ILLINOIS POLLUTION CONTROL BOARD
January 7, 1999

UNION OIL COMPANY OF CALIFORNIA d/b/a UNOCAL, a California corporation,	)	
Complainant,	)	
v.	)	PCB 98-169
	)	(Enforcement - UST, Citizens)
BARGE-WAY OIL COMPANY, INC., BARGEWAY SYSTEMS, INC., JOSEPH KELLOGG, GERTRUDE KELLOGG, NIELSEN'S BARGEWAY, ROBERT NIELSEN, ROBERT F. ATKINS, and MOBIL OIL COMPANY,	)	
Respondents.	)	

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

This matter is before the Board on the filing of a complaint (Comp.) on June 18, 1998, by Union Oil Company of California d/b/a Unocal, a California corporation (Unocal), against Barge-Way Oil Company, Inc., Bargeway Systems, Inc., Joseph Kellogg, Gertrude Kellogg, Nielsen's Bargeway, Robert Nielsen, Robert F. Atkins, and Mobil Oil Company (collectively, respondents). The complaint alleges violations under Sections 12(a), 12(d), 21(e), and 57.1(a) of the Environmental Protection Act (Act) (415 ILCS 5/12(a), 12(d), 21(e), 57.1(a) (1996)), 41 Ill. Adm. Code 170.590, and Sections 1 and 2(3)(f) of the Gasoline Storage Act (430 ILCS 15/1, 2(3)(f) (1996)), which pertain to, among other things, the disposal, treatment, storage, or abandonment of any waste, water pollution, and underground storage tank removal requirements. Unocal requests that the Board order respondents to reimburse all costs which Unocal has incurred due to the alleged contamination of the site by respondents.

On July 6, 1998, Mobil Oil Company (Mobil) filed a motion to dismiss Unocal's complaint and a memorandum in support of the motion (collectively, Mot.). On various dates following the filing of Mobil's motion, Gertrude Kellogg, Bargeway Oil, Robert Nielsen, Bargeway Systems, and Robert Atkins individually filed motions to join in Mobil's motion. Unocal filed its response (Resp.) to Mobil's motion to dismiss on August 18, 1998, and Mobil's reply (Reply) was filed on August 27, 1998.

For the reasons set forth below, the Board grants, in part, and denies, in part, Mobil's motion to dismiss. Specifically, the Board dismisses counts I, II, IV, V, and VI from the complaint. The Board orders the remaining claim, count III, to proceed to hearing.

BACKGROUND

On June 18, 1998, Unocal filed the underlying complaint in this action. In a six-count complaint, Unocal alleges that respondents owned and operated a gasoline service station on the property which is the subject of this litigation. Comp. at 3. The complaint further alleges that during that same period, respondents' "sloppy practices," "inferior maintenance," and "improper operation" in the handling, storage, treatment, transportation, or disposal of petroleum products and other chemicals resulted in contamination of the site. Comp. at 3. Unocal maintains that when it purchased the property in 1982, it was unaware of the contamination at the site. Comp. at 4. Additionally, the complaint states that Unocal never operated a gasoline service station or any other business on the property and that Unocal held the property as vacant land. Comp. at 4. According to Unocal, the contamination was not discovered until September 1991, and was immediately reported to the Illinois Environmental Protection Agency. Comp. at 4. Based on these allegations, Unocal requests that the Board find violations on six separate counts.

On July 6, 1998, Mobil filed a motion to dismiss all six counts of Unocal's complaint as frivolous, contending: 1) that counts IV, V, and VI should be dismissed because the Board lacks jurisdiction to hear claims under the Gasoline Storage Act; 2) that all claims should be dismissed because the Board lacks authority to award private cost recovery; 3) that counts I and II should be dismissed because they allege violations which did not exist in and prior to 1974; and 4) that all claims are barred by the statute of limitations. Mot. at 2-3. On July 16, 1998, Gertrude Kellogg filed a motion to join in Mobil's motion to dismiss. Similar motions were also filed separately by respondents Bargeway Oil, Robert Nielsen, Bargeway Systems, and Robert Atkins at later dates.

On August 18, 1998, Unocal filed a response to Mobil's motion. In their response, Unocal asks the Board to uphold its prior decisions finding that private cost recovery is a proper remedy within the Board's authority. Resp. at 3. Unocal also responds that counts I and II do not seek retroactive application of the law. Resp. at 3-4. Rather, Unocal contends that the respondents' activities "in or about 1974" fall within the purview of the Act because "the Act became effective in 1970, and thus applies to pre-1974 contamination." Resp. at 4. Additionally, Unocal contends that Section 21 of the Act, as it existed in 1974, applies to the present case because the general definition of "garbage" includes waste oil or petroleum products. Resp. at 6. In response to the statute of limitations issue raised by Mobil, Unocal argues that it was entitled to a one-year extension of time to re-file its case, pursuant to 735 ILCS 5/13-217, when it voluntarily dismissed a prior action pending in the DuPage County circuit court. Resp. at 4-5. In support of their response, Unocal attaches a copy of its "Fifth Amended Complaint" from the DuPage County case.

