ILLINOIS POLLUTION CONTROL BOARD
June 19, 2003

2222 ELSTON LLC,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 03-55
	)	(Citizens UST Enforcement)
PUREX INDUSTRIES, INC., FEDERAL DIE CASTING COMPANY, FEDERAL CHICAGO CORPORATION, RAYMOND E. CROSS, BEVERLY BANK TRUST NO. 8-7611, and LAKESIDE BANK TRUST NOS. 10-1087 AND 10-1343,	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (W.A. Marovitz):

On October 25, 2002, complainant 2222 Elston LLC (Elston) filed a 13-count complaint against respondents alleging violations of the Environmental Protection Act (Act) 415 ILCS 5/*et seq.* (2002) and seeking reimbursement for cleanup costs. Elston alleges that it has already incurred $500,000 in cleaning up oils, solvents and varnish-related products from leaking underground storage tanks (USTs) at 2228 N. Elston, Chicago, Cook County. Elston also seeks attorney fees and expert witness fees, including interest.

Elston alleges that between 1970 and January 2000, respondents violated Sections 21(a), (b), (d), (e), (f), 12(a), (d), and 55(a) of the Act. 415 ILCS 5/21(a), (b), (d), (e), (f), 12(a), (d) and 55(a) (2002). The respondents filed two motions to dismiss the complaint as frivolous.

As discussed below, the Board finds that portions of the complaint are frivolous, and strikes and dismisses those portions of the complaint requesting attorney fees. The Board strikes and also dismisses the complaint as to the Beverly and Lakeside Trusts. The Board further finds that the complaint is not duplicative. The Board therefore denies the parties' motions to dismiss and accepts the case for hearing.

The Board will first address procedural matters and then set forth the applicable law. Next, the Board addresses the arguments raised in the motions to dismiss and the responses to the motions. The Board's analysis follows each issue.

PROCEDURAL MATTERS

Purex Filings

On December 2, 2002, respondent Purex Industries Inc. (Purex) filed a motion to dismiss the complaint as frivolous. Purex attached as an exhibit to the motion the affidavit of Jeffrey

Smith, an attorney for Purex. On April 23, 2003, Elston filed a combined motion to strike Smith's affidavit and a response to Purex's motion. On May 5, 2003, Purex filed a motion for leave to file a reply and a memorandum in support of its motion to dismiss *instanter*. On May 27, 2003, Elston filed a motion for leave to file a combined surreply in support of its response to Purex's motion to dismiss and reply in support of its motion to strike.

The Board's procedural rules allow the filing of a reply to a response only by permission of the Board or hearing officer to prevent material prejudice. *See* 35 Ill. Adm. Code 101.500(e). Purex asserts that Elston's response raises numerous factual and legal arguments to which Purex wants to respond. The Board grants Purex's motion for leave to file a reply.[1] The Board finds that the surreply is not necessary to prevent material prejudice and therefore denies Elston's motion for leave to file the surreply. However, the Board will accept Elston's reply in support of its motion to strike Smith's affidavit.[2]

Federal Respondents Filings

On December 5, 2002, respondents Federal Die Casting Company (FDCC), Federal Chicago Corporation (FCC), Raymond E. Cross (Cross), Beverly Bank Trust No. 807611 (Beverly), and Lakeside Bank Trust Nos. 10-1087 and 10-1343 (Lakeside) (collectively, Federal respondents) filed a motion to dismiss the complaint (Federal Motion). On April 23, 2003, Elston filed a combined motion to strike and response to Federal respondents' motion to dismiss. On May 12, 2003, Federal respondents filed a motion for leave to file a reply memorandum in support of their motion to dismiss *instanter*. The Board grants the motion for leave to file a reply.[3]

APPLICABLE LAW

Citizens Enforcement Actions

In addition to providing that the Illinois Attorney General and the State's Attorneys may file complaints with the Board, the Act authorizes citizens to bring enforcement actions before the Board, alleging violations of the Act or Board regulations. Section 31(d) of the Act provides:

> Any person may file with the Board a complaint, meeting the requirements of subsection (c) of this Section, against any person allegedly violating this Act or any rule or regulation thereunder . . . . Unless the Board determines that such

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[1] Purex's motion to dismiss will be cited as "Purex Mot. at __." Elston's motion to strike and response will be cited as "Elston Resp. to Purex at __." Purex's reply will be cited as "Purex Reply at __."

[2] Elston's Reply in support of its motion to strike will be cited as "Elston Reply at __."

[3] The Federal Respondents' motion to dismiss will be cited as "Federal Mot. at __." Elston's motion to strike and response will be cited as "Elston Resp. to Federal at __." The Federal Respondents' reply will be cited as "Federal Reply at __."

> complaint is duplicative or frivolous, it shall schedule a hearing . . . . 415 ILCS 5/31(d) (2002).

Section 31(c), referred to in the quoted passage, in turn states that the complaint "shall specify the provision of the Act or the rule or regulation . . . under which such person is said to be in violation, and a statement of the manner in, and the extent to which such person is said to violate the Act or such rule or regulation . . . ." 415 ILCS 5/31(c) (2002). The Board's procedural rules codify the requirements for the contents of a complaint, including the "dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations" and a "concise statement of the relief that the complainant seeks." 35 Ill. Adm. Code 103.204(c).

