ILLINOIS POLLUTION CONTROL BOARD
June 6, 2002

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| VILLAGE OF PARK FOREST, an Illinois municipal corporation, | ) | |
| Complainant, | ) | |
| v. | ) | PCB 01-77 |
| | ) | (Enforcement - Land, Water) |
| SEARS, ROEBUCK & CO., a New York corporation, | ) | |
| Respondent. | ) | |

ORDER OF THE BOARD (by C.A. Manning):

On November 1, 2000, the Village of Park Forest (Village) filed a four-count complaint against Sears, Roebuck & Co. (Sears) regarding Sears' facility located at 100 Victory Boulevard, Park Forest, Cook County (site). The Village alleges that Sears caused or allowed the open dumping of waste, and illegally disposed of waste, in violation of Sections 21(a) and (e) of the Environmental Protection Act (Act) (415 ILCS 5/21(a), (e) (2000)). The Village further alleges that Sears caused or threatened to cause water pollution, and created a water pollution hazard, in violation of Sections 12(a) and (d) of the Act (415 ILCS 5/12(a), (d) (2000)).

This matter is before the Board on a motion for summary judgment filed by Sears on December 12, 2001. The Village filed a response on December 26, 2001. Sears filed a reply on January 2, 2002. On January 3, 2002, the Village moved to strike Sears' reply. The Board denies the motion to strike Sears' reply, noting no resulting prejudice to the Village. Based on the present record, the Board declines to find, as Sears requests, that Sears did not violate the Act as alleged, or that the Village's requested remedy of cleanup cost reimbursement is inappropriate. The Board therefore denies the motion for summary judgment.

## BACKGROUND

In the early 1960s, Sears purchased the site located at the Centre of Park Forest shopping center. Mot. at 3; Resp. at 1.[1] Sears constructed a department store on the west side of the site and an automotive service and gas station on the east side. Resp. at 2. Sears installed five gasoline underground storage tanks (USTs), and one waste oil UST on the east

[1] References to Sears' motion for summary judgment will be cited as "Mot. at ___"; references to the Village's response will be cited as "Resp. at ___".

side of the site. *Id.* Sears closed the gas station in 1985, and removed the gasoline USTs at that time, but not the waste oil UST. Mot. at 3, Resp. at 2.

The Village objected to Sears' closure of the facility because of alleged financial expenditures and commitments the Village had made to benefit Sears. Resp. at 3. As part of a settlement agreement dated December 11, 1995, the Village acquired the site from Sears at no cost. Mot. at 4; Resp. at 3. At the time of closing, Sears submitted to the Village an environmental disclosure document. Resp. at 3. The Village alleges that the document represented that no petroleum had ever been released into the ground. *Id.* The parties disagree as to whether Sears knew, or should have known, of any contamination. Resp. at 20, Reply at 2.[2] Sears denies knowledge of any release of petroleum, and further alleges that the disclosure document simply stated that there had been no reportable release under the law in effect at that time. Reply at 2-3. Pursuant to the settlement agreement, the Village could not sell or transfer the property for a period of two years after the conveyance to allow Sears to receive a tax write-off for the conveyance. Resp. at 3.

In early 1998, American Store Properties, Inc. (ASPI) began negotiations with the Village to purchase the east side of the site to build an Osco Drug Store. Mot. at 5, Resp. at 4. Also, in September 1998, the Village agreed to convey the west side of the site to Associated Ventures, Inc. (AVI) to construct a senior, independent and assisted, residential care facility. Resp. at 5. By contract, the Village was obligated to convey to AVI an environmentally clean property. *Id.* at 6.9

ASPI employed SECOR, an environmental consultant, to perform an environmental assessment of the east side of the site. Mot. at 5; Resp. at 4. SECOR's investigation in April and May 1998, detected contaminants, including petroleum, petroleum related products, and by-products. *Id.* On belief that the contamination exceeded the boundaries of ASPI's parcel, SECOR conducted assessments on the south and west sides of the site, also detecting contamination. Mot. at 5, Resp. at 5. SECOR's supplemental report is dated August 25, 1998. Resp. at 5.

