ILLINOIS POLLUTION CONTROL BOARD
August 26, 1993

PEOPLE OF THE STATE OF ILLINOIS,	)	
Complainant,	)	
v.	)	PCB 92-164
	)	(Enforcement)
BERNIECE KERSHAW and DARWIN DALE KERSHAW d/b/a KERSHAW MOBILE HOME PARK,	)	
Respondents.	)	

ORDER OF THE BOARD (by G. T. Girard):

This matter comes before the Board on the May 12, 1993 motion for reconsideration of the Board's order of April 8, 1993 filed by respondents Berniece and Darwin Dale Kershaw. In that order, the Board granted the uncontested motion for summary judgment of the complainant, the Attorney General, filed on behalf of the People of the State of Illinois.

The Board found, as alleged in the complaint, that the Kershaws had violated Sections 12 and 18 of the Environmental Protection Act, as well as various Board regulations dealing with water quality parameters, monitoring and permit requirements for wastewater discharges, and operation of a public water supply. These violations arise out of respondents' operation of the Kershaw Mobile Home Park in Colona, Henry County, which serves an estimated population of 265. The order also assessed a penalty of two hundred fifty thousand dollars ($250,000) against respondents, noting that the maximum penalty authorized by the Act was seven hundred sixteen million one hundred thousand dollars ($716,100,000).

Pursuant to leave of the Board, the Attorney General filed its response in opposition on August 6, 1993. [2] On August 10,

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[1] The Board regulations involved are 35 Ill. Adm. Code 304.106, 304.120(c), 304.121(a), 305.102(b), 305.103, 309.102(a), 309.104(a), 601.101. Also involved are Agency regulations found at 35 Ill. Adm. Code 652.111, 653.109, and 653.118.

[2] Complainant's time to respond was extended during the pendency of its unsuccessful motion to disqualify respondents' counsel retained by the respondents after entry of the order granting summary judgment. See Orders of May 27, June 17, and July

1993, the Kershaws filed a reply clarifying certain agreed language in complainant's response. The reply was accompanied by a motion for leave to file instanter. The motion for leave, which is not opposed by the complainant, is hereby granted.

For the reasons stated below, the motion for reconsideration is hereby granted. Upon reconsideration, the Board reaffirms the portion of its April 8, 1993 order which finds the Kershaws in violations of the Act and Board regulations (p. 1-4). However, the Board reserves ruling on the balance of the order relating to the civil penalty, costs and fees for a period of roughly 120 days. As suggested by the complainant and agreed to by the respondents, this time is intended to "allow the parties an opportunity to attempt to formulate a Stipulation and Proposal for Settlement" concerning these issues. (Response, p. 15.)

ISSUES

Used of Recycled Paper

The Kershaws assert that the Board's order of April 8, 1993 should be "stricken" as complainant's motion for summary judgment did not state that it was filed on recycled paper as required by 35 Ill. Adm. Code 101.103(d). (Motion, par. 11.) In response, complainant states that, although the required statement was omitted from its motion, the motion was in fact submitted on recycled paper. Complainant has submitted two affidavits in support of this assertion. (Response, pp. 11-12 & Exh. A & B.)

The Board finds that complainant's motion for summary judgment substantially complied with the requirements of 35 Ill. Adm. Code 101.103(d), and declines to modify its April 8 order on this ground.

Timeliness of Filing

The complainant's motion for summary judgment was filed on February 17, 1993, 19 days prior to the hearing scheduled for March 8, 1993. The Kershaws assert that the motion was untimely filed. 35 Ill. Adm. Code 101.244 provides for the filing of motions for summary judgment, and states that "[s]pecific rules for such motions...are found in 35 Ill. Adm. Code 103 (enforcement proceedings)...". Respondents assert that there are no specific rules governing summary judgment in Part 103. They accordingly argue that the time for filing is established by Section 101.245(a), which states "all motions preliminary to hearing shall be presented to the Board or the hearing officer at

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11, 1993.

least 21 days prior to the date of hearing, unless allowed by the Board or the hearing officer to prevent material prejudice." Respondents therefore, believe that complainant's motion was untimely filed, only 19 days prior to hearing.

In response, complainant argues that the time for filing is established by Section 103.140 which provides "all motions preliminary to a hearing shall be presented to the Board or the hearing officer at least 14 days prior to the date of the hearing". Pursuant to this section, complainant urges that the motion filed 19 days in advance of hearing was timely.

The Board agrees that there are no rules in Part 103 which are titled "Motion for Summary Judgment" and which specifically detail the requirements for, and handling of, motions for summary judgment. However, the rule on which the Kershaws rely for their 21-day filing requirement, Section 101.241(a), is included in 35 Ill. Adm. Code 101.Subpart H. The rule immediately preceding Section 101.241 is Section 101.240 "Applicability". This rule expressly provides that:

> This Subpart applies to all Board proceedings generally. However, to the extent that 35 Ill. Adm. Code 102 through 120 conflict with or supplement this Subpart, that more specific Part governs.

This rule, when read with Section 101.244 "Motion for Summary Judgment" with its cross-reference to 35 Ill. Adm. Code 103, clearly indicates the Board's intent that the time for filing motion for summary judgment is 14 days prior to hearing as stated in Section 103.140(a). The Board accordingly finds that complainant's motion for summary judgment was timely filed 19 days prior to hearing.

