Because the amended regulations occupy the entire space, any regulations existing prior to August 27, 2012 are, therefore, no longer applicable.

Accordingly, when the Complaint, which was filed subsequent to August 27, 2012, seeks to charge SHERIDAN with purported violations of Board CCDD Regulations, it is obligated to charge SHERIDAN with violations of regulations that actually appear "on the books." The STATE apparently admits that SHERIDAN is in compliance with these regulations. The STATE's Response at 15 actually states that "the violations were corrected prior to the filing of the Complaint." Pursuant to § 49(e) of the Act, 415 ILCS 49(e):

> Compliance with the rules and regulations promulgated by the Board under this Act shall constitute a prima facie defense to any action, legal, equitable, or criminal, or an administrative proceeding for a violation of this Act, brought by any person.

That SHERIDAN is, in fact, in compliance with the Board CCDD Regulations, as Amended, means that SHERIDAN has "a prima facie defense to any action, legal, equitable, or criminal, or an administrative proceeding for a violation of this Act." Such a prima facie defense would also apply not only the allegations under Counts I, V and VI, but to those in the entire Complaint. Yet, the STATE, instead of conceding this defense, has in effect set forth allegations of violations of no-longer-existent regulations, and has proceeded to charge thereunder.

Compare the case at bar to that of *Mystik Tape, Div. of Borden, Inc. v. Pollution Control Board*, 60 Ill. 2d 330, 339-340 (1975), where the Court allowed the Pollution Control Board to enforce regulations of a predecessor enforcement board because it was specifically authorized by statute. Former § 49(c) of the Act, Ill. Rev. Stat. 1971, ch. 111 1/2, par. 1049(c), provided that "all rules and regulations" of such predecessor boards "shall remain in full force and effect until repealed, amended, or superseded by regulations under this Act." Tellingly, no such provision

remains in the Act with respect to former regulations. Without such a saving provision, they must simply fall by the wayside.

The STATE seeks to justify its attempted resuscitation of these defunct Board CCDD Regulations with three arguments. First, the STATE argues that there is such a thing as "old" 35 Ill. Adm. Code 1100.205(a)(b)(c) and (h. If so, where are they? Where do they exist? In which book of regulations are they presently codified? May someone go to the Board's website and download these regulations? May someone pick up a copy at the Board's offices? Certainly, nothing in 35 Ill. Adm. Code, Part 1100 states that regulations that have been amended out of existence are still around or that the Board reserves the right to apply them.

If the Illinois Environmental Protection Agency ("Illinois EPA") and the Board had the authority to apply such superseded regulations, which is doubtful given the absence of statutory authority to do so, and if they intended to do so, they at least needed to provide notice to the regulated community. Fair notice encapsulates "the principle that agencies must provide regulated parties 'fair warning of forbidden conduct or requirements.'" *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) (internal quotation marks and citations omitted.) No notice that these superseded requirements purportedly still remain in force was ever provided.

Moreover, the Complaint, itself, makes no reference to *old* 35 Ill. Adm. Code 1100.205(a)(b)(c). The Complaint speaks of such purported regulations in the present tense. For example, Count I, par. 14 alleges, in pertinent part: "Section 1100.205(a)(b)(c) of the Board CCDD Regulations, 35 Ill. Adm. Code 1100.205(a)(b)(c), titled Load Checking, *provides* in pertinent part, as follows..." (Emphasis added.) If such regulation at one time *provided* for something, it certainly no longer "*provides*" for *anything*. At a minimum, assuming *arguendo*

that these regulations may be resurrected from the trash heap of dead and discarded regulations, the Complaint, in order to aver a sufficient cause of action, would have to distinguish these purported regulations from regulations that actually, currently apply. It does not do so. Charges filed before an administrative agency need not be drawn with the same refinements and subtleties as pleadings in a court of record, but it is essential that the respondent before the agency be reasonably apprised by the complaint of the charges brought against him so as to enable him to intelligently prepare his defense. *Wierenga v. Board of Fire & Police Commissioners*, 40 Ill. App. 3d 270, 274 (1st Dist. 1976). Even that minimal standard was clearly not met here.

