

ILLINOIS POLLUTION CONTROL BOARD
March 4, 2004

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 97-119
) (Enforcement - Land)
G&M TOTAL, INC., an Illinois corporation,)
and GEORGE PAPAS, individually and as)
president of G&M TOTAL, INC.,)
)
Respondents.)

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

In 1997, the Illinois Attorney General, on behalf of the People of the State of Illinois (People), filed a complaint against G&M Total, Inc., an Illinois corporation (G&M), and George Papas, individually and as president of G&M (Papas). The People allege that G&M and Papas violated the Environmental Protection Act (Act) (415 ILCS 5/12(a) (2002)) and Board regulations (35 Ill. Adm. Code 731.160, 731.162, 731.163) by not timely responding to a leaking underground storage tank (UST) at their gasoline station in Zion, Lake County. On December 1, 2003, the People filed a motion for summary judgment, to which neither G&M nor Papas responded.

For the reasons below, the Board today grants the People's motion for summary judgment in part, finding that G&M and Papas have violated the Board's UST regulations as alleged. The Board denies the People's motion, however, with respect to both the alleged violation of Section 12(a) of the Act and the requested relief, including civil penalty. Before discussing the motion for summary judgment, the Board sets forth this case's procedural history and facts, followed by the relevant statutory and regulatory provisions.

PROCEDURAL HISTORY

On January 8, 1997, the People filed a complaint against G&M and Papas. On December 1, 1997, the People mailed to respondents a request to admit the material facts alleged in the complaint. On August 5, 2003, the People filed a motion to deem the facts admitted. Neither G&M nor Papas responded to the request to admit or the motion to deem facts admitted. On October 2, 2003, the Board granted the People's motion to deem facts admitted. On December 1, 2003, the People filed a motion for summary judgment. Neither G&M nor Papas responded to the People's motion for summary judgment.¹

¹ The Board cites the admissions, as set forth in the People's request to admit, as "Admission at _." The Board cites the People's motion for summary judgment as "Motion at _."

FACTS

Papas owns the real property at 2301 Sheridan Road, Zion, Lake County, and has owned it since at least October 5, 1988. Admission at 3. Papas is the president of G&M and has been the president since at least June 12, 1990. *Id.* G&M owns and operates a gas station at the site and has done so since at least June 12, 1990. *Id.* at 4. Papas signed UST notifications for the site and submitted them to the Office of the State Fire Marshal in 1988 and 1993. *Id.* From at least October 5, 1988, and continuing until at least May 1, 1995, at least five USTs and related systems were located at the site. *Id.* Four USTs stored gasoline and one UST stored kerosene. *Id.*

On July 10, 1991, G&M tested four of the USTs to determine if each was tight. One UST failed the tightness test. Admission at 4-5. On July 11, 1991, G&M reported a gasoline release from a UST system at the site to the Illinois Emergency Management Agency (IEMA), formerly known as the Illinois Emergency Services and Disaster Agency. *Id.* at 5. On November 7, 1994, a subsurface soil boring was performed at the site. The results of that investigation revealed a release of a petroleum substance. *Id.* On November 7, 1994, G&M again reported a UST gasoline release to IEMA. *Id.* On or about May 1, 1995, at least five USTs were removed from the site. *Id.*

Neither Papas nor G&M provided a “20 day report” to the Illinois Environmental Protection Agency (Agency) until G&M submitted the report on or about May 17, 1996. Admission at 5-6. Neither Papas nor G&M provided a “45 day report” to the Agency until G&M submitted the report on or about March 27, 1996, which the Agency received on May 1, 1996. *Id.* at 6-7.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The Act

Section 12(a) of the Act provides:

No person shall:

- a. Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act. 415 ILCS 5/12(a) (2002).

The Act defines “contaminant” as “any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source.” 415 ILCS 5/3.165 (2002). The Act defines “water pollution” as:

such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into

any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life. 415 ILCS 5/3.545 (2002).

The Act defines “waters” as “all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State.” 415 ILCS 5/3.550 (2002).

The UST Regulations

Section 731.160 of the Board’s rules provides in relevant part:

Owners and operators of petroleum or hazardous substance UST systems must, in response to a confirmed release from the UST system, comply with the requirements of this Subpart . . . 35 Ill. Adm. Code 731.160.

