

ILLINOIS POLLUTION CONTROL BOARD

November 1, 2007

CASEYVILLE SPORT CHOICE, LLC,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 08-30
	)	(Citizens Enforcement - Land)
ERMA I. SEIBER, ADMINISTRATRIX OF	)	
THE ESTATE OF JAMES A. SEIBER,	)	
DECEASED, and ERMA I. SEIBER,	)	
INDIVIDUALLY,	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by G.T. Girard):

On October 3, 2007, Caseyville Sport Choice, LLC (complainants), filed a complaint (Comp.) against Erma I. Seiber, administratrix of the estate of James A. Seiber and individually (respondents). *See* 415 ILCS 5/31(d)(1) (2006); 35 Ill. Adm. Code 103.204. On October 22, 2007, respondents filed a motion to dismiss (Mot.) the complaint. Also on October 22, 2007, the complainant filed a response to the motion (Resp.). For the reasons discussed below the motion to dismiss is denied and this matter is accepted for hearing.

**COMPLAINT**

Complainants allege in the complaint that respondents violated Sections 21 (a), (d) and (e) of the Environmental Protection Act (Act) (415 ILCS 5/21(a), (d) and (e) (2006)) and 35 Ill. Adm Code 807.201 and 807.202 of the Board's rules. Comp. at 3. Complainants further allege that respondents violated these provisions by depositing tons of horse manure mixed with "municipal trash" on the surface of the three parcels of land in St. Clair County. Comp. at 2-3. Complainants ask the Board to order respondents to reimburse the complainants for the cost of cleaning up the site. Comp. at 4. The Board finds that the complaint meets the content requirements of the Board's procedural rules. *See* 35 Ill. Adm. Code 103.204(c), (f).

**STATUTORY AND REGULATORY BACKGROUND**

Section 31(d)(1) of the Act (415 ILCS 5/31(d)(1) (2006)) allows any person to file a complaint with the Board. Section 31(d)(1) further provides that "[u]nless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing." *Id.*; *see also* 35 Ill. Adm. Code 103.212(a). A complaint is duplicative if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. A complaint is frivolous if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *Id.* Within 30 days after being served

with a complaint, a respondent may file a motion alleging that the complaint is duplicative or frivolous. 35 Ill. Adm. Code 103.212(b).

## **DISCUSSION**

The Board will first address the motion to dismiss the complaint as duplicative. Then the Board will discuss a finding on whether or not the complaint is frivolous. Finally, the Board sets this matter for hearing.

### **Duplicative**

The respondents argue that the complaint should be dismissed, as the complaint is identical or substantially similar to a case pending in the U.S. District Court for the Southern District of Illinois. Mot. at 3. Respondents note that the complaint even refers to the two-count complaint filed in federal court and the federal complaint is seeking a judgment in the amount of \$4,528,500. Mot. at 2. Therefore, respondents argue the complaint before the Board should be dismissed. Mot. at 3.

In response, complainants argue that the Board has previously ruled that a formal complaint filed with the Board is not duplicative of a complaint in federal court. Resp. at 2, citing Dayton Hudson Corporation v. Cardinal Industries, PCB 97-134 (Aug. 21, 1997) and Lake Forest Preserve District v. Ostro, PCB 92-80 (July 30, 1992). Respondent asserts that the federal complaint is brought upon common law theories of breach of contract and fraud and therefore does not render the complaint before the Board duplicative. *Id.*

The Board has consistently found that a complaint before the Board is not *per se* duplicative of a complaint in federal court. The Board has found that even where the complaint in federal court involves the same parties, the same timeframe, and the same actions, if the complaints are based on different legal theories, the complaints are not duplicative. Lake Forest, slip op. at 3; Dayton Hudson, slip op. at 10. Further, in Chrysler Realty Corp. v. Thomas Indus. Inc., PCB 01-25 (Dec. 7, 2000), the Board held the complaint was not duplicative of a complaint in the federal court where the complaint in federal court was based on federal law, negligence, and unjust enrichment. And in Grand Pier Center LLC, and American International Specialty Lines Insurance Co. v. River East LLC, Chicago Dock And Canal Trust, Chicago Dock And Canal Company, and Tronox LLC, PCB 05-157 (May 19, 2005), the Board reiterated the finding in Chrysler, stating:

In both cases, a complaint was filed in federal courts involving the same parties and the same basic set of facts. In Chrysler, the federal court dismissed the alleged violations of the State Act, leaving the only remedy for violations of the State Act to be found with the Board. Chrysler, slip op. at 5. Even though the federal complaint references the Act, the Board is not convinced that the federal complaint is based on allegations of violation of the Act. The Board finds that at this time the only remedy for alleged violations of the Act in this proceeding are also to found with the Board. Therefore, as in Chrysler, the Board finds that the complaint is not duplicative. Grand Pier, slip op. at 4-5.

In this case, the federal complaint is brought under common law theories of breach of contract and fraud. The federal complaint does not allege violations of the Act. Therefore, the Board denies the motion to dismiss the complaint as duplicative.

### **Frivolous Finding**

The motion to dismiss makes no allegations that the complaint is frivolous. The Board finds that the complaint states a cause of action upon which the Board may grant relief and requests relief that the Board has the authority to grant. Therefore, the Board finds that the complaint is not frivolous.

### **Set for Hearing**

The Board accepts the complaint for hearing. *See* 415 ILCS 5/31(d) (2002); 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 respondents fail within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider respondents to have admitted the allegation. 35 Ill. Adm. Code 103.204(d). The Board directs the hearing officer to proceed expeditiously to hearing.

### **CONCLUSION**

The Board denies the motion to dismiss, as the complaint is not duplicative of the federal complaint. The complaint before the Board alleges violations of the Act, while the federal complaint is brought on theories of common law. Further, the Board finds the complaint is not frivolous and directs that the parties proceed to hearing.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 1, 2007, by a vote of 4-0.



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John T. Therriault, Assistant Clerk  
Illinois Pollution Control Board