ILLINOIS POLLUTION CONTROL BOARD
August 1, 1996

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 96-143
	)	(Enforcement - Water)
MICHEL GRAIN COMPANY, INC., d/b/a MICHEL GRAIN FERTILIZER, an Illinois corporation, and CARYLE MICHEL,	)	
	)	
Respondents.	)	

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

This matter is before the Board on several motions including respondents' motion to dismiss filed on February 6, 1996, complainant's April 25, 1996 filing of an amended complaint, and respondents' motion to strike the amended complaint filed on May 8, 1996. On December 27, 1995 the Illinois Attorney General, on behalf of the People of the State of Illinois and at the request of the Illinois Environmental Protection Agency (Agency), filed a two-count complaint against respondents, Michel Grain Company, Inc., d/b/a Michel Grain Fertilizer (Michael Grain, Inc.) and Mr. Caryle Michel (Michel), alleging violations of the water pollution provisions of the Environmental Protection Act (Act) (Sections 12(a) and (d)) and violations set forth at 35 Ill. Adm. Code 302.203, 304.105, 304.106 and 306.102(b) of the Board's regulations, concerning pesticide and fertilizer spills at a grain elevator and liquid agrichemical facility in the Village of Ina, Jefferson County, Illinois (Ina facility), and seeks a declaration concerning the State's rights to past and future cost recovery pursuant Section 22.2 of the Act. Complainant's filing of an amended complaint alleges, in addition to the original two counts, groundwater contamination at a liquid and dry fertilizer and agrichemical facility located in the Village of Broughton, Hamilton County, Illinois (Broughton facility), and also alleges the unlawful disposal of waste at both facilities.

Respondents request that we dismiss the original two-count complaint concerning the Ina facility as to both parties, Michel Grain Company, Inc. and Michel, on the basis that they each received a discharge from the United States Bankruptcy Court for the Southern District of Illinois on February 27, 1990. Alternatively, respondents seek dismissal on the grounds that the original two-count complaint is substantially insufficient at law and fails to state claims upon which relief may be granted. In addition, respondents request that we strike the amended complaint because the amended complaint realleges identical violations contained in the original complaint regarding the Ina facility and also includes new violations at the Broughton facility which, respondents argue, are identical to alleged violations at the Ina facility. In the alternative, respondents request time to file their response to the amended complaint after the Board's ruling on the motion to dismiss.

For reasons more fully explained below, we hereby deny the motion to dismiss as to both party respondents, Caryle Michel and Michel Grain, Inc. We deny the motion to strike the amended complaint and allow respondents to file an answer to the amended complaint on or before September 3, 1996.

PROCEDURAL HISTORY

On December 27, 1995 complainant filed its complaint alleging that respondents violated Sections 12(a) and (d) of the Act and 35 Ill. Adm. Code 302.203, 304.105, 304.106 and 306.102(b) of the Board's regulations and alleging that respondents were statutorily liable for past and future removal costs pursuant to Section 22.2 of the Act. Respondents filed their motion for leave to file instanter a motion to dismiss the complaint and the motion to dismiss the complaint on February 6, 1996.

On February 15, 1996 complainant objected to respondents' motion for leave to file instanter their motion to dismiss and the motion to dismiss on the basis that the motion to dismiss was filed with the Board more than 21 days after service of the complaint and on the basis that the motion to dismiss was filed instanter. Complainant argued that respondents' motion was untimely and should be rejected by the Board. Respondents filed a reply on February 27, 1996 accompanied by a motion for leave to file instanter conceding that the motion to dismiss was untimely filed, yet argued good cause for the Board to extend time for filing such a motion. On March 7, 1996 complainant submitted a motion to strike respondents' reply stating that respondents failed to either request the Board's permission to file the motion to dismiss or show that material prejudice would have resulted but for the filing of the motion to dismiss.

