ILLINOIS POLLUTION CONTROL BOARD
February 15, 2001

UNION OIL COMPANY OF CALIFORNIA d/b/a UNOCAL,	)	
Complainant,	)	
v.	)	PCB 98-169
	)	(Enforcement – Citizens, UST)
BARGE-WAY OIL COMPANY, INC., GERTRUDE KELLOGG, and JOSEPH KELLOGG,	)	
Respondents.	)	

BARGE-WAY OIL COMPANY, INC.,	)	
Third-Party Complainant,	)	
v.	)	PCB 98-169
	)	(Enforcement – Citizens, UST)
ROBERT F. ATKINS, BARGEWAY SYSTEMS, INC., and ROBERT NIELSEN,	)	(Third-Party Complaint)
Third-Party Respondents.	)	

ORDER OF THE BOARD (by E.Z. Kezelis):

On January 30, 2001, the hearing officer issued an order summarizing a status conference held in this case. Among other things, the parties summarized the status of ongoing efforts by complainant to obtain reimbursement from the State's Underground Storage Tank Fund (UST Fund), as well as the fact that the parties had agreed to continue for six months the hearing previously scheduled in this matter for December 11, 2000. See January 30, 2001 hearing officer order. Finally, the parties noted that several potentially dispositive motions remain pending. Because rulings at this time from the Board might advance the resolution of this citizens' enforcement action, the Board addresses them below.

Two motions are before the Board. First, a motion for summary judgment and memorandum in support thereof was filed by Barge-Way Oil Company, Inc. (Barge-Way) on October 30, 2000. Union Oil Company of California d/b/a UNOCAL (UNOCAL) filed its response to the motion on November 6, 2000, and Barge-Way sought leave to file a reply

memorandum on November 15, 2000.[1] In its motion, Barge-Way argues that it is entitled to summary judgment because UNOCAL failed to initiate its claim within the applicable statute of limitations.

The second motion concerns an amended third-party complaint filed on October 10, 2000, by third-party complainant Barge-Way against third-party respondents, Robert F. Atkins (Atkins), Bargeway Systems, Inc. (BSI), Robert Nielsen (Nielsen), and Tom Biggers (Biggers). On November 15, 2000, BSI and Atkins moved for leave to file a dispositive motion as to the third-party complaint and also filed a motion to dismiss for lack of jurisdiction. Barge-Way filed a response to the motion to dismiss on November 27, 2000.

For the reasons described below, the motion for summary judgment is denied. The motion for leave to file the motion to dismiss the third-party complaint is granted and the motion to dismiss is denied. Finally, the Board finds that the third-party complaint is neither duplicitous nor frivolous, and accepts it for hearing. The caption of today's order is consistent with the decision of the Board in this matter.

MOTION FOR SUMMARY JUDGMENT

Barge-Way's Motion for Summary Judgment

Barge-Way argues that it is entitled to summary judgment because UNOCAL failed to file its claim within the applicable statute of limitations.

Barge-Way correctly points out that the Board has already concluded that, pursuant to Section 13-205 of the Code of Civil Procedure (735 ILCS 5/12-205 (1998)), the statute of limitations applicable to this case is five years. See Union Oil Company of California d/b/a UNOCAL v. Barge-Way Oil Company, Inc. (January 7, 1999), PCB 98-169.

Barge-Way alleges that in response to a request from UNOCAL, environmental consultants Woodward-Clyde provided a "limited environmental report" to UNOCAL which indicated the presence of petroleum hydrocarbons in the soil at the site which is the subject of this cost recovery action (site). S.J. Memo. at 6. Additionally, Barge-Way alleges that Woodward-Clyde recommended to UNOCAL, in November 1989, that additional investigation was needed in order to determine the location of any tanks and any possible uncontrolled petroleum releases. *Id*. Barge-Way alleges that UNOCAL's response to Woodward-Clyde rejected the recommendation for further investigation. *Id*.

