ILLINOIS POLLUTION CONTROL BOARD
December 7, 2000

CHRYSLER REALTY CORPORATION,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 01-25
	)	(Enforcement – Citizens, UST)
THOMAS INDUSTRIES, INC., and	)	
TDY INDUSTRIES, INC.,	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by M. McFawn):

On August 7, 2000, Chrysler Realty Corporation (CRC) filed a complaint against Thomas Industries, Inc., and TDY Industries, Inc. (collectively, respondents). Respondent TDY (TDY) filed an answer on September 5, 2000. On October 12, 2000, TDY filed several motions for its attorneys to appear *pro hac vice*. In this order, the Board determines whether the complaint is duplicitous or frivolous, and rules on the *pro hac vice* motions. The Board finds that the violations alleged in the complaint are not duplicitous or frivolous and therefore accepts this case for hearing, and grants the motions to appear *pro hac vice*.

BACKGROUND

In 1965 and 1971, CRC acquired two parcels of land located at 622 East Northeast Highway in DesPlaines, Illinois (property), from parties with connections to both named respondents.[1] From sometime in 1965, until 1996, CRC constructed and leased a dealership showroom with a vehicle service garage on the property. In 1996, CRC decided to sell the property, and contracted for an environmental site assessment. The assessment revealed a 200,000-gallon underground storage tank (UST), soil and groundwater contamination surrounding the tank, and soil contamination in various locations elsewhere on the property. The complaint alleges that these conditions are the result of the respondent's operations and activities at the property. The complaint asks the Board to enter an order finding that the respondents have violated the Leaking Underground Storage Tank Program (LUST) and applicable regulations (415 ILCS 5/57 *et seq.* (1998) and 35 Ill. Adm. Code 732), and Sections 12(a), (d) and 21(e) of the Environmental Protection Act (Act) (415 ILCS 5/12(a), 12(d), and 21(e) (1998)). As relief,

[1] As alleged in the complaint, the property in question was acquired in 1918 by the Benjamin Electric Manufacturing Company (Benjamin). In the late 1950s, Thomas Industries (Thomas) acquired Benjamin, including the property. In 1964, Thomas transferred the property to the Frederick Post Company (Frederick). From 1965 through 1970, the property was conveyed to a series of Frederick-related entities, until conveyed in 1970 to a predecessor to respondent TDY.

the complaint asks the Board to issue a cease and desist order against respondents for each of the alleged violations, award CRC costs it has incurred and will incur, and other such relief the Board deems just and consistent with the underlying goals of the Act.

In it's answer, TDY raises several affirmative defenses to the allegations contained in the complaint. Among these are the following:

> 9. CRC is precluded from recovering under the [Act] against TDY Industries because said Act does not provide a private cause of action for the requested relief.
>
> 10. CRC's claims are barred, in whole or in part, by the common law doctrines of the case, collateral estoppel and/or *res judicata*, in that a federal district court already has held that CRC's claims are not cognizable under Illinois law. TDY Ans. Par. 9 and 10.[2]

On October 5, 2000, the Board entered an order directing TDY to file a memorandum that provided additional information regarding its tenth affirmative defense. The order also granted Thomas additional time to file its answer to the complaint.

On November 13, 2000, TDY filed its memorandum re: *res judicata* (memorandum). TDY's memorandum alleged that on January 4, 2000, CRC filed a complaint in the District Court for the Northern District of Illinois, Eastern Division (federal complaint). In addition to alleged violations of federal law, negligence, and unjust enrichment, the federal complaint included substantially the same alleged violations as those found in CRC's complaint filed before the Board. Thomas moved that court to dismiss the state violations. In granting that motion, the federal court held that it had no jurisdiction to hear the state claims, as the Act does not sanction a private right of action absent state enforcement. See Chrysler Realty Corporation v. Thomas Industries, 97 F. Supp. 2d 877 (2000).

DUPLICITOUS OR FRIVOLOUS DETERMINATION

Section 31(d) of the Environmental Protection Act (Act) (415 ILCS 5/31(d) (1998)) requires the Board to set citizen's enforcement actions for hearing unless the Board determines that the complaint is "duplicitous or frivolous." The Board and the courts consistently have interpreted "duplicitous" to mean duplicative. See Winnetkans Interested in Protecting the Environment (WIPE) v. Illinois Pollution Control Board, 55 Ill. App. 3d 475, 478-479, 270 N.E.2d 1176, 1178-1179 (1st Dist. 1977); People v. State Oil Company (August 19, 1999), PCB 97-103, slip op. at 2-3.

Section 103.124(a) of the Board's procedural rules provides in part as follows:

> If [a] complaint is filed by a person other than the Agency . . . the Chairman shall

[2] TDY's answer will be referred to as "TDY Ans. Par. __."

place the matter on the agenda for Board determination whether the complaint is duplicitous or frivolous. 35 Ill. Adm. Code 103.124(a).