In January 1999, SECOR submitted to ASPI and the Village a Corrective Action Plan (CAP) report. Resp. at 6. The report addressed remediation of the entire property, both ASPI's and AVI's parcels. *Id.* The CAP report stated that the objective of the remediation was to obtain a No Further Remediation (NFR) letter from the Illinois Environmental Protection Agency (Agency) for both parcels. *Id.* The CAP report proposed three alternative methods to obtain the objective under the Board's regulations for a tiered approach to corrective action objectives (TACO) (*see* 35 Ill. Adm. Code 742). *Id.* The alternative methods were proposed as follows: (1) remediate AVI's parcel to Tier I residential cleanup objectives by soil removal, and remediate ASPI's parcel to Tier III commercial cleanup objectives by property use restrictions and engineered barriers; (2) remediate only the residential portion of AVI's parcel to Tier I residential objectives, and remediate the remainder

[2] References to Sears' reply to the Village's response will be cited as "Reply at ___."

of AVI's parcel, and ASPI's parcel, to Tier III commercial objectives by the same means as the first method; or (3) remediate both parcels to Tier I residential objectives for Class II groundwater migration. *Id.*

Upon learning of the contamination, the Village hired an independent environmental consultant, Beling, to review SECOR's proposals, and advise the Village of the preferred method of remediation. Resp. at 7. In subsequent discussions, both SECOR and Beling recommended the third approach as the preferred alternative. *Id.* The Village accepted the advice and recommendation to remediate to Tier I residential cleanup objectives for both parcels. *Id.* This decision allegedly was based on the health and welfare of the Village residents and the residents of the senior care facility; the contamination across both parcels; the lack of a substantial cost difference between a total Tier I residential remediation and a split Tier I/Tier III approach; ASPI's desire to avoid long term maintenance and liability issues; and the possibility that Tier III might be rejected by the Agency. *Id.* at 8.

On April 21, 1999, the Village hired SECOR to remediate AVI's parcel since SECOR was already remediating the ASPI parcel. Resp. at 8. The Village and ASPI agreed that the Village would pay to remediate AVI's parcel, and the parties would split the costs to remediate ASPI's parcel. Resp. at 8-9.

On May 7, 1999, the Village allegedly notified Sears of the contamination, the plans for remediation, and the Village's belief that Sears would be liable for costs. Resp. at 9. According to the Village, Sears continually requested environmental reports, and other information, but no progress was made between the parties pertaining to the settlement of the issue. *Id.* Sears alleges that it was never consulted on the remediation alternatives, and the Village alleges that Sears never so requested. Mot. at 6, Resp. at 9.

SECOR performed the remediation during the summer of 1999. Resp. at 9. According to the Village, SECOR disposed of 9,766 tons of impacted soil, 1,700 gallons of petroleum-impacted "perched" groundwater, and the 1,000 gallon waste oil UST. *Id.* On October 14, 1999, ASPI purchased the parcel. *Id.*

On November 5, 1999, SECOR submitted to the Agency a corrective action completion report that the site had been remediated to Tier I objectives for residential property with Class II groundwater. Resp. at 10. The report requested an NFR letter. *Id.* The Agency required SECOR to amend the report to explain that the groundwater ingestion pathway was sufficiently excluded. *Id.* at 11. The Agency then issued an NFR letter dated April 28, 2000. *Id.*

On November 1, 2000, the Village filed a complaint alleging that Sears violated the Act, and seeking cost reimbursement from Sears for the remediation. The Village alleges that costs for assessment and remediation exceed $650,000. Complaint at 3. On February 15, 2001, the Board held that the complaint was neither duplicitous, nor frivolous, and granted Sears' application to submit documents "not subject to disclosure." On February 7, 2002, the Board granted Sears' motion to remove the "not subject to disclosure" designation on past and

future documents. On February 11, 2002, Sears re-filed its motion for summary judgment and reply without the "not subject to disclosure" designation.

## SUMMARY JUDGMENT

Summary judgment is appropriate where the pleadings and depositions, together with any affidavits and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd., v. Gleason, 181 Ill. 2d at 460, 693 N.E.2d at 358 (1998). 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, 181 Ill. 2d at 483, 693 N.E.2d at 370.

Summary judgment "is a drastic means of disposing of litigation," and therefore it should only be granted when the movant's right to the relief "is clear and free from doubt." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Putrill 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 arguable entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

## DISCUSSION

In considering Sears' motion for summary judgment, the Board will first consider the alleged violations, and will then consider the requested remedy.

### Alleged Violations of the Act

The Village alleges that Sears violated Sections 12 and 21 of the Act. 415 ILCS 5/12, 21 (2000).

Section 12 of the Act provides in pertinent part:

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 on the land in such place and manner so as to create a water pollution hazard. 415 ILCS 5/12 (2000).

