

ILLINOIS POLLUTION CONTROL BOARD
September 19, 1996

OLIVE STREIT and LISA STREIT,)	
)	
Complainants,)	
)	
v.)	PCB 95-122
)	(Enforcement - Citizens)
OBERWEIS DAIRY, INC., RICHARD J.)	
FETZER AND JOHNNIE W. WARD d/b/a)	
SERVE-N-SAVE, and RICHARD J.)	
FETZER, individually, AMOCO OIL)	
COMPANY, and MOBIL OIL)	
CORPORATION,)	
)	
Respondents.)	

ORDER OF THE BOARD (by C.A. Manning):

This matter comes before the Board on a motion for summary judgment filed on April 3, 1996 by complainants, Olive and Lisa Streit. Complainants request that the Board grant summary judgment in their favor against respondent, Oberweis Dairy, Inc. (Oberweis). Oberweis filed its response to complainants' motion for summary judgment on May 1, 1996. Complainants filed their reply to Oberweis' response on May 15, 1996, and filed a second motion to supplement the record on May 22, 1996. On May 30, 1996 Oberweis filed a response to complainants' motion to supplement the record. In this order, we address both complainants' motion for summary judgment and complainants' motion to supplement the record.

Summary judgment will be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. (Sherex Chemical v. IEPA (July 30, 1992), PCB 91-202; Williams Adhesives, Inc. v. IEPA (August 22, 1991), PCB 91-112.) In complainants' motion for summary judgment, complainants set forth facts deemed admitted by Oberweis' failure to properly serve a signed and verified copy of its response to respondent Amoco Oil Company's (Amoco) request to admit facts. The Board acknowledges that although facts have been deemed admitted as a result of Oberweis' failure to respond to Amoco's request to admit, genuine issues of material fact continue to exist and remain in dispute between the parties. For reasons more fully explained below, we deny complainants' motion for summary judgment and deny complainants' motion to supplement the record.

BACKGROUND

On April 4, 1995 complainants filed this citizens' enforcement action¹ against respondents alleging that respondents violated the underground storage tank (UST) provisions of the Environmental Protection Act (Act) (415 ILCS 5/57) (1994) and seeking injunctive relief, costs, and civil penalties. This case involves the drinking water source of three residential properties owned and occupied by complainants and located at 1003, 1009 and 1011 North Lake Street, Aurora, Illinois. Complainants allege that a natural spring which serves as complainants' drinking water source is contaminated and that the contamination was caused by one or more of respondents' neighboring properties. Complainants allege that up until 1991, their "potable water supplies" within the meaning of the Illinois Water Well Construction Code, were a spring located at 1009 North Lake Street and a deep water well. (Comp. at 5, 8.) During 1991, complainants state that their drinking water sources became contaminated with unlawful concentrations of petroleum products. (Id. at 7.)

Oberweis is located at 945 and 1001 North Lake Street and is currently a dairy and retail ice cream store. (Id. at 4-5.) The dairy is uphill and approximately 500 feet from the Streets and was once operated as a retail gas station by Fetzer and Ward d/b/a Serve-N-Save. (Id. at 5.) Eight heating oil, gasoline, and diesel-containing USTs were located on the property. Several of the USTs were removed, which led to the discovery of petroleum contamination and, at one time, corrective action. (Id. at 5-6, Exh. D.)

The complaint alleges that respondents are in violation of Section 57.1(a) and 22.18(a) of the Act, for failing to sufficiently respond to a release of petroleum, conduct groundwater investigation or conduct corrective action in accordance with the requirements of the Illinois UST program. The complaint further alleges the failure to register the USTs with the State of Illinois. (Id. at 8.) The complaint also alleges that respondents are in violation of Section 57.12 of the Act for costs and damages, remediation, and restoring a potable water supply.

On February 1, 1996 the Board entered an order which, among other matters, granted Amoco's motion to strike Oberweis' response to Amoco's request to admit. The Board reasoned that because Oberweis' response was not properly verified and because Oberweis had not shown good cause for such a deficiency, Amoco's motion to strike Oberweis' response was proper. The Board thereby deemed the facts admitted pursuant to Section 103.162 of the Board's procedural rules (35 Ill. Adm. Code 103.162). As a result of the facts deemed admitted, complainants filed a motion for summary judgment and motion to supplement the record.

¹ The complaint will hereinafter be referred to as (Comp. at ____). Complainants' motion for summary judgment will hereinafter be referred to as (Mot. at ____). Complainants' memorandum in support of their motion for summary judgment will hereinafter be referred to as (Memo at ____). Oberweis' response to complainants' motion for summary judgment will hereinafter be referred to as (Res. at ____). Complainants' reply in response to Oberweis' response will be referred to as (Reply at ____). Complainants' motion to supplement the record will hereinafter be referred to as (Supp. at ____). Oberweis' reply will be referred to as (Reply Supp. at ____).

ARGUMENT

Motion to Supplement the Record

Complainants filed a motion to supplement the record on the pending motion for summary judgment requesting that the Board add Oberweis' notification to the Illinois Office of the State Fire Marshal (OSFM) that the USTs at issue were removed in July 1991. Oberweis opposes complainants' motion to supplement the record stating that complainants failed to establish any ground for their request. Oberweis further argues that the admittance of this information would be grossly unfair and prejudicial to Oberweis which argued the summary judgment motion based on the record prior to the motion to supplement the record.

The Board finds that granting complainants' motion to supplement the record at this time would be unfair and prejudicial to Oberweis. As a result, for purposes of the motion for summary judgment, we deny complainants' motion to supplement the record.

