ILLINOIS POLLUTION CONTROL BOARD
February 16, 2012

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 11-79
	)	(Enforcement - Water)
INVERSE INVESTMENTS, L.L.C.,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by D. Glosser):

The Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a one-count complaint (Comp.) against Inverse Investments, L.L.C. (Inverse) on May 4, 2011. On September 21, 2011, Inverse filed a motion (Mot.) to dismiss, along with a memorandum (Memo) in support of the motion. On November 7, 2011, the People filed a response (Resp.). For the reasons discussed below, the Board denies the motion to dismiss.

BACKGROUND

On May 4, 2011, the People filed a complaint alleging that Inverse violated Section 12(a) of the Illinois Environmental Protection Act (Act) (415 ILCS 5/12(a)). The complaint alleges that Section 12(a) was violated because of the migration of contaminants from Inverse's property at 3004 West Route 120 in McHenry, Illinois (Site) to offsite areas. The migration allegedly extends to wells as far as 500 feet from the Site. On May 19, 2011, the Board accepted the complaint for hearing.

On September 21, 2011, Inverse filed a motion to dismiss the complaint along with a memorandum in support. On November 7, 2011, the People timely filed a response to the motion to dismiss. The hearing officer allowed additional time to respond to the motion per the People's request. *See* Hearing Officer Order Sept. 29, 2011.

People's Complaint

The People's complaint alleges that between August 4, 2003 and the date the complaint was filed, chlorinated volatile organic compounds (VOCs) were present in the soil and groundwater at the Site. Comp. at 3, 4. The People allege that in that time period, "Inverse caused, threatened, or allowed the migration of chlorinated VOCs into soils and groundwater at the Site so as to cause the Class I Groundwater Quality Standards [35 Ill. Adm. Code 620] to be exceeded" in offsite water. *Id.* at 9. This "created, or threatened to create a nuisance and rendered the groundwater harmful to human health and the environment." *Id.* The People contend that by causing, threatening, or allowing water pollution, Inverse violated Section 12(a) of the Act, 415 ILCS 5/12(a) (2010). *Id.* at 9-10.

Facts

The Site was leased to a dry cleaner between 1970 and 1977 that used certain solvents that resulted in contamination of the Site with chlorinated VOCs. Comp. at 2; Memo. at 1. VOCs are also associated with automotive repair shops, and the Site also once held such a shop. Comp. at 2. Certain VOCs can degrade and dissolve in groundwater. Comp. at 3.

In the late 1990s, a prior owner of the Site placed the property in a land trust. Memo. at 1. In 2003, after discovering that the dry cleaning operation at the Site caused contamination, the prior owner enrolled the Site in the Site Remediation Program (SRP) (35 Ill. Adm. Code 740). Memo. at 2. The Site trust owner died in 2004 and the wife became the benefit owner in 2005. The property was then transferred to Inverse. *Id*. Inverse has continued in the SRP program spending over $200,000 and continuing to remediate the Site. *Id*., Memo. Exh. A at 2.

INVERSE MOTION TO DISMISS

Inverse asks that the Board dismiss the complaint because the complaint "never alleges a discharge from the Site". Mot. at 2. Further Inverse asserts that the complaint fails to state a cause of action and must be dismissed because Inverse is not a liable party under the statute." Mot. at 3. Inverse supports its motion by arguing: 1) no discharge occurred, 2) Inverse did not cause or allow any discharge, 3) the complaint fails to allege sufficient facts to support a claim, and 4) Inverse is not liable for contamination. Memo at 1-13. The Board will summarize each of the arguments below.

No Discharge Occurred

Inverse's first argument for dismissal of the complaint is that the migration of previously discharged contaminants that occurred while Inverse was the owner of the Site does not constitute a discharge under Section 12(a) of the Act. 415 ILCS 5/12(a) (2010). Section 12(a) of the Act states that it is a violation of the Act to cause, threaten, or allow the discharge of any contaminants so as to cause water pollution either alone or in combination with other sources. 415 ILCS 5/12(a) (2010). Inverse argues that the People's complaint alleges not that Inverse caused a discharge of VOCs pursuant to Section 12(a) of the Act (415 ILCS 5/12(a) (2010)), but that after inheriting the Site, Inverse caused, threatened, or allowed the migration of contaminants that were initially discharged when the Site was leased to dry cleaners before Inverse was the owner. Memo at 6.

