

ILLINOIS POLLUTION CONTROL BOARD

August 22, 2002

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainants,)
)
v.) PCB 96-143
) (Enforcement – Water, Land)
MICHEL GRAIN COMPANY, INC. d/b/a)
MICHEL FERTILIZER, an Illinois)
corporation, CARLYLE MICHEL, and)
RONNIE TODD)
)
Respondents.)

ORDER OF THE BOARD (by C.A. Manning):

Today the Board rules on respondent Ronnie Todd's (Todd) motion to be dismissed from this enforcement action. Todd, along with respondents Michel Grain Company, Inc. d/b/a Michel Fertilizer (Michel Grain) and Carlyle Michel (Michel), were named by the Illinois Attorney General, on behalf of the People of the State of Illinois (People) in a second amended complaint on October 4, 2001. Neither Michel Grain nor Michel has filed any pleadings in response to Todd's motion. The People oppose the motion.

Based on alleged contamination from two fertilizer and agrichemical facilities, one in Jefferson County and the other in Hamilton County, the People have pled water pollution and land pollution violations of the Environmental Protection Act (Act) (415 ILCS 5/12(a), (d), 21(d) (2000) *as amended by* P.A. 92-0574, eff. June 26, 2002) and Board regulations (35 Ill. Adm. Code 302.203, 304.106, 808.121(c)(1)). The People seek several remedies, including payment of cleanup costs. *See* 415 ILCS 5/22.2(f) (2000) *as amended by* P.A. 92-0574, eff. June 26, 2002.

For the reasons below, the Board denies Todd's motion to be dismissed from this proceeding. The Board also requires the People to amend its complaint. In this order, the Board first addresses several procedural matters, then discusses Todd's motion to dismiss.

PROCEDURAL MATTERS

The People filed an original complaint and two amended complaints in this enforcement action. On December 27, 1995, the People filed the original complaint, naming only Michel Grain and Michel as respondents. The complaint alleged violations of the Act and Board regulations concerning pesticide and fertilizer releases at a grain elevator and liquid

agrichemical facility. The facility is located in the Village of Ina, Jefferson County (Ina facility).

The People's first amended complaint, filed on April 25, 1996, added similar allegations regarding a fertilizer and agrichemical facility located immediately west of State Route 142 in the Village of Broughton, Hamilton County (Broughton facility). On October 4, 2001, the People filed a second amended complaint, naming Todd as an additional respondent and alleging that he is the current owner of the Broughton facility. On July 2, 2002, Todd filed a motion to be dismissed from this proceeding, attaching a supporting affidavit.

The People filed a response to Todd's motion on August 2, 2002, with a motion for leave to file the response, which the Board grants. On August 14, 2002, Todd filed a reply to the People's response. Though Todd did not request leave to file a reply, the Board allows the reply as no prejudice will result to the People.¹ Because Todd's motion to dismiss, and the People's allegations against him, pertain only to the Broughton facility, the Board will not further discuss the Ina facility in this order.

Under the Board's procedural rules, Todd's July 2, 2002 motion to dismiss was due by November 3, 2001, the 30th day after he was served with the October 4, 2001 second amended complaint. *See* 35 Ill. Adm. Code 101.506. The People, however, failed to include in the second amended complaint the required notice to respondents that failing to timely answer the complaint would mean that its material allegations are deemed admitted. *See* 35 Ill. Adm. Code 103.204(e), (f); *see also* People v. American Disposal Co., PCB 00-67 (Feb. 7, 2002) (new procedural rules, effective January 1, 2001, apply to amended complaint filed on or after effective date, even when original complaint was filed before new rules took effect). In the interest of administrative economy, the Board accepts Todd's late-filed motion and, as explained below, directs the People to file an amended complaint that provides the notice required by Section 103.204(f) of the Board's procedural rules.

DISCUSSION

When ruling on a motion to dismiss, the Board takes all well-pled allegations as true. *See* People v. Peabody Coal Co., PCB 99-134 (June 20, 2002); People v. Stein Steel Mills Co., PCB 02-1 (Nov. 15, 2001) citing Import Sales, Inc. v. Continental Bearings Corp., 217 Ill. App. 3d 893, 577 N.E.2d 1205 (1st Dist. 1991). Dismissal is proper only if it is clear that no set of facts could be proven that would entitle complainant to relief. *See* Peabody, PCB 99-134; Stein Steel, PCB 02-1. The Board describes the People's second amended complaint before turning to Todd's motion to dismiss.

¹ The People's second amended complaint is cited as "Comp. at ___." Todd's motion to dismiss is cited as "Mot. at _." Todd's affidavit attached to the motion is cited as "Affid. at _." The People's response to the motion is cited as "Resp. at _."

People's Complaint

The second amended complaint alleges that Michel Grain and Michel owned and operated the Broughton facility, a liquid and dry fertilizer and agrichemical facility. Comp. at 14. According to the People, the facility formerly included above-ground storage tanks, a storage building for dry and bulk fertilizer, and two underground drains that discharged to an unnamed tributary of the North Fork Saline River. *Id.* at 15. The People further assert that Michel Grain and Michel leased the Broughton facility to a “third party” who operated it for an unknown period of time before selling the property in 1998 to Todd, the alleged current owner. *Id.* at 14-15.

