

ILLINOIS POLLUTION CONTROL BOARD

June 20, 2002

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.)
) PCB 99-134
PEABODY COAL COMPANY, a Delaware) (Enforcement - Water)
corporation,)
)
Respondent.)

ORDER OF THE BOARD (by N.J. Melas):

This matter is before the Board today on respondent Peabody Coal Company's (Peabody) motion to dismiss or strike complaint (Mot.). Complainant subsequently filed a response to the motion to dismiss or strike (Resp.).

For the reasons stated below, the Board grants in part and denies in part Peabody's motion to dismiss or strike the complaint. The Board will allow complainant to file another amended complaint confined to correcting technical errors and deleting those items that the Board has stricken as outlined below.

PROCEDURAL MATTERS

Peabody's motion addresses the amended complaint (Am. Comp.) filed on May 31, 2000. The Board's hearing officer set a deadline of March 11, 2002, for the filing of the motion to dismiss or strike. See 35 Ill. Adm. Code 101.506. On March 20, 2002, respondent Peabody Coal Company filed a motion for leave to file *instanter* along with the motion to dismiss or strike the complaint. The Board granted Peabody's motion for leave to file *instanter* in an April 3, 2002 order. In that same order, the Board also set a deadline for complainant's response which complainant timely filed on May 6, 2002. See 35 Ill. Adm. Code 101.300(b)(2).

STANDARD FOR MOTIONS TO DISMISS

The Board's standard for determining motions to dismiss has been well-established in case law. See People v. Stein Steel Mills Services, Inc., PCB 02-1 (Nov. 15, 2001); Shelton v. Crown, PCB 96-53 (May 2, 1996); Krautsak v. Patel, PCB 95-143 (June 15, 1995); Miehle v. Chicago Bridge and Iron Co., PCB 93-150 (Nov. 4, 1993). It is axiomatic that, in determining a motion to dismiss, the Board takes all well-pleaded allegations as true. Import Sales, Inc. v. Continental Bearings Corp., 217 Ill. App. 3d 893, 577 N.E.2d 1205 (1st Dist. 1991). See also Stein Steel, PCB 02-1; Shelton, PCB 96-53; Krautsack, PCB 95-143; Miehle,

PCB 93-150. In addition, dismissal of the complaint is proper only if it is clear that no set of facts could be proven that that would entitle complainant to relief. Callaizakis v. Astor Development Co., 4 Ill. App. 3d 163, 280 N.E.2d 512 (1st Dist. 1972). *See also* Stein Steel, PCB 02-1; Shelton, PCB 96-53; Krautsack, PCB 95-143; Miehle, PCB 93-150.

Section 31 of the Illinois Environmental Protection Act (Act) requires notice of a specific violation and a formal complaint. The formal complaint must specify the provision of the Act, regulation or permit and “the manner in, and the extent to which” the person is violating the Act, regulation, or permit. 415 ILCS 5/31(c)(1) (2000). Section 103.204(c) of the Board’s procedural regulations has similar guidelines. 35 Ill. Adm. Code 103.204(c).

THE AMENDED COMPLAINT

The complaint involves the Peabody Coal Eagle No. 2 Mine Site in Gallatin County near Shawneetown. Complainant alleges that Peabody constructed and operated six refuse disposal areas at the mine site between 1968 and 1993. Am. Comp. at 2. Complainant also alleges that Peabody disposed several million tons of coal-related wastes in the refuse disposal areas and that none of the disposal areas have liners or other barriers to prevent leaching of contaminants into an underlying aquifer. Am. Com. at 2-3.

Complainant states that the mine is at the eastern edge of the Henry Aquifer, a Class 1 Groundwater Resource. The Saline County Conservancy District (SVCD) has public water supply wells to the southwest and hydraulically downgradient from the mine. Am. Comp. at 2.

