

ILLINOIS POLLUTION CONTROL BOARD
February 19, 2004

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 02-77
) (Enforcement - Land)
MILLENIUM RECYCLING & SOLID)
WASTE CONSULTANTS, INC., SHERRI)
CLEMENTI, individually and as president of)
MILLENIUM RECYCLING & SOLID)
WASTE CONSULTANTS, INC., and)
MICHAEL LORENCE, individually,)
)
Respondents.)

OPINION AND ORDER OF THE BOARD (by T.E. Johnson):

On December 15, 2003, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a motion to deem facts admitted and for summary judgment against Millenium Recycling & Solid Waste Consultants, Inc. (Millenium), Sherri Clementi (Clementi), and Michael Lorence (Lorence) (collectively respondents) on all counts of the amended complaint filed in this matter. To date, no respondent has filed any response to the motion.

For the reasons set forth below, the Board grants the People's motion. The Board finds that the respondents have violated the Environmental Protection Act (Act) as alleged in the amended complaint, and imposes a \$25,000 penalty on the respondents.

BACKGROUND

On December 12, 2001, the People filed a complaint against Millenium alleging violations of Sections 21(a), 21 (d)(1), 21(e), and 21(p)(1) of the Act. 415 ILCS 5/21(a), (d)(1), (e), and (p)(1) (2002). The People alleged that Millenium violated these provisions by conducting a waste disposal operation without a permit, and causing or allowing litter. The complaint concerns Millenium's facility at 31W620 Spaulding Road, Elgin, Cook County.

On January 23, 2003, the Board granted Millenium's attorney motion to withdraw. In order to avoid any undue delay in the resolution of this case, the Board ordered Millenium to retain an attorney who was directed to file an appearance on or before February 24, 2003, and an answer to the complaint on or before March 24, 2003. At a telephonic status conference held on March 4, 2003, Clementi, not a licensed attorney, attempted to appear on behalf of respondent Millenium in her capacity as registered agent. Clementi represented that the respondent corporation is dissolved and bankrupt and lacked the funds to retain an attorney. By order dated

March 4, 2003, the hearing officer gave Clementi until March 19, 2003, to respond to the January 23, 2003 Board order. No response was received by the Board.

On April 10, 2003, the People filed an amended complaint that added Sherri Clementi and Michael Lorence as respondents. The Board accepted the amended complaint on May 15, 2003, advising Sherri Clementi and Michael Lorence that their time to file any answer or responsive motion to the complaint would begin to run from their respective receipt of the order. On August 21, 2003, the Board ordered respondent Millenium to show cause why a default order in this case should not be entered for failure to appear at numerous status conferences. The Board allowed Millenium until September 4, 2003, to respond to this order.

On September 17, 2003 the Board received a Discharge of Debtor Order dated September 8, 2003 issued by the U. S. Bankruptcy Court (N.D. Ill.) regarding “Sherri Lynn Clementi AKA: Millenium Recycling.” *In re Sherri Lynn Clementi*, No. 03-20318 (Bankr. N.D. Ill. Sept. 8, 2003).

On October 2, 2003, the Board issued an order finding Millenium in default for repeated failure to comply with Board and hearing officer orders to appear and proceed with this case. The Board found Millenium had violated Section 21(a), 21(d)(1), 21(e), and 21(p)(1) of the Act, as alleged, by conducting a waste disposal operation without a permit, and causing or allowing litter. The order also addressed an alleged deficiency in service by allowing Lorence until December 1, 2003, to answer the amended complaint; and directed the People to file a motion or other appropriate pleading regarding the appropriate remedy or penalty.

On November 3, 2003, the People filed proofs of service showing that service of the amended complaint on Clementi and Lorence was achieved on April 12, 2003. The instant motion was, as stated, filed on December 15, 2003. No hearing has been held in this matter.

