ILLINOIS POLLUTION CONTROL BOARD
November 20, 1997

ENVIRONMENTAL SITE DEVELOPERS, INC., an Illinois corporation,	)	
Complainant,	)	PCB 96-180
	)	(Enforcement - Water - Citizens)
v.	)	
WHITE & BREWER TRUCKING, INC., an Illinois corporation,	)	
Respondent.	)	

ORDER OF THE BOARD (by M. McFawn):

This case is before the Board on the "Complainant's Motion for Partial Summary Judgment," filed on December 9, 1996, by complainant Environmental Site Developers, Inc. (ESDI). Also before the Board are the "Counterclaim" filed by respondent White & Brewer Trucking, Inc. (White & Brewer) on August 4, 1997, and "Complainant's Motion to Lift Stay and to Enter Order of Partial Summary Judgment," filed by ESDI on November 12, 1997. ESDI's motion for partial summary judgment is granted in part and denied in part. White & Brewer's counterclaim is accepted for hearing. ESDI's motion to lift stay is denied as moot.

MOTION FOR PARTIAL SUMMARY JUDGMENT

ESDI moved for partial summary judgment against White & Brewer based on certain allegations made by White & Brewer in a complaint filed in the United States District Court for the Central District of Illinois in Springfield in White & Brewer Trucking, Inc. v. Donley et al., case number 95-3224, arguing that the statements in White & Brewer's complaint in the federal case were admissions, and that those admissions establish that White & Brewer has violated sections 12(a), 12(d), 12(f), and 21(d)(1) of the Illinois Environmental Protection Act, 415 ILCS 5/1 *et seq*. (1996) (Act). ESDI moves for summary judgment only on the issue of whether a violation has occurred and seeks only an order directing White & Brewer to cease and desist from violations of the Act; the issue of an appropriate monetary penalty for any violations would be determined after an evidentiary hearing.

By an order adopted on September 18, 1997, the Board imposed a stay of proceedings in this case based upon the pendency of the federal case, which involved the same issues as are raised by ESDI's complaint here. ESDI filed a counterclaim in the federal suit, count IV of which alleged the same violations of the Act as are the subject of the complaint in this case. On October 7, 1997, the federal court entered an order dismissing, *inter alia*, count IV of ESDI's counterclaim in the federal case. On November 5, 1997, the federal court entered orders dismissing all remaining federal claims and declined to retain supplemental jurisdiction

over White & Brewer's state law claims. There is thus no longer any case pending in the federal court. By the terms of the Board's order of September 18, the federal court's dismissal of count IV of ESDI's counterclaim dissolved the stay, rendering "Complainant's Motion to Lift Stay and to Enter Order of Partial Summary Judgment" moot. We now proceed to rule on ESDI's partial summary judgment motion.

After considering the arguments of the parties, the Board concludes that the statements in White & Brewer's complaint in the federal case are admissions, and that based on those admissions judgment may be entered against White & Brewer for violation of Section 12(f) of the Act. The Board concludes that issues of fact remain as to White & Brewer's alleged violations of Sections 12(a), 12(d), and 21(d)(1) of the Act, and that summary judgment as to violations of those sections of the Act is not appropriate on the record before the Board.

Summary Judgment Standards

The Illinois Supreme Court set forth the standards for consideration of motions for summary judgment in Jackson Jordan, Inc. v. Leydig, Voit & Mayer, 158 Ill.2d 240, 249, 633 N.E.2d 627, 630 (1994):

> A motion for summary judgment is to be granted if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. [735 ILCS 5/2-1005(c).] The pleadings, depositions, admissions, and affidavits on file must be construed against the movant and in favor of the opponent of the motion, although the opponent cannot rely simply on his complaint or answer to raise an issue of fact when the movant has supplied facts which, if not contradicted, entitle him to judgment as a matter of law. Summary judgment is a drastic means of disposing of litigation, so the right of the moving party to obtain summary judgment must be clear and free of doubt. Where doubt exists as to the right to summary judgment, the wiser judicial policy is to permit resolution of the dispute by a trial.

