

ILLINOIS POLLUTION CONTROL BOARD
November 4, 1993

ROBERT MIEHLE,)
)
 Complainant,)
)
 v.) PCB 93-150
) (Enforcement)
 CHICAGO BRIDGE AND)
 IRON COMPANY,)
)
 Respondent.)

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

This matter is before the Board pursuant to a two-count complaint filed August 18, 1993 by Robert Miehle (Miehle) against Chicago Bridge and Iron Company (CBI), located in Chicago, Cook County, Illinois. The complaint alleges that respondent violated 415 ILCS 5/21(e) of the Environmental Protection Act (Act) in that respondent disposed or abandoned waste at a facility which does not meet the requirements of the Act, and 35 Ill. Adm. Code Section 731.160, in that respondent failed to undertake corrective action regarding an alleged release of petroleum from underground storage tanks (USTs).

On September 10, 1993, CBI filed a motion to dismiss the complaint and a memorandum of law in support of the motion pursuant to 35 Ill. Adm. Code Section 101.243 on essentially two bases: (1) the Board does not have jurisdiction over the complaint; and (2) the complaint is substantially insufficient in law. Miehle filed a response to the motion to dismiss on October 4, 1993.

After consideration of the issues raised by the motion, for the following reasons, the Board hereby denies the motion to dismiss and accepts this case for hearing.

The Complaint

Count I - Violation of 35 Ill. Adm. Code Section 731.160

Count I alleges CBI was the "owner" or "operator" of "property" located at 1357 West 105th Street in Chicago, Illinois until approximately April 4, 1986, (Complaint, at 1) and that during CBI's "ownership," "numerous" USTs were located on-site and contained petroleum and/or heating oil. (Id.) The complaint states that CBI is the last party to have operated or otherwise "used" the USTs (Id.) and the tanks were no longer in use on November 4, 1984.

Without explaining how the release was discovered, the complaint alleges a laboratory analysis was performed on April 28, 1993, on soil samples from the 1357 West 105th Street site and the analysis "confirmed" a release of petroleum from the USTs. (Id. at

2.) The complaint does not indicate from which USTs the petroleum release is alleged to have occurred.

Count I also alleges Miehle contacted CBI notifying respondent of the releases of petroleum from the USTs. (Id.) According to Miehle, CBI responded by "disclaiming status as owner or operator of the USTs and effectively refusing to undertake corrective action." (Id.)

The Count I prayer for relief requests that the Board find CBI is the "owner" and "operator" of the USTs; that CBI failed to undertake corrective action in violation of 35 Ill. Adm. Code 731.160; that CBI pay a civil penalty of \$50,000 for each violation and an additional civil penalty of \$10,000 for each day the violations continue; and that the Board direct CBI to cease and desist from further violation of the Act¹ and to undertake corrective action of the petroleum releases.

Count II - Violation of Section 21(e) of the Environmental Protection Act

Count II realleges the paragraphs of Count I and in addition, asserts a violation of 415 ILCS 5/21(e), "which makes it a violation of the Environmental Protection Act to dispose or abandon any waste at a site which does not meet the requirements of the Act." (Id. at 3.) Count II concludes, by "respondent's failure to clean-up, remove or reclaim petroleum from underground storage tanks, in soils at the above-referenced [site], respondent has disposed of or abandoned a waste at the above-described facility." (Id.) Without any description, it is Miehle's claim the facility at 1357 West 105th Street in Chicago does not meet the requirements of the Act. (Id.)

The Count II prayer for relief requests that the Board find CBI violated 415 ILCS 5/21(e); that CBI pay a civil penalty of \$50,000 for each violation and an additional civil penalty of \$10,000 for each day the violations continue; and that the Board direct CBI to cease and desist from further violation of the Act and to undertake "clean up" of the petroleum releases.

