ILLINOIS POLLUTION CONTROL BOARD
November 20, 1997

GEORGE CASANAVE,	)	
	)	
Complainant,	)	
	)	PCB 97-84
v.	)	(Enforcement - UST)
	)	
AMOCO OIL COMPANY,	)	
	)	
Respondent.	)	

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

This matter comes before the Board on a motion to dismiss filed by respondent Amoco Oil Company (Amoco) on January 21, 1997. At the request of complainant George Casanave (complainant), and with no objection by Amoco, the Board, on February 6, 1997, and March 6, 1997, granted complainant additional time to respond to Amoco's motion to dismiss. On March 18, 1997, complainant responded to Amoco's motion to dismiss. On April 4, 1997, Amoco filed its reply and a motion for leave to file instanter, which the Board grants. For the following reasons, the Board grants Amoco's motion to dismiss.

BACKGROUND

On November 6, 1996, complainant filed this citizen's enforcement action against Standard Oil Company, Inc. (Amoco)[1] and Ray L. Pearson. On November 11, 1996, the Board received complainant's certificate of service and receipt, as is required by Section 103.123 of the Board's procedural rules (35 Ill. Adm. Code 103.123), indicating that Amoco had been served with the complaint on November 7, 1997. The Board has never received proof of service indicating that Ray L. Pearson was served with a complaint in this matter. Therefore, we hereby dismiss Ray L. Pearson as a respondent in this matter. The above caption reflects this dismissal.

The underlying complaint concerns a tract of property (property or site) located at 3925 North Pulaski Road, Chicago, Cook County, Illinois, which was purchased by complainant on August 15, 1991. On April 2, 1992, complainant discovered leaking underground storage tanks on the property and, subsequently, remediated the property by removing the contaminated soil and the leaking underground storage tanks located on the property. Comp. at 2.

[1] By Board order of February 6, 1997, the Board accepted a joint stipulation filed by the parties on January 21, 1997, which directed that all references to Standard Oil Company be changed to Amoco Oil Company.

Complainant denies any allegation that it, or any other person or entity during the time which complainant owned the property, used the underground storage tanks or caused or contributed to any of the contamination of the property that was required to be remediated. Comp. at 2. Rather, complainant alleges that between approximately July 19, 1932, and December 18, 1952, Amoco, by and through its agents, entered into a lease with the owners of the property at the time and installed underground storage tanks on the property. Comp. at 2. Complainant further asserts that because Amoco allowed gasoline to be placed into the tanks and allowed the property to be used as a gasoline filling station, contamination resulted from Amoco's operations and through no fault of complainant. Complainant asserts that, as a result of the operations by Amoco on the property, the underground storage tanks remained in the soil and contaminated the property with gasoline products. Comp. at 3. Complainant also alleges that Ray L. Pearson owned the property after Amoco from 1952 to 1961 during which time Pearson operated a truck rental business on the property and used the underground storage tanks to fuel the trucks. Comp. at 2.

Based on the actions of Amoco, the complaint alleges that Amoco violated various provisions of the Environmental Protection Act (Act), including Sections 21(a), (d), (e), (f), (i), and (m), which pertain to the storage, treatment, or disposal of any wastes or hazardous wastes (415 ILCS 5/21(a), (d), (e), (f), (i), (m) (1996)). Comp. at 3. The complaint requests that the Board order Amoco to pay cleanup costs in the amount of $106,665.50, pursuant to Section 33(a) of the Act (415 ILCS 5/33(a) (1996)). The complaint further requests other additional costs, attorney fees, and any other further relief the Board deems just or equitable. Comp. at 3.

For the following reasons, the Board grants Amoco's motion to dismiss.

ARGUMENTS

Motion to Dismiss

In its motion to dismiss, Amoco argues that complainant has not stated a cause of action upon which relief may be granted and that the Board lacks jurisdiction in this matter. Specifically, Amoco contends that none of the statutory provisions cited by complainant in the complaint were in effect in 1952 when Amoco's interest in the property allegedly ceased. Mot. at 4. Amoco argues that "[b]ecause [its] alleged conduct ended in 1952, [Amoco] cannot be held liable for violating the Act without impermissibly applying the [Section 21] provisions retroactively." Mot. at 4. For these reasons, Amoco requests that the Board dismiss the instant action.