Complainant filed an amended complaint on April 25, 1996 adding new allegations against respondents' Broughton facility and alleging violations concerning the unlawful disposal of waste at both facilities. On May 8, 1996 respondents filed a motion to strike the amended complaint stating that complainant did not file a motion requesting leave of the Board to file its amended complaint and stating that the new allegations were procedurally and substantively defective. Complainant subsequently filed a motion for leave to file its amended complaint on May 17, 1996.

BACKGROUND

Ina Facility

According to the allegations of the complaint and amended complaint,[1] Michel Grain, Inc. is a grain elevator and liquid agrichemical facility located in the Village of Ina, Jefferson

[1] The Board will refer to the amended complaint filed on April 25, 1996, for all alleged violations occurring at the facility located in the Village of Ina, Jefferson County, Illinois, and all alleged violations occurring at the facility located in the Village of Broughton, Hamilton County, Illinois. References to the April 25, 1996 amended complaint will be cited to as (Comp. at ___.). References to respondents' motion to dismiss will be cited to as (Mot. to

County, Illinois. The Ina facility has a mixing area with three 5,000-gallon fertilizer tanks situated on one side and a drainageway bordering the other. The Ina facility is situated near the water main for the Ewing-Ina water system, located less than ten feet downgrade of the adjacent drainageway, and less than one mile from Rend Lake, which serves as a source of public drinking water for approximately 12,000 people. (Id. at 2-3.) The complaint alleges that Rend Lake and the drainageway are both "waters of the State" as defined in Section 3.56 of the Act. (415 ILCS 5/3.56) (Id. at 3.)

Complainant states that the Agency inspected the Michel Grain, Inc. Ina facility on May 8, 1989 in response to concerns of the Village of Ina Water District regarding potential contamination of the public water supply. The Agency observed that, for a period of time prior to May 8, 1996, respondents had operated the Ina facility in a manner resulting in the discharge of pesticides, fertilizers and herbicides onto the ground and in the drainageway. (Id. at 4, 6.) The amended complaint alleges that these practices included failure to install or use impervious drip pads for washing trucks, storing herbicide containers and mixing chemicals, lack of an on-site collection system for rinsate, and failure to place dikes around the fertilizer tanks. (Id. at 4.)

The complaint further alleges that during the May 8, 1989 inspection and, subsequently during a second inspection on January 8, 1990, the Agency inspector collected water and soil samples from the Ina facility. The samples were taken from two pools of liquid from the mixing area and from the parking area east of the mixing area. The sampling contained a milky white liquid and showed the presence of three pesticides on site: atrazine, alachlor, and pendimethalin. (Id. at 5.) During the January 8, 1990 inspection, the Agency collected water and soil samples from a nearby field, a water tap, and from the main ditch/drainageway. These samples showed the presence of four pesticides: atrazine, alachlor, metolachlor, and pendimethalin. (Id.)

The amended complaint also alleges that on or before May 8, 1989 respondents caused or allowed pesticides, fertilizers, and herbicides to be discarded onto the ground at the facility. (Id. at 8-9.) Complainant further alleges a cost recovery claim seeking a Board determination that respondents are liable for the State's past and future cleanup costs "at all times relevant" to the complaint for the release of pesticides at the Ina facility. (Id. at 14.) Complainant argues that respondents have failed to take any preventative or corrective action to address the release of pesticides, thus triggering the State's cost recovery rights under Section 22.2 of the Act.

Based on respondents' operational practices and the sampling data, complainant requests that the Board find Michel Grain, Inc. and Michel in violation of Sections 12(a) and 12(d) of the Act and 35 Ill. Adm. Code 306.103(b), 302.203 and 304.106 of the corresponding Board regulations. (Id. at 6-7.) Complainant also requests that the Board find

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Dismiss at ___.) References to complainant's response to the motion to dismiss will be cited to as (Resp. at ___.) References to respondents' motion to strike will be cited to as (Mot. to Strike at ___.)

respondent in violation of the unlawful disposal of waste pursuant to Section 21(d)(2) of the Act. (415 ILCS 5/21(d)(2) (1994).) Complainant finally requests that the Board find respondents liable for past and future removal costs incurred by the State and that the Board order respondents to take response action at the Ina facility. (Id. at 14.)

