

ILLINOIS POLLUTION CONTROL BOARD
February 16, 1995

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
)
 v.) PCB 94-275
) (Enforcement - Water)
 BOYD BROTHERS, INC.)
 an Illinois Corporation,)
)
 Respondent.)

BOYD BROTHERS, INC.)
 an Illinois Corporation,)
)
 Complainant,)
)
 v.) PCB 94-311
) (Enforcement - Water)
 ABANDONED MINED LANDS)
 RECLAMATION COUNCIL, an Illinois) (Consolidated)
 state entity,)
)
 Respondent.)

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

This matter is before the Board on a motion to dismiss Docket No. PCB 94-311, Boyd Brothers v. Abandoned Mined Lands Reclamation Council, one of the cases in this consolidated docket. On January 17, 1995, the Office of the Illinois Attorney General filed the motion on behalf of the Abandoned Mined Lands Reclamation Council (AMLRC) arguing that the AMLRC, as a state agency, is protected by sovereign immunity from this cause of action. Boyd Brothers filed a response on February 1, 1995 and on February 9, 1995, the Board received a motion to file instanter the Attorney General's January 17 motion to dismiss. For reasons more fully set forth below, the motion to dismiss is denied.

PROCEDURAL AND FACTUAL BACKGROUND

On September 28, 1994, the Illinois Attorney General on behalf of the People of the State of Illinois filed a formal enforcement action against Boyd Brothers alleging violations of Section 12(a) of the Environmental Protection Act (Act) (415 ILCS 5/12(a)) and 35 Ill. Adm. Code 406.106. The complaint alleges that Boyd Brothers discharged acid water into a tributary of Crab Orchard Creek during the course of reclamation activities at the Peabody Utility Coal mine site in Williamson County. The Board

accepted the case for hearing and docketed the matter as People v. Boyd Brothers, Inc., PCB 94-275.

Thereafter, on October 31, 1994, Boyd Brothers filed a private citizen's enforcement action against the AMLRC which alleged similar violations of Section 12(a) of the Act and Section 406.106 of the regulations. Boyd Brothers claims that AMLRC contracted with Boyd Brothers to perform reclamation activities at the Peabody mine site and pursuant to the contract, AMLRC retained the right to sample and authorize the acid water releases, which AMLRC did in this case. According to Boyd Brothers, if the release violated the Act and the regulations, it was the AMLRC that authorized the discharge, and the AMLRC should be held similarly liable.

The Board docketed the private citizen enforcement action as Boyd Brothers, Inc. v. Abandoned Mined Lands Reclamation Council, PCB 94-311 and because both cases concern the same set of operative facts, the Board consolidated it with PCB 94-275 on December 1, 1994. Accordingly on January 17, 1995, AMLRC filed the instant motion to dismiss PCB 94-311, Boyd Brothers' private citizen enforcement action against AMLRC.

MOTION TO DISMISS

In support of the motion to dismiss, AMLRC argues that the Board is without subject matter jurisdiction to hear the citizen suit and the matter should be dismissed. It is AMLRC's position that as an Illinois state agency, the State Lawsuit Immunity Act (SLIA) (745 ILCS 5/1) controls this case and prohibits a lawsuit against the State of Illinois except in the Court of Claims. AMLRC argues that such "sovereign immunity" includes a private citizen enforcement complaint under the Environmental Protection Act on the basis that if the cause of action is successful, AMLRC may be subjected to, among other things, a monetary penalty. AMLRC argues that only the Court of Claims may adjudicate the validity of a monetary claim against the State of Illinois. The AMLRC further contends that because the allegations of the Boyd Brothers' complaint are based on the contract between AMLRC and Boyd Brothers, this issue is more properly before the Court of Claims.

In response, Boyd Brothers distinguishes AMLRC's argument regarding sovereign immunity on the grounds that 1) the SLIA only prohibits states from being made "a defendant or party in any court" and that since this is an action before an administrative agency, the Board has jurisdiction; 2) the SLIA only prohibits lawsuits which are "claims against the state" and in this case, this is not a "claim" or a lawsuit for a money judgment as AMLRC contends; it is instead, a citizen complaint filed pursuant to the Act's specific authorization that citizens may themselves come forward to enforce the Act; and 3) while the Court of Claims

may be a proper forum to litigate a contract or tort lawsuit seeking a money judgment, it is not the proper forum to determine whether the AMLRC violated the Environmental Protection Act. Boyd Brothers believes this adjudicatory power lies squarely with the Illinois Pollution Control Board as set forth in the Environmental Protection Act.

