

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB No. 13-19
)
SHERIDAN-JOLIET LAND)
DEVELOPMENT, LLC, an Illinois limited-)
liability company, and SHERIDAN SAND)
& GRAVEL CO.,)
)
Respondents.)

MOTION TO STRIKE
AMENDED NOTICE OF ELECTRONIC FILING
AND SUPPORTING MEMORANDUM

Respondents, SHERIDAN-JOLIET LAND DEVELOPMENT, LLC, an Illinois limited-liability company, and SHERIDAN SAND & GRAVEL CO. (collectively "SHERIDAN"), by their attorney, Kenneth Anspach, pursuant to § 2-615(a) of the Code of Civil Procedure, 735 ILCS 2-615(a), § 2-616 of the Code of Civil Procedure, 735 ILCS 2-616, and §§101.100, 101.500 and 101.506 of the General Rules of the Pollution Control Board, 35 Ill. Adm. Code 101.100, 101.500 and 101.506, hereby move the Pollution Control Board (the "Board") to strike the so-called Amended Notice of Electronic Filing of complainant, PEOPLE OF THE STATE OF ILLINOIS (the "STATE") and for such other relief as is set forth in this Motion, and in support thereof states as follows:

I. A NOTICE THAT FINANCING MAY BE AVAILABLE IS "A JURISDICTIONAL PREREQUISITE FOR THE PROPER FILING OF AN ENFORCEMENT CASE."

On November 30, 2012 SHERIDAN filed its Motion to Strike and Dismiss the STATE's Complaint (the "Motion to Strike and Dismiss"), which is currently the subject of a briefing schedule before this Board. One of the bases for dismissal raised in the Motion to Strike and

Dismiss was that the Complaint must be dismissed under § 2-619(a)(9) of the Code of Civil Procedure, 735 ILCS 2-619(a)(9), as it is barred by the STATE's failure to comply with the requirements of § 31(c)(1) of the Illinois Environmental Protection Act (the "Act"), 415 ILCS 5/31(c)(1). In particular, the Motion to Strike and Dismiss at 18 argues that "the entire complaint must be stricken and dismissed" due to the STATE's "failure to comply with the requirement under § 31(c)(1) of the Act, 415 ILCS 5/31(c)(1), that it must serve upon SHERIDAN notification that financing may be available" to correct the violations alleged in the Complaint. In support of that assertion, the Motion to Strike and Dismiss quoted the provisions of § 31(c)(1) of the Act, 415 ILCS 31(c)(1), which states in pertinent part, as follows:

(c)(1) For alleged violations which remain the subject of disagreement between the Agency and the person complained against following waiver pursuant to subdivision (10) of subsection (a) of this Section or fulfillment of the requirements of subsections (a) and (b) of this Section, the Office of *the Illinois Attorney General or the State's Attorney of the county in which the alleged violation occurred shall issue and serve upon the person complained against a written notice, together with a formal complaint*, which shall specify the provision of the Act, rule, regulation, permit, or term or condition thereof under which such person is said to be in violation and a statement of the manner in and the extent to which such person is said to violate the Act, rule, regulation, permit, or term or condition thereof and shall require the person so complained against to answer the charges of such formal complaint at a hearing before the Board at a time not less than 21 days after the date of notice by the Board, except as provided in Section 34 of this Act [415 ILCS 5/34]. *Such complaint **shall be accompanied by a notification to the defendant that financing may be available, through the Illinois Environmental Facilities Financing Act [20 ILCS 3515/1 et seq.] to correct such violation.*** (Bold and Emphasis added.)

Thus, § 31(c)(1) of the Act, 415 ILCS 5/31(c)(1), requires that, when filing a complaint under § 31 of the Act, 415 ILCS 5/31, the Attorney General must "serve upon the person complained against a written notice, together with a formal complaint." In addition, "Such complaint shall

be accompanied by a notification to the defendant that financing may be available, through the Illinois Environmental Facilities Financing Act [20 ILCS 3515/1 et seq.] to correct such violation.” In other words, in order to comply with the requirements of § 31(c)(1) of the Act, 415 ILCS 5/31(c)(1), the STATE must serve the defendant with a notice of filing (hereinafter “Notice of Filing”) together with a formal complaint, and must *also* serve the defendant contemporaneously with “a notification to the defendant that financing may be available, through the Illinois Environmental Facilities Financing Act [20 ILCS 3515/1 et seq.] to correct such violation.” (The latter notice is hereinafter referenced as a “Notice That Financing May Be Available.”) Simply stated, two notices are required, in addition to the complaint, one a Notice of Filing and the second a Notice That Financing May Be Available.

