

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)

Complainant,)

v.)

THOMAS GRAY, an individual,)

Respondent.)

PCB No. 04-106
(Enforcement-Cost Recovery)

VIA ELECTRONIC FILING

NOTICE OF FILING

TO: Thomas Gray
13163 East 2500 South Road
Mokenca, Illinois 60954

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, Illinois 62794-9274

PLEASE TAKE NOTICE that on February 15, 2006 we filed with the Clerk of the Illinois Pollution Control Board, Complainant's Motion for Summary Judgment and Certificate of Service, a copy of which is attached and served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
LISA Madigan, Attorney General State
of Illinois

By: Gerald T. Karr
Gerald T. Karr
Senior Assistant Attorney General
Environmental Bureau
188 West Randolph Street, 20th Floor
Chicago, Illinois 60601
(312) 814-3369

DATED: February 15, 2006

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
)	
Complainant,)	
)	
v.)	PCB No. 04-106
)	(Enforcement-Cost Recovery)
THOMAS GRAY, an individual,)	
)	
)	
Respondent.)	

COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT

NOW COMES, Complainant, PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General for the State of Illinois, and pursuant to Section 101.516 of the Illinois Pollution Control Board Procedural Regulations, 35 Ill. Adm. Code 101.516, hereby moves for the entry of an order granting summary judgment in favor of the Complainant and against the Respondent Thomas Gray. In support of its motion Complainant states as follows:

INTRODUCTION

On December 29, 2003, Complainant filed a one count Complaint seeking to recover monies expended by the State of Illinois in conducting a clean-up of an accumulation of used or waste tires owned and operated by Thomas Gray (hereinafter referred to as "Respondent Gray") at a Site partially owned and solely operated by Respondent Gray. A copy of the Complaint is attached hereto and is incorporated herein as Exhibit "A". In addition to Respondent Gray the Complaint named four additional Respondents as Site owners. During the course of these proceedings Respondents Leona Childress and William McCoy were voluntarily dismissed due to lack of evidence against them. See

copy of the Order of the Board dated June 16, 2005, attached hereto and incorporated herein as Exhibit "B". Respondents Steven and Gladys Whyte were dismissed as a result of their deaths. See copy of the Order of the Board dated December 15, 2005, attached hereto and incorporated herein as Exhibit "C". The only remaining Respondent is Thomas Gray. On July 14, 2004, the Complainant filed a Motion for Summary Judgment. The Board denied this Motion because it found that the record was unclear and there was no showing that "no genuine issue of material fact exists". See copy of Board Order dated October 7, 2004 attached hereto and incorporated herein as Exhibit "D".

In an effort to clarify the record and on the recommendation of the Hearing Officer, Complainant on December 6, 2005, served upon Respondent Gray at his address of record, Requests for Admission of Facts. See copy of Complainant's First Request for Admission of Facts, attached hereto and incorporated herein as Exhibit "E". As of the date of this filing Respondent Gray has failed to provide answers to this Request. Pursuant to Section 101.618(f) of the Illinois Pollution Control Board Regulations, 35 Ill. Adm. Code 101.618(f), Respondent Gray's failure to provide answers to these requests, results in these facts being deemed admitted as true for this proceeding.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill.2d 460, 483, 693 N.E.2d 358, 370 (Ill. Sup. 1998). Use of summary judgment procedure is to be encouraged as an aid in expeditious disposition of lawsuits; however, it is drastic means of disposing of litigation and should be allowed only when the right of the moving party is clear and free of doubt. Gilbert v. Sycamore Municipal Hospital, 156 Ill.2d 511, 622 N.E.2d 788 (Ill. Sup. 1993). Granted summary judgment is a drastic consequence, the instant case is tailor made for this type of disposition and resolution.

UNCONTESTED FACTS

In light of Respondent Gray's failure to answer the Request for Admission of Facts the following is deemed admitted as true.

1. Respondent Gray was the sole operator of the Site;
2. Respondent Gray accepted used and waste tires at the Site and placed them on the adjacent properties without the knowledge and consent of the adjacent landowners (Whyte, Childress and McCoy);
3. Respondent Gray was the sole owner and operator of the accumulation of used or waste tires which were removed by the Agency during its corrective action; and
4. Respondent Gray admits he has not reimbursed the State of Illinois for any costs incurred by the State in removing the waste tires from the Site.

The following additional facts are deemed admitted due to Respondent Gray's failure to file an answer to Complainant's Complaint.

