ILLINOIS POLLUTION CONTROL BOARD
March 6, 2003

DONALD MCCARRELL and ANN MCCARREL, individually, and as trustees under the Don McCarrell Living Trust,	)	
Complainants,	)	
v.	)	PCB 98-55
	)	(Citizens Enforcement - Land)
AIR DISTRIBUTION ASSOCIATES, INC.	)	
Respondent.	)	

JOHN N. PIEPER APPEARED ON BEHALF OF COMPLAINANTS.

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

On October 16, 1997, Donald and Ann McCarrell (complainants) filed a complaint against Air Distribution Associates, Inc. (ADAI). The complainants allege that ADAI violated Section 21(a) of the Environmental Protection Act (Act) (415 ILCS 5/21(a) (2002)) by causing or allowing the open dumping of waste at a Wood Dale, DuPage County property, thereby contaminating the property's soil. As a remedy for the alleged violation, the complainants seek to recover $37,261.81 that they purportedly spent to clean up the soil contamination.

A hearing was held in this matter on August 28, 2003. Today, the Board decides whether ADAI contaminated soil at a site in Wood Dale, DuPage County. The Board also decides whether the complainants, the purchasers of that site, may recover costs incurred in remediating the soil contamination.

For the reasons set forth in this opinion, the Board finds that ADAI caused soil contamination at the site, in violation of Section 21(a) of the Act, which prohibits the open dumping of waste. The Board further finds that the complainants are entitled to recover their clean up costs from ADAI in the amount of $37,261.81, and orders ADAI to pay that sum.

PROCEDURAL MATTERS

On October 30, 1997, ADAI filed an answer to the complaint denying the alleged violations. However, ADAI has not participated in this case since its attorney withdrew on February 3, 2000. John Kinney (Kinney), the sole shareholder of ADAI, is not an attorney and therefore cannot represent ADAI in this matter. *See* 35 Ill. Adm. Code 101.400(a)(2). The Board and hearing officer advised Kinney many times that ADAI must be represented by a licensed attorney. *See* McCarrell v. Air Distribution Associates, PCB 98-55 (May 2, 2002); Hearing Officer Orders of February 16, 2000, June 20, 2001, November 5, 2001, March 28, 2002, June 25, 2002, August 15, 2002.

ADAI did not appear at the August 28, 2002 hearing in this matter. On November 15, 2002, Kinney sent a letter to the Board that addresses the allegations at issue. The complainants filed a post-hearing brief, motion for leave to file their post-hearing brief and a motion to strike the letter on November 26, 2002.

FACTS

The complainants purchased a property located at 935 Lively Boulevard in Wood Dale, DuPage County from ADAI on July 15, 1993. Tr. at 9, Exh. 1. The complainants established a bindery business at the property in September 1993, that ceased operation in August 1995. Tr. at 11-12, 16.

Prior to selling the Wood Dale property to the complainants, ADAI hired the Green Environmental Group, Ltd. (Green) to perform a Phase I environmental assessment of the property. Tr. at 22. Green is owned, in part, by William W. Frerichs (Frerichs). Tr. at 19. Frerichs is a registered environmental property assessor. Tr. at 20. He worked for the Illinois Attorney General's Office as deputy chief, during which time he trained hazardous waste investigators. Tr. at 20-21. Frerichs has overseen approximately 50 remediations during is career with Green. Tr. at 21.

During the 1993 assessment, Frerichs observed ADAI "storing 55-gallon drums at the northeast corner of the [Wood Dale] Property in the same location that was found in late 1995 to be contaminated with trichloroethane." Exh. 17. at 3. On the basis of observations made in the 1993 assessment, Frerichs recommended that sampling be performed at the Wood Dale property. Exh 8 at 5. The report found that, among other areas of concern, testing should be performed around the overhead door as a result of paint being rinsed out the rear door of the facility and the solvents used by ADAI. *Id*.