While the Act does not define "discharge," Inverse relies on the term's definition under the Clean Water Act (CWA) to establish that the type of migration of contaminants that occurred on Inverse's watch does not constitute discharge under Section 12(a) of the Act (415 ILCS 5/12(a) (2010)). Memo at 5, citing 33 USC §1362(16). Inverse notes that under the CWA "'discharge' is defined as a discharge of a pollutant or pollutants", and discharge of pollutant or pollutants means the addition of any pollutant to waters from any point source. Memo at 5-6, citing 33 USC §1362(16) and (12).

Inverse relies on federal case law that has determined that the migration of contamination from a previous release does not constitute discharge under the Clean Water Act. Memo at 6, citing Aiello v. Town of Brookhaven, 136 F.Supp.2d 81; Wilson v. Amoco Corp., 33F.Supp.2d 969. Inverse argues that in Wilson, the court found that when the facility from which contamination was emanating ceases to operate, "rarely will an ongoing CWA violation exist." *Id.*

Inverse asserts that by alleging that Inverse allowed migration to occur after 2003, the People are asking the Board to find Inverse responsible for an ongoing discharge. Memo at 6. Inverse opines that following the analysis of the language of the CWA, migration is not an ongoing discharge, and further that the dry cleaning business that ceased operation over 30 years ago caused the contamination. *Id.* Inverse maintains that there is no allegation of a discharge by Inverse; therefore, the complaint fails to state a cause of action. Memo at 6-7.

Inverse Did Not Cause or Allow a Discharge

Inverse argues that even if the migration were a discharge, Inverse did not cause or allow the initial discharge of VOCs, and so did not cause or allow the migration of contaminants from the site. Therefore, Inverse did not violate the statute. Memo. at 7-9. Inverse relies on People v. Fiorini, which stated that the analysis applied to determine whether an alleged polluter violated the Act "is whether the alleged polluter exercised sufficient control over the source of pollution." People v. Fiorini, 143 Ill.2d 318, 346, 574 N.E.2d 612, 623 (1991). Inverse also relies on Perkinson v. Pollution Control Board, 187 Ill. App. 3d 689 (3rd Dist. 1989) where the court stated that "the owner of the source of pollution causes or allows the pollution . . . unless the facts establish the owner either lacked the capability to control the source . . . or had undertaken extensive precautions to prevent vandalism or other intervening causes." Perkinson, 187 Ill. App. 3d at 694-695.

Inverse further argues that the phrase "cause or allow" relates to a person's acts or omissions. Memo at 8. Inverse notes that the Board has stated that the language of Section 12(a) of the Act (415 ILCS 5/12(a) (2010)) means that the owner of the property has a duty to take prudent measures to prevent pollution. *Id.*, citing IEPA v. Omer Thomas, AC 89-215, slip op. at 4 (Jan. 23, 1992).

Inverse asserts that it had no control over the initial discharge of the VOC contaminants because that discharge occurred prior to Inverse's ownership of the property. Memo at 8. Furthermore, Inverse's remediation under the SRP is evidence of precautionary action to prevent pollution and serves as further evidence that Inverse did not intend or know it was engaged in a discharge of contaminants. Memo at 9. Inverse claims that the People do not allege any act or omission by Inverse that caused or allowed the contamination, and therefore the Board cannot grant the relief and the matter should be dismissed. *Id.*

Insufficient Facts to Support a Claim

Inverse argues that the People have not provided sufficient facts to allow Inverse to prepare a defense. Memo at 9. Inverse argues that Illinois is a fact-pleading state and for a

complaint to be sufficient, the complaint must set forth the ultimate facts to support a cause of action. Memo at 9-10, citing People. Waste Hauling, PCB 10-9 (Dec. 3, 2009). Inverse maintains that the People have not provided information as to the possible proportion of pollutants in the groundwater from Inverse's Site. Memo at 9-12.

Inverse argues that under Section 58.9 of the Act (415 ILCS 5/58.9 (2010)), the People may not bring an action against a person for remediation that extends beyond the releases proximately caused by that person. Memo at 10. Section 58.9(a)(1) of the Act provides:

> Notwithstanding any other provisions of this Act to the contrary, including subsection (f) of Section 22.2, in no event may the Agency, the State of Illinois, or any person bring an action pursuant to this Act or the Groundwater Protection Act to require any person to conduct remedial action or to seek recovery of costs for remedial activity conducted by the State of Illinois or any person beyond the remediation of releases of regulated substances that may be attributed to being proximately caused by such person's act or omission or beyond such person's proportionate degree of responsibility for costs of the remedial action of releases of regulated substances that were proximately caused or contributed to by 2 or more persons. 415 ILCS 5/58.9(a)(1) (2010).

