ILLINOIS POLLUTION CONTROL BOARD
September 7, 1995

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

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

This matter is before the Board on several motions to dismiss filed by five of the respondents in this cause. The underlying citizens' enforcement complaint was filed by Olive and Lisa Streit (Streits) on April 4, 1995 and alleges that the respondents, with the exception of the Illinois Environmental Protection Agency (Agency), violated the underground storage tank (UST) provisions of the Illinois Environmental Protection Act (Act) (415 ILCS 5/57). The complaint seeks injunctive relief, costs and civil penalties. Motions to dismiss were timely filed by Amoco Oil Company (Amoco) on April 21, 1995; Oberweis Dairy, Inc. (Oberweis) on May 5, 1995; the Agency on April 24, 1995; Richard J. Fetzer (Fetzer) on May 11, 1995; and pursuant to an extension granted by the Board, Mobil Oil Corporation (Mobil) on May 12, 1995. On July 26, 1995, Mobil filed a motion for leave to amend it motion to dismiss, which the Board hereby grants. Additionally, our review of Fetzer's motion to dismiss shows that Fetzer appears to be moving for dismissal in his capacity of being held personally, and individually liable, rather than in his capacity as doing business as Serve-N-Save. Therefore, the only party to have not filed a motion to dismiss, or otherwise answer is Johnnie W. Ward. Further, no response has been filed by the Streits to any of the motions pending before the Board.

Though each motion to dismiss raises independent and various grounds for dismissal relative to each respondent, the motions, other than that of the Agency, all argue the complaint is factually and legally deficient pursuant to the Act (415 ILCS 31(a)) and the Board's procedural rules (35 Ill. Adm. Code Section 103.122(c)), is therefore frivolous and should be dismissed. The Agency's motion seeks to have the Agency dismissed as a party-respondent on the basis that the complaint is in actuality, asking the Agency to perform an investigation of the property at issue.

For the reasons explained in this order, we hereby deny the motions to dismiss filed by Amoco, Oberweis, Fetzer and Mobil and grant the Agency's motion to dismiss itself out as a respondent. Additionally we find, as we are required to do pursuant to Section 31(b) of the Act, that this matter is neither frivolous or duplicitous. Amoco, Oberweis, Fetzer and Mobil may answer the complaint within 30 days from service of this order and we set this matter for hearing.[1]

BACKGROUND

This case involves the drinking water source of three residential properties owned and occupied by the Streits and which are located at 1003, 1009 and 1011 North Lake Street, Aurora, Illinois. The Streits allege that a natural spring which serves as the Streits drinking water source is contaminated and that the contamination was caused by one or more of the neighboring properties of the respondents: Amoco, Oberweis, Fetzer and Ward d/b/a Serve-N-Save or Mobil.

The Streits' property is adjacent to or within a three-block area of three sites owned currently by Amoco, Oberweis and Mobil. According to the allegations of the complaint, all three properties currently have or had USTs which sustained reportable releases of petroleum products. Amoco is located at 1120 North Lake Street (the Amoco site) and according to complaint sustained a reportable release of petroleum product from a UST sometime in 1991 which was prompted by an odor complaint and groundwater sampling (IESDA No. 91-0750). (Complaint at 3-4.) The complainants allege they have in their possession reports which indicate that due to the proximity of the Amoco site, migration from the Amoco release may have followed a public sewer or water main, to the edge of the Fox River.

Oberweis is located at 945 and 1011 North Lake Street (the Oberweis site) and is currently a dairy and retail ice cream store. (Complaint at 4-5.) The dairy is uphill and approximately 500 feet from the Streits and was once operated as a retail gas station by Fetzer and Ward d/b/a Serve-N-Save. (Complaint at 5.) Over time, eight heating oil, gasoline and diesel-containing USTs were located on the property, (four 3,000-gallon USTs, three 8,000-gallon UST and one 1100-gallon heating oil UST), though several USTs were removed which lead to the discovery of petroleum contamination which was reported, and for which Oberweis was at one time performing corrective action. (IESDA No. 91-1723). (Complaint at 5-6; Exhibit "D".) An

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[1]Since Ward has not answered the complaint or filed a motion to dismiss within the time allowed under our procedural rules, he is considered to have "denied" the allegations of the complaint. (35 Ill. Adm. Code Section 103.122(d).)

attachment to the complaint indicates that in 1991, the Agency had approved Oberweis' groundwater monitoring plan, though the current status of corrective action is either unknown, or according to the complainants, inactive.

