ILLINOIS POLLUTION CONTROL BOARD
November 29, 1990

LEFTON IRON AND METAL COMPANY INC., A MISSOURI CORPORATION, and LEFTON LAND AND DEVELOPMENT COMPANY, INC., A MISSOURI CORPORATION,	)	
Complainant,	)	
v.	)	PCB 87-191 (Enforcement)
MOSS-AMERICAN CORPORATION, A DELAWARE CORPORATION, and KERR-McGEE CHEMICAL CORPORATION, A DELAWARE CORPORATION,	)	
Respondents.	)	
KERR-McGEE CHEMICAL CORPORATION, A DELAWARE CORPORATION,	)	
Counterclaimant,	)	
v.	)	
LEFTON IRON & METAL COMPANY, INC., A MISSOURI CORPORATION, and LEFTON LAND AND DEVELOPMENT CO., INC., A MISSOURI CORPORATION,	)	
Counterdefendants.	)	

OPINION AND ORDER OF THE BOARD (by J.D. Dumelle):

This matter comes before the Board due to a citizen enforcement action filed on November 30, 1987 by Lefton Iron and Metal Inc. ("Lefton") alleging that Kerr-McGee Chemical Corporation ("Kerr-McGee") and its subsidiary, Moss-American Corporation ("Moss-American') have violated sections 21(a) and (e) of the Illinois Environmental Protection Act ("Act"). Lefton later amended this complaint at hearing to include section 12(d) of the Act. On December 29, 1988, Kerr-McGee filed a cross complaint maintaining that Lefton was also responsible for violations of the Act encompassing the same sections.

FACTS

From 1927 until 1968, Kerr-McGee or its subsidiary, Moss-American, operated a wood treatment facility near the intersection of South 20th Street and Upper Cahokia Road in Sauget, St. Clair County, Illinois ("site"). From 1969 until 1973, while still retaining ownership, Kerr-McGee no longer treated wood products at the site. In 1973, Kerr-McGee sold the forty-acre parcel to Lefton.

Under Kerr-McGee's ownership and until 1969, the company operated a wood treatment facility on the site. During the course of this operation, creosote and its by-products were allowed to spill or leak upon the land, into surface impoundments and into groundwater at the site. From 1969 until 1973 (the period of time between Kerr-McGee's cessation of operations and Lefton's purchase) Kerr-McGee stored creosote and various creosote wastes at the site in storage tanks, waste piles and on-site ponds.

Subsequent to Lefton's purchase of the site in 1973 (ostensibly for use as a scrap yard) very little activity occurred. Lefton's principal owner died shortly after the purchase and tentative plans never materialized. Lefton did, however, engage an independent contractor to salvage some of the storage tanks. In the course thereof, some of the creosote was removed from these tanks and pumped into 55 gallon drums. Moreover, between 1973 and 1986 some household refuse was deposited onto the site by unknown individuals.

In 1981, Kerr-McGee notified USEPA that hazardous materials had been used and were stored within the site. Lefton was not notified of this information. In 1986, the Illinois Environmental Protection Agency ("Agency") notified both Lefton and Kerr-McGee that both parties were potentially subject to liability in connection with the site. In 1987, Lefton filed suit against Kerr-McGee with the Board. In 1988, the State initiated an action against both parties in the Circuit Court of St. Clair County (No. 88-CH-4).

As a result of the state enforcement action, Kerr-McGee entered into a consent decree with the Attorney General. In this decree, Kerr-McGee incurred responsibility for the cleanup and agreed to certain payments. For example, Kerr-McGee paid $25,000 in lieu of a civil penalty, paid $28,093 in reimbursement cost to the State, set up on escrow account for $50,000 for the State to withdraw from as provided for within the consent agreement and agreed to pay up to $35,000 in oversight costs to the State annually.

The consent decree also states that:

> The State shall prosecute this pending action against Lefton Iron and Lefton Land to recover the complete relief to which the State is entitled to at law and in equity. To this end, nothing herein is intended to release any claims, causes of action or demand at law or in equity against Lefton Iron or Lefton Land for any liability they may have arising out of the matters alleged in the complaint.

