

BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, )  
by LISA MADIGAN, Attorney General )  
of the State of Illinois, )  
 )  
Complainant, )  
 )  
v. )  
 )  
VALLEY RUN STONE, a Division of )  
AVERY GRAVEL CO., INC. )  
an Illinois Corporation, )  
 )  
Respondent. )

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SEP 11 2003  
STATE OF ILLINOIS  
Pollution Control Board

PCB 04-06

(Enforcement - Air)


**NOTICE OF FILING**

To: Christopher P. Perzan  
Assistant Attorney General  
Office of the Attorney General,  
State of Illinois  
188 W. Randolph St., 20<sup>th</sup> Floor  
Chicago, IL 60601

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

PLEASE TAKE NOTICE that on September 11, 2003, Respondent, VALLEY RUN STONE, a Division of AVERY GRAVEL CO., INC., filed with the Office of the Clerk of the Illinois Pollution Control Board, an original and ten copies of the attached "ANSWER TO COMPLAINT," a copy of which is served upon you. Pursuant to 35 Ill. Admin. Code § 101.302 (g), this filing is submitted on recycled paper.

VALLEY RUN STONE, a Division of  
AVERY GRAVEL CO., INC.



By: One of Its Attorneys

Bill S. Forcade  
JENNER & BLOCK  
One IBM Plaza  
Chicago, IL 60611  
312/222-9350

Dated: September 11, 2003

THIS FILING IS SUBMITTED ON RECYCLED PAPER

**CERTIFICATE OF SERVICE**

I, Bill S. Forcade, an attorney, hereby certify that on September 11, 2003, I caused a copy of the foregoing "Appearance and Answer to Complaint" to be served by messenger on the following parties:

Christopher P. Perzan  
Assistant Attorney General  
Office of the Attorney General, State of Illinois  
188 W. Randolph St., 20<sup>th</sup> Floor  
Chicago, IL 60601

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



Bill S. Forcade

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STATE OF ILLINOIS  
Pollution Control Board

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PEOPLE OF THE STATE OF ILLINOIS, )  
by LISA MADIGAN, Attorney General )  
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Complainant, )

v. )

VALLEY RUN STONE, a Division of )  
AVERY GRAVEL CO., INC. )  
an Illinois Corporation, )


Respondent. )

PCB 04-06

(Enforcement - Air)

APPEARANCE OF BILL S. FORCADE

I, Bill S. Forcade, hereby file my appearance in this proceeding, on behalf of Respondent, VALLEY RUN STONE, a Division of AVERY GRAVEL CO., INC.

  
\_\_\_\_\_  
Bill S. Forcade

Bill S. Forcade  
Jenner & Block, LLC  
One IBM Plaza  
Chicago, IL 60611  
312/222-9350

Dated: September 11, 2003

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS

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

STATE OF ILLINOIS  
*Pollution Control Board*

Complainant, )

PCB 04-06

vi. )

(Enforcement - Air)

VALLEY RUN STONE, a Division of )  
AVERY GRAVEL CO., INC. )  
an Illinois Corporation, )

Respondent. )

**ANSWER TO COMPLAINT**

Respondent VALLEY RUN STONE, a Division of AVERY GRAVEL CO.,  
INC., ("VRS") hereby answers Complainant's Complaint and asserts  
its affirmative defenses as follows:

**COUNT I**

**FAILURE TO OBTAIN A CONSTRUCTION PERMIT**

1. This Complaint is brought by the Attorney General on her  
own motion and upon the request of the Illinois Environmental  
Protection Agency ("Illinois EPA") pursuant to the terms and  
provisions of Section 31 of the Illinois Environmental Protection  
Act ("Act"), 415 ILCS 5/31 (2002).

**ANSWER:** VRS lacks sufficient information to form a belief as to  
the truth of the allegations in Paragraph 1 and therefore  
denies each and every one of them.

2. The Illinois EPA is an administrative agency of the State of Illinois, created pursuant to Section 4 of the Act, 415 ILCS 5/4 (2002) , and charged, inter alia, with the duty of enforcing the Act.

**ANSWER:** VRS admits Paragraph 2.

3. AVERY GRAVEL CO., INC., is an Illinois corporation in good standing and headquartered at 10425 Joliet Road, Lisbon, Kendall County, Illinois. AVERY GRAVEL CO., INC. includes a division known as VALLEY Run STONE. AVERY GRAVEL CO., INC. and its VALLEY RUN STONE division are hereinafter referred to as VRS.