The determination that a Notice That Financing May Be Available must accompany the complaint is not just the view of Respondents, but is actually a restatement of what this Board has previously said. In 1986 this Board held that the filing and serving of a Notice That Financing May Be Available is not only mandatory, but is jurisdictional. In *Illinois EPA v. Production Finishers and Fabricators, Inc.* (“*Production Finishers and Fabricators, Inc.*”), PCB No. 85-31, 1986 Ill. ENV LEXIS 8 (January 9, 1986), this Board held, as follows:

... Respondent moved to dismiss this enforcement action for failure of the Illinois Environmental Protection Agency to comply with mandatory language of the Environmental Protection Act which requires that a statement that financing may be available to correct violations accompany any complaint. Ill. Rev. Stat. 1983, ch. 111-1/2, par. 1031(a)...¹

The Board finds that compliance with the requirement of Section

¹ The notes to § 31 of the Act, 415 ILCS 5/31, indicate that the 1996 amendment to § 31 of the Act, 415 ILCS 5/31, by P.A. 89-596, effective August 1, 1996, added subsections (a) and (b) and redesignated former subdivision (a)(1) as present subdivision (c)(1). Accordingly, the requirement of a Notice That Financing May Be Available is now found at § 31(c)(1) of the Act, 415 ILCS 5/31(c)(1), as set forth above.

1031(a) is a jurisdictional prerequisite for the proper filing of an enforcement case before the Board. Accordingly, the motion to dismiss is granted and this matter is dismissed without prejudice. (Emphasis added.)

Thus, in *Production Finishers and Fabricators, Inc.* this Board held that the filing of a Notice That Financing May Be Available “is a jurisdictional prerequisite for the proper filing of an enforcement case before the Board.” Because it is a jurisdictional prerequisite, the Board dismissed the action.

II. THE ATTEMPTED FILING OF THE SO-CALLED AMENDED NOTICE OF ELECTRONIC FILING IS A NULLITY.

In the face of that statutory jurisdictional prerequisite, the STATE on February 27, 2013 attempted the filing of a so-called “Amended Notice of Electronic Filing.” This attempted filing was a nullity for the following reasons.

A. This Board Cannot Extend Its Subject Matter Jurisdiction to a Cause of Action Where It Lacks The Jurisdiction to Act.

First of all, as set forth above, under *Production Finishers and Fabricators, Inc.* the STATE has failed to satisfy a statutory jurisdictional prerequisite to bringing an action in that it failed to file a Notice That Financing May Be Available contemporaneously with the filing of its Complaint. How does attempting to file the so-called Amended Notice of Electronic Filing satisfy that jurisdictional prerequisite? The STATE’s premise appears to be that the so-called Amended Notice of Electronic Filing purportedly filed with the Board on February 27, 2013 cures a failure to file a Notice That Financing May Be Available contemporaneously with the filing of the Complaint on October 30, 2012. Setting aside for the moment that the STATE did not have leave of this Board to file such a pleading and that a Notice of Filing is distinct from a Notice That Financing May Be Available, the attempted filing of the Amended Notice of Electronic Filing, itself, is a nullity. This Board simply cannot extend its authority to a cause of

action where it lacks the jurisdiction to act. Such was the holding in *Illinois EPA v. Busby* (“*Busby*”), AC No. 01-6, 2000 Ill. ENV LEXIS 757 (December 7, 2000), where, the Board held in relation to a similar jurisdictional requirement for the filing of petitions for administrative review of administrative citations under § 31.1(d) of the Act, 415 ILCS 5/31.1(d) that:

The Board can not [sic] expand its authority beyond that which the legislature expressly granted to it. *** According to the long-standing principal of administrative review law, the 35-day filing period for a petition for review is jurisdictional, and the failure to file a timely petition deprives the Board of subject matter jurisdiction. *** (Citations omitted.)