(Respondent's Motion to Stay, Exhibit B at p. 10-11)

When the Agency tested the site in 1986, the hazardous constituents present included creosote, benzene, carbon disulfide, toluene, pentachlorophenol, naphthalene as well as various chlorinated solvents. Evidence admitted at hearing revealed that the contamination was so severe that some of these chemicals were present at bedrock level - 115 feet below the surface area of the site.

PROCEDURAL HISTORY

On November 30, 1987 Lefton filed this enforcement action with the Board against respondents Kerr-McGee and Moss-American. Shortly thereafter, the State of Illinois filed an enforcement action against both parties in the Circuit Court of St. Clair County. As a result of the state enforcement action, Kerr-McGee entered into a consent decree assuming full liability for clean-up of the contaminated site. Kerr-McGee also filed a counterclaim against Lefton in the circuit court on February 12, 1988 seeking equitable remedies in contract indemnification, contribution (among joint tortfeasors) and private recovery costs under CERCLA and SARA.

On January 14, 1988 Kerr-McGee also sought a stay of the Board proceedings pending the outcome of the circuit court action. This motion was granted by the hearing officer on March 11, 1988. Subsequent to this, Kerr-McGee also filed a motion to dismiss. The Board denied Kerr-McGee's motion to dismiss even though it noted in its Order of April 21, 1988 that the same violations were alleged in the state action and the same relief was sought. The Board held that in the absence of legal justification for dismissal or an Order of the Court, "this matter before the Board will proceed".

On July 8, 1988, the hearing officer, apparently based upon the April 21, 1988 ruling of the Board, vacated his grant of Kerr-McGee's motion to stay. Even though the April Board Order only addressed the motion to dismiss, the hearing officer

apparently interpreted the language that "this matter will proceed" to include a lifting of the stay. One month later, a new hearing officer was assigned to the case.

On December 29, 1988 Kerr-McGee filed a counterclaim against Lefton before the Board. On March 9, 1989 the Board accepted this counterclaim holding that it was not duplicative. In its ruling, the Board addressed Kerr-McGee's counterclaim in circuit court but did not consider the pending enforcement action by the State as against Lefton. Hearing in the case before the Baord was held on November 1st and 2nd in 1989.

DISCUSSION

The Board initially notes that this is a somewhat unusual case. Here we have two private parties disputing the extent of their liability while the same matters are pending before another jurisdiction. Moreover, a consent decree has been entered into which documents Kerr-McGee's operation and the contamination which resulted due to that operation.

Due to the existence of the consent decree, the question of whether Kerr-McGee has violated Sections 12 and 21 of the Act is moot. Kerr-McGee has undertaken full liability and, as such, the purpose of the Act has been achieved. Their contamination of the site by virtue of forty-two years of treating wood is evident within the record and set forth within the consent decree.

> During the period the site was operated as a wood treatment facility, creosote and creosote wastes were handled in such a manner that creosote and creosote wastes were allowed to spill and/or leak upon the land and into the surface impoundments and groundwater at the site. Upon cessation of operations in 1968 and continuing until October 1972, Moss and Kerr-McGee stored creosote and various creosote wastes at the site in storage tanks, waste piles, and two on-site ponds. Neither Moss nor Kerr-McGee disposed of these materials off-site or addressed the contamination resulting from operations at the site prior to the sale of the site.

(Respondent's Motion to Stay, Exhibit B, pg. 3)

Kerr-McGee has not used the site in twenty-one years and has agreed to a cleanup. Thus to fine Kerr-McGee or to issue a cease and desist order as Lefton pleads in their complaint would serve no purpose under the Act. In terms of a fine, Kerr-McGee has already tendered a civil penalty and committed to other, continuing obligations.[1] The appellate courts have held that the

pupose of Board imposed fines is to achieve compliance with the Act while punitive concerns are secondary. Modine Manufacturing v. PCB, 193 Ill. App. 3d 643 (1990). For the Board to levy a fine in the instant case would only be punitive given the extent of the consent decree. Accordingly, the Board declines to do so today.

