ILLINOIS POLLUTION CONTROL BOARD
August 19, 1999

PEOPLE OF THE STATE OF ILLINOIS, Complainant, v. STATE OIL COMPANY, WILLIAM ANEST f/d/b/a S & S PETROLEUM PRODUCTS, PETER ANEST f/d/b/a S & S PETROLEUM PRODUCTS, CHARLES ABRAHAM, JOSEPHINE ABRAHAM, and MILLSTREAM SERVICES, INC., Respondents.	)	PCB 97-103 (Enforcement - Land, Water)
CHARLES ABRAHAM, JOSEPHINE ABRAHAM, and MILLSTREAM SERVICES, INC., Cross-Complainants, v. WILLIAM ANEST and PETER ANEST, Cross-Respondents.	)	PCB 97-103 (Enforcement - Land, Water) (Cross-Complaint)

ORDER OF THE BOARD (by K. M. Hennessey):

This case involves a site in McHenry, McHenry County, Illinois. The People of the State of Illinois (People) allege that all respondents caused or allowed water pollution in violation of Section 12(a) of the Environmental Protection Act (Act), 415 ILCS 5/12(a) (1998) . The People also seek to recover from respondents Charles and Josephine Abraham and Millstream Services, Inc. over $150,000 the People expended to address contamination from underground storage tanks at the site. The People seek these costs under Section 57.12(a) of the Act, 415 ILCS 5/57.12(a) (1998).

Respondents Charles and Josephine Abraham and Millstream Services, Inc. (collectively, the Abrahams) filed a first amended cross-complaint (cross-complaint, cited as "Cross-Comp.") against respondents William and Peter Anest (the Anests). The Abrahams allege that the Anests violated various provisions of the Act, including prohibitions regarding water pollution, open dumping, and waste disposal. See 415 ILCS 5/12(d), 12(f), 21(a), 21(d)(2) (1998). The Abrahams also seek to recover cleanup costs from the Anests under Section 57.12(a) of the Act. See 415 ILCS 5/57.12(a) (1998). The Anests moved to dismiss the cross-complaint (motion, cited as "Mot.").

The Board first determines whether the cross-complaint is duplicitous or frivolous. For reasons set forth below, the Board finds that the cross-complaint is not duplicitous. The Board finds that the Abrahams' Section 12(f) and Section 57.12(a) claims, as well as a portion of their request for relief, are frivolous. The Board finds that the remainder of the cross-complaint is not frivolous. The Board denies the Anests' motion to dismiss the cross-complaint.

BACKGROUND

On February 26, 1999, the Abrahams filed the cross-complaint with the Board. The Abrahams state that the Anests once owned the site. The Abrahams allege that in early 1984, while the Anests still owned the site, gasoline began leaking from the underground storage tanks at the site and seeped into the stream that borders the site. Cross-Comp. at 2. According to the Abrahams, the tanks were tested and repaired at the time of this initial leak; however, gasoline was detected again in the stream in late 1984 and early 1985. *Id.* The Abrahams further allege that the Anests knew of these leaks and sold the site to Charles and Josephine Abraham in 1985. *Id.*

The Abrahams state that Charles and Josephine Abraham filed suit against the Anests in the circuit court of McHenry County (the McHenry County case).[1] In the McHenry County case, Charles and Josephine Abraham alleged that the Anests committed breach of contract and fraud when the Anests sold the site to them. Cross-Comp. at 2, 10. The Abrahams allege that the Anests were found liable to Charles and Josephine Abraham in that case. *Id.* at 2, 10-11. The Abrahams state that the breach of contract and fraud, in addition to the Anests' failure to assume responsibility for the leaks, "ultimately lead the State of Illinois to allegedly conduct and pay for certain remedial activities at the [site] relating to leakage of gasoline into the stream." *Id.* at 2. Based on these allegations, the Abrahams ask the Board to find the Anests jointly and severally liable for any relief to which the State of Illinois may be entitled. *Id.* at 14, 17, 19, 21. The Abrahams also request that the Board find the Anests in violation of 415 ILCS 5/12(d), 12(f), 21(a), 21(d)(2), and 57.12(a); order the Anests to remediate any gasoline and waste oil contamination at the site; and order the Anests to pay for all of the Abrahams' costs of this proceeding, including expert witness and attorney fees. *Id.* at 14, 17, 19, 21.

