

ILLINOIS POLLUTION CONTROL BOARD  
July 13, 2000

MDI LIMITED PARTNERSHIP #42, )  
 )  
 Complainant, )  
 )  
 v. ) PCB 00-181  
 ) (Enforcement - Citizens, UST)  
 REGIONAL BOARD OF TRUSTEES FOR )  
 BOONE AND WINNEBAGO COUNTIES )  
 and BOARD OF EDUCATION OF )  
 BELVIDERE DISTRICT 100, )  
 )  
 Respondents. )

ORDER OF THE BOARD (by G. T. Girard):

On May 4, 2000, MDI Limited Partnership (complainant) filed a complaint against Regional Board of Trustees for Boone and Winnebago Counties (Regional Board) and Board of Education of Belvidere District 100 (Belvidere). The complaint alleges that the respondents violated specified provisions of the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (1998)) pertaining to the remediation of contamination from two leaking underground storage tanks.

On June 9, 2000, the Regional Board filed a motion to dismiss. In the motion to dismiss, the Regional Board maintains that the complainants cannot recover under the complaint and that the Regional Board's holding of title to the property was a ministerial function imposed on the Regional Board by statute. On June 19, 2000, the complainant filed a response.

For the reasons discussed below the Board denies the motion to dismiss.

STANDARD OF REVIEW

The courts have stated that a motion to dismiss a pleading should be granted where the well-pleaded allegations, considered in the light most favorable to the non-movant, indicate that no set of facts could be proven upon which the petitioner would be entitled to the relief requested. See Uptown Federal Savings & Loan Assoc. v. Kotsiopoulos, 105 Ill. App. 3d 444, 434 N.E.2d 476 ( 1982). The Board has stated "[a] motion to dismiss, like a motion for summary judgment, can succeed where the facts, taken in a light most favorable to the party opposing the motion, prove that the movant is entitled to dismissal as a matter of law." BTL Specialty Resins v. Illinois Environmental Protection Agency (April 20, 1995), PCB 95-98.

Section 103.124(a) of the Board's procedural rules implements Section 31(d) of the Act. It provides:

The Clerk shall assign a docket number to each complaint filed \*\*\* the Chairman shall place the matter on the agenda for Board determination whether the complaint is duplicitous or frivolous. If the Board rules that the complaint is duplicitous or frivolous, it shall enter an order setting forth its reasons for so ruling and shall notify the parties of its decision. If the Board rules that the complaint is not duplicitous or frivolous, this does not preclude the filing of motions regarding the insufficiency of the pleadings. 35 Ill. Adm. Code 103.124 (a).

An action before the Board is duplicitous if the matter is identical or substantially similar to one brought in another forum. Brandle v. Ropp (June 13, 1985), PCB 85-68. An action before the Board is frivolous if it fails to state a cause of action upon which relief can be granted by the Board. Citizens for a Better Environment v. Reynolds Metals Co. (May 17, 1973), PCB 73-173.

### DISCUSSION

The Board notes that only the Regional Board has filed a motion to dismiss this matter. Therefore, the Board will first discuss the motion to dismiss and then the Board will discuss whether the matter is duplicitous or frivolous.

#### Motion to Dismiss

The Regional Board asserts two arguments in support of its motion to dismiss. First, the Regional Board maintains that pursuant to Section 22.2(f) of the Act (415 ILCS 5/22.2(f)), only the State of Illinois or a local unit of government may recover for the costs of removal or remedial action. Secondly, the Regional Board argues that although it held title to the property, the holding of title was purely “ministerial” and was imposed by statute. The Regional Board maintains that it “had no statutory authority or obligation to install, remove or maintain fuel tanks” and thus was not the proximate cause of the situation leading to the complaint.

In response to the Regional Board’s assertion regarding 22.2(f) of the Act, the complainant maintains that the complaint alleges a violation of Section 21 of the Act not Section 22.2(f). The complainant argues that pursuant to Lake County Forest Preserve District v. Ostro (March 31, 1994), PCB 92-80, the Board has the authority to award clean-up costs to a private party. In response to the argument that the Regional Board’s ownership was “ministerial”, the complainant maintains that the allegations of the complaint along with the admission of ownership are sufficient to state a claim for relief.

The Board denies the motion to dismiss. The Board has consistently found that the Board has the authority to award clean-up costs to a private party. Lake County Forest Preserve District v. Ostro (March 31, 1994), PCB 92-80. In addition, the admission of ownership, no matter how ministerial, does appear to support a cause of action. Therefore, the motion to dismiss is denied.

Duplicitous

An action before the Board is duplicitous if the matter is identical or substantially similar to one brought in another forum. 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 other forums. Therefore, based on the record before us, this matter is not duplicitous.

Frivolous

An action before the Board is frivolous if it requests relief which the Board cannot grant. Lake County Forest Preserve Dist. v. Ostro (July 30, 1992), PCB 92-80. The Board finds that the complaint is not frivolous.

CONCLUSION

The Board denies the motion to dismiss filed by the Regional Board. The Board finds that, pursuant to Section 103.124(a), the complaint 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. The Board will assign a hearing officer to conduct hearings consistent with this order and Section 103.125 of the Board's rules. 35 Ill. Adm. Code 103.125. The Clerk of the Board shall promptly issue appropriate directions to the assigned hearing officer.

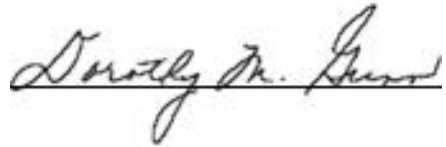
The assigned hearing officer shall inform the Clerk of the Board of the time and location of the hearing at least 30 days in advance of hearing so that a 21-day public notice of hearing may be published. After hearing, the hearing officer shall submit an exhibit list, a statement regarding credibility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

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 13th day of July 2000 by a vote of 6-1.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", is written over a horizontal line.

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board