Mobil is the owner/operator of certain USTs located at 1218 North Lake Street and according to the complaint, this property also sustained a reportable release (IESDA No. 92-1635) stemming from a tank removal. (Complaint at 4.) According to the complaint, Mobil is "currently under review for required replacement of monitor wells due to findings of groundwater contamination." (Complaint at 7.)

The Streits allege that their residential properties have never been used for commercial purposes, have no underground storage tanks, and that up until 1991, their drinking water sources were a spring located at 1009 North Lake Street and a deep water well, and that these were "potable water supplies" (within the meaning of the Illinois Water Well Construction Code). (Complaint at 5 and 8.) After sometime in 1991, which is the same time frame in which the neighboring Amoco, Oberweis and Mobil sites experienced UST releases, the Streits' drinking water sources became contaminated with unlawful concentrations of petroleum products. (Complaint at 7). The City of Aurora has provided an alternative source for potable water for the Streits; however, the Streits allege that pursuant to the Illinois Water Well Construction Code, this is the responsibility of the owner/operator who is the source of the potential contamination.

Regarding Oberweis and Fetzer, the complaint specifically alleges these respondents are in violation of Section 22.18(A), now Section 57.1(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. (Complaint, at 8, par. 25(a).) The complaint also alleges that respondents violated Section 22.18(A) for failing to register the USTs. (*Id.*, par. 25(b).) Finally, the complaint alleges respondents are in violation of Section 57.7 (sic.) (Section 57.12 contains the majority of these alleged violations), for costs and damages incurred by the State, the complainants, the costs of remediation and restoring a potable water supply. Regarding Amoco and Mobil, the complaint alleges that if after an investigation occurs, and the source of the contamination is shown to be Amoco or Mobil, that the Board find Amoco or Mobil similarly in violation of the Act and liable for costs.

APPLICABLE PROVISIONS OF THE ACT AND REGULATIONS GOVERNING THE MOTION TO DISMISS

Specifically, the Act and our rules governing the factual and legal sufficiency of a citizens' enforcement complaint provide:

Section 31(a) of the Act[2]:

> The complaint *** shall specify the provision of this law or the rule or regulation or permit or term or condition thereof under which such person is said to be in violation, and a statement of the manner in, and the extent to which such person is said to violate this law or such rule or regulation or permit or term or condition thereof ***.

Section 103.122(c) of the Board's Procedural Rules:

(c) The formal complaint shall contain:

(1) A reference to the provision of the Act and regulations which the respondents are alleged to be violating;

(2) The dates, location, events, nature, extent, duration, and strength of discharges or emissions, and consequences alleged to constitute violations of the Act and regulations. The complaint shall advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense; and

(3) A concise statement of the relief which the complainant seeks.

AMOCO, OBERWEIS, FETZER AND MOBIL MOTIONS TO DISMISS

Amoco, Oberweis, Fetzer and Mobil each argue that the complaint is factually and legally deficient to the extent that it fails to put the parties on notice of the defense they must construct, and that it fails to satisfy the requirements of the

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[2]Section 31(b) of the Act provides: Any person may file with the Board, a complaint, meeting the requirements of subsection (a) of this Section, against any person allegedly violating this Act or any rule or regulation thereunder or any permit or term or condition thereof. The complainant shall immediately serve a copy of such complaint upon the person or persons named therein. Unless the Board determines that such complaint is duplicitous or frivolous, it shall schedule a hearing and serve written notice thereof upon the person or persons named therein, in accord with subsection (a) of this Section.

Act and the Board's procedural rules. These respondents all argue the complaint contains vague references to the violations at issue (Section 103.122(c)(1)), limited factual allegations regarding the manner, and the extent to which each respondent has violated the Act or regulations (Section 103.122(c)(2)), and contains a legally insufficient prayer for relief because the Board is neither authorized to order the respondents to require corrective action, reimburse complainants' corrective action costs, or to order relief under the Illinois Water Well Construction Code.

