

BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE

DEC 12 2003

STATE OF ILLINOIS
Pollution Control Board

REPUBLIC BANK OF CHICAGO, as)
Trustee of Trust # 2234, ARISTOTLE)
HALIKIAS, LENA HALIKIAS, MICHAEL)
HALIKIAS, NIKOLAS HALIKIAS, NOULA)
HALIKIAS, and PATRICIA HALIKIAS, as)
beneficiaries of Trust # 2234,)

PCB-04-69
(Citizen's Suit UST Enforcement)

Complainants,)

v.)

SUNOCO, INC. (R&M),)

Respondent.

NOTICE OF FILING

To: SUNOCO, INC. (R&M), c/o CT Corporation System, Registered Agent, 208
South LaSalle Street, Chicago, Illinois 60604

PLEASE TAKE NOTICE that on December 12, 2003, we filed with the Clerk of
the Illinois Pollution Control Board ("Board"), 100 West Randolph Street, James R.
Thompson Center Suite 11-500, Chicago, Illinois, 60601-3218, an original and nine (9)
copies of a **MOTION FOR RECONSIDERATION OR ALTERNATELY
CLARIFICATION**; a copy of said motion is attached hereto and hereby served upon
you.

REPUBLIC BANK OF CHICAGO, as
Trustee of Trust # 2234, ARISTOTLE
HALIKIAS, LENA HALIKIAS, MICHAEL
HALIKIAS, NIKOLAS HALIKIAS, NOULA
HALIKIAS, and PATRICIA HALIKIAS, as
beneficiaries of Trust # 2234

Andrew H. Perellis
SEYFARTH SHAW LLC
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000

By: 
One of Their Attorneys

BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE

DEC 12 2003

STATE OF ILLINOIS
Pollution Control Board

REPUBLIC BANK OF CHICAGO, as)
Trustee of Trust # 2234, ARISTOTLE)
HALIKIAS, LENA HALIKIAS, MICHAEL)
HALIKIAS, NIKOLAS HALIKIAS, NOULA)
HALIKIAS, and PATRICIA HALIKIAS, as)
beneficiaries of Trust # 2234,)

PCB-04-69
(Citizen's Suit UST Enforcement)

Complainants,)

v.)

SUNOCO, INC. (R&M),)

Respondent.)

AFFIDAVIT OF SERVICE

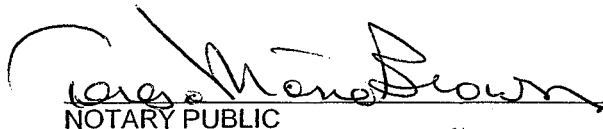
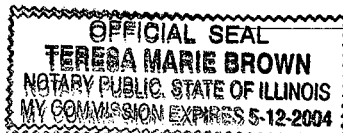
The undersigned, an attorney, states that he caused a copy of the attached (i) MOTION FOR RECONSIDERATION OR ALTERNATELY CLARIFICATION, and (ii) NOTICE OF FILING, to be served upon the following by first-class mail, from 55 East Monroe St., Chicago, Illinois 60603, this 12th day of December, 2003:

SUNOCO, INC. (R&M)
c/o CT Corporation System, Registered Agent
208 South LaSalle Street
Chicago, Illinois 60604



Andrew H. Perellis

SUBSCRIBED TO AND SWORN BEFORE ME
THIS 12th DAY OF DECEMBER, 2003.


NOTARY PUBLIC

BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE

DEC 12 2003

STATE OF ILLINOIS
Pollution Control Board

REPUBLIC BANK OF CHICAGO, as)
Trustee of Trust # 2234, ARISTOTLE)
HALIKIAS, LENA HALIKIAS, MICHAEL)
HALIKIAS, NIKOLAS HALIKIAS, NOULA)
HALIKIAS, and PATRICIA HALIKIAS, as)
beneficiaries of Trust # 2234,)

PCB-04-69
(Citizen's Suit UST Enforcement)

Complainants,)

v.)

SUNOCO, INC. (R&M),)

Respondent.

