ILLINOIS POLLUTION CONTROL BOARD
December 20, 1995

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 95-163
	)	(Enforcement-Air, Water & RCRA)
CLARK REFINING & MARKETING, INC.,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by E. Dunham):

This matter comes before the Board on a "Motion to Reconsider and Vacate" filed on September 13, 1995 by complainant. Complainant requests that the Board reconsider and vacate the Board's September 7, 1995 order granting in part Clark Refining & Marketing, Inc.'s (Clark's) motion to strike and dismiss portions of the complaint or allow complainant additional time to file a response to the motion. On October 5, 1995, the Board granted complainant additional time to file its response to Clark's July 28, 1995 motion to strike and dismiss portions of the complaint. The Board allowed the complainant's request for additional time to file a response based on complainant's contention that it did not receive a copy of the motion to strike or dismiss. Complainant filed its response to Clark's motion to strike or dismiss on October 13, 1995. The Board reconsiders its September 7, 1995 order in this matter based on the response filed by the complainant.

The 13-count complaint in this matter was filed on June 6, 1995 by the Attorney General of the State of Illinois, on his own motion and at the request of the Illinois Environmental Protection Agency (Agency). In its September 7, 1995 order, the Board partially granted Clark's motion to strike. The Board ordered that certain portions be stricken from the complaint because proper notice prior to the filing of the complaint as required by Section 31(d) of the Environmental Protection Act (Act) (415 ILCS 5/31(d) (1994)) was not given to the respondent. The portions to be stricken from the complaint were Count XIII in its entirety and portions of the following paragraphs: paragraph 7 of Count III, paragraph 18 of Count V, paragraph 10 of Count IX, paragraphs 13 and 22 of Count X, paragraph 21 through 25 of Count XI and paragraph 26 of Count XI.

Timeliness of Clark's Motion to Strike

Complainant maintains that Clark's motion should be denied because it was filed later than 14 days after the filing of the complaint. Pursuant to 35 Ill. Adm. Code 103.140(a), in enforcement actions, "[a]ll motions by respondent to dismiss or strike the complaint or challenging the jurisdiction of the Board

shall be filed within 14 days after receipt of complaint". Complainant cites to People v. City of Herrin (July 20, 1995), PCB 95-158 in support of its contention that the motion should be dismissed as untimely.

Clark argues that 35 Ill. Adm. Code 101.243(b) is the standard to be applied in this case. Section 101.243(b) provides that "all motions challenging jurisdiction shall be filed prior to the filing of any other document by the moving party, unless material prejudice will result."

Section 101.243 is generally applicable to all proceedings before the Board while Section 103.140 is applicable to enforcement actions pursuant to Section 101.100. Therefore, Section 103.140 is applicable to this enforcement action. However, the Board may still exercise its discretion to consider a motion filed after the 14-day period if material prejudice would result, as allowed by Section 101.243. The Board finds that Clark would be materially prejudiced if the Board were to find the motion to strike or dismiss as untimely. Therefore, the Board will consider the merits of Clark's motion to strike or dismiss.

Typographical error

Complainant contends that the violation of Section 9(a) alleged in paragraph 7 of Count III should not be stricken. Complainant contends that the reference to Section 9(b) of the Act in the April 26, 1994 Enforcement Notice Letter was a typographical error and should have been Section 9(a) of the Act. Complainant notes that the obligation to submit the required report is established by regulation rather than by permit condition.

The Board finds that the reference to 9(a) in paragraph 7 of Count III should be restored to the complaint. Sections 9(a) and 9(b) are substantially different. Section 9(a) contains a general prohibition against air pollution while Section 9(b) pertains to permitting. Complainant claims that the reference to Section 9(a) is a typographical error. None of the enforcement notice letters in the record contain any citation to Section 9(a) in reference to the alleged reporting violation as contained in the complaint. However, the required notice for Section 9(a) was provided by citing to the appropriate section of the administrative code and reference to facts sufficient to place Clark on notice of the potential violation.

Where specific sections of Board regulations with facts to support violations are noticed; the Board will deem the respondent to be on notice of a violation of the general sections of the Act from which those regulations derive.

Violations flowing from conduct contained in the notice letter.

Complainant contends that the violation of Section 9(b) in paragraph 18 of Count V should not be stricken because the alleged violations (operating without a permit) flow from conduct that was the subject of a Section 31(d) notice. Complainant states that respondent was notified that its wastewater treatment plant exceeded the emission limits of 35 Ill. Adm. Code 219.986 and 219.991. (See IEPA Enforcement Notice letter dated April 26, 1994.) Complainant argues that because respondent was denied an air operating permit due to these violations, and respondent was on specific notice as to the emission limit violations, respondent was therefore, reasonably apprised that other violations would flow from that noncompliance. Complainant maintains that an additional Section 31(d) notice is not necessary for violations that flow from conduct that was the subject of a Section 31(d) notice.

