

ILLINOIS POLLUTION CONTROL BOARD  
March 16, 2006

PEOPLE OF THE STATE OF ILLINOIS, )  
)  
Complainant, )  
)  
v. ) PCB 06-82  
) (Enforcement - Water)  
BARGER ENGINEERING, INC., )  
)  
Respondent. )

ORDER OF THE BOARD (by G.T. Girard):

On December 1, 2005, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a one-count complaint (Comp.) against Barger Engineering, Inc. (Barger). On December 30, 2005, Barger filed a motion to dismiss the complaint (Mot.), accompanied by an affidavit from Mr. Matthew Stone. The People timely filed a response in opposition on February 3, 2006 (Resp.). The Board denies the motion to dismiss because the People properly brought this complaint pursuant to Section 31(d) of the Environmental Protection Act (Act) (415 ILCS 5/31(d) (2004)). The following paragraphs will summarize the allegations in the complaint, set forth the facts, and then the arguments in the motion and response. Finally, a discussion of the Board decision will be set forth.

**COMPLAINT**

The People allege that Barger violated Sections 12 (a) and (f) of Act (415 ILCS 5/12 (a) and (f) (2004)), and provisions of the Board’s rules at 35 Ill. Adm. Code 302.203 and 302.208(g) at a facility known as Phillipstown Unit Water Flood Plant (plant) located in White County. Comp. at 2, 5. The complaint alleges that on September 23, 2005, a PVC transfer line ruptured and released approximately 1,000 to 1,500 barrels of salt water and 10 to 20 barrels of crude oil. Comp. at 2. The release traveled into a drainageway and an unnamed stream to the Wabash River. *Id.* The crude oil and crude oil staining occurred approximately one mile downstream from the plant. *Id.*

The spill resulted in a fish kill of over 50 small fish approximately one and one quarter miles downstream of the plant on September 23, 2005. Comp. at 2. By September 26, 2005, over 100 more fish had been killed approximately one and one quarter miles to one and one half miles downstream of the plant. *Id.*

**FACTS**

Barger states that the Illinois Environmental Protection Agency (Agency) was timely notified of the spill and Barger began remedial actions to cleanup the spill. Mot. at 1. During the remedial action, Barger was in contact with Mr. Tom Powell, an emergency response

coordinator with the Agency. *Id.* On October 11, 2005, Barger received a letter from the Mr. Tom Davis, which indicated that the Agency asked the People to initiate enforcement. Mot. at 1-2. The letter asked that Barger contact Mr. Davis. Mot. at 2.

After several attempts by both parties, a date was set for a conference call and that call was held on November 9, 2005. Mot. at 2. On December 1, 2005, the People filed this enforcement action and the complaint states the action was brought in part “at the request of” the Agency. Mot. at 2, citing Comp. at 1. The Agency has not contacted Barger in writing about the spill. Mot. at 2; Resp. at 6.

### **STATUTORY BACKGROUND AND LEGAL PRECEDENT**

In 1996, the legislature amended Section 31 of the Act (*see* P.A. 89-596, eff. Aug. 1, 1996) to require the Agency to “follow specific time-driven procedures” when a violation is discovered. People v. Heuermann, PCB 97-92 (Sept. 18, 1997). This modification replaced a prior notification process under Section 31(d) of the Act (415 ILCS 5/31(d) (1994)) that had been viewed as jurisdictional and an absolute prerequisite to filing of an enforcement action. Heuermann PCB 97-92.

The new procedures were codified in Section 31 (a) and (b) of the Act (415 ILCS 5/31(a) and (b) (2004)) and are a precondition to referral of a case to the Attorney General. *See* People v. Eagle-Picher-Boge, L.L.C., PCB 99-152 (July 22, 1999). Section 31 (a) of the Act provides, in part:

- (1) Within 180 days of becoming aware of an alleged violation of the Act or any rule adopted under the Act or of a permit granted by the Agency or condition of the permit, the Agency shall issue and serve, by certified mail, upon the person complained against a written notice informing that person that the Agency has evidence of the alleged violation.  
\* \* \*
- (2) A written response to the violations alleged shall be submitted to the Agency, by certified mail, within 45 days of receipt of notice by the person complained against, unless the Agency agrees to an extension.  
\* \* \*
- (4) A meeting requested pursuant to subdivision (2) of this subsection (a) shall be held without a representative of the Office of the Illinois Attorney General or the State's Attorney of the county in which the alleged violation occurred, within 60 days of receipt of notice by the person complained against, unless the Agency agrees to a postponement. At the meeting, the Agency shall provide an opportunity for the person complained against to respond to each alleged violation, suggested resolution, and suggested implementation time frame, and to suggest alternate resolutions. 415 ILCS 5/31(a)(1), (2), (4) (2004).

Section 31 (b) of the Act provides, in part:

For alleged violations that remain the subject of disagreement between the Agency and the person complained against following fulfillment of the requirements of subsection (a) of this Section, and as a precondition to the Agency's referral or request to the Office of the Illinois Attorney General or the State's Attorney of the county in which the alleged violation occurred for legal representation regarding an alleged violation that may be addressed pursuant to subsection (c) or (d) of this Section or pursuant to Section 42 of this Act, the Agency shall issue and serve, by certified mail, upon the person complained against a written notice informing that person that the Agency intends to pursue legal action. Such notice shall notify the person complained against of the violations to be alleged and offer the person an opportunity to meet with appropriate Agency personnel in an effort to resolve any alleged violations that could lead to the filing of a formal complaint. 415 ILCS 5/31(b) (2004).

In Heuermann, the Board noted that the new provisions “create an environment insulated from the Attorney General wherein the Agency and alleged violator could share information in an attempt to reach compliance without prosecution.” Heuermann PCB 97-92 at 3. The Board further noted that the “legislature clearly did not desire to weaken the Act or cut into the Attorney General’s authority to prosecute by the creation of such process.” Heuermann PCB 97-92 at 3. Ultimately, the Board denied a motion to dismiss the complaint because the referral of the enforcement action to the Attorney General took place before the modification to Section 31 of the Act.

In People v. Geon Company, Inc., PCB 97-62 (Oct. 2, 1997), the respondent sought dismissal of an amended complaint for the Agency’s failure to comply with Section 31(a) and (b) of the Act (415 ILCS 5/31(a) and (b) (2004)). The complainant responded that the amended complaint was brought on the Attorney General’s own motion, not on behalf of the Agency. Geon PCB 97-62 at 9. The Board reiterated that the procedures in Section 31(a) and (b) were not intended to limit the Attorney General’s authority to prosecute on the Attorney General’s own behalf. Geon PCB 97-62 at 9. The Board found that the Attorney General could bring the amended complaint pursuant to Section 31(d) of the Act (415 ILCS 5/31(d) (2004)) and the Board denied the motion to dismiss. Geon PCB 97-62 at 9.

The Board has consistently ruled that the Attorney General’s authority to bring an enforcement action is not limited by the provisions of Section 31 (a) and (b) of the Act. *See* Eagle-Picher-Boge PCB 99-152; People v. Chemetco, Inc., PCB 96-76 (July 8, 1998); People v. Community Landfill Company, Inc., PCB 97-193 (Mar. 16, 2000). The Board has held that when the Attorney General brings a complaint “solely on behalf of the people” even if the complaint is based on information obtained from the Agency, the complaint will not be dismissed. Community Landfill Company PCB 97-193 at 4.

In People v. Chiquita Processed Foods L.L.C., PCB 02-56 (Nov. 21, 2002), the Board did dismiss two counts in a complaint because the Agency failed to follow the procedures in Section 31 of the Act (415 ILCS 5/31 (2004)) before referring the alleged violation to the Attorney General. The Board indicated that the Board has repeatedly found that the 1996 amendments to Section 31 “were not intended to bar the Attorney General from prosecuting an environmental

violation.” Chiquita PCB 02-56 at 5. However, the Board noted that in Chiquita the Attorney General was not bringing a complaint on its own motion but rather pursuant to a referral containing information provided by the Agency. Chiquita PCB 02-56 at 5. The Board stated:

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. Chiquita PCB 02-56 at 5.