Second, the STATE argues that, "The Board made no substantive changes in the amendments to these respective rules."[2] Thus, the STATE makes a kind of "no harm, no foul" argument, *i.e.*, since the two sets of rules are purportedly equivalent, what's the big deal in applying the superseded set? However, the STATE's argument here simply begs the question: If they are equivalent, then why not did the STATE simply charge SHERIDAN under the current version of the regulations? The answer to that question is set forth in the STATE's Response at 12, as follows: "[O]wners and operators of CCDD fill operations were required to comply with the old rules until August 27, 2012, and thereafter the new rules governed." So, the STATE admits it is barred from bringing its Complaint under the "new rules," because the allegations concern purported violations that occurred on September 15, 2010 and June 1, 2011, when the superseded rules governed. Of course, the STATE failed to bring an action while the superseded rules were in effect. An implied admission is one which results from some act or failure to act of the party. *Black's Law Dictionary*, 4th Ed. at 44. *See also Keen v. Bump*, 310 Ill. 218, 220 (1923). By arguing "no harm, no foul" the STATE admits that by failing to act in a timely fashion, it did foul, and, in point of fact, fouled out.

---

[2] STATE's Response at 12

The STATE's third argument in support of charging under superseded regulations is that the Board CCDD Regulations, as Amended, do not apply retroactively. SHERIDAN has never asserted that the Board CCDD Regulations, as Amended, apply retroactively, and, thus, has no quarrel with the STATE's argument. However, that argument does not justify charging under regulations that have been amended out of existence.

Further, the Complaint alleges that because there was a violation of the non-existent "Section 1100.205(a)(b)(c) [and (h)] of the Board CCDD Regulations, 35 Ill. Adm. Code 1100.205(a)(b)(c). [and (h)]" then there were concomitant violations of (for Count I) of §1100.201(a) of the Board CCDD Regulations, 35 Ill. Adm. Code 1100.201(a), and §§ 22.51(a) and 22.51(b)(3)(ii) of the Act, 415 ILCS 5/22.51(a) and 22.51(b)(3)(ii),[3] (for Count V) §§ 22.51(a) and 22.51(b)(3)(ii) of the Act, 415 ILCS 5/22.51(a) and 5/22.51(b)(3)(ii),[4] and (for Count VI) §§ 22.51(a) and 22.51(b)(iii) and 22.51(b)(3)(ii) of the Act, 415 ILCS 5/22.51(a) and 5/22.51(b)(3)(ii).[5] Because the only violations alleged in Counts I, V and VI are those of superseded and non-existent regulations, then the alleged violation of such purported regulations did not result in any violation of the cited provisions of the regulations and the Act. Similarly, there could not have been any violation of SHERIDAN's permit, as alleged.[6]

B. COUNTS II, III AND IV EACH FAILS TO STATE A CAUSE OF ACTION BECAUSE EACH ALLEGES AN OFFENSE BASED UPON A STATUTE NO LONGER IN EFFECT.

As set forth in the Motion to Dismiss at 5-9, Count II alleges that SHERIDAN violated the site of origin requirements of § 22.51(f)(2)(A)(i) of the Act, 415 ILCS 5/22.51(f)(2)(A)(i).[7] Count III alleges that SHERIDAN violated the soil certification requirements of § 22.51(f)(2)(B)