Mobil's reply, filed on August 27, 1998, counters that section 5/13-217 is not applicable to the present case because Unocal's "Fourth Amended Complaint" does not relate back to the original complaint filed by Unocal in the circuit court. Reply at 9. Thus, Mobil contends that the one year re-filing period is inapplicable in this case. Reply at 10. In addition, Mobil maintains that the law existing in 1974 did not define waste oil or petroleum as "garbage" and even though such items now fall within the definition of garbage, it is

impermissible to retroactively apply the law in that manner. Reply at 4-5. Mobil again asks the Board to reconsider its position on private cost recovery. Reply at 10-11. Attached to Mobil's reply are copies of documents filed in the DuPage County case which include the original complaint, the "Fourth Amended Complaint," and a set of pleadings regarding a motion to dismiss.

DISCUSSION

Motions to Join in Mobil's Motion

As a preliminary matter, the Board must address the motions filed separately by Gertrude Kellogg, Bargeway Oil, Robert Nielsen, Bargeway Systems, and Robert Atkins seeking to join in Mobil's motion to dismiss. The Board has not received any objections to these motions. Finding that no unfair prejudice would result, the Board grants the above-mentioned parties motions to join in Mobil's motion to dismiss. Accordingly, the Board's determinations as to Mobil's motion to dismiss will apply to the above-joined parties.

Motion to Dismiss

Gasoline Storage Act

Initially, Mobil contends that counts IV, V, and VI of the complaint should be dismissed as frivolous because the Board does not have jurisdiction to resolve claims that allege violations of the Gasoline Storage Act. Mot. at 2. 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. The Board agrees with Mobil's contention. Under Illinois law, the Board does not have jurisdiction to find a violation under 41 Ill. Adm. Code 170.590 nor the jurisdiction to hear cases arising under the Gasoline Storage Act. Material Service Co. v. J.W. Peters and Sons (April 2, 1998), PCB 98-97 (citing North Oak Chrysler Plymouth v. Amoco Oil Co. (April 9, 1992), PCB 91-214). Since counts IV, V, and VI allege violations of these provisions, the Board strikes those portions of the complaint as frivolous.

Private Cost Recovery

In addition, Mobil also contends that all counts of Unocal's complaint should be dismissed as frivolous because the Board lacks jurisdiction to award Unocal the recovery of costs that it seeks. Mot. at 3. Specifically, Mobil asks the Board to reconsider its previous rulings which held that private cost recovery is a remedy within the Board's authority. Mot. at 3. Since first dealing with this issue in 1994, the Board has consistently held that it has the authority to award cleanup costs to private parties for a violation of the Act. See Lake County Forest Preserve District v. Ostro (July 30, 1992), PCB 92-80; Herrin Security Bank v. Shell Oil. Co. (September 1, 1994), PCB 94-178; Streit v. Oberweis Dairy, Inc. (September 8, 1995), PCB 95-122; Richey v. Texaco Refining and Marketing, Inc. (August 7, 1997), PCB 97-148; Dayton Hudson Corporation v. Cardinal Industries, Inc. (August 21, 1997), PCB 97-134; Malina v. Day (January 22, 1998), PCB 98-54. This holding is based on the broad

language of Section 33(a) of the Act (415 ILCS 5/33(a) (1996)) as well as the Illinois Supreme Court decision in People v. Fiorini, 143 Ill. 2d 318, 574 N.E.2d 612 (1991). In dealing with this issue the federal district court has also concluded that the Board has the authority to hear private cost recovery actions. See Midland Life Insurance Co. v. Regent Partners I General Partnership, 1996 U.S. Dist. LEXIS 15545 (N.D. Ill. Oct. 17, 1996); Krempel v. Martin Oil Marketing, Ltd., 1995 U.S. Dist. LEXIS 18236 (N.D. Ill. Dec. 8, 1995).

Because the Board continues to believe that the award of cleanup costs to private parties is a remedy within the Board's jurisdiction, it is not inclined to reverse its prior decisions. Thus, the Board finds that it has authority to entertain Unocal's requests for the recovery of cleanup costs as a remedy and therefore, the action will not be dismissed as frivolous on this basis.