APPLICABLE STATUTORY LAW

Section 31(b) of the Act provides:

Any person may file with the Board a complaint, meeting the requirements of subsection(a) of this Section, against any person allegedly violating this Act or any rule or regulation thereunder or any permit or term or condition thereof. *** (415 ILCS 5/31(b).) (Emphasis added.)

Section 3.26 of the Act defines a "person" as

any individual, partnership, co-partnership, firm, company, corporation, association, joint stock company, trust, estate, political subdivision, state agency, or any other legal entity, or their legal representative, agent or assigns. (415 ILCS 5/3.26.) (Emphasis added.)

Section 47(a) of the Act:

The State of Illinois and all its agencies, institutions, officers and subdivisions shall comply with all requirements, prohibitions, and other provisions of the Act and of regulations adopted thereunder. (415 ILCS 5/47(a).)

Section 42(a) of the Act:

Except as provided in this Section, any person that violates any provision of this Act or any regulation adopted by the Board, or any permit or term or condition thereof, or that violates any determination or order of the Board pursuant to this Act, shall be liable to a civil penalty of not to exceed \$50,000 for the violation and an additional civil penalty of not to exceed \$10,000 for each day during which the violation continues; such penalties may, upon order of the Board or a court of competent jurisdiction, be made payable to the Environmental Protection Trust Fund, to be used in accordance with the provisions of "An Act creating the Environmental Protection Trust Fund", approved September 22, 1979. (415 ILCS 5/42(a).) (Emphasis added.)

DISCUSSION

The Board, early in its history, examined the issue of whether a private enforcement action may be brought against a state agency. In IEPA v. City of Champaign (September 16, 1971) PCB 71-51C, 2 PCB 411, rev'd on other grounds 12 Ill. App.3d 720, 299 N.E.2d 28, we found that the Board, and not the Court of Claims, is the proper forum to hear citizen suits alleging violations of the Act. In City of Champaign, the Illinois Environmental Protection Agency (Agency) had filed an enforcement action against the City for discharging contaminants into Boneyard Creek and the City cross-complained against the University of Illinois on the grounds that the University's power plant had contributed to the pollution. In seeking to have the City's complaint dismissed, the University argued that it was exempt from the Act and if the Board were to find the University in violation, the state (via the Pollution Control Board) would be in the illogical position of levying a fine against itself. The University also argued that even if it was subject to the lawsuit, the Court of Claims was the proper jurisdiction because the case "sounded in tort."

Relying on the clear language of Section 47 of the Act which charges all state agencies with compliance with the provisions of the Environmental Protection Act, we rejected the notion that a state entity is exempt from the Act. We did not reach the issue of the penalty in the case, because we believed a penalty was unwarranted. On the issue of whether the proper forum was the Board or the Court of Claims, we determined that this case was not a "tort" action and that the Board was vested with jurisdiction under the Environmental Protection Act to hear cases concerning violations of the Act. (City of Champaign, 2 PCB at 416.) We stated,

In actuality, these proceedings are neither criminal in nature nor are they actions in tort. This is an administrative adjudication under authority of the Illinois Environmental Protection Act, which quite clearly states, as we have indicated above, that all state agencies must comply with all the provision of the Act and Rules adopted thereunder. Exclusive jurisdiction of "tort" claims against the University may well be in the Court of Claims, but the action we are dealing with here is not a "tort" claim but rather, a new, statutory action, which did not exist at common law. The Pollution Control Board is the proper body to hear this matter, as the Environmental Protection Act plainly provides. (City of Champaign, 2 PCB 416.)

On appeal, the court nullified our order finding the University in violation of the Act but did so on evidentiary grounds. The

court's decision thus left the Board's jurisdictional finding intact. (City of Champaign, 299 N.E.2d at 29.)¹

While we squarely addressed whether the University of Illinois could be named as a respondent in a private enforcement action, City of Champaign did not however, analyze the issue of sovereign immunity which is presented by the Attorney General's motion to dismiss. After reviewing the Attorney General's arguments, we can reach no conclusion different from that in City of Champaign. The sovereign immunity fails to consider the statutory scheme and specific effect of the Environmental Protection Act. While sovereign immunity may require parties with contract or tort actions to pursue a lawsuit in the Court of Claims, or will prevent certain types of actions from being heard in circuit court,² sovereign immunity is not a bar when the legislature has provided a mechanism for the state to be made a party. This is the case here. The plain and unambiguous language of the Environmental Protection Act includes state agencies in the group of responsible parties that may be enforced against for violations of the Act before the Illinois Pollution Control Board. Specifically, Section 31(b) of the Act authorizes a private citizen to file an enforcement action against "any person" and the Act includes "state agency" within the definition of "person" in Section 3.26.

