ILLINOIS POLLUTION CONTROL BOARD
July 18, 1996

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	PCB 93-191
LLOYD WIEMANN, d/b/a WIEMANN ICE AND FUEL, TEXACO REFINING and MARKETING, INC., AND EUGENE and CHERYL HALBROOKS,	)	(Enforcement - UST)
	)	
Respondents.	)	

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

This matter comes before the Board on a motion for leave to join additional parties filed by respondent Lloyd Wiemann d/b/a Wiemann Ice and Fuel (Wiemann) on October 30, 1995. In an order dated March 25, 1996 Hearing Officer Deborah Frank ordered Wiemann to serve the motion on the parties sought to be added: Texaco Refining and Marketing Inc. (TRMI) and Eugene and Cheryl Halbrooks (Halbrooks). On April 15, 1996 TRMI filed a response in opposition to Wiemann's motion to join additional parties. Wiemann subsequently filed a reply to TRMI's response on May 2, 1996. This order addresses Wiemann's motion to join additional parties and TRMI's response in opposition to Wiemann's motion.

BACKGROUND AND PROCEDURAL HISTORY

The Illinois Attorney General, representing the People of the State of Illinois on behalf of the Illinois Environmental Protection Agency (Agency), filed this enforcement case on October 8, 1993 alleging that Wiemann was the owner or operator of one or more tanks and underground pipes located at two locations: (1) 1800 Vandalia Street, Collinsville, Madison County, Illinois (Site One) and (2) Route 111 and Forest Boulevard, Washington Park, St. Clair County, Illinois (Site Two). Complainant also alleged that Wiemann failed to file 20-day and 45-day reports and alleged that Wiemann failed to perform abatement measures as required by 35 Ill. Adm. Code 731.162, 731.163, 731.160 (1994).

On February 1, 1996 the Board issued an opinion and order addressing the motion for summary judgment filed October 6, 1995 by complainant, the People of the State of Illinois on behalf of the Illinois Environmental Protection Agency (Agency), and Wiemann's cross-motion for summary judgment filed on December 18, 1995. The Board denied complainant's motion for summary judgment as to Site One and granted partial summary judgment as to the Site Two. The Board further denied Wiemann's cross-motion for summary judgment. Regarding Site One, the Board found that a genuine issue of material fact needed further

determination at hearing since Wiemann denied being owner or operator of the underground storage tanks (USTs). The Board also decided that the penalty issue had yet to be determined with regard to Site Two. The Board ordered this case to proceed to hearing.

ARGUMENT

Wiemann argues in its motion for leave to join additional parties that it is not the owner or operator of the USTs at Site One. Wiemann asserts that TRMI is the owner of the USTs at Site One. Wiemann further argues that the service station owners, Eugene and Cheryl Halbrooks, are the operators of Site One since the Halbrooks are responsible for the vending of fuel products at the premises. As such, they were responsible for the daily operation of the UST system. (Motion to Join at 2-3.) Wiemann states that its role was limited to supplying the fuel and owning the pumps and signage at Site One. Wiemann argues that evidence exists to prove that it is neither the owner nor operator of the USTs at Site One and that TRMI and the Halbrooks should be designated as owner and operator. Wiemann seeks to prevent assigning liability and penalties to a person who has no statutory responsibility for the USTs at issue; therefore, Wiemann requests that this Board join both TRMI and the Halbrooks as respondents in this matter. (Id. at 5.)

TRMI responded by arguing that it did not own or operate the USTs during the time of the release in question. TRMI asserts that because the USTs were sold to the Halbrooks in 1986 and because the release occurred in April 1991, the Halbrooks were the owners during the time of the release. TRMI states that the definition of an underground storage tank owner or operator refers to a person who presently owns the underground storage tank. (See 35 Ill. Adm. Code 731.112 (1994).) (Response at 2-3.) TRMI asserts that the Bill of Sale signed on November 21, 1986 by TRMI's attorney and the Halbrooks releases TRMI of all risks, liabilities, and hazards. TRMI also asserts that the indemnification and "hold harmless clauses" in the Bill of Sale require the Halbrooks to assume responsibility for the USTs located at Site One.

