ILLINOIS POLLUTION CONTROL BOARD
December 18, 1997

FOREST PRESERVE DISTRICT OF DUPAGE COUNTY, ILLINOIS, a body politic and corporate in the County of DuPage, State of Illinois,	)	
Complainant,	)	
v.	)	PCB 96-84
	)	(Enforcement - Land)
MINERAL AND LAND RESOURCES CORPORATION, a Delaware corporation, SOUTHWIND FINANCIAL, LTD., an Illinois corporation, f/k/a ABBOTT CONTRACTORS, INC., and BLUFF CITY MATERIALS, INC., an Illinois corporation, as assignee of ABBOTT CONTRACTORS, INC.,	)	
Respondents.	)	

ORDER OF THE BOARD (by M. McFawn):

This case is before the Board on "Mineral and Land Resource's Motion for a Finding in its Favor and Against Complainant" (Finding Motion), filed on October 23, 1997. Also before the Board are two related motions: a "Motion for Leave to File Reply" (Reply Motion) filed on November 4, 1997, by respondent Mineral and Land Resource Corporation (MLR), and "Complainant's Motion to Strike Respondents Southwind Financial, Ltd.'s and Bluff City Materials, Inc.'s Response" (Motion to Strike), filed on November 5, 1997, by complainant the Forest Preserve District of DuPage County, Illinois (FPD). Both motions were filed in connection with the Finding Motion.

Each of the above motions is contested. After reviewing the evidence submitted and considering the arguments of the parties, the Board grants MLR's Finding Motion and both related motions.

PROCEDURAL HISTORY

A "Complaint for Environmental Remediation" (Complaint) was filed by FPD on October 19, 1995. The Complaint alleges that the respondents collectively violated various provisions of Sections 12 and 21 of the Environmental Protection Act (Act), 415 ILCS 5/12, 21 (1996). Hearings were held on September 23, 24, and 25, and October 21, 22, and 23, 1997. FPD concluded the presentation of its case-in-chief on October 23. Upon completion

of FPD's case, MLR brought its Finding Motion, seeking a finding in its favor based on an asserted lack of any evidence establishing MLR's liability for the violations of the Act alleged in the complaint. Hearings were continued indefinitely pending the Board's ruling on this and other motions.

On October 29, 1997, FPD filed "Complainant's Response and Opposition to Respondent Mineral and Land Resources' Motion for a Finding in its Favor and Against Complainant" (Response). On November 4, 1997, MLR filed its Reply Motion and "Mineral and Land Resource Corporation's Reply to Complainant's Response to its Motion for a Finding in its Favor" (Reply). FPD filed "Complainant's Response and Objection to Mineral and Land Resources Corporation's Motion for Leave to File Reply" (FPD Objection) on November 10, 1997.

Additionally, on October 31, 1997, the other respondents in this case, Southwind Financial, Ltd. (Southwind) and Bluff City Materials, Inc. (Bluff City), filed "Respondents Southwind Financial, Ltd.'s and Bluff City Materials, Inc.'s Response to Complainant's Response and Opposition to Respondent Mineral and Land Resource's Motion for a Finding in its Favor and Against Complainant" (Respondents' Response). FPD responded with its Motion to Strike on November 5, 1997. On November 12, 1997, Southwind and Bluff City filed "Respondents Southwind Financial, Ltd.'s and Bluff City Materials, Inc.'s Objection to Complainant's Motion to Strike Respondent's Response" (Respondents' Objection).

MOTION FOR LEAVE TO FILE REPLY

MLR, in its Finding Motion, asserts that FPD has produced no evidence establishing liability of MLR for any of the violations alleged in the Complaint. In its Response, FPD raised for the first time the theory that MLR is vicariously liable for violations because one of the other respondents was its agent. By its Reply Motion, MLR seeks leave to file a reply presenting its contrary position on the issue of agency. Under 35 Ill. Adm. Code 101.241, a moving party may file a reply only with the Board's permission, to prevent material prejudice.