Motion to Dismiss

(1) The Board is Without Jurisdiction

CBI filed a motion to dismiss and a memorandum of law in support, pleading that the Board does not have jurisdiction to order an "owner" or "operator" of USTs to conduct release

¹Count I does not allege a violation of the Act; but instead alleges a violation of 35 Ill. Adm. Code Section 731.160.

investigation, site assessment or, in this case, corrective action, unless a prior enforcement action has been brought before the Office of the State Fire Marshal (OSFM). (Motion to Dismiss at 1, citing, North Oak Chrysler Plymouth v. Amoco Oil Co., (April 4, 1992) PCB 91-214, PCB .) It is CBI's position that P.A. 87-323, effective September 6, 1991, divided jurisdiction between the OSFM and the Board, giving the Board jurisdiction only over corrective action requirements applicable to owners and operators required to undertake corrective action by the OSFM. According to CBI, the Board is authorized to promulgate regulations only for corrective action, while the OSFM promulgates regulations defining owner or operator or certifying a release. The OSFM is responsible for promulgating regulations pursuant to Section 22.4(d)(3), which provides:

"Corrective action shall not include requirements providing for design, construction, installation, general operation, release detection, release reporting, release investigation, release confirmation, out-of-service systems and their closure or financial responsibility."
(415 ILCS 5/22.4(d)(3).)

CBI argues the Board is limited to promulgating regulations for UST corrective action beyond Section 22.14(d)(3) and that because of this distinction between the Board and the OSFM's authority, neither the Agency nor a private citizen, such as is the case here, may bring a claim before the Board that a UST owner violated 35 Ill. Adm. Code Section 731.160, until such time as the OSFM has confirmed a release.

In support of the proposition that the Board is without authority to order CBI to commence "corrective action" or "clean up" the site, and generally that P.A. 87-323 limits the Board's jurisdiction, CBI points to the Board's opinion and order in In the Matter of UST Update, R91-14 (January 9, 1992). In that opinion the Board stated:

We suggest that another problem with the current scheme is that there appears to be no real enforcement potential before the Board, except for failure of the operator to properly execute the corrective action plan, even for intentional violation of the design and operating requirements. For example, an operator could intentionally design a tank in violation of the regulations, operate it in a reckless manner so as to cause a release, and then fail to report [the release]. So long as the operator (after being caught) complied

with]² the corrective action requirements of Subpart F; there would be no possibility of enforcement before the Board. Moreover, if the operator failed to comply with Subpart F, Board enforcement would be limited to enforcement of the "paperwork" requirements of that Subpart. There would be no opportunity to enforce for the pollution incident itself or the underlying design and operation violations which cause the release. (In the Matter of: UST Update USEPA Regulations (1/1/91 - 6/30/91), (January 9, 1992) R91-14, 129 PCB 151, 155 (Footnote added).)

Based on this quotation, CBI makes the argument that before Miehle can allege that CBI violated "the detailed procedural requirements applicable to those parties who were required to undertake corrective action, the OSFM (not the Board) must find (1) CBI is an owner or operator, and (2) that CBI failed to "begin corrective action in accordance with 40 CFR 280, Subpart F, incorporated by reference in Section [41 Ill. Adm. Code] 170.410." (See 41 Ill. Adm. Code Section 170.580(b)(2).)

(2) The Complaint is Insufficient in Law

The motion to dismiss and memorandum further argue that the complaint is insufficient at law to state a claim for relief. First CBI asserts that the complaint fails to state a claim for declaratory relief because CBI fails to allege any fact that indicates Miehle has an interest in the outcome of the litigation. CBI cites to Underground Contractors Ass'n v. City of Chicago, (1977) 66 Ill.2d 371, 376, 362 N.E.2d 29, for the proposition that it is "fundamental that any claim, including one for declaratory judgment, must contain an allegation which demonstrates that a party is 'interested in the controversy.'" (Memorandum at 8, quoting, Underground Contractors, 362 N.E.2d at 301.)

The motion to dismiss and memorandum also argue the complaint is insufficient at law to state a claim for declaratory relief because Miehle fails to allege the "source" of the purported contamination. (Memorandum at 8.) CBI argues that the complaint concludes that "[a] laboratory analysis of soil samples at the above-described site confirmed a release of petroleum from the USTs." (Id. quoting, complaint at par. 7.) However, the report does not reach this conclusion, but instead fails to indicate the source. (Id.) CBI cites to Outboard Marine v. James Chisholm & Sons, Inc., (2nd Dist. 1985) 113 Ill.App.3d 238, 478 N.E.2d 651 for the proposition that "although a motion to dismiss admits well-

²Bracketed language appears in the text of the Board's opinion and order in R91-14 on page 5, but was omitted in the quotation of the opinion cited in CBI's memorandum. (Memorandum at 3-4.)

pleaded facts, it does not admit unsupported conclusions of law or fact; nor does it admit facts which contradict facts contained in an exhibit." (Id. citing, Outboard Marine, 478 N.E.2d at 656.)

