

ILLINOIS POLLUTION CONTROL BOARD
November 6, 2003

2222 ELSTON LLC,)
)
Complainant,)
)
v.) PCB 03-55
) (Citizens UST Enforcement)
PUREX INDUSTRIES, INC., FEDERAL DIE)
CASTING COMPANY, FEDERAL)
CHICAGO CORPORATION, and)
RAYMOND E. CROSS,)
)
Respondents.)

THE CITY OF CHICAGO,)
)
Complainant,)
)
v.) PCB 04-29
) (Citizens UST Enforcement)
PUREX INDUSTRIES, INC., FEDERAL DIE)
CASTING COMPANY, FEDERAL)
CHICAGO CORPORATION, and)
RAYMOND E. CROSS,)
)
Respondent.)

ORDER OF THE BOARD (by W.A. Marovitz):

Today the Board accepts the City of Chicago's complaint concerning a site allegedly contaminated by leaking underground storage tanks. The site is located at 2228 N. Elston Avenue in Chicago. For purposes of hearing, the Board also consolidates the City of Chicago's enforcement action (docketed as PCB 04-29) with an already-existing enforcement action (docketed as PCB 03-55) brought against the same respondents for the same site.

In the order below, the Board describes the relevant procedural history before turning to the City of Chicago's complaint and the issue of consolidating the two related proceedings.

PROCEDURAL HISTORY

On October 25, 2002, 2222 Elston LLC (Elston) filed a complaint against several respondents alleging violations of the Environmental Protection Act (Act) (415 ILCS 5) (2002)) and seeking reimbursement of cleanup costs. The Board docketed Elston's enforcement action

as PCB 03-55. On December 20, 2002, the City of Chicago (City) filed a motion to intervene in PCB 03-55, which the Board denied on January 23, 2003. After granting numerous extensions to accommodate the parties' pleadings concerning motions to dismiss, the Board on June 23, 2003, accepted Elston's complaint for hearing against respondents Purex Industries, Inc. (Purex), Federal Die Casting Company (Federal Die), Federal Chicago Corporation (Federal Chicago), and Raymond E. Cross (Cross).

On September 5, 2003, the City filed a complaint against Purex, Federal Die, Federal Chicago, and Cross, which the Board docketed as PCB 04-29. The City also moved the Board to consolidate its enforcement action with the action initiated by Elston, PCB 03-55.¹ On September 16, 2003, the Board received a copy of a letter from attorney Jeffrey M. Smith directed to the City. In the letter, Mr. Smith states that Purex was dissolved on April 4, 2003. On September 23, 2003, Elston notified the Board that it does not oppose the City's motion to consolidate.²

CITY OF CHICAGO COMPLAINT

Under Section 31(d) of the Act, any person may file a complaint with the Board. *See* 415 ILCS 5/3.315, 31(d) (2002); 35 Ill. Adm. Code 103. In the Board's order denying the City's motion to intervene, the Board stated that the "ruling does not preclude the City from filing its own complaint to seek reimbursement for costs incurred involving the site." 2222 Elston LLC v. Purex Industries, Inc., PCB 03-55, slip op. at 2 (Jan. 23, 2003). The City has now done just that. In its complaint, the City alleges that between 1970 and 2000, underground storage tanks (USTs) at the site leaked waste and hazardous substances. *Comp.* at 4.

According to the City, Purex is the successor to companies that conducted varnish operations at the site from 1913 through 1978. The City further alleges that these operations included 17 USTs used for chemicals and petroleum. *Comp.* at 2-3. According to the complaint, Federal Chicago acquired the site in December 1978 and, at that time, Federal Chicago or Federal Die began conducting die-casting operations at the site, including use of the 17 USTs. *Id.* at 3. The City also alleges that from 1978 through January 2000, Cross (1) was a shareholder, officer, and director of both Federal Chicago and Federal Die, and (2) owned or controlled the site and its operations. *Id.* at 3-4.

The City seeks to recover past and future hazardous substance cleanup costs from respondents under Section 22.2(f) of the Act (415 ILCS 5/22.2(f) (2002)). *Comp.* at 5-6. The City also alleges that respondents have violated Sections 21(a), (b), (e), (f), and (m) (415 ILCS 5/21(a), (b), (e), (f), (m)(2002)) by, respectively, open dumping, abandoning waste on public property, disposing waste at an unauthorized disposal site, conducting hazardous waste disposal without a Resource Conservation and Recovery Act (RCRA) permit, and transferring a

¹ The Board cites the City's complaint as "Comp. at _," and the City's motion to consolidate as "Mot. at _."

² The Board cites Mr. Smith's letter as "Letter at _," and Elston's notification as "Notice at _."

hazardous waste disposal site without proper notifications. *Id.* at 6-12. The City also seeks civil penalties. *Id.* at 13.

