

ILLINOIS POLLUTION CONTROL BOARD
March 5, 2009

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 08-87
)	(Enforcement – Water)
STEVE SODERBERG d/b/a STEVE’S)	
CONCRETE AND EXCAVATING,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by A.S. Moore):

On May 7, 2008, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a complaint against Steve Soderberg d/b/a Steve’s Concrete and Excavating (respondent). See 415 ILCS 5/31(c)(1) (2006); 35 Ill. Adm. Code 103.204. The People allege that respondent violated Sections 12(a), 12(d), and 12(f) of the Environmental Protection Act (Act) (415 ILCS 5/12(a), 12(d), 12(f) (2006)) and Sections 309.102(a) and 302.203 of the Board’s water pollution regulations (35 Ill. Adm. Code 309.102(a), 302.203). The People allege that respondent violated these provisions by causing or threatening or allowing the discharge of contaminants into the environment so as to cause or tend to cause water pollution; by depositing contaminants upon the land in such as place and manner as to create a water pollution hazard; by causing, threatening, or allowing the discharge of contaminants into the waters of the State without a National Pollutant Discharge Elimination System (NPDES) permit; and by causing or allowing the creation of an offensive condition. The complaint concerns respondent’s removal of an aboveground fuel tank from a site at 2303 Charles Street, Rockford, Winnebago County.

Today the Board decides an uncontested motion to deem facts admitted and for summary judgment filed by the People on October 27, 2008. For the reasons discussed below, the Board grants the People’s motion to deem facts admitted and for summary judgment, requires respondent to pay a \$12,000 civil penalty, and also requires respondent to cease and desist from further violations.

This opinion and order first reviews the procedural history of this case. It then summarizes the People’s complaint and addresses the People’s motion to deem facts admitted. The opinion and order then sets forth the relevant statutory and regulatory provisions. The Board next describes the standard of review applied by the Board in considering summary judgment motions and then summarizes the People’s motion for summary judgment. Next, the order provides the Board’s discussion of and ruling on that motion before issuing the Board’s final order.

PROCEDURAL HISTORY

On May 7, 2008, the People filed a four-count complaint (Comp.) alleging that respondent had committed water pollution violations. In an order dated May 15, 2008, the Board accepted the complaint for hearing. During a telephonic status conference on September 25, 2008, the hearing officer noted that respondent's answer had been due on September 19, 2008. Respondent indicated that that answer had been mailed to the complainant on September 16 or 17, 2008. To date, however, the respondent has not filed an answer to the complaint with the Board and has raised no affirmative defenses. On October 27, 2008, the People filed a motion to deem facts admitted and for summary judgment (Mot.). Respondent has filed no response to the People's motion to deem facts admitted and for summary judgment. The respondent did not appear for telephonic status conferences with the hearing officer scheduled for November 13, 2008, or January 15, 2009.

PEOPLE'S COMPLAINT

The People allege that respondent owns and operates Steve's Concrete and Excavating, which is located at 1720 Charles Street in Rockford. Comp. at 1 (¶3). The People further allege that respondent is a "person" as that term is defined by the Act. *Id.* at 4 (¶¶14-15); *see* 415 ILCS 5/3.315 (2006) (definition of "person"). The People also allege that respondent "is not registered with the Illinois Secretary of State." Comp. at 1 (¶3).

Count I

The People allege that, after persons at a local elementary school noticed an odor of petroleum near Keith Creek on May 12, 2006, the Rockford Fire Department (RFD) reported a diesel fuel spill in the creek to the Illinois Environmental Protection Agency (Agency). Comp. at 2 (¶4). The People also allege that Keith Creek and its surrounding area are "waters" under the Act. *Id.* at 5 (¶¶18-19); *see* 415 ILCS 5/3.550 (2006) (definition of "water"). The People further allege that the Agency "determined that the source of the contamination was a spill area behind 2239 Charles Street." Comp. at 2 (¶4).