¹Though not posited specifically as a sovereign immunity claim, there is at least one other Board case on the issue of a state agency's capacity to be sued for violations of the Environmental Protection Act which warrants mentioning in this case. In Envirite v. IEPA and Peoria Disposal Co. (December 19, 1991) PCB 91-152, 128 PCB 279, 282, rev'd in part 239 Ill.App.3d 1004, 607 N.E.2d 302, 180 Ill.Dec. 408 (3rd Dist. 1993), the Board dismissed the Illinois Environmental Protection Agency as a defendant in a citizen suit, but did so on the basis that a citizen cannot bring an enforcement action which is tantamount to challenging the Agency's performance of its statutory duties. Envirite did not address the specific issue of whether a lawsuit could be maintained when a state agency is alleged to have affirmatively violated provisions of the Act, e.g., cause or allow the discharge of contaminants. (C.f. Landfill, Inc. v. PCB, 74 Ill.2d 541, 387 N.E.2d 258, 264, 25 Ill.Dec. 602, wherein the Supreme Court held that a Board rule allowing the Agency to be a respondent to a private enforcement action was improper. The court determined that "prosecution under the Act...is against polluters, not the Agency.")

²The courts have barred tort, contract, garnishment, injunctions and quiet title actions from being litigated in civil court on the basis of sovereign immunity and in the case of claims for monetary reimbursement, found that the proper and exclusive jurisdiction is before the Court of Claims. (See e.g. Liebman v. Board of Governors of State Colleges and Universities (1st Dist. 1979) 78 Ill. App.3d 89, 398 N.E.2d 305, 34 Ill. Dec. 630 and Board of Education v. Cronin (1st Dist. 1977) 54 Ill. App.3d 584, 370 N.E.2d 19, 12 Ill. Dec. 396.)

Our finding, that the legislature has provided a specific statutory scheme for the state to be made a party in a private enforcement action, is consistent with the caselaw on sovereign immunity. Illinois courts have on several occasions found that sovereign immunity is not a bar to actions where statutory language specifically contemplates the state as a party. (See e.g. People ex rel. Conn v. Randolph (1966) 35 Ill.2d 24, 31, 219 N.E.2d 337 (reimbursement for court-appointed attorney costs); Martin v. Giordano (4th Dist. 1983) 115 Ill. App.3d 367, 369, 450 N.E.2d 933, 71 Ill. Dec 245 (additional payments of 50% for vexatious and unreasonable delay under the Workers' Compensation Act; and City of Springfield v. Allphin, (1980) 82 Ill. 2d 578, 413 N.E. 394; 45 Ill. Dec. 916 (recoup 1% interest on the state's unpaid bills).)

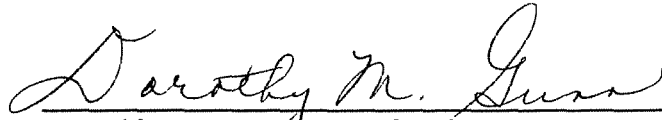
We further disagree that we cannot assess a penalty against a state agency under the Environmental Protection Act. Section 42(a) provides that "any person that violates any provision of this Act or any regulation adopted by the Board *** shall be liable for a civil penalty *** payable to the Environmental Protection Trust Fund." (415 ILCS 42(a).) It may be that, to have the penalty directed to the Trust Fund or to exact payment if the AMLRC does not have the resources to allocate for the payment of a penalty, an action may need to be pursued in the Court of Claims; however, we do not believe such action would serve to divest the Board of jurisdiction to assess the penalty. While the Board has rarely addressed the issue of awarding a penalty against a state agency, we have assessed sanctions against a state agency, the Illinois Environmental Protection Agency, pursuant to our procedural rule, 35 Ill. Adm. Code 101.280. Such sanction authority was specifically required by the court in Grigoleit Company v. IPCB and IEPA, (4th Dist. 1993) 245 Ill. App.3d 337, 613 N.E.2d 371, appeal denied (1993) 152 Ill.2d 558, 622 N.E.2d 1205.

DECISION AND ORDER OF THE BOARD

We find that the doctrine of sovereign immunity does not deprive the Illinois Pollution Control Board of subject matter jurisdiction to hear a private citizen enforcement action filed against the Abandoned Mined Lands Reclamation Council. The motion to dismiss filed by AMLRC is denied.

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 16th day of February, 1995, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board