ILLINOIS POLLUTION CONTROL BOARD
February 18, 1999

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 98-80
	)	(Enforcement - Land)
CRAIG LINTON, an individual, and	)	
RANDY ROWE, an individual,	)	
	)	
Respondents.	)	

CONCURRING OPINION (by M. McFawn and K. M. Hennessey):

We respectfully concur with the Board's decision today because we agree that the Board must deny complainant's motion for summary judgment, as the Board did in its order of December 3, 1998. We do not, however, agree with the approach taken by the Board in resolving complainant's motion to reconsider. The motion to reconsider raised two significant new legal issues, one of which is potentially dispositive. We believe these issues warrant discussion, and therefore write separately to explain the basis for our votes to affirm the Board's earlier ruling.

Complainant seeks reconsideration based on two asserted errors by the Board in application of the law in its analysis in the December 3 order. First, complainant asserts that the Board erred by focusing on ownership of the site, rather than ownership of the tires. Second, complainant asserts that there is no requirement in Section 55.3 that the respondents own the tires at the time of removal in order to be held liable.

OWNERSHIP OF TIRES VERSUS OWNERSHIP OF SITE

Section 55.3(g) of the Act provides in pertinent part that

> the owner or operator of any accumulation of used or waste tires at which the [Illinois Environmental Protection] Agency has undertaken corrective or preventive action under this Section shall be liable for all costs thereof incurred by the State of Illinois[.] 415 ILCS 5/55.3(g) (1996)

We believe complainant is correct that ownership or operation of the accumulation of tires, and not ownership of the site, makes a person liable for removal costs under Section 55.3(g).[1]

[1] Even if not dispositive, however, ownership of the site could still be probative of ownership or operation of an accumulation of tires at the site.

Even under this view, however, there would still be an issue of material fact precluding summary judgment.

In its order of December 3 the Board concluded that the record, construed liberally in favor of the respondents, established that respondents owned and operated the site and the tires in 1991, but did not establish that they owned the site in March of 1996, when the Agency removed the tires. The Board concluded that an issue of fact existed as to whether they owned or operated the site (and, by extension, the tires) at the time liability for the cost of removal arose. Accordingly, the motion for summary judgment was denied.

Even if the Board were to focus on whether the respondents owned or operated the accumulation of the tires at the site (as opposed to the site itself), complainant is not entitled to summary judgment. Respondents' admissions of possession, dominion, enjoyment, authority and control of the tires all refer to a time in the indefinite past, and it is possible that respondents could have transferred the site and the tires with it before March 1996. In ruling on a motion for summary judgment, the Board must draw the inference favoring the non-movant respondents, *i.e.*, that any transfer of the property included the tires. Pyne v. Witmer, 129 Ill. 2d 351, 358, 543 N.E.2d 1304, 1308 (1989). Therefore, even under complainant's interpretation of Section 55.3(g) there remains an issue of material fact as to whether respondents owned or operated the accumulation of tires at the time the removal took place.

OWNERSHIP OR OPERATION OF ACCUMULATION
OF TIRES AT TIME OF REMOVAL

Complainant also argues that the Act does not require complainant to show that respondents owned or operated the tires at the time that the Agency removed the tires. Under complainant's view, the Board could impose liability on any person who ever owned or operated an accumulation of used or waste tires, even if that person transferred ownership or ceased operation before the State acted to prevent or correct a hazard. We find no support for this interpretation in the Act.

Section 55.3 imposes liability on the "owner or operator of any accumulation of used or waste tires at which the Agency has undertaken corrective or preventive action." The phrase "at which the Agency has undertaken corrective or preventive action" modifies "owner or operator or any accumulation of tires." Therefore, Section 55.3(g) imposes liability only on those who are owners or operators when the Agency takes corrective action. A prior owner or operator who legally and completely divests himself of ownership and control of the tires before the Agency acts is not liable for the Agency's costs under Section 55.3(g), because he does not own or operate the tires that are the subject of the Agency's action.

CONCLUSION

Because we believe this analysis should have been included in the Board's order, we do not join in the order adopted by the Board today, although we concur in the result.

Marili McFawn
Board Member

Kathleen M. Hennessey
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above concurring opinion was submitted on the 22nd day of February 1999.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board