

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.)
)
 ATKINSON LANDFILL CO., an)
 Illinois corporation,)
)
 Respondent.)

PCB No. 13-28
 (Enforcement-Water)

NOTICE OF MOTION

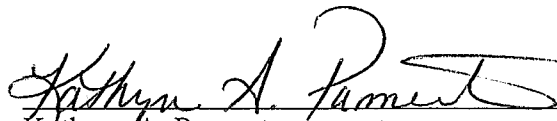
To: *Via Email/Regular Mail*
 Kenneth Anspach, Esq.
 Anspach Law Office
 111 West Washington Street
 Suite 1625
 Chicago, Illinois 60602

Via Email
 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 21st day of June, 2013, the Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, filed the attached Motion to Strike Respondent's Section 2-619(a)(9) Motion to Dismiss and Affidavits of Gary Hull and Erik Vardijan, 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: June 21, 2013

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ex rel. LISA MADIGAN, Attorney)
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 ATKINSON LANDFILL CO., an)
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 Respondent.)

PCB No. 13-28
 (Enforcement-Water)

**COMPLAINANT'S MOTION TO STRIKE RESPONDENT'S SECTION 2-619(a)(9)
 MOTION TO DISMISS AND AFFIDAVITS OF GARY HULL AND ERIK VARDIJAN**

Complainant, PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois, pursuant to 35 Ill. Adm. Code 101.100, 101.500 and 101.506, 735 ILCS 2-615 and Supreme Court Rule 191(a), hereby moves this Board to strike (a) Respondent's Section 2-619(a)(9) argument within its Motion to Strike and Dismiss the People's Complaint (the "Respondent's Motion to Dismiss"), and (b) paragraphs 2-4 of the Affidavit of Gary Hull and paragraphs 3 and 4 of the Affidavit of Erik Vardijan, which Respondent filed in support of its Section 2-619(a)(9) argument. In support thereof, Complainant states as follows:

STATEMENT OF FACTS

On April 18, 2013, the Illinois Pollution Control Board ("Board") accepted Complainant's four-count First Amended Complaint against Respondent, which alleges that Respondent disposed of landfill leachate at the Village of Atkinson Sewage Treatment Plant ("Village Treatment Plant") in excess of Respondent's permit limitations and at the City of Galva wastewater treatment facility ("Galva Treatment Facility") without any operating permit. (See Complainant's Response to Respondent's Motion to Strike and Dismiss First Amended

Complaint filed contemporaneously herewith and incorporated herein by reference.) On June 7, 2013, Respondent filed its Motion to Dismiss which, in part, seeks the dismissal of the First Amended Complaint pursuant to 735 ILCS 2-619(a)(9). (Respondent's Motion to Dismiss at pp. 18-21, 25-27.) Specifically, Respondent contends that the Village Treatment Plant and the Galva Treatment Facility authorized Respondent's disposals of landfill leachate at designated locations on March 16, 2011 and May 4, 2011, respectively. (*Id.*)

That portion of Respondent's Motion to Dismiss relies upon the Affidavit of Gary Hull ("Hull Affidavit") and the Affidavit of Erik Vardijan ("Vardijan Affidavit" and together with the Hull Affidavit, the "Affidavits"), which are attached to Respondent's Motion to Dismiss as Exhibit A and Exhibit B, respectively.¹ (*Id.*) The Hull Affidavit only refers to an authorization allegedly given for Respondent's disposal of landfill leachate at a designated location on March 16, 2011, and the Vardijan Affidavit only refers to an authorization allegedly given for Respondent's disposal of landfill leachate at a designated location on May 4, 2011. (*Id.* at Exhibits A and B.) Neither Affidavit refers to the amount of landfill leachate allegedly authorized for disposal. (*Id.*) Moreover, neither Affidavit specifically addresses any of Respondent's other disposals between March 17, 2011 and April 12, 2011 at the Village Treatment Plant and between May 5, 2011 and June 16, 2011 at the Galva Treatment Facility. (*See* First Amended Complaint at p. 2, ¶ 6; p. 9, ¶ 13.) Therefore, even if Complainant's Motion to Strike were denied, the cause of action would remain as to all of Respondent's disposals of landfill leachate that occurred on dates other than March 16, 2011 and May 4, 2011.

¹ To date, neither party has conducted any discovery, including a deposition of Mr. Hull or Mr. Vardijan.

