ILLINOIS POLLUTION CONTROL BOARD
September 18, 1997

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	PCB 97-92
v.	)	(Enforcement - Water)
	)	
VICTOR G. HEUERMANN,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by C.A. Manning):

Pursuant to Section 31(a) of the Environmental Protection Act (Act) (415 ILCS 5/31(a) (1994)), the Illinois Attorney General (complainant or Attorney General) filed a complaint for enforcement on behalf of the People of the State of Illinois and the Illinois Environmental Protection Agency (Agency). Filed on November 25, 1996, the complaint alleges that respondent Victor G. Heuermann (respondent) violated the Act through his operation of a wastewater treatment plant. Respondent moves to dismiss the complaint, arguing that the Board lacks jurisdiction since the Agency has not complied with the new notice requirements of Section 31(a) of the Act (415 ILCS 5/31(a) (1996)), which became effective on August 1, 1996. The Board today denies respondent's motion to dismiss and orders this case to hearing on the merits of the allegations contained in the complaint.

BACKGROUND

Section 31 of the Act sets forth certain procedural and notice requirements applicable to the environmental enforcement process. Section 31 of the Act is, and has always been, the statutory mechanism which drives the environmental enforcement process in Illinois. It sets forth the obligations, the rights, the opportunities, and the responsibilities upon which the State and an alleged polluter rely to come to judicial decision on questions of violations of the Act. In Illinois, the Agency is the police officer in the environmental process. Its job is to investigate and bring to the attention of the Attorney General evidence of violations of the Act. The Attorney General, as the lawyer for the people of the State of Illinois, is vested with the authority and responsibility to bring to the Board or to circuit court a complaint for enforcement of the Act. See People *ex rel*. Scott v. Briceland, 65 Ill. 2d 485, 500-02, 359 N.E.2d 149, 156-57 (1976).

Section 31 of the Act has also provided that, in some fashion, the person alleged to be violating the Act would receive notice of such allegations and have an opportunity to meet with the State in an effort to come to an agreement short of formal initiation of prosecution. 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) it notified the person complained against of the alleged charges, and (2) it offered the person complained against an opportunity to meet with appropriate Agency personnel in an effort to resolve the conflict. Well-established Board case law holds that the Section 31(d) letter requirement is jurisdictional and, where such notice is not given, the complaint is dismissed without prejudice to refile once such notice has properly been given. See People v. Chicago Heights Refuse Depot, Inc. (October 10, 1991), PCB 90-112; People v. Escat, Inc. (July 20, 1992), PCB 92-27; People v. American Waste Processing, Ltd. (January 23, 1997), PCB 96-264. In this case, it is uncontested that the Agency complied with Section 31(d) prior to the filing of this complaint for enforcement.

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 of a case to the Attorney General for initiation of a formal enforcement action. See 415 ILCS 5/31(b) (1996).

Specifically, the new law requires that, prior to the Agency's referral of a case to the Attorney General or State's Attorney for prosecution, certain notices must be given and an opportunity to meet with the Agency must be provided. 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 extending another opportunity to meet with the Agency prior to any referral of the matter to the Attorney General 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 or State's Attorney. New Section 31, however, no longer contains a specific notice provision that must be met as a precondition to the filing of a complaint, as did the former Section 31(d).

Thus, the August 1996 amendments to Section 31, 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.

The basic difference between the former and current Section 31 is that the pre-August provisions of Section 31 required notice and an opportunity to meet prior to a complaint being

filed, while the post-August 1996 provisions require notice and an opportunity to meet prior to the Agency's referral to the Attorney General for prosecution. The new provisions therefore 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:

> REPRESENTATIVE PERSICO: Representative, the business community and the IEPA didn't feel that it was necessary to always have a member of the Attorney General's office there. This helps to set up an agreeable resolution to a dispute without resorting to any costly litigation. You know if they can come to some sort of agreement, we can do this in a different matter rather than just going to litigate all the time.
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> REPRESENTATIVE NOVAK: Okay, you mentioned the Attorney General. Will they still be allowed to be in meetings or will they be barred from meetings with the IEPA?
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> REPRESENTATIVE PERSICO: Representative, the whole idea behind this Bill is to preclude them from the pre-enforcement hearing in order to reach some sort of a dispute resolution. If there is no resolution that is reached, then it will go to the Attorney General's Office.
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> REPRESENTATIVE NOVAK: So I see it as sort of a step before you get to the other step, let me draw an example, I guess, if the agency and the company in this particular instance, got together and talked about this potential violation. So in order to keep the AG's office or the States Attorney's office out of the meeting that would take away sort of an accusatory environment or a prosecutory environment. So to keep those parties out and to have the EPA and the businesses talk about this potential conflict, would hopefully in the future help them ameliorate the situation. Is that correct?
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> REPRESENTATIVE PERSICO: Yes, Representative that's the whole idea behind this piece of legislation. In order to reach these kind[s] of resolutions, to put anything that might not be in the compliance and to come up with a system of doing that before going into litigation. And hopefully, most of the cases will be done without litigation. 89th Gen. Assem. House Proceedings, March 25, 1996, at 103-04.

While the intention behind the clarification was to create this insulated meeting process, 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:

> REPRESENTATIVE PERSICO: Representative, as I mentioned in my opening, this encourages disputes resolutions but there is nothing in this Bill that would preclude the Attorney General from acting on his own or hinders the IEPA from acting in cases of imminent danger or criminal activities ***.

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> REPRESENTATIVE NOVAK: So this is supposed to help resolve potential violations of Illinois law, Illinois Environmental Law. But if there was a charge against a corporation for violating a law of the Illinois Environmental Protection Agency, let's say excess dumping or dumping toxic pollutants into a river or a stream, this Bill would not in any means weaken the current laws we have as far as punishing violators that perpetrate such a crime. Is that correct?
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> REPRESENTATIVE PERSICO: You are absolutely correct there, Representative. 89th Gen. Assem. House Proceedings, March 25, 1996, at 103.

The Senate debates on the amendments to Section 31 also shed light on the legislature's intent in amending Section 31: [the bill] "helps promote mutually agreed resolutions without resorting to litigation when there is a contaminated site. [It] [d]oes not hinder the Attorney General or the State's attorneys from instigating their own enforcement action independent of the [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).

Ironically, while the amendments to Section 31 were intended to reduce the amount of litigation in the environmental context, the amendments themselves have been the cause of much litigation. The Board currently has pending many enforcement cases wherein the applicability of the new provisions are being contested and questioned. The questions raised in these cases stem primarily from the fact that the Agency's discovery of the alleged violations predated the effective date of the amendments, while the complaint for enforcement was filed after that date.

Indeed, respondent filed an answer in the present case on March 17, 1997, in which he raised two affirmative defenses, each dealing with the argument that the Board lacks jurisdiction to hear the complaint because the Agency failed to comply with the new Section 31(a) requirements prior to the filing of the complaint. On July 14, 1997, respondent filed a motion to dismiss alleging similar arguments. On July 18, 1997, complainant filed a response to the motion to dismiss. On July 23, 1997, respondent filed a motion for leave to file a reply and its reply to complainant's response. On August 1, 1997, complainant filed a motion for leave to file an objection and its objection to respondent's motion for leave to file a reply. The Board grants both parties' motions for leave to file.

FACTS

Since 1989, the Agency has been dealing with respondent concerning questions of violations of the Act and Board rules that allegedly result from the operation of his wastewater treatment plant. On January 6, 1989, the Agency held a pre-enforcement conference with the respondent, and the Agency conducted investigations of the respondent's facility on each of the following days: May 31, 1989, August 2, 1989, August 9, 1990, February 27-28, 1995, and August 3, 1995. The Agency held a second pre-enforcement conference with the respondent on

April 19, 1995. As the Agency cannot pursue environmental violations before the Board or in court on its own (see Briceland, 65 Ill. 2d at 500-02, 359 N.E.2d at 156-57), the matter was thereafter referred to the Attorney General for prosecution. This referral took place on or about April 24, 1996. Pursuant to the law that existed at the time of this referral, a formal Section 31(d) notice was sent to the respondent on September 13, 1996. 415 ILCS 5/31(d) (1994).

