

ILLINOIS POLLUTION CONTROL BOARD
April 6, 1995

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-Land,Water)

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

This matter is before the Board pursuant to a March 31, 1995 motion by the respondent, Caterpillar, Inc. ("Caterpillar") requesting "full Board consideration of complainant's motion for inspection of premises." Caterpillar is requesting that the Board consider and immediately rule upon a motion currently pending before the hearing officer in this case which was filed by the International Union, United Automobile, Aerospace and Agriculture Implement Workers of America and UAW Local 974 ("complainants" or "UAW") on March 28, 1995 and which seeks access to Caterpillar's East Peoria facility ("Caterpillar site") to conduct a site inspection ("motion for site inspection"). Caterpillar filed an objection to the complainants' motion for a site inspection on April 3, 1995. The complainants filed a response to Caterpillar's motion for full Board consideration on April 5, 1995 and also filed a reply to Caterpillar's response.¹

The Board hereby grants Caterpillar's motion for full Board consideration and denies the complainants motion for site inspection. The arguments regarding each of the motions are set forth below.

¹We note that the reply was unaccompanied by a motion for leave to file, and that the Board's procedural rule, Section 101.241(c), does not provide an automatic right to file a reply. However, the Board may allow the reply in order to prevent material prejudice, and due to the importance of the matter at hand, the Board will allow the reply. (See 35 Ill. Adm. 101.241(c).)

**CATERPILLAR'S MOTION FOR FULL BOARD CONSIDERATION OF
COMPLAINANTS' MOTION FOR A SITE INSPECTION**

As a basis for its request that the Board render a decision rather than the hearing officer, Caterpillar cites to the unique nature of this site inspection request; that there is a question of urgency due to the nearness of the hearing date of May 8, 1995; that this request for a site inspection raises issues regarding safety for Caterpillar employees in light of the current labor dispute involving Caterpillar and the UAW; and finally, that this matter involves important policy questions regarding the use of discovery in a citizen enforcement action. (Caterpillar Motion at 2.) In response, complainants believe that there is no valid reason to deprive the hearing officer of her authority to enter an order pursuant to the discovery provisions contained in the Board's procedural rules, 35 Ill. Adm. Code 103.161(a)(4). (Complainants' Response at 1-2.) However, the complainants do agree that in the "interests of affording the parties a full investigation and airing of the issues set forth in the complaint," that the Board should determine whether it will entertain the motion for inspection or whether it will delegate the matter to the hearing officer. (Complainants' Response at 2-3.)

While issues of discovery normally would be dealt with by the hearing officer in the course of conducting a fair hearing, given the parties and their particular concerns, and in the interest of administrative economy, we will grant Caterpillar's motion for full Board consideration.

COMPLAINANTS' MOTION FOR SITE INSPECTION

The complainants' motion for site inspection requests an order from the hearing officer granting the complainants access to the Caterpillar site for a period of 19 days from April 3, 1995 through April 21, 1995 for the purpose of making surface and subsurface inspections, surveys and photographs. (Complainant's Motion for Site Inspection at 2.) The motion further states that the complainants seek access to the land in and around Buildings X and HH, and the land located southwest to west by northwest of Building HH, between Building HH and the Illinois River. (Complainant's Motion for Site Inspection at 2.)

In response, Caterpillar objects to the complainants having access to the property to make a site inspection in total and cites four bases: (1) Caterpillar is concerned with the safety of its employees due to the on-going labor dispute between Caterpillar and UAW; (2) neither the Environmental Protection Act ("Act") nor the Board's procedural rule at Section 103.161(a)(4) allowing a reasonable site inspection, authorizes an invasive inspection comprised of extensive sampling, monitoring or photographing; (3) extensive sampling, monitoring, and

photographing have already been performed at the site for purposes of characterizing the site; and (4) sampling the site risks spreading any contamination on the site and that no technical experts have been proffered regarding the proposed inspection.²

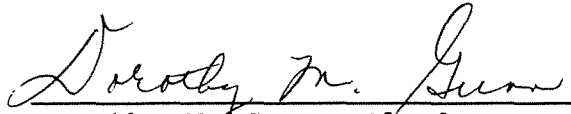
Regarding each of Caterpillar's objections, first, the complainants reply that all arguments concerning the labor dispute are outside of the scope of the pleadings and should be stricken by the Board. Second, while the complainants do not dispute that the Agency is the statutorily authorized entity to conduct site investigations, under the Act and the Board's discovery rule, 35 Ill. Adm. Code 103.161(a)(4), the complainants should have the same access as the Agency for purposes of discovery in order to "protect against inadequate prosecutions." Third, the complainants further dispute that any information that they will gain as a result of a site inspection would be duplicative or irrelevant; the complainants insist that the Agency's investigation report is wholly insufficient. Also on the issue of relevance of any information that could be gained from a site inspection, the complainants summarily point to the complaint's plain allegations of contamination of soil and groundwater and that any information obtained from the site inspection regarding contamination would be clearly relevant. (Id. at 19.) Fourth, regarding Caterpillar's final concern that the complainants' request is unreasonable and fails to provide any information about the sampling plan or anything else, for the first time in the reply, the complainants indicate, among other things, that they would retain a qualified environmental engineering firm for any sampling and/or inspection and would follow all Agency-approved sampling requirements.

Based on the arguments of the parties and our consideration of the issues in this case, we hereby find that a site inspection to conduct surface and subsurface sampling, inspection and photographing is overly burdensome and unreasonable in this case at this time. We therefore deny the complainants' motion for site inspection.

²Caterpillar further argues that complainants have not provided a sampling plan for Agency approval, a health and safety plan for the protection of employees, including Caterpillar employees, a quality assurance/quality control plan, nor have the complainants shown how they plan to provide for indemnification.

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 6th day of April, 1995, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board