The People allege that Agency personnel responded to RFD's report of the spill by inspecting the spill area. Comp. at 2 (¶5). The complaint characterizes the spill area as "a small concrete landing above a storm water culvert discharging to Keith Creek." *Id.* The People further allege that "[f]uel had pooled on the concrete and flowed into the culvert, to the creek, and onto a small area of surrounding ground surface." *Id.* The People further allege that the Agency "observed a sheen moving on top of the water and collecting in the curves and vegetation along the creek." *Id.*

The People allege that respondent had rented the rear of a building located at 2303 Charles Street, an address "which was part of the same property at which the spill occurred." Comp. at 2 (¶6). The complaint states that, when the spill was discovered, "[t]he property was owned by the Rockford Local Development Corporation." *Id.* The People further allege that, "at the time the spill was discovered, Respondent had agreed to a termination of the lease and removal of an above ground fuel tank from the site." *Id.*

The People allege that a witness reported to RFD that he or she had observed a truck marked with the name “Steve’s Concrete and Excavating” removing equipment including an above ground fuel tank from the site. Comp. at 2 (¶7). The People also allege that respondent “conceded that his employees had removed the fuel tank, but indicated that the tank did not belong to him and that there had been no problems during removal.” *Id.* The People further allege that “diesel fuel improperly emptied from the above ground fuel tank is a “contaminant”” under the Act. *Id.* (¶¶16-17); *see* 415 ILCS 5/3.165 (2006) (definition of “contaminant”).

The People allege that, in responding to the report of a fuel spill, RFD first constructed “a small earthen dike to stop the flow of fuel to the culvert and creek.” Comp. at 2 (¶8). The People further allege, soon after constructing the dike, RFD “placed a boom in the creek at the mouth of the culvert to prevent further release and placed a pad on the area of the spill to absorb the fuel.” *Id.* at 2-3 (¶8).

The People allege that respondent took over remedial efforts from the RFD by contracting with Trans Environmental. Comp. at 3 (¶9). The People further allege that Trans Environmental “estimated that the release was less than ten gallons of fuel based on the size of the tank and the volume of fuel remaining.” *Id.* The complaint states that Trans Environmental reported the release to the Illinois Emergency Management Agency (IEMA). *Id.*

The People allege that the Agency instructed Trans Environmental “to remove the soaked pads from the culvert and replace them with new ones.” Comp. at 3 (¶10). The People further allege that Trans Environmental agreed to place contaminated soil from the spill area into a disposal drum and to notify the Agency upon completion of its cleanup. *Id.* The People also allege that the Agency re-inspected the site on May 15, 2006. *Id.* The People further allege that, during that inspection, the Agency “observed that the concrete above the culvert was clean and that waste materials had been placed in a fifty-five gallon drum.” *Id.*

The People allege that, on or about June 20, 2006, the Agency informed the respondent that the site required additional cleanup. Comp. at 3 (¶11). The People further allege that respondent contacted Trans Environmental to consult with the Agency and remediate the area of the release. *Id.* The People also allege that “[a]fter replacing absorbent materials and installing additional booms and pads at the site, a steel drum of contaminated soils and absorbents was disposed of at Orchard Hills Landfill on June 23, 2006.” *Id.*

The People allege that the Agency cited an “unpermitted discharge of contaminants and water quality violations” in sending a violation notice letter to the respondent on July 18, 2006. Comp. at 3 (¶12). The People further allege that, in a response dated September 29, 2006, Trans Environmental stated that it “had taken immediate corrective actions following the release, and minimized the impact to the environment.” *Id.* at 3-4 (¶12). The People also allege that the Agency on October 16, 2006 rejected a proposed compliance agreement submitted on behalf of respondent by Trans Environmental. *Id.* at 4 (¶12). The People also allege that, on March 21, 2007, the Agency sent a letter providing notice of intent to pursue legal action. *Id.*

The People allege that, “[b]y spilling diesel fuel which flowed to the culvert and creek, Respondent caused, threatened, or allowed the discharge of contaminants into the environment

so as to cause or tend to cause water pollution in violation of Section 12(a) of the Act.” Comp. at 5 (¶21), citing 415 ILCS 5/12(a) (2006).

Count II

The People allege that, during Agency inspections at the site, “fuel was observed floating on top of the water as well as on the soil leading from the culvert to the creek.” Comp. at 6 (¶16). The People further allege that, before the RFD placed absorbent materials on the spill, “the fuel was uncovered and unprotected from exposure to the elements.” *Id.*

The People allege that, “[b]y spilling fuel which then flowed to the creek and surrounding soil areas, Respondent deposited contaminants upon the land in such place and manner so as to create a water pollution hazard, in violation of Section 12(d) of the Act.” Comp. at 6-7 (¶17), citing 415 ILCS 5/12(d) (2006).

