

ILLINOIS POLLUTION CONTROL BOARD

October 7, 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.)	

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

On March 4, 2004, the Board entered an order granting the Illinois Attorney General’s, on behalf of the People of the State of Illinois’ (People) motion for summary judgment in part. Specifically, the Board found that that G&M Total, Inc., an Illinois corporation (G&M), and George Papas, individually and as president of G&M (Papas) violated Sections 731.160, 731.162, and 731.163 of the Board’s underground storage tank (UST) regulations 35 Ill. Adm. Code 731.160, 731.162, 731.163. The Board, however, denied the People’s motion for summary judgment regarding the alleged violation of Section 12(a) 415 ILCS 5/12(a) (2002).

On August 12, 2004, the People filed a brief in support of remedy. On August 26, 2004, the People filed a motion to voluntarily dismiss the alleged violations of Section 12(a) of the Environmental Protection Act (Act). To date, neither G&M nor Papas (respondents) have filed a response to either pleading. For the reasons set forth below the Board grants the motion to voluntarily dismiss the alleged violations of Section 12(a) of the Act, imposes a \$15,000 civil penalty on the respondents, but does not direct respondent to perform the requested remediation at the site.

BACKGROUND

On January 8, 1997, the People filed a complaint against the respondents. The complaint alleges that respondents violated the Act and Board regulations 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. The Board granted the motion in part on March 4, 2004.

The complaint concerns property owned by Papas located at 2301 Sheridan Road, Zion, Lake County (site). Papas is the president of G&M. People v. G&M Total, PCB 97-119 (Mar. 4, 2004). G&M owns and operates a gas station at the site and has done so since at least June 12, 1990. *Id.* at 2. 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 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. 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. On November 7, 1994, G&M again reported a UST gasoline release to IEMA. On or about May 1, 1995, at least five USTs were removed from the site.

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. 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.

The Board, as noted above, entered an order on March 4, 2004, that found the respondents violated Sections 731.160, 731.162, and 731.163 of the Board’s UST regulations. The People also sought summary judgment on the alleged violations of Section 12(a) of the Act. Section 12(a) of the Act provides, in pertinent part, that no person shall cause or allow the discharge of contaminant into the environment so as to cause water pollution. *See* 415 ILCS 5/12(a) (2002). The Board found that genuine issues of material facts existed concerning the alleged violation of Section 12(a), and directed the parties to hearing on that issue.

MOTION TO VOLUNTARILY DISMISS

The People request that the Board dismiss the alleged violations of Section 12(a) of the Act asserted in count I of the complaint. Mot. at 1. The People assert that because the Board found respondents in violation of 35 Ill. Adm. Code 731.160, 731.162 and 731.163, it is not necessary to request that the Board also find respondents liable for violating Section 12(a) of the Act. Mot. at 2.

To date, the respondents have not filed a response to the motion for voluntary dismissal. 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 Board grants the People’s motion to voluntarily dismiss the alleged violations of Section 12(a) of the Act as asserted in count I of the complaint.

RELIEF

Having found that respondents violated the Act and Board regulations, the Board will now decide the appropriate relief. The People ask the Board to impose a civil penalty of \$15,000 on the respondents. The People also request the Board to order the respondents to address the remaining petroleum contamination at the site, providing a detailed plan of remediation.

If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2002). If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount.

The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation. Specifically, Section 33(c) reads as follows:

In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved including, but not limited to:

- i. The character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
- ii. The social and economic value of the pollution source;
- iii. The suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
- iv. The technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
- v. Any subsequent compliance. 415 ILCS 5/33(c) (2002).

If the Board, after considering the Section 33(c) factors, finds that a civil penalty should be imposed, then the Board considers the factors of Section 42(h) of the Act (415 ILCS 5/42(h) (2002)) to determine the appropriate penalty amount. The Board now turns to the Section 33(c) factors, providing the People's argument on each factor before reaching a decision.

The People assert that respondents' failure to comply with the Act and regulations denies the Agency, and the public, information that is important to the control and regulation of USTs in Illinois. Br. at 4. The People contend that respondents have failed to completely and adequately remediate the site fostering the continual exposure of benzene, ethyl benzene, toluene and xylene to the environment. *Id.* The respondents failed, in large part, to comply with the requirements of the UST regulations. 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. *See* 35 Ill. Adm. Code 731.162. 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. Timely compliance with the 20-day and 45-day report requirements of the UST regulations can help prevent or minimize water pollution. Further, respondents were

approximately five years late in submitting the required reports. The Board weighs Section 33(c)(i) against respondents.