Retroactive Application of Law

As discussed above, Mobil's motion also urges the Board to dismiss counts I and II because Unocal's complaint alleges violations of the Act which did not exist at the time of the alleged infringement. Mot. at 2. As pled in the complaint, counts I and II allege that Mobil violated the current versions of Sections 21(e) and 57.1(a) of the Act. Comp. at 5-9. Section 21(e), in its present form, is the product of significant amendment in 1979 which effectively expanded the types of substances regulated under Section 21(e). See Pub. Act 81-856, eff. Jan. 1, 1980. Section 57.1(a), which requires that removal or other remedial action regarding underground storage tanks conform to the Illinois Leaking Underground Storage Tank program, was enacted in 1993. Unocal's complaint, however, alleges that respondents violated these sections by their actions in or before 1974. Thus, in essence, Unocal's complaint asks the Board to retroactively apply the current versions of Sections 21(e) and 57.1(a) in this case.

Under Illinois law, a statutory amendment will be construed as applying prospectively absent express language to the contrary. People v. Fiorini, 143 Ill. 2d 318, 333, 574 N.E.2d 612 (1991). As stated in Fiorini, "[a]n exception to the rule of prospectivity arises where the legislature intended that the amendment apply retroactively and where the amendment applies only to changes in procedure or remedies, rather than substantive rights." (Emphasis added.) Fiorini, 143 Ill.2d at 333 (citing Matier v. Chicago Board of Education, 82 Ill. 2d 373, 390, 415 N.E.2d 1034 (1980)). Thus, in order for retroactive application to be permissible, there must be both express statutory language allowing for such application and the law which is sought to be retroactively applied is not substantive. *Id*. Illinois courts have defined substantive law as that "which establishes rights and duties that may be redressed through the rules of procedure." Fiorini, 143 Ill. 2d at 333.

Both parties cite Casanave v. Amoco Oil Co. (November 20, 1997), PCB 97-84, in support of their respective positions on this issue. In Casanave, the Board recognized that not all factual situations require examination of the case under a "retroactive application of law" analysis. Specifically, the Board noted that: "attaching liability to present conditions stemming from past acts does not necessarily have a retroactive application of the Act . . . when the allegations [involve] . . . continuing violations that began before Illinois adopted the

[law]" sought to be applied. Casanave, PCB 97-84, slip op. at 10-11. This "continuous violations" theory, however, applies only where respondent has "some sort of ownership, control, or authority over the property or source of pollution after the effective date of the cited provision." (Emphasis added.) Casanave, PCB 97-84, slip op. at 11. In this case, Unocal does not allege that respondents had ownership, possession, control, or authority over the property in question after its sale in 1974. Thus, the "continuing violations" theory is not applicable to the present case. Instead, the Board must examine counts I and II under the "retroactive application of law" analysis set forth in Fiorini.

A plain reading of both Sections 21(e) and 57.1(a) of the Act reveals that there is no express language which would lend itself to support retroactive application of these provisions. Absent such language, the current version of Sections 21(e) and 57(a) cannot be applied to the present case. See Matier, 82 Ill. 2d at 390. Nevertheless, even if there was language in the statute which supported retroactive application of these sections, such application would be impermissible because the law sought by Unocal to be applied is substantive. Thus, the Board cannot retroactively apply section 21(e) and 57(a) in this case and must dismiss counts I and II from the complaint.

Statute of Limitations

Mobil's motion also argues that Unocal's entire complaint should be dismissed because it is barred by the statute of limitations.[1] Mot. at 2-3. Specifically, Mobil cites Section 13-205 of the Illinois Code of Civil Procedure (735 ILCS 5/13-205) as the dispositive statute of limitations period which allows a five-year time limit for the filing of an action. Mot. at 2. Mobil contends that the present action accrued no later than 1991 and thus, the limitations period expired in 1996. Mot. at 2. In its response, Unocal contends that, pursuant to 735 ILCS 5/13-217, it was entitled to a one-year extension to re-file when they voluntarily dismissed its suit in DuPage County. Resp. at 4. Mobil's reply counters that the one-year extension only applies if Unocal's "Fourth Amended Complaint," filed in the DuPage County proceeding, relates back to the original timely filed complaint in that case. Reply at 9.

Section 2-616(b) of the Illinois Code of Civil Procedure (735 ILCS 2-616(b)) permits an amended complaint, filed after the applicable statute of limitations period has expired, to relate back to the original complaint where two requirements are met: "(1) the original pleading was timely filed; and (2) the original and amended pleadings indicate that the cause of action asserted in the amended pleading grew out of the same transaction or occurrence set up in the original pleading." Boatmen's National Bank of Belleville v. Direct Lines, 167 Ill. 2d 88, 102, 656 N.E.2d 1101 (1995). "'[T]he right to amend and the relation-back of an amendment depend upon whether the original complaint furnished to the [respondent] all the information necessary for him to prepare a defense to the claim subsequently asserted in the amended complaint.'" Direct Lines, 167 Ill. 2d at 102, 656 N.E.2d at 1107 (quoting Lopez v.

