ILLINOIS POLLUTION CONTROL BOARD
November 3, 1994

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA AND UAW LOCAL 974; AND CITIZENS FOR A BETTER ENVIRONMENT, Complainants, v. CATERPILLAR INC., Respondent, - - - - - - - - - - - - - - - - - - - ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Party-in-Interest.	)	PCB 94-240 (Enforcement)

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

This matter is before the Board on a private citizens enforcement complaint filed on September 1, 1994 by three complainants: the International Union, United Automobile, Aerospace and Agriculture Implement Workers of America ("UAW International Union"); UAW Local 974 ("Local 974"); and Citizens for a Better Environment ("CBE")(collectively, "complainants"). The seven-count complaint alleges that Caterpillar, Inc. ("Caterpillar" or "company") has violated seven different provisions of the Environmental Protection Act ("Act") and 14 provisions of the Illinois Administrative Code. The complainants seek declaratory and injunctive relief and the maximum penalties allowed by law for these violations.

The complaint charges that Caterpillar conducted the unlawful operation of a waste treatment, storage and disposal site, operated a hazardous waste management facility without interim status, operated without a hazardous waste permit, operated in violation of the Board's hazardous waste regulations, failed to apply for and obtain a post-closure permit, unlawfully stored hazardous waste, caused water pollution and created a water pollution hazard at Caterpillar's East Peoria transmission and assembly operations. The complaint specifically alleges violations of Sections 12(a), 12(d), 21(e), 21(f), 21(f)(1), 21(f)(2), 21(f)(3) of the Act and the Board's regulations, 35 Ill. Adm. Code 702.121(a), 702.121(b), 703.121, 703.126, 703.151,

703.152, 703.152(a), 703.153, 703.154, 703.155, 703.155(a), 703.155(b), 703.155(c) and 703.180.

On September 20, 1994, Caterpillar filed a motion to dismiss the complaint arguing that the complaint is frivolous and duplicitous, that it fails to state a cause of action and that the Board lacks jurisdiction to consider the matter. On October 11, 1994, the complainants filed a response to the motion to dismiss. Thereafter on October 18, 1994, Caterpillar filed a reply to the motion accompanied by a motion for leave to file. On October 31, 1994, complainants filed a response to Caterpillar's reply. For the reasons more fully explained below, the motion to dismiss is denied, and this case shall be set for hearing.

BACKGROUND

As alleged in the complaint, and as described in the memorandum of law and affidavits in support of the motion to dismiss, in November of 1990 during construction excavation at Caterpillar's East Peoria transmission and assembly operations, Caterpillar discovered perchlorolethylene, trichloroethylene and 1,2 dichloroethylene on-site. The complainants allege that tetracholoethylene and vinyl chloride were also sampled at the site. (Complaint at 3.) Complainants allege, among other things, that the contaminants at issue here are probable and known human carcinogens, that at least 13,000 tons of contaminated soil have already been excavated and need to be remediated, and an additional 35,000 tons may need to be excavated. According to the complainants, the excavated 13,000 tons contain nearly 4 tons of VOCs, including 3 tons of perchlorolethylene. The 35,000 tons of soil needing to be excavated contain 13 tons of VOCs. (Complaint at 5.) Complainants further allege there is shallow groundwater below the surface of the contamination at a depth of 15 to 27 feet, that this groundwater has been impacted, and that the groundwater flow runs towards the Illinois River.

According to Caterpillar, the company notified the Illinois Environmental Protection Agency ("Agency"), entered the Agency's voluntary cleanup program which is now referred to as the Agency's 4(q) Pre-Notice Program ("4(q) Program"), and has been in the program since. Some corrective action has been conducted at the site. According to the reply filed by Caterpillar, the company has recently received approval under the 4(q) Program for Caterpillar's soil remediation plan and has begun remediation of the excavated soils. (Reply at 2.)

