ILLINOIS POLLUTION CONTROL BOARD
December 5, 1996

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 96-143
	)	(Enforcement - Water)
MICHEL GRAIN COMPANY, INC., d/b/a MICHEL GRAIN FERTILIZER, an Illinois corporation, and CARYLE MICHEL,	)	
	)	
Respondents.	)	

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

This matter comes before the Board on a motion to reconsider and clarify filed by respondents, Michel Grain Company, Inc., d/b/a Michel Grain Fertilizer (Michael Grain, Inc.) and Mr. Caryle Michel (Michel) on September 3, 1996.[1] On August 1, 1996 the Board denied the motion to dismiss as to both party respondents, Michel and Michel Grain, Inc. The Board also denied the motion to strike the amended complaint and allowed respondents to file an answer to the amended complaint on or before September 3, 1996.

In ruling upon a motion for reconsideration the Board is to consider, but is not limited to, error in the previous decision and facts in the record which may have been overlooked. (35 Ill. Adm. Code 101.246(d).) In Citizens Against Regional Landfill v. The County Board of Whiteside County (March 11, 1993), PCB 93-156, we stated that "[t]he intended purpose of a motion for reconsideration is to bring to the court's attention newly-discovered evidence which was not available at the time of the hearing, changes in the law, or errors in the court's previous application of the existing law." (Korogluyan v. Chicago Title & Trust Co. 213 Ill. App.3d 622, 572 N.E.2d 1154 (1st Dist. 1992).)

Respondents reiterate in their motion to reconsider that the complaint remains insufficient because it does not establish violations of Sections 12(a) and (d) of the Environmental Protection Act (Act) (415 ILCS 5/12(a)(d)), and associated regulations. Respondents argue that Illinois is a fact-pleading state which requires ultimate facts necessary to support the action alleged in the complaint. Respondents also argue that Section 22.2(f) of the Act requires that the State must have incurred costs of removal before bringing a claim for cost recovery. Respondents further argue that a 4(q) notice

[1] No response was filed in this matter by complainant.

(415 ILCS 5/4(q)) should have been provided to respondents advising them of their potential liability under Section 22.2(f) of the Act.

The Board denies the motion to reconsider and further clarifies its order as follows. Illinois is a fact-pleading state which requires the pleader to set out ultimate facts which support his cause of action. (LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297 (2d Dist. 1993).) Despite the requirement of fact pleading, courts are to construe pleadings liberally to do substantial justice between the parties. (Classic Hotels, Ltd. v. Lewis, 259 Ill. App. 3d 55, 60, 630 N.E.2d 1167 (1st Dist. 1994).) However case law is consistent in finding that pleading requirements for administrative review are less exacting than for other causes of action. (Mueller v. Board of Fire and Police Commissioners of the Village of Lake Zurich, 267 Ill. App. 3d 726, 643 N.E.2d 255, 262 (2d Dist. 1994).) In the instant matter, we found that though more facts probably would have been more helpful in this case, the amended complaint may proceed to hearing. (August 1, 1996 Order at 7-8.) We continue to believe that the facts pleaded by complainant in its complaint are sufficient to proceed to hearing before this administrative agency.

Regarding respondents' argument that costs must have been incurred prior to hearing, the Board reiterates its previous findings. In our August 1, 1996 order, we stated that complainant has a right to a determination as to respondents' liability before it engages in the costs of cleanup. This matter is being sent to hearing in order to ascertain liability for the ongoing pollution. Once liability is determined, a concurrent action based on cost recovery may be appropriate since it would expedite the proceedings and prevent undue delay. If complainant has incurred costs in removal and complainant proves this at hearing, in addition to proving respondents' liability, then complainant may seek costs from respondents. Therefore, it is premature for the Board to dismiss the cost recovery action in this matter.

Finally, the Board notes that the issue of a 4(q) notice correlates to the cost recovery action discussed above. Section 4(q) states that the Agency "shall have the authority to provide notice to any person who may be liable pursuant to Section 22.2(f) of this Act for a release or a substantial threat of a release of a hazardous substance or pesticide." (415 ILCS 5/4(q) (1994)).[2] Section 4(q) does not require the Agency to provide a 4(q) notice in every circumstance, but authorizes the Agency to provide notice of liability at the Agency's discretion.

[2] As a comparison of Section 4(q) to Section 31(d)(1) of the Act (415 ILCS 5/31(d)(1) (1994)), Section 31(d)(1) states that the Agency "…shall issue and serve upon the person complained against a written notice informing such person that the Agency intends to file a formal complaint." The Board notes that Section 31(d)(1) requires the serving of a pre-enforcement letter upon the person complained against by the Agency and offers the person an opportunity to meet with appropriate Agency personnel in an effort to resolve such conflicts. Section 4(q) does not mandate such rigid requirements.

By serving a party with a 4(q) notice, the Agency may seek further damages so long as liability is found by the reviewing authority. The Illinois Supreme Court found in National Marine, Inc. v. Illinois Environmental Protection Agency, 159 Ill. 2d 381, 389, 639 N.E.2d 571, 574-575 (1994) that the 4(q) notice neither determines nor adjudicates the question of liability, but merely puts a party on notice that it may be potentially liable. The Court further stated that a party may take the response action requested by the Agency or may choose to ignore the notice entirely. *Id*. at 574. Where the party ignores the notice, there will be no hearing on the matter until the Agency initiates a recovery action for expenses incurred in the cleanup process. (City of Quincy v. Richard Carlson *et al*., 163 Ill. App.3d 1049, 1053, 517 N.E.2d 33, 35 (4th Dist. 1987).) If liability is found to exist in a recovery action where a 4(q) notice has been served, the party may be liable to the State for punitive damages as a result of the party's failure to take removal or remedial action. *Id*. As stated above with regard to the cost recovery issue, we find no reason to prematurely decide liability issues pursuant to the 4(q) notice since these issues must be proven at hearing.

In summary, the motion to reconsider is denied and the Board's August 1, 1996 order is clarified to the extent discussed in this order. If respondents intend to file an answer to all allegations in the amended complaint, such answer is to be filed on or before December 23, 1996 to insure that this matter expeditiously proceeds to hearing.

IT IS SO ORDERED.

Board Member K.M. Hennessey abstained and Board Member M. McFawn concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the _____ day of _____, 1996, by a vote of _____.

_____
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board