Initially, the Board must consider whether the cross-complaint is duplicitous[2] or frivolous under Section 103.124(a) of the Board's procedural rules, which provides in part as follows:

> If [a] complaint is filed by a person other than the Agency, the Clerk shall also send a copy to the Agency; the Chairman shall place the matter on the agenda for Board determination whether the complaint is duplicitous or frivolous. 35 Ill. Adm. Code 103.124(a).

A complaint is duplicitous if the matter is identical or substantially similar to one brought in another forum. See, *e.g.*, Dayton Hudson Corporation v. Cardinal Industries, Inc. (August 21, 1997), PCB 97-134, slip op. at 3. A complaint is frivolous if it fails to state a cause of action upon which the Board can grant relief. *Id.* A complaint also is frivolous if it requests relief that the Board cannot grant. See, *e.g.*, Lake County Forest Preserve District v. Ostro (July 30, 1992), PCB 92-80, slip op. at 2.

The Board also must consider the Anests' April 7, 1999 motion to dismiss the cross-complaint. In the motion, the Anests contend that the Board should dismiss the cross-complaint, or portions thereof, on three bases: (1) *res judicata* bars the entire cross-complaint; (2) the open dumping and waste disposal claims under Sections 21(a) and 21(d)(2) of the Act, respectively, should be dismissed because those provisions do not apply to the facts of this case; and (3) the Section 57.12(a) claim should be dismissed because that section cannot be applied retroactively here. Mot. at 1, 3, 4. The Abrahams filed a response opposing the motion on May 10, 1999 (response, cited as "Resp."). On May 24, 1999, the Anests filed a reply to the response, along with a motion to file the reply *instanter*.[3]

DISCUSSION

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[1] Millstream was not a party to the McHenry County case. Mot. at Exhibit A.

[2] The Board and the courts consistently have read the term "duplicitous" as "in the sense of being duplicative." Winnetkans Interested in Protecting the Environment v. Pollution Control Board, 55 Ill. App. 3d 475, 478, 270 N.E.2d 1176, 1179 (1st Dist. 1977). Furthermore, although Section 103.124(a) refers to "complaints," the Board has made this determination with respect to counterclaims and cross-claims and will do so here. See, *e.g.*, People v. Rogers O'Hare Terminal Limited (March 19, 1998), PCB 96-240 and 98-107 (cons.), slip op. at 2-3; Miehle v. Chicago Bridge & Iron Company (December 16, 1993), PCB 93-150, slip op. at 1.

[3] No one objected to the motion to file *instanter*. The Board grants the motion.

Duplicitous and Frivolous Determination

The Board finds that the cross-complaint is not duplicitous. While an action relating to the site was litigated in McHenry County Circuit Court, the claims litigated in that case were breach of contract, fraud, and Consumer Fraud and Deceptive Practices Act claims. Mot. at Exhibit A. The cross-complaint, by contrast, presents claims under Sections 12(d), 12(f), 21(a), 21(d)(2), and 57.12(a) of the Act. The claims presented in the two actions therefore are not identical or substantially similar. See, *e.g.*, Morton College Board of Trustees v. Town of Cicero (January 8, 1998), PCB 98-59, slip op. at 5 (breach of contract claim pending in circuit court was not duplicitous of claim pending before the Board alleging violations of the Act).

The Board therefore must consider whether any of the claims are frivolous. First, the Board finds that the cross-complaint states a cause of action for a violation of Section 12(d). The cross-complaint alleges, among other things, that the Anests allowed oil and gasoline to remain in soils adjacent to the waters of the State and allowed the discharge of oil and gasoline into those waters. If proven, these facts would constitute a violation of Section 12(d) of the Act. This claim therefore is not frivolous.

The Abrahams also allege that the Anests violated Section 12(f) of the Act. Section 12(f) reads in pertinent part:

> No person shall . . . [c]ause, threaten or allow the discharge of any contaminant into the waters of the State . . . without an NPDES [National Pollutant Discharge Elimination System] permit for point source discharges issued by the Agency under Section 39(b) of this Act, or in violation of any term or condition imposed by such permit, or in violation of any NPDES permit filing requirement established under Section 39(b), or in violation of any regulations adopted by the Board or of any order adopted by the Board with respect to the NPDES program. 415 ILCS 5/12(f) (1998).

The Abrahams allege that the Anests violated this provision by allowing the discharge of contaminants into the waters of the State. Cross-Comp. at 20. However, the Abrahams do not allege that the Anests allowed the discharge without an NPDES permit or in violation of NPDES requirements. As a result of this omission, the Abrahams failed to state a cause of action for a violation of Section 12(f). Accordingly, the Board finds this claim frivolous and strikes it from the cross-complaint.

