ILLINOIS POLLUTION CONTROL BOARD
February 3, 2011

CASEYVILLE SPORT CHOICE, LLC,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 08-030
	)	(Citizens Enforcement - Land)
ERMA I. SEIBER, ADMINISTRATRIX OF	)	
THE ESTATE OF JAMES A. SEIBER,	)	
DECEASED, AND ERMA I. SEIBER, IN	)	
HER INDIVIDUAL CAPACITY, AND	)	
FAIRMOUNT PARK, INC.,	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by G.T. Girard):

This citizen's enforcement concerns the disposal of horse manure and municipal waste on three parcels of land in St. Clair County. The case is before the Board today on a Motion to Dismiss filed by Fairmount Park, Inc. (Fairmount Park) and a motion for summary judgment filed by Fairmount Park. Respondent Erma I. Seiber, Administratrix of the estate of James A. Seiber and Erma I. Seiber (Seiber) also filed a motion to dismiss on similar grounds as Fairmount Park but did not join in the motion for summary judgment. Caseyville Sport Choice LLC (Caseyville) filed a response to the motions to dismiss *instanter* and sought an extension of time to respond to the motion for summary judgment.

For the reasons discussed below, the Board denies Caseyville's request to file response *instanter* and for an extension of time to file the response to the motion for summary judgment. The Board denies the motions to dismiss filed by Fairmont Park and Seiber because the Board has consistently found that the Board has the authority to order cost recovery. The Board further denies the motion for summary judgment filed by Fairmont because there are issues of material fact. Therefore, the Board will direct the hearing officer to proceed to hearing.

Below, the Board will provide the procedural history of the case. Next the Board summarizes the amended complaint and the statutory background. The Board then summarizes and rules on the motion to dismiss followed by the motion for summary judgment.

PROCEDURAL HISTORY

On October 3, 2007, Caseyville filed a complaint against Seiber alleging various violations of the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq*. (2008)). On October 22, 2007, Seiber filed a motion to dismiss the complaint alleging that the complaint was duplicative of a complaint filed in the U.S. District Court for the Southern District of Illinois. Also on October 22, 2007, Caseyville responded to the motion arguing that the complaint was

not duplicative. On November 1, 2007, the Board denied the motion to dismiss finding that the complaint was not duplicative. *See* Caseyville Sport Choice, LLC v. Erma Seiber Administratrix of the estate of James A. Seiber and Erma I. Seiber, PCB 8-30 (Nov. 1, 2007). The Board also found that the complaint was not frivolous. *Id.*

On August 26, 2008, Caseyville filed a motion for leave to add Fairmount Park and a first amended complaint (Comp). On September 12, 2008, Fairmount Park filed a motion to dismiss the count against Fairmount Park. On September 24, 2008, Caseyville filed a response to the motion to dismiss. On October 16, 2008, the Board accepted the amended complaint finding that the complaint was neither duplicative nor frivolous and that the statue of limitations did not bar the action. *See* Caseyville Sport Choice, LLC v. Erma Seiber *et al.*, PCB 8-30 (Oct. 16, 2008).

On January 5, 2009, respondent Fairmount Park filed an answer to the amended complaint that included a counterclaim against Caseyville. On February 3, 2009, Seiber filed an answer to Fairmount Park's counterclaim, including replies to Fairmount Park's asserted affirmative defenses. On February 5, 2009, Caseyville timely filed a Motion to Dismiss the Fairmount Park Counterclaim, which also included answers to Fairmount Park's asserted affirmative defenses. On February 18, 2009, Fairmount Park filed a response to Caseyville's motion to dismiss the counterclaim.

On April 16, 2009, the Board granted Caseyville's Motion to Dismiss the Counterclaim of Fairmount Park because the counterclaim sought relief that the Board is not authorized to grant pursuant to the Act and Board regulations.

On July 13, 2010, Fairmount Park filed both a motion to dismiss (MotD) and a motion for summary judgment (Mot.SJ). By hearing officer order a response was due by September 13, 2010; however, Caseyville sought an extension during a hearing conference and Fairmount Park objected. *See* Hearing Officer Order Sept. 14, 2010. The Hearing Officer directed Caseyville to file a written motion or to file a response with a motion to file *instanter*. *Id*. In a hearing officer order dated December 6, 2010, the hearing officer allowed Caseyville to file a response by January 7, 2011.

