

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB No. 13-19
)	(Enforcement – Land)
)	
SHERIDAN-JOLIET LAND)	
DEVELOPMENT, LLC, an Illinois limited-)	
liability company, and SHERIDAN SAND)	PCB No. 13-20
)	(Enforcement – Land)
)	(Consolidated)
& GRAVEL CO.,)	
)	
Respondents.)	

MOTION FOR RECONSIDERATION 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 Section 101.520 of the General Rules of the Pollution Control Board, 35 Ill. Adm. Code 101.520, hereby move the Pollution Control Board (the “Board”) to reconsider its Order dated August 8, 2013 (the “8/8/13 Order”) insofar as it denied SHERIDAN’s Motions to Strike and Dismiss (“Motions to Dismiss”) the complaints (the “Complaints”) and the Motions to Strike the Amended Notices of Filing (collectively, the “Jurisdictional Motions”) and in support thereof states as follows:

I. THE BOARD ERRED IN FAILING TO DISMISS THE COMPLAINTS FOR WANT OF JURISDICTION.

A. Failure to File a Notice That Financing May Be Available Requires Dismissal for Want of Jurisdiction.

Under § 31(c)(1) of the Act, 415 ILCS 31(c)(1), the Attorney General is required to serve with any complaint brought thereunder a notification to the defendant that financing may be available to correct the alleged violations, 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 ... shall issue and serve upon the person complained against a written notice, together with a formal complaint...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 Attorney General must serve the defendant with a 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.”) In this regard, no Notice That Financing May Be Available accompanied the Complaints in this cause.

This Board has previously 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 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. For the same reason, here, the Board must dismiss the Complaints due to the Attorney General's failure to serve with the Complaints a Notice That Financing May Be Available.

In the 8-8-13 Order at 17 the Board acknowledged that in *Production Finishers and Fabricators, Inc.* the Board previously held that failure to serve a Notice That Financing May Be Available is jurisdictional and dismissed the cause on that basis, as follows:

[I]n *Production Finishers & Fabricators*...the Agency, the complainant in that case, did not file and serve a financing notification with the complaint. *Finding the financing notification requirement jurisdictional, the Board dismissed the case, but the*

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.

Board did so without prejudice. Production Finishers & Fabricators, PCB 85-31 at 1. (Emphasis added.)

Yet, despite having previously held in *Production Finishers and Fabricators, Inc.* that failure to serve a Notice That Financing May Be Available is jurisdictional, warranting dismissal of the cause, the Board chose to disregard that precedent.

Instead of following the only precedential decision on point, *Production Finishers and Fabricators, Inc.*, the Board hung its hat on a decision which never reached the jurisdictional issue, *People v. City of Herrin*, PCB 95-158 (July 7, 1995) (“*City of Herrin*”). In *City of Herrin* the Board merely found that the State, by filing an amended notice of filing, had cured a *statutory*, as opposed to a *jurisdictional*, deficiency:

Specific notice as delineated in Section 31(d) [sic] is required in conjunction with serving the complaint on Herrin. The State failed to send notice in compliance with Section 31(d) of the Act to the City of Herrin in its May 30, 1995 complaint.

The Board nonetheless accepts the State's June 27, 1995 amended notice of filing and interprets it as an amended complaint curing the financing notification deficiency. (Emphasis added.)

Despite *City of Herrin* never having reached the jurisdictional issue, the Board held, not only that *City of Herrin* controlled, but that on the basis of *City of Herrin* the failure to serve a Notice That Financing May Be Available by complainant, STATE OF ILLINOIS (the “STATE”), did not impact the Board’s ability to exercise jurisdiction over the Complaints. In that regard, the Board found:

Consistent with City of Herrin—the most recent relevant decision—the Board finds that the requirement to file a financing notification with the complaint does not affect the Board's subject matter jurisdiction over an enforcement proceeding. As the People state, the Board has statutory authority, and thus jurisdiction, to entertain complaints alleging violations of the Act, the Board's regulations, a permit, or a Board order. See 415 ILCS 5/5(d) (2010). The Act does not make compliance with Section 31(c)(1)

(415 ILCS 5-31(c)(1) (2010)) a prerequisite to the Board's exercise of this jurisdiction. (8-8-13 Order at 17.) (Emphasis added.)

