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New Section 31 enforcement procedures

By Coty Hopinks-Baul

In late August 2011, the Illinois Legislature amended the enforcement provisions of the Environmental Protection Act. The changes made minor grammatical and stylistic changes, modified the Compliance Commitment Agreement process, and added a penalty provision for violating the terms of such an agreement. Below are a detailed description of the enforcement process for practitioners not already familiar with the "Section 31 Process" (as it is commonly referred to) and a brief discussion of the amendments to the process for those already familiar with it.

Overview of Enforcement Process

Section 31 of Illinois' Environmental Protection Act ("Act") dictates how parties are to be notified of alleged violations, how a party receiving such a notice may respond to avoid prosecution, and how the Illinois Environmental Protection Agency ("IEPA") must proceed before it refers a matter to a prosecuting authority.

Section 31(a)(1) requires IEPA to send by certified mail a written notice of alleged violations within 180 days after becoming aware of alleged violations of the Act, rules adopted under the Act, an IEPA-issued permit, or a condition of such a permit. This violation notice ("VN") must contain at least the following information: (1) notice to the VN recipient of the requirement to submit within 45 days a written response addressing the alleged violations, and of the option to meet with appropriate IEPA personnel to resolve the alleged violations; (2) a detailed explanation of the alleged violations; (3) an explanation of the actions that may be taken to resolve the alleged violations and estimated reasonable

timeframes to complete the suggested resolution; and (4) an explanation of any alleged violations that cannot be resolved without involving the appropriate prosecutor's office (i.e., the Illinois Attorney General or State's Attorney of the county in which the violation occurred) and the reason(s) which preclude such a resolution (e.g., the imposition of statutory penalties).

The VN recipient's written response (by certified mail) is due 45 days from receipt of the VN (unless the IEPA agrees to an extension) and is to include: (1) information in rebuttal, explanation or justification of each alleged violation; (2) proposed terms for a Compliance Commitment Agreement ("CCA") which includes specified times for achieving each commitment (or a statement indicating that compliance has been achieved) if the VN recipient wishes to enter into a CCA; and (3) a request for a meeting with appropriate IEPA personnel if the VN recipient so desires. If the VN recipient fails to respond as required, the CCA process is deemed to have been waived and IEPA can proceed with further legal action (discussed below).

If a meeting with IEPA personnel is requested, it must take place (in person or by telephone) within 60 days after the receipt of the VN notice (except on the rare occasion where IEPA agrees to a postponement), at which time the VN recipient must be given an opportunity to respond to the alleged violations, IEPA's suggested resolutions and estimated timeframes, and to suggest alternate resolutions. The VN recipient has 21 days from the date of the meeting (or within the timeframe agreed to by IEPA) to submit by certified mail a written response which

provides additional information in rebuttal, explanation, or justification of the alleged violations, proposed terms for a CCA (or a statement indicating that compliance has been achieved) if the VN recipient wishes to enter into a CCA, and a statement indicating that the VN recipient is opting to rely on its initial written response if applicable. Here again, if the VN recipient fails to submit this written response as required, the CCA process is deemed waived and IEPA may proceed with further legal action.

IEPA has 30 days from receipt of the VN recipient's initial written response if a meeting is not requested or post-meeting written response (unless both parties have agreed to a longer time period) to send by certified mail either a proposed CCA (which is to take into consideration the VN recipient's proposed terms), or a notice that one or more violations cannot be resolved without involving the appropriate prosecutor's office and a CCA will not be offered for those violations. The VN recipient has 30 days to either accept the CCA by signing and returning it via certified mail, or to reject it by written notice via certified mail or by not responding. Although the VN recipient cannot propose amendments to the offered CCA, amendments to an *executed* CCA are theoretically possible (as provided by Section 31(a)(7.5)).

If IEPA fails to respond within 30 days (or the time period agreed to by both parties) to the VN recipient's initial written response or post-meeting written response, the VN recipient's proposed CCA terms are deemed accepted.

The Section 31 Process requires IEPA to give parties notice of its intent to pursue legal action ("NIPLA") for alleged violations not

resolved via the CCA process above and for alleged violations of an executed CCA (and the alleged violations which were the subject of the CCA). The NIPLA must also be sent by certified mail and must notify the recipient of the alleged violations and the opportunity to meet with appropriate IEPA personnel to resolve the alleged violations. The meeting with IEPA must occur within 30 days of receipt of the NIPLA (unless IEPA agrees to a postponement).

When the CCA process is waived or if it does not (or cannot) resolve the alleged violations, the prosecutor's office is to serve the VN recipient with a formal complaint and a written notice specifying the requirement (provision of the Act, rule, regulation, permit, or term or condition thereof) which was allegedly violated, a statement of the manner in and extent to which the person is said to violate that requirement, a statement that financing may be available through the Illinois Environmental Facilities Financing Act to correct the violation, and which requires the recipient to respond to the charges in the complaint at a hearing before the Illinois Pollution Control Board (the "Board"), which is to be held not less than 21 days after the date of notice by the Board (unless entailing emergency actions or actions to seal equipment, vehicles or facilities under section 34 of the Act). A written answer may be filed but is not required. The parties may file a stipulation and proposal for a settlement and may request relief from the requirement of a hearing.

