ILLINOIS POLLUTION CONTROL BOARD
November 4, 2004

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | PCB 04-207 |
| | ) | (Enforcement – Land) |
| EDWARD PRUIM and ROBERT PRUIM, | ) | |
| | ) | |
| Respondents. | ) | |

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

On September 10, 2004, respondents, Edward and Robert Pruim (respondents) filed a motion to dismiss and memorandum in support of the motion (Memo). Respondents seek dismissal of a complaint (Comp.) filed by the Office of the Attorney General, on behalf of the People of the State of Illinois (complainant). On October 4, 2004, complainant filed a response (Resp.) to the motion. On October 18, 2004, respondents filed a motion for leave to file a reply and a reply (Reply). The Board grants the motion for leave to file a reply. For the reasons discussed below the Board denies the motion to dismiss.

## BACKGROUND

On May 21, 2004, complainant filed a nineteen-count complaint against the respondents alleging numerous violations of the Environmental Protection Act (Act) (415 ILCS 5/1 *et. seq.* (2002)) and the Board's regulations. The allegations revolve around the respondents' management, operation, and ownership of Community Landfill Company (CLC) and the Morris Community Landfill in Morris, Grundy County. Comp. at 1. CLC is a respondent in a related case before the Board, People v. Community Landfill Company, Inc., PCB 97-193.

On March 18, 2004, the Board denied the complainants' motion to file a third amended complaint in PCB 97-193. CLC, PCB 97-193 (Mar. 18, 2004). Specifically, the Board stated:

> The Board finds that the third amended complaint would prejudice the other parties, is not timely, and that complainant previously had the opportunity to amend the complaint. Because the right to amend a complaint is not absolute, the Board finds that the third amended complaint should not be accepted. Therefore, the Board denies the motion for leave to file a third amended complaint and strikes the third amended complaint. The Board further directs this matter to hearing expeditiously.
>
> The Board notes that nothing in this order prevents the complainant from filing a separate enforcement action against the new respondents named in the third amended complaint. CLC, PCB 97-193, slip. op. at 4-5, (Mar. 18, 2004).

## MOTION TO DISMISS

Respondents set forth three separate arguments in support of the motion to dismiss. First, respondents maintain that the Board should follow the reasoning articulated by the Board in CLC, PCB 97-193 (Mar. 18, 2004). Second, respondents assert that complainant failed to plead sufficient facts under Illinois law to support the complaint. Third, respondents argue that, at a minimum, Count XI should be dismissed based on the doctrine of *res judicata*. The following paragraphs will summarize the reasoning of the respondents.

### Board's Decision in PCB 97-193

Respondents maintain that the Board "has already found that the third amended complaint [in PCB 97-193] would prejudice the other parties, was not timely, and that Complainant had previous opportunities to amend the complaint." Memo at 5. Respondents argue that the allegations in this complaint are nearly identical to the allegations contained in the "third amended complaint" filed in PCB 97-193 and the allegations have been the subject of seven years of intense litigation in the almost identical matter in PCB 97-193. Memo at 1, 2. Further, respondents assert that the allegations in this complaint are based on documents that have been in the possession of the Illinois Environmental Protection Agency (Agency) since 1993, 1995, and 1996. *Id*. Based on these points, respondents assert that the complaint is untimely and will prejudice the respondents and CLC. Memo at 5.

### Untimely

Respondents observe that the first complaint filed in PCB 97-193 was filed on May 1, 1997, with amendments in 1998 and 1999. Memo at 5. Respondents also point to a Board order of April 5, 2001, ruling on two counts of the complaint and to a Board order of October 4, 2002, ruling on 17 counts of the complaint filed in PCB 97-193. *Id*. Respondents further note that discovery was closed in PCB 97-193 almost one year ago. *Id*. Respondents argue that every allegation in the complaint filed in this proceeding was known to complainant when the complaint was filed in 1997 and the Board noted that respondents have been owners of CLC since the inception of the 1997 complaint. Memo at 5-6. Therefore, respondents argue the Board should again hold that the complaint filed in this proceeding is untimely. Memo at 6.

Respondents also argue that complainant has had "numerous previous opportunities" to file a complaint against respondent and has not done so. Memo at 6-7. Specifically, respondent notes that only counts IV and VII "contain any specific allegations against either respondent." Memo at 6. Respondents argue that the documents referred to in count VII were in the Agency's possession for twenty-eight and sixteen months before the filing of the complaint in PCB 97-193. As to count IV, respondents argue that complainant "would" have known for nearly four years prior to filing the complaint in PCB 97-193 of alleged violations. Memo at 7.

