

ILLINOIS POLLUTION CONTROL BOARD
January 21, 1999

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 99-27
) (Enforcement - Land)
JAMES and CAROL GILMER,)
)
Respondents.)

JAMES and CAROL GILMER,)
)
Third-Party Complainants,)
)
v.) PCB 99-27
) (Enforcement - Land)
CL INDUSTRIES, INC., KRAFT FOODS)
CORPORATION and AC HUMKO)
CORPORATION,)
)
Third-Party Respondents.)

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

This matter is before the Board on a number of motions. First on November 9, 1998, the Board received a motion to dismiss count I (Mot. 11/9) of the complaint and a third-party complaint filed by James and Carol Gilmer (Gilmers). On December 4, 1998, the Board received a motion to dismiss the third-party complaint (Mot. 12/4) filed by Kraft Foods Corporation (Kraft). On December 7, 1998, the Gilmers filed a motion to amend the third-party complaint. On December 15, 1998, the People of the State of Illinois (People) filed a motion for leave to file a response to the Gilmers' motion to dismiss count I. On January 14, 1999, the Gilmers filed a motion for leave to file a reply to the People's response.

The Board will first address the motion to dismiss count I, the motion to file a response to that motion and the motion to file a reply. The Board will then address Kraft's motion to dismiss and finally the Board will address the motion to amend.

Regarding the November 9, 1998 motion to dismiss count I, the Gilmers argue that the allegations contained in count I are allegations of violations of the Board's rules regarding the duties of the "operator" of the site. The Gilmers maintain that Multi-County Landfill, Inc. was the operator of the site and that the complaint does not allege that the Gilmers "operated" the site. The Board disagrees with the Gilmers and finds there are sufficient facts plead to

support the allegations in the complaint. The Gilmers may raise the issue of who “operated” the site at hearing and in briefs. However, the pleadings are sufficiently plead to sustain the allegations.

On December 15, 1998, the People filed a motion to file a response. The certificate of service filed with the motion contains several errors as to when the motion was served. Therefore, the Board believes that it is unclear when service of the motion was had on the parties and we deny the motion to respond. However, the Board notes that we have denied the motion to dismiss in this order as well and the response would be moot.

As the Board has denied the motion to file a response, the Board will also deny the motion to file a reply.

Regarding the December 4, 1998 motion to dismiss, Kraft alleges a lack of jurisdiction for failure to personally serve Kraft. The Gilmers responded on December 18, 1998, asserting that they served Kraft’s authorized agent and “upon return of certified mail receipt, proof of service indicating service on Kraft was made with due diligence by Respondents [Gilmers] filing such receipt with the Board.” The Board received the receipt on January 4, 1999. Therefore, the Board denies the motion to dismiss Kraft as a third-party respondent.

As to the December 7, 1998 motion to amend the complaint, the Board must first determine whether or not to accept the third-party complaint. Section 103.124(a) of the Board’s procedural rules, which implements Section 31(b) of the Environmental Protection Act (415 ILCS 5/31(b) (1996)), provides:

***If a complaint is filed by a person other than the Agency, the Clerk shall also send a copy to the Agency; the Chairman shall place the matter on the Board 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.

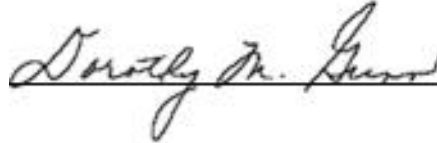
An action before the Board is duplicitous if the matter is identical or substantially similar to one brought in another forum. Brandle v. Ropp (June 13, 1985) PCB 85-68. An action before the Board is frivolous if it fails to state a cause of action upon which relief can be granted by the Board. Citizens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

At this time, the Board finds that, pursuant to Section 103.124(a), the evidence before the Board does not indicate that the third-party complaint is either duplicitous nor frivolous. Accordingly, the Board accepts the third-party complaint. The Board also grants the December 7, 1998 motion to amend and the caption in this order reflects the amendments.

In summary, the Board denies the motion to dismiss count I filed by the Gilmer's, the People's motion to file a response to the motion to dismiss and the motion to file a reply. The Board also denies Kraft's motion to dismiss and grants the Gilmer's' motion to amend the third-party complaint.

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 21st day of January 1999 by a vote of 7-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board