ILLINOIS POLLUTION CONTROL BOARD
December 16, 2010

ELMHURST MEMORIAL HEALTHCARE and ELMHURST MEMORIAL HOSPITAL,	)	
Complainants,	)	
v.	)	PCB 2009-066
	)	(Citizen's Enforcement – Land)
CHEVRON U.S.A. INC. and TEXACO INC.,	)	
Respondents.	)	

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

The Board today rules on the motion of Chevron U.S.A., Inc. (Chevron) and Texaco Inc. (Texaco) (collectively, Respondents) for a determination that the amended formal complaint should not be set for hearing (Motion). For the reasons stated below, the Board denies the motion and directs that this action proceed to hearing.

Below the Board first sets forth the procedural history of this case. The Board next details the relevant statutory and regulatory provisions. The Board then summarizes the Motion as well as the response of Elmhurst Memorial Healthcare and Elmhurst Memorial Hospital (collectively, Complainants). Lastly, the Board will set forth the reasons for its decision.

PROCEDURAL BACKGROUND

On March 6, 2009, Complainants filed a complaint (Comp.) against Chevron seeking reimbursement for remediation costs. The Complaint alleges that Chevron is responsible for contamination associated with underground storage tanks (USTs) once operated by Texaco at 701 South Main Street, Lombard, DuPage County. Comp. at 2. Count I of the complaint alleges that Texaco, Chevron's predecessor in interest, violated Section 21(a) of Act (415 ILCS 5/21(a) (2008)) 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(e) (2008)) by disposing, treating, storing, or transporting waste at a facility that did not meet the requirements of the Act. Comp. at 7-8. In an order dated May 7, 2009, the Board accepted the complaint for hearing.

On May 8, 2009, Chevron filed its answer, which raised nine affirmative defenses. Chevron stated in affirmative defense II that any claims alleged in the complaint were discharged as a result of Texaco's bankruptcy proceedings under a January 26, 1988 court order. Ans. at 13-14. On June 5, 2009, Complainants filed a response to affirmative defense I and a motion to strike affirmative defenses II through IX. On June 26, 2009, Chevron filed its response to the motion to strike. Addressing affirmative defense II, Chevron stated that, under Texaco Inc. v. Sanders, 182 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. at 4-9.

On July 10, 2009, Complainants filed a motion for leave to file *instanter* a reply in support of the motion to strike affirmative defenses. Complainants limited their motion for leave to reply to affirmative defense II. Mot. Reply at 1, 8. On July 21, 2009, Chevron filed its response to the motion for leave to file *instanter* a reply. Chevron argued that the Board should deny Complainants' motion or, as an alternative in the event that the Board granted the motion, grant Chevron 14 days in which to file a sur-reply. Resp. Reply at 5-6. In an order dated August 6, 2009, the Board granted Complainants' motion for leave to file a reply and also granted Chevron's request for leave to file a sur-reply. On August 12, 2009, Complainants filed a reply in support of their motion to strike affirmative defenses. On August 25, 2009, Chevron filed its sur-reply to Complainants' reply.

On March 18, 2010, the Board issued an order denying the Complainant's motion to strike Affirmative Defenses No. II and III, and granting the Complainant's motion to strike Affirmative Defenses Nos. IV through IX. The Board found that Chevron had plead the ultimate facts necessary to establish Affirmative Defenses No. II and III.

On April 21, 2010, Complainants filed a motion for leave to file an amended complaint instanster as well as an amended formal complaint (Am. Compl.) which adds Texaco as a respondent. On June 3, 2010, the Board directed Complainants to provide proof of service on Texaco. On June 17, 2010, Complainants filed with the Board proof of service on both respondents on June 11, 2010.

On July 9, 2010, Respondents filed their motion that the amended formal complaint not be set for hearing. Complainants filed their response to the motion on July 23, 2010 (Resp.).

STATUTORY AND REGULATORY BACKGROUND

Section 101.202 of the Board's procedural rules defines "frivolous" as:

> [A] request for relief that the Board does not have the authority to grant, or a complaint that fails to state a cause of action upon which the Board can grant relief. 35 Ill. Adm. Code 101.202.

Under section 101.202 of the Board's procedural rules, a matter is "duplicative" when:

> [T]he matter is identical or substantially similar to one brought before the Board or another forum. *Id.*

The Board's procedural rules state in regards to staying an answer to a complaint:

> If the respondent timely files a motion under Section 103.212(b) or 35 Ill. Adm. Code 101.506, the 60-day period to file an answer described in subsection (d) of

this Section will be stayed. The stay will begin when the motion is filed and end when the Board disposes of the motion. 35 Ill. Adm. Code 103.204(e).

Motions made by respondents alleging that a citizen's complaint is duplicative or frivolous must be filed no later than 30 days following the date of service of the complaint upon the respondent. Motions under this subsection may be made only with respect to citizen's enforcement proceedings. Timely filing the motion will, pursuant to Section 103.204(e) of the Subpart, stay the 60 day period for filing an answer to the complaint. 35 Ill. Adm. Code 103.212(b).

COMPLAINANTS' AMENDED FORMAL COMPLAINT

Parties

Complainants state that they are both Illinois not-for-profit corporations with primary offices in Elmhurst. Comp. at 2. Complainants further state that "Chevron is a Pennsylvania corporation licensed to conduct business in Illinois" with its primary offices located in San Ramon, California. *Id*. Complainants state that "Texaco is a Delaware corporation that conducted business in Illinois" with its primary offices also located in San Ramon, California. *Id*. at 3. Complainants argue that each of these four entities is a "person" under the Act. *Id*., citing 415 ILCS 5/3.315 (2008).

Complainants allege that, pursuant to an October 9, 2001 transaction, the common stock of Texaco was acquired by a subsidiary of Chevron Corporation and that Texaco became a wholly-owned subsidiary of Chevron Corporation as a result. *Id*. Complainants allege that "Texaco remains liable for its pre-2001 actions relevant to this Amended Complaint." *Id*.

Complainants state that Chevron is a subsidiary of Chevron Corporation and that most of Chevron Corporation's United States businesses are managed and operated by Chevron. *Id*. Complainants allege that certain Chevron Corporation subsidiaries transferred assets to Chevron as a result of corporate restructuring and that Chevron may also be liable for Texaco's pre-2001 actions relevant to the Amended Complaint. *Id*.