Caryle Michel d/b/a Michel Grain Company and Michel Fertilizer Company filed a voluntary petition pursuant to Chapter 11 of the United States Bankruptcy Code on July 18, 1989. (11 USC 1100 et seq.) A one-paragraph letter was written by Caryle Michel to William Busch of the Agency on November 6, 1989. The letter stated that the Michel Fertilizer Company, Ina facility, was in Chapter 11 and stated that a plan of reorganization would be submitted November 18, 1989. (Mot. to Dismiss at 2; Attachment 1.) The State did not partake in the bankruptcy proceeding nor did the State file a claim as a creditor. Michel Grain, Inc. was involuntary dissolved by the Illinois Secretary of State on November 1, 1991. Caryle Michel was the "owner and sole proprietor" of Michel Grain, Inc. prior to November 1, 1991. (Comp. at 2.)

In the case styled In Re: Caryle and Catherine Michel, Case No. BK89-40672, the U.S. Bankruptcy Court for the Southern District of Illinois released the debtors, Caryle and Catherine Michel, from all dischargeable debts on February 27, 1990. (Mot. to Dismiss at 3.) On July 30, 1990 respondents submitted a proposed Site Assessment Plan (SAP) after repeated notifications by the Agency of the conditions at the Ina facility. (Comp. at 6-7.) The Agency subsequently notified respondents of numerous deficiencies in the SAP and requested revisions. Respondents submitted a revised SAP on September 20, 1991 as a result of the deficiencies and, on October 16, 1991, the Agency notified respondents of the deficiencies in the revisions. Finally, on January 16, 1992 respondents submitted a SAP which the Agency approved on January 29, 1992. Due to respondents' inaction in implementing the agreed SAP and due to the continuing water pollution violations, complainant filed this action.

Broughton Facility

The additional counts alleged in the second half of the amended complaint were not previously alleged in the original complaint. The second facility, added in the amended complaint, is a liquid and dry fertilizer and agrichemical facility located in the Village of Broughton, Hamilton County, Illinois. The amended complaint describes the Broughton facility as having three above-ground storage tanks, a storage building for dry and bulk fertilizer, loading pad and station, mixing area, workshop, packaged warehouse, and office area. (Id. at 15.) The Broughton facility formerly consisted of 16 above-ground storage tanks ranging from 3,000 to 30,000 gallons in size. Two underground drains discharge from the Broughton facility to a drainageway which is tributary to an unnamed tributary of the North Fork Saline River, which are each "waters of the State" as defined in Section 3.56 of the Act (415 ILCS 5/3.56). Complainant alleges that respondents leased the Broughton facility to an unnamed third party who operated the facility for a period of time. (Id.)

The complaint recites that on January 9, 1992 the Agency inspected the facility in response to a complaint from the Illinois Department of Agriculture. The inspection revealed that, though the facility had been abandoned for approximately three years, several outdoor

bulk storage tanks containing liquids remained on the site. (Id. at 16.) Also, the warehouse contained "several liquid jugs of pesticide or insecticide product and approximately two tons of damp fertilizer." Upon inspection, the Agency also found that a small drain extending from the former liquid blending area was discharging an unknown white-colored liquid. A second inspection on January 28, 1992 revealed discolored soil and gravel, and trenches with apparent contamination at the Broughton facility's former operational area. (Id.) During the second inspection, soil samples were taken from the excavation area and from the exposed area in one of the trenches which resulted in various concentrations of alachlor, atrazine, and trifluralin.

Complainant alleges that on or before January 9, 1992, respondents caused or allowed pesticides, herbicide, fertilizer, and fuels to be discarded upon the ground and contaminated the soils and water entering the drainageway at the Broughton facility. Complainant also alleges the existence of a cost recovery action at the Broughton facility, similar to the cost recovery claim alleged at the Ina facility. Complainant asserts that respondents have failed to take any preventative or corrective action to address the contamination of past and present discharges and/or leaching of pesticides at the Broughton facility. (Id. at 20.)

