ILLINOIS POLLUTION CONTROL BOARD
February 6, 2003

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 96-143
	)	(Enforcement – Water)
MICHEL GRAIN COMPANY, Inc. a/k/a MICHEL FERTILIZER, CARYLE MICHEL, RONNIE TODD, and RONNIE TODD LAND TRUST,	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by W.A. Marovitz):

On November 20, 2002, complainant, the People of the State of Illinois (complainant), filed a four-count, third amended complaint against respondents, Michel Grain Company, Inc. a/k/a Michel Fertilizer (Michel Grain) and the company's owner and sole proprietor Caryle Michel (Michel), and Ronnie Todd and Ronnie Todd Land Trust (collectively, Todd). Todd filed an answer and affirmative defenses to counts III and IV on November 13, 2002. On November 15, 2002, respondents Michel and Michel Grain filed an answer and affirmative defenses to counts I-IV. Complainant filed two motions to strike each set of respondents' affirmative defenses on December 20, 2002. Todd filed a response to the motion to strike on January 13, 2003. Michel and Michel Grain filed a response to the motion to strike on January 16, 2003.[1] Although Todd asks that counts I and II be dismissed as to Todd, the Board finds this action unnecessary as counts I and II do not pertain to Todd.

For the reasons outlined below, the Board grants the motion to strike Todd's affirmative defenses. The Board grants the motion to strike Michel Grain and Michel's affirmative defenses regarding counts I and II, but does not strike the affirmative defense regarding counts III and IV.

FACILITIES

Michel Grain Company Inc. was an Illinois corporation that was involuntarily dissolved in November 1, 1991. Third Am. Comp. at 4. Michel owned and operated Michel Grain, a

[1] Citations to the complaint will be "Comp. at __." Citations to Respondents Todd's answer will be cited as "Todd Ans. at __." Todd's affirmative defenses will be cited as "Todd Aff. Def. At __." Citations to Respondents Michel Grain and Michel's answer and affirmative defenses will be "Michel Ans. at __." Citations to complainant's motions to strike will be "Comp. Mot. to Strike Todd at __." and "Comp. Mot. to Strike Michel at __." Citations to Todd's response will be "Todd Resp. at __." Citations to Michel Grain and Michel's response will be "Michel Resp. at __."

grain elevator and liquid agricultural chemical facility located in the Village of Ina, Jefferson County (Ina facility). Third Am. Comp. at 6.

Michel also owned and operated a liquid and dry fertilizer and agrichemical facility in the Village of Broughton, Hamilton County (Broughton facility). Third Am. Comp. at 10. The parties agree that Michel sold Todd the Broughton facility on June 24, 1997. Third Am. Comp. at 10, Todd Ans . at 2, Michel Ans. at 8. Todd placed the Broughton facility in the Ronnie Todd Land Trust on July 21, 2000. Third Am. Comp. at 10, Todd Ans. at 2, Michel Ans. at 10.

Counts I and II in the complaint address the Ina facility and Michel himself. Counts III-IV address the Broughton facility, Michel Grain, Michel and Todd.

PROCEDURAL BACKGROUND

On August 22, 2002, the Board ordered complainant to file a third amended complaint in this matter to include the required notice to Michel Grain Company, Caryle Michel, and Ronnie Todd regarding the consequences of failure to answer the complaint. *See* 35 Ill. Adm. Code 103.204(e), (f). On September 20, 2002, complainant filed an amended four-count complaint against respondents. *See* 415 ILCS 5/31(c)(1) (2002).

Based on alleged contamination from two fertilizer and agrichemical facilities, the Ina and Broughton facilities, complainant has alleged water pollution and land pollution violations of the Environmental Protection Act (Act) (415 ILCS 5/12(a), (d), 21(d) (2002) and Board regulations (35 Ill. Adm. Code 302.203, 304.106, 808.121(c)(1)).

On December 27, 1995, complainant filed the original complaint, naming only Michel Grain and Michel as respondents. The complaint alleged water pollution violations of the Act and Board regulations concerning pesticide and fertilizer spills at the Ina facility. Complainant's first amended complaint, filed on April 25, 1996, added similar allegations regarding the Broughton facility. On October 4, 2001, complainant filed a second amended complaint, naming Ronnie Todd as an additional respondent and alleging that he was the current owner of the Broughton facility. On July 2, 2002, Todd filed a motion to be dismissed from this proceeding, as the property had been transferred to the Ronnie Todd Land Trust.

