

ILLINOIS POLLUTION CONTROL BOARD

February 1, 1996

PEOPLE OF THE)	
STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 93-191
)	(Enforcement - UST)
LLOYD WIEMANN,)	
d/b/a WIEMANN ICE AND FUEL,)	
)	
Respondent.)	

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

This matter comes before the Board on a motion for summary judgment filed on October 6, 1995, by complainant, the People of the State of Illinois on behalf of the Illinois Environmental Protection Agency (Agency). Complainant requests the Board grant summary judgment in its favor against respondent, Lloyd Wiemann, d/b/a Wiemann Ice and Fuel (Wiemann). Wiemann filed its response to complainant's motion for summary judgment and a cross-motion for summary judgment on December 18, 1995. Complainant filed its response to Wiemann's cross-motion for summary judgment on January 9, 1996. At this time, the Board addresses both parties' motions for summary judgment.

Summary judgment will be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. (Sherex Chemical v. IEPA (July 30, 1992), PCB 91-202; Williams Adhesives, Inc. v. IEPA (August 22, 1991), PCB 91-112.) In complainant's motion for summary judgment, complainant sets forth facts deemed admitted by Wiemann's failure to timely respond to complainant's request to admit facts. However, after considering Wiemann's response to the request to admit which was subsequently filed in the case per hearing officer order, genuine issues of material fact continue to exist and remain in dispute between the parties. For reasons more fully explained below, we grant complainant's motion for summary judgment in part and deny in part. For the same reasons, the Board denies Wiemann's cross-motion for summary judgment.

BACKGROUND

On October 8, 1993, complainant filed this enforcement action¹ against Lloyd Wiemann, individually and doing business as Wiemann Ice and Fuel, Inc. Wiemann owns and/or operates one or more tanks and underground pipes located at two locations: (1) 1800 Vandalia Street, Collinsville, Madison County, Illinois (Site One) and (2) Route 111 and Forest Blvd., Washington Park, St. Clair County, Illinois (Site Two). (Complaint at 2, 10.) The tank or tanks contain gasoline or other petroleum distillates. At least 10 per centum of each tank's volume and associated piping is located beneath the surface of the ground. (Complaint at 2, 10.)

Complainant charged Wiemann with the failure to file 20 day and 45 day reports as required by 35 Ill. Adm. Code 731.162 and 731.163 (1994). Complainant further charged Wiemann with the failure to perform abatement measures as required by 35 Ill. Adm. Code 731.160. Hearing Officer Deborah Frank heard several motions concerning discovery and status reports from January 1994 through November 1995. Among various requests for discovery, complainant served a request to admit facts on Wiemann on February 17, 1994. On May 13, 1994, the hearing officer deemed the facts admitted since respondent failed to timely respond within 20 days as required by 35 Ill. Adm. Code 103.162 (c). The parties continued to negotiate and requested that the case not be set for hearing. Several status reports were filed and several phone status conferences were held in order to expedite proceedings in this case.

On October 6, 1995, complainant filed a motion for summary judgment based on the facts deemed admitted. On October 11, 1995, Wiemann filed a motion to vacate or modify the May 13, 1994 hearing officer order. The hearing officer issued an order on November 22, 1995 which modified the hearing officer order of May 13, 1994. Specifically, the hearing officer ordered Wiemann to respond to questions 3-9 of the request to admit because the facts sought to be admitted concerned central issues in the case. (Order at 5.) Citing Sims v. City of Alton, 172 Ill. App.3d 694 (5th Dist. 1988), the hearing officer noted that "the trial court has wide discretion with regard to a request to admit and may allow a late filing in order to prevent injustice." (Order at 5.) The hearing officer further stated that complainant had not shown prejudice which would arise as a result of the late filing. (Order at 4.) Finally, the hearing officer granted Wiemann's motion for extension of time to file a response to complainant's motion for summary judgment. (Order at 5.)

¹ The complaint will hereinafter be referred to as (Complaint at ____). The hearing officer order of November 22, 1995 will hereinafter be referred to as (Order at ____). Complainant's motion for summary judgment will hereinafter be referred to as (Motion at ____). Wiemann's response to complainant's motion for summary judgment and cross-motion for summary judgment will hereinafter be referred to as (Response at ____). Wiemann's memorandum in support of its response to complainant's motion for summary judgment and cross-motion for summary judgment will hereinafter be referred to as (Memo at ____).

On December 5, 1995, Wiemann responded to questions 3-9 of complainant's request to admit as ordered by the hearing officer. On December 18, 1995, Wiemann responded to the motion for summary judgment and filed a cross motion for summary judgment.

