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
Eight South Michigan Avenue
Suite 3400
Chicago, Illinois 60603

Bradley P. Halloran, Esq.
Hearing Officer
Illinois Pollution Control Board
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 REPLY TO RESPONDENT'S RESPONSE TO COMPLAINANT'S MOTION TO STRIKE FIRST AMENDED 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: _____

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DATE: April 17, 2007

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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v.	)	PCB No. 06-177
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REPLY TO RESPONDENT'S RESPONSE TO COMPLAINANT'S MOTION TO STRIKE FIRST AMENDED AFFIRMATIVE DEFENSES

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS ("People" or "State"), by LISA MADIGAN, Attorney General of the State of Illinois, and for its reply to Respondent SHERIDAN SAND & GRAVEL CO.'s Response to Motion to Strike First Amended Affirmative Defenses, Complainant states as follows:

The Board's Order dated April 5, 2007, allows the Complainant leave to reply to Sheridan Sand & Gravel Co.'s Response to Complainant's Motion to Strike Affirmative Defenses.

I. RESPONDENT'S PURPORTED AFFIRMATIVE DEFENSES ARE LEGALLY INSUFFICIENT

Defendant's First Affirmative Defense is Irrelevant

1. Complainant repeats its Motion to Strike Sheridan Sand & Gravel Co. ("Respondent") First Affirmative Defense, and further notes that this affirmative defense is directed toward an allegation that the State never alleges in its Complaint.

2. On May 22, 2006, Complainant filed its five-count Complaint in this matter. The Complaint alleges violations of Sections 55(d)(1), 55(e), 55(g), 55.6(b), and 21(k) of the Illinois Environmental Protection Act ("Act"), and violations of Sections 848.202(b)(4) and (5),

848.304(a) and (c), 848.305, and 848.601(a)(1) and (2) of the Illinois Pollution Control Board's ("Board") regulations.

3. In its Response, Sheridan Sand & Gravel Co. ("Respondent") reiterates its assertion that because the State failed to comply with Section 55.5(c) of the Act, 415 ILCS 5/55.5(c), the Attorney General was barred from filing its Complaint. Response, p. 3, 5-6. Respondent further asserts that because "compliance with the requirements of Section 31(a) of the Act, 415 ILCS 5/31(a) is conditioned by statute upon compliance with Section 55.5 of the Act, 415 ILCS 5/55.5," "Illinois EPA failed to fulfill the requirements of Section 31(a), [and] it also violated 31(b) of the Act, 415 ILCS 5/31(b)." Response, p. 4. Therefore, as Respondent argues, the Board is without subject matter jurisdiction. Response, p. 4.

4. Firstly, Respondent's defense under Section 55.5 of the Act is inappropriate since Respondent's defense is not directed towards any claim for relief in the Complaint. Section 55.5(c) states that "prior to taking action pursuant to Title VIII for violation of subsection *(a), (b) or (c) of Section 55 of the Act*, the Agency...shall issue and serve upon the person complained against a written warning notice..." 415 ILCS 5/55.5(c) (2004). Ergo, whether Illinois EPA or the State complied with the procedural guidelines of Section 55.5(c), is irrelevant in deciding whether Respondent violated Sections 55(d)(1), 55(e), 55(g), 55.6(b), and 21(k) of the Act, which are alleged in the Complaint. Thus, because Respondent's first affirmative defense is directed to violations of Sections 55(a), (b) and (c) of the Act, none of which have been alleged, it does not address the underlying cause of action, and is therefore, legally insufficient and should be stricken and dismissed.

5. Secondly, notwithstanding the inapplicability of Section 55.5(c) of the Act, Illinois EPA did comply with the notice and referral process of Sections 31 and 55. Motion, p.10-

12. Indeed, Respondent even points out Illinois EPA's compliance with the Act by stating that "the Illinois EPA did, in fact, request the representation of the Office of the Attorney General for all violations set forth in the Violation Notice and Notice of Intent." First Affirmative Defense, ¶18, Response, p. 4. Hence, because the Agency complied with the Act and Respondent's defense does not attack the truth of the allegations in the Complaint, it should be stricken and dismissed with prejudice.

6. Thirdly, even if Illinois EPA did not comply with the notice and referral process, the Attorney General has independent authority to bring an enforcement action pursuant to Section 31(d) of the Act. 415 ILCS 5/31(d) (2004).