Section 731.162 of the Board’s rules provides:

- a) Owners and operators shall perform the following abatement measures:
 - 1) Remove as much of the regulated substance from the UST system as is necessary to prevent further release to the environment;
 - 2) Visually inspect any aboveground releases or exposed belowground releases and prevent further migration of the released substance into surrounding soils and groundwater;
 - 3) Continue to monitor and mitigate any additional fire and safety hazards posed by vapors or free product that have migrated from the UST excavation zone and entered into substance structures (such as sewers or basements);
 - 4) Remedy hazards posed by contaminated soils that are excavated or exposed as a result of release confirmation, site investigation, abatement or corrective action activities. If these remedies include treatment or disposal of soils, the owner and operator shall comply with 35 Ill. Adm. Code 722, 724, 725 and 807 through 815.
 - 5) Measure for the presence of a release where contamination is most likely to be present at the UST site, unless the presence and source of the release have been confirmed in accordance with the site check or the closure site assessment. In selecting sample types, sample locations and measurement methods, the owner and operator shall consider the nature of the stored substance, the type

of backfill, depth to groundwater and other factors as appropriate for identifying the presence and source of the release; and

- 6) Investigate to determine the possible presence of free product, and begin free product removal as soon as practicable and in accordance with Section 731.164.
- b) Within 20 days after release confirmation, owners and operators shall submit a report to the Agency, summarizing the initial abatement steps taken under subsection (a), above, and any resulting information or data. 35 Ill. Adm. Code 731.162.

Section 731.163 of the Board's rules provides:

- a) Owners and operators shall assemble information about the site and the nature of the release, including information gained while confirming the release or completing the initial abatement measures in Section 731.160 and Section 731.161. This information must include, but is not necessarily limited to the following:
 - 1) Data on the nature and estimated quantity of release;
 - 2) Data from available sources or site investigations concerning the following factors: surrounding populations, water quality, use and approximate locations of wells potentially affected by the release, subsurface soil conditions, locations of subsurface sewers, climatological conditions and land use;
 - 3) Results of the site check required under Section 731.162(a)(5); and
 - 4) Results of the free product investigations required under Section 731.162(a)(6), to be used by owners and operators to determine whether free product must be recovered under Section 731.164.
- b) Within 45 days after confirmation of the release, owners and operators shall submit the information collected in compliance with subsection (a) to the Agency, in a manner that demonstrates its applicability and technical adequacy. 35 Ill. Adm. Code 731.163.

The regulations define "operator," "owner," and "regulated substance" in relevant part as follows:

"Operator" means any person in control of, or having responsibility for, the daily operation of the UST system.

"Owner" means: In the case of an UST system in use on November 8,

1984, or brought into use after that date, any person who owns an UST system used for storage, use or dispensing of regulated substances

“Regulated substance” means any “hazardous substance” or “petroleum.”
35 Ill. Adm. Code 731.112.

DISCUSSION

The Board first discusses the standard it applies when reviewing motions for summary judgment. The Board then applies that standard in ruling on the People’s motion for summary judgment concerning the alleged violations and the requested relief.

Standard of Review

Summary judgment is appropriate when the pleadings, depositions, admissions, 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, 483, 693 N.E.2d 358, 370 (1998); *see also* 35 Ill. Adm. Code 101.516(b). When ruling on a motion for summary judgment, 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 the Board should grant it only 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 *Putrill v. Hess*, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). “Even so, while the nonmoving party in a summary judgment motion is not required to prove [its] case, [it] must nonetheless 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 (2d Dist. 1994).

Here, the People’s motion for summary judgment is unopposed. By not responding to the People’s motion, G&M and Papas waive any objection to the Board granting it. *See* 35 Ill. Adm. Code 101.500(d).

Alleged Violations

The People allege that G&M and Papas violated Section 12(a) of the Act (415 ILCS 5/12(a) (2002)) and Sections 731.160, 731.162, and 731.163 of the Board’s UST regulations (35 Ill. Adm. Code 731.160, 731.162, 731.163) by failing to timely perform initial abatement and site characterization measures in response to a UST release at their Zion, Lake County gasoline station. The Board first addresses the alleged regulatory violations and then the alleged statutory violation.

Alleged Violations of Board UST Regulations

The People allege that G&M and Papas violated Board regulations (Sections 731.160, 731.162, and 731.163) by failing to timely respond to a UST release and submit required documentation to the Agency. Motion at 6. The documentation, a “20 day report” and a “45 day report,” must respectively demonstrate that the UST release has been initially abated and the release and site characterized as required. *See* 35 Ill. Adm. Code 731.162, 731.163.

As a threshold issue under the UST regulations, the Board finds that G&M and Papas are the UST “owner” and “operator.” The Board further finds that the gasoline released from the UST into the site’s subsurface soil is a “regulated substance” under the Board’s UST rules.

Turning to the 20-day and 45-day reporting requirements, G&M notified IEMA of the release in July 1991 after a UST failed a tightness test. Over three years later, in November 1994, G&M conducted a subsurface boring investigation, revealing soil contamination. It was not until May 1996 that the Agency received the “20 day report” and “45 day report” from G&M. These reports were due within 20 and 45 days, respectively, of release confirmation. *See* 35 Ill. Adm. Code 731.162(b), 731.163(b).

The Board finds that there is no genuine issue of material fact and that the People are entitled to judgment as a matter of law on the alleged regulatory violations. Specifically, the Board finds that G&M and Papas violated Sections 731.162 and 731.163, and in turn Section 731.160, of the Board’s UST regulations by, respectively, not timely submitting a “20 day report” and “45 day report” to the Agency documenting initial response measures.