1. On February 5, 2001, Respondent Gray received a formal written notice pursuant to Section 55.3(d) of the Act that informed him that the accumulation of the used or waste tires posed a threat to public health or the environment and directed him to submit a plan within 30 days detailing the removal of all the used or waste tires at the Site;
2. The February 5, 2001, Notice informed Respondent Gray that if he did not comply with the Notice, the Agency would perform the clean-up of the used or waste tires and Respondent Gray may be subject to costs and additional punitive damages in an amount equal to, and not more than two times the amount of costs incurred by the State;
3. As of July 1, 2001, Respondent Gray failed to submit a clean-up plan;
4. From October 11, 2001 to December 21, 2001, the Agency removed the accumulation

of used or waste tires from the Site; and

5. The Agency incurred costs of \$131,902.48 in removing the used or waste tires.

ARGUMENT

Respondent Gray has admitted that he was the sole owner and operator of the accumulation of used or waste tires. (Exhibit "E", Request No. 3) Additionally, he has admitted that he was the sole operator of the Site, the other property owners upon which the use or waste tires were placed played no role in the operation of the Site and in fact the use or waste tires were placed there without the property owners' knowledge or consent. (Exhibit "E", Requests Nos. 1 & 2). Respondent Gray received a notice from the Agency requesting a clean-up plan. (Exhibit "A", paras. 14 & 15). This Notice informed Respondent Gray that he would be liable for the cost of the clean-up if he failed to perform it. (Exhibit "A", para. 15). Respondent Gray failed to provide the plan and the Agency conducted the clean-up. (Exhibit "A", paras. 17 & 19). The cost of the clean-up was \$131,902.48 and Respondent Gray has failed to reimburse the State of Illinois for any portion of these costs. (Exhibit "A", para. 27, Exhibit "E", Request No. 4).

There is no genuine issue of material fact that Respondent Gray is liable to the State of Illinois for the costs incurred in the clean-up of the used or waste tire accumulation he owned and operated. Respondent had notice to complete the clean-up or be liable for its cost. He did not even attempt to perform the clean-up. The Agency completed the clean-up and incurred costs in the amount of \$131,902.48 in doing so. Summary Judgment, though a drastic measure, is warranted in this factual scenario. As a matter of law Respondent Gray is liable to the State for the cost of the clean-up.

CONCLUSION

WHEREFORE, for the foregoing reasons, Complainant respectfully requests that the Illinois

Pollution Control Board:

1. Enter an order granting summary judgment for Complainant and against Respondent, Thomas Gray;
2. Enter an Order finding Respondent Thomas Gray liable to the State of Illinois for clean-up costs in the amount of \$131,902.48;
3. Order Respondent, Thomas Gray, to reimburse the Illinois Environmental Protection Agency, \$131,902.48 for the cost of the tire clean-up; and
4. Order any other relief it deems just and appropriate.

PEOPLE OF THE STATE OF ILLINOIS,

LISA MADIGAN, Attorney General
State of Illinois

By: Gerald T. Karr
Gerald T. Karr
Senior Assistant Attorney General
Environmental Bureau
188 West Randolph Street, 20th Floor
Chicago, Illinois 60601
(312) 814-3369

EXHIBIT A

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE
DEC 29 2003
STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS,)
)
)
Complainant,)
)
v.)
)
THOMAS GRAY, an individual, STEVE)
WHYTE, an individual, GLADYS WHYTE, an)
individual, LEONA CHILDRESS, an individual,)
and WILLIAM McCOY, an individual)
)
)
Respondents.)

PCB No. 04- 106
(Enforcement-Cost Recovery)

NOTICE OF FILING

TO: Attached Service List

PLEASE TAKE NOTICE that on December 29, 2003, we filed with the Clerk of the Illinois Pollution Control Board, Complainant's Complaint and Certificate of Service, a copy of which is attached and served upon you. Failure to file an answer to this Complaint within 60 days may have severe consequences. Failure to answer will mean that all allegations in the Complaint will be taken as if admitted for purposes of this proceeding. If you have questions about this procedure, you should contact the hearing officer assigned to this proceeding, the Clerk's Office or an attorney.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
LISA Madigan, Attorney General State
of Illinois

By: Gerald T. Kair

Gerald T. Kair
Assistant Attorney General
Environmental Bureau
188 West Randolph Street, 20th Floor
Chicago, Illinois 60601
(312) 814-3369

DATED: December 29, 2003

SERVICE LIST

Thomas Gray
13163 East 2500 South Road
Momence, Illinois 60954

Steve Whyte
Gladys Whyte
242 West 150th Street
Harvey, Illinois 60426-2058

Leona Childress
William McCoy
13493 East 6000 South Road
Saint Anne, Illinois 60964-4571

RECEIVED
CLERK'S OFFICE
DEC 29 2003

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS,)
)
)
 Complainant,)
)
 v.)
)
 THOMAS GRAY, an individual, STEVE)
 WHYTE, an individual, GLADYS WHYTE, an)
 individual, LEONA CHILDRESS, an individual,)
 and WILLIAM McCOY, an individual)
)
)
 Respondents.)