The appellate court explained the burden of each party in prosecuting or defending against a motion for summary judgment in Estate of Sewart, 236 Ill.App.3d 1, 8, 602 N.E.2d 1277, 1281-82 (1st Dist. 1992) (citations omitted):

> The party seeking summary judgment may meet its initial burden of persuasion by presenting facts which, if uncontradicted, would entitle it to judgment as a matter of law. Once the party seeking the summary judgment produces such evidence, the burden of production shifts to the party opposing the motion, who may not rely solely on allegations in the complaint, but is required to come forth with some facts which create a material issue of fact. Although a [party] opposing a motion for summary judgment need not prove her case at this point, she must provide some factual basis which would arguably entitle her to

judgment under the applicable law. If the respondent fails to produce such evidence, summary judgment is properly granted.

Based upon this, we must determine whether the pleadings, depositions, admissions, and affidavits on file show that there is no genuine issue as to any material fact, and whether judgment can be entered against White & Brewer as a matter of law. Therefore, we must first consider whether ESDI has presented facts which, if uncontradicted, would entitle it to judgment as a matter of law. If so, then we must consider whether White & Brewer has come forth with evidence which creates a material issue of fact. Before we can engage in this two part examination, we must initially determine whether the facts relied upon by ESDI are acceptable as evidence in support of its motion for summary judgment. The facts upon which ESDI relies are statements made by White & Brewer in its federal complaint against ESDI, and White & Brewer argues that these statements are not admissions. Once this determination is made, we can proceed as necessary to examining the merits of the motion for summary judgment.

Admissions

Allegations in Complaint as Admissions in Subsequent Case. It is well settled that statements contained in pleadings are admissions which can be offered as evidence. "Where statements in pleadings are not expressed in the alternative and state facts which are adverse to the interests of the pleader, they are proper evidence by an adversary in the instant or subsequent cases concerning the same subject matter[.]" Wells v. Web Machinery Co., 20 Ill.App.3d 545, 556, 315 N.E.2d 301, 311-12 (1st Dist. 1974). Although statements in a prior pleading can be explained or contradicted, a prior complaint is competent evidence. Carlson v. New York Life Ins. Co., 76 Ill.App.2d 187, 197, 222 N.E.2d 363, 369 (2nd Dist. 1966); see also Goodwin v. ITT Comm. Fin. Corp., 146 Ill.App.3d 810, 814, 497 N.E.2d 331, 333 (1st Dist. 1986). The Board accordingly concludes that the statements in the federal complaint are admissions of White & Brewer upon which summary judgment could be based.

White & Brewer attempts in its "Response to Motion for Partial Summary Judgment" (Response or Res.) filed on January 14, 1997, to avoid the conclusion that the statements in the federal complaint are admissions by characterizing them as "descriptions of background facts" which "do not in any way purport to be an 'admission' of White & Brewer as to any fact or conclusion of law." Res. at 7, 8. The statements in the federal complaint are admissions of White & Brewer under the law of Illinois as set forth in the cases cited above; it is immaterial whether the statements in the complaint "purport" to be admissions. White & Brewer has not cited, nor have we found, any legal support for a distinction between "descriptions of background facts" and any other allegations in a complaint. We note that under Rule 11(b)(3) of the Federal Rules of Civil Procedure, White & Brewer's attorney, by signing the federal complaint, certified after a reasonable inquiry that the allegations in the complaint were supported by evidence. Rule 11 does not distinguish between "descriptions of background facts" and other allegations in its requirement of certification that allegations are supported by evidence. The Board finds White & Brewer's position to be without merit.

The Board likewise rejects White & Brewer's suggestion (Res. at 5 n.2) that 35 Ill. Adm. Code 103.162 prevents statements in the federal complaint from being effective as admissions in this case. Section 103.162 set forth procedures for use of a Request for Admission of Fact, a discovery device. Section 103.162(d) provides that "[a]n admission made by a party *pursuant to request under this section* is for the purpose of the pending action only. It does not constitute an admission by him for any other purpose and may not be used against him in any other proceeding." (Emphasis added.) Since the admissions involved here were not made pursuant to a Request for Admission of Fact served in discovery by ESDI, but rather are admissions by operation of law, Section 103.162 is inapplicable.

Having concluded that statements in the federal complaint are admissions upon which summary judgment may be based, the Board proceeds to examine the statements in the federal complaint to determine whether they establish any of the violations of the Act alleged by ESDI.

Admissions by White & Brewer in Federal Complaint. The Board notes the following statements from the "General Allegations" section of the federal complaint which, per the authorities cited above, are evidentiary admissions:[1]

1. On or about December 13, 1977, the [Agency] ("IEPA") issued ESDI a permit (Permit No. 1977-28-DE) to develop a solid waste disposal site (hereinafter referred to as "Landfill") south of Coffeen in Montgomery County, Illinois.