FACTUAL SUMMARY

At all times pertaining to the violations alleged in the complaint, Millenium was an Illinois corporation operating at 31W620 Spaulding Road, Elgin, Cook County. Am. Com. at 2. Clementi is the president and registered agent for Millenium, and communicated directly with the Agency regarding the environmental issues alleged in the amended complaint. *Id.* Lorence is the operations manager responsible for day-to-day operations. *Id.*

As part of the business, Millenium regularly accepted various types of waste and refuse such as wood, construction debris and garbage at the site. Am. Com. at 3. The majority of the waste was wood that was ground and shred to produce animal bedding and compost for landscaping. *Id.* Millenium also separated construction and demolition debris, cardboard and metal for offsite recycling. *Id.* The site at which these activities occurred was never permitted by the Agency for the disposal of waste. Am. Com. at 5,7.

In a letter dated February 13, 2001, Clementi stated that Millenium has removed all the garbage, except “daily activity,” from the site and is in the process of moving from the site. Am.

Com. Ex. B. Clementi asserts in that letter that the new owner of the property has been dumping mixed debris on the site. *Id.*

MOTION TO DEEM FACTS ADMITTED

The People contend that the Board's October 2, 2003 order required Lorence to answer the amended complaint on or before December 1, 2003, and that Lorence has not yet filed an answer or other pleading in response to the amended complaint. Mot. at 2. The People assert that by failing to answer the amended complaint by December 1, 2003, or by failing to file a motion staying the 60-day period in which to file an answer, Lorence has admitted the material allegations asserted in the amended complaint. Mot. at 4.

The People contend that the amended complaint was served on Cleminti by certified mail on April 12, 2003, that Clementi has appeared before the Board, and has not filed any answer or other pleading in response to the amended complaint. Mot. at 3. The People assert that by failing to answer the amended complaint by June 11, 2003, or by failing to file a motion staying the 60-day period in which to file an answer, Clementi has admitted the material allegations asserted in the amended complaint. Mot. at 4.

The People request that that pursuant to Section 103.204(d) and (e) of the Board's procedural rules, the Board find Lorence and Clementi have admitted all material allegations asserted in the amended complaint. Mot. at 4.

The Board's Procedural Rules

Section 103.204 of the Board's procedural rules for enforcement actions provides in part:

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. 35 Ill. Adm. Code 103.204(d).

Subsection (e) indicates that the 60-day period to file an answer will be stayed if a respondent timely files a motion attacking the sufficiency of the complaint under Section 101.506 of the Board rules, or claiming the complaint is duplicative or frivolous under Section 103.212(b). 35 Ill. Adm. Code 103.202(e); *see also* 35 Ill. Adm. Code 101.506, 103.212(b).

Subsection (f) provides:

Any party serving a complaint upon another party must include the following language in the notice: "Failure to file an answer to this complaint within 60 days may have severe consequences. Failure to answer will mean that all allegations in the complaint will be taken as if admitted for purposes of this

proceeding. If you have any questions about this procedure, you should contact the hearing officer assigned to this proceeding, the Clerk's Office or an attorney.” 35 Ill. Adm. Code 103.204(f).

Discussion

To date, neither Lorence nor Clementi have filed any response to the motion to deem facts admitted. If a party files no response to a motion within 14 days the party will be deemed to have waived objection to the granting of the motion. *See* 35 Ill. Adm. Code 101.500(d).

The Board grants the People’s motion to deem facts admitted. The notice of filing attached to the amended complaint contained language regarding failure to answer the complaint, as required by Section 103.204(f) of the Board rules. 35 Ill. Adm. Code 103.204(f). The Board deems admitted the material allegations alleged in the People’s amended complaint against Lorence and Clementi.

MOTION FOR SUMMARY JUDGMENT

Section 101.516(b) of the Board’s procedural rules for enforcement actions provides:

If the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment. 35 Ill. Adm. Code 101.516(b).

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 the 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 arguably entitle [it] to a judgment.” *Gauthier v. Westfall*, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

The People’s Arguments

The People argue that if the Board finds that Lorence and Clementi have admitted all material allegations asserted in the amended complaint then the record shows there is no genuine issue of material fact left for review. Mot. at 5. Accordingly, the People contend, summary judgment in the People’s favor as a matter of law is appropriate. *Id.* The People request that the

Board grant summary judgment in favor of the People and against the respondents on counts I through IV of the amended complaint. Mot. at 6. Further, the People ask the Board to find Lorence and Clementi have violated Sections 21(a), (d)(1), (e) and (p)(1) of the Act. *Id.*

The People request that a civil penalty of \$50,000 be assessed against the respondents for the violations, and further ask the Board to order respondents to cease and desist from further violations of the Act and Board regulations. Mot. at 8. As previously noted, the respondents did not respond to the motion.

