

ILLINOIS POLLUTION CONTROL BOARD

February 25, 1993

JAY AGUILAR,)	
)	
Complainant,)	
)	
v.)	PCB 93-2
)	(Enforcement)
)	
VENUS LABORATORIES, INC.)	
)	
Respondent.)	

ORDER OF THE BOARD (by B. Forcade):

On January 4, 1993, Jay Aguilar filed a complaint against Venus Laboratories (Venus) alleging that Venus violated Section 12(a), 12(d), 21(a) and 21(p)(6) of the Environmental Protection Act (Act). (415 ILCS 5/1 et seq. (1992).)¹ On January 19, 1993, Venus filed a Motion to Dismiss or Stay. Mr. Aguilar did not file a response to the motion to dismiss

Venus asserts the complaint is frivolous in that it is factually insufficient and fails to meet the pleading requirements of 35 Ill. Adm. Code 103.122(c). Venus claims that the complaint lacks sufficient specificity for Venus to prepare a defense. Venus alleges that the complaint seeks relief which the Board cannot grant. Venus also asserts that the complaint is duplicative. Venus claims that the relief sought in the complaint is already in the process of being provided through negotiations and agreements with the Illinois Attorney General, Illinois Environmental Protection Agency and the Illinois State Fire Marshal.

The Board finds that the complaint is not frivolous. A complaint is frivolous if it fails to state a cause of action upon which relief can be granted. (See, In re Duplicitous or Frivolous Determination (June 8, 1989), RES 89-2, 100 PCB 53; section 31(b) of the Act.) The complaint alleges violations of specific sections of the Act. The Board finds that the complaint satisfies the pleading requirements. The complaint sufficiently states a cause of action. Additional information concerning the nature of the alleged violations may be obtained through discovery.

However, the Board finds a part of the relief requested in the complaint is inapplicable. The complaint seeks the following relief: 1) a cease and desist order; 2) order Venus to pay for all testing; 3) impose a fine against Venus under Section 44(b) of the Act; 4) an order requiring Venus to pay all costs of clean

¹ The Act was formerly codified at Ill.Rev.Stat. 1991, ch. 111 1/2, par. 1001 et seq.

up; and 5) any other penalty. (emphasis added) The Board finds that Section 44(b) is not applicable to citizen enforcement actions. Section 44(b) states the fine for the offense of Calculated Criminal Disposal of Hazardous Waste. Actions under Section 44 are to be brought solely by the State's Attorney or the Attorney General. (Section 44(m).) While penalties under Section 44(b) are not applicable to this enforcement action, civil penalties, as provided by Section 42 of the Act, may be appropriate if a violation is found. However, the other forms of relief requested in the complaint can be granted by the Board and therefore the complaint is not frivolous.

An action before the Board is duplicitous if the matter is identical or substantially similar to one brought in another forum. (See, In re Duplicitous or Frivolous Determination (June 8, 1989), RES 89-2, 100 PCB 53; section 31(b) of the Act.) The Board finds that the complaint is not duplicative. Venus notes that it is involved in negotiations relating to the cleanup of the site with other government entities as a result of a notice pursuant to 31(d) issued in June of 1991. The Board has previously held that such a notice does not constitute a prior pending enforcement action to render a complaint duplicative. (Village of Kildeer v. Village of Lake Zurich (January 5, 1989), PCB 88-173.) The Board finds that respondent has presented no special circumstances to cause the Board to deviate from its prior holding.

Venus requests that the Board stay the proceedings pending the resolution of current proceedings between Venus and other State agencies. Having found that these proceedings are not duplicative, the Board denies the motion to stay.

The motion to dismiss also provides arguments which go to the merits of the matter; such are not proper for a motion to dismiss based on a duplicitous or frivolous determination or that the complaint fails to set forth a cause of action. The Board denies the motion to dismiss and finds that the complaint sets forth a basis for a cause of action before the Board. Today the Board makes no determination on the merits of the case (whether violation as alleged has occurred); the Board finds only that the case is properly before it.

The Board is concerned with the failure of Mr. Aguilar to file a response to the motion to dismiss. By filing a formal complaint, the complainant assumes the responsibility to actively proceed with the case. That responsibility includes the obligation to respond to the written motions filed by Venus Laboratories and to otherwise follow the Board's procedural rules regarding practice before the Board.

In this type of proceeding, the burden is upon Mr. Aguilar to establish at a formal hearing, by oral testimony under oath or by properly submitted written documents, that a violation did occur, under the terms of the Environmental Protection Act, and applicable regulations.

In order to prevail at hearing, Mr. Aguilar must present facts and arguments as to why a violation should be found. The Board hearing is not an informal informational hearing at which the Board or the respondent must explain its actions. The hearing is more in the nature of a court proceeding with testimony under oath and questions of the witnesses. This Board cannot provide legal advice or legal assistance to Mr. Aguilar. The complainant bears the burden of providing information to support its position. The initial burden at hearing to explain why the violation should be found is not upon the Board or respondent.

Failure of Mr. Aguilar to actively proceed with the case or to follow procedural rules may result in dismissal of this matter.

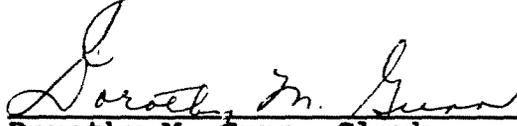
If complainant does not wish to proceed with this matter he may file a motion to dismiss (reference Sections 101.241 and 101.242 of the Board's rules and regulations for filing procedures.) If a motion to dismiss is not received by the Board prior to March 31, 1993 this matter will be set for hearing.

In addition, the Board maintains a "List of Pro Bono Attorneys." These are individuals or organizations that have agreed, in certain circumstances, to represent individuals before the Board without charge to the individual. The Board has not reviewed the qualifications of these individuals. By providing and maintaining this list, the Board makes no recommendations concerning their qualifications or ability to successfully prosecute your case. Presence of a name on this list does not require an attorney to accept your individual case. If Mr. Aguilar desires to contact these individuals, he must do so in his own manner, and the individual will analyze the merits of the particular case.

The motion to dismiss or stay is denied. Accordingly, this matter is accepted for hearing. The hearing officer is instructed to delay setting this matter for hearing until after March 31, 1993.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 25th day of February, 1993, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board