ILLINOIS POLLUTION CONTROL BOARD
March 18, 2004

MATE TECHNOLOGIES, INC.,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 04-75
	)	(Citizens Enforcement - Land)
F.I.C. AMERICA CORPORATION,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by T.E. Johnson):

This matter is before the Board on a January 5, 2004 motion to dismiss, or otherwise to strike, filed by F.I.C. America Corporation (FIC). On January 23, 2004, Mate Technologies, Inc. (Mate) filed a response to the motion. FIC filed a reply on February 6, 2004, and a motion for leave to file a reply and a motion to supplement the reply on February 10, 2004. Mate filed a response to the motion for leave to file a reply brief on February 17, 2004.

For the reasons set forth below, the Board denies FIC's motion to dismiss, and directs the hearing officer to proceed to hearing in this matter. FIC is directed to file an answer within 60 days after the receipt of this order.

BACKGROUND

The complaint at issue was filed on October 24, 2003, and accepted by the Board for hearing on January 22, 2004. On December 9, 2003, Hearing Officer Brad Halloran granted FIC's request for an extension until January 5, 2004 to file a motion to dismiss. As noted, the motion was timely filed on January 5, 2004, and has been fully briefed.

In the complaint, Mate alleges that FIC violated Sections 9(a), 12(a), and 21(e) of the Environmental Protection Act (Act) (415 ILCS 5/9(a), 12(a) and 21(e) (2002)) as well as 35 Ill. Adm. Code 703.121(a), 722.111, 739.122(a), 739.181 and 815.201. Mate further alleges that FIC violated these provisions by failing to contain or control the oil disseminated from its operations and allowing the release of oil through windows, doors and other openings in the building and via storm sewers on the property. The complaint concerns property located at 4750 Rohlwing Road, Itasca, Cook County.

Beginning in March 2002, FIC continuously operated the property for the purpose of manufacturing automobile components consisting primarily of welding and other processes. Comp. at 2. The metal that FIC uses as a feedstock is coated with oil. *Id*. Mate alleges that the operations have caused vast quantities of the oil to disseminate uncontrolled on and about the

property and into the environment. *Id*. Mate alleges that through FIC's operations, the released oil has become contaminated with chromium and other metals. *Id*.

Mate alleges that FIC has failed to contain or control the oil from its operations and, as a result, the oil has been released into the environment through windows, doors, storm sewers and other openings in the building. Comp. at 3. Mate also alleges that it has been inhaled by persons on or about the property, and has settled on surfaces throughout the property, coating the surfaces with a black film. *Id.*

Mate alleges that samples of the disseminated oil were taken and submitted for laboratory analysis revealing contamination. Comp. at 4.

INITIAL MATTERS

On February 10, 2004, FIC moved the Board for leave to file *instanter* a reply in support of its motion to dismiss. In the motion, FIC asserts that the complaint and Mate's response assert novel theories of liability and FIC would be materially prejudiced if it is not allowed to reply to the theories and arguments raised therein. Mot. to reply at 1. FIC further argues that the attachment to Mate's response would materially prejudice FIC if no leave to reply is given.

On February 17, 2004, Mate filed a response to the motion for leave to file a response brief asserting that although Mate disagrees with the positions stated therein, it did not intend to substantively oppose the motion. Accordingly, FIC's the motion for leave to file a reply in this matter is granted. FIC's February 10, 2004 reply is accepted.

FIC MOTION TO DISMISS

FIC asserts that the complaint on its face simply depicts the routine operation and maintenance of a metal parts plant, which as a matter of law are "outside the scope of the cited authorities." Mot. at 2. FIC asserts that Mate is "stretching the Act in illogical ways and manufacturing violations in order to convert a landlord-tenant contract disagreement into some sort of public threat." *Id*. FIC argues that Mate is improperly attempting to turn the property in question into a storage or landfill facility by alleging that a layer of dust from the intended operations of an active assembly plant has created violations of the Act. Mot. at 4.

FIC first addresses counts I through VII of the complaint. FIC argues that the only type of claim that can be stated in counts I through VII, if any, is one pursuant to the air pollution provisions of the Act because the allegations all concern air emissions associated with welding or related assembly units. Mot. at 4. FIC asserts that the alleged substances of concern are outside the definition of waste found at Section 3.535 of the Act. *Id*. FIC contends that the "mere settlement of air emissions" does not constitute waste and that, consequently, counts I through VII cannot involve waste as a matter of law and must be dismissed. Mot. at 4-5.

