

ILLINOIS POLLUTION CONTROL BOARD

August 6, 2009

ELMHURST MEMORIAL HEALTHCARE)	
and ELMHURST MEMORIAL HOSPITAL,)	
)	
Complainants,)	
)	
v.)	PCB 09-066
)	(Citizens Enforcement - Land)
CHEVRON U.S.A., INC.)	
)	
Respondents.)	

ORDER OF THE BOARD (by G.L. Blankenship):

On July 10, 2009, Elmhurst Memorial Healthcare and Elmhurst Memorial Hospital (complainants) filed a Motion for Leave to File Reply *Instantly* in Support of their Motion to Strike Affirmative Defenses (Mot. to File Reply). This motion was limited to requesting leave to file the complainants' reply to Affirmative Defense No. II of Chevron U.S.A., Inc. (Chevron). Mot. to File Reply at 2. On July 21, 2009, Chevron filed a Response to Complainants' Motion for Leave to File Reply (Resp. to Mot. to File Reply), asking that the Board deny the request for leave, and asking in the alternative that the Board grant Chevron leave to file a sur-reply if the Board grants the complainants' motion. Resp. to Mot. to File Reply at 5-6.

For the reasons below, the Board grants the complainants' motion for leave to file a reply and Chevron's request for leave to file a sur-reply.

PROCEDURAL HISTORY

On March 3, 2009, the complainants filed a two-count complaint (Comp.) against Chevron, seeking reimbursement for remediation costs. The Complaint alleges that Chevron is responsible for contamination associated with underground storage tanks (USTs), which were once operated by Texaco, Inc. (Texaco) at 701 South Main Street, Lombard, Illinois. Comp. at 2. Count I of the complaint alleges that Texaco, Chevron's predecessor in interest, violated Section 21(a) of the Illinois Environmental Protection Act (Act) (415 ILCS 5/21(a) (2008))¹ by causing or allowing the open dumping of waste. Comp. at 6-7. Count II alleges that Texaco violated Section 21(e) of the Act (415 ILCS 5/21(a) (2008)) by disposing, treating, storing, or transporting waste at a facility that did not meet the requirements of the Act. Comp. at 7-8.

On May 8, 2009, Chevron filed its Answer and Affirmative Defenses to the Complaint (Ans.). Chevron stated in Affirmative Defense No. II that any claims alleged in the Complaint

¹ All citations to the Act will be to the 2008 compiled statutes, unless the provision at issue has been substantively amended in the 2008 compiled statutes.

were discharged as a result of Texaco's bankruptcy proceedings under a January 26, 1988 court order. Ans. At 13-14.

On June 6, 2009, the complainants filed a Response to Affirmative Defense Number I and Motion to Strike Affirmative Defenses II through IX (Mot. to Strike). Chevron filed a Response to the Motion to Strike (Resp. Mot. to Strike), in which it stated regarding Affirmative Defense No. 2 that under Texaco Inc. v. Saunders, (*In re Texaco Inc.*, 192 B.R. 937 (1995)), all claims that the complainants may have had against Texaco were barred, because they were discharged as a result of Texaco's bankruptcy proceedings. Resp. Mot. to Strike at 4-9.

DISCUSSION

The complainants' July 10, 2009 motion requesting leave to file a reply alleges that material prejudice will result if the complainants are not allowed "to rectify Chevron's misstatements of law and fact" in regard to Affirmative Defense II. Mot. to File Reply at 4, 9. Chevron alleged in its July 21, 2009 response motion that the complainants would not be materially prejudiced by the denial of leave to reply, because the complainants' argument was redundant. Resp. to Mot. to File Reply at 2.

Regarding replies, the Board's procedural rules provide that "the moving person will not have the right to reply, except as permitted by the Board or hearing officer to prevent material prejudice." 35 Ill. Adm. Code 101.500(e). Because petitioners allege that denying the reply would result in material prejudice, the Board grants the motion. The complainants must file the reply by August 20, which is 14 days after the date of this order. The Board also grants Chevron's request for leave to file a sur-reply, if it wishes to do so, within 14 days after service of the complainants' reply.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on August 6, 2009, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board