Below, the Board determines whether the complaint is duplicitous or frivolous.

Duplicitous

A complaint is duplicitous if the matter is identical or substantially similar to one brought in this or another forum. See Walsh v. Kolpas (September 23, 1999), PCB 00-35; Brandle v. Ropp (June 13, 1985), PCB 85-68. While the allegations in the complaint before the Board arise from the same basic set of facts as those alleged in the federal complaint, the federal district court dismissed the allegations related to state law. The federal court can no longer address any alleged violations of the LUST program. CRC's only remedy, if any, for violations of state law must now be found in this action before the Board. The Board therefore finds that the complaint is not duplicitous.

Frivolous

A complaint is frivolous if it requests relief that the Board does not have the authority to grant or fails to state a cause of action upon which the Board can grant relief. See People v. State Oil, PCB 97-103, slip op. at 3; Lake County Forest Preserve Dist. v. Ostro (July 30, 1992), PCB 92-80. In it's answer, TDY challenges a party's authority to file a private cause of action for the requested relief under the Act.

CRC requests, among other things, that the Board award it costs that is has incurred and will incur to address the contamination at the property. The Board has consistently held that it has the authority to award cleanup costs to private parties for a violation of the Act. See Lake County Forest Preserve District v. Ostro (March 31, 1994), PCB 92-80; Herrin Security Bank v. Shell Oil Co. (September 1, 1994), PCB 94-178; Richey v. Texaco Refining and Marketing, Inc. (August 7, 1997), PCB 97-148; and Dayton Hudson Corporation v. Cardinal Industries, Inc., and Daniel E. Cardinal, Jr. (August 21, 1997), PCB 97-134. As noted in Ostro, this holding is based on the broad language of Section 33(a) of the Act (415 ILCS 5/33(a) (1998)) as well as the Illinois Supreme Court decision in People v. Fiorini, 143 Ill. 2d 318, 574 N.E.2d 612 (1991).

In Fiorini, the Illinois Supreme Court considered the issue of private cost recovery in the context of a third-party complaint that sought, among other things, cleanup costs incurred because of an alleged violation of Section 21 of the Act. In denying a motion to dismiss the third-party complaint, the Supreme Court stated that, "[w]hile cleanup costs are not expressly provided for in these [Sections 33(b) and 42 through 45] of the Act, we decline to hold here that an award of cleanup costs would not be an available remedy for a violation of the Act under appropriate facts. Rather, we believe that such a determination is properly left to the trial court's discretion." Fiorini, 143 Ill. 2d at 350, 574 N.E.2d at 625.

Using this rationale, the Board has repeatedly upheld its ability to award cleanup costs under the Act. The instant case involves a citizen's enforcement action brought under Section 31

(d) of the Act. 415 ILCS 5/31(1) (1998). The recovery of cleanup costs sought by CRC is a remedy within the Board's authority.

CRC also requests that the Board direct respondent to cease and desist from further violations. Contrary to TDY's assertion, Section 33(b) of the Act provides clear authority for the Board to order a party to cease and desist from violations of the Act or of the Board's rules and regulations. 415 ILCS 5/33(b) (1998). Thus, the complaint seeks relief which the Board could grant and is, therefore, not frivolous.

CONCLUSION

The Board finds that the complaint is neither duplicitous nor frivolous and is therefore accepted for hearing.

The hearing should be scheduled and completed in a timely manner consistent with Board practices. The Board will assign a hearing officer to conduct hearings consistent with this order and with section 103.125 of the Board's procedural rules. 35 Ill. Adm. Code 103.125.

The assigned hearing officer shall inform the Clerk of the Board of the time and location of the hearing at least 30 days in advance of hearing so that a 21-day public notice of hearing may be published. After hearing, the hearing officer shall submit an exhibit list, a statement regarding credibility of witnesses, and all actual exhibits to the Board within five days of hearing.

Any briefing schedule shall provide for final filings as expeditiously as possible. If, after appropriate consultation with the parties, the parties fail to provide an acceptable hearing date or if, after an attempt, the hearing officer is unable to consult with all of the parties, the hearing officer shall unilaterally set a hearing date. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible.

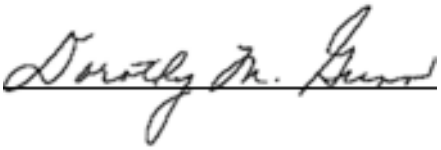
MOTIONS TO APPEAR *PRO HAC VICE*

On October 12, 2000, the Board received motions to appear *pro hac vice* from attorneys Paul K. Stockman, Richard D. Dworek, and Richard W. Hosking. Stockman, Dworek, and Hosking are all licensed attorneys in the Commonwealth of Pennsylvania, and seek to represent TDY in this matter before the Board. The Board allows Stockman, Dworek, and Hosking to appear *pro hac vic*e.

IT IS SO ORDERED.

Board Member R.C. Flemal dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 7th day of December 2000 by a vote of 6-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board