

ILLINIOS POLLUTION CONTROL BOARD
February 20, 2003

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 02-162
) (Enforcement – Land)
FOX VALLEY DRY WALL, INC., an)
Illinois corporation,)
)
Respondent.)

INTERIM OPINION AND ORDER OF THE BOARD (by M.E. Tristano):

This matter is before the Board on the complainant's January 16, 2003 motion to deem facts admitted and for summary judgment against Fox Valley Dry Wall (respondent). The People filed a two-count complaint against respondent on April 2, 2002 which was served on respondent. The complaint alleges that respondent failed to perform timely site classification and early action requirements at its manufacturing facility located at 707 North Highland, Aurora, Kane County. Specifically, the complainant alleges that respondent violated Sections 57.6 and 57.7(b) of the Environmental Protection Act (Act) (415 ILCS 5/57.6, 57.7(b) (2002)), and Sections 732.300(a), 732.100(c), 732.307(b) of the Board regulations. (35 Ill. Adm. Code 732.300(a), 732.100(c), 732.307(b)). The respondent has not filed an answer to the complaint, the motion to deem facts admitted, or the motion for summary judgment as of the date of this order. For the reasons stated below, the Board grants the complainant's motion to deem facts admitted and summary judgment against respondent.

PROCEDURAL BACKGROUND

On April 2, 2002, the People filed a two-count complaint against Fox Valley Dry Wall, Inc., with appropriate service of said complaint being made. Section 103.204(d) of the Board's procedural rules allows respondent 60 days to respond to the complaint. A telephonic status conference was conducted on May 2, 2002. During that conference, Mr. Brent Schleifer, appeared on behalf of the respondent and was informed that he could not represent the corporation and that only an attorney could do so and one must be obtained. Subsequent telephonic status conference calls were conducted on May 23, 2002, August 22, 2002, November 14, 2002, and January 23, 2003. At these conferences, neither the respondent nor its legal representative appeared. The record indicates appropriate service of all hearing officer orders scheduling these conferences. On January 16, 2003, the complainant filed a motion to deem facts admitted and for summary judgment. As of the date of this order, the respondent has failed to respond to either the complaint or the motion to deem facts admitted and for summary judgment.

MOTION TO DEEM FACTS ADMITTED

Complainant alleges in its motion that, according to Section 103.204(d) of the Board's procedural rules (35 Ill. Adm. Code 103.204(d)), respondent admitted the material allegations asserted in the complaint because it failed to file an answer to the complaint. Mot. at 2. Section 103.204(d) states in relevant part that:

- (d) Except as provided in subsection (e) of this Section, the respondent may file an answer within 60 days after receipt of the complaint if respondent wants to deny any allegations in the complaint. All material allegations of the complaint will be taken as admitted if no answer is filed or if not specifically denied by the answer, unless respondent asserts a lack of knowledge sufficient to form a belief. Any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing.

Respondent has failed to answer or motion pursuant to 35 Ill. Adm. Code 103.204(d) as of the date of this order. The Board has accorded Fox Valley Dry Wall, Inc., numerous opportunities to respond to the complaint and it has failed to do so well beyond the 60-day limit. Thus, Board must deem the material allegations concerning the respondent in the complaint to be admitted pursuant to 35 Ill. Adm. Code 103.204(d). Specifically, the Board finds the following material allegations are admitted:

1. Fox Valley Dry Wall, Inc., is an Illinois corporation. Respondent operates a manufacturing business at 707 North Highland, Aurora, Kane County. Respondent is the owner of a 1,000 gallon gasoline storage tank system, including pipes. This tank system is buried completely underground at the site, and was operating prior to and on September 2, 1998. Comp. at 2.
2. On September 2, 1998, respondent, during excavation and removal of the underground tank, discovered that an unknown quantity of gasoline had been released from the tank into the surrounding soil. Respondent reported this release to the Illinois Emergency Management Agency that same day. The release was assigned Leaking Underground Storage Tank incident number 982188. Comp. at 2.
3. Gasoline released from the underground tank spread through soils at the site. The released gasoline has also migrated into soils outside of the site.
4. On April 24, 2002, approximately 19 months after the release, the respondent sent a combine 20-day and 45-day report for the LUST incident 982188 to the Agency. Comp. at 2.