Historical Background

On the basis of information and belief, Complainants allege that, from approximately 1957 to 1977, The Texas Company (which later became respondent Texaco) owned and/or operated a gasoline filing station under the name "Texaco" on the Property. Comp. at 3. Complainants further allege that, "in 1959, The Texas Company changed its names to 'Texaco, Inc. (i.e., Respondent Texaco).'" *Id*. Complainants further allege that Texaco caused the installation of "one heating oil UST, at least four gasoline USTs and two other USTs" at the Property. *Id.* at 4. Complainants allege that "releases of petroleum occurred as a direct result of Texaco's operation of the gasoline USTs." *Id*. Complainants also allege that "Texaco ceased using the Property as a gasoline filling station in or about 1977, and abandoned in place all of the USTs then located on the Property." *Id*.

On the basis of information and belief, Complainants allege that a transferee of the Property discovered in 1981 "that some or all of the USTs had not been abandoned properly." *Id.* Complainants further allege that this discovery came at that time to the attention of the Lombard Fire Department, which "promptly notified the company that performed the 1978 abandonment of the deficiency in its work, stating that the USTs were only partially filled with an inert solid material." *Id.* Complainants also allege that "a transferee of the Property removed two USTs in or about 1981." *Id.*

Remediation

Complainants allege that, in 2005, they "identified the Property as a possible site for a facility to treat patients suffering from sleep disorders." Comp. at 4. Complainants further allege that "Elmhurst Memorial Healthcare purchased the Property for that purpose in the same year." *Id*.

Complainants allege that, through contractors, they "conducted an electromagnetic search to locate any USTs remaining on the Property." *Id*. at 5. Complainants further allege that, on the east side of an existing building, the search detected one UST believed to have contained heating oil. *Id.* Complainants further allege that they "obtained a permit to remove the UST and drained approximately 230 gallons of water from it." *Id.* Complainants also allege that, "[o]n March 17, 2006, the UST was extracted in the presence of representatives of the Illinois State Fire Marshal and the Lombard Fire Department." *Id.* The complaint states that the UST was located near the soil surface, had a dented top, "and had holes of between two and four inches in length." *Id*. Complainants allege that "[s]oil samples were collected from the vicinity of the excavation pit and submitted for laboratory analysis." *Id.* Complainants further allege that, "[n]otwithstanding the poor condition of the UST and detection of petroleum odors, the UST was determined not to be leaking." *Id*.

Complainants allege that they did not at that time find gasoline USTs on the Property. *Id*. Complainants allege, however, that they "did locate the area of the former gasoline pump islands and collected soil samples in that vicinity." *Id*. Complainants allege that analysis of the samples "showed that the soil in the Property contained benzene and ethylbenzene at concentrations exceeding" regulatory standards. *Id*., citing 35 Ill. Adm. Code 734.405(b) (Indicator Contaminants), 35 Ill. Adm. Code 742.Appendix B (Tier I Illustrations and Tables). Complainants further allege that "[t]he soil was contaminated as a result of Texaco's operation of the gasoline filling station." Comp. at 5. Complainants allege that they "caused over 570 tons of contaminated soil to be excavated and disposed off-site." *Id*. Complainants further argue that, because groundwater seeped into the excavation, they collected approximately 1,350 gallons of water and disposed of it off-site. *Id*.

Complainants allege that, following this remediation, "the existing building on the Property was razed to make way for the new [] facility." *Id*. at 6. Complainants allege that construction revealed four gasoline USTs, each of which had a capacity of 3,000 gallons. *Id*. Complainants also allege that, on September 19, 2007, these four gasoline USTs were removed in the presence of a representative of the Office of the Illinois State Fire Marshal. *Id*. Complainants argue that the representative determined that a release had occurred and that the

release was reported to the Illinois Emergency Management Agency. *Id*. (noting Incident No. 20071269).

Complainants allege that each of the four gasoline USTs "contained gasoline and water and was partially filled with sand" and had holes at the bottom. Compl. at 6. Complainants further allege that analysis of soil samples from the sidewalls and floor of the excavation pit showed that the soil contained benzene at levels exceeding regulatory standards. *Id*., citing 35 Ill. Adm. Code 734.405(b), 35 Ill. Adm. Code 742.Appendix B. Complainants also allege that "[a]bout 10,500 gallons of gasoline and water was pumped from the tanks and the excavation pit and disposed [of] off-site." Comp. at 6. Complainants further allege that "[a]bout 315 tons of contaminated soil was excavated from the area affected by the gasoline USTs." *Id*.

The Complaint states that Complainants have spent more than $100,000 to remediate the Property. *Id*. Complainants allege that "[a] representative of [complainants] contacted representatives of the Respondents at the time of the excavation, and the latter represented that Chevron U.S.A., or some other subsidiary of Chevron Corporation, was responsible for the liabilities of Texaco." *Id*. at 7. Complainants state that they "demanded that Respondents reimburse [complainants] for the costs expended in relation to the USTs as early as October 2, 2007." *Id*. Complainants further allege that, in spite of repeated demands, "Respondents have not reimbursed [complainants] for any of the costs it incurred in relation to the USTs on the Property." *Id*.

Count I

Complainants allege that "[t]he USTs, the substances in the USTs, and the contaminated media resulting from releases associated with the USTs on the Property (collectively, 'Gas Station Waste') all constitute "waste" within the meaning of the Act." Comp. at 7, citing 415 ILCS 5/3.535 (2008) (defining "waste"). On the basis of information and belief, Complainants allege that the Property did not at any relevant time fulfill the requirements of a sanitary landfill. Comp. at 7. Complainants further allege that "[t]he abandonment of the Gas Station Waste constitutes 'open dumping' within the meaning of the Act." *Id*. Complainants further allege that Texaco caused or allowed the open dumping of the Gas Station Waste in violation of the Act. *Id*. at 8, citing 415 ILCS 5/21(a) (2008). Complainants request that the Board enter an order requiring Respondents to reimburse Complainants for all costs incurred in investigating and remediating the Gas Station Waste at the Property. Comp. at 7. Complainants also request any other relief that the Board and equity deem appropriate. *Id*.