PCB No. 04- 106
(Enforcement-Cost Recovery)

COMPLAINT

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, complains of Respondents, THOMAS GRAY, STEVE WHYTE, GLADYS WHYTE, LEONA CHILDRESS AND WILLIAM McCOY, (referred to hereafter collectively as "Respondents") as follows:

1. This Complaint is brought by Lisa Madigan, Attorney General of the State of Illinois, on her own motion and at the request of the Illinois Environmental Protection Agency ("Illinois EPA"), pursuant to the terms and provisions of Section 55.3(k) of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/55.3(k) (2002) and is an action to recover the costs incurred by the People of the State of Illinois in a corrective action undertaken by the Illinois EPA.

2. The Illinois EPA is an administrative agency of the State of Illinois, created by Section 4 of the Act, 415 ILCS 5/4 (2002), and charged, *inter alia*, with the duty of enforcing the Act.

3. The parcels of land (hereinafter "Site") that are the subject of this proceeding are identified as Tax Parcels No. 10-19-16-101-033, 10-19-16-101-034, and 10-19-16-101-035, and are located in Momence, Kankakee County, Illinois, 60954.

4. At all times relevant to this Complaint, Respondent Gray, an Illinois resident, owned parcel 10-19-16-101-034 and operated the Site.

5. At all times relevant to this Complaint, Respondents Steve and Gladys Whyte owned parcel 10-19-16-101-033.

6. At all times relevant to this Complainant, Respondents Childress and McCoy owned parcel 10-19-16-101-035.

7. The last known address for Respondent Gray was 13163 East 2500 South Road, Momence, Illinois, 60954.

8. The last known address for Respondents Steve and Gladys Whyte was 242 West 150th Street, Harvey, Illinois 60426-2058.

9. The last known address for Respondents Childress and McCoy was 13493 East 6000 South Road, St. Anne, Illinois 60946-4571.

10. On November 10, 1997, the Illinois EPA conducted an inspection of the Site. Pursuant to this inspection, the Illinois EPA determined that the Site contained approximately 100,000 used or waste tires.

11. On June 9, 2000, the Illinois EPA conducted a re-inspection of the Site, conditions had not changed.

12. Section 55.3(d) of the Act, 415 ILCS 5/55.3(d)(2002), provides in pertinent part, as follows:

- d. The Agency shall have authority to provide notice to the owner or operator, or both, of a Site where used or waste tires are located, ...whenever the Agency finds that the used or waste tires pose a threat to the public health or the environment...

* * *

The notice provided by the Agency shall include the identified preventive or corrective action, and shall provide an opportunity for the owner, operator, or both to perform such action.

13. Section 848.104 of the Illinois Pollution Control Board Regulations (hereinafter "Board Regulations"), 35 Ill. Adm. Code 848.104, titled, Management of Used and Waste Tires, in pertinent part, provides the following definitions:

"DISPOSAL" means the placement of used tires into or on land or water except as an integral part of a systematic reuse or conversion in the regular course of business.

"STORAGE" means the placement of used or waste tires that does not constitute disposal. At a minimum, such an accumulation must be an integral part of a systematic alteration, reuse, reprocessing or conversion of the tire business in the regular course of business.

"TIRE" means a hollow ring, made of rubber or similar materials, which was manufactured for the purpose of being placed on the wheel rim of a vehicle.

"TIRE STORAGE SITE" means a Site where used tires are stored or processed.

"USED TIRE" means a worn, damaged, or defective tire which is not mounted on a vehicle rim.

"WASTE TIRE" means a used tire that has been disposed of.

14. On February 5, 2001, pursuant to Section 55.3(d) of the Act, 415 ILCS 5/55.3(d) (2002), the Illinois EPA issued a formal written notice to the Respondents. (This notice will

hereinafter be referred to as the "55.3(d) notice").