Wiemann's reply states that TRMI did not address its potential status as operator of the USTs located at Site One. Wiemann further argues that the Bill of Sale is an agreement between TRMI and the Halbrooks which has no direct nexus to the liability issues present in this matter. (Reply at 2.) Wiemann asserts that TRMI may pursue the Halbrooks for fulfillment of the indemnity provision in the Bill of Sale after TRMI and the Halbrooks are joined and after the Board determines who is the owner or operator of the USTs at Site One. Wiemann argues that though the release in question was reported in April 1991, the release may have actually occurred before TRMI sold the USTs to the Halbrooks. Finally, Wiemann argues that a former tank farm on Site One removed by TRMI in 1984 caused contamination to Site One and continues to cause off-site impacts. (Id. at 4.) Therefore, Wiemann states TRMI should be added as a party respondent to insure that all issues regarding owner or operator status of the USTs at Site One may be resolved in this matter.

ANALYSIS

In determining whether to join an additional party, the Board refers to Section 103.121(c) of the Board's procedural rules. (35 Ill. Adm. Code 103.121(c) (1994).) Section 103.121(c) requires that the Board bring in another party if a complete determination of a controversy cannot occur without the presence of the other party. This section further allows the Board or hearing officer to join another party to a controversy in an enforcement proceeding if the other party has an interest which the order may affect. In order for the Board to make a complete determination of the factual and legal issues concerning liability, we must determine the proper owner or operator of Site One for this enforcement action. The pleadings in this case have not presented the Board with adequate information to determine which parties are responsible for the contamination at Site One. Presently, all potential owners or operators have not been joined before the Board so as to insure that all liability issues will be adequately addressed. As a result, the Board finds that a complete determination of this matter cannot be made, and accordingly joins both the Halbrooks and TRMI.

Halbrooks

On May 2, 1996 the hearing officer in this case found that Wiemann substantially complied with the previous March 25, 1996 hearing officer order requiring service on the Halbrooks and TRMI. The Board acknowledges that though Eugene Halbrooks was unable to be served, Cheryl Halbrooks was properly served on April 5, 1996. The Board has not received any filing from either Cheryl or Eugene Halbrooks which opposes Wiemann's motion to join additional parties. The Halbrooks may be potential owners or operators. For these reasons, the Board joins the Halbrooks as additional party respondents in this case.

TRMI

TRMI argues that it is neither the owner nor operator of the USTs at Site One. TRMI believes that the Halbrooks own the USTs located at Site One and, therefore, TRMI believes it should be released of all liability. TRMI fails to draw a nexus, however, between the date of the Bill of Sale to the Halbrooks and the time of the release of the contaminants. The pleadings address the date which the release was reported but no discussion exists regarding the timeframe of the actual release. Further, TRMI fails to explain what remediation, if any at all, took place due to the previous removal of the other USTs located at Site One in 1984. TRMI may be a potential owner or operator in this matter; it raises issues and arguments that would be best presented at hearing. Therefore, the Board also joins TRMI as an additional party respondent in this matter.

At this time, the Board directs this matter to proceed to hearing. Several issues of fact and law must still be addressed in this case. The Board requires information on the record that shows which party is the owner or operator of the USTs at Site One. Further, consistent with the February 2, 1996 Board order, the Board requests that evidence and arguments concerning any penalty be addressed at hearing with regard to Site Two. The Board stresses the importance that this matter expeditiously proceed to hearing to address all questions which remain in this case. This matter shall proceed to hearing consistent with this order.

CONCLUSION

In summary, the Board grants Wiemann's motion to join both additional parties, TRMI and the Halbrooks.[1] The Board denies TRMI's response motion in opposition to Wiemann's motion to join. The Board directs the hearing officer to promptly set this matter for hearing.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the _____ day of _____, 1996, by a vote of _____.

_____
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

[1] The caption of this opinion and order has been amended to include these joined parties. This amended caption should be used in all future pleadings.