Complainant alleges that inorganic chemicals from the coal-related wastes (such as chlorides, manganese, total dissolved solids, sulfates, and iron) at the mine have contaminated the groundwater both at the site of the mine and off-site. Complainant also alleges that the inorganic chemicals from the coal-related wastes are the cause of deteriorating water quality at the SVCD wells. Am. Comp. at 3.

ALLEGATIONS

In counts I and II, complainant alleges that by allowing the discharge of inorganic chemicals into the groundwater, Peabody has caused or tended to cause water pollution in violation of Section 12(a) of the Act (415 ILCS 5/12(a) (2000)). Complainant also alleges that by allowing the deposit of coal mine refuse and related waste, Peabody has created a water pollution hazard in violation of Section 12(d) of the Act (415 ILCS 5/12(d) (2000)). Am. Comp. at 23-24, 46-47.

Section 12(a) and (d) of the Act provide:

No person shall:

- (a) Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution

in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act.

* * *

- (d) Deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard.

“Water pollution” is such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety, or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life. 415 ILCS 5/3.55 (2000).

In alleging violations of Section 12(a), complainant states that Peabody has not complied with various regulations. Although complainant refers to Peabody’s noncompliance with these regulations, complainant does not ultimately allege that Peabody is in violation of these regulations.

In count III, complainant alleges that by causing or allowing the discharge or release of inorganic chemicals to groundwater at the mine Peabody has violated Section 12(a) of the Act, the water quality standards at 35 Ill. Adm. Code 302.304 and 302.208, and the associated preceding sections of the Act and Board regulations. Complainant also alleges that Peabody has violated 35 Ill. Adm. Code 620.301, 620.405, and 620.410(a).

Section 302.208 of the Board’s regulations contains the Board’s numeric general use water quality standards while Section 302.304 contains the Board’s limits for public and food processing water supplies. Section 620.301 is a general prohibition against use impairment of resource groundwater. Section 620.405 is a general prohibition against violations of groundwater quality standards while Section 620.410 are the numeric groundwater quality standards for Class I potable resource groundwater.

ARGUMENTS AND DISCUSSION

Amending the Complaint

Arguments

In counts I and II, Peabody cites typographical errors in the amended complaint, including incorrect citations to Board regulations. Complainant admits to those errors, claims that they do not prejudice Peabody, and requests leave to file another amended complaint in order to correct the typographical errors. Mot. at 3, 4, 9, 10; Resp. at 3, 6-7, 9, 13, 14. In response to Peabody citing the undefined term “mineral content” in count III, complainant requests leave to delete it. Mot. at 13; Resp. at 19.

Discussion

The hearing officer granted the most recent motion for leave to file an amended complaint on February 7, 2002. The Board construes the requests in complainant's response as a motion for leave to file another amended complaint. In order to avoid prejudice to Peabody, the Board grants the motion for leave to file another amended complaint so long as the amendments to the complaint are confined to correcting the errors that complainant admitted in its response and deleting those parts of the amended complaint that the Board has stricken (see below).

Migration of Contamination

Arguments

In each count of the complaint, Peabody claims that allegations of contamination migrating off-site from the mine, particularly at the SVCD wells, should be stricken because there is no evidence of off-site contamination. Mot. at 3-5, 7, 9, 11. Complainant alleges that the off-site contamination, including the SVCD wells, migrated from the mine site. Complainant contends that the complaint sets forth the factual basis for the allegations of the off-site contamination, including the SVCD wells. In particular, complainant points to sampling data from off-site wells and the SVCD wells. Complainant also states that increased levels of sulfates in one of the SVCD wells could be considered detrimental to the water supply or a nuisance in violation of Section 12(a) and 12(d) of the Act. Resp. at 4-9, 10, 11-12, 14-15.