MOTION TO DISMISS

Citing both the Board's caselaw on frivolous and duplicitous determinations and 35 Ill. Adm. Code 103.140, Caterpillar argues that the complaint should be dismissed because

it fails to state a cause of action. (See Citizens for a Better Environment v. Reynolds Metals Co., (May 17, 1973) PCB 73-173, 8 PCB 46.) Caterpillar mainly argues that because the bulk of the complaint (Counts I - VI) concerns Caterpillar's failure to obtain the proper permits for handling, storing and disposing of hazardous substances, it should be dismissed because Caterpillar is effectively exempt from having to submit permit applications. Caterpillar asserts that its participation in the 4(q) Program is the functional equivalent of submitting to the permitting process, and it cannot now be sued for not having done so. Caterpillar is essentially arguing that its participation in the 4(q) Program effectively shields these counts of the complaint from this private citizen enforcement action because the Board can not now order that Caterpillar apply for any permits. In any event, Caterpillar argues that it has begun corrective action and the necessity of a permit is moot.

Caterpillar further argues that the complaint's only other allegations do not relate to permit requirements (Count VII), but concern other alleged violations of the Act's land and water pollution prohibitions contained in Section 12(a) and (d), and these allegations fail to state a cause of action altogether. Caterpillar cites to appellate court caselaw for the proposition that a complaint must allege facts which would show a very definite danger of pollution, and that in the absence of such specificity, a conclusory allegation is insufficient to state a cause of action. (City of Des Plaines v. Pollution Control Board (1st Dist. 1978) 17 Ill. App.3d 924, 377 N.E.2d 114.) and Jerry Russel Bliss Inc. v. IEPA (5th Dist. 1985) 138 Ill. App.3d 699, 485 N.E.2d 1154.) Caterpillar asserts that the allegations are fatally insufficient in that they merely claim "on information and belief" that groundwater has been impacted. Among Caterpillar's many complaints with the water pollution allegations, the company is mostly concerned with the term "impacted" and claims that this description is simply inadequate. Caterpillar believes that the water pollution allegation must do more; it must claim that the contamination will create a nuisance, or render the waters "harmful, detrimental, or injurious." (Memorandum of Law at 9.)

Caterpillar also argues that the complaint is duplicitous because this matter is already being considered by another forum, i.e., the Illinois Environmental Protection Agency. Caterpillar argues that Board jurisdiction over this citizen enforcement action is inconsistent with the intent of the Section 4(q) Program and accordingly should be barred.

Caterpillar also argues that under the federal CERCLA provisions analogous to Illinois' clean up statutes, Congress barred federal courts from reviewing private citizen actions when a site is involved in a CERCLA remedial action. Caterpillar argues that this case is nothing more than a collateral attack on

the remedial efforts of the Agency and that it should be jurisdictionally barred, as it is under the federal law. (Motion to Dismiss at 5, citing, CERCLA, 42 U.S. C. Sec. 9613(h).)

In response to the motion to dismiss, the complainants argue that unlike CERCLA, which provides an express bar to federal court jurisdiction over a citizens suit, there is no such bar to citizens' enforcement actions brought pursuant to Section 31(b) of the Act. They argue that neither Section 22.2(m)(2) of the Act nor the relevant administrative rules of the Board or the Agency contain such a bar. Therefore, complainants argue that the Board is not without jurisdiction to hear this case.

DISCUSSION

The Board has previously held that a complaint should not be dismissed unless it clearly appears that no set of facts could be proven which would entitle a complainant to relief. (Herrin Security Bank v. Shell Oil Company (September 1, 1994) PCB 94-178.) At this stage of the proceeding, Caterpillar has not shown that an absolute bar exists to the bringing of this particular enforcement action and we find that the complaint alleges sufficient facts and raises an adequate basis for relief so as to warrant a hearing. It is not frivolous since it presents allegations which, if proven, may result in findings of violations of the Environmental Protection Act.

