

ILLINOIS POLLUTION CONTROL BOARD  
April 9, 1992

NORTH OAK CHRYSLER PLYMOUTH, )  
 )  
 Complainant, )  
 )  
 v. ) PCB 91-214  
 ) (Enforcement)  
 )  
 AMOCO OIL COMPANY, )  
 )  
 Respondent. )

DISSENTING OPINION (by B. Forcade):

I respectfully dissent from today's decision. The majority essentially has granted dismissal for failure to state a cause of action over which the Board has jurisdiction. For two reasons, I would have denied both motions for summary judgment and set the matter for hearing.

First, despite any ruling regarding the UST regulations, I believe North Oak Chrysler (North Oak) has filed a complaint which states sufficient facts to support a cause of action over which this Board has jurisdiction.

For purposes of ruling on a motion to dismiss, all well pleaded facts contained in the complaint must be taken as true and all inferences therefrom must be drawn in favor of the nonmovant. [citations omitted]. A complaint should not be dismissed for failure to state a cause of action unless it clearly appears that no set of facts could be proven under the pleadings which would entitle plaintiff to relief. [citations omitted] ... Illinois requires fact rather than notice pleading. [citations omitted]...[Emphasis Added]

Brumley v. Touche, Ross & Co. (1984), 123 Ill. App. 3d 636, 463 N.E.2d 195.

North Oak's Complaint states that: (1) Amoco was the owner and operator of underground gasoline storage tanks (USTs) at the site from 1961 until 1986 when the USTs were removed so the property could be sold to North Oak (paragraphs 3-12), (2) no one has used the property for storage or handling of petroleum products since that time (paragraph 6), (3) chemical analysis of soil and groundwater from the immediate proximity of the UST's demonstrated contamination (including benzene, ethylbenzene, toluene, xylene and total hydrocarbons in the groundwater) with

the heaviest concentrations of petroleum contamination at the exact site of two of the removed USTs (paragraphs 4, 16), and (4) Amoco did not remove the soil and groundwater contamination which had resulted from the USTs when it sold the property (paragraph 3). These facts, favorably construed, could support a finding of violation under the Illinois Environmental Protection Act (Act) Ill. Rev. Stat. 1991, ch. 111 1/2, para. 1001, et. seq.. For example, Section 12 of the Act states, in part:

Section 12

No person shall:

- a. Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act;

\* \* \*

- d. Deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard;

Since I believe the complaint states sufficient facts to support a viable cause of action, I would not have granted dismissal. I do not yet know whether North Oak can prove those facts and their most favorable inferences. Nor do I know if Amoco might have a perfectly valid defense. The question of what relief is available, if any, is even more complicated. Those matters must be resolved later in the proceeding.

Since the majority focuses only on the regulatory provisions involved, I assume the majority concludes that notice pleading rather than fact pleading controls here. I would disagree. Illinois is a fact pleading state. Ill. Rev. Stat. 1989, ch. 110, para. 2-601. This Board is an administrative agency rather than a court of law. Further, this proceeding is a citizen enforcement action. Under those conditions, I believe the Board should be as lenient as the law will allow in regard to the particulars of formal pleading.

Second, I disagree with the majority pertaining to the interpretation of the statutory amendments contained in P.A. 87-323 and their impact on this case. I agree that P.A. 87-323 requires this Board to repeal our UST regulations pertaining to,

"design, construction, installation, general operation, release detection, release reporting, release investigation, release confirmation, out-of-service systems and their closure or financial responsibility" (hereinafter "the non-corrective action regulations"). This will constitute repeal of about 60 of the 75 typed pages of regulations in 35 Ill. Adm Code Part 731. However, I do not believe that P.A. 87-323 has a retroactive application or that it makes the Board's prior regulatory activity in this area void ab initio. The Board's identical in substance regulations are generally intended to secure federal approval for environmental regulatory programs. Any interpretation which can allow those regulations to be declared void ab initio years after their adoption could threaten federal approval of such Illinois programs.

To me, the non-corrective action regulations were validly adopted under existing statutory authority. They remain valid Illinois regulatory law from the date of their adoption to the date of their repeal. Since the repeal was adopted by the Board today in docket R 91-14, UST Update, USEPA Regulations (1/1/91 - 6/30/91), I fail to understand how this action could vacate regulations in effect upon the date of filing of this complaint. The complaint alleges violations of both the non-corrective action regulations and the corrective action regulations of 35 Ill. Adm. Code Part 731 from about August 3, 1990 until the filing of the complaint in November, 1991. To me, the regulations were in full force and effect during that time frame.

In dicta, the majority states without explanation that, "the Board's regulations are inapplicable to UST's that were removed prior to the effective date of the regulations". According to the majority, jurisdiction over such removed UST's rests with the Fire Marshall under 41 Ill. Adm. Code 170.650. The regulatory language of 41 Ill. Adm. Code 170.650 is identical to the Board's regulation at 35 Ill. Adm Code 731.173. Both regulations are identical in substance to federal regulations at 40 CFR 280.73. In fact, nearly all of the federal regulatory language of 40 CFR Part 280 has been duplicated in both Fire Marshall regulations at 41 Ill. Adm. Code Part 170 and Pollution Control Board regulations at 35 Ill. Adm. Code Part 731. All three regulatory programs were adopted at least two years after Amoco's tanks were removed from the ground. I cannot understand how one set of three identical regulatory programs would not be applicable to tanks removed before regulatory adoption, but the remaining 2 sets of identical regulations would be applicable.

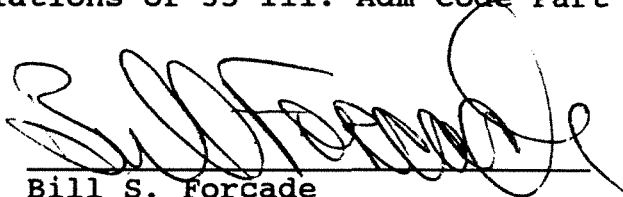
The relevant federal regulatory language setting forth the general mandate to clean up permanently closed systems is 40 CFR 280.73, which states:

When directed by the implementing agency, the owner and operator of an UST system

permanently closed before December 22, 1988, must assess the excavation zone and close the UST system in accordance with this Subpart if releases from the UST system may, in the judgment of the implementing agency, pose a current or potential threat to human health or the environment.

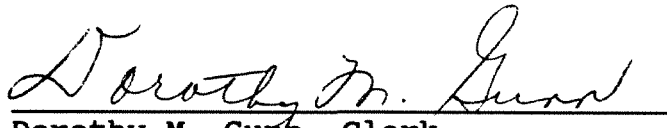
I believe that this language (which was adopted by USEPA in December, 1988, and by this Board in June, 1989) is definitely retroactive in that it only addresses conduct which occurred prior to its adoption. This is evidence of a clear federal intent that this body of regulations should address the present impact from any past activity. This interpretation is not violative of due process, and is consistent with interpretations of other federal environmental laws. U.S. v. Conservation Chemical Company (1985, WD Missouri), 619 F. Supp. 162; Zands v. Nelson (1991, SD California), 779 F. Supp. 1254.

In sum, I believe the complaint states a viable claim, over which this Board has jurisdiction, for violations of Section 12 of the Act, and for past violations of 35 Ill. Adm Code Part 731.



Bill S. Forcade  
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above dissenting opinion was filed on the 15<sup>th</sup> day of April, 1992.



Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board