Motion for Summary Judgment

Complainants argue that summary judgment should be granted since the facts deemed admitted show that Oberweis is responsible for the alleged violations. Complainants assert that since all facts are admitted, no genuine issue of material fact exists in the instant action and, therefore, the motion should be granted as a matter of law. (Mot. at 1.) Complainants further argue that in granting their motion, the Board should order Oberweis to take the following actions: (1) cause appropriate coring of bedrock and installation of monitoring wells; (2) assist in, and pay the expense of, furnishing potable water supply to complainants' properties from the City of Aurora water main; (3) take action in response and remediation under the supervision of the Agency with advance notification to complainants' engineering and legal counsel; and (4) determine the contributory involvement of Mobil and Amoco in further proceedings so as to share liability and responsibility among co-respondents. (Mot. at 2-3, Memo at 3.)

Specifically, complainants argue facts deemed admitted by Oberweis. Complainants state that Oberweis is the responsible party for petroleum releases of USTs on June 24, 1991 and July 15, 1991 (ESDA Incident Nos. 91-1723 and 91-1937). (Memo at 4.) Complainants state that soil borings conducted by the Agency in August 1991 revealed petroleum contamination and complainants also state that Oberweis failed to investigate groundwater contamination pursuant to the Agency's April 10, 1992 approval of Oberweis' groundwater investigation work plan. (Id. at 5.) Complainants further assert that the documents set forth in Amoco's request to admit fully and conclusively support the factual occurrences necessary for the granting of a motion for summary judgment. (Id. at 6-7.) Complainants argue that the admissions prove Oberweis violated all sections of the law as alleged and ignored its responsibility to investigate and identify the source, nature, and extent of contamination as a potentially responsible party. (Id. at 8.) In their motion, complainants also argue that Oberweis improperly sought a "no further action" letter under the 1994 UST provisions (415 ILCS 5/57 (1994)) when, complainants argue, Oberweis was not within the class for which "no further action" is available. (Id. at 10.)

Oberweis argues that genuine issues of material fact still exist with respect to each issue asserted by complainants. Oberweis states that complainants are not entitled to summary judgment if disputed issues still exist; therefore, Oberweis argues several disputed issues. First, Oberweis states that complainants have not established a causal connection between the leakage of the USTs at the site and the contamination of complainants' spring. Oberweis states that complainants have not shown that Oberweis caused the contamination on complainants' property and that Oberweis was the owner or operator of the USTs at the time of the alleged release. (Res. at 3-4.) Oberweis further argues that the lack of a causal connection is evident by its consultants' report (the SEECO report).² The report states that the USTs were not the source of contamination of the spring, the soil boring from the UST basin did not produce any groundwater, the USTs were removed over four years ago though the contamination continues, and no fissures exist in the bedrock that would enable a discharge of contaminants. (Id. at 4-5.)

Second, Oberweis argues it has never been an owner or operator of the USTs or an operator of the filling station; therefore, it is not obliged to comply with the regulatory provisions imposed on owners and operators of USTs. Among other documents, Oberweis submits an affidavit of Elaine Oberweis to establish that Oberweis was never an owner or operator of the USTs. Oberweis argues that nothing in the affidavit undermines Ms. Oberweis' affidavit. Oberweis states it was only acting as a volunteer when removing the USTs four years ago. (Id. at 6-7.) Third, Oberweis asserts it has voluntarily complied with Agency directives. Oberweis argues it pursued remediation of its property so as to comply with regulations. Oberweis submits various exhibits attached to its response to show that it was never accused by the Agency of violating applicable regulations and followed the Agency directives appropriately. (Id. at 8-9.) Last, Oberweis states that complainants' spring may have been contaminated by sources other than Oberweis.

Overall, Oberweis states that complainants have not properly established that they are entitled to summary judgment. Oberweis states that complainants cannot show that Oberweis is the source that is liable for the contamination. Oberweis states that the facts show it was never an owner or operator of the USTs or of the filling station operated by its tenants; therefore, Oberweis states it had no obligation to pursue any remediation program as alleged by complainants. Oberweis finally states that liability cannot be imposed on it based on pure speculation simply because it is an "easy target for accusation." (Id. at 10.) Complainants argue further in their reply that none of Oberweis' factual interpretations raises any controversy. Complainants state that the question of owner or operator of the USTs is a question of law to be decided by the Board. (Reply at 3-4.)

ANALYSIS

² Oberweis attaches to its response the affidavit of Mr. Collin Gray, President of SEECO consultants, which states that the contamination in the water on the Streit property has not been demonstrated to have resulted from an occurrence or release from the Oberweis property. (Res. at 5.)

In a motion for summary judgment, judgment will only be granted where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Complainants' motion for summary judgment is based on the facts deemed admitted pursuant to Board order dated February 1, 1996. However, issues of fact remain unanswered by the facts deemed admitted. Complainants argue that Oberweis is the party responsible for petroleum releases of the USTs which contaminated complainants' spring. Yet complainants fail to draw a nexus between any such petroleum release and contamination of the properties in question.

The regulations pertaining to the charges against Oberweis place responsibility on the owner or operator of the USTs. Since Ms. Oberweis, as chief executive officer of Oberweis Dairy, Inc., denies in her affidavit that Oberweis is the owner or operator of the USTs, a genuine fact remains at issue. Additionally, in the affidavit of Mr. Gray, Oberweis' consultant, it is stated that the contamination on the Streit property has not resulted from a release from the Oberweis property. Although complainants state that Oberweis did not investigate the source of the release, the record indicates that, in 1991, Oberweis cooperated with the Agency in remediating any releases caused by USTs located on its property. In this matter, genuine issues of material fact continue to exist; therefore the Board denies complainants' motion for summary judgment.

In summary, the Board denies complainants' motion for summary judgment and denies complainants' motion to supplement the record. Hearing shall expeditiously proceed consistent with this order.

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 _____ day of _____, 1996, by a vote of

_____.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board