Count II

Complainants restate their allegation that "[t]he Gas Station Waste constitutes "waste" within the meaning of the Act." Comp. at 8, citing 415 ILCS 5/3.535 (2008). Complainants allege that the presence of the Gas Station Waste on the Property constitutes both "storage" and "disposal" under the Act. Comp. at 8, citing 415 ILCS 5/3.185 (defining "disposal"), 415 ILCS 5/3.480 (defining "storage"). Complainants argue that "[t]he presence of the Gas Station Waste on the Property for decades after the cessation of active use by Texaco constitutes 'abandonment'" under the Act. Comp. at 8-9, citing 415 ILCS 5/21(e) (2008). Complainants

further allege that "Texaco disposed, stored, and abandoned waste at a facility that did not meet the requirements of the Act, and the regulations there under, in violation of Section 21(e) of the Act." *Id*. at 9, *see* 415 ILCS 5/21(e) (2008). Complainants request that the Board enter an order requiring Respondents to reimburse Complainants for all costs incurred in removing the USTs, investigating and remediating the Property, and disposing of contaminants such as contaminated soil and water. Comp. at 9. Complainants also request any other relief that the Board and equity deem appropriate. *Id*.

MOTION FOR A DETERMINATION THAT THE AMENDED FORMAL COMPLAINT SHOULD NOT BE SET FOR HEARING

The Board will first summarize the arguments in the Motion followed by the Complainants' response.

Chevron and Texaco's Motion

Respondents allege that the amended complaint is frivolous because "it seeks relief that the Board does not have the authority to grant and/or fails to state a cause of action upon which the Board can grant relief." Motion at 3.

With regard to Chevron, Respondents contends that (a) the amended complaint does not allege that Chevron ever violated any provisions of the Act and the Board does not have authority under the Act to hear the claim that Chevron is responsible for the obligations of Texaco, and (b) even if the Board had authority, the amended complaint does not allege sufficient facts to state a cause of action. *Id.* at 4.

With regard to Texaco, Respondents contend that (a) the provisions of the Act alleged to have been violated by Texaco were not in effect at the time of the alleged release, and (b) the amended complaint is barred by the five year statute of limitations. *Id.*

The Board does not have the authority to determine a claim for liability of Chevron U.S.A. Inc. for the obligations of Texaco Inc.

Respondents state that the amended complaint does not allege that Chevron ever "owned, operated, leased, serviced or had any other legal or physical connection to the property or the USTs located at the property at any time whatsoever." Mot. at 5. Respondents further allege that the amended complaint "does not allege that [Chevron] ever violated the Act." *Id.* Respondents therefore contend that Chevron could not have any liability to Complainants under the Act. *Id.*, citing 415 ILCS 5/1 *et seq.*

Respondents state that the Board has limited, not general, jurisdiction under the Act (415 ILCS 5/5 *et seq.*) and is granted the authority to hear and rule on only certain specified matters. Mot. at 5. Respondents cite the Act with respect to enforcement actions, which states:

> The Board shall have authority to conduct proceedings upon complaints charging violations of this Act, any rule or regulation adopted under this Act, any permit or

> term or condition of a permit, or any Board order; upon administrative citations; upon petitions for variances or adjusted standards; upon petitions for review of the Agency's final determinations on permit applications in accordance with Title X of this Act; upon petitions to remove seals under Section 34 of this Act; and upon other petitions for review of final determinations which are made pursuant to this Act or Board rule and which involve a subject which the Board is authorized to regulate. The Board may also conduct other proceedings as may be provided by this Act or any other statute or rule. *Id.* at 5-6, citing 415 ILCS 5/5(d) (emphasis added).

Respondents therefore contend that, while the Board has authority to hear complaints alleging violations of the Act, the Board "has not been given the authority to make determinations as to whether another entity, who is not alleged to have violated the Act, may have civil liability under corporate or contract law for the debts and obligations of the entity alleged to have violated the Act." Mot. at 6. Respondents argue that this is a civil law claim that must be brought in a court of law. *Id.* Respondents cite EPA v. Will County Landfill, PCB No. 72-13 (Dec. 12, 1972), in which the parties filed claims for indemnity arising out of the provisions of contracts and legal relationships among the parties. Mot. at 6. The Board in that case dismissed the indemnity claim, stating:

> We do not determine the rights of the parties for indemnity under the lease or for a breach of contract. For a determination of these issues the parties must resort to a court of law. We assert jurisdiction only to decide those issues relating to the quality of our environment. *Id.*, citing PCB No. 72-13, and EPA v. Kenneth Martin, Jr., PCB Nos. 71-308 and 72-328 (May 24, 1973).

Respondents contend that a determination by the Board that Chevron is responsible for any monetary judgment entered against Texaco is virtually identical to a determination of indemnity. *Id.* at 6-7. Respondents state that, if Complainants seek relief against Chevron, those claims must be brought before the proper court of law and not the Board. *Id.* at 7.

The Amended Complaint fails to state a cause of action for liability of Chevron U.S.A. Inc. for the obligations of Texaco Inc.

Respondents allege that, even if the Board had authority to hear Complainants' claims against Chevron, Complainants "have not sufficiently alleged a cause of action for such relief." Mot. at 7. Respondents claim that Complainants have not alleged sufficiently well plead facts to state a cause of action, and that no such set of facts exist. *Id.*, citing People v. Stein Steel Mills Services, Inc., PCB 02-1 (Nov. 15, 2001) (In ruling on a motion to dismiss, all well plead facts contained in the pleading must be taken as true and all inferences from them must be drawn in favor of the non-moving party); and Shelton v. Crown, PCB 96-53 (May 2, 1996) (A pleading should not be dismissed for failure to state a claim unless it clearly appears that no set of facts could be proven under the pleadings which would entitle petitioner to relief).

Respondents claim that Complainants only make two vague allegations supporting their claim against Chevron: (a) most of Chevron Corporation's United States businesses are managed

and operated by Chevron U.S.A. Inc. (Mot. at 7, citing Am. Compl. at ¶5); and (b) certain Chevron Corporation subsidiaries transferred assets to Chevron U.S.A. Inc. and, as a result, Chevron U.S.A. Inc. may also be liable for Texaco's pre-2001 actions relevant to the amended complaint. (Mot. at 7-8, citing Am. Compl. at ¶6). Respondents state:

> Complainants do not allege that Texaco Inc. is one of the Chevron Corporation subsidiaries referred to in (a) above, or even if it were, that it was managed by Chevron U.S.A. Inc. during the period of time in which the violations are alleged to have occurred, or even if it were, how that alleged management would cause Chevron U.S.A. Inc. to be liable for the pre-2001 debts of Texaco Inc. Mot. at 8.

