ILLINOIS POLLUTION CONTROL BOARD
August 21, 1997

DAYTON HUDSON CORPORATION,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 97-134
	)	(Enforcement -
CARDINAL INDUSTRIES, INC., and	)	Citizens - Land)
DANIEL E. CARDINAL, JR.,	)	
	)	
Respondents.	)	

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

Respondents Cardinal Industries Inc. and Daniel E. Cardinal, Jr. (Cardinal) move to strike petitioner Dayton Hudson Corporation's (Dayton) complaint filed on February 7, 1997. The complaint alleges violations of Sections 21(a), 21(p), and 21(f) of the Environmental Protection Act (Act) (415 ILCS 5/21(a), 21(p), 21(f) (1996)) regarding the open dumping of waste, discharge and release of liquids, and operation of a facility in violation of a Resource Conservation and Recovery Act (RCRA) permit.[1] Additionally, the complaint seeks injunctive relief pursuant to Section 45 of the Act (415 ILCS 5/45 (1996)), costs for past remediation, and attorney fees. Dayton also seeks, by separate motion, to amend its prayer for relief to include a request for civil penalties against Cardinal, which the Board allows. In support of its motion to strike, Cardinal argues that Dayton's complaint is both duplicitous and frivolous.

The Board denies Cardinal's motion to strike Dayton's complaint because the Board finds the complaint is neither duplicitous nor frivolous. In arguing that the complaint is duplicitous, Cardinal relies primarily on a federal action currently pending between the parties. However, since the federal case between the parties involves different allegations than those allegations in the complaint before the Board, the Board concludes that this matter is not duplicitous. Additionally, because the Board has the authority to award cleanup costs in private cost recovery actions, we find this matter is not frivolous. Accordingly, this matter shall proceed to hearing.

---

[1] Dayton's complaint was filed on February 7, 1997, and will be cited to as Comp. at __. Dayton's motion for leave to amend prayer for relief was filed on April 15, 1997, and will be cited to as Mot. to Amend at __. Cardinal's motion to strike complaint was filed on March 17, 1997, and will be cited to as Mot. to Strike at __. Dayton's response to Cardinal's motion to strike was filed on April 7, 1997, and will be cited to as Resp. at __.

BACKGROUND

In 1957, Cardinal acquired an 80-acre parcel of land located at the southeast corner of Army Trail Road and Schmale Road in unincorporated DuPage County, Illinois (site). Comp. at 1. In 1962, Cardinal built a facility (facility) for the manufacture of various types of products, including purchase display cases and shelving using painted and vinyl laminated hardboards and particle boards. Comp. at 2. The complaint alleges that Cardinal generated hazardous substances in their painting, laminating, and gluing processes at the facility. Dayton alleges that Cardinal used xylene-based solvents, benzene-based lacquer thinners, 1-1-1 trichloroethane, and methylene chloride to clean the painting, filling, and gluing equipment. Comp. at 2. Additionally, the complaint alleges that during its operations, Cardinal filled several 55-gallon drums, pails and other containers with hazardous substances, and buried these drums at the facility. Comp. at 3.

In 1988, Cardinal sold the site to American National Bank and Trust Company of Chicago as a trustee under a trust agreement. Comp. at 4. Cardinal continued to operate the facility as a lessee of the trust until the fall of 1989 when the buildings which once housed the Cardinal facility were demolished. Comp. at 4-5. On January 29, 1991, Dayton entered into a purchase/sale agreement to purchase the site where the Cardinal facility once stood. Comp. at 5. Dayton closed on the sale of the site with American National Bank and Trust Company on April 24, 1991.

In May 1992, during construction work on the subject site for a Target "Greatland" retail store, Dayton encountered 55-gallon drums, pails, and other containers and materials containing hazardous substances and contaminated soils. Comp. at 5. As a result, Dayton ordered its general contractor and subcontractors to cease any further construction. Dayton retained an environmental consultant to perform an emergency response and to assess the extent of contamination at the site. Comp. at 6. In accordance with directives issued by the Illinois Environmental Protection Agency, Dayton then removed the drums, pails, and other materials containing hazardous waste, contaminated soils, and contaminated groundwater from the site. Comp. at 7.

ALLEGATIONS AND RELIEF SOUGHT

In its complaint, Dayton alleges that during the course of Cardinal's ownership and operation of the site, Cardinal caused or allowed the open dumping of waste in violation of Section 21(a) of the Act (415 ILCS 5/21(a) (1996)). Comp. at 7. Further, Dayton alleges that, by causing or allowing open dumping of waste, Cardinal caused standing or flowing liquid to be discharged and released from the site in violation of Section 21(p) of the Act (415 ILCS 5/21(p) (1996)). Comp. at 7. Finally, Dayton alleges that Cardinal operated the hazardous waste disposal operations without a RCRA permit in violation of Section 21(f) of the Act (415 ILCS 5/21(f) (1996)). Comp. at 8.

