ILLINOIS POLLUTION CONTROL BOARD
July 22, 1999

UNION OIL COMPANY OF CALIFORNIA d/b/a UNOCAL, a California corporation,	)	
Complainant,	)	
v.	)	PCB 98-169
	)	(Enforcement - UST, Citizens)
BARGE-WAY OIL COMPANY, INC., BARGEWAY SYSTEMS, INC., JOSEPH KELLOGG, NIELSEN'S BARGEWAY, GERTRUDE KELLOGG, ROBERT NIELSEN, ROBERT F. ATKINS, and MOBIL OIL COMPANY,	)	
Respondents.	)	

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

This matter is before the Board on a motion (Mot.) and memorandum (Memo.) for summary judgment and for sanctions filed by Mobil Oil Company (Mobil) on March 17, 1999. On April 8, 1999, respondent Barge-Way Oil Company, Inc. (Barge-Way) filed a motion *instanter* to join Mobil's motion for summary judgment; on April 9, 1999, respondent Robert Nielsen (Nielsen) filed a motion *instanter* to join Mobil's motion for summary judgment. The Board grants both of these motions to join Mobil's motion for summary judgment.[1] On May 17, 1999, Union Oil Company of California d/b/a Unocal, a California corporation (Unocal), filed its response in opposition to Mobil's motion (Resp. Br.). On June 11, 1999, Mobil filed its reply to Unocal's response (Reply Br.).

For the reasons set forth below, the Board denies Mobil's motion for summary judgment and request for sanctions.

BACKGROUND

Unocal alleges that it is the owner of a parcel of property located at 600 East North Avenue, Glendale Heights, County of DuPage, Illinois (site). Unocal purchased the site in 1982 and has held the site as vacant land. Complaint (Comp.) at 1, 4. In approximately September 1991, Unocal reported a release of petroleum from two existing underground storage tanks (USTs) at the site. Pursuant to the direction of the Illinois Environmental

[1] When referring to Mobil's motion for summary judgment and sanctions in this order, the Board is also referencing the other two parties who have joined in Mobil's motion, Barge-Way and Nielsen.

Protection Agency (Agency) and the Illinois Office of the State Fire Marshal (OSFM), Unocal investigated the contamination, prepared reports, removed contaminated water, removed the USTs and treated 4,300 tons of contaminated soil. It also removed an additional 1,555 cubic yards of contaminated soil. Comp. at 4-5. Unocal incurred approximately $600,000 in response costs to assess and remediate the site. Comp. at 5.

Unocal alleges that Mobil owned and operated a gasoline service station at the site from approximately 1971 to 1974. Unocal also alleges that Joseph Kellogg, Gertrude Kellogg, Robert Nielsen, and Robert F. Atkins are individuals who owned or operated and controlled the site (or were otherwise responsible) during the relevant timeframe that contamination occurred. Unocal also alleges that Barge-Way distributed gasoline to and from the site or operated the site from approximately 1955 to 1974. Finally, Unocal alleges that respondent Nielsen's Bargeway operated the site or was otherwise responsible from approximately 1955 to 1969. Comp. at 2.

Unocal filed this complaint against the respondents on June 18, 1998, alleging certain violations of Sections 12(a), 12(d), 21(e), and 57.1(a) of the Environmental Protection Act (Act) (415 ILCS 5/12(a), 12(d), 21(e), 57.1(a) (1998)), 41 Ill. Adm. Code 170.590, and Sections 1 and 2(3)(f) of the Gasoline Storage Act (430 ILCS 15/1, 2(3)(f) (1998)), pertaining to the disposal, treatment, storage, or abandonment of waste, water pollution, and to underground storage tank removal requirements. In its complaint, Unocal requests reimbursement of all costs which it has incurred due to the alleged contamination of the site by respondents.

By Board order dated January 7, 1999, the Board dismissed all but one of the counts in the complaint and ordered the one remaining claim, count III, to proceed to hearing. See Unocal v. Barge-Way Oil Co. (January 7, 1999), PCB 98-169. Count III of the complaint alleges violations of Sections 12(a) and 12(d) of the Act (415 ILCS 5/12(a), 12(d), (1998)), which pertain to water pollution. Comp. at 9-11. Unocal alleges that respondents violated the Act when they "contributed to contamination of underground water at the [s]ite or failed to clean up contamination at the [s]ite." Comp. at 10.

RELEVANT STATUTES

Sections 12(a) and 12(d) of the Act state that:

No person shall:

a. Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act. 415 ILCS 5/12(a) (1998).

* * *

d. Deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard. 415 ILCS 5/12(d) (1998).

Section 3.55 defines "water pollution" as:

> such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State . . . 415 ILCS 5/3.55 (1998).

Section 3.56 defines "waters" to mean:

> all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State. 415 ILCS 5/3.56 (1998).

ARGUMENTS OF THE PARTIES

Mobil's Motion

Mobil requests that summary judgment be granted in its favor as to count III of the complaint because there are no remaining genuine issues of material fact to be considered by the Board. Mobil states that none of the reports generated by Unocal during its investigation and remediation efforts at the site demonstrate any groundwater contamination at the site. Mot. at 2. Since there is no evidence of water pollution, Mobil argues, Unocal cannot prove a violation of the Act. Mot. at 3.

