

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

PEOPLE OF THE STATE OF ILLINOIS    )  
  )  
  Complainant,    )  
  )  
v.    )       Case No. 06-82  
  )  
BARGER ENGINEERING, INC., an        )  
Indiana corporation,                    )  
  )  
  Respondent.    )

**MOTION TO DISMISS**

NOW COMES Respondent, Barger Engineering, Inc., by and through its counsel, Sorling, Northrup, Hanna, Cullen & Cochran, Ltd., Charles J. Northrup, of counsel, and pursuant to 35 Ill. Adm. Code 101.506 hereby moves to dismiss this action for failure to comply with Section 31 of the Act. In support, Respondent states:

1.       The Complainant filed the Complaint in this matter on or about December 1, 2005. The Complaint alleges that on September 23, 2005, a PVC transfer line owned and operated by the Respondent ruptured resulting in the release of 1,500 barrels of salt water and 10 to 20 barrels of crude oil. The Complainant contends that such event caused or tended to cause water pollution and thus violated the Illinois Environmental Protection Act (the "Act").

2.       Respondent timely notified the Illinois Environmental Protection Agency (Illinois EPA) of the event and began remedial actions to clean it up. During the remedial actions, Respondent was often in contact with Mr. Tom Powell, an emergency response coordinator with the Illinois EPA. During this period Respondent had no contact with anyone from the Attorney General's Office.

3.       On October 11, 2005, the Attorney General's Office mailed a letter to Respondent stating that "the Illinois Environmental Protection Agency has asked this Office to initiate an

enforcement action against your company..." (A copy of this letter is attached to this Motion as Attachment 1). The letter was signed by Mr. Tom Davis, Chief, Environmental Bureau. The letter further requested that Respondent call Mr. Davis to discuss the release.

4. On October 13, 2005, Respondent called the Attorney General's Office and left a message for Mr. Davis. On October 20, 2005, Mr. Davis returned Respondents call and left a message. Respondent returned that telephone call and left another message. On October 21, 2005, Ms. Kristen Laughridge telephoned Respondent and indicated that a telephone conference call would be set up to discuss the release. On November 1, 2005, Ms. Kristin Laughridge telephoned again and advised as to the date and time of the conference call. On November 2, 2005, Ms. Laughridge telephoned again and changed the time of the telephone conference call.

5. On November 9, 2005, Respondent participated in a telephone conference call. Participating in the conference call were Mr. Matt Stone for Respondent, Ms. Laughridge for the Attorney General, and Messrs. John Waligore and Thomas Powell for the Illinois EPA. The nature of the event, and Respondent's clean-up efforts, were discussed.

6. As noted above, on December 1, 2005, the Attorney General filed this action against Respondent. The Complaint expressly states that it is brought, in part, "at the request of the Illinois Environmental Protection Agency" (Compl. Par. 1).

7. To date, Respondent has never received any writing of any kind from the Illinois EPA concerning the event.

8. Pursuant to Section 31 of the Act, prior to referring a matter to the Attorney General for possible enforcement, the Illinois EPA must provide written notice via certified mail to a potential respondent. 415 ILCS 5/31 et seq. The Illinois EPA's compliance with this notice procedure is mandatory and failure to comply with it must result in the dismissal of that portion

of a lawsuit improperly referred. People v. Chiquita Processed Foods, L.L.C., PCB No. 02-56 (November 21, 2002)(2002 ILL.ENV LEXIS 648).

In Chiquita, the Attorney General filed a multi-count complaint against a respondent alleging water pollution. Chiquita filed a motion for summary judgment on two counts of the complaint contending that because the Illinois EPA did not provide the required statutory notice of the violations under section 31(a)(1) of the Act before the matter was referred to the Attorney General, those two counts of the complaint must be dismissed. The Board agreed. As referenced above, the Board held that "the written notice required by Section 31(a) (1) [of the Act] is a precondition to the Agency's referral of the alleged violations to the Attorney General." Chiquita, PCB No. 02-56 (November 21, 2005), p. 3. The Board then went on to find that the facts, supported by affidavit, demonstrated that: (1) no written notice of the potential violations was ever issued or served upon Chiquita prior to the referral; and (2) the counts at issue were referred to the Attorney General by the Illinois EPA. In light of these facts and the law, the Board dismissed the two counts at issue.

The same facts are present in this case. There can be no dispute that the Respondent never received any kind of notice compliant with Section 31(a)(1) of the Act from the Illinois EPA. The attached affidavit of Matthew Stone, Vice President of Barger Engineering, unequivocally states that no notice has ever been received from the Illinois EPA. In addition, based upon the knowledge of Barger Engineering employees and the limited documents available at this time it is also unequivocally clear that any potential violations in this matter were, in fact, referred to the Attorney General by the Illinois EPA. First, as noted in the Mathew Stone affidavit, prior to receipt of the October 11, 2005, letter from the Attorney General's Office, Barger had no contact with the Attorney General's Office. In fact, the only contact

between Respondent and the State was through the Illinois EPA. Accordingly, the only source of information to this event was the Illinois EPA. Second, the October 11, 2005, letter from the Attorney General's Office to Respondent advising of an impending enforcement action clearly states the matter initiated from, and was referred to, the Attorney General from the Illinois EPA ("Please be advised that the Illinois Environmental Protection Agency has asked this Office to initiate an enforcement action against your company..."). Third, the Attorney General's Complaint itself recites that the matter is being brought "at the request of the Illinois Environmental Protection Agency." In light of these facts, this matter must be dismissed for failure of the Illinois EPA to comply with the notice requirements of Section 31(a)(1).

