

On July 16, 2007, the People filed a four-count complaint (Comp.) alleging that UPRC had committed water pollution violations. In an order dated July 26, 2007, the Board accepted the complaint for hearing. On April 3, 2009, UPRC filed a motion to sever claims (Mot.) and a memorandum in support of that motion (Memo.). The People filed a response opposing UPRC's motion (Resp.) on April 22, 2009. On May 1, 2009, UPRC filed a reply in support of its motion to sever claims (Reply).

PEOPLE'S COMPLAINT

The People allege that UPRC owns and operates a rail yard and intermodal facility located at 301 West Lake Street in Northlake (Facility). Comp. at 2 (P4). The People also allege that UPRC is a "person" as that term is defined by the Act. *Id.* at 4 (PP15-16); *See* 415 ILCS 5/3.315 (2008) (definition of "person"). The People further allege that UPRC is a Delaware corporation duly authorized to do business in Illinois. *Id.* at 2 (P3).

Count I

The People allege that stormwater and accumulated groundwater from the Facility are treated using an oil/water separator (Separator) which consists of several weirs over which the water passes prior to its discharge into Mud Creek, a tributary of Addison Creek. Comp. at 2 (P5). The People further allege that discharge of the Facility's Separator-treated water is authorized under the terms of NPDES Permit No. IL0002127 (NPDES Permit). *Id.*

The People allege that on November 23, 2005, the Agency inspected the Facility after an employee of the Metropolitan Water Reclamation District of Greater Chicago (MWRDC) notified the Agency of a recent fuel oil release on the site. Comp. at 2 (PP6-7). The People further allege that, during the November 23, 2005 inspection, the Agency observed "a rainbow and silver colored sheen on the water extending from a storm culvert at the Facility's Locomotive Fueling Pad, continuing on through a drainage ditch and ultimately flowing . . . over the final weir in the Separator before being discharged into Mud Creek." *Id.* at 2 (PP7).

The People allege that on February 19, 2006, or a date better known to UPRC, a diesel fuel release occurred at the Facility. Comp. at 3 (P9). The People also allege that the Agency and MWRDC confirmed the occurrence during a February 22, 2006 inspection. *Id.* at 3 (P11). The People further allege that, during this inspection, a representative of UPRC informed the Agency and MWRDC that one of UPRC's contractors "had caused the fuel release when a fuel line on one of [the contractor's] trucks ruptured, discharging diesel fuel into a storm sewer inlet at the Facility." *Id.* at 3 (P12). According to the People, the February 22, 2006 inspection determined that, on February 19, 2006, "at least some of the diesel fuel which had been released as a result of the rupture to the fuel line had flowed through the Facility's Separator and had been subsequently discharged into Mud Creek." Comp. at 3 (P13).

The People allege that, "by causing, threatening or allowing the discharge of rainbow and silver colored fuel oil sheen and the diesel fuel, both of which are 'contaminants,' to discharge

into Mud Creek, a water of the State, [UPRC] caused, threatened or allowed water pollution . . . in violation of Section 12(a) of the Act.” Comp. at 3 (P25), citing 415 ILCS 5/12(a) (2008).

Count II

The People allege that, on at least November 23, 2005, and February 19, 2006, UPRC “deposited petroleum products which are contaminants onto the land in such a place and manner as to create a water pollution hazard, in violation of Section 12(d) of the Act.” Comp. at 7 (P15), citing 415 ILCS 5/12(d) (2008).

Count III

The People allege that “the discharge of petroleum products from the Separator into Mud Creek” violated UPRC’s NPDES Permit and 35 Ill. Adm. Code 309.102(a). Comp. at 8 (P16). The People further allege that, by violating 35 Ill. Adm. Code 309.102(a), UPRC also violated Section 12(f) of the Act. Comp. at 9 (P17), citing 415 ILCS 5/12(f) (2008).

Count IV

The People allege that on November 23, 2005, and February 19, 2006, or dates better known to UPRC, UPRC “caused or allowed petroleum products to leave the Separator at the Facility and to enter Mud Creek.” Comp. at 10 (P17). The People also allege that, “[b]y allowing the petroleum products to enter Mud Creek, [UPRC] thereby violated the water quality standard found in 35 Ill. Adm. Code 302.203, as well as 35 Ill. Adm. Code 304.105, and Section 12(a) of the Act. Comp. at 10 (PP18-19), citing 415 ILCS 5/12(a) (2008).