2. On or about September 7, 1978, IEPA issued ESDI a permit (Permit No. 1977-28-OP) to operate approximately six acres (Cell A) of the Landfill.

3. On or about January 17, 1979, IEPA issued ESDI a supplemental permit (Permit No. 79-0141) to operate Cell B of the Landfill.

4. On or about December 21, 1979, IEPA issued ESDI a supplemental permit (Permit No. 79-3097) to operate Cell C of the Landfill.

5. On or about October 2, 1981, IEPA issued ESDI a supplemental permit (Permit No. 1981-91) to operate Cell D of the Landfill.

6. ESDI was the owner and operator of the Landfill commencing on or about December 13, 1977 and continuing to August 23, 1990.

* * *

[1] Although ESDI has not specifically referred to each of the following statements in its argument, all statements in the federal complaint are "admissions on file" which the Board considers in ruling on a summary judgment motion. Jackson Jordan, 633 N.E.2d at 630. The portions of the federal complaint quoted here are those which the Board believes are either relevant to the issues before it on ESDI's "Motion for Partial Summary Judgment" or useful to frame the claims at issue in this case.

11. Closure occurred for Cell A in 1980, Cell B in 1981, Cell C in 1982, and a portion of Cell D at some point prior to 1985. * * *

12. ESDI applied for closure of the remaining acreage in Cell D on August 3, 1990.

* * *

15. * * * [T]he coal combustion waste constituents disposed of in Cell D have been exiting Cell D in water flowing out of Cell D, onto the surface of the Landfill site, and eventually into Shoal Creek.

* * *

19. On or about June 4, 1986, IEPA issued ESDI a permit (Permit No. 1985-19-OP) to operate Cell E for disposal of fly ash.

20. On August 1, 1990, ESDI entered into a purchase agreement with White & Brewer for the sale of the Landfill. * * *

21. ESDI transferred the Landfill to White & Brewer at [a] closing on August 23, 1990. * * *

22. At all times subsequent to August 23, 1990, White & Brewer has been the owner of the Landfill.

23. On February 8, 1991, IEPA issued Supplemental Permit No. 1990-206-SP to White & Brewer for Cells A-D. This supplemental permit transferred the ownership and operating rights to Cells A-D to White & Brewer and separated Cell E from Cells A-D to form two independent facilities.

24. On February 8, 1991, IEPA issued Supplemental Permit No. 1990-229-SP to White & Brewer for Cell E. This supplemental permit transferred ownership and operating rights to Cell E to White & Brewer and separated Cell E from Cells A-D to form two independent facilities.

* * *

26. On October 28, 1992, after White & Brewer acquired the Landfill, a Montgomery County Health Department inspector conducted an inspection of the Landfill site. This inspection included the closed cells, A-D, as well as the cell being operated, Cell E.

27. During the inspection, the Montgomery County Health Department inspector observed a seep or leachate flow in the disposal area of the Landfill.

28. At a follow-up inspection on December 23, 1992, the Montgomery County Health Department inspector pointed out the leachate flow to the representatives

of White & Brewer. * * * The inspector followed the flow and noted that the flow left the Landfill property to the east and eventually emptied into the east branch of Shoal Creek.

* * *

30. On January 27, 1986, a National Pollution Discharge Elimination System ("NPDES") permit was issued to ESDI by IEPA pursuant to the Federal Water Pollution Control Act, 33 U.S.C. § 1251. This permit (Permit Number IL0064785) prescribed testing requirements for the discharge of water (hereinafter referred to as "effluent") from an outfall or point source at the Landfill site. The permit established "effluent limitations" which dictate the level of contaminants, based on the State's water quality standards, which cannot be exceeded in the effluent.

31. The NPDES outfall is located upon a tributary of Shoal Creek and has been periodically sampled according to the parameters specified in the permit and the corresponding water quality standards.

* * *

33. The Landfill's NPDES permit was transferred to White & Brewer on September 10, 1991.

34. Pursuant to the NPDES permit as transferred to White & Brewer, the Landfill conducts sampling and analysis of water from various points on the Landfill site and Shoal Creek.