9. An affidavit of Respondent's Vice President in support of this Motion is attached as attachment 2.

WHEREFORE, Respondent Barger Engineering L.L.C., respectfully requests that the Board grant this Motion to Dismiss and for any other relief this Board deems appropriate.

Respectfully submitted,

Barger Engineering, Inc., Respondent

By: \_\_\_\_\_

One Of Its Attorneys

Sorling, Northrup, Hanna,  
Cullen & Cochran, Ltd.  
Charles J. Northrup, of Counsel  
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**PROOF OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing document was electronically filed with the Illinois Pollution Control Board.

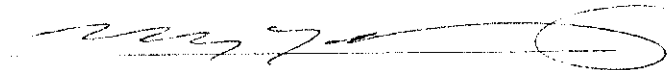
Ms. Dorothy Gunn  
Illinois Pollution Control Board  
James R. Thompson Center  
Suite 11-500  
100 West Randolph  
Chicago, IL 60601

and served on the following by placing same in a sealed envelope addressed:

Mr. Matthew J. Dunn  
Environmental Enforcement/Asbestos  
Litigation Division  
500 South Second St.  
Springfield, IL 62706

Mr. Kristen Laughridge  
Attorney General's Office  
Assistant Attorney General  
500 South Second St.  
Springfield, IL 62706

and by depositing same in the United States mail in Springfield, Illinois, on the 30<sup>th</sup> day of December, 2005, with postage fully prepaid.





OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

*John Waligore*  
October 11, 2005

October 11, 2005

Mr. Hugh Berger  
Berger Engineering, Inc.  
Post Office Box 2507  
Evansville, Indiana 47723-0507

Re: *September 23, 2005, release*

Dear Sir:

Please be advised that the Illinois Environmental Protection Agency has asked this Office to initiate an enforcement action against your company for water pollution violations resulting from the above-referenced incident at the Phillipstown Unit Water Flood Plant in White County. In addition to a civil penalty, the State is seeking to have your company perform the following actions: remove any standing salt water; flush the drainageway and receiving stream with fresh water; sample the sediment for chlorides; and identify any other transfer lines located within drainageways for relocation or repair as necessary. Please call me to discuss this matter.

Thank you for your assistance and cooperation.

Sincerely,

  
Thomas Davis, Chief  
Environmental Bureau  
500 South Second Street  
Springfield, Illinois 62706  
217/782-7968

cc: John Waligore

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	)	
Respondent.	)	

AFFIDAVIT OF MR. MATHEW STONE, VICE PRESIDENT,  
BARGER ENGINEERING, INC.

STATE OF INDIANA        )  
                                  )ss  
COUNTY OF                )

1. My name is Mathew Stone and I am currently, and at all times relevant hereto, Vice President of Barger Engineering, Inc.

2. As part of my duties at Barger Engineering, Inc. I have from time to time been involved in communicating with the Illinois Environmental Protection Agency and responding to releases of crude oil and produced water from Barger Engineering facilities.

3. I am aware of an event referenced in the Complaint filed by the Illinois Attorney General's Office with the Illinois Pollution Control Board related to an event occurring on September 23, 2005. I am the Barger Engineering employee who is responsible for responding to the September 23, 2005 event as well communicating with representatives of the State of Illinois about it.

4. Since September 23, 2005 I have had various discussions with Illinois EPA personnel concerning the September 23, 2005, event.

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Barger Engineering, Inc.

5. I have never received any written communication from the Illinois EPA related in any way to the September 23, 2005 event. Nor am I aware of any other Barger Engineering employee receiving any such written communication. Had such a communication been sent by the Illinois EPA and received by Barger Engineering it would have been directed to me.

6. The only written communication I have received concerning the September 23, 2005 event was an October 11, 2005 letter from Mr. Thomas Davis at the Illinois Attorney General's Office and a Complaint filed by the Attorney General with the Pollution Control Board (Case no. 06-82).

7. Other facts as represented in the Motion to Dismiss are true and accurate to the best of my belief.

FURTHER AFFIANT SAYETH NOT.

  
MATTHEW STONE

Subscribed and sworn to before me this 29<sup>th</sup> day of December, 2005.

  
NOTARY PUBLIC

TAMEA LYNN PRIDDIS  
NOTARY PUBLIC STATE OF INDIANA  
VANDERBURGH COUNTY  
MY COMMISSION EXPI. AUG. 13, 2006