Thus, the Board explicitly failed to follow its own prior holding in *Production Finishers and Fabricators, Inc.* that failure to serve a Notice That Financing May Be Available is *jurisdictional*, instead holding that "The Act does not make compliance with Section 31(c)(1) (415 ILCS 5-31(c)(1) (2010)) a prerequisite to the Board's exercise of this jurisdiction."

B. The Board's Failure to Abide by its Decision in *Production Finishers and Fabricators, Inc.* Constitutes a Failure to Adhere to the Principle of *Stare Decisis*.

Yet, previously the Board has declared that it *is* bound by its own (and equal or superior court) precedent. In *M.I.G. Investments, Inc., v. Illinois EPA*, PCB No. 85-60 (August 15, 1985) the Board found:

* * * For us to reconsider the rule here would only lead to new confusion in an area of law once confused and now settled. * * *
As Mr. Justice Brandeis stated, dissenting in *Burnet v. Coronado Oil and Gas Company* (1932), 285 U.S. 393, 406, 52 S. Ct. 443, 447, 76 L. Ed 815: 'Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right [Citations.] This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation.'" 394 N.E.2d 46-47.

Further, in *Hunt Super Service, Inc. v. Edgar*, 172 Ill. App. 3d 512, 518 (4th Dist. 1988), the court found that an administrative agency is bound by its own precedent and may only make adjustments that are not arbitrary and capricious, as follows:

The United States Supreme Court has held that a "corollary of the general rule requiring that [an] agency explain the policies underlying its action" is a rule that the agency follow the precedent it has established or explain its reasons for departure from the precedent. (*Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Board of Trade* (1973), 412 U.S. 800, 807, 37 L. Ed. 2d 350, 362, 93 S. Ct. 2367, 2375.) However, the appellate court of the State has held an agency is not absolutely bound by its prior rulings but can make adjustments to its precedents as long as the adjustments

are not arbitrary or capricious. *Citizens Utilities Co. v. Illinois Commerce Comm'n* (1987), 153 Ill. App. 3d 28, 504 N.E.2d 1367.

Yet, here, the Board made absolutely no adjustment to *Production Finishers and Fabricators, Inc.* In that respect, it did not overrule *Production Finishers and Fabricators, Inc.*, either in whole or in part. It simply ruled directly opposite to that decision.

Further, the only reason given by the Board for doing so was one which was totally arbitrary and capricious, *i.e.*, that it would be more expedient to deny the Motions to Dismiss than to follow the Board's own precedent. In that regard, the Board found, as follows:

If the Board were to strike the amended notice and dismiss the complaint based on the financing notification deficiency, as respondents request, the People could simply re-file the complaint along with the notification, initiating a new enforcement proceeding based on the exact same allegations in this case. That outcome would merely delay unnecessarily adjudication of the People's claims. (8-8-13 Order at 28.) (Emphasis added.)

What the Board fails to grasp is that dismissal of the Complaints *is* an "adjudication of the People's claims!"

It is well settled in this State that a motion to dismiss must be granted where doing so preserves the principle of *stare decisis*. In *Hoffman v. Nustra*, 143 Ill. App. 3d 259, 273 (2nd Dist. 1986), the court found the doctrine of *stare decisis* to be a "basic tenet of our legal system," finding, as follows:

We find, however, that the trial court's dismissal of the Hoffmans' initial complaint amounted to simple adherence to the doctrine of *stare decisis*; that is, "that a question once deliberately examined and decided be considered as settled and closed to further argument."


Similarly, here, this Board must reconsider its 8-8-13 Order by granting the Jurisdictional Motions and thereby upholding the principle of *stare decisis*. In doing so it will adhere to the principle "that a question once deliberately examined and decided be considered as settled and

closed to further argument."

WHEREFORE, SHERIDAN moves that the Board reconsider its 8-8-13 Order insofar as it denied the Jurisdictional Motions, and that the Board grant SHERIDAN's Jurisdictional Motions.

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

By:



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THIS FILING IS SUBMITTED ON RECYCLED PAPER.

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 for Reconsideration 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 12th day of September, 2013.

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