**ANSWER:** VRS admits Paragraph 3.

4. VRS operates a quarry located in Lisbon, Illinois ("facility").

**ANSWER:** VRS admits Paragraph 4.

5. Section 3.315 of the Act, 415 ILCS 5/3.315 (2002), provides the following definition:

"PERSON" is any individual, partnership, co-partnership, firm company, limited liability company, corporation, association, joint stock company, trust, estate, political subdivision, state agency, or any other legal entity, or their legal representative, agent or assigns.

**ANSWER:** The allegations in Paragraph 5 are conclusions of law for which no answer is required.

6. VRS is a "person" as that term is defined in Section 3.315 of the Act, 415 ILCS 5/3.315 (2002).

**ANSWER:** VRS admits Paragraph 6

7. Some time in late 2000 VRS constructed a 1,400 kilowatt natural gas-fired power generation engine at its facility. VRS did not at any time relevant to this complaint have a permit to construct the natural gas-fired power generation engine.

**ANSWER:** VRS admits Paragraph 7.

8. Some time in March or April 2001 VRS began testing the natural gas-fired power generation engine. Thereafter, VRS began operation of the natural gas-fired engine. VRS operated the natural gas-fired engine at least from June 2001 through August 2002.

**ANSWER:** VRS admits Paragraph 8.

9. The natural gas-fired power generation engine can emit, among other things, nitrogen oxides and particulate matter into the atmosphere.

**ANSWER:** VRS admits Paragraph 9.

10. Nitrogen oxides and particulate matter when emitted into the air can have injurious effects on human, plant and animal life.

**ANSWER:** VRS denies that the amounts of Nitrogen oxides and particulate matter emitted by the natural gas engine can have injurious effects on human, plant and animal life.

11. Section 3.165 of the Act, 415 ILCS 5/3.155 (2002), provides the following definition:

"CONTAMINANT" is any solid, liquid, or gaseous matter, any odor, or any form of energy from whatever source.

**ANSWER:** The allegations in Paragraph 11 are conclusions of law for which no answer is required.

12. Plaintiff's Complaint does not contain a Paragraph No. 12.

**ANSWER:** No answer is required.

13. Nitrogen oxides and particulate matter are "contaminants" as defined in Section 3.165 of the Act, 415 ILCS 5/3.165 (2002).

**ANSWER:** The allegations in Paragraph 12 are conclusions of law for which no answer is required.

14. Section 3.115 of the Act, 415 ILCS 5/3.115 (2002), contains the following definition:

"Air pollution" is the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property

**ANSWER:** The allegations in Paragraph 14 are conclusions of law for which no answer is required.

15. Section 9(b) of the Act, 415 ILCS 5/9(b) (2002), provides as follows:

No person shall construct, install or operate any equipment, facility, vehicle, vessel, or aircraft capable of causing or contributing to air pollution or designed to prevent air pollution, of any type designated by Board regulations, without a permit granted by the Agency, or in violation of any conditions imposed by such permit.

**ANSWER:** The allegations in Paragraph 15 are conclusions of law for which no answer is required.

16. Section 201.142 of the Illinois Pollution Control Board Air Pollution Regulations ("Board regulations"), 35 Ill. Adm. Code 201.142, provides as follows:

No person shall cause or allow the construction of any new emission source or any new air pollution control equipment, or cause or allow the modification of any existing emission source or air pollution control equipment, without first obtaining a construction permit from the Agency, except as provided in Section 201.146.

**ANSWER:** The allegations in Paragraph 16 are conclusions of law for which no answer is required.

17. Section 201.102 of the Board regulations, 35 Ill. Adm. Code 201.102, provides the following pertinent definitions:

"Air Contaminant": any solid, liquid or gaseous matter, any odor or any form of energy, that is capable of being released into the atmosphere from an emission source.

"Construction": commencement of on-site fabrication, erection or installation of an emission source or of air pollution control equipment.



"Emission Source": any equipment or facility of a type capable of emitting specified air contaminants to the atmosphere.

"New Emission Source": any emission source, the construction or modification of which is commenced on or after April 14, 1972.

"Owner or Operator": any person who owns, leases, controls or supervises an emission source or air pollution control equipment.

"Specified Air Contaminant": any air contaminant as to which this Subtitle contains emission standards or other specific limitations and any contaminant regulated in Illinois pursuant to Section 9.1 of the Act.

**ANSWER:** The allegations in Paragraph 17 are conclusions of law for which no answer is required.

18. Nitrogen oxides are specified air contaminants as defined in 35 Ill. Adm. Code 201.102.

**ANSWER:** The allegations in Paragraph 18 are conclusions of law for which no answer is required.

19. The natural gas-fired power generation engine was capable of causing or contributing to air pollution through its emission of contaminants, including nitrogen oxides and particulate matter, into the atmosphere.