Further, FIC posits, settled air emissions cannot constitute waste until such time as they have been "discarded" either by being swept or wiped up or, perhaps, by abandonment of the subject property. Mot. at 5. FIC contends that Mate did not allege that the property had been

abandoned, or that janitorial or maintenance activities at the property would not or could not be conducted, or that substances were mishandled after they had been collected or stored. *Id*.

FIC contends that counts I through VII of the complaint are deficient because they attempt to apply solid waste requirements to permitted air emissions that were not wastes because such matter had not yet been discarded, stored or disposed. Mot. at 2. FIC concludes that the mere existence or presence of a material in an active facility that may eventually require certain regulated management does not mean the material is a waste or somehow has been passively discarded. Mot. at 6. FIC asserts that its situation is similar to a previous Board case in which the Board found that chipped and peeling lead-based paint throughout a structure that emitted dust or particulate into soil and elsewhere was not a waste because it had not yet been discarded. Mot. at 6, citing Boyer v. Harris, PCB 96-151 (Sept. 4, 1997).

FIC contends that counts I through VII are pre-empted by the federal Occupational Safety and Health Administration (OSHA) pursuant to the Occupational Safety and Health Act (OSH) Act to the extent they involve indoor workplace emissions. Mot. at 6. Additionally, FIC asserts that the complaint does not allege any factual basis for inferring that FIC intended to allow settled particulates to remain in place permanently or that FIC operated a waste storage, treatment or disposal facility. *Id*. Finally, FIC argues that count I should be dismissed because the cited authorities are premised upon storage of used oil in tanks and tanks are used to store liquids, but the complaint does not allege that the materials of concern are liquids. Mot. at 7.

FIC next addresses count VIII, which concerns an alleged air pollution violation of section 9(a) of the Act. 415 ILCS 5/9(a) (2002). FIC argues that Mate's allegations of harm are legally and factually insufficient to provide the basis for a claim, particularly where, as here, there is no alleged violation of applicable air pollution control regulations or standards and the Board's regulations exempt the relevant activities from air permitting. Mot. at 8. FIC asserts that Mate has not alleged that any emissions at the property violated any specific permit requirement or emission limitation, and that welding and assembly operations are exempt specifically from permitting and related requirements. Mot. at 7. FIC asserts that count VIII should be dismissed because it is pre-empted by the OSH Act. Mot. at 9.

FIC asserts that no allegations regarding air quality, either indoors or outdoors, or a description of any injuries caused thereby, were made. Mot. at 8. In addition, FIC contends, Mate has acknowledged that cleaning activities such as pressure washing did occur. *Id*. FIC argues that in the absence of allegations of property damage or harm to health or environment, the citizen's complaint process should not be used as a tool for converting a landlord-tenant dispute into an environmental enforcement proceeding. Mot. at 9.

FIC asserts that the allegations contained in count IX are the subject of a notice of alleged violation letter issued by the Environmental Protection Agency (Agency) on November 3, 2003. Mot. at 10. FIC argues that count IX is duplicitous because it is identical or substantially similar to the allegations being prosecuted by the Agency. *Id*.

Finally, FIC argues that the relief requested for remediation in paragraph C of counts I through VII should be stricken because the existence, emission, settlement or handling of oily or

non-oily particulates at the property cannot be related to, or proximately caused by, a failure to undertake any of the alleged obligations. Mot. at 12.

MATE'S RESPONSE TO THE MOTION

Mate asserts that FIC does not argue that there is no set of facts that could be proven to entitle Mate to relief, but instead relies on "extraordinary" regulatory interpretations that find no basis in law. Resp. at 2. Mate disagrees with FIC's characterization of the nature of waste, and states that Board regulations are founded on the premise that effluents, emissions and wastes must be intensively analyzed and managed before, during and after their production. Resp. at 3.

Mate contends that the complaint details exactly how FIC's policy of "dump now, think later" has violated a host of environmental regulations, and that the facts necessary to demonstrate the violations cited in counts I through VII were well pled. Resp. at 3-4.

Mate argues that Section 9(a) can be violated either on the basis of causing air pollution or on the basis of exceeding a standard, but that both bases are not needed. Resp. at 4. Mate further argues that a specific standard adopted by the Board does not have to have been violated for there to be a determination either of air pollution or of prohibited conduct. Resp. at 5.