Regarding (b), Respondents state:

> Complainants do not allege that Texaco Inc. is one of the alleged subsidiaries that allegedly transferred assets to Chevron U.S.A. Inc., or if it were, how any alleged transfer would make Chevron U.S.A. liable for the debts of Texaco Inc. *Id.*

Respondents contend that these types of factual allegations are necessary and required under the applicable rules for pleading, which require a pleading to be sufficiently well grounded in fact and warranted by existing law. *Id.*, citing Illinois Supreme court Rule 137, Central Rivers Towing v. City of Beardstown, Illinois, 750 F2d 565 (7th Cir. 1984) (In cause of action for indemnity, plaintiff must allege facts which will support recovery under theory alleged), and Chicago Upholsters' International Union Pension Fund v. Artistic Furniture of Pontiac, 920 F2d 1323 (7th Cir. 1990) (In corporate successor liability action, plaintiff must prove, *inter alia*, sufficient indicia of continuity between the two companies). Respondents state that merely using the word "may" is not sufficient. Mot. at 8.

The Board does not have jurisdiction over the Amended Complaint against Texaco Inc. as the provisions of the Act that are alleged to have been violated by Texaco Inc. were not in effect at the time of the alleged releases

Respondents contend that neither of the provisions of the Act alleged to have been violated (Sections 21(a) and (e)), nor the current definition of "waste" contained in those provisions, were in effect in 1977 or prior thereto, *i.e.* the time period that Texaco Inc. is alleged to have ceased using the property. Mot. at 9-10. Respondents state that the Board is without jurisdiction to enforce these current versions of the Act against Texaco and therefore does not have authority to hear this case. *Id.* at 10.

Respondents note that Section 21(a) of the Act as effective in 1970, provided only as follows:

> No person shall:
>
> (a) Cause or allow the open dumping of garbage[.] *Id.*, citing 1971 Ill. Rev. Stat., 111½, Sec. 1021(a).

Respondents note that the Act in 1970 had no reference to "waste" and only defined "garbage" as:

> (e) "Garbage" is waste resulting from the handling, processing, preparation, cooking, and consumption of food, and wastes from the handling, processing, storage, and sale of produce. *Id.*, citing 1971 Ill. Rev. Stat., Ch. 111½, Sec. 1003(e).

Respondents contend that this definition of "garbage" does not include releases of petroleum from USTs and that Section 21(a) does not relate to or regulate the releases of USTs alleged in the complaint. Mot. at 10.

Respondent argues similarly for Section 21(e), which in 1970 stated:

> No person shall:
>
> (e) Conduct any refuse-collection or refuse-disposal operations, except for refuse generated by the operator's own activities, without a permit granted by the Agency upon such conditions, including periodic reports and full access to adequate records and the inspection of facilities, as may be necessary to assure compliance with this Act and with regulations adopted there under, after the Board has adopted standards for the location, design, operation and maintenance of such facilities[.] Mot. at 10-11, citing 1971 Ill. Rev. Stat., Ch. 111½, Sec. 1021(e).

Respondent notes that "waste" is not referenced in Section 1021(e) and that "refuse" is defined under the 1970 Act as:

> (k) "Refuse" is any garbage or other discarded solid materials. Mot. at 11, citing 1971 Ill. Rev. Stat., Ch. 111½, Sec. 1003(k).

Respondents argue that "refuse" does not include releases of petroleum and that Section 21(e) in 1970 did not relate to releases from USTs as alleged in the complaint. Mot. at 11. Respondents further contend that no other provision in the 1970 version of Section 1021, prohibiting land pollution, related to or regulated the alleged releases from the USTs. Mot. at 11, citing 1971 Ill. Rev. Stat., Ch. 111½, Sec. 1021 (b)-(d) and (f). Respondents also note that a release or discharge of a "contaminant" as defined under the 1970 Act was only regulated in respect to air and water pollution. Mot. at 11, citing 1971 Ill. Rev. Stat., Ch. 111½, Sec. 1009 and 1012.

Respondents note that "waste" only became a defined term in the 1979 version of the Act, as contained in the 1979 Illinois Revised Statutes. Mot. at 12. Respondents allege that whether "waste" did or did not include the releases alleged in the amended complaint is irrelevant to this matter as the earliest that any amendment contained in the 1979 Illinois Revised Statutes was effective is July 1, 1978, which is after Texaco is alleged to have ceased operating at the property. *Id.* Respondents argue that a plain reading of Section 21 of the Act from 1970 to

1978 shows that the Act never regulated releases of petroleum from USTs and the Act cannot therefore be applicable to the releases alleged in the amended complaint. *Id.*

Respondents allege that these provisions also cannot be applied retroactively. *Id.* at 12-13. Respondents cite Casanave v. Amoco Oil Company, PCB No. 97-84 (1997), a citizen's enforcement action brought against Amoco regarding leaking USTs under Sections 21(a), (d)-(f), (i) and (m) of the 1996 Act provisions. Mot. at 13. Amoco ceased operations of the USTs in 1952 and the Board, citing People v. Fiorino, 143 Ill. 2d 318, 574 N.E.2d 612, held that, "for Amoco to have violated the provisions of the Act relief upon by Complainants, Amoco must have engaged in the proscribed conduct after those provisions became effective." Mot. at 13. The Board further stated:

> Because the complaint does not allege that Amoco owned, operated, possessed or controlled the property or the underground storage tanks after the effective date of the Act in 1970 or after the Section 21 provisions became effective, Amoco could not have allowed contamination to continue or disposed, stored or abandoned any waste based on the facts of this case after the Section 21 provisions became effective. *See* Mandel, PCB 92-33, slip op. at 5-6. Therefore, even assuming that all well-pleaded allegations are true, none of the conduct alleged in the complaint occurred after 1970, the effective date of the Act, or after the effective dates of the Section 21 provisions. Consequently, no set of facts in the complaint can be proved that would entitle the complainant to relief. Hence, the complaint must be dismissed. *See* People ex rel. Fahner v. Carriage Way West, Inc., 88 Ill. 2d 300, 430 N.E.2d 1005, 1008-09 (1981). Mot. at 13.