Within 30 days after being served with a complaint, a respondent may file a motion with the Board to dismiss the complaint on the grounds that the complaint is frivolous or duplicative. 35 Ill. Adm. Code 103.212(b). The Board's procedural rules define "frivolous" and "duplicative" as follows:

> "Frivolous" means a request for relief that the Board does not have the authority to grant, or a complaint that fails to state a cause of action upon which the Board can grant relief.
>
> "Duplicative" means the matter is identical or substantially similar to one brought before the Board or another forum.

Provisions Allegedly Violated

Land Pollution

Sections 21(a), (b), (d), (e), and (f) of the Act state:

> No person shall:
>
> (a) Cause or allow the open dumping of any waste.
>
> (b) Abandon, dump, or deposit any waste upon the public highways or other public property, except in a sanitary landfill approved by the Agency pursuant to regulations adopted by the Board.
>
> (d) Conduct any waste-storage, waste-treatment, or waste disposal operation:
>
> (1) without a permit granted by the Agency or in violation of any conditions imposed by such permit, including periodic reports and full access to adequate records and the Inspection of facilities, as

may be necessary to assure compliance with this Act and with regulations and standards adopted thereunder; provided, however, that, except for municipal solid waste landfill units that receive waste on or after October 9, 1993, no permit shall be required for

(i) any person conducting a waste-storage, waste-treatment, or waste-disposal operation for wastes generated by such person's own activities which are stored, treated, or disposed within the site where such wastes are generated, or

(ii) a facility located in a county with a population over 700,000, operated and located in accordance with Section 22.38 of this Act, and used exclusively for the transfer, storage, or treatment of general construction or demolition debris;

(2) in violation of any regulations or standards adopted by the Board under this Act; or

(3) which receives waste after August 31, 1988, does not have a permit issued by the Agency, and is

(i) a landfill used exclusively for the disposal of waste generated at the site,

(ii) a surface impoundment receiving special waste not listed in an NPDES permit,

(iii) a waste pile in which the total volume of waste is greater than 100 cubic yards or the waste is stored for over one year, or

(iv) a land treatment facility receiving special waste generated at the site; without giving notice of the operation to the Agency by January 1, 1989, or 30 days after the date on which the operation commences, whichever is later, and every 3 years thereafter. The form for such notification shall be specified by the Agency, and shall be limited to information regarding: the name and address

of the location of the operation; the type of operation; the types and amounts of waste stored, treated or disposed of on an annual basis; the remaining capacity of the operation; and the remaining expected life of the operation.

Item (3) of this subsection (d) shall not apply to any person engaged in agricultural activity who is disposing of a substance that constitutes solid waste, if the substance was acquired for use by that person on his own property, and the substance is disposed of on his own property in accordance with regulations or standards adopted by the Board.

This subsection (d) shall not apply to hazardous waste.

(e) Dispose, treat, store or abandon any waste, or transport any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder.

(f) Conduct any hazardous waste-storage, hazardous waste-treatment or hazardous waste-disposal operation:

(1) without a RCRA permit for the site issued by the Agency under subsection (d) of Section 39 of this Act, or in violation of any condition imposed by such permit, including periodic reports and full access to adequate records and the inspection of facilities, as may be necessary to assure compliance with this Act and with regulations and standards adopted thereunder; or

(2) in violation of any regulations or standards adopted by the Board under this Act; or

(3) in violation of any RCRA permit filing requirement established under standards adopted by the Board under this Act; or

(4) in violation of any order adopted by the Board under this Act.

Notwithstanding the above, no RCRA permit shall be required under this subsection or subsection (d) of Section 39 of this Act for any person engaged in agricultural activity who is disposing of a substance which has been identified as a hazardous waste, and which has been designated by Board regulations as being subject to this exception, if the substance was acquired for use by that person on his own property and the substance is disposed of on his own property in accordance with regulations or standards adopted by the Board. 415 ILCS 5/21(a), (b), (d), (e), (f) (2002).

Water Pollution

Sections 12(a) and (d) state:

No person shall:

(a) Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act.

(d) Deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard. 415 ILCS 5/12(a), (d) (2002).

Used Tires

Section 55(a) of the Act states:

No person shall:

(1) Cause or allow the open dumping of any used or waste tire.

(2) Cause or allow the open burning of any used or waste tire.

(3) Except at a tire storage site which contains more than 50 used tires, cause or allow the storage of any used tire unless the tire is altered, reprocessed, converted, covered, or otherwise prevented from accumulating water.

(4) Cause or allow the operation of a tire storage site except in compliance with Board regulations.

(5) Abandon, dump or dispose of any used or waste tire on private or public property, except in a sanitary landfill approved by the Agency pursuant to regulations adopted by the Board.

(6) Fail to submit required reports, tire removal agreements, or Board regulations. 415 ILCS 5/55(a) (2002).

PUREX MOTION TO DISMISS

Purex argues that Elston's complaint against Purex should be dismissed as frivolous because the Board does not have personal jurisdiction over Purex. Purex Mot. at 2. Purex argues that Purex has no contacts with Illinois. Purex Mot. at 2. Purex further argues the complaint fails to allege that Purex has ever done business in Illinois. Purex Mot. at 2.

To support Purex's motion, Purex attached the affidavit of Jeffrey M. Smith, who is Purex's counsel. Purex Mot. at Exh. A. His affidavit states that since Purex's creation, Purex has had no offices in Illinois, has not done any business in Illinois, and has not had any contacts with Illinois. Purex. Mot. at Exh. A.