Mate contends that the plain language of count IX belies FIC's claim that no allegations regarding air quality or description of injuries cause thereby were made. Resp. at 5. Specifically, Mate highlights language in count IX alleging that FIC's emission of oil has been injurious to human health because it has been inhaled by persons in and near the property. *Id.* Mate contends that FIC cannot validly argue that the complaint does not provide sufficient notice to enable respondent to prepare a defense. *Id.*

Mate disagrees with FIC's contention that count IX is duplicitious, noting that the matter in question is not before another forum as referenced in 35 Ill. Adm. Code 101.202. Resp. at 6. Mate asserts that the Board has held that investigation by the government of potential violations does not render duplicative a citizen complaint filed before the Board. Resp. at 6, *citing* Finley v. IFCO ICS-Chicago, Inc., PCB 02-208 (Aug. 8, 2002).

Mate asserts that the OSH Act does not pre-empt the Act's prohibition of air pollution because the Act's prohibition is a law of general applicability that does not constitute a direct, clear and substantial regulation of worker health and safety, and instead regulates workers simply as members of the general public. Resp. at 6, *citing* Gade v. National Solid Wastes Management Association, 505 U.S. 88, 112 S.Ct. 2374 (1992).

Mate contends that Section 33 of the Act provides the Board with ample authority to issue the order requested in the complaint, and that if a manufacturing facility chooses not to analyze its wastes, the chances of offensive substances being released into the environment increase substantially. Resp. at 7. That is precisely what occurred here, Mate asserts. *Id.* Mate attaches a letter addressed to OSHA purportedly from employees at FIC asserting health problems due to the inadequate ventilation at the plant. Resp. Ex. 1.

FIC Reply

FIC asserts that it does not reject the Act as suggested by Mate, but instead simply notes that the facts alleged by the complaint could never constitute a violation. Reply at 1. FIC reiterates that there is no basis alleged in the complaint to ever conclude that the materials of concern can constitute waste or result in violations of the Act. Reply at 2. FIC reasserts that the mere settlement of oily dust inside of a plant in the course of production does not mean such material has been disposed of, discarded or constitutes waste. *Id*. FIC argues that dust settles in every building and that this, without more, cannot violate the solid waste requirements of the Act. Reply at 3.

FIC argues that case law demonstrates that the property cannot, as a matter of law, be a disposal or similar facility requiring a permit. Reply at 3, *citing* Matteson WHP Partnership v. Martin, PCB 97-121 (June 22, 2000). FIC asserts that the complaint contains no allegations of serious actual adverse consequences that would support an allegation of air pollution. Reply at 3-4.

FIC reasserts that count VIII should be dismissed with respect to indoor air emissions and welding because the OHS Act pre-empts the state regulations. Reply at 4. FIC argues that federal law is clear that even general state laws are pre-empted by the OHS Act to the extent that they regulate subjects covered directly by the OHS Act. Reply at 5. FIC asserts that the complaint does concern matters covered by OHSA standards. Reply at 6. In a footnote, FIC argues that Mate improperly attached an exhibit (the employee letter) to the response, and that such an abuse of procedure should be rejected. Reply at 5.

In addressing count IX, FIC argues that it has not located any precedent holding that a citizen complaint may proceed where the Agency is prosecuting the same factual allegations pursuant to the same provisions of the Act. Reply at 7. FIC argues that an enforcement proceeding by a regulatory agency such as the Agency should be considered a forum. *Id*.

DISCUSSION

When ruling on a motion to dismiss**,** the Board takes all well-pled allegations as true and draws all inferences from them in favor of the non-movant. Dismissal is proper only if it is clear that no set of facts could be proven that would entitle complainant to relief. *See* People v. Peabody Coal Co., PCB 99-134, slip. op. at 1-2 (June 20, 2002); People v. Stein Steel Mills Co., PCB 02-1, slip op. at 1 (Nov. 15, 2001), citing Import Sales, Inc. v. Continental Bearings Corp., 217 Ill. App. 3d 893, 577 N.E.2d 1205 (1st Dist. 1991).