Due to the Agency's findings during the January 9, 1992 and January 28, 1992 inspections at the Broughton facility, complainant alleges that Michel Grain, Inc. and Michel both violated Section 12(a) and 12(d) of the Act and corresponding Board regulations set forth at 35 Ill. Adm. Code 302.203, and 304.106. Complainant further alleges that respondents have unlawfully disposed of waste by causing or allowing contaminants to be discarded in violation of Section 21(d)(2) of the Act. Therefore, complainant requests that the Board find respondents in violation, enter a cease and desist order, assess civil penalties, and award attorney's fees. (Id. at 18, 19.) Complainant further requests that respondents be found liable for past and future removal costs incurred by the State and that respondents be ordered to undertake and complete response action at the facility in accordance with an Agency directive. (Id. at 21.)

DISCUSSION

Motion to Dismiss

Respondents argue two theories in their motion to dismiss. Respondents argue that the allegations concerning the Ina facility are discharged due to the bankruptcy case which absolved Caryle Michel and Michel Grain, Inc. of all liability. Respondents also argue that the allegations concerning the Ina facility are insufficient at law and fail to state any claim upon which relief may be granted.

Timeliness of the filings. Complainant initially argues that the motion to dismiss should be denied since it was not timely filed by respondents. Respondents agreed that the motion was filed late, yet argued Illinois Supreme Court Rule 183 which states that a court may, for good cause shown, extend the time for filing any pleading either before or after the expiration of time. (107 Ill. 2d R. 183.) Respondents argued "good cause" by stating their need to gather documentation for the filing of their motion to dismiss and to consult with

respondents' previous counsel. The Board finds respondents' arguments convincing and will not deny the motion on grounds of untimeliness.

Bankruptcy. Respondents argue that both Caryle Michel and Michel Grain, Inc. should be dismissed from the complaint due to the 1990 bankruptcy case which, respondents argue, absolves Caryle Michel and Michel Grain, Inc. of all liability. Respondents state that they notified the Agency of the pending bankruptcy case and the Agency failed to participate in the bankruptcy proceeding or otherwise file a claim. Respondents argue that the discharge acts as an injunction against commencing an action to collect on a pre-petition claim against the bankruptcy debtor. (Mot. to Dismiss at 3-4.)

Complainant states that neither Caryle Michel nor Michel Grain, Inc. are discharged from this proceeding. Complainant argues that the allegations in the complaint pertain to the violations occurring during the dates of inspection and also pertain to continuing violations occurring as a result of ongoing pollution. Complainant argues that because the harmful releases continue to be a threat and are ongoing, the site at the Ina facility poses an endangerment to the public health and welfare. Complainant further asserts, citing In re Chateaugay Corp., 944 F.2d 997, 1006-09 (2d Cir. 1991), that an order for clean up which mandates the removal of the contamination and prevents any ongoing pollution is not a dischargeable claim. (Resp. at 2-3.) Complainant further argues that it has a right to force any debtor to comply with the applicable environmental laws by remedying the existing hazard. (Resp. at 3, citing Chateaugay, 944 F.2d at 1008.) Complainant also states that penalties for environmental violations are not subject to discharge since civil penalties are excepted from discharge in the U.S. Bankruptcy Code.

We find that the bankruptcy case does not discharge any of the present allegations against either Caryle Michel or Michel Grain, Inc. In the U.S. Bankruptcy Court's confirmation order, dated February 27, 1990, Caryle and Catherine Michel are specifically named as individual debtors. Michael Grain, Inc. was not even named as a debtor in the bankruptcy court proceeding. Nowhere in the order is there mention of any other legal entity, corporate or otherwise, as being a debtor before the court in that bankruptcy proceeding; therefore, respondents' argument that both Caryle Michel and Michel Grain, Inc. are discharged of all pre-petition liability because of the bankruptcy case is without merit.