Right to a Public Hearing

Respondents' final argument is that they were not represented by counsel prior to entry of the summary judgment order, that they did not understand, or have access to, the Board's rules, and that they believed that they would have a chance to "present their case at a hearing", notwithstanding the motion for summary judgment. (Motion, Affidavit of Darwin Dale Kershaw.) Counsel for respondents asserts that:

> Respondents concede that they did not file a written response to complainant's motion for summary judgment. §31(a)(1) of the Environmental Protection Act, however, establishes the right of an enforcement respondent to a hearing, indicating that the

> person so complained against must "answer the charges of such formal complaint at hearing before the Board at a time not less than 21 days after the date of notice by the Board". Thus, respondents' statutory right and obligation is to answer the complaint at a hearing; the statute does not by its terms require a written response. By granting a final Order in the absence of such hearing, the actions of the hearing officer and Board may strip respondent of this fundamental right. Respondents, not represented by Counsel, understood that they would get their opportunity to present their side of the story at a hearing; See affidavit of Darwin Kershaw attached hereto as Exhibit "B". (Motion, par. 12.)

In response, complainant essentially assert that the "ignorance of the law" arguments based on facts asserted in Mr. Kershaw's affidavit are substantially undercut by facts asserted in the May 17, 1993 affidavit of Board attorney Marie Tipsord. [3] This affidavit asserts that Ms. Tipsord explained the procedural aspects of the motion for summary judgment to Mr. Kershaw by telephone on or about March 9, 1993, and "urged him to seek counsel and to respond to the motion". Ms. Tipsord also requested the Clerk's office to mail Mr. Kershaw a copy of the procedural rules to a corrected address received from Mr. Kershaw.

The Board notes that respondents' reply does not address the discrepancy between the factual allegations contained in the Kershaw and Tipsord affidavits. The Board finds no basis to disturb its April 8, 1993 order in the Kershaw affidavit.

As to the asserted "absolute" right to a hearing pursuant to Section 31(a)(1) of the Act, the complainant argues that this section must be read in conjunction with Section 26 of the Act authorizing summary judgment procedures and with 35 Ill. Adm. Code 101.244 and 103.140 implementing Section 26. The complainant notes that:

> the fundamental purpose of summary judgment is to promote judicial and administrative economy, and that if parties such as respondents are allowed to wait until after an adverse judgment is entered against them before choosing to participate in the defense

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[3] Ms. Tipsord has not assisted the Board in its deliberations in this matter in any way since her recusal on May 17, 1993.

> of their case, then efficiency is not served, and the purpose of summary judgment is defeated. In this case, respondents expended no effort to defend themselves during the course of the proceeding and now seek to overturn an unfavorable summary judgment order. (Response, p. 9-10)

The Board notes that the hearing provision of Section 31(a)(1) has been included in the Act since its inception. The summary judgment authorization of Section 26 is a relatively recent amendment to that section (P.A. 85-1048, effective January 1, 1989). P.A. 85-1048 was specifically adopted by the legislature to avoid the burden to the state and to the parties of conducting unnecessary hearings when no genuine issue of law or fact exists. The Board finds no absolute right to hearing in enforcement cases as suggested by respondents, and finds no reason to modify its April 8 order.

Complainant's Offer to Engage in Settlement Discussion Concerning Penalty and Compliance Terms

Complainant observes that respondents ask, in the alternative, for a hearing on the issue of penalty with no reasoning or authority to support this "afterthought" request. Complainant believes that respondents have waived any grounds for argument concerning penalty. Lake County Trust Co. v. Two Bar B, Inc., (1192), 238 Ill. App. 3d 589, 606 N.E. 2d 258. Without further explanation, however, complainant:

> recognizes that this may be the appropriate time to address the issue of penalty amount and other remedies with particular reference to Section 42(h) of the Act, as suggested by Board Member Anderson in her April 8, 1993 concurrence with the Board's order of summary judgment.
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> Complainant suggests that this may be accomplished by engaging in discussions with respondents about specific proposals for correcting the violations and about an appropriate penalty, with a view to coming to an agreement on one or both issues. The complainant has approached the respondents with a proposal along these lines, and respondents have indicated a willingness to proceed in this manner.
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> A Board order requiring the respondents to submit to complainant, within 30 days of the

> Board's consideration of the Motion to Reconsider, a detailed explanation of respondents' plan to correct the violations, along with a realistic timetable and accurate cost estimates, and deferring a ruling on the Motion to Reconsider insofar as it relates to the penalty issue, would allow the parties to pursue these further discussions and negotiations.
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> Complainant proposes that if an agreement can be negotiated, the agreement would be submitted to the Board in the form of a Stipulation and Proposal for Settlement which would contain a specific schedule by which the respondents would gain compliance with the Act and regulations and provide a civil penalty as warranted. If the agreement is not negotiated, the parties would preserve their rights to present evidence and arguments to the Board regarding a penalty. (Response p. 13-14)

For all of the reasons earlier expressed, the Board is unpersuaded by any of the Kershaws' arguments that its April 8, 1993 order should be modified in any way. However, the law favors settlements. See, Chemetco Inc. v. Illinois Pollution Control Board, 140 Ill. App.3d, 283, 488 N.E.2d 639, 643 (5th Dist. 1986); and Archer Daniels Midland v. Pollution Control Board, 140 Ill.App.3d 823, 489 N.E.2d 887 (3rd Dist. 1986). The Board will accordingly accede to the parties' request and will allow them an opportunity to negotiate penalty and compliance terms.

Upon reconsideration, the Board reaffirms that portion of its April 8, 1993 order (pp. 1-4) which finds the Kershaws in violation of the Act and Board regulations. However, the Board reserves ruling on the balance of the order relating to the civil penalty, costs, and fees.

On or before October 15, 1993, the respondents shall submit to complainant a proposed compliance plan, including timetable and costs estimates. On or before December 6, 1993 the parties shall submit to the Board a proposal for settlement of penalty issues, a status report, or any other appropriate pleading suggesting the appropriate means for final disposition of this case.

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 26th day of August, 1993, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board