Additionally, Amoco and Mobil claim that the complaint does not specifically state that either Amoco or Mobil are allegedly in violation of the Act, but only infers an alleged liability which might result from an investigation: The complaint states:

> ***if the investigation of the migration pathway reveals that the source of contamination on the Streit property is the Amoco site or the Mobil site, then Amoco or Mobil is liable for all costs of corrective action and preventative actions as above described and the damage, injury and loss incurred by the Complainants and costs of remediating the threat to human health and the threat to potable water supply as above described. (Complaint, at par. 26.)

Two of the respondents, Oberweis and Fetzer, further argue that this case should be dismissed because the Streits have attempted to pursue relief in circuit court and the Streits have voluntarily dismissed the case because they themselves recognize the difficulty in proving the source of petroleum contaminating the complainants' drinking water source. In support, the respondents point to the complaint before the Board which states:

> The Complainants have sought to recover damages from certain of the parties believed responsible, including Oberweis Diary, Inc. and Fetzer, and others, but have dismissed or will dismiss their action in the civil court because of the difficulty and expense of obtaining investigative proof of the migration pathway and tracing the contamination to a definite source. (Complaint at par. 20.)
>
> *** It is geologically possible that neither of the three sites is the actual source, but that cannot be determined without further investigation of migration pathway. (Complaint at par. 21.)

Additionally, the respondents object to this case going forward if the case will require the respondents having to expend resources to prove the complainants' case before the Board, especially when a case could not be adequately made in circuit

court. (Amoco Motion at 7; Oberweis Motion at 3-4; and Fetzer at 5.)

DISCUSSION

We hereby deny the motions to dismiss on the basis that the allegations of the complaint are sufficient to warrant a hearing on the facts. We believe the complaint sufficiently states a cause of action. At a minimum, pursuant to Section 57.1(a) of the Act, if the respondents meet the definitions of the Title XVI: Petroleum Underground Storage Tanks, they are required to "conduct correction (sic.) action in accordance with the requirements of the Leaking Underground Storage Tank Program" (415 ILCS 5/57.1(a)). If the parties have failed to conduct corrective action pursuant to Title XVI, this would constitute violation of Section 57.1(a). We do not believe it is necessary to allege violations of the general prohibitions against pollution in the Act (Sections 12 and 21) in order to bring a private citizens' enforcement action in response to leaking USTs.

We also disagree that the facts are insufficient to put the parties on notice of the defense that they must muster for this case. It is clear that there is a source of contamination adversely affecting the Streits' water supply. The complainants have alleged that prior to 1991, the Streits had a spring which served as their potable water source, and that after 1991, the water became contaminated, and remains contaminated with petroleum. The complaint further alleges that the Amoco, Oberweis and Mobil properties, are all within a three-block proximity to the Streit property (the Oberweis site being uphill) and they have all experienced reported releases of petroleum into the environment from USTs, releases which are all alleged to have occurred within the same time frame that the Streit's water source became undrinkable. Moreover, the respondents do not dispute that the reported releases of petroleum occurred, and importantly, the respondents do not dispute the complaint's allegations that all three properties have at one time been required by the State to perform groundwater monitoring.

If the complainants meet their burden of proof using their own experts' reports and evidence that have been admitted to the record, any discoverable information or information resulting from an FOIA request, we are clearly authorized under the Act to make a determination regarding liability for violating of the Act and "necessarily the power to order compliance with the Act." (*Discovery South Group, Ltd. Music Center Associates Ltd. and Tinley Park Jam Corp. v. IPCB and the Village of Matteson*, No. 1-93-1438 (1st Dist. August 28, 1995), *slip op. at 20, citing, Kaeding v. IPCB* (1974), 22 Ill. App. 3d 36, 38, 316 N.E.2d 788.) Consequently, we are authorized to award relief under the Act which may include a compliance plan governing any necessary investigation or corrective action, and compliance with Illinois' UST program. (*See Id.* at 18 ("Illinois decisions reflect the

generally acknowledged authority of the Board to take whatever steps are necessary to rectify the problem of pollution and to correct instance of pollution on a case-by-case basis.")) Such relief may also include providing an alternative drinking water source, reimbursing any costs incurred by the complainants in performing corrective action (*see Lake County Forest Preserve Dist. v. Ostro, Ostro and Big Foot Enterprises,* (June 2, 1994) PCB 92-80) and awarding civil penalties to be paid to the Illinois Environmental Protection Trust Fund.