15. Pursuant to the 55.3(d) notice, Respondents were informed that:
 - a. The accumulation of the used or waste tires posed a threat to public health or the environment;
 - b. A plan must be submitted to the Illinois EPA within 30 days from the date of the 55.3(d) notice detailing the removal of all the used waste tires at the Site;
 - c. If owner or operator did not comply with the 55.3(d) notice, the Illinois EPA would perform the clean-up and pursue any potentially responsible parties for all costs incurred by the State; and
 - d. If owner or operator failed to comply with the 55.3(d) notice, such failure may subject the owner or operator to additional punitive damages in an amount equal to, and not more than two times, the amount of costs incurred by the State.
16. Section 55.3(e) of the Act, 415 ILCS 5/55.3(e) (2002), provides in pertinent part, as follows:
 - e. In accordance with constitutional limitations, the Agency shall have authority to enter at all reasonable times upon any private or public property for the purpose of taking whatever preventive or corrective action is necessary and appropriate in accordance with the provisions of this section, including but not limited to removal, processing or treatment of used or waste tires, whenever the Agency finds that used or waste tires pose a threat to public health or the environment.
17. As of July 1, 2001, Respondents had not submitted a cleanup plan, nor removed the waste tires.
18. On or about July 6, 2001, Respondents were informed that the Illinois EPA had not

received a response to the Section 55.3(d) Notice and that the Illinois EPA intended to remove the tires from the Site. Respondent Gray authorized and consented to the Illinois EPA's removal action.

19. The tire removal was commenced on or about October 11, 2001, and was completed on or about December 21, 2001.

20. As part of the removal action, 421.41 tons of tires were removed from the Whyte parcel, 449.20 tons of tires were removed from the Gray parcel, and 228.62 tons of tires were removed from the Childress/McCoy parcel, for a total of 999.93 tons.

21. Section 55.3(g) of the Act, 415 ILCS 5/55.3(g)(2002), provides in pertinent part, as follows:

- g. Except as otherwise provided in this Section, the owner or operator of any site or accumulation of used or waste tires at which the Agency has undertaken corrective or preventive action under this Section shall be liable for all costs thereof incurred by the State of Illinois, including costs of collection. Any monies received by the Agency shall be deposited in the Used Tire Management Fund.

22. The materials described in paragraphs 11 and 20 of this Complaint constitute an accumulation of "used tires" and "waste tires" within the meaning of Section 807.104 of 35 Ill. Adm. Code.

23. The Site and the accumulation of used tires and waste tires thereon were the subject of a corrective or preventive action undertaken by the State of Illinois pursuant to Section 55.3 of the Act, 415 ILCS 5/55.3 (2002).

24. The Illinois EPA incurred costs in undertaking corrective or preventive action to removed the accumulation of used tires and waste tires on the Site as follows; Whyte parcel in the amount of \$50,624.43, the Gray parcel in the amount of \$54,059.08 and the Childress/McCoy parcel in the amount of \$27, 198.97 for a total of \$131,902.48.

25. Respondents are owners and/or operators of an accumulation of used or waste tires within the meaning of Section 55.3(g) of the Act, 415 ILCS 5/55.3(g)(2002), because they owned the Site at the time of the removal of the accumulation of tires.

26. As an owner and/or operator of an accumulation of waste and used tires, pursuant to Section 55.3(g) of the Act, Respondents are liable for \$131,902.48 in costs incurred by the State for corrective action or preventive action taken at the Site in accordance with Section 55.3(g) of the Act, 415 ILCS 5/55.3(g) (2002).

27. As of the date of the filing of this Complaint, Respondents have failed to reimburse the State for any portion of the \$131,902.48 expended in removing used and waste tires from the Site.

28. Section 55.3(h) of the Act, 415 ILCS 5/55.3(h)(2002), provides, in pertinent part, as follows:

h. Any person liable to the Agency for costs incurred under Section (g) of this Section may be liable to the State for punitive damages in an amount at least equal to, and not more than 2 times, the costs incurred by the State if such person failed without sufficient cause to take preventive or corrective action pursuant to notice issued under Section (d) of this Section.

29. Section 3.315 of the Act, 415 ILCS 5/3.315 (2002), provides the following definition:

"PERSON" is any individual, partnership, co-partnership, firm, company, limited liability company, corporation, association, joint stock company, trust, estate, political subdivision, state agency, or any other legal entity, or their legal representative, agent or assigns.

30. Respondents are a "person" as that term is defined in Section 3.315 of the Act, 415 ILCS 5/3.315 (2002).

31. Respondents received a 55.3(d) notice on or about February 7, 2001. They failed

without sufficient cause to take any preventive or corrective action to remediate the threat created by the accumulation of waste and used tires present at the Site.

32. By failing without sufficient cause to take preventive or corrective action pursuant to the 55.3(d) notice, Respondents are also liable to the State of Illinois for punitive damages equal to at least \$131,902.48 and up to \$263,804.96.

