

ILLINOIS POLLUTION CONTROL BOARD
May 4, 2006

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 04-106
)	(Enforcement – Cost Recovery)
THOMAS GRAY, an individual,)	
)	
Respondent.)	

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

On February 15, 2006, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a motion for summary judgment against the last remaining respondent, Thomas Gray (Gray), on a one-count cost-recovery complaint filed in this matter. To date, Gray has not filed any response to the motion.

For the reasons set forth below, the Board grants the People’s motion. The Board finds that Gray is liable for the cost of the tire-removal, and orders Gray to reimburse the Illinois Environmental Protection Agency (Agency) for costs in the amount of \$131,902.48.

PROCEDURAL BACKGROUND

On December 29, 2003, the People filed a complaint against Gray, Steve Whyte, Gladys Whyte, Leona Childress and William McCoy. The complaint seeks to recover costs the Agency allegedly incurred in undertaking corrective or preventive 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 Gray; one owned by Steve and Gladys Whyte; and one owned by Leona Childress and William McCoy. Comp. at 2. The People allege that Gray operated the site. *Id.*

In the complaint, the People allege that the respondents are liable under Section 55.3(d) of the Illinois Environmental Protection Act (Act) (415 ILCS 5/55.3(d) (2004)) 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.

On January 22, 2004, the Board accepted the People’s complaint for hearing. On February 25, 2004, respondents McCoy and Childress filed answers and affirmative defenses. On July 19, 2004, the People filed a motion for summary judgment against each of the respondents. The Board issued an order denying the motion for summary judgment on October 7, 2004.

On June 1, 2005, the People filed a motion to voluntarily dismiss respondents Leona Childress and William McCoy from the complaint. The Board granted the motion to dismiss on June 16, 2005. On December 6, 2005, the People filed a motion to voluntarily dismiss respondents Steve Whyte and Gladys Whyte. The Board granted that motion to dismiss on December 15, 2005.

On December 6, 2005, the People served Gray a request for admission facts. The People assert that Gray did not provide any answer to the request. The People filed the instant motion for summary judgment on February 15, 2006. To date, Gray has not filed a response to the motion.

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, except that subsection (c) of Section 33 of this Act shall not apply to any such action. *See* 415 ILCS 5/55.3(e),(g),(h) and (k) (2004).

APPLICABLE 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).

Section 101.618 provides in part:

- c) Request to Admit. Any party serving a request to admit in accordance with subsection (d) or (e) must include the following language in the first paragraph of the request. “Failure to respond to the following requests to admit within 28 days may have severe consequences. Failure to respond to the following requests will result in all the facts requested being deemed admitted as true for this proceeding. If you have any questions about this procedure, you should contact the hearing officer assigned to this proceeding or an attorney.”
- d) Request for Admission of Fact. A party may serve a written request for admission of the truth of specific statements of fact on any other party.

- f) Admission in the Absence of Denial. Each of the matters of fact and the genuineness of each document of which admission is requested is admitted unless, within 28 days after service thereof, the party to whom the request is directed serves upon the party requesting the admission either a sworn statement denying specifically the matters of which admission is requested or setting forth in detail the reasons why the party cannot truthfully admit or deny those matters, or written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part. If written objections to a part of the request are made, the remainder of the request must be answered within the period designated in the request. A denial must fairly address

the substance of the requested admission. 35 Ill. Adm. Code 101.618 (c), (d), and (f).

STANDARD OF DECISION

Section 101.516(b) of the Board's procedural rules for enforcement actions provides:

If the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment. 35 Ill. Adm. Code 101.516(b).

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.

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).

MOTION FOR SUMMARY JUDGMENT

The People assert that Gray is the only remaining respondent in this matter. Mot. at 2. The People assert that Gray's failure to provide answers to the complaint and the request to admit facts results in those facts being deemed admitted as true for this proceeding. Mot. at 2-3.

The People argue that Gray has admitted that he was the sole owner and operator of the accumulation of used or waste tires, the sole operator of the site, and that the used or waste tires were placed on the site without the other property owners' knowledge or consent. Mot. at 4. The People contend that Gray received a notice from the Agency requesting a cleanup plan and informing him that he would be liable for the cost of the cleanup if he failed to perform it. *Id.* The People assert that Gray failed to provide the plan and the Agency conducted a cleanup costing \$131,902.48. *Id.* The People assert that Gray has failed to reimburse the State of Illinois for any portion of these costs. *Id.*

The People argue that there is no genuine issue of material fact that Gray is liable to the State of Illinois for the costs incurred in the cleanup of the used or waste tire accumulation he owned and operated. Mot. at 4. The People argue that Gray had notice, did not even attempt to perform a cleanup, and that the Agency incurred \$131,902.48 in costs while cleaning up the site. *Id.* The People argue that summary judgment, though a drastic measure is warranted in this

factual scenario. *Id.* The People ask the Board to find Gray liable to the State of Illinois for the cleanup costs in the amount of \$131,902.48 and to order him to reimburse the Agency for that amount. Mot. at 5. As previously noted, Gray did not respond to the motion.

DISCUSSION

Facts Deemed Admitted

As asserted in the motion for summary judgment, Gray did not file an answer to the complaint or a motion pursuant to 35 Ill. Adm. Code 103.204(d). The record shows that Gray was 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 Gray 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 as admitted under 35 Ill. Adm. Code 103.204(d).