In the fall of 1995, Don McCarrell hired Green to perform a subsurface investigation following the recommendations of their 1993 Phase I report. *See* Exh. 14. Tr. at 32. Green discovered contaminants, including trichloroethane, in excess of legal limits at the northeast corner of the site. Exh. 14 at 2; Exh. 17 at 2. The complainants used a small amount of cleaning solvent for their paper puncher, described as a "standard commercial parts washer," and the solvent was recirculated and reused. Tr. at 16-17. Neither the complainants, nor anyone from their company, stored or dumped any type of chemicals outside. Tr. at 18. The complainants spent $37,261.81 to remove the contaminants. Tr. at 13; Exh. 5-6. The complainants sold the property in February 1996. Tr. at 11.

During Green's work for the complainants in 1995, Green discovered contaminants at the property "which exceeded the standards then applicable." Exh. 17 at 2. Green in turn excavated 220 cubic yards of soil in December 1995 and January 1996, concluding that the "floors and walls of the excavated area are clean according to Illinois Soil Remediation Criteria." Exh. 17 at 3.

Frerichs states that "trichloroethane is used in industry as a solvent to degrease equipment prior to painting, and . . . paint solvents and degreasers (such as trichloroethane) were used by [ADAI] in preparing large commercial air conditioner units for repainting . . . ." Exh. 17 at 5. The 1995-1996 excavations revealed that the highest concentrations of trichloroethane in the soil were close to the location of ADAI's paint booth at the northeast corner of the building. Exh. 17 at 4. Frerichs concludes that "based on the depth below grade, the pattern, and the concentrations, of trichloroethane and the other contaminants . . ., the trichloroethane and the other contaminants could not have been introduced into the soil in the time period between July 15, 1993 and December 20, 1995, and had been present in the soil at [the Wood Dale property] before July 1993. Exh. 17 at 5. Friechs testified that because of the variability and intermixing of both trichlorethane and mineral spirits indicated applications of small amounts of solvents over an extended period of time. Tr. at 36.

ADAI did not appear at hearing. The only facts asserted by ADAI appear in its answer to the complaint filed on October 30, 1997. At that time, ADAI stated that it had no knowledge of any alleged soil contamination or cleanup at the property or any alleged cleanup expenses incurred by the complainants. Ans. at 1-2. In its answer, ADAI denies that the alleged pollution occurred prior to July 15, 1993, when ADAI owned the subject property and conducted its business. Ans. at 1. ADAI further denies that the alleged soil contamination occurred as the result of solvents and chemicals being dumped by its employees. Ans. at 1-2. Because of ADAI's answer, the Board denied the complainants' motion for summary judgment due to remaining questions of fact, and ordered the case to hearing. *See* McCarrell v. ADAI, PCB 98-55 (May 2, 2002).

APPLICABLE LAW

Section 21of the Act provides:

No person shall:

(a) cause or allow the open dumping of any waste. 415 ICLS 5/21(a) (2002).

"OPEN DUMPING" means the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill. 415 ILCS 5/3.305 (2002).

"WASTE" means any garbage, . . . or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial commercial, . . . and community activities . . . . 415 ILCS 5/3.535 (2002).

PRELIMINARY MATTERS

Motion to Amend Complaint

In its post-hearing brief and at hearing, the complainants sought leave to amend the complaint to reflect the complainants as Donald and Ann McCarrell individually and as trustee

under the Don McCarrell Living Trust dated December 21, 1993. Brief at 1, Tr. at 5.[1] No response to the motion has been made by ADAI.

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, but the waiver of objection does not bind the Board in its disposition of the motion. *See* 35 Ill. Adm. Code 101.500(d).

The only difference between the original complaint and the amended complaint relate to respondents' name change. The Board grants the motion for leave to file an amended complaint and changes the case caption accordingly.

Motion to Strike

In the motion to strike, the complainants argue that the November 15, 2002 letter filed by Kinney is in the nature of unsworn testimony submitted on behalf of ADAI from someone who has no legal right to appear and act on ADAI's behalf. Mot. at 2. The complainants argue that Kinney should not be permitted to circumvent the rules and submit documents to the Board in the nature of unsworn testimony. *Id*. No response to this motion has been made by ADAI.

