ILLINOIS POLLUTION CONTROL BOARD
July 30, 1992

ERICH J. MANDEL,
Complainant,
v.
THADDEUS G. KULPAKA,
Respondent.

PCB 92-33
(Enforcement)

ORDER OF THE BOARD (by J. Theodore Meyer):

This matter comes before the Board on the motion to dismiss or for summary judgment filed by the respondent, Thaddeus G. Kulpaka, dated June 5, 1992. The complainant, Erich J. Mandel, responded to the motion on June 15, 1992. Upon consideration of the issues raised by the motion, the Board strikes certain portions of the complaint, denies the motion for summary judgment, and grants the motion to dismiss in part and denies it in part.

The Complaint

The complaint, filed February 25, 1992, states that Mr. Kulpaka purchased a parcel of real estate in August 1968. The property was the site of a gasoline service station that had used three underground storage tanks (USTs), two for storage of gasoline and one for storage of heating oil.

Mr. Kulpaka's predecessors in interest installed the tanks in about 1958. Mr. Kulpaka allegedly learned that one of the gasoline tanks was leaking in about September, 1970, and he replaced it with another UST. In about September, 1971, Mr. Kulpaka learned that the other gasoline storage tank was leaking, so he took all gasoline and heating oil storage tanks out of use and ceased doing business as a gasoline service station. He continued use of the property as a tire dealership. On about August 13, 1982, Mr. Kulpaka sold the tire dealership to Mr. Mandel, granting a five year lease on the property. On about August 13, 1987, Mr. Kulpaka sold the real estate to Mr. Mandel.

In the course of seeking refinancing for business loans in October, 1991, the lender instructed Mr. Mandel to remove the four USTs, which he did in December, 1991. The contractor he hired allegedly "found evidence of soil and possible groundwater contamination . . . beneath and near the [USTs] . . . ." Complaint, ¶ 19, at p. 4. According to the complaint, Mr. Mandel exclusively used the property, he knew nothing of the contamination, and he neither used the USTs nor sold petroleum products during the period he has occupied the property.

Count I of the complaint alleges that Mr. Kulpaka violated Sections 11(b) and 12(a) of the Environmental Protection Act (Act) by causing or allowing petroleum to leak (discharge) into the soil and groundwater near the tank, thereby causing water pollution. Count II essentially alleges that Mr. Kulpaka polluted or misused land, by disposing of refuse (the tanks) at a facility that did not meet the requirements of the Act and Board regulations, thereby violating Sections 20(b) and 21(e)[1] of the Act. Count III similarly alleges that Mr. Kulpaka violated Section 21(e)[2] of the Act by abandoning or disposing of waste (the tanks and leaked petroleum products) at a facility that did not meet the requirements of the Act and Board regulations. Count IV alleges that Mr. Kulpaka was the owner and operator of the tanks at the time of discovery of the petroleum leaks, and he violated Section 731.150(a)[3] of the Board's rules when he failed to submit timely notification of those leaks on June 12, 1989, when the regulatory requirement to do so became effective. Similarly, Count V alleges a violation of Section 731.160[4] of the regulations because Mr. Kulpaka did not undertake required corrective actions when the pertinent Board rules became effective in 1989.

The prayer for relief requests that the Board find that Mr. Kulpaka violated Ill. Rev. Stat ch. 111½, pars. 1011, 1012(a), 1020, 1021(e), and 1021(f) (Sections 11, 12(a), 20, 21(e), and 21(f) of the Environmental Protection Act) and 35 Ill. Adm. Code 731.150 and 731.160 (of the Board's rules). It requests that the Board direct Mr. Kulpaka to implement the cleanup provisions of our UST corrective action rules. It finally seeks such other

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[1] Citing this as Ill. Rev. Stat. ch. 111½, par. 1021(f). The statutory prohibition against disposal, treatment, or storage of "refuse" except at a compliant location appeared as Section 21(f) until P.A. 81-856 renumbered it to Section 21(e) effective January 1, 1980. The relevant substance of this prohibition remained unchanged. P.A. 81-983 amended this provision to prohibit disposal, treatment, storage, or abandonment of "waste", effective December 12, 1983.