UPRC’S MOTION TO SEVER CLAIMS

UPRC requests that the Board sever the claims in this action and direct the People to refile separate actions. Mot. at 1. UPRC states that the four counts in the People’s complaint improperly consolidate claims arising from two “separate and unrelated” events in November 2005 and February 2006. *Id.* UPRC argues that requiring UPRC to defend these claims in a single action would result in material prejudice against UPRC because a finding of liability as to either claim “would create an impermissible negative influence as to [UPRC’s] liability related to the other.” *Id.* at 2. UPRC further argues that, due to the consolidated damages in the complaint, “[a]n objective damages determination as to either alleged event would also be impossible.” *Id.*

UPRC asserts that the November 2005 and February 2006 events are unrelated because they occurred on different properties, at different times. Memo. at 1. UPRC argues that, according to the People’s complaint, the November 2005 event occurred at UPRC’s Proviso Yard, while the February 2006 event occurred at Global II intermodal facility. *Id.* at 2. According to UPRC, Proviso Yard and Global II are two separate properties with separate purposes. *Id.* UPRC states that Proviso Yard is a classification yard at 505 W. Lake Street in Melrose Park, where UPRC services trains, while Global II is an exchange hub located at 301 W. Lake Street in Northlake, where third-party contractors exchange shipping products. *Id.* UPRC

claims that the State acknowledged Proviso Yard and Global II as distinct facilities by using separate violation notices and classifications for each location during the investigation. *Id.* at 5.

UPRC asserts that the complaint alleges no causal connection between the November 2005 and February 2006 events. Memo. at 3. With respect to the November 2005 event, UPRC claims that the People's complaint "does not identify the cause or source" of the alleged release at Proviso Yard. *Id.* UPRC asserts that, in contrast, the People's complaint alleges that the February 2006 "diesel fuel release" at Global II was caused by one of UPRC's contractors. *Id.* UPRC argues that the complaint does not contain any allegations connecting the two events. *Id.*

In addition, UPRC argues that both incidents involve different theories of liability, witnesses and potential evidence. Memo. at 5. According to UPRC, the People's theory of liability with respect to the November 2005 event is akin to "strict liability," in that "the existence of the alleged release sufficed to impose liability." *Id.* UPRC contends that the People's allegations respecting the February 2006 event involve a different theory of liability because they stem from an operational release caused by a third-party on UPRC property. *Id.*

UPRC insists that severance is necessary to avoid prejudice to UPRC and asserts that severance would "serve the convenient, expeditious and complete determination of the issues" and offer the parties an opportunity to settle either of the claims individually. Memo. at 6.

PEOPLE'S RESPONSE

The People oppose UPRC's motion to sever claims and ask the Board to deny the motion. The People argue that the complaint properly consolidates the People's claims because both claims involve the same responsible party, facility, NPDES Permit, and theory of liability. Resp. at 1.

The People argue that Proviso Yard and Global II occupy the same facility because they are both part of the same 500 acre parcel of UPRC's land, though they have different street addresses. Resp. at 2, citing People's Exhibit A (Letter from Lee Hammond: "UPRC's Manager of Environmental Field Operations response to VN dated June 6, 2006"). The People emphasize that both Proviso Yard and Global II are located "at and below" UPRC's oil/water Separator, which receives stormwater runoff from the entire property and is governed by a single NPDES permit. *Id.* The People also note that the alleged releases in both areas are separated by less than 90 days. Resp. at 3.

The People argue that the alleged events at Proviso Yard and Global II both involve "inadequate operation/maintenance/design of the oil/water Separator" in violation of the same NPDES permit. Resp. at 2-3. According to the People, severance would not only waste the Board's resources by requiring the Board to "try the same matter twice," it would prejudice the People by precluding the Board from considering "the pattern of violations at [UPRC's] facility." *Id.* at 3.

The People argue that the same theory of liability is applicable to both the November 2005 and February 2006 allegations, explaining that "the pertinent inquiry is whether [UPRC]

had sufficient control over the source of pollution at the time of the discharge of the pollutant.” Resp. at 4, citing Illinois v. Danvinroy Contractors, 249 Ill.App.3d 788, 793 (1998).

UPRC’S REPLY

UPRC restates its argument that the November 2005 and February 2006 events alleged in the complaint occurred on separate properties at different times, and insists that the events bear no causal connection to each other. Reply at 1-2. UPRC argues that Illinois courts have recognized that “requiring a party to try two unrelated claims in the same case is reversible error.” *Id.*, citing Mount v. Dusing, 414 Ill. 361, 367-68 (1953) and Rogola v. Silva, 16 Ill.App.3d 63, 64-65, 68 (1st Dist. 1973). UPRC notes that the People’s response cites no contrary authority. Reply at 2.

UPRC contends that the People’s response contains three independent procedural deficiencies. Reply at 2. First, UPRC argues that the People’s response was untimely and thus the People waived any objection to UPRC’s motion. *Id.* at 2-3. Second, UPRC claims that the Board cannot consider the statements in the People’s motion because they are unverified and inaccurate. *Id.* at 3-4. Finally, UPRC argues that the Board “should not credit the [People’s] attempted rewrite of its complaint, via its response” because “[t]he [c]omplaint does not allege any ‘pattern of violations’ by [UPRC].” *Id.* at 5-6.

PROCEDURAL MATTERS

Before addressing the substance of UPRC’s motion to sever claims, it is necessary to address two procedural matters.

First, the Board notes that the People’s response to UPRC’s motion to sever was untimely because it was electronically filed two days after the April 20, 2009 deadline set by the Hearing Officer. *See* People v. Union Pacific Railroad, PCB 08-07, Hearing Officer Order (March 23, 2009). Section 101.500(d) of the Board’s Procedural Rules provides, in pertinent part:

Within 14 days of service of a motion, a party may file a response to the motion. If no response is filed, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board or the hearing officer in its disposition of the motion. 35 Ill. Adm. Code 101.500(d).

