

The complaint alleges that American Waste stored hazardous wastes and closed an area of the site without a proper closure plan. The complaint states that once a closure plan was approved by the Agency, soil samples, and groundwater samples indicated contamination above the Agency's established clean-up objectives. (*Id.* at 4.) The complaint further alleges that American Waste failed to submit a modified closure plan, failed to timely complete closure, and failed to provide certification of closure. (*Id.* at 7, 9.) The complaint further contends that American Waste failed to possess a written estimate in current dollars of the cost of closing, failed to adjust the closure cost estimate for inflation, failed to revise the closure cost estimate no later than 30 days after a revision was made to the closure plan, and failed to establish financial assurance for closure. (*Id.* at 12-14.) Further, the complaint alleges that American Waste failed to provide the Agency with a detailed written estimate or financial assurance for post-closure monitoring and maintenance. (*Id.* at 14.) The complaint also alleges that American Waste failed to provide liability coverage at the site, failed to meet groundwater monitoring requirements, and failed to implement an adequate groundwater quality assessment plan. (*Id.* at 15, 19-20.)

The Board previously denied a motion to dismiss filed by American Waste in an order dated August 1, 1996. While American Waste argued that the alleged violations were already compromised and settled with the Agency, the Board found that American Waste did not provide any documentation of the terms of that agreement. (See People of the State of Illinois v. American Waste Processing, Ltd. (August 1, 1996), PCB 96-264.) In an order dated October 17, 1996 the Board also denied a motion to reconsider filed by American Waste.

On November 25, 1996 American Waste filed the motion to dismiss at issue here. In the motion to dismiss, American Waste contends that the Board lacks subject matter jurisdiction over the instant action because the complaint does not allege that the Agency complied with Section 31(d) of the Act. Complainant responded to the motion to dismiss on December 6, 1996, arguing that the motion to dismiss was not timely under the Board's regulations at 35 Ill. Adm. Code 101.243(a), 101.243(b), and 103.140, and thus, American Waste waived any challenge to the Board's jurisdiction. Complainant further argued that Section 31(d) of the Act does not require that the complaint contain an allegation that the Agency complied with Section 31(d). Alternatively, complainant requests that, in the event the Board agrees with American Waste, it be granted leave to file an amended complaint.

American Waste filed its reply on December 10, 1996, asserting that Section 101.243(b) does not apply to subject matter jurisdiction. American Waste further argued that the Board does not obtain subject matter jurisdiction until the Agency has followed the prerequisites of Section 31(d). Complainant filed a response to American Waste's reply on December 20, 1996.² For the reasons stated below, we grant the motion to dismiss.

² Pursuant to Section 103.140(c) of the Board's regulations, "[t]he moving party shall not have the right to reply, except as permitted by the Hearing Officer or the Board." In this matter, American Waste failed to ask leave of the Board to file its December 10, 1996 reply to complainant's response. Further, complainant failed to ask leave of the Board to file its December 20, 1996 response to American Waste's reply. Because both parties failed to seek

DISCUSSION

Pursuant to 35 Ill. Adm. Code 103.140(a), in enforcement actions, “[a]ll motions by respondent to dismiss or strike the complaint or challenging the jurisdiction of the Board shall be filed within 14 days after receipt of complaint.” Section 101.243(b) provides that “all motions challenging jurisdiction shall be filed prior to the filing of any other document by the moving party, unless material prejudice will result.” As the Board has previously stated, Section 101.243 is generally applicable to all proceedings before the Board, while Section 103.140 is applicable to enforcement actions, pursuant to Section 101.100. (People of the State of Illinois v. Clark Refining & Marketing, Inc. (December 20, 1995), PCB 95-163 at 2.) Because the instant case is an enforcement action, Section 103.140 is applicable. Therefore, all motions to dismiss or motions challenging the jurisdiction of Board had to be filed within 14 days after receipt of the complaint to be timely.

In the present case, American Waste’s motion to dismiss was filed five months after the complaint was filed, far beyond the 14-day period to file such motions under section 103.140(a). Therefore, the Board agrees with complainant that the motion to dismiss is not timely. However, Clark Refining & Marketing indicates that in enforcement actions the Board may still exercise its discretion to consider an untimely motion if the Board determines that material prejudice would otherwise result. (Clark Refining & Marketing, Inc. (December 20, 1995), PCB 95-163 at 2.) While American Waste does not specifically allege that it would be materially prejudiced if the Board were to find the motion to dismiss untimely, the Board concludes that American Waste would suffer material prejudice if the merits of the motion to dismiss were not considered.

By its terms, Section 31(d) requires that the Agency serve upon the alleged violator a written notice informing the person of the charges alleged, that the Agency intends to file a formal written complaint, and offering an opportunity to meet with Agency personnel to resolve conflicts, all prior to the filing of the complaint. Because the record reveals no evidence that American Waste received the statutorily required notice under Section 31(d), the Board is persuaded that material prejudice would result if the merits of the motion to dismiss were not considered.³ Accordingly, the Board will proceed to consider the merits of American Waste’s motion to dismiss.

leave to file their respective replies, as required by Board rules, the Board strikes both the reply and the response.

³ Despite the fact that the Agency filed pre-enforcement conference letters with respondent on several occasions including February 16, 1983, January 22, 1986, May 14, 1986, September 21, 1987, April 19, 1990, and August 24, 1994, the allegations herein pertain to occurrences up through and including at least September 29, 1995. (See Resp. 1, Attachments; See complaint generally.) The pleadings fail to contain any pre-enforcement letter which pertains to these later dates.

In its motion to dismiss, American Waste contends that the Board lacks subject matter jurisdiction over the instant matter because the complaint fails to allege that the Agency served it with written notice of the impending charges prior to the filing of the formal complaint. As previously noted, Section 31(d) requires that, prior to the filing of a formal complaint, the Agency serve upon a complainant a written notice informing the person of the charges alleged, that the Agency intends to file a formal written complaint, and offering an opportunity to meet with Agency personnel to resolve conflicts. (415 ILCS 5/31(d)(1) (1994).) Nowhere in the complaint is it stated that the Agency served a written notice upon American Waste, nor does the record indicate that such notice was served upon American Waste.⁴ The Board has previously held that specific notice, as delineated in Section 31(d), is required prior to the filing of a complaint. (People of the State of Illinois v. Chicago Heights Refuse Depot, Inc., (October 10, 1991) PCB 90-112; People of the State of Illinois v. EMCO Chemical Distributors, Inc., (December 2, 1993) PCB 93-186; People of the State of Illinois v Escast, Inc., (July 30, 1992) PCB 92-67.) Lack of such notice prior to the filing of a complaint results in defective or insufficient notice on all counts. (*Id.*)

Although the Board's rules do not specifically state that an allegation of compliance with Section 31(d) be included in the complaint (see 35 Ill. Adm. Code 103.122), it is uncontroverted that written notice of the charges must be served prior to the filing of the complaint. Failure to do so results in the dismissal of the complaint or portions thereof. Because there is no evidence pled or otherwise shown or alleged that the Agency served American Waste with the required Section 31(d) notice, the Board dismisses the complaint without prejudice. The action is dismissed without prejudice since a motion to dismiss for failure to comply with Section 31(d) is not an adjudication on the merits of the complaint. Moreover, complainant is free to, at any time, serve American Waste with the required 31(d) notice and then proceed with the filing of another formal complaint with the Board.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41(1994)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246 "Motions for Reconsideration.")

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the _____ day of _____, 1997, by a vote of _____.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

⁴ See *supra* note 3.

