

ILLINOIS POLLUTION CONTROL BOARD
March 9, 1989

LEFTON IRON AND METAL COMPANY,)
INC., a Missouri Corporation,)
and LEFTON LAND AND DEVELOPMENT)
COMPANY, INC., a Missouri)
Corporation,)
Complainants - Counter-respondents,)
v.) PCB 87-191
MOSS-AMERICAN CORPORATION,)
a Delaware Corporation, and)
KERR-McGEE CHEMICAL CORPORATION,)
a Delaware Corporation,)
Respondents - Counterclaimants.)

ORDER OF THE BOARD (by J. Marlin):

On December 29, 1988, Kerr-McGee Chemical Corporation (Kerr-McGee) filed a counterclaim against Lefton Iron and Metal Company, Inc. (Lefton Iron) and Lefton Land and Development Company, Inc. (Lefton Land). By its Order of January 19, 1989, the Board directed the parties to address the issues of 1) whether the counterclaim should be docketed as a separate action and 2) whether the counterclaim is duplicitous or frivolous pursuant to Section 31(b) of the Environmental Protection Act (Act). Kerr-McGee filed its response to the Board's January 19 Order on February 3, 1989, and Lefton Iron and Lefton Land (hereafter referred to collectively as Lefton) filed their response on February 21.

For clarity of this Order, the Board will review relevant events concerning and relating to this proceeding in chronological order. On November 30, 1987, Lefton filed with the Board a complaint against Moss-American Corporation (Moss) and Kerr-McGee. The complaint alleges violations of the Act by Moss and Kerr-McGee and requests the Board to issue an Order which requires Moss and Kerr-McGee to cease and desist violations of the Act, to tender a plan for site clean-up, and to pay a civil penalty.

On January 7, 1989 the Illinois Attorney General, on behalf of the People of the State of Illinois, filed in the Illinois circuit court, St. Clair County, a complaint against Lefton, Moss, and Kerr-McGee, alleging violations of the Act. In the circuit court action, Kerr-McGee filed a "counterclaim" against Lefton on February 12, 1988. Through that claim Kerr-McGee seeks to recover costs and expenses from Lefton that Kerr-McGee incurred due to the circuit court action. The claim presents various alternative theories for recovery.

Subsequently, Kerr-McGee filed a motion to dismiss Lefton's complaint in this Board proceeding. Notwithstanding the consent order by the circuit court, the Board denied Kerr-McGee's motion to dismiss Lefton's complaint by the Board's Order of April 21, 1988. Finally, on December 29, 1988 Kerr-McGee filed with the Board a counterclaim against Lefton alleging violations of the Act and requesting the Board to issue an Order which requires Lefton to cease and desist violations, to tender a plan for site clean-up, to finance the clean-up, and to pay a civil penalty.

Since the violations alleged by Kerr-McGee's counterclaim concern the same site which is the subject of Lefton's complaint and the same parties are involved, it would be efficient to handle these actions in the same proceeding. The Board does not find that the Act or Board procedures necessarily preclude a counterclaim in this instance. As a result, the Board will treat Kerr-McGee's claim as a counterclaim and not as a separate action in another docket.

Even though Kerr-McGee's claim is docketed as a counterclaim, the Board finds that it must still make a determination as to whether the claim is duplicitous or frivolous pursuant to Section 31(b) of the Act.

Kerr-McGee states that its counterclaim is not duplicitous because it has not previously brought an action against Lefton before the Board. The Board notes that it considers similar, previously-filed circuit court actions to be relevant for purposes of a duplicitous finding. Northern Illinois Anglers' Association v. City of Kankakee, PCB 88-183. (January 5, 1989). Lefton counters that the Kerr-McGee counterclaim filed with the Board duplicates the pending circuit court counterclaim of Kerr-McGee since according to Lefton, "if Kerr-McGee anticipates success on its counterclaim in the circuit court, it will necessarily have to begin by proving most, if not all, of the facts which have been pled in the counterclaim filed before this Board." (Lefton Response, p.2).

As stated earlier, the circuit court counterclaim filed by Kerr-McGee seeks to recover expenses and costs from Lefton which Kerr-McGee incurs as a result of the circuit court action. The legal basis for the counterclaim is alternatively argued as contractual indemnity, statutory contribution (among joint tortfeasors), private cost recovery under CERLA, or private cost recovery under SARA. In the counterclaim before the Board, Kerr-McGee alleges that Lefton violated the Act and requests remedies typical to that of an enforcement action. Moreover, Lefton "candidly note[s] that it has opposed the St. Clair County Circuit Court Counterclaim on the grounds that this Board should have primary jurisdiction of the matter." (Lefton Response, p.3). Lefton further asserts that the circuit court has not yet ruled on that issue.

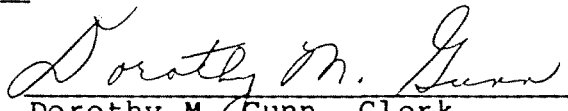
Given the circumstances the Board finds that Kerr-McGee's counterclaim of December 29, 1988 is not duplicitous of the counterclaim that Kerr-McGee filed in the circuit court.

Lefton does not argue in its Response that the counterclaim is "frivolous". After reviewing the counterclaim, the Board finds that it is not frivolous.

In summary, the December 29, 1989 filing of Kerr-McGee is docketed as a counterclaim in this matter; the caption on this Order has been altered to reflect the existence of the counterclaim. Additionally, the counterclaim is neither duplicitous, or frivolous under Section 31(b) of the Act. The complaint and counterclaim may proceed to hearing as appropriate.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 9th day of March, 1989, by a vote of 7-0.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board