Inverse argues that Section 58.9 of the Act (415 ILCS 5/58.9 (2010)) applies to Inverse because the People seek to require Inverse to perform additional remediation to the Site. *Id*. Inverse argues that the People failed to satisfy the requirements of Section 58.9 of the Act (415 ILCS 5/58.9 (2010)) because in the complaint, it identified contaminants in the affected groundwater that were not only attributable to dry cleaning operations, but also other contaminants attributable to one of the several gas stations in the vicinity. Memo at 11. Thus, Inverse contends that while the People recognize others' responsibility for contamination of the Site, the People do not specifically identify those sources, nor does it establish proportionate share liability for all potential contributors to the Site's contamination. *Id*.

Inverse is not Liable

Inverse argues that the Board should dismiss the complaint pursuant to third party action or omission under Section 22.2(j) of the Act. Memo at 12, citing 415 ILCS 5/22.2(j) (2010)). Section 22.2(j) of the Act provides:

> There shall be no liability under this Section for a person otherwise liable who can establish by a preponderance of the evidence that the release or substantial threat of release of a hazardous substance and the damages resulting therefrom were caused solely by:
>
> (A) an act of God;
>
> (B) an act of war;

(C) an act or omission of a third party other than an employee or agent of the defendant, or other than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (i) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (ii) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(D) any combination of the foregoing paragraphs. 415 ILCS 5/22.2(j) (2010).

Inverse asserts that because it inherited the property, and did not have a contract with the responsible previous owner, Inverse is therefore an innocent landowner. Memo at 13. Inverse opines that under Section 22.2(j) of the Act, a person can claim defense to liability for acts of a third party (the previous Site owner) if he can show he exercised due care and took precautions against contamination. *Id*. Here, Inverse argues that because it has not used the Site as a dry cleaner or a disposal Site for other contaminants and has undergone remediation measures under the SRP, it has satisfied Section 22.2(j) requirement of taking precautionary measures to prevent the contamination. *Id*.

Inverse claims that a party whose act or omissions occurred in connection with a contractual relationship does not include the person who inherited the property. Memo at 13, citing 415 ILCS 5/22.2(j)(6)(A)(iii) (2010). Inverse opines that this language is analogous to language in CERCLA (42 U.S.C. §9607b), and that cases interpreting "due care" establish that if a similarly situated prudent person would take such precautions, "due care" is established. *Id*., citing New York v. Lashins Arcade Co., 91 F.3d 353 (2nd Cir . 1996) and Kerr-McGee Chemical Corp v. Lefron Iron & Metal Co., 14 F.3d 321 (7th Cir. 1994). Inverse asserts that due care was taken by Inverse in this case and the Board should dismiss the complaint. Memo at 13-14.

PEOPLE'S RESPONSE TO INVERSE'S MOTION

The People assert that Inverse's motion should be denied because based on the Illinois Code of Civil Procedure (Code), a motion must be dismissed with prejudice if it does not designate whether it is pursuant to Section 2-615 or Section 2-619 of the Code (735 ILCS 5/2-615 and 2-619 (2010)). Resp. at 2. The People assert that Inverse's motion to dismiss fails to specify which Section of the Code the motion is brought under. Therefore the People claim the motion should be denied. *Id*.

Section 2-615 of the Code provides:

(a) All objections to pleadings shall be raised by motion. The motion shall point out specifically the defects complained of, and shall ask for appropriate relief, such

as: that a pleading or portion thereof be stricken because substantially insufficient in law, or that the action be dismissed, or that a pleading be made more definite and certain in a specified particular, or that designated immaterial matter be stricken out, or that necessary parties be added, or that designated misjoined parties be dismissed, and so forth.

(b) If a pleading or a division thereof is objected to by a motion to dismiss or for judgment or to strike out the pleading, because it is substantially insufficient in law, the motion must specify wherein the pleading or division thereof is insufficient.

(c) Upon motions based upon defects in pleadings, substantial defects in prior pleadings may be considered.

(d) After rulings on motions, the court may enter appropriate orders either to permit or require pleading over or amending or to terminate the litigation in whole or in part.

(e) Any party may seasonably move for judgment on the pleadings. 735 ILCS 5/2-615 (2010).

Section 2-619 of the Code provides in part:

> Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit . . .. 735 ILCS 5/2-619(a) (2010).