**ANSWER:** VRS denies Paragraph 19.

20. The natural gas-fired power generation engine was an "emission source" and a "new emission source" as defined in 35 Ill. Adm. Code 201.102.

**ANSWER:** The allegations in Paragraph 20 are conclusions of law for which no answer is required.

21. VRS was, at all times relevant to this Complaint, an "owner or operator" as defined in 35 Ill. Adm. Code 201.142.

**ANSWER:** The allegations in Paragraph 21 are conclusions of law for which no answer is required.

22. The construction of the emission source without a permit from the Agency constituted a violation of Section 9(b) of the Act, 415 ILCS 5/9(b) (2002) and 35 Ill. Adm. Code 201.142.

**ANSWER:** The allegations in Paragraph 22 are conclusions of law for which no answer is required.

## COUNT II

### FAILURE TO COMPLY WITH PRECONSTRUCTION PREVENTION OF SIGNIFICANT DETERIORATION STANDARDS

1-19. Complainant realleges and incorporates by reference herein paragraphs 1 through 14 and 17 through 21 of Count I of this Complaint as paragraphs 1 through 19 of this Count II.

**ANSWER:** VRS realleges and incorporates by reference its answers to paragraphs 1 through 19.

20. Section 9.1 of the Act, 415 ILCS 5/9.1 (2002), provides as follows:

- a) The General Assembly finds that the federal Clean Air Act, as amended, and regulations adopted pursuant thereto establish complex and detailed provisions for State-federal cooperation in the field of air pollution control, provide for a

Prevention of Significant Deterioration program to regulate the issuance of preconstruction permits to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources....

\* \* \*

d) No person shall:

- 1) violate any provisions of Sections 111, 112, 165 or 173 of the Clean Air Act, as now or hereafter amended, or federal regulations adopted pursuant thereto; or
- 2) construct, install, modify or operate any equipment, building, facility, source or installation which is subject to regulation under Sections 111, 112, 165 or 173 of the Clean Air Act, as now or hereafter amended, except in compliance with the requirements of such Sections and federal regulations adopted pursuant thereto, and no such action shall be undertaken without a permit granted by the Agency or in violation of any conditions imposed by such permit.

**ANSWER:** The allegations in Paragraph 20 are conclusions of law for which no answer is required.

21. Nitrogen oxides are regulated under Section 9.1 of the Act, 415 ILCS 5/9.1(2002) because they are a precursor of ozone, a criteria pollutant for which a National Ambient Air Quality Standard has been adopted under the Clean Air Act.

**ANSWER:** The allegations in Paragraph 21 are conclusions of law for which no answer is required.

22. Section 52.21 of Title 40 of the Code of Federal Regulations, 40 C.F.R. 52.21 (2002), is within that category of federal regulations enforceable under 415 ILCS 5/9.1(d). Section 52.21 contains the relevant requirements for the Prevention of Significant Deterioration ("PSD") program.

**ANSWER:** The allegations in Paragraph 22 are conclusions of law for which no answer is required.

23. The PSD program generally requires a party in an attainment area to acquire a construction permit, to perform PSD air quality analysis and to meet other analytical and informational requirements in order to demonstrate that the construction of the emission source will not cause or contribute to air pollution in violation of any national ambient air quality standard or to any applicable maximum allowable increase over the baseline concentration.

**ANSWER:** The allegations in Paragraph 23 are conclusions of law for which no answer is required.

24. The VRS facility is located within an attainment area and is subject to PSD requirements.

**ANSWER:** The allegations in Paragraph 24 are conclusions of law for which no answer is required.

25. The natural gas-fired power generation engine has the potential to emit 251.59 tons of nitrogen oxides per year.

**ANSWER:** VRS denies Paragraph 25

26. Section 52.21 of Title 40 of the Code of Federal Regulations, 40 C.F.R. 52.21 (2002), provides, in pertinent part, as follows:

(b) *Definitions.* For the purposes of this section:

(1) (i) *Major stationary source* means:

\* \* \*

(b) Notwithstanding the stationary source size specified in paragraph (b) (1)(i) of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of any air pollutant subject to regulation under the Act;

\* \* \*

(i) *Review of major stationary sources and major modifications-source applicability and exemptions*

(1) No stationary source or modification to which the requirements of paragraphs (j) through (r) of this section apply shall begin actual construction without a permit which states that the stationary source or modification would meet those requirements. The Administrator has the authority to issue any such permit.

(2) The requirements of paragraphs (j) through (r) of this section shall apply to any major stationary source and any major modification with respect to each pollutant subject to regulations under the Act that it would emit, except as this section otherwise provides.