5. On December 29, 2000, the Agency wrote to the respondent, and required respondent to submit a Site Classification Completion Report within 45 days, or by February 12, 2001. This report was not received by the Agency until April 16, 2001. Comp. at 2-3.
6. From at least September 2, 1998 until April 16, 2000, respondent failed to evaluate and classify the Site, and failed to provide Site Classification results to the Agency. Comp. at 7.
7. Respondents reported the release of petroleum to the Agency on September 2, 1998, but did not submit 20-day and 45-day reports until April 24, 2000. Comp. at 10.

Since the Board finds that the facts concerning the respondent are deemed to be admitted, it next addresses whether to grant complainant's motion for summary judgment.

MOTION FOR SUMMARY JUDGMENT

Complainant alleges in its January 16, 2003 motion for summary judgment, which was properly served, that if respondent admits all material allegations in the complaint, then no genuine issue of material fact remains in the case, and the complainant is entitled to summary judgment in its favor as a matter of law. Respondent has not filed a response to the complainant's motion as of February 12, 2003. The Board grants complainant's motion for summary judgment for the reasons expressed below.

Standard of Review

Summary judgment is appropriate when 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. See Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 693 N.E.2d 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 relief "is clear and free from doubt." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Purtill 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 (2d Dist. 1994)

Discussion of Summary Judgment

The Board finds that the allegations deemed admitted pursuant to 35 Ill. Adm. Code 103.204(d) are sufficient to prove that complainant is entitled to summary judgment in its favor under 35 Ill. Adm. Code 101.506(b). Fox Valley Dry Wall, Inc., has failed to respond to the

motion for summary judgment. The Board discusses how these allegations support each of the two counts of the complaint in turn.

Count I

Complainant first alleges that respondent violated Sections 57.6 and 57.7(b) of the Act and 35 Ill. Adm. Code 732.300(a), 732.100(c), and 732.307(b) by failing to perform timely site classification.

Section 57.6 of the Act states that:

- a. Owners and operators of underground storage tanks shall, in response to all confirmed releases, comply with all applicable statutory and regulatory reporting and response requirement.

Section 57.7(b) of the Act states that:

- b. Site Classification

After evaluation of the physical soil classification and groundwater investigation results, when required, and general site information, the site shall be classified as “No Further Action”, “Low Priority”, or “High Priority” based on the requirements of this Section. Site classification shall be determined by a Licensed Professional Engineer in accordance with the requirements of this Title and the Licensed Professional Engineer shall submit a certification to the Agency of the site classification. The Agency has the authority to audit site classifications and reject or modify any site classification inconsistent with the requirements of this Title.

Section 732.300(a) of the Underground Storage Tank Regulations states that:

- a. Except as provided in subsection (b) of this Section, the owner or operator of any site subject to this Part shall evaluate and classify the site in accordance with the requirements of this Subpart C. All such sites shall be classified as No Further Action, Low Priority or High Priority. Site classifications shall be based on the results of the site evaluation, including, but not limited to, the physical soil classification and the groundwater investigation, if applicable.

Section 732.100 (c) of the Underground Storage Tank Regulations states that:

- b. Owners or operators subject to this Part by law or by election shall proceed expeditiously to comply with all requirements of the Act and the regulations and to obtain the No Further Remediation Letter signifying final disposition of the site for purposes of this

Part. The Agency may use its authority pursuant to the Act and Section 732.105 of this Part to expedite investigative, preventive or corrective action by an owner or operator or to initiate such action.

Section 732.307(b) of the Underground Storage Tank Regulations states that:

- c. As a part of each site evaluation, the Licensed Professional Engineer shall conduct a physical soil classification in accordance with the procedures at subsection (c) or (d) of this Section. Except as provided in subsection (e) of this Section, all elements of the chosen method of physical soil classification must be completed for each site. In addition to the requirement for a physical soil classification, the Licensed Professional Engineer shall, at a minimum, complete the requirements at subsections (f) through (j) of this Section before classifying a site as High Priority or Low Priority and subsection (f) through (i) of this Section before classifying a site as No Further Action.

The Board in this order deemed admitted the allegations that on September 2, 1998, during excavation and removal of the underground tank, respondent discovered that an unknown quantity of gasoline had been released from the tank into the surrounding soil. That same day, the respondent reported this release to the Agency. The release was assigned LUST incident number 982188. Gasoline released from the underground tank spread through the soils at the site and has also migrated into soils outside of the site. On April 24, 2000, approximately 19 months after the release, the respondent sent a combined 20-day and 45-day report for LUST incident 982188 to the Agency. Comp. at 2. On December 29, 2000, the Agency wrote to respondent, and required the respondent to submit a Site Classification Completion Report within 45 days, or by February 12, 2001. This report was not received by the Agency until April 16, 2001. Comp. at 2-3. From at least September 2, 1998 until April 16, 2000, the respondent failed to evaluate and classify the site as required by the Act and regulations. The respondent also failed to provide Site Classification results to the Agency. Comp. at 7.