Thus, the Board cannot expand its authority over an untimely filed petition for review under § 31.1(d) of the Act, 415 ILCS 5/31.1(d) because it cannot extend its authority beyond that which was granted to it by the legislature. By the same token, given that the Board determined in *Production Finishers and Fabricators, Inc.* that the Notice That Financing May Be Available is jurisdictional, the Board cannot expand its authority beyond that granted to it by the legislature to accept the so-called Amended Notice of Electronic Filing where no Notice That Financing May Be Available was filed contemporaneously with the Complaint.

B. Jurisdiction Failed to Attach to The Complaint and the Board Cannot Confer Jurisdiction Where It Never Existed.

Either jurisdiction attached to the Complaint or it did not. If it did not, then no subsequent attempted filing will cure the defect. For example, in *Figueroa v. Deacon*, 404 Ill. App. 3d 48, 52 (1st Dist. 2010), where a written demand was a statutory prerequisite to the filing of a complaint for forcible entry and detainer, the court found that “the demand must be made in strict compliance with the statute or jurisdiction will not attach.” Likewise, in *Allord v. Municipal Officers Electoral Board*, 288 Ill. App. 3d 897, 902 (1st Dist. 1997), service of a legally proper petition on the necessary parties did not occur within the statutorily limited period

during which jurisdiction could be satisfied and attach. Similarly, here, jurisdiction will not attach to the Complaint in the face of a failure of strict compliance with the jurisdictional prerequisite of serving a Notice That Financing May Be Available contemporaneously with the filing of the Complaint under § 31(c)(1) of the Act, 415 ILCS 5/31(c)(1).

As set forth above, § 31(c)(1) of the Act, 415 ILCS 5/31(c)(1) requires that the “complaint shall be *accompanied by* a notification to the defendant that financing may be available, through the Illinois Environmental Facilities Financing Act.” (Emphasis added.) Does the filing of a so-called Notice of Electronic Filing on February 27, 2013, even if *arguendo* otherwise legally sufficient, mean that it “accompanied” the complaint when it was filed on October 30, 2012? In determining legislative intent, the plain language of the statute first must be examined; unambiguous terms, when not specifically defined, will be given their plain and ordinary meaning. *Allord v. Municipal Officers Electoral Board*, 288 Ill. App. 3d at 900. The “plain and ordinary meaning” of “accompany” means “to happen at the same time as something else.”² Filing a so-called Amended Notice of Electronic Filing five months later does not constitute filing “at the same time.”

Accordingly, the Board may not grant jurisdiction where the Act does not. Simply stated, jurisdiction failed to attach to the Complaint and the Board cannot confer jurisdiction where it never existed, regardless of the attempted filing of the so-called Amended Notice of Electronic Filing.

C. A *Nunc Pro Tunc* Filing May Not Be Used To Cure a Jurisdictional Defect.

As set forth above, the failure to comply with the statutory jurisdictional prerequisite occurred five months previous to the attempted filing of the so-called Amended Notice of Electronic Filing. Assuming *arguendo* that the STATE could address this jurisdictional defect,

² Encarta Dictionary: English (North America).

then the February 27, 2013 attempted filing would need to be treated by the Board as a *nunc pro tunc* filing back to October 30, 2012, the date of the filing of the Complaint. Yet, it is well settled in this State that a *nunc pro tunc* order may not be used to cure a jurisdictional defect. *Beck v. Stepp*, 144 Ill. 2d 232, 238 (1991).

D. The Attempted Filing of an Amended Pleading Without Leave of this Board is Void.

The STATE neither sought nor was granted leave by this Board to file the Amended Notice of Electronic Filing. The filing of an amended pleading without leave of court is void. *Kohlhaas v. Morse*, 36 Ill. App. 2d 158, 161 (4th Dist. 1962). Thus, the attempted filing of the Notice of Electronic Filing without leave of this Board is void.

