

ILLINOIS POLLUTION CONTROL BOARD

October 2, 2003

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

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

Today the Board rules on a motion to dismiss filed by respondents Ronnie Todd (Todd) and Ronnie Todd Land Trust (Trust) in this enforcement action. Todd and the Trust, along with Michel Grain Company, Inc. a/k/a Michel Fertilizer (Michel Grain) and Caryle Michel (Michel), were named as respondents by the Illinois Attorney General, on behalf of the People of the State of Illinois (People) in a third amended complaint filed on September 20, 2002. Neither Michel Grain nor Michel has responded to the motion to dismiss. The People oppose the motion.

Based on alleged contamination from two fertilizer and agrichemical facilities, one in Jefferson County and the other in Hamilton County, the People have pled 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)). The People seek a Board order: (1) requiring respondents to cease and desist from any further violations; (2) imposing civil penalties; and (3) awarding costs and attorney fees.

For the reasons below, the Board denies the motion to dismiss. The Board will provide this case’s procedural history and describe the relevant pleadings before discussing and ruling on the motion to dismiss.

PROCEDURAL HISTORY

Since the People filed the original complaint in this enforcement action, they have filed three amended complaints. The original complaint, filed on December 27, 1995, named 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 a grain elevator and liquid agrichemical facility. The facility is located in the Village of Ina, Jefferson County (Ina facility).

The People's first amended complaint, filed on April 25, 1996, added similar allegations regarding a fertilizer and agrichemical facility located immediately west of State Route 142 in the Village of Broughton, Hamilton County (Broughton facility). On October 4, 2001, the People filed a second amended complaint, naming Todd as an additional respondent and alleging that he is the current owner of the Broughton facility. On August 22, 2002, the Board denied Todd's first motion to be dismissed from this proceeding. On September 20, 2002, the People filed a third amended complaint, along with a motion for leave to file, which the Board grants. The third amended complaint adds the Trust as a respondent regarding the Broughton facility.¹

On July 17, 2003, Todd and the Trust filed a motion to be dismissed from this case—the motion at issue today. The People filed a response on August 18, 2003, with the hearing officer's leave to file late.² Todd and the Trust were granted leave to reply by August 29, 2003, but failed to do so. Because the motion to dismiss filed by Todd and the Trust, and the People's allegations against them, pertain only the Broughton facility, the Board will not further discuss the Ina facility in this order.

Under the Board's procedural rules, a motion to dismiss is due within 30 days after service of the challenged document, unless the Board determines that material prejudice would result. *See* 35 Ill. Adm. Code 101.506. Todd and the Trust filed the motion to dismiss some ten months after being served with the third amended complaint. However, because the motion purports to challenge the Board's authority to issue a final decision in this case, the Board will address the motion's merits. *See Ogle County Board v. PCB*, 272 Ill. App. 3d 184, 196-97, 649 N.E.2d 545, 554 (2d Dist. 1995) (challenges to jurisdiction over a case may be raised at any time during the proceeding).

THIRD AMENDED COMPLAINT

Property Transfers

The third amended complaint alleges that Michel Grain and Michel owned and operated the Broughton facility, a liquid and dry fertilizer and agrichemical facility. Comp. at 10. According to the People, Michel sold the facility to Todd in June 1997, before which time Todd leased the facility from Michel. *Id.* The complaint further alleges that in July 2000, Todd placed the facility property in the Trust, the beneficiary of which is Todd. Todd currently uses the property as a truck lot and truck repair facility. *Id.*

Physical Facility

The People assert that the Broughton facility formerly included 16 above-ground storage tanks, a storage building for dry and bulk fertilizer, a loading pad and station, a mixing area, and a workshop, all of which were removed from the site during the first half of 1997. Comp. at 10.

¹ The Board cites the People's amended complaint as "Comp. at _."

² The Board cites the motion to dismiss as "Mot. at _" and the response as "Resp. at _."

According to the complaint, the facility still has two underground drains that discharge to a drainage way tributary to an unnamed tributary of the North Fork Saline River. *Id.*

Inspections

The complaint states that the Illinois Environmental Protection Agency (Agency) inspected the Broughton facility on January 9, 1992, revealing that the facility: (1) had been abandoned for about three years and was not secured; (2) had several outdoor bulk storage tanks containing liquid; (3) had several jugs of liquid pesticide or insecticide and approximately two tons of damp fertilizer; and (4) had a drain extending from the former liquid blending area that was discharging a white liquid. *Comp.* at 11.

The complaint further alleges that on January 28, 1992, the Agency again inspected the facility, finding: (1) a new lessee attempting to repair a broken water line running through the former operational area; and (2) apparently contaminated soil, gravel, trenches, and sump holes. Some of the soils had an agrichemical odor while others had a petroleum odor, according to the complaint. *Comp.* at 11. The People allege that soil samples collected during this inspection had concentrations of alachlor, atrazine, and trifluralin. *Id.* at 12.

Alleged Violations and Requested Relief

According to the People, the four respondents have caused or allowed pesticides, herbicides, fertilizers, and fuels to be discharged and discarded at the facility, contaminating the soil and the water entering the drainage way. The People allege water and land pollution violations of the Act and Board regulations, as specifically set out at the beginning of this order. The third amended complaint asks for a cease and desist order, civil penalties, and the People's costs and attorney fees. Unlike in the second amended complaint, the People no longer explicitly seek payment of cleanup costs under Section 22.2(f) of the Act (415 ILCS 5/22.2(f) (2002), *as amended* by P.A. 93-152, eff. July 10, 2003).