Alleged Violations

The amended complaint contains four counts alleging violations of Section 21 of the Act. 415 ILCS 5/21 (2002). Section 21(a) of the Act is a prohibition against open dumping of waste. 415 ILCS 5/21(a) (2002). 'Open dumping' is defined as the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill. 415 ILCS 5/3.24 (2002). 'Sanitary landfill' is defined, in part, as a facility permitted by the Agency for the disposal of waste. 415 ILCS 5/3.41 (2002). 'Refuse' is defined as waste, and 'waste' is defined, in part, as any garbage or other discarded material. 415 ILCS 5/3.31 and 3.53 (2002). Section 21(d)(1) prohibits the operation of a waste disposal operation without a permit issued by the Agency. 415 ILCS 5/21(d)(1) (2002). Section 21(e) of the Act provides, in pertinent part, that no person may dispose, treat, store or abandon any waste except at a site meeting the requirements of the Act and regulations. Section 21(p)(1) prohibits the open dumping of any waste in a manner resulting in litter. 415 ILCS 5/21(p)(1) (2002).

The Board will first address each of the four counts in turn, with the Board's analysis following each count. Once all four counts have been analyzed, the Board will turn to a penalty determination.

DISCUSSION

The Board finds that the allegations deemed admitted pursuant to 35 Ill. Adm. Code 103.204(d) are sufficient to prove that the People are entitled to a judgment as a matter of law against Lorence and Clementi under 35 Ill. Adm. Code 101.516(b). Below the Board discusses how the admitted facts support each of the four counts of the complaint in turn.

Count I – Open Dumping

In count I, the People contend that the respondents violated Section 21(a) of the Act (415 ILCS 5/21(a) (2002)) by causing or allowing waste consisting of wood, garbage, construction and demolition debris, cardboard, metal and other unidentifiable items to be discharged, deposited, dumped, spilled or leaked onto a disposal site which does not fulfill the requirements of a sanitary landfill, and therefore engaged in open dumping as that term is defined in the Act. Am. Com. at 5-6.

The People state that on April 20, 2000 and continuing through May, 2001 there were various types of waste and refuse (wood, construction debris and garbage) piled on the site, and

that respondents did not demonstrate to the Agency that the waste was properly disposed of at a permitted facility. Am. Com. at 3. The People assert that the wood, garbage and other items were and are waste and refuse as defined by the Act. Am. Com. at 4. Further, the People contend that the site where the waste and refuse was placed is and was a disposal site as defined in the Act. Am. Com. at 5.

Count II – Conducting a Waste Disposal Operation Without a Permit

The People contend in count II that the respondents violated Section 21(d) of the Act (415 ILCS 5/21(d) (2002)) by causing or allowing the disposal of waste and refuse on their site from at least April 26, 2000 through May, 2001 without having an Agency permit to conduct a waste disposal operation at the site. Am. Com. at 7-8. The People assert that by accepting and piling waste on the site without a permit, respondents operated a waste disposal operation in violation of Section 21(d) of the Act. Am. Com. at 8.

Count III – Disposal of Waste at an Unpermitted Facility

The People state in count III that respondents violated Section 21(e) of the Act (415 ILCS 5/21(e)) by causing or allowing waste to be disposed of at an unpermitted site. Am. Com. at 9-10. The People assert that from at least April 26, 2000 and continuing through May, 2001 the site was never permitted by the Agency for the disposal of waste, and that such disposal did occur. *Id.*

Count IV – Causing or Allowing Litter

The People contend that the respondents violated Section 21(p)(1) of the Act (415 ILCS 5/21(p)(1) (2002)) by causing or allowing the open dumping of waste resulting in litter at the site. Am. Com. at 11. The People argue that the wood, garbage, construction and demolition debris, cardboard, metal and other unidentifiable items constitute litter as contemplated in the Act. *Id.*

Board Analysis

As previously stated, the Board deems all of the facts contained in the People's second amended complaint admitted by Lorence and Clementi. Accordingly, the Board finds that Lorence and Clementi violated Section 21(a), 21(d)(1), 21(e), and 21(p)(1) as alleged in the amended complaint. Further, in the October 2, 2003 Board order, the Board found Millennium had violated Section 21(a), 21(d)(1), 21(e), and 21(p)(1) as alleged in the amended complaint.