In the November 15, 2002 letter, Kinney states that Green's 1993 report indicated that, as of that date, no serious environmental problems relating to the property existed. Letter at 1. Kinney argues that Wilder employees used "black and evil smelling" solvents to clean various items of printing press equipment, and then threw the solvents onto what was the ADAI rose garden. Id. Kinney asserts that no pollution existed on the property as of the date ADAI sold it. *Id*.

The Board has previously found that Kinney is not an attorney and cannot represent ADAI in this case. *See supra* p. 2. Accordingly, the motion to strike the letter is granted as follows: the letter will be accepted by the Board as a public comment. Public comments are not entitled to the same weight as expert testimony submitted under oath and subject to cross-examination. Public comments receive a lesser weight. City of Geneva v. Waste Management Inc., PCB 94-58 (Jul. 21, 1994); Browning Ferris Industries v. Lake County Board of Supervisors, PCB 82-101 (Dec. 2, 1982).

Kinney's letter constitutes evidence in the record properly considered by the Board, and will be assessed as discussed above.

DISCUSSION

Since ADAI has made no effort to introduce any facts into the record to dispute the complainants' claims, the Board finds the facts in favor of the complainants. The Board finds that a preponderance of evidence supports the complainants' argument that the soil

[1] The hearing transcript will be cited as "Tr. at __."; the complainants' hearing exhibits will be cited as "Ex. at __."; the complainants' brief will be cited as "Brief at __."; ADAI's answer to the complaint will be cited as "Ans. at _."

contamination predated the complainants' ownership of the property, and occurred in the portion of the property where ADAI operated its paint booth.

The Board must now consider complainants' allegations that ADAI violated Section 21(a) of the Act (415 ILCS 5/21(a) (2002)), and complainants' request to require ADAI to reimburse the complainants for alleged cleanup costs.

Alleged Open Dumping of Waste

The complainants argue that ADAI violated Section 21(a) of the Act by causing or allowing the open dumping of waste, specifically, paint solvents and degreasers containing TCE.

Open dumping is defined as "the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill." 415 ILCS 5/3.24 (2002). Pursuant to the Act, "Refuse means waste." 415 ILCS 5/3.31 (2002). Waste includes any garbage or other discarded material. 415 ILCS 5/3.53 (2002).

The record shows that ADAI operated a paint booth at the northeast corner of the site where TCE was discovered, and further shows that the contamination predated the complainants' ownership of the property. While the complainants admit to using small amounts of cleaning solvents on their machinery inside of the facility, the complainants did not store or dump any chemicals outside. The record also shows that the site was not permitted by the Agency for the disposal of waste, and thus did not fulfill the requirements of a sanitary landfill.

The Board finds that the materials deposited at the site constitutes discarded material within the meaning of waste as defined by the Act. The Board also finds that the deposit of the materials constituted a consolidation of refuse at a disposal site not fulfilling the requirements of a sanitary landfill. The Board is not convinced by the arguments contained in Kinney's letter. The evidence clearly shows that ADAI caused or allowed open dumping of waste in violation of Section 21(a) of the Act.

Remedy

The complainants argue that they are entitled to recover their costs expended in remediating the site, but do not seek a civil penalty be imposed on ADAI. When deciding upon the appropriate remedy for violations of the Act and Board regulations, the Board considers the factors set forth in Section 33(c) of the Act and further considers the Section 42(h) factors when determining an appropriate penalty amount. 415 ILCS 5/33(c), 42(h) (2002).

Section 33(c) lists five factors, which the Board considers in making orders and determinations. First, the facts and circumstances of this case show that ADAI conducted open dumping of trichloroethane and other contaminants resulting in interference with the protection of the health, general welfare and physical property of the people. *See* 415 ILCS 5/33(c)(i) (2002). Second, there is no evidence in the record showing that the open dumping of waste had any social or economic value. *See* 415 ILCS 5/33(c)(ii) (2002). Third, the open dumping of waste was not suitable to the area. *See* 415 ILCS 5/33(c)(iii) (2002). Fourth, reducing or

eliminating the deposits was not an economically unreasonable burden. ADAI could have properly removed the solvents instead of dumping them on the ground. The evidence in the record does not show any technical impracticability with properly disposing of the used solvents. *See* ILCS 5/33(c)(iv) (2002). Finally, the record does not reveal any efforts by ADAI to comply once the violations were identified. *See* ILCS 5/33(c)(v) (2002)