[3] Complaint, Count I, par. 19.
[4] Complaint, Count V, par. 18.
[5] Complaint, Count VI, par. 17.
[6] Contrary to the assertion in the STATE's Response at Note 1 that the Motion to Dismiss "contains no argument regarding the contention in Count I that the Respondents violated Permit Operating Condition I.1" such argument is set forth in the Motion to Dismiss at 3.
[7] Complaint, Count II, par. 17

of the Act, 415 ILCS 5/22(f)(2)(B).[6] Count IV alleges SHERIDAN failed to maintain the soil documentation requirements of § 22.51(f)(2)(C) of the Act, 415 ILCS 5/22(f)(2)(C).[7] Yet, the requirements of §§ 22.51(f)(2)(A)-(C) of the Act, 415 ILCS 5/22(f)(2)(A)-(C) are no longer in effect. The provisions of § 22.51(f)(2)(A) of the Act, 415 ILCS 5/22(f)(2)(A), § 22.51(f)(2)(B) of the Act, 415 ILCS 5/22(f)(2)(B) and § 22.51(f)(2)(C) of the Act, 415 ILCS 5/22(f)(2)(C), expired on August 27, 2012 by the terms of § 22.51(f)(1) of the Act, 415 ILCS 5/22.51(f)(1), and § 22.51(f)(2) of the Act, 415 ILCS 5/22(f)(2).

Specifically, § 22.51(f)(1) of the Act, 415 ILCS 5/22.51(f)(1) provides, in pertinent part, as follows:

> *No later than one year after the effective date of this amendatory Act of the 96th General Assembly [P.A. 96-1416], the Agency shall propose to the Board, and, no later than one year after the Board's receipt of the Agency's proposal, the Board shall adopt, rules for the use of clean construction or demolition debris and uncontaminated soil as fill material at clean construction or demolition debris fill operations.* (Emphasis added.)

Thus, pursuant to the terms of § 22.51(f)(1) of the Act, 415 ILCS 5/22.51(f)(1), the General Assembly declared that by no later than two years following the amendatory enactment of P.A. 96-1416 on July 30, 2010 the Board was required to adopt "rules for the use of clean construction or demolition debris and uncontaminated soil as fill material at clean construction or demolition debris fill operations." Those rules were adopted by the Board in PCB No. R12-9 at 36 Ill. Reg. 13892, effective August 27, 2012, as amendments to the Board CCDD Regulations, 35 Ill. Adm. Code 1100.101 *et seq.*

Section 22.51(f)(2) of the Act, 415 ILCS 5/22(f)(2), in turn, provides that any and all requirements thereunder were only effective until the statutory deadline for the adoption of rules

[6] Complaint, Count III, par. 18
[7] Complaint, Count IV, par. 18

by the Board set forth by the General Assembly under § 22.51(f)(1) of the Act, 415 ILCS 5/22.51(f)(1). In that regard § 22.51(f)(2) of the Act, 415 ILCS 5/22(f)(2), provides, in pertinent part, as follows:

> *Until the effective date of the Board rules adopted under subdivision (f)(1) of this Section*, and in addition to any other requirements, *owners and operators of clean construction or demolition debris fill operations must do all of the following in subdivisions (f)(2)(A) through (f)(2)(D) of this §* for all clean construction or demolition debris and uncontaminated soil accepted for use as fill material. (Emphasis added.)

Thus, owners and operators of CCDD sites need only "do all the following in subdivisions (f)(2)(A) through (f)(2)(D) of this Section," "[u]ntil the effective date of the Board rules adopted under subdivision (f)(1) of this Section." That date is August 27, 2012 by virtue of the Board's rulemaking in PCB No. R12-9 at 36 Ill. Reg. 13892. In other words, the provisions of § 22.51(f)(2) of the Act, 415 ILCS 5/22(f)(2), were only enforceable until August 27, 2012. Thereafter, only the rules adopted by the Board "under subdivision (f)(1) of this Section" have been enforceable, *i.e.*, those rules adopted as amendments to the Board CCDD Regulations, 35 Ill. Adm. Code 1100.101 *et seq.*

The violations alleged in Counts II, III and IV against SHERIDAN are averred to have occurred on September 15, 2010. Thereafter, § 22.51(f)(2) of the Act, 415 ILCS 5/22(f)(2), expired on August 27, 2012, and the amendments to the Board CCDD Regulations, 35 Ill. Adm. Code 1100.101 *et seq.* took effect. Because § 22.51(f)(2) of the Act, 415 ILCS 5/22(f)(2), expired on August 27, 2012, it was not in effect when the Complaint was filed on October 31, 2012. By the same token, the amendments to the Board CCDD Regulations, 35 Ill. Adm. Code 1100.101 *et seq.*, were not in effect when the alleged violations occurred on September 15, 2010 and June 1, 2011. Therefore, neither the statute nor the rules are enforceable against

SHERIDAN.

