

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

PEOPLE OF THE STATE OF ILLINOIS, )  
)  
Complainant, )  
)  
vs. )  
)  
RIVERDALE RECYCLING, INC., an )  
Illinois corporation, and TRI-STATE )  
DISPOSAL, INC., an Illinois corporation, )  
)  
Respondents. )

No. PCB 03-73

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STATE OF ILLINOIS  
*Pollution Control Board*

**NOTICE OF FILING**

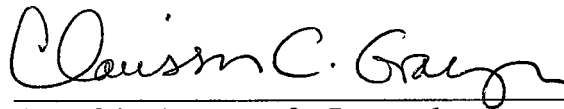
TO: Ms. Dorothy Gunn, Clerk, Pollution Control Board, 100 W. Randolph, Suite 11-500, Chicago, IL 60601

Ms. Paula Becker Wheeler, Assistant Attorney General, Environmental Bureau, 188 W. Randolph, Suite 2001, Chicago, Illinois 60601

Mr. Christopher Grant, Assistant Attorney General, Environmental Bureau, 188 W. Randolph, Suite 2001, Chicago, Illinois 60601

Mr. Brad Halloran, Hearing Officer, Pollution Control Board, 100 W. Randolph, Suite 11-500, Chicago, IL 60601

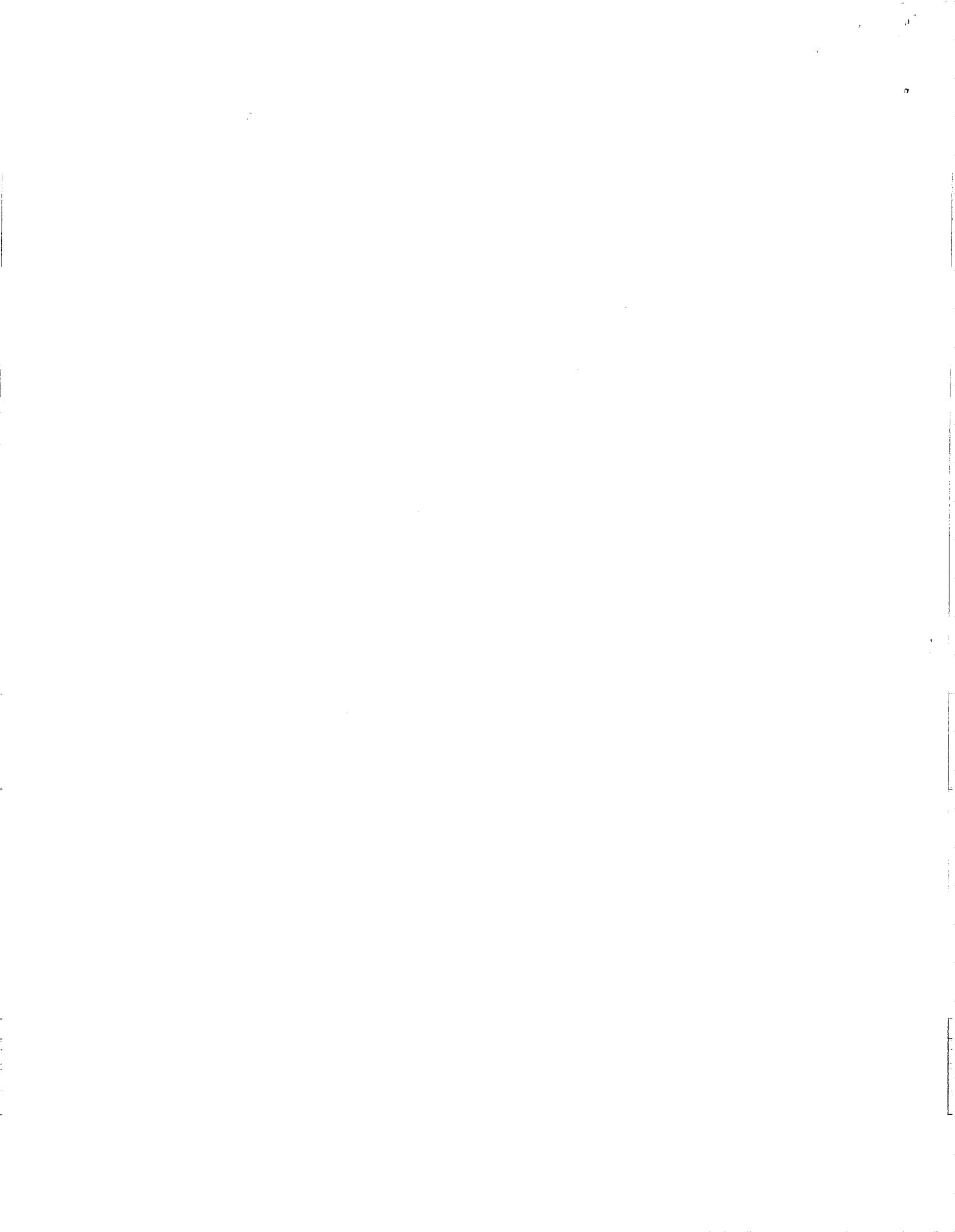
PLEASE TAKE NOTICE that on September 2, 2003 the undersigned filed an original and nine copies of RESPONDENTS' RIVERDALE RECYCLING, INC. AND TRI-STATE DISPOSAL, INC.'S RESPONSE TO COMPLAINANT'S MOTION TO DISMISS AFFIRMATIVE DEFENSES, with Ms. Dorothy Gunn, Clerk of the Illinois Pollution Control Board, 100 W. Randolph Street, Suite 11-500, Chicago, Illinois 60601, a copy of which is attached and hereby served upon you.