Section 21(a) of the Act prohibits the open dumping of waste, and Section 21(d)(2) of the Act prohibits any person from, among other things, conducting a waste-disposal operation in violation of Board regulations. See 415 ILCS 5/21(a), 21(d)(2) (1998). In the motion to dismiss, the Anests argue that Sections 21(a) and 21(d)(2) do not apply and, in effect, that these claims are frivolous. The Anests maintain that the gasoline that leaked out of the underground storage tanks was valuable and that they intended to resell it. Mot. at 3-4. The Anests conclude that the gasoline was not "waste" under Sections 21(a) and 21(d)(2) and they therefore did not violate those provisions. *Id.*

The Act defines "waste" as:

> any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities . . . . 415 ILCS 5/3.53 (1998).

When determining whether material is a "waste," the Board considers federal court interpretations of the definition of "solid waste" under the federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et*

seq. See R.R. Donnelley & Sons Co. v. Illinois Environmental Protection Agency (February 23, 1989), PCB 88-79, slip op. at 3-5. The RCRA definition of "solid waste" is nearly identical to the definition of "waste" under the Act.[4]

Federal courts interpreting the RCRA definition have found that once petroleum leaks from an underground storage tank, it becomes "discarded material" and thus a "solid waste." See, *e.g.*, Agricultural Excess & Surplus Insurance Company v. A.B.D. Tank & Pump Co., 878 F. Supp. 1091, 1095 (N.D. Ill. 1995) ("[L]eaked gasoline from an underground storage tank is no longer useful and is appropriately defined as discarded material or solid waste."); Zands v. Nelson, 779 F. Supp. 1254, 1262 (S.D. Cal. 1991) ("[G]asoline is no longer a useful product after it leaks into, and contaminates, the soil."). The Board finds these cases persuasive here.

The Board further finds that the facts pled, if proven, would demonstrate violations of Sections 21(a) and 21(d)(2). See, *e.g.*, Village of Niles v. Mobil Oil Co. (July 24, 1997), PCB 98-10, slip op. at 2. Accordingly, the Board will not dismiss the Abrahams' claims under Sections 21(a) and 21(d)(2) as frivolous, and denies the Anests' motion to dismiss these claims.

The Abrahams also assert a claim under Section 57.12(a) of the Act, which provides:

> Notwithstanding any other provision or rule of law, the owner or operator, or both, of an underground storage tank shall be liable for all costs of investigation, preventive action, corrective action and enforcement action incurred by the State of Illinois resulting from an underground storage tank. 415 ILCS 5/57.12(a) (1998).

In the motion to dismiss, the Anests note that Section 57.12(a) became effective after the Anests sold the site. Mot. at 4. The Anests therefore contend that they could not have violated Section 57.12(a) and that Section 57.12(a) cannot be applied retroactively. *Id.* The Abrahams urge a different reading of the statute based on the definition of "owner" that applies in Section 57.12(a). Resp. at 10.

The Board need not reach these arguments, however, because the plain language of Section 57.12(a) shows that it applies only to state enforcement actions, not private enforcement actions. Accordingly, the Board dismisses the Abrahams' Section 57.12(a) claim as frivolous. This finding renders the Anests' motion to dismiss this claim moot, and the Board therefore denies that portion of the motion.

In determining whether a complaint is frivolous, the Board also must consider whether the complaint requests relief that the Board cannot grant. The Abrahams request that the Board award them "all costs of this proceeding, including but not limited to expert witness fees and attorneys' fees . . . ." Cross-Comp. at 14, 17, 19, 21. The Board cannot award the Abrahams litigation costs, including expert witness fees and attorney fees. See, *e.g.*, Charter Hall Homeowners Association v. Overland Transportation System (January 22, 1998), PCB 98-81, slip op. at 2. Accordingly, the Board strikes this portion of the cross-complaint.

Motion to Dismiss on *Res Judicata* Grounds

Initially, the Board notes that the motion is untimely. Under Section 103.140(a) of the Board's procedural rules, "[a]ll motions by respondent to dismiss or strike the complaint . . . shall be filed within 14 days after receipt of [the] complaint . . . ." 35 Ill. Adm. Code 103.140(a). The Board finds that this limit applies to cross-complaints as well as complaints. The Abrahams filed the cross-complaint on February 26, 1999, but the Anests did not file the motion to dismiss until April 7, 1999. Accordingly, the motion is untimely.