35. Among other parameters, White & Brewer's NPDES permit requires analysis of sulfate, boron and manganese. The permitted levels for these parameters have consistently been exceeded in samples taken from the leachate seep from Cell D. Consequently, these parameters are also exceeded at the discharge point from the Landfill site.

36. As part of the operating permits for Cells A-D and Cell E of the Landfill, the Landfill is required to monitor the quality of the groundwater at the Landfill site. The permits prescribe certain parameters which are to be analyzed in groundwater samples.

* * *

38. Since White & Brewer assumed ownership and operation of the Landfill, groundwater monitoring has consistently revealed exceedences of the groundwater quality standards for manganese, sulfate, boron, and total dissolved solids.

We also note the following statement in count I of the federal complaint:

> 19. Since White & Brewer's ownership of the Landfill, samples of the leachate flow from Cell D have consistently shown exceedences of the effluent limitations contained in the Landfill's NPDES permit. Therefore, the leachate flow from Cell D is directly impacting the quality of the effluent at the permitted outfall and is causing violations of the NPDES permit at that outfall.

Finally, we note the following statement in count II of the federal complaint:

> 15. The actions of Donley and ESDI at the Landfill have presented an imminent and substantial endangerment to health or the environment in that the leaching contaminants from Cells A-D have caused contamination of the groundwater above the State's water quality and groundwater quality standards. The exceedences of water quality and groundwater quality standards for boron and sulfate during ESDI's ownership of the Landfill, as well as the exceedences of water quality and groundwater quality standards for boron, sulfate, manganese and total dissolved solids during White & Brewer's ownership and operation of the Landfill have demonstrated that the aquifers underlying the Landfill are contaminated with coal combustion waste constituents. This creates an imminent and substantial endangerment to the drinking water of the area surrounding the Landfill.

Analysis

We now consider whether these admissions establish the violations of the Act claimed by ESDI. As noted, ESDI asserts that these admissions establish violations of Sections 12(a) (water pollution), 12(d) (creating a water pollution hazard), 12(f) (operation in violation of an NPDES permit), and 21(d)(1) (operation in violation of a landfill permit) of the Act (415 ILCS 5/12(a), 12(d), 12(f), and 21(d)(1) (1996)). We deal with each of these sections in turn.

Section 12(a): Water Pollution. Section 12(a) of the Act provides that no person shall:

> a. 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.

"Water pollution" is a defined in section 3.55 of the Act (415 ILCS 5/3.55 (1996)):

> "WATER POLLUTION" is such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety and welfare, or to domestic, commercial,

> industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish or other aquatic life.

The mere presence of a contaminant is insufficient to establish that water pollution has occurred or is threatened; it must also be shown that the particular quantity and concentration of the contaminant in question is likely to create a nuisance or render the waters harmful, detrimental, or injurious. Jerry Russell Bliss, Inc. v. Illinois Environmental Protection Agency, 138 Ill.App.3d 699, 704, 485 N.E.2d 1154, 1157 (5th Dist. 1985). While the admissions in paragraphs 27, 28, 31, 35, and 38 of the "General Allegations" section of the federal complaint establish the discharge of sulfate, boron and manganese into Shoal Creek and the presence of excessive levels of sulfate, boron, manganese and total suspended solids in groundwater, the admissions in the federal complaint do not establish that the concentrations of the aforementioned substances in Shoal Creek or the groundwater at the landfill site create a nuisance or render the waters harmful, detrimental or injurious.

We are mindful of the statement in paragraph 15 of count II of the federal complaint that "[t]he exceedences of water quality and groundwater quality standards for boron, sulfate, manganese and total dissolved solids during White & Brewer's ownership and operation of the Landfill . . . create[] an imminent and substantial endangerment to the drinking water of the area surrounding the Landfill." It is not clear, however, exactly what is meant by the phrase "imminent and substantial endangerment to drinking water." In light of this ambiguity, the Board cannot conclude that there are no issues of material fact as to whether Section 12(a) has been violated.

Since issues of fact as to whether the concentrations of sulfate, boron, manganese and total suspended solids in Shoal Creek or the groundwater at the landfill site create a nuisance or render the waters harmful, detrimental or injurious cannot be resolved on the record before the Board, the Board concludes that ESDI has not met its burden, and that summary judgment as to violation of Act Section 12(a) is inappropriate.

Section 12(d): Water Pollution Hazard. Section 12(d) of the Act provides that no person shall:

> d. Deposit any contaminants upon the land in such a place and manner so as to create a water pollution hazard.