MOTION TO DISMISS AND RESPONSE

In the motion to dismiss, Todd and the Trust make a four-step argument. First, they assert that any potential liability either respondent has in this case is based solely on them holding or having held title to the property. *Mot.* at 1. Second, Todd and the Trust maintain that if holding title triggers liability, then "all parties in ownership from the date of release are necessary parties." *Id.* Third, according to the motion, not all necessary parties are before the Board. *Id.* at 1-2. Fourth and finally, Todd and the Trust argue it is "mandatory" that all "necessary parties" be brought into this action before the Board can issue a "valid" final order. *Id.* Todd and the Trust therefore move that they be dismissed from this case or, alternatively, that "all previous owners be determined and be joined as parties respondent." *Id.*

In their response to the motion to dismiss, the People assert that Todd and the Trust have not explained how prior property owners are necessary parties. *Resp.* at 7. The People state that the previous property owners have no present or substantial interest in this litigation and are not needed to resolve the claims against respondent. *Id.* The People maintain that Todd and the

Trust are “liable for the on-going contamination on the property because [they] have the ability to control the source of pollution and have not taken any precautions to prevent the release, and not[] because they merely have or had title to the property.” *Id.*

DISCUSSION

A necessary party is “one with a present, substantial interest in the subject matter of the litigation without whose participation a complete resolution cannot be had.” Import Sales, Inc. v. Continental Bearings Corporation, 217 Ill. App. 3d 893, 902, 577 N.E.2d 1205, 1211 (1st 1991); *see also* Brumley v. Touche Ross & Co., 123 Ill. App. 3d 636, 643-44, 463 N.E.2d 195, 201 (2d Dist. 1984). As explained below, Todd and the Trust have failed to show the need of adding past titleholders as respondents for the Board to be able to decide the merits of this case.

The People allege that Todd and the Trust have violated the Act and Board rules by, among other things, allowing contamination to remain while the property is under their control, thus allowing contaminant discharge resulting in water pollution. It is well-established that a property owner may be found to have violated the Act or Board rules even if it has not actively caused the emissions at issue. *See, e.g.,* Perkinson v. PCB, 187 Ill. App. 3d 689, 694-95, 543 N.E.2d 901, 904 (3d Dist. 1989) (“the owner of the source of pollution causes or allows the pollution . . . unless the facts establish the owner either lacked the capability to control the source . . . or had undertaken extensive precautions”); Meadowlark Farms, Inc., v. PCB, 17 Ill. App. 3d 851, 861, 308 N.E.2d 829, 836 (5th Dist. 1974) (property owner violated Act’s prohibition on causing or allowing discharge resulting in water pollution because owner had “capability of controlling the pollutorial discharge”). If the People meet their burden of proof, the Board would in no way be precluded from finding one or more of the violations alleged against Todd and the Trust merely because some past titleholders are absent from this proceeding.

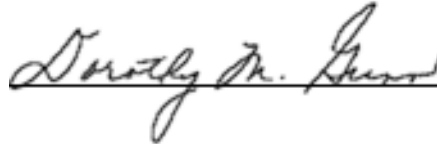
Likewise, if the alleged violations are proven, the presence of other past titleholders as respondents is not a condition precedent to granting the People’s requested relief of civil penalties, costs, and attorney fees. The People allege that Todd is the site’s current operator and the Trust is the site’s current owner, and that respondents Michel Grain and Michel formerly owned and operated the Broughton fertilizer and agrichemical facility. The People also assert that none of the respondents have undertaken any “action to abate the soil contamination.” Resp. at 5. If the Board issues an order to cease and desist further violations, if any, that order may necessitate site cleanup. Whether a respondent’s cleanup liability, if any, is limited to its proportionate share or is joint and several, nothing in the current record indicates that the Board would be unable to fashion an appropriate order under the circumstances, regardless of the presence of other past titleholders as parties. *See* 415 ILCS 5/58.9 (2002); 35 Ill. Adm. Code 741.

The Board finds that Todd and the Trust have not identified any prior property owners, let alone alleged that any prior titleholders not a party to this action had the capability to control the site’s purported pollution. Todd and the Trust have not shown that any prior titleholder has a substantial, present interest in this enforcement action, or is required to be a party to allow the Board to completely resolve this controversy.

When ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all inferences from them in favor of the non-movant. Dismissal is proper only if it is clear that no set of facts could be proven that would entitle complainant to relief. *See People v. Peabody Coal Co.*, PCB 99-134, slip. op. at 1-2 (June 20, 2002); *People v. Stein Steel Mills Co.*, PCB 02-1, slip op. at 1 (Nov. 15, 2001), citing *Import Sales, Inc. v. Continental Bearings Corp.*, 217 Ill. App. 3d 893, 577 N.E.2d 1205 (1st Dist. 1991). Taking the People's well-pled allegations as true and drawing all inferences from them in favor of the People, the Board cannot find that there is no set of facts that could be proven entitling the People to relief. The Board therefore denies the motion of Todd and the Trust to be dismissed. The Board also denies their alternative request that the Board determine and join "all previous owners." Mot. at 2. Nothing in this order, however, precludes Todd or the Trust from filing a third-party complaint. *See* 35 Ill. Adm. Code 103.206.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 2, 2003, by a vote of 7-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board