Count III

The People allege that “[t]he spilled fuel identified at the site are not covered by any NPDES permit issued to, or held by, the Respondent.” Comp. at 8 (¶18). The People further allege that, “[b]y discharging contaminants not covered by an NPDES permit, Respondent has violated Section 12(f) of the Act . . . and Section 309.102(a) of the Board Water Pollution Regulations.” Comp. at 8 (¶19), citing 415 ILCS 5/12(f) (2006), 35 Ill. Adm. Code 309.102(a).

Count IV

The People allege that, on the dates of Agency inspections, “[o]il sheens were visible on the creek surface and petroleum odor in the area was evident.” Comp. at 10 (¶16). The People further allege that, “[b]y causing and allowing the oil sheens which disturbed the natural appearance of the creek, Respondent has created an offensive condition and violated Section 302.203 of the Board Water Pollution Regulations.” *Id.* at 10 (¶17), citing 35 Ill. Adm. Code 302.203.

PEOPLE’S MOTION TO DEEM FACTS ADMITTED

During a conference with the hearing officer on July 24, 2008, the People reported re-serving the respondent with the complaint in response to issues raised by the respondent. People v. Steve Soderberg d/b/a Steve’s Concrete and Excavating, PCB 08-87 (July 24, 2008) (hearing officer order). Specifically, the People served the complaint upon respondent on July 16, 2008. Mot., Exh. 1. Under Section 103.204(d) of the Board’s procedural rules, respondent had 60 days after receipt of the People’s complaint to file an answer. 35 Ill. Adm. Code 103.204(d). Accordingly, “it was agreed that respondent has until September 19, 2008, to answer the complaint or otherwise plead.” People v. Steve Soderberg d/b/a Steve’s Concrete and Excavating, PCB 08-87 (July 24, 2008).

During a conference on September 25, 2008, in which all parties participated, the hearing officer noted the September 19, 2008, deadline to file respondent’s answer. People v. Steve

Soderberg d/b/a Steve's Concrete and Excavating, PCB 08-87 (Sept. 25, 2008) (hearing officer order). During the same conference, respondent stated that he had mailed an answer to the People on September 16 or 17, 2008. *Id.* To date, however, neither the People nor the Board has received from respondent an answer to the complaint or any other responsive pleading that would stay the 60-day deadline. *See* 35 Ill. Adm. Code 103.204(e).

On October 27, 2008, the People filed a motion to deem facts admitted. The People argue that, under Section 103.204(d) of the Board's procedural rules, "[a]ll material allegations of the complaint will be taken as admitted if no answer is filed." Mot. at 2, citing 35 Ill. Adm. Code 103.204(d). In addition to filing no answer, respondent has filed no response to the People's motion to deem facts admitted. The Board's procedural rules provide that "[w]thin 14 days after service of a motion, a party may file a response to the motion. If no response is filed, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board or the hearing officer in its disposition of the motion." 35 Ill. Adm. Code 101.500(d).

Under these provisions, the Board grants the People's motion to deem facts admitted. The Board finds that respondent's failure to answer the complaint has caused the material allegations of the complaint to be taken as admitted. In the following section, the Board summarizes the factual record, including facts taken as admitted by respondent.

FACTUAL BACKGROUND

After persons at a local elementary school noticed an odor of petroleum near Keith Creek on May 12, 2006, RFD reported a diesel fuel spill in the creek to the Agency. Keith Creek and the area surrounding it are "waters." The Agency determined that the contamination originated from a spill area behind 2239 Charles Street. Agency personnel responded to RFD's report by inspecting the spill area, a small concrete landing above a storm water culvert discharging to Keith Creek. The inspection revealed that fuel had pooled on the concrete and flowed into the culvert, to the creek, and onto a small area of surrounding ground surface. During the course of its inspection, the Agency observed fuel on the soil leading from the culvert to the creek and an evident odor of petroleum in the area. The Agency also observed a sheen moving on top of the water and collecting in the curves and vegetation along the creek.

