

ILLINOIS POLLUTION CONTROL BOARD
May 16, 2002

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 97-103
) (Enforcement – Land, Water)
STATE OIL COMPANY, WILLIAM)
ANEST f/d/b/a S&S PETROLEUM)
PRODUCTS, PETER ANEST f/d/b/a S&S)
PETROLEUM, CHARLES ABRAHAM,)
JOSEPHINE ABRAHAM, and)
MILLSTREAM SERVICE, INC.,)
)
Respondents.)

CHARLES ABRAHAM, JOSEPHINE)
ABRAHAM, and MILLSTREAM)
SERVICE, INC.,)
)
Cross-Complainants,)
)
v.) PCB 97-103
) (Enforcement – Land, Water)
WILLIAM ANEST and PETER ANEST,) (Cross-Complaint)
)
Cross-Respondents.)

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

This matter is before the Board on a motion for certification of interlocutory appeal and stay filed on April 23, 2002. The motion was filed by Charles Abraham, Josephine Abraham, Millstream Service Inc., William Anest, and Peter Anest (movants). To date, no response to the motion has been received.

For the reasons stated below, the Board denies the motion for certification and stay.

BACKGROUND

This case involves a site in McHenry, McHenry County. The People of the State of Illinois (People) allege that all respondents caused or allowed water pollution in violation of Section 12(a) of the Environmental Protection Act (Act). 415 ILCS 5/12(a) (2000). The

People also seek to recover from Charles Abraham, Josephine Abraham, and Millstream over \$150,000 the People expended to address contamination from underground storage tanks at the site. The People seek these costs under Section 57.12(a) of the Act. 415 ICLS 5/57.12(a) (2000).

On March 6, 1997, Charles Abraham, Josephine Abraham and Millstream filed a cross-complaint against William and Peter Anest. The cross-complaint alleges that William and Peter Anest should be held liable to Charles Abraham, Josephine Abraham and Millstream for any costs or penalties assessed under count II of the People's complaint.

In its April 4, 2002 order, the Board found, *inter alia*, that sites subject to federal or State underground storage tank laws are excluded from proportionate share liability under Section 58.1(a)(2) of the Act (415 ILCS 5/58.1(a)(2) (2000)), and that the People's action under Section 57.12 of the Act (415 ILCS 5/57.12 (2000)) is, therefore, excluded from proportionate share liability. See People v. State Oil, et al., PCB 97-103 (Apr. 4, 2002), slip op. at 17.

MOTION

The movants request that the Board certify for interlocutory appeal, that portion of its April 4, 2002 order involving the applicability of proportionate share liability. Specifically, the motion asks for an order certifying the following question of law for interlocutory appeal: Does the proportionate share liability provision of the Act (415 ILCS 5/58.9 (2000)) apply to all sites or does it apply only to sites not exempted from Title XVII of the Act by Section 58.1(a)(2) (415 ILCS 5/58.1(a)(2) (2000)). Mot. at 3.¹ Additionally, the movants request that the Board stay all proceedings in this matter pending resolution of the appeal. Mot. at 12.

The People have not yet filed a response to the motion for summary judgment. If no response to a motion is filed within 14 days, the non-responding party will be deemed to have waived the objection to the granting of the motion., but the waiver of objection does not bind the Board in its disposition of the motion. See 35 Ill. Adm. Code 101.500(d).

RELEVANT LAW

The movants ask that the Board issue an order in accordance with 35 Ill. Adm. Code 101.908 and Supreme Court Rule 308(a) (153 Ill. 2d R. 308), certifying an appeal of the Board's April 4, 2002 order in this matter. The Board, in its procedural rules, specifically provides for Board certification of interlocutory appeals in accordance with Supreme Court Rule 308(a). See 35 Ill. Adm. Code 101.908. Supreme Court Rule 308(a) provides:

When the trial court, in making an interlocutory order not otherwise

¹ The motion for certification of interlocutory appeal and stay will be cited as "Mot. at ___."

appealable, finds that the order involves a question of law, as to which there is substantial ground for difference of opinion, that an immediate appeal from the order may materially advance the ultimate termination of the litigation; the court shall so state in writing, identifying the question of law involved. Such a statement may be made at the time of the entry of the order or thereafter on the court's own motion or on motion of any party. The Appellate Court may thereupon in its discretion, allow an appeal from the order. 153 Ill. 2d R. 308.

The Board's authority to certify interlocutory appeals is also supported by judicial interpretation. *See* People v. PCB, 129 Ill. App. 3d 958, 473 N.E.2d 452 (1st Dist. 1984); Getty Synthetic Fuel v. PCB, 104 Ill. App. 3d 285, 432 N.E.2d 942 (1st Dist. 1982).

