ILLINOIS POLLUTION CONTROL BOARD
October 2, 1997

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | PCB 97-62 |
| v. | ) | (Enforcement - Air) |
| | ) | |
| GEON COMPANY, INC., | ) | |
| | ) | |
| Respondent. | ) | |

ORDER OF THE BOARD (by J. Theodore Meyer):

This matter is before the Board on an amended complaint filed April 10, 1997, by the Attorney General's Office on behalf of the People of the State of Illinois (complainant). The complaint alleges that, in addition to the original release of monomer vinyl chloride on November 8, 1995, another release of monomer vinyl chloride occurred on September 28, 1996, which resulted in three violations of the Environmental Protection Act (Act). On June 19, 1997, Geon Company, Inc. (Geon)[1] filed its answer and affirmative defenses (Ans.).

On July 11, 1997, complainant filed a motion to strike affirmative defenses. On July 29, 1997, Geon filed a motion to dismiss the amended complaint or, in the alternative, a memorandum in opposition to the motion to strike affirmative defenses. On August 12, 1997, complainant filed an objection to Geon's motion to dismiss the amended complaint, and a response to Geon's memorandum in opposition to the motion to strike affirmative defenses (Obj.).

Also, on July 25, 1997, complainant filed a motion to file a second amended complaint and a second amended complaint, and Geon filed a motion for extension of time to respond. By order dated July 31, 1997, Chief Hearing Officer Michael L. Wallace stated that these motions would be held until the Board issues an order regarding the motion to strike affirmative defenses and Geon's motion to dismiss.

For the reasons stated below, the Board denies complainant's motion to strike affirmative defenses as to Geon's first, second, and third affirmative defenses and grants the motion to strike as to Geon's fourth and fifth affirmative defenses. The Board also accepts

[1] The Board notes that respondent's correct name is Geon Company, Inc., not Geon Corporation as prior captions have indicated. Respondent's correct name is reflected in this order and will be so indicated in all future orders.

Geon's motion to dismiss the amended complaint, but declines to dismiss the amended complaint.

## BACKGROUND

Geon operates a chemical plant located at Rural Route 1, Henry, Marshall County, Illinois, which manufactures polyvinyl chloride. Complaint at 2. On September 20, 1996, complainant, on behalf of the Illinois Environmental Protection Agency (Agency), filed a three-count complaint pursuant to Section 31(a) of the Act, after notice and opportunity to meet with the Agency was provided pursuant to Section 31(d) of the Act. 415 ILCS 5/31(a) and 31(d) (1994). The complaint alleged violations of Section 9(a), 9.1(d)(1), and 9(b) of the Act (415 ILCS 5/9(a), 9.1(d)(1), 9(b) (1994)), 35 Ill. Adm. Code 201.141, 42 U.S.C. §7412(i)(3) (1993), 40 C.F.R. 61.45(a) (1993), and Special Conditions 3(b) and 3(c) of Operating Permit No. 73050009 for a release of 3,737 pounds of monomer vinyl chloride which occurred on November 8, 1995.

On April 8, 1997, complainant, on behalf of the People of the State of Illinois, filed a motion for leave to file amended complaint and amended complaint. This motion was granted by hearing officer order dated May 21, 1997. The amended complaint realleges the allegations contained in the original complaint and adds additional allegations related to a release of monomer vinyl chloride at respondent's facility on September 28, 1996. On July 7, 1997, over six weeks after the amended complaint was filed, the Agency sent Geon a Notice of Intent to Pursue Legal Action which included an offer to meet with the Agency to resolve the allegations involving the September 28, 1996 release.

On July 9, 1997, complainant filed its motion to strike affirmative defenses and on July 29, 1997, Geon filed its motion to dismiss the amended complaint and its memorandum in opposition to the motion to strike affirmative defenses. The Board will present first the arguments regarding the affirmative defenses and then the arguments regarding the motion to dismiss the amended complaint.