Respondent had rented the rear of a building located at 2303 Charles Street, a part of the property owned by the Rockford Local Development Corporation at which the spill occurred. At the time the spill was discovered, respondent had agreed to terminate the lease and remove an above ground fuel tank from the site. A witness had reported to the RFD that he or she had observed a truck marked "Steve's Concrete and Excavating" removing equipment including an above ground fuel tank from the site. Respondent conceded that his employees had removed the fuel tank, but indicted that the tank did not belong to him and that there had been no problems during its removal.

Responding to the spill, the RFD had constructed a small earthen dike to stop the flow of fuel to the culvert and creek. Soon after constructing the dike, the RFD placed a boom in the creek at the mouth of the culvert to prevent further release and placed a pad on the area of the

spill to absorb the fuel. Before the RFD placed absorbent materials on the spill, the fuel was uncovered and unprotected from exposure to the elements. The respondent took over remedial efforts from RFD by contracting with Trans Environmental. Trans Environmental reported the release to IEMA. Trans Environmental estimated that the release was less than ten gallons of fuel based on the size of the tank and the volume of fuel remaining. The spilled fuel identified at the site is not covered by an NPDES permit issued to, or held by, respondent.

The Agency instructed Trans Environmental to remove soaked pads from the culvert and replace them with new ones. Trans Environmental agreed to place contaminated soil into a disposal drum and to notify the Agency upon completion of its cleanup. The Agency re-inspected the site on May 15, 2006. The Agency observed that the concrete above the culvert was clean and that waste materials had been placed in a fifty-five gallon drum. The Agency informed the respondent on or about June 20, 2006 that the site required additional cleanup. The respondent contacted Trans Environmental to consult with the Agency on remediating the area of the release. Following the replacement of absorbent materials and the installation of additional booms and pads at the site, a steel drum of contaminated soils and absorbents was disposed of at Orchard Hills Landfill on June 23, 2006.

In sending a violation notice to the respondent on July 18, 2006, the Agency cited an “unpermitted discharge of contaminants and water quality violations.” In a response dated September 29, 2006, Trans Environmental stated that it “had taken immediate corrective actions following the release, and minimized the impact to the environment.” On October 16, 2006, the Agency rejected a proposed compliance agreement submitted on behalf of respondent by Trans Environmental. On March 21, 2007, the Agency sent a letter providing notice of intent to pursue legal action.

STATUTORY AND REGULATORY PROVISIONS

Section 3.315 of the Act provides that a “[p]erson’ is any individual, partnership, co-partnership, firm, company, limited liability company, corporation, association, joint stock company, trust, estate, political subdivision, state agency, or any other legal entity, or their legal representative, agent or assigns.” 415 ILCS 5/3.315 (2006).

Section 3.165 of the Act provides that a “[c]ontaminant’ is any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source.” 415 ILCS 5/3.165 (2006).

Section 3.545 of the Act provides that

“[w]ater pollution” is 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 (2006).

Section 3.550 of the Act provides that “[w]aters’ means 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 (2006).

Section 12 of the Act provides in pertinent part that 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.
* * *
- (d) Deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard.
* * *
- (f) Cause, threaten or allow the discharge of any contaminant into the waters of the State, as defined herein, including but not limited to, waters to any sewage works, or into any well or from any point source within the State, without an NPDES permit for point source discharges issued by the Agency under Section 39(b) of this Act, or in violation of any term or condition imposed by such permit, or in violation of any NPDES permit filing requirement established under Section 39(b), or in violation of any regulations adopted by the Board or of any order adopted by the Board with respect to the NPDES program. 415 ILCS 5/12(a), 12(d), 12(f) (2006).

Section 33(c) of the Act provides in its entirety that

- (c) 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) (2006).

Section 42(h) of the Act provides that

In determining the appropriate penalty to be imposed . . . the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors:

- (i) the duration and gravity of the violation;
- (ii) the presence or absence of due diligence on the part of the respondent in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;
- (iii) any economic benefits accrued by the respondent because of delay in compliance with requirements, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance;
- (iv) the amount of monetary penalty which will serve to deter further violations by the respondent and to otherwise aid in enhancing voluntary compliance with this Act by the respondent and other persons similarly subject to the Act;
- (v) the number, proximity in time, and gravity of previously adjudicated violations of the Act by the respondent;
- (vi) whether the respondent voluntarily self-disclosed, in accordance with subsection (i) of this Section, the non-compliance to the Agency; and
- (vii) whether the respondent has agreed to undertake a “supplemental environmental project,” which means an environmentally beneficial project that a respondent agrees to undertake in settlement of an enforcement action brought under this Act, but which the respondent is not otherwise legally required to perform. 415 ILCS 5/42(h) (2006).