ARGUMENT

Illinois Supreme Court Rule 191(a), which establishes the requirements for affidavits filed in support of motions for involuntary dismissals, provides, in relevant part, as follows:

Affidavits . . . submitted in connection with a motion for involuntary dismissal under section 2-619 of the Code of Civil Procedure . . . shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; *shall not consist of conclusions but of facts admissible in evidence*; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto.

Ill. S. Ct. Rule 191(a) (emphasis added). The Affidavits are substantively deficient because they are based upon hearsay statements. The hearsay statements contained in the Affidavits are as follows:

- On or around March 16, 2011 I drove a tanker truck containing a load of leachate (the "ALC Leachate") from the Atkinson Landfill to the Village of Atkinson Sewage Treatment Plant (the "Atkinson STP") where I met village employee, *Bob Floming, who told me that the Atkinson STP had too much water due to heavy rains from the past several days.* (Hull Affidavit at ¶ 2 (emphasis added)).
- At that time and place, *Mr. Floming told me to then go to the abandoned gas station located on the southwest corner of the intersection of State Street (or County Road 5) and Commercial Drive and discharge the ALC Leachate into the sewer access there.* (Hull Affidavit at ¶ 3 (emphasis added)).
- I called Diana Vardijan, a manager at Atkinson Landfill, and *told her what Mr. Floming had directed me to do. She told me to proceed with the Village representative's instructions.* (Hull Affidavit at ¶ 4 (emphasis added)).
- At that time and place *Greg Thompson, Water and Sewer Superintendent, City of Galva, designated a discharge point for me to discharge the ALC Leachate into sewers of the Galva WWTF. That discharge point was at the main sewer interceptor to the North Treatment Plant (the "Plant"), about 1000 feet from the Plant. All subsequent loads of ALC Leachate discharged by either me or other tanker truck drivers employed by ALC were discharged into the sewers of the Galva WWTF at the same designated discharge point.* (Vardijan Affidavit at ¶¶ 3-4 (emphasis added)).

Each of these out-of-court statements is being offered for the truth of the matter asserted, and thereby constitutes a hearsay statement that would be inadmissible if offered at trial. *See, e.g., People v. State Oil Co. et al.*, PCB 97-103, 1998 WL 820935, slip op. at *6-*7 (Nov. 19, 1998). Because the above-quoted statements would be inadmissible at trial, the statements are also inadmissible for purposes of supporting Respondent's Motion to Dismiss. Ill. S. Ct. Rule 191(a). Accordingly, Paragraphs 2-4 of the Hull Affidavit and Paragraphs 3-4 of the Vardijan Affidavit must be stricken. Similarly, because Respondent's Section 2-619(a)(9) argument within its Motion to Dismiss is based solely on the Hull Affidavit and the Vardijan Affidavit and the inadmissible hearsay statements contained therein, *see* Respondent's Motion to Dismiss at pp. 18-21, 25-27, that argument must also be stricken.²

WHEREFORE, Complainant, People of the State of Illinois, requests that the Board:

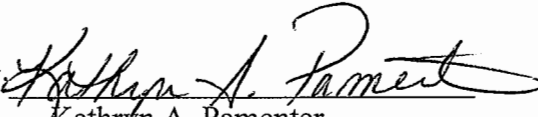
1. Grant Complainant's Motion to Strike Respondent's Section 2-619(a)(9) Motion to Dismiss and the Affidavits of Gary Hull and Erik Vardijan;
2. Strike Paragraphs 2-4 of the Hull Affidavit and Paragraphs 3-4 of the Vardijan Affidavit;
3. Strike Respondent's Section 2-619(a)(9) argument within its Motion to Dismiss at pages 18-21 and 25-27; and

² Given that the threshold issue argued in this Motion to Strike must first be resolved, Complainant reserves the right to respond to Respondent's Section 2-619(a)(9) argument on the merits if the Board denies its Motion to Strike Respondent's Section 2-619(a)(9) Motion to Dismiss and Affidavits of Gary Hull and Erik Vardijan.

4. Afford such other relief as this Court shall deem appropriate and just.

Respectfully Submitted,

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

BY: 
Kathryn A. Pamerter
Assistant Attorney General
69 W. Washington, Suite 1800
Chicago, IL 60602
(312) 814-0608

CERTIFICATE OF SERVICE

I, KATHRYN A. PAMENTER, an Assistant Attorney General, do certify that I caused to be served this 21st day of June, 2013, the attached Notice of Motion and Motion to Strike Respondent's Section 2-619(a)(9) Motion to Dismiss and Affidavits of Gary Hull and Erik Vardijan upon (a) Kenneth Anspach, Esq. *via email and via regular mail* 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 email*.


KATHRYN A. PAMENTER