As a result of the alleged violations, Dayton seeks injunctive relief under Section 45 of the Act (415 ILCS 5/45 (1996)) because further environmental investigation and remediation of any remaining contamination on the site is necessary as required by the Act. Comp. at 8.

Dayton also requests all cleanup costs as a result of Cardinal's violations of the Act. Comp. at 8. Finally, Dayton requests that it receive its costs, attorney fees, civil penalties, and any other relief the Board deems equitable and just. Comp. at 9; Mot. to Amend at 2.

ARGUMENT AND ANALYSIS

Cardinal maintains that the Board should strike Dayton's complaint because it is duplicitous and frivolous. In support of its position, Cardinal argues first that the complaint is duplicitous of a currently pending federal action before the Northern District of Illinois. Second, Cardinal argues that the complaint is frivolous because the Board does not have the authority under the Act to adjudicate private cost recovery actions or to award any costs arising out of such an action.

Section 103.124(a) of the Board's procedural rules (35 Ill. Adm. Code 103.124(a)) which implements Section 31(b) of the Act (415 ILCS 5/31(b) (1996)), provides that this matter shall be placed on the Board agenda for the Board's determination as to whether or not the complaint is duplicitous or frivolous. Section 103.124(a) further states that if 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, however, does not preclude the filing of motions regarding the insufficiency of the pleadings. 35 Ill. Adm. Code 103.124(a).

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. A complaint should not be dismissed unless it clearly appears that no set of facts could be proven that would entitle a complainant to relief. Miehle v. Chicago Bridge and Iron Co. (November 4, 1993), PCB 93-150, citing Callaizakis v. Astor Development Co. 4 Ill. App. 3d 163, 280 N.E.2d 512 (1st Dist. 1972). At this time, the Board finds that, pursuant to 35 Ill. Adm. Code 103.124(a), the evidence before the Board does not indicate that this complaint is either duplicitous or frivolous.

Duplicitous Determination

Cardinal states that Dayton's complaint should be stricken because Dayton has also filed a case in federal court, and therefore the complaint before the Board is duplicitous. Mot. to Str. at 3. In support of its argument, Cardinal asserts that because a "release" under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) and "open dumping" under the Act are in essence the same claims, the complaint filed before the Board is duplicitous of the federal action. Mot. to Strike at 4; see *e.g.* New York v. Shore Realty Corp., 759 F.2d 1032 (2nd Cir. 1985); Colorado v. Asarco, Inc., 616 F.Supp. 822 (D. Colo. 1985). Cardinal also argues that the relief sought by Dayton in both causes of action are the same. Therefore, Cardinal argues that Dayton's action before the Board is duplicitous of the federal action.

In response to Cardinal's allegations, Dayton argues that the Board previously held in Lake County Forest Preserve District v. Ostro (July 30, 1992), PCB 92-80, that an action before the Board is not duplicitous when there is another action pending between the same parties in federal court and relating to the same piece of property. Dayton further notes that in Ostro, the Board highlighted that the remedy sought in the Board complaint was a cease and desist order and statutory penalties, none of which were available in the federal court action. Resp. at 11.

Dayton further maintains that while the parties are the same in both the Board and the federal actions, the two actions are rooted in separate statutes and distinguishable legal theories. Resp. at 11. Dayton alleges that the federal action against Cardinal is a private cost recovery action brought under CERCLA (42 U.S.C. § 9607), under which liability is triggered by a release of hazardous waste or ownership of property. Resp. at 12-13. To be held liable under the Act, however, Dayton argues that Cardinal must have caused or allowed open dumping of waste, caused or allowed standing or flowing liquid to be discharged from the dump site, or conducted hazardous waste disposal operations without a RCRA permit. Resp. at 12. Moreover, Dayton asserts that Cardinal can be held liable for not having a RCRA permit and operating illegally in the Board action, while no such liability exists for a CERCLA defendant. Resp. at 13.