Section 302.203 of the Board’s water pollution regulations provides in its entirety that “[w]aters of the State shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, color or turbidity of other than natural origin. The allowed mixing provisions of Section 302.102 shall not be used to comply with the provisions of this Section.” 35 Ill. Adm. Code 302.203.

Section 309.102(a) of the Board’s water pollution regulations provides in its entirety that “[e]xcept as in compliance with the provisions of the Act, Board regulations, and the CWA, and the provisions and conditions of the NPDES permit issued to the discharger, the discharge of any contaminant or pollutant by any person into the waters of the State from a point source or into a well shall be unlawful.” 35 Ill. Adm. Code 309.102(a).

STANDARD OF REVIEW FOR MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E. 2d 358, 370 (1998); *see* 35 Ill. Adm. Code 101.516(b) (Motions for Summary Judgment). 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 & Dowd, 693 N.E.2d at 370 (1998).

Summary judgment “is a drastic means of disposing of litigation,” and therefore it should be granted only when the movant’s right to relief “is clear and free from doubt.” Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E. 2d 358, 370 (1998), citing Purtill v. Hess, 111 Ill. 2d 299, 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 judgment.” Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

PEOPLE’S MOTION FOR SUMMARY JUDGMENT

In their motion for summary judgment, the People argue that the respondent has not filed an answer to the complaint or a motion that would stay the 60-day deadline to file an answer. Mot. at 2-3 (¶¶4, 6), citing 35 Ill. Adm. Code 103.204(d), 103.204(e). The People further argue that, by failing to do so, respondent “has admitted the material allegations asserted in the Complaint.” Mot. at 3 (¶6). Specifically, the People seek a Board order finding that, pursuant to the Board’s procedural rules, the respondent has admitted the material allegations asserted in the complaint. *Id.* (¶7). Above, the Board granted the People’s motion to deem facts admitted and found that respondent’s failure to answer the complaint had caused the material allegations of the complaint to be taken as admitted.

The People argue that the complaint states facts sufficient to establish that respondent had violated the Act and the Board’s regulations as alleged in the four counts of the complaint. Mot. at 3 (¶8). The People further argue that, if the Board finds that respondent admitted the material allegations in the complaint, “then the record shows that there is no issue of material fact remaining for review.” *Id.* at 4 (¶10). The People claim that the Board’s procedural rules entitle the People to summary judgment in their favor as a matter of law. *Id.*, citing 35 Ill. Adm. Code 101.516(b)

The Board’s procedural rules provide that, “[w]ithin 14 days after service of a motion, a party may file a response to the motion. If no response is filed, the party will be deemed to have

waived objection to the granting of the motion, but the waiver of objection does not bind the Board . . . in its disposition of the motion.” 35 Ill. Adm. Code 101.500(d). Respondent’s failure to respond to the motion for summary judgment has resulted in his waiving any objection to the Board granting the motion. Below, the Board reviews the motion and the evidence and arguments offered in its support before making its findings and reaching its conclusions.

DISCUSSION

Count I

The record demonstrates that respondent allowed, caused, or threatened the discharge of diesel fuel into a culvert and Keith Creek so as to cause or tend to cause waste pollution. Specifically, the record shows that respondent rented the rear of a building located at 2303 Charles Street in Rockford. The record also shows that respondent had agreed to remove an aboveground fuel tank from that location, that a witness observed a truck marked as respondent’s removing an above ground fuel tank from the site, and that respondent conceded his employees had removed the tank.

The record further shows that RFD received a report of a diesel fuel spill in Keith Creek, which it reported to the Agency on May 12, 2006. The Agency determined that the spill originated from the area behind 2239 Charles Street, part of the same property at which respondent rented the rear of a building. The Agency’s inspection determined that fuel had pooled on a concrete landing and a small area of surrounding ground surface and then flowed into a stormwater culvert and Keith Creek. The record also shows that the spill released less than ten gallons of fuel.