A finding of creation of a water pollution hazard requires a finding of the potential for the same effects as are involved in a finding of water pollution: creation of a nuisance or rendering of waters harmful, detrimental or injurious. For the same reasons as set forth in the Board's discussion of Section 12(a) above, the Board finds that ESDI has not met its burden with respect to violations of Section 12(d), and concludes that summary judgment as to violations of Section 12(d) is inappropriate.

Section 12(f): NPDES Permit Violation. Section 12(f) of the Act provides that no person shall:

> f. Cause, threaten or allow the discharge of any contaminant into the waters of the State, as defined herein, including but not limited to, waters to any sewage works, or into any well or from any point source within the State, without an NPDES permit for point source discharges issued by the Agency under Section 39(b) of this Act, or in violation of any term or condition imposed by such permit, or in violation of any NPDES permit filing requirement established under Section 39(b), or in violation of any regulations adopted by the Board with respect to the NPDES program.

Based on the admissions set forth above, particularly paragraphs 34 and 35 of the "General Allegations" section of the federal complaint and paragraph 19 of count I of the federal complaint, the Board finds that White & Brewer has at the very least allowed discharges of contaminants into waters of the State in violation of its NPDES permit. The Board concludes, based on the admissions on file, that ESDI has met its burden of coming forth with facts which, if uncontradicted, entitle it to judgment as a matter of law against White & Brewer for violation of Section 12(f) of the Act.

Section 21(d)(1): Landfill Permit Violation. Section 21(d)(1) of the Act provides that no person shall:

> d. Conduct any waste-storage, waste-treatment, or waste-disposal operation:
>
> 1. without a permit granted by the Agency or in violation of any conditions imposed by such permit. . . .

Copies of White & Brewer's landfill permits are not among the documents before us. Although paragraphs 36 and 38 of the federal complaint refer to the permits, the federal complaint contains no allegation of a specific provision of a permit which has been violated. The terms of the permits, and whether those terms have been violated by White & Brewer, are issues of fact which cannot be determined based on the record before us.

The Board is mindful of the statement in paragraph 38 of the "General Allegations" section of the federal complaint, that "[s]ince White & Brewer assumed ownership and operation of the Landfill, groundwater monitoring has consistently revealed exceedences of the groundwater quality standards for manganese, sulfate, boron, and total dissolved solids." Absent some evidence that violation of groundwater quality standards is also a violation of one of White & Brewer's landfill permits, however, this admission does not establish a violation of Section 21(d)(1).

The Board concludes that ESDI has not met its burden with respect to violations of Section 21(d)(1), and finds that summary judgment as to violation of Section 21(d)(1) is inappropriate.

Responsive Evidence and Arguments

Having concluded that ESDI has met its burden with respect to the allegations of violation of Section 12(f) of the Act by presenting facts which, if uncontradicted, entitle it to judgment, we now turn to White & Brewer's submissions in response to ESDI's motion, to determine whether White & Brewer has come forth with facts establishing a material issue of fact. We also address White & Brewer's arguments set forth in its Response.

Responsive Evidence. With its Response, White & Brewer submitted an "Affidavit of John G. Hooker," and directed the Board's attention to certain Agency documents of which it asserts the Board may take judicial notice. Neither Mr. Hooker's affidavit nor the referenced Agency documents bear on the issue of whether White & Brewer has violated Section 12(f) of the Act; they are concerned rather with the economic reasonableness of reducing or eliminating the discharges from the landfill. White & Brewer has submitted nothing further but instead only argued that it is entitled at hearing to explain the prior pleadings.

Opportunity to Explain Admissions. To avoid summary judgment, White & Brewer must provide some evidence at this point to overcome ESDI's *prima facie* case. "The [nonmovant] has the burden of responding to [movant's] motion for summary judgment by bringing forth facts which raise an alternative inference." Blonder v. Watts, 166 Ill.App.3d 633, 636, 520 N.E.2d 75, 77 (2nd Dist. 1988). The mere fact that White & Brewer is entitled to explain or contradict evidentiary admissions in prior pleadings will not serve to defeat ESDI's summary judgment motion where White & Brewer has not come forth with any affidavit or other evidence which actually explains or contradicts the admissions in the federal complaint.

