

ILLINOIS POLLUTION CONTROL BOARD
July 27, 1989

ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Complainant,)	
)	
v.)	PCB 89-87
)	also
MOLINE CORPORATION, an)	PCB 89-44
Illinois Corporation,)	
)	
Respondent.)	

DISSENTING OPINION (by J. Anderson and J. T. Meyer):

We would have granted Respondent's Motion for Judgment on the Pleadings with respect to the Agency's Count IV noise complaint; we then would have denied the motion to consolidate the PCB 89-87 and PCB 89-44 hearings, since the latter citizens' complaint involves noise violations and the former Agency complaint, absent Count IV, involves air violations.

Section 31(d) of the Act is quite explicit in requiring "up-front" service of written notice by the Agency of a) intent to file a formal complaint, b) the charges alleged, and c) an offer to meet within 30 days thereafter to provide an opportunity to resolve the conflicts.

Since the Agency admitted it did not include in its "31(d)" notice of air violations anything about noise violations at all, and if one is to assume this defect can be cured by other means, then one must look at whether all aspects of "31(d)" were later addressed. We do not believe they were.

First, at no point in the Agency's interactions with Moline is there any indication that the Agency stated its intent to file a Count IV formal complaint. Nor did the Attorney General. The majority opinion completely glosses over this defect.

Second, there is no indication that the Agency told Moline exactly what would be the charges it would allege regarding Count IV. The interactions between the Agency and Moline concerned the citizen noise allegations, not those initiated by the Agency. It cannot be assumed for purposes of 31(d), that these allegations are the same, or concern the same noise sources or dates of violation.

The essence of Section 31(d) is to assure that a potential respondent knows that a formal complaint is forthcoming and knows what the alleged charges are before meeting on them. Section

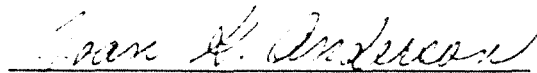
31(d) is written as explicitly as it is in part to provide an opportunity to the potential respondent to anticipate "up front" exactly what the Agency intends to file so as to prepare for the meeting, including the bringing of any experts, so as to avoid litigation. "Backing and filling" efforts to cure the 31(d) notice defect should be scrutinized carefully or 31(d) will be rendered meaningless.


Of course, Moline knew of the citizen complaints against them; that it acknowledged that it discussed the noise issue does not constitute a waiver of notice. Indeed, Moline specifically cautioned the Agency that a referral to the Attorney General flowing from the discussions would violate Section 31(d). Although the Board held in IEPA v. Mervis, (PCB 88-36) that the 31(d) notice defect was not fatal, the circumstances in this case do not warrant such a conclusion. And we certainly do not see how the Attorney General's letter has any bearing on the 31(d) process at all.

Finally, the Agency gives no explanation as to why it did not cure the "31(d)" problem by sending another notice of intent to file a formal complaint and alleging the additional noise violation during the months that elapsed after the referral of the air complaint to the Attorney General.


We submit that hindsight suggests that we may have erred in not strictly applying the Section 31(d) notice provisions in Mervis. We certainly believe that the majority here has gone well beyond any arguable limits of flexibility in construing the intent of Section 31(d), with, we predict, a resulting chilling effect on the very resolution process that "31(d)" was designed to encourage.

For these reasons we respectfully dissent.


Joan Anderson


J. T. Meyer

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was submitted on the 9th day of August, 1989.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board