ILLINOIS POLLUTION CONTROL BOARD
July 22, 1999

KELLY-MAC PARTNERS, an Illinois partnership,	)	
Complainant,	)	
v.	)	PCB 99-162 (Enforcement - Citizens, UST)
ROBERTSON-CECO CORP., a foreign corporation,	)	
Respondent.	)	

ORDER OF THE BOARD (by E.Z. Kezelis):

This matter comes before the Board on the May 14, 1999 filing of a citizen's enforcement complaint by Kelly-Mac Partners (Kelly-Mac) against Robertson-CECO Corp. (CECO). Under the Board's procedural rules, such complaints are placed on the Board's meeting agenda for a duplicitous and frivolous determination. See 35 Ill. Adm. Code 103.124(a). Also before the Board are a motion for admission *pro hac vice*, a joint "stipulation of extension of time," both filed on May 26, 1999, and a motion to dismiss, filed by CECO on June 11, 1999. Kelly-Mac's response to the motion to dismiss, a motion to strike exhibits to the motion to dismiss, and a motion for leave to file *instanter* were filed on June 29, 1999. On July 8, 1999, CECO filed a response to Kelly-Mac's motion to strike. Kelly-Mac filed a reply on July 14, 1999.[1]

Before turning to a discussion of the merits of this case and CECO's motion to dismiss, the Board first addresses the three procedural motions and Kelly-Mac's motion to strike. First, for good cause shown, the Board grants the motion for admittance *pro hac vice* of respondent's counsel. Second, for purposes of this order, the Board will treat the joint "stipulation of extension of time" as a motion for extension of time to respond to the complaint. Since this was a joint request submitted by the parties, the Board grants the motion for extension of time to respond and accordingly accepts CECO's June 11, 1999 motion to dismiss. Finally, the Board grants Kelly-Mac's motion for leave to file a response *instanter* to CECO's motion to dismiss. The delay in filing this response was not significant and the Board believes that CECO will not be unfairly prejudiced as a result.

As discussed more fully below, the Board denies Kelly-Mac's motion to strike the exhibits to CECO's motion to dismiss. This ruling does not preclude future objections and argument during hearing to the documents or the information contained therein.

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[1] Kelly-Mac's complaint is referred to herein as "Comp. at __." CECO's motion to dismiss is referred to herein as "Mot. at __." Kelly-Mac's response to the motion to dismiss is referred to herein as "Resp. at __."

Finally, but for the exceptions more fully set forth below, the Board finds that the complaint is neither duplicitous nor frivolous and denies CECO's motion to dismiss. The Board finds facts have been alleged that, if proven, would entitle Kelly-Mac to relief. Furthermore, the Board finds that it has the authority to grant at least some of the relief requested. Therefore, with the exceptions noted below, the Board accepts this complaint and directs that it proceed to hearing.

BACKGROUND

Kelly-Mac alleges that from 1952 until 1984, CECO, or its predecessor in interest, Ceco Steel Products Corporation, owned property located in Broadview, Cook County, Illinois (the facility). Comp. at 2. Kelly-Mac further alleges that CECO owned and operated three underground storage tanks at the facility, including a 2,000 gallon tank, an 8,000 gallon tank, and a 12,000 gallon tank. *Id*. Kelly-Mac alleges that CECO permitted petroleum constituents to be released into soils at the facility during its operation of the three underground storage tanks and that CECO's usage of the 2,000 gallon tank and the 12,000 gallon tank was discontinued on November 8, 1984. *Id*.

According to the complaint, Kelly-Mac purchased the facility from CECO in early 1985. Comp at 2. Kelly-Mac maintains that it never operated the 2,000 gallon tank or the 12,000 gallon tank. *Id*. While Kelly-Mac provides no information regarding the specific usage of the 8,000 gallon tank, CECO, in its motion to dismiss, alleges that Kelly-Mac continued to use the 8,000 gallon tank after purchasing the facility and that Kelly-Mac registered the 8,000 gallon tank with the Office of the State Fire Marshal (OSFM). Mot. at 4.