White & Brewer argues otherwise in its Response: it contends that its entitlement to explain admissions in the federal complaint requires an opportunity to do so at hearing, precluding summary judgment. Res. at 5. This argument is counter to established case law regarding summary judgment. It is insufficient for White & Brewer to merely identify issues it could raise; a more specific response is required. "[Nonmovant] must present *bona fide* facts to withstand a motion for summary judgment; [nonmovant] cannot hide behind equivocations and conjecture and expect to prevent the entry of summary judgment." Wilson v. Bell Fuels, Inc., 214 Ill.App.3d 868, 874, 574 N.E.2d 200, 204 (1st Dist. 1991). See also Chicago Transit Authority v. Yellow Cab Co., 110 Ill.App.3d 379, 385, 442 N.E.2d 546, 550 (1st Dist. 1982) (in opposing motion supported by evidence, nonmovant has burden of establishing disputed question of fact, which could be done by filing counteraffidavits, interrogatories, documents, or depositions).

The situation before the Board here is analogous to that in Addison v. Whittenberg, 124 Ill.2d 287, 529 N.E.2d 552 (1988), where the plaintiff, in opposing a motion for summary judgment, identified potential witnesses who could be called at trial but submitted no evidence (such as affidavits) as to the facts to which those potential witnesses would testify. The Supreme Court ruled that such a submission was insufficient to resist a motion for summary judgment. Addison, 124 Ill.2d at 299, 529 N.E.2d at 557. The Board likewise concludes that

White & Brewer's mere identification of subjects on which it could introduce evidence at hearing is insufficient to establish that an issue of material fact exists as to the matters admitted in the federal complaint.

Because there are no facts before the Board contravening or explaining the admissions in the federal complaint establishing the Section 12(f) violation, the Board concludes that White & Brewer has not met its burden in opposing ESDI's "Motion for Partial Summary Judgment."

Applicability of Act Section 33(c). White & Brewer argues that Section 33(c) of the Act (415 ILCS 5/33(c) (1996)) mandates that the Board must consider a number of factors in determining whether a violation of the Act has occurred, and that these factors preclude entry of summary judgment as to White & Brewer's violation of the Act. Section 33(c) provides in relevant part:

> In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved including, but not limited to:
>
> i. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
>
> ii. the social and economic value of the pollution source;
>
> iii. the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
>
> iv. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
>
> v. any subsequent compliance.

The respondent has the burden of raising any issues involving Section 33(c) factors. Concluding that "it cannot be said that the legislature intended the [complainant] to have the additional burden of introducing proof (affirmatively, as part of complainant's case) relative to each of the factors enumerated in section 33(c)," the appellate court elaborated upon the operation of Section 33(c) in Ford v. Environmental Protection Agency, 9 Ill.App.3d 711, 720-21, 292 N.E.2d 540, 546 (3rd Dist. 1973):

> [S]ection 33(c) has reference to mitigating factors and where pertinent and applicable to a particular case, it was the intent of the legislature that such factors as were known to the Board through its expertise or put into issue by evidence before it, should be considered by the Board in making its

> determination. Necessarily, in view of the limited burden put upon the [complainant] by section 31(c) [now 31(e)], the burden of going forward, after the [complainant] has made a *prima facie* case, would then be on the [respondent], if he so desired, to prove what section 33(c) describes as the "facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits" involved in the violation. No such proof was introduced in this case, and we, therefore, cannot say that the order of the Board is defective because the specific determinations were not made as to each of the factors set forth in section 33(c).

The burden is thus on White & Brewer, in responding to ESDI's summary judgment motion, to raise any issues with respect to the factors set forth in Section 33(c) which are pertinent and applicable to this case. White & Brewer has, through submission of the affidavit of John G. Hooker and the associated documents, come forth with evidence relating to Section 33(c)(iv), regarding the economic reasonableness of reducing the discharge from the landfill.