Elston Motion To Strike and Response

Elston moves the Board to strike the Smith affidavit attached to Purex's motion. Elston Resp. to Purex at 1. Elston argues that the affidavit is inadequate to support a challenge to the Board's personal jurisdiction, and is nothing more than conclusions that recite the legal standards in the Illinois long-arm statute. Elston Resp. to Purex at 2. Elston asserts that the Board's rules do not address how the Board should handle affidavits supporting motions contesting personal jurisdiction. Therefore, Elston notes that under 35 Ill. Adm. Code 101.100(b), the Board may look to the Supreme Court's rules for guidance. Elston Resp. to Purex at 10-11, citing 35 Ill. Adm. Code 101.100(b). Supreme Court Rule 191 states that affidavits regarding a motion to contest personal jurisdiction shall, among other things "set forth with particularity the facts upon which the claim. . . is based; shall. . . not consist of conclusions but of facts admissible in evidence. . . ." Elston Resp. to Purex at 10, citing Supreme Court Rule 191. Elston asserts that Smith's affidavit fails to state facts with particularity and is a series of conclusory statements. Elston Resp. to Purex at 11.

Elston also argues that Purex is the lawful corporate successor to Purex Corporation (Purex Corp.), which purchased the site from the T.F. Washburn Company (Washburn) in 1961 and operated it before selling the site in 1978. Elston Resp. to Purex at 2. As Purex Corp.'s successor in interest, Elston asserts that Purex Corp.'s jurisdictional ties are imputed to Purex automatically and as a matter of law. Elston Resp. to Purex at 3; Elston Resp. at Exh. 1 at 194:1-195:16, 197:3-197:19.

To support its claim that Purex is the successor in interest to Washburn and Purex Corp., Elston states that Purex Corporation Ltd. acquired Washburn (the owner and operator of the site) in 1961. Elston Resp. to Purex at 4. In 1964, Purex Corporation Ltd. liquidated and dissolved

Washburn, and merged Washburn into Purex Corporation Ltd. *Id*. In 1974, Purex Corporation Ltd. changed its name to Purex Corporation. *Id.* In 1978, Purex was incorporated in Delaware and acquired all Purex Corp.'s stock. *Id*. In 1982, Purex Corp. changed its name to T.P. Industrial Inc., as a part of a leveraged buyout. *Id*. In 1986, T.P. Industrial Inc. merged with Purex (the respondent in this case).

To further support its assertion that Purex is Purex Corp.'s corporate successor, Elston states that Purex admitted being the corporate successor in a federal suit in New Jersey. Elston Resp. to Purex at 5, citing United States v. Farber, 86-3736, (N.J. 1988). Elston also cites a California Water Resources Board decision that stated that Purex was civilly liable for a site cleanup and held that "Purex Industries, Inc. is the successor to Purex Corporation." Elston Resp. to Purex at 6, citing Petition of Purex Industries, Inc. Order WQ 97-04 (May 14, 1997), Exh. 6. Further, Elston states that Purex itself argued Purex was the corporate successor to Purex Corp.'s insurance rights in Associated Aviation Underwriters, Inc. v. Purex Indus., Inc., 121 Cal Rptr. 2d 259, 261 (Cal. Ct. App.). Elston Resp. to Purex at 7.

Elston further argues that in these proceedings, Purex has asserted the attorney-client privilege and other "evidentiary immunities" over documents created by Purex Corp. Elston Resp. to Purex at 7. Additionally, Elston states that Purex has had environmental contacts in East St. Louis, Illinois, and paid the Illinois Environmental Protection Agency $50,000 to resolve its liability related to the site in East St. Louis. Elston Resp. to Purex at 8,citing Exh. 12 at 1-3.

Elston's remaining arguments allege Purex is collaterally and judicially estopped from denying it is the lawful successor to Purex Corp. Elston Resp. to Purex at 20-21.

Purex Reply

Regarding the motion to strike Smith's affidavit, Purex replies that the Board should not strike the affidavit because it is reliable under Illinois law and the affidavit can be corroborated independently. Purex Reply at 17. Purex also provides additional affidavit testimony (Smith affidavit #2) attached to the reply, that Purex argues "further verifies the veracity" of Smith's original affidavit. Purex Reply at 19.

Regarding the acquisition of Washburn, Purex offers its version of events in its reply. Purex argues that Purex Corporation Ltd. (Purex California) acquired Washburn's stock in 1961. Purex Reply at 3. Washburn's operations included the site on Elston Avenue. Purex Reply at 3. In 1974, Purex California sold the Washburn business on Elston Avenue to Syncon Resins, which operated the site for three years. Purex Reply at 3. In 1977 or 1978, Purex California repossessed the site and sold it to Federal Die Casting in 1978. Also in 1978 Purex Industries Inc. (Purex NYSE) was created to serve as the parent corporation of Purex California. Purex Reply at 3. Purex California was a wholly-owned subsidiary of Purex NYSE from 1978-1982. Purex Reply at 3.