On November 23, 2010, Seiber filed a motion to dismiss (SMot.) asserting that the complaint is frivolous. A response to that motion by Caseyville was due by January 7, 2011. *See* Hearing Officer Order Dec. 6, 2010.

On January 31, 2011, Caseyville filed a response to the motion to dismiss *instanter* and a request for an extension of time to respond to the motion for summary judgment.

CASEYVILLE'S MOTIONS TO FILE *INSTANTER* AND FOR AN EXTENSION

Caseyville has previously received extension of time to respond to both the motion to dismiss and the motion for summary judgment filed by Fairmount Park. Nearly a month has passed since the last response was due. The Board notes that new attorneys have filed appearances for Caseyville. However, the Board denies the request to file *instanter* and for an extension of time. Caseyville will not be prejudiced by this decision as the Board is denying the motions to dismiss and the motion for summary judgment.

AMENDED COMPLAINT

In count one of the amended complaint, Caseyville alleges that Seiber violated Sections 21(a), (d), and (e) of the Illinois Environmental Protection Act (Act) and the Board's waste regulations at 35 Ill. Adm. Code 807.201 and 807.202. Caseyville alleges that Seiber violated these provisions by dumping over 159,000 tons of horse manure and over 2,600 tons of municipal trash on three parcels of land. Comp. at 3. The complaint alleges that the dumping occurred over a period of years from approximately 1981-1993. *Id*. The parcels were conveyed to Caseyville on December 16, 2004, and Caseyville became aware of the presence of the horse manure and municipal trash in April, 2005. *Id*.

In count two of the complaint, Caseyville alleges that Fairmount Park violated Section 21(a) of the Act. Comp. at 7. Caseyville alleges that Fairmount Park operated a horse racing track and repeatedly paid James Seiber to haul away from the track horse manure and municipal trash. *Id*. Caseyville maintains that Fairmount Park expected that Seiber would dispose of the horse manure and municipal waste on Seiber's land rather than a permitted waste-disposal site. *Id*.

The relief sought by Caseyville is the reimbursement of the clean-up costs in the amount of $4,528,589.10. Comp. at 4 and 8.

STATUTORY BACKGROUND

Section 21(a) of the Act provides that "no person shall cause or allow the open dumping of any waste". 415 ILCS 5/21(a) (2008)

Section 45(d) of the Act provides:

> If the State brings an action under this Act against a person with an interest in real property upon which the person is alleged to have allowed open dumping or open burning by a third party in violation of this Act, which action seeks to compel the defendant to remove the waste or otherwise clean up the site, the defendant may, in the manner provided by law for third-party complaints, bring in as a third-party defendant a person who with actual knowledge caused or contributed to the illegal open dumping or open burning, or who is or may be liable for all or part of the removal and cleanup costs. The court may include any of the parties which it determines to have, with actual knowledge, allowed, caused or contributed to the illegal open dumping or open burning in any order that it may issue to compel removal of the waste and cleanup of the site, and may apportion the removal and cleanup costs among such parties, as it deems appropriate. However, a person may not seek to recover any fines or civil penalties imposed upon him under this Act from a third-party defendant in an action brought under this subsection. 415 ILCS 5/45(d) (2008).

MOTIONS TO DISMISS

The Board will first address the motions to dismiss and summarize each respondents' arguments. The Board will then discuss the motion.

Fairmount Park's Motion To Dismiss

Fairmount Park argues that the allegations in the complaint are based on the activities of a prior owner of the property, which Caseyville purchased for $1.46 million. MotD. at 1. Fairmount Park notes that Caseyville's request for relief in the complaint is seeking reimbursement for clean-up costs incurred by Caseyville in cleaning the site. *Id*. Fairmount Park asserts that no provision exists in the Act to authorize a private party to obtain reimbursement for clean-up costs and thus the action is frivolous and must be dismissed. MotD. at 1-2.

