

ILLINOIS POLLUTION CONTROL BOARD

January 6, 2005

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 05-51
)	(Enforcement - Air)
ENVIRONMENTAL HEALTH AND)	
SAFETY, INC., an Illinois corporation,)	
)	
Respondent.)	

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

On September 13, 2004, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a complaint against Randy Oldenberger d/b/a Environmental Health and Safety (Oldenberger). The Board accepted this complaint on September 16, 2004. On October 18, 2004, Oldenberger filed a motion to dismiss, asserting that Environmental Health and Safety Services, Inc. (EHSS), an Illinois corporation, performed all the work referenced in the complaint. On November 22, 2004, the People filed a response to the motion acknowledging that EHSS is a corporation in good standing and indicating that it would drop Oldenberger from the complaint and file an amended complaint against the corporation.

On December 6, 2004, the People filed an amended complaint against EHSS. *See* 415 ILCS 5/31(c)(1) (2002); 35 Ill. Adm. Code 103.204. The amended complaint does not allege any violations against Oldenberger, but is otherwise substantially identical to the initial complaint. The amended complaint alleges that EHSS, an asbestos removal contractor located at 1304 Derby Lane, Rockford, Winnebago County, conducted asbestos removal activities in violation of the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (2002)), and both state and federal regulations. The amended complaint alleges that these violations occurred at the Lincoln Park School, 4103 West State Street, Rockford, Winnebago County. For the reasons below, the Board accepts the amended complaint for hearing. Accordingly, the Board finds Oldenberger's motion to dismiss moot.

Under the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (2002)), the Attorney General and the State's Attorneys may bring actions before the Board to enforce Illinois' environmental requirements on behalf of the People. *See* 415 ILCS 5/31 (2002); 35 Ill. Adm. Code 103. In this case, the People allege that EHSS violated Sections 9(a) and 9.1(d)(1) of the Act (415 ILCS 5/9(a) and 9.1(d)(1) (2002)); 35 Ill. Adm. Code 201.141; and 40 C.F.R. 61.145(b)(1), (b)(3)(iv), (b)(4)(vi), (c)(3), and (c)(6)(i) and 61.150(a)(1) and (b) by (1) causing, threatening, or allowing the emission of asbestos so as to cause or tend to cause air pollution; (2) failing to provide a complete National Emission Standards for Hazardous Air Pollutants (NESHAPS) notification for asbestos removal activities; (3) failing to provide a timely NESHAPS notification of rescheduling of asbestos removal activities; (4) failing to adequately

wet all regulated asbestos-containing material (RACM) before stripping from structures; (5) failing to adequately wet all RACM until collection; (6) failing to adequately wet and keep wet all RACM; and (7) failing to deposit all RACM at a permitted site. The People ask the Board to order EHSS to cease and desist from further violation and pay a civil penalty of \$50,000 per violation and \$10,000 for each day the violations continued.

The Board finds that the complaint meets the content requirements of the Board's procedural rules and accepts the complaint for hearing. *See* 35 Ill. Adm. Code 103.204(c), (f), 103.212(c). A respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if EHSS fails 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 EHSS 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 or unreasonable financial hardship."

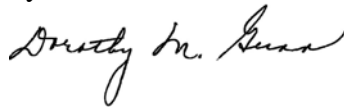
Under these amendments, the Board may also order a penalty lower than a respondent's economic benefit from delayed compliance if the respondent agrees to perform a "supplemental environmental project" (SEP). A SEP is defined in Section 42(h)(7) as an "environmentally beneficial project" that a respondent "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 January 6, 2005, by a vote of 5-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board