WHEREFORE, the Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests the Board to enter an order in favor of the Complainant and against the Respondents, granting the following relief:

1. Finding that the Respondents are owners and/or operators of an accumulation of waste and used tires pursuant to Section 55.3(g) of the Act;
2. Ordering the Respondents to pay at least \$131,902.48 to the Used Tire Management Fund as a reimbursement of the actual costs expended by the State in funding the clean-up of the Site;
3. Finding that Respondents failed without sufficient cause to take preventive or corrective action pursuant to notice issued under Section 55.3(d) of the Act;
4. Ordering Respondents to pay at least \$131,902.48 and up to \$263,804.96 as punitive damages pursuant to Section 55.3(h) of the Act;
5. Ordering the Respondents to cease and desist from further violations of the Act;
6. Assessing all costs of this proceeding pursuant to Section 42(f) of the Act, 415 ILCS 5/42(f), (2002), including attorneys' fees, expert witness fees, and consultant fees against Respondents; and
7. Granting such other relief as the Board deems equitable and just.

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY:


ROSEMARIE CAZEAU, Chief
Environmental Bureau
Assistant Attorney General

OF COUNSEL:

Gerald T. Karr
Assistant Attorney General
Environmental Bureau
188 West Randolph Street, 20th Floor
Chicago, Illinois 60601
(312) 814-3369

CERTIFICATE OF SERVICE

I, GERALD T. KARR, an Assistant Attorney General in this case, do certify that on this 29th day of December, 2003, I caused to be served by First Class Mail the foregoing Notice of Filing and Complainant upon the individuals listed on the attached service list, by depositing the same in the U.S. Mail depository located at 100 West Randolph Street, Chicago, Illinois in an envelope with sufficient postage prepaid.

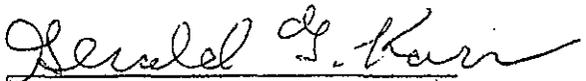

GERALD T. KARR

EXHIBIT B

ILLINOIS POLLUTION CONTROL BOARD

June 16, 2005

PEOPLE OF THE STATE OF ILLINOIS,)

Complainant,)

v.)

PCB 04-106

(Enforcement – Cost Recovery)

THOMAS GRAY, an individual, STEVE)

WHYTE, an individual, and GLADYS)

WHYTE, an individual,)

Respondents.)

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

On December 29, 2003, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a complaint against Thomas Gray, Steve Whyte, Gladys Whyte, Leona Childress and William McCoy. The complaint seeks to recover costs the Illinois Environmental Protection Agency allegedly incurred in undertaking corrective or preventative action to remove the accumulation of used and waste tires on a site owned by respondents in Momence, Kankakee County. The People allege the site is comprised of three parcels of land: one owned by Thomas Gray; one owned by Steve and Gladys Whyte; and one owned by Leona Childress and William McCoy.

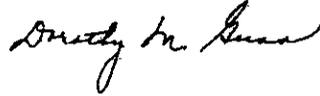
On June 1, 2005, the People filed a motion to voluntarily dismiss Leona Childress and William McCoy from the complaint. In the motion, the People assert that based on information developed during this proceeding Leona Childress and William McCoy should be dismissed without prejudice. To date, no response to the motion has been received by the Board.

If a party files no response to a motion within 14 days the party will be deemed to have waived objection to the granting of the motion. See 35 Ill. Adm. Code 101.500(d). The motion is granted. The Board hereby dismisses Leona Childress and William McCoy from the complaint. This dismissal is noted in the above caption.

Pursuant to a June 3, 2005 hearing officer order, the hearing scheduled for July 20, 2005, was canceled to allow the People to file a request to admit facts on the remaining respondents. The hearing officer is directed to ensure that this matter continues to proceed to resolution in a timely manner.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 16, 2005, by a vote of 5-0.

A handwritten signature in cursive script, appearing to read "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

EXHIBIT C

ILLINOIS POLLUTION CONTROL BOARD
December 15, 2005

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 04-106
)	(Enforcement – Cost Recovery)
THOMAS GRAY, an individual, LEONA)	
CHILDRESS, an individual, and WILLIAM)	
McCOY, an individual,)	
)	
Respondents.)	

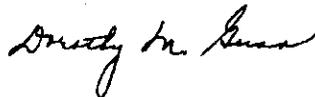
ORDER OF THE BOARD (by T.E. Johnson):

This matter is before the Board on a complaint filed by the People of the State of Illinois (People) against Thomas Gray, Steve Whyte, Gladys Whyte, Leona Childress and William McCoy. The complaint seeks to recover costs the Illinois Environmental Protection Agency (Agency) allegedly incurred in undertaking corrective or preventative action to remove the accumulation of used and waste tires on a site owned by respondents in Momence, Kankakee County. The People allege the site is comprised of three parcels of land, one owned by Thomas Gray, one owned by Steve and Gladys Whyte, and one owned by Leona Childress and William McCoy. Comp. at 2.

