ILLINOIS POLLUTION CONTROL BOARD
July 22, 1999

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 99-152
	)	(Enforcement - Air)
EAGLE-PICHER-BOGE, L.L.C., a Delaware Limited Liability Company,	)	
	)	
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by E.Z. Kezelis):

On April 23, 1999, the Illinois Attorney General (complainant or Attorney General) filed a three-count complaint for enforcement. The complaint alleges that Eagle-Picher-Boge (Eagle-Picher) violated the Illinois Environmental Protection Act (Act), 415 ILCS 5/1 *et seq*. (1998), and associated Board regulations, through the operation of an Edgar County, Illinois facility at which rubber-molded parts for the automotive industry are manufactured. On June 16, 1999, Eagle-Picher filed special appearances together with a motion for leave to file *instanter* its motion to dismiss (Mot. at _.), and a brief in support of its motion to dismiss (Br. at _.). Eagle-Picher moves to dismiss the complaint on the ground that the Illinois Environmental Protection Agency (Agency) did not comply with the notice requirements of Sections 31(a) and (b) of the Act. On June 25, 1999, complainant filed its response to the motion to dismiss (Resp. at _.).

For the reasons set forth more fully below, the Board grants Eagle-Picher's motion for leave to file and denies Eagle-Picher's motion to dismiss.

BACKGROUND

The critical facts are not in dispute. The complaint (Comp. at _.) alleges as follows.[1]

[1] While the majority of facts are taken directly from the complaint, several additional facts become important because of the nature of Eagle-Picher's jurisdictional arguments. Both parties address those additional facts through their respective attachments of official Agency records. The Board concludes that it may take administrative notice of those four documents as business records. See generally People v. ESG Watts, Inc. (February 5, 1998), PCB 96-107; In the Matter of: Site-Specific Limitation for the Modine Manufacturing Company Facility, Ringwood, Illinois (May 24, 1990), R87-36. They are: Attachment A to complainant's response to the motion to dismiss (Resp. Attachment A.) and Attachments A, B, and C to the brief in support of respondent's motion to dismiss complaint (Br. Attachment __.).

Eagle-Picher manufactures rubber-molded parts for the automotive industry at a facility in Paris, Edgar County, Illinois (the facility). As part of this manufacturing process, Eagle-Picher utilizes spray equipment to apply a primer and adhesive to molded parts. Its facility includes a coating line with three spray booths; twenty-eight rubber injection molding presses; two additional coating lines, each equipped with one spray booth; and a regenerative thermal oxidizer. Comp. at 2.

Eagle-Picher's rubber mold injection presses were constructed over a period of years. According to complainant, one rubber injection mold press was constructed in 1972; five were constructed in 1979; one was constructed in 1980; two in 1981; three in 1982; four in 1985; three in 1986; one in 1987; one in 1989; one each in 1991 and 1992; and one in 1995. Comp. at 6.

On June 1, 1984, the Agency issued a "permit not required" letter for Permit Application No. 84020033 for the operation of one coating line with three spray booths. The permit was deemed not required because Eagle-Picher used less than 5,000 gallons per year of coating material, and thus, met the exemption of 35 Ill. Adm. Code 210.146(g). Comp. at 4.

In December 1995, Eagle-Picher submitted Permit Application No. 95120166 to construct two additional coating lines, each line to contain one spray booth. Comp. at 4.

That application was denied on February 21, 1996. Br. Attachment A. It was denied because emissions from the existing coating line were exceeding the 3.0 VOM/gal limitation prescribed by 35 Ill. Adm. Code 215.204. Comp. at 4.

On January 28, 1997, the Agency conducted an inspection of Eagle-Picher's facility. Comp. at 4; Resp. Attachment A. During the inspection, the Agency verified that solvent and adhesive usage from spray booths #2 and #3 on the existing coating line exceeded the 5,000 gallon per year exemption. A subsequent record review revealed that since at least 1994, Eagle-Picher had exceed the 5,000 gallon/year exemption and VOM emissions had exceeded 25 tons/year, and thus, that Eagle-Picher was not in compliance with the Part 215 coating regulations. Comp. at 4.

On July 14, 1997, the Agency issued a Violation Notice to Eagle-Pitcher pursuant to Section 31(a) of the Act. Br. Attachment C.

In September of 1997, Eagle-Picher applied for a construction permit for the construction of two coating lines, each equipped with one spray booth, one regenerative thermal oxidizer and four rubber injection molding presses. Construction Permit No. 97090024 was granted in December 1997. Br. Attachment B; Comp. at 7.

