

ILLINOIS POLLUTION CONTROL BOARD

December 2, 1999

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 93-191
	)	(Enforcement - UST)
ESTATE OF LLOYD WIEMANN and	)	
CHERYL HALBROOKS,	)	
	)	
Respondents.	)	

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ESTATE OF LLOYD WIEMANN,	)	
	)	
Cross-complainant,	)	
	)	
v.	)	PCB 93-191
	)	(Enforcement - UST, Citizens)
CHERYL HALBROOKS,	)	(Cross-Complaint)
	)	
Cross-respondent.	)	

DISSENTING OPINION (by M. McFawn):

On August 10, 1999, the People filed a complaint against Cheryl Halbrooks. On November 8, 1999, the Estate of Lloyd Wiemann (Estate) filed a cross-complaint against Halbrooks. The allegations in the cross-complaint filed by the Estate are identical to counts I and II of complaint brought by the People. In its Resolution In the Matter of: Duplicitous or Frivolous Determination, RES 89-2, 100 PCB 53 at 100-54, the Board has stated that duplicitous "has been interpreted to apply to complaints which duplicate allegations identical or substantially similar matters previously brought before the Board." Therefore, the Estate's cross-complaint is clearly duplicitous. It is the second complaint filed and it is identical to a portion of the People's complaint. Contrary to the majority, I would find the Estate's complaint to be duplicitous and dismiss it without prejudice.

In support of its finding that the Estate's complaint is not duplicitous or frivolous, the majority simply cites to People v. Bell Sports, Inc. (December 7, 1995), PCB 95-91. The majority is correct that the Bell Sports, Inc. order is analogous: the counterclaim in that case was filed after the People's case and was identical to parts of the People's complaint. Unfortunately, after further examination, that order was in error.

In its December 7, 1995 order, the Board found the counterclaim filed by two fellow respondents against Bell Sports, Inc. to be neither duplicitous nor frivolous because it believed that those two respondents were entitled to “present evidence on the issue of responsible parties, liability for violations of the Act and any corresponding regulations.” Slip op. at 4. These same or similar evidentiary issues may be present in this case. However, upon examination they do not support a finding that the cross-complaint is not duplicitous. Dismissing a cross-complaint does not eliminate the respondent’s right to present such evidence and arguments at the hearing on the complainant’s case (or at a hearing on a proposed settlement should such become necessary). As a respondent in the People’s case, the Estate can present such evidence and arguments.

Furthermore, Section 31(d) of the Environmental Protection Act (415 ILCS 5/31(d) (1998)) provides (emphasis added):

Any person may file with the Board a complaint . . . against any person allegedly violating this Act or any rule or regulation thereunder or any permit or term or condition thereof. \*\*\* Unless the Board determines that such complaint is duplicitous or frivolous, it shall schedule a hearing and serve written notice thereof upon the person or persons named therein . . . .

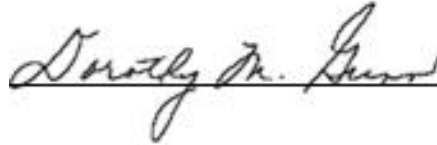
Thus, citizens may bring enforcement actions under the Act, but such complaints are subject to a duplicitous and frivolous determination by the Board, unlike the cases brought by the Attorney General on behalf of the People. The citizen suit under Section 31(d) is subject to the duplicitous and frivolous test for a variety of reasons, among which are to insure that the Attorney General and the “private attorney general” do not duplicate efforts and that a respondent is not required to defend against a claim more than once. Based on Section 31(d), when the two complaints are identical, that filed by the private citizen can and should be dismissed as duplicitous.

I agree with the majority that this matter should proceed expeditiously to hearing, but on the People’s complaint alone. The evidentiary concerns cited by the majority could still be addressed at such hearing by the Estate as a respondent. I would find the Estate’s cross-complaint to be duplicitous and dismiss it without prejudice. I therefore dissent from today’s ruling by the Board.

A handwritten signature in black ink, reading "Marili McFawn", written over a horizontal line.

Marili McFawn  
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above dissenting opinion was submitted on the 6th day of December 1999 .

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

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board