The record also demonstrates that the spill of diesel fuel altered the physical and chemical properties of Keith Creek. The Agency observed a sheen on top of the water and collecting in the curves and vegetation along the creek. Also, individuals at a local elementary school detected an odor of petroleum in the vicinity of the creek.

The Board finds that the allegations deemed admitted pursuant to Sections 103.204(d) of the Board’s procedural rules (35 Ill. Adm. Code 103.204(d)) are sufficient to prove that there are no genuine issues of material fact and that the People are entitled to judgment as a matter of law on Count I. *See* 35 Ill. Adm. Code 101.516(b). Consequently, the Board grants the People’s motion for summary judgment as to Count I and finds that respondent violated Section 12(a) of the Act. 415 ILCS 5/12(a) (2006).

Count II

The record demonstrates that respondent deposited contaminants upon the land in such a place and manner as to create a water pollution hazard. Specifically, the record shows that respondent allowed, caused, or threatened the discharge of diesel fuel into a culvert and Keith Creek and that fuel had flowed onto the ground surface. The record also shows that, until the RFD placed absorbent materials on the spilled fuel, it remained uncovered and unprotected from

the elements. Furthermore, the record demonstrates that the Agency observed a sheen on top of the water and in the curves and vegetation along the creek.

The Board finds that the allegations deemed admitted pursuant to Sections 103.204(d) of the Board's procedural rules (35 Ill. Adm. Code 103.204(d)) are sufficient to prove that there are no genuine issues of material fact and that the People are entitled to judgment as a matter of law on Count II. *See* 35 Ill. Adm. Code 101.516(b). Consequently, the Board grants the People's motion for summary judgment as to Count II and finds that respondent violated Section 12(d) of the Act. 415 ILCS 5/12(d) (2006).

Count III

The record demonstrates that respondent has allowed, threatened, or caused the discharge of contaminants into the waters of the State without an NPDES permit issued by the Agency. Specifically, the record shows that no NPDES permit issued to or held by respondent covered or allowed the diesel fuel that respondent allowed, threatened, or cause to be discharge at the site.

The Board finds that the allegations deemed admitted pursuant to Sections 103.204(d) of the Board's procedural rules (35 Ill. Adm. Code 103.204(d)) are sufficient to prove that there are no genuine issues of material fact and that the People are entitled to judgment as a matter of law on Count II. *See* 35 Ill. Adm. Code 101.516(b). Consequently, the Board grants the People's motion for summary judgment as to Count III and finds that respondent violated Section 12(f) of the Act. 415 ILCS 5/12(f) (2006) and Section 309.102(a) of the Board's regulations (35 Ill. Adm. Code 309.102(a)).

Count IV

The record demonstrates respondent created an offensive condition. Specifically, the record shows that respondent allowed, caused, or threatened the discharge of diesel fuel into a culvert and Keith Creek. The record further shows that the spill of diesel fuel resulted in oil sheens visible on the creek surface and an evident odor of petroleum in the vicinity of the spill.

The Board finds that the allegations deemed admitted pursuant to Sections 103.204(d) of the Board's procedural rules (35 Ill. Adm. Code 103.204(d)) are sufficient to prove that there are no genuine issues of material fact and that the People are entitled to judgment as a matter of law on Count IV. *See* 35 Ill. Adm. Code 101.516(b). Consequently, the Board grants the People's motion for summary judgment as to Count II and finds that respondent violated Section 302.203 of the Board's regulations (35 Ill. Adm. Code 302.203)).

Remedies

Pursuant to the Board's May 15, 2008 order accepting the complaint for hearing, the People propose a remedy for respondent's violations. Mot. at 5 (¶4).

Section 33(c)

Addressing the factors at Section 33(c) of the Act (415 ILCS 5/33(c) (2006)), the People first state that “[t]he impact to the public resulting from Respondent’s removal of an above ground fuel storage tank was that diesel fuel spilled on to the ground, and into a culvert, then flowed into Keith Creek and collected in the curves and vegetation of the creek. Keith Creek flows by an elementary school.” Mot. at 5. The Board finds that this spill of diesel fuel resulted in a significant “injury to or interference with the protection of the health, general welfare and physical property of the people” and weighs this factor in favor of imposing remedies sought by the People. *See* 415 ILCS 5/33(c)(1) (2006).