This complaint, which is brought in three counts, was filed on April 23, 1999. Count I alleges that since at least 1994, Eagle-Picher has caused or allowed air pollution in that it used more than 5,000 gallons per year of coating material with VOM emissions in excess of 25 tons per year in its adhesive coating operations. Count II alleges that Eagle-Picher constructed

portions of its facility during the period of 1972 through 1995 without the requisite construction permits. Count III alleges that since 1994, Eagle-Picher has conducted its adhesive coating operations without the requisite operating permits.

In summary, the Attorney General argues that Eagle-Picher's operations have caused or allowed excessive emission of VOM so as to cause or tend to cause air pollution in violation of Section 9(a) of the Act (415 ILCS 5/9(a) (1998)), and 35 Ill. Adm. Code 201.141 and 215.204(j)(5). Complainant further argues that Eagle-Picher constructed and operated portions of its facility without the requisite permits in violation of Section 9(b) of the Act (415 ILCS 5/9(b) (1998)), and 35 Ill. Adm. Code 201.142 and 201.143. The Attorney General seeks a cease and desist order, imposition of a civil penalty of up to fifty thousand dollars ($50,000) for each violation that occurred on or after July 1, 1990, and an additional penalty of ten thousand dollars ($10,000) for each day during which such violations continued after July 1, 1990, and his costs and reasonable attorney fees.

MOTION TO DISMISS

In ruling on a motion to dismiss, the Board takes all well-pleaded allegations in the complaint as true. Behrmann v. Okawville Farmers Elevator-St. Libory (July 8, 1998), PCB 98-84; Malina v. Day (January 22, 1998), PCB 98-54.

Eagle-Picher's motion to dismiss argues that the Agency failed to comply with the notice requirements of Section 31, and accordingly, that the Board lacks jurisdiction to hear the complaint. See 415 ILCS 5/31 (1998). In order to better evaluate the merits of Eagle-Picher's arguments, a short synopsis of the various notice requirements of Section 31 follows.

Notice Requirements of Section 31

Section 31 of the Act establishes the procedural framework for Illinois' environmental enforcement process. It provides that a person whom the Agency believes has violated the Act is to receive notice of such allegations and will be allowed an opportunity to meet with the Agency in an effort to come to an agreement prior to initiation of formal enforcement proceedings. Until August 1, 1996, Section 31(d) required that the Agency issue and serve a notice of violation letter on a potential violator prior to the filing of a complaint for enforcement. See 415 ILCS 5/31(d) (1994). Well-established Board precedent dictated that this Section 31(d) notice requirement was jurisdictional; absent such notice, cases were dismissed without prejudice and could be refiled once notice had been given properly. People v. American Waste Processing, Ltd. (January 23, 1997), PCB 96-264; People v. Escat, Inc. (July 20, 1992), PCB 92-27; People v. Chicago Heights Refuse Depot, Inc (October 10, 1991), PCB 90-112.

In 1996, the Illinois General Assembly amended Section 31. Public Act 89-596, which became effective on August 1, 1996, established a new time-driven procedure that the Agency must follow when it discovers a potential violation. See 415 ILCS 5/31 (1998). Compliance with this new time-driven procedure is now a precondition to Agency referral of a case to the Attorney General for enforcement. *Id*.

Specifically, Section 31(a) now requires that within 180 days of becoming aware of a potential violation, the Agency must serve the alleged violator with a written notice containing specific information about the potential violation. 415 ILCS 5/31(a) (1998). This "evidence of violation notice" initiates a series of opportunities for the alleged violator to meet with the Agency in an attempt to resolve the problems prior to enforcement. *Id.* If, after complying with the Section 31(a) requirements, the Agency still wishes to pursue legal action, Section 31(b) requires that the Agency provide the alleged violator with written notice of its intention to pursue legal action and allow another opportunity to meet prior to a referral of the case to the Attorney General. 415 ILCS 5/31(b) (1998).

The notice and meeting requirements of the new Section 31 apply only to the Agency, not to the Attorney General. Nowhere in Section 31 are any restrictions placed on the Attorney General's authority to proceed with an enforcement case and file a complaint on his own initiative.

ARGUMENT AND ANALYSIS WITH RESPECT TO COUNTS I AND III

Counts I and III were brought by the Attorney General on his own motion as well as on referral by the Agency. Because the new Section 31 provisions control Agency referrals, the Board addresses the arguments concerning these counts first.

Eagle-Pitcher's Arguments

In its brief in support of its motion to dismiss Counts I and III, Eagle-Picher argues that the Section 31 notice process should have been initiated at the time the Agency first became aware of the alleged violations. Eagle-Picher argues that the Agency first became aware of the alleged violations no later than February 1996, when the Agency denied a permit for the facility in question. Mot. at 2; Br. at 9-10.