FPD asserts in the FPD Objection that MLR would not be prejudiced by being denied an opportunity to respond to arguments raised for the first time in its Response. The asserted basis for this position is that FPD's arguments in its Response are self-evidently correct, and so there is no point in allowing MLR to submit contrary arguments. FPD also asserts that the arguments made by MLR in its Reply should have been set forth in its initial brief, notwithstanding that the agency issue had not yet been raised.

FPD's arguments are meritless. The Board hereby grants MLR's Reply Motion and accepts its Reply.

MOTION TO STRIKE RESPONSE

FPD has moved to strike Respondents' Response, on the basis that it was filed without authorization as required under 35 Ill. Adm. Code 101.241. Section 101.241 provides in part:

> b) Within 7 days after service of a motion, a participant or party may file a response to the motion. * * *
>
> c) The moving person shall not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice.

Because Respondents' Response addresses FPD's Response to the Finding Motion, rather than the Finding Motion itself, FPD argues that filing of Respondents' Response is not authorized under Section 101.241. Accordingly, FPD contends that Respondents' Response should be stricken. In Respondents' Objection, Southwind and Bluff City argue that Respondents' Response should be considered a reply, and allowed by the Board to prevent material prejudice. Res. Obj. at 3.

Even if we consider Respondents' Response a reply subject to filing under Section 101.241(c), Southwind and Bluff City did not obtain permission to file a reply prior to filing Respondents' Response. Neither have they identified any material prejudice that they will suffer if Respondents' Response is not accepted. They have not asserted that Respondents' Response directs the Board to evidence relevant to determination of the Finding Motion, or that it raises any legal argument as to whether the Finding Motion should be granted or denied. (In fact, Respondents' Objection includes the statement, "Respondents' Response was not filed in support of, or in opposition to, the Finding Motion." Res. Obj. at 2.) Rather, Respondents' Response is described as requesting that the Board "avoid unnecessarily interpreting" certain contracts which the parties have cited as relevant to resolution of the Finding Motion. Res. Obj. at 2. The contracts are also the subject of a lawsuit pending in the Circuit Court of DuPage County, and Southwind and Bluff City assert an interest in having the contracts interpreted by the circuit court. Res. Obj. at 2.

To the extent interpretation of the contracts is necessary to resolution of the case before the Board, Southwind and Bluff City have not explained why interpretation of the contracts by the Board, rather than the circuit court, would result in material prejudice to them. Only necessary interpretations would have any effect in the pending circuit court case; "unnecessary" interpretations would not collaterally estop the parties. Congregation of the Passion, Holy Cross Province v. Touche Ross & Co., 159 Ill.2d 137, 153-54, 636 N.E.2d 503, 510 (1994) (doctrine of collateral estoppel applies only to controlling facts or questions material to the determination of both causes). Accordingly, the Board finds no basis to permit filing of Respondents' Response, and FPD's Motion to Strike is granted.

MOTION FOR FINDING IN MLR'S FAVOR

Arguments Of The Parties

FPD's Complaint alleges that "Respondents" have violated Sections 21(a), (b), (d), (e), (o)(1), (o)(7), (o)(10), and (p)(4), and 12(d), of the Act (415 ILCS 5/21(a), (b), (e), (o)(1), (o)(7), (o)(10), and (p)(4); 415 ILCS 5/12(d)). The Complaint does not attribute particular actions violating the Act to particular respondents. MLR claims that no evidence has been

presented that MLR, as opposed to either of the other respondents, participated in or controlled any activity which resulted in the alleged violations of the Act. F. Mot. at 1. FPD, in its Response, does not argue that there is any evidence of direct participation by MLR. Rather, it asserts that a "Sublicense Agreement" between MLR and co-respondent Abbott Contractors, Inc. (Abbott)[1] establishes that Abbott was the agent of MLR, and consequently under doctrines of vicarious liability and *respondeat superior* MLR is liable for the activities of Abbott. Res. at 2. MLR replies that the Sublicense Agreement does not create a principal/agent relationship between MLR and Abbott. Reply at 2-5. FPD also argues that MLR exercised sufficient control over Abbott for the Board to find that MLR "allowed" violations of the Act. Res. at 4.