The complaint states that the Illinois Environmental Protection Agency inspected the Broughton facility on January 28, 1992, revealing apparently contaminated soil, gravel, and trenches. Comp. at 16. During the inspection, soil samples taken had concentrations of alachlor, atrazine, and trifluralin, according to the complaint. *Id.* The People allege that respondents have caused or allowed pesticides, herbicides, fertilizers, and fuels to contaminate soil at the Broughton facility since at least January 9, 1992, that respondents have unlawfully disposed of waste, and that contaminants have entered the drainage way causing water pollution. *Id.*

Todd's Motion to Dismiss

Todd makes three arguments for his dismissal from this case: (1) he is not (and was not at any relevant time) the owner of the Broughton facility and has never operated a fertilizer or farm chemical business; (2) he is exempt from liability for cleanup costs; and (3) the complaint lacks sufficient detail for Todd to prepare a defense. The Board addresses these arguments in turn.

Todd claims that he is not the owner of the Broughton facility and that he was not the owner during the time periods identified in the complaint. Mot. at 1, Affid. at 1. Todd further asserts that he is in the trucking business, and is not engaged in fertilizer or farm chemical operations. Mot. at 2, Affid. at 1.

The People respond that Todd is the referenced “third party” who leased the Broughton facility before buying it, and that Todd conveyed the property to the Ronnie Todd Land Trust on July 21, 2000. Resp. at 5, Att. C. According to the People, Todd still uses the property as a truck lot and repair facility. The People assert therefore that Todd previously leased and owned the site, and that he maintains control of the site. Resp. at 5-6. The Board notes that the People's response includes factual allegations not found in the second amended complaint.

The People argue that Todd has caused, threatened, or allowed water pollution by allowing contamination to remain in the soil during his ownership and use of the site, in violation of Sections 12(a) and 12(d) of the Act and corresponding Board regulations. Resp. at 6. The People further argue that Todd has violated and continues to violate Section 21(d) of

the Act and corresponding Board regulations by allowing contamination to remain in the soil while the facility is under his control, thereby creating a waste disposal site. Resp. at 6.

The Board finds no merit in Todd's position. Owning a site is not a prerequisite to violating the Act or Board regulations. Moreover, a respondent with control over a site may be found in violation even if the respondent did not actively dispose of contaminants at the site. In addition, with respect to cost recovery under Section 22.2(f) of the Act, Section 22.2(h)(2)(C) (415 ILCS 5/22.2(h)(2)(C) (2000)) defines "owner or operator" as, in the case of a land trust, the person owning the beneficial interest in the land trust.

Todd's second argument for dismissal is that he is not liable for cleanup cost recovery because he (1) was a "good faith" purchaser of the Boughton facility and (2) did not cause the contaminant release for he was not the owner or operator of the site at the time that the release occurred. Mot. at 3.

The Board recognizes the Act's "innocent landowner" defense at Section 22.2(j) (415 ILCS 5/22.2(j) (2000) *as amended by* P.A. 92-0574, eff. June 26, 2002), as well as proportionate share liability under Section 58.9 (415 ILCS 5/58.9 (2000)). The former is a defense with many elements for a respondent to establish. The latter limits a cost recovery remedy while imposing a burden on complainant to show, among other things, that respondent proximately caused or contributed to the release or substantial threat of release. *See* 35 Ill. Adm. Code 741.

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 Todd 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. Of course, nothing in this order precludes the parties from addressing these issues.

Todd also argues that the complaint does not sufficiently allege violations against him, and that he therefore cannot prepare a defense. Mot. at 2. The Board disagrees. The complaint alleges violations of specific provisions of the Act and Board regulations and states the manner and extent to which Todd allegedly committed the violations: since at least January 9, 1992, Todd caused or allowed the discharge of contaminants; Todd deposited contaminants on the land so as to create a water pollution hazard; and Todd caused or allowed contaminants to be discarded at the site. Comp. at 16-18. The Board finds the allegations sufficiently specific to meet the requirements for complaints at Section 31(c)(1) of the Act (415 ILCS 5/31(c) (2000) *as amended by* P.A. 92-0574, eff. June 26, 2002) and Section 103.204(c) of the Board's procedural rules (35 Ill. Adm. Code 103.204(c)).

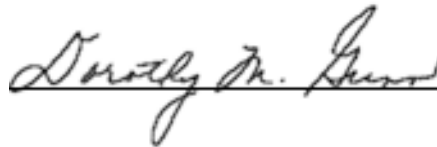
CONCLUSION

The Board denies Todd's motion to be dismissed from this enforcement action. In addition, the Board requires the People to amend its complaint within 30 days after the date of this order to reflect the notice to respondents required under 35 Ill. Adm. Code 103.204(f). The Board further grants the People leave to include in the amended complaint any new allegations.

Each respondent may file an answer within 60 days after receiving the People's amended complaint. A respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if a respondent fails within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider that respondent to have admitted the allegation. 35 Ill. Adm. Code 103.204(d).

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 22, 2002, by a vote of 7-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board