The People contend that the pollution source is an abandoned UST system within an inoperable service station and is, therefore, currently of minimal social and economic benefit. Br. at 4. The Board agrees, and weighs Section 33(c)(ii) against the respondents. The People acknowledge that the site is located in a commercial area and is suitable to its location. Br. at 4. The Board weighs Section 33(c)(iii) in favor of the respondents.

The People argue that it was technically practicable and economically reasonable for the respondents to comply with the Board's UST regulations, and that a threat of soil and groundwater contamination from the petroleum release exists to date. Br. at 4-5. Complying with the requirements of the UST regulations is part of doing business in the State of Illinois. It was technically practicable and economically reasonable for the respondents to comply with these requirements. The Board weighs Section 33(c)(iv) against respondents.

The People assert that respondents' failure to complete the corrective action necessary to address the remaining contamination at the site has resulted in a continuing threat to human health and the environment. Br. at 6. The respondents violated Sections 731.160, 731.162, and 731.163 of the Board's UST regulations by failing to file 20-day and 45-day reports. The respondents ultimately filed the reports, but not until approximately five years had elapsed. The Board weighs this factor against the respondents.

Remedy

Protecting public health was compromised by the respondents' failure to comply with the UST regulations. The weight given to the suitability of the location of respondents' site does not overcome that or the other factors the Board weighed against the respondents. Based on the Section 33(c) factors, the Board finds that civil penalties against the respondents are warranted. The amount of the penalty to be imposed will be decided after consideration of the 42(h) factors. *See* 415 ILCS 5/42(h) (2002).

In addition to the request for civil penalty, the People are asking the Board to order the respondents to address the remaining petroleum contamination at the site. Br. at 9. In making that request, the People specifically decline to seek an order requesting that respondents cease and desist from further violations of the UST regulations that were the subject matter of the complaint. *Id.* The People provide a detailed plan of remediation with schedules for submission to the Agency for approval of, among other things, a site investigation plan, a site investigation report, a second phase site investigation plan, a remediation objectives report, a corrective action plan and a corrective action completion report. Br. at 9-15.

Although four of the five Section 33(c) factors weigh against the respondents, the Board will not order the respondents to remediate the site as requested by the People. In addition, the People have specifically declined to seek a cease and desist order. Even had the People not declined to seek a cease and desist order, the Board would not be able to issue a cease and desist order because respondents have complied with the only found violations in this case: failure to

timely file reports. No allegations of ongoing violations exist following the People's dismissal of count I of the complaint. The Board found that a genuine issue of material fact existed as to whether or not respondents were in violation of Section 12(a) of the Act (*see People v. G&M Total*, PCB 91-119 (Mar. 4, 2004)), and the People moved to voluntarily dismiss that allegation of the complaint. Although the People contend that petroleum contamination still exists at the site, the Board has not found the respondents in violation of any such allegation. Accordingly, the Board will not order the respondents to remediate the site as requested by the People in their brief.

The Appropriate Amount of Civil Penalties.

The maximum civil penalties the Board can assess are established in Section 42(a) of the Act:

[A]ny person that violates any provision of this Act or any regulation adopted by the Board . . . shall be liable for a civil penalty of not to exceed \$50,000 for the violation and an additional civil penalty of not to exceed \$10,000 for each day during which the violation continues 415 ILCS 5/42(a) (2002).

Pursuant to Section 42(a) of the Act, the Board could require each respondent to pay a \$50,000 civil penalty for each of his respective violations and a \$10,000 civil penalty for each day that violation continued.

The People do not seek the statutory maximum penalties. Instead, the People ask the Board to impose a total civil penalty of \$15,000. The Board considers the factors of Section 42(h) of the Act (415 ILCS 5/42(h) (2002)) to determine the appropriate amount of a civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount. Section 42(h) of the Act specifically provides:

In determining the appropriate civil penalty to be imposed under subdivisions (a), (b)(1), (b)(2), (b)(3), or (b)(5) of this Section, the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors:

- (1) the duration and gravity of the violation;
- (2) the presence or absence of due diligence on the part of the violator in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;
- (3) any economic benefits accrued by the violator;
- (4) the amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with this Act by the violator and other persons similarly subject to the Act; and

- (5) the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator. 415 ILCS 5/42(h) (2002).¹

The Board will now consider the Section 42(h) factors in turn, providing the People's argument on each factor before reaching a decision.