Kelly-Mac further alleges that in December 1997, it retained the services of Petroleum Technologies Equipment, Inc., for the removal of the three underground storage tanks. Comp. at 3. It was during this removal that contaminated soil was allegedly discovered. *Id*. Kelly-Mac alleges it spent $133,598.60 in removing the tanks, investigating and removing contaminated soil, and investigating groundwater. Comp. at 4.

Kelly-Mac seeks reimbursement from CECO. In support of its request, Kelly-Mac alleges that CECO violated Section 21(e) of the Illinois Environmental Protection Act (Act) by disposing, storing, and abandoning wastes at a facility that does not meet the requirements of the Act. 415 ILCS 5/21(e) (1998). Kelly-Mac also alleges that CECO caused, threatened, or allowed water pollution in violation of Section 12(a) of the Act (415 ILCS 5/12(a) (1998)) and created a water pollution hazard in violation of Section 12(d) of the Act (415 ILCS 5/12(d) (1998)). Finally, Kelly-Mac also alleges that CECO violated various provisions of the Board's regulations, including 35 Ill. Adm. Code 731.162, 731.163, and 731.165, which relate to the duties of an owner or operator of underground storage tank systems in the event that a release is confirmed from the system.

In addition to seeking reimbursement for the costs associated with performing corrective actions at the facility, Kelly-Mac also seeks an order imposing interest thereon at a

rate of nine percent per year. Finally, Kelly-Mac seeks reimbursement of its attorney fees and costs.

DUPLICITOUS/FRIVOLOUS DETERMINATION

Section 103.124(a) of the Board's procedural rules implements Section 31(d) of the Act (415 ILCS 5/31(d) (1998)). Section 103.124(a) provides:

> a) The Clerk shall assign a docket number to each complaint filed . . . the Chairman shall place the matter on the agenda for Board determination whether the complaint is duplicitous or frivolous. If the Board rules that the complaint is duplicitous or frivolous, it 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).

Duplicitous

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.

The Board has not identified any other cases, identical or substantially similar to this, pending in other forums. Moreover, CECO's motion to dismiss has not brought any potentially duplicitous matters to our attention. Therefore, based on the record before us, this matter is not duplicitous.

Frivolous

An action before the Board is frivolous if it requests relief which the Board cannot grant. Lake County Forest Preserve Dist. v. Ostro (July 30, 1992), PCB 92-80.

In the present case, Kelly-Mac alleges land and water related violations. Specifically, it alleges that CECO operated an underground storage tank system in such a manner as to violate Sections 12(a), (d) and 21(e) of the Act (415 ILCS 5/12(a), (d) and 21(e) (1998)), and 35 Ill. Adm. Code 731.162, 731.163, and 731.165. With the exceptions noted below, the complaint alleges facts which, if proven at hearing, could result in a finding of violation against CECO. If Kelly-Mac proves these violations, the Board has the authority to grant at least some of the relief requested. Specifically, Kelly-Mac requests that CECO be ordered to reimburse it for all remediation costs incurred at the facility. The Board has consistently found that it has the authority to award cleanup costs to private parties for a violation of the Act. See Union Oil Company of California v. Barge-Way Oil Company, Inc. (January 7, 1999), PCB 98-169; Malina v. Day (January 22, 1998), PCB 98-54; Dayton Hudson Corp. v. Cardinal Industries Inc. (August 21, 1997), PCB 97-134; Richey v. Texaco Refining and Marketing, Inc. (August 7, 1997), PCB 97-148; Herrin Security Bank v. Shell Oil Co. (September 1, 1994), PCB 94-178; and Lake County Forest Preserve District v. Ostro (March 31, 1994),

PCB 92-80.. As noted in the Ostro opinion, this holding is based on the broad language of Section 33(a) of the Act (415 ILCS 5/33(a) (1998)) 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 court considered the issue of private cost recovery in the context of a third-party complaint which sought, among other things, recovery of 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, "[w]hile '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.