License and Sublicense Agreements

On March 26, 1991, FPD and MLR entered into a "License Agreement" (entered into evidence as a part of Complainant's Exhibit 4) under which FPD granted MLR a license to mine certain minerals from a parcel of land owned by FPD. The term of the license was five years, at the end of which period MLR was to have constructed a wetland on the property. The "License Agreement" included specific instructions regarding construction of the wetland. FPD retained a right to access to the property during MLR's operating hours, provided such access did not obstruct or delay MLR's operations. Abbott was specifically referenced as an approved subcontractor for the purpose of fulfilling MLR's obligations under the "License Agreement." FPD retained the right to have a representative periodically observe the work, and to stop construction of the wetland if not in accordance with specifications.

On the same date, MLR and Abbott entered into the "Sublicense Agreement" (entered into evidence as part of Complainant's Exhibit 39). Under the "Sublicense Agreement," MLR granted Abbott its license to mine minerals from the FPD property, and Abbott agreed to accept and fulfill MLR's obligations to FPD under the "License Agreement." MLR was also to receive a royalty on each ton of minerals mined by Abbott. MLR retained the right to have representatives inspect the mining operations on the property.

Analysis

Agency

The first issue the Board must resolve in ruling on MLR's motion is whether the "Sublicense Agreement" creates a principal/agent relationship between MLR and Abbott. Generally, a principal is liable for the acts of its agent, but not the acts of an independent contractor. Lewis v. Mount Greenwood Bank, 91 Ill.App.3d 481, 487, 414 N.E.2d 1079, 1084 (1st Dist. 1980). So, if the "Sublicense Agreement" creates a principal/agent relationship between MLR and Abbott, then MLR is liable for the acts of Abbott within the scope of its agency, and the Motion must be denied. If, however, the "Sublicense

[1] Abbott is now known and participating in this case as Southwind Financial, Ltd. Because the parties to the "Sublicense Agreement" were MLR and Abbott, we refer to Abbott in our discussion of the "Sublicense Agreement."

Agreement" does not create a principal/agent relationship, and Abbott is an independent contractor, then MLR has no liability as principal for Abbott's acts, and we move on to FPD's second argument. In ruling on this issue, the Board first considers the tests applied by Illinois courts to determine whether or not two parties are principal and agent. The Board then determines whether the relationship between MLR and Abbott established by the "Sublicense Agreement" meets the applicable criteria.

In Illinois, "the test of agency is whether the alleged principal has the right to control the manner and method in which work is carried out by the alleged agent and whether the alleged agent can affect the legal relationships of the principal." Moy v. County of Cook, 244 Ill.App.3d 1034, 1038, 614 N.E.2d 265, 267 (1st Dist. 1993). A more detailed description of the second element of this test, affecting legal relationships, is found in the opinion of the appellate court in Hoffman & Morton Co. v. American Insurance Co., 35 Ill.App.2d 97, 102,181 N.E.2d 821, 823 (1st Dist. 1962) (citations omitted):

> The distinguishing characteristic of an agent is that he represents another contractually. When properly authorized, he makes contracts or other negotiations of a business nature on behalf of his principal, by which his principal is bound. An agent is generally defined by the Illinois courts as being one who undertakes to manage some affairs to be transacted for another by his authority, on account of the latter, who is called the "principal," and to render an account.

The Board has carefully examined the "Sublicense Agreement" and can find no provision of that document (or of the "License Agreement") which gives Abbott the authority to contract on behalf of MLR or to negotiate business arrangements to which MLR would be bound. Absent such authority, the Board cannot find that Abbott was an agent of MLR. The Board finds that Abbott's relationship to MLR was that of an independent contractor. In light of this finding, it is unnecessary to consider whether MLR exercised sufficient control over Abbott to have satisfied the other element of the test for agency.