Purex was created under PII Holdings, Inc. (PII) in 1982 to effect a leverage buyout of Purex NYSE. Purex Reply at 4. PII (the parent) underwent a name change to Purex Industries, Inc. (the Purex in this case) in 1982. During all of the corporate transactions, Purex argues that

Purex's sole role was as a parent corporation, and that Purex was not involved in the acquisition or distribution of assets and liabilities. Purex Reply at 5.

Purex replies that none of Elston's arguments contradict Purex's claim that is has no contacts with Illinois that subject Purex to personal jurisdiction in this proceeding. Purex Reply at 6. Purex argues that Elston has failed to show that Purex had sufficient contacts with Illinois. Purex Reply at 7. Purex also replies that the personal jurisdiction contact of another corporation may not be imputed to respondent. Purex Reply at 8. Even if the contacts could be imputed, Elston has failed to show that Purex succeeded to contacts of any subsidiary (that may have been liable for the operations at the site). Purex Reply at 10. Purex argues that Elston has failed to show that Purex succeeded to the assets and liabilities of any predecessor corporation relating to Washburn or the site. Purex Reply at 10.

Purex declares that Elston cannot rely on the California Water Resources Board's decision to argue that Purex is collaterally estopped from alleging it did not succeed the liabilities relating to site. Purex Reply at 12. Purex also claims that judicial estoppel does not apply to Purex. Purex Reply at 13. Purex also argues that Elston has not proven that Purex is the successor. Purex Reply at 16.

Elston Reply

Elston replies that Smith's affidavit should be stricken because Purex employed him in 1984, which is 23 years after Purex acquired Washburn, and six years after Purex sold the assets of the Washburn division at the Elston site. Elston Reply at 15. Elston argues that Smith cannot have knowledge of the facts that occurred before Purex employed him. *Id.* Elston argues that Smith has not met the factual allegations described in the complaint, and argues the affidavit is conclusory. *Id*. at 16. Purex argues that both the original Smith affidavit, and Smith affidavit #2 (attached to Purex's reply) should be stricken. Elston Reply at 17

Analysis

Regarding Elston's motion to strike the Smith affidavit, the Board's procedural rules do not provide detail on the parameters of an affidavit. MDI Limited Partnership #42 v. Regional Board of Trustees for Boone and Winnebago Counties and Board of Education of Belvidere District 100, PCB 00-181 (May 2, 2002). The Board may then look to the Supreme Court Rules for guidance and the Board does so here.

Supreme Court Rule 191 provides in part that an affidavit:

> shall be made on personnel knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto. 145 Ill. 2d R. 191.; S. Ct. Rule 191.

The Board has examined both affidavits and Supreme Court Rule 191. Based on the Board's examination, the Board strikes both Smith affidavits. The affidavit attached to Purex's motion to dismiss is conclusory. Furthermore, it is not clear from either affidavit that Smith could testify to the facts presented in the affidavits. Therefore, the Board will strike both Smith affidavits. The Board notes that Purex is not precluded from presenting the information in the affidavits by another means.

Regarding the issue of personal jurisdiction, both Elston and Purex supply documentation to support their arguments that Purex is either a successor in interest to the company that contaminated the site, or parent company to the company that contaminated the site. The Board must dismiss a case as frivolous if the Board determines that the complaint 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.

The Board finds the complaint requests relief that the Board has authority to grant and states a cause of action upon which the Board can grant relief. Pursuant to Section 31(d) of the Act, a person can file a complaint against any person allegedly violating the Act. A "person" includes a corporation, "or any other legal entity, or their legal representative, agent or assigns". Purex is a "person" under the Act who has received service of a complaint alleging violations of the Act. Specifically, Purex is alleged to, among other thing, have "caused or allowed" pollution in Illinois in violation of the Act. Based on the current record, the Board cannot find that no set of facts could be proven that would entitle Elston to relief from Purex. The Board therefore denies Purex's motion to be dismissed from this case.

Elston Motion to Strike

Elston moves the Board to strike the nine exhibits attached to Federal respondents' motion to dismiss. Elston Resp. to Federal at 3. Elston argues that in ruling on a motion to dismiss, the Board must rely only on only the facts alleged in the complaint, and may not consider facts extrinsic to the complaint, including supporting affidavits. Elston Resp. to Federal at 3, citing Johnson v. ADM-Demeter, PCB 98-31 (July 8, 1998) and Davis v. Weiskopf, 108 Ill. App. 3d 505, 439 N.E.2d 60, 63 (2d Dist. 1982). Elston further argues that even if the Board could consider extrinsic facts, the Federal respondents have failed to provide competent testimony authenticating the documents they have submitted and verifying the facts they have alleged. Elston Resp. to Federal at 3-4, citing Giertych v. 4T's Mgmt, LLC, PCB 00-133 (Apr. 20, 2000) and Krautsack v. Patel, PCB 95-143 (June 15, 1995).

Besides asking the Board to strike the nine exhibits, Elston asks the Board to strike the portions of the motion that rely entirely on the facts presented in the exhibits, including pages 2-4 of the motion; the third argument at Section III.A at pages 6-8 of the motion; and Section III.C at pages 10-11 of the motion. Elston Resp. to Federal at 4.

The Federal respondents reply that the Board has denied similar motions at this stage of the proceedings. Federal Reply at 1, citing Kelly-Mack Partners v. Robertson-Ceco Corp., PCB 99-162 (July 22, 1999).