Discussion

The Board finds that the allegations of off-site contamination, including the allegations of contamination at the SVCD wells, are well-pled. Since, for the purposes of deciding the motion to dismiss, the Board takes these allegations as true, the Board finds that they could conceivably result in a finding of violation of Section 12(a) or 12(d) of the Act. The allegations of off-site contamination also comply with the requirements of Section 31(c)(1) of the Act. The Board will not strike the allegations related to migration of contamination.

Lack of Evidence

Arguments

Peabody also requests that portions of the complaint be stricken because complainants have not listed the sampling results from some of the off-site wells, including wells at SVCD. Mot. at 5, 7, 9-10, 11-12. Complainant responds (1) that it is "not under an obligation to plead evidence," (2) that it has pled sufficient sampling results to properly allege violations of the Act, (3) that it need not include all sampling results in the complaint, and (4) that, during discovery, respondents have obtained sampling results not included in the amended complaint. Resp. at 4-7, 10, 11-12, 14-15.

Peabody claims that, in count II, complainants have not provided a complete set of inorganic chemical pollutants. Mot. at 10. Complainant contends that there may still be more information coming from Peabody and that it is not obligated to list a complete set of inorganic chemical pollutants in the complaint. Resp. at 13-14.

Discussion

The Board finds that complainant has pled sufficient evidence to allege violations of the Act and the Board's regulations if the allegations are taken as true. Peabody's allegations of a lack of evidence do not run afoul of requirements in Section 31(c)(1) of the Act. The Board will not strike the allegations for reasons related to lack of evidence.

Citations to Allegedly Inapplicable Board Regulations

Arguments

Peabody states that although the complaint refers to Section 302.208 of the Board's regulations with respect to the monitoring wells within Slurry No. 3 and 5,¹ there are no monitoring samples listed that violate the numeric water quality standards at Section 302.208. Peabody asks that the Board strike complainant's references to Section 302.208 of the Board's regulations. Mot. at 6-7. Complainant admits that Section 302.208 is "inapplicable to the subject site and situation" but that it was "included for the sake of completeness". Resp. at 10.

Similarly, Peabody points to complainant's reference to 35 Ill. Adm. Code 601.101 (responsibility of owners of public water supplies to provide clean water) in count III as inapplicable to the alleged violations. Mot. at 11. Complainant claims that the citation to Section 601.101 relates to the alleged violation of Section 620.301, the general prohibition against use impairment of groundwater. Resp. at 15-16.

Discussion

The Board queries why complainant would allege a violation of Section 302.208 in the amended complaint but in the response state that Section 302.208 is inapplicable. As complainant admits that Section 302.208 is inapplicable, the Board grants the motion to strike it from the complaint.

The Board will also strike the reference to Section 601.101 of the Board's regulations. Complainant is not alleging a violation of Section 601.101 in the complaint.

Citation to 35 Ill. Adm. Code 303.202/Alleged Violation of 35 Ill. Adm. Code 302.304

¹ See Paragraph 15 of count I of the amended complaint that is incorporated by reference into counts II and III.

Arguments

Peabody points out that parts of counts II and III are based on the requirements of 35 Ill. Adm. Code 303.202 which provides that “waters of the State shall meet the public and food processing water supply standards of Subpart C, Part 302, at any point at which water is withdrawn for treatment and distribution as a potable supply or for food processing.” Complainant alleges a violation of 35 Ill. Adm. Code 302.304 (in Subpart C of Part 302), which contains numeric public and food processing water supply standards.

Peabody claims that complainant fails to allege in counts II and III that the water in the monitoring wells at issue was withdrawn for treatment or distribution. Mot. at 9, 11. Complainant responds by citing the regulation which preceded Section 303.202 which stated “[t]he underground waters of Illinois which are a *present or a potential source* of water for public or food processing supply shall meet the general use and public and food processing water supply standards of Subparts B and C, Part 302, except due to natural causes.” (emphasis added) See 35 Ill. Adm. Code 303.203 (1982). Complainant contends that the groundwater at issue is and has always been a Class I resource and thus a “present or potential source” of water for the public and for food processing. Complainant claims that it does not need to allege that the water at issue is being withdrawn for treatment or distribution; complainant claims that it only needs to allege that the groundwater could have been a potential source of water for the public and food processing. Resp. at 12-13, 15.