Thereafter, at least one more meeting was held between the Agency and the respondent in November 1996. On November 25, 1996, the Attorney General, on behalf of the People and the Agency, filed this complaint for enforcement. It is uncontested that the Agency did not follow the new enforcement procedures of Section 31, as they became effective on August 1, 1996. See 415 ILCS 5/31(a), (b) (1996).

ISSUE

Whether this case should be dismissed because the Agency did not comply with the requirements of new Section 31 prior to the filing of the complaint in this matter?

ARGUMENTS

In its motion to dismiss, respondent argues that the procedural requirements at the time of filing are the ones that need to be followed in this matter: the new Section 31. Citing Maiter v. Chicago Board of Education, 82 Ill. 2d 373, 415 N.E.2d 1034 (1980) and Hardee's Food Systems v. Human Rights Commission, 155 Ill. App. 3d 173, 507 N.E.2d 1300 (5th Dist. 1987), respondent asserts that "[w]hen a change of law merely affects the remedy or law of procedure, all rights of action will be enforceable under the new procedure, without regard to whether they accrued before or after such change of law and without regard to whether or not the action has been instituted, unless there is a savings clause as to existing litigation." Mot. to Dism. at 4. Since there is no savings clause in the amended Section 31, respondent argues that the new procedures apply. Since the new procedures have not (and cannot now be) complied with, and since the Board has always considered former Section 31(d) notice requirements to be jurisdictional, respondent contends that this complaint must be dismissed as the Board is without jurisdiction to hear it.

Complainant responds that the new Section 31 was intended to be applied prospectively from the date of the enactment and was not intended to apply where referral had already been made to complainant and the enforcement process had already begun. In this case, the Agency notified and met with respondent pursuant to Section 31 of the Act as it existed at the time of the discovery of the violation, at the time of the Agency's pursuit of a resolution of those violations, and at the time of referral to the Attorney General's office. While the new Section 31 creates an obligation on the part of the Agency to give certain notices prior to referring this case to the Attorney General, complainant argues that in the present case the referral had been made long before the statutory obligation was created. Moreover, complainant notes that the legislative history clearly indicates that the new requirements of Section 31 were not intended to foreclose environmental enforcement by the Attorney General. To the extent that any new obligations exist under the new Section 31, even if they are applicable to this action,

complainant asserts that they are only applicable to the Agency and cannot constitutionally serve to divest the Attorney General of the ability to pursue environmental violations under the Act.

ANALYSIS

With the preceding background in mind, the Board now turns to resolve the issue raised in this case, that being whether the case should be dismissed for failure of the Agency to comply with the new Section 31(a) and (b) requirements prior to the filing of the complaint. The Board finds that the amendments to Section 31(a) and (b) are prospective in nature and do not apply to the present case. Accordingly, the Board denies respondent's motion to dismiss.

Under the former provisions of Section 31, prior to the filing of a formal complaint, the Agency was required to serve on respondent a written notice informing respondent that the Agency intends to file a written formal complaint, and offering an opportunity to meet with Agency personnel to resolve conflicts, all prior to the filing of the complaint. 415 ILCS 5/31(d) (1994). It is uncontested that the Agency served respondents with the statutorily-required notice under former Section 31(d). However, respondent argues that the complaint was filed after the effective date of the new amendments to Section 31, and therefore, the Agency had to comply with the new notice provisions prior to the filing of the complaint. The Board disagrees.

The amendments to Section 31 establish preconditions that must be met prior to the Agency referring a matter to the Attorney General or State's Attorney. Therefore, the Board finds that the date of the Agency's referral to the Attorney General is the operative date in determining whether the new Section 31(a) and (b) requirements apply to a pending matter before the Board. Because the new Section 31 requirements establish preconditions prior to referral, the Board concludes that if a matter has been properly referred under the former Section 31 prior to August 1, 1996, the amendments to Section 31(a) and (b) must be applied prospectively. This is so because the new Section 31 would impose new requirements for referral after referral had already been made and the enforcement process begun. See First of America Trust Co. v. Armstead, 171 Ill. 2d 282, 286, 664 N.E.2d 36, 40 (1996) ("a retroactive change in the law is one that takes away or impairs vested rights acquired under the existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions of considerations already past"); see also Landgraf v. USI Film Products, 511 I.S. 244, 274 n. 29, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994) (the applicability of new procedural rules to pending cases depends on the posture of the particular case). Application of the new Section 31 requirements where the matter had already been properly referred would not be feasible.