## AFFIRMATIVE DEFENSES

In its first affirmative defense, Geon argues that complainant improperly split a single cause of action into three causes of action in an attempt to inflate the penalties it seeks from Geon. Ans. at 9-10. Geon asserts in its second affirmative defense that the release which occurred on November 8, 1995, and September 28, 1996, were not injurious to human, plant or animal life, to health or to property, nor did they unreasonably interfere with the enjoyment of life and property; therefore, the releases do not constitute "air pollution" as defined by the Act. Ans. at 10. In its third affirmative defense, Geon argues that the November 8, 1995 release was not preventable in that, without Geon's knowledge, Geon's contractor removed and improperly replaced a component of the rupture disk assembly, the equipment where the release occurred. Regarding the September 28, 1996 release, Geon states that the release

occurred due to mechanical failure beyond Geon's control and therefore also was not preventable. Ans. at 10-11.

Geon argues in its fourth affirmative defense that, if held responsible for any alleged violations, any relief granted is subject to mitigation based upon: an absence of willfulness and Geon's pattern of cooperation with the Agency; Geon's good faith efforts to control vinyl chloride releases; the lack of any economic benefit gained by Geon as a result of the releases; the *de minimus* and isolated nature of the releases; the lack of a significant adverse impact on air quality; and the lack of any prior adjudicated violations of the Act or its operating permit by Geon. Ans. at 11-12. Finally, in its fifth affirmative defense, Geon asserts that complainant is not entitled to attorney fees and costs because the violations were not willful, knowing, or repeated. Ans. at 12.

## Motion to Strike Affirmative Defenses

In its motion to strike (Mot.), complainant responds to the first affirmative defense by asserting that three causes of action are alleged because three violations of the Act occurred from each release; therefore, Geon's first affirmative defense fails because it states a legal conclusion. Mot. at 2. Geon's second affirmative defense, that no injury resulted from the releases, is a legal conclusion unsupported by fact and complainant argues that it should therefore be dismissed. In addition, complainant states, the statutory prohibition in Section 9(a) of the Act does not require a finding of injury or unreasonable interference in order for a violation to occur. Mot. at 3. Complainant states that the third affirmative defense is an admission of improper operation of equipment. Since Geon remained in control of the source from which the release occurred, Geon remains responsible for preventing releases from occurring, even if the release was caused by one of its contractors. Therefore, Geon's third affirmative defense should be stricken as well. Mot. at 5.

Complainant argues that Geon's fourth affirmative defense does not constitute an affirmative defense because the arguments revolve around the question of mitigation, not whether a violation occurred. Mot. at 7. Finally, complainant argues that Geon's fifth affirmative defense, the claim that complainant is not entitled to attorney fees, is not an affirmative defense and should therefore be stricken. Complainant notes that the factors considered by the Board in awarding attorney fees will not be known until after a hearing is held. Mot. at 7.

## Discussion

Although the Board notes that Geon's affirmative defenses filed in response to the amended complaint, and complainant's arguments in its motion to strike the affirmative defenses, are substantially similar to those filed in response to the original complaint, the Board finds it prudent to revisit the issues, in light of recent Board orders regarding affirmative defenses.

Complainant argues that Geon's first three affirmative defenses are based on legal conclusions only, and that no facts were provided in support of these claims. The Board disagrees. Geon provided facts to support its claims that the amended complaint improperly split a single cause of action, that the alleged releases did not harm human health or the environment, and that the release occurred due to a mechanical failure beyond Geon's control. The fact that these pleadings include legal conclusions does not serve to defeat them as affirmative defenses. As the Board has previously stated, allowance of liberal pleading of defenses serves to inform parties of the legal theories to be presented by their opponents, prevents confusion as to whether a defense has been waived as not timely raised, and avoids taking an opponent by surprise later in the proceedings. People v. Midwest Grain Products of Illinois, Inc. (August 21, 1997), PCB 97-179, slip op. at 4. Therefore, the Board declines to strike Geon's first three affirmative defenses.

The Board in recent rulings has determined that an affirmative defense concerning factors in mitigation with regard to any penalty that may be assessed in this matter, is not an appropriate affirmative defense to a claim that a violation has occurred. People v. Midwest Grain Products of Illinois, Inc. (August 21, 1997), PCB 97-179, slip op. at 5; People v. Douglas Furniture of California, Inc. (May 1, 1997), PCB 97-133, slip op. at 6. Since Geon's fourth affirmative defense speaks to the imposition of a penalty rather than the underlying allegations in this cause of action, the Board will strike it as improper. The Board reminds the parties that Geon is not precluded from introducing at hearing evidence regarding such mitigation factors.