Barge-Way includes excerpts from the deposition testimony of Dr. Paul Lundegard, a consultant allegedly employed by UNOCAL, in which Lundegard testifies that the Woodward-

[1] Barge-Way's memorandum shall be referred to as "S.J. Memo. at __." UNOCAL's response shall be referred to as "S.J. Resp. at __." Barge-Way's reply memorandum shall be referred to as "S.J. Reply at __."

Clyde investigation report indicated the presence of petroleum hydrocarbons in the subsurface water at the site. S.J. Memo. at 7.

UNOCAL originally filed suit against Barge-Way and others in DuPage County Circuit Court on April 26, 1995. S.J. Memo at 8. Barge-Way alleges that this was more than five years after UNOCAL was aware of the contamination at the site. *Id*. Furthermore, Barge-Way argues that the initial April 26, 1995 complaint did not include any allegations regarding water contamination. *Id*. According to Barge-Way, it was not until its fifth amended complaint, filed on May 12, 1997, that UNOCAL raised the water pollution allegations in its complaint. S.J. Memo. at 9.

Barge-Way argues that UNOCAL knew or should have known of the contamination at the site and the "injury" it suffered by at least January 1990. S.J. Memo. at 10. Accordingly, Barge-Way argues that the claims contained in the present complaint are barred by the five-year statute of limitations. S.J. Memo. at 12.

Barge-Way also argues that UNOCAL's alleged failure to raise the claims within the applicable limitations period has prejudiced it because "several potential witnesses cannot be located or are dead and . . . numerous documents no longer exist." S.J. Memo. at 12.

UNOCAL's Response to the Motion for Summary Judgment

UNOCAL opposes Barge-Way's motion for summary judgment. UNOCAL argues that it had reasonably relied on its experts, who found no contamination in excess of Illinois Environmental Protection Agency (Agency) limits in 1990. It also argues that its cause of action did not accrue until August 1991, when UNOCAL learned, during the course of excavation by others, that the level of petroleum hydrocarbons at the site exceeded Agency cleanup standards. S.J. Resp. at 1. UNOCAL argues that because there is a disputed fact as to when its cause of action actually accrued, summary judgment against it is not appropriate. *Id*.

Barge-Way's Motion for Leave to File Reply Memorandum and Barge-Way's Reply Memorandum

Barge-Way's motion for leave to file a reply memorandum fails to specify any reason why a reply memorandum should be allowed. Barge-Way merely seeks leave to file a reply without justification. Nevertheless, having reviewed the reply, the Board finds that substantial issues are addressed in the reply that warrant granting Barge-Way's request for leave. Accordingly, Barge-Way's reply is hereby accepted for the Board's review in this matter.

In its reply, Barge-Way emphasizes several points. First, Barge-Way argues that UNOCAL's response is deficient in that UNOCAL has failed to come forward with any facts suggesting that it could not have known or reasonably known of the contamination at the site in

January 1990. S.J. Reply at **. Second, Barge-Way argues that the "discovery rule"[2] dictates that UNOCAL had sufficient facts available to it in January 1990, so that UNOCAL knew or should have known of the actionable contamination at the site. S.J. Reply at 4. Finally, Barge-Way also argues generally that it was prejudiced by UNOCAL's delay in filing suit.

In support of its argument that the undisputed facts support a finding that UNOCAL knew or should have known of the presence of actionable contamination caused by another in January 1990, Barge-Way cites two Seventh Circuit cases. In the first, McWane Inc. v. Crow Chicago Industrial, Inc., 224 F.3d 582 (7th Cir. 2000), the court upheld the grant of summary judgment on statute of limitations grounds.

The court in McWane recognized that the statute of limitations begins to run when the "injury could have been discovered through the exercise of appropriate diligence." McWane, 224 F.3d at 585. The court in McWane also recognized that "[w]hen it becomes apparent from the undisputed facts that only one conclusion can be drawn, it is a question for the court." *Id.*, citing Witherell v. Weimer, 85 Ill. 2d 146, 421 N.E.2d 869 (1981).

