

ILLINOIS POLLUTION CONTROL BOARD
June 10, 1987

ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Complainant,)
)
v.) PCB 83-163
)
LARRY BITTLE d/b/a)
Southern Recycling, a)
dissolved Illinois)
corporation, WILLIAM GAMBER,)
LEONARD C. BITTLE, and)
J. MAX MITCHELL,)
)
Respondents.)

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

This matter comes before the Board upon the May 19, 1987, motion for reconsideration filed by Respondent J. Max Mitchell. Mitchell generally requests that the Board "reconsider its opinion and modify its order of April 16, 1987", and specifically asks that:

1. The Board reconsider its finding treating J. Max Mitchell as being of equal culpability with Larry Bittle and William Gamber;
2. The Board consider the effect of the refusal of Larry Bittle and William Gamber to cooperate in submitting or implementing a remedial plan upon the responsibility of Mitchell therefore;
3. The Board reconsider its finding that the action filed against Mitchell in this matter was not unfairly brought.

The Agency filed an objection to Mitchell's motion on May 27, 1987¹.

The Board finds that no new issues have been raised in Mitchell's May 19 motion. The motion is therefore denied. Each of Mitchell's contentions, however, will be addressed in turn.

Mitchell first argues that the Board is treating him "as being of the same level of culpability as both Larry Bittle and

¹ This filing did not include a certificate of service. The Agency refiled its objection, complete with such certificate, on June 1, 1987.

William Gamber while the facts as found by the Board indicate that Mitchell was not directly responsible for the threat to the environment, but was only the owner of the land upon which the activities of the other respondents took place". The discussion contained in the Board's April 16, 1987 Opinion (pages 5-10) explains the rationale for why this view is appropriate. As stated there, the standard utilized by the Board to determine owner-lessor liability turns on whether an owner-lessor could have reasonably exercised control in order to prevent past or continuing pollution. Mitchell's characterization of himself as "only" the owner of the land does not diminish his liability in that capacity. As explained in the April 16, 1987 Opinion, pages 8-10, Mitchell did nothing to control pollution at the site even after learning of Agency's concern about conduct at the site during the pendency of the lease. Moreover, he continued to do nothing after he obtained complete control upon cessation of the lease.

Mitchell also requests that the Board modify its April 16, 1987 Order to provide for the contingency that Larry Bittle and William Gamber refuse to cooperate with Mitchell in the preparation, submission, and implementation of a remedial plan for the site in question. The Board continues to believe that the imposition of joint and several liability was proper in this instance. Mitchell, Larry Bittle, and William Gamber jointly brought about the environmental problems at issue in this case as a result of their actions. Mitchell's role involved leasing to the other individuals the land upon which the carbon recovery operation took place. The Board notes that this action gained him more than \$100,000 (April 16, 1987 Opinion, page 33). If in fact Bittle and Gamber do not end up cooperating with the provisions of the Board's Order, Mitchell will still retain a right of contribution against them because of their status as jointly liable.

Finally, Mitchell continues to argue that this action was "unfairly" brought against him, and suggests that the Board incorrectly dismissed "without due consideration" the equitable defenses of laches, estoppel, and waiver which he raised before the Board.

The focus of Mitchell's argument pertaining to the "fairness" of the action brought against him here by the Agency appear's to be a 1979 Franklin County Circuit Court action². Mitchell was not a party to that suit. There is no legal impediment to the Agency's action against Mitchell here as a consequence of the 1979 action. Under the provisions of the Environmental Protection Act, the Agency had every right to file this case with the Board. Mitchell may feel that the remedy

² For a complete description of that litigation, see the April 16, 1987 Opinion, page 4.

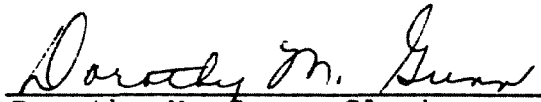
imposed by the Board is "unfair", but such a concern does not impact the propriety of the filing of the action. Regarding the equitable defenses raised by Mitchell, the Board notes that it did not dismiss them "without due consideration". Rather, it found them inapplicable to the present situation where an action is properly brought pursuant to a statutorily created cause of action. The Board continues to be of this view.

The May 19, 1987 motion of J. Max Mitchell is denied.

IT IS SO ORDERED.

Board Member Joan Anderson concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 10th day of June, 1987, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board