

ILLINOIS POLLUTION CONTROL BOARD
January 5, 1989

VILLAGE OF KILDEER,)	
)	
Complainant,)	
)	
v.)	PCB 88-173
)	
VILLAGE OF LAKE ZURICH)	
NICHOLS GROVE PROPERTIES,)	
LIBERTY LAKE PARTNERSHIP,)	
ESR/ANDEN CORPORATION,)	
LEXINGTON DEVELOPMENT CO.,)	
LEXINGTON HOMES, INC.,)	
)	
Respondents.)	

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

This matter is before the Board on a November 9, 1988 motion to dismiss filed by respondent the Village of Lake Zurich. Respondent Lexington Development Corp. (Lexington) filed its motion to dismiss on November 15, 1988, adopting and incorporating Lake Zurich's motion to dismiss. On November 18, 1988 ESR/Anden Corporation (ESR/Anden) and Liberty Lake Partnership (Liberty Lake) filed a motion to dismiss, also adopting and incorporating Lake Zurich's motion to dismiss. Complainant the Village of Kildeer filed its response to the motions on November 23, 1988.

Lake Zurich, Lexington, ESR/Anden, and Liberty Lake (collectively, respondents) move the Board to dismiss Kildeer's complaint, which alleges effluent violations, water quality violations, and hydraulic overloading resulting from the operation of Lake Zurich's southeast wastewater treatment plant. Respondents claim that Kildeer's complaint is duplicative under Section 31(b) of the Environmental Protection Act (Act) (Ill. Rev. Stat. 1987, ch. 111^{1/2} par. 1031(b)), because the Illinois Environmental Protection Agency (Agency) has sent Lake Zurich an enforcement letter pursuant to Section 31(d) of the Act. Respondents state that settlement discussions between Lake Zurich and the Agency are continuing with the objective of obtaining a judicially sanctioned consent decree. Respondents note that on November 3, 1988, this Board issued an order concluding that there is no pending legal action between the parties alleging violations of the Act, and thus finding that Kildeer's complaint is not duplicative. Respondents contend, however, that because the Agency's enforcement letter is mandated by Section 31(d), the Agency's action is on an equal footing with Kildeer's complaint and thus is a prior pending enforcement proceeding, rendering Kildeer's complaint duplicative. Additionally, respondents maintain that the Board should strike and dismiss Count III of the complaint, which seeks revocation of six permits issued by the Agency. Respondents assert that the Agency is thus a necessary party over whom the Board lacks jurisdiction.

In response, Kildeer states that respondents' motions present no reason why the Board should reconsider its November 3 decision that the complaint is not duplicative. Kildeer contends that settlement negotiations pursuant to a Section 31(d) notice are not the type of action that render a citizen enforcement complaint duplicative. Kildeer further maintains that its complaint is not duplicative because the violations alleged in the complaint and those raised in the Agency's Section 31(d) notice are not identical, and because the Agency does not seek the same complete relief that Kildeer seeks. Finally, Kildeer disputes respondents' contention that the Agency is a necessary party in this proceeding. Kildeer states that it seeks no relief against the Agency, but merely asks the Board to exercise its statutory authority to revoke the challenged permits.

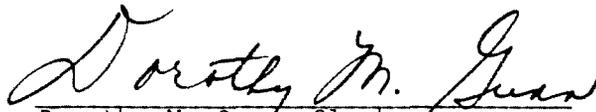
The Board agrees with Kildeer that a Section 31(d) notice does not constitute a prior pending enforcement action which would render Kildeer's complaint duplicative. Respondents are correct in noting that a Section 31(d) notice is a necessary prerequisite to a formal enforcement action. However, the issuance of a Section 31(d) letter does not always result in the filing of a formal enforcement action. In determining whether a complaint is duplicative, the issue is whether the complaint raises allegations identical or substantially similar to matters previously brought before the Board. Winnetkans Interested in Protecting the Environment (WIPE) v. Pollution Control Board (1st Dist. 1977), 55 Ill. App.3d 475, 370 N.E.2d 1176, 1179.) In instances where the Board has concurrent jurisdiction with a circuit court, substantially similar matters previously brought before a circuit court may also be dismissed as duplicative. Brandle v. Ropp, 64 PCB 263 (PCB 85-68, June 13, 1985). Respondents do not claim that Kildeer's complaint raises allegations which have been previously brought before the Board or a circuit court. The Board also agrees with Kildeer's claim that its complaint is not identical or substantially identical to the Agency's Section 31(d) notice. Kildeer's complaint alleges violations of the ammonia nitrogen water quality standards, while the Section 31(d) notice does not allege ammonia nitrogen violations. Additionally, Kildeer seeks revocation of permits issued by the Agency, while the Agency has stated that it will not revoke those permits at this time. (See Lake Zurich's Motion to Dismiss, Exh. B.) The Board reaffirms its November 3 finding that the complaint is not duplicative.

The Board further finds that the Agency is not a necessary party to this action. Kildeer asks that Agency-issued permits be revoked, but seeks no relief against the Agency. Pursuant to Section 33(b) of the Act, the Board may revoke a permit as a penalty for violation. It is solely the province of the Board to revoke permits; action by the Agency is not required. No interest of the Agency will be materially affected by the decision of this case. Thus, the Agency is not a necessary party. However, the Agency is urged to participate in this proceeding by commenting upon the status of its discussions with Lake Zurich and its intentions for any further action. The Clerk is directed to serve a copy of this Order on the Agency.

For these reasons, respondents' motions to dismiss are denied.

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 5th day of January, 1989, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board