Second, Barge-Way also relies upon the reasoning in Vector-Springfield Properties, Ltd. v. Central Illinois Light Company, Inc., 108 F.3d 806 (7th Cir. 1997). In Vector-Springfield, the court identified a "threshold" involving when an "injured person becomes possessed of sufficient information concerning his injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved." Vector-Springfield, 108 F.3d at 809, citing Hermitage Corp. v. Contractors Adjustment Co., 166 Ill. 2d 72, 651 N.E.2d 1132 (1995) and Knox College v. Celotex Corp., 88 Ill. 2d 407, 430 N.E.2d 976 (1981). The factual question in the case at hand is whether this "threshold" was crossed in January 1990 or not until August 1991.

Application of the reasoning of these two cases to the present set of facts leads the Board to two possible conclusions; UNOCAL should reasonably have been aware of actionable contamination in January 1990, or not. The inferences to be drawn from the allegedly undisputed facts can support either conclusion. When the possible inferences are viewed in light of the burden imposed on the party moving for summary judgment, the Board finds that Barge-Way is not entitled to summary judgment, and that this matter should proceed to hearing.

Summary judgment is appropriate when the pleadings and depositions, together with any affidavits and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 693 N.E.2d 358 (1998). In ruling on a motion for summary

[2] The "discovery rule" provides that a statute of limitation begins to run not on the date that an injury actually occurred, but on the date that the injured person knew or reasonably should have known of the injury and that the injury was wrongfully caused. See Hermitage Corp. v. Contractors Adjustment Co., 166 Ill. 2d 72, 651 N.E.2d 1132 (1995).

judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370.

Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief, "is clear and free from doubt." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

In order to grant Barge-Way's motion for summary judgment, we must find that there is no genuine issue of material fact and that the undisputed facts show that Barge-Way's right to the relief requested is "clear and free from doubt." See Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Purtill, 111 Ill. 2d at 240, 489 N.E.2d at 871. The Board finds that Barge-Way has failed to satisfy its burden of demonstrating that there is no genuine issue of material fact as to when UNOCAL knew or reasonably should have known of the existence of actionable contamination at the site. Although Barge-Way's arguments in reply are well-crafted and facially appealing, we conclude that the matter is not clear and free from doubt.

The Board is confident that if additional evidence exists regarding the state of UNOCAL's knowledge or its alleged obligation to aggressively pursue additional study in January 1990, Barge-Way will present it at hearing. However, because the information currently available to the Board reveals that two opposing interpretations could be drawn, Barge-Way is not clearly entitled to judgment in its favor. Accordingly, Barge-Way's motion for summary judgment is denied.

THIRD-PARTY COMPLAINT

As previously stated, Barge-Way filed an amended third-party complaint against Atkins, BSI, Nielsen, and Biggers on October 10, 2000. Briefly, Barge-Way alleges that the third-party respondents exercised control over the site during a portion of the period in question and that through their activities at the site, caused or allowed the violations that UNOCAL is now asserting against Barge-Way. Accordingly, Barge-Way alleges that the third-party respondents should be held liable to it for any response costs awarded UNOCAL in the underlying complaint.

MOTION TO DISMISS

Motion for Leave to File Dispositive Motion as to Third-Party Complaint

BSI and Atkins seek leave to file a dispositive motion after expiration of the time permitted in the Board's procedural rules for the filing of responsive pleadings. They argue that a motion to dismiss which challenges the jurisdiction of the Board may be filed at any time. Furthermore, BSI and Atkins argue that no party will be unduly prejudiced by the

Board's considering of this motion. Conversely, if the Board refuses to hear the jurisdictional challenge and the jurisdictional issue is raised and sustained on appeal, then "these proceedings will be a nullity, and a considerable waste of the adjudicatory resources of this Board." Mot. for Leave at 2.