MOTION FOR RECONSIDERATION OR ALTERNATELY CLARIFICATION

Complainants, Republic Bank of Chicago, et al., by their counsel, move the Pollution Control Board to reconsider that portion of its Order dated December 4, 2003, which struck as frivolous "the allegations in count IV [of the Complaint] relating to violations of the [regulations of the] Office of State Fire Marshal." In support of this motion, Complainants state:

1. The Board should reconsider its Order because it erred in striking certain allegations of the Complaint. It erred for a number of reasons. First, the Board does possess statutory authority to enforce the regulations of the State Fire Marshal. Second, even if the Board lacked such authority, it must enforce violations of the Environmental Protection Act. A violation of the State Fire Marshal's regulations would give rise to a violation of the Act, and accordingly, whether a regulatory violation occurred is relevant to the Board's inquiry. Third, even if the Board (despite its statutory mandate) is

unwilling to adjudicate a violation of the Fire Marshal's regulations, and even if such violation did not give rise to a *per se* violation of the Act, it would still be appropriate for Complainants to allege that Respondent did not meet the Fire Marshal's regulatory requirements. This is because conduct underlying the violation (as opposed to the regulatory violation itself) would be relevant and admissible proof for the Board to consider in fulfilling its statutory obligation to adjudicate whether a violation of the Act has occurred. Fourth, even if none of the foregoing arguments prevail, the "frivolous" determination to be made by the Board pertains to whether a cause of action is frivolous, not whether particular allegations are surplusage. Particular allegations are subject to a motion to strike as being "immaterial," but should not be addressed *sua sponte* by the Board. These four contentions are discussed in reverse order to provide a logical progression of thought.

2. The Board has confused a frivolous complaint with what it considers to be a frivolous *allegation* in a complaint. Where the *complaint* is not frivolous, neither Section 31(d) of the Act and Section 103.212 of the Board's regulations provide authority for striking particular allegations in a complaint. Count IV of the Complaint alleges, *inter alia*, that "Sunoco has violated Sections 57.1(a), 57.5, 57.6, and 57.7 of the [Environmental Protection] Act." The relief sought includes a "[d]etermination that Sunoco has violated Sections 57.1(a), 57.5, 57.6, and 57.7, of the Act, 415 ILCS 5/57.1(a), 5/57.5; 5/57.6 and 5/57.7" and an order directing "Sunoco to remediate the petroleum-related contaminated soil and groundwater," as well as an order requiring reimbursement of cleanup costs incurred by Complainants. Count IV, then, is not frivolous because it states a cause of action upon which the Board can grant relief, and

because it requests relief that the Board has authority to grant.

3. The Board, absent motion from the Respondent, should take no action *sua sponte* to strike particular *allegations* of the complaint. However, when considering whether to strike *particular* allegations within a complaint (either *sua sponte* or by motion), the Board (in addition to its own Rule 101.506) should be guided by Illinois Code of Civil Procedure 5/2-615, which allows the striking of “designated immaterial matter” from pleadings. An allegation that violations of the Fire Marshal’s regulations has occurred is neither immaterial to Complainants’ cause of action nor frivolous, regardless of whether the Board has authority to *enforce* the regulations of the Office of the State Fire Marshal. To the contrary, such allegations are germane to and help support the allegation that Respondent has violated the Environmental Protection Act. After all, and at a minimum, these the regulations provide a sister agency’s view as to how compliance with the Environmental Protection Act is to be achieved. Respondent’s conduct, viewed against the backdrop of the regulations, is relevant to and may assist the Board in its determination of whether the Environmental Protection Act has been violated. A similar legal concept might be where a statute does not give rise to a private cause of action, but the allegation of such violation will form the basis for a negligence claim. Where the conduct giving rise to a cause of action is addressed by a statute, no court would suggest that it is frivolous or immaterial to allege the statute’s violation merely because the court lacks power to enforce the statute.