The Board denies Elston's motion to strike the Federal respondents' attachments, as well as the motion to strike the portions of the motion to dismiss that rely on the facts in the exhibits. At this stage of the proceedings, all that the Board has considered is whether the complaint is frivolous or duplicative, and whether the complaint contains sufficiently well-plead allegations that, if accepted as true, could result in a set of facts proven that may entitle Elston to relief. In the course of this inquiry, Elston has suffered no prejudice from the presence of attachments in the Federal respondents' filings. This ruling does not bar any future motions by either party, nor does it dictate the future outcome of any evidentiary rulings during the course of hearing.

FEDERAL RESPONDENTS MOTION TO DISMISS

The Federal respondents move the Board to dismiss the complaint as frivolous for three reasons. They assert that the complaint seeks relief that the Board does not have authority to award, the complaint fails to state its claims with specificity, and the complaint fails to state a cause of action. Federal Mot. at 5, 8, 10 and 11.

Attorney Fees and Action for Cleanup Costs

The Federal respondents argue that the Board does not have the authority to grant attorney fees and other expenses incurred during the litigation of citizen's suits. Fed. Mot. at 5, citing ESG Watts Inc. v. PCB and IEPA, 676 N.E.2d 299, 307-09 (3rd Dist. 1997). The Federal respondents also argue that this case is a "direct action for costs" and argues Elston does not ask the Board to "enforce" any requirements of the Act. Federal Mot. at 5-6, citing People v. State Oil Co., PCB 97-103 (May 18, 2000). The Federal respondents argue that in State Oil the Board distinguished between a direct action for costs and an enforcement action that requests costs as a discretionary remedy for a violation of the Act. Fed. Mot. at 5.

The Federal respondents conclude that the Board is not authorized to grant cost recovery for disappointed real estate purchase. Fed. Mot. at 6, citing NBD Bank, 686 N.E.2d at 709. In the alternative, the Federal respondents argue that this is not a case where the Board should exercise its discretion and award costs because the contract for the sale of the site included a clause that Elston was obliged to investigate the property before closing. Fed. Mot. at 7. The Federal respondents claim Elston waived this right and agreed to limit the seller's liability to $50,000. Fed. Mot. at 6-7.

Elston responds that the Federal respondents' motion must be denied because Elston's case is a statutorily-authorized enforcement action. Elston Resp. to Federal at 5. Elston argues that its complaint clearly states the eight sections of the Act the Federal respondents have violated. *Id.* at 6. Elston argues that it seeks reimbursement for cleanup costs as a discretionary remedy for the Federal respondents' violations of the Act. *Id.* at 6. Elston claims that in State Oil the Board explained that NBD Bank set forth the test to determine whether a statue creates a private right of action in the nature of a tort claim. *Id.* at 7. In State Oil, the Board explained that tort claims brought in a state court may include recovery costs incurred in connection with a cleanup, but those claims must be distinguished from enforcement actions brought before the Board. *Id.* at 7. Elston argues it is not bringing a direct action in tort for damages, but seeks reimbursement of cleanup costs through an enforcement action under Section 31(d) of the Act, so that the motion to dismiss should be denied. *Id.* at 8.

Regarding the issue of attorney fees, Elston asserts that the Board has the discretion to award fees that are "closely tied to the actual cleanup" as opposed to "litigation related" fees, even though such fees may be paid to attorneys. *Id.* at 8. Elston argues this issue is one of first impression before the Board and cites to federal Comprehensive Environmental Response Compensation and Liability Act (CERCLA) cases for the proposition that "some lawyers' work that is closely tied to the actual cleanup" may be awarded costs at the discretion of the trier of fact. *Id.* at 8, citing Key Troni Corp. v. United States, 711 U.S. 809, 819-20 (1994); Lai v. Nudelman, No. 94 C 4585 (ND Ill. June 19, 1995). Elston summarizes its request as asking the Board "to consider whether its broad authority to "enter such final order . . . as it shall deem appropriate under the circumstances," 415 ILCS 5/33(a) (2002), gives the Board "discretion to award attorney's fees that are not related to litigation, but rather are closely tied to the actual cleanup." *Id.* at 9. Elston suggests the Board reserve ruling on this issue until the Board has an opportunity to consider the "details and evidence" of the "cleanup-related fees Elston has had to bear." *Id.* at 10.

Regarding the Federal respondents' argument that Elston's complaint should be dismissed because the contract for the sale of the site included a clause that Elston was obliged to investigate the property before closing and Elston waived this right and agreed to limit the seller's liability to $50,000, Elston responds that only Lakeside was a party to the contract. *Id.* at 11. Elston further responds that the Board has held that contract law principles are not a defense in enforcement actions. *Id.* at 11, citing Dayton Hudson Corp. v. Cardinal Indus., Inc., PCB 97-134 (Aug. 21. 1997).

In their reply, the Federal respondents reiterate all of their previously addressed claims. Federal Reply at 2-10.