In light of Fiorini, the Board has repeatedly invoked its authority to award cleanup costs under the Act. Thus, with the exceptions set forth below, the complaint seeks relief which the Board could grant and is, therefore, not frivolous.

Attorney Fees and Interest

The first exception to the Board's determination that the complaint is not frivolous deals with Kelly-Mac's request for an award of attorney fees. The Board has previously held that Section 42(f) of the Act authorizes the award of attorney fees only in cases in which the Attorney General or a State's Attorney prevails on behalf of the People of the State of Illinois. See 415 ILCS 5/42(f) (1998); see also Charter Hall Homeowner's Association v. Overland Transportation System, Inc. (January 22, 1998), PCB 98-81 and Dayton Hudson (August 21, 1997), PCB 97-134. Accordingly, the Board strikes those portions of the complaint in which Kelly-Mac seeks an award of attorney fees.

The second exception deals with Kelly-Mac's request for an award of interest at the rate of nine percent per year on the $133,598.60 it allegedly spent. The Board has previously recognized that it does not generally have the authority under Section 42(f) of the Act to award attorney fees or accrued interest in citizen enforcement cases. See generally Farmers State Bank v. Phillips Petroleum Co. (January 23, 1997), PCB 97-100. While the Board did not definitively hold in the Farmers State Bank case that it lacked the authority to award accrued interest in citizen enforcement cases, we do so now.

The Board is a creature of statute; accordingly, its powers are prescribed by the statutes creating it. When the language of the statutes in question does not specifically indicate that ordinary expenses of litigation or attorney fees are recoverable, neither the courts nor the Board will give the language in question an expanded meaning. In City of Springfield v. Allphin, 82 Ill. 2d 571, 413 N.E.2d 394 (1980), the court recognized that absent a statute or agreement providing for it, interest is not recoverable. Because no statute authorizes the award of accrued interest in citizen enforcement cases before the Board, the Board holds that it lacks the authority to award them. Accordingly, the Board strikes as frivolous those portions of the complaint in which Kelly-Mac seeks an award of interest at 9% per year.

MOTION TO DISMISS

In its motion to dismiss the complaint, CECO raises three main arguments. First, CECO argues that the Board lacks the authority to consider cost recovery cases. Mot. at 5. Second, CECO maintains that since OSFM never ordered the removal of the tanks, CECO should not be responsible for the expenses incurred by Kelly-Mac. Mot. at 6. Finally, since Kelly-Mac continued to operate one of the three underground storage tanks after acquiring ownership of the facility, CECO argues that Kelly-Mac alone should bear the responsibility for that tank. Mot. at 7.

In its June 29, 1999 response, Kelly-Mac addresses only two of CECO's three arguments. Kelly-Mac's response is silent as to the allegations regarding the 8,000 gallon tank. Regarding the other points raised in the motion to dismiss, Kelly-Mac first responds by stating that the Board clearly has the authority to hear citizen cost recovery cases. Resp. at 2-3. Additionally, Kelly-Mac maintains that because there are ongoing factual disputes regarding when the tanks were taken out of service and regarding whether an OSFM determination was ever made, dismissal at this point would be inappropriate. Resp. at 4.

Board's Lack of Authority to Grant Requested Relief

Addressing CECO's first argument in support of dismissal, the Board finds that it does have the authority to award cleanup costs to private parties for a violation of the Act. CECO's first argument in favor of dismissal is rejected. See Board's determination that the complaint is not frivolous *supra* pp. 3-4.

Absence of OSFM Order Directing Removal of Tanks

In its second argument, CECO asserts that because the 2,000 gallon tank and the 12,000 gallon tank were taken out of service in 1960, there is no requirement to remove them absent an order from OSFM. Mot. at 6. CECO refers to Section 57.5 of the Act (415 ILCS 5/57.5 (1998)), which provides that underground storage tanks taken out of service prior to 1974 need not be removed unless OSFM determines that a release from the tanks poses a threat to human health and the environment. Mot. at 5-6. Since there was no such determination by OSFM, CECO maintains that neither it nor Kelly-Mac had any obligation to remove the tanks. Mot. at 6.