In addition, the record shows that the People served Gray with a request to admit facts on December 6, 2006. The record shows that Gray did not respond to the People's request to admit facts within 28 days after service thereof. Pursuant to Section 101.618(f) of the procedural rules, the Board finds that each of the matters of fact of which admission is requested is admitted.

Accordingly, the Board finds the following material allegations admitted by Gray:

- 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. Gray owned parcel 10-19-16-101-034 and solely operated the site.
- c. Gray accepted used and waste tires at the site and placed them on adjacent properties without the knowledge and consent of the adjacent landowners – formerly co-respondents Whyte, Childress and McCoy.
- d. Gray was the sole owner and operator of the accumulation of used or waste tires removed by the Agency during its corrective action.
- e. 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.
- f. On February 5, 2001, Gray 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.

- g. The February 5, 2001 notice informed Gray that if he did not comply with the notice the Agency would perform the cleanup and that Gray 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.
- h. As of July 1, 2001, Gray had not submitted a cleanup plan or removed the tires.
- i. From October 11, 2001 to December 21, 2001, the Agency removed the accumulated tires from the site and incurred \$131,902.48 in costs.
- j. Gray has 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

In the motion for summary judgment, the People ask the Board to find Gray liable to the State of Illinois for the clean-up costs in the amount of \$131,902.48. As previously noted, Gray did not respond to the motion. 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).

In the complaint, the People allege that the respondents are liable for \$131,902.48 in costs pursuant to Section 55.3 of the Act. As a result of the material facts deemed admitted pursuant to 35 Ill. Adm. Code 103.204(d) and 101.618(f), no genuine issue of material fact remains and the People are entitled to judgment as a matter of law under 35 Ill. Adm. Code 101.516(b). The uncontroverted facts show that the People have met the requirements of Section 55.3 in this instance.

Proper Section 55.3(d) notice was served on Gray. The Section 55.3 notice stated that the accumulation of used or waste tires posed a threat to public health or the environment, and directed Gray to submit a plan within 30 days detailing the removal of all the used waste tires at the site. The Section 55.3 notice also informed Gray that if he did not comply with the notice the Agency would perform the cleanup and that Gray 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. Gray failed to respond to the notice.

The record shows that the Agency, as authorized under Section 55.3(e) of the Act, took corrective action by arranging and paying for the removal of used or waste tires at the site. *See* 415 ILCS 5/55.3(e) (2004). From October 11, 2001 to December 21, 2001, the Agency removed the accumulated tires from the site incurring \$131,902.48 in costs that have not been reimbursed. Section 55.3(k) of the Act provides in part that the Board may impose costs and damages provided for by this section. 415 ILCS 5/55.3(k) (2004).

The record shows that there is no genuine issue of material fact concerning the allegations in the complaint, and that the People are entitled to judgment as a matter of law. Since the People met its burden for summary judgment, and Gray did not provide any evidence to present a factual basis, which arguably entitled him to a judgment, the Board finds Gray is

liable to the Agency for \$131,902.48 - the cost of the tire removal. The Board orders Gray to reimburse the Agency for costs in the amount of \$131,902.48.

Punitive Damages and Collection Costs

Section 55.3(h) of the Act provides that any person liable to the Agency for costs “may also 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.” 415 ILCS 5/55.3(h) (2004). The statute dictates that, if punitive damages are imposed, they must be equal to, but not greater than; the actual costs incurred by the Agency from its tire removal operations.

Section 55.3(g) provides that, the costs for which the respondent is liable in cases of this type, are “all costs incurred by the State, including reasonable costs of collection.” 415 ILCS 5/55.3(g) (2004). Award by the Board of punitive damages or attorney fees and costs is not automatic upon a finding of violation. Instead, the Board considers the facts and circumstances of the case in light of the statutory language. See, *e.g.*, People v. CyberAmerica Corporation f/k/a Canton Industrial Corporation, PCB 97-8 (Mar. 5, 1998 and May 21, 1998)

The People asked for punitive damages, attorney fees, and collection costs in the complaint. See Mot., Ex. A at 9. But, the motion for summary judgment does not renew the request for either, or argue that the facts in this case warrant such awards. Accordingly, the Board will not award punitive damages or attorney fees and collection costs in this case.

CONCLUSION

In conclusion, the Board grants the People’s motion for summary judgment against Gray, finding that no genuine issue of material fact exists and that the People are entitled to judgment as a matter of law. The Board finds that the State is entitled to costs pursuant to Sections 55.3(g) and (k) of the Act for monies expended by the Agency in removing waste and used tires from the site operated and partially owned by Gray. See 415 ILCS 5/55.3(g), (k) (2004). In accordance with Section 55.3(g) of the Act, the Board awards the State \$131,902.48 in corrective action costs.

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

ORDER

1. The Board hereby grants the People of the State of Illinois’ (People) motion for summary judgment and Thomas Gray (Gray).
2. The Board orders Gray to reimburse the Illinois Environmental Protection Agency in the amount of \$131,902.48 for costs incurred in the cleanup of accumulated used and waste tires at the site 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 located in Momence, Kankakee County.

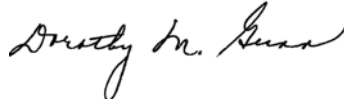
3. Payment must be made in the form of a certified check or money order or electronic funds transfer, payable to the Used Tire Management Fund. The case number, name, and Gray's social security number or federal employer number should also be included on the check or money order. If submitting an electronic funds transfer, the electronic funds transfer must be made in accordance to the specific instructions provided to Gray.
4. The check or money order shall be sent to:

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

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) (2004); *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.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on May 4, 2006, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board