ILLINOIS POLLUTION CONTROL BOARD
May 19, 2005

GRAND PIER CENTER LLC, and AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE CO., as subrogee of Grand Pier Center LLC,	)	
Complainants,	)	
v.	)	PCB 05-157
	)	(Citizens Enforcement - Land)
RIVER EAST LLC, CHICAGO DOCK AND CANAL TRUST, CHICAGO DOCK AND CANAL COMPANY, and KERR-MCGEE CHEMICAL, LLC,	)	
Respondents.	)	

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

On February 25, 2005, Grand Pier Center, LLC and American International Specialty Lines Insurance Co. (complainants), filed a complaint against River East LLC, Chicago Dock and Canal Trust, Chicago Dock and Canal Company, and Kerr-McGee Chemical, LLC (Kerr-McGee) (collectively respondents). *See* 415 ILCS 5/31(d) (2002); 35 Ill. Adm. Code 103.204. On April 4, 2005, Kerr-McGee filed a motion to dismiss the complaint. On April 18, 2005, the complainants filed a response to the motion. On May 5, 2005, Kerr-McGee filed a motion for leave to file a reply. On May 17, 2005, complainants filed an objection to the motion for leave to file a reply or in the alternative the complainants ask to file a surreply. The Board grants the motion for leave to file a reply and denies the complainants' request to file a surreply. For the reasons discussed below the motion to dismiss is denied and this matter is accepted for hearing.

COMPLAINT

Complainants allege in a three-count complaint that respondents violated Sections 21(e), 12(a), and 12(d) of the Environmental Protection Act (Act) (415 ILCS 5/21(e), 12(a) and (d) (2002)). Complainants further allege that respondents violated these provisions by depositing hazardous substances on the land at the site known as the RV3 North Columbus Drive Site. This site is generally located at 316 East Illinois, in Chicago, Cook County.

STATUTORY AND REGULATORY BACKGROUND

Section 31(d) of the Act (415 ILCS 5/31(d) (2002)) allows any person to file a complaint with the Board. Section 31(d) further provides that "[u]nless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing." *Id.*; *see also* 35 Ill. Adm. Code 103.212(a). A complaint is duplicitous if it is "identical or substantially similar to one brought

before the Board or another forum." 35 Ill. Adm. Code 101.202. A complaint is frivolous if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *Id.* Within 30 days after being served with a complaint, a respondent may file a motion alleging that the complaint is duplicitous or frivolous. 35 Ill. Adm. Code 103.212(b).

MOTION TO DISMISS

Kerr-McGee argues that the complaint is duplicative and frivolous and should be dismissed. Kerr-McGee asserts that the complaint is substantially similar to an action in the United States District Court for the Northern District of Illinois. Kerr-McGee further asserts that is frivolous because the complaint seeks relief which the Board does not have the authority to grant and the complaint fails to state a cause of action upon which the Board can grant relief. The following paragraphs further delineate the arguments of Kerr-McGee.

Duplicative

Kerr-McGee notes that the definition of duplicative is that the "matter is identical or substantially similar to one brought before the Board or another forum." Mot. at 2, citing 35 Ill. Adm. Code 101.202. Kerr-McGee asserts that the complaint is substantially similar to complainants' complaint filed before United States District Court for the Northern District of Illinois. Mot. at 2. Kerr-McGee maintains that the two actions are against the same parties, are based on the same contaminant, are premised on the same site, and the demand for relief is the same. *Id.* Kerr-McGee provided a copy of the complaint filed before the United States District Court for the Northern District of Illinois. Mot. at Exh. A.

Board Does Not Have Authority to Grant Requested Relief

Kerr-McGee asserts that the Board does not have the authority to grant the requested relief. Mot. at 3. Specifically, Kerr-McGee argues that the only relief for violations of Sections 21(e), 12(a), and 12(d) of the Act (415 ILCS 5/21(e), 12(a) and (d) (2002)) are civil penalties pursuant to Section 42(a) of the Act (415 ILCS 5/42(a) (2002)). Mot. at 3. Kerr-McGee notes that the complainants do not seek the imposition of civil penalties, but rather ask for "attorney fees, expert witness fees, and past and future response costs with interest." Mot. at 3, citing Comp. at 8-9.