Merely raising an issue with respect to one of the factors listed in Section 33(c) will not, however, necessarily preclude entry of partial summary judgment solely on the issue of whether a violation has occurred. The Section 33(c)(iv) matters raised by White & Brewer, while potentially relevant to the question of the appropriate terms of a final order (*i.e.*, an appropriate penalty or other remedy), have no bearing in this case on whether or not there has been a violation of Section 12(f). The technical practicability or economic reasonableness of reducing the discharges does not affect the determination of whether the levels of various pollutants in the discharge from the landfill exceed the limits set in White & Brewer's NPDES permit. Since ESDI's success on the portion of its Section 12(f) claim on which it seeks summary judgment (*i.e.*, whether Section 12(f) was violated) is not dependent upon the existence of any fact relating to the Section 33(c) factors raised by White & Brewer, any such facts are not material to that portion of ESDI's Section 12(f) claim. Lindenmier v. City of Rockford, 156 Ill.App.3d 76, 88, 508 N.E.2d 1201, 1209 (2nd Dist. 1987). Consequently, issues of fact with respect to Section 33(c)(iv) factors will not prevent entry of partial summary judgment on the issue of White & Brewer's violation of Section 12(f). Swope v. Northern Illinois Gas Co., 251 Ill.App.3d 850, 858, 623 N.E.2d 841, 846 (3rd Dist. 1993) ("Factual issues which are not material to the essential elements of the cause of action or defense, regardless of how sharply controverted, do not warrant the denial of summary judgment.").

Nothing in the cases cited by White & Brewer requires a different result. White & Brewer has cited cases in which the Board, in determining whether violations of the Act had occurred, considered the Section 33(c) factors. None of the cited cases, however, involved Section 12(f) of the Act. Tri-County Landfill Co. v. Illinois Pollution Control Board, 41 Ill.App.3d 249, 353 N.E.2d 316 (2nd Dist. 1976), involved a claimed violation of Section 12(d) (creation of a water pollution hazard) which, inasmuch as water pollution may be found where a nuisance is created (see Section 3.55, quoted above), may involve an analysis of the reasonableness of the pollution. The Section 33(c) factors would be material to such an analysis. Three of the other cases cited by White & Brewer, Oltman v. Cowan (Nov. 21, 1996), PCB 96-185, Zarlenga v. Partnership Concepts (Sept. 17, 1992), PCB 89-169, and

Kaji v. R. Olson Manufacturing Co., Inc. (Apr. 16, 1981), PCB 80-46, involved asserted violations of Section 24 of the Act (415 ILCS 5/24 (1996)), *i.e.*, noise pollution. Section 24 prohibits emission of noise which "unreasonably interferes with the enjoyment of life or with any lawful business or activity" in violation of Board regulations. Again, Section 33(c) factors would be material to the issue of reasonableness of noise.

The final case cited by White & Brewer, Illinois Environmental Protection Agency v. Collins Improvement Co., Inc. (Nov. 6, 1975), PCB 75-126, included violations of Act Sections 21(b) and (e) (415 ILCS 5/21(b) and 21(e) (1996)), involving dumping or disposal of waste other than at permitted landfills. In that case, the Board, noting that there was "no question . . . as to whether a violation of the operating permit requirement occurred," specifically stated that the factors in Section 33(c) did not affect the Board's determination that a violation had occurred. Slip op. at 3-4. While the Board discussed the Section 33(c) factors, in light of the Board's finding we do not consider the Collins Improvement case persuasive authority for the position that the Board must in this case consider the Section 33(c) factors in determining solely whether a violation of the Act has occurred (independent of the issue of an appropriate order in response to such a violation).

Conflicting Inferences as to Responsibility. Finally, the Board rejects White & Brewer's argument that the allegations in the federal complaint are "subject to conflicting inferences as to proper responsibility for the violations alleged by ESDI." Res. at 13-14. White & Brewer has missed no opportunity in these proceedings to point out to the Board that all waste in Cell D of the landfill was placed there by ESDI, not White & Brewer, and that Cell D of the landfill was closed prior to White & Brewer's purchase of the landfill. White & Brewer likewise has asserted on a number of occasions, including in the "Introduction" section of its Response, that it never operated Cell D of the landfill. Res. at 1. As the Board noted, however, in its order of July 10, 1997, as owner of the landfill (including Cell D), White & Brewer is the operator of the landfill (including Cell D) and has been since its purchase of the landfill. This is by operation of 35 Ill. Adm. Code 810.103, which provides as part of the definition of "owner" that "[t]he 'owner' is the 'operator' if there is no other person who is operating and maintaining a solid waste disposal facility." Since paragraph 19 of count I of the federal complaint, upon which the Board predicates its grant of partial summary judgment, refers only to circumstances since White & Brewer's purchase of the landfill, there are no conflicting inferences as to responsibility for violations of Section 12(f). White & Brewer was operator of the landfill when the violations took place.