Recognizing that this would predate the August 1, 1996 effective date of the new Section 31 notice provisions, Eagle-Picher likens the new Section 31 to a statute of limitations and argues that notice of the alleged violations should have been provided within 180 days of the effective date of the Section 31 amendment. Br. at 10-11, 14-15.

Finally, Eagle-Picher argues that its interpretation does not constitute a retroactive application of the Section 31 amendments because the violations at issue were not referred to the Attorney General until after the August 1, 1996 effective date of the new Section 31. Br. at 13. Eagle-Picher refers the Board to its own opinions in People v. Inspiration Development Co. (March 19, 1998), PCB 97-207; People v. Heuermann (September 18, 1997), PCB 97-92; and People v. Amsted Industries, Inc. (October 16, 1996), PCB 97-38, for the proposition that the August 1996 amendments to Section 31 are to be applied only prospectively. Eagle-Picher correctly points out that in those cases, the Board held that when alleged violations were referred to the Attorney General prior to the effective date of the amendments, the complaint would not be dismissed for failure to comply with the new Section 31 notice requirements. Since the alleged

violations at issue in this case were not referred to the Attorney General until after August 1, 1996, Eagle-Picher argues that its interpretation of Sections 31(a) and (b) would not be a retroactive application.

Complainant's Arguments

In its response, complainant first contends that the Board lacks the authority to dismiss a complaint for failure to comply with the Section 31 notice requirements and that "[t]he Board has no real powers in equity." Resp. at 3. Furthermore, complainant maintains that the Board, as an administrative agency, has no greater powers than those conferred upon it by legislative enactment, and that even those powers delegated to the Board are limited . Resp. at 4, citing Lombard v. Pollution Control Board, 66 Ill. 2d 503, 506 (1977). Since the amendments to Section 31 do not direct the Board to dismiss a complaint for the Agency's failure to comply with the notice requirements, the complainant argues that the Board cannot confer such a power upon itself. *Id.*

Complainant also argues that since the amendments to Section 31 do not impose a deadline by which the Agency must file a formal action or claim, Eagle-Picher's likening the section to a statute of limitations is misplaced. Resp. at 4. Alternatively, complainant argues that if the section is viewed as a statute of limitations, Illinois courts have long recognized the inapplicability of such limitations against the State where public rights are being asserted. Resp. at 5, citing County of Cook v. Chicago Magnet Wire Corp., 152 Ill. App. 3d 726, 504 N.E.2d 904 (1st Dist. 1987); Pielet Pros. Trading, Inc. v. Pollution Control Board, 110 Ill. App. 3d 752, 442 N.E.2d 1374 (5th Dist. 1982).

Finally, complainant argues that Eagle-Picher's view of the alleged violations as separate and distinct incidents is incorrect. Resp. at 6-11. Complainant maintains that due to the ongoing nature of the alleged violations, the Agency should not be precluded from documenting and referring continuing violations noted at the time of the January 28, 1997 inspection and included in the July 14, 1997 notice of violation, issued within 180 days of the inspection. Resp. at 11. Complainant does admit that at the time of the February 1996 permit denial, the Agency had "some awareness of certain compliance issues," but did not initiate the Section 31 notice process until after the Agency's January 28, 1997 inspection of Eagle-Picher's facility during which the Agency purportedly confirmed ongoing violations. Resp. at 9.

Analysis

For the following reasons, the Board denies Eagle-Picher's motion to dismiss regarding counts I and III of the complaint.

The facts underlying this complaint are somewhat different from those previously encountered by the Board in the context of a motion to dismiss based on the new Section 31. In this case, the violations challenged by Eagle-Picher are those that the Agency referred to when it denied Eagle-Picher's permit application in February 1996. The Agency conducted a January 28, 1997 inspection and found evidence of continuing violations reaching back as early as the 1970's.

Since the Agency complied with the Section 31 notice requirements following its January 1997 inspection, the Board finds that the Agency properly included the ongoing nature of the violations confirmed during the January 1997 inspection in its referral to the Attorney General.

The Board finds that applying the Section 31 notice requirements as urged by Eagle-Picher, would, contrary to prior Board decisions, result in the retroactive application of the amendments. The Board has repeatedly held that the Section 31 notice requirements should be applied only prospectively. See *supra* p. 5. Requiring the Agency to provide 180 days notice for violations first noted prior to the effective date of the amended Section 31 is an unreasonable and unworkable interpretation of Section 31.