Fairmount Park maintains that Section 45(d) of the Act (415 ILCS 5/45(d) (2008)) allows the State to bring an action under the Act to seek reimbursement for clean-up, but no such action occurred in this case and the Board lacks the authority to grant the relief requested. MotD. at 2. Fairmount Park argues that the no other provision of the Act offers relief similar to Section 45(d) and Fairmount Park does not meet the requirements found in the first sentence of Section 45(d). Fairmount Park asserts that only a court under common law has jurisdiction to grant the relief requested and therefore this proceeding is frivolous. *Id*.

Seiber's Motion To Dismiss

Seiber argues that Caseyville's complaint is based on activity of the Seibers as prior property owners. SMot. at 1. Seiber asserts that the activity ended in 1993 with a court order issued in St. Clair county. *Id*. Seiber sold the property to Caseyville for $1.46 million. Seiber notes that the relief the complaint is seeking is reimbursement for clean-up costs incurred by Caseyville in cleaning the site. SMot. at 2.

Seiber asserts that no provision of the Act allows the Board to authorize a private party to obtain reimbursement for cleanup costs and only Section 45(d) of the Act (415 ILCS 5/45(d) (2008) allows for reimbursement. SMot. at 2. Seiber maintains that Section 45(d) allows the State to seek reimbursement, but not a private citizen. *Id*. Seiber argues that based on the clear and concise language of the Act, the Board cannot grant the relief requested and the compliant is frivolous. SMot. at 2-.3

Discussion On Motions To Dismiss

Before reaching the merits of the motions, the Board notes that Section 103.212(b) requires the filing of a motion to dismiss alleging that the complaint is duplicative or frivolous within 30 days of the receipt of the complaint. 35 Ill. Adm. Code 103.212(b). Both respondents timely filed a motion to dismiss arguing the complaint was duplicative, which the Board denied and specifically finding the complaint was not frivolous in those orders. *See* Caseyville v. Seiber, PCB 8-30 (Nov. 1, 2007); Caseyville v. Seiber *et al.*, PCB 8-30 (Oct. 16, 2008). Almost

two years after the Board ruled against respondents on motions to dismiss, the respondents filed motions to dismiss the complaint as frivolous. The Board has recently struck a motion to dismiss in a citizen's enforcement case as untimely (*see* Yorkville v. Hamman Farms, PCB 08-96 (Nov. 4, 2010); however the Board will address the merits of the motions.

Under the Act "any person may file with the Board a complaint, . . . against any person allegedly violating this Act, [or] any rule or regulation adopted under this Act . . . ." 415 ILCS 5/31(d)(1)(2008). Section 31(d)(1) of the Act requires that a complaint not be "duplicative or frivolous." 415 ILCS 5/31(d)(1) (2008).

Section 101.202 of the Board's procedural rules defines "frivolous" as "a request for relief that the Board does not have the authority to grant . . .." 35 Ill. Adm. Code 101.202. Since 1994, the Board has consistently held that pursuant to the broad language of Section 33 of the Act (415 ILCS 5/33 (2008)), the Board has the authority to award cleanup costs to private parties for a violation of the Act. *See* Lake County Forest Preserve District v. Ostro, PCB 92-80 (Mar. 31, 1994); Chrysler Realty Corp. v. Thomas Indus, Inc., PCB 01-25 (Dec. 7, 2000); Grand Pier Center, LLC and American International Specialty Lines Insurance Co. v. River East LLC, Chicago Dock and Canal Trust, Chicago Dock and Canal Company, and Kerr-McGee Chemical, LLC PCB 05-157 (May 19, 2005); Elmhurst Memorial Healthcare *et al* v. Chevron USA, Inc. *et. al.*, PCB 09-66 (Dec. 16, 2010). Fairmount Park has not persuaded the Board to deviate from these cases; therefore, the Board finds that the Board does have the authority to grant cost recovery. The Board finds the complaint is not frivolous and denies both the motion to dismiss.

MOTION FOR SUMMARY JUDGMENT

The Board will first set forth the standard for granting a motion for summary judgment and then set forth the facts. Next the Board will summarize Fairmount Park's arguments and then the Board will discuss the motion.