Finally, Dayton alleges that the relief sought by Dayton in the federal action and Illinois action are distinguishable and therefore not duplicitous. In support of this assertion, Dayton argues that the action before the Board for response costs under the Act are different than a claim for CERCLA costs in federal court. Resp. at 13; see Ostro (March 31, 1994), PCB 92-80. In the Board action, Dayton maintains that it is entitled to injunctive relief and statutory penalties under Section 45 of the Act. Comp. at 8-9; see 415 ILCS 5/45 (1996). Dayton further alleges that injunctive relief, civil penalties, and cost reimbursement are available remedies under the Act, but are unavailable to Dayton in the federal action. Resp. at 12; see 415 ILCS 5/33, 45 (1996). For all of these reasons, Dayton asserts that the action before the Board is not duplicitous.

The Board finds that this matter is similar to Ostro. In that case, a cause of action was pending both before the Board and in the federal district court. Ostro (July 30, 1992), PCB 92-80. The Board found that although both actions were filed on the same day, involved the same parties, the same time frame, and the same actions, the federal action was based on statutes and legal theories other than the Act. Ostro (July 30, 1992), PCB 92-80, slip op. at 2. The Board further concluded that the federal action involved liability under CERCLA, as well as other common law counts, while the Board action was strictly based on the Act. Accordingly, the Board denied respondent's motion to strike, holding that the federal action was not duplicitous of the Board action.

Similarly, in the instant matter, although the complaints involve the same parties (and several more in the federal action), the same time frame, and the same actions, they are based on statutes and legal theories that are separate and distinct from the Act. Like Ostro, this matter presents a similar situation. In both Ostro and this case, the federal actions involve

CERCLA and common law counts. Additionally, both cases before the Board involve allegations of the Act. Based on Ostro, the Board finds that the complaint here is not duplicitous. For these reasons, the Board will not strike this complaint on the ground that it is duplicitous.

Frivolous Determination

Cardinal also maintains that the complaint should be stricken as frivolous because the Board lacks the authority to award damages. Cardinal asserts that because Dayton is a private party and not a citizen of the State, Dayton is not entitled to bring an action for cost recovery. Moreover, Cardinal asserts that since Ostro did not involve a private party suing for cleanup costs, it cannot stand for the proposition that private parties have standing to recover cleanup costs under the Act. Mot. to Strike at 10. If cleanup costs can be awarded to private parties by the Board, Cardinal maintains that such costs must be allowed pursuant to a theory other than a direct action for damages under the Act. Mot. to Strike at 10. Therefore, Cardinal argues that subsequent Board cases citing Ostro were in error. Mot. to Strike at 10; see Herrin (September 1, 1994), PCB 94-178; Streit (September 7, 1995), PCB 95-122.

Cardinal further asserts that even if Ostro can be read to provide for private cost recovery, Cardinal requests that the Board reconsider and clarify its decision in that case, as its reliance on the decision, People v. Fiorini, 143 Ill.2d 318, 574 N.E. 612 (1991) is misplaced. Mot. to Strike at 8-9. Cardinal asserts that Fiorini does not stand for the proposition that private parties can recover cleanup costs under the Act. Mot. to Strike at 9; see Fiorini, 143 Ill.2d 318, 574 N.E. 2d 612 (1991). For all of these reasons, Cardinal states that the Board erred in its post-Ostro decisions. Mot. to Strike at 10; see Herrin (September 1, 1994), PCB 94-178; Streit (September 7, 1995), PCB 95-122.

Additionally, in support of its argument, Cardinal alleges that the Board recently decided in Farmers State Bank v. Phillips Petroleum Company (January 23, 1997), PCB 97-100, that it does not have the discretion to award attorney fees or interest for costs incurred by a citizen complainant. Mot. to Strike at 7. Cardinal therefore concludes that Dayton's request for attorney fees should be stricken as the Board does not have the authority to award such fees.

Finally, Cardinal maintains that in this case, and in Ostro and its progeny, the complainant was seeking to recover for injury to property which occurred prior to the transfer of property. Mot. to Strike at 10. Cardinal alleges that because Illinois law favors finality in real estate transactions, the common law principle of *caveat emptor* is strictly applied to claims arising out of the condition of the property prior to its conveyance. Mot. to Strike at 10; see Heider v. Leewards Creative Crafts, 245 Ill. App.3d 258, 613 N.E. 805 (2nd Dist. 1993), *appeal denied*, 152 Ill.2d 559, 622 N.E.2d 1206 (1993) and *In re* Illinois Bell Switching Station Litigation, 161 Ill.2d 240, 641 N.E.2d 440, (1994).

In its response, Dayton asserts that the Board has the authority under the Act to grant Dayton response costs and injunctive relief. Resp. at 6. Citing Ostro and its progeny, Dayton

alleges that the Board has already held that a private party is entitled to recover its response costs from a responsible party. Resp. at 6; see Ostro (March 31, 1994), PCB 92-80.