Nor is the Board persuaded by Eagle-Picher's argument that the Section 31 time-driven deadlines should be treated as a statute of limitations. Statutes of limitations discourage the filing of stale, old claims, by restricting a person's ability to bring a complaint or petition for relief before a court or administrative agency after a certain period of time has expired. See generally Tom Okesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc., 61 Ill. 2d 129, 334 N.E.2d 160 (1975). Section 31 is not a statute of limitations, but an administrative tool that ensures potential violators have an opportunity to negotiate an alleged violation with the Agency prior to initiation of formal enforcement proceedings. Therefore, Eagle-Picher's argument that the 180-day time period should be calculated from the effective date of the amendment is rejected.

Accordingly, we find that the Agency satisfied the new Section 31 conditions, and that we have jurisdiction over the allegations in counts I and III. Eagle-Picher's motion to dismiss counts I and III is denied.

Count II

Count II is brought before the Board solely by the Attorney General on behalf of the People of the State of Illinois. There is no evidence in the record currently before us to indicate that the violations in this count were ever the subject of an Agency referral to the Attorney General.

In support of its argument for dismissing count II, Eagle-Picher essentially argues that whether the Agency actually referred the violations contained in count II is irrelevant. Eagle-Picher maintains that because the Agency was allegedly aware of the violations now alleged by the Attorney General in count II of the complaint, the Attorney General can not be found to have identified the count II violations on his own initiative. Br. at 12-13. Since no notice of the alleged violations in count II was ever provided, Eagle-Picher argues for dismissal of this count.

In response, the complainant points out that the Attorney General's office is not subject to the notice requirements of Sections 31(a) and (b). Resp. at 12. Furthermore, the complainant maintains that since the August 1, 1996 amendments, the Board has unwaveringly upheld the independent authority of the Attorney General to initiate enforcement cases. Resp. at 13. In support of this statement, complainant cites to prior Board cases: People v. Chemetco (July 8, 1998), PCB 96-76; People v. Heuermann (September 18, 1997), PCB 97-92; and People v.

Amsted Industries, Inc. (October 16, 1996), PCB 97-38.[2] Complainant also argues that nothing in Section 31 precludes the Attorney General from pursuing violations of which the Agency may be aware, but for which no referral was ever made. *Id*. The complainant, therefore, argues against dismissal of count II.

As the Board has previously held, the new Section 31 notice requirements do not apply to the Attorney General. See Chemetco (July 8, 1998), PCB 96-76 (where Attorney General learned of violations in amended complaint through discovery, rather than through referral from Agency, Sections 31(a) and (b) did not apply). See also People v. Geon (October 2, 1997), PCB 97-62; Heuermann (September 18, 1997), PCB 97-92; Amsted (October 16, 1996), PCB 97-38. In Geon, the Board recognized that the legislative intent behind the amendment to Section 31 was not to limit the authority of the Attorney General, "[t]he Board agrees . . . that the Attorney General's Office is not subject to the requirements of new Section 31(a) and (b) of the Act. Indeed the legislature did not intend to undermine the Attorney General's authority to prosecute on its own behalf . . . ." Geon, slip op. at 9.

Furthermore, Section 31(d) of the Act specifically authorizes any person to file a complaint before the Board. 415 ILCS 5/31(d) (1998). The Attorney General is a "person" as that term is defined in Section 3.26 of the Act (415 ILCS 5/3.26 (1998)), and is therefore free to pursue violations before the Board without a referral from the Agency.

Since nothing in the record indicates that the Agency referred the violations contained in count II to the Attorney General, Sections 31(a) and (b) do not apply. The Board finds that the Attorney General can bring the allegations in count II of the complaint pursuant to Section 31(d) of the Act. The Board therefore denies respondent's motion to dismiss as it applies to Count II of the complaint.

CONCLUSION

For the above stated reasons, the Board denies Eagle-Picher's motion to dismiss. Accordingly, the Board directs this matter proceed to hearing in a timely fashion.

The assigned hearing officer shall inform the Clerk of the Board of the time and the location of the hearing at least 30 days in advance of hearing so that a 21-day public notice of hearing may be published. After hearing, the hearing officer shall submit an exhibit list, a statement regarding credibility of witnesses, and all actual exhibits to the Board within five days of hearing.

Any briefing schedule shall provide for final filings as expeditiously as possible. If, after appropriate consultation with the parties, the parties fail to provide an acceptable hearing date or if, after an attempt, the hearing officer is unable to consult with all of the parties, the hearing

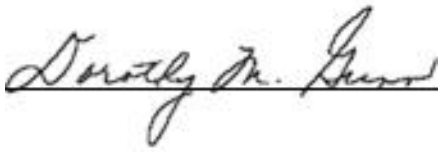
---

[2] In the complainant's response to the motion to dismiss, the citation to Amsted Industries, Inc. is incomplete. The citation simply reads, "Amsted." For purposes of this order, the Board believes that complainant is referring to the case cited above.

officer shall unilaterally set a hearing date. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 22nd day of July 1999 by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board