Regarding “the social and economic value of the pollution source,” the People claim that “Keith Creek, which is the site of the spill, has social value.” Mot. at 5; *see* 415 ILCS 5/33(c)(2) (2006). On the issue of “the suitability or unsuitability of the pollution source to the area in which it is located,” the People also claim that “[t]he creek is suitable to the area in which it is located.” Mot. at 6; *see* 415 ILCS 5/33(c)(3) (2006). These claims appear to merge the fuel tank as the source of the spill and the creek as the site of the spill. As the record does not indicate the value or suitability of either the fuel tank or respondent’s business, the Board declines to weigh these two factors in favor of or against remedies sought by the People.

The People also argue that “[p]reventing a diesel spill from the above ground tank was both technically practicable and economically reasonable.” Mot. at 6; *see* 415 ILCS 5/33(c)(4) (2006). Respondent has in no way opposed this argument, and the Board finds that this factor weighs in favor of remedies sought by the People.

Addressing the final factor of any subsequent compliance, the People state that the site has been completely remediated. Mot. at 6; *see* 415 ILCS 5/33(c)(5) (2006). The Board finds that this factor weighs in favor of respondent.

The Board finds on the basis of the record before it that the Section 33(c) factors weigh in favor of granting relief requested by the People, including assessing a civil penalty. In reaching this finding, the Board places considerable emphasis on the impact of this spill of diesel fuel upon the people’s health, general welfare, and property. To determine the appropriate penalty amount, the Board below considers factors listed in Section 42(h) of the Act. *See* 415 ILCS 5/42(h) (2006).

Section 42

The People note that, under Section 42(a) of the Act, violators are liable for a civil penalty of up to \$50,000 for each violation and an additional penalty of \$10,000 for each day that the violations continue. Mot. at 7; *see* 415 ILCS 5/42(a) (2006). The People argue that, if the Board finds that respondent committed the four violations alleged in the complaint and that those violations continued at least ten days to May 22, 2006, then the maximum penalty authorized by Section 42(a) is \$570,000, as follows:

Count I	
1 violation of Section 12(a)	\$50,000
1 violation continuing 10 days	\$100,000

Count II

1 violation of Section 12(d)	\$50,000
1 violation continuing 10 days	\$100,000

Count III

1 violation of Section 12(d)	\$10,000
1 violation of Section 309.102(a)	\$10,000
1 violation continuing 10 days	\$100,000

Count IV

1 violation of Section 302.203	\$50,000
1 violation continuing 10 days	\$100,000

Mot. at 7, citing 415 ILCS 5/42(a) (2006). With regard to Count III, however, the Board notes that the maximum penalty for a violation of both Section 12(d) of the Act (415 ILCS 5/12(d) (2006)) and Section 309.102(a) of the Board's regulations (35 Ill. Adm. Code 309.102(a)) is not \$10,000 but \$50,000. 415 ILCS 5/42(a) (2006). The Board further notes that, if these violations continued for ten days as claimed, then the maximum penalty for the violation of Count III is \$300,000 and the maximum total penalty for the four violations would be \$750,000.

Turning to the aggravating and mitigating factors that the Board weighs in determining the amount of an appropriate civil penalty (*see* 415 ILCS 5/42(h) (2006)), the People first allege that the violations continued for ten days “and resulted in an estimated amount of approximately 10 gallons of diesel fuel to spill into Illinois waters and to cause water pollution.” Mot. at 9; *see* 415 ILCS 5/42(h)(1) (2006). The Board notes that the Agency re-inspected the site of the spill on or about June 20, 2006, approximately one month after the spill occurred, and determined that the site required additional clean-up. As the record indicates that the violation persisted at least until approximately June 20, 2006, the Board weighs this factor against respondent.

On the issue of respondent's diligence, the People claim that “[r]espondent failed to act diligently in this matter, as evidenced by his failure to report the spill, failure to take any measures to prevent the spill from flowing into Keith Creek, and only hiring a clean-up crew after he was notified of the spill.” Mot. at 9; *see* 415 ILCS 5/42(h)(2) (2006). This claim finds support in the record, and respondent has in no way opposed it. The Board finds that this factor weighs against respondent.

