ILLINOIS POLLUTION CONTROL BOARD
November 21, 2002

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | PCB 02-56 |
| | ) | (Enforcement - Water) |
| CHIQUITA PROCESSED FOODS, L.L.C., a Wisconsin limited liability corporation, | ) | |
| | ) | |
| Respondent. | ) | |

ORDER OF THE BOARD (by T.E. Johnson):

This matter is before the Board on a September 20, 2002 motion for summary judgment filed by Chiquita Processed Foods, L.L.C., a Wisconsin limited liability corporation (Chiquita). Chiquita filed a memorandum supporting the motion on September 20, 2002. On September 27, 2002, the complainant filed a motion for extension of time to respond to the motion. The complainant filed its response to the motion on October 18, 2002. On November 1, 2002, Chiquita filed a motion for leave to file a reply to the response, and a reply.

For the reasons outlined below, the Board grants Chiquita's motion for summary judgment.

## PROCEDURAL BACKGROUND

On November 9, 2001, the complainant filed a complaint alleging that Chiquita caused or allowed water pollution in violation of the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq*. (2000), *as amended by* P.A. 92-0574, eff. June 26, 2002) and the associated regulations at its pumpkin processing facility located in Princeville, Peoria County. On July 31, 2002, the complainant filed an amended complaint resulting in Chiquita's motion for summary judgment and subsequent related pleadings.

## PRELIMINARY MATTERS

In its September 27, 2002 motion for extension of time, the complainant requests until October 17, 2002, to file its response to Chiquita's motion for summary judgment. The complainant asserts that it needs this time in order to more fully respond to the arguments in the motion, and that Chiquita does not object to the extension.

Complainant's motion for extension of time is granted, and complainant's response, filed on October 18, 2002, is accepted.

In its November 1, 2002 motion for leave to file a reply *instanter*, Chiquita asserts that material prejudice will result if it is not allowed to explain to the Board why the consent order referenced by the complainant in its response does not exempt the Agency from compliance with Section 31 of the Act.

On November 13, 2002, the complainant filed a response to the motion for leave to file a reply. In its response, the complainant asserts that Chiquita has not sufficiently established grounds showing that material prejudice will result if leave to file the reply is not granted.

The Board finds that Chiquita's reply is necessary to prevent material prejudice. Accordingly, Chiquita's motion for leave to file a reply *instanter* is granted, and its reply filed on November 1, 2002, is accepted.

## STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings and depositions, together with any affidavits and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 693 N.E.2d 358 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370.

Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

## CHIQUITA'S MOTION FOR PARTIAL SUMMARY JUDGMENT

In the motion for summary judgment, Chiquita asserts that the Illinois Environmental Protection Agency (Agency) failed to provide Chiquita with notice prior to its referral of the alleged violations set forth in counts IV and V of the amended complaint to the Attorney General's Office (Attorney General). Mot. at 2.[1] Chiquita attaches an affidavit by the area manager of its facility stating that to the best of his knowledge, no notice regarding the violations alleged in counts IV and V of the complaint was provided to Chiquita prior to the Attorney General's involvement in this case. Mem. Ex. D. Chiquita argues that the notice requirements of Section 31 of the Act are a mandatory precondition to the Agency's referral of violations to the Attorney General, and that lack of notice results in defective or insufficient notice of the

[1] Chiquita's motion for summary judgment will be referred to as "Mot. at __."; Chiquita's memorandum in support of its motion for summary judgment will be referred to as "Mem. at __."; Exhibits attached to Chiquita's memorandum will be referred to as "Mem. Ex. __."; complainant's response to the motion for summary judgment will be referred to as "Resp. at __."; Chiquita's reply will be referred to as "Reply at __."

claim and divests the court of personal jurisdiction over the respondent with respect to that claim. *Id, citing* People v. Chicago Heights Refuse Depot, Inc., PCB 90-112 (Oct. 10, 1991).