Standard For Review For Motion For Summary Judgment

Summary judgment is appropriate where the pleadings, admissions, and affidavits on file show 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). A genuine issue of material fact exists when "the material facts are disputed, or, if [they] are undisputed, reasonable persons might draw different inferences from the undisputed facts." Adames v. Sheahan, 233 Ill. 2d 276, 296, 909 N.E.2d 742, 754 (2009).

"In ruling on a motion for summary judgment, the trial court must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." Dowd 181 Ill. 2d at 483. Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." *Id.*, 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).

Fairmount Park's motion for summary judgment states that all discovery is complete and all witnesses were deposed thus all the evidence that can be developed has been and summary judgment is appropriate. Mot.SJ at 2. The Board has reviewed the filings and disagrees with Fairmount Park that summary judgment is appropriate.

Facts

Before setting forth the facts, the Board notes that attached to Fairmount Park's motion for summary judgment are 15 exhibits. Those exhibits are:

Exhibit 1	Several contracts both executed and unexecuted between Fairmount Park and James Seiber.
Exhibit 2	A June 28, 1993 order entered by the Circuit Court of St. Clair County, fining James Seiber $5,000 and issuing a permanent injunction against further disposal of horse manure on his property.
Exhibit 3	Unexecuted contracts between James Seiber and Fairmount Park.
Exhibit 4	Executed contracts between Fairmount Park and Keller Farms, Inc.
Exhibit 5	Deposition of Mr. Fred Haida, former director of operations and security for Fairmount Park.
Exhibit 6	Deposition of Mr. Frank Killlian who is director of properties for Fairmount Park.
Exhibit 7	A 1981 ordered entered by the Circuit Court of St. Clair county.
Exhibit 8	Letter dated January 7, 1999, signed by James Seiber Sr.
Exhibit 9	Deposition of Mr. Glen Hierlmeier, President and CEO of Caseyville Sport Choice LLC
Exhibit 10	Letter dated September 8, 2004, and Phase I Environmental Site Assessment Update from Geotechnology, Inc to Don Ferris with Burns & McDonnell
Exhibit 11	Letter dated December 29, 1998, and Phase I Environmental Site Assessment Report from Geotechnology, Inc to Mark Everett with Burns & McDonnell
Exhibit 12	Pictures headed Blight and Environmental
Exhibit 13	Deposition of Don Ferris, former employee of Burns & McDonnell
Exhibit 14	Sales contract between Caseyville and Seiber
Exhibit 15	Letter dated June 14, 2006, and Site Remediation Plan to Illinois Environmental Protection Agency (IEPA) from New Horizon Environmental

The facts in this proceeding are that Seiber disposed of horse manure and trash generated by Fairmount Park from approximately 1981 to 1993 on property in St. Clair County. Comp. at 2; Mot.SJ Exh. 15 at 4; *Id*. at Exh. 3, 5, 6. In a 1993 circuit court action brought by the People of the State of Illinois and St. Clair County, James Seiber was fined $5000 for open dumping of horse manure and enjoined from further disposal activities. *Id*.

Fairmount Park entered into several contracts with Seiber for the disposal of manure and debris from Fairmount Park. *See generally* Mot.SJ Exh. 1. Contracts entered into between Seiber and Fairmount Park in 1982, 1986, 1987, 1990, and 1992 all contain provisions that generally require that: 1) Seiber dispose of all trash and manure collected at Fairmount Park in strict compliance with all applicable laws, and 2) the manure becomes the exclusive property of Seiber. *Id*. Contract drafted in 1994 and 1995 also required that Seiber dispose of the manure consistent with the injunction order entered by the Circuit Court. *Id*; Mot.SJ Exh. 3. These contracts were not executed. *Id*.

One witness for Fairmount Park testified that he was not aware of Seiber's dumping of horse manure on his property until the issuance of the 1993 Circuit Court injunction. Mot.SJ Exh. 5 at 2, 3. However, another testified that he knew horse manure was being placed on Seiber's property, but not the trash. Mot.SJ. Exh. 6 at 8. Seiber did remove some trash along with the horse manure from Fairmount Park. *Id*. at 10.