DISCUSSION

Standard to be Applied on a Motion to Dismiss

CBI filed the motion to dismiss in this matter pursuant to 35 Ill. Adm. Code Section 101.243, Motions Attacking Jurisdiction or Sufficiency of the Pleadings, which provides:

- a) All motions to strike or dismiss challenging the sufficiency of any pleading shall be filed within 21 days after the service of the challenged document, unless the Board determines that material prejudice would result....
- b) All motion challenging the jurisdiction of the Board shall be filed prior to the filing of any other document by the moving participant or party unless the Board determines that material prejudice will result....

It is well-settled that proceedings before the Board are governed by the Board's procedural rules rather than the Illinois Code of Civil Procedure. (Village of South Elgin v. Waste Mgt of Illinois, Inc., (1978) 64 Ill.App.3d 565, 381 N.E.2d 778, 21 Ill.Dec. 451.) However, Section 101.100(b) of the Board's procedural rules allows that in the absence of a specific rule to govern a particular situation, the parties may argue that the Code (or the Illinois Supreme Court Rules) applies. (35 Ill. Adm. Code Section 101.100(b).) Our procedures do not articulate standards upon which to decide a motion to dismiss; therefore, we will determine the instant motion by the same principles applied to Illinois Code of Civil Procedure 2-615 and 2-619 motions to strike or dismiss. (735 ILCS 5/2-615 and 5/2-619.) It is axiomatic that the trial court must take all well-pleaded allegations in the complaint as true, (Import Sales v. Continental Bearings, (1st Dist. 1991) 217 Ill.App.3d 893, 577 N.E.2d 1205, 160 Ill.Dec. 634, 639) and a complaint should not be dismissed unless it clearly appears that no set of facts could be proven that would entitle a plaintiff to relief (Callaizakis v. Astor Development Co., (1st Dist. 1972) 4 Ill.App.3d 163, 280 N.E.2d 512). The Board will consider the instant motion to dismiss by the same criteria.

Count I - Violation of 35 Ill. Adm. Code Section 731.160

Jurisdiction

CBI's main argument against the Board's allowing Count I to go forward is that the Board is without the statutory authority to enter an order finding a violation of Section 731.160 and order the respondent to perform corrective action without there first being an "enforcement action" before the OSFM. On this issue, CBI and Miehle have cited North Oak, In the Matter of UST Update, USEPA Regulations (1/1/91 - 6/30/91), (January 9, 1992) R91-14, 129 PCB 149, and AKA Land, Inc. v. IEPA (March 14, 1991) PCB 90-177, 120 PCB 35. However, the Board has issued an order on this identical issue when deciding a motion to dismiss and motion for summary judgment in Mandel v. Kulpaka, (July 30, 1992) PCB 92-33, PCB _____.

In Mandel, on a motion to dismiss, we struck the portion of the complaint alleging a violation Section 731.160 on the basis that it is the "confirmation of a release that imposes the requirements of Section 731.160 on the owner or operator." (Mandel, Slip Op. at 11.) Though not expressly stated as such in Mandel, the Board need not wait for a prior enforcement action before the OSFM. The Environmental Protection Act (Act) confers jurisdiction upon the Board to entertain violations of the Act and Board regulations. (415 ILCS 5/31.) Section 31 of the Act authorizes the Board to impose civil penalties for violations payable into public funds, not to private parties, and it authorizes the Board to order a person found in violation to cease and desist from further violation. (415 ILCS 5/33(a), 5/33(b) and 5/42.) Count I of the complaint requests that the Board find CBI in violation of Section 731.160 of the Board's regulations, that we declare CBI to be the owner or operator, that we issue a cease and desist order, that we order CBI to perform corrective action and that a civil penalty be assessed. Such forms of relief are within the Board's traditional statutory authority. (Mandel, Slip Op. at 4-5.)

It is significant that we struck the portion of the Mandel complaint alleging a violation of Section 731.160 because Mandel had alleged the petroleum release occurred in the 1970's. We reasoned that because the release did not occur subsequent to the effective date of Section 731.160 - June, 1989 - it would have been an unlawful retroactive application of that provision. (Mandel, Slip Op. at 11, citing, Pulitzer Community Newspapers, Inc. v. IEPA, (December 20, 1990), PCB 90-142, 117 PCB 99, Slip Op. at 4.)