The Board may also issue a cease and desist order and find one or both parties in violation of the Act, but to do so would have little, if any effect under these particular circumstances. The source of the pollution which contaminated this site has not been in operation for over two decades. The effect of a stop order therefore, would be in name only. Moreover, Kerr-McGee has assumed liability and entered into an agreement to clean up the site. The remaining issue then becomes whether Lefton violated the Act and, if so, how much liability it will incur.

The allegations that Lefton violated the Act were brought before the Board by Kerr-McGee's counterclaim filed on December 29, 1988. The state enforcement action against Lefton was filed on January 6, 1988, almost a full year earlier. Yet even if the Board elected to retain jurisdiction in this matter, its power under the circumstances would be limited to whether a violation of the Act occured. The Circuit Court, on the other hand, also has before it equitable considerations which will allow it to rule upon all aspects of the case. Had the state enforcement proceeding been brought before the Board, it would likewise possess jurisdiction over all the issues presented in the instant case. Instead, the Board is only left with the question of whether Lefton violated the Act - the very same issue the Circuit Court has before it.

If, for example, the Board were to retain jurisdiction and find both parties in violation of the Act, these very same parties would be in Circuit Court arguing the extent of their liability. In point of fact, they are already there. And the Circuit Court has the power to declare that either party is in violation of the Act and further, to order either party to proceed in accordance with its determination, regardless of whether it is based upon equity or law - or as is likely in this case, a combination thereof.

Although the Board is not precluded from considering equitable issues, it holds today that the Circuit Court of St. Clair County is in a much better position to do so. The Circuit

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[1]Had the Attorney General brought this enforcement action before the Board, the Board would have almost certainly accepted the Consent Decree pursuant to Chemetco v. IPCB, 140 Ill. App. 3d 283 (5th Dist. 1986).

Court entered the consent decree executed by the State and Kerr-McGee, and has a complete factual background of the case. Further, as a court sitting in chancery, it has undoubtedly considered many of the pendent issues such as contract law and contribution among joint tortfeasors in prior circumstances. Finally, the presence of only one adjudicator would alleviate the possibility of two dissimilar rulings and future litigation.

The Board notes that this is not the first time it has divested itself of jurisdiction in the name of judicial economy. Indeed, in Northern Illinois Anglers Assn. v. City of Kankakee, PCB 88-183 (January 5, 1989), we stated:

> It is the Board's position that in instances where the Board has concurrent jurisdiction with the Circuit Court, substantially similar matters previously brought before the Circuit Court can similarly be dismissed by the Board.

Id. at 5. Also see, Brandle v. Ropp, PCB 85-68 (June 13, 1985).

It should be noted that in Northern Anglers the Board used the language "previously brought before the Circuit Court". While the issue of Kerr-McGee's liability under the Act was initially brought before the Board, the reasons contained in this Opinion highlight why the Circuit Court is better equipped to handle this matter in this circumstance.

CONCLUSION

Given the unique facts in the case at bar, the Board is convinced that deferring jurisdiction to the circuit court is in the best interest of every party. As a result of the enforcement case filed against it, Kerr-McGee has assumed full liability, subject to state approval, for cleanup of the contaminated site. Thus the environmental damage is being rectified. The remaining question of Lefton's liability, both under the Act and in equity, are currently pending before the circuit court. Because the court is empowered to consider issues in equity and law, it can make a complete determination and craft a final resolution. Therefore, due to the highly unusual circumstances involved here, the Board hereby defers jurisdiction to the circuit court.

ORDER

For the reasons stated herein, this docket is hereby dismissed.

IT IS SO ORDERED.

Board Members J.C. Marlin and J. Anderson dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board hereby certify that the above Opinion and Order was adopted on the 29th day of November, 1990 by a vote of 5-2.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board