Caseyville purchased property for development in 2004. Mot.SJ Exh. 9 at 20-28, 41. Caseyville paid approximately nine million dollars for over 500 acres, approximately 160 acres of which was owned by Seiber. *Id*. In June, 2004 Caseyville paid Seiber $1,460,000 for the property. Mot.SJ Exh. 14.

Prior to the purchase of the property, Caseyville began investigating the property in August, 2003. *Id*. at 14. Engineers developed preliminary plans including environmental investigations, which included an update to the Phase I Environmental Site Assessment. *Id*. at 14-19; Mot.SJ Exh. 10. Prior to the purchase of the property, Caseyville was not aware of issues concerning the disposal of horse manure and debris from the Fairmount Park on Seiber's land. *Id*. at 56-57. However, Caseyville was aware that horse manure had been dumped on Seiber's land. *Id*. at 58, 62. Caseyville became aware of a lawsuit by the Village of Caseyville against Seiber regarding manure disposal in August, 2005 after the purchase of the property. *Id*. at 59-60.

On June 14, 2006, New Horizon on behalf of Caseyville submitted a site remediation plan for the Seiber property. Mot.SJ Exh. 15. Two samples collected from the dumped horse manure were analyzed for the presence of various TCLP metals, volatile organic compounds (VOCs), or TCLP semi-volatile organics. *Id*. at i-ii. Analysis of the two samples " revealed the waste to be within acceptable regulatory criteria for disposal at a non-hazardous waste landfill." *Id*. at ii. The site remediation plan indicates that at total of 162,850.95 tons of waste was removed and disposed of at a properly permitted waste facility. *Id*. at iii. New Horizon stated that the objective of the plan was to:

> adequately address the identified recognized environmental conditions (RECs) for the former Seiber properties so that a focused No Further Remediation determination letter can be issued for benzene, toluene, ethyl benzene and xylene (BTEX), and chlorinated pesticides in soils. *Id*. at i.

After removal of the horse manure and debris, contamination of BTEX and chlorinated pesticides did not exceed the TACO Tier 1 level. *Id*. at iii.

Argument

Fairmount Park argues that summary judgment is appropriate as no genuine issues of material fact exist and Fairmount Park is entitled to judgment as a matter of law. Mot.SJ at 13. Fairmount Park argues that the facts are uncontested and the only facts which might support Caseyville are that James Seiber apparently open dumped horse manure and failed to clean up the site as ordered by the Court. *Id*. Fairmount Park maintains that because Fairmount Park entered into contracts with Mr. Seiber to dispose of horse manure from 1982 until the end of 1993, Caseyville seeks relief from Fairmount Park. Mot.SJ at 14. Fairmount Park opines that to hold Fairmount Park liable would be unjust and not serve the purposes of the Act.[1] *Id*.

Fairmount Park asserts that the contracts entered into between Seiber and Fairmount Park establishes that Seiber contracted to legally dispose of manure and that the manure became the exclusive property of Seiber. Mot.SJ at 2-4. Further, Fairmount Park asserts that there is no evidence that Fairmount Park had actual knowledge that Seiber was not properly disposing of the manure and had buried smaller amounts of trash and debris on Seiber's property. *Id*. at 3. Fairmount Park maintains that when no actual knowledge exits and the contract was knowingly breached, the Act is not served by requiring Fairmount Park to reimburse the costs for cleaning up a site. *Id*.

Fairmount Park argues that Seiber was paid varying amounts over time for the collection of manure and that the amounts were sufficient to pay for proper disposal at a permitted landfill. Mot.SJ at 3. Fairmount Park further argues that the contracts made clear that Seiber was responsible for properly disposing of materials and Seiber was paid for that service. *Id*. at 4.

Fairmount Park acknowledges becoming aware of Seiber's open dumping of manure due to the issuance of a June 1993 permanent injunction entered by the St. Clair County Court. Mot.SJ at 4. Fairmount Park claims a new agreement was not reached with Seiber after Fairmount Park became aware of the open dumping of manure. *Id*. Fairmount Park points to depositions from Mr. Haida and Mr. Killian as evidence that Fairmount Park had no knowledge of the illegal dumping by Seiber. *Id*. at 5.