The Section 31 Process also requires notice of the initiation of the suit and any proposed settlement to persons who have complained to IEPA about the respondent within the 6 months preceding the filing of the complaint, notice to the public by publication in the county where the alleged violation occurred, and other interested parties. If relief from the requirement for a hearing is requested and not immediately denied by the Board, a hearing must be held if any party files a written demand for a hearing within 21 days of receiving notice of the proposed settlement.

Revisions to the Section 31 Process

Previously, under 415 ILCS 5/31(a)(2), the VN recipient was required to submit a Compliance Commitment Agreement ("CCA"), which IEPA could accept, reject or return with proposed modifications. Under the revised

"Section 31 Process," a party is not required to submit a CCA; rather, the party may include in its response *proposed terms* for a CCA and it is IEPA that drafts a CCA if the alleged violation(s) can be administratively resolved.

While the prior version of the statute would ultimately lead to the same result (a CCA agreeable to both parties), the process was illogical in that it required the VN recipient to draft both a compliance schedule and conditions and terms unrelated to a compliance schedule. The revised process is far more sensible in that VN recipients need only focus on developing compliance schedules, and allows for greater administrative efficiency and consistency by allowing IEPA to work from templates and boilerplate language for conditions and terms unrelated to compliance schedules.

If the alleged violation(s) can be administratively resolved, IEPA is to take into consideration the terms proposed by the VN recipient in drafting a CCA (which can be amended after execution by mutual, written agreement). The VN recipient has 30 days from receipt of the proposed CCA to agree, sign, and return by certified mail the proposed CCA or notify IEPA of its rejection of the proposed CCA. If the VN recipient fails to respond, the CCA is deemed rejected.

When one or more alleged violations cannot be administratively resolved, IEPA is required to notify the VN recipient that a CCA will not be issued because one or more of the alleged violations cannot be resolved without the involvement of either the Office of the Attorney General or the State's Attorney of the county where the alleged violation occurred.

Referrals to Prosecutor

Under a statutory provision not affected by the August 2011 amendments, IEPA was prohibited from referring alleged violations which were the subject of a CCA to the prosecutor's office if the CCA participant was complying with the terms of its CCA. Under the revised Section 31 Process, if a CCA participant fails to comply with the terms and conditions of a CCA, IEPA must, before it refers the matter to prosecution, notify the CCA participant of its intent to pursue legal action for the violation of the CCA and the alleged violations which were the subject of the CCA, and of the opportunity to meet with IEPA personnel to resolve the alleged violation(s). When alleged violations are referred to the

prosecutor's office, the revised Section 31 Process requires prosecutors to take into consideration the successful completion of a CCA or an amended CCA in determining whether to file a complaint for the violations that were the subject of the CCA.

Requiring IEPA to notify CCA participants of its intent to sue and the opportunity to meet to resolve the alleged violation effectively prevents IEPA from including in its CCAs a provision which allows for immediate referral to prosecution when CCA parties fall into non-compliance with the terms and conditions of their CCAs. This provision also gives CCA participants who fall into non-compliance time to cure conditions of non-compliance, a benefit that might not otherwise be available under the conditions and terms of a CCA.

Given the prohibition on referral to the prosecutor's office, the requirement that prosecutors consider a party's successful completion of a CCA appears to apply to situations in which a CCA participant falls into noncompliance with terms of the CCA, is referred to prosecution, and later cures the breach or secures an amendment which moots the non-compliance. Requiring prosecutors to take into consideration successful completion of a CCA or amended CCA prior to filing a complaint benefits the CCA participant and has the potential for reducing civil enforcement caseloads, particularly if prosecutors give parties who have fallen into non-compliance with their CCAs time to complete their compliance schedules albeit belatedly.

New Penalty Provision

Finally, a penalty provision was added to 415 ILCS 5/42, which provides for a civil penalty of \$2,000 in addition to any other civil or criminal penalties assessed for violating the terms or conditions of a CCA. While additional penalties are hardly welcome news, the inclusion of a fixed amount—rather than language authorizing IEPA to draft rules or include in CCAs penalty provisions within a prescribed range (i.e., not less than \$100 but not to exceed \$2,000)—is good news in that it caps the amount of such a penalty when more than one condition or term is violated (such as when the failure to meet one benchmark results in the party's inability to meet later benchmarks, which would constitute separate violations of a general compliance provision).

Conclusion

If your client is served with a VN, review the statutory requirements before drafting your standard response and keep an eye on the calendar when responding to and await-

ing responses from IEPA. Also, if it is some time before you have to respond to a VN, check for administrative rules as these recent amendments authorized IEPA to adopt rules for administering the Section 31 Process. ■

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