On December 6, 2005, the People filed a motion to voluntarily dismiss respondents Steve Whyte and Gladys Whyte. The People assert that it has recently learned that Steve Whyte and Gladys Whyte are deceased. The People attach Social Security death records to the motion. The motion is granted. The Board hereby dismisses the complaint against Steve Whyte and Gladys Whyte. This action is reflected in the caption of today's order.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on December 15, 2005, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

EXHIBIT D

ILLINOIS POLLUTION CONTROL BOARD

October 7, 2004

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 04-106
) (Enforcement – Cost Recovery)
THOMAS GRAY, an individual, STEVE)
WHYTE, an individual, GLADYS WHYTE,)
an individual, LEONA CHILDRESS, an)
individual, and WILLIAM McCOY, an)
individual,)
)
Respondents.)

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

On July 19, 2004, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a motion for summary judgment against Thomas Gray, Steve Whyte and Gladys Whyte (MSJ respondents). For the reasons explained below, the Board denies the People's motion for summary judgment.

BACKGROUND

On December 29, 2003, the People filed a complaint against Thomas Gray, Steve Whyte, Gladys Whyte, Leona Childress and William McCoy. The complaint seeks to recover costs the Illinois Environmental Protection Agency (Agency) allegedly incurred in undertaking corrective or preventative action to remove the accumulation of used and waste tires on a site owned by respondents in Momence, Kankakee County. The People allege the site is comprised of three parcels of land, one owned by Thomas Gray, one owned by Steve and Gladys Whyte, and one owned by Leona Childress and William McCoy. Comp. at 2.

Under the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (2002)), the Attorney General and the State's Attorneys may bring actions before the Board to enforce Illinois' environmental requirements on behalf of the People. *See* 415 ILCS 5/31 (2002); 35 Ill. Adm. Code 103. In this case, the People allege that the respondents are liable under Section 55.3(d) of the Act (415 ILCS 5/55.3(d) (2002)) for failing to reimburse the State for any portion of the \$131,902.48 expended in cleaning up the site. The People also allege that by failing without sufficient cause to take preventive or corrective action pursuant to notice given under Section 55.3(d) of the Act, the respondents are liable to the State of Illinois for punitive damages equal to at least \$131,902.48 and up to \$263,804.96.

The Board order of January 22, 2004, accepted the People's complaint for hearing and noted that if a respondent fails to file an answer to complaint in 60 days after receiving

complaint, the Board will consider that respondent as having admitted allegations in the complaint. On February 25, 2004, Respondents McCoy and Childress filed answers and affirmative defenses. To date, the MSJ respondents have not filed an answer with the Board.

APPLICABLE STATUTE

Section 55.3 of the Act provides in part:

- e. In accordance with constitutional limitations, the Agency shall have authority to enter at all reasonable times upon any private or public property for the purpose of taking whatever preventive or corrective action is necessary and appropriate in accordance with the provision of this section, including but not limited to, removal, processing or treatment of used or waste tires, whenever the Agency finds that used or waste tires pose a threat to public health or the environment.

- g. Except as otherwise provided in this Section, the owner or operator of any site or accumulation of used or waste tires at which the Agency has undertaken corrective or preventive action under this Section shall be liable for all costs thereof incurred by the State of Illinois, including reasonable costs of collection.
- h. Any person liable to the Agency for costs incurred under subsection (g) of this Section may be liable to the State of Illinois for punitive damages in an amount at least equal to, and not more than, two times, the costs incurred by the State if such person failed without sufficient cause to take preventive or corrective action pursuant to notice issued under subsection (d) of this Section.

- k. The costs and damages provided for in this Section may be imposed by the Board in an action brought before the Board in accordance with Title VIII of this Act ... 415 ILCS 5/55.3(e),(g),(h) and (k) (2002).

THE BOARD'S PROCEDURAL RULES

Section 103.204(d) of the Board's procedural rules for enforcement actions provides in part:

Except as provided in subsection (e) of this Section, the respondent may file an answer within 60 days after receipt of the complaint if respondent wants to deny any allegations in the complaint. All material allegations of the complaint will be taken as admitted if no answer is filed or if not specifically denied by the answer,

unless respondent asserts a lack of knowledge sufficient to form a belief. 35 Ill. Adm. Code 103.204(d).

Subsection (e) of Section 103.204 states that the 60-day period to file an answer will be stayed if a respondent timely files a motion attacking the sufficiency of the complaint under Section 101.506 of the Board rules. 35 Ill. Adm. Code 103.202(e); *see also* 35 Ill. Adm. Code 101.506.