Respondents state that the Board again held that Section 21 cannot be applied retroactively two years later in Union Oil Company v. Barge-Way Oil Company, PCB No. 98-169 (1999). Mot. at 13. Union Oil sought to enforce Section 21(e) as amended in 1979 to include "waste" against actions of Mobil Oil Company alleged to have occurred around 1974. Mot. at 13-14. Respondents allege that the Board agreed with Mobil's claims that the amendments could not be applied retroactively and dismissed the case. *Id.* at 14. The Board stated:

> Under Illinois law, a statutory amendment will be construed as applying prospectively absent express language to the contrary. People v. Fiorini, 143 Ill. 2d 318, 333, 574 N.E.2d 612 (1991). As stated in Fiorini, "an exception to the rule of prospectivity arises where the legislature intended that the amendment apply retroactively and where the amendment applies only to changes in procedure or remedies, rather than substantive rights," . . . Fiorini, 143 Ill. 2d at 333 (citing Matier v. Chicago Board of Education, [10] 82 Ill. 2d 373, 390, 415 N.E.2d 1034 (1980)).
>
> Thus, in order for retroactive application to be permissible, there must be both express statutory language allowing for such application and the law which is sought to be retroactively applied is not substantive. *Id.* Illinois courts have

> defined substantive law as that "which establishes rights and duties that may be redressed through the rules of procedure." Fiorini, 143 Ill. 2d at 333. Mot. at 14.

Respondents allege that the Board holdings in Casanave and Union Oil are controlling in this case. Mot. at 14. Respondents state that the amendments to Section 21 do not state that they are to be applied retroactively and that prior decisions of the Board have determined that the amendments are substantive and therefore cannot be applied retroactively. Mot. at 14-15, citing also Vogue Tyre & Rubber Company v. Illinois EPA, PCB 96-10 (2004).[1]

The Amended Complaint against Texaco Inc. is barred by the applicable statute of limitations

Respondents allege that, while "[i]t is well settled that statutes of limitation do not apply to actions brought by governmental entities before the Board; . . . it is equally well settled that, in cost recovery actions brought by private citizens, statutes of limitation do apply." Mot. at 15, citing Caseyville Sport Choice, LLC v. Erma I. Seiber, PCB No. 08-30 (Oct. 16, 2008); Pielet Bros. Trading, Inc. v. The Pollution Control Board, 110 Ill. App. 3d 752, 442 N.E.2d 1374 (5th Dist. 1982), Union Oil Company of California d/b/a Unocal v. Barge-Way Oil Company, Inc., PCB No. 98-169 (Jan. 7, 1999). Respondents state that complainants are private citizens bringing an action for cost recovery and therefore statutes of limitation apply. Mot. at 15.

Respondents allege that a five-year statute of limitation applies in private cost recovery actions. *Id.* This is stated at Section 13-205 of the Code of Civil Procedure, 735 ILCS 5/13-205, which states:

> Sec. 13-205. Five year limitation. Except as provided in Section 2-725 of the "Uniform Commercial Code," approved July 31, 1961, as amended, and Section 11-13 of "The Illinois Public Aid Code," approved April 11, 1967, as amended, actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued. Mot. at 16.

Respondents contend that this five-year statute is applicable to the amended complaint. *Id.*, citing Caseyville, PCB 08-30; Union Oil Company, PCB 98-169.

Respondents state that Texaco was served the amended complaint on June 11, 2010. Mot. at 16. The amended complaint alleges that releases from the USTs occurred during the time period from 1959-1977, when Texaco owned or operated a gasoline filling station at the

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[1] Respondents in a footnote cite to the decision in Grand Pier Center LLC v. American International Specialty Lines Insurance Company, PCB 05-157 (2005), which Respondents allege "is plainly wrong and in apposite to all existing decisions of the Board." Mot. at 15. Respondents state that the decision "may incorrectly be interpreted as finding that the Act can be applied retroactively." *Id.*

property. *Id.* Therefore, more than 32 years have passed between the date that the cause of action accrued and the date of service of the amended complaint on Texaco. *Id.*

Respondents acknowledge that the Board has recognized the "discovery rule" in applying statutes of limitation. *Id.* This rule "provides that the beginning of the running of the statute of limitations may be delayed until the injured party knew or reasonably should have known of the injury or the injury could have been discovered through the exercise of reasonable or appropriate diligence." *Id.* at 16-17, citing Union Oil Company of California d/b/a Unocal v. Barge-Way Oil Company, Inc., PCB 98-169 (Feb. 15, 2001), Caseyville, PCB 08-30. Respondents state that, in order to survive the bar of the statute of limitations, the amended complaint "must affirmatively demonstrate that Complainants did not know, or could not reasonably have known, through the exercise of reasonable diligence or otherwise, of the existence of the releases alleged at the property on or before June 11, 2005. The Amended Complaint . . . does not meet this requirement." Mot. at 17.

Respondents note that the amended complaint is silent as to when complainants knew or reasonably should have known of the releases. *Id.* Respondents also note that, while the amended complaint admits that complainants "identified the property" and "purchased the property" in 2005, it fails to give specific dates in 2005 for those actions. *Id.* Furthermore, the amended complaint does not state what actions and investigations complainants undertook in identifying and purchasing the property in 2005. *Id.* Respondents point out, however, that the amended complaint "conversely details each and every action that Complainants took after closing to remove USTs and remediate the property." *Id.* at 18. Respondents contend that sophisticated purchasers such as complainants "usually and customarily perform substantial due diligence in acquiring commercial property, including Phase I and additional investigations." *Id.* at 17. Respondents do not believe that complainants have demonstrated that the discovery rule applies to them and the amended complaint, therefore, does not state a cause of action upon which the Board can grant relief. *Id.* at 18. Respondents note that a ruling in favor of Texaco on this part of the motion would be dispositive of complainants' claim against Chevron, as complainants claim against Chevron is that it is responsible for the obligations of Texaco. *Id.*

Respondents summarize their motion by stating the amended complaint is frivolous and should not be set for hearing because (i) the amended complaint alleges violations of sections of the Act that were not in effect when the releases are alleged to have occurred and thus the Board does not have jurisdiction or authority to enforce those sections against Texaco, and (ii) the amended complaint is barred by the statute of limitations thus failing to state a cause of action for which the Board can grant relief. *Id.*

Complainants' Response

Complainants state that, upon Board request, the amended two-count complaint was served upon Respondents Chevron and Texaco on June 11, 2010. Resp. at 1.

