

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
ex rel. LISA MADIGAN, Attorney)
General of the State of Illinois,)

Complainant,)

v.)

PCB No. 13-19
(Enforcement-Land)

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

Respondents.)

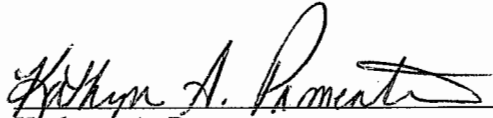
NOTICE OF MOTION

To: *Via Regular Mail*
Kenneth Anspach, Esq.
Anspach Law Office
111 West Washington Street
Suite 1625
Chicago, Illinois 60602

Via E-Mail
Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601
Brad.Halloran@illinois.gov

PLEASE TAKE NOTICE that on the 1st day of May, 2013, the Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, filed the attached Motion for Leave to File Surreply to Respondents' Reply in Support of Motion to Strike Amended Notice of Electronic Filing, a true and correct copy of which is attached hereto and is hereby served upon you.

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

By: 
Kathryn A. Pamerter
Assistant Attorney General
Environmental Bureau
69 W. Washington St., 18th Floor
Chicago, IL 60602
(312) 814-0608

DATE: May 1, 2013

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS)	
by LISA MADIGAN, Attorney General)	
of the State of Illinois,)	
)	
Complainant,)	
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v.)	PCB No. 13-19
)	(Enforcement - Land)
SHERIDAN-JOLIET LAND)	
DEVELOPMENT, LLC, an Illinois)	
limited-liability company, and SHERIDAN)	
SAND & GRAVEL CO., an Illinois)	
corporation,)	
)	
Respondents.)	

**COMPLAINANT’S MOTION FOR LEAVE TO FILE SURREPLY TO RESPONDENTS’
REPLY IN SUPPORT OF MOTION TO STRIKE AMENDED NOTICE OF
ELECTRONIC FILING**

Complainant, PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois, pursuant to 35 Ill. Adm. Code 101.500(e), hereby moves this Court for leave to file a surreply to SHERIDAN-JOLIET LAND DEVELOPMENT, LLC’s and SHERIDAN SAND & GRAVEL CO.’s (“Respondents”) Reply in Support of Motion to Strike Amended Notice of Electronic Filing. In support of its motion, Complainant states as follows:

1. On October 31, 2012, the Complainant filed a nine-count Complaint (the “Complaint”) against the Respondents, alleging violations of the Illinois Environmental Protection Act (“Act”) and the Illinois Pollution Control Board’s regulations regarding clean construction or demolition debris fill operations (“Board CCDD Regulations”).

2. On November 30, 2012, the Respondents filed their Motion to Strike and Dismiss and Supporting Memorandum (“Motion to Dismiss”). Among the contentions made in the

Motion to Dismiss, the Respondents set forth a four-sentence argument that the Complaint should be dismissed because the People did not accompany the Complaint with “a notification to the defendant that financing may be available, though the Illinois Environmental Facilities Financing Act [20 ILCS 3515/1 *et seq.*] to correct such violation.” (Motion to Dismiss at p. 17 (quoting 415 ILCS 5/31(c)(1) (2010))).

3. On February 27, 2013, the Complainant filed its (a) Response to the Respondents’ Motion to Dismiss (“Response to Motion to Dismiss”) and (b) Amended Notice of Electronic Filing, which are incorporated herein by reference. The Complainant argued, among other things, that the Illinois Environmental Facilities Financing Act and the corresponding Section 31(c)(1) notification address financing to correct violations, not the payment of a civil penalty which is the remedy sought against the Respondents in this case. (Response to Motion to Dismiss at pp. 14-15). Alternatively, the Complainant argued that it cured any deficiency by filing an Amended Notice of Electronic Filing on February 27, 2013 with the Illinois Pollution Control Board (the “Board”), which was served on the Respondents and includes the Section 31(c)(1) financing notification.

4. On March 29, 2013, the Respondents filed their Motion to Strike Amended Notice of Electronic Filing and Supporting Memorandum.

5. On April 12, 2013, the Respondents filed their Reply in Support of Motion to Strike and Dismiss.

6. On April 12, 2013, the Complainant filed its Response to Respondents’ Motion to Strike Amended Notice of Electronic Filing and Supporting Memorandum (“Response to Motion to Strike”).

7. On April 26, 2013, the Respondents filed their Reply in Support of Motion to Strike Amended Notice of Electronic Filing, in which the Respondents mischaracterize the Complainant's Response to Motion to Strike and case law.