Dayton argues that, contrary to Cardinal's claims, there is nothing in the Ostro decision suggesting that its holding should be limited to a governmental entity. Resp. at 6. Dayton cites to recent Board and federal court actions which have held that private citizens have an implied right to bring a cost recovery action under the Act. Resp. at 6-7; See *e.g.*, Midland Life Ins. Co. v. Regent Partners, 1996 U.S. Dist. LEXIS 15545, 44 ERC (BNA) 1019 (N.D. Ill. October 17, 1996); Krempel v. Martin Oil Marketing, Ltd., 1995 U.S. Dist. LEXIS 18236 (N.D. Ill. December 8, 1995); Streit v. Oberweis Dairy, Inc., (September 7, 1995), PCB 95-122; Herrin Security Bank v. Shell Oil Co. (September 1, 1994) PCB 94-178. In addition, Dayton argues that there is no basis for Cardinal's claim that because Dayton is a Minnesota corporation, and therefore not a citizen of the State of Illinois, it is not entitled to the protections of the Act. Resp. at 9. In reply to Cardinal's claim, Dayton suggests that neither Ostro, Herrin, Streit, nor Section 31 of the Act purports to limit non-governmental actions to "citizen suits." Resp. at 9.

In asking the Board to reconsider Ostro, Dayton maintains that Cardinal ignores the plain language of People v. Fiorini, 143 Ill.2d 318, 574 N.E.2d 612 (1991), upon which the Ostro decision was based. Resp. at 7. Dayton suggests that Ostro interpreted Fiorini to mean that in its discretion the Board could award costs under "appropriate facts." Resp. at 7. Ostro further concluded that "allowing the award of cleanup costs in some cases will further the purposes of the Act, by encouraging parties to remediate a threat to the environment immediately, knowing that their costs will be reimbursed." Resp. at 7, citing Ostro (March 31, 1994), PCB 92-80. Moreover, Dayton argues that in Ostro, the Board noted that Section 33(a) of the Act specifically allows the Board to enter such final orders as it deems appropriate. Resp. at 7.

With regard to attorney fees, Dayton argues that the Board has not expressly stated that it does not have the authority to award attorney fees. Resp. at 9. Dayton states that the Board held in Farmers State Bank v. Phillips Petroleum Company (January 23, 1997), PCB 97-100 that generally the Board does not have the discretion to award attorney fees. Resp. at 9. Dayton further notes that the Board found that "at this time, the Board does not want to make a determination regarding the request for attorney fees and accrued interest." Resp. at 9 (citing Farmers State Bank v. Phillips Petroleum Company (January 23, 1997), PCB 97-100).

None of the arguments put forth by Cardinal convinces the Board that the complaint should be stricken for frivolous reasons. As noted previously, the Board has already stated that it has the authority to award cleanup costs to private parties in a cost recovery action and Cardinal has not presented any arguments that persuade the Board to change its position here. See Ostro (March 31, 1994), PCB 92-80; Streit v. Oberweis Dairy, Inc. (September 7, 1995), PCB 95-122; Herrin Security Bank v. Shell Oil Co. (September 1, 1994) PCB 94-178; Richey v. Texaco Refining and Marketing, Inc. (August 7, 1997), PCB 97-148. As the Board stated in Ostro:

> [w]e also find that allowing the award of clean up costs in some cases will further the purposes of the Act, by encouraging persons to remediate a threat to environment immediately, knowing that their costs could be reimbursed. Section 33(a) specifically allows the Board to enter into such final orders as it deems appropriate. We find that this broad grant of authority, coupled with the supreme court's refusal in Fiorini to find that the award of cleanup costs is not available under the Act, gives the Board the authority to award cleanup costs. Ostro (March 31, 1994), PCB 92-80, slip. op. at 13.

The Board continues to agree with the Ostro decision. Current owners should be entitled to recover the cost of performing cleanup as a result of a prior party's actions on the property. As Section 2(b) of the Act states: "the purpose of this Act . . . [is] . . . to establish a unified, state-wide program supplemented by private remedies, to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them." 415 ILCS 5/2(b) (1996). The Act establishes that "[t]he Board shall determine, define and implement the environmental control standards applicable in the State of Illinois…" 415 ILCS 5/5 (1996). The Board believes that reading the Act to allow for private cost recovery actions furthers the intent of the Act and promotes good public policy since private cost recovery actions ensure that the party responsible for contaminating the property pays for its proportionate share of the costs of the cleanup. See 415 ILCS 5/58 *et seq*. (1996)**.**