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[4] Under RCRA, "solid waste" means "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities
. . . ." 42 U.S.C. § 6903(27).

However, the Board notes that the motion could be re-filed as a motion for summary judgment, and that motions for summary judgment need not be filed within 14 days after respondent's receipt of the complaint. The Board further notes that the Abrahams have not objected to the motion as untimely, and that this is the second time that the parties have briefed the *res judicata* issue. (The Anests sought to dismiss the original cross-complaint on *res judicata* grounds, but the Board dismissed that cross-complaint on other grounds.) There is little to be gained by requiring the parties to brief this issue a third time, so the Board will exercise its discretion to consider the motion to dismiss in the interests of judicial economy.

Under the doctrine of *res judicata*, a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies and constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action. See River Park, Inc. v. City of Highland Park , 184 Ill. 2d 290, 302, 703 N.E.2d 883, 889 (1998). The bar extends to what was actually decided in the first action, as well as those matters that could have been decided in that suit. See River Park, 184 Ill. 2d at 302, 703 N.E.2d at 889.

In general, *res judicata* applies when three elements are present: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of the parties or their privies; and (3) an identity of cause of action. See River Park, 184 Ill. 2d at 302, 703 N.E.2d at 889. The burden of establishing *res judicata* "is on the party invoking it, and to operate as such it must either appear upon the face of the record or be shown by extrinsic evidence that the precise question, or point, was raised in determining the former suit." Torcasso v. Standard Outdoor Sales, Inc., 157 Ill. 2d 484, 491, 626 N.E.2d 225, 228-229 (1993).

Even if all of the elements for *res judicata* are present, however, *res judicata* will not apply "if the court in the first action lacked subject matter jurisdiction over that claim." Village of Maywood Board of Fire and Police Commissioners v. Department of Human Rights of the State of Illinois, 296 Ill. App. 3d 570, 580, 695 N.E.2d 873, 880 (1st Dist. 1998). In this case, *res judicata* will not apply if the McHenry County Circuit Court lacked subject matter jurisdiction over the claims that the Abrahams now assert before the Board. This in turn raises the question of whether the Board has exclusive jurisdiction over citizens' complaints under the Act.

Generally:

> [T]he courts of Illinois have original jurisdiction over all justiciable matters. The legislature may vest exclusive original jurisdiction in an administrative agency. However, if the legislative enactment does divest the circuit courts of their original jurisdiction through a comprehensive statutory administrative scheme, it must do so explicitly. Employers Mutual Companies v. Skilling, 163 Ill. 2d 284, 287, 644 N.E.2d 1163, 1165 (1994).

Several provisions of the Act address the Board's jurisdiction over actions brought by private parties such as the Abrahams. Section 31(d) of the Act provides: "Any person may file with the Board a complaint, meeting the requirements of subsection (c) of this Section, against any person allegedly violating this Act or any rule or regulation thereunder or any permit or term or condition thereof." 415 ILCS 5/31(d) (1998). One of the primary authors of the Act, David Currie, stated that while the Attorney General or State's Attorney generally may bring an action before a court or the Board,[5] "the citizen . . . has no option to file in court in the first instance." D. P. Currie, Enforcement Under the Illinois Pollution Law, 70 Nw. L. Rev. 389, 452 n.308 (July-August 1976).

This reading of the Act is consistent with Section 45(b) of the Act, which allows citizens to sue for injunctive relief in circuit court, but only after first seeking relief before the Board:

> Any person adversely affected in fact by a violation of this Act or of regulations adopted thereunder may sue for injunctive relief against such violation. However, except as provided in subsection (d), no action shall be brought under this Section until 30 days after the plaintiff has

[5] See 415 ILCS 5/42, 43 (1998).

> been denied relief by the Board in a proceeding brought under subsection [(d)] of Section 31 of this Act. 415 ILCS 5/45(b) (1998).