[2] Citing this as Ill. Rev. Stat. ch. 111½, par. 1021(e), as amended by P.A. 83-983, effective December 12, 1983. This is essentially the same prohibition as is involved in Count III, but as subsequently amended.

[3] 35 Ill. Adm. Code 731.150(a) (adopted in R88-27 at 13 Ill. Reg. 9519, effective June 12, 1989; repealed in R91-14 at 16 Ill. Reg. 7407, effective April 24, 1992).

[4] 35 Ill. Adm. Code 731.160 (adopted in R88-27 at 13 Ill. Reg. 9519, effective June 12, 1989).

relief as the Board deems appropriate.

DISCUSSION

As stated in Williamson Adhesives, Inc. v. EPA (Aug. 22, 1991), PCB 91-112, "Summary judgment is appropriate where there is no genuine issue of material fact based on the affidavits, admissions, pleadings, and other items in the record." (Williamson Adhesives at 1-2 (citing Caruthers v. B.C. Christopher & Co. (1974), 57 Ill. 2d 376, 380, 313 N.E.2d 457, 459 and Ill. Rev. Stat. 1989 ch. 110, par. 1005(d)).) It is necessary to examine the nature of the complaint and the facts presented by the pleadings in order to dispose of a motion for summary judgment. An affidavit must accompany any motion and response to support all facts not of record. 35 Ill. Adm. Code 101.241.

No affidavit accompanied either the June 5, 1992 motion or the June 15, 1992 response. Therefore, the only facts pertinent to summary judgment are those asserted by the complaint. Under the circumstances presented by this proceeding, summary judgment is inappropriate. The Board will deny summary judgment.

If summary judgment is inappropriate, the Board may nevertheless dismiss a complaint for some legal defect. For dismissal, the Board may accept all well-pleaded facts as true and draw all inferences in favor of the non-moving party. Ultimately, the first issue presented in this proceeding on the sufficiency of each count is whether it pleads sufficient facts to place Mr. Kulpaka on notice of the violations alleged and to permit him to mount his defense. Dismissal is inappropriate if the facts pled and all reasonable inferences based on those facts reasonably inform Mr. Kulpaka of a violation of the Act or Board rules. (Brumley v. Touche, Ross & Co. (2d Dist. 1984), 123 Ill. App. 3d 636, 463 N.E.2d 195.) The other issue presented is whether the count states a claim and prays for relief that are within the Board's jurisdiction. To this end, the Board will examine each count after addressing a couple of general issues raised relating to our jurisdiction.

General Issues

The instant motion characterizes the complaint as an attempt to shift liability for the cleanup of a leaking UST, in contravention of the Board's determination in A.K.A. Land, Inc. v. EPA (Mar. 14, 1991), PCB 91-33, 120 PCB 35. The motion argues that whatever complaint Mr. Mandel has against Mr. Kulpaka, it is one derived from contract law, rather than from the Act.

Mr. Kulpaka argues that the Board lacks the statutory authority to grant a major portion of the relief requested. He contends that the heart of the prayer is for an order that Mr.

Kulpaka is responsible for site cleanup: an order that he asserts the Board is without authority to issue. He states, rather, that both Mr. Kulpaka (as an "owner") and Mr. Mandel (as an "operator") share this responsibility.[5] The motion places great emphasis on the present ownership of the property and tanks by Mr. Mandel, essentially asserting that an owner of land acquires all contingent liabilities with the property. Mr. Kulpaka characterizes this action as an attempt by Mr. Mandel to avoid his responsibility for cleanup of his property. The motion implies that a decision in favor of liability of a predecessor in interest would "undermin[e] completed real estate transfers absent a clear and express [legislative] intent to do so." Motion at 4. He asserts that this matter is not properly before the Board because it is little more than a private cost recovery action. He concludes that the dispute between the parties is one more appropriate for a court of law.

Mr. Mandel concedes by his response that a circuit court may have concurrent jurisdiction over aspects of the dispute between the parties. However, he asserts that the real issue here is whether the Board has jurisdiction. He maintains that the complaint sufficiently alleges a violation of the Act. Mr. Mandel argues that without regard to any responsibility he himself bore for corrective action, the real issue here is the responsibility under the Act that Mr. Kulpaka independently bore for the UST leaks. He similarly responds to Mr. Kulpaka's characterization of this action as one for private cost recovery.