Section 103.204(f) provides:

Any party serving a complaint upon another party must include the following language in the notice: "Failure to file an answer to this complaint within 60 days may have severe consequences. Failure to answer will mean that all allegations in the complaint will be taken as if admitted for purposes of this proceeding. If you have any questions about this procedure, you should contact the hearing officer assigned to this proceeding, the Clerk's Office or an attorney." 35 Ill. Adm. Code 103.204(f).

FACTS DEEMED ADMITTED

Respondents Thomas Gray, Steve Whyte and Gladys Whyte failed to file an answer or motion pursuant to 35 Ill. Adm. Code 103.204(d). The record shows that these respondents were properly served and that the complaint was accompanied by a notice of filing that contained the language reference in 35 Ill. Adm. Code 103.204(f). The Board's order of January 22, 2004, also alerted the respondents that failure to file an answer to complaint in 60 days after receiving complaint would result in the Board considering the material allegations in the complaint as admitted.

The Board deems the material allegations in the complaint regarding the MSJ respondents as admitted under 35 Ill. Adm. Code 103.204(d). Specifically, the Board finds the following material allegations admitted by the MSJ respondents:

- a. The site is comprised of three parcels of land identified as tax parcels 10-19-16-101-033, 10-19-16-101-034, and 10-19-16-101-035 and is located in Momence, Kankakee County.
- b. Thomas Gray owned parcel 10-19-16-101-034 and operated the site.
- c. Steve and Gladys Whyte owned parcel 10-19-16-101-033.
- d. On November 10, 1997 and again on June 9, 2000, the Agency conducted inspections of the site and determined that the site contained approximately 100,000 used or waste tires.

- e. On February 5, 2001, the MSJ respondents received formal written notice pursuant to Section 55.3(d) of the Act that informed them that the accumulation of the used or waste tires posed a threat to public health or the environment, and directed them to submit a plan within 30 days detailing the removal of all the used waste tires at the site.
- f. The February 5, 2001 notice informed the MSJ respondents that if they didn't comply with the notice the Agency would perform the cleanup and that the MSJ respondents may be subject to costs and additional punitive damages in an amount equal to, and not more than two times the amount of costs incurred by the State.
- g. As of July 1, 2001, the MSJ respondents had not submitted a cleanup plan or removed the tires.
- h. From October 11, 2001 to December 21, 2001, the Agency removed 421.41 tons of tires from the Whyte parcel, 449.20 tons of tires from the Gray parcel and 228.62 tons of tires from the Childress/McCoy parcel.
- i. The Agency incurred costs in removing the tires in the amount of \$50,624.43 for the Whyte parcel, \$54,059.08 from the Gray parcel, and \$27,198.97 from the Childress/McCoy parcel.
- j. The MSJ respondents have not reimbursed the State for any portion of the \$131,902.48 expended in removing used and waste tires from the site.

MOTION FOR SUMMARY JUDGMENT

The People argue that because all material allegations are admitted by operation of law, that summary judgment is appropriate. The People ask for summary judgment against the MSJ respondents and request that the Board order them to reimburse the Agency for the \$131,902.48 spent on tire cleanup and for any other relief the Board deems appropriate. MSJ at 2-3. To date, no respondent has filed a response to the motion for summary judgment¹.

Summary judgment is appropriate when the pleadings and depositions, together with any affidavits and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 693 N.E.2d 358 (1998). In ruling on a motion for summary judgment,

¹ The motion for summary judgment did not include respondents Leona Childress and William McCoy, both of whom filed an answer to the complaint on February 25, 2004. In a hearing officer order issued September 14, 2004, the hearing officer asserts that the People are still working towards settlement with Leona Childress and William McCoy.

the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370.

Summary judgment "is a drastic means of disposing of litigation," and therefore it should only be granted when the movant's right to the relief "is clear and free from doubt." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis, which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

The Board has found that the MSJ respondents have admitted the material facts noted above by failing to answer or otherwise respond to the complaint in this matter. However, the Board cannot find that no genuine issue of material fact exists regarding the MSJ respondents. The People attached the affidavit of Todd J. Marvel, Manager of the Agency's Used Tire Unit, and a number of invoices to the motion for summary judgment. In the affidavit, Marvel attests that he oversaw the tire removal and that the cost of the tire removal was \$131,902.48. People's Ex. C. The invoices, however, contain references that appear inconsistent with the facts deemed admitted by the MSJ respondents. For example, the invoices do not categorize the tires removed or the cost involved according to parcel. Further, the site is referenced as site number 0918105004, but lists, in separate places, both Thomas Gray and Childress as the owner.

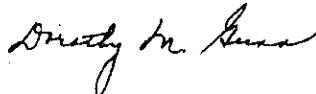
Since the record is unclear, the Board finds that the People have not shown that no genuine issue of material facts exists in this case. The motion for summary judgment is, therefore, denied. The Board finds the record must be supplemented and clarified at hearing, which should be held as expeditiously as practicable. At hearing, the parties should also address the issue of punitive damages.