Analysis

The Board has previously held that Section 42(f) of the Act authorizes the award of attorney fees only in cases in which the Attorney General or a State's Attorney prevails on behalf of the People of the State of Illinois. See 415 ILCS 5/42(f) (2002); *see also* Charter Hall Homeowner's Association v. Overland Transportation System, Inc., PCB 98-81 (Jan. 22, 1998), and Dayton Hudson Corp. v. Cardinal Industries Inc., PCB 97-134 (Aug. 21, 1997). The Board cannot award attorney fees and other ordinary expenses of litigation in citizen's enforcement suits. ESG Watts v. PCB and IEPA, 286 Ill. App. 3d 325, 337, 676 N.E.2d 299, 307 (3rd Dist. 1997); Village of Park Forest v. Sears, Roebuck, & Co., PCB 01-77 (Feb. 15 2001). An administrative Agency such as the Board is a **"**creature of statute" and, therefore, the statute that created the Board provides it with its authority. Granite City Div. of National Steel Co. v. Illinois Pollution Control Board, 155 Ill. 2d 149, 171, 613 N.E. 2d 719, 729 (1993).

It is a settled issue that the Board does not have authority to award attorney fees in citizen's cases. Because an action before the Board is frivolous if it requests relief that the Board cannot grant, Lake County Forest Preserve Dist. v. Ostro, PCB 92-80 (July 30, 1992), the Board dismisses as frivolous those portions of the complaint in which Elston requests attorney fees.

The Federal respondents argue that Elston's complaint should be dismissed as frivolous because the complaint is a direct action for costs, and Elston does not ask the Board to enforce any requirements of the Act. The Federal respondents argue that the Board should dismiss the complaint because the Board is not authorized to grant cost recovery for a disappointed real estate purchase. In the alternative, the Federal respondents argue the contract for sale of the property included a provision that Elston must investigate the property before closing (which Elston waived), and limited the seller's liability to $50,000. For these reasons, the Federal respondents assert the claim is frivolous.

The Board finds that Elston's complaint plainly states the Sections of the Act it seeks to have enforced. Specifically, Elston alleges all of the respondents violated Sections 21(a), (b), (d), (e), (f), 12(a), (d), and 55(a) of the Environmental Protection Act (Act). 415 ILCS 5 *et seq*. (2002). The Board denies the Federal respondents' motion to dismiss on the grounds that Elston's complaint is frivolous because it is not an enforcement action.

The Board further finds that the complaint is not frivolous because its authority to grant cost recovery is a settled issue. The Board has already stated that it has the authority to award cleanup costs to citizen complainants as a remedy for a violation of the Act. *See, e.g.*, Lake County Forest Preserve District v. Ostro, PCB 92-80 (Mar. 31, 1994), PCB 92-80; Streit v. Oberweis Dairy, Inc., PCB 95-122 (Sept. 7, 1995); Herrin Security Bank v. Shell Oil Co., PCB 94-178 (Sept. 1, 1994); Richey v. Texaco Refining and Marketing, Inc., PCB 97-148 (Aug. 7, 1997); MDI v. Regional Board of Trustees, PCB 00-181 (May 2, 2002);. As the Board stated in Ostro:

> we also find that allowing the award of clean up costs in some cases will further the purposes of the Act, by encouraging persons to remediate a threat to environment immediately, knowing that their costs could be reimbursed. Section 33(a) specifically allows the Board to enter into such final orders as it deems appropriate. We find that this broad grant of authority, coupled with the supreme court's refusal in Fiorini to find that the award of cleanup costs is not available under the Act, gives the Board the authority to award cleanup costs. Ostro, PCB 92-80 (Mar. 31, 1994).

Whether or not Elston is a disappointed real estate purchaser, the Board finds that Elston is alleging violations of the Act over which the Board has jurisdiction. The claim is not frivolous. Moreover, the Board has previously found that the Act "supplanted [*caveat emptor*] with a liability scheme that holds responsible parties liable for their actions." Dayton Hudson Corporation v. Cardinal Industries, Inc., PCB 97-134 (Aug. 21, 1997). The issue before the Board is whether Federal respondents' violated the Act. The contract between the parties does not divest the Board of jurisdiction in this matter. The Board finds that the complaint is not frivolous.

Lack of Specificity

The Federal respondents argue that Elston's complaint should be dismissed as frivolous because the complaint fails to comply with 35 Ill. Adm. Code 103.204(c)(2) and Section 31(c) –

(d) of the Act. Namely, the Federal respondents assert that the complaint is devoid of information regarding the dates, events, nature, extent, duration and strength of the alleged discharges alleged to violate the Act. Federal Mot. at 8. The Federal respondents further argue that each of the eight counts fails to provide any specific information with respect to any particular Federal respondent. Federal Mot. at 8. Additionally, the complaint does not specify which Federal respondent was allegedly responsible for discharging which contaminant. Federal Mot. at 9. Moreover, Elston fails to specify when any of the alleged discharges occurred. Federal Mot. at 9.

The Federal respondents claim that because of these alleged deficiencies it is impossible for them to answer the complaint or prepare a defense. Federal Mot. at 9.

Elston responds that the causes of action are factually sufficient to state a claim. Elston Resp. to Federal at 13. Elston cites to portions of its complaint that plead with "great specificity the dates, location, events, nature, extent, duration, and strength of discharges" as they relate to the Federal respondents. *Id.* at 14, citing paragraphs 1-40 of the complaint. Elston also argues that the claims raised in its complaint are comparable to other enforcement actions accepted by the Board where parties sought reimbursement for cleanup costs associated with leaking USTs. *Id.* at 13, citing, among other cases, Village of Park Forest v. Sears Roebuck & Co., PCB 01-77 (June 6, 2002).

