ILLINOIS POLLUTION CONTROL BOARD
July 7, 2005

KAPP, INC., an Illinois corporation,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 05-196
	)	(Citizens Enforcement – Land, Water)
HARTLEY CARLTON, individually and d/b/a/ ONE HOUR CLEANERS,	)	
	)	
Respondent.	)	

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

On May 13, 2005, Kapp, Inc. (Kapp) filed a complaint against Hartley Carlton, individually and doing business as One Hour Cleaners (Carlton). The complaint concerns alleged soil and groundwater pollution resulting from a dry cleaning business in Decatur, Macon County. For the reasons below, the Board accepts the complaint for hearing.

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, Kapp owned real estate located at the southwest corner of West Grand Avenue and North Oakland Avenue in Decatur, Macon County. Kapp states that Carlton rented property at this site to operate a dry cleaning business. The complaint alleges that improper disposal and releases of chemicals from Carlton's dry cleaning operations contaminated soil and groundwater at Kapp's site and adjacent property. The contamination allegedly includes trichloroethene (TCE) and tetrachloroethene, also known as perchlorethylene (PERC), at levels exceeding remediation objectives under the Board's rules for the Tiered Approach to Corrective Action Objectives (TACO) (35 Ill. Adm. Code 742). Kapp further alleges that despite this contamination, Carlton has failed to begin remedial action.

According to the complaint, Carlton violated Section 12(a) of the Act (415 ILCS 5/12(a) (2004)) by causing or threatening or allowing the discharge of contaminants so as to cause or tend to cause water pollution. The complaint also alleges that Carlton violated Section 12(d) of the Act (415 ILCS 5/12(d) (2004)) by depositing contaminants on the land so as to create a water pollution hazard. Kapp further alleges in the complaint that Carlton violated Section 21(e) of the Act (415 ILCS 5/21(e) (2004)) by disposing of waste at the Kapp property, a site that is not a permitted sanitary landfill.

Kapp asks the Board to order Carlton to pay a civil penalty of $50,000 per violation and $10,000 for each day the violation continued, and to cease and desist from further violations. Kapp also requests that the Board order Carlton to "remediate any contamination remaining on Kapp's Property and property adjacent to it to levels less than the TACO Tier I Residential Site

Remediation Objective Levels for the Ingestion Exposure Route, contained in 35 Ill. Admin. Code Part 742." Complaint at 9. 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. *See* 35 Ill. Adm. Code 103.212(b). Carlton has filed no motion with the Board. Nothing before the Board indicates that the complaint is duplicative or frivolous. The Board accepts the complaint 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 the 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 come into compliance. The Board notes that even if an alleged violation is proven, there may be limits on any remediation the Board might order. *See, e.g.*, Matteson WHP Partnership v. Martin, PCB 97-121 (June 22, 2000) (ordered cleanup conditional on property access), *rev'd in part on other grounds sub nom.* Martin v. PCB, No. 1-00-2513 (1st Dist., June 29, 2001) (Rule 23 Order); *see also* 35 Ill. Adm. Code 741 (proportionate share liability).

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.

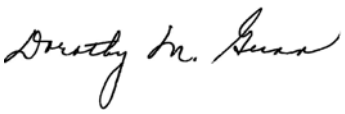
With Public Act 93-575, effective January 1, 2004, the General Assembly changed the Act's civil penalty provisions, amending Section 42(h) and adding a new subsection (i) to Section 42. Section 42(h)(3) now states that any economic benefit to respondent from delayed compliance is to be determined by 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