CONCLUSION

In conclusion, the Board finds that the People did not show that no genuine issue of material fact exists. The Board directs that the hearing be held as expeditiously as practicable.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 7, 2004, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

EXHIBIT E

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
)	
Complainant,)	
)	
v.)	PCB No. 04-106
)	(Enforcement-Cost Recovery)
THOMAS GRAY, an individual, STEVE)	
WHYTE, an individual, GLADYS WHYTE, an)	
individual,)	
)	
Respondents.)	

COMPLAINANT'S FIRST REQUEST FOR ADMISSION OF FACT

THE PEOPLE OF THE STATE OF ILLINOIS, requests Respondent, THOMAS GRAY., to serve his sworn responses to the following request for admissions of fact, upon Complainant, pursuant to Section 101.618 of the Illinois Pollution Control Board Rules of Procedure, 35 Ill. Adm Code Section 101.618. Failure to respond to the following requests to admit within 28 days may have serious consequences. Failure to respond to the following requests will result in all the facts requested being deemed admitted as true for this proceeding. If you have any questions about this procedure, you should contact the hearing officer assigned to this proceeding or an attorney.

DEFINITIONS AND INSTRUCTIONS

As used herein, the words and phrases set out below shall have the following meaning or meanings:

- A. "Site" shall mean where used tires have been disposed of on the property located in Momence, Kankakee County, identified as tax parcels 10-19-16-101-033, 10-19-16-101-034, 10-19-16-101-035 .
- B. "Agency" or "IEPA" shall mean the Illinois Environmental Protection Agency.
- C. All terms not specifically defined herein shall have their ordinary meaning, unless such terms are defined in the Act or the regulations promulgated thereunder, in which case the statutory or regulatory definitions shall apply.
- D. Unless otherwise specified, the time periods of each request shall be 1996 through to the present.

OBJECTIONS OR CLAIMS OF PRIVILEGE

All responses to the Request for Admission of Fact which fail or refuse to admit or deny on the ground of any objection or claim of privilege of any kind whatever shall:

- a. state the nature of the objection, claim or privilege;
- b. state all facts relied upon in support of the objection, claim or privilege;
- c. identify all documents related to the objection, claim or privilege;
- d. identify all persons having knowledge of any facts related to the objection, claim, or privilege;
- e. identify all events, transactions or occurrences related to the objection, claim or privilege. If the objection related to only part a request, the balance of the request shall be answered in full.

REQUEST FOR ADMISSION OF FACT

Request No. 1

Respondent Gray admits that during the relevant time period he was the sole operator of the Site.

Answer:

Request No. 2

Respondent Gray admits that during the relevant time period he accepted used and waste tires at the Site and placed them on the adjacent properties without the knowledge or consent of the adjacent landowners.

Answer:

Request No. 3

Respondent Gray admits that during the relevant time period he was the sole owner and operator of the accumulation of used or waste tires which were removed by the Agency during its corrective action.

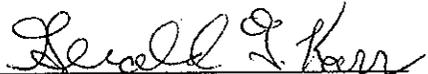
Answer:

Request No. 4

Respondent Gray admits that he has not reimbursed the State of Illinois for any of the costs incurred by the State in removing the waste tires from the Site.

Answer

PEOPLE OF THE STATE OF ILLINOIS

By: 
GERALD T. KARR
Senior Assistant Attorney General
Environmental Bureau
188 West Randolph Street, 20th Floor
Chicago, Illinois 60601
(312) 814-3369

CERTIFICATE OF SERVICE

I, GERALD T. KARR, an Assistant Attorney General in this case, do certify that on December 6, 2005, I caused to be served by First Class Mail the foregoing Request to Admit

Facts upon:

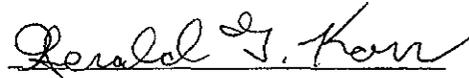
Thomas Gray
13163 East 2500 South Road
Mokenca, Illinois 60954

by depositing the same in the U.S. Mail depository located at 100 West Randolph Street, Chicago, Illinois in an envelope with sufficient postage prepaid.


GERALD T. KARR

CERTIFICATE OF SERVICE

I, GERALD T. KARR, an Assistant Attorney General in this case, do certify that on February 15, 2006, I caused to be served by First Class Mail the foregoing Notice of Filing and Complainant's Motion for Summary Judgment upon the individuals listed on the attached Notice of Filing, by depositing the same in the U.S. Mail depository located at 100 West Randolph Street, Chicago, Illinois in an envelope with sufficient postage prepaid.



GERALD T. KARR