Kerr-McGee argues that the only provision of the Act which contemplates reimbursement of response costs is Section 22.2(f) of the Act (415 ILCS 5/22.2(f) (2002)). Mot. at 4. Kerr-McGee observes that Section 22.2(f) of the Act contemplates reimbursement for costs incurred by the State or any unit of local government. Mot. at 4. Therefore, Kerr-McGee argues that the Board lacks the authority to grant the relief requested.

No Cause of Action

Kerr-McGee asserts that the activities that allegedly resulted in contamination occurred decades before the Act was adopted. Mot. at 4. Kerr-McGee argues that Sections 21(e), 12(a),

and 12(d) of the Act (415 ILCS 5/21(e), 12(a) and (d) (2002)) do not provide a cause of action for activates which occurred prior to the adoption of the provisions. Mot. at 4.

RESPONSE

Complainants argue that the motion to dismiss should be denied. Complainants maintain that the complaint is neither duplicative nor frivolous. The following paragraphs will summarize the complainants' response.

Duplicative

Complainants argue that the complaint is not duplicative even though the complainants concede the parties are the same and arise out of the same facts. Resp. at 2. However, complainants argue the two complaints allege different causes of action. *Id*. Complainants assert that this proceeding is analogous to Chrysler Realty Corp. v. Thomas Indus, Inc., PCB 01-25 (Dec. 7, 2000). Resp. at 2. In Chrysler, the Board held the complaint was not duplicative of a complaint in the federal court where the complaint in federal court was based on federal law, negligence, and unjust enrichment. *Id*. Complainants note that in federal court alleged violations of Sections 21(e), 12(a), and 12(d) of the Act (415 ILCS 5.21(e), 12(a) and (d) (2002)) were dismissed in the Chrysler case. Resp. at 2. Thus, complainants maintain raising allegations of violation of Sections 21(e), 12(a), and 12(d) of the Act (415 ILCS 5.21(e), 12(a) and (d) (2002)) in the federal court complaint brought by complainants would have been pointless. *Id*.

Complainants argue that to deny complainants their suit pursuant to the Act before the Board would require complainants to elect between asserting their rights in federal court or before the Board. Resp. at 2. Complainants maintain that the precedent establishes that complainants have viable, but separate claims in each forum. Resp. at 2.

Board Does Not Have Authority to Grant Requested Relief

Complainants argue that there is no merit in Kerr-McGee's argument. Resp. at 4. Complainants point to the Board's prior decisions, which have consistently held that the Board has authority to award cleanup costs to a private party. Resp. at 3, citing Chrysler, and Lake County Forest Preserve Dist. v. Ostro, PCB 92-80 (Mar. 31, 1994). Complainants assert that the Board's authority is based on the broad language of Section 33(a) of the Act (415 ILCS 5/33(a) (2002)) as well as People v. Fiorini, 143 Ill. 2d 318 (1991). Resp. at 3.

Complainants argue that the Act also grants the Board the authority to order a party to cease and desist from violations of the Act and Board regulations. Resp. at 4. Complainants assert that contrary to Kerr-McGee's argument, the authority to order cease and desist is an injunctive power and the relief would not be pointless. *Id*.

No Cause of Action

Complainants argue that Kerr-McGee would "strip the Act of any authority over any clean-up operations concerning sites initially contaminated prior to the enactment of the Act."

Resp. at 4. Complainants assert that Kerr-McGee is mistaken and the legislature intended the Act to have retroactive effect. Resp. at 4. Complainants rely on State Oil Co. v. PCB, 352 Ill. App. 3d 813; 816 N.E.2d 845 (2nd Dist. 2004), which found "indications" that the legislature generally intended the Act to be given retroactive effect. *Id*.

Complainants assert that the wrongful acts of Kerr-McGee over 70 years ago resulted in contamination that has persisted to this day. Resp. at 5. Complainants first incurred costs related to cleanup in 2000 and continue. *Id*. Complainants argue that the costs were incurred subsequent to the enactment of the Act, thereby subjecting Kerr-McGee to provisions of the Act. *Id*.

REPLY

Kerr-McGee argues in reply that the federal complaint does include allegations of violation of the Act. Reply at 1-2. Kerr-McGee asserts that this fact readily distinguishes this case from prior decisions by the Board. Reply at 2. Furthermore, Kerr-McGee maintains that in Ostro the relief sought included civil penalties which complainant is not seeking in this matter. *Id*. Kerr-McGee argues that complainant is seeking the same relief in federal court as that being sought before the Board. *Id*. Kerr-McGee maintains that for these reasons the Board should dismiss the complaint as duplicative. *Id*. Kerr-McGee also argues that if the Board accepts the complainants' theory of the merits of the complaint, the Board "may open itself to a wide variety" of private party petitions seeking overlapping relief under Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 USC § 9605). Reply at 3.