Section 42(h)(1): Duration and Gravity of Violation. The People assert that from July 11, 1991 to May 1, 1996, the respondents failed to perform initial abatement or site characterization in response to a known petroleum release at the site, and have not yet fully addressed the remaining contamination at the site. Br. at 7. The respondents' violations were ongoing for almost five years. Not complying with the UST reporting requirements interferes with the protection of public health by creating potential environmental hazards and undermining the system. Respondents disregard for the need to comply with the UST regulations highlights the gravity of this type of violation. The Board weighs this factor against respondents.

Section 42(h)(2): Presence or Absence of Due Diligence. The People contend that the respondents did not promptly initiate remediation of the release, and, to date, have not addressed the remaining contamination at the site. Br. at 7. As stated, the respondents exercised little or no diligence in attempting to comply with Board regulations. The Board weighs this factor against respondents.

Section 42(h)(3): Economic Benefit from Delayed Compliance. The People assert that the respondents realized a cost savings by not complying with any of the applicable UST remediation regulations for six years, but that any cost savings may be offset by the cost of investigation and remediation to a larger area of petroleum migration over time. Br. at 8. The Board agrees that the respondents derived a benefit by not conducting initial site remediation and characterization for approximately 5 years, and weighs this factor against the respondents.

Section 42(h)(4): Penalty Amount That Will Deter Further Violations and Enhance Voluntary Compliance. The People contend that a civil penalty of \$15,000 will serve to deter further violations and aid in future voluntary compliance with the Act and Board regulations. Br. at 8. Considering all of the circumstances, the Board finds that a civil penalty on respondents will assist in deterring further violations.

Section 42(h)(5): Previously Adjudicated Violations of the Act. The Board is not aware of any previously adjudicated violations of the Act by respondents. The Board weighs this factor in respondents' favor.

¹ Section 42(h) of the Act was substantially amended by P.A. 93-575, effective January 1, 2004. Among other things, the amendments establish that a violator's economic benefit from delayed compliance is to be the minimum penalty amount. Because the record in this proceeding was complete before January 1, 2004, the Board did not use the amendments in determining the appropriate penalties to impose on respondents.

Board Finding on the Appropriate Amount of Civil Penalties. The violations in this case lasted for a significant amount of time and indicate disregard for the importance of the State's UST regulations. The respondents did not exhibit due diligence, but have ultimately corrected the found violations.

The People are seeking a civil penalty of \$15,000. The Board agrees that this is an appropriate penalty in this case. In imposing the penalty sought by the People, the Board notes that the respondents have no previously adjudicated violations and have come into compliance with the violations found by the Board. Based on the Section 42(h) factors, the Board imposes a \$15,000 civil penalty on the respondents. Under Section 42(a) of the Act (415 ILCS 5/42(f)(2002)), these funds must be deposited in the Environmental Protection Trust Fund. The Board finds that the penalty amounts ordered today will aid in enforcing the Act.

CONCLUSION

The Board finds that respondents have violated 35 Ill. Adm. Code 731.160, 731.162 and 731.163, and directs respondents to pay a civil penalty of \$15,000. But, based on the record, the Board will not direct respondents to perform the further remediation at the site requested by the People.

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

1. For the reasons set forth in its March 4, 2004 summary judgment order, the Board finds that G&M Total, Inc., an Illinois corporation (G&M), and George Papas, individually and as president of G&M (Papas) violated 35 Ill. Adm. Code 731.160, 731.162, and 731.163.
2. The respondents must pay \$15,000 in civil penalties on or before November 8, 2004, which is the 30th day after the date of this order. Respondents must pay the civil penalty by certified check or money order, payable to the Environmental Protection Trust Fund. The case number, case name, and respondents' social security numbers or federal employer identification number must be included on each certified check or money order.
3. Respondents must send each certified check or money order to:

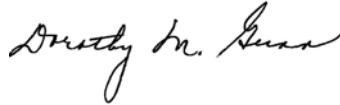
Illinois Environmental Protection Agency
Fiscal Services Division
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

4. Penalties unpaid within the time prescribed will accrue interest under Section 42(g) of the Act (415 ILCS 5/42(g) (2002)) at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a) (2002)).

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2002); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

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



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board