ILLINOIS POLLUTION CONTROL BOARD September 6, 2001

PEOPLE OF THE STATE OF ILLINOIS,)	
Complainant,)	
V.)	PCB 01-155
ALLOY ENGINEERING AND)	(Enforcement – Air)
CASTING COMPANY,)	
Respondent.)	

ORDER OF THE BOARD (by R.C. Flemal):

This matter is before the Board on a motion for leave to intervene (motion) filed by 45 movants who reside, or did reside, near respondent's facility. Movants filed the motion on July 12, 2001. Complainant, the People of the State of Illinois, and respondent, Alloy Engineering and Casting Company, both filed separate responses objecting to the motion on July 26, 2001, and July 30, 2001, respectively. On August 1, 2001, movants filed a motion for leave to file a reply *instanter* and a reply. The motion to file a reply *instanter* is granted. For the reasons set forth below, the Board denies the motion to intervene.

Complainant originally brought this action against respondent for allegedly causing or allowing the emission of contaminants and noncompliance with their operating permit for their facility at 1700 West Washington Street, Champaign, Champaign County, Illinois. The activities were in alleged violation of Section 9(a) and 9(b) of the Environmental Protection Act (Act) (415 ILCS 9(a), (b) (2000)), and the Board's air pollution regulations at 35 Ill. Adm. Code 201.141 and 212.301. The Board accepted this matter for hearing on June 7, 2001.

ARGUMENTS

In their motion, movants assert that they may be materially prejudiced or adversely affected by a final Board order in this matter. Motion at 2. Specifically, movants argue that they will be adversely affected by a final Board order that does not ensure that respondent will comply with the Act. Motion at 3. Additionally, movants argue that they will be prejudiced by a final Board order that does not restore confidence to them and prospective home buyers in the neighborhood, that dust emissions from respondent's facility will not again damage their properties or impair their health. Motion at 3.

Movants acknowledge that they are all plaintiffs in a pending lawsuit filed in the Circuit Court of Champaign County against respondent. Motion at 3. They have alleged damages proximately caused by respondent. Motion at 3. The allegations include negligence, *res ipsa loquitur*, permanent nuisance, temporary nuisance and trespass. Motion at 3. Movants also allege that a final Board order in this matter could have a collateral estoppel effect on their pending lawsuit in the circuit court. Motion at 4.

In complainant's response (Comp. Resp.), complainant argues that movants' motion fails to sufficiently set forth grounds for intervention. Comp. Resp. at 1. Complainant also argues that the movants fail to state which issues in their pending lawsuit will be effected by collateral estoppel. Comp. Resp. at 2. Complainants also notes that the movants do not argue that complainant cannot adequately represent the movants' interests. Comp. Resp. at 3.

In respondent's response (Resp.), respondent asserts movants have failed to meet the procedural requirements for intervention. Resp. at 1. Respondent alleges movants have not adequately supported how their interests may be adversely affected or how they may be materially prejudiced if not allowed to intervene. Resp. at 2.

Respondent also argues that movants will only be collaterally estopped if they are allowed to intervene. Resp. at 3. Respondent asserts movants' interests are adequately represented in the circuit court proceedings. Additionally, respondent argues that the case before the Board will be delayed if movants are allowed to intervene. Resp. at 3.

In their reply, movants argue that they could be adversely affected if the Board finds that alleged fugitive dust emissions are not violation of the Act, because that is the basis for one of movants' claims in the civil lawsuit. Reply at 2. Movants further argue the attorney general, who represents the complainant the People of the State of Illinois, may not represent their specific interests, since they live so close to the facility. Reply at 2. Movants further argue that if they are called as witnesses in this case, they could be impeached with those statements in the civil lawsuit. Reply at 3.

DISCUSSION

To prevail on their motion, movants must satisfy Section 101.402(d) of the Board's procedural rules, which provide that:

Subject to subsection (b) of this Section, the Board may permit any person to intervene in any adjudicatory proceeding if:

- 1) The person has a conditional statutory right to intervene in the proceeding;
- 2) The person may be materially prejudiced absent intervention; or
- 3) The person is so situated that the person may be adversely affected by a final Board order. 35 Ill. Adm. Code 101.402(d).

Subsection 101.402(b) of the Board's procedural rules provides that, "in determining whether to grant a motion to intervene, the Board will consider the timeliness of the motion and whether intervention will unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding." 35 Ill. Adm. Code 101.402(b).

As is reflected above, the Board's decision to grant or deny intervention is discretionary.

Movants do not contend that they have a statutory right to intervene. Movants do allege, however, that they may be materially prejudiced or adversely affected if they are not allowed to intervene. Motion at 2.

The Board is not persuaded that movants will be materially prejudiced if they are not allowed to intervene. The attorney general represents all of the people of the State of Illinois in this matter. Movants' concern that "it is foreseeable that what may appear to the attorney general to be a satisfactory resolution in this proceeding may not be satisfactory from the perspective of the movants" (Reply at 2), is unpersuasive. The Board believes the attorney general is fully cognizant of the people who live near this affected facility. Complainant, who is represented by the attorney general, even intends to call some of the movants as witnesses. Comp. Resp. at 3. The Board believes the attorney general will adequately represent the concerns of all of the People of the State of Illinois in this matter.

The Board further notes that if indeed the Board finds that respondent violated the Act, any order the Board issues will address these violations, and as is customary, order respondents to cease and desist from further violations of the Act. The Board does not believe such a finding would adversely affect movants. To the extent that the Board does not find respondent violated the Act, movants still will not be adversely affected in their lawsuit. The Illinois Supreme Court has identified three minimum threshold requirements for the application of collateral estoppel. The requirements are: (1) that the issue decided in the prior adjudication is identical with the one presented in the suit in question; (2) that there was a final judgment on the merits in the prior adjudication; and (3) that the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication. Talarico v. Dunlap, 177 Ill. 2d 185, 191; 685 N.E.2d 325, 328 (1997). Respondent, therefore, is correct when it argues that a final Board order will not have a collateral estoppel effect if movants are not parties to this proceeding. Resp. at 3. Since the third requirement under the Talarico is not satisfied, the Board will not address the first two requirements. To the extent that movants believe or allege that a finding by the Board will influence a judge or jury in the civil case (see Reply at 4), the Board declines to speculate over what influence its findings might have.

The motion to intervene is denied.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 6, 2001, by a vote of 7-0.

Dorothy Mr. Gund

Dorothy M. Gunn, Clerk Illinois Pollution Control Board