



**RECEIVED**  
CLERK'S OFFICE

FEB 03 2006

STATE OF ILLINOIS  
Pollution Control Board

OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

**Lisa Madigan**  
ATTORNEY GENERAL

February 1, 2006

The Honorable Dorothy Gunn  
Illinois Pollution Control Board  
State of Illinois Center  
100 West Randolph  
Chicago, Illinois 60601

Re: ***People v. Barger Engineering, Inc.***  
**PCB 06-82**

Dear Clerk Gunn:

Enclosed for filing please find the original and ten copies of a Notice of Filing and Complainant's Response to Respondent's Motion to Dismiss Complaint in regard to the above-captioned matter. Please file the originals and return file-stamped copies to me in the enclosed, self-addressed envelope.

Thank you for your cooperation and consideration.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Kristen Laughridge Gale".

Kristen Laughridge Gale  
Environmental Bureau  
500 South Second Street  
Springfield, Illinois 62706  
(217) 782-9031

KLG/pp  
Enclosure

**RECEIVED**  
CLERK'S OFFICE

FEB 03 2006

STATE OF ILLINOIS  
Pollution Control Board

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

PEOPLE OF THE STATE OF )  
ILLINOIS, )  
 )  
Complainant, )  
 )  
vs. )  
 )  
BARGER ENGINEERING, INC., an )  
Indiana corporation, )  
 )  
Respondent. )

PCB No. 06-82  
(Enforcement)

**NOTICE OF FILING**

To: Charlie Northrup  
Sorling, Northrup, Hanna, Cullen & Cochran, Ltd.  
Suite 800, Illinois Building  
607 East Adams  
P.O. Box 5131  
Springfield, IL 62705

PLEASE TAKE NOTICE that on this date I mailed for filing with the Clerk of the Pollution Control Board of the State of Illinois, COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS COMPLAINT, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,  
Attorney General of the  
State of Illinois

MATTHEW J. DUNN, Chief  
Environmental Enforcement/Asbestos  
Litigation Division

BY   
KRISTEN LAUGHRIDGE GALE  
Assistant Attorney General  
Environmental Bureau

500 South Second Street  
Springfield, Illinois 62706  
217/782-9031  
Dated: February 1, 2006

**CERTIFICATE OF SERVICE**

I hereby certify that I did on February 1, 2006, send by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box a true and correct copy of the following instruments entitled NOTICE OF FILING and COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS COMPLAINT

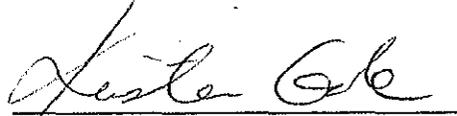
To: Charlie Northrup  
Sorling, Northrup, Hanna, Cullen & Cochran, Ltd.  
Suite 800, Illinois Building  
607 East Adams  
P.O. Box 5131  
Springfield, IL 62705

and the original and ten copies by First Class Mail with postage thereon fully prepaid of the same foregoing instrument(s):

To: Dorothy Gunn, Clerk  
Illinois Pollution Control Board  
James R. Thompson Center  
Suite 11-500  
100 West Randolph  
Chicago, Illinois 60601

A copy was also sent by First Class Mail with postage thereon fully prepaid to:

Carol Webb  
Hearing Officer  
Illinois Pollution Control Board  
1021 North Grand Avenue East  
Springfield, IL 62794

  
Kristen Laughridge Gale  
Assistant Attorney General

This filing is submitted on recycled paper.

FEB 03 2006

STATE OF ILLINOIS  
Pollution Control Board

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
 Complainant, )  
 )  
 v. ) PCB No. 06-82  
 ) (Enforcement)  
 BARGER ENGINEERING, INC., an )  
 Indiana corporation, )  
 )  
 Respondents. )

**COMPLAINANT'S RESPONSE TO RESPONDENT'S  
MOTION TO DISMISS COMPLAINT**

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by Lisa Madigan Attorney General of the State of Illinois, responds to Respondent's Motion to Dismiss Complaint filed by the Respondent, BARGER ENGINEERING, INC., but not served upon the Complainant, as follows:

**GENERAL COMMENTS**

1. Dismissal is sought by the Respondent on the basis that the Illinois Environmental Protection Agency ("Illinois EPA") did not comply with the Section 31 administrative notice requirements within the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/31 (2004). The Complainant objects to the Motion to Dismiss and requests that it be denied.

2. The Complaint was brought against the Respondent in the name of the People of the State of Illinois, by Lisa Madigan, Attorney General of the State of Illinois, on her own motion pursuant to Section 31(d) of the Act, and at the request of the Illinois Environmental Protection Agency ("Illinois EPA"). The Attorney General has standing pursuant to the Act, 415 ILCS 5/1 *et seq.* (2004), other statutes and the common law, and the Illinois Constitution, to undertake enforcement action against environmental violators.

