ILLINOIS POLLUTION CONTROL BOARD
July 22, 2004

THE VILLAGE OF LOMBARD,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 04-213
	)	(Citizens Enforcement – Cost Recovery)
BILL'S AUTO CENTER, BILL'S STANDARD SERVICE and WILLIAM KOVAR,	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by N.J. Melas):

Today's order accepts the complainant's cost recovery complaint for hearing. On June 1, 2004, The Village of Lombard, Illinois (the Village) filed a complaint against Bill's Auto Center, Bill's Standard Service, and Mr. William Kovar (respondents). *See* 415 ILCS 5/31(d) (2002); 35 Ill. Adm. Code 103.204. Mr. Kovar owns and manages Bill's Auto Center and Bill's Standard Service.

In its five-count complaint, the Village seeks recovery of $98,000 in costs incurred as a result of respondents violating the following sections of the Environmental Protection Act (Act): (1) Section 21(a) by causing or allowing open dumping of petroleum; (2) Section 21(d)(2) by unlawfully storing and disposing of petroleum products in violation of Board regulations; (3) Section 21(e) by unlawfully storing and disposing of petroleum products in violation of the Act; (4) Section 12(a) by causing water pollution in count IV; (5) and Section 12(d) by creating a water pollution hazard. 415 ILCS 5/12(a), (d), 21(a), (d)(2), and (e) (2002). The Village further alleges that respondents violated these provisions by contaminating Village property while removing and remediating petroleum contamination from leaking underground storage tanks at the respondents' facility. The complaint concerns respondents' former gas station located at 330 South Main Street, Lombard, DuPage County.

Section 31(d) of the Act allows any person to file a complaint with the Board. 415 ILCS 5/31(d) (2002). Section 31(d) further provides that "[u]nless the Board determines that such complaint is duplicitous or frivolous, it shall schedule a hearing." *Id.*; *see also* 35 Ill. Adm. Code 103.212(a). A complaint is duplicitous if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. A complaint is frivolous if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *Id.* Within 30 days after being served with a complaint, a respondent may file a motion alleging that the complaint is duplicitous or frivolous. 35 Ill. Adm. Code 103.212(b). Respondents have filed no motion.

The Board, on its own motion, dismisses count II of the Village's complaint as frivolous. Count II of the Village's complaint alleges a violation of Section 21(d)(2) of the Act, which prohibits a person from conducting a waste storage operation or waste disposal in violation of any regulation or standard adopted by the Board pursuant to the Act. 415 ILCS 5/21(d)(2) (2002). The Board finds no alleged violation of any Board regulation or standard in the Village's complaint. Accordingly, the Board finds count II frivolous because it fails to state a cause of action upon which the Board can grant relief. The Board notes that the Village may move the Board for leave to file an amended complaint by following the procedures set forth in Sections 103.204 and 103.206 of the Board's procedural rules. 35 Ill. Adm. Code 103.204, 103.206.

The Board accepts the remainder of the Village's complaint for hearing. *See* 415 ILCS 5/31(d) (2002); 35 Ill. Adm. Code 103.212(a). A respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if respondents fail within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider respondents to have admitted the allegation. 35 Ill. Adm. Code 103.204(d).

The Board directs the hearing officer to proceed expeditiously to hearing. Among the hearing officer's responsibilities is the "duty . . . to ensure development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Adm. Code 101.610. A complete record in an enforcement case thoroughly addresses, among other things, the appropriate remedy, if any, for the alleged violations, including any civil penalty.

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). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an on-going violation, if any, and, second, whether to order the respondent to pay a civil penalty. The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

With Public Act 93-575, effective January 1, 2004, the General Assembly changed the Act's civil penalty provisions, amending Section 42(h) and adding a new subsection (i) to Section 42. Section 42(h)(3) now states that any economic benefit to respondent from delayed compliance is to be determined by the "lowest cost alternative for achieving compliance." The amended Section 42(h) also requires the Board to ensure that the penalty is "at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary of unreasonable financial hardship."

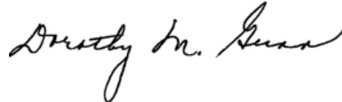
Under these amendments, the Board may also order a penalty lower than a respondent's economic benefit from delayed compliance if the respondent agrees to perform a "supplemental environmental project" (SEP). A SEP is defined in Section 42(h)(7) as an "environmentally

beneficial project" that a respondent "agrees to undertake in settlement of an enforcement action . . . but which the respondent is not otherwise legally required to perform." SEPs are also added as a new Section 42(h) factor (Section 42(h)(7)), as is whether a respondent has "voluntary self-disclosed . . . the non-compliance to the [Illinois Environmental Protection] Agency" (Section 42(h)(6)). A new Section 42(i) lists nine criteria for establishing voluntary self-disclosure of non-compliance. A respondent establishing these criteria is entitled to a "reduction in the portion of the penalty that is not based on the economic benefit of non-compliance."

Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any (including whether to impose a civil penalty), and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if any (including a specific total dollar amount and the portion of that amount attributable to the respondent's economic benefit, if any, from delayed compliance), and supporting its position with facts and arguments that address any or all of the Section 42(h) factors. The Board also directs the hearing officer to advise the parties to address these issues in any stipulation and proposed settlement that may be filed with the Board.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 22, 2004, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board