Complainant's Response

Complainant responds that Amoco's motion should be denied because the Act was intended to be applied retroactively. Alternatively, complainant argues that a finding of liability against Amoco in this matter would not require retroactive application of the Act. Complainant refers the Board to the purpose of the Act in deciding whether or not to

retroactively apply the Act. Complainant cites to several sections of the Act which allegedly exemplify the legislative intent that the Act was "meant to allow private individuals to take actions to restore the environment." Resp. at 2. To further its argument, complainant argues that the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) (42 U.S.C. Section 9601 *et seq*.) has previously been held to apply retroactively. Resp. at 3. Complainant additionally argues that there is no due process limitation against applying the Act retroactively. Complainant cites to Section 2(b) of the Act (415 ILCS 5/2(b) (1996)) for the proposition that the Act should have retroactive application. Resp. at 2, 4.

Further, complainant argues that the motion to dismiss should be denied because Amoco is liable for storing gasoline, which subsequently leaked from the underground storage tanks, onto the property. Complainant argues that the gasoline which contaminated the property belonged to Amoco at one time and, therefore, Amoco is responsible for any contamination caused by the gasoline. Resp. at 6. In addition to the above reasons, complainant also requests that the Board deny the motion to dismiss due to an insufficiency of facts at the present time. Resp. at 7, 9.

Amoco's Reply

In its reply, Amoco reiterates its argument that the Act clearly does not indicate that Section 21 may be applied retroactively. Amoco states that, absent express language or clear indication that Section 21 of the Act should be retroactively applied, Section 21 of the Act should be applied only prospectively. Reply at 2. Amoco further states that the complaint does not properly allege that Amoco violated Section 21 of the Act after its effective date, since no allegation in the complaint states that Amoco had any ownership, possession, or control over the underground storage tanks after 1952. Reply at 3.

ANALYSIS

A motion to dismiss should be granted where the well-pleaded allegations, considered in the light most favorable to the non-movant, indicate that no set of facts could be proven upon which the petitioner would be entitled to the relief requested. See Conway v. Johnson (August 7, 1997), PCB 97-221; BTL Specialty Resins v. IEPA (April 20, 1995), PCB 95-98. Applying this standard to the instant action, the Board finds that the complaint must be dismissed. Accordingly, the Board grants Amoco's motion to dismiss.

According to the complaint, Amoco installed underground storage tanks at the subject property and operated a gasoline filling station on the property from 1932 to 1952. In 1952, the property was purchased by Ray L. Pearson, who used the property and the underground storage tanks for a family-owned truck rental business. The complaint further alleges that Amoco allowed the underground storage tanks to remain in the soil and to leak, causing gasoline products to contaminate the soil in violation of Sections 21(a), (d), (e), (f), (i), and (m) of the Act. See 415 ILCS 5/21(a), (d), (e), (f), (i), (m) (1996)). These sections provide in pertinent part:

No person shall:

a. Cause or allow the open dumping of any waste.

***

d. Conduct any waste-storage, waste-treatment, or waste-disposal operation:

***

e. Dispose, treat, store, or abandon any waste, or transport any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder.

f. Conduct any hazardous waste-storage, hazardous waste-treatment or hazardous waste-disposal operation:

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i. Conduct any process or engage in any act which produces hazardous waste in violation of any regulations or standards adopted by the Board under subsections (a) and (c) of Section 22.4 of this Act.

***

m. Transfer interest in any land which has been used as a hazardous waste disposal site without written notification to the Agency of the transfer and to the transferee of the conditions imposed by the Agency upon its use under subsection (g) of Section 39.

Neither the Act nor any of the above statutory provisions were in effect when Amoco's interest in the property allegedly ceased in 1952. The Board agrees with Amoco that the Section 21 provisions cited in the complaint may not be retroactively applied to action that occurred prior to the effective date of the Act in 1970 because Section 49 of the Act specifically requires that "[a]ll proceedings respecting acts done before the effective date of this Act shall be determined in accordance with the law and regulations in force at the time such acts occurred." 415 ILCS 5/49(b) (1996); see also People v. Fiorini, 143 Ill. 2d 318, 333, 574 N.E.2d 612, 617 (1991).