8. In the absence of an opportunity to file a Surreply to the Respondents' Reply in Support of Motion to Strike Amended Notice of Electronic Filing, the Complainant will be materially prejudiced.

9. The Complainant has prepared a Surreply to Respondents' Reply in Support of Motion to Strike Amended Notice of Electronic Filing, a copy of which is attached hereto as Exhibit A. By this Motion, the Complainant seeks leave to file its Surreply with the Illinois Pollution Control Board to avoid material prejudice.

WHEREFORE, the Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board grant it leave to file its Surreply to Respondents' Reply in Support of Motion to Strike Amended Notice of Electronic Filing and such other relief as the Board deems proper.

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

MATTHEW J. DUNN, Chief
Environmental Enforcement /
Asbestos Litigation Division

By:



KATHRYN A. PAMENTER
Assistant Attorney General
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69 W. Washington, 18th Floor
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(312) 814-0608

EXHIBIT A

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS)
 by LISA MADIGAN, Attorney General)
 of the State of Illinois,)
)
 Complainant,)
)
 v.)
)
 SHERIDAN-JOLIET LAND)
 DEVELOPMENT, LLC, an Illinois)
 limited-liability company, and SHERIDAN)
 SAND & GRAVEL CO., an Illinois)
 corporation,)
)
 Respondents.)

PCB No. 13-19
 (Enforcement - Land)

**COMPLAINANT’S SURREPLY TO RESPONDENTS’ REPLY IN SUPPORT OF
 MOTION TO STRIKE AMENDED NOTICE OF ELECTRONIC FILING**

Complainant, PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois, for its Surreply to SHERIDAN-JOLIET LAND DEVELOPMENT, LLC’s and SHERIDAN SAND & GRAVEL CO.’s (“Respondents”) Reply in Support of Motion to Strike Amended Notice of Electronic Filing, hereby states as follows:

1. On April 26, 2013, the Respondents filed their Reply in Support of Motion to Strike Amended Notice of Electronic Filing (the “Reply”), in which the Respondents mischaracterize the Complainant’s Response to Respondents’ Motion to Strike Amended Notice of Electronic Filing and Supporting Memorandum (the “Response”) and existing case law.

2. First, the Complainant did not “purposely decline to address” or waive the Respondents’ lack of jurisdiction argument. (Reply at pp. 2-3.) Rather, the Complainant cited *People v. City of Herrin*, PCB 95-158, 1995 WL 415802 (July 7, 1995), a true and correct copy of which is attached hereto as Exhibit 1. In *City of Herrin*, the Illinois Pollution Control Board (the “Board”) stated:

Section 31(a) states in pertinent part that the “complaint shall be accompanied by a notification to the defendant that financing may be available, through the Illinois Environmental Facilities Financing Act, to correct such violation.” (415 ILCS 5/31(a)(1).) The State did not include such financing notification in the original complaint. The State asserts that the absence of such notification has resulted in no harm to Herrin because Herrin’s motion reflects its knowledge of the financing. The State’s June 27th Amended Notice of Filing includes the financing notification. Specific notice as delineated in Section 31(d) [sic] is required in conjunction with serving the complaint on Herrin. The State failed to send notice in compliance with Section 31(d) [sic] of the Act to the City of Herrin in its May 30, 1995 complaint. The Board nonetheless accepts the State’s June 27, 1995 amended notice of filing and interprets it as an amended complaint curing the financing notification deficiency. The Board therefore denies Herrin’s Motion Attacking Jurisdiction.

1995 WL 415802 at *1-2. *City of Herrin*, the Board’s current decision on the issue, did not determine that the financing notification under Section 31(a) of the Illinois Environmental Protection Act (the “Act”) (now Section 31(c)(1) of the Act) constituted a jurisdictional requirement.¹

3. Second, contrary to the Respondents’ contention, *City of Herrin* is not inapposite. (Reply at pp. 3-4). In *City of Herrin*, the Board considered City of Herrin’s Motion Attacking Jurisdiction, which argued that the Board lacked jurisdiction over the case because the complainant failed to satisfy the financing notification requirement of Section 31(a) of the Act, 415 ILCS 5/31(a). No further motion to strike or objection was required. As the Respondents argue, jurisdiction may not be “supplied by the waiver or consent of the parties.” (Reply at p. 8.) The Board did not find that it lacked jurisdiction over the case due to the absence of the financing notification in the original filing and thereby denied Herrin’s Motion Attacking

¹ As also stated in its Response at p. 3, fn. 1, to the extent that the Board overrules *City of Herrin*, the parties should be afforded the opportunity to fully brief whether the financing notification requirement constitutes a jurisdictional requirement. As cited in the Response, Section 5(d) of the Act confers jurisdiction to the Board over enforcement actions, 415 ILCS 5/5(d) (2010). The financing notification under Section 31(c)(1) of the Act constitutes a statutory requirement. See Respondents’ Reply at p. 4 (In *City of Herrin* respondent waived its *statutory right* that the complaint be accompanied by a Notice that Financing May Be Available”) (emphasis added) and at p. 6 (. . . under different statutes with different *statutory requirements* than under § 31(c)(1) of the Act, 415 ILCS 5/31(c)(1) (emphasis added)).