E. The Failure to File a Notice That Financing May Be Available is Not Cured by Duplicative Notices of Filing.

As discussed above, both a Notice of Filing *and* a Notice That Financing May Be Available are required under § 31(c)(1) of the Act, 415 ILCS 5/31(c)(1). Here, the STATE has merely attempted the filing of an amended Notice of *Filing*. Yet, there is no dispute that the STATE *already* timely filed a Notice of Filing with its Complaint on October 30, 2012. The Motion to Strike and Dismiss points out that the STATE has failed to file a Notice That Financing May Be Available. Assuming *arguendo* that the STATE could properly address the jurisdictional defect it created by its failure to file a Notice That Financing May Be Available, one could hardly fathom that it could cure that defect by attempting to file yet another Notice of Filing!

F. The State Has Admitted That It Failed to Comply With the Statutory Jurisdictional Prerequisite of Filing the Notice That Financing May Be Available Contemporaneously With the Complaint.

That the STATE attempted the filing of the so-called Amended Notice of Electronic Filing is, in and of itself, a judicial admission that the STATE deviated from the procedure

required by § 31(c)(1) of the Act, 415 ILCS 5/31(c)(1). Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge. *Furniss v. Rennick (In re Estate of Rennick)*, 181 Ill. 2d 395, 406 (1997). Here, that the Amended Notice of Electronic Filing was attempted to be filed in a deliberate act, is clear. Further, that the Amended Notice of Electronic Filing was attempted to be filed following Respondents having pointed out in their Motion to Strike and Dismiss that the Notice That Financing May Be Available was required by statute and was missing is an unequivocal statement about a concrete fact, *i.e.*, that it did not accompany the Complaint and that it should have.

Even if the Amended Notice of Electronic Filing does not constitute a judicial admission, it certainly constitutes an implied admission that the STATE failed to file a Notice That Financing May Be Available. An implied admission is one which results from some act or failure to act of the party. *Black's Law Dictionary*, 4th Ed. at 44. *See also Keen v. Bump*, 310 Ill. 218, 220 (1923). Accordingly, the act of attempting to file the so-called Amended Notice of Electronic Filing constitutes an implied admission that the STATE failed to file a Notice That Financing May Be Available contemporaneously with the Complaint. Certainly, if there was no requirement to do so, the STATE would not have attempted this filing. By the same token, it is also an implied admission the filing the Notice That Financing May Be Available contemporaneously with the Complaint is a statutory jurisdictional prerequisite. *Id.* If the Notice of Filing was not jurisdictional, why bother attempting to cure the defect?

III. JURISDICTION IS NEVER SUPPLIED BY THE KNOWLEDGE OR AGREEMENT OF A PARTY.

Contrary to the holding of the Board in *Production Finishers and Fabricators, Inc.* that that the requirement of § 31(c)(1) of the Act, 415 ILCS 5/31(c)(1), that a Notice That Financing

May Be Available “shall” accompany the complaint is jurisdictional, the STATE, in Complainant’s Response to Respondents’ Motion to Strike and Dismiss (the “STATE’s Response”), argues that the statute should not be taken literally, and, at any rate, should not be applied here.³ In so doing, the STATE quotes a portion of the pertinent language set forth above from § 31(c)(1) of the Act, 415 ILCS 5/31(c)(1), as follows:

“[s]uch complaint shall be accompanied by a notification to the defendant that financing may be available, through the Illinois Environmental Facilities Financing Act, to correct such violation.”

Upon reading this quotation from the statute, one may have the impression that only one notice is required to accompany the complaint, *i.e.*, the Notice That Financing May Be Available. Yet, as set forth above, immediately preceding the language quoted from this statute in the STATE’s Response is the language, *i.e.*, “the Illinois Attorney General or the State's Attorney of the county in which the alleged violation occurred shall issue and serve upon the person complained against a written notice, together with a formal complaint.” Thus, as set forth above, *both* a Notice of Filing and the Notice That Financing May Be Available are required. The STATE’s attempt to file a so-called Amended Notice of Electronic Filing is a stab at conflating the two requirements, and it simply fails to do so.

The STATE tries to explain its filing of the Amended Notice of Electronic Filing at Note No. 5 of the STATE’s Response, as follows:

Although the Respondents had notice of the financing provision in Section 31(c)(1) of the Act as evidenced by the argument in their Motion, on February 27, 2013, an Amended Notice of Electronic Filing was filed with the Board and served on the Respondents, which includes the financing notification and thereby cures any deficiency. *See Exhibit C* attached hereto.

