ILLINOIS POLLUTION CONTROL BOARD
July 7, 1995

DOALL COMPANY, DOALL CREDIT CORPORATION, and THE RAMS-HEAD COMPANY,	)	
Complainants,	)	
v.	)	PCB 94-256 (Enforcement-Land)
SKOKIE VALLEY ASPHALT COMPANY, INC., and SEPTRAN, INC.,	)	
Respondents.	)	

ORDER OF THE BOARD (by M. McFawn):

On September 16, 1994, complainants DoAll Company, DoAll Credit Corporation, and the Rams-Head Company (collectively, DoAll), filed this enforcement action against respondents Mobil Oil Company (Mobil), Skokie Valley Asphalt Company, Inc. (SVA), and Septran, Inc. (Septran) alleging violations of the Environmental Protection Act (Act), seeking the imposition of penalties, and seeking to recover cleanup costs arising out of contamination of a site located at 1228 Harding Avenue, Des Plaines, Illinois. On October 25, 1994, Mobil filed a motion to dismiss, accompanied by a motion to file instanter. On October 20, 1994, the Board granted the motion to file instanter and accepted the motion to dismiss. On November 16, 1994, SVA filed a motion to dismiss with supporting memorandum, accompanied by a motion to file instanter, wherein SVA sought to join Mobil's motion to dismiss and incorporate the applicable substantive legal arguments of Mobil's motion. By order dated December 1, 1994, the Board granted SVA's motion to file instanter and accepted SVA's motion to dismiss. After being granted several extensions, DoAll timely filed its response to SVA's motion to dismiss on March 20, 1995. On April 12, 1995, Septran filed a motion to join in SVA's motion to dismiss. On May 2, 1995, Mobil and DoAll filed a joint motion to dismiss all claims against Mobil, which the Board granted by order dated May 4, 1995. Mobil is therefore no longer a party to this action.

Thus, several filings are currently pending before the Board: SVA's motion to dismiss, DoAll's response to SVA's motion to dismiss, and Septran's motion to join in SVA's motion to dismiss. Additionally, pursuant to Section 31(b) of the Act, the Board must make a determination as to whether the complaint is frivolous or duplicitous.

As an initial matter, the Board hereby grants Septran's April 12, 1995 motion to join in SVA's motion to dismiss.

Septran merely seeks to join in SVA's motion to dismiss, and does not seek to add any additional arguments. Septran therefore asserts that DoAll will not be prejudiced by the Board's granting of the motion. DoAll has not responded to Septran's motion. We find that allowing Septran to join the motion to dismiss will not cause prejudice to DoAll, and grant the motion accordingly.

Section 31(b) of the Act states that when a citizen's enforcement complaint is filed:

> Unless the Board determines that such complaint is duplicitous or frivolous, it shall schedule a hearing.

(415 ILCS 5/31(b) (1992).)

Section 103.124 of the Board's procedural rules provides:

> If a complaint is filed by a person other that the Agency, the Clerk shall also send a copy to the Agency; the Chairman shall place the matter on the Board 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.)

An action before the Board is duplicitous if the matter is identical or substantially similar to one brought before the Board or in another forum. (Brandle v. Ropp, (June 13, 1985), PCB 85-68, 64 PCB 263; League of Women Voters v. North Shore Sanitary Dist., (October 8, 1970) PCB 70-1, 1 PCB 35.) An action before the Board is frivolous if it fails to state a cause of action upon which relief can be granted. (Citizens for a Better Environment v. Reynolds Metals Co., (May 17, 1973) PCB 73-173, 8 PCB 46.)

In their motions to dismiss, respondents seek to dismiss the complaint on the following grounds:

1) The complaint is frivolous because it inappropriately requests the Board to award complainants their costs of remediation;

2) The complaint is duplicitous because the request for remediation is already the subject of an action pending in another forum; and

3) The complaint is frivolous because it requests the Board to impose civil penalties with respect to a site that has already been cleaned up.

In support of their motions, respondents state that the Board is without authority to entertain DoAll's request for remediation costs, since the Act does not provide for private cost recovery. Additionally, respondents assert that this action before the Board is duplicative of an action filed before the Circuit Court of Cook County, titled DoALL Company, et al., v. Mobil Oil Company, et al., No 94 L 11724. A copy of the complaint before the circuit court was attached to Mobil's October 25, 1994 motion to dismiss, the relevant portions of which were incorporated by reference into SVA's motion to dismiss, and subsequently into Septran's motion to dismiss.

Respondents assert that the circuit court action is premised on the same facts and seeks recovery of the same cleanup costs DoAll seeks to recover in the present action before the Board. In response, DoAll asserts that the circuit court action is premised on state common law theories, while the complaint before the Board seeks reimbursement of past cleanup costs for violations of the Act.

An examination of the complaint in the circuit court action reveals that it is premised on the same facts, and seeks the same relief, as the cost recovery portions of this action before the Board. The Board is not persuaded by DoAll's assertions concerning separate legal theories. In both actions, DoAll seeks to hold the same parties responsible for the same costs DoAll incurred in remediating the same contamination. We therefore find that the cost recovery portions of the complaint are substantially similar to the circuit court action, and we therefore strike as duplicitous the cost recovery portions of the complaint. This renders moot any consideration of whether DoAll properly seeks recovery of its costs in this action.

Wholly-Past Violations

Respondents assert that the complaint is frivolous because it requests the Board to impose civil penalties with respect to a site that has already been cleaned up. Respondents assert that there is no need for Board intervention, since the site has already been cleaned up, and that there is therefore no need for the Board to exercise its authority to issue a cease and desist order requiring respondents to clean up the site. Furthermore, respondents assert that civil penalties are "unwarranted and

unnecessary," since the imposition of penalties would not aid enforcement of the Act, but would only serve to punish.

In its complaint, DoAll alleges that SVA and Septran each caused or allowed the following violations at the site: 1) causing or allowing open dumping of waste in violation of Section 21(a) of the Act; 2) storing, disposing and abandoning waste at the site in a manner which did not meet the requirements of the Act and Board regulations in violation of Section 21(e) of the Act; and 3) causing or allowing the open dumping of waste at the site in violation of Section 21(a) of the Act in a manner which resulted in standing or flowing liquid discharge from the site in violation of Section 21(p) of the Act.

While the alleged violations are wholly-past and the site has already been cleaned up, the Board has authority to impose penalties for wholly-past violations. (415 ILCS 5/33(a); *see also* Modine Manufacturing v. Pollution Control Board, 549 N.E.2d 1379, 1382, 193 Ill.App.3d 643 (2d Dist. 1990).) While the wholly-past nature of a violation must be considered when determining an appropriate penalty, it does not excuse the violation of the Act. (Modine Manufacturing at 1384; *see also* Illinois Environmental Protection Agency v. Barry, PCB 88-71 at 31, 111 PCB 41.) We therefore find that DoAll's complaint properly alleges violations of the Act, and properly seeks the imposition of penalties for those violations. The Board is clearly the appropriate forum for adjudication of alleged violations of the Act. Accordingly, this matter shall proceed to hearing.

The hearing must be scheduled and completed in a timely manner, consistent with Board practices. The Chief Hearing Officer shall assign a hearing officer to conduct hearings. The Clerk of the Board shall promptly issue appropriate directions to the assigned hearing officer consistent with this order.

The assigned hearing officer shall inform the Clerk of the Board of the time and location of the hearing at least 40 days in advance of hearing so that 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 the hearing. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 7th day of July, 1995, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board