One of the Attorneys for Respondents

Mark A. LaRose  
Clarissa C. Grayson  
LaRose & Bosco, Ltd.  
Attorney No. 37346  
734 N. Wells Street  
Chicago, IL 60610  
(312) 642-4414  
Fax (312) 642-0434

**THIS FILING IS SUBMITTED ON RECYCLED PAPER.**



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PEOPLE OF THE STATE OF ILLINOIS, )  
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RIVERDALE RECYCLING, INC., )  
an Illinois corporation, and )  
TRI-STATE DISPOSAL, INC., )  
an Illinois corporation, )  
)  
Respondents. )

No. PCB 03-73  
(Enforcement)

**RIVERDALE RECYCLING, INC. AND TRI-STATE DISPOSAL, INC.'S RESPONSE TO  
COMPLAINANT'S MOTION TO DISMISS AFFIRMATIVE DEFENSES**

Respondents, Riverdale Recycling, Inc. ("RRI" or "Respondent") and Tri-State Disposal, Inc. ("Tri-State" or "Respondent") by and through its attorneys LaRose & Bosco, Ltd., respond to the People of the State of Illinois' ("Complainant") Motion to Dismiss Affirmative Defenses, and moves the Board to deny Complainant's motion, and in support thereof, state as follows:

**INTRODUCTION**

On November 19, 2002, Complainant filed a complaint alleging that RRI and Tri-State ("Respondents") engaged in the open dumping of waste in violation of the Environmental Protection Act ("the Act") and conducted a waste storage operation outside of the Permitted Area in violation of their permit. On July 11, 2003<sup>1</sup>, Respondents RRI and Tri-State filed its answer and affirmative defenses. On August 12, 2003, Complainant filed its motion to dismiss RRI and Tri-State's

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<sup>1</sup>Because the parties engaged in extensive settlement negotiations, Respondents' oral motions for an extension of time to answer the complaint were granted on January 27, 2003, February 13, 2003, March 24, 2003, and April 23, 2003 when Respondents were ordered to answer the complaint on or before July 11, 2003.

affirmative defenses. Respondents' response is timely filed pursuant to 35 I.A.C Section 101.500(d).

RRI and Tri-State's affirmative defenses are as follows:

First Affirmative Defense

The waste observed on December 2, 1999 and March 12, 2001 outside of the Permitted Area was general construction and demolition debris (415 ILCS 5/3.78) which is authorized for storage without a permit pursuant to Section 22.38 of the Act (415 ILCS 5/22.38). Respondents are therefore in compliance with the Act pursuant to Section 22.38 of the Act (415 ILCS 5/22.38).

Second Affirmative Defense

At a pre-enforcement conference held on September 15, 1999 in Maywood, Illinois, Respondents were advised by Cliff Gould and James Haennicke of the IEPA that it was acceptable for Respondents to store general construction and demolition debris in any unpermitted area of the Site pursuant to Section 22.38 of the Act as long as proper notice was given to the IEPA and proper procedures were followed. Therefore, the activities undertaken by the Respondents were both in compliance with Section 22.38 of the Act and undertaken in a manner specifically suggested and approved by personnel in the Agency's enforcement division.

**ARGUMENT**

In support of its motion to strike Respondents' affirmative defenses, Complainant argues that the first affirmative defense should be stricken on the grounds that it contains only a broad assertion that Respondents are in compliance the Act because they acted in accordance with Section 22.38 of the Act. (Complainant's Motion, p.2). However, Respondent's first affirmative defense also contains the factual assertions that the waste observed on December 2, 1999 and March 12, 2001, was general construction and demolition debris.