The Environmental Protection Act confers the Board's jurisdiction. The Act authorizes the Board to hear complaints of violations of the Act and Board regulations. (Ill. Rev. Stat. 1991 ch. 111½, par. 1031.) It authorizes the Board to impose a civil penalty for violations that is payable into public funds, not to private parties, and it authorizes the Board to order a person found in violation to cease and desist from further violation. (Ill. Rev. Stat. 1991 ch. 111½, par. 1033(a) & (b) & 1042.) If a complaint before the Board requests relief we cannot grant, or if it states claims outside our jurisdiction, we can strike or dismiss those claims. Conversely, although a circuit

[5] In a recent case cited by Mr. Kulpaka, the Board confronted a similar scenario between a prior site owner who used the tanks and a later owner who purchased the property and later had to perform site cleanup operations. We determined that only the prior landholder, which had actually "used" them, was an "owner" for the purposes of the UST cleanup provisions. (A.K.A. Land, Inc. v. EPA (Mar. 14, 1991), PCB 90-177 at 10-12, 120 PCB 35, 44-46.) The current site owner became an "operator" of the tanks when it became subject to the UST closure regulations by removing them. (PCB 90-177 at 12-18, 120 PCB 46-52.)

court may have concurrent jurisdiction over aspects of the same case, that concurrent jurisdiction does not divest the Board of jurisdiction.

The Board will not further sidetrack into the issues raised that relate to private cost recovery and circuit court jurisdiction. Those are not within the Board's statutory jurisdiction. The appropriate forum for such claims is the appropriate circuit court. We will only consider alleged violations within our statutory jurisdiction and only entertain relief within our statutory authority. Mr. Mandel's complaint prays for various findings of violation against Mr. Kulpaka, that the Board find Mr. Kulpaka responsible for site contamination and order him to perform site corrective action, and that we grant such other relief as we deem appropriate under the circumstances. Such orders are within the Board's traditional statutory authority.

Count I

The basic thrust of Count I is that while removing the USTs from the property, Mr. Mandel became aware of possible soil and groundwater contamination from the tanks. He performed no physical or chemical analyses to confirm that in fact contamination had occurred. Rather, the sole evidence of contamination was the representations of the contractor hired to remove the tanks. Mr. Kulpaka was the last person to use the USTs for storage of petroleum, and during the course of that use he had two episodes of tank leakage. In fact, he ceased using the USTs in 1971 as a result of the second episode of leakage. Until 1982, Mr. Kulpaka continued to operate a business on the property on which the tanks reside, and he continued to own the property until 1987. Mr. Mandel claims that this violated the legislative intent of the Act (Section 11(b)) and the statutory prohibition against causing, threatening, or allowing a discharge of contaminants that causes or tends to cause water pollution (Section 12(a)). The Environmental Protection Act became effective on July 1, 1970,[6] so the times complained of are by inference from July 1, 1970 until the filing of the complaint.

The motion to dismiss argues that Mr. Kulpaka could not have violated Section 11(b) of the Act because this provision is essentially only hortatory language of legislative purpose. Mr. Kulpaka argues that it includes no express prohibitions capable of violation.

In response, Mr. Mandel asserts that the legislative purpose behind the Environmental Protection Act, of providing private

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[6] P.A. 76-2429.

remedies to assure that those who cause adverse environmental effects fully bear their costs (see Ill. Rev. Stat. 1991 ch. 111½, par 1002(b)), the provisions authorizing the Board to enter "appropriate" orders (see Ill. Rev. Stat. 1991 ch. 111½, par. 1033(a)), and the provision making a Board order enforceable by an "other appropriate remedy" (Ill. Rev. Stat. 1991 ch. 111½, par. 1033(d)), would make dismissal especially improper. Mr. Mandel urges the Board to take an expansive view of the Act. He "espouses such a liberal construction" of the Act. (Response at 7.)

Section 11(b) contains no prohibitory or mandatory language. A violation of legislative purpose, without more, is not actionable. Therefore, we will strike all claims as to any purported violation of Section 11(b).

