

ILLINOIS POLLUTION CONTROL BOARD  
April 2, 1998

MATERIAL SERVICE CORPORATION,	)	
a Delaware corporation,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 98-97
	)	(Enforcement - UST - Citizens)
J.W. PETERS & SONS, Inc., a Wisconsin	)	
corporation,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by J. Yi):

This matter comes before the Board on the January 13, 1998, filing of a citizen's enforcement complaint by Material Service Corporation (Material Service). Before the Board today are respondent J.W. Peters & Sons, Inc.'s (Peters) request for appearance of Mark R. Kaster, request for appearance of Alexandra B. Klass, and motion to dismiss. These pleadings were sent for filing on January 29, 1998, and received on February 2, 1998. On February 13, 1998, the Board received Peters' motion to request administrative correction. On February 17, 1998, Material Service filed a response to the motion to dismiss and to motion requesting corrections, accompanied with a request for leave to file response.

The Board grants Peters' requests for appearance, and Material Services request for leave to file response. The Board finds Peters' motion to request administrative correction moot, and denies the motion. Peters' motion to dismiss is granted.

REQUESTS FOR APPEARANCE

Peters filed two requests for appearance seeking permission for Mark R. Kaster and Alexandra B. Klass to appear before the Board in this proceeding. The requests to appear assert that both attorneys are familiar with the Board's procedural rules and in good standing in all the Bars before which they practice. Material Service did not file an objection to either request. The requests to appear are granted.

MOTION TO REQUEST ADMINISTRATIVE CORRECTION

In its motion to request administrative correction, Peters seeks to amend the Board's February 5, 1998, order. Peters asks that paragraph 1 of the order be amended to reflect that the complaint in this matter was filed on January 13, 1998, and that a motion to dismiss was filed on January 29, 1998. Peters also requests that the Board strike the finding contained in paragraph 4 that the complaint is neither duplicitous nor frivolous and will be accepted for hearing.

Material Service filed a request for leave to file a response to the motion to request administrative correction and the motion to dismiss. The Board grants this request. In its response, Material Service asks the Board to deny the motion requesting corrections. Material Service maintains that most requested corrections are moot, and that any remaining requests for correction are without merit.

On February 11, 1998, the Board, on its own motion, amended the order issued on February 5, 1998. In that order, the Board corrected the filing date of the complaint, and noted that a motion to dismiss was received on February 2, 1998. The Board is cognizant that the motion to dismiss was sent for filing on January 29, 1998, and will use that date for time computation purposes. Both the original and the corrected order note that an initial duplicitous/frivolous determination by the Board does not preclude the filing of motions regarding the insufficiency of the pleadings. Both orders cite Section 103.124(a) of the Board's procedural rules for this proposition. In addition, the corrected order clearly states that the Board is not ruling on the motion to dismiss or the requests for appearance. The motion to request administrative corrections is therefore moot and will be denied.

#### MOTION TO DISMISS

Peters asserts that the complaint should be dismissed as frivolous. Peters argues the complaint is insufficient in three ways. First, Peters notes that the complaint refers to Section 31(b) as authority for bringing the instant action. Peters maintains that no private right of action exists under Section 31(b) of the Act. Next, Peters maintains that it never owned the tanks in question. Peters asserts that Material Service is the owner of the Underground Storage Tanks (UST), and, as such, is responsible for any necessary removal. Finally, Peters argues that, regardless of ownership issues, no obligation to remove one UST exists. Peters claims that the 10,000 gallon UST contains heating oil, and that an owner of a tank holding oil for consumptive use on the property need not remove the UST unless the Office of the State Fire Marshal (OSFM) finds a current or potential threat to human health or the environment. For all three reasons, Peters asks the Board to dismiss the complaint as frivolous.

In its response, Material Service asserts that the Board has proper authority under the Act to order compliance with Section 57.1(a) of the Act and to require the owner/operator of an UST to remove or abandon the UST according to the requirements of the leaking underground storage tank program. Material Service urges that the complaint is not frivolous. Material Service notes that when reviewing a motion to dismiss, the Board must accept all well pleaded facts as true and interpret allegations in the light most favorable to the complainant. In addition, Material Service maintains that the complaint meets the requirements of Section 103.122(c)(2) requiring that the complainant advise respondents of the extent and nature of the alleged violations so to reasonably allow preparation of a defense.

The Board grants Peters' motion to dismiss. The Board finds the complaint frivolous, and will not address Peters' remaining arguments. In the complaint, Material Service pleads that Peters is in violation of Section 57.1(a) of the Act and 41 Ill. Adm. Code 170.670(a)

because of its failure to remove and lawfully close three USTs. Section 57.1(a) provides in part:

- a. An owner or operator of an underground storage tank who meets the definition of this Title shall be required to conduct tank removal...in accordance with the requirements of the Leaking Underground Storage Tank Program. 415 ILCS 5/57.1(a) (1996).

Section 57.1(a) does not require Peters to remove the tanks. It requires only that if the USTs are to be removed, they be removed in accordance with the requirements of the LUST program. In addition, the provision that Material Service alleges requires the USTs to be removed is 41 Ill. Adm. Code 170.670(a). This regulation is promulgated and enforced by the OSFM, and is not incorporated into the Act.

Section 5(d) of the Act authorizes the Board to conduct hearings on complaints charging violations of the Act or the regulations thereunder. 415 ILCS 5/5(d) (1996). However, the regulation in question, 41 Ill. Adm. Code 170.670, is authorized by Section 2 of the Gasoline Storage Act (GSA) (430 ILCS 15/2 (1996)), and is not a regulation promulgated under the Act. Thus, the Board does not have the jurisdiction to determine whether Peters is in violation of 41 Ill. Adm. Code 170.670; this determination must be made by the OSFM. See North Oak Chrysler Plymouth v. Amoco Oil Company (April 9, 1992), PCB 91-214.

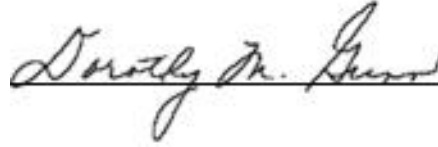
### CONCLUSION

The complaint asks the Board to order Peters to remove and effect lawful closure of the three USTs. This exceeds the Board's authority. The Board may issue an order to enforce Section 57.1(a), but only if a determination has previously been made by the OSFM that Peters must remove the USTs pursuant to 41 Ill. Adm. Code 170.160. No such determination has been alleged. The complaint is therefore dismissed.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1996)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 172 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 2nd day of April 1998, by a vote of 6-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board