In response to this argument, Kelly-Mac asserts that there is a factual dispute regarding the dates on which the tanks were actually taken out of service and regarding whether OSFM ever made a determination pursuant to Section 57.5 of the Act. Resp. at 4. Therefore, Kelly-Mac argues that dismissal would be inappropriate at this point in time. *Id*.

The Board finds that there is a factual dispute as to the date on which the tanks were actually taken out of service. Additionally, sufficient facts are alleged which, if proven, could result in a finding of violation against CECO.

Kelly-Mac's Continued Use and Ownership of 8,000 Gallon Tank

Finally, CECO argues that since Kelly-Mac continued to use the 8,000 gallon tank after purchasing the facility, Kelly-Mac should be considered the owner of the tank and would therefore be solely responsible for any clean up costs associated with the removal of or any release from the 8,000 gallon tank. Mot. at 7.

As previously stated, Kelly-Mac's response is silent as to this allegation. Nevertheless, we again look to the well-pleaded facts in the complaint to decide whether any set of facts exist under which Kelly-Mac would be entitled to relief. With regard to the 8,000 gallon tank, Kelly-Mac alleges that the release of petroleum constituents occurred sometime between 1952 and 1985. Comp. at 2. If this is proven, Kelly-Mac could be entitled to at least some of the relief requested.

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. Callaizakis v. Astor Development Co., 4 Ill. App. 3d 163, 280 N.E.2d 512 (1st Dist. 1972); Behrmann v. Okawville Farmers Elevator (November 19, 1998), PCB 98-84; Shelton v. Crown (May 2, 1996), PCB 96-53. The Board takes all well-pleaded allegations in the complaint as true. Krautsack v. Patel (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 well-pleaded allegations are accepted as true, a set of facts could be proven that may entitle Kelly-Mac to relief. For this and the above reasons, the Board denies CECO's motion to dismiss.

MOTION TO STRIKE

The last matter before the Board is Kelly-Mac's motion to strike pursuant to 35 Ill. Adm. Code 101.242 and Illinois Supreme Court Rule 191. Briefly, Kelly-Mac challenges CECO's attachments to its motion to dismiss. CECO attached several exhibits, including purchase agreements for the property in question and correspondence between counsel for the litigants. Kelly-Mac requests that the Board strike all the attachments as well as the paragraphs of CECO's motion which rely on the exhibits or state facts unsupported by an affidavit.

The Board denies Kelly-Mac's motion to strike the attachments. At this stage of the proceedings, all that the Board has considered is whether the complaint is frivolous or duplicitous, and whether the complaint contains sufficient well-pleaded allegations that, if accepted as true, could result in a set of facts proven that may entitle Kelly-Mac to relief. In the course of this inquiry, Kelly-Mac has suffered no prejudice from the presence of attachments in CECO's filings. This ruling does not bar any future motions by either party, nor does it dictate the future outcome of any evidentiary rulings during the course of hearing.

CONCLUSION

With the specific exceptions discussed above, this matter is accepted for hearing. CECO's motion to dismiss the complaint is denied. Kelly-Mac's motion to strike attachments to CECO's motion to dismiss is also denied.

A hearing should 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. See 35 Ill. Adm. Code 103.125.

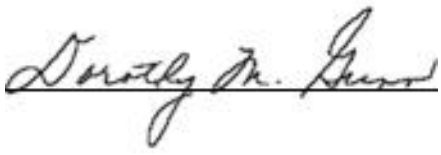
The assigned hearing officer shall inform the Clerk of the Board of the time and the location of the hearing at least 30 days in advance of hearing so that a 21-day public notice of hearing may be published. After hearing, the hearing officer shall submit an exhibit list, a statement regarding credibility of witnesses, and all actual exhibits to the Board within five days of 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 all of 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 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 July 1999 by a vote of 4-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board