The term "expiration" is defined at Black's Law Dictionary, 5th Ed. At 519 as:

> Cessation; termination from mere lapse of time, as the expiration of a lease, insurance policy, *statute*, and the like. Coming to close; termination or end. (Emphasis added.)

Thus, a statute may, by its own terms, expire or come to a close. That is what is extant here. That statutes expire has been long recognized in this state. *See Nance v. Howard*, 1 Ill. 242, 245 (1828). Section 22.51(f)(2) of the Act, 415 ILCS 5 22(f)(2), is no different.

The STATE's first argument in support of charging under statutory provisions that are no longer in effect is that Board CCDD Regulations, as Amended, which supplants those provisions, do not apply retroactively.[1] SHERIDAN has never asserted that the Board CCDD Regulations, as Amended, apply retroactively, and, thus, has no quarrel with the STATE's argument. However, that argument does not justify charging under § 22.51(f)(2) of the Act, 415 ILCS 5 22(f)(2), which, by its own terms, has expired.

The STATE next argues that this provision "has not been impliedly repealed or preempted."[2] Yet, these arguments, like that on retroactivity, are "straw man" arguments, never asserted by SHERIDAN. Expiration is not preemption, nor is it implied repeal.

The STATE also argues that no statute of limitations applies to § 22.51(f)(2) of the Act, 415 ILCS 5 22(f)(2). This is yet another straw man argument, never made by SHERIDAN.

SHERIDAN has merely pointed out that § 22.51(f)(2) of the Act, 415 ILCS 5/22(f)(2), is explicit that owners and operators of CCDD sites need only "do all the following in subdivisions (f)(2)(A) through (f)(2)(D) of this Section," "[u]ntil the effective date of the Board rules adopted under subdivision (f)(1) of this Section." At that juncture, § 22.51(f)(2) of the Act, 415 ILCS

[1] STATE's Response at 7-9.
[2] STATE's Response at 9-10.

5/22(f)(2), by its own terms, no longer applies, having expired as set forth therein. Accordingly, because the violations alleged in Counts II, III and IV rely upon an expired statute, they do not allege a cause of action.

II. THE COMPLAINT MUST BE DISMISSED UNDER § 2-619(a)(9) OF THE CODE OF CIVIL PROCEDURE, 735 ILCS 2-619(a)(9), AS IT IS BARRED BY THE ATTORNEY GENERAL'S FAILURE TO COMPLY WITH THE REQUIREMENTS OF § 31(c)(1) OF THE ACT, 415 ILCS 5/31(c)(1).

A. THE ARGUMENTS AT SECTIONS II(A), II(B) AND II(C) OF THE MOTION TO DISMISS ARE WITHDRAWN WITHOUT PREJUDICE.

The Motion to Dismiss, Sections II(A), II(B) and II(C), at 10-17 asserted that violations alleged in the Complaint at Counts VII, VIII and IX should be dismissed because Illinois EPA never sent SHERIDAN notice of these purported violations. In response to that assertion, the STATE attached to the STATE's Response as Exhibit "B" what appears to be a Notice of Violation dated May 11, 2011 apparently addressing those particular violations. On the hasis of Exhibit "B", SHERIDAN withdraws its arguments at Sections II(A), II(B) and II(C) of the Motion to Dismiss without prejudice to reasserting those arguments if subsequently warranted by the evidence.