On August 22, 2002, the Board denied Todd's motion to dismiss, and ordered complainant to file a third amended complaint in this matter to include the required notice to Michel Grain Company, Caryle Michel, and Ronnie Todd regarding the consequences of failure to answer the complaint. Complainant's third amended complaint requested that the Board add the Ronnie Todd Land Trust as a respondent. On October 3, 2002, the Board accepted the third amended complaint.

RELEVANT STATUTORY PROVISIONS

Section 12(a) of the Act provides:

No person shall:

> 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.

Section 12(d) of the Act provides:

> No person shall:
>
> Deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard.

Section 21(d)(2) of the Act provides:

> No person shall:
>
> Conduct any waste-storage, waste-treatment, or waste-disposal operation:
>
> * * *
>
> (2) in violation of any regulations or standards adopted by the Board under this Act; or
>
> * * *

35 Ill. Adm. Code 302.203 states:

> Waters of the State shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, color or turbidity of other than natural origin. The allowed mixing provisions of Section 302.102 shall not be used to comply with the provisions of this Section.

35 Ill. Adm. Code 304.106 states:

> In addition to the other requirements of this Part, no effluent shall contain settleable solids, floating debris, visible oil, grease, scum or sludge solids. Color, odor and turbidity must be reduced to below obvious levels.

35 Ill. Adm. Code 808.121(c)(1) states:

> No person shall cause, threaten or allow the treatment, storage or disposal of special waste in Illinois except:
>
> (1) At a facility permitted or otherwise authorized to manage the special waste pursuant to 35 Ill. Adm. Code 703 or 807 (Section 21(d) and (e) of the Act); or

STANDARD

In an affirmative defense, the respondent alleges "new facts or arguments that, if true, will defeat . . . [complainant's] claim even if all allegations in the complaint are true." People v. Community Landfill Co., PCB 97-193, (Aug. 6, 1998). The Code of Civil Procedure gives additional guidance on pleading affirmative defenses. Section 2-613(d) provides, in part:

> The facts constituting any affirmative defense . . . and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint, . . . in whole or in part, and any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply." 735 ILCS 5/2-613(d) (2002).

A valid affirmative defense gives color to the opposing party's claim but then asserts new matter which defeats an apparent right. Condon v. American Telephone and Telegraph Co., 210 Ill. App. 3d 701, 709, 569 N.E.2d 518, 523 (2nd Dist. 1991), citing The Worner Agency Inc. v. Doyle, 121 Ill. App. 3d 219, 222, 459 N.E.2d 633, 635 (4th Dist. 1984). A motion to strike an affirmative defense admits well-pleaded facts constituting the defense, and attacks only the legal sufficiency of the facts. "Where the well-pleaded facts of an affirmative defense raise the possibility that the party asserting them will prevail, the defense should not be stricken." International Insurance Co. v. Sargent and Lundy, 242 Ill. App. 3d 614, 630-31, 609 N.E.2d 842, 853-54 (1st Dist. 1993), citing Raprager v. Allstate Insurance Co., 183 Ill. App. 3d 847, 854, 539 N.E.2d 787, 791 (2nd Dist. 1989).

COUNTS I and II: WATER POLLUTION – UNLAWFUL DISPOSAL OF WASTE - VILLAGE OF INA FACILITY

In count I, complainant alleges respondents Michel Grain and Michel violated Sections 12(a) and (d) of the Act (415 ILCS 5/12(a), (d) (2002) and 35 Ill. Adm. Code 302.203 and 304.106. Third Am. Comp. at 6. Specifically, complainant alleges that an inspection on May 8, 1989, revealed that Michel Grain and Michel operated the facility in such a manner that resulted in the discharge of pesticides, fertilizers, herbicides and fuels onto the ground and in the drainage way. Third Am. Comp. at 4-6. By causing or allowing the discharge of these items, Michel Grain and Michel have allegedly caused, threatened or allowed the discharge of contaminants so as to cause or tend to cause water pollution in violation of Section 12(a) of the Act. Third Am. Comp. at 6. By creating a water pollution hazard through the potential for runoff into waters of the State, Michel Grain and Michel violated Section 12(d) of the Act.

In count II, complainant alleges that on or before May 8, 1989, respondents Michel Grain and Michel caused or allowed pesticides, fertilizers and herbicides to be discarded onto the ground at the facility. Third Am. Comp. at 9. By causing or allowing the unlawful disposal of waste, complainant alleges respondents Michel Grain and Michel violated Section 21(d)(2) of the Act.

Affirmative Defense

Respondent Michel states as an affirmative defense to both counts I and II, that both counts have been resolved because he had the property tested, and the results show no contamination at the facility. Michel Ans. at 3 and 7.