Respondents argue that complainant "failed in its" attempt to add the respondents individually to the proceeding in PCB 97-193 and is therefore seeking relief against respondents separately. Memo at 7. Respondents assert that the Board should not allow the complainant to

succeed and the Board should apply the reasoning from PCB 97-193 and dismiss this complaint. Memo at 7.

**Prejudice**

Respondents reiterate that the documents cited by complainant in support of the alleged violations in counts IV and VII were in complainant's files at the time that all pleadings for PCB 97-193 were filed. Memo at 8. Further respondents argue that complainant for between eight and eleven years knew the facts behind the allegations. *Id*. Respondents argue that if the complaint in this proceeding goes forward, issues that have already been the subject of seven years of intense litigation will have to be relitigated. Memo at 8. Respondents opine that complainant may even seek to consolidate this case with PCB 97-193. *Id*. Respondents argue that consolidation of the two cases would have the same practical effect as amending the complaint. Memo at 9. As nothing has changed since the Board's March 18, 2004 ruling in PCB 97-193, respondents argue the Board should dismiss the complaint. Memo at 9.

**Failure to Allege Sufficient Facts**

Respondents argue that complainant has failed to allege facts establishing that respondents had personal involvement or active participation in the specific acts resulting in liability, not just personal involvement or active participation in the management of the corporation. Memo at 9, citing People v. Tang, 346 Ill. App. 3d 277, 289, 805 N.E.2d 243, 253-54 (1st Dist. 2004). Respondents assert that merely alleging that an officer "caused or allowed" certain actions to occur in violation of the Act is insufficient to support a cause of action. Memo at 9, citing U.S. v. Bestfoods, 524 U.S. 62, 72 (1998); Tang at 346 Ill. App. 3d at 289.

**Caused or allowed**

Respondents argue that in order for liability to attach to corporate officers, complainant must allege facts establishing that respondents had personal involvement or active participation in the acts resulting in liability. Memo at 10, citing Tang. Respondents assert that allegations of personal involvement in the management of the corporation are not sufficient under Illinois law for liability to attach. *Id*. Respondents further maintain that allegations that respondents "caused or allowed" certain actions to occur is not sufficient. *Id*. Respondents point to the complaint and note that throughout the complaint the allegations may have slightly different wording; however, the effect is the same. Memo at 11. Therefore, respondents argue the complaint should be dismissed. Memo at 12.

**Allegations Do Not Rise to Level Where Liability Should Attach**

Respondents argue that the complaint must allege more than the fact that the corporate officer held a management position, had general corporate authority, or served in a supervisory capacity in order to establish liability under the Act. Memo at 13. Respondents also allege that activities that involve the facility, such as: 1) monitoring performance, 2) supervising finance and capital budget decisions, and 3) articulating general policies and procedures, should not rise

to direct liability. Memo at 13, citing Bestfoods, 524 U.S. at 72. Respondents maintain that the activities set forth in Count I are just such activities. Memo at 13.

Respondents argue that in cases where liability did attach, the courts found that the officer personally ran operations at the site, spent a great deal of time at the site, directly supervised the employees, and personally participated in activities leading to the violations. Memo at 13, citing People v. Agpro, 345 Ill. App. 3d 1011, 1028-29, 803 N.E.2d 1007, 1019 (2nd Dist. 2004). Respondents also cite to a Seventh Circuit case where liability attached when the officer knowingly exercised direct control over the substance at issue. Memo at 13, citing Arst v. Pipefitters, 25 F.3d 416, 421 (7th Cir. 1994).

Respondents argue that the complaint does not allege that the respondents manage the day-to-day operations of CLC, other than to make "vague and general" allegations that respondents "managed, operated and co-owned" CLC. Memo at 14. Respondents assert that the complaint does not make these specific allegations because complainant cannot. *Id*. Respondents maintain that sworn evidence establishes the respondents' complete lack of involvement in day-to-day operations of the landfill. Memo at 14, Exhibit F. Respondents assert that the involvement of respondents is only in "typical corporate functions" such as paying bills and securing customers. *Id*.

Respondents maintain that the allegations in the complaint are insufficiently pled and do not establish a cause of action against respondents individually. Memo at 14. Therefore, respondents argue the complaint should be dismissed.