Similarly, the Board has previously ruled that an affirmative defense based on whether a respondent should pay complainant's attorney fees and costs addresses the issue of penalty, not the underlying cause. Douglas Furniture, PCB 97-133, slip op. at 6. Therefore, Geon's fifth affirmative defense is stricken as improper. Again, Geon can raise this argument at hearing for purposes of arguing the appropriateness of any penalty to be imposed in this matter.

## MOTION TO DISMISS AMENDED COMPLAINT

In its motion to dismiss the amended complaint (Mot. to Dism.), Geon first acknowledges that its motion was not filed within 14 days of receiving the amended complaint, but requests the Board to accept this filing, otherwise Geon would be materially prejudiced. Mot. to Dism. at 1. Geon next argues that the amended complaint should be dismissed because complainant failed to comply with Section 31(b) of the Act. Specifically, Geon argues that newly amended Section 31(a) and (b) of the Act, which became effective August 1, 1996, requires the Agency, prior to referring a matter to the Attorney General's Office, to issue and serve upon the person complained against a written notice that the Agency intends to pursue legal action. In addition, the Agency must offer that person an opportunity to meet with the Agency to attempt to resolve any alleged violations. Mot. to Dism. at 4.

Geon notes that the Agency issued a Notice of Intent to Pursue Legal Action and offered a meeting to resolve the alleged violations of the Act resulting from the September 28,

1996 release. However, Geon asserts that the Notice of Intent to Pursue Legal Action was sent after the amended complaint was filed. Citing People of the State of Illinois v. American Waste Processing, Ltd. (January 23, 1997), PCB 96-264, People v. Clark Refining & Marketing, Inc. (September 7, 1995), PCB 95-163, and People v. Chicago Heights Refuse Depot, Inc. (October 10, 1991), PCB 90-112, Geon contends that the express language and purpose of Section 31(b) is to promote resolution of matters prior to taking formal legal action, and cites to several Board cases in support of its contention. Mot. to Dism. at 5.

Alternatively, Geon again urges the Board to deny complainant's motion to strike affirmative defenses as duplicitous of complainant's motion to strike addressed in the Board's January 7, 1997, order. Mot. to Dism. at 6.

Complainant's Objection to Geon's Motion to Dismiss

Complainant first objects to Geon's motion to dismiss, arguing that it is untimely in that Geon filed its motion 98 days beyond the due date for such filings. Obj. at 2. Complainant also argues that Geon failed to file a motion requesting leave to file its motion to dismiss, as required by Section 2-609 of the Illinois Code of Civil Procedure (735 ILCS 5/2-609 (1996)) which states that there is no absolute right to file supplemental pleadings, and allowance of same is discretionary. Obj. at 5.

Complainant further argues that Geon will not be materially prejudiced if its motion to dismiss is denied. Contrary to Geon's representation that the amended complaint was filed on behalf of the Agency, complainant states that the amended complaint was filed on the motion of the Attorney General's Office alone. As such, the notice requirements in Section 31(b) of the Act do not apply to the amended complaint. Therefore, no jurisdictional issue exists and Geon's motion to dismiss should be denied.

STATUTORY FRAMEWORK

The following is the pertinent language from Section 31 of the Act as it appeared before the recent amendments of Public Act 89-596.

Section 31 of the Act prior to Public Act 89-596:

> (a)(1) If such investigation discloses that a violation may exist, the Agency shall issue and serve upon the person complained against a written notice, together with a formal complaint, which shall specify the provision of this law or the rule or regulation or 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 this law or such rule or regulation or 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.