Similarly, complainant argues that Count XIII and paragraphs 13 and 22 of Count X should not be stricken because Clark was notified of the offending conduct, albeit not all the violations that occurred as a result of that conduct. Complainant reasons that no additional Section 31(d) notice should be required. The portions stricken at Count X concern Clark's failure to have a NPDES permit; Count XIII alleged violations of Section 12(a) relating to oil sheens on state water. The violation actually noticed involved contamination of surface waters, i.e., violation of Sections 12(a) and (d) of the Act. (See IEPA Pre-Enforcement Conference Letters dated October 7 and 21, 1994).

Complainant maintains that since the Section 31(d) notice is a step removed from the formal complaint and intended to be more informal, the scrutiny of a Section 31(d) notice should be less rigorous than the requirements for the complaint. Complainant cites to Rasky v. Department of Registration and Education (1st Dist. 1980), 87 Ill.App.3d 580, 585-586, 410 N.E. 2d 69,[1] to illustrate that a complaint need not detail every allegation to be considered sufficient. In Rasky, the plaintiff maintained that the complaint was insufficient because it did not specify in detail the municipal codes which the plaintiff was alleged to have violated. The court in Rasky found the complaint was sufficient because the appropriate section of the statute was

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[1]Rasky sought the revocation of plaintiff's real estate broker's license under the Real Estate Brokers and Salesman License Act (Ill. Rev. Stat 1975, ch. 114½) which provides that a license may be revoked where the registrant has shown unworthiness or incompetency which may be shown by knowledge of the registrant to be in violation of ordinance. The municipal code violations were alleged to show the registrant's unworthiness or incompetency.

alleged and sufficient facts were pled to appraise the plaintiff of the case against him to intelligently prepare his defense.

The Board observes several distinctions between Rasky and the present situation. Rasky involved the sufficiency of the complaint, whereas the matter presently before the Board involves the adequacy of the pre-enforcement notice required by Section 31(d). While the Board recognizes a relationship between the sufficiency of a complaint and the adequacy of the Section 31(d) notice requirements, the Board also notes a distinction between the purposes of the complaint and the notice. The notice requirements of Section 31(d) are intended to place the respondent on notice of possible violations, and the intent of complainant to file a formal complaint, and to allow a meeting between the parties to discuss the alleged violations. The complaint is the initial action in a formal proceeding and places the respondent on notice of the alleged violations to which the respondent needs to prepare a defense. In addition, the municipal codes which were not alleged in the complaint in Rasky were ancillary to the provisions of the statute for which a violation was alleged.

The Board believes that it is incorrect to review the sufficiency of the Section 31(d) notice against the requirements of a complaint under the Administrative Procedures Act or rules of civil procedure. The sufficiency of the Section 31(d) notice can be adjudged based on the requirements found in Section 31(d) of the Act. The Board finds that to fulfill the purpose of Section 31(d), the pre-enforcement notice must be specific enough to inform the recipient of the alleged violations. The Board finds that the pre-enforcement notices received by Clark did not properly inform Clark concerning a possible violation of Section 9(b) as alleged in paragraph 18 of Count V.

Pursuant to Section 31(d) of the Act, the violations alleged in the notice must be sufficiently specific to inform the recipient, in this case Clark, that the Agency intends to file a formal complaint concerning those violations and offer the recipient an opportunity to meet with the appropriate personnel at the Agency in an effort to resolve the conflict. First none of the Section 31(d) notices sent to Clark contained an allegation that Clark was operating its WWTP without an air operating permit. The Board finds that the violation noticed by the Agency in its April 26, 1994 Enforcement Notice Letter that Clark was causing air pollution due to excess VOM emission from its WWTP does not suffice. The relevant statutory section cited therein was to Section 9(a) of the Act. Clark certainly is not informed by this notice that it was allegedly operating without an air permit in violation of Section 9(b) of the Act.

Second, none of the Section 31(d) notices sent to Clark contained an allegation that Clark failed to have an NPDES

permit. For the same reasons as stated above concerning the failure to have an air permit, noticing alleged surface water violations does not provide notice to Clark of an alleged failure to have a water discharge permit. Therefore, paragraphs 13 and 22 of Count X remain stricken.

Finally, concerning Count XIII, no notice was given to respondent concerning alleged violation of 35 Ill. Adm. Code 302.203 in any notice letter. Therefore, Count XIII remains stricken in its entirety. Citation to the Act absent any citation to the Board's rules or the facts informing the respondent concerning an alleged oil sheen is not sufficient to satisfy Section 31(d).

Notice of 21(f) instead of 21(i)

The complaint against Clark alleges violation of both Section 21(f)(2) and Section 21(i) of the Act, but only Section 21(i) was cited in a Section 31(d) Notice. Complainant argues that paragraph 10 of Count IX as it relates to a violation of Section 21(f)(2) of the Act should not be stricken because notice of an alleged violation of Section 21(i) was given and there is no practical difference between the two statutory sections for the purposes of a Section 31(d) notice. Citing to People v. Escast (July 30, 1992), PCB 92-67, complainant argues that therein the Board "found" that there was no practical difference between citing Section 21(f)(2) and Section 21(i) for the purpose of a Section 31(d) notice.