No party has filed a response to the motion. Once again, if a party files no response to a motion within 14 days the party will be deemed to have waived objection to the granting of the motion. *See* 35 Ill. Adm. Code 101.500(d). The Board finds that no genuine issue of material fact remains and that the People are entitled to judgment as a matter of law. The Board grants the People's motion for summary judgment on all four counts.

REMEDY

If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2002). If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount.

The People provided information regarding an appropriate remedy, including a civil penalty, in their motion. The only remedy sought by the People is the imposition of a civil penalty. The People noted that \$50,000 is the amount of civil penalty authorized by the Act for one violation, and that respondents committed four violations over a period of one year. Mot. at 7. The People recommend that a \$50,000 penalty be imposed. Mot. at 8.

Statutory Background

Section 33(c) of the Act states: “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;
- (ii) the social and economic value of the pollution source;
- (iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
- (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
- (v) any subsequent compliance.” 415 ILCS 5/33(c) (2002).

According to Section 42(h) of the Act, in determining the appropriate civil penalty, the Board considers any matters of record in mitigation or aggravation of penalty, including “the following factors:

- (1) the duration and gravity of the violation;
- (2) the presence or absence of due diligence on the part of the violator in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;
- (3) any economic benefits accrued by the violator because of delay in compliance with requirements;

- (4) the amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with this Act by the violator and other persons similarly subject to the Act; and
- (5) the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator.” 415 ILCS 5/42(h) (2002).¹

Discussion

In determining what remedy is appropriate, the Board considers all facts and circumstances of record that bear upon the reasonableness of the respondents’ violations of the Act. 415 ILCS 5/33(c) (2002).

Section 33(c)

Section 33(c) lists five factors the Board considers in making orders and determinations. First, the facts and circumstances of this case show that the violations in question interfered with the protection of the health, general welfare and physical property in an area around the site. The waste and refuse was dumped, and not properly stored or disposed. *See* 415 ILCS 5/33(c)(i) (2002). Second, there is no evidence in the record showing that respondents’ operation, as conducted, had a social or economic value. *See* 415 ILCS 5/33(c)(ii) (2002). Third, the waste or refuse was in an area that would have been suitable were it disposed of or stored properly. The People did not provide any evidence indicating that the location was not suitable. *See* 415 ILCS 5/33(c)(iii) (2002). Fourth, the record does not contain evidence concerning the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source, but it is evident that the waste and refuse was eliminated. *See* 415 ILCS 5/33(c)(iv) (2002). Finally, the respondents did not comply with the Act and left the waste and refuse for over a year. *See* 415 ILCS 5/33(c)(v) (2002).

After considering the Section 33(c) factors, the Board finds that a civil penalty is proper in this instance. To determine the proper penalty, the Board considers factors listed in Section 42(h) of the Act.

Section 42(h)

In determining the appropriate civil penalty, the Board considers any matters of record in mitigation or aggravation of penalty. 415 ILCS 42(h) (2002). The Board’s determination is aided by the five factors listed in Section 42(h) of the Act.

The People’s Arguments Concerning 42(h) Factors. In its motion, the People address each of the 42(h) factors. The People assert that in considering the duration and gravity of the

¹ Section 42(h) of the Act (415 ILCS 5/42(h) (2002)) was substantially amended by P.A. 93-575, effective January 1, 2004. The amendments include establishing that the economic benefit from delayed compliance is a minimum penalty. Because the complaint in this proceeding was filed prior to January 1, 2004, the Board did not use the amendments to Section 42(h) of the Act in determining the appropriate penalty in this proceeding.

violations, the respondents' site was in violation of the Act for over a year – from at least April 20, 2000 through May, 2001. Mot. at 7.