* * *

(d)(1) Notwithstanding the provisions of subsection (a) of this Section, prior to issuance and service of a written notice and formal complaint under subsection (a) of this Section, the Agency shall issue and serve upon the person complained against a written notice informing such person that the Agency intends to file a formal complaint. Such written notice shall notify the person of the charges alleged and offer the person an opportunity to meet with appropriate agency personnel in an effort to resolve such conflicts which could lead to the filing of a formal complaint. Such meeting shall be held within 30 days of receipt of notice by the person complained against unless the Agency agrees to a postponement, or the person complained against fails to respond to the notice or such person notifies the Agency that he will not appear at a meeting. Nothing in this subsection is intended to preclude the Agency from following the provisions of subsection (a) of this Section after the provisions of this subsection are fulfilled.

* * *

After Public Act 89-596 was enacted, Section 31 of the Act states in pertinent part:

(a)(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. At a minimum, the written notice shall contain:

* * *

(b) 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 (415 ILCS 5/42), 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.

* * *

(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 or the rule or regulation or 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 or such rule or regulation or 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.

* * *

(d) Any person may file with the Board a complaint, meeting the requirements of subsection (c) of this Section, against any person allegedly violating this act or any rule or regulations thereunder or any permit or term or condition thereof. The complaint shall immediately serve a copy of such complaint upon the person or persons named therein. Unless the Board determines that such complaint is duplicitous or frivolous, it shall schedule a hearing and serve written notice thereof upon the person or persons named therein, in accord with subsection (c) of this Section.

## Discussion

### Timeliness of Geon's Motion to Dismiss Amended Complaint

Complainant maintains that Geon's motion to dismiss should be denied as untimely filed because it was filed later than 14 days after the amended complaint was filed. Pursuant to 35 Ill. Adm. Code 103.140(a), in enforcement actions, "[a]ll motions by respondent to dismiss or strike the complaint or challenging the jurisdiction of the Board shall be filed within 14 days after receipt of complaint." However, the Board may exercise its discretion to consider a motion filed after the 14-day time period, pursuant to Section 101.243(b) which provides that "[a]ll motions challenging the jurisdiction of the Board shall be filed prior to the

filing of any other document by the moving party, unless the Board determines that material prejudice will result." 35 Ill. Adm. Code 101.243.

In the instant matter, complainant filed its amended complaint on April 10, 1997. Geon's motion to dismiss, which challenges the amended complaint on jurisdictional grounds, was filed on July 29, 1997, well past the 14-day time period for such responses but prior to the filing of any other document regarding the amended complaint. The Board believes that material prejudice would result if Geon were denied an opportunity to challenge the amended complaint on jurisdictional grounds and therefore declines to dismiss Geon's motion to dismiss the amended complaint.

Geon's Motion to Dismiss Amended Complaint

Geon has challenged the amended complaint based on the Agency's failure to provide the notice required under new Section 31(a) and (b) prior to its filing. Section 31 of the Act sets forth certain procedural and notice requirements applicable to the environmental enforcement process. Prior to August 1, 1996, Section 31(d) required that the Agency issue and serve a notice of violation letter on respondents prior to the filing of a complaint for enforcement. See 415 ILCS 5/31(d) (1994). The purpose of the Section 31(d) letter was two-fold: (1) to notify the person complained against of the charges alleged, and (2) to offer the person complained against an opportunity to meet with appropriate Agency personnel in an effort to resolve the conflict.

By legislative amendment effective August 1, 1996, Section 31 was modified. See 415 ILCS 5/31 (1996). Instead of requiring the old Section 31(d) letter as a precondition to the filing of the complaint, revised Section 31 now sets forth a specific time-driven procedure that the Agency must follow when it discovers a potential violation. Compliance with the new procedures outlined in Section 31 is a precondition to the Agency's referral to the Attorney General's Office for enforcement. See 415 ILCS 5/31(b) (1996).

Specifically, the new law requires that, prior to the Agency's referral to the Attorney General's Office or State's Attorney for prosecution, certain notices be given to provide for an opportunity to meet with the Agency. First, Section 31(a) of the new law requires that, within 180 days of becoming aware of an alleged violation, the Agency must serve the alleged violator with a written notice containing very specific information about the alleged violations. See 415 ILCS 5/31(a) (1996). Once received, 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 problem. See 415 ILCS 5/31(a) (1996). If no satisfactory resolution is achieved, and the Agency wishes to pursue legal action, Section 31(b) requires that the Agency serve a written notice on the person informing him of this intention and extend another opportunity to meet with the Agency prior to any referral of the matter to the Attorney General's Office or State's Attorney for enforcement. See 415 ILCS 5/31(b) (1996). Under the new law, these notices are a precondition to the Agency's referral of a matter to the Attorney General's Office or

State's Attorney-- Section 31 no longer contains a specific precondition to the filing of a complaint, however.