Remedy

ESDI asks the Board to order White & Brewer to cease and desist from violations of the Act. Entry of such an order is within the Board's authority and discretion pursuant to Sections 33(a) and (b) of the Act (415 ILCS 5/33(a) and 33(b) (1996)). As noted above, however, the factors listed in Section 33(c) are relevant to the appropriate order to be issued upon a finding of a violation of the Act. This is true with respect to the determination of whether a "cease and desist" order is appropriate, as well as the amount of any monetary penalty. Because White & Brewer has raised issues of fact with respect to the economic

reasonableness of reducing or eliminating the discharges from the landfill (Section 33(c)(iv)), the Board concludes that entry of an order directing White & Brewer to cease and desist is not appropriate at this time.

COUNTERCLAIM

On August 4, 1997, White & Brewer filed a "Counterclaim" asserting a number of violations of the Act by ESDI. Although the Board's procedural rules do not specifically authorize filing of counterclaims, neither are counterclaims prohibited, and the Board has in the past allowed filing of counterclaims where it would be efficient to handle the original claim and counterclaim in the same proceeding. See Lefton Iron & Metal Co., Inc. v. Moss-American Corp. (Mar. 9. 1989), PCB 87-191, slip op. at 2-3. In this case, as in Lefton, the violations alleged in the counterclaim concern the same site and involve the same parties as ESDI's complaint. The Board accordingly will allow filing of a counterclaim by White & Brewer in this case.

Even though White & Brewer's claim is docketed as a counterclaim, the Board still considers whether the counterclaim is frivolous or duplicitous. Lefton, slip op. at 3. A complaint is frivolous if it seeks relief which the Board could not grant. Lake County Forest Preserve District v. Ostro (July 30, 1992), PCB 92-80. A complaint is duplicitous if the matter is identical or substantially similar to one brought in another forum. Brandle v. Ropp (Jun. 13, 1985), PCB 85-68.

Pursuant to 35 Ill. Adm. Code 101.243(a), all motions to strike or dismiss challenging the sufficiency of any pleading filed with the Board are to be filed within 21 days after the service of the challenged document. This deadline has long since run with respect to White & Brewer's counterclaim and no challenging documents have been received. The Board notes that the complaint seeks relief for alleged violations of various subsections of Sections 12 and 21 of the Act, and seeks relief (statutory penalties, "cease and desist" orders, and directions to come into compliance)[2] which is within the Board's authority to grant under Section 33 of the Act. We are unaware of any identical or substantially similar action brought in another forum. (Indeed, the federal suit, of which White & Brewer's counterclaim may arguably have been duplicitous, was recently dismissed.) Accordingly, the Board does not find that White & Brewer's counterclaim is either frivolous or duplicitous. White & Brewer's counterclaim is accepted for hearing.

CONCLUSION

[2] White & Brewer also seeks an order assessing liability against ESDI for remedial costs incurred by White & Brewer. Inasmuch as there is no indication that White & Brewer has incurred any remedial costs (indeed, who will incur such costs seems to be the point of this litigation), and ample other grounds exist for accepting White & Brewer's counterclaim, the Board will not address the availability of such relief at this point.

ESDI's "Motion for Partial Summary Judgment" is granted with respect to violation of Section 12(f) of the Act and denied with respect to violation of Sections 12(a), 12(d) and 21(d)(1) of the Act. The Board in entering partial summary judgment against White & Brewer by this order determines only that White & Brewer has violated Section 12(f), and does not pass on the issue of an appropriate order in response to said violation. Ruling on this issue is reserved pending a hearing on the remaining matters in this case. All parties may present evidence relevant to the issue of penalty at the hearing.

"Complainant's Motion to Lift Stay and to Enter Order of Partial Summary Judgment" is denied as moot.

White & Brewer's counterclaim is accepted for hearing.

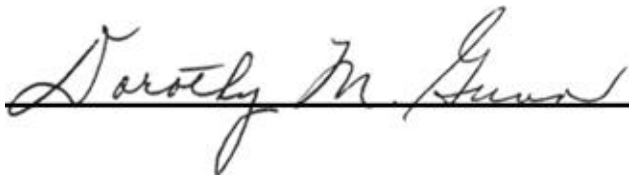
IT IS SO ORDERED.

Board Members G.Tanner Girard and J. Theodore Meyer dissented.

Board Member K.M. Hennessey abstained.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1996)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 145 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 20th day of November 1997, by a vote of 4-2.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board