4. The Board must determine the Motion to Dismiss according to the principles applied by the circuit courts pursuant to Sections 2-615 and 2-619 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615, 2-619 (2004). It is instructive to note that in *County of DuPage v. Waste Management of Illinois*, PCB 94-92 (December 1, 1994), in denying the motion to dismiss, the Board relied upon both "these [principles] and normal practice standards before the Board." Order at p. 5.

5. In a motion to dismiss, all well-pleaded facts must be deemed true. *People of the State of Illinois v. Peabody Coal Company*, PCB 99-134 (June 20, 2002).

**THE OFFICE OF THE ATTORNEY GENERAL MAINTAINS INDEPENDENT  
AUTHORITY TO ENFORCE VIOLATIONS OF THE ACT**

6. The Attorney General has the constitutional, statutory and common law duty and authority to enforce laws of the State of Illinois. See ILL. CONST., Art. 5, § 15. The Attorney General is charged with the investigation of violations of statutes which she has the duty to enforce. 15 ILCS 205/4 (2004). The Attorney General is charged with the enforcement of the Act. 415 ILCS 5/42(e) (2004). The Illinois Supreme Court has been absolutely clear that the Attorney General is the sole representative of the State in proceedings where the State is the real party in interest, including those under the Act. *Lyons v. Ryan*, 201 Ill. 2d 529, 535, 780 N.E.2d 1098, 1103 (2002); *People ex rel. Scott v. Briceland*, 65 Ill. 2d 485, 501, 359 N.E.2d 149, 158; *Fergus v. Russell*, 270 Ill. 304, 342, 110 N.E. 130, 145 (1915).

7. Legislature enactments cannot be applied to usurp or diminish the authority of the Attorney General. *Lyons*, 201 Ill. 2d at 541, 780 N.E. at 1106; *Briceland*, 65 Ill. 2d at 502, 359 N.E. 2d at 157-158. Neither the judiciary nor the legislature may deprive the Attorney General of her constitutional common law powers. *Environmental Protection Agency v. Pollution*

*Control Board*, 69 Ill.2d 394, 399, 372 N.E.2d 50, 52 (1977). Those duties include ensuring a healthful environment. *People v. NL Industries*, 152 Ill.2d 82, 102, 604 N.E.2d 349, 358 (1992); ILL. CONST., Art. 11, § 1. Section 31 was not amended to restrict the authority of the Attorney General but rather to impose administrative obligations upon the Agency.

8. The Office of the Attorney General has the independent authority to prosecute violations of the Act according to Section 31(d) of the Act, 415 ILCS 5/31(d) (1996):

Any person may file with the Board a complaint, meeting the requirements of subsection (c) of this Section, against any person allegedly violating this Act or any rule or regulation thereunder or any permit or term of condition thereof. . .

9. Section 3.26 of the Act, 415 ILCS 5/3.26 (1996), defines "person" as follows:

"PERSON" is any individual, partnership, co-partnership, firm, company, limited liability company, corporation, association, joint stock company, trust, estate, political subdivision, state agency, or any other legal entity, or their legal representative, agent or assigns.

10. The Board has held that the Attorney General's Office is not subject to the requirements of Sections 31(a) and (b) of the Act and has acknowledged the Attorney General's broad independent authority to bring actions pursuant to Section 31(d). *People v. Geon Company* (October 2, 1997), PCB 97-62, *People v. Victor Heuerman*, PCB 97-92 (September 18, 1997).

11. The Attorney General is a person as defined by the Act, therefore she clearly has the authority to file a complaint with the Board pursuant to Section 31(d) of the Act.

**NO LEGISLATIVE MANDATE REQUIRES DISMISSAL FOR THE ILLINOIS EPA'S  
PURPORTED FAILURE TO COMPLY WITH SECTIONS 31(a) AND (b) OF THE ACT**

12. Section 31 of the Act does not mandate dismissal (or any other sanction) because Illinois EPA did not provide Section 31 notice. Nothing in Section 31 implicitly limits

the Attorney General's broad authority to bring enforcement actions or explicitly states that the Office of the Attorney General must independently develop any violations alleged in a complaint.

13. In *People v. Heuerman*, the Board clearly outlined the legislative intent of the 1996 amendments to Section 31. Most importantly the Board included Representative Persico's statement: "...there is nothing in this Bill that would preclude the Attorney General from acting on his own..." Coincidentally, Representative Novak continued with an example:

So this is supposed to help resolve potential violations of Illinois law, Illinois Environmental Law. But if there was a charge against a corporation for violating a law of the Illinois Environmental Protection Agency, let's say excess dumping or dumping toxic pollutants into a river or a stream, this Bill would not in any means weaken the current laws we have as far as punishing violators that perpetrate such a crime. Is that correct? (emphasis added)

14. Representative Persico responds, "You are absolutely correct there, Representative." *People v. Heuerman*, PCB 97-92 (September 18, 1997) *citing*, 89th Ben. Assem. House Proceedings, March 25, 1996, at 103.

15. In this case, crude oil and salt water were released in a stream and flowed over a mile downstream killing approximately 150 small fish. Clearly, the violations in this case is the sort of situation that the General Assembly intended would not be limited by Section 31.

