

ILLINOIS POLLUTION CONTROL BOARD

February 1, 1996

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 96-75
	)	(Enforcement-Air)
HARVEY CASH d/b/a CASH OIL COMPANY,	)	
	)	
Respondent.	)	

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

On January 2, 1996, the complainant filed a motion for summary judgment in this proceeding. As of today no response has been filed by respondent. Pursuant to the Board's regulations at 35 Ill. Adm. Code 101.241 if no response is filed the party failing to respond may be deemed to waive objection to the granting of the motion. Such waiver of objection does not bind the Board in its decision on the motion.

Complainant asks that the Board: grant summary judgment against respondent; order respondent to cease and desist from further violations of the Act and associated Board regulations; impose a civil penalty of seven thousand dollars; and award costs in this matter. In support of its request, complainant maintains that respondent failed to respond within 20 days to complainant's request to admit facts. Therefore, complainant argues the facts are admitted and the admission of the facts establish the truth of the violations alleged in the complaint. Thus, according to the complainant no genuine issue of fact remains.

The Board agrees that the respondent's failure to respond to the request to admit results in the facts being admitted. (See 35 Ill. Adm. Code 103.162(c).) Thus, respondent admits that it performed a demolition of the Flora Lumber Company and burned some of the debris. Respondent further admits that the burned demolition debris was discarded on a portion of property which is not a sanitary landfill. (Request to admit at 1-2.) However, the Board disagrees that the admission of these facts supports granting summary judgment. Requests to admit should not include conclusions of law or opinions of law. (See People v. Mindham, 625 N.E.2d 835, 253 Ill.App.3d 792 (Second Dist. 1994); and Sims v. Alton, 526 N.E.2d 931, 172 Ill.App.3d 694 (5th Dist. 1988).)

First, the facts which are deemed admitted do not include an admission of fact which would support a finding that the respondent violated the National Emission Standards for Hazardous Air Pollutants (NESHAP) as alleged. Second, the motion merely states that the "admission of the facts establish the truth of the violations alleged in the complaint". Complainant has not specified in its motion how each specific admission

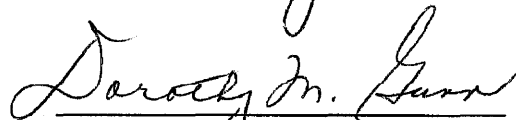
of fact relates to a finding of violation of the law. In addition, complainant has not established that a seven thousand dollar fine is appropriate to meet the purposes of the Act.

The Board must take into account factors outlined in Section 33(c) of the Act in determining the unreasonableness of the alleged pollution. (Wells Manufacturing Company v. Pollution Control Board, 73 Ill.2d 226, 383 N.E.2d 148 (1978).) Further, the Board is expressly authorized by statute to consider the factors in Section 42(h) of the Act in determining an appropriate penalty. Therefore, the Board has held that in determining the appropriate civil penalty, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act. (People v. Berniece Kershaw and Darwin Dale Kershaw d/b/a Kershaw Mobile Home Park, PCB 92-164 (April 20, 1994); IEPA v. Allen Barry, individually and d/b/a Allen Barry Livestock, PCB 88-71, 111 PCB 11 at 72 (May 10, 1990).) The record in this case lacks sufficient information to allow the Board to consider the factors in Section 33(c) and 42(h) of the Act in fashioning an appropriate penalty in this case.

For the reasons discussed above, the Board hereby denies the motion for summary judgment at this time. Unless additional motions are forthcoming, the hearing officer shall proceed with hearing on this matter.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 1st day of February, 1996, by a vote of 7-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board