Alleged Violation of Section 12(a) of the Act

The People allege that G&M and Papas violated the Act (Section 12(a)) by releasing gasoline into the soil from the UST at the site and then failing to timely document that they took required initial abatement and site characterization steps in response to the release. Motion at 4-5.

As an initial matter, the Board finds that the gasoline released from the UST into the site’s subsurface soil is a “contaminant” under the Act. Additionally, to be liable under Section 12(a) of the Act, a respondent must have had the capability to control the pollution or have been in control of the premises where the pollution occurred. *See People v. A.J. Davinroy Contractors*, 249 Ill. App. 3d 788, 793, 618 N.E. 2d 1282, 1286 (5th Dist. 1993). Under the admitted facts, the Board finds that G&M and Papas controlled the UST site and had the capability to control the contamination.

The “20 day report” required by the Board’s UST regulations is supposed to set forth the required initial abatement and site check measures the UST owner or operator has taken in response to a release. These measures include: preventing further migration of the released substance into surrounding soils and groundwater; and checking for free product. *See* 35 Ill. Adm. Code 731.162. “Free product” includes petroleum “present as a nonaqueous liquid phase (e.g., liquid not dissolved in water.)” 35 Ill. Adm. Code 731.112. The “45 day report” is

supposed to describe the required initial site characterization performed by the UST owner or operator in response to a release. The site characterization is to include: data on the nature and quantity of the release; data on water quality and use, and the approximate locations of wells potentially affected by the release; subsurface soil conditions; and the results of free product investigations. *See* 35 Ill. Adm. Code 731.163.

The Board recognizes that timely compliance with the 20-day and 45-day report requirements of the UST regulations can help prevent or minimize water pollution. It was roughly five years after the petroleum release was initially reported, and approximately one and a half years after subsurface testing revealed soil contamination, before G&M or Papas supplied the Agency with any documentation of the requisite initial measures being taken to abate the contamination and to characterize the site. This delay, as found above, violated the Board's regulations.

However, the Board cannot presently find a threat of water pollution in violation of Section 12(a) of the Act. This record lacks any information on what waters, if any, were threatened by the UST release, such as whether and at what depth groundwater is present. Nor do the People point to any information on the site's soil conditions, groundwater exposure pathways, or extent of soil contamination. Like cases in which a threat of water pollution has been found include this type of evidence. *See, e.g., Wasteland, Inc. v. PCB*, 118 Ill. App. 3d 1041, 456 N.E. 2d 964 (3d Dist. 1983) (landfill operator created the threat of water pollution by allowing unpermitted waste to be deposited at site *without natural or designed groundwater safeguards*); *Allaert Rendering, Inc. v. PCB*, 91 Ill. App. 3d 153, 414 N.E.2d 492 (3d Dist. 1980) (threat of water pollution found where highly contaminated wastewater lagoon was present in *area that had flooded from river overflow*). Indeed, this record does not include the 20-day or 45-day reports ultimately submitted to the Agency.

Considering the filings, as the Board must, strictly against the movant and in favor of the non-movants, the evidence does not clearly establish that respondents violated Section 12(a) of the Act. The Board finds that genuine issues of material fact exist on the issue of threatened water pollution, which precludes a grant of summary judgment on this alleged violation.

Requested Relief

In the motion for summary judgment, the People ask the Board to order G&M and Papas to pay civil penalties of \$50,000 for each violation and \$10,000 for each day a violation continues, which is what the People requested in the complaint. Motion at 10. The People's motion for summary judgment also requests that the Board order respondents to cease and desist from further violations and to pay the People's costs and attorney fees. *Id.*

For the following reasons, the Board denies the People's motion for summary judgment with respect to the requested relief. First, because the People may still try to prove the alleged violation of Section 12(a) of the Act, ruling on the requested relief now would be premature. Second, on civil penalties, the People's motion fails to address the factors of Section 33(c) or 42(h) of the Act (415 ILCS 5/33(c), 42(h) (2002)) and fails to propose a specific dollar amount. Third, it is unclear from this record that there are any continuing violations that would

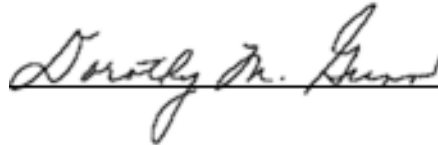
necessitate an order to cease and desist. Finally, on costs and attorney fees, the People have not addressed the elements of Section 42(f) of the Act (415 ILCS 5/42(f) (2002)), nor have the People documented any costs or attorney fees.

CONCLUSION

The Board grants the People's motion for summary judgment in part, finding that G&M and Papas violated Sections 731.160, 731.162, and 731.163 of the Board's UST regulations. The Board, however, denies the People's motion for summary judgment regarding the alleged violation of Section 12(a) of the Act and the requested relief, and orders the parties to hearing on those remaining issues.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 4, 2004, by a vote of 5-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board