Discussion

Complainant includes monitoring well sampling results from the late 1980s and early 1990s that pre-date the effective date of the current requirements of Section 303.202.² See Am. Comp. at 35, 37-39. In analyzing those sampling results, the Board would look to the preceding regulation that complainant cited (35 Ill. Adm. Code 303.203 (1982)). As complainant stated in its response, it need only allege that the water at issue was potentially for public use and food processing. The Board finds that complainant has pled sufficient evidence to allege violations of the public and food processing water supply standards at Section 302.304 of the Board’s regulations if the allegations are taken as true. The alleged violations of these regulations also meet the requirements of Section 31(c)(1) of the Act. The Board will not strike the allegations related to Section 302.304 of the Board’s regulations.

Alleged Violation of 35 Ill. Adm. Code 620.301

Arguments

Although complainant has alleged that the inorganic chemicals in the groundwater may cause offensive odors, tastes, or colors in the groundwater in violation of Section 620.301 and Section 12(a) of the Act, Peabody claims that complainant has not properly alleged that the

² The current Section 302.202 became effective September 10, 1992.

drinking water has become offensive. Mot. at 12. Complainant responds that it has already alleged sufficient facts and set forth sampling results to properly plead violations of Section 620.301 of the Board's regulations and Section 12(a) of the Act. Resp. at 17-18.

Discussion

Section 620.301 is a general prohibition against use impairment of resource groundwater. Complainant must plead a use impairment, either by citing the offensive nature of the groundwater or by citing other facts in the complaint. The Board finds that the allegations in the complaint are well-pled and could lead to a finding of violation of Section 620.301 and Section 12(a) of the Act. These allegations also meet the requirements of Section 31(c)(1) of the Act. The Board will not strike the allegations related to Section 620.301 of the Board's regulations or Section 12(a) of the Act.

Miscellaneous

Peabody cites other minor items that should be stricken in the amended complaint such as words not defined in the Act and the way in which complainant charts the sampling results from the monitoring wells. Mot. at 5, 8, 9-10, 11-12.

The Board finds that these miscellaneous items do not merit a dismissal of any part of the amended complaint.

CONCLUSION

In summary, Peabody claims that the shortcomings in the complaint should lead the Board to dismiss the amended complaint. Short of outright dismissal, Peabody claims that the portions of the amended complaint that it cited should be stricken. Mot. at 8, 10-11, 13.

After examining all of the allegations in the amended complaint and taking all well-pled allegations as true, the Board finds that nearly all of the well-pled allegations could conceivably result in a finding of violation of the cited provisions of the Act and the Board's regulations. *See supra* 2-3. The Board also finds that nearly all of the allegations in the complaint meet the requirements of Section 31(c)(1) of the Act and Section 103.204 of the Board's regulations. The Board will only strike the allegations related to Sections 302.208 and 601.101 of the Board's regulations for not being properly pled.

The Board finds that to dismiss the rest of the complaint at this point would be premature and that complainant should be allowed to present its case at hearing.

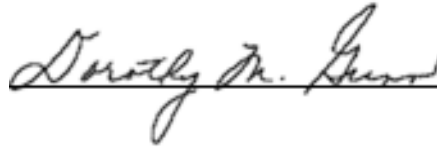
The Board thus grants in part and denies in part Peabody's motion to dismiss. In so ruling, the Board makes no finding as to the merits of the amended complaint.

The Board also grants complainant leave to file another amended complaint confined to correcting those errors that complainant admitted in the response and to deleting those items

that the Board has stricken. Complainant must file its amended complaint with the Board no later than July 19, 2002.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 20, 2002, by a vote of 7-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board