

ILLINOIS POLLUTION CONTROL BOARD  
October 10, 1991

|                        |   |               |
|------------------------|---|---------------|
| PEOPLE OF THE STATE OF | ) |               |
| ILLINOIS,              | ) |               |
|                        | ) |               |
| Complainant,           | ) |               |
|                        | ) |               |
| v.                     | ) | PCB 90-112    |
|                        | ) | (Enforcement) |
| CHICAGO HEIGHTS REFUSE | ) |               |
| DEPOT, INC.,           | ) |               |
|                        | ) |               |
| Respondent.            | ) |               |

CONCURRING OPINION (by B. Forcade):

I respectfully Concur in today's Opinion and Order. I disagree with the majority on one legal issue and would have preferred a more comprehensive evaluation on another point.

First, I disagree with the majority finding that notice was defective under Section 31(d) of Illinois Environmental Protection Act ("Act") for all Counts except Count I. The majority dismisses those remaining Counts. I would have considered them. Section 31 of the Act provides in relevant part:

Section 31

- a. If such investigation discloses that a violation may exist, the Agency shall issue and serve upon the person complained against a written notice, together with a formal complaint, which shall specify the provision of this law or the rule or regulation or permit or term or condition thereof under which such person is said to be in violation, and a statement of the manner in, and the extent to which such person is said to violate this law or such rule or regulation or permit or term or condition thereof and shall require the person so complained against to answer the charges of such formal complaint at a hearing before the Board at a time not less than 21 days after the date of notice, except as provided in Section 34 of this Act. Such complaint shall be accompanied by a notification to the defendant that financing may be available, through the Illinois Environmental Facilities Financing Act, to correct such violation....
- b. Any person may file with the Board a complaint, meeting the requirements of subsection (a) of this Section, against any person allegedly violating this Act or any

rule or regulation thereunder or any permit or term or condition thereof. The complainant shall immediately serve a copy of such complaint upon the person or persons named therein. Unless the Board determines that such complaint is duplicitous or frivolous, it shall schedule a hearing and serve written notice thereof upon the person or persons named therein, in accord with subsection (a) of this Section.

\* \* \* \*

- d. Notwithstanding the provisions of subsection (a) of this Section, prior to issuance and service of a written notice and formal complaint under subsection (a) of this Section, the Agency shall issue and serve upon the person complained against a written notice informing such person that the Agency intends to file a formal complaint. Such written notice shall notify the person of the charges alleged and offer the person an opportunity to meet with appropriate agency personnel in an effort to resolve such conflicts which could lead to the filing of a formal complaint. Such meeting shall be held within 30 days of receipt of notice by the person complained against unless the Agency agrees to a postponement, or the person complained against fails to respond to the notice or such person notifies the Agency that he will not appear at a meeting. Nothing in this subsection is intended to preclude the Agency from following the provisions of subsection (a) of this Section after the provisions of this subsection are fulfilled. (Emphasis Added)

\* \* \* \* \*

None of this language operates to bar a suite by the People as represented by the Attorney General or the State's Attorney. The Agency is not the complainant in this proceeding, so Section 31(d) does not apply. These Counts should not have been dismissed.

The second matter where I differ with the majority concerns the discussion of the penalty amount. I support the general magnitude of the penalty imposed in this proceeding but believe the penalty discussion should be expanded. In Illinois Environmental Protection Agency v. Allen Barry d/b/a Allen Barry Livestock, PCB 88-71 (May 1, 1990), the Board issued an Opinion and Order, with appendices, of over 85 pages. That document recounted the history of penalties within the federal environmental program as well as the environmental programs in Illinois and other states. It compared the magnitude of the various penalties imposed at each level of government and the

legal precedents that guide penalty determinations. That Opinion noted that in their 1989 treatise, "State Environmental Law", Professors Selmi and Manaster observed that the body of state case law is relatively limited on the issue of civil penalties for environmental violations. They noted that Illinois cases represent the bulk of state decisions discussing penalty determinations. The Opinion stated:

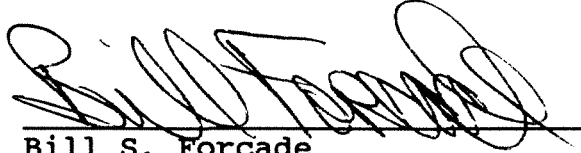
The review process is not generally predictable, however, Selmi and Manaster note that the degree of deference given to agency penalty assessments can vary widely. They cited Fee Plan, Inc. v. Dept. of Env'tl. Conservation, 118 A.D.2d 855, 500 N.Y.S.2d 344, 345 (1986) for the New York Court's position that the courts will not overturn an Agency's penalty unless "so disproportionate to the offense as to shock one's sense of fairness". They noted in contrast that Illinois courts have engaged in some intensive reviews of Board decisions based on the Illinois Supreme Court's holdings in Southern Illinois Asphalt, [Case No. 4], and City of Monmouth, [Case No. 2], that the penalties should primarily "aid in the enforcement of the Act" and that "punitive considerations" are secondary. The authors observed this consequence of the review process in Illinois:

This standard has allowed the lower courts considerable freedom in their review -- freedom that in some instances plainly amounts to a de novo review of the agency's penalty assessment. The result has been a series of decisions in which the Pollution Control Board's assessments have been overturned by reviewing courts which have concluded that the assessments will not aid in the enforcement of the Act. At the same time, however, the opinions in that state on this issue have an ad hoc quality to them and provide the penalty decisionmaker with very little guidance on whether a penalty assessment will be upheld on review.

Selmi and Manaster, at 16-69 (emphasis added).  
Opinion and Order at p. 63.

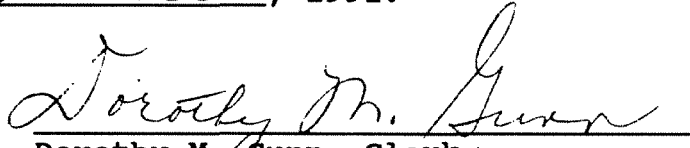
For this reason, I believed the Board would attempt to follow the guidance of Barry and attempt to provide a mathematical precision to our penalty determinations. Today's decision represents a small but significant retreat from the determination process articulated in Barry, if fact, the majority opinion does not even reference Barry.

Since I still believe Barry is not only good law, but the best example of how to make a penalty determination, I must concur with any Opinion which attempts to abandon its guidance.



Bill S. Forcade  
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Concurring Opinion was filed on the 1<sup>st</sup> day of November, 1991.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board