The motion to dismiss argues that Count I otherwise fails because it alleges only "possible groundwater contamination" with no indication of what evidence would indicate that such has occurred. It maintains that a laboratory report attached to the complaint and the contractor's representation to this effect are both insufficient to characterize the extent of any groundwater contamination which may have occurred.

Mr. Mandel responds by highlighting the "tends to cause" language in Section 12 and the "likely to create" language in the definition at Section 3.55. On Count I he admits that he is unaware of the discharges made from the tanks, but "as can be implied from the allegations in the Complaint, these findings arguably were known or should have been known to [Mr. Kulpaka]." (Response at 9.) He states that he can ascertain these facts before hearing if necessary.

As to the alleged water pollution in violation of Section 12(a), the Board can envision evidence that could support a finding of violation. The complaint alleges and implies various activities by Mr. Kulpaka with regard to the tanks over a long period of time. At the very least, it alleges that leakage actually occurred during times since the Environmental Protection Act became effective, that this occurred while Mr. Kulpaka owned and used the tanks, and that Mr. Kulpaka was aware of the leakage. Whether the complaint contains sufficient proofs of a violation is immaterial. What is important is that if the allegations are proven, a finding of violation is possible. The Board will not dismiss Count I as it relates to possible violation of Section 12(a).

Count II

On the same facts as Count I, this count alleges that Mr. Kulpaka violated the intent of the Act (Section 20(b)) and the prohibition against disposal of refuse at a site that did not

comply with the requirements of the Act and Board regulations (former Section 21(f), now codified as Section 21(e) as amended). The complaint alleges Mr. Kulpaka committed this violation by leaving the tanks in the ground when he ceased using them in 1971.

Mr. Kulpaka makes the same arguments with regard to the violation of Section 20(b) as he did for Section 11(b), involved in Count I. Mr. Mandel also responds similarly as to Count I.

As with the recitation of legislative purpose contained in Section 11(b), the recitation in Section 20(b) contains no prohibitory or mandatory language. For the same reasons as for Section 11(b), the Board will strike all claims alleging a violation of Section 20(b).

With regard to the issue of disposal of the tanks, Mr. Kulpaka argues that no "disposal" of the tanks occurred at the site because he only used an existing UST system for a time, then ceased its use. He thus implies that because he did not place the tanks in the ground, he could not have disposed of them.

Mr. Kulpaka also argues that former Section 21(e), now codified as modified at Section 21(d)(1), included an exemption applicable to on-site disposal. He further argues that Count II fails because it fails to effectively affirmatively plead that the property did not meet the requirements of the Act and Board regulations, as such is used in Section 21(e).

Mr. Mandel responds that disposal did in fact occur and that the former station site did not meet the requirements of the Act and Board regulations for disposal. He argues that the complaint sufficiently pleads to this effect. Mr. Mandel also argues that any "on-site" disposal exemption does not apply in this instance.

Former Section 21(f) and current Section 21(e) include the caveat, "except at a site or facility which meets the requirements of this Act and of regulations thereunder." (Ill. Rev. Stat. 1977 ch. 111½, par. 1021(f); Ill. Rev. Stat. 1991 ch. 111½, par. 1021(e).) Former Section 21(e) and current Section 21(d) include an exception from the permit requirement for sites receiving wastes generated on-site. (Ill. Rev. Stat. 1977 ch. 111½, par. 1021(e); Ill. Rev. Stat. 1991 ch. 111½, par. 1021(d).) Thus, no permit was required for disposal of wastes generated at the station and disposed of on the property. However, the record is not sufficiently developed to allow the conclusion: "Therefore, the station premises met the requirements of the Act and Board regulations." The present record does not preclude the possibility that other, substantive operational requirements may have applied to such a disposal site. The development of a record and briefing on these issues will aid the Board's deliberations.