Jurisdiction. 1995 WL 415802 at *2. Rather, the filing of an amended notice of filing containing the financing notification cured any deficiency of the Section 31(c)(1) requirement. *Id.*

4. Third, the Complainant did not “waive any objection” to the purported “legal principles” that the Respondents assert by citing *Illinois Environmental Protection Agency v. Busby*, AC 01-6, 2000 WL 1860141 (Dec. 7, 2000), *Figueroa v. Deacon*, 404 Ill. App. 3d 48 (1st Dist. 2010), *Allord v. Municipal Electoral Bd. for the Village of South Chicago Heights*, 288 Ill. App. 3d 897 (1st Dist. 1997), *Beck v. Stepp*, 144 Ill.2d 232 (Ill. 1991), *Kohlhaas v. Morse*, 36 Ill. App. 2d 158 (4th Dist. 1962), *In re Estate of Rennick*, 181 Ill.2d 395 (Ill. 1998), *Keen v. Bump*, 310 Ill. 218 (Ill. 1923), *Floto v. Floto*, 213 Ill. 438 (Ill. 1904) and *People v. McGee*, 268 Ill. App. 3d 32 (2nd Dist. 1994). (Reply at pp. 5-9.) Rather, by distinguishing each of the foregoing cases based on their facts and holdings, the Complainant objected to the applicability of each of the cases. (Response at pp. 3-4.)

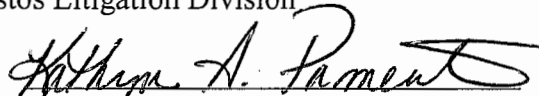
5. Fourth, the Complainant did not “fail to distinguish, deny or object to” the five-sentence decision in *Illinois Environmental Protection Agency v. Production Finishers and Fabricators, Inc.*, PCB No. 85-31, 1986 WL 26688 (Jan. 9, 1986), a true and correct of which is attached hereto as Exhibit B. (Response at pp. 3, 9.) Rather, the Complainant cited to *City of Herrin*, which is the current authority that has been located on the issue. In addition, in its response, the Complainant stated, “*City of Herrin* is consistent with *Illinois Environmental Protection Agency v. Production Finishers and Fabricators, Inc.*, PCB No. 85-31, 1986 WL 26688 (Jan. 9, 1986), on which the Respondents rely, in that the Board dismissed the Illinois Environmental Protection Agency’s case without prejudice as no notice of filing existed in the case that included the financing notification.” (Response at p. 3.)

WHEREFORE, based upon the foregoing and its Response to the Respondents' Motion to Strike Amended Notice of Electronic Filing, which is incorporated herein by reference, the Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board deny the Respondents' Motion to Strike Amended Notice of Electronic Filing and grant such other relief as the Board deems proper.

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

MATTHEW J. DUNN, Chief
Environmental Enforcement /
Asbestos Litigation Division

By:



KATHRYN A. PAMENTER
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(312) 814-0608

EXHIBIT 1

Westlaw

Page 1

1995 WL 415802 (Ill.Pol.Control.Bd.)

Illinois Pollution Control Board
State of Illinois

*1 PEOPLE OF THE STATE OF ILLINOIS, COMPLAINANT

v.

CITY OF
HERRIN
, RESPONDENT

PCB 95-158

July 7, 1995

(Enforcement - Land)

ORDER OF THE BOARD

This matter is before the Board upon the following several filings. On June 21, 1995 the City of Herrin (Herrin) filed a Motion for Leave to File Pleadings, accompanied by a Motion Attacking Jurisdiction and a Motion Attacking the Pleadings. The Motion Attacking Jurisdiction was correctly filed and included an appropriate certificate of service. However the Motion Attacking the Pleadings was not signed and did not include a proper certificate of service. An Amended Certificate of Service was filed on June 22, 1995 which demonstrated appropriate service of process for both motions. A signed Motion Attacking the Pleadings was filed on June 23, 1995.

