ILLINOIS POLLUTION CONTROL BOARD
July 7, 2005

VERNON and ELAINE ZOHFELD,	)	
	)	
Complainants,	)	
	)	
v.	)	PCB 05-193
	)	(Citizens Enforcement - Air)
BOB DRAKE, WABASH VALLEY SERVICE COMPANY, MICHAEL J. PFISTER, NOAH D. HORTON, and STEVE KINDER,	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by A.S. Moore):

On May 26, 2005, Vernon and Elaine Zohfeld (complainants) filed a complaint against Bob Drake, Wabash Valley Service Company, Michael J. Pfister, Noah D. Norton, and Steve Kinder (respondents). The complaint concerns alleged air pollution resulting from agrichemical spraying in Hamilton County. For the reasons below, the Board accepts the complaint for hearing, but strikes a portion of the requested relief.

Under the Environmental Protection Act (Act) (415 ILCS 5 (2004)), any person may bring an action before the Board to enforce Illinois' environmental requirements. *See* 415 ILCS 5/3.315, 31(d)(1) (2004); 35 Ill. Adm. Code 103. According to the complaint in this case, respondent Bob Drake owns agricultural land located next to complainants' residence and horse farm in Hamilton County; respondent Wabash Valley Service Company is an agricultural cooperative that sells agrichemicals, including chemical pesticides and herbicides, and applies them to agricultural fields; and respondents Michael J. Pfister, Noah D. Norton, and Steve Kinder work for Wabash Valley Service Company.

Complainants allege that respondents caused or allowed agrichemical spray applied on and around Bob Drake's field to drift over to complainants' adjacent property, causing or tending to cause air pollution in violation of Section 9(a) of the Act (415 ILCS 5/9(a) (2004)) and Section 201.141 of the Board's regulations (35 Ill. Adm. Code 201.141). Complainants ask the Board to order respondents to cease and desist from further violations, pay a civil penalty of $50,000 for each violation, and pay complainants' costs and reasonable attorney fees. The Board finds that the complaint meets the content requirements of the Board's procedural rules. *See* 35 Ill. Adm. Code 103.204(c), (f).

Section 31(d)(1) of the Act provides that "[u]nless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing." 415 ILCS 5/31(d)(1) (2004); *see also* 35 Ill. Adm. Code 103.212(a). A complaint is duplicative 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 duplicative or frivolous. 35 Ill. Adm. Code 103.212(b). Respondents here have filed no motions with the Board.

No evidence before the Board indicates that the complaint is duplicative. The Board further finds that the complaint is not frivolous, except for complainants' request for costs and attorney fees. The Board lacks the statutory authority to award attorney fees and other litigation expenses in citizen enforcement actions, and accordingly strikes that request for relief from the complaint as frivolous. *See* ESG Watts, Inc. v. PCB, 286 Ill. App. 3d 325, 337-39, 676 N.E.2d 299 (3rd Dist. 1997); People v. State Oil Co., PCB 97-103 (Aug. 19, 1999) (striking as frivolous a citizen complainant's request for attorney and expert witness fees); *compare* 415 ILCS 5/42(f) (2004) (Board may award costs and reasonable attorney fees to the prevailing Attorney General or State's Attorney when the violation was willful, knowing, or repeated).

The Board accepts the complaint, as modified by this order, for hearing. *See* 415 ILCS 5/31(d)(1) (2004); 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 a respondent 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 the respondent to have admitted the allegation. *See* 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) (2004). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do, if anything, to address the violation 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.

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, such as the duration and gravity of the violation, whether the respondent showed due diligence in attempting to comply, any economic benefit that

the respondent accrued from delaying compliance, and the need to deter further violations by the respondent and others similarly situated.

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 7, 2005, by a vote of 4-0.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board