Section 21 of the Act provides in pertinent part:

No person shall:

(a) Cause or allow the open dumping of waste.

(e) Dispose, treat, store or abandon any waste, or transport any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder. 415 ILCS 5/21 (2000).

**Sears' Argument**

Sears argues that the facts demonstrate no clear violation of Sections 12 and 21 of the Act (415 ILCS 5/12, 21 (2000)). According to Sears, there can be no violation of Section 12 of the Act because, in its NFR application, the Village advised the Agency that there was no groundwater exposure pathway. Sears argues that if there is no groundwater at the site, there can be no violation of Section 12 of the Act.

Regarding Section 21 of the Act, Sears argues that dumping or disposal of waste cannot be considered a violation unless there is some environmental consequence or risk. Otherwise, Sears asserts, dripping one ounce of gasoline while filling up a car would be a violation of the Act, and owners of USTs closed with State approval would still be in violation unless they removed every particle of gasoline. According to Sears, in this case, there was no excessive risk to human health or the environment. Sears argues that if detectable levels of contaminants always resulted in a violation of Section 21 of the Act, then neither the UST regulations nor an NFR letter can protect a party from liability under the Act.

**Village's Argument**

With respect to the alleged violation of Section 12 of the Act, the Village argues that Sears misinterprets SECOR's representation to the Agency that there was no groundwater exposure. According to the Village, SECOR's position was that there was no significant threat of migration to groundwater by the limited contamination left in place after remediation.

The Village further argues that Sears violated Section 21 of the Act by abandoning waste at the site. The Village alleges that Sears removed the USTs without notifying the State, left the piping and waste oil UST in the ground long after it was abandoned, and made no remediation efforts. The Board has previously found that gasoline leaked from a UST constitutes waste. *See* People v. State Oil Co., PCB 97-103 (Aug. 19, 1999). The Village cites precedent that an owner has a right to recover cleanup costs under Section 21(e) for the prior abandonment of waste. *See* Singer v. Bulk Petroleum Corp., 9 F.Supp.2d 916 (N.D.Ill. 1998).

**Board Analysis**

The Board finds questions of fact as to whether Sears violated Section 12 of the Act. Based on the parties' differing interpretations of SECOR's assessment, facts are in dispute regarding the existence of a groundwater pathway, and any actual or threatened water pollution prior to remediation. With respect to the alleged violation of Section 21 of the Act, Sears cites no authority for the proposition that there can be no violation when the amount of abandoned waste allegedly did not cause or threaten significant risk. The Village asserts that it removed 9,766 tons of impacted soil, 1,700 gallons of petroleum-impacted "perched" groundwater, and the 1,000 gallon waste oil UST to meet TACO Tier I residential cleanup objectives. It is implicit in Sears' argument that waste was present at the site. The Board cannot find as a matter of law that there was no violation of Section 21 of the Act. Accordingly, the Board denies Sears' motion for summary judgment on the alleged violations.

**Requested Remedy**

Sears disputes that private cost recovery is available in this case, but if it is an available remedy, Sears argues that the Village's actions were unreasonable under Section 33(c) of the Act (415 ILCS 5/33(c) (2000)). Of course, if the Village does not prove that Sears violated the Act, the issue of remedy will not arise. However, the Board will rule on this argument for judicial economy, as cost reimbursement is the only relief the Village seeks.

**Private Cost Recovery**

**Sears' Argument.** Sears argues that there is no provision in the Act that provides for a private cost recovery action. Sears cites case law that the Act was not designed to protect the purchasers of real estate from economic losses when they discover after the conveyance that remedial action is necessary to remove contaminants from the property. NBD Bank v. Krueger Ringier, Inc., 292 Ill. App. 3d 691, 686 N.E. 2d 705 (1st Dist. 1997). According to Sears, the exception to this rule is the private right of contribution when the purchaser is sued to enforce the Act. *See* People v. Fiorini, 143 Ill.2d 318, 574 N.E.2d 612 (1991).

Sears asserts that the alleged contamination was discovered after the land was conveyed "as is," thus NBD prevents recovery of economic losses. Furthermore, since the Village is not seeking contribution from Sears due to a remediation order from any government agency, Sears argues that Fiorini does not apply.

Sears does not dispute that the Board has previously authorized cost recovery in citizen suits, but argues that the judgment in those cases furthered the public policy purpose of the Act, such as eliminating environmental damage. Sears argues that there is no public policy goal in this case, since the land was already remediated prior to the initial filing of the complaint.

