

ILLINOIS POLLUTION CONTROL BOARD
January 23, 1997

FARMERS STATE BANK, PITTSFIELD,)	
ILLINOIS,)	
)	
Complainant,)	PCB 97-100
)	(Enforcement -
v.)	Citizens - Land, Water)
)	
PHILLIPS PETROLEUM COMPANY, a)	
Delaware corporation,)	
)	
Respondent.)	

ORDER OF THE BOARD (by C.A. Manning):

This matter comes before the Board on the filing of a complaint by Farmers State Bank, Pittsfield, Illinois on December 9, 1996. Respondent Phillips Petroleum Company filed its “answer and affirmative defenses” on January 3, 1997. This matter is accepted for hearing.

Complainant alleges that respondent improperly stored, disposed and handled petroleum products and waste materials on the property now owned by complainant in violation of Sections 12(a), 12(d), 21(a), 21(d) and 21(e) of the Environmental Protection Act (Act) (415 ILCS 5/12(a)(d), 5/21(a)(d)(e) (1994)), and in violation of Section 620.405 of the Board’s groundwater regulations. Complainant seeks to recover investigative and remediation costs incurred and costs which may be incurred by complainant in the future as a result of the alleged contamination. Complainant further seeks penalties, attorney’s fees, and interest incurred to date.

In its answer, respondent denies that it is in violation of the Act. Respondent further states that complainant has failed to name other parties to this action and that complainant was aware that the property had been used by a number of individuals prior to purchasing the property. Respondent therefore argues that the Board cannot fully determine the proper amount of liability for each necessary party since those parties are not present in this matter.

The Board finds that the “answer and affirmative defenses” do not prevent this matter from being set for hearing. The “affirmative defenses” as set forth, are not affirmative defenses within the commonly accepted meaning of the term,¹ but merely alleged facts which respondent is entitled to prove at hearing.²

¹ “Affirmative defense,” as defined by Black’s Law Dictionary, means “in pleading, matter asserted by defendant which, assuming the complaint to be true, constitutes a defense to it. A

Section 103.124(a) of the Board's procedural rules which implements Section 31(b) of the Act (415 ILCS 5/31(b)), provides that the Chairman shall place the matter on the Board agenda for Board determination whether or not the complaint is duplicitous or frivolous. This section further states that if 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).)

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.) An action before the Board is frivolous if it fails to state a cause of action upon which relief can be granted by the Board. (Citizens for a Better Environment v. Reynolds Metals Co. (May 17, 1973), PCB 73-173.) At this time, the Board finds that, pursuant to Section 103.124(a), the evidence before the Board does not indicate that this complaint is either duplicitous or frivolous. We note that complainant is seeking attorney's fees and accrued interest in this matter. In an enforcement case, the Board generally does not have the discretion under the Act to award attorney's fees or interest for costs incurred by a citizen complainant (415 ILCS 5/42(f)).³ At this time, the Board does not want to make a determination regarding the request for attorney's fees and accrued interest.

The hearing must 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 (35 Ill. Adm. Code 103.125). The Clerk of the Board shall promptly issue appropriate directions to that assigned hearing officer.

The assigned hearing officer shall inform the Clerk of the Board of the time and location of the hearing at least 21 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.

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 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.

response to a plaintiff's claim which attacks the plaintiff's *legal* right to bring an action, as opposed to attacking the truth of claim." Black's Law Dictionary 61 (6th ed. 1990).

² In the event respondent believes the Board should join an additional party to the present action, the Board directs respondent to Section 103.141 and Section 103.121(c) of the Board's procedural rules.

³ The Board notes, however, that the Act provides for some circumstances for the recovery of attorney's fees. (See, e.g., Public Water Supplies (Title IV of the Act); Water Pollution Control (Title IV-A of the Act); and Land Pollution and Refuse Disposal (Title V of the Act).)

IT IS SO ORDERED.

Board Member K.M. Hennessey abstained.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the ____ day of _____, 1997, by a vote of _____.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board