ILLINOIS POLLUTION CONTROL BOARD
December 20, 1990

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainant,	)	
v.	)	AC 90-27 (IEPA Case No. 147-90-AC) (Administrative Citation)
JOHNSON BLACKWELL,	)	
Respondent.	)	

ORDER OF THE BOARD BY (J. C. Marlin):

This matter comes before the Board on an October 5, 1990 motion to reconsider filed by the Illinois Environmental Protection Agency (Agency). In support of its motion the Agency has four main arguments challenging the Board's August 30, 1990 Order. One, that the Board raised and decided a legal issue without participation of the parties. Two, that the Board cannot grant a form of relief which has not been requested by the respondent. Three, that the Board misinterpreted the statutory language of Section 31.1 of the Environmental Protection Act (Act). And four, that the Board incorrectly applied the Act to the facts of this matter. The Board hereby grants reconsideration and upon reconsideration affirms the August 30, 1990 Order.

The complete facts of this case are detailed in the Board's August 30, 1990 Order and will not be reprinted here. In summary, the facts are that after an Agency inspection, the respondent received a Pre-Enforcement Conference Letter stating that the Agency intended to file a formal complaint and that the respondent could attend a conference with officials "in an effort to resolve such conflicts which could lead to the filing of formal action." Several days later an administrative citation was received by the respondent. As discussed below, this contradicted the language of the Pre-Enforcement Conference Letter stating no formal action would be taken until the conference. Several days after receiving the administrative citation the respondent attended the conference where he was informed that "no '<u>formal enforcement</u>' action would be filed . . . if Respondent cleaned up the site as agreed between the parties" (July 12, 1990 Agency response to motion to vacate. Emphasis in original.). Prior to the final date agreed upon between the parties for resolution of the matter, the Board issued a Default Order against the respondent.

The respondent filed a timely motion for reconsideration of the Default Order, making nine statements in support of his

request. The nine statements attested to the respondent receiving a Pre-Enforcement Conference Letter (PECL), his attendance at the Pre-Enforcement Conference, the agreement made at the Pre-Enforcement Conference, respondent's belief that no charges would be brought against him because of his cooperation at the Pre-enforcement Conference and his distress at having charges against him despite the agreement and his cooperation. Respondent finally stated that he felt "manipulated and lead down a garden path."

The Agency's "Response to Motion to Vacate" admitted the Respondent's statements regarding the PECL, the Pre-Enforcement Conference and the agreement but denied the statements about "charges". The Agency stated that no assertions were made concerning the filing of an administrative citation but that it had informed the Respondent that "no 'formal enforcement' action would be filed if Respondent cleaned up the site as agreed." The only reply to Respondent's final statement was the Agency's assertion that the Respondent failed to meet the agreement. The Board entered its decision on the Motion to Vacate in favor of the Respondent in an Order of August 30, 1990.

In its motion for reconsideration of the August 30, 1990 Order, the Agency contends that the Board raised an issue and decided it without participation from the parties. The Board disagrees. The Respondent's motion indicates confusion, misunderstanding and distress with the Agency's simultaneous use of multiple methods of enforcement and raises the issue of the procedural correctness and fairness of these multiple proceedings. The Agency's response did not address the Respondent's assertions that he was misled. The Board considered both filings in making its decision. That the Board did not find the Agency's argument persuasive does not make the Board's finding "contrary to an adversarial system of jurisprudence".

The Agency argues that the relief granted by the Board was improper because it was not specifically requested by the Respondent. The Respondent's motion requested reconsideration of the matter, as the Agency has done in this case, and also requested relief which would be favorable to the Respondent, as the Agency has requested relief favorable to itself. The Board reconsidered the matter using the filings of both parties. On reconsideration, in similar fashion to its original consideration of a matter, the Board can grant the relief requested, modify the requested relief, or grant what relief it deems appropriate and within its statutory authority. In the present matter, the Board found in its August 30, 1990 Order that certain facts concerning the Agency's procedures required that the matter be dismissed for failure to comply with the Act.

The Agency next argues that the Board misinterpreted Section 31.1(a) of the Act which states that specified prohibitions of

the Act "shall be enforceable either by administrative citation or as otherwise provided by this Act." The Agency contends that the "as otherwise provided by this Act" language of Section 31.1(a) "refers to a formal complaint filed under Section 31 of the Act" and "to the filing of a formal complaint." (Emphasis in original.) Apparently, the Agency contends that the "as otherwise provided" language refers to and only to the filing of a formal complaint. In support of this contention, the Agency argues that a letter pursuant to Section 31(d)[1] "cannot bar the Agency from exercising its option to file a citation action." Also, the Agency has stated, in a different administrative citation proceeding, that "[i]n appropriate cases, a matter may be referred for both formal enforcement and issuance of an administrative citation." County of Tazewell v. Steve Zimmerman, AC 90-40, December 20, 1990, (Agency delegation agreement with county).