The Board finds that the City's complaint meets the content requirements of the Board's procedural rules. *See* 35 Ill. Adm. Code 103.204(c), (f). Section 31(d) of the Act provides that "[u]nless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing." 415 ILCS 5/31(d) (2002); *see also* 35 Ill. Adm. Code 103.212(a). A complaint is duplicative if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. A complaint is frivolous if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *Id.*

Within 30 days after being served with a complaint, a respondent may file a motion alleging that the complaint is duplicative or frivolous, or stating another ground for dismissal. *See* 35 Ill. Adm. Code 101.506, 103.212(b). None of the respondents have filed a response to the City's complaint.

No evidence before the Board indicates that the City's complaint is duplicative or frivolous. The City seeks reimbursement of the City's alleged cleanup costs, while Elston seeks reimbursement of Elston's alleged cleanup costs. The Board did receive a copy of a letter from Jeffrey M. Smith, an attorney who the City's complaint describes as the authorized agent of Purex. Mr. Smith has not filed an appearance in PCB 03-55 or PCB 04-29, nor does he purport in the letter to be representing Purex before the Board.

Mr. Smith states in his letter that Purex was dissolved as a corporation in April 2003. Letter at 1. He also states that the City's complaint was not properly served because, contrary to the complaint, he is not the authorized agent of Purex and the United States Corporation Company is not the registered agent of Purex. *Id.* Mr. Smith affirms his statements under penalty of perjury. *Id.* at 2. His letter, however, which was directed not to the Board but to the City, does not ask the Board to dismiss the complaint or, for that matter, make any motion to the Board. The Board directs the City to file proof that its complaint was properly served on all respondents. *See* 35 Ill. Adm. Code 101.304(b)-(d), 103.204(a).

The Board accepts the City's complaint for hearing. *See* 415 ILCS 5/31(d) (2002); 35 Ill. Adm. Code 103.212(a). A respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if a respondent fails within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider the respondent to have admitted the allegation. *See* 35 Ill. Adm. Code 103.204(d).

MOTION TO CONSOLIDATE

When the City filed its complaint, it also moved the Board to consolidate this proceeding with PCB 03-55. The Board stated in PCB 03-55 that if the City files its own complaint, "consolidating the two actions may be appropriate." 2222 Elston LLC, PCB 03-55, slip op. at 2 (Jan. 23, 2003). On June 19, 2003, the Board accepted Elston's complaint in PCB 03-55 against

the same respondents that the City has now named as respondents for the same site. Like the City, Elston alleges violations of the Act related to alleged contamination from leaking USTs and seeks reimbursement of cleanup costs. *See* 2222 Elston LLC, PCB 03-55, slip op. at 1 (June 19, 2003).

In its motion to consolidate, the City asserts that the two cases involve the same site, environmental conditions, events, and transactions, and will therefore involve much of the same evidence at hearing. Motion at 2. The City emphasizes that the litigation in PCB 03-55 is still in its early stages, with discovery scheduled to continue well into next year. *Id.* The City maintains that consolidating the cases will neither delay nor prejudice any party to the Elston action, and will promote the Board's complete determination of all claims concerning respondents' activities at the site. *Id.* at 2-3.

None of the respondents have responded to the City's motion to consolidate. Elston filed a non-party "notice of non-opposition" to the City's motion to consolidate, stating that consolidation will enhance administrative efficiency and avoid any risk of inconsistent factual or legal rulings. Notice at 1.

Section 101.406 of the Board procedural rules provides:

The Board will consolidate [two or more] proceedings if consolidation is in the interest of convenient, expeditious, and complete determination of claims, and if consolidation would not cause material prejudice to any party. The Board will not consolidate proceedings where the burdens of proof vary. 35 Ill. Adm. Code 101.406.

The Board finds that consolidation of PCB 03-55 and PCB 04-29 is appropriate under Section 101.406 and grants the City's motion to consolidate. The actions are consolidated for hearing, but not necessarily for Board decision. *See* 35 Ill. Adm. Code 101.406. Future filings must reflect the amended caption of this order.

HEARING

The Board directs the hearing officer to proceed expeditiously to hearing. Among the hearing officer's responsibilities is the "duty . . . to ensure development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Adm. Code 101.610. A complete record in an enforcement case thoroughly addresses, among other things, the appropriate remedy, if any, for the alleged violations, including any civil penalty.

If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2002). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an on-going violation, if any, and, second, whether to order the respondent to pay a civil penalty. The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical

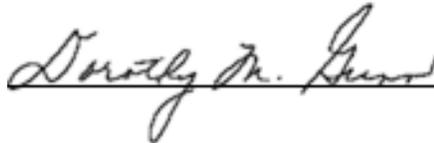
practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount, such as the duration and gravity of the violation, whether the respondent showed due diligence in attempting to comply, any economic benefit that the respondent accrued from delaying compliance, and the need to deter further violations by the respondent and others similarly situated.

Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any, including whether to impose a civil penalty, and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if any, including a specific dollar amount, and supporting its position with facts and arguments that address any or all of the Section 42(h) factors.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 6, 2003, by a vote of 6-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board