ILLINOIS POLLUTION CONTROL BOARD

September 4, 1980

ENVIRONMENTAL PROTECTION AGENCY, Complainant,	)	
v.	)	PCB 78-278
PETERSON/PURITAN, INC., Respondent.	)	

MS. NANCY J. BENNETT, ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF THE COMPLAINANT.

MS. PERCY L. ANGELO, MAYER, BROWN & PLATT, APPEARED ON BEHALF OF THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (by D. Satchell):

This matter comes before the Board upon a complaint filed November 8, 1978 by the Environmental Protection Agency (Agency) naming as respondent Peterson/Puritan, Inc. (Peterson), a Delaware corporation doing business in Illinois. The two count complaint alleges violations of Sections 12(a) and 12(f) of the Environmental Protection Act (Act) and Rules 203(a) and 901 of Chapter 3: Water Pollution (Rules) in connection with a fish kill. On March 4, 1980 a hearing was held in Kankakee, at which time the parties presented a stipulation of facts but no settlement agreement. No members of the public attended and the Board has received no public comment (R. 1, 12).

Peterson operates a plant which manufactures aerosol and liquid household and personal products in Momence, Kankakee County. In 1978 the facility employed 400 to 450 people with a payroll of $2.6 million. Peterson uses a non-ionic surfactant manufactured by Union Carbide which is known as Tergitol 25-L-3 (Tergitol). On August 14, 1978 the plant was shut down for revisions which included work by a contract plumber on piping which transferred Tergitol from the bulk storage area to the process area. A ¼" pipe plug was left out of the system in the B Dock area. The system was apparently restarted at some time on August 16, 1978. At about 11:15 a.m. approximately 100 gallons of Tergitol spilled onto the floor in the B Dock area. The spill was discovered by a security guard and promptly stopped.

A storm drain runs from the Peterson plant across city property for five or six blocks to an outfall on the south bank of the Kankakee River, southeast of the Illinois Route 1 and 17 bridge. A citizen reported dead and dying fish downstream at around 5:00 p.m. on August 16, 1978. The Momence police notified Peterson that

a milky flow was entering the river at around 10:00 p.m. Peterson supervisory personnel arrived at the outfall about 10:30 p.m. The storm sewer line was plugged with sandbags by Peterson's contract plumber at around 5:00 a.m. on August 17, 1978.

Peterson plugged the B Dock drain and closed the Momence plant. The B Dock area and storm sewers were completely cleaned to remove all detergent residue. The B Dock drain was permanently sealed with cement. Sanitary sewers were fitted with stainless steel sleeves and sealed. The last line was not started until the second shift on August 17, 1978.

On August 16 and 17, 1978 dead fish were collected for a distance of three miles from the outfall. The Illinois Department of Conservation estimated that 254,790 fish were killed. These fish were valued at $23,834.91. A complaint was filed against Peterson by the Department of Conservation in the Circuit Court of Kankakee County. Peterson paid $23,834.91 on September 25, 1978 in settlement of that complaint (Stip. 4).

Under Section 42(b) of the Act the money paid to the Department of Conservation could have been recovered in this action before the Board. Peterson argues that this action is therefore barred by the doctrine of res judicata. When a former adjudication is relied upon as a complete bar to a subsequent action, the questions to be determined are whether the cause of action is the same in the two proceedings, whether the two actions are between the same parties or their privies, whether the former adjudication was a final judgment upon the merits and whether it was within the jurisdiction of the court rendering it [EPA v. Giachini, PCB 77-143, 33 PCB 547, 551 (May 24, 1979); People v. Kidd, 398 Ill. 405, 408 (1947)].

Peterson could have invoked res judicata either by way of an affirmative defense in an answer or by way of a motion to dismiss. Procedural Rule 308(a) requires that an answer be filed within thirty days of receipt of the compliant, and motions to dismiss within fourteen days. Where an affirmative defense has not been raised by the pleadings the complainant does not have adequate notice and the opportunity to cross examine and present rebuttal evidence at a hearing. [Central States Cooperatives, Inc., v. Watson Bros. Transportation Co., 404 Ill. 566, 572 (January 18, 1950; Section 43(4) of the Civil Practice Act.] Application of the technical legal defense of res judicata in this case would absolve the Respondent without consideration of whether the Act or Rules have been violated or whether the environment has been harmed [Section 33(c) of the Act]. Therefore the *time requirements must be strictly applied to res judicata defenses.* The Board holds that Peterson has waived the defense of res judicata by failure to raise it with an appropriate pleading filed at the outset of the action.