As a threshold issue, the Board disagrees with FIC's assertion that the Act is pre-empted by the OHS Act. The U.S. Supreme Court has addressed pre-emption of state law in an OSHA context. *See* Gade v. National Solid Wastes Management Association, 505 U.S. 88, 112 S.Ct. 2374 (1992). In Gade, the Supreme Court held that state regulation of occupational safety and health issues is impliedly pre-empted by the OSH Act. Gade, at 112 S.Ct. 2375. The OSH Act pre-empts state law that constitutes, in a direct, clear and substantial way, regulation of worker health and safety. Gade, at 112. S.Ct. 2387. However, the Supreme Court noted that state laws

of general applicability, such as laws regarding traffic safety or fire safety, that do not conflict with the OSH Act standards are not generally pre-empted because they regulate the conduct of workers and non-workers alike. *Id*. Based on Gade, the Board finds that the Act is not pre-empted because it does not conflict with the OSH Act, nor directly and substantially regulate worker health and safety. Instead, the Act is a law of general applicability, such as traffic and fire safety laws, and regulates workers simply as members of the general public. Accordingly, the complaint at issue does not allege violations that are pre-empted by the OHS Act.

When taking Mate's well-pled allegations as true and drawing all inferences from them in favor of Mate, the Board finds that there is a set of facts that could be proven entitling Mate to relief on counts I through VII. Accordingly, FIC's motion fails.

FIC contends that the settlement of air emissions does not constitute waste and, in addition, cannot constitute waste until such time as the emissions have been discarded. Consequently, FIC asserts that counts I through VII cannot involve waste as a matter of law and must be dismissed. The Board has previously found that air emission in the form of dust may constitute "waste" for the purpose of a Section 21(b) allegation. Here, the alleged emissions are either oily or oil-contaminated dust or other particulates. *See* Trepanier v. Speedway Wrecking Co., PCB 97-50 (Oct. 15, 1998). In the complaint, Mate has sufficiently alleged facts to constitute the violations contained in counts I through VII.

This case also differs from Boyer in which the Board held that paint chips that had peeled or otherwise fell from a structure had not been discarded because paint is the type of material that, once applied to a structure, is typically included with that structure when sold for the use of the new owner. Boyer, PCB 96-151, (Sept. 4, 1997), slip op. at 5. In the instant case, the oil in question has not been applied to a structure, but has allegedly been disseminated directly and indirectly into the environment. Comp. at 2.

FIC mischaracterizes Matteson, PCB 97-121 (June 22, 2000). In that case, the Board found that a drycleaning business was not a disposal facility because the evidence failed to demonstrate that the respondents knew or intended waste disposal at the site. Matteson, PCB 97-121 (June 22, 2000) slip op. at 7. Finding that Resource Conservation and Recovery Act permitting regulations did not apply for accidental discharges of waste, the Board held that a violation of Section 21(f)(1) of the Act was not proved. *Id*. The instant case does not involve an unknowing discharge, but, as alleged in the complaint, has been brought to FIC's attention, and is still ongoing.

Again, when taking the allegations as pled in the complaint as true and drawing all inferences from them in favor of Mate, the Board cannot find that no set of facts could be proven that would entitle Mate to relief. Counts VIII and IX are also sufficient to withstand a motion to dismiss when viewed, as they must be, under this standard.

Finally, FIC argues that the allegations in count IX are the subject of a notice of alleged violation letter issued by the Agency on November 3, 2003, and are therefore, duplicative, and subject to dismissal. The Board has clearly stated that preliminary enforcement steps do not mean the matter is before another forum for the purposes of dismissal, and that investigation by

the government of potential violations does not render duplicative a citizen complaint, formally filed with the Board under Section 31(d) of the Act. *See* Finley, PCB 02-208 (Aug. 8, 2002). Accordingly, the allegations contained in count IX are not duplicative within the meaning of Section 31(d) of the Act or 35 Ill. Adm. Code 103.212..

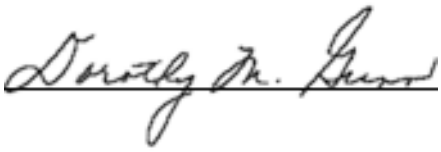
Board procedural rules provide that timely filing of a motion to dismiss effectively stays the 60-day period for filing an answer to the complaint. *See* 35 Ill. Adm. Code 103.212(b). The stay resulting from FIC's timely motion to dismiss is no longer in effect. FIC must file its answer within 60 days from the receipt of this order. The hearing officer is directed to expeditiously proceed to hearing in this matter.

CONCLUSION

When taking Mate's well-pled allegations as true and drawing all inferences from them in favor of Mate, the Board finds that there is a set of facts that could be proven entitling Mate to relief on the complaint. Accordingly, the motion to dismiss is denied. FIC is directed to file an answer to the complaint within 60 days after the receipt of this order, in accordance with Board rules.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 18, 2004, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board