### **MOTION TO DISMISS**

Barger argues that pursuant to Section 31 of the Act (415 ILCS 5/31 (2004)) prior to referring an enforcement matter to the Attorney General, the Agency must provide written notice to a potential respondent. Mot. at 2. Barger asserts that the Agency’s compliance with the notice procedure is mandatory and failure to comply must result in dismissal of the complaint. *Id.* To support this assertion, Barger relies upon Chiquita.

Barger asserts that the same facts are present in this proceeding as those in Chiquita. Mot. at 3. Barger argues that “[t]here can be no dispute” that Barger never received any kind of notice from the Agency pursuant to Section 31 of the Act (415 ILCS 5/31 (2004)). *Id.* Barger also maintains that any potential violations in this matter were referred to the Attorney General by the Agency. *Id.* Barger points to Mr. Stone’s affidavit to support this contention. *Id.* The affidavit indicates that there had been no contact from the Attorney General prior to the October 11, 2005 letter. Mot. at 3.

Barger maintains that the only source of information for the spill is the Agency. Mot. at 4. Further, Barger argues that the October 11, 2005 letter from the Mr. Davis clearly states that the matter was referred by the Agency. *Id.* Finally, Barger asserts that the complaint states that the action was brought at the request of the Agency. *Id.* Barger asserts that in light of these facts the matter must be dismissed for failure of the Agency to comply with Section 31 of the Act (415 ILCS 5/31 (2004)). *Id.*

### **RESPONSE TO THE MOTION TO DISMISS**

The People argue against dismissal of the complaint and set forth several arguments to support a denial of the motion. The People first offer general comments, then assert that the Attorney General maintains independent authority to enforce the Act. Finally, the People argue that the statute does not require dismissal of the complaint and Chiquita improperly limits the authority of the Attorney General. The Board will summarize each of these arguments below.

### **General**

The People argue that the Board, “must determine the Motion to Dismiss according to the principles applied by the circuit courts pursuant to Section 2-616 and 2-619 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615, 2-619 (2004).” Resp. at 2. The People state that “in County of DuPage v. Waste Management of Illinois, PCB [*sic*] 94-92 (Dec. 1, 1994)” the Board relied on the Code of Civil Procedure and normal practice standards before the Board. *Id.* The People further state that in a motion to dismiss all well-pled facts must be deemed true. Resp. at 2, citing People v. Peabody Coal Company, PCB 99-134 (June 20, 2002).

### **Attorney General’s Authority**

The People argue that the complaint should not be dismissed because the complaint was brought in the name of the People pursuant to Section 31(d) of the Act (415 ILCS 5/31(d) (2004)), and at the request of the Agency. Resp. at 1. The People state that the Attorney General has the authority generally to bring an enforcement action. *Id.* The People note that the Illinois Supreme Court has held that the Attorney General is the sole representative of the State where the State is the real party in interest. Resp. at 2, citing Lyons v. Ryan, 201 Ill. 2d 529, 535; 780 N.E.2d 1098, 1103 (2002).

The People assert that legislative enactments cannot usurp or diminish the authority of the Attorney General. Resp. at 2. Further, the People maintain that neither the judiciary nor the legislature may deprive the Attorney General of her constitutional common law powers. Resp. at 2, citing IEPA v. PCB, 69 Ill. 2d 394, 399; 372 N.E.2d 50, 52 (1977). The People state that the duties of the Attorney General include ensuring a healthful environment. Resp. at 3, citing People v. NL Industries, 152 Ill. 2d 82, 102; 604 N.E.2d 349, 358 (1992).

The People point out that pursuant to Section 31(d) of the Act (415 ILCS 5/31(d) (2004)), the Attorney General has independent authority to bring an enforcement action. Resp. at 3. Further, the People note that the Board has held that Sections 31 (a) and (b) of the Act (415 ILCS 5/31 (a) and (b) (2004)) do not apply to the Attorney General and that the Attorney General has broad independent authority to bring actions pursuant to Section 31(d) of the Act (415 ILCS 5/31(d) (2004)). Resp. at 3.