Elston argues that it sufficiently identifies the precise contaminants that each of the Federal respondents discharged and the dates the contamination occurred. *Id.* at 19-20. Elston states that its complaint alleges that FDCC or FCC stored or disposed of "oils, solvents, varnish-related products and by-products, PCB containing materials, and petroleum related products and by-products," and "waste tires, bricks and other discarded material in each of the 17 USTs at the site." Elston Resp. to Federal at 20. Elston argues that the leaking occurred or continued to occur between 1978 and January 2000. *Id.* at 20. During the time of the leaking, "Cross, Beverly and Lakeside owned, operated, possessed, controlled or had authority over the site and the die casting operations conducted there, including FDCC or FCC's storage, disposal or abandonment" of these contaminants. *Id.* at 20.

Analysis

For purposes of ruling on a motion to dismiss, all well plead facts contained in the pleading must be taken as true and all inferences from them must be drawn in favor of the nonmovant. People v. Stein Steel Mills Services, Inc., PCB 02-1 (Nov. 15, 2001). A complaint should not be dismissed for failure to state a claim unless it clearly appears that no set of facts could be proven under the pleadings that would entitle complainant to relief. Shelton v. Crown, PCB 96-53 (May 2, 1996).

The Board's review of the complaint shows that Elston alleges that all of the Federal respondents "owned, operated, possessed, controlled or had authority over the site and relevant operations conducted there. . . at various times during the period 1970 through January 2000." Comp. at 9. Elston further alleges that oils, solvents, varnish-related products and by-products, PCB-containing materials, and petroleum related products were released from USTs at the site

while respondents were the owners and operators of the site. Comp. at 9. The complaint further alleges claims of waste or contaminant dumping, abandoning, depositing, disposing, and discharging against all of the respondents.

The Board finds that the complaint alleges facts in sufficient detail. Although the Federal respondents object to Elston arguing the same allegations for each respondent, the Board finds that this is not cause to dismiss the complaint as frivolous.

Failure to State a Cause of Action

The Federal respondents also argue that the complaint should be dismissed if not as to all of the Federal respondents, then as to some of the Federal respondents. Federal Mot. at 10. Specifically, the complaint should be dismissed as frivolous against the Beverly and Lakeside Trusts because the trusts have all been dissolved. *Id.* at 10, citing Fed. Exh. G.[4] The complaint against Cross should be dismissed because he never owned the site, and his alleged status as shareholder, officer or director of FDCC or FCC is insufficient to establish liability under the Act. *Id.* at 11, citing Fed. Exh. B. The complaint against FCC should be dismissed because it never conducted any operations at the site. *Id*. at 11. FCC was only a holding company and never did anything that would subject it to liability under the Act. *Id*. at 11, citing Exh. I.

The Federal respondents further argue that five of the eight counts should be dismissed as frivolous against all Federal respondents except FDCC (collectively, non-FDCC Federal respondents) because they fail to state a cause of action. *Id*. at 11. The non-FDCC Federal respondents allege that no facts could support the liability as a matter of law as to counts II, III, IV, V, and VII because all require some affirmative act (abandon, dump, deposit, etc.) that the parties without operations at the site could not possibly have undertaken. *Id*. at 12.

Similarly, the Federal respondents argue Elston failed to state a claim under Section 21(d) and (f) of the Act because Elston failed to allege that the non-FDCC Federal respondents "conducted" any sort of waste-treatment, waste disposal, etc. because the non-FDCC Federal respondents did not conduct any operations at all at the site. *Id*. at 12-13. Additionally, the Federal respondents allege Elston failed to state a claim under Section 21(e) of the Act because the non-FDCC Federal respondents did not have any waste to begin with and could not have disposed, treated, stored, or abandoned it. *Id*. at 13.

Finally, Federal respondents claim that Elston failed to sufficiently allege that the non-FDCC Federal respondents violated Section 12(d) of the Act (prohibiting depositing contaminants on the land). Elston failed to allege that the non-FDCC Federal respondents deposited any contaminants because the non-FDCC had no contaminants to deposit. *Id.*. at 13.

Elston responds that its allegations against Beverly, Lakeside and Cross are sufficient. Elston Resp. to Federal at 21. Elston argues that Beverly, Lakeside and Cross owned the site and leased it to FDCC to conduct die casting operations. *Id.* at 21. Elston argues that Beverly,

[4] Exhibits attached to the Federal Respondents' motion will be cited as "Fed Exh. __."

Lakeside and Cross had the authority to control and did control operations at the site relating to the treatment, storage and disposal of waste. *Id.* at 21.

Regarding Beverly and Lakeside, Elston argues that as trustees for certain land trusts that owned the site, they are liable as owners, controllers and lessors. *Id.* at 23. Elston argues the Board has held that the liability of trustees will depend on the circumstances of each case. *Id.* at 23, citing IEPA v. City of Waukegan, PCB 71-298 (Dec. 21, 1971). Elston argues its claims against Beverly and Lakeside are sufficient and Elston is entitled to take discovery of the entities that succeeded to the liabilities of Beverly and Lakeside. *Id.* at 23.

Regarding Cross, Elston argues that the beneficiaries of land trusts typically possess the attributes of ownership sufficient to establish liability for violations of the Act. *Id.* at 24, citing Montgomery County v. Crispens, AC 95-43 (Feb. 1, 1996). Because Elston asserts that Cross was the beneficiary of the trust that owned and operated the site, and because in his individual capacity that he operated by the site, Elston argues the motion to dismiss must be denied as to Cross.

