

ILLINOIS POLLUTION CONTROL BOARD  
October 19, 1995

RICHARD BURI, )  
 )  
 Complainant, )  
 )  
 v. ) PCB 95-165  
 ) (Enforcement-RCRA)  
 BATAVIA CONCRETE, INC., )  
 )  
 Respondent. )

ORDER OF THE BOARD (by G. T. Girard):

On September 25, 1995, the Board received a motion for leave to file a motion to dismiss and a motion to dismiss filed by respondent. The Board granted the motion for leave to file and on October 12, 1995 respondent filed a second copy of its motion to dismiss. The complainant responded to the motion to dismiss on October 4, 1995.

Respondent argues that the complaint filed in this proceeding is duplicitous of a proceeding pending in the circuit court. (Buri v. Batavia Concrete, Inc., Case No. CH KA 0182, Circuit Court of the Sixteenth Judicial Circuit, Kane County, Illinois.) Respondent states that "the factual predicate for each of the three counts of the Complaint in the Circuit Court Action is that BTEX constituents are allegedly migrating from Batavia's property onto Buri's neighboring property". (Mot. at 2.) Respondent also cites to the following similarities in the two actions: identical parties, identical properties, identical allegations concerning migration of contaminants, and "injunctive-type" relief is sought in both. (*Id.*) Respondent maintains that the Board should not "expend its resources adjudicating a matter which is substantially similar to Buri's prior pending action" in the circuit court. (Mot. at 4.) Therefore, respondent argues based on "law and common sense" the Board action should be dismissed.

Complainant does not dispute that the two actions involve the same parties and arise from contamination on Batavia's property. However, complainant argues that the "similarities end there". (Resp. at 2.) Complainant maintains that the two actions seek substantially different relief. Complainant states that the circuit court action involves property damage to complainant's property while the action before the Board addresses alleged regulatory violations on respondent's property. (*Id.*) Therefore, complainant asserts that the two actions are not duplicitous.

Section 103.124(a) of the Board's procedural rules, which implements Section 31(b) of the Environmental Protection Act (415 ILCS 5/31(b)), provides:

... If a complaint is filed by a person other than the Agency, the Clerk shall also send a copy to the Agency; the Chairman shall place the matter on the Board agenda for Board determination whether the complaint is duplicitous or frivolous. If the Board rules that the complaint is duplicitous or frivolous, it shall enter an order setting forth its reasons for so ruling and shall notify the parties of its decision. If the Board rules that the complaint is not duplicitous or frivolous, this does not preclude the filing of motions regarding the insufficiency of the pleadings.  
35 Ill. Adm. Code 103.124.

It is well settled that an action before the Board is duplicitous if the matter is identical or substantially similar to one brought in another forum. (Brandle v. Ropp, PCB 85-68, 64 PCB 263 (1985); DoAll Co. v. Skokie Valley Asphalt Company, Inc., PCB 94-256 (July 7, 1995).) In DoAll, the Board dismissed a portion of a complaint as duplicitous because the circuit court action was "premised on the same facts, and seeks the same relief". (DoAll at 3.) The Board was not persuaded by DoAll's arguments concerning separate legal theories. (*Id.*) However, the Board also proceeded to hearing with portions of the complaint which sought civil penalties for violations at the site. (DoAll at 4.)

The Board finds that the action pending in Kane County is not duplicitous of the action before the Board. The relief sought in the Kane County case includes "consequential damages and loss of value of the property" (Mot. Attch. A at 4.) Thus, in circuit court, complainant is seeking relief for damages complainant has suffered under common law. In the action before the Board, complainant is using the citizen enforcement provisions of the Environmental Protection Act (Act) to seek civil damages for violations of the Act and Board regulations. As the Board recently stated in People v. Bell Sports, Inc. and Waste Hauling Landfill, Inc., PCB 95-91 (August 3, 1995):

We also observe that the Board, as a statutorily-authorized forum to hear violations of the Environmental Protection Act and Illinois' regulations, is comprised of technically qualified members designated to hold hearings on violations of the Act, determine issues of fact regarding the alleged violations and to consider any other ancillary issues to the complaint such as permitting and proper closure of a facility. (415 ILCS 5/5(a) and (d).) (See e.g. Employers Mutual Companies v. Skilling (1994) 163 Ill.2d 284, 644 N.E.2d 1163, 206 Ill.Dec. 110, 113, where the Illinois Supreme Court held, citing Kellerman v. MCI Telecommunications Corp. (1986), 112 Ill.2d 428,

493 N.E.2d 1045, 98 Ill. Dec. 24, 25, that matters should be referred to an administrative agency when it has a specialized or technical expertise that would help resolve the controversy, or when there is a need for uniform administrative standards.)

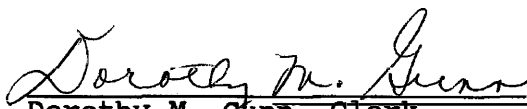
Therefore, the motion to dismiss is denied.

The hearing must be scheduled and completed in a timely manner, consistent with Board practices. The Board will assign a hearing officer to conduct hearings consistent with this order and the Clerk of the Board shall promptly issue appropriate directions to the assigned hearing officer consistent with this order.

The assigned hearing officer shall inform the Clerk of the Board of the time and location of the hearing at least 40 days in advance of hearing so that public notice of hearing may be published. After hearing, the hearing officer shall submit an exhibit list, a statement regarding credibility of witnesses and all actual exhibits to the Board within five days of the hearing. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible.

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 19<sup>th</sup> day of October, 1995, by a vote of 7-0.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board