Motion to Dismiss Third-Party Complaint for Lack of Jurisdiction

In their motion to dismiss[3], BSI and Atkins argue that the Board lacks jurisdiction over the amended third-party complaint because the Board allegedly lacks the authority to hear and determine complaints seeking indemnification. Mot. to Dism. at 2. BSI and Atkins argue that the relief requested by Barge-Way is different from the relief that the Board may grant in a situation where the allocation of appropriate costs is to be determined amongst those responsible for the pollution. *Id*. at 2. BSI and Atkins argue that what Barge-Way is seeking is the Board's enforcement of a written agreement between Barge-Way and BSI, and that the Board cannot grant this relief. BSI and Atkins do not cite to any legal authority or Board precedent for their arguments.

Barge-Way's Response to Motion for Leave and Motion to Dismiss

First, Barge-Way argues that the Board should deny the request for leave to file a dispositive motion. Barge-Way argues that Section 103.140(a) of the Board's procedural rules (35 Ill. Adm. Code 103.140(a)) governs the filing of motions challenging the Board's jurisdiction and that the motion is untimely. Resp. Br. at 3. Additionally, Barge-Way argues that BSI and Atkins have failed to demonstrate how denial of their motion for leave would result in material prejudice. Resp. Br. at 4. According to Barge-Way, not only have they failed to show material prejudice, but Barge-Way also alleges that they have failed to give a good explanation for the delay in the filing of this request. *Id*.

In the event, however, that the Board does entertain the substantive issues presented in the motion to dismiss, Barge-Way argues that that motion should also be denied. Barge-Way argues that the issues raised in the motion to dismiss have already been addressed in this and other Board cases. Resp. Br. at 4-5. Specifically, Barge-Way cites to a recent Board decision in People v. State Oil Company (August 19, 1999), PCB 97-103, in which the Board examined at length various issues arising from the filing of a cross-complaint before permitting it to proceed.

Barge-Way also relies on the Supreme Court decision in People v. Brockman, 143 Ill. 2d 351, 574 N.E.2d 626, 633 (1991), where the court stated, "where a defendant properly states a claim for contribution, indemnification, or any other cause of action which supports derivative liability, that claim may be properly joined," with a primary action under the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq*. (1998)). Resp. Br. at 5. Therefore, Barge-Way argues that even if its claims could not have been brought in an original

[3] The motion to dismiss shall be referred to as "Mot. to Dism. at __." Barge-Way's response shall be referred to as "Resp. Br. at __."

complaint under the Act, they are, nevertheless, the proper subject of a third-party complaint. *Id*. at 5-6.

DISCUSSION

For the reasons expressed herein, the Board finds that the subject matter of the amended third-party complaint is properly joined, and that the precedent examined in People v. State Oil should be followed here. While no predecessor circuit court case like that discussed in People v. State Oil exists here, the underlying jurisdictional principles apply with equal force here. The Board has exclusive jurisdiction over private enforcement actions under the Act, except in cases in which the State is the original plaintiff. People v. State Oil, PCB 97-103, slip op. at 7. Where, as here, a party respondent seeks indemnification from others in an enforcement action, the comprehensive regulatory scheme established by the Act recognizes it is best served by permitting such actions to proceed before the Board. Moreover, such an outcome serves judicial economy, inhibits forum shopping, and helps protect against inconsistent decisions. For these reasons, the motion to dismiss the amended third-party complaint is denied.

DUPLICITOUS/FRIVOLOUS DETERMINATION

Section 103.124 of the Board's procedural rules (35 Ill. Adm. Code 103.124) directs the Board to determine whether or not a citizen's enforcement complaint is duplicitous or frivolous. Section 103.124 implements Section 31(b) of the Act (415 ILCS 5/31(b) (1998)).

For the reasons stated below, the Board finds that the third-party complaint filed by Barge-Way against Atkins, BSI, Nielsen, and Biggers is neither duplicitous nor frivolous, and therefore accepts it for hearing.