With regard to Counts I through IV, the Act provides that enforcement actions may be brought by any person such as the Agency, local state's attorneys or by private citizens. (415 ILCS 5/31(a)(1) and (b).) While Caterpillar's incentive to enter the 4(q) Program may be the Agency's agreement to excuse any permitting requirements that would otherwise apply, we find nothing specifically in the Act which would prohibit a citizens enforcement action on these counts. The parties, of course, are free to further address the applicability of permits to the 4(q) Program during this proceeding.

With regard to Count VII, we find that the cases cited by Caterpillar are distinguishable, especially City of Des Plaines which involved allegations of air pollution from a sewage treatment plant. In this case, the complainants have pled sufficient information to survive the motion to dismiss alleging that there are large quantities of hazardous substances on-site that are known and probable human carcinogens, that the groundwater has been impacted, that the contaminants have migrated toward the Illinois River, that the contaminants are in the groundwater, and that the uses of the river will be negatively impacted and degraded if the contaminants remain in the soil and groundwater.

Finally, with regard to whether the complaint is duplicitous

under Section 31(b) of the Act, Caterpillar appears to argue that the complaint is duplicitous since the environmental matters at issue have been brought to the Agency's attention and may be resolved under the Agency's 4(q) Program. We have before us, however, a citizen's enforcement complaint alleging various violations of the Act. Pursuant to Section 31(b), 35 Ill. Adm. Code Section 103.124 and Board precedent, a complaint is duplicitous if it is identical or substantially similar to one brought in another forum. (Brandle v. Ropp, (June 13, 1985), PCB 85-68, 64 PCB 263.)[1] In the context of the adjudication of environmental enforcement cases, the Agency is not a duplicative forum to the Board. Rather, the Agency, along with the Illinois Attorney General, is the prosecutorial arm of the enforcement process. When the Agency chooses to work with companies in its voluntary program, it may of course exercise its prosecutorial discretion to bring or not bring a complaint before the Board or a court. The exercise of this discretion however does not make the Agency another "forum" for the adjudication of a citizen's enforcement complaint properly brought pursuant to Section 31(b)of the Act. Since the issues before the Board are not being litigated before any other judicial forum with jurisdiction to hear and decide these issues, this complaint is not duplicitous.

CONCLUSION

We hereby deny the motion to dismiss brought by Caterpillar, Inc. We find that the complaint is neither frivolous nor duplicitous, that it states a claim upon which relief could be granted, and no authority exists serving to deprive us of jurisdiction of this matter. Accordingly, this matter is to proceed, to hearing, and Caterpillar's answer to the complaint is due 30 days from the date of this order.

Additionally, we believe that the Agency's participation in this case is vital to a final resolution of this matter. We hereby request, pursuant to Section 30 of the Act, that the Agency initiate an investigation of the allegations contained in the complaint. The results of that investigation are important and are to be made a part of this case. We believe that in the interest of a convenient, expeditious and complete determination of this claim, the Agency should be joined as a party to this proceeding. Further, any order we may eventually enter in this

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[1]Pursuant to Section 31(b) of the Act, complaints of violations of the Act may be brought by the Illinois Environmental Protection Agency, the Attorney General, local state's attorneys or private citizens, and may be heard by either the Board or circuit courts of Illinois. Generally, when the Board finds an enforcement action "duplicitous" such finding is based upon facts that the same issue is being litigated in an Illinois circuit court. (See e.g. Decatur Auto Auction v. Macon County Farm Bureau, Inc., et al. (November 18, 1993) PCB 93-192.)

case has the potential to impact the Agency's 4(q) Program, and therefore, on our own motion we find that the Illinois Environmental Protection Agency is a necessary party-in-interest. (35 Ill. Adm.Code 103.141 and 103.121(c).)

The hearing officer shall establish a hearing schedule which may include a pre-hearing conference or a status meeting with all the parties in order to coordinate, among other things, a filing date for the results of the Agency investigation and the presentation of evidence and testimony at hearing.

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 3rd day of November, 1994, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board