The amended complaint states that representatives of the Respondents told a representative of complainants "that Chevron U.S.A., or some other subsidiary of Chevron Corporation, was responsible for the liabilities of Texaco." *Id.* at 1. Complainants make two

points on this statement. First, taking the statement as true, the motion must fail. *Id.* at 2. Complainants allege that the language quoted from the amended complaint "clearly alleges sufficient facts to state a cause of action against Chevron U.S.A." *Id.* Second, complainants allege that respondents do not point to any support for why the Board does not have authority under the Act to hold Chevron liable for the contamination at the property. *Id.* Complainants state that the two cases relied on by respondents, EPA v. Will County Landfill, PCB 72-13 (Dec. 12, 1972) and EPA v. Kenneth Martin. Jr., PCB 71-308, 72-328 (May 24, 1973), are unrelated cases that deal with contractual indemnification and breach of contract asserted against third parties, which is not applicable here. Resp. at 2.

Complainants allege that respondents "retroactivity argument is simply a rehashing of Chevron U.S.A.'s third affirmative defense in its answer (May 8, 2009)." Resp. at 2. Complainants incorporate by reference their June 6, 2009 motion to strike, at 9-10. *Id.* There, complainants noted that the Act may be retroactively applied in enforcement cases that seek reimbursement for clean-up costs, as in this case. Resp. at 2, citing State Oil v. People, 822 N.E. 2d 876, 352 Ill. App. 3d 813 (2004), cited by Grand Pier v. River East, PCB 05-157, 2005 WL 1255254 at *4 (May 19, 2005), citing also EMH v. Chevron, PCB 09-66, 2010 WL 2147432 at *32 (March 18, 2010).

Complainants also argue that respondents cite no authority for the proposition that a cause of action for damage to property accrues before one has an interest in the property. Resp. at 3. Complainants state that they purchased the property in 2005 and that "[i]ts June 2010 Amended Complaint was filed within five years." *Id.*

Complainants ask that the Board denies the Respondents' motion and accepts the amended complaint for hearing. *Id.*

DISCUSSION

The Board will first address complainants' motion for leave to file an amended complaint adding Texaco as a respondent. The Board will then address the respondents' motion for a determination that the amended formal complaint not be set for hearing.

Motion to File Amended Complaint

On April 21, 2010, Complainants filed a motion for leave to file an amended complaint *instanter* as well as an amended formal complaint which adds Texaco as a respondent. On June 3, 2010, the Board directed Complainants to provide proof of service on Texaco. This proof of service was filed with the Board on June 17, 2010.

The Board grants complainants' motion for leave to file an amended complaint. *See* 35 Ill. Adm. Code 103.206(a). The caption of this order reflects the respondents named in that complaint.

Motion to Dismiss

The Board will first set forth the legal standard for considering a motion to dismiss on the sufficiency of the pleadings. The Board will then address the motion of the respondents.

Standard For Granting Motion to Dismiss

In ruling on a motion to dismiss, the Board looks to Illinois civil practice law for guidance. *See, e.g.*, United City of Yorkville, PCB 08-96, slip op. at 14-15 (Oct.16, 2008); People v. The Highlands, LLC, PCB 00-104, slip op. at 4 (Oct. 20, 2005); Sierra Club and Jim Bensman v. City of Wood River and Norton Environmental, PCB 98-43, slip op. at 2 (Nov. 6, 1997); Loschen v. Grist Mill Confections, Inc., PCB 97-174, slip op. at 3-4 (June 5, 1997). In ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See e.g.*, Beers v. Calhoun, PCB 04-204, slip op. at 2 (July 22, 2004); *see also* In re Chicago Flood Litigation, 176 Ill. 2d 179, 184, 680 N.E.2d 265, 268 (1997); Board of Education v. A, C & S, Inc., 131 Ill. 2d 428, 438, 546 N.E.2d 580, 584 (1989). "[I]t is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief." Smith v. Central Illinois Regional Airport, 207 Ill. 2d 578, 584-85, 802 N.E.2d 250, 254 (2003).

Illinois requires fact-pleading, not the mere notice-pleading of federal practice. Adkins v. Sarah Bush Lincoln Health Center, 129 Ill. 2d 497, 518, 544 N.E.2d 733, 743 (1989); College Hills Corp., 91 Ill. 2d at 145, 435 N.E.2d at 466-67. In assessing the adequacy of pleadings in a complaint, the Board has accordingly stated that "Illinois is a fact-pleading state which requires the pleader to set out the ultimate facts which support his cause of action." Grist Mill Confections, PCB 97-174, slip op. at 4 (*citing* Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303); *see also* College Hills, 91 Ill. 2d at 145, 435 N.E.2d at 466-67; City of Wood River, PCB 98-43, slip op. at 2 (petitioner is not required "to plead all facts specifically in the petition, but to set out ultimate facts which support his cause of action"). "[L]egal conclusions unsupported by allegations of specific facts are insufficient." Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303 (*citing* Estate of Johnson v. Condell Memorial Hospital, 119 Ill. 2d 496, 509-10, 520 N.E.2d 37 (1988)). A complaint's failure to allege facts necessary to recover "may not be cured by liberal construction or argument." Condell Memorial Hospital, 119 Ill. 2d at 510, 520 N.E.2d at 43 (*quoting* People ex rel. Kucharski v. Loop Mortgage Co., 43 Ill. 2d 150, 152 (1969)). A complaint's allegations are "sufficiently specific if they reasonably inform the defendants by factually setting forth the elements necessary to state a cause of action." College Hills, 91 Ill. 2d at 145, 435 N.E.2d at 467.

