ILLINOIS POLLUTION CONTROL BOARD
January 22, 1998

EDWARD MALINA,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 98-54
	)	(Enforcement - UST - Citizen)
JEAN DAY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by J. Yi):

This matter comes before the Board on the October 16, 1997, filing of a citizen's enforcement complaint by Edward Malina (Malina). Also before the Board are a motion to dismiss the complaint, filed by Jean Day (Day) on November 6, 1997; a response to the motion to dismiss; and a motion to stay the proceeding to allow respondent to correct it's motion to dismiss, both filed by Malina on November 17, 1997. On December 5, 1997, respondent re-filed her motion to dismiss.

The Board accepts this matter for hearing. Respondent's motion to stay the proceeding is rendered moot by Malina's re-filing of his motion to dismiss on December 5, 1997. After considering the arguments raised in the motion to dismiss and the response thereto, the Board denies respondent's motion to dismiss.

BACKGROUND

The complaint alleges that Day owned and operated a gasoline station located at 101 E. Washington, West Chicago, Illinois (site) from 1931 to 1981, and caused the open dumping of waste at the site by allowing underground storage tanks to leak gasoline onto the site in violation of Section 21(a) of the Environmental Protection Act (Act). 415 ILCS 5/21(a) (1996). Complainant also alleges that Day improperly conducted a waste storage, waste treatment or waste disposal operation in violation of 35 Ill. Adm. Code 732.200 of the Board's regulations and in violation of Section 21(d)(2) of the Act. 415 ILCS 5/21(d)(2) (1996). Malina states that he acquired the site in 1982, and has spent a significant amount of money attempting to remediate the site. Malina requests that the Board order Day to reimburse all remediation costs which he has incurred, and to remediate the site as required by the Environmental Protection Act and implementing regulations.

DUPLICITOUS/FRIVOLOUS DETERMINATION

Section 103.124(a) of the Board's procedural rules, 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. This section further states that if the complaint is duplicitous or frivolous, the Board 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 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 requests relief which the Board cannot grant. Lake County Forest Preserve District v. Neil Ostro, Janet Ostro, and Big Foot Enterprises (July 30, 1992), PCB 92-80.

In the instant case, complainant requests, *inter alia*, that respondent be ordered to reimburse all remediation costs which complainant has incurred at the site. The Board has consistently held that it has the authority to award cleanup costs to private parties for a violation of the Act. See Lake County Forest Preserve District v. Ostro (March 31, 1994), PCB 92-80; 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; and Dayton Hudson Corporation v. Cardinal Industries, Inc., and Daniel E. Cardinal, Jr. (August 21, 1997) PCB 97-134. As noted in Ostro, this holding is based on the broad language of Section 33(a) of the Act (415 ILCS 5/33(a) (1996)) as well as the Illinois Supreme Court decision in People v. Fiorini, 143 Ill. 2d 318, 574 N.E.2d 612 (1991).

In Fiorini, the Illinois Supreme Court considered the issue of private cost recovery in the context of a third-party complaint which sought, among other things, cleanup costs incurred because of an alleged violation of Section 21 of the Act. In denying a motion to dismiss the third-party complaint, the Supreme Court stated that, "While cleanup costs are not expressly provided for in these [Sections 33(b) and 42 through 45] of the Act, we decline to hold here that an award of cleanup costs would not be an available remedy for a violation of the Act under appropriate facts. Rather, we believe that such a determination is properly left to the trial court's discretion." Fiorini, 143 Ill. 2d at 350, 574 N.E.2d at 625.

Using this rationale, the Board has repeatedly upheld its ability to award cleanup costs under the Act. The Board is cognizant of a recent decision, NBD Bank and Klairmont Enterprises, Inc. v. Krueger Ringier, Inc., *226 Ill. Dec. 921, 686 N.E.2d 704*, (1st Dist. September 30, 1997), which discusses cost recovery in an environmental law context.[1] However, the NBD decision does not impact the line of Board decisions finding authority to

[1] See concurring opinion in Casanave v. Amoco Oil Company (November 20, 1997), PCB 97-84.

award cleanup costs for a violation of the Act. NBD involves an action in tort to recover cleanup costs resulting from plaintiffs' remediation of contaminated soil on property purchased from the defendant. The court decided that the "economic loss doctrine" precludes recovery under section 353 of the Restatement (Second) of Torts. The Court also decided that, under the facts of the case, no private right of action exists under the Act to allow recovery of costs in tort. The Court distinguished Fiorini as being a contribution claim by a third party plaintiff, and also noted that Fiorini presented public policy concerns not present in NBD.

