

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, 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.

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.

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.

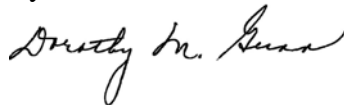
Since the record is unclear, the Board finds that the People have not shown that no genuine issue of material facts exists in this case. The motion for summary judgment is, therefore, denied. The Board finds the record must be supplemented and clarified at hearing, which should be held as expeditiously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