



ARGUMENTS

In support of its motion, Clark presents the following chronology of events:

- On December 23, 1992, Clark received a Compliance Inquiry Letter regarding a stormwater management device known as a Guard Basin. (Ex. 1). Clark subsequently met with the Agency, implemented measures and thought it had resolved the issues.

- On October 20, 1993, Clark received an Enforcement Notice Letter relating to a number of RCRA allegations raised in the complaint as Counts VI and VII. (Ex. 2) Clark again met with the Agency and took steps to resolve the issues.

- On April 26, 1994, Clark received an Enforcement Notice Letter regarding a number of air issues. (Ex. 3.) Clark subsequently met with the Agency and took steps to resolve the issues raised.

- On October 11 and October 27, 1994, Clark received substantially identical pre-enforcement notice letters relative to thirteen alleged release incidents described in Counts X through XIII. (Ex.4.) Clark and the Agency met in November of 1994 and Clark took action to resolve the Agency's concerns.

- On June 2, 1995, the parties met again to discuss Clark's progress toward resolving an issue raised at the November meeting. At the outset of the meeting the Assistant Attorney General stated his view that the meeting was intended to satisfy the Section 31(d) requirements for five more new, unnoticed alleged releases that occurred since the November meeting, and also for alleged violations at the Hartford facility that had been noticed by the Agency and discussed between the parties over the previous two and a half years. Clark had believed that many of the issues had been resolved. Clark was surprised by the announcement and unprepared to discuss the alleged violations. In addition, Clark did not have the proper personnel present to discuss these issues.

Clark maintains that Counts I through IX contain issues that had been resolved and are now reopened without proper 31(d) notice. Clark contends that the Agency cannot use meetings to induce a company to undertake millions of dollars of work to resolve the issue and then bring a formal action against the party several years later without renoticing the allegations. Clark contends that such action subverts the intent of the 31(d)

notice. Clark argues that the failure to provide proper notice renders Counts I through IX invalid.

In addition, Clark maintains that various paragraphs of Counts III, V, IX, X, XI and XII contain allegations for which Clark received no written notice prior to the filing of the complaint. Clark requests that these paragraphs be stricken from the complaint because the notice required by Section 31(d) was not provided by the complainant.

#### DISCUSSION

The Board finds that the Compliance Inquiry Letter dated December 23, 1992 does not satisfy the notice requirements of Section 31(d). Section 31(d) indicates that no letter similarly drafted can fulfill the requirements of the Act. This letter does not offer an opportunity to meet with the appropriate personnel but instead seeks a written response to the alleged violations. This letter referred to possible violations of Part 703, subparts A through D and Parts 725, Subparts B, E through H and K. Many of the alleged violations referenced in the December 23, 1992 Compliance Inquiry Letter were also referenced in the October 20, 1993 Enforcement Notice Letter.

The Board finds that the allegations contained in Counts I through IX were included in the Enforcement Notice Letters dated October 20, 1993 and April 26, 1994. In addition the Enforcement Notice Letters fulfill the requirements of Section 31(d).

The Board finds no support for Clark's contention that once the parties have met and resolved the issues the Agency is barred from filing a formal action. Cessation of the complained-of activity does not preclude an action before the Board to determine whether the activity violated the Act, although "subsequent compliance" is to be considered by the Board in issuing its orders. (415 ILCS 5/33(c), Joseph A. Schrantz v. Village of Villa Park (October 21, 1993), PCB 93-161 .) In addition Section 31(d) states that fulfilling the notice requirements does not preclude the filing of an action pursuant to Section 31(a). In IEPA v. Nesco Steel Barrel Company (May 24, 1990), PCB 90-37, the Board declined to require that prior allegations be included in subsequent pre-enforcement notices. In Nesco, the Board denied NESCO's motion to strike a count for which notice was provided more than four years prior to the filing of the complaint.

Therefore, the Board denies Clark's request to strike Counts I through IX as the required notice was provided to the respondent. The statute does not preclude the filing of a complaint if compliance is achieved nor does the statute require that a formal complaint be filed within a specified time period of the notice or meeting. The time period between the first

Enforcement Notice Letter (October 20, 1993) and the filing of the complaint (June 6, 1995) is slightly more than 19 months. The Board finds that this does not represent an unreasonable period of time especially considering the nature of the allegations and the nature of compliance. In addition, the Board does not believe that Clark was materially prejudiced by the lapse of time between the initial enforcement letter and the filing of the complaint. While Clark claims to be taken by surprise when previously discussed allegations were raised at the June 2, 1995 meeting with the Agency this situation does not violate the notice requirements. The respondent was notified of the previous discussed allegations and met with the Agency on these allegations.

The Board finds that the allegation of paragraph 9 of Count IX is included in the Enforcement Notice Letter dated October 20, 1993 as Item #14. After reviewing the complaint and the Enforcement Notice Letters the Board is unable to find any written notice of the allegations contained in the paragraphs specified by Clark in Counts III, V, X, and XII. The facts presented by Clark state that the Assistant Attorney General represented at the meeting that the meeting itself was intended to fulfil the notice requirements of Section 31(d). In People v. EMCO Chemical (December 2, 1993), PCB 93-186, the Board found that oral discussions cannot substitute for the clear requirement in the Act for written notice of the charges alleged. Therefore, any oral representation by complainant of additional allegations at a meeting held in response to a enforcement letter would not satisfy the notice requirements of Section 31(d).

In EMCO Chemical, the Board held that the failure to provide proper notice in accordance with Section 31(d) resulted in a lack of personal jurisdiction by the Board and that those alleged violations should be dismissed without prejudice because a dismissal due to lack of personal jurisdiction is not an adjudication on the merits.

#### CONCLUSION

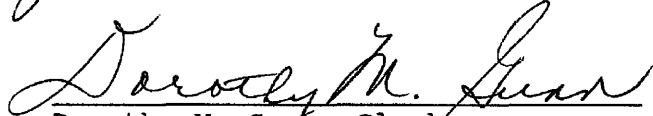
The Board strikes the following paragraphs from the complaint as the Agency did not provide notice of these allegations to Clark as required by Section 31(d):

- a. Paragraph 7 of Count III as it relates to the alleged violation of Section 9(a) of the Act.
- b. Paragraph 18 of Count V as it relates to the alleged violation of Section 9(b) of the Act.
- c. Paragraph 10 of Count IX as it relates to the alleged violation of Section 21(f)(2) of the Act.

- d. Paragraphs 13 and 22 of Count X as it relates to the alleged violation of Section 12(f) of the Act.
- e. Paragraph 21 through 25 of Count XI which allege a discharge of gasoline on October 10, 1994 and a spill of diesel fuel on October 28, 1994. Paragraph 26 of Count XI as it relates to the alleged violation of Section 12(a) and (d) to the incidents alleged in Paragraphs 21 through 25.
- f. Count XIII in its entirety.

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 7<sup>th</sup> day of September, 1995, by a vote of 7-0.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board