[1] The Board has consistently held that a statute of limitations bar will not preclude any action seeking enforcement of the Act, if brought by the State on behalf of the public's interest. See Pielet Bros. Trading, Inc. v. Pollution Control Board, 110 Ill. App. 3d 752, 758, 442 N.E.2d 1374 (5th Dist. 1982). The instant case, however, does not fall under this exception.

Oyarzabal, 180 Ill. App. 3d 132, 135, 535 N.E.2d 8, 10 (1989)). A respondent "will not be prejudiced by an amendment so long as 'his attention was directed, within the time prescribed or limited, to the facts that form the basis of the claim asserted against him.'" Direct Lines, 167 Ill. 2d at 102 (citing Simmons v. Hendricks, 32 Ill. 2d 489, 495, 207 N.E.2d 440 (1965)).

While the Board agrees that the doctrine of relation-back controls determination of this statute of limitations issue, it finds that the relevant inquiry in resolving the issue differs from that raised by Mobil. Specifically, based on the Illinois Supreme Court decision in Bryson v. News America Publications, Inc., 174 Ill. 2d 77, 672 N.E.2d 1207 (1996), the Board finds that its analysis must focus on whether the underlying complaint in this action relates back to the original, timely-filed complaint in the DuPage County case, rather than comparing the relationship between the original and last amended complaints filed in the DuPage County case. In Bryson, the plaintiff filed an action in federal court which was dismissed for lack of diversity jurisdiction. Bryson, 174 Ill. 2d at 83, 672 N.E.2d at 1212. Plaintiff then re-filed her action in the State court, after the original statute of limitations period had run, but within the one-year extension for re-filing permitted by 735 ILCS 5/13-217. *Id*. Plaintiff's State court complaint included additional claims not pled in the federal district court. *Id*. In determining whether the new claims were barred by the statute of limitations, the Illinois Supreme Court applied the doctrine of relation-back and treated the complaint filed in State court as an amendment to the original complaint filed in federal court. *Id*. at 105-106. Accordingly, the Board will treat the underlying complaint in the present action as if it were an amendment to the original complaint which was timely filed in DuPage County.

Since the only remaining claim is count III, the Board's analysis may focus even more narrowly on whether respondents were made aware, within the limitations period, of the relevant facts underlying the claims raised in count III. If so, then the underlying complaint relates back and the statute of limitations does not bar count III.

In conformance with the Illinois Supreme Court's admonition that Section 2-616(b) should be liberally construed to avoid "elevating questions of form over substance," (Direct Lines, 167 Ill. 2d at 102, 656 N.E.2d at 1107), the Board finds that it does not have sufficient facts before it to determine whether each individual respondent was made aware of the relevant facts underlying the claim raised in count III, before the five-year statute of limitations period expired. Therefore, the Board denies the motion to dismiss count III based on a statute of limitations bar. The Board notes that nothing prevents the parties from re-filing their motion with a more in-depth analysis of whether count III of the underlying complaint in this action relates back to the original complaint filed in the circuit court.

Additionally, the Board notes that Mobil does not allege that any portion of Unocal's complaint is duplicitous. Nevertheless, pursuant to Section 103.124(a) of the Board's procedural rules (35 Ill. Adm. Code 103.124(a)), which implements Section 31(d) of the Act (415 ILCS 5/31(d) (1996)), the Board must still make a determination as to whether any of the claims raised by Unocal are 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. Based on the limited information before it, the Board finds no reason to strike the remaining claim as duplicitous.

CONCLUSION

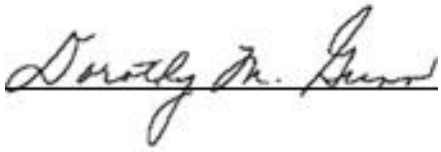
In sum, the Board grants the motions to join Mobil's motion to dismiss filed by Gertrude Kellogg, Bargeway Oil, Robert Nielsen, Bargeway Systems, and Robert Atkins. The Board grants Mobil's motion to dismiss, in part, and denies the motion, in part. Specifically, the Board orders counts I, II, IV, V, and VI to be stricken from the complaint, and count III, the sole remaining count, to be resolved at hearing.

The hearing on count III must be scheduled and completed in a timely manner consistent with Board practices. The assigned hearing officer shall schedule and conduct the hearing in accordance with the Board's procedural rules. See 35 Ill. Adm. Code 103.125. Once the hearing officer has scheduled a date, time, and location of the hearing, the hearing officer should inform the Clerk of the Board at least 30 days in advance of hearing so that a 21-day public notice of hearing may be published.

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 7th day of January 1999 by a vote of 4-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board