The People’s response was not accompanied by a motion for leave to file *instanter* and no justification for the delayed response was given. The Board will, nevertheless, address the arguments raised in the People’s response in order to ensure a thorough treatment of the issues. The Board notes that UPRC does not argue, and there is no evidence, that UPRC was prejudiced by the People’s two-day filing delay.

Second, UPRC argues that the Board cannot credit facts asserted in the People’s response because they are unverified. *See* 35 Ill. Adm. Code 101.504 (“Facts asserted that are not of record in the proceeding must be supported by oath, affidavit, or certification in accordance with

Section 1-109 of the Code of Civil Procedure [735 ILCS 5/1-109]”). However, to support their statements, the People attach a letter which appears to be a copy of UPRC’s response to the Agency’s April 25, 2009 violation notice. *See* Resp. Exh. A. UPRC does not specify any manner in which the proffered document is deficient or untrustworthy. Under these circumstances, the Board will consider the letter in its deliberation as a business record kept in the ordinary course of business by the Agency.

DISCUSSION

UPRC urges the Board to sever the People’s claims so that a finding of liability as to one claim will not result in a “negative influence” on decision of the other. The Board’s procedural rules provide:

Upon motion of any party or on the Board’s own motion, in the interest of convenient, expeditious, and complete determination of claims, and where no material prejudice will be caused, the Board may sever claims involving any number of parties. 35 Ill. Adm. Code 101.408.

UPRC argues that severance would serve the convenient, expeditious and complete determination of the issues in this case because the November 2005 and February 2006 allegations are factually unrelated and thus require different theories of liability.

The People, however, contend that the two incidents involve the same parties, the same facility, the same NPDES Permit, and the same theory of liability. The People argue that severance would waste the Board’s resources and prejudice the People by preventing the Board from considering UPRC’s “pattern of violations.” In reply, UPRC contends that the Board should disregard the People’s argument because a pattern of violations is not alleged in the complaint.

Factually, the Board finds that the events alleged in the complaint involve the same parties and the same facility. Further, although the People’s allegations involve two transactions which occurred at different times and may involve different witnesses and evidence, both allegations stem from the discharge of contaminants into Mud Creek via UPRC’s oil/water Separator, which is governed by the same NPDES permit. The connection between both of the People’s claims and the oil/water Separator is apparent from the face of the complaint.

Moreover, the same theory of liability applies to both of the People’s claims. With respect to either claim, the People must show that UPRC “has the capability of control over the pollution” or that UPRC “was in control of the premises where the pollution occurred.” *See People v. A. J. Davinroy Contractors*, 249 Ill. App. 3d 788, 793-96 (5th Dist. 1993); *see also Meadowlark Farms, Inc. v. PCB*, 17 Ill. App. 3d 851, 861 (5th Dist. 1974).

Based on the similarities between the alleged violations, the Board concludes that UPRC would not be materially prejudiced by defending the People’s claims in a consolidated action. The Board also notes that Dusing and Rogala are distinguishable from the instant case. The claims remanded for severance in Dusing involved different parties, different theories of liability,

and different witnesses. *See* 414 Ill. 361 at 369 (noting that both the defendant mother and her son were sued regarding a will contest, while the mother alone was the defendant in an action to set aside a deed. Not only were the events separated by one year, but, as the court acknowledged, “a higher degree of mental capacity [was] required to make a valid deed than to execute a will”). As in Dusing, the claims in Rogala were “based upon two entirely separate transactions . . . involved different parties and were based upon different theories.” 16 Ill. App. 3d 63 at 68. Unlike the severed claims depicted in Dusing and Rogala, the People’s claims share the same parties, same facility, same regulatory scheme, and the same theory of liability.²

Under these circumstances, the Board finds that severance would not further the convenient, expeditious, and complete determination of the claims in this case. Respondent has not demonstrated that any prejudice would result from failure to sever; the Board is well able to avoid carrying “any impermissible negative influence” over from its determinations concerning one count to another. Based on the connection between the People’s claims and the adequacy of UPRC’s oil/water Separator, hearing the claims together would be in the interest of administrative economy. As argued by the People, the Board finds that conducting two proceedings regarding alleged violations of the same NPDES Permit at the same facility by the same party would waste the resources of the Board and the parties involved.

CONCLUSION

For the reasons set forth in this order, the Board denies UPRC’s motion to sever claims.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 20, 2009, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board

² The Board also notes that Dusing and Rogala concern causes of action and legal theories which are completely different from those involved in the People’s action against UPRC. Dusing involved a will contest and a title dispute (*see* 414 Ill. 361 at 369), while Rogala involved a breach of warranty and a mental distress claim. *See* 16 Ill. App. 3d 63 at 68. Consequently, the Board finds that the decisions in Dusing and Rogala are of limited relevance in deciding UPRC’s motion.