

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

TO: Kenneth Anspach	Bradley P. Halloran, Esq.
Eight South Michigan Avenue	Hearing Officer
Suite 3400	Illinois Pollution Control Board
Chicago, Illinois 60603	James R. Thompson Center, Suite 11-500
	100 W. Randolph Street
	Chicago, Illinois 60601

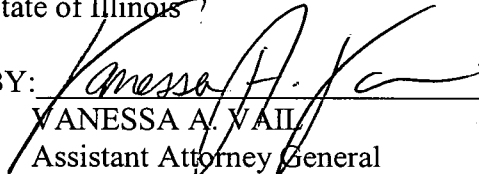
(VIA ELECTRONIC FILING)

PLEASE TAKE NOTICE that today I have filed with the Office of the Clerk of the Illinois Pollution Control Board by electronic filing the attached RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION FOR LEAVE TO FILE FIRST AMENDED ANSWER AND AFFIRMATIVE DEFENSES, a copy of which is attached and hereby served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General of the
State of Illinois

BY: 
 VANESSA A. VAIL
 Assistant Attorney General
 Environmental Bureau
 188 W. Randolph St., 20th Floor
 Chicago, Illinois 60601
 (312) 814-5361

DATE: December 11, 2006

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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Complainant,)	
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v.)	PCB No. 06-177
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COMPLAINANT’S RESPONSE IN OPPOSITION TO RESPONDENT’S MOTION FOR LEAVE TO FILE FIRST AMENDED ANSWER AND AFFIRMATIVE DEFENSES

Now comes Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, and in response to Respondent SHERIDAN SAND & GRAVEL CO.’s Motion for Leave to File First Amended Answer and Affirmative Defenses pursuant to Section 101.100(b) of the Illinois Pollution Control Board’s Procedural Regulations, 35 Ill. Adm. Code 101.100(b), and Section 2-616(a) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-616(a) (2004), states as follows:

INTRODUCTION

On October 13, 2006, Respondent Sheridan Sand and Gravel Co. (“Sheridan” or “Respondent”) filed its Answer and Affirmative Defenses to the Complaint. On November 14, 2006, Complainant filed its Motion to Dismiss Affirmative Defenses. On November 27, 2006, Respondent filed a Motion for Leave to File First Amended Answer and Affirmative Defenses. Complainant strenuously objects to Respondent’s motion to file amendments to its answer and affirmative defenses on several grounds.

ARGUMENT

As a preliminary matter, instead of responding or objecting to Complainant’s November 14, 2006, Motion to Dismiss Affirmative Defenses, Respondent has filed a motion essentially

conceding the points raised in Complainant's Motion to Dismiss Affirmative Defenses but then seeking leave to amend its answer and specific affirmative defenses. Indeed, in its First Amended Answer and Affirmative Defenses, Respondent has deleted two of its five original affirmative defenses alleged in its Answer. Additionally, Respondent's motion purports to raise three (3) new affirmative defenses, but actually raises no new allegations and only replicates the First, Second and Fourth affirmative defenses Respondent originally filed. Consequently, where Respondent itself acknowledges its own invalid affirmative defenses and has not filed an objection to Complainant's pending motion to dismiss affirmative defenses, the Illinois Pollution Control Board ("Board") should treat Complainant's motion as unopposed and dismiss Respondent's five (5) affirmative defenses proffered in its original Answer.

Moreover, as a result of Respondent filing its motion on the day its response to Complainant's Motion to Dismiss Affirmative Defenses was due, Respondent has waived objection to the Board's granting of Complainant's motion under the Board regulations. Pursuant to Section 101.500 of the Board regulations, "[i]f no response is filed, the party will be deemed to have waived objection to the granting of the motion." 35 Ill. Adm. Code 101.500(d). Thus, Respondent's failure to file a response should be deemed a consent to Complainant's Motion to Dismiss Affirmative Defenses, and the Board should deny Respondent's request to amend its Answer and affirmative defenses.

Next, Respondent has speciously granted itself permission to amend its Answer and affirmative defenses while offering no argument as to why it should be permitted to amend its affirmative defenses or to substitute a First Amended Answer for its earlier admission to the allegations in the Complaint. The motion itself consists of a scant one paragraph citing the Board's discretionary authority and an incorrect conclusion by Respondent that "filing an

amended answer and affirmative defenses *must* be allowed". ¶¶2, 3 Motion. Respondent is mistaken to assert that amendments to pleadings are an absolute right. Rather, under the rules, amendments to pleadings are discretionary, i.e., "amendments may be allowed on just and reasonable terms," and not as a matter of right as Respondent incorrectly claims. 735 ILCS 5/2-616(a).

Moreover, in the instant motion, Respondent has not articulated any specific new information or position that would support its need to file a First Amended Answer and Affirmative Defenses. Thus, in addition to the reasons provided above, Respondent's request to amend its answer and affirmative defenses should be denied as Respondent has proffered no reason as to why the Board should allow it.

Lastly, where Complainant's motion to dismiss Respondent's affirmative defenses is currently pending before the Board, Respondent's filing of its motion is procedurally premature. Further proceedings on amending Respondent's affirmative defenses are premature until Complainant's motion to dismiss affirmative defenses is decided by the Board. Respondent's motion requesting to amend its answer and affirmative defenses asks this Board to take an action that it cannot do without first ruling on Complainant's motion currently pending before it. If the Board grants Complainant's motion and dismisses the original affirmative defenses, with prejudice, then Respondent would not be able to refile them.

Respondent seeks to preempt an adverse ruling by the Board on Complainant's motion, and effectively grant itself leave to file amended defenses, which it may be precluded from bringing if Complainant prevails on its motion. Procedurally, this is inappropriate and improper. Moreover, it could prejudice Complainant, who is entitled to a ruling on its motion. As such, Respondent's motion to amend its affirmative defenses and answer should be denied.

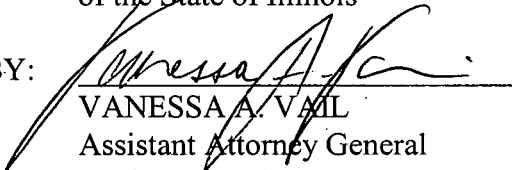
CONCLUSION

WHEREFORE, for the reasons stated, the Complainant, PEOPLE OF THE STATE OF ILLINOIS, requests that the Respondent's requests to amend its Answer and affirmative defenses be denied.

Respectfully submitted,

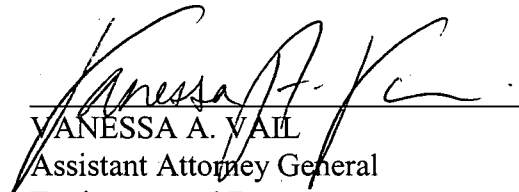
PEOPLE OF THE STATE OF ILLINOIS,
LISA MADIGAN, Attorney General
of the State of Illinois

BY:


VANESSA A. VAIL
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CERTIFICATE OF SERVICE

I, VANESSA A. VAIL, an Assistant Attorney General, do certify that I caused to be mailed this 11th day of December 2006, a true and correct copy of the attached RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION FOR LEAVE TO FILE FIRST AMENDED ANSWER AND AFFIRMATIVE DEFENSES and Notice of Filing by certified mail with return receipt requested to the persons listed on the said Notice of Filing, and depositing same with the United States Postal Service located at 188 West Randolph Street, Chicago, Illinois, 60601.


VANESSA A. VAIL
Assistant Attorney General
Environmental Bureau