### **Statute Does Not Require Dismissal**

The People argue that Section 31 of the Act (415 ILCS 5/31 (2004)) does not mandate dismissal or any other sanction because the Agency fails to provide Section 31 notice. Resp. at 3. Further, according to the People, nothing in Section 31 of the Act (415 ILCS 5/31 (2004)) implicitly limits the Attorney General’s broad authority to bring an enforcement action; nor does Section 31 of the Act (415 ILCS 5/31 (2004)) explicitly state that the Attorney General must independently develop any violations alleged in the complaint. Resp. at 3-4. The People point to the Board’s decision in Heuerman and the recitation of legislative history indicating that the legislature did not intend Section 31 to limit the authority of the Attorney General as further support that the statute does not require dismissal. *Id.*

The People also argue that the Board has “no real powers in equity and therefore cannot create powers for itself not outlined in the Act.” Resp. at 4. The People maintain that the Board is an administrative agency and has only powers conferred upon the Board by the legislature. Resp. at 5. The People assert that neither the Board nor the legislature may limit the power of the Attorney General. *Id.* The People opine that since Section 31 of the Act (415 ILCS 5/31 (2004)) does not mandate dismissal of a complaint if the Agency fails to comply with Section 31, the Board cannot “create for itself this power.” Resp. at 5.

### **Chiquita**

The People note that Barger cites only Chiquita as support for the motion to dismiss. Resp. at 5. The People assert that Chiquita improperly limits the Attorney General’s authority. *Id.* The People argue that the Board’s dismissal of two counts in Chiquita “effectively diminished the authority of the Attorney General in contravention of the principles” set forth in NL Industries. Resp. at 6. The People maintain that the Board “ought to unequivocally nullify” the order in Chiquita and deny the motion to dismiss. *Id.*

The People maintain that Section 31 of the Act (415 ILCS 5/31 (2004)) can only be “reconciled” with the decisions of the Illinois Supreme Court if Section 31 is not enforceable against the Attorney General. Resp. at 6. The People opine that if the Agency’s failure to follow Section 31 of the Act (415 ILCS 5/31 (2004)) results in dismissal of a case brought by the Attorney General “that result would impinge upon the Attorney General’s primary right to decide what cases to bring on behalf of the State.” *Id.*

The People also opine that the Board “does not have any power in equity . . . [and] improperly created for itself the power to dismiss Counts” in Chiquita. Resp. at 6.

### **DISCUSSION**

For purposes of ruling on a motion to dismiss, all well pled facts contained in the pleading must be taken as true and all inferences from them must be drawn in favor of the nonmovant. Skokie Valley Asphalt, slip op. at 6; People v. Stein Steel Mills Services, Inc., PCB 02-01, (Nov. 15, 2001). The facts surrounding the motion are not in dispute as the People do not contest that the Agency failed to follow the procedures in Section 31 of the Act (415 ILCS 5/31 (2004)). *See* Resp. at 6.

The Board has consistently held that the procedures of Section 31(a) and (b), while being a precondition for referral by the Agency to the Attorney General, are not a limitation on the Attorney General. Chiquita PCB 02-56. The Attorney General may bring an enforcement action pursuant to Section 31(d) of the Act (415 ILCS 5/31(d) (2004)) on the Attorney General’s own motion regardless of the Agency’s actions. Community Landfill Company PCB 97-193 at 4. The Board has dismissed counts brought only in Chiquita where the record demonstrated that the counts were brought on behalf of the Agency as a result of an Agency referral and not on the Attorney General’s motion.

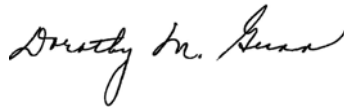
In this proceeding, the complaint states:

This action is brought against the Respondent in the name of the People of the State of Illinois, by Lisa Madigan, Attorney General of the State of Illinois, *on her own motion* [emphasis added] and at the request of the Illinois Environmental Protection Agency . . . . Comp at 1.

Thus, the complaint may be based on information provided by the Agency, but the complaint is brought on the motion of the Attorney General. The Board finds that the facts in this case are analogous to Community Landfill Company and not Chiquita. Therefore, the Board denies the motion to dismiss.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order March 16, 2006, by a vote of 4-0.

A handwritten signature in cursive script that reads "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board