7. Further, 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. *See* Eagle-Picher-Boge PCB 99-152; People v. Chemetco, Inc., PCB 96-76 (July 8, 1998); People v. Community Landfill Company, Inc., PCB 97-193 (Mar. 16, 2000). Moreover, the Board has held that when the Attorney General brings a complaint "solely on behalf of the people," even if the complaint is based on information obtained from the Agency, the complaint will not be dismissed. Community Landfill Company, PCB 97-193 at 4. Thus, where the Attorney General also filed its Complaint on her own motion, Respondent's defense is without merit, and the Attorney General is authorized to proceed with enforcement of this case. Complaint, Count I, ¶1.

8. Despite Board holdings and what is stated in the Complaint, Respondent presents a fabrication of facts to the Board, by representing to the Board that the Attorney General did not file the complaint on her own motion. Response, p. 14. Respondent asserts to the Board that the Attorney General filed the Complaint "[b]ased solely upon the referral of the Illinois EPA," and "brought this action exclusively 'pursuant to the terms and conditions of Section 31 of the

Illinois Environmental Protection Act." First Affirmative Defense, ¶19, Response, p. 14-15. This is an outright misstatement of the facts.

9. In the first paragraph of each count in the Complaint, the Complaint explicitly states that the action "is brought on behalf of the People of the State of Illinois, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois, *on her own motion* and at the request of the Illinois Environmental Protection Agency ("Illinois EPA"), against SHERIDAN SAND & GRAVEL CO." Motion, p. 5, Complaint, ¶1.

10. However, in spite of the Complaint's clear language, Respondent inappropriately relies on People v. Chiquita Processed Foods, L.L.C., PCB 02-56 (Nov. 21, 2002), a case in which the Board confirmed the Attorney General's authority to bring a complaint on her own motion. Response, p.13-15.

11. The Board in Chiquita held that the procedures of Section 31(a) and (b), while being a precondition for referral by the Agency to the Attorney General, are not a limitation on the Attorney General. People v. Barger Engineering, Inc., PCB 06-82 (Mar 16, 2006), *citing* Chiquita, PCB 02-56.

12. In Chiquita, the Board did dismiss two counts in the complaint because the Agency failed to follow the procedures in Section 31 of the Act before referring the alleged violation to the Attorney General. However, the Board noted in Chiquita that the Attorney General was not bringing a complaint on its own motion, but rather pursuant to a referral containing information provided by the Agency. Chiquita, PCB 02-56 at 5. Here, the Attorney General filed the Complaint pursuant to a proper referral by the Illinois EPA and on her own motion as stated in paragraph 1 of the Complaint. Thus, contrary to what Respondent speciously presents to the Board, the Complaint in this matter was properly brought in the name of the

People and at the request of the Agency.

13. Additionally, Respondent further argues that because "[t]here is no reference in the Complaint to Section 42(e) of the Act, 415 ILCS 5/42(e), whatsoever!" the Attorney General is prohibited from proceeding with an action on her own motion. Response, p. 15. In Barger, where the action was "*brought against the Respondent in the name of the People of the State of Illinois, by Lisa Madigan, Attorney General of the State of Illinois, on her own motion and at the request of the Illinois EPA*," almost verbatim as paragraph 1 of the State's Complaint, the Board confirmed that the State may bring an enforcement action pursuant to Section 31(d) of the Act and on the Attorney General's own motion regardless of the Agency's actions. Barger, PCB 06-82 at 6 (emphasis provided).

14. Thus, where the set of facts here are analogous to Barger, and not Chiquita, Respondent's defense is illogical and should be stricken and dismissed with prejudice. In addition, by Respondent acknowledging that the allegations are valid, it has basically admitted that its First Affirmative Defense should be stricken.

Respondent's Second Affirmative Defense is Without Merit

1. As already explained in Complainant's Motion to Strike Respondent's Second Affirmative Defense, Respondent's defense speaks to the issue of penalty, not the cause of action.

2. In its second affirmative defense, Respondent claims that "the completion of the Suggested Resolution constitutes, by operation of law, completion of a corrective action pursuant to Section 55.5(c) of the Act, 415 ILCS 5/55.5(c), and thereby has become a bar to enforcement action against Sheridan." Response, p. 16.

3. Contrary to how Respondent disguises compliance, an enforcement action does

not automatically cease upon correction of a violation, nor has the Board or court ever interpreted the Act as providing for this.

4. Notwithstanding that Section 55.5(c) is irrelevant in this matter for reasons stated above in paragraph 4, Respondent's claim that the allegations are moot because of subsequent compliance is not an affirmative defense, but rather a mitigation factor. *See* People v. Texaco Refining and Marketing, Inc., PCB 02-3, slip op. at 405. "Compliance relates to the issue of remedy and not to the cause of action." Id at 5.