As an owner of an underground storage tank, respondent failed to comply with all applicable statutory regulations under Section 57.6 of the Act. The respondent also failed to evaluate and classify the site, and failed to provide Site Classification results to the Agency as required by 732.000(a), 732.100(c), and 732.307(b). The Board finds that the facts, as deemed admitted, are sufficient to find respondent in violation of the Act and regulations. The respondent, therefore, violated Section 57.6 and 57.7(b) of the Act and 35 Ill. Adm. Code 732.300(a), 732.100(c), and 732.307(b).

Count II

Complainant alleged in the second count of its complaint that respondent failed to perform early action requirements in violation of Section 57.6 of the Act and 35 Ill. Adm. Code 732.202.

Section 57.6 of the Act states that:

- a. Owners and operators of underground storage tanks shall, in response to all confirmed releases, comply with all applicable statutory and regulatory and regulatory reporting and response requirement.

Section 732.202 of the Underground Storage Tank Regulations provides, in pertinent part, as follows:

* * *

- b. Within 20 days after confirmation of a release of petroleum from a UST system in accordance with regulations promulgated by the OSFM, the owner or operator shall perform the following initial abatement measures:

* * *

- c. Within 45 days after confirmation of a release, owners or operators shall assemble information about the site and the nature of the release, including information gained while confirming the release or completing the initial abatement measures in subsections (a) and (b) of this Section. This information shall include, but is not limited to, the following:

1. Data on the nature and estimated quantity of release;
2. Data from available sources or site investigations concerning the following factors: surrounding populations, water quality, use and approximate locations of wells potentially affected by the release, subsurface soil conditions, locations of subsurface sewers, climatological conditions and land use;
3. Results of the site check required at subsection (b)(5) of this Section;
4. Results of the free product investigations required at subsection(b)(6) of this Section, to be used by owners or operators to determine whether free product must be recovered under Section 732.203.

Respondents reported the release of petroleum to the Agency on September 2, 1998, but did not submit the 20-day and 45-day reports until April 24, 2000. Comp. at 10. As an owner of an underground storage tank, respondent failed to comply with all applicable statutory regulations as required by Section 57.6 of the Act. Respondent reported the release of petroleum on September 2, 1998 but it failed to submit the 20-day and 45-day reports until April 24, 2000, as

required by 35 Ill. Adm. Code 732.202. The Board finds that these facts, as deemed admitted, are sufficient to find that respondent violated Section 57.6 of the Act and 35 Ill. Adm. Code 732.202. The respondent, therefore has violated these Sections.

CONCLUSION

The Board deems admitted the material allegations set forth in the complaint in this matter. The Board has accorded Fox Valley Dry Wall, Inc., numerous opportunities to respond to the complaint and it has failed to do so well beyond the 60-day limit under 35 Ill. Adm. Code 103.204(d). The Board also grants complainant's motion for summary judgment against respondent. The Board finds that respondent violated Sections 57.6 and 57.7(b) of the Act and 35 Ill. Adm. Code 732.300(a), 732.100(c), 732.307(b), and 732.202. The Board also finds that respondent may be liable for all costs, including attorney, expert witness, and consultant fees, expended by the State in pursuit of this action against respondent.

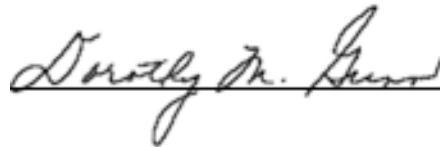
The Board directs the parties to hearing as expeditiously as practicable on the specific issue of the appropriate penalty amounts, costs, and attorney fees in this matter.

ORDER

1. The Board grants complainant's motion to deem admitted the material allegations in its April 2, 2002 complaint, as set forth in the opinion above.
2. The Board grants complainant's motion for summary judgment, and finds respondent in violation of Sections 57.6 and 57.7(b) of the Act and 35 Ill. Adm. Code 732.300(a), 732.100(c), 732.307(b), and 732.202.
3. The Board directs the parties to hearing on the specific issue of the appropriate penalty amount, costs, and attorney fees in this matter.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on February 20, 2003, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board