Regarding FCC, Elston responds that the motion to dismiss must be denied because the Federal respondents admit that FCC owned the site from at least 1978 through 1983 and as the owners, they are liable for violations of the Act. *Id.* at 27.

Lastly, in response to the non-FDCC Federal respondents' allegation that no facts could support the liability as a matter of law as to counts II, III, IV, V and VII because all require some affirmative act (abandon, dump, deposit, etc.) that the parties without operations at the site could not possibly have undertaken, Elston states that it has sufficiently pled allegations for those counts. *Id.* at 27. Elston cites to the paragraphs 1-40 of its complaint in support of its response. *Id.* at 27.

Analysis

Elston does not refute the Federal respondents' claim that the Beverly and Lakeside trusts have been dissolved. Rather, Elston argues it is entitled to take discovery of the entities that succeeded to the liabilities of Beverly and Lakeside. While the Board agrees that Elston may pursue the matter against the entities that succeeded the liabilities of the trusts, the Board dismisses the complaint against the Beverly and Lakeside trusts because the evidence shows the trusts have been closed. Elston cites no authority for the proposition that a closed trust is a proper entity against which a complaint for violations of the Act may be filed. This ruling does not preclude Elston from seeking leave to amend the complaint to name the entities that succeeded Beverly and Lakeside's liabilities, if Elston later determines who the entities are. *See* 35 Ill. Adm. Code 103.206.

The Board denies the motion to dismiss as to Cross. Section 21 prohibits a "person" from illegally disposing of waste. Section 3.315 of the Act defines "person" as, among other things a "trust. . . or any other legal entity, or their legal representative, agent or assigns." 415 ILCS 5/3.315 (2002). Because a set of facts could be proven under the pleadings that would entitle Elston to relief, the Board denies the motion to dismiss as to Cross.

The Board finds that the Federal respondents' statements that FCC owned the property from 1978-1932 and was the lessor of the property is sufficient to deny the motion to dismiss as to FCC. Because a set of facts could be proven under the pleadings that would entitle Elston to relief, the Board denies the motion to dismiss as to FCC.

Lastly, the Federal respondents argue that the Board should dismiss counts II, III, IV, V and VII as to the non-FDCC Federal respondents because all of the counts require an affirmative act that the non-FDCC respondents could not possibly have undertaken. The Board denies the motion to dismiss counts II, III, IV, V, and VII as to the non-FDCC Federal respondents because a set of facts could be proven under the pleadings that would entitle Elston to relief.

DUPLICATIVE DETERMINATION

An action before the Board is duplicative if the matter is identical or substantially similar to one brought before the Board or in another forum. Brandle v. Ropp, PCB 85-68 (June 13, 1985); 35 Ill. Adm. Code 101.202. The Board has not identified any other cases, identical or substantially similar to this, pending in this or other forums. Therefore, based on the record before us, this matter is not duplicative.

CONCLUSION

The Board strikes the two affidavits of Jeffrey Smith. The Board declines to dismiss the Purex complaint on personal jurisdiction grounds. The Board denies Elston's motion to strike the Federal respondents' attachments. The Board denies the Federal respondents' motion to dismiss the complaint as frivolous for failing to ask the Board to enforce the Act's requirements. The Board denies the motion to dismiss the complaint because the Board does have authority to grant cost recovery. The Board finds that the complaint alleges facts in sufficient detail. The Board denies the motion to dismiss as to Cross and FCC.

The Board strikes and dismisses as frivolous the portions of Elston's complaint that requests attorney fees. The Board strikes and dismisses the complaint as to the Beverly and Lakeside Trusts because the evidence shows those trust have been closed.

The Board finds this matter is not duplicative.

The Board accepts the complaint for hearing. *See* 415 ILCS 5/31(d) (2002); 35 Ill. Adm. Code 103.212(a). A respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if the respondents fail within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider the respondents to have admitted the allegations. 35 Ill. Adm. Code 103.204(d). Motions to dismiss stay the 60-day answer period. 35 Ill. Adm. Code 103.212(b). All respondents have 60 days from receipt of this order to file an answer. 35 Ill. Adm. Code 103.204(e).

The Board directs the hearing officer to proceed expeditiously to hearing. Among the hearing officer's responsibilities is the "duty . . . to ensure development of a clear, complete, and

concise record for timely transmission to the Board." 35 Ill. Adm. Code 101.610. A complete record in an enforcement case thoroughly addresses, among other things, the appropriate remedy, if any, for the alleged violations, including any civil penalty.

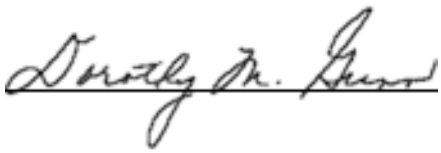
If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2002). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an on-going violation, if any, and, second, whether to order the respondent to pay a civil penalty. The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount, such as the duration and gravity of the violation, whether the respondent showed due diligence in attempting to comply, any economic benefit that the respondent accrued from delaying compliance, and the need to deter further violations by the respondent and others similarly situated.

Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any, including whether to impose a civil penalty, and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if any, including a specific dollar amount, and supporting its position with facts and arguments that address any or all of the Section 42(h) factors.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 19, 2003, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board