5. It is a well recognized rule by the Board, the agency charged with the primary responsibility for interpreting the Act, that a "defense which speaks to the imposition of a penalty, rather than the underlying cause of action, is not an 'affirmative defense' to that cause of action" and should be stricken. People v. Community Landfill Co., Inc., PCB No. 97-193, 1998 Westlaw 473246, at 4 (Aug. 6, 1998); *see also* People v. Geon Co. Inc., PCB No. 97-62, 1997 Westlaw 621493; at 3 (Oct. 2, 1997); People v. Douglas Furniture of California, Inc., PCB No. 97-133, 1997 Westlaw 235230, at 5 (May 1, 1997); People v. Midwest Grain Prods. of Illinois, Inc., PCB No. 97-179, 1997 Westlaw 530544, at 4 (Aug. 21, 1997); *see also* 415 ILCS 5/5(b) (2004) (authorizing the Board to "determine, define and implement the environmental control standards applicable in the State.").

6. This rule is also supported by at least one court decision. In United States v. Vitasafe Corporation, the Defendants first denied liability, then proceeded to plead six affirmative defenses which included penalty mitigation arguments. *See* 212 F. Supp. 397, 398 (S.D.N.Y. 1962). The Vitasafe Court held, in relevant part, as follows (emphasis added):

> The way in which defendant carries on its operations, and its claimed good faith, have *no bearing on the question of whether it has [committed a violation]* . . Defendant may urge its lack of intent to violate . . . in mitigation of the penalty. It cannot do so, however, as a defense to liability . . . *The pleading of such evidence as an affirmative defense is unnecessary and improper.* Id.

7. The Board and at least one court have made it abundantly clear that an affirmative defense which speaks to the imposition of a penalty rather than the underlying causes of action is not an "affirmative defense" to that cause of action and should be stricken.

8. Alternatively, Respondent's own interpretation of the statute is not written down anywhere. Respondent points to no Board or court decisions interpreting Section 55.5(c), as it has not been interpreted anywhere, and as such, this argument is not rational.

9. Therefore, Respondent's second purported affirmative defense, which speaks to the penalty factors under Section 33(c) of the Act, is not an affirmative defense to the causes of action in the State's Complaint, and should be stricken and dismissed, with prejudice.

Respondent's Third Affirmative Defense is Not an Affirmative Defense

1. In addition to Illinois EPA's compliance with the procedural guidelines under Section 31 of the Act, Complainant also moved to strike this defense on the basis that Section 31 pre-filing requirements do not apply to the Attorney General.

2. The Board has held the notice and meeting requirements of Section 31 apply only to the Agency, not to the Attorney General. Eagle-Picher-Boge, PCB 99-152 at 8. Rather than repeat the Board's holding and the statutory authority authorizing the Attorney General to bring a complaint on her own motion, the State reasserts its argument provided in its Motion and Reply. *See* Motion, p.5, 14-15, Reply, ¶7, 9-14.

3. Despite the Act authorizing the Attorney General to bring a complaint on her own motion, the Board consistently affirming this authority, and paragraph 1 of the Complaint clearly stating that the Complaint was filed by the Attorney General, "...on her own motion and at the request of the Illinois Environmental Protection Agency ('Illinois EPA')," Respondent declares throughout fifteen (15) pages of its Response how and why the Illinois EPA violated Section

31(b). In addition to this defense being irrelevant and a waste of the Board's time, the alleged actions of Illinois EPA do not affect whether the alleged violations occurred or not.

4. Moreover, the Board has held that the People do not have to plead in the complaint or prove at hearing that the Agency complied with Section 31 of the Act. People v. Crane PCB 01-76, slip op. at 7-8 (May 17, 2001); *see also* People v. Panhandle Eastern Pipe Line Co., PCB 99-191, slip op at 3 (Nov. 16, 2000).

5. Section 31 of the Act acts as a precondition only to the Illinois EPA's referral of an action to the Attorney General's office for enforcement, and does not bar the filing of an action by the Attorney General on her own motion. Respondent's affirmative defense is therefore legally insufficient and should be stricken.

II. CONCLUSION

WHEREFORE, for the reasons stated, the Complainant, PEOPLE OF THE STATE OF ILLINOIS, requests that the affirmative defenses of the Respondent be stricken, with prejudice.

Respectfully submitted,

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

BY: _____

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CERTIFICATE OF SERVICE

I, VANESSA A. VAIL, an Assistant Attorney General, do certify that I caused to be mailed this 17th day of April 2007, a true and correct copy of the attached REPLY TO RESPONDENT'S RESPONSE TO COMPLAINANT'S MOTION TO STRIKE FIRST AMENDED 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 69 West Washington Street, Chicago, Illinois, 60602.

VANESSA A. VAIL
Assistant Attorney General
Environmental Bureau