The NBD court does not address the availability of cleanup costs as a remedy for a violation of the Act, nor does it discuss the aforementioned line of Board decisions finding that the Board has the authority to award such costs. In Ostro and its progeny, a private right of action is not in dispute; Section 31(d) of the Act allows a private citizen to sue any person for a violation of the Act. The issue is, rather, whether or not cleanup costs are a remedy that the Board can award for a violation of the Act. The Board has consistently held that such costs are a potential remedy, and the Board finds nothing in the NBD court's decision which affects our prior holdings in this regard.

The instant case involves a citizens' enforcement action brought under Section 31(d) of the Act. 415 ILCS 5/31(d) (1996). The recovery of cleanup costs sought by respondent is a remedy within the Board's authority. Thus, the complaint seeks relief which the Board could grant and is, therefore, not frivolous. In addition, review of the available evidence indicates the complaint is not duplicitous. Having made its finding pursuant to Section 103.124(a), the Board accepts the matter for hearing.

MOTION TO STAY PROCEEDING

In the motion to stay the proceeding, Malina correctly reports that Day's motion to dismiss does not contain the words "THIS FILING IS SUBMITTED ON RECYCLED PAPER" on the notice of filing or certificate of service as required by 35 Ill. Adm. Code 101.103(d). Malina asks that the Board stay the present proceedings until Day's pleadings are corrected. On December 5, 1997, Day filed a motion to dismiss substantially identical to that filed on November 6, 1997. This motion to dismiss was accompanied by a notice of filing which contained the necessary words required by 35 Ill. Adm. Code 101.103(d). The motion to stay the proceeding is therefore moot.

MOTION TO DISMISS

Day's motion to dismiss asserts that Count I of the complaint makes no factual allegations of open dumping, under any possible definition, so that Section 5/21(a) of the Act (415 ILCS 5/21(a) (1996)) does not by its terms apply to Count I. The motion to dismiss also states that Count II of the complaint does not allege a waste-storage operation, a waste-treatment operation, or a waste-disposal site. The motion to dismiss raises two additional arguments: First, that no provision of law requiring respondent to reimburse complainant for alleged costs exists or is cited; Second, that no allegation is contained in the complaint that any gasoline contaminated soil exists on site to necessitate the requested remediation order. Day asks that the complaint be dismissed.

In his response to the motion to dismiss, Malina notes that, using the definitions of the Act where available and the dictionary definition of discard, when the contents of an UST leak into the land, open dumping results. The response also states that because gasoline in the form of waste was disposed at the site in question, Count II of the complaint appropriately alleges the site is a waste disposal site. Finally, Malina asserts that, not only does Section 33(d) provide the Board with equitable remedies such as cost recovery, but that it would be grossly unfair to not give complainant an opportunity to plead his case on the merits before the Board. Malina asks that the motion to dismiss be denied.

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. The Board will take all well-pleaded allegations in the complaint as true. Gorden Krautsack v. Bhogilal Patel, Subhas Patel, and Electronic Inerconnect, Inc. (June 15, 1995) PCB 95-143, Miehle v. Chicago Bridge and Iron Co. (November 4, 1993) PCB 93-150. After reviewing the pleadings, the Board finds that if all allegations are accepted as true, a set of facts could be proven that may entitle Malina to relief. The Board therefore denies respondent's motion to dismiss.

CONCLUSION

As previously stated, this matter is accepted for hearing. The hearing must be scheduled and completed in a timely manner consistent with Board practices. The Board will assign a hearing officer to conduct hearings consistent with this order and Section 103.125 of the Board's rules. 35 Ill. Adm. Code 103.125. The Clerk of the Board shall promptly issue appropriate directions to that assigned hearing officer.

The assigned 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 credibility of witnesses, and all actual exhibits to the Board within five days of the hearing.

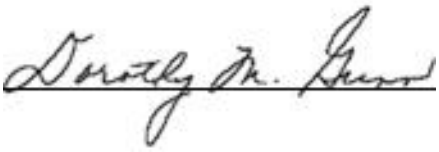
Any briefing schedule shall provide for final filings as expeditiously as possible. If, after appropriate consultation with the parties, the parties fail to provide an acceptable hearing date or if, after an attempt the hearing officer is unable to consult with the parties, the hearing officer shall unilaterally set a hearing date. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible.

IT IS SO ORDERED.

Board Member M. McFawn concurred.

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 22nd day of January 1998, by a vote of 6-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board