Fairmount Park asserts that Fairmount Park had no knowledge of the illegal activities and therefore could not have caused or allowed open dumping. Mot.SJ at 8. However, Fairmount Park maintains that Caseyville did have knowledge and points to deposition testimony by Mr. Hierlmeirer for support. *Id*., citing Exh. 9. Fairmount Park opines that proper due diligence by Caseyville could have identified the extent of the contamination. *Id*. at 9-10.

[1] The Board notes that throughout the motion for summary judgment, Fairmount Park renews the argument made in its motion to dismiss that the Board lacks the authority to award cost recovery in this case. The Board will not reexamine those arguments.

Discussion

When ruling on a motion for summary judgment, pleadings, depositions, and affidavits must be considered "strictly against the movant and in favor of the opposing party." Dowd, 181 Ill. 2d at 483. The purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine question of material fact exists. Bagent v. Blessing Care Corp., 224 Ill. 2d 154, 162, 862 N.E.2d 985 (2007). The Supreme Court has held:

> Although summary judgment can aid in the expeditious disposition of a lawsuit, it remains a drastic means of disposing of litigation and, therefore, should be allowed only where the right of the moving party is clear and free from doubt. Bagent, 224 Ill. 2d at 163.

In order to prove a violation of the Act, the complainant must prove by a preponderance of the evidence that a violation occurred. *See* Nash v. Jimenez, PCB 7-97 (Aug. 19, 2010). Taking the facts presented to the Board in a light most favorable to Caseyville, the Board finds that there are issues of material fact which require that the case proceed to hearing.

The facts do establish that Fairmount Park paid Seiber to remove horse manure and some trash and that the contracts specifically required the proper disposal of the horse manure and trash. The facts currently before the Board appear to show that Fairmount Park was unaware that materials were being disposed of on Seiber's property until Seiber was fined $5000 and a permanent injunction issued.

Knowledge is not an element of a violation of the Act and lack of knowledge is not a defense (*See* People v. Davinroy, 249 Ill. App. 3d 788, 793; 618 N.E.2d 1282, 1286 (5th Dist. 1993), citing Meodowlark Farms. Inc. v. PCB, 17 Ill. App. 3d 851, 308 N.E.2d 829 (5th Dist.1974)) (alleged violation of Section 12(a) of the Act (415 ILS 5/12(a) (2008)). In Davinroy the court stated:

> the fact that guilty knowledge is not a necessary element of proof under the Act does not mean that alleged polluters are under a theory of strict liability. The State must show that the alleged polluter has the capability of control over the pollution or that the alleged polluter was in control of the premises where the pollution occurred. Phillips Petroleum Co. v. Pollution Control Board, 72 Ill. App. 3d 217, 390 N.E.2d 620 (2nd Dist. 1979). The analysis applied by courts in Illinois for determining whether an alleged polluter has violated the Act is whether the alleged polluter exercised sufficient control over the source of the pollution. Davinroy, 249 Ill. App. 3d at 793, quoting People v. Fiorini, 143 Ill. 2d 318, 346, 574 N.E.2d 612, 623, (1991).

In this case, taking the facts in a light most favorable to the complainant, the Board finds that there are issues of material fact outstanding. For example, the record is unclear as to what control Fairmount Park exerted. The record contains an unexecuted contract, which was negotiated even after the injunction was entered against Seiber. *See* Mot.SJ Exh. 3. This contract demonstrates that Fairmount Park was willing to consider allowing Seiber to continue to collect

horse manure from the racetrack after the injunction was issued. Also, employees of Fairmount Park were aware that some trash was collected by Seiber and that Seiber was placing horse manure on his property. *See* Mot.SJ Exh. 5 at 2; Exh. 6 at 8. Thus, the Board finds that issues of material fact exist regarding the alleged violation and the right of the moving party is not free from doubt. Therefore, the Board denies the motion for summary judgment.

CONCLUSION

The Board denies the motions to dismiss as the Board has consistently found that the Board has the authority to grant cost recovery. In addition the Board denies the motion for summary judgment filed by Fairmount Park as there exists genuine issues of material fact. The Board directs the hearing officer to proceed to hearing in this matter.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 3, 2011, by a vote of 5-0.

John Therriault, Assistant Clerk
Illinois Pollution Control Board