Pursuant to our determination in Mandel, Count I of the instant complaint survives the motion to dismiss. Here, Miehle alleged that even though CBI was the last party to be the "owner" or "operator" of USTs sometime in 1986 (Complaint, at 1), Miehle also alleged that the release was discovered in 1993 - a release, which if is proven at hearing, will have been "confirmed" subsequent to the effective date of Section 731.160.

We note that the parties have placed great emphasis on

comments made in In the Matter of UST Update where we discussed the Board's authority over certain aspects of the UST program. (See supra at 3 - 4.) The intent of R91-14 was to illustrate how jurisdiction is divided between the OSFM and the Board with regard to the State of Illinois' UST program. The comments made by the Board in R91-14 were never intended to apply to the rights of a private citizen, the Environmental Protection Agency or the Office of the Attorney General, to enforce the Act or its corresponding regulations. The statements made by the Board in R91-14, which have been construed by CBI to limit the Board's authority, have no bearing on this private citizen enforcement action and are not dispositive of the outcome in this adjudicatory proceeding.³

Insufficient in Law

CBI further argues that the complaint is insufficient in law because it includes a request for declaratory relief, and it alleges insufficient facts to demonstrate Miehle's interest in the outcome of the case to substantiate a "case or controversy." We find that such an argument is misplaced in the context of a "citizen's enforcement action." The Act specifically grants standing to "any person" to enforce the provisions of the Act or regulations promulgated thereunder:

Any person may file with the Board, a complaint...
against any person allegedly violating this Act. (415
ILCS 5/31(b).)

Miehle is a "person" as that term is defined in the Act, "Person" is any individual...." (415 ILCS 5/3.26.) Caselaw relied upon by CBI - Underground Contractors - has no consequence when citizen's enforcement actions are directly authorized by statute.⁴

³Discussing the Board's authority in relation to Section 731.160, in Mandel, we recounted our holdings in R91-14 and North Oak and stated that we have "opined that the repeal of those rules [R91-14 UST rules] would leave the Board without authority to enter an order absent a prior finding by the Fire Marshal." (Mandel, Slip Op. at 10, n. 10.) As a matter of clarification, the Board decided in Mandel that the Board has authority to enter a corrective action order once a release has been confirmed. The effect of Mandel is that we rejected the notion that the Board is without such authority.

⁴The right to bring a citizen's enforcement action has its roots in the Constitution of the State of Illinois. Though the Constitution does not by itself confer the right to bring the citizen's enforcement action (Parsons v. Walker, (4th Dist. 1975) 28 Ill.App.3d 517, 328 N.E.2d 920), the Illinois Constitution of

Similarly, with regard to the argument that Count I is insufficient in law because it failed to allege that the source of the contamination came from tanks owned or operated by CBI, this argument also fails. In a light most favorable to Miehle as the nonmoving party, the Board can foresee a set of facts upon which Miehle could recover. If Miehle can demonstrate at hearing that CBI is the "owner" or "operator" of the tanks located at 1357 West 105th Street, and if Miehle can show the petroleum discovered on the premises "leaked" from those tanks, a finding of violation could result. The Board notes however, that by way of this order, the Board makes no finding as to the merits of the complaint. We only find that the allegations regarding a release of petroleum are sufficiently pled to survive a motion to dismiss as to Count I.

Count II - Violation of Section 21(e) of the Environmental Protection Act

Jurisdiction

The memorandum of law in support of the motion to dismiss Count II primarily argues that the Board is without jurisdiction to order CBI to "clean up...petroleum waste" at the site even if Miehle could prove a violation of Section 21(e) of the Act. (Memorandum, at 6-7.) Section 21(e) provides that no person shall:

No person shall: e. Dispose, treat, store or abandon any waste, or transport any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder.

The contention raised by CBI is that Congress specifically designed the Resource and Conservation and Recovery Act to regulate USTs, 42

1970 in conjunction with the Environmental Protection Act (Section 31) allows individual members of the public to sue on behalf of the public at large. Article XI, Section 2 of the Illinois Constitution provides:

Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.

It is clear from the records of the Constitutional Convention that this provision was intended to "abolish" any requirement that the party suing have any "special damage." L.Cunningham, Procedure, "Environmental Law", IICLE, ch. 1.14, at 1-16 (1983.)