Thus, the STATE attempts to justify its failure to comply with § 31(c)(1) of the Act, 415 ILCS

³ Response to Respondents’ Motion to Strike and Dismiss at 14-15.

5/31(c)(1), by arguing that "...the Respondents had notice of the financing provision in Section 31(c)(1) of the Act as evidenced by the argument in their Motion." Thus, the STATE asserts (without citation of authority) that because SHERIDAN is purportedly aware of the law, the STATE is absolved from complying with it.

Yet, what SHERIDAN knew or did not know about the requirements of § 31(c)(1) of the Act, 415 ILCS 5/31(c)(1), is irrelevant. Yet, the courts in this state have long held that subject matter jurisdiction is never supplied by the knowledge or agreement of a party. For example, in *Floto v. Floto*, 213 Ill. 438, 442-443 (1904), the Court held that where a court acts without jurisdiction, knowledge of parties interested that it is so going to act or has so acted cannot confer jurisdiction upon it. Further, in *Westcott v. Kinney*, 120 Ill. 564, 566 (1887), the Court held that the parties in the case could not confer jurisdiction by stipulation.

IV. CONCLUSION.

Finally, that the filing of a Notice That Financing May Be Available is a jurisdictional prerequisite was declared by the Board in *Production Finishers and Fabricators, Inc.* in 1986, twenty-seven years ago. The statutory requirement that the STATE provide a Notice That Financing May Be Available in enforcement actions has been in existence since well before that. Yet, the STATE persists in ignoring this requirement. Contrast the STATE's *twenty-seven years* of violating § 31(c)(1) of the Act, 415 ILCS 5/31(c)(1), with the Complaint's allegations that SHERIDAN engaged in technical violations on September 15, 2010 of a statute⁴ enacted on July 30, 2010, a mere *forty-six days* previously! Consider also that the STATE admits that "the violations were corrected prior to the filing of the Complaint!"⁵


⁴ Amendments to § 22.51 of the Act, 415 ILCS 5/22.51.

⁵ STATE's Response at 15. Further, it is well settled that public documents that are included in the records of other courts and administrative tribunals may be the subject of judicial notice. *N B D Highland Park Bank, N.A. v. Wien*, 251 Ill. App. 3d 512, 520-521 (2nd Dist. 1993). Accordingly, this Board may take notice that following the July 30,

In *Production Finishers and Fabricators, Inc.* the Board dealt with the STATE's failure to honor this statutory jurisdictional prerequisite by dismissing that enforcement action without prejudice. Apparently, a dismissal without prejudice did nothing to alter the STATE's behavior relative to this requirement. Therefore, in order to achieve "institutional compliance"⁶ with this statutory prerequisite, SHERIDAN submits that a dismissal without prejudice is insufficient. SHERIDAN respectfully requests that this Board, in addition to striking the Amended Notice of Electronic Filing, dismiss the Complaint *with* prejudice.

WHEREFORE, SHERIDAN moves that the Amended Notice of Electronic Filing be stricken and for such other relief as is set forth in this Motion.

Respondents, SHERIDAN-JOLIET LAND DEVELOPMENT, LLC, an Illinois limited-liability company, and SHERIDAN SAND & GRAVEL CO.,

By: 
their attorney

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THIS FILING IS SUBMITTED ON RECYCLED PAPER.

2010 amendments to § 22.51 of the Act, 415 ILCS 5/22.51, the Illinois Environmental Protection Agency did not send SHERIDAN any notice of the pertinent statutory changes and of SHERIDAN's new purported legal responsibilities thereunder.


⁶ See *People v. McGee*, 268 Ill. App. 3d 32, 43 (2nd Dist. 1994).

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalties of perjury as provided by law pursuant to 735 ILCS 5/1-109, that the attached Motion to Strike Amended Notice of Electronic Filing and Supporting Memorandum was __ personally delivered, X placed in the U. S. Mail, with first class postage prepaid, ___ sent via facsimile and directed to all parties of record at the address(es) set forth below on or before 5:00 p.m. on the 29^h day of March, 2013.

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