"Despite the requirement of fact pleading, courts are to construe pleadings liberally to do substantial justice between the parties." Grist Mill Confections, PCB 97-174, slip op. at 4 (*citing* Classic Hotels, Ltd. v. Lewis, 259 Ill. App. 3d 55, 60, 630 N.E. 2d 1167 (1st Dist. 1994)); *see also* College Hills, 91 Ill. 2d at 145, 435 N.E.2d at 466 ("In determining whether the complaint is adequate, pleadings are liberally construed. The aim is to see substantial justice done between the parties."). Fact-pleading does not require a complainant to set out its evidence: "'[t]o the contrary, only the ultimate facts to be proved should be alleged and not the evidentiary facts

tending to prove such ultimate facts.'" People ex rel. Fahner v. Carriage Way West, Inc., 88 Ill. 2d 300, 308, 430 N.E.2d 1005, 1008-09 (1981) (*quoting* Board of Education v. Kankakee Federation of Teachers Local No. 886, 46 Ill. 2d 439, 446-47 (1970)); City of Wood River, PCB 98-43, slip op. at 2. Moreover, "pleadings are not intended to create technical obstacles to reaching the merits of a case at trial; rather, their purpose is to facilitate the resolution of real and substantial controversies." Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303 (*citing* College Hills, 91 Ill. 2d at 145).

Respondents' motion that the amended complaint not be set for hearing

Respondents have presented several grounds for why the amended complaint should not be set for hearing. Specifically, respondents claim that (1) the Board does not have the authority to determine a claim for liability of Chevron for the obligations of Texaco, (2) the amended complaint fails to state a cause of action for liability of Chevron for the obligations of Texaco, (3) the Board does not have jurisdiction over the amended complaint against Texaco as the provisions of the Act that are alleged to have been violated by Texaco were not in effect at the time of the alleged releases, and (4) the amended complaint against Texaco is barred by the applicable statute of limitations. The Board will address each of these arguments separately below.

The Board does have the authority to determine a claim for liability of Chevron for the obligations of Texaco.

Respondents argue that the Board "has not been given the authority to make determinations as to whether another entity, who is not alleged to have violated the Act, may have civil liability under corporate or contract law for the debts and obligations of the entity alleged to have violated the Act." Mot. at 6. Complainants contend that representatives of the respondents told a representative of complainants "that Chevron U.S.A., or some other subsidiary of Chevron Corporation, was responsible for the liabilities of Texaco." Resp. at 1. Complainants also allege that respondents do not point to any support for why the Board does not have authority under the Act to hold Chevron liable for the contamination at the property. *Id.*

The Board agrees with complainants. Respondents cite two cases supporting their position: EPA v. Will County Landfill, PCB 72-13 (Dec. 12, 1972) and EPA v. Kenneth Martin. Jr., PCB 71-308, 72-328 (May 24, 1973). Respondents state that these cases deal with indemnity claims arising out of provisions of contracts and legal relationships among the parties. Mot. at 6. This is not "virtually identical" to the claims in the current case. As cited by respondents, the Act at 415 ILCS 5/5(d) states in part that "the Board shall have authority to conduct proceedings upon complaints charging violations of this Act, [and] any rule or regulation adopted under this Act[.]" Complainants allege that Texaco has violated Sections 21(a) and (e) of the Act (Am. Compl. at 7-8) and that Chevron may be liable for any violations by Texaco. Am. Compl. at 3. If the Board takes these allegations as true and in a light most favorable to complainants, Chevron would be liable for any violations of the Act committed by Texaco. The amended complaint is therefore, in effect, charging Chevron with the violations committed by Texaco.

Furthermore, complainants are requesting that the Board enter an order requiring both respondents to reimburse complainants for remediation costs at the property. Am. Compl. at 8-9. As noted in Grand Pier Center I, PCB 05-157, the Board consistently holds that, pursuant to the broad language in Section 33 of the Act, the Board has the authority to award clean-up costs to private parties for a violation of the Act. *See* Fiorini, 143 Ill. 2d at 350, 574 N.E.2d at 625; Chrysler Realty Corp. v. Thomas Industries, Inc. and TDY Industries, Inc., PCB 01-25 slip op. at 7 (Dec. 7, 2000); Lake County Forest Preserve v. Ostro, PCB 92-80 (Mar. 31, 1994). In this case, complainants are in effect alleging that Chevron, through Texaco's actions, should be required to reimburse complainants for all costs incurred in remediating the property. Am. Compl. at 8-9. The Board has the authority to award these costs and therefore has the proper authority to hear complainants' allegations against Chevron.

The Amended Complaint does state a cause of action for liability of Chevron for the obligations of Texaco.

Respondents allege that, even if the Board had authority to hear Complainants' claims against Chevron, Complainants "have not sufficiently alleged a cause of action for such relief." Mot. at 7. Respondents also claim that Complainants have not alleged sufficiently well plead facts to state a cause of action, and that no such set of facts exist. *Id.* Complainants contend that representatives of the respondents told a representative of complainants "that Chevron U.S.A., or some other subsidiary of Chevron Corporation, was responsible for the liabilities of Texaco." Resp. at 1.

The Board finds that complainants sufficiently plead a cause of action against Chevron. In assessing the adequacy of pleadings in a complaint, the Board has accordingly stated that "Illinois is a fact-pleading state which requires the pleader to set out the ultimate facts which support his cause of action." Grist Mill Confections, PCB 97-174, slip op. at 4. "Despite the requirement of fact pleading, courts are to construe pleadings liberally to do substantial justice between the parties." *Id*. Furthermore, in ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See e.g.*, Beers, PCB 04-204, slip op. at 2; *see also* In re Chicago Flood Litigation, 176 Ill. 2d at 184, 680 N.E.2d at 268; A, C & S, Inc., 131 Ill. 2d 428 at 438, 546 N.E.2d at 584.

Complainants contend that a representative of the respondents told complainants that Chevron or some other subsidiary of Chevron Corporation was responsible for the liabilities of Texaco. Resp. at 1. Complainants also allege that certain Chevron Corporation subsidiaries transferred assets to Chevron and that, as a result, Chevron may be liable for Texaco's pre-2001 actions. Am. Compl. at 3. Taking these claims as true and in a light most favorable to complainants, and in light of the limited record currently before the Board, the Board finds that there is a set of facts upon which the complainants could prevail. Therefore, complainants sufficiently state a claim against Chevron.