Kerr-McGee argues that the claim is frivolous because the alleged violations occurred prior to the enactment of the Act. Reply at 3. Kerr-McGee asserts that the acts are so remote that complainant is unable to plead the allegations with the precision required by the Board. *Id*. Kerr-McGee maintains that acceptance of this case under these circumstances is beyond the jurisdiction of the Board and the Board should dismiss the complaint. Reply at 4.

DISCUSSION

Kerr-McGee sets forth three arguments in support of the motion to dismiss. Kerr-McGee asserts that the complaint is duplicative because the complaint is substantially similar to a complaint filed in federal court. Kerr-McGee also asserts that the complaint is frivolous because the Board lacks the authority to grant the relief requested and the complaint does not set forth a cause of action. In the following paragraphs the Board will address each of the three arguments.

Duplicative

The Board agrees with complainants that the facts of this case are very similar to Chrysler. The Board notes that Kerr-McGee did not address Chrysler in the reply except to cite the case in a footnote. The Board is persuaded that Chrysler is on point. In both cases, a complaint was filed in federal courts involving the same parties and the same basic set of facts. In Chrysler, the federal court dismissed the alleged violations of the State Act, leaving the only

remedy for violations of the State Act to be found with the Board. Chrysler, slip op. at 5. Even though the federal complaint references the Act, the Board is not convinced that the federal complaint is based on allegations of violation of the Act. The Board finds that at this time the only remedy for alleged violations of the Act in this proceeding are also to found with the Board. Therefore, as in Chrysler, the Board finds that the complaint is not duplicative.

Board Does Not Have Authority to Grant Requested Relief

Since 1994, the Board has consistently held that pursuant to the broad language of Section 33 of the Act (415 ILCS 5/33 (2002)), the Board has the authority to award cleanup costs to private parties for a violation of the Act. *See* Lake County Forest Preserve District v. Ostro, PCB 92-80 (Mar. 31, 1994); Chrysler, slip op. at 6-7. Kerr-McGee has not persuaded the Board to deviate from these cases; therefore, the Board finds that the Board does have the authority to grant cost recovery and a cease and desist order. However, the Board has also held that attorney fees cannot be awarded in a citizen's enforcement action. 2222 Elston LLC v. Purex Industries *et. al.*, PCB 03-55, slip op. at 26-27 (June 19, 2003). The Board therefore strikes the requested relief seeking attorney fees.

No Cause of Action

Kerr-McGee argues that because the activities that allegedly resulted in contamination occurred decades before the Act was adopted, no cause of action exists. Kerr-McGee is wrong. As complainants point out, in State Oil the Appellate Court specifically found that the legislature intended the Act to address ongoing problems, which by definition existed at the time the Act was enacted. State Oil, 352 Ill. App. 3d 819. Obviously, the alleged violations existed at the time the Act was enacted and were ongoing. As with Chrysler above, Kerr-McGee does not address State Oil. The Board finds that State Oil clearly provides that the Act can be retroactively applied and therefore, there exists a cause of action for the alleged violations of Section 21(e), 12(a) and 12(d) of the Act (415 ILCS 5/21(e), 12(a) and (d) (2002)).

Set for Hearing

The Board accepts the complaint for hearing. *See* 415 ILCS 5/31(d) (2002); 35 Ill. Adm. Code 103.212(a). A respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if respondents fail within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider respondents to have admitted the allegation. 35 Ill. Adm. Code 103.204(d). The Board directs the hearing officer to proceed expeditiously to hearing.

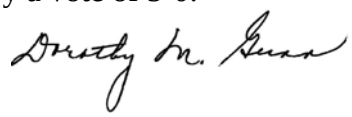
CONCLUSION

Kerr-McGee sets forth three arguments in support of the assertions that the complaint in this matter is duplicative and frivolous. The Board finds that Kerr-McGee's arguments are without merit; except the argument regarding attorney fees. Complainants have accurately delineated the case law and statutory basis, which allow the complainants to proceed with this

complaint. Nothing in Kerr-McGee's arguments persuades the Board to deviate from our prior cases; therefore, the Board accepts the complaint for hearing. However, the Board agrees with Kerr-McGee that the request for relief seeking attorney fees is frivolous and the Board strikes that request.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 19, 2005, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board