ARGUMENT

Site One

Complainant argues that summary judgment should be granted since Wiemann failed to respond to the February 17, 1994 request to admit facts. Complainant states that since all facts are admitted, no genuine issue of material fact exists in the instant action and, therefore, the motion should be granted as a matter of law. (Motion at 2.) Complainant further argues that a civil penalty of \$30,000 should be imposed along with costs including attorney's fees and expert witness fees or, alternatively, that a hearing should be set solely to determine the amount of the civil penalty. (Motion at 2.)

Wiemann argues that genuine issues of material fact exist with regard to Site One and, therefore, complainant's motion for summary judgment should be denied. Wiemann argues that complainant must establish Wiemann as owner or operator of the underground storage tanks (USTs) in Site One in order to prevail on the allegations in the complaint. In Wiemann's response to complainant's request to admit dated December 5, 1995, Wiemann denied the allegation he was owner or operator of Site One. Wiemann also submitted a sworn affidavit as affirmative evidence to indicate Wiemann is not the owner or operator of the USTs at Site One. (Response at 2.) Wiemann further argues that though he was listed as "owner" on the Notification Form filed with the Office of the State Fire Marshall (OSFM) regarding the USTs at Site One, Wiemann neither participated in the filing of the form, nor signed the form. (Memo at 9-10.) Finally, Wiemann argues that in the absence of evidence supporting complainant's claims against Wiemann, the Board should grant Wiemann summary judgment for the alleged Site One violations. (Response at 2.)

Site Two

In Wiemann's response to complainant's motion for summary judgment, Wiemann agrees that the facts deemed admitted were sufficient to find Wiemann in violation as to Site Two. (Response at 1.) Wiemann, however, argues the penalty suggested by complainant is excessive when considering the penalty factors under Section 33(c) and Section 42(h) of the Illinois Environmental Protection Act (Act). (Memo at 3-5.) Wiemann therefore requests the Board to reduce complainant's penalty request accordingly, or in the alternative, set a hearing to determine the appropriate penalty for Site Two. (Response at 2.) Wiemann further requests the Board to deny complainant's request for attorney's fees and expert witness fees.

ANALYSIS

Complainant's motion for summary judgment is based on the facts deemed admitted pursuant to the hearing officer order of May 13, 1994. However, the hearing officer vacated her May 13, 1994 order ultimately causing only the facts in questions 1-2 and 10-14 to be admitted. The hearing officer subsequently ordered Wiemann to file a response to questions 3-9. As a result of Wiemann's response filed on December 5, 1995, Wiemann denied, admitted or otherwise addressed the varying matters pertaining to questions 3-9. Most notably, Wiemann denied being owner and/or operator of an underground storage tank system located at Site One.

In a motion for summary judgment, judgment will only be granted where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. The regulations pertaining to the charges against Wiemann place responsibility on the owner or operator of the USTs. Only the owner or operator can be charged with failure to perform abatement measures or the failure to file 20 and 45 day reports. Since Wiemann denies both in his affidavit and in the response to admit facts that he is not the owner or operator of the USTs at Site One, a genuine fact remains at issue as to Site One. Therefore, the Board directs this case proceed to hearing as to Site One.

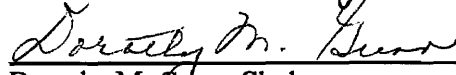
For the same reason that complainant's motion for summary judgment has been denied above, the Board also denies Wiemann's cross-motion for summary judgment.

In Site Two, the facts were deemed admitted when Wiemann failed to timely respond to complainant's request to admit. The facts deemed admitted as to Site Two establish the material facts necessary to prove Wiemann's violations of the above-referenced violations. However, disagreement exists between the two parties as to the amount of the penalty. When determining a civil penalty, the Board is required to consider the factors in Section 33(c) and Section 42(h) of the Act. Wiemann argues that an environmental consulting firm, SITEX Environmental, was retained to investigate the release at Site Two. Wiemann further argues that SITEX's reports submitted to the Agency were the substantial equivalent of the information required to be included in the 20 day and 45 day reports. Additionally, Wiemann argues the penalty amount including the costs of attorney's fees and expert witness fees requested by complainant is exorbitant. Given these disputes, the Board believes the penalty issue should be addressed at hearing.

In summary, the Board denies complainant's motion for summary judgment as to Site One, and grants partial summary judgment as to Site Two relating to the issue of liability only. Wiemann's cross-motion for summary judgment is denied. Hearing shall proceed consistent with this order.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 1st day of February, 1996, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board