Respondents' only possible claim for discharge would be applicable to Caryle Michel. Respondents argue that Caryle Michel is discharged because the allegations pertain to pre-petition claims. What respondents fail to fully consider, however, are complainant's allegations of ongoing pollution. Caselaw is clear on the issue of ongoing pollution: a bankruptcy discharge may not operate as an injunction against the commencement of any action if pollution continues to be ongoing. (See In re Chateaugay Corp., 944 F.2d 997 (2d Cir. 1991).) If the ongoing nature of an environmental obligation continues, a debtor is prevented from obtaining a discharge of its liability in a bankruptcy proceeding. (In Re: Industrial Salvage, Inc. v. People of the State of Illinois, BK93-40767, ADV. 95-4107; In Re: John Prior v. People of the State of Illinois, BK93-40768, ADV. 95-4108, U.S. Bankruptcy Court, Southern District of Illinois, June 6, 1996.) Status as a debtor in bankruptcy does not authorize a company to maintain a current nuisance or otherwise excuse it from current

compliance with the environmental laws of that state. (Ohio v. Kovacs, 469 U.S. 274, 285 (1985).)

In this matter, we believe that the complaint sufficiently alleges ongoing pollution for purposes of setting this matter for hearing. Caryle Michel was aware of the obligations to clean up the Ina facility as evidenced by respondents' development of a Site Assessment Plan (SAP).[2] Though the complaint does not draw a perfect nexus between the pre-petition claims and post-bankruptcy continuing pollution, we find that the complaint satisfactorily alleges ongoing pollution. For these reasons, neither Caryle Michel nor Michel Grain, Inc. are discharged and this matter shall proceed to hearing. In the event the facts at hearing show that all of the alleged water pollution has ended prior to the 1990 bankruptcy case, the Board may entertain a new motion to dismiss this portion of the complaint at the proper time.

Sufficiency of the pleadings. Respondents argue that no water pollution hazard or threat has been established in the complaint. Respondents state that the complaint neither properly describes the location or flow of the drainageway. Respondents further assert that the drainage contains runoff treated with fertilizers and pesticides from other cornfields adjacent to respondents' facility. In its motion to dismiss, respondents summarily argue that the complaint fails to provide proper information showing how the alleged discharges violate Sections 12(a) and (d) of the Act and 35 Ill. Admin. Code 302.203, 304.105 and 304.106. (Mot. to Dismiss at 5-7.) Respondents assert that complainant has improperly alleged respondents' failure to implement a SAP. Respondents argue that the Act does not require respondents to prepare or implement a SAP.

Complainant argues that the facts are sufficient and, if proven, would entitle relief to complainant. Complainant asserts that the direct or indirect path of the "waters" is of little consequence since the path leads to a body of water, Rend Lake, which serves as public drinking supply for area residents. (Resp. at 4.) Complainant states that the samples and data referencing the public water supply show the continuing presence of contamination to area groundwaters and complainant argues that pollution is amply demonstrated. Complainant states that the Agency must obtain respondents' compliance with the SAP so as to insure the requirements of the Act have been satisfied. Further, complainant states that any challenges to the source of contamination should be presented at hearing. (Resp. at 6.) Complainant overall argues that the allegations pursuant to the Act and the Board's regulations are properly alleged under these facts.

The Board finds that the complaint is sufficient to proceed to hearing. The complaint has sufficiently alleged facts which, if proven at hearing, may warrant relief to complainant. Though the Board acknowledges that the complaint is not fact-specific in all of the allegations and the Board notes that more facts would be helpful in understanding the issues in this case, we find the amended complaint satisfactory to proceed to hearing. The Board also notes that, among other things, the State of Illinois is a notice-pleading state and, as such, does not require complainant to plead all facts specifically in its complaint. As a result, the Board finds no merit in respondents' argument that the complaint is insufficient at law. At this time, we

[2] For additional discussion of the SAP, *see* page 8, *infra*.

will not rule about the sufficiency of the alleged violation of a SAP, but will allow the parties to further argue the matter in the course of this proceeding.