Several courts have found that the Board has exclusive jurisdiction over citizen complaints. Most recently, in City of Elgin v. County of Cook, 257 Ill. App. 3d 186, 629 N.E.2d 86 (1st Dist. 1993), *aff'd in part on other grounds and rev'd in part on other grounds*, 169 Ill. 2d 53, 660 N.E.2d 875 (1995), the court considered a challenge to a zoning ordinance that Cook County passed granting a special use permit to a solid waste facility known as a "balefill." In so doing, the court noted:

> The legislature conferred exclusive jurisdiction upon the [Board] to adjudicate actual or threatened violations of the [Act], IEPA permits or [Board] rules and regulations. Where an administrative agency is vested with exclusive jurisdiction to hear an action, the exhaustion of remedies doctrine provides that a party must pursue all available administrative remedies before seeking judicial review when an adequate administrative remedy exists. City of Elgin, 257 Ill. App. 3d at 195, 629 N.E.2d at 93.

The City of Elgin court also dismissed a count that another plaintiff, the Village of South Elgin, brought to enjoin the development or construction of the balefill pending the siting approval required by various provisions of the Act. The court held:

> While the State's Attorney or the Attorney General is permitted to institute an immediate injunctive action in the circuit court to enjoin violations of the [Act] or halt any activity causing or contributing to a substantial danger to the environment or public welfare, section 45 of the [Act] requires any person adversely affected by a violation of the [Act] to exhaust their administrative remedies before seeking injunctive relief in the circuit court. Because the Village of South Elgin has not exhausted its administrative remedies here, the circuit court is without jurisdiction to consider the violations of the [Act] alleged . . . . City of Elgin, 257 Ill. App. 3d at 198, 629 N.E.2d at 95, citing People v. Fiorini, 143 Ill. 2d 318, 337-338, 574 N.E.2d 612, 619-620 (1991).

See also Village of South Elgin v. Waste Management of Illinois, 62 Ill. App. 3d 815, 820-822, 379 N.E.2d 349, 354-355 (2d Dist. 1978) (upholding circuit court's dismissal of claim seeking to have certain landfill permits declared void on the grounds that complainants had not exhausted their administrative remedies before the Board).

Several Illinois Supreme Court cases, however, find that the Board does not have exclusive jurisdiction over all citizen enforcement actions. In People v. Fiorini, 143 Ill. 2d 318, 574 N.E.2d 612 (1991), the Illinois Attorney General sought injunctive relief and statutory penalties against Geno and Bernardine Fiorini for causing or allowing waste to be deposited at a dump site in violation of the Act, Board regulations, and the Illinois Public Nuisance Act. The Fiorinis filed a third-party complaint alleging that several third-party defendants violated Sections 21(a) and 21(e) of the Act by improperly dumping waste at the dump site. The Fiorinis sought injunctive relief and cleanup costs.

Third-party defendants moved to dismiss the third-party complaint on the grounds that the Fiorinis failed to exhaust their administrative remedies, as Section 45(b) of the Act requires. While holding that third-party defendants waived this issue by failing to raise it in the trial court, the Illinois Supreme Court opined that "Section 45(b) does not . . . express the standard for potential third-party complaints brought from actions by the State pending in the circuit court. Further, as this court stated in People *ex rel.* Scott v. Janson (1974), 57 Ill. 2d 458-459, 312 N.E.2d 620, concurrent jurisdiction exists in the circuit court and the proper administrative agency for actions alleging violations of the Act." Fiorini, 143 Ill. 2d at 337-338, 574 N.E.2d at 619. The Fiorini court concluded that "[t]o require that a portion of the instant action be heard before the [Board] at this juncture would frustrate judicial economy and common sense." Fiorini, 143 Ill. 2d at 338, 574 N.E.2d at 619.

While Fiorini could be read to suggest that the circuit courts have concurrent jurisdiction with the Board over all citizen enforcement actions under the Act, courts in subsequent cases have limited Fiorini to third-party claims. See People v. NL Industries, 152 Ill. 2d 82, 93, 604 N.E.2d 349, 353 (1992) ("In [Fiorini], this court held that, pursuant to the Environmental Protection Act, the circuit court has concurrent jurisdiction to adjudicate . . . third-party complaint[s], filed by private litigants, seeking injunctions and recovery costs."); City of Elgin, 257 Ill. App. 3d at 198, 629 N.E.2d at 95 (citing Fiorini and dismissing claim for injunctive relief under the Act when plaintiff had not exhausted its administrative remedies); see also Shepard v. R. A. Cullinan & Sons, Case No. 95-1227 (C.D. Ill. July 16, 1997), slip op. at 2-3 (holding that private parties seeking to enforce the Act must first proceed before the Board, and noting that Fiorini and NL Industries "were very clearly distinguishing between actions initiated by the State, for which concurrent jurisdiction exists without regard to administrative remedies, and private actions, in which exhaustion is required.")[6]

