ILLINOIS POLLUTION CONTROL BOARD
October 16, 1997

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	
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,	)	PCB 97-38
	)	(Enforcement - Land)
	)	
	)	
	)	
	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by C.A. Manning):

Pursuant to Section 31 of the Environmental Protection Act (Act) (415 ILCS 5/31 (1994)), the Illinois Attorney General (complainant or Attorney General) filed this complaint for enforcement on behalf of the People of the State of Illinois and the Illinois Environmental Protection Agency (Agency). Filed on August 22, 1996, the complaint alleges that respondents Amsted Industries, Inc. d/b/a Griffin Wheel Company (Amsted) and L.E. Swiderski d/b/a Griffin Wheel Company (Swiderski) violated 35 Ill. Adm. Code 809.301 by failing to complete and deliver a completed manifest to a hauler who held a valid special waste hauling permit. The complaint also alleges that respondent Horsehead Resource Company, Inc., (Horsehead) violated 35 Ill. Adm. Code 809.302(a) and Section 21(d)(2) of the Act (415 ILCS 5/21(d)(2) (1994)) by accepting special waste without a signed manifest.[1]

[1] The complaint also alleged that Hellman Trucking Company, Inc., (Hellman) violated 35 Ill. Adm. Code 809.201 and Sections 21(g)(1) and (2) of the Act (415 ILCS 5/21(g)(1), (2) (1994)) by shipping special waste without a current and valid permit. On April 24, 1997, complainant filed a stipulation and proposal for settlement with the Board as to Hellman and a joint request to waive the hearing requirement pursuant to Section 31(c)(1) of the Act (415 ILCS 5/31(c)(1) (1996)). On June 19, 1997, the Board granted the parties' joint motion for relief from the hearing requirement and found the settlement agreement between complainant and Hellman acceptable under 35 Ill. Adm. Code 103.180. Accordingly, the Board dismissed Hellman as a respondent in this matter and ordered that the matter proceed against the remaining respondents. See People v. Amsted Industries, Inc. *et al.* (June 19, 1997), PCB 97-38.

Respondents seek dismissal of the complaint, arguing that the Board lacks jurisdiction since the Agency failed to meet certain statutory notice requirements prior to bringing the complaint. Complainant admits statutory notice requirements were not met and moves to withdraw the complaint without prejudice so that a new complaint may be filed after the notice requirements have been met (see 415 ILCS 5/31(d) (1994)). Respondents object, arguing that this case should be dismissed with prejudice as complainant cannot cure the notice deficiencies because of a change in law that modified the notice requirements (see 415 ILCS 5/31(a), (b) (1996)). For the reasons that follow, the Board grants respondents' motion to dismiss, but does so without prejudice.

BACKGROUND

Prior to August 1, 1996, Section 31(d) required that the Agency issue and serve a notice of violation letter on respondents prior to the filing of a complaint for enforcement. See 415 ILCS 5/31(d) (1994). By legislative amendment effective August 1, 1996, Section 31 was modified. See 415 ILCS 5/31 (1996). Instead of requiring the former Section 31(d) letter as a precondition to the filing of the complaint, revised Section 31 now sets forth a specific time-driven procedure that the Agency must follow when it discovers a potential violation. Compliance with the new procedures outlined in Section 31 is a precondition to the Agency's referral of a case to the Attorney General for initiation of a formal enforcement action. See 415 ILCS 5/31(b) (1996).

Sometime in 1993, the Agency became aware of respondents' alleged noncompliance with the Act and the Board's waste disposal rules. On November 5, 1993, the Agency sent a Compliance Inquiry Letter to Horsehead, notifying Horsehead of its apparent noncompliance with the Board's waste disposal regulations. As the Agency cannot pursue environmental violations before the Board or in court on its own (see People *ex rel.* Scott v. Briceland, 65 Ill.2d 485, 500-501, 359 N.E.2d 149, 157 (1976)), the matter was, through the normal course of State environmental business, referred to the Attorney General for environmental prosecution prior to August 1, 1996. On August 22, 1996, the Attorney General filed the complaint in this matter, 22 days after the effective date of the new law. It is uncontested that the Compliance Inquiry Letter did not meet the new Section 31(a) requirements, and the Agency failed to provide respondents with any other notification meeting the requirements of former Section 31(d) or new Sections 31(a) and (b), prior to the referral or filing of the complaint in this matter.

ISSUES

Whether this matter should be dismissed for the Agency's failure to comply with Section 31 requirements? If so, can this complaint properly be refiled?

ARGUMENTS

The respondents argue that new Section 31(a) and (b) apply to this matter since the complaint was filed after the effective date of the amendments to Section 31. Since the

Agency did not comply with new Section 31(a) and (b) and cannot now comply, respondents assert that the Board lacks jurisdiction to hear the complaint, and the matter should therefore be dismissed. The Attorney General, on behalf of the people and the Agency, argues that since the violation was discovered and the matter referred to the Attorney General by the Agency prior to the effective date of the amendments, former Section 31 applies. Since the former Section 31(d) letter was not sent, the Attorney General argues that the well-established Board precedent under that law would allow it to withdraw the complaint without prejudice and refile it after the Section 31(d) letter was sent. The Attorney General seeks to do so through its motion to voluntarily withdraw without prejudice.