Chiquita contends that the notice requirements of Section 31 of the Act are a precondition to the Agency's referral or request to the Attorney General for legal representation regarding an alleged violation. Mem. at 5. Chiquita asserts that the complainant obtained all of the facts upon which the complaint and amended complaint are based from the Agency. *Id*. Chiquita argues that the Agency's failure to comply with the mandatory provisions of Section 31 renders the proceeding void as to the alleged violations in counts IV and V. Mem. at 6.

Chiquita argues that pursuant to Section 47(a) of Act (415 ILCS 5/47(a) (2000), *as amended by* P.A. 92-0574, eff. June 26, 2002), the Attorney General must require the Agency to comply with its obligations under Section 31 as a precondition to any request for legal representation. Mem. at 6. Chiquita contends that, although the Act allows the Attorney General to bring actions on its own motion, there is no language in the Act to suggest that the Agency can disregard Section 31 of the Act so long as the Attorney General agrees to represent the Agency anyway and, in effect, concurs with the Agency's request. Mem. at 7. Chiquita maintains that such an interpretation would emasculate Section 31 of the Act and make the preconditions on referral of no effect. *Id*.

Chiquita maintains that Section 31 of the Act is a tool that ensures the regulated community has an opportunity to be informed of an alleged violation, and is able to at least discuss it with the Agency prior to the initiation of formal enforcement proceedings. Mem. at 7. Chiquita argues that compliance with the Agency's interpretation of Chiquita's permit conditions could have been achieved through the Section 31 process. Mem. at 9.

Chiquita further contends that if the Agency had complied with Section 31 of the Act, many of the alleged violations in counts IV and V could have been quickly resolved. Mem. at 10. Chiquita asserts, as an example, that at least 18 of the discharge monitoring report (DMR) violations alleged in Counts IV and V appear to be nothing more that the complainant having misread the DMRs. *Id*.

Chiquita asserts that as a matter of law, complainant's allegations of violations based upon the results of samples taken by the Agency on February 7, 2001, are inaccurate. Mot. at 2. Chiquita asserts that the conditions of its National Pollutant Discharge Elimination System (NPDES) permit are vague and that the interpretation proffered by the Agency is inconsistent with the Board's regulations. Mem. at 18-19. Chiquita argues that a permit condition that is so vague a person must guess at it's meaning has been properly held to be unenforceable. Mem. at 19, *citing* Halfway House v. City of Waukegan, 267 Ill. App. 3d 112, 641 N.E. 2d 1005 (2nd Dist. 1994).

## COMPLAINANT'S RESPONSE

The complainant contends that a genuine issue of material fact exists as to whether the allegations within counts IV and V are inaccurate and premised upon the Agency's misinterpretation of the data reported by the DMRs and the terms of Chiquita's NPDES permit.

Resp. at 1. The complainant asserts that all well-pled facts must be considered in the light most favorable to the nonmovant, and that the proof of the alleged effluent violations is a contested matter. Resp. at 2.

The complainant next asserts that the Board has not addressed whether the Attorney General must require the Agency to comply with its obligations under Section 31 of the Act as a precondition to any request for legal representation, but that the argument suggesting the Attorney General ought to refuse a referral unless administrative compliance with Section 31 of the Act is demonstrated is somewhat tortured. Resp. at 2.

The complainant contends the Board has held the Attorney General is not subject to the requirements of Sections 31 (a) and (b) of the Act, but has broad independent authority to bring actions pursuant to Section 31(d). Resp. at 2, *citing* People v. Geon Company, PCB 97-62 (Oct. 2, 1997).

The complainant asserts that the Attorney General has a "general expectation" that the Agency will timely inform the Attorney General of any violations relating to facilities or violators operating under pending or previous court or Board orders when the Agency becomes aware of such a violation. Resp. at 3. The complainant contends the information received on November 2, 2000, from the Agency, satisfied the Attorney General's general expectation, and that the Attorney General explicitly requested any additional information possessed by the Agency "as to potential allegations of violation relating to a facility and/or violator." Resp. at 3-4. The complainant maintains that such additional information was provided by the Agency in August 2001. Resp. at 4.

In summary, the complainant argues that the communications that occurred between attorney and client and underlie the purported noncompliance with Section 31 of the Act were occasioned by the pendency of a Peoria County Consent Order and not by any intent on the part of the Agency to circumvent statutory requirements. Resp. at 4.

