

ILLINOIS POLLUTION CONTROL BOARD  
September 6, 2001

ANTONIO D.H. NAM, )  
 )  
 Complainant, )  
 )  
 v. ) PCB 97-234  
 ) (Citizens Enforcement – UST)  
 KIKON SUH, )  
 )  
 Respondent. )

JOSEPH J. ANNUNZIO, JOSEPH J. ANNUNZIO AND ASSOCIATES, LTD., APPEARED ON BEHALF OF COMPLAINANT; and

JACOB REISS APPEARED ON BEHALF OF RESPONDENT.

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

On June 24, 1997, Antonio D.H. Nam (Nam) filed a two-count citizens enforcement complaint against Kikon Suh (Suh) pursuant to 415 ILCS 5/31(b) of the Environmental Protection Act (Act). The complaint alleges that Nam is the present owner of a site located at 5101-5117 North Kedzie Avenue, Chicago (site), which was previously owned by Suh. Comp. at 1.<sup>1</sup> Nam further asserts that in May 1996, soil contamination was confirmed in the vicinity of a 1,000 gallon gasoline underground storage tank (UST) found on the site. Nam alleges that a release of the gasoline at the site occurred during the time when Suh owned the site, as Nam never operated the tanks during his ownership of the site. Comp. at 2. Nam developed and implemented a corrective action plan and, subsequently, the Illinois Environmental Protection Agency (Agency) issued a “No Further Action” letter on December 23, 1996.

Nam asserts in count I that Suh violated Section 21(a) of the Act (415 ILCS 5/21(a) (1996)) by causing or allowing open dumping of waste onto the site. Comp. at 3. In count II, Nam alleges that Suh violated Section 21(d)(2) of the Act (415 ILCS 5/21(d)(2) (1996)) by conducting a waste-storage, waste-treatment, or waste-disposal operation in violation of 35 Ill. Adm. Code 732.200. Comp. at 5. Nam states that Suh, as the owner of the site during the time of the contamination, violated Section 732.200 by not responding to all confirmed releases of petroleum as required by the applicable statutory and regulatory reporting requirements. Comp. at 5. Therefore, Nam requests that the Board (1) find Suh in violation of the Act and Board regulations; (2) order Suh to remediate the gasoline-contaminated soil; (3) order him to reimburse Nam for all costs incurred due to contamination of the site; and (4) grant any further relief the Board deems appropriate. Comp. at 3, 5.

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<sup>1</sup> The complaint in this matter will be referred to as “Comp. at \_\_\_\_.”

Hearings in this matter began on October 5, 1999, and concluded on March 29, 2001.<sup>2</sup> On May 4, 2001, the complainant filed his post-hearing brief. Suh failed to file a brief.

For the reasons expressed below, the Board finds that Nam has failed to prove the violations of the Act and Board rules alleged in the complaint.

### **Procedural History**

On July 24, 1997, the Board accepted this matter for hearing. On June 1, 1998, Jacob Reiss (Reiss) filed an appearance on behalf of Suh. On May 29, 1998, Nam filed a request to admit facts. On July 16, 1998, Nam filed a motion for summary judgment. On October 15, 1998, the Board denied Nam's motion for summary judgment, but admitted certain facts as discussed below.

Starting in 1999, hearing was noticed and cancelled eight times at the behest of the Suh. Tr.2 at 11. On April 4, 2000, Suh filed a motion for leave to file a third-party complaint *instanter*. On May 4, 2000, the Board directed Suh to file proof of service of the third-party complaint. On June 8, 2000, the Board dismissed Suh's motion for leave to file a third-party complaint for failure to file proof of service. On December 8, 2000, the case was set for hearing on January 3 and 4, 2001. On January 2, 2001, Suh filed a motion to continue the hearing and a request for leave to refile the third-party complaint. The motion was granted in part. Specifically, Nam was allowed to proceed with its case in chief on January 3, 2001. The hearing was then continued, and Suh given leave to conduct cross-examination, and present evidence when the hearing resumed. Suh was also given leave to file the third-party complaint. Suh failed to file the third-party complaint.

Another hearing was held on February 26, 2001. At the hearing, Reiss asserted that in preparing for the hearing he had discovered a conflict of interest, and felt that he could no longer represent Suh. Tr.1 at 32. Reiss indicated that the conflict was recently discovered, and that Suh had not, at the time of the hearing, been notified of the conflict.<sup>3</sup> Reiss did, however, state that Suh would be notified of the conflict that day. As a result, the attorney for Suh stated that he was orally withdrawing from the case at the hearing. As evidenced on the record, Reiss was informed that the appropriate filing would have to be made with the Board. To date, no withdrawal pursuant to Section 101.400(b) of the Board's procedural regulations has been received.

On March 29, 2001, Reiss filed motions to continue the hearing scheduled for that day, to file an answer *instanter*, for leave to withdraw as attorney, for time for Suh to obtain a new

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<sup>2</sup> The January 3, 2001 and February 26, 2001 transcripts will be referred to as "Tr.1 at \_\_\_\_." The March 29, 2001 transcript will be referred to as "Tr.2 at \_\_\_\_."