Section 2-619 of the Code then lists specific grounds on which a motion to dismiss may be based. *Id*.

Motion to Dismiss Should be Denied under Section 2-615

The People argue that a movant is entitled to judgment under Section 2-615 of the Code (735 ILCS 5/2-615 (2010)) only if the complaint is "substantially insufficient at law", and points out defects in the complaint. Resp. at 2-3. The People assert that if the motion relies on "unsupported legal conclusions, as does Inverse's motions" the motion must be denied. Resp. at 3. The People maintain that the Board can consider only the allegations in the pleadings themselves and if a genuine issue of material fact is disclosed by the pleading the complaint cannot be dismissed. Resp. at 3, citing Urbaitis v. Commonwealth Edison, 143 Il1.2d 458,475 (1991); Gillen v. State Farm Mutual Automobile Insurance Co., 215 111.2d 381,385 (2005) (citing M.A.K. v. Rush-Presbyterian-St. Luke's Medical Center, 198 Il1.2d 249,255 (2001); Employers Insurance of Wausau v. Ehlco Liguidating Trust, 186 Il1.2d 127, 138 (1999)).

The People maintain that Inverse's motion should be dismissed because the complaint is sufficiently pled and includes citations to statutory provisions that establish a cause of action.

Resp. at 3. The People assert that there is a continuing discharge of contaminants from the Site resulting in groundwater contamination. *Id.* The People note that discovery of a Class I groundwater violation may take years to be discovered due to migration of contaminants through soils. *Id.* The People opine that Inverse would have the Board find that the violations ended when the contaminant was last spilled at the Site. Resp. at 3-4.

The People allege that there is a continued migration from the Site into the groundwater and the facts alleged support a finding that Inverse is allowing continued discharge of contamination into groundwater. Resp. at 4-5. The People note that in People v. John Chalmers, PCB 96-111(Jan. 6, 2000). The Board found the complaint was sufficiently pled, stating that:

> the mere presence of a contaminant is insufficient to establish that water pollution has occurred or is threatened; it must also be shown that the particular quantity and concentration of the contaminant in question is likely to create a nuisance or render the waters harmful, detrimental, or injurious. PCB 96-111, slip op. at 8 (citing Jerry Russell Bliss, Inc. v. IEPA, 138 Ill. App. 3d 699, 704 (5th Dist. 1985)).

The People further note that in Chalmers the Board found sufficient allegations that liquid livestock waste was attributable to the respondent because respondent's was the only facility in the watershed. Resp. at 5. In this case, the People are alleging that VOCs are attributable to Inverse's Site because the Site is the only area where the historic use involves VOCs. Resp. at 5-6.

The People argue that the Board also found the People's claim sufficient when a current owner of a contaminated property caused, threatened, or allowed water pollution by allowing the contamination to remain in place. Resp. at 6, citing People v. Michel Grain, Co. Inc., PCB 96-143 (Aug. 22, 2002). The People point out that the Board indicated that a respondent with control over a Site may be in violation even if the respondent did not actively dispose of the contamination. *Id.*

The People further argue that Inverse has control over the Site and is liable unless Inverse "lacked the capability to control the source of pollution." People v. AJ. Davinroy Contractors, 249 Ill. App. 3d 788, 794 (1993). The People note that property owners are responsible for the pollution on their land unless the facts establish the owners either "lacked the capability to control the source" or "had undertaken extensive precautions" to prevent the pollution. Perkinson, 187 Ill. App. 3d at 695. The People assert that by claiming completion of remediation at the Site, Inverse has demonstrated the ability to control the source of pollution. Resp. at 7. The People agree that Inverse has performed activities at the Site aimed at controlling contamination; however, the activities have not been sufficient to alleviate the risk posed to human health and the environment. Resp. at 7-8.

The People claim that the complaint is sufficiently pled under Illinois law as a fact-pleading state. Resp. at 8. The People are not required to plead evidentiary facts, but merely facts sufficient to allow respondent to prepare a defense. Resp. at 8-9, citing Cunningham v. City of Sullivan, 15 Ill. App. 2d 561 (3rd Dist. 1958); 35 Ill. Adm. Code 103.204(c)(2). The

People opine that the complaint informed Inverse of the ultimate facts and the motion must therefore be denied.

