ILLINOIS POLLUTION CONTROL BOARD
October 16, 1997

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	PCB 97-38
v.	)	(Enforcement - Land)
	)	
AMSTED INDUSTRIES, INC., a Delaware corporation d/b/a GRIFFIN WHEEL COMPANY; L.E. SWIDERSKI d/b/a GRIFFIN WHEEL COMPANY; and HORSEHEAD RESOURCE DEVELOPMENT COMPANY, INC., a Delaware corporation,	)	
	)	
Respondents.	)	

CONCURRING OPINION (by M. McFawn and J. Theodore Meyer):

While we agree that dismissal of this case must be without prejudice, we disagree with two of the Board's conclusions. Therefore, we concur. First, we do not agree that failure to comply with former Section 31(d) of the Environmental Protection Act (Act), 415 ILCS 5/31(d) (1994) ("old" Section 31(d)), results in a jurisdictional defect in this case filed after that section was deleted, and would therefore deny the respondents' motion to dismiss with prejudice. Second, we disagree that the Attorney General must comply with the provisions of former Section 31(d) in order to file a new complaint in this matter because the amendments to Section 31 effective August 1, 1996, eliminated the precondition to filing imposed under former Section 31(d). We disagree with the majority's decision that the current version of the Act must be construed to impose the old Section 31(d) notice requirement in cases filed with the Board after the effective date of the legislation deleting that requirement.

As has been recounted in detail recently in the Board's opinions in People v. Heuermann (Sept. 18, 1997), PCB 97-92, and People v. Geon Company, Inc. (Oct. 2, 1997), PCB 97-62, as well as the Board's opinion and order adopted today in this case, the amendments to Section 31 imposed new preconditions on referral of cases from the Illinois Environmental Protection Agency (Agency) to the Attorney General for enforcement proceedings, see 415 ILCS 5/31(a) and (b) (1996) ("new" Section 31(a) and (b)), but at the same time removed the prior precondition to filing which had been contained in old Section 31(d). See Heuermann, slip op. at 2; Geon, slip op. at 8-9. Under old Section 31(d), a notice and an opportunity to negotiate prior to filing (the so-called "Section 31(d) letter") was held to be a precondition to the filing of an enforcement action. See People v. Chicago Heights Refuse Depot, Inc. (October 10, 1991), PCB 90-112. Under the new Section 31, however, the language on which this conclusion was predicated, "prior to the issuance and service of a

written notice and formal complaint under subsection (a) of this Section, the Agency shall issue and serve on the person complained against a written notice. . .," has been deleted from the Act.

New Section 31(d), 415 ILCS 5/31(d) (1996), in pertinent part, provides:

> 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 regulation thereunder or any permit or term or condition thereof. The complainant shall immediately serve a copy of such complaint upon the person or persons named therein.

"Any person," as the phrase is used in new Section 31(d), includes the Attorney General on behalf of the People of the State of Illinois. See 415 ILCS 5/3.26 (1996). Thus, under new Section 31(d), the Attorney General (as well as any other person) retains its broad authority to commence enforcement actions. Nothing in subsections (a), (b), or (c) of new Section 31 limits or qualifies this authority. These subsections concern interagency dealings between the Agency and the Attorney General, into which the Board need not inquire, at least not in this case or the similar cases which have lately come before us.

The majority applied the old Section 31(d) notice requirement to this case on the premise that the new Section 31 is ambiguous. We find no ambiguity in any provision of the new Section 31 which justifies resorting to legislative history to reach such a conclusion. The asserted "ambiguity" is not a provision of the amended Act which is subject to conflicting interpretations. Rather, it involves resolution of a question on which the amended Act is silent: procedures applicable to a case referred prior to the amendments to Section 31 but filed after those amendments. This question may be easily answered by application of the principles identified by our Supreme Court in First of America Trust Co. v. Armstead, 171 Ill.2d 282, 286, 664 N.E.2d 36, 39-40 (1996): apply the law as it exists when the matter comes before the tribunal, unless to do so would interfere with a vested right. The court in Armstead noted that there is no vested right in the mere continuance of a statute, because the legislature has an ongoing right to amend a statute. Thus, no alleged violator of the Act can claim a vested right in an opportunity to meet and negotiate prior to filing of an enforcement action. The court also noted that, as here, the amendment did not create a new obligation or duty with respect to a past transaction. Indeed, the court went so far as to state that "where an amendment has no. . . retroactive impact, there is simply no need to apply further rules of construction to determine legislative intent because the amendment by definition has only prospective application." Armstead, 664 N.E.2d at 40. There is thus no need or reason to resort to legislative history to resolve any issue facing the Board in this case.

Even if resort to legislative history were warranted in this case, we do not find that the legislative history militates in favor of imposing the requirements of old Section 31(d) in a case filed after the effective date of the amendments to Section 31. Two things are clear from the

legislative history of the amendments to Section 31: the amendments were intended to exclude the Attorney General from pre-enforcement negotiations, and the amendments were not intended to hinder the Attorney General in bringing enforcement actions. See 89th Gen. Assem., House Proceedings, March 25, 1996, at 102-04; 89th Gen. Assem., Senate Proceedings, May 8, 1996, at 87. Application of the procedure under old Section 31(d) furthers neither of these goals: the Attorney General participates in negotiations under old Section 31(d), and the Attorney General will be hindered in bringing enforcement actions.

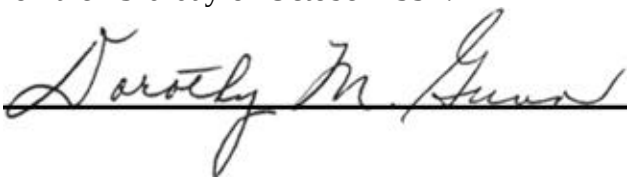
We acknowledge that it is possible, under this literal interpretation of the statute, that an enforcement action could be initiated against an alleged violator of the Act without an opportunity for that party to meet and negotiate with the Agency prior to filing. Every alleged violator, however, has always faced this prospect, inasmuch as even under Section 31(b) of the old law, anyone (including the Attorney General) could file such a suit at any time. This is still true under new Section 31(d). We note that neither ongoing discussions in accordance with new Sections 31(a) and (b) nor meticulous compliance with all the provisions of a settlement entered into under new Sections 31(a) and (b) provides any defense to filing of an enforcement action under new Section 31(d). As acknowledged in the majority's opinion, the Attorney General is not excluded from bringing an enforcement action under that subsection of the amended Section 31.

Applying these principles to this case, since there is no jurisdictional defect for failure to comply with either new Section 31(a) and (b) or with old Section 31(d), the Attorney General is free to re-file its complaint, and should not be required to send a Section 31(d) letter as a precondition to doing so. Accordingly, we do not join in the Board's opinion, although we concur with the ultimate decision to dismiss without prejudice since the Attorney General has made a motion for voluntary dismissal.

Marili McFawn
Board Member

J. Theodore Meyer
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above concurring opinion was submitted on the 23rd day of October 1997.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board