ILLINOIS POLLUTION CONTROL BOARD
July 20, 1995

WHITE GLOVE OF MORTON GROVE ILLINOIS, A LIMITED PARTNERSHIP,	)	
Complainant,	)	
v.	)	PCB 95-113
	)	(Enforcement - Land)
AMOCO OIL COMPANY, A DELAWARE CORPORATION,	)	
Respondent.	)	

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

This matter is a private citizen enforcement action filed by White Glove of Morton Grove (White Glove) on March 28, 1995 charging Amoco Oil Company (Amoco) with open dumping and unlawful disposal of petroleum, petroleum products and special waste in violation of Sections 21(a) and (e) of Illinois Environmental Protection Act (Act) and the corresponding Board regulations. (415 ILCS 5/21(a),(e); 35 Ill. Adm. Code 809.301 and 809.302.) White Glove seeks an award of cost recovery, civil penalties and injunctive relief directing Amoco to remediate White Glove's property. As an initial matter, the Board must make a "frivolous and duplicitous" determination in this private citizen enforcement in order to accept this case for hearing pursuant to the Act and the Board's regulations. (415 ILCS 5/31(b) (1992).) Additionally, there are three motions pending before the Board for decision: The first is a motion for leave to take depositions filed by White Glove; the second and third are cross-motions for sanctions filed by the parties.

For reasons more fully explained below, we hereby find that this case is neither frivolous nor duplicitous and set this matter for hearing. Additionally we deny the cross-motions for sanctions, and refer White Glove's motion for leave to take depositions to the hearing officer for a ruling.

FRIVOLOUS AND DUPLICITOUS DETERMINATION

According to the complaint, White Glove is the beneficial owner and operator of White Glove Car Wash located at 9122 Waukegan Road, Morton Grove, Illinois. White Glove alleges that from 1961 to 1986, Amoco was the former owner and operator of eight or nine underground storage tanks which were leaking, and during this time, Amoco failed to take remedial action. The Board received Amoco's answer and affirmative defenses on April 27, 1995. In its affirmative defenses, Amoco argues that the Board has no jurisdiction as the Office of State Fire Marshal has not directed Amoco to remove the tanks on the property and that the Board may not award civil penalties or grant injunctive

relief. Amoco has not filed a motion to dismiss or otherwise addressed the issue of whether the complaint is frivolous or duplicitous pursuant to Section 31(b) of the Act. (415 ILCS 5/31(b)).

Pursuant to Section 31(b) of the Act and the Board's procedural rules, the Board must make a determination as to whether the complaint is frivolous or duplicitous, and if the Board finds that the complaint is neither frivolous or duplicitous, the Board shall set the matter for hearing and assign a hearing officer. (415 ILCS 5/31(b) (1992); 35 Ill. Adm. Code 103.104.) We find that in this case, the complaint is neither frivolous or duplicitous. There is no allegation nor statement in either the complaint or answer that there is another identical or substantially similar matter pending before the Board or in any other forum. (*Brandle v. Ropp,* (June 13, 1985), PCB 85-68, 64 PCB 263; *League of Women Voters v. North Shore Sanitary Dist.*, (October 8, 1970) PCB 70-1,1 PCB 35; *Winnetkans Interested in Protecting the Environment v.Illinois Pollution Control Board*, 13 Ill.Dec. 149, 153, 370 N.E.2d 1176 (1st Dist. 1977).)

An action before the Board is frivolous if it fails to state a cause of action upon which relief can be granted by the Board. (*Citizens for a Better Environment v. Reynolds Metals Co.* (May 17, 1973) PCB 73-173, 8 PCB 46.) Complainant requests that the Board find respondent has violated Section 21(a) and (e) of the Act, assess civil penalties for each violation, direct that corrective action take place and reimburse complainant's costs incurred conducting corrective action at the site. We find that the allegations of the complaint are sufficient to warrant a hearing on the facts. At this time, therefore the Board finds that, pursuant to Section 103.124(a), the complaint is not frivolous.