The People acknowledge that “[r]espondent accrued no economic benefit as a result of the violations.” Mot. at 9; *see* 415 ILCS 5/42(h)(3) (2006). The record contains no evidence to the contrary, and the Board weighs this factor in favor of respondent.

In addition, the People state that respondent “has no previously adjudicated violations” of the Act. Mot. at 9; *see* 415 ILCS 5/42(h)(5) (2006). The Board weighs this factor in favor of respondent.

With regard to self-disclosure, the People claim that respondent “did not voluntarily disclose the spill” to the Agency under subsection (i). Mot. at 9; *see* 415 ILCS 5/42(h)(6) (2006); *see also* 415 ILCS 5/42(i) (2006) (providing for reduction in penalty for voluntary self-disclosure of non-compliance discovered through audit to Agency). As this provision does not plainly pertain to this spill, the Board does not weigh this factor in favor of or against respondent.

Finally, the People stated that respondent “has not offered to perform a supplemental environmental project.” Mot. at 9; *see* 415 ILCS 5/42(h)(7) (2006). The record shows no evidence of such an offer, and the Board weighs this factor against respondent.

Finally, on the issue of deterrence, the People argue that a maximum civil penalty of \$12,000 “will serve to deter further violations by Respondent and to otherwise aid in enhancing voluntary compliance. . . .” Mot. at 9; *see* 415 ILCS 5/42(h)(4) (2006). Respondent has offered no facts or arguments to dispute this argument.

The Board finds that the Section 42(h) factors justify the imposition of the \$12,000 penalty on respondent as proposed by the People. *See* People v. Ogoco, Inc., PCB 06-16, slip op. at 10 (Sept. 21, 2006) (imposing People’s unopposed penalty request), citing People v. J&F Hauling, Inc., PCB 02-21 (Feb.6, 2003). In reaching this finding, the Board places particular weight on the duration and gravity of the violation and on respondent’s lack of due diligence in attempting to comply with the Act and the Board’s regulations.

In their complaint, the People’s request for relief included “[o]rdering Respondent to pay all costs, pursuant to Section 42(f) of the Act, 415 ILCS 5/42(f) (2006), including attorney, expert witness and consultant fees expended by the State in its pursuit of this action.” Comp. at 6, 7, 9, 10. The People did not renew this request in their motion for summary judgment. *See* Mot. at 4-10 (Remedy). As the record includes no amount for these costs and fees and no argument that the violations were “willful, knowing, or repeated” (415 ILCS 5/42(f) (2006)), the Board declines to grant this relief.

CONCLUSION

The Board grants the People’s unopposed motion to deem facts admitted and for summary judgment. The Board therefore finds that respondent violated the Act and the Board’s regulations as alleged in the four counts of the complaint and imposes the People’s requested civil penalty of \$12,000 on respondent. In addition, the Board requires respondent to cease and desist from further violations of the Act and the Board’s regulations. However, the Board declines to order respondent to pay costs or fees.

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

ORDER

1. The Board grants the Office of the Attorney General, on behalf of the People of the State of Illinois, summary judgment on all four counts of the

complaint as alleged against respondent. The Board thus finds that respondent has violated Sections 12(a), 12(d), and 12(f) of the Environmental Protection Act (Act) (415 ILCS 5/12(a), 12(d), 12(f) (2006)) and Sections 309.102(a) and 302.203 of the Board's water pollution regulations (35 Ill. Adm. Code 309.102(a), 302.203).

2. Respondent must pay a civil penalty of \$12,000 no later than Monday, April 6, 2009, which is the first business day after 30 days from the date of this order. Such payment must be made by certified check, money order, or electronic transfer of funds, payable to the Environmental Protection Trust Fund. The case number, case name, and respondent's social security number or federal employer identification number must be included on the certified check or money order.
3. Respondent must send the certified check, money order, or confirmation of electronic funds transfer 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 Environmental Protection Act (415 ILCS 5/42(g) (2006)) at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a) (2006)).
5. Respondent must cease and desist from further violations of the Act and the Board's regulations.

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) (2006); *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, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on March 5, 2009, by a vote of 5-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish at the end.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board