<sup>3</sup> Reiss determined that he had represented the complainant on previous matters. Tr.2 at 32.

attorney, and to re-file third-party proceedings.<sup>4</sup> On April 23, 2001, a hearing officer order was issued granting leave to file the answer *instanter*, but denying all other motions.<sup>5</sup>

### **Hearing**

Attorney Joseph Annunzio appeared on behalf of Nam. Reiss appeared on behalf of Suh, but Suh did not appear. Nam testified on his own behalf that: (1) Suh did not inform him about the existence of the USTs when Nam purchased the property from Suh in 1989; (2) that Nam discovered the USTs when he attempted to sell the property in 1996; and (3) that Nam has since remediated the site. Tr.1 at 12-13. No members of the public attended the hearing.

### **Discussion**

As mentioned above, pursuant to the Board's October 15, 1998 order, the following facts requested to be admitted were deemed admitted: (1) Suh currently resides at 316 Indian Ridge, Glenview, Illinois 60025; (2) Suh was the owner of the property located at 5105-5117 North Kedzie Avenue, Chicago, Illinois, from 1987 to August 22, 1989; (3) three USTs were located on the property while Suh was the owner and operator of said property; (4) on September 24, 1971, a permit was issued by the City of Chicago to install a 10,000 gallon tank on the property; and (5) during the time in which Suh was the owner of the property, the USTs were never tested to determine whether they were leaking gasoline. Comp. Req. at 1-2.<sup>6</sup> Nam presented no evidence regarding when the tanks were in use or when the leak started.

### **Count I**

Section 21(a) of the Act states that no person shall cause or allow the open dumping of any waste. 415 ILCS 5/21(a) (2000). Pursuant to Section 31(e) of the Act (415 ILCS 31(e) (2000)), it is Nam's burden to show by a preponderance of the evidence that Suh violated the provisions of the Act alleged.

The record demonstrates only that the City of Chicago issued a permit to install a UST in 1971, and that Suh was the owner of the site from 1987 to August 22, 1989. Nam presented no

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<sup>4</sup> Reiss filed a motion for leave to withdraw, rather than a motion to withdraw pursuant to 35. Ill. Adm. Code 101.400(v).

<sup>5</sup> As this case was initially filed in 1997, the Board's procedural rules published on April 1, 1994 apply. Those rules allow the respondent 30 days after receipt of the complaint to file an answer. Those rules also provide that material allegations of the complaint are deemed denied if no answer is filed. *See* 35 Ill. Adm. Code Subtitle A, Chapter I, Section 103.122(d) (effective December 3, 1981). Since, the answer filed on March 29, 2001, does not contain any affirmative defenses, and, since all allegations are to be taken as denied, if filed, the hearing officer ruled that no material prejudice would result from accepting the answer *instanter*.

<sup>6</sup> Nam's May 29, 1998 request for admission of facts will be referred to as "Comp. Req. at \_\_\_\_\_."

evidence regarding when the tanks were in use or when the leak started. Accordingly, the Board finds Nam has not proven by a preponderance of the evidence that Suh caused or allowed open dumping of any waste. Therefore, the Board finds that no violation of Section 21(a) has occurred.

## **Count II**

Section 21(d)(2) of the Act (415 ILCS 5/21(d)(2) (2000)) states that:

No person shall:

- (d) Conduct any waste-storage, waste-treatment, or waste-disposal operation:
  - (2) in violation of any regulations or standards adopted by the Board under this Act . . .

Section 732.200 states that:

Owners and operator of underground storage tanks shall, in response to all confirmed releases of petroleum, comply with all applicable statutory and regulatory reporting and response requirements. 35 Ill. Adm. Code 732.200.

Section 732.103 defines “owner” as:

In the case of an underground storage tank in use on November 8, 1984, or brought into use after that date, any person who owns an underground storage tank used for the storage, use or dispensing of regulated substances;

In the case of any underground storage tank in use before November 8, 1984, but no longer in use on that date, any person who owned such underground storage tank immediately before the discontinuation of its use. 35 Ill. Admin. Code 732.103 (citation omitted).

Pursuant to the October 15, 1998 Board order denying Nam’s motion for summary judgment and in order to establish a violation of count II, Nam must show the specific timeframe that Suh owned and/or operated the tanks and must show that Suh was the owner and/or operator of the tanks when a release occurred. Nam failed to present any evidence regarding these two issues. The facts admitted pursuant to the October 15, 1998 Board order are not sufficient to prove this allegation. Specifically, Nam requested and the Board admitted only the fact that Suh was the owner and operator of the property, rather than the owner and operator of the USTs. There is no admission of fact or evidence that demonstrates Suh owned or operated the USTs or even knew of their existence. Pursuant to 35 Ill. Adm. Code 732.103, if the tank was not in use after November 8, 1984, whoever owned the UST immediately before the discontinuation of its

use would be considered the owner. Accordingly, the Board finds that Nam has failed to satisfy his burden of proof, and that it must enter a final order in favor of respondent Suh.

### **CONCLUSION**

Although Suh presented no evidence, it is Nam's burden to prove the allegations of the complaint. Accordingly, the Board finds Nam failed to prove that Suh violated the provisions alleged.

This opinion constitutes the Board's findings of fact and conclusions of law in this matter.

### **ORDER**

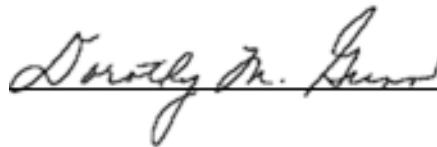
Nam has failed to prove the violations of the Act and Board rules alleged in the complaint.

Accordingly, this matter is dismissed and the docket is closed.

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) (2000); *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 101.520; *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 September 6, 2001, by a vote of 7-0.

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

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board