A finding that the Board has exclusive jurisdiction over citizens' complaints is also consistent with the comprehensive regulatory scheme that the Act establishes. Courts have found that similar statutes also grant exclusive jurisdiction, even if the statute does not use the word "exclusive." In Cessna v. City of Danville, 296 Ill. App. 3d 156, 693 N.E.2d 1264 (4th Dist. 1998), for example, the court found that the Illinois Public Labor Relations Act (IPLRA) granted the Illinois State Labor Relations Board (Labor Board) exclusive jurisdiction over certain claims, despite the absence of the word "exclusive" in the statute. The court noted that the IPLRA provided for direct appeal of the decisions of the Labor Board to the appellate courts, and that no provision of the IPLRA expressly allowed employees to file suit in circuit court. The Cessna court concluded that "[c]oncurrent jurisdiction in the circuit courts would allow inconsistent decisions and forum shopping, which would undermine the goal" of the IPLRA. Cessna, 296 Ill. App. 3d at 163, 693 N.E.2d at 1269; see also Board of Education of Community School District No. 1, Coles County v. Compton, 123 Ill. 2d 216, 221-226, 526 N.E.2d 149, 152-154 (1988) (holding that the Illinois Educational Labor Relations Act divests the circuit courts of jurisdiction over labor arbitration awards, and vests exclusive jurisdiction over such matters in the Illinois Educational Labor Relations Board).

Similarly, the Act provides for direct appeal of Board decisions to the appellate court, and no provision of the Act expressly allows citizens to file suit under the Act in the circuit court (except under Section 45(b) of the Act, 415 ILCS 5/45(b) (1998), after the Board denies relief to the citizen). In addition, concurrent jurisdiction would invite forum shopping and could result in inconsistent decisions.

The Board therefore finds that it has exclusive jurisdiction over private enforcement actions under the Act, except in cases in which the State is the original plaintiff. For that reason, the Abrahams could not have brought the claims in the cross-complaint, which are claims under the Act, in the McHenry County case. *Res judicata* does not apply, and the Board therefore denies the Anests' motion to dismiss the cross-complaint on these grounds.

CONCLUSION

The Board finds that the cross-complaint is not duplicitous. The Board further finds that the Section 12(f) and Section 57.12(a) claims, as well as the Abrahams' request for litigation costs, including expert witness fees and attorney fees, are frivolous and are therefore stricken. The Board finds that the remainder of the cross-complaint is

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[6] The Board is aware that some federal courts have read NL Industries as holding that "'circuit courts have concurrent jurisdiction with the [Board] over cost recovery actions under the [Act].'" Midland Life Insurance Company v. Regent Partners I General Partnership, 1996 U.S. Dist. Lexis 15545, *17 (N.D. Ill. Oct. 17, 1996), quoting Krempel v. Martin Oil Marketing, Ltd., 1995 U.S. Dist. Lexis 18236 (N.D. Ill. Dec. 8, 1995); see also Mehta Motors, Inc. v. A.V.W. Equipment Co., Inc., 1996 U.S. Dist. Lexis 9666 (N.D. Ill. July 10, 1996). However, these cases do not recognize that the NL Industries court addressed only cost recovery claims under Section 22.2 of the Act. NL Industries does not address the question of whether the Board and the circuit courts have concurrent jurisdiction over private actions to enforce Sections 12 and 21 of the Act in which cost recovery is sought as a remedy, the action that the Abrahams present here. Accordingly, the Board declines to follow the holdings in these federal cases. (While Fiorini did involve an action under Section 21 of the Act, the cases cited above demonstrate that it is limited to third-party actions.)

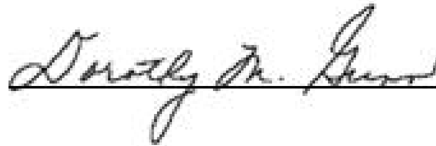
not frivolous. The Board denies the Anests' motion to dismiss the Abrahams' claims under Sections 21(a) and 21(d)(2), and denies as moot the Anests' motion to dismiss the Abrahams' Section 57.12(a) claim. Finally, the Board denies the Anests' motion to dismiss the cross-complaint on the grounds of *res judicata*.

IT IS SO ORDERED.

Board Members E.Z. Kezelis and N.J. Melas concurred.

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 19th day of August 1999 by a vote of 6-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board