Though the Board's statement in Escast was in the dicta of the case, both sections relate to the prohibition against violating the hazardous waste regulations of the Board, and are thus very non-specific. The 31(d) notice and the complaint cite to the regulations affected, and the statutory provisions giving rise to those regulations may be several. Clark should be on notice that a general prohibition may be included in the specific charge. References to Section 21(f)(2) of the Act are restored.

Allegedly continuing violations statutory

Complainant contends that the violations alleged in paragraphs 21 through 25 and the related portions of paragraph 26 of Count XI should not be stricken since respondent was notified of alleged violations from similar releases. Complainant maintains that these sections of the complaint merely address additional releases which occurred contemporaneously with service of the Section 31(d) notice and the subsequent meeting. Complainant claims that including the subsequent releases in this complaint is no different from including claims of continuing exceedences of air emission limits or water discharge limits, or operating without a permit, all of which may continue to occur after a Section 31(d) notice has been issued.

The Board is not persuaded by this analogy. The violations alleged in paragraphs 21 through 25 of Count XI concern a discharge on October 10, 1994 of gasoline from a pipeline within the facility and a spill of diesel fuel from a diesel pipeline on October 28, 1995. The other alleged violations in Count XI pertain to incidents on different dates concerning different materials and equipment. The Board finds a distinction between continuing or patterned air or water exceedences and the alleged releases in the complaint. The former represent a continuin or reoccurring violation based on the same factual situation, w le the releases alleged in the complaint involve factual situat ons with different locations and different materials. It is sim y not a matter of just different dates and otherwise identical facts underlying the alleged releases.

The argument advanced by the complainant would permit the filing of a complaint containing allegations based on incidents that were not specified in any 31(d) notice. Complainant asserts that having once notified respondent that a specific incident represents a possible violation, respondent is on notice that similar incidents may also be included in a formal complaint without any additional notice. Under complainant's argument the respondent is not afforded an opportunity to meet with the complainant to address the specifics of the incidents that have occurred after the initial Section 31(d) notice is issued. Accordingly, the Board finds that the Section 31(d) notice in these instances does not correspond to the allegations contained in the complaint and therefore those allegations should remain stricken from the complaint.

Filing of an additional Section 31(d) notice

Complainant reports that an additional Section 31(d) notice including violations alleged in paragraphs 13 and 22 of Count X, paragraphs 21 through 25 and 26 of Count XI and Count XII has been issued. That notice is dated September 22, 1995 and, there is also a clarification of the notice dated September 28, 1995. (Exh. 2 of Agency Response.) Complainant claims that the additional Section 31(d) notice moots respondent's challenges and therefore these allegations should not be stricken.

The Board finds that the filing of an additional Section 31(d) notice issued after the filing of the complaint does not moot the respondent's challenges to the complaint. Section 31(d) clearly states that "prior to issuance and service of a written notice and formal complaint, the Agency shall issue" a written notice. To allow the Agency to issue such written notice after the complaint has been filed would abrogate the purpose of Section 31(d) which is, again, to inform the person of the charges alleged and to provide an opportunity for the respondent to meet with the complainant to discuss the alleged violations. Therefore, the filing of the requisite Section 31(d) notice after

the filing of the complaint does not satisfy the requirements of Section 31(d).[2] The notice required by Section 31(d) is to be filed prior to the filing of the formal complaint to inform respondent of the Agency's intent to file a formal complaint, to place the respondent on notice of the alleged violations and to provide an opportunity for the respondent to meet with the complainant to discuss the alleged violations. Therefore, the filing of the requisite Section 31(d) notice after the filling of the complaint does not satisfy the requirements of Section 31(d).

SUMMARY

Upon reconsideration, the Board finds that complainant has presented sufficient cause for the Board to modify its order of September 7, 1995. The Board restates the portion of its previous order striking specific provisions from the complaint.

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):

b. Paragraph 18 of Count V as it relates to the alleged violation of Section 9(b) 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 that the discharge of gasoline on October 10, 1994 and the 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.

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[2]The Board notes that in People v. James Lee Watts (November 3, 1995), PCB 94-127, the Board allowed the filing of an amended complaint to correct alleged notice deficiencies after a new 31(d) notice was filed and a meeting was held between the parties. The Board observes that in Watts, the respondents did not object to the filing of the amended complaint. Also the Board recognizes that the complainant in this matter has not filed an amended complaint, so the issue of whether Section 31(d) deficiencies can be cured by the filing of an amended complaint is not at issue in this matter.

IT IS SO ORDERED.

Board Member M. McFawn dissented.
Board Member J. Yi concurred.

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, 1995, by a vote of 6-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board