MOTIONS PENDING BEFORE THE BOARD

Motion for Leave to Take Depositions

On April 28, 1995, White Glove filed a motion for leave to take depositions which was directed to either the hearing officer or, if one had not yet been assigned, to the full Board. White Glove requests that the Board allow discovery to proceed despite the case having not been accepted for hearing. On May 5, 1995, Amoco filed a response indicating that Amoco was opposed to taking depositions as they would be premature unless and until the case had been accepted for hearing by the Board.

Section 103.161(a) of our procedural rules specifically states that if the parties cannot agree on a schedule, then it is the hearing officer who will establish a discovery schedule. Therefore, as this case has been set for hearing by virtue of

today's order, we will leave the pending motion for leave to take depositions to the discretion of the hearing officer.

Cross-Motions for Sanctions

On May 22, 1995, Amoco filed a motion for sanctions against White Glove for costs and reasonable attorneys fees. The motion objects to White Glove's carbon copying the Board on certain letters to Amoco regarding discovery in this case, and though Amoco received a carbon copy, Amoco objects to White Glove sending a direct letter regarding discovery and assigning a hearing officer to one of the Board's attorneys. Amoco argues that sending the Board copies of private communication between the parties is not only in violation of the intended spirit of cooperation which is to take place in the deposition stage of a case, but also as inappropriate and ex parte communication. Amoco further alleges that the direct letter to a Board attorney contains argument and factual inaccuracies, and is therefore violative of the Board's procedural rules on ex parte contacts for the reason that Amoco is not afforded a reply.

White Glove responded to Amoco's motion for sanctions by filing a counter motion for sanctions on May 24, 1995. White Glove views the letter to the attorney as a request that White Glove be informed when a hearing officer is appointed. White Glove does not offer argument on the propriety of carbon copying the Board on correspondence between the parties, other than to explain her reasons for doing so. White Glove insists that all of its counsel's actions are to expedite this case and to have a hearing officer appointed. White Glove also seeks reasonable costs and attorneys fees for having to respond to Amoco's motion for sanctions.

Both cross-motions for sanctions are denied at this time. No costs or attorneys fees will be awarded for these recent filings on the issue of whether letters should or should not be carbon copied to the Board, or directly mailed to a Board attorney. Definitionally, White Glove did not engage in an ex parte communication with Board personnel as Amoco was a party to the communications because Amoco received carbon copies which allowed Amoco to file the motion for sanctions, or otherwise file a response. (35 Ill. Adm. Code 101.200.) Further, the correspondence is file-stamped and part of the public record in this case. More importantly, Amoco does not contend that it did not receive the correspondence.

Nonetheless, we appreciate Amoco's concerns regarding direct written communication by White Glove's counsel to specific personnel at the Board prior to the Board setting this matter for hearing and assigning a hearing officer to deal with these issues. Direct correspondence to a Board assistant is not appropriate. However, such communication in this case is not

tantamount to ex parte communication and it did not prejudice the respondent. We believe that the ultimate resolution of the discovery matter, *i.e.*, White Glove's filing of a motion for leave to take depositions with the Board, is the proper method of communicating White Glove's desire to proceed with this case and we note that attorneys who desire case processing information should contact the Clerk's Office or the Board's Chief Hearing Officer, if a hearing officer has not yet been assigned.

HEARING PROCEDURE

Having determined that this case is neither frivolous or duplicitous, the hearing must be scheduled and completed in a timely manner consistent with Board practices. The 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 the credibility of witnesses and all actual exhibits to the Board within five days of the hearing.

If after appropriate consultation with the parties, the parties fail to provide an acceptable hearing date or if after an attempt the hearing officer is unable to consult with the parties, the hearing officer shall unilaterally set a hearing date in conformance with the schedule above. The hearing officer and the parties are encouraged to expedite this proceeding to the extent 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 20th day of July, 1995, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board