**Dismissal of Count XI**

Respondents argue that count XI should be dismissed based on the doctrine of *res judicata*. Memo at 15. The doctrine of *res judicata* provides that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive to the rights of the parties and their privies and constitutes a bar to subsequent action involving the same claim. Memo at 15, citing Nowak v. St. Rita High School, 197 Ill. 2d 381, 389, 757 N.E.2d 471, 477 (2001). Respondents argue that the Board, a court of competent jurisdiction, dismissed the identical count in CLC, PCB 97-193 (July 26, 2001). Further, respondents assert that the complainant is the same party in this action and respondents, under Grisanzio v. Bilka, 158 Ill. App. 3d 821, 827, 511 N.E.2d 762, 766 (2nd Dist. 1987), are the same parties. Memo at 16. Therefore, respondents argue that at a minimum count XI should be dismissed.

**RESPONSE**

Complainant responds in opposition to the motion dismiss; however, complainant does consent to dismissal of count XI. Resp. at 8.. Complainant's argument is couched in terms of the standard for reviewing a motion to dismiss. Complainant enunciates that standard: that the Board "admits all well pled facts in the complaint, and all inferences must be drawn in favor of the nonmovant." Resp. at 2, citing People v. Skokie Valley Asphalt *et al.*, PCB 96-98 (June 5, 2003) slip. op. at 7. Based on that standard, complainant argues that the facts have been sufficiently pled. Resp. at 4. Complainant further argues that the Board's reasoning in PCB 97-

193 is not controlling here and therefore, the motion to dismiss should be denied. Resp. at 2. The following paragraphs set forth the complainant's support for these arguments.

**Board's Decision in PCB 97-193**

Complainant points out that the Board's decision in CLC, PCB 97-193 (Mar. 18, 2004) applied factors interpreting 735 ILCS 5/2-616(a) and found that earlier findings of violation would prejudice the additional respondents. Resp. at 2-3. Complainant asserts that the factors applied in PCB 97-193 have no applicability to this case and CLC is not a party to this case and cannot be prejudiced. Resp. at 3. Further, complainant maintains that a prior finding of violation against another entity prejudices neither respondent in this proceeding. Resp. at 3.

Complainant argues that the Board has consistently recognized that there is no statute of limitations for enforcement proceedings under the Act. Resp. at 3, citing People v. Peabody Coal Company, PCB 99-134, slip op. at 6, (June 5, 2003). Complainant asserts that the respondents' argument is more akin to the affirmative defense of *laches*. Resp. at 3. Complainant notes that the Board has ruled that *laches* is not a proper basis for a motion to dismiss. Resp. at 3, citing Skokie Valley Asphalt PCB 96-98, slip op. at 6, (June 5, 2002).

**The Complaint is Sufficiently Pled**

Complainant maintains that the complaint is sufficiently pled and respondents' reliance on Tang is misplaced. Resp. at 4. Complainant argues that the applicable standard for evaluating the sufficiency of the pleading is People v. C.J.R. Processing *et al.*, 269 Ill. App. 3d 1013 (3rd Dist. 1995). Resp. at 4. Complainant argues that the location of the site and the hearing in this case is and, will be, Grundy County and that county is located in the area of the State in which the Appellate Court, Third District presides. *Id*. Complainant notes that the Third District Appellate Court will hear any appeal of a Board decision. Complainant contends that since Tang and C.J.R. set different pleading standards, the First District's 2004 decision in Tang is not binding. *Id*.

Complainant asserts that in C.J.R., the court held that the General Assembly intended to impose liability on those responsible for harming the environment, including corporate officers. Resp. at 4, citing C.J.R., 269 Ill. App. 3d at 1018. Complainant indicates that the court found that a corporate officer could be held liable for personal involvement or active participation in a violation of the Act. Resp. at 5, citing C.J.R., 269 Ill. App. 3d at 1018. However, complainant argues the court found that the State had sufficiently pled against the corporate officer by merely alleging that the respondent "caused or allowed" the violations. *Id*.

Complainant concedes that there is a "split between the 1st and 3rd Districts on the pleading issue." Resp. at 5. Complainant argues that to the extent that Tang disagrees with C.J.R., the Board should consider C.J.R. applicable law. Resp. at 5. Complainant maintains that under either standard, however, the complaint is sufficiently pled. *Id*. Complainant asserts that even applying the standard in Tang, when all well pled facts and inferences are taken as true, the complaint is sufficient. Resp. at 8.