Respondents object, arguing that the applicable law is the one in effect at the time of the filing of the complaint, and accordingly, the Board should not allow the State to perfect its filing under the old law. Rather, the law in effect at the August 22 filing of the complaint required that, within 180 days of the discovery of the violation, a "violation notice" had to be sent which would give respondent an opportunity to settle with the Agency prior to enforcement. Thereafter, absent satisfactory resolution, a "Notice of Intent to Pursue Legal Action" had to be given as a precondition to the filing of this case before the Board. The respondents argue that the Agency's failure to meet these requirements divests the Board of jurisdiction in this matter. Respondents also assert that the 180-period began to run on August 1, 1996, the effective date of the amendments to Section 31. However, since the 180-day period has expired, respondents contend the Agency cannot now meet its obligation under the amended law, and accordingly, the Board cannot allow a refiling under the amended law.[2]

To this argument, complainant responds that the new Section 31 was not intended to prevent it from pursuing environmental enforcement of the Act, but was merely intended to set up a procedure prior to the Agency's referral to the Attorney General for such. Accordingly, even if the new Section 31 applies, it applies only to the Agency and does not serve to stop the Attorney General from filing complaints for enforcement of the Act with the Board or in court.

ANALYSIS

In People v. Heuermann (September 18, 1997), PCB 97-92, the Board determined that the new Section 31(a) and (b) applied prospectively to cases referred to the Attorney General after August 1, 1996, the effective date of the amendments to Section 31. In reaching this conclusion, the Board found that to apply the provisions of new Section 31(a) and (b) to cases that were referred prior to August 1, 1996, would improperly impose new requirements and duties on transactions already past, that being the referral of a case to the Attorney General for enforcement.

In the present case, it is uncontested that the Agency referred the matter to the Attorney General prior to August 1, 1996. Based on Heuermann, new Section 31(a) and (b) do not

[2] On June 25, 1997, Horsehead filed a motion for leave to file a reply to complainant's response to respondent's objection to the motion for voluntary dismissal. The Board grants Horsehead's motion.

apply to the pending matter. Accordingly, the Board rejects respondents' argument that this matter should be dismissed because the Agency failed to comply with new Section 31(a) and (b) prior to the referral or filing of the complaint.

Respondents also argue that this matter should be dismissed because the Agency failed to comply with former Section 31(d) prior to the filing of the complaint in this matter. Since the complaint in this matter was filed after the effective date of the amendments to Section 31, the provisions of new Section 31 apply unless their application would result in a retroactive impact on an existing controversy. See First of America Trust Co. v. Armstead, 171 Ill. 2d 282, 286, 664 N.E.2d 36, 40 (1996). As previously noted, the Board determined in Heuermann that to apply new Section 31(a) and (b) to cases that had been referred to the Attorney General prior to August 1, 1996, would result in such a retroactive impact. The more difficult question is whether the notice requirements of former Section 31(d) apply to cases referred prior to August 1, 1996, when the notice requirements of new Section 31(a) and (b) do not apply. The Board believes that they do.

The statute itself is ambiguous on this point. The amendments to Section 31 do not contain a savings clause, nor do they contain any language regarding what cases the new provisions of Section 31 apply. However, if the former Section 31(d) did not apply to those cases in which new Section 31(a) and (b) could not apply, the result would be that respondents would not be entitled to any notice of the alleged violations or the opportunity to meet with the Agency. The Board does not believe that this was the intent of the legislature. The legislative history of the amendments illustrate that the intent of the amendments was to foster an atmosphere where resolutions could be reached without resorting to litigation (see Heuermann, PCB 97-92, slip op. at 7) and was to "clarify the procedure where the IEPA and potential violators of the Environmental Protection Act work together in an effort to resolve potential violations of the Act." 89th Gen. Assem. House Proceedings, March 25, 1996 at 101 (statements of Representative Persico). To hold that Section 31(d) does not apply in this instance would seem to defeat the whole purpose of the new amendments. Had the legislature intended such a result, it could have so provided, but it did not. Therefore, for complaints filed on behalf of the Agency and the State based on an Agency referral that occurred prior to August 1, 1996, the notice provisions of Section 31(d) must be met.

As noted earlier, it is uncontested that former Section 31(d) was not met. Under existing case law regarding former Section 31, the failure to comply with former Section 31(d) prior to the filing of a complaint resulted in defective or insufficient notice on all counts. See People v. Chicago Heights Refuse Depot, Inc. (October 10, 1991), PCB 90-112; People v. EMCO Chemical Distributors, Inc. (December 2, 1993), PCB 93-186; People v. Escast, Inc. (July 20, 1992), PCB 92-67; People v. American Waste Processing, Ltd. (January 23, 1997), PCB 96-264. Moreover, failure to comply with Section 31(d) prior to the filing of the complaint resulted in the dismissal of the complaint. See American Waste, PCB 96-264, slip op. at 4.

Because the Agency failed to comply with former Section 31(d) prior to the filing of the complaint in this matter, the Board grants respondents' motion to dismiss. The Board

grants the motion to dismiss, however, without prejudice since Board precedent establishes that the failure to comply with former Section 31(d) can be cured by service of a Section 31(d) letter prior to the filing of another complaint. See American Waste, PCB 96-264, slip. op at 4.

Moreover, regardless of whether former Section 31(d) applies to this case, the Board would still dismiss this action without prejudice as complainant could refile the action on its own motion under new Section 31(d). See People v. Geon (October 2, 1997), PCB 97-62.

CONCLUSION

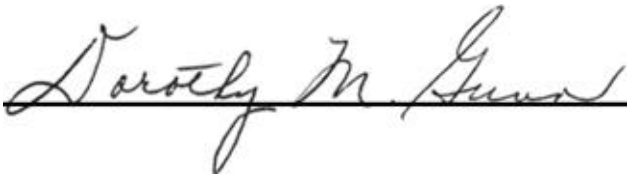
For the foregoing reasons, the Board grants respondents' motion to dismiss, but does so without prejudice. Because the Board grants the motion to dismiss, the Board need not rule on complainant's motion to withdraw.

IT IS SO ORDERED.

Board Members M. McFawn and J. Theodore Meyer concurred.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1996)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 145 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 16th day of October, 1997 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board