0135-0163

The Board is also unprepared to dismiss Count II on the present record as it relates to Section 21(f). Too many unresolved legal and factual issues remain. For example, the complaint cites the disposition of the tanks in the ground as the basis for this violation. Does this include the contents of the tanks? Did "dispose" include "abandon", as that word was later added by amendment--i.e., was this addition by P.A. 81-856, on December 12, 1983, a clarification or a substantive amendment? What effect does the redesignation of Section 21(f) as Section 21(e), on January 1, 1980, have on the time-frame of the complaint? When did the offending act(s) occur--in 1970, when Mr. Kulpaka replaced the leaking tank; in 1971, when Mr. Kulpaka ceased actively using the tanks, in 1982, when he leased the property to Mr. Mandel, or in 1987, when he sold the premises to Mr. Mandel? While reserving judgment on the merits of these issues, we note that the complaint is sufficient on Count II to raise issues within the Board's jurisdiction, without regard to how we would determine the issues involved. The development of a record and briefing on these issues will aid the Board's deliberations.

Count III

Count III is closely related to Count II inasmuch as it involves the successor provision to that involved in Count II. It alleges that the disposition of the tanks and their contents in the ground constitutes land pollution in violation of Section 21(e) of the Act. The primary difference in thrust, according to Mr. Mandel's response, is that Count II focuses on "disposal" and Count III focuses on "abandon" in a narrower time-frame.

Mr. Kulpaka maintains by the motion to dismiss that Mr. Mandel attempts to apply the provision of the Act retroactively. Section 21(e) of the Act, involved in Count III, became effective in 1983.[7] Mr. Kulpaka points out that nothing in the statutory language exhibits an intent for retroactive application.

Mr. Mandel responds that the complaint alleges that the abandonment took place after the 1983 effective date of the amendments to Section 21(e) that added the prohibition against "abandonment" of waste. He argues that the effectiveness of these amendments imposed a new affirmative responsibility on Mr. Kulpaka, which Mr. Kulpaka breached by his inaction with regard to the tanks.

Even if Count III is limited in time to the time since Section 21(e) became effective in its present form in 1983, the Board cannot agree that dismissal is warranted. As asserted by

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[7] See supra note 1.

the complaint, Mr. Kulpaka still owned the property on which the tanks resided until 1987. The present record does not permit a decision as to the effect of such ownership and the subsequent sale as it relates to Section 21(e). Further, the present record does not preclude the possibility of some other knowledge or activity on the part of Mr. Kulpaka with regard to the USTs during the time from 1983 until 1987 that might warrant a finding of violation. The Board is unprepared to dismiss Count III on this basis.

Mr. Kulpaka raises the "on-site" disposal argument on Count III, similarly to Count II. For reasons similar to those involved in Count II, the Board is unprepared to dismiss Count III on this basis.

As to the substantive allegations of Count III, the Board is unprepared to dismiss at this stage. The Board cannot conclude that the facts alleged in this count could not constitute a violation of Section 21(e) if proven. The development of the record and briefing on the legal issues will ultimately benefit the Board's judgment.

Count IV

Count IV is different from the alleged statutory violations of the preceding three counts. It alleges an administrative violation by asserting that Mr. Kulpaka failed to make a notification purportedly required by Section 731.150(a) of the Illinois UST regulations.

Mr. Kulpaka argues that Mr. Mandel attempts to apply this prohibition retroactively. Section 731.150(a) became effective in 1989.[8] Mr. Kulpaka points out that nothing in this provision exhibits an intent for retroactive application.

Mr. Mandel essentially argues that the effectiveness of Section 731.150(a) imposed an affirmative duty to notify of all known past releases from USTs. As he asserts, "It strains good sense to suppose that the Board's rules and regulations are only to apply to prospective discoveries of leaks . . . ." Response a 15.

The Board's UST rules do not address past releases. Rather, Section 731.150(a) requires notice within 24 hours of the discovery of a release. This requirement became effective in June, 1989, nearly two years after Mr. Kulpaka sold the property on which the tanks stood. The complaint alleges that these discoveries occurred in 1970 and 1971; nowhere does it allege

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[8] See supra note 3.

that Mr. Kulpaka discovered a release during the effectiveness of Section 731.150(a). The Board cannot accept the argument that the effective date of this provision triggered the notification requirement for a past detection of a release. If the Board were to impose this requirement on Mr. Kulpaka on this basis, it would have the effect of retroactive application. (See Pulitzer Community Newspapers, Inc. v. IEPA (Dec. 20, 1990), PCB 90-142 at 4, 117 PCB 99, 102.) For this reason, the Board will dismiss Count IV.