The Illinois Supreme Court has indicated that Rule 308 appeals are to be allowed only in certain exceptional circumstances. People v. Pollution Control Board, 473 N.E.2d at 456, *citing* People ex. rel. Mosley v. Carey, 74 Ill.2d 527 (1979). Thus, Rule 308 should be strictly construed and sparingly exercised. People v. PCB, 473 N.E.2d at 456. In order for the Board to grant Rule 308(a) certification, it must determine that a two-prong test is satisfied: (1) whether the Board's decision involves a question of law involving substantial ground for difference of opinion; and (2) whether immediate appeal may materially advance the ultimate termination of the litigation. Residents Against a Polluted Environment and the Edmund B. Thornton Foundation v. County of LaSalle and Landcomp Corporation, PCB 96-243 (Nov. 7, 1996); Land and Lakes Co. v. Village of Romeoville, PCB 91-7 (Apr. 11, 1991)). However, even after the trial court has made the required finding and the application has stated why an immediate appeal is justified, allowance of an appeal is discretionary. Voss v. Lincoln Mall Management, 166 Ill. App. 3d 442, 519 N.E.2d 1056 (1st Dist. 1988); Camp v. Chicago Transit Authority, 82 Ill. App. 3d 1107, 403 N.E.2d 704 (1st Dist. 1980).

ARGUMENT

In support of the motion for certification, the movants state that the Board's April 4, 2002 order presents a question of law about which there are substantial grounds for a difference of opinion. First, the movants contend that the Board's own rulemaking history in establishing the rules for determining proportionate share Proportionate Share Liability, R97-16 (Sept. 3, 1998; Nov. 12, 1998; Dec. 3, 1998; and Dec. 17, 1998)) shows that the question of whether proportionate share liability provision is limited by Section 58.1(a)(2) of the Act is a question of law about which there is a substantial ground for difference of opinion. Mot. at 9.

The movants assert that in the first round of rulemaking, the Board held in a 7-0 vote that "Section 58.9 (the proportionate share liability provision) applies to all remediation sites rather than only those sites not exempted from XVII by Section 58.1(a)(2)." Mot. at 8 *quoting* Proportionate Share Liability, R97-16, slip op. at 12 (Sept. 3, 1998),. The movants note that the Board subsequently reversed itself and decided that the proportionate share liability provision was limited by Section 58.1(a)(2), but that several concerned parties, including the

State's own Joint Committee on Administrative Rules, still contended (as the Board first concluded) that the provision applied to all sites and was not limited by Section 58.1(a)(2). Mot. at 9. The movants state that in the rulemaking opinion, the Board noted that two Circuit Courts that had considered the issue held that the proportionate share liability provision was not limited by Section 58.1(a)(2). Mot. at 9 *citing* In the Matter of Proportionate Share Liability, R97-16, slip op. at 13 (Sept. 3, 1998),.

The movants assert that if the appeal is granted and the Board's decision on this issue overturned, a large number of difficult, time-consuming and fact intensive issues will be eliminated. Mot. at 10. The movants contend that allowing an interlocutory appeal may, accordingly, materially advance the resolution of this action. Mot. at 11.

DISCUSSION

The motion to certify is denied. The movants have failed to prove that this exceptional relief is warranted under the circumstances of this case. The Board is not persuaded that its April 4, 2002 order concerning the application the proportionate share liability provision involves a question of law on which there is substantial ground for difference of opinion.

The Board resolved the applicability of proportionate share liability in the final order and opinion that adopted regulations implementing the program. *See* Proportionate Share Liability, R97-16 (Dec. 17, 1998). In that order, the Board found that Section 58.1(a)(2) excludes from proportionate share liability a site subject to federal or State underground storage tank laws, and codified this exclusion in its rules implementing the proportionate share liability program. *See* 35 Ill. Adm. Code 741.105(f)(5). It is true, that the Board initially proposed regulations that would have applied the proportionate share liability provision to all remediation sites. *See* Proportionate Share Liability, R97-16 (Sept. 3, 1998). However, in response to hearing testimony and public comments provided after the first notice proposal, the Board was persuaded that excluding a site subject to federal or State underground storage tank laws from proportionate share liability provision was more consistent with the legislative history of Title XVII and the Act as a whole.

The movants have not put forth any authority to persuade the Board that a substantial ground for a difference of opinion exists on this issue. The arguments contained in the motion for certification all relate to the time period before the Board issued the final order adopting the regulations implementing proportionate share liability – December 17, 1998. Since that time, a substantial ground for a difference of opinion has not existed on this issue, and the Board denies the motion to certify on this ground.

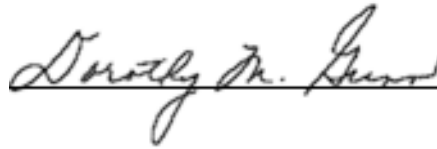
Because no substantial grounds for difference of opinion on a question of law has been established, it is not necessary to consider if an immediate appeal of this issue may materially advance the ultimate termination of the litigation. The Board notes that it has discretionary authority to certify an issue for interlocutory appeal. *See* Voss, 166 Ill. App. 3d 442, 519 N.E. 2d 1056 (1st Dist. 1988). In light of the fact that interlocutory appeals should be strictly

construed and sparingly used, the Board finds that a certification of appeal is not warranted in this instance.

For these reasons, the Board denies the motion for certification of appeal. As the Board denies the motion for certificate of appeal, the Board finds it is unnecessary to stay the present proceedings. The parties are directed to proceed expeditiously to hearing.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 16, 2002, by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", is written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control