B. THE COMPLAINT MUST BE STRICKEN AND DISMISSED DUE TO THE ATTORNEY GENERAL'S FAILURE TO COMPLY WITH THE REQUIREMENT UNDER § 31(c)(1) OF THE ACT, 415 ILCS 5/31(c)(1), THAT IT MUST SERVE UPON SHERIDAN NOTIFICATION THAT FINANCING MAY BE AVAILABLE TO CORRECT THE ALLEGED VIOLATIONS.

Under § 31(c)(1) of the Act, 415 ILCS 31(c)(1), the Attorney General is required to serve with any complaint brought thereunder a notification to the defendant that financing may be available to correct the alleged violations, as follows:

> (c)(1) For alleged violations which remain the subject of disagreement between the Agency and the person complained against following waiver pursuant to subdivision (10) of subsection (a) of this Section or 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...Such complaint* ***shall be*** *accompanied by a notification to the defendant that financing may be available, through the Illinois Environmental Facilities Financing Act [20 ILCS 3515/1 et seq.] to correct such violation.* (Bold and Emphasis added.)

Thus, § 31(c)(1) of the Act, 415 ILCS 5/31(c)(1), requires that, when filing a complaint under § 31 of the Act, 415 ILCS 5/31, the Attorney General must "serve upon the person complained against a written notice, together with a formal complaint." In addition, "Such complaint shall be accompanied by a notification to the defendant that financing may be available, through the Illinois Environmental Facilities Financing Act [20 ILCS 3515/1 et seq.] to correct such violation." In other words, in order to comply with the requirements of § 31(c)(1) of the Act, 415 ILCS 5/31(c)(1), the Attorney General must serve the defendant with a notice of filing together with a formal complaint, and must *also* serve the defendant contemporaneously with "a notification to the defendant that financing may be available, through the Illinois Environmental Facilities Financing Act [20 ILCS 3515/1 et seq.] to correct such violation." (The latter notice is hereinafter referenced as a "Notice That Financing May Be Available.") This Board may take judicial notice that no Notice That Financing May Be Available accompanied the Complaint in this cause.

This Board has held that the filing and serving of a Notice That Financing May Be Available is not only mandatory, but is jurisdictional. In *Illinois EPA v. Production Finishers and Fabricators, Inc.* ("*Production Finishers and Fabricators, Inc.*"), PCB No. 85-31, 1986 Ill. ENV LEXIS 8 (January 9, 1986), this Board held, as follows:

> ... Respondent moved to dismiss this enforcement action for failure of the Illinois Environmental Protection Agency to comply with mandatory language of the Environmental Protection Act which requires that a statement that financing may be available to correct

> violations accompany any complaint. Ill. Rev. Stat. 1983, ch. 111-1 2, par. 1031(a)... [12]
>
> ***
>
> *The Board finds that compliance with the requirement of Section 1031(a) is a jurisdictional prerequisite for the proper filing of an enforcement case before the Board. Accordingly, the motion to dismiss is granted* and this matter is dismissed without prejudice. (Emphasis added.)

Thus, in *Production Finishers and Fabricators, Inc.* this Board held that the filing of a Notice That Financing May Be Available "is a jurisdictional prerequisite for the proper filing of an enforcement case before the Board." Because it is a jurisdictional prerequisite, the Board dismissed the action.

For the same reason, here, the Board must dismiss the present action due to the Attorney General's failure to serve with the Complaint a Notice That Financing May Be Available. In support of this argument, SHERIDAN hereby explicitly incorporates by this reference SHERIDAN's Motion to Strike Amended Notice of Electronic Filing and Supporting Memorandum filed with the Board on March 29, 2013.

It is noteworthy that the requirements of § 31(c)(1) of the Act, 415 ILCS 5/31(c)(1), specifically apply to the "Office of the Illinois Attorney General." In this respect, these requirements are unlike the other requirements of § 31(a) and (b) of the Act, 415 ILCS 5/31(a) and (b), which this Board has interpreted to only apply to Illinois EPA and not the Attorney General. See, *e.g.*, *People v. Barger Engineering, Inc.*, PCB No. 06-82, 2006 Ill. ENV LEXIS 173 (March 16, 2006), where the Board stated:

---

[12] The notes to § 31 of the Act, 415 ILCS 5/31, indicate that the 1996 amendment to § 31 of the Act, 415 ILCS 5/31, by P.A. 89-596, effective August 1, 1996, added subsections (a) and (b) and redesignated former subdivision (a)(1) as present subdivision (c)(1). Accordingly, the requirement of a Notice That Financing May Be Available is now found at § 31(c)(1) of the Act, 415 ILCS 5/31(c)(1), as set forth above.