## CHIQUITA'S REPLY

Chiquita argues that no language in the Act permits the Attorney General to disregard the mandates of Section 31 of the Act if a facility has previously entered into a consent order. Reply at 3. In addition, contends Chiquita, complainant's position is contrary to the express language of the consent order itself that requires informal negotiations prior to a dispute being presented to a court. Reply at 4.

Chiquita contends there is no genuine issue of material fact as to the Agency's non-compliance with Section 31 of the Act, and that Chiquita is, accordingly, entitled to summary judgment as a matter of law. Reply at 5.

Chiquita asserts that the prior decisions of the Board relied upon by the complainant involve different circumstances than found in the instant case. Reply at 5. Specifically, Chiquita argues that it is undisputed here that all of the allegations against Chiquita were made at the request of the Agency, and that this was not the situation in Geon, PCB 97-62. *Id*.

Chiquita concludes that Section 31 of the Act was not followed by the Agency prior to its referral of the allegations in counts IV and V to the Attorney General, and that neither the Act, nor the consent order, nor the decisions relied upon by the complainant exempt the Agency from compliance with the requirements of Section 31 of the Act. Reply at 6.

## DISCUSSION

The Board has extensively addressed the requirements of Section 31 of the Act. In considering the legislative history of the 1996 amendments to Section 31the Board has repeatedly found that they were not intended to bar the Attorney General from prosecuting an environmental violation. *See* People v. Eagle-Picher-Boge, PCB 99-152 (July 22, 1999); People v. Geon, PCB 97-62 (Oct. 2, 1997); and People v. Heuermann, PCB 97-92 (Sept. 18, 1997).

Rather, the written notice required by Section 31(a)(1) is a precondition to the Agency's referral of the alleged violations to the Attorney General. People v. Chemetco, PCB 96-76 (July 8, 1998). The legislative history of Section 31 indicates that the legislature did not intend to prevent the Attorney General from bringing enforcement actions that are not based on an Agency referral. *Id*.

In this case, however, the Attorney General is bringing a complaint not on its own, but pursuant to a referral containing information provided by the Agency. It is undisputed that the Section 31 process was not followed. Chiquita has provided an affidavit stating that no notice of violation was ever received. The complainant has not refuted that claim. The complainant has admitted in a discovery response that the violations of counts IV and V were referred to the Attorney General by the Agency. *See* Mem. Exs. G and H.

In People v. Crane, PCB 01-76 (May 17, 2001), the Board found that while the 180 day time period of Section 31(a)(1) is directory, the substance of the Section 31 referral process is mandatory. Crane, PCB 01-76, slip op. at 17. Here, the Agency never issued or served a written notice of violation – either before or after the 180-day time period - as required by Section 31(a)(1) of the Act. 415 ILCS 5/31(a)(1) 2000, *as amended by* P.A. 92-0574, eff. June 26, 2002.

The Board is not convinced by complainant's contention that compliance with Section 31 is obviated by a general expectation, acknowledged by the Agency, that the Attorney General's Office will be timely informed of any alleged violations relating to facilities or violators operating under pending or previous court or Board orders. This expectation does not excuse the Agency from complying with the provisions of Section 31 of the Act.

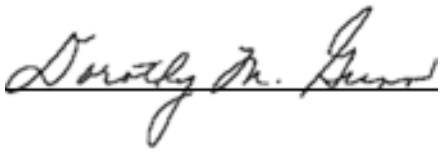
The Board finds that the violations alleged in counts IV and V were referred to the Attorney General by the Agency, and that the Agency did not issue or serve a written notice of violation prior to this referral. No genuine issue of material facts exists on these matters. Accordingly, the Board finds that the Agency did not meet the requirements of Section 31(a)(1) of the Act, and grants Chiquita's motion for summary judgment.

## CONCLUSION

The Board grants Chiquita's motion for summary judgment, and dismisses counts IV and V without prejudice. The parties are directed to proceed expeditiously to hearing on the remainder of the complaint.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 21, 2002, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board