Motion to Dismiss Should be Denied under Section 2-619

The People argue that a motion to dismiss pursuant to Section 2-619 of the Code (735 ILCS 5/2-619 (2010)) "allow[s] for a threshold disposition of questions of law and easily proven issues of fact." Resp. at 10, citing Mio v. Alberto-Culver, 306 Ill. App. 3d 822, 824 (1999). A motion filed pursuant to Section 2-619 of the Code (735 ILCS 5/2-619 (2010)) admits the legal sufficiency of the complaint and raises defects, defenses, or other affirmative matters that defeat the claim. Resp. at 10, citing Cohen v. McDonald's Corp., 347 Ill. App. 3d 627,632 (2004). The People maintain that under Section 2-619 of the Code a motion to dismiss should only be granted if after construing the pleadings in a light most favorable to a moving party, there is no set of facts that could be proven to allow the relief requested in the complaint. Resp. at 10. The People assert that the Board can find that the complaint can support a finding of violation. *Id*.

The People argue that Inverse introduces two "affirmative matters" in an attempt to defeat the claims made by the People. Resp. at 10. Those matters are a defense of an innocent landowner and proportionate share liability. *Id*. The People maintain that being an innocent landowner does not alleviate liability under Section 12(a) of the Act (415 ILCS 5/12(a) (2010)), and proportionate share liability only applies to mitigate the extent of a party's liability for cleanup. Resp. at 11. The People opine that the Board squarely addressed the innocent landowner defense in Michel Grain stating:

> To be clear, Sections 22.2(j) and 58.9 potentially eliminate or limit Section 22.2(f) liability to pay for a cleanup. Neither a defense under Section 22.2(j) nor proportionate share liability under Section 58.9, however, prevents a finding of violation or the imposition of civil penalties, both of which the People seek here. For that reason alone, the Board cannot dismiss [the current owner] from this enforcement action based on his allegations that he purchased the Site in 'good faith' or that he did not cause the release. Moreover, the Board cannot now, with the current record, determine the applicability of either the innocent landowner defense or proportionate share liability. Michel Grain, PCB 96-143 slip op. at 4.

The People urge the Board to adopt the reasoning from Michel Grain and deny the motion to dismiss.

The People argue that likewise Section 58.9 of the Act (415 ILCS 5/58.9 (2010)) does not prevent a finding of liability against Inverse. Resp. at 14. The People state: "Proportionate share liability defenses create burden of proof issues, not pleading requirements under the Act. *See* Proportionate Share Liability: 35 Ill. Adm. Code 741, R97-16 (Dec. 17, 1998) and Cole Taylor Bank v. Rowe Industries *et al*., PCB 01-173 (June 2, 2002)." Resp. at 14. The People opine that the Board has considered a defense of proportionate share liability under Section 12(a) of the Act (415 ILCS 5/12(a) (2010)) and found that proportionate share liability does not prevent a finding of violation. *Id*., citing Michel Grain, PCB 96-143.

DISCUSSION

The Board will first set forth the legal standard to be used when ruling on a motion to dismiss. Next the Board will explain the Board's findings.

Standard for Granting Motion to Dismiss

The Board has often looked to Illinois civil practice law for guidance when considering motions to strike or dismiss pleadings. 35 Ill. Adm. Code 101.100(b); *See also* United City of Yorkville, PCB 08-96, slip. op. at 14-15 (Oct.16, 2008). In ruling on a motion to strike or dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See e.g.*, Beers v. Calhoun, PCB 04-204, slip op. at 2 (July 22, 2004); *see also* In re Chicago Flood Litigation, 176 Ill. 2d 179, 184, 680 N.E.2d 265, 268 (1997); Board of Education v. A, C & S, Inc., 131 Ill. 2d 428, 438, 546 N.E.2d 580, 584 (1989). "[I]t is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief." Smith v. Central Illinois Regional Airport, 207 Ill. 2d 578, 584-85, 802 N.E.2d 250, 254 (2003). Further, all inferences from those facts must be considered in the light most favorable to the non-movant. People v. Stein Steel Mills Svcs., PCB 02-1 (Nov. 15, 2001); Nash v. Jiminez, PCB 7-97 (Aug. 19, 2010); Chicago Coke v. IEPA, PCB 10-75 (Sept. 2, 2010)