> In 1996, the legislature amended Section 31 of the Act (*see* P.A. 89-596, eff. Aug. 1, 1996) to require the Agency to "follow specific time-driven procedures" when a violation is discovered. ...
>
> ***
>
> The new procedures were codified in Section 31 (a) and (b) of the Act (415 ILCS 5/31(a) and (b) (2004)...
>
> ***
>
> The Board has consistently ruled that the Attorney General's authority to bring an enforcement action is not limited by the provisions of Section 31 (a) and (b) of the Act. (Citations omitted.)

Thus, while the Board has ruled in cases such as *Barger Engineering, Inc.* that § 31(a) and (b) of the Act, 415 ILCS 5/31(a) and (b), do not apply to the Attorney General, that view has never been extended to § 31(c)(1) of the Act, 415 ILCS 5/31(c)(1). In fact, just the opposite is true. As set forth above, in *Production Finishers and Fabricators, Inc.* the Board held that the filing of a Notice That Financing May Be Available "is a jurisdictional prerequisite for the proper filing of an enforcement case before the Board."

III. CONCLUSION.

In summary, Counts I-VI are substantially insufficient in law and must be stricken pursuant to 735 ILCS 5/2-615. In particular, Count I fails to state a cause of action in regards to load checking because it alleges a violation of a superseded and non-existent regulation. Counts II-IV each fail to state a cause of action because each alleges an offense based upon a statute no longer in effect. Counts V-VI each fail to state a cause of action because each alleges a violation of a superseded and non-existent regulation.

Additionally, the Complaint must be dismissed under § 2-619(a)(9) of the Code of Civil Procedure, 735 ILCS 2-619(a)(9), as it is barred by the Attorney General's failure to comply

with the requirement under § 31(c)(1) of the Act, 415 ILCS 5/31(c)(1), that the Attorney General must serve upon SHERIDAN, with the Complaint, a Notice That Financing May Be Available.

WHEREFORE, SHERIDAN moves that the Complaint be stricken and dismissed.

Respondents, SHERIDAN-JOLIET LAND DEVELOPMENT, LLC, an Illinois limited-liability company, and SHERIDAN SAND & GRAVEL CO.,

By: _____
their attorney

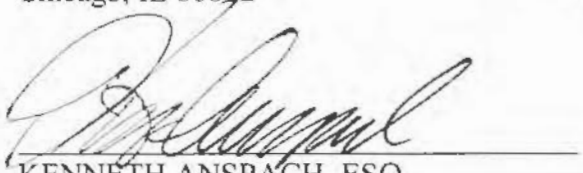
KENNETH ANSPACH, ESQ.
ANSPACH LAW OFFICE
111 West Washington Street
Suite 1625
Chicago, Illinois 60602
(312) 407-7888
Attorney No. 55305

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalties of perjury as provided by law pursuant to 735 ILCS 5/1-109, that the attached Reply in Support of Motion to Strike and Dismiss was __ personally delivered, _X_ placed in the U. S. Mail, with first class postage prepaid, ___ sent via facsimile and directed to all parties of record at the address(es) set forth below on or before 5:00 p.m. on the 12th day of April, 2013.

Kathryn A. Pamenter
Assistant Attorney General
Environmental Bureau
69 West Washington Street
18th Floor
Chicago, IL 60602

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, IL 60601



KENNETH ANSPACH, ESQ.
ANSPACH LAW OFFICE
111 West Washington Avenue
Suite 1625
Chicago, Illinois 60602
(312) 407-7888