The Board does have jurisdiction over the Amended Complaint against Texaco

Respondents contend that neither of the provisions of the Act alleged to have been violated (Sections 21(a) and (e)), nor the current definition of "waste" contained in those

provisions, were in effect in 1977 or prior thereto, *i.e.* the time period that Texaco Inc. is alleged to have ceased using the property. Mot. at 9-10. Respondents also allege that these provisions cannot be applied retroactively. *Id.* at 12-13. Complainants argue that the Act may be retroactively applied in enforcement cases that seek reimbursement for clean-up costs. Resp. at 2.

As stated in the Board's March 18, 2010 order, the Appellate Court, Second District has stated that "the legislature intended the Act to address ongoing problems, which by definition, existed at the time the Act was enacted." State Oil Co., 822 N.E.2d at 882. The Court found that Section 2 of the Act indicates "that the legislature generally intended the Act to be given retroactive application." *Id.*, citing 415 ILCS 5/2 (1996). The Board has also held that "attaching liability to present conditions stemming from past acts does not necessarily have a retroactive application of the Act . . . when the allegations [involve] . . . continuing violations that began before Illinois adopted the [law] sought to be applied." Union Oil Co., PCB 98-169, citing Casanave, PCB 97-84.

Complainants allege that the soil on the property was contaminated as a result of Texaco's operation of the gasoline filling station on the property. Am. Compl. at 5. This contamination is alleged to have continued up through the time that Sections 21(a) and (e) were amended.

Complainants state that, in 2006, soil samples indicated contaminant concentrations in excess of those specified in 35 Ill. Adm. Code Part 742, Appendix B (Tier One). Am. Compl. at 5. Furthermore, complainants allege that four gasoline USTs were removed in 2007 and that a representative of the State Fire Marshall determined that a release had occurred. *Id.* at 6. Soil samples taken at the time indicated contaminant concentrations exceeding those specified in 35 Ill. Adm. Code Part 742, Appendix B (Tier One). Am. Compl. at 6. These removal projects were performed by complainants in 2006 and 2007, well after the dates that Sections 21(a) and (e) were amended.

Taking complainants allegations in a light most favorable to the complainants, *i.e.*, that the contamination continued through the time period that the new laws were applied and also continued through the date the complainants purchased the property, the Board finds that there exist enough facts against the respondents to survive respondents' motion to dismiss.

The Amended Complaint against Texaco Inc. is not barred by the applicable statute of limitations

Respondents allege that a five-year statute of limitation applies in private cost recovery actions and that this five-year statute is applicable to the amended complaint. Mot. at 15-16. Respondents state that Texaco was served the amended complaint on June 11, 2010. *Id.* at 16. The amended complaint alleges that releases from the USTs occurred during the time period from 1959-1977, when Texaco owned or operated a gasoline filling station at the property. *Id.* Therefore, more than 32 years have passed between the date that the cause of action accrued and the date of service of the amended complaint on Texaco. *Id.*

Respondents acknowledge that the Board has recognized the "discovery rule" in applying statutes of limitation. *Id.* This rule "provides that the beginning of the running of the statute of limitations may be delayed until the injured party knew or reasonably should have known of the injury or the injury could have been discovered through the exercise of reasonable or appropriate diligence." *Id.* at 16-17, citing Union Oil Company of California d/b/a Unocal v. Barge-Way Oil Company, Inc., PCB 98-169 (Feb. 15, 2001), Caseyville, PCB 08-30. Respondents state that, in order to survive the bar of the statute of limitations, the amended complaint "must affirmatively demonstrate that Complainants did not know, or could not reasonably have known, through the exercise of reasonable diligence or otherwise, of the existence of the releases alleged at the property on or before June 11, 2005. The Amended Complaint . . . does not meet this requirement." Mot. at 17.

Complainants argue that respondents cite no authority for the proposition that a cause of action for damage to property accrues before one has an interest in the property. Resp. at 3. Complainants state that they purchased the property in 2005 and that "[i]ts June 2010 amended complaint was filed within five years." *Id.*

The Board agrees with the complainants. Complainants state that they purchased the property in 2005 and that the June 2010 amended complaint was filed within five years. Resp. at 3. The injury to complainants did not accrue prior to their purchase of the property, and respondents have cited no authority to suggest otherwise.

This is not to say that the Board finds that complainants prevail on any statute of limitations issue that may arise in this case. However, when considering the limited record before the Board and taking all allegations as true and in a "light most favorable to the non-movants," there does exist a set of facts in which complainants may prevail. Therefore, the Board does not find that the amended complaint against Texaco is barred by the statute of limitations.

ACCEPT FOR HEARING

The Board accepts the amended complaint for hearing. *See* 415 ILCS 5/31(d) (2008); 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 Chevron and/or Texaco fail within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the amended complaint, the Board will consider Chevron and/or Texaco to have admitted the allegation. 35 Ill. Adm. Code 103.204(d).

If the respondent timely files a motion under Section 103.212(b) or 35 Ill. Adm. Code 101.506, the 60-day period to file an answer described in subsection (d) of this Section will be stayed. The stay will begin when the motion is filed and end when the Board disposes of the motion. 35 Ill. Adm. Code 103.204(e). Respondents filed their motion pursuant to Section 31(d) of the Act, 415 ILCS 5/31(d), and Section 103.212 of the Board's Procedural Rules. Motion at 1, citing 35 Ill. Adm. Code 103.212.

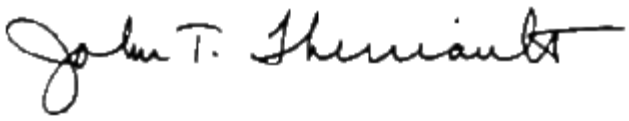
The respondents have 60 days from the date of this order, up to and including February 14, 2011, to file an answer to the amended complaint.

CONCLUSION

The Board grants the motion to file an amended complaint and orders the Clerk to amend the case heading as provided in this order to reflect the parties named in this amended complaint. The Board denies respondents' motion for a determination that the amended formal complaint should not be set for hearing, finds that the amended formal complaint is neither duplicative nor frivolous, and accepts complainants' amended complaint for hearing. The respondents have 60 days, up to and including February 14, 2011, to file an answer.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on December 16, 2010, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board