Section 42 (h) lists five factors to be considered in mitigation or aggravation of penalties. First, the record in this case indicates small amounts of solvents were deposited over an extended period of time. *See* ILCS 5/42 (h)(1) (2002). The record does not reveal any due diligence on the part of ADAI to comply with the requirements of the Act, nor any economic benefits accrued as a result of the violation. S*ee* ILCS 5/42 (h)(2), (3) (2002). The record contains no direct information on the amount of monetary penalty necessary to deter further violations. *See* ILCS 415 5/42 (h)(4) (2002). The record does not contain any references to previously adjudicated violations of the Act by ADAI. *See* ILCS 415 5/42 (h)(5) (2002).

The complainant's evidence provided at the Board's hearing is uncontested. ADAI has failed to provide any evidence at the Board's hearing and has failed to file a post-hearing brief. Applying the uncontested facts in this case to the Section 33(c) factors shows that ADAI's violations were unreasonable.

Cost Recovery

The complainants argue that they are entitled to cost recovery in the amount of $37, 261.81. The Board has consistently held that it 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 (July 30, 1992); Malina v. Day, PCB 98-54 (Jan. 22, 1998); MDI v. Regional Board of Trustees, PCB 00-181 (May 2, 2002); Village of Park Forest v. Sears, Roebuck and Co., PCB 01-77 (June 6, 2002); *see also* Dalise Enterprises d/b/a/ Barge-Way Co. v. PCB, 00-CH-12113 (Cook County Cir. Ct., Sept. 1, 2000 and Dalise Enterprises, Inc. d/b/a Barge-Way Co. v. PCB, No. 1-00-3391 (1st Dist., Feb. 14, 2000) (dismissed for want of prosecution).

After considering the Section 33(c) factors, the Board finds that recovery of the complainants' costs is proper in this instance. The complainant provided sufficient evidence that it paid $37,261.81 to remove the contaminants. The complainants' witness testified that he was familiar with the rates and costs for cleanup in effect at the time, that the charges in the invoices were fair and reasonable and consistent with the charges typically incurred for remediation, and were paid by Don McCarrell. Tr. at 39. He also testified that the remediation method used was the most economical and reasonable way to remediate the contamination that was found. Id.

Since the complainants have provided sufficient evidence concerning the costs incurred to remediate the site, the Board finds that ADAI should reimburse the complainants for costs in the amount of $37,261.81.

Penalty

As previously stated, the complainants do not ask that a civil penalty be imposed on ADAI. The Board finds that the imposition of a civil penalty is not required in this case in light of the Board's decision to order ADAI to pay $37,261.81 to the complainants for the remediation of the soil contamination.

CONCLUSION

In conclusion, the Board finds that ADAI caused soil contamination at the site, in violation of Section 21(a) of the Act, which prohibits the open dumping of waste. The Board further finds that the complainants are entitled to recover their clean up costs from ADAI in the amount of $37,261.81, and orders ADAI to pay that sum.

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

ORDER

1. The Board finds that ADAI violated Section 21(a) of the Illinois Environmental Protection Act. 415 ILCS 5/21(a) (2002).

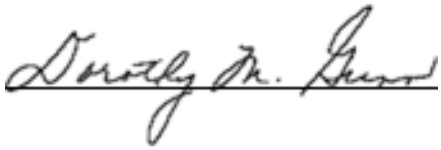
2. The Board orders ADAI to reimburse the complainants in the amount of $37,261.81 for costs incurred in the clean up of trichloroethane and other contaminants at 935 Lively Boulevard in Wood Dale, DuPage County.

3. Payment must be made within 30 days from the date of this order in the form of a certified check or money order, payable to Don and Ann McCarrell, individually, and as trustees under the Don McCarrell living trust. The case number, name, and ADAI's social security number or federal employer number should also be included on the check or money order.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2002); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.502; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on March 6, 2003, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board