Allowance of Violations

The Board's finding on the issue of agency precludes findings that MLR was liable for most of the violations of the Act alleged in the complaint. Two of the sections of the Act implicated, however, include prohibitions against "allowing" open dumping: Sections 21(a) and 21(p)(4), 415 ILCS 5/21(a), (p)(4). FPD has suggested in its Response that MLR exercised sufficient control over Abbott that by failing to take action to stop Abbott's activities, MLR allowed open dumping by Abbott. Res. at 4. The Board considers whether the evidence submitted establishes a relationship between MLR and Abbott such that MLR could be found liable for allowing open dumping based on the conduct of Abbott. In many cases in which the Board has considered whether a party has "allowed" open dumping, the party involved has been an owner of the property. Because MLR is not the owner here, the

Board focuses in its analysis on the liability of a party for the acts of its independent contractor, as opposed to questions of liability as an owner.

In determining whether a party who engages an independent contractor is liable for "allowing" pollution based on the acts of the independent contractor, "the question for our decision is whether, in light of statutory policy, a respondent is in such a relationship to the transaction that it is reasonable to expect him to exercise control to prevent pollution." Environmental Protection Agency v. James McHugh Construction Co. (May 17, 1972), PCB 71-291, slip op. at 3. In the McHugh case, the Board found the City of Chicago liable for the acts of its independent contractor where "the City recognized its responsibility [to prevent pollution] by inserting in the contract a provision requiring construction and maintenance of the settling basin, by placing an engineer on the site to enforce the contract, and by participating in later decisions to improve the treatment facilities." McHugh, Slip op. at 4. In Illinois Environmental Protection Agency v. Milam Corp. (January 3, 1974), PCB 72-485, however, the Board, applying McHugh to a lessor-lessee relationship,[2] held that "where the companies are distinct and unrelated and where the operation is an extensive one, lessor should not have the burden of seeing to it that lessee obeys the law." Milam, slip op. at 4. More recently, in County of Madison v. Abert (Dec. 17, 1992), AC 91-55, the Board found that, where the contracting party (who was not present when the violations of the Act occurred) gave the independent contractor specific instructions, and the violations in question resulted from the independent contractor's exceeding the directions given, the party engaging the independent contractor did not "allow" the violation. Abert, slip op. at 6.

The Board believes that the situation here is more analogous to that in Abert or Milam than McHugh. We have no evidence from which we can find that MLR and Abbott are anything but distinct and unrelated companies. The operation contemplated in the License Agreement and Sublicense Agreement was an extensive one. There is no evidence that MLR maintained any physical presence at the site of Abbott's operations. Through the "Sublicense Agreement," which incorporates the terms of the "License Agreement," Abbott received very specific instructions regarding the work to be done by Abbott as sublicensee. Any violation of the Act by Abbott, beyond being an exceedence of its instructions, is a violation of the "Sublicense Agreement," which provides in paragraph 7 that "[d]uring the term of this Sublicense, Sublicensee shall comply with all applicable laws[.]" The Board concludes that, on the facts of this case, MLR did not have an obligation to undertake physical inspections to ensure that Abbott complied with the Act. On the evidence before it, the Board cannot find that any violations of the Act committed by Abbott were "allowed" by MLR.

Conclusion

The Board finds no evidence establishing liability of MLR for any of the alleged violations of the Act, either under an agency theory or under a theory of "allowing" pollution

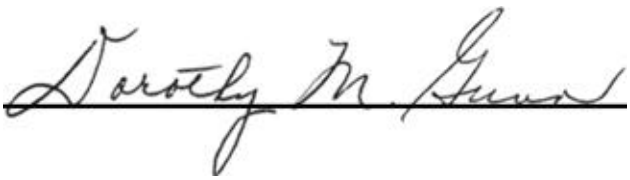
[2] Because the Sublicense Agreement in this case grants a right to use and occupy real estate, and is thus to some extent analogous to a lease, the Board finds Milam's discussion of a lessor/lessee relationship relevant and helpful.

in violation of Sections 21(a) or 21(p)(4) of the Act. The Board accordingly grants MLR's Finding Motion.

IT IS SO ORDERED.

Board Member K.M. Hennessey abstained.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 18th day of December 1997, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board