## REPLY

In the reply, respondents take issue with the complainant's argument that C.J.R. should be applied and Tang ignored because the Third District Appellate Court would preside over any potential appeal of a Board decision. Reply at 2-4. Respondents argue that complainant has cited no legal authority for this proposition and even the courts do not "blindly follow" prior precedent. Reply at 2, citing *In re* Application of County Treasurer, 292 Ill. App. 3d 310, 315, 685 N.E.2d 656 (1997). Respondents argue that the Board could and should review the sufficiency of the pleadings using both Tang and Agpro.

## DISCUSSION

The Board will first set forth the standard for review employed by the Board in deciding a motion to dismiss. Next the Board will address whether or not the Board's March 18, 2004 decision in CLC, PCB 97-193 is controlling. Finally, the Board will decide if the complaint has been sufficiently pled.

### Standard of Review

For purposes of ruling on a motion to dismiss, all well pled facts contained in the pleading must be taken as true and all inferences from them must be drawn in favor of the nonmovant. Skokie Valley Asphalt, slip op. at 6; People v. Stein Steel Mills Services, Inc., PCB 02-01, (Nov. 15, 2001).

### Board's Decision in PCB 97-193

Respondent has argued that the Board should dismiss this complaint for the reasons articulated by the Board in the March 18, 2004 decision in PCB 97-193. *See* Memo at 5-9. However, respondents' argument ignores the specific finding by the Board that:

> nothing in this order prevents the complainant from filing a separate enforcement action against the new respondents named in the third amended complaint. CLC, PCB 97-193, slip. op. at 4-5, (Mar. 18, 2004).

Thus, the Board clearly indicated that a separate complaint could be filed against the respondents.

Respondents argue that the complaint would prejudice the respondents and CLC and that the complaint is untimely. *See* Memo at 5-9. The Board is not persuaded by these arguments. As complainant points out, a finding of violation by CLC in PCB 97-193 does not prejudice the respondents in this, a different proceeding with different respondents. Further, complainant is correct that the Board has consistently found that there is no statute of limitation under the Act and a defense of *laches* does not warrant dismissal. Therefore the Board finds that the March 18, 2004 decision in PCB 97-193 is not controlling in this case.

## Sufficiency of the Complaint

Respondents argue that under Tang and Agpro, the complaint is not sufficiently pled to establish that respondents are liable under the Act. *See* Memo at 9-14. Complainant asks the Board to rely on C.J.R., but notes that under either standard the complaint is sufficient. The Board agrees that the complaint is sufficient. *See* Resp. at 8. The court in Tang reviewed the decision in C.J.R. to arrive at the conclusion that "in order to state a claim for personal liability against a corporate officer under the Act, a plaintiff must do more than allege corporate wrongdoing." Tang, 805 N.E.2d at 253. The court goes on to state that "[t]he plaintiff must allege facts establishing that the corporate officer had personal involvement or active participation in the acts resulting in liability." Tang, 805 N.E.2d at 253-54. Personal involvement or active participation in the management of the corporation is not sufficient, according to the court. Tang, 805 N.E.2d at 254.

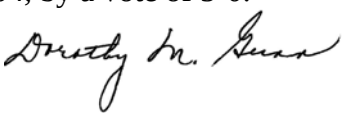
The Board need look no further than the first 17 paragraphs of count I, which are incorporated into the remaining counts, to establish that the complaint is sufficient. In paragraph nine, the complaint states that respondents "were responsible for, and did, sign and submit all permit application and reports" to the Agency related to the landfill. Comp. at 2. In deciding a motion to dismiss, all well pled facts contained in the pleading must be taken as true. Therefore, the Board finds that the facts pled in the complaint are sufficient to establish "that the corporate officer had personal involvement or active participation in the acts resulting in liability." Tang, 805 N.E.2d at 253-54.

## CONCLUSION

As discussed in the preceding paragraphs, the Board finds that the March 18, 2004 decision in PCB 97-193 is not controlling in this proceeding. The Board further finds that the complaint is sufficiently pled to establish liability of the respondents. Finally, the Board will dismiss count XI as the complainant has no objection. The Board however denies the motion to dismiss the remaining counts of the complaint and directs the parties to hearing on this complaint.

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 4, 2004, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board