The facts constituting an affirmative defense must be plainly set forth in the answer. International Insurance Co. v. Sargent & Lundy, 242 Ill.App.3d 614, 630, 609 N.E.2d 842, 853 (1<sup>st</sup> Dist. 1993). Where the well-pleaded facts of an affirmative defense raise the possibility that the party asserting them will prevail, the defense should not be stricken. Id., 242 Ill.App.3d at 631, 609 N.E.2d at 854. Respondents need not prove their case in pleading their affirmative defenses; it is sufficient that they raise the possibility that they will prevail. Id.

Nevertheless, Complainant moves to dismiss the first affirmative defense as falling “well short of the standard required by the Board.” (Complainant’s Motion, p.3). In doing so, Complainant cites absolutely no case law that supports the existence of a specific standard for pleading an affirmative defense under Section 22.38, but merely recites the language of the law which was cited by the Respondents for their affirmative defense. Id. The fact remains, however, that the Respondents have complied with the general standard of pleading affirmative defenses as even presented by Complainant. Id. at 2. Rather than attacking the truth of the claim, the first affirmative defense alleges compliance with the statute, an argument “that if true, will defeat ... the government’s claim even if all allegations in the complaint are true.” *See* Complainant’s Motion, p. 2.

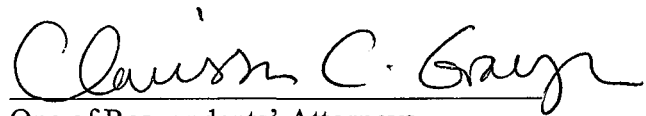
In their first affirmative defense, Respondents have pled the facts that the waste observed during the inspections at issue was general construction and demolition debris which is authorized for storage without a permit pursuant to Section 22.38 of the Act. (415 ILCS 5/22.38). Because these facts raise the possibility that Respondents will ultimately prevail on the merits, the first affirmative defense should not be dismissed.

Similarly, Complainant argues that the second affirmative defense should be dismissed

because Respondent's have failed to allege any new facts. (Complainant's Motion, p.5). The facts alleged by Respondents are that the activities undertaken by the Respondents were done "in a manner specifically suggested and approved by personnel in the Agency's enforcement division," in a discussion with IEPA employees, Cliff Gould and James Haennicke while attending a pre-enforcement conference. While it is unfortunate that the "complainant is unsure as to the meaning of this allegation," the Respondents have, in fact, brought forth new facts and allegations "that if true, will defeat ... the government's claim even if all allegations in the complaint are true." See Complainant's Motion p. 2. As is the case with the facts pled in the first affirmative defense, the facts contained in the second affirmative defense raise the possibility that Respondents will ultimately prevail on the merits. Therefore, Respondent's second affirmative defense should not be dismissed.

WHEREFORE, Respondents respectfully request that the Board deny Complainant's Motion to Dismiss Affirmative Defenses; or in the alternative, grant Respondents leave to amend their answer and replead their affirmative defenses.

Respectfully Submitted,



One of Respondents' Attorneys

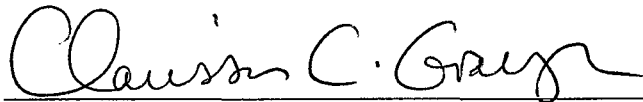
Mark A. LaRose  
Clarissa C. Grayson  
LAROSE & BOSCO, LTD.  
734 North Wells Streete  
Chicago IL 60610  
(312) 642-4414  
fax (312) 642-0434

**CERTIFICATE OF SERVICE**

The undersigned, an attorney, certifies that a copy of the foregoing RESPONDENTS RIVERDALE RECYCLING, INC. AND TRI-STATE DISPOSAL, INC.'S RESPONSE TO COMPLAINANT'S MOTION TO DISMISS AFFIRMATIVE DEFENSES was served upon the following persons by placing same in U.S. Mail, postage prepaid, this 2<sup>nd</sup> Day of September, 2003.

Ms. Paula Becker Wheeler  
Assistant Attorney General  
Environmental Bureau  
188 W. Randolph, Suite 2001  
Chicago, IL 60601

Mr. Christopher Grant  
Assistant Attorney General  
Environmental Bureau  
188 W. Randolph, Suite 2001  
Chicago, IL 60601



One of the Attorneys for Respondent

Mark A. LaRose  
Clarissa C. Grayson  
LaRose & Bosco, Ltd.  
Attorney No. 37346  
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