We hereby deny the motions to dismiss filed by Amoco, Oberweis, Fetzer and Mobil. These respondents may answer the complaint within 30 days of service of this order.

THE AGENCY'S MOTION TO BE DISMISSED AS A PARTY

Essentially, the Agency argues that it should not be a party to this proceeding because this is a dispute between private parties. To the extent that the complainants are seeking that the Board require the Agency to perform an investigative report regarding the allegations of the complaint pursuant to Section 30 of the Act, the Agency requests that it be dismissed as a party and deny the request for a Section 30 report.

At this time, we grant the Agency's motion to be dismissed from this proceeding, but do so on the basis that we believe that the Agency is not properly before us as a respondent in this matter. The Agency may only be a named respondent if the complainants are alleging that the Agency violated the Act. Such an allegation is absent here and therefore it is not appropriate for the Agency to continue to be a respondent to this private citizens' enforcement action. (*Landfill, Inc. v. IPCB*, (1978) 74 Ill.2d 541, 25 Ill.Dec. 602, 387 N.E.2d 258.)

However because we believe that either the parties themselves may be in possession of the evidence which will be determinative of the outcome of this case, or such evidence may be obtainable through discovery or an FOIA request, we reserve the right to request a Section 30 investigative report from the Agency or join the Agency as a necessary-party-in-interest. (*See International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and UAW Local 974; and Citizens for a Better Environment v. Caterpillar Inc.* (November 3, 1995) PCB 94-240; 35 Ill. Adm. Code 103.141 and 103.121(c).) This case involves three sites which ostensibly have been or are currently undergoing corrective action for UST releases under the supervision of the Agency, wherein one of the migratory pathways may have led off-site to neighboring parcels of property. While we understand the reasons why the Agency would argue against being a named respondent, we are confident that our sister agency will provide to the Streits, pursuant to their procedures, all public information in their possession relevant to this inquiry.

Such information could include, unless otherwise prohibited under the Freedom of Information Act, Agency investigation reports of the sites, groundwater monitoring reports, corrective action plans, etc. Similarly, during the course of discovery, we anticipate that any reports or expert opinions developed by the complainants regarding the Streits' property will be made available.

PROCEDURAL AND HEARING MATTERS

Frivolous and Duplicitous Standard

Pursuant to Section 31(b) of the Act and the Board's procedural rules, the Board must also make a determination as to whether the complaint is frivolous or duplicitous, and if the Board finds that the complaint is neither frivolous or duplicitous, the Board shall set the matter for hearing and assign a hearing officer. (415 ILCS 5/31(b) (1992); 35 Ill. Adm. Code 103.104.) For the reasons set forth above, we find that in this case, the complaint is not frivolous, nor do we find that this case is duplicitous of another matter currently pending in another forum. While there appears to be another matter that was pending in the circuit court of Kane County (L KA 92-0406), there is no allegation that this matter is currently pending, or that the parties view the Board complaint as failing the duplicitous standard under which we review citizen's enforcement actions. (*See Brandle v. Ropp,* (June 13, 1985), PCB 85-68, 64 PCB 263.)

Scheduling the Hearing

The hearing must be scheduled and completed in a timely manner consistent with Board practices. The hearing officer shall inform the Clerk of the Board of the time and location of the hearing at least 40 days in advance of hearing so that public notice of hearing may be published. After hearing, the hearing officer shall submit an exhibit list, a statement regarding the credibility of witnesses and all actual exhibits to the Board within five days of the hearing.

If after appropriate consultation with the parties, the parties fail to provide an acceptable hearing date of if after an attempt the hearing officer is unable to consult with the parties, the hearing officer shall unilaterally set a hearing date in conformance with the schedule above. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible.

IT IS SO ORDERED.

Board Member J.Theodore Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 7th day of September, 1995, by a vote of 6-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board