Complainant responds that even if tests in 2001 reveal no contamination at the site, Michel is still responsible for violations that occurred in 1989 and continued until he closed the facility. Comp. Mot. to Strike Michel at 3.

Discussion

Michel's affirmative defenses to counts I and II do not allege "new facts or arguments that, if true, will defeat . . . [complainant's] claim even if all allegations in the complaint are true." People v. Community Landfill Co., PCB 97-193, (Aug. 6, 1998). Even if tests show that the Ina facility has no contamination, this does not show that no violation occurred as alleged by complainant. The Board strikes Michel's affirmative defenses for counts I and II. Respondents are free to address these matters at hearing, as they are relevant to the Board's consideration of various factors under 33(c) and 42(h) of the Act. 415 ILCS 5/33(c), 42(h) (2002).

COUNTS III and IV – WATER POLLUTION and UNLAWFUL DISPOSAL OF WASTE – VILLAGE OF BROUGHTON FACILITY

In count III, complainant states that Michel Grain and Michel owned and operated the Broughton facility "for a period of time known only to respondents." Third Am. Comp. at 10. Complainant further states, and Todd admits, that on June 24, 1997, Michel and his wife sold the Broughton facility to Ronnie Todd. Third Am. Comp. at 10; Todd Ans. at 2. Prior to June 24, 1997, Todd leased the facility from Michel. Third Am. Comp. at 10; Todd Ans. at 2. On July 21, 2000, Todd put the Broughton facility property in the Ronnie Todd Land Trust (trust). Third Am. Comp. at 10; Todd Ans. at 2.

Complainant alleges that since at least January 9, 1992, and continuing to a date known only to respondents, respondents have caused or allowed pesticides, herbicides, fertilizers, and fuels to contaminate soils at the facility which have contaminated water entering the drainage way. Third Am. Comp. at 12. Complainant further alleges that since at least January 9, 1992, and continuing to a date known only to respondents, respondents have caused or allowed the discharge of contaminants from its facility into the drainage way so as to cause water pollution in violation of Section 12(a) of the Act 415 ILCS 5/12(a)(2002) and 35 Ill. Adm. Code 302.203 and 304.106. Third Am. Comp. at 12. Moreover, respondents deposited contaminants on the land so as to create a water pollution hazard in violation of Section 12(d) of the Act, 415 ILCS 5/12(d) (2002). Third Am. Comp. at 12.

In count IV complainant alleges that on or before January 9, 1992, respondents unlawfully disposed of waste, by causing or allowing pesticides, herbicides, fertilizers, and fuels to be discarded upon the ground at its facility and contaminate the soils and water entering the drainage way, in violation of Section 12(d)(2) of the Act, 415 ILCS 5/12(d)(2) (2002).

Todd's Affirmative Defenses

Todd argues neither Ronnie Todd nor the trust owned the property when the alleged violations occurred. Todd Aff. Def. at 1. Todd asserts that the allegations of 12(a) and (d) (causing or allowing discharge and contamination), occurred before either Ronnie Todd or the trust was associated with the property. Todd Aff. Def. at 2. Todd further argues that complainant violated Section 21(m) of the Act by not giving Todd notice that the land Todd purchased from Michel was a waste disposal site. Todd. Aff. Def. at 3. Todd also asserts he was a good faith purchaser of the property, citing Sections 21.3(a) and (c) of the Act (415 ILCS 5/21.3(a), (c) (2002)). Aff. Def. at 3-4. Todd also raises defenses pursuant to Section 22.2 of the Act (415 ILCS 5/22.2 (2002)).

Complainant responds that all of Todd's affirmative defenses are wholly conclusive and insufficient, and they should be struck. Comp. Mot. to Strike Todd at 7. Specifically, complainant argues that Todd, as the operator and lessee of the facility before 1997, and the owner of the facility from 1997 to 2000, and a beneficial user of the facility since 2000, controlled the source of pollution at the facility and has not taken precautions to prevent the pollution from continuing. Comp. Mot. to Strike Todd at 4.

Complainant also alleges that Todd failed to provide a factual basis to show how complainant violated Section 21(m) of the Act. Comp. Mot. to Strike Todd at 5. Complainant alleges the claim is actually against Michel and is not an affirmative defense to the complaint.

Complainant also characterizes as premature Todd's argument regarding being a good faith purchaser, with no environmental lien being against the property pursuant to Section 21.3(a) and (c) of the Act. Comp. Mot. to Strike Todd at 6. Complainant states that those sections address when the Environmental Protection Agency (Agency) should file an environmental reclamation lien. Comp. Mot. to Strike Todd at 6. Specifically, a lien should be filed when the Agency has incurred any removal or remedial costs at the site, which has not occurred at this site. Comp. Mot. to Strike at 6.