Count V

Like Count IV, Count V alleges a violation of an administrative requirement, Section 731.160. This UST regulation requires a UST owner or operator to undertake certain corrective action procedures upon the confirmation of a release from a UST.

Mr. Kulpaka asserts that under the Board's decision in A.K.A. Land, Inc. v. EPA (Mar. 14, 1991), PCB 91-33, 120 PCB 35, and through the real estate transfer, Mr. Mandel became the owner or operator of the tanks. He further argues that the requirements of Section 731.160 do not come into play until after a "confirmed release",[9] and points out that the record does not indicate any such release during the effectiveness of this provision. Mr. Kulpaka asserts that without a prior enforcement action by the Office of the State Fire Marshal, the corrective action provisions of Section 731.160 are not required.[10]

Mr. Mandel responds with the assertion that Mr. Kulpaka was aware of the prior releases. He argues, in essence, that it is the discovered fact of leakage that imposes the duties of this provision, not the technical administrative confirmation of leakage. He prays that if the Board should determine that this interpretation is wrong, we grant him leave to amend his complaint. Similar to his argument with respect to Section 731.150(b), in Count IV, Mr. Mandel asserts that the effective date of this provision imposed on Mr. Kulpaka the present duty to perform the corrective action measures for past releases.

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[9] Mr. Kulpaka cites former 35 Ill. Adm. Code 731.152, which set forth a procedure for confirmation of a release. The Board repealed that provision in R91-14, at 16 Ill. Reg. 7407, effective April 24, 1992.

[10] In the repeal of various of our UST rules, in R91-14 (Apr. 9, 1992) at 6-7, and in rendering our decision in North Oak Chrysler Plymouth v. Amoco Oil Co. (Apr. 9, 1992), PCB 91-214 at 5, we opined that the repeal of those rules would leave the Board without authority to enter an order absent a prior finding by the Fire Marshall.

It is the confirmation of a release that imposes the requirements of Section 731.160 on the owner or operator. Together with Section 731.150(b), Section 731.160 became effective in June, 1989,[11] nearly two years after Mr. Kulpaka sold the property on which the tanks stood. The complaint alleges that the discoveries of releases occurred in 1970 and 1971. Nowhere does the complaint allege that a release was confirmed to Mr. Kulpaka during the effectiveness of this provision. The Board cannot accept the argument that the effective date of this provision triggered the notification requirement for a past detection of a release. If the Board were to impose this requirement on Mr. Kulpaka on this basis, it would have the effect of retroactive application. As with Section 731.150(a), the Board will not give Section 731.160 retroactive effect. (See Pulitzer Community Newspapers at 4.) For this reason, the Board will dismiss Count V.

With regard to any amendment of Count V, as suggested by Mr. Mandel's response, 35 Ill. Adm. Code 103.210 sets forth the procedural rule relating to amendment of pleadings.

CONCLUSION

The Board hereby denies Mr. Kulpaka's motion for summary judgment or to dismiss. The Board hereby strikes the following portions of the complaint:

1. Those portions of Count I alleging violation of Ill. Rev. Stat. 1991 ch. 111½, par. 1011;

2. Those portions of Count II alleging violation of Ill. Rev. Stat. 1991 ch. 111½, par. 1020;

The Board hereby dismisses the following counts:

1. Count IV alleging violation of 35 Ill. Adm. Code 731.150(a); and

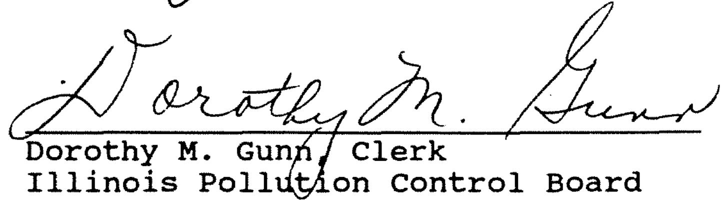
2. Count V alleging violation of 35 Ill. Adm. Code 731.160.

IT IS SO ORDERED.

B. Forcade concurred.

[11] See supra note 4.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, do hereby certify that the above order was adopted by the Board on the 30th day of July, 1992, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board