Mobil also seeks sanctions against Unocal. Specifically, Mobil argues that in several documents submitted by Unocal to the Agency, Unocal never disclosed that groundwater contamination posed a problem at the site. Memo. at 1-2, 6. Mobil asserts that because Unocal failed to propose any remedial action for groundwater in Unocal's February 20, 1992 corrective action plan prepared by Braun Intertec Environmental, Inc. (Braun), and submitted to the Agency, Unocal and its consultant found that a groundwater remediation plan was unnecessary for the site. Memo. at 3; see also Memo. Exhibit (Exh.) E. Mobil also argues that because Braun did not find any further impact on groundwater at the site after investigation, no water pollution occurred. Memo. at 4; see also Memo. Exh. G. Mobil further points to Unocal's corrective action completion report which again stated its earlier conclusion that groundwater did not appear to have been impacted by the contamination. Memo. at 5; see also Memo. Exh. K. Finally, Mobil argues that the Agency has not required Unocal to remediate any groundwater contamination. Memo. at 5.

In summary, Mobil argues that water pollution never occurred, nor was it threatened at the site, and therefore Mobil could not have violated Sections 12(a) or 12(d) of the Act. Memo. at 7. Accordingly, Mobil requests that the Board grant summary judgment and sanction Unocal for having filed the claim. Mobil asserts that sanctions are warranted against Unocal since it forced many respondents to incur large costs and expend time and resources defending Unocal's claims. Memo. at 8-9.

Unocal's Response

Unocal asserts that summary judgment is unwarranted at this time. It states that during the remediation of the site, two 8,000 gallon USTs and 8,500 gallons of petroleum-contaminated water from the USTs were removed. Resp. Br. at 3. Unocal states that between November 6 and November 16, 1992, another 9,450 gallons of petroleum-contaminated water were transported from the site. Resp. Br. at 3-4. Unocal further points to the transportation of an additional 12,400 gallons of petroleum-contaminated water which were removed from the site in December 1992. Resp. Br. at 4; see Resp. Exh. A.

Unocal argues that a violation of Section 12 is not limited to the pollution of groundwater, but includes the discharge of any contaminant into the environment so as to cause or tend to cause water pollution, and includes the pollution of any subsurface water(s). Resp. Br. at 7-8. Finally, Unocal argues that respondents violated the Act when they allowed the release of petroleum products on the site so as to create a water pollution hazard under Section 12(d) of the Act. Relying on Tri-County Landfill Co. v. PCB, 41 Ill. App. 3d 249, 258, 353 N.E.2d 316, 358 (2nd Dist. 1976), Unocal asserts that an operator of a service station can create a water pollution hazard even though the contamination may not yet threaten to cause water pollution. Resp. Br. at 7-8.

Mobil's Reply

Mobil replies by arguing that the water removed from the site was rainwater which Unocal allowed to accumulate in Unocal's excavation pit and inside the two USTs. Reply Br. at 6. Mobil states that at least 12,000 gallons of the alleged water and petroleum mixture were pumped from inside the two USTs; therefore, Mobil asserts that liquids removed from inside the tanks cannot be considered "waters of the State." 415 ILCS 5/3.55 (1998); Reply Br. at 6-7. Mobil points to Unocal's corrective action completion report which states that a trench was dug due to heavy rainfall and states that a large amount of surface water was accumulating on the site. Reply Br. at 7; Memo. Exh. K at 9. Finally, Mobil argues that contrary to Unocal's assertion, the mere presence of a contaminant is insufficient to constitute a water pollution hazard under Section 12(d) of the Act. Reply Br. at 10.

ANALYSIS

In order to grant summary judgment in this matter, the Board must determine whether the facts indisputably show that no water pollution occurred at the site, and that no water pollution hazard existed at the site. 415 ILCS 5/12(a),(d) (1998).

A motion for summary judgment is to be granted only if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." See 735 ILCS 5/2-1005(c). Summary judgment is appropriate when there are no genuine issues of fact for the trier of fact to consider and the movant is entitled to judgment as a matter of law. Jackson Jordan, Inc. v. Leydig, Voit & Mayer, 158 Ill. 2d 240, 249, 633 N.E.2d 627, 630

(1994); Sherex Chemical v. IEPA (July 30, 1992), PCB 91-202; Williams Adhesives, Inc. v. IEPA (August 22, 1991), PCB 91-112.

In this matter, it is uncontroverted that water was removed from two USTs and the area surrounding them. It is also uncontroverted that during the course of Unocal's remediation, trenches were dug adjacent to the USTs and there was rainfall. The record before us also reflects that water removed from the tanks and trenches was "contaminated with petroleum products." Resp. Br. at 7. The record before us reflects neither the nature and extent of the contamination nor whether there was water pollution at the site in violation of Section 12(a) of the Act for which the respondents should be held liable. Finally, the record does not disclose whether a water pollution hazard was created by any action (or inaction) of the respondents in violation of Section 12(d) of the Act. Because material issues of fact continue to exist, the Board denies summary judgment.

Accordingly, the Board also finds that sanctions are not warranted in this matter.

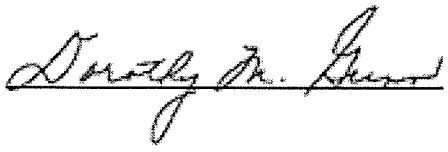
CONCLUSION

Mobil's motion for summary judgment is denied. Sanctions are not warranted in this matter. This case shall proceed to hearing.

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