16. Furthermore, the Board has no real powers in equity and therefore cannot create powers for itself not outlined in the Act. The Board and the circuit court "do not have the same powers and are not coordinate tribunals." Janson v. Illinois Pollution Control Board, 69 Ill. App. 3d 324, 25 Ill. Dec. 748, 751 (3rd Dist. 1979). "The Board has no authority to issue or enforce injunctive relief . . . or to punish for civil contempt." Id. at 752. The Board also has no power to issue a declaratory judgment. See Landfill, Inc. v. Pollution Control Board, 74 Ill. 2d 541, 551 (1978) (absent statutory authorization, the Board did not have the power to entertain an action in which a third party challenges the Agency's granting of a permit). "The Board lacks the

authority to delineate the Agency's jurisdiction." White Fence Farm, Inc. v. Land & Lakes Co., 99 Ill. App. 3d 234, 240 (4th Dist. 1981). "The grant of authority to conduct hearings upon complaints charging violations of the Act is merely a delegation of quasi-judicial powers to the Pollution Control Board incidental to its duty of administering the law. [citations omitted] The Board is limited in its jurisdiction, procedural due process is provided for, and the Board's decisions are subject to judicial review." Meadowlark Farms v. Pollution Control Board, 17 Ill. App. 3d 851, 856 (5th Dist. 1979). Even these delegated powers are limited. For instance, a circuit court could hold a municipal ordinance to be invalid or to order a municipality to repeal such ordinance; the Board cannot. See Lake Forest v. Pollution Control Board, 146 Ill. App. 3d 848, 854 (2d Dist. 1986). It is well settled that the Board is an administrative agency created by the legislature and statutorily empowered by the legislature. "An administrative agency, such as the Pollution Control Board, has no greater powers than those conferred upon it by the legislative enactment creating it." Lombard v. Pollution Control Board, 66 Ill. 2d 503, 506 (1977). Neither the legislature nor the Board may limit the power of the Attorney General to take action. People v. NL Industries, 152 Ill. 2d 82, 178 Ill. Dec. 93, 102 (1992).

17. Since the statute does not mandate dismissal for the Illinois EPA's purported notification deficiencies, the Board cannot create for itself this power.

#### **CHIQUITA IMPROPERLY LIMITS THE ATTORNEY GENERAL'S AUTHORITY**

18. Respondent cites only *People of the State of Illinois v. Chiquita Processed Foods, LLC*, PCB 02-56 (November 21, 2002) as its basis for the dismissal. *Chiquita* improperly limits the Attorney General's authority.

19. Complainant does not dispute that the Illinois EPA did not provide Section 31 notification for the violations set forth in the complaint. However, the Attorney General is the paramount authority when it comes to the representation of the State.

20. The Board in *Chiquita* stated in its discussion that the Board had repeatedly found that Section 31 was not intended to bar the Attorney General from prosecuting an environmental violation, but then resolved to do exactly that. By dismissing counts brought by the Attorney General because of failure to follow Section 31 by Illinois EPA, the Board effectively diminished the authority of the Attorney General in contravention of the principals laid out by the Illinois Supreme Court in *Briceland, Lyons, NL Industries* and other cases cited above. The Board, in denying the motion to dismiss, ought to unequivocally nullify its prior erroneous ruling in *Chiquita*.

21. Section 31 can only be reconciled with the discussed precedent of the Illinois Supreme Court if it is not enforceable against the Attorney General. If a failure to properly follow Section 31 by the Illinois EPA results in the dismissal of a case brought by the Attorney General, that result would impinge upon the Attorney General's primary right to decide what cases to bring on behalf of the State. Respondent maintains that this case should be dismissed because the Illinois EPA did not follow Section 31. However, this case was brought, and could only have been brought, by the Attorney General, not by the Illinois EPA. To construct Section 31 in the way found in *Chiquita* improperly subordinates the Attorney General's authority, i.e., the decision as to whether or not, and how, to proceed with a case on behalf of the State, to the Illinois EPA over which the Attorney General has no authority or control.

22. Furthermore, since the Board does not have any power in equity as stated above, the Board in *Chiquita* improperly created for itself the power to dismiss Counts

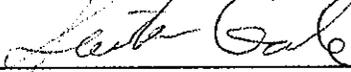
23. The Attorney General's independent authority and prosecutorial discretion to allege violations of the Act, as well as the absence of a legislative mandate, dictates the denial of Respondent's Motion to Dismiss.

WHEREFORE, the People of the State of Illinois respectfully request that the Board deny the Motion to Dismiss.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,  
LISA MADIGAN  
Attorney General  
State of Illinois

MATTHEW J. DUNN, Chief  
Environmental Enforcement Division

BY:   
KRISTEN LAUGHRIDGE GALE  
Environmental Bureau  
Assistant Attorney General

Of counsel:  
500 South Second Street  
Springfield, Illinois 62706  
217/782-9031  
Dated: February 1, 2006