

ILLINOIS POLLUTION CONTROL BOARD
January 24, 2002

ECOLAB, INC.,)
)
 Complainant,)
)
 v.) PCB 02-78
) (Citizens UST Enforcement)
 OCCIDENTAL CHEMICAL CORPORATION)
 f/d/b/a Occidental Electrochemicals Corporation,)
 successor to Diamond Shamrock Corporation,)
)
 Respondent.)

ORDER OF THE BOARD (by S.T. Lawton, Jr.):

This matter is before the Board to determine whether the citizen's enforcement complaint by Ecolab, Inc. (Ecolab) for cost recovery is duplicitous or frivolous. Ecolab alleges in its complaint that from 1975 through 1987, respondent, Occidental Chemical Corporation (Occidental) improperly handled, treated, stored and disposed of solid and hazardous wastes at its leased location at 10421 Franklin Avenue, Franklin Park. Ecolab asserts that Occidental's actions resulted in the wastes being released, spilled, emitted, and discharged into the environment, in violation of Sections 21(e), 12(a), and 12(d) of the Environmental Protection Act (Act) (415 ILCS 5/21(e), 12(a), (d) (2000)). Ecolab alleges that it purchased the site in 1987, and paid \$225,000 to remediate the site. The Board finds that the complaint is neither duplicitous nor frivolous, and accepts this matter for hearing for the reasons expressed below.

DUPLICITOUS/FRIVOLOUS DETERMINATION

Section 103.212(a) of the Board's procedural rules (35 Ill. Adm. Code 103.212(a)) implements Section 31(d) of the Act (415 ILCS 5/31(d) (2000)), providing that the Board shall schedule a hearing upon receipt of a citizen's complaint, unless it determines that the complaint is duplicitous or frivolous.

Duplicitous

A matter is duplicitous if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. The Board has not identified any other cases, identical or substantively similar to this, pending in this or any other forum.

Frivolous

An action before the Board is frivolous if the complaint requests relief that the Board does not have the authority to grant, or "fails to state a cause of action upon which the Board can grant relief." 35 Ill. Adm. Code 101.202. Ecolab requests, among other things, that the Board

award it costs that it has incurred in cleaning up contamination at the site. The Board has consistently held that it has the authority to award cleanup costs to private parties for a violation of the Act. See Chrysler Realty Corp. v. Thomas Industries, Inc., PCB 01-25, slip op. at 3 (Dec. 7, 2000); Lake County Forrest Preserve Dist. v. Ostro, PCB 92-80 (Mar. 31, 1994); Richey v. Texaco Refining and Marketing, Inc., PCB 97-148 (Aug. 7, 1997). Our holding in Ostro was based on the broad language of Section 33(a) of the Act (415 ILCS 5/33(a) (2000)) as well as the Illinois Supreme Court decision in People v. Fiorini, 143 Ill. 2d 318, 574 N.E.2d 612 (1991).

In Fiorini, the Illinois Supreme Court considered the issue of private cost recovery in the context of a third-party complaint that sought, among other things, cleanup costs incurred because of an alleged violation of Section 21 of the Act. See also Chrysler, PCB 01-25, slip op. at 3. The Supreme Court denied respondent's motion to dismiss the third party complaint, stating that, "[w]hile cleanup costs are not expressly provided for in these [Sections 33(b) and 42 through 45] of the Act, we decline to hold here that an award of cleanup costs would not be an available remedy for a violation of the Act under appropriate facts. Rather, we believe that such a determination is properly left to the trial court's discretion." Fiorini, 143 Ill. 2d at 350, 574 N.E.2d 625. Using this rationale, the Board has repeatedly upheld its ability to award cleanup costs under the Act. See Chrysler, PCB 01-25, slip op. at 3.

Ecolab also alleges violations under the Act that are not frivolous. Specifically, Ecolab alleges that Occidental violated Sections 21(e), 12(a), and 12(d) of the Act (415 ILCS 5/21(e), 12(a), (d) (2000)). Section 21(e) provides that no person shall "[d]ispose, treat, store or abandon any waste, or transport any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder." 415 ILCS 5/21(e) (2000). Section 12(a) states in pertinent part that no person shall "cause or threaten or allow the discharge of any contaminant into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources. . . ." 415 ILCS 5/12(a) (2000). Section 12(d) of the Act states in relevant part that no person shall "[d]eposit any contaminants upon the land in such place and manner so as to create a water pollution hazard." 415 ILCS 5/12(d) (2000).

Ecolab alleges that the above violations occurred when Occidental conducted various manufacturing operations at the site between 1975 and 1987. According to Ecolab, Occidental manufactured specialty cleaning chemicals and supplies that it sold to commercial, institutional, and industrial laundries. Ecolab asserts that Occidental stored and mixed liquid and solid caustics, surfactants, phosphates, solvents, oils and alcohols. Ecolab alleges that Occidental specifically used organic compounds including acetone, trimethylbenzene, and tetrachloroethene, which is otherwise known as perc or PCE. Ecolab states that PCE breaks down into trichloroethene, dichloroethene, and vinyl chloride, which it alleges are hazardous under the Act. Ecolab further alleges that if these substances are discarded, they are considered to be hazardous wastes under the Resource Conservation and Recovery Act.

Ecolab alleges that it conducted tests that show that Occidental improperly handled, treated, stored and disposed of these solid and hazardous wastes in a manner resulting in the above violations of the Act. Ecolab states that March, 2000 soil samples showed elevated concentrations of volatile organic compounds, including tetrachloroethene, trichloroethene,

trimethylbenzene, and vinyl chloride. Ecolab also alleges that June, 2000 soil and groundwater samples at the site show elevated concentrations of volatile organic compounds, including acetone, cis – 1, 2 dichloroethene, tetrachloroethene, trichloroethene, trimethylbenzene, and vinyl chloride. Ecolab states that it remediated the contaminated soil and water, and received a “No Further Remediation” letter from the Illinois Environmental Protection Agency for the site on July 23, 2001. The Board finds that Ecolab provided sufficient facts in support of the above alleged violations of the Act to show that the complaint is not frivolous.

CONCLUSION

The Board finds that the allegations concerning Sections 12(a), 12(d), and 21(e) of the Act (415 ILCS 5/12(a), 12(d), 21(e) (2000)) are neither frivolous nor duplicitous, and accepts this matter for hearing. The Board directs that this matter proceed to hearing as expeditiously as practicable. The Board will assign a hearing officer to conduct hearings consistent with this order and Sections 101.600 and 101.612 of the Board’s rules. *See* 35 Ill. Adm. Code 101.600 and 101.612.

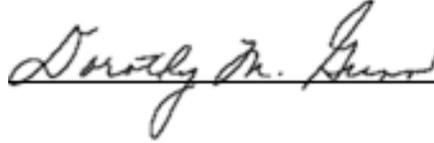
The assigned hearing officer shall inform the Clerk of the Board of the time and location of the hearing at least 30 days within advance of the hearing so that a 21-day public notice of the hearing may be published. After hearing, the hearing officer shall submit an exhibit list, a statement regarding credibility of witnesses, and all actual exhibits to the Board within five days of the hearing.

Any briefing schedule shall provide for final filings as expeditiously as possible. It is the responsibility of the hearing officer to guide the parties toward prompt resolution or adjudication of this matter, through whatever status calls and hearing officer orders he determines are necessary and appropriate.

IT IS SO ORDERED.

Board Member R.C. Flemal dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on January 24, 2002, by a vote of 6-1.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control