Moreover, the Board has the authority, pursuant to Section 33(b) of the Act (415 ILCS 5/33(b) (1996), to order a party to cease and desist from violations of the Act or of the Board's regulations. In determining whether the Board shall enter a cease and desist order, it applies the factors set forth in Section 33(c) of the Act (415 ILCS 5/33(c) 1996)). See Ostro (March 31, 1994), PCB 92-80. We note that, contrary to Dayton's allegations, the Board does not have the authority to award injunctive relief. 415 ILCS 5/33(b) (1996). However, as previously mentioned, the Board can order a violator of the Act to cease and desist from further violations of the Act. 415 ILCS 5/33(b) (1996). A party may seek enforcement of a Board order in circuit court by "injunction, mandamus, or other appropriate remedy" in accordance with Section 33(d) of the Act. 415 ILCS 5/33(d) (1996).

With regard to attorney fees and costs, we find that the Board generally does not have the discretion under the Act to award attorney fees and costs incurred by citizen complainants.[2] 415 ILCS 5/42(f) (1996); see Farmers State Bank v. Phillips Petroleum Company (January 23, 1997), PCB 97-100. Such costs and fees are allowed by Section 42(f) of the Act only when the Attorney General or a State's Attorney prevails in an enforcement action on behalf of the People of the State of Illinois. See 415 ILCS 5/42(f) (1996); see also Bill Aden, John Schroder, Velma Schroder, Joe Kendall, Lamorn Morris et al. v. City of Freeport (September

[2] The Board notes, however, that the Act provides for some circumstances for the recovery of attorney fees. See *e.g.*, Public Water Supplies (Title IV of the Act); Water Pollution Control (Title IV-A of the Act); and Land Pollution and Refuse Disposal (Title V of the Act).

8, 1988), PCB 86-193. When the language of the statute does not specifically indicate that ordinary expenses of litigation or attorney fees are recoverable, the courts will not give the language expanded meaning. See ESG Watts, Inc. v. Illinois Pollution Control Board, 286 Ill. App. 3d 325, 679 N.E.2d 299 (3rd Dist. 1997) (citing Sanelli v. Glenview State Bank, 126 Ill. App. 3d 411, 466 N.E. 2d 1119 (1st Dist. 1984); Qazi v. Ismail, 50 Ill. App. 3d 271, 364 N.E.2d 595 (1st Dist. 1977)). Accordingly, the Board concludes that it does not have specific statutory authority to order attorney fees under the statutory sections in which this case was filed and, accordingly, strikes the request for this relief.

Finally, the Board notes that Cardinal's reliance on the common law principle of *caveat emptor* is obsolete. Dayton maintains that it is now the policy of the State under 415 ILCS 5/2(b) (1996) that those who have caused hazardous waste contamination should be held responsible for cleaning the property they have contaminated. Resp. at 10. The Board finds that holding Dayton to the common law principle of *caveat emptor*, as Cardinal argues, is improper. The enactment of the Act has supplanted this principle with a liability scheme that holds responsible parties liable for their actions.

For the above reasons, the Board will not strike this complaint on grounds that it is frivolous. The Board will, however, strike the request for attorney fees. This case shall proceed to hearing.

Having determined that this case is neither duplicitous nor frivolous, the hearing must be scheduled and completed in a timely manner consistent with Board practices. The hearing officer shall inform the clerk of the Board of the time and location of the hearing at least 30 days in advance of hearing so that a 21-day public notice of hearing may be published. After hearing, the hearing officer shall submit an exhibit list, a statement regarding the credibility of witnesses, and all actual exhibits to the Board within five days of the hearing.

If after appropriate consultation with the parties, the parties fail to provide an acceptable hearing date or if after an attempt the hearing officer is unable to consult with the parties, the hearing officer shall unilaterally set a hearing date in conformance with the schedule above. The hearing officer and the parties are encouraged to expedite this proceeding to the extent possible.

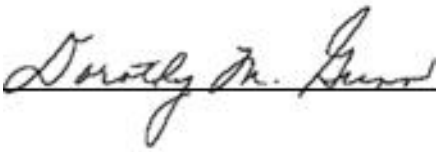
CONCLUSION

For the foregoing reasons, the motion to strike is denied with the exception of the request for attorney fees which the Board hereby strikes. We find that the allegations of the complaint are sufficient to warrant a hearing on the facts. Pursuant to 35 Ill. Adm. Code 103.124(a), the complaint is neither duplicitous nor frivolous. A hearing officer will be designated and this matter will be set for hearing.

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 21st day of August 1997, by a vote of 5-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board