\* \* \*

(k) *Source impact analysis*

The owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other

applicable emissions increases or reductions (including secondary emissions) would not cause or contribute to air pollution in violation of:

- (1) Any national ambient air quality standard in any air quality control region; or
- (2) any applicable maximum allowable increase over the baseline concentration in any area.

\* \* \*

(m) *Air quality analysis*

(1) Preapplication analysis

(i) Any application for a permit under this section shall contain an analysis of ambient air quality in the area that the major stationary source or major modification would affect for each of the following pollutants:

(a) For the source, each pollutant that it would have the potential to emit in a significant amount.

(b) For the modification, each pollutant for which it would result in a significant net emissions increase.

\* \* \*

n) *Source information*

The owner or operator of a proposed source or modification shall submit all information necessary to perform any analysis or make any determination required under this section.

(1) with respect to a source or modification to which paragraphs (j), (l), (n) and (p) of this section apply, such information shall include:

(i) A description of the nature, location, design capacity, and typical operating

schedule of the source or modification, including specifications and drawings showing its design and plant layout;

\* \* \*

(r) *Source obligation*

- (1) Any owner or operator who constructs or operates a source or modification not in accordance with the application submitted pursuant to this section or with the terms of any approval to construct, or any owner or operator of a source or modification subject to this section who commences construction after the effective date of these regulations without applying for and receiving approval hereunder, shall be subject to appropriate enforcement action.

\* \* \*

**ANSWER:** The allegations in Paragraph 26 are conclusions of law for which no answer is required.

27. Upon its construction, the VRS facility constituted a major stationary source, as defined in 40 C.F.R. 52.21(b)(1)(i)(b), for the purposes of the PSD program and 40 C.F.R. 52.21(b)(2002), because the natural gas-fired power generation engine has the potential to emit greater than 250 tons per year of nitrogen oxides.

**ANSWER:** VRS denies Paragraph 27

28. VRS did not perform or provide the source impact analysis demonstration required by Section 52.21(k), 40 C.F.R. 52.21(k),

prior to construction of the natural gas-fired power generation engine.

**ANSWER:** VRS denies that such actions were required for the natural gas-fired power generation engine.

29. VRS did not perform or provide the air quality analysis required by Section 52.21(m), 40 C.F.R. 52.21(m), prior to construction of the natural gas-fired power generation engine.

**ANSWER:** VRS denies that such actions were required for the natural gas-fired power generation engine.

30. VRS did not submit all of the source information required by Section 52.21(n), 40 C.F.R. 52.21(n), prior to the construction of the natural gas-fired power generation engine.

**ANSWER:** VRS denies that such actions were required for the natural gas-fired power generation engine.

31. By such actions or omissions as alleged above, VRS violated Section 9.1(d) of the Act, 415 ILCS 5/9.1(d), and Sections 52.21(i)(1), 52.21(k), 52.21(m), and 52.21(n), 40 C.F.R. 52.21(i), (1), (k), (in) and (n).

**ANSWER:** VRS denies that such actions were required for the natural gas-fired power generation engine.



COUNT III

FAILURE TO OBTAIN AN OPERATING PERMIT

1.- 20. Complainant realleges and incorporates by reference herein paragraphs 1 through 15 and 17 through 21 of Count I of this Complaint as paragraphs 1 through 20 of this Count III.

ANSWER: VRS realleges and incorporates by reference its answers to paragraphs 1 through 15 and 17 through 21 of Count I.

21. Section 201.143 of the Board regulations, 35 Ill. Adm. Code 201.143, provides as follows:

No person shall cause or allow the operation of any new emission source or new air pollution control equipment of a type for which a construction permit is required by Section 201.142 without first obtaining an operating permit from the Agency, except for such testing operations as may be authorized by the construction permit. Applications for operating permits shall be made at such times and contain such information (in addition to the information required by Section 201.157) as shall be specified in the construction permit.

ANSWER: The allegations in Paragraph 21 are conclusions of law for which no answer is required.

22. At no time relevant to this Complaint did VRS have a permit from the Illinois EPA to operate the natural gas-fired engine.

ANSWER: VRS admits Paragraph 22.

23. The operation of the natural gas-fired power generation engine without a permit from the Illinois EPA constituted a violation of Section 9(b) of the Act, 415 ILCS 5/9(b) (2002) and 35 Ill. Adm. Code 201.143.

**ANSWER:** VRS denies Paragraph 23.

#### COUNT IV

##### FAILURE TO OBTAIN A CLEAN AIR ACT PERMIT

1 - 20. Complainant realleges and incorporates by reference herein paragraphs 1 through 14 and 17 through 21 of Count I and paragraph 25 of Count II as paragraphs 1 through 20 of Count IV.

