

ILLINOIS POLLUTION CONTROL BOARD  
December 2, 1993

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
 Complainant, )  
 )  
 v. ) PCB 93-186  
 ) (Enforcement)  
 EMCO CHEMICAL DISTRIBUTORS, INC., )  
 )  
 Respondent. )

ORDER OF THE BOARD (by R.C. Flemal):

This matter comes before the Board on respondent's October 28, 1993 motion to dismiss count VIII and to strike certain allegations contained in counts XVI-XX of the complaint filed October 7, 1993 by Roland W. Burris, Attorney General of the State of Illinois, on behalf of Illinois Environmental Protection Agency and the People of the State of Illinois. On November 18, 1993 the Board granted complainant leave to file its response to the motion to dismiss and strike by November 22, 1993. The complainant filed its response on November 23, 1993 accompanied by a motion to file. The Board hereby grants the motion to file.

Section 31(d) Notice

The respondent requests dismissal of count VIII. Part of count VIII alleges violations of condition 6(b) of respondent's air operating permit<sup>1</sup>. Respondent alleges that this count is brought by the Attorney General's office upon request of the Illinois Environmental Protection Agency (Agency) pursuant to the terms of Section 31 of the Act. (See footnote 1.) Respondent requests dismissal for failure of the Agency to include alleged violation of condition 6(b) in written notice to respondent pursuant to Section 31(d) of the Act. (415 ILCS 5/31(d)). Respondent further claims that none of the enforcement notice letters sent to respondent by the Agency included an alleged violation of condition 6(b) of the permit. (See Exhs. A, B, and C to respondent's motion.) Respondent argues that Agency failure to give respondent notice pursuant to Section 31(d) prior to the filing of the complaint results in the Board lacking personal jurisdiction over respondent for the allegations contained in Count VIII pertaining to condition 6(b) of the permit. Respondent further argues that count VIII should be dismissed with prejudice, claiming that the statutory requirement of notice

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<sup>1</sup> Permit No. 84100044.

prior to filing of a complaint cannot be met after filing of the complaint has been accomplished.

Complainant argues in response that respondent had "constructive notice" of the alleged violation of condition 6(b) of the permit. This "constructive notice" is described as (1) oral notice of violation of condition 6(b) in discussions during a facility inspection prior to the filing of the complaint, and (2) written notice of alleged violation of condition 6(a) that would serve as constructive notice of alleged violation of condition 6(b), due to the nexus between conditions 6(a) and 6(b) in the permit. Additionally, complainant argues that should the Board find that failure to provide notice pursuant to Section 31(d) occurred for count VIII, the count should not be dismissed with prejudice.

The Board finds that written notice was not given for alleged violations of condition 6(b) of the permit, and therefore the Board lacks personal jurisdiction over the respondent pertaining solely to violations of condition 6(b). (See, People v. Chicago Heights Refuse Depot, Inc. (October 10, 1991), PCB 90-112; and People v. Escast, Inc. (July 30, 1992), PCB 92-67.) The Board is not persuaded by the "constructive notice" arguments of the complainant. Section 31(d) of the Act requires written notice of the charges alleged as follows:

\* \* \* [P]rior to issuance and service of a written notice and formal complaint under subsection (a) of this Section, the Agency shall issue and serve upon a person complained against a written notice informing such person that the Agency intends to file a formal complaint. Such written notice shall notify the person of the charges alleged and offer the person an opportunity to meet with appropriate agency personnel in an effort to resolve such conflicts which could lead to the filing of the formal complaint. \* \* \*

Oral notification during a facility inspection and written notification of alleged violation of condition 6(a) do not amount to written notice of alleged violation of condition 6(b). The Board here finds that oral discussions cannot substitute for the clear requirement in the Act for written notice of the charges alleged.

The Board further finds that complainant is correct that count VIII should not be dismissed with prejudice. A dismissal due to lack of personal jurisdiction is not an adjudication on the merits. Based on the above, the Board hereby dismisses count VIII without prejudice, but only as it pertains to condition 6(b) of the permit.

Striking of Certain Allegations Pertaining to Tank Truck Loading Operations

Respondent requests that the following paragraphs of counts XVI through XX of the complaint be stricken:

Count XVI, paragraphs 7, 8, and 13;  
Count XVII, paragraphs 9, 10, 14, and 15;  
Count XVIII, paragraphs 9, 10, and 14;  
Count XIX, paragraphs 9, 10, 14, and 15;  
Count XX, paragraphs 9, 10, and 14.

Respondent alleges that counts XVI through XX of the complaint allege that respondent's tank truck loading operations violated certain special and standard conditions of permit no. 84110021. However, in a complaint recently filed against respondent in the Circuit Court of Lake County, complainant alleges that respondent does not possess an operating permit for its tank truck loading operations. (People v. Emco Chemical Distributors, Inc., et al., Cir. Ct. Lake County No. 93-CH-658 (Exhibit D)). From this, respondent asserts that complainant's unequivocal statements contained in the circuit court complaint should be taken as judicial admissions by complainant that respondent's tank truck loading operations are not encompassed in the tank truck washing permit no. 84110021, and that the portions of the complaint pertaining to violations of tank truck loading under permit number 84110021 should be stricken.

Complainant responds that "tank truck loading" or "tank truck loading/unloading" (terms used interchangeably) comprises two separate actions that require two separate permits. Complainant states that:

Respondent's unloading activities though generally considered a part of its loading operation is permitted by the Agency. It is the violation of the permit conditions associated with the permitted "unloading" activities that is addressed in counts XVI-XX.  
(complainant's response at 9-10, emphasis in original.)

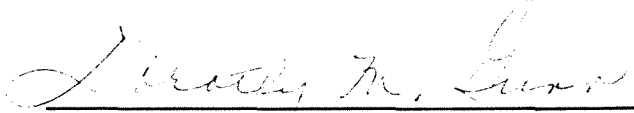
Complainant claims that it has set forth information in both the complaint before the Board and the District Court to notify respondent of the violations alleged, distinguishing between the two permit requirements.

The Board denies the motion to strike certain portions of counts XVI-XX. These portions pertain to alleged violations for actions required under permit no. 84110021. Neither party claims that permit no. 84110021 is not a valid permit issued to respondent. Whether actions required by this permit were not performed as required, and hence result in violation of the

permit, is an issue to be decided by the Board after development and completion of the record in this proceeding.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 3<sup>rd</sup> day of December, 1993, by a vote of 6-0.

  
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Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board