Duplicitous

An action before the Board is duplicitous if the matter is identical or substantially similar to one brought in another forum. 35 Ill. Adm. Code 101.200; Brandle v. Ropp (June 13, 1985), PCB 85-68.

The Board has not identified any other cases, identical or substantially similar to this, pending in this or any other forum. Therefore, based on the record before us, this case is not duplicitous.

Frivolous

An action before the Board is frivolous if it requests relief that the Board cannot grant. 35 Ill. Adm. Code 101.200; Lake County Forest Preserve Dist. v. Ostro (July 30, 1992), PCB 92-80.

In the third-party complaint, Barge-Way appears to allege violations of Sections 12(a) and (d) of the Act (415 ILCS 5/12(a), (d) (1998)), and then seeks contribution from all third-party respondents and indemnification from Atkins. Barge-Way seeks to have the Board order the following relief: (1) order the third-party respondents to pay an amount equal to the amount of response costs which are attributable to Barge-Way in the underlying complaint; (2) order the third-party respondents to pay any interest that is assessed thereon; and (3) order the third-party respondents to pay any costs and fees associated with this proceeding and with the proceeding filed in DuPage County Circuit Court.

With the exceptions noted herein, the Board finds that Barge-Way has alleged sufficient facts, which if proven, would result in a finding of violation for which the Board could grant relief.

The exception to this finding is in Barge-Way's request for an award of costs and fees associated with this and the DuPage County court case. The Board has previously held that Section 42(f) of the Act allows for an award of attorneys fees and costs only in cases in which the Attorney General or a State's Attorney prevail on behalf of the People of the State of Illinois. See 415 ILCS 5/42(f) (1998); see also Universal Scrap Metals, Inc. v. Flexi-Van Leasing, Inc. (May 20, 1999), PCB 99-149 and Charter Hall Homeowner's Ass'n v. Overland Transportation System, Inc. (January 22, 1998), PCB 98-81. Furthermore, the Board has no authority to award costs associated with the DuPage County Circuit Court case. Accordingly, the Board strikes those portions of the third-party complaint in which Barge-Way seeks an award of costs.

For the reasons set forth herein, the Board finds that pursuant to Section 103.212(a), the third-party complaint, with the aforementioned exception, is neither duplicitous nor frivolous, and is accepted for hearing.

The hearing must be scheduled and completed in a timely manner consistent with Board practices and in light of the parties' agreed continuance pending completion of the claim for reimbursement from the State's UST Fund. The Board has assigned a hearing officer to conduct the hearings consistent with this order and with the Board's procedural rules.

The assigned hearing officer shall inform the Clerk of the Board of the time and location of the hearing at least 30 days in advance of hearing so that 21-day public notice of hearing may be published. After hearing, the hearing officer shall submit an exhibit list, a statement regarding credibility of witnesses, and all actual exhibits to the Board within five days of the hearing.

Any briefing schedule shall provide for final filings as expeditiously as possible. If, after appropriate consultation with the parties, the parties fail to provide an acceptable hearing date or if, after an attempt, the hearing officer is unable to consult with all of the parties, the hearing officer shall unilaterally set a hearing date. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible.

Finally, because the docket reflects that Biggers' whereabouts are unknown and that he has not been served in this matter, he is dismissed from this docket.

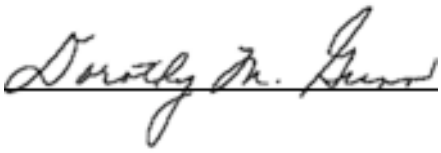
CONCLUSION

For the foregoing reasons, the Board denies the motion for summary judgment. The Board also denies third-party respondents' motion to dismiss, accepts the third-party enforcement case, with the noted exception, as neither duplicitous nor frivolous, and orders the case proceed to hearing under the direction of the Board's previously assigned hearing officer.

IT IS SO ORDERED.

Board Member R.C. Flemal dissented

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 15th day of February 2001 by a vote of 6-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board