Illinois requires fact-pleading, not the mere notice-pleading of federal practice. Adkins v. Sarah Bush Lincoln Health Center, 129 Ill. 2d 497, 518, 544 N.E.2d 733, 743 (1989). In assessing the adequacy of pleadings in a complaint, the Board has accordingly stated that "Illinois is a fact-pleading state which requires the pleader to set out the ultimate facts which support his cause of action." Bernice Loschen v. Grist Mill Confections, PCB 97-174, slip op. at 4 (June 5, 1997) (*citing* LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297, 1303 (2nd Dist. 1993)). "[L]egal conclusions unsupported by allegations of specific facts are insufficient." Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303 (*citing* Estate of Johnson v. Condell Memorial Hospital, 119 Ill. 2d 496, 509-10, 520 N.E.2d 37 (1988)). A complaint's allegations are "sufficiently specific if they reasonably inform the defendants by factually setting forth the elements necessary to state a cause of action." People v. College Hills Co., 91 Ill. 2d 138, 145, 435 N.E.2d 463, 467 (March 16, 1982). Fact-pleading does not require a complainant to set out its evidence: "'[t]o the contrary, only the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts.'" People ex rel. Fahner v. Carriage Way West, Inc., 88 Ill. 2d 300, 308, 430 N.E.2d 1005, 1008-09 (1981) (*quoting* Board of Education v. Kankakee Federation of Teachers Local No. 886, 46 Ill. 2d 439, 446-47 (1970)).

Board's Findings

Inverse made four arguments for dismissal of the complaint. Those arguments are: 1) no discharge occurred, 2) Inverse did not cause or allow any discharge, 3) the complaint fails to allege sufficient facts to support a claim, and 4) Inverse is not liable for contamination. Memo at 1-13. The People respondrd to the arguments asserting a procedural defect in the motion (failure

to designate whether the motion is filed pursuant to 2-615 or 2-619 of the Code (735 Ill. Adm. Code 5/2-615, 2-5619 (2010)).

In deciding the motion to dismiss, the Board must take all well-pled allegations as true and draw all reasonable inferences from them in favor of the People. Under that standard, the Board is not persuaded by Inverse's arguments. As to the claim that there is no discharge, and Inverse did not cause or allow a discharge, the People allege that contamination from a Site owned by Inverse has caused pollution of the groundwater. Under the Board's decision in Michel Grain, the current owner may be responsible for contamination even if the current owner did not actively dispose of the contamination. Thus, taking the facts as true, the People may be able to establish that Inverse caused, allowed or threatened a violation of Section 12(a) of the Act 415 ILCS 5/12(a) (2010)). Therefore, the motion to dismiss cannot succeed on these grounds.

Inverse also argued that the complaint fails to allege sufficient facts to support a claim. However, the People have alleged that Inverse is the owner of a Site that contains contamination that is migrating offsite and polluting groundwater. Further, the People's complaint sets forth the contamination levels and alleges migration from Inverse's Site. In assessing the adequacy of pleadings in a complaint, the Board has stated that "Illinois is a fact-pleading state which requires the pleader to set out the ultimate facts which support his cause of action." Grist Mill Confections, PCB 97-174, slip op. at 4. The Board finds that the People have set out the ultimate facts to support the cause of action and the motion to dismiss must fail on this argument.

As to Inverse's arguments that Sections 22.2(j) and 58.9 of the Act (415 ILCS 5/22.2(j) and 58.9 (2010)) limit Inverse's liability, the Board is unconvinced. The Board first notes that the Section 22.2(j) "innocent landowner" defense is inapplicable to this case because the People do not seek cost recovery under Section 22.2(f) of the Act (415 ILCS 5/22.2(f) (2010)). Section 58.9 proportionate share liability may limit a respondent's responsibility to perform, or to pay for, a response to a release or substantial threat of release. *See* 35 Ill. Adm. Code 741. However, the People have not requested either remedy here. Proportionate share liability cannot prevent a finding of violation or the imposition of a civil penalty, both of which the People seek. Inverse is arguing that proportionate share relieves Inverse of any responsibility for a violation. The People have alleged that Inverse is the owner of a Site containing contamination that is migrating offsite and polluting groundwater. That others might also be liable does not defeat the People's allegations in the complaint. Taking all well-pled allegations as true and drawing all reasonable inferences from them in favor of the People, the Board finds that the People have alleged sufficient facts to establish Inverse may be responsible for the contamination. Therefore, the motion to dismiss must be denied on these grounds.

CONCLUSION

Based on the pleadings, taking all well-pled allegations as true, and drawing all reasonable inferences from them in favor of the People, the Board finds that the motion to dismiss cannot be supported. Therefore, the Board denies the motion to dismiss.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 16, 2012, by a vote of 5-0.

John Therriault, Assistant Clerk
Illinois Pollution Control Board