4. Additionally, the Board clearly has authority to enforce violations of the Act. A violation of the Fire Marshal’s regulations gives rise to a *independent* violation of the Act. In other words, the Board can decide whether a violation of regulation occurred

without enforcing the regulation itself; instead, it would be adjudicating whether a violation of the Environmental Protection Act took place. Section 31(d) of the Act allows a complaint against any person "allegedly violating this Act." Section 5(d) of the Act provides the Board with authority to "conduct hearings upon complaints charging violations of this Act." Under Section 57.1 of the Act, a person who fails to perform site investigation or corrective action in accordance with the requirements of the Leaking Underground Storage Tank Program has violated *the Act*. Under Section 57.5(b), a person who has failed to remove or abandon a UST in accordance with the Fire Marshal's regulations has violated *the Act*. Similarly, under Section 57.6(a), a person who fails to "comply with all applicable statutory and regulatory reporting and response requirements" has violated *the Act*. Indeed, with respect to the UST program in Illinois, in *Miehle v. Chicago Bridge and Iron Company*, PCB 93-150, 1993 Ill. ENV LEXIS 1224 (Nov. 4, 1993), the Board confirmed its authority to adjudicate violations of the Act without regard to whether the Fire Marshal has made any prior findings of a violation of its regulations. Accordingly, it is proper to allege a violation of the State Fire Marshal's regulations because violation of the regulation will give rise to a violation of the Act, which is properly before the Board.¹ Indeed, the failure of the Board to consider whether the Act has been violated by the conduct of the Respondent would be an unlawful *abdication* of the authority conferred on the Board by the legislature.

5. Although the Board states in its December 4 Order that it lacks authority to enforce directly the Fire Marshal's regulations, the Board clearly has such authority

¹ An analogous situation is presented by the alleged failure to comply with a federal regulation promulgated under Section 111 or 112 of the Clean Air Act, which gives rise to a violation of the Environmental Protection Act under Section 9.1(d).

conferred on it by statute. Section 5(d) of the Act provides the Board with authority not only to enforce violations of the Act, but also "regulations thereunder." Section 31(d) of the Act authorizes the Board to adjudicate not only violation of the Act, but also "any rule or regulation thereunder." (Emphasis added.) Section 33 of the Act authorizes the Board to enter a final order "as it shall deem appropriate under the circumstances," consistent with its Authority under the Act (Section 5(b)) to "determine, define and implement the environmental control standards applicable in the State of Illinois." The fact that regulations are adopted by one agency in the executive branch of government (e.g., the Fire Marshal) in no way limits another agency of the executive branch from construing or determining compliance with such regulation (e.g., the Board) where the legislature has authorized such activity. Because both agencies are created by the legislature and vested only with such authority as is conferred by the legislature, the Board's authority to enforce the Fire Marshal's regulations, promulgated pursuant to the Act, does not usurp the authority of the Fire Marshal or interfere with its jurisdiction. For this reason, in addition to enforcing violations of the Act, the Board may properly directly enforce violations of regulations promulgated "thereunder," including those promulgated by the Office of the State Fire Marshal pursuant to the Act.

6. In the event that the Board does not favorably grant reconsideration by allowing the complaint to stand as filed, Complainants respectfully ask the Board to clarify its Order of December 4 by identifying with specificity what allegations of the complaint have been stricken. Complainant's concern is that the Hearing Officer not later misconstrue the Board's Order by depriving Complainant of the opportunity to obtain discovery regarding Respondent's conduct relating to its compliance with the

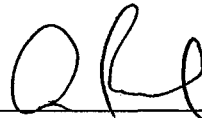
requirements imposed by the Fire Marshal's regulations, or by prohibiting Complainant from introducing evidence of such conduct at hearing.

WHEREFORE, Complainants respectfully move the Board to reconsider its Order of December 4, 2003 and allow the complaint to stand, as initially filed with the Board.

Respectfully Submitted,

REPUBLIC BANK OF CHICAGO, as
Trustee of Trust # 2234, **ARISTOTLE
HALIKIAS, LENA HALIKIAS, MICHAEL
HALIKIAS, NIKOLAS HALIKIAS, NOULA
HALIKIAS**, and **PATRICIA HALIKIAS**, as
beneficiaries of Trust # 2234

By: _____



One of Their Attorneys

Andrew H. Perellis
SEYFARTH SHAW LLC
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000

December 12, 2003