Thus, with the August 1996 amendments to Section 31 the legislature sought to "clarify the procedure where the IEPA and potential violators of the Environmental Protection Act work together in an effort to resolve potential violations of the Act." 89th Gen. Assem. House Proceedings, March 25, 1996 at 101 (statements of Representative Persico). The clarification "encourages dispute resolution [and] establishes reasonable time limits for the exchange of communication" (see 89th Gen. Assem. House Proceedings, March 25, 1996 at 102 (statements of Representative Persico)) between the alleged violator and the Agency. Such exchange of communication, however, was clearly designed to occur outside the presence of the Attorney General.

In the instant matter, Geon admitted in its November 1, 1996 answer that the complaint was brought pursuant to former Section 31(a) of the Act after the Agency provided notice and opportunity for a meeting, pursuant to former Section 31(d) of the Act. Ans. at 2. Thus, there is no question that the original complaint is properly before the Board. Geon argues that the amended complaint, filed after August 1, 1996, is improperly before the Board because the Agency did not provide notice pursuant to the new Section 31(a) and 31(b) notice requirements.

Complainant responds that the amended complaint was filed on the Attorney General's own motion, not on behalf of the Agency. Complainant asserts that the notice requirements of new Section 31 of the Act only apply to the Agency and are not applicable to enforcement actions brought solely by the Attorney General's Office. Therefore, since the notice requirements of new Section 31 of the Act only apply to the Agency, complainant argues that the amended complaint is properly before the Board, and it therefore should not be dismissed.

The Board agrees with complainant's assessment 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, as demonstrated by Senator Fawell's statements in the Senate debates regarding the amendements to Section 31:

> "[The proposed legislation] helps promote mutually agreed resolutions without resorting to litigation when there is a contaminated site. Does not hinder the Attorney General or the State's attorneys from instigating their own enforcement action independent of the IEA {sic} (IEPA), but it is a bill which, hopefully, will stop a lot of litigation." 89th Gen. Assem. Senate Proceedings, May 8, 1996 at 87 (statements by Senator Fawell).

The Board finds that in the instant matter, the Attorney General's Office can bring an amended complaint, pursuant to new Section 31(d) of the Act (415 ILCS 5/31(d) (1996)) on

behalf of the People of the State of Illinois. The Board therefore declines to dismiss the amended complaint in this matter.

Second Amended Complaint

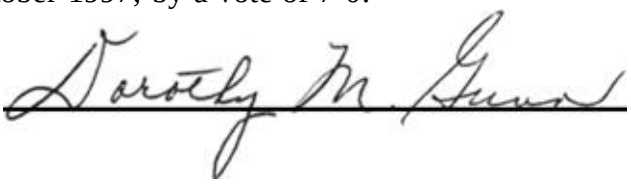
As previously stated, on July 25, 1997, complainant filed a motion to file a second amended complaint and a second amended complaint. By hearing officer order dated July 31, 1997, this motion, as well as any response, were held until the Board ruled on the pending motions regarding affirmative defenses and the amended complaint. Since this order disposes of such motions, the Board directs the hearing officer to set a new schedule for Geon's response to the motion for leave to file a second amended complaint, and for complainant's reply.

## CONCLUSION

For the above-stated reasons, the Board denies complainant's motion to strike affirmative defenses as to Geon's first, second, and third affirmative defenses and grants the motion to strike as to Geon's fourth and fifth affirmative defenses. The Board accepts Geon's motion to dismiss the amended complaint but declines to dismiss the amended complaint. Finally, the Board directs the hearing officer to set a new schedule for Geon's response to the motion for leave to file a second amended complaint, and for complainant's reply.

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 2nd day of October 1997, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board