The burden of proving res judicata lies with the respondent. The stipulation states only that a certain sum was paid to the Department of Conservation. There is no evidence in the record as to what the cause of action was or whether the payment resulted from a final judgment upon the merits. Indeed, a letter from a Conservation Police Officer of the Department of Conservation to Peterson states that, upon receiving notification of issuance of the check, he would "void your citation" (Res. Ex. 2). Furthermore, judgments should be proved by a certified copy (Ill. Rev. Stat. 1979, ch. 51, Section 13). Although the Agency did not raise these objections at the hearing, it had no notice that Peterson intended to rely on res judicata. The Board finds that, even if Peterson had placed res judicata into issue, it has failed to present sufficient evidence to obtain a dismissal.

Section 12(a) of the Act provides that no person cause or allow the discharge of contaminants so as to cause water pollution or violate Board regulations. Rule 203(a) requires that waters of the State be free of matter in concentrations toxic to aquatic life. The Board finds that Peterson violated Section 12(a) and Rule 203(a) substantially as alleged in Count I.

Count II alleges violation of Section 12(f) of the Act and Rule 901 which proscribe the discharge of contaminants into waters of the State from a point source without an NPDES permit. The Board cannot determine from the facts stipulated what the point of discharge was or whether it was into waters of the State. Count II is therefore dismissed with prejudice as to the events of August 16 and 17, 1978, but without prejudice to the ultimate question of whether an NPDES permit is required.

Peterson states in a brief that the Department of Conservation action was brought pursuant to Ill. Rev. Stat. (1979), ch. 56, Section 2.1 (Reply Brief, 4). This statute provides that fish and certain other aquatic life are the property of the State of Illinois if within its boundaries. The second paragraph provides that the State may recover the reasonable value of aquatic life destroyed by a discharge. The Board assumes that the payment to the Department of Conservation fully compensated the State for its loss of aquatic life. The Board has considered this, and the fact that the money was promptly paid, in mitigation under Section 33(c)(1). However, the Board is required to consider "the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people." This encompasses more than dead fish.

On August 15 and in the morning of August 17 there was considerable rainfall in the area. There was a strong current in the river. Water temperature was 24° C (74° F.) with 12.6 mg/l dissolved oxygen (Comp. Ex. C). It seems unlikely that the fish kill was exacerbated by summer conditions which often place fish under stress. The fish kill was very large, involving over 250,000 fish along three miles of river. The discharge would appear to have been very toxic to fish. The Board finds that, apart from the actual damage to the fish, there is a general public injury associated with the discharge of such contaminants into the waters of the State. The Board finds that the plant has social and economic value. Its suitability to the area is unquestioned.

The Tergitol piping system was inspected by both Peterson and the installer prior to the spill. There is no indication of whether this involved inspection of the lines while the Tergitol was being transferred. There is no indication that the discovery of the leak was other than through routine patrolling of the premises by the security guard. There is no indication of how long the system had been in operation before the leak was discovered.

A rubber mat was customarily placed over the storm drain while liquids were being loaded in the B Dock area. This was not in place since loading was not taking place at the time of the spill. Six to eight weeks before the spill a rubber seal had been placed into the line. At some time prior to the spill the drain became unsealed or the seal was removed from its proper place (Stip. 2). Peterson assumed that the spill had been contained within the plant site. Nearly eleven hours passed between the time of the spill and the time the police notified Peterson. During this time there were apparently no efforts made to check this assumption or to pump the spilled material from the supposedly plugged pipe.

Seven hours elapsed between the time Peterson was notified of the spill and the time the outfall was plugged by the plumbing contractor with sandbags. There is no indication in the record as to whether this could have been done faster by plant personnel. There is no evidence as to whether seven hours was a reasonable time to plug the outfall.

Since the spill Peterson has permanently sealed the B Dock drain with cement. There is no indication that Peterson has adopted any revised spill containment procedures. There is no indication of the fate of the storm water which used to go down the drain. It is questionable whether mere sealing of the drain is sufficient in an area where chemical transfers occur.

Having considered the factors enumerated in Section 33(c) of the Act, the Board finds that a monetary penalty of $500 is necessary to aid in enforcement of the Act.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

1. Respondent Peterson/Puritan, Inc. is in violation of Section 12(a) of the Environmental Protection Act and Rule 203(a) of Chapter 3: Water Pollution, substantially as alleged in Count I of the compliant.

2. Count II is dismissed.

3. Respondent Peterson/Puritan, Inc. shall cease and desist from further violations of Section 12(a) of the Environmental Protection Act and Rule 203 of Chapter 3: Water Pollution.

4. Respondent shall, by certified check or money order payable to the State of Illinois, pay a civil penalty of $500 which is to be sent to:

   Illinois Environmental Protection Agency
   Fiscal Services Division
   2200 Churchill Road
   Springfield, Illinois 62706

IT IS SO ORDERED.

Mr. I. Goodman and Mr. J. Dumelle concur.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order were adopted on the 4th day of September 1980 by a vote of 5-0.

Christan L. Moffett
Christan L. Moffett, Clerk
Illinois Pollution Control Board