The Board disagrees with the Agency's interpretation of Section 31.1(a) for three reasons. First, the language of Section 31.1(a) does not express any conclusions regarding the "formality" of the enforcement. Second, the "or as otherwise provided" statutory language is inclusive of all other enforcement methods contained in the Act. There is no exclusion for the 31(d) notice letter. And, third, even if the language referred only to the formal enforcement process of Section 31, the Agency would still be precluded from using the Section 31(d) letter and an administrative citation. The Act requires that before a formal complaint could be filed, the Agency must serve the Respondent with written notice of the intent to file a formal complaint and offer to meet with Respondent as part of "an effort to resolve such conflicts which could lead to the filing of a formal complaint." (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1031(d).) The Act therefore establishes the 31(d) written notice as both a statutorily mandated negotiation process and a statutorily mandated preliminary administrative step within the formal enforcement process of Section 31(a). This dual nature of the Section 31(d) letter is not ignored by the Board, as suggested by the Agency, but is a focal point of concern when the 31(d) letter is used simultaneously with other enforcement methods to address a specific violation.

The Agency's final argument contends that the Board's August 30, 1990 Order precludes the Agency from issuing a PECL and then proceeding with an administrative citation. The Agency argues that such a finding is incorrect and inconsistent with the Act because a PECL is not the actual filing of formal enforcement. The Agency does not regard the issuance of a PECL and an

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[1] The Board notes that letters issued pursuant to Section 31(d) of the Act are titled a Pre-Enforcement Conference Letter or PECL by the Agency.

administrative citation at roughly the same time to contradict the Act because it does not consider the Section 31(d) negotiation procedures to be either "formal enforcement" or included in the "as otherwise provided by this Act" language of Section 31.1(a). The Agency believes that this "simultaneous use of available enforcement tools has been most positive from the environmental viewpoint."

The Board must disagree. The concurrent implementation of various enforcement methods by the Agency for a specific violation has led to vagueness, confusion and a diminished usefulness of the administrative citation process. The Agency's failure to identify the differences and connections between the 31(d) letter, the Section 31(a) enforcement and the administrative citation process in its oral and written communications with the Respondent creates a vagueness about the procedures. Confusion is created when the Agency refers to the administrative citation as "informal enforcement" when it is an expedited formal enforcement proceeding. An average citizen would consider the receipt of a legal document demanding five hundred dollars per violation as formal enforcement no matter what the Agency termed it. And the usefulness of the administrative citation process is diminished when the process which was to have had the simplicity of a traffic ticket becomes overly complex and adjudicatory.

For these reasons, the Board disagrees that its August 30, 1990 finding was incorrect and inconsistent with the Act. In that Order, the Board stated that a plain reading of the statute indicated "that the General Assembly did not intend that a citizen be charged for the same violation under both the administrative citation provisions and the formal enforcement provisions of the Act." The Board went on to find that since the PECL contained "the Agency's stated intention and notification to the Respondent to pursue formal enforcement" and a "statement that the letter constitutes the notice required under Section 31(d) of the Act", the subsequent issuance of the administrative citation was inconsistent with Section 31.1(a). In addition, the PECL represented that all violations on the attached inspection report were the subject of the intended formal enforcement action.

The Board found that based on the language of this PECL Johnson Blackwell could reasonably rely on the Section 31 enforcement process being the only enforcement method used against him. He could also have reasonably relied upon the agreement reached at the pre-enforcement conference regarding the timeframes for corrective action. The Board believes that its holding supports the language of Section 31.1(a). A Section 31(d) written notice begins both formal negotiations and formal enforcement, either one of which is an enforcement method "as otherwise provided by [the] Act", and therefore is not to be used

simultaneously with the administrative citation for the same violation. In this regard the Board is aware that a given inspection may result in allegations of several specific, individual violations, each of which may be pursued independently by one suitable enforcement method.

The success of the administrative citation process depends on simplicity and a lack of ambiguity and confusion. The Board is not inclined to look favorably on the validity of an administrative citation where the Agency was not specific in handling various violations, especially where reasonable persons may have relied on Agency documents and representations to their detriment. The enforcement of violations must utilize consistent, accurate and informative language to avoid the complexity and resulting confusion which has recently accompanied some administrative citation proceedings. The Board's action will not "entangle" the administrative citation process, as the Agency believes, but will untangle it from other enforcement methods as the Act intended.

Finally, the Board notes that the Agency has stated that the Board's decision was improperly influenced by the respondent's assertion that he had cleaned up the site. This is not true. The Board is aware of both parties' assertions as to subsequent clean up of the site but this factual dispute was not considered by the Board in making its decision.

For the foregoing reasons, the Board affirms its Order of August 30, 1990 in this matter. The Board does not make any finding with regards to the merits of the Agency's allegations in this case.

IT IS SO ORDERED.

Board Member Bill Forcade dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 20th day of December, 1990, by a vote of 6-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board