**ANSWER:** VRS realleges and incorporates by reference herein its answers to paragraphs 1 through 14 and 17 through 21 of Count I and paragraph 25 of Count II as paragraphs 1 through 20 of Count IV.

21. Section 39.5 of the Act, 415 ILCS 5/39.5 (2002), governing the Clean Air Act Permit Program ("CAAPP") in the State of Illinois, provides, in pertinent part, as follows:

##### 1. Definitions

"Major source" means a source for which emissions of one or more air pollutants meet the criteria for major status pursuant to paragraph 2(c) Of this Section.

\* \* \*

"Owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

\* \* \*

"Regulated air pollutant" means the following;

- (1) Nitrogen Oxides (NOx) or any volatile organic compound.

\* \* \*

"Stationary source" means any building, structure, facility, or installation that emits or may emit any regulated air pollutant or any pollutant listed under Section 112(b) of the Clean Air Act.

\* \* \*

## 2. Applicability

- a. Sources subject to this Section shall include:
  - i. Any major source as defined in paragraph (c) of this subsection.
- c. For the purposes of this Section the term "major source" means any source that is:
  - ii. A major stationary source of air pollutants, as defined in Section 302 of the Clear Air Act, that directly emits or has the potential to emit, 100 tpy or more of any air pollutant (including any major source of fugitive emissions of any such pollutant, as determined by rule by USEPA)...

**ANSWER:** The allegations in Paragraph 21 are conclusions of law for which no answer is required.

22. The nitrogen oxides emitted by VRS are regulated air pollutants under Section 39.5(1) of the Act, 415 ILCS 5/39.5(1) (2002).

**ANSWER:** The allegations in Paragraph 22 are conclusions of law for which no answer is required.

23. Because the natural gas-fired engine had the potential to emit greater than 100 tons per year of nitrogen oxides, it constituted a "stationary source" and a "major source" pursuant to Section 39.5(2) of the Act, 415 ILCS 5/39.5(2) (2002).

**ANSWER:** The allegations in Paragraph 23 are conclusions of law for which no answer is required.

24. VRS was, at all times relevant to this Complaint, the "owner and operator" of a major stationary source pursuant to Section 39.5(2) of the Act, 415 ILCS 5/39.2 (2002).

**ANSWER:** VRS denies Paragraph 24

25. As a major source, the VRS facility constituted a CAAPP source by operation of 415 ILCS 5/39.5(2) (2002).

**ANSWER:** VRS denies Paragraph 25.

26. Section 39.6(6)(b) of the Act, 415 ILCS 5/39.5(6)(b), provides as follows:

After the applicable CAAPP permit or renewal application submittal date, as specified in subsection 5 of this Section, no person shall operate a CAAPP source without a CAAPP permit unless the complete CAAPP permit or renewal application for such source has been timely submitted to the Agency.

**ANSWER:** The allegations in Paragraph 26 are conclusions of law for which no answer is required.

27. At no time relevant to this complaint did VRS have a CAAPP permit to operate the natural gas-fired power generation engine.

**ANSWER:** VRS admits Paragraph 27, but asserts no such permit was required.

28. By operating the natural gas-fired power generation engine VRS without submitting the CAAPP permit application to the Illinois EPA or obtaining a CAAPP permit, VRS violated Section 39.5(6)(b) of the Act, 415 ILCS 5/39.5(6)(b)(2002).

**ANSWER:** VRS denies Paragraph 28.

**FIRST AFFIRMATIVE DEFENSE: EQUITABLE ESTOPPEL/WAIVER**

In the alternative, without admitting any of the Complaint's allegations that it has denied or otherwise contradicting its answers and solely by way of affirmative and/or additional defense, VRS alleges as follows:

1. VRS filed a permit application for the natural gas-fired generator with the Illinois EPA in November 2002. IEPA has refused to act on that application in a timely manner, subjecting VRS to unnecessary utility costs.

2. As a result of the facts set forth in Paragraphs 1 above, Complainant is estopped from recovering any civil penalties relating to past operations of the gas-fired generator at the Site.

WHEREFORE, VRS asks that the Board render a judgment in its favor and against Complainant; and that the Board enter an order that Complainant be awarded nothing as against VRS and denying Complainant any and all of the relief it seeks herein against VRS; and such other and further relief to which VRS is entitled under the law.

Dated: September 11, 2003

Respectfully submitted,

VALLEY RUN STONE, a Division of AVERY  
GRAVEL CO., INC.

By: 

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