U.S.C. Section 6991-6991i, (RCRA, Subtitle I), and the Illinois General Assembly specifically created a UST program and authorized the Board to adopt regulations "identical-in-substance" to federal regulations promulgated by the USEPA pursuant to RCRA Subtitle I. CBI's argument is that the intention of these laws is to enable UST owners and operators to voluntarily remediate UST releases and gauge compliance. (Memorandum, at 7.) According to CBI, the regulations enable the OSFM, the IEPA and the Board to consistently address in a "streamlined fashion", the numerous UST releases in Illinois.

In the response to the motion to dismiss, Miehle indicates that research has provided no caselaw on point, either from Board decisions or Illinois Appellate decisions, that hold the failure to remediate petroleum leakage from a UST constitutes the abandonment or disposal of a waste, and that this is may be a matter of first impression in Illinois. (Response, at 12.) Miehle urges the Board to find that a respondent's refusal to remediate petroleum leakage can violate Section 21(e) and that this policy is consistent with the State's public policy that "the Act shall be liberally construed to effectuate the purposes of the Act." (415 ILCS 5/2(c).) "It is the purpose of the Act to restore, protect and enhance...the environment, and to assure that adverse effects upon the environment are fully borne by those who cause them." (415 ILCS 5/2(b).) (Response, at 12.) Miehle argues that a petroleum leak can be a "waste" resulting from "commercial activities" as provided for in the definition of waste as enacted by the General Assembly:

Any garbage or other discarded material, including solid [or] liquid, from industrial [or] commercial activities. (415 ILCS 5/3.53.)

Miehle points to the case of Pantry, Inc. v. Stop-N-Go Foods, Inc., (S.D. Ind. 1991) 796 F.Supp. 1171, which held that a UST owner/operator's refusal to remediate petroleum leakage was an improper disposal of waste in violation of a Kentucky statute virtually identical to Illinois' Section 21(e). (Response, at 12-13.)

While Board research has not found a final Board opinion "on-point" on this issue, in Mandel, the Board allowed the portion of the complaint to proceed to hearing which alleged a violation of Section 21(e). In that case, we determined that the development of the record and the briefing of certain issues germane to that case would aid the Board's deliberations on whether a violation of Section 21(e) had occurred. The Board found that the complaint had raised issues within the Board's jurisdiction.

Similarly, the Board is inclined to follow our determination in Mandel and allow Count II to proceed to hearing. Pursuant to

the motion to dismiss standard, that the complaint should only be dismissed if no set of facts could be alleged warranting recovery, the Board finds that there are many issues which need to be addressed at hearing, and which could support the finding of a violation. These issues could include, but would not be limited to: (1) Whether CBI is an owner or operator for purposes of Section 21(e); (2) Whether "leaking" occurred from USTs owned or operated by CBI; (3) Whether "leaking" constitutes abandonment or disposal or whether it is the alleged refusal to perform corrective action which constitutes disposal or abandonment; (4) Whether "waste" includes "petroleum"; (5) Whether Illinois' UST program with the corresponding regulations and statutory authority, is intended to be the exclusive remedy for rectifying releases of petroleum from USTs in the State of Illinois; and (7) Whether violation of Section 21(e) is intended to include confirmed releases of petroleum from USTs.

Insufficient in Law

CBI also moved to dismiss Count II on one of the same bases as it moved to dismiss Count I - that Miehle failed to allege that the source of the petroleum was the USTs owned or operated by CBI. For the same reasons we set out with regard to Count I, the Board finds that Count II is sufficient to survive the motion to dismiss.

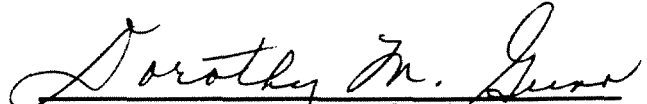
CONCLUSION

The Board hereby denies CBI's motion to dismiss in its entirety. Accordingly, this matter shall proceed to hearing. The Chief Hearing Officer shall assign a hearing officer to conduct hearings. Hearing must be scheduled and completed as directed by the Chief hearing Officer. The Chief Hearing Officer shall promptly issue appropriate directions to the assigned hearing officer consistent with this order.

The assigned hearing officer shall inform the Clerk of the Board regarding the time and location of the hearing at least 40 days in advance of hearing so that public notice may be published. After hearing, the hearing office shall submit an exhibit list, a statement regarding credibility of witnesses and all actual exhibits to the Board within five (5) days of the hearing. The hearing officer and the parties are encouraged to expedite this proceeding to the extent possible.

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 ~~4th~~ day of November, 1993, by a vote of 6-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board