The People argue that the respondents exhibited no diligence whatsoever as is evidenced by the length of time they left the site in an offensive condition and failed to answer the amended complaint or otherwise comply with the Act. Mot. at 7. The People assert that respondents avoided the cost of cleaning the site for over one year and avoided the costs of getting the proper permits from the Agency. *Id.*

The People suggest that \$50,000 will deter further violations of the Act by these respondents and others similarly subject to the Act. Mot. at 7-8. Finally, the People note that they are unaware of any previously adjudicated violations against any of the respondents. Mot. at 8.

Board Analysis of 42(h) Factors. The record in this case clearly shows that the violations in this matter lasted for over a one-year period of time. The respondents committed serious violations that can lead to damage to the environment and human health and welfare. Accordingly, the duration and gravity of the violations are weighed against the respondents. *See* 415 ILCS 5/42(h)(1) (2002). The respondents did not exhibit due diligence in attempting to comply with requirements of this Act and regulations. The waste and refuse remained on site for over one year after respondents were made aware of the violation. This factor, too, is weighed in aggravation of the civil penalty. *See* 415 ILCS 5/42(h)(2) (2002). The record shows that respondents benefited from avoiding the cost of cleaning the site for over one year and, and further never incurred the costs of getting the proper permits from the Agency. This factor is weighed in aggravation of the penalty. *See* 415 ILCS 5/42(h)(3) (2002). The respondents did not promptly remediate the site, and have not been responsive during the proceeding before the Board. Accordingly, the amount of monetary penalty which will serve to deter further violations by the violator and other persons similarly subject to the Act must be substantial, and this factor is aggravates the penalty. *See* 415 ILCS 5/42(h)(4) (2002). The record does not indicate that any respondent has any previously adjudicated violations. Accordingly, this factor serves to mitigate the civil penalty. *See* 415 ILCS 5/42(h)(5) (2002).

Penalty Determination

The Board finds that the nature of the violations in this matter posed potential risks to the environment of the State as well as to the people living near the site, for 13 months. Accordingly, the Board finds that a substantial penalty is necessary. However, any risk has ended and the likelihood of the offense being repeated is minimal. Respondents no longer own the site, and the corporation is no longer in existence. After consideration of the 33(c) and 42(h) factors, the Board finds that a penalty of \$25,000 is warranted in this case.

CONCLUSION

The Board grants the People's motion for summary judgment as to all counts in the amended complaint. The Board finds that all the respondents have violated Section 21(a), 21(d)(1), 21(e), and 21(p)(1) of the Act. 415 ILCS 5/21(a), (d)(1), (e) and (p)(1) (2002). The Board imposes a civil penalty of \$25,000 on the respondents.

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

ORDER

1. The Board finds that Millenium Recycling & Solid Waste Consultants, Inc. (Millenium), Sherri Clementi (Clementi) and Michael Lorence (Lorence) (collectively respondents) have violated 415 ILCS 21(a),(d)(1), (e) and (p)(1) (2002);
2. The respondents must pay a penalty of \$25,000 for violating Sections 21(a), (d)(1), (e) and (p)(1) of the Act. 415 ILCS 5/21(a), (d)(1), (e) and (p)(1) (2002).
3. The respondents must pay \$25,000 within 60 days of the date of this order. Such payment must be made by certified check or money order payable to the Treasurer of the State of Illinois, designated to the Environmental Protection Trust Fund, and must be sent by first class mail to:

Illinois Environmental Protection Agency
Fiscal Services Division
1021 N. Grand Avenue East
P.O. Box 19276
Springfield, IL 62702

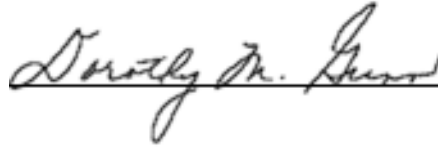
Respondents must write their federal employer identification number or social security number on the certified check or money order. Any such penalty not paid within the time prescribed will incur interest at the rate set forth in subsection (a) of Section 1003 of the Illinois Income Tax Act (35 ILCS 5/1003) as now or hereafter amended, from the date payment is due until the date payment is received. Interest will not accrue during the pendency of an appeal during which payment of the penalty has been stayed.

4. The respondents must cease and desist from any further violations of the Act, and associated regulations.

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) (2002); *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 February 19, 2004, by a vote of 5-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board