On June 27, 1995 the People of the State of Illinois (State) filed an Amended Notice of Filing and Complainant's Response to Motion Attacking Jurisdiction, accompanied with a Certificate of Service, and a Notice of Filing and Objection to Motion for Leave to File Pleadings.

The instant order deals with a four count complaint filed on May 30, 1995 by the State against Herrin. The Board hereby grants Herrin's Motion for Leave to File Pleadings.

In the Motion Attacking the Pleadings, Herrin claims the State failed to comply with the requirements of Section 31(a) of the Environmental Protection Act (Act). (415 ILCS 5/31(a).) Herrin argues that the complaint fails to sufficiently locate the site of the alleged refuse, allege facts to support the violations were committed "knowingly and repeatedly", and vaguely characterizes the dates of the violations by stating those dates are "better known only to the city". Herrin requests that the complaint be stricken on grounds that it is indefinite and ambiguous.

The State asserts that Herrin's motion attacking the pleadings was at least 8 days late with no sufficient explanation. In addition, the State claims the complaint satisfies the requirements of proper pleading and points to the specific paragraphs in its complaint which support the alleged violations.

The Board finds the complaint is sufficiently definite to put Herrin on notice of the alleged violations and to prepare a defense. The Board hereby denies Herrin's Motion Attacking the Pleadings.

Next, Herrin's Motion Attacking Jurisdiction states that the Board lacks jurisdiction to entertain the State's complaint because the complainant fails to comply with the financing notification requirement of Section 31(a) of the Act. (415 ILCS 5/31(a).) Section 31(a) states in pertinent part that the "complaint shall be accompanied by a notification to the defendant that financing may be available, through the Illinois Environmental Facilities Financing Act, to correct such violation". (415 ILCS 5/31(a)(1).) The State did not include such financing notification in the original complaint. The State asserts that the absence of such notification has resulted in no harm to Herrin because Herrin's motion reflects its knowledge of the financing. The State's June 27th Amended Notice of Filing includes the financing notification.

*2 Specific notice as delineated in Section 31(d) is required in conjunction with serving the complaint on Herrin. The State failed to send notice in compliance with Section 31(d) of the Act to the City of Herrin in its May 30, 1995 complaint.

The Board nonetheless accepts the State's June 27, 1995 amended notice of filing and interprets it as an amended complaint curing the financing notification deficiency. The Board therefore denies Herrin's Motion Attacking Jurisdiction. [FN1]

IT IS SO ORDERED.

R.C. Flemal

FN1. On July 6, 1995 Herrin filed an additional Motion Attacking Jurisdiction and a Motion Attacking the Pleadings. These pleadings are not ripe and are therefore not addressed in this order.

1995 WL 415802 (Ill.Pol.Control.Bd.)

END OF DOCUMENT

EXHIBIT 2

Westlaw

Page 1

1986 WL 26688 (Ill.Pol.Control.Bd.)

Illinois Pollution Control Board
State of Illinois

*1 ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, COMPLAINANT,

v.

**PRODUCTION
FINISHERS
AND
FABRICATORS
, INC. RESPONDENT.**

PCB 85-31

January 9, 1986

ORDER OF THE BOARD

by J. Theodore Meyer

On November 19, 1985 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). The Agency responded to the motion at the hearing conducted in this matter on November 26, 1985. (R. at 9-10). The hearing officer erroneously dismissed the motion in contravention of 35 Ill. Adm. Code 103.140(a) and (e) which requires that all motions to dismiss be ruled upon by the Board. (R. at 17).

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.

IT IS SO ORDERED.

J. Anderson concurred.

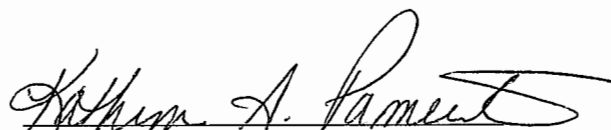
J. D. Dumelle and R. C. Flegal dissented.

1986 WL 26688 (Ill.Pol.Control.Bd.)

END OF DOCUMENT

CERTIFICATE OF SERVICE

I, KATHRYN A. PAMENTER, an Assistant Attorney General, do certify that I caused to be served this 1st day of May, 2013, the attached Notice of Motion and Motion for Leave to File Surreply to Respondents' Reply in Support of Motion to Strike Amended Notice of Electronic Filing upon (a) Kenneth Anspach, Esq. by placing a true and correct copy in an envelope addressed as set forth on said Notice of Motion, first class postage prepaid, and depositing same with the United States Postal Service at 100 West Randolph Street, Chicago, Illinois, at or before the hour of 5:00 p.m., and (b) Bradley P. Halloran via e-mail.



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Environmental Bureau
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