**Village's Argument.** The Village notes that the Board has previously ruled that the Act authorizes it to award cleanup costs to private parties for violations of the Act where no state enforcement action was pending. *See* Union Oil Co. v. Barge-Way Oil Co., PCB 98-169 (Jan. 7, 1999).

The Village criticizes Sears assertion that the Village should have waited for the State to file an action against the Village rather than complying with the law on its own initiative. The Village argues that this concealment would have been contrary to public policy, and the statutory provisions mitigating penalties (*see* 415 ILCS 5/42(h) (2000)).

**Board Analysis.** The Board has already distinguished NBD from earlier Board precedent in that it involved an action in tort. In a factually similar case, the Board held that NBD does not affect the Board's prior decisions holding that the Board may award cleanup costs in a citizen enforcement action as a remedy for a violation of the Act. *See* Malina v. Day, PCB 98-54 (Jan. 22, 1998); *also see* 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, 2002 ) (dismissed for want of prosecution); Lake County Forest Preserve v. Ostro, PCB 92-80 (Mar. 31, 1994); and MDI v. Regional Board of Trustees, PCB 00-181 (May 2, 2002). In fact, the Board has already determined in this matter that the request for reimbursement of cleanup costs is not frivolous under the Act. *See* Village of Park Forest v. Sears, PCB 01-77 (Feb. 15, 2001).

The Board finds no compelling reason to find, as a matter of law, that the facts of this case preclude an award of cleanup costs simply because the remediation was not ordered by a government agency, and the Village received an NFR prior to filing this complaint. Additionally, the Board is not compelled to find at this time that the Village's requested remedy is inappropriate as a matter of law because the land was allegedly transferred "as is." The Board denies Sears' motion for summary judgment on the availability of private cost recovery.

**Appropriate Remedy**

In the alternative, if private cost recovery is available under these facts, Sears argues that the Village's actions were unreasonable under Section 33(c) of the Act (415 ILCS 5/33(c) (2000)).

Section 33(c) of the Act provides in pertinent part:

> 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;

(iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source. 415 ILCS 5/33(c).

**Sears' Argument.** Sears argues that it is entitled to judgment as a matter of law because the factors enumerated in Section 33(c) of the Act (415 ILS 5/33(c) (2000)) demonstrate that the Village's remediation to Tier I residential cleanup objectives was not economically reasonable, nor was it chosen to protect health, general welfare, and property. Sears argues that the Village was not concerned with economic reasonableness because it determined that Sears would be liable. Additionally, Sears asserts that the Village's approach was not chosen to protect health, general welfare, and property, but was chosen to assist financing for a residential development. According to Sears, SECOR estimated that costs for obtaining an NFR letter using methods of remediation other than Tier I residential or commercial cleanup objectives could have ranged from $50,000-$100,000.

**Village's Argument.** The Village argues that the question of remedy should be reserved for hearing. Section 33(c) of the Act requires the Board to weigh mitigating factors which is a fact intensive inquiry. Even if there were no facts at issue, the Village argues that the remedy is appropriate based on the intended use of the property for a living facility for the elderly and an Osco drug store. The Village denies Sears' allegation that the Tier I residential remediation alternative was selected to obtain HUD financing for the AVI's parcel.

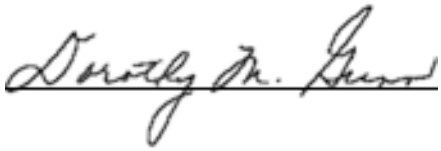
**Board Analysis.** The parties disagree over the appropriate degree of remediation. The Village disagrees with Sears, and alleges a lack of substantial cost difference between the alternative methods. The Village further alleges that it opted for Tier I residential remediation objectives for reasons including the best interests of the health and welfare of Village residents and the elderly residing on AVI's parcel, and the desire to use the property in any manner without long-term maintenance or liability issues. The Board finds that questions of fact exist with regard to Section 33(c) factors. For example, there is insufficient evidence in the record for the Board to determine as a matter of law that the Village's actions were economically unreasonable. The Board therefore denies Sears motion for summary judgment on the appropriateness of the Village's cleanup costs.

## CONCLUSION

Without further findings of fact, the Board cannot find that Sears did not violate Sections 12 or 21 of the Act, nor can we find that private cost recovery is unavailable under these facts, or that the requested remedy is inappropriate. Accordingly, the Board denies Sears' motion for summary judgment. The Board directs the parties to proceed to hearing as scheduled.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 6, 2002, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board