Complainant also argues that as complainant has not alleged any violation of Section 22.2 of the Act, that defenses regarding Section 22.2 are not applicable in this matter. Comp. Mot. to Strike at 7.

Todd responds that Todd did not have control over the property when the release occurred, nor knowledge of what the complained of release is. Todd Resp. at 2.

Discussion

Neither Section 12(a) or (d) require that the person liable for the contamination be the owner or operator of the contaminated property. So, Todd's assertion that the allegations of 12(a) and (d) (causing or allowing discharge and contamination) occurred before either Ronnie Todd or the trust was associated with the property, is not an appropriate affirmative defense. The

affirmative defense does not allege new facts or arguments that, if true, will defeat complainant's claim even if all allegations in the complaint are true. The Board strikes the affirmative defense

Todd's assertion that complainant violated Section 21(m) of the Act by not giving Todd notice that the land Todd purchased from Michel was a waste disposal site, is an allegation that may be appropriate for a cross-complaint, but it is not an affirmative defense. The Board strikes the affirmative defense.

The Board previously addressed Todd's Section 22 arguments in the context of denying his previous motion to dismiss. People v. Michel Grain Company Inc., PCB 96-143, (Aug. 22, 2002) at 4. Todd's allegation that he was a good faith purchaser of the property does not prevent the Board from finding a violation of the Act. The affirmative defense does not allege new facts or arguments that, if true, will defeat complainant's claim even if all allegations in the complaint are true. The Board strikes the affirmative defense.

Regarding Todd's allegation that Section 22.2(j) of the Act provides an exemption for liability, the Board agrees with complainant that complainant has not alleged liability under Section 22.2. By its terms, Section 22.2(j) only applies to cases brought under Section 22.2. Any affirmative defense that Section 22.2(j) provides is not relevant to this matter, because complainant alleged only violations of factors existed that were substantially and significantly different from those relied upon by the Board when it adopted the regulation prohibiting open burning Sections 12(a) and (d), not Section 22.2. The Board strikes the affirmative defense.

Michel's Affirmative Defenses

As to both count III and IV, Michel asserts that he never operated a liquid chemical operation at the Broughton facility. Michel Ans. at 10, 14. Michel claims he purchased the Broughton facility from a bank, and the site may have previously contained a liquid chemical operation. Michel Ans. at 10, 14. Michel asserts he rented the facility to Todd and had no control over the facility at that time. Michel Ans. at 10-11, 14.

Complainant states that as owner of the property from at least 1992 to 1997, Michel had the capability of control over the pollution source at the facility, and he has not taken any necessary precautions to prevent the pollution from continuing. Comp. Mot. to Strike Michel at 4.

Discussion

The Board has previously refused to strike affirmative defenses regarding lack of ability to control the alleged pollution source. As the Board stated in Chiquita People v. Chiquita Processed Foods, L.L.C., PCB 02-56 (Apr. 18, 2002), the test it applies in determining whether an alleged polluter has violated the Act is whether or not an alleged polluter exercised sufficient control over the source of the pollution. *See* People v. A.J. Davinroy Contractors, 618 N.E.2d 1282, 1286 (5th Dist. 1993) *citing* People v. Fiorini, 574 N.E.2d 612, 623 (1991). Additionally, Davinroy also states that the owner of a pollution source "is responsible for that pollution unless the facts establish that the owner either lacked the capability to control the source or had

undertaken extensive precautions to prevent . . . other intervening causes." Davinroy, 618 N.E.2d at 1287. However, Davinroy also states that the owner of a pollution source is responsible for that pollution unless the facts establish that the owner either lacked the capability to control the source or had undertaken extensive precautions to prevent . . . other intervening causes. Davinroy, 618 N.E.2d at 1287.

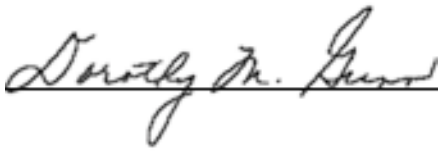
Although Michel does not deny owning the site, because Michel may be able to prove that he lacked the capability to control the pollution source, the Board will not strike this affirmative defense.

CONCLUSION

In sum, the Board grants the motion to strike Todd's affirmative defenses. The Board grants the motion to strike Michel Grain and Michel's affirmative defenses regarding counts I and II, but does not strike the affirmative defense regarding counts III and IV.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the above order was adopted on February 6, 2003, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board