Cost recovery. Among other things, respondents argue that complainant is not entitled to recover any removal costs. Respondents state that the complaint improperly alleges the contaminants as "hazardous substances." (Mot. to Dismiss at 9-10.) Respondents argue that the State must have incurred costs prior to the commencement of a cost recovery action. (Mot. to Dismiss at 10-11.) Respondents finally argue that the Agency, pursuant to Section 4 of the Act (415 ILCS 5/4(q) (1994)), should have provided notice to any person potentially liable for a release. (Mot. to Dismiss at 13.)

Complainant asserts, citing Section 33 of the Act (415 ILCS 5/33(a) (1994)), that the Board has the authority to direct respondents to pay all costs, past or future, related to the remedial or removal activity incurred by the State of Illinois. Complainant argues it would have to relitigate the issue of release as the costs are incurred which would, in effect, result in an inefficient use of resources and possibly foreclose complainant's further proceedings based on res judicata. (Resp. at 7.) Complainant also asserts its references to the contaminants in the complaint as "hazardous" is an accurate reference. Complainant further states that it has the authority to provide notice of liability under Section 4(q), yet it is not clearly required to provide notice in order for liability to result. (Resp. at 8,9.)

We find that complainant has a right to a determination as to respondents' liability before it engages in the costs of cleanup. In this matter, this case will be sent to hearing in order to ascertain liability for the ongoing pollution. Once liability is determined, a concurrent action based on cost recovery may be appropriate since it would expedite the proceedings and prevent undue delay. Because respondents are potentially liable parties, the complainant may proceed with such cost recovery issues. Section 22.2 of the Act (415 ILCS 5/22.2 (1994)) specifies that responsible parties shall be liable for all costs of removal or remedial action incurred by the State of Illinois for the release or substantial threat of a release. If complainant has incurred costs in removal and complainant proves this at hearing, in addition to respondents' liability, then complainant may seek costs from respondents. As a result, it would be premature for the Board to dismiss the cost recovery action in this matter.

Motion to Strike

Respondents argue that the Board should strike and dismiss the amended complaint filed by complainant on April 25, 1996. Respondents assert that because complainant did not file a motion requesting leave of the Board to file an amended complaint pursuant to Section 2-616 of the Illinois Code of Civil Procedure (735 ILCS 5/2-616), complainant has waived its right to obtain leave of the Board to file the amended complaint. (Mot. to Strike at 3.) Respondents further assert that the violations in the amended complaint reallege identical violations in the original complaint with regard to the Ina facility except for the additional count of a solid waste violation. (Id.) Respondents state that the new violations alleged in the amended complaint with regard to the Broughton facility are identical to the violations alleged at the Ina facility and, therefore, the same arguments in respondents' motion to dismiss may be applied to the violations alleged at the Broughton facility. (Id.) Overall, respondents argue

that the amended complaint is both procedurally and substantively defective and should be stricken. Alternatively, respondents request that the Board grant an extension of time for respondents to respond to the amended complaint after the Board's ruling on the motion to dismiss.

The Board will allow the filing of the amended complaint and further finds that the amended complaint states a cause of action which shall proceed to hearing. Subsequent to the filing of complainant's amended complaint, complainant filed a motion asking leave of the Board to file an amended complaint, thereby curing any procedural defect in the filing. The Board has not been presented with any reasons demonstrating that the filing of the amended complaint would be unduly prejudicial to respondents in this matter. The Board recognizes that the additional allegations against respondents' Broughton facility could have been filed as a new complaint in a separate case; however, we will allow this case to proceed as filed, so long as the parties realize that all allegations brought against respondents' Ina facility and respondents' Broughton facility are proven separately.

In summary, respondents' motion to dismiss is denied and respondents' motion to strike the amended complaint is denied. Respondent is directed to file an answer to all allegations in the complaint, as amended, on or before September 3, 1996.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the _____ day of _____, 1996, by a vote of _____.

_____

Dorothy M. Gunn, Clerk

Illinois Pollution Control Board