In People v. Rawe (October 16, 1992), AC 92-5, the Board determined that the "cause" language in Section 21(a) of the Act could not be applied retroactively to actions that occurred prior to the effective date of the Act because such language deals with a certain course of conduct. The same logic applies to the allegations that Amoco conducted a waste-storage operation, treated or transported waste, conducted a hazardous waste-storage operation, conducted any act which produced hazardous waste, and transferred its interest in

the property, as proscribed by Sections 21(d), (e), (f), (i), and (m). For Amoco to have violated any of these provisions, Amoco would have had to engage in the proscribed conduct after the Section 21 provisions became effective. Because these allegations regard activities that would have occurred prior to the enactment of the various Section 21 provisions, Amoco can not be found to have violated these certain provisions.

Under appropriate circumstances, however, attaching liability to present conditions stemming from past acts does not necessarily have a retroactive application of the Act. In fact, the Board has allowed cases to proceed to hearing when the allegations involved continuing violations that began before Illinois adopted the Act. In making references to such ongoing violations alleged in a complaint, the Board stated in Lake County Forest Preserve v. Ostro (July 30, 1992), PCB 92-80, slip op. at 2, that "some of the allegations are of continuing violations, for which the Board could find a violation and order remedial action, even if they began long before the Act was adopted (emphasis added)." See also People v. Michel Grain Co., *et al*. (August 1, 1996, and December 5, 1996), PCB 96-143.

While the "allow" language in Section 21(a) and the "dispose, store, and abandon" language of Section 21(e), may, under appropriate circumstances, be read to encompass continuing violations, such a finding is not warranted in the present case. Under a continuing violation theory, in order for Amoco to have violated these provisions, Amoco must have had some sort of ownership, possession, control, or authority over the property or source of pollution after the effective date of the cited provisions. See Meadowlark Farms, Inc. v. Pollution Control Board, 17 Ill. App. 3d 851, 862, 308 N.E.2d 829, 836-37 (5th Dist. 1974); Freeman Coal Mining Corp. v. Pollution Control Board, 21 Ill. App. 3d 157, 163-69, 313 N.E.2d 616, 621-23 (3rd Dist. 1974); Mandel v. Kulpaka (July 30, 1992), PCB 92-33; Rawe, AC 92-5, slip op. at 6; see also Phillips Petroleum Co. v. Illinois Environmental Protection Agency, 72 Ill. App. 217, 220-21, 390 N.E.2d 620, 623 (2nd Dist. 1979) (discussing Meadowlark).

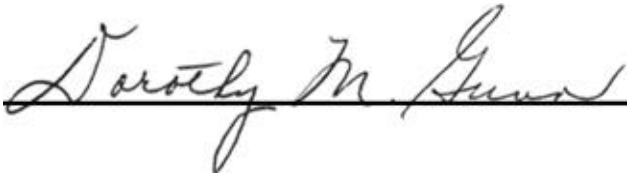
Because the complaint does not allege that Amoco owned, operated, possessed, or controlled the property or the underground storage tanks after the effective date of the Act in 1970 or after the Section 21 provisions became effective, Amoco could not have allowed contamination to continue or disposed, stored, or abandoned any waste based on the facts of this case after the Section 21 provisions became effective. See Mandel, PCB 92-33, slip op. at 5-6. Therefore, even assuming that all the well-pleaded allegations are true, none of the conduct alleged in the complaint occurred after 1970, the effective date of the Act, or after the effective dates of the Section 21 provisions. Consequently, no set of facts in the complaint can be proved that would entitle the complainant to relief. Hence, the complaint must be dismissed. See People *ex rel*. Fahner v. Carriage Way West, Inc., 88 Ill. 2d 300, 430 N.E.2d 1005, 1008-09 (1981).

IT IS SO ORDERED.

Board Member R.C. Flemal concurred.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1996)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 145 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 20th day of November 1997, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board