Applying this analysis to the facts of this case, the Board finds that the amendments to Section 31(a) and (b) do not apply to the present case because the case was referred to the Attorney General prior to August 1, 1996. To retroactively apply the new provisions to the present action would improperly impose new obligations and duties on the Agency to a transaction that has already been completed, that being the referral of the action to the

Attorney General. To bar this action by retroactively applying the amendments to Section 31 of the Act to the Agency's referral process would be unreasonable since the Agency properly referred the matter pursuant to existing law. Therefore, the new requirements under Section 31(a) and (b) would not apply to this case since the Agency already referred the matter, and it no longer had the case on the effective date of the amendments to Section 31. To rule otherwise, would effectively immunize from prosecution all those potential violators whose violations were discovered and referred pre-August 1996, but whose actual enforcement proceeded thereafter. Rather, we believe the legislature clearly intended these new provisions to apply prospectively, *i.e.* to violations referred after August 1,1996.

The Board further finds that the Board's resolution in this case comports with the legislative intent of the amendments to Section 31. The legislative intent of the amendments was to foster an atmosphere where resolutions could be reached without resorting to litigation. The Board does not believe that the legislature envisioned that the amendments would be applied retroactively to defeat claims properly referred under the former law. Had the legislature intended this result, it could have so provided, but it did not. Further, the Board believes that the result reached herein is the only result that is reasonable and does not result in the absurd application of the new amendments to Section 31.

Finally, while not necessary for the resolution of this case, the Board feels compelled to address complainant's argument that even if the new Section 31 applied to this case, the new Section 31(a) does not preclude the Attorney General from proceeding on its own initiative.[1] The Board agrees with the Attorney General that the procedural prerequisites now contained in Section 31 apply to the Agency as a precursor to a referral. If the Agency wishes to refer a case to the Attorney General under new Section 31(c), based on the Agency's referral or request for representation, the Agency must comply with new Sections 31(a) and (b) prior to that referral or request for representation. If a complaint is brought under new Section 31(c), the Board cannot turn a blind eye to the requirements of Sections 31(a) and (b). Rather, the Agency must comply with Sections 31(a) and (b) before referring the case to the Attorney General under new Section 31(c). However, the Board acknowledges the broad authority of the Attorney General to bring a complaint pursuant to new Section 31(d) on its own. See Briceland, 65 Ill. 2d at 500-02, 359 N.E.2d at 156-57; see also 415 ILCS 5/31(d) (1996).

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[1] Complainant also argues that respondent's motion to dismiss should be stricken because the motion was untimely. The Board denies this motion. See People v. Clark Refining & Marketing, Inc. (December 20, 1995), PCB 95-163. Complainant also argues that respondent's motion to dismiss should be denied because by filing an answer prior to challenging the Board's jurisdiction in this case, respondent has waived his jurisdictional claim. Because the Board has found that the motion should be dismissed because the new amendments to Section 31 do not apply to the present case, the Board need not address complainant's additional arguments for denying the motion.

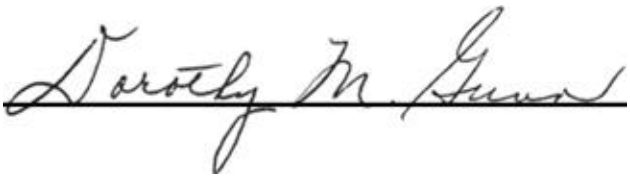
CONCLUSION

For the foregoing reasons, the Board denies respondent's motion to dismiss and orders this case to hearing on the merits of the allegations contained in the complaint.

IT IS SO ORDERED.

Board Member K.M. Hennessey abstained.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 18th day of September 1997, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board