ILLINOIS POLLUTION CONTROL BOARD December 15, 2005

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
V.)	PCB 06-54
)	(Enforcement - Land)
WEBB, AG, INC., an Illinois corporation,)	
)	
Respondent.)	

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

On November 2, 2005, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a three-count complaint against Webb, Ag, Inc. (Webb). According to the complaint, Webb owns an agrichemical sales and distribution facility in Fairview, Fulton County. The complaint concerns an alleged spill of fertilizer solution from an overturned flatbed truck in Duncan Mills, Fulton County.

In a November 17, 2005 order, the Board found that counts I and III of the complaint meet the content requirements of the Board's procedural rules. Counts I and III respectively allege violations of Sections 12(d) and 21(e) of the Environmental Protection Act (Act) (415 ILCS 5/12(d), 21(e) (2004)). <u>People v. Webb Ag, Inc.</u>, PCB 06-54, slip op. at 1 (Nov. 17, 2005). The Board therefore accepted counts I and III of the complaint for hearing. *Id.*; *see* 35 Ill. Adm. Code 103.204(c), 103.204(f), 103.212(c). In the same order, the Board noted that count II of the complaint alleges that Webb violated the Illinois Hazardous Materials Emergency Act (430 ILCS 50/7.01 (2004)) and 29 Ill. Adm. Code 430.30. <u>Webb Ag</u>, PCB 06-54, slip op. at 2. Accordingly, the Board directed the People to address by December 19, 2005, the Board's jurisdiction to hear count II of the complaint. *Id*.

On December 5, 2005, the People filed a motion for voluntary dismissal of count II (Mot.). The People state that count II does not allege a violation of the Act and that the Board does not therefore have jurisdiction over the count. Mot. at 1. The People ask that the Board dismiss count II without prejudice. *Id.* The Board grants the People's motion and dismisses count II.

In its November 17, 2005 order, the Board stayed the time period for Webb to file an answer or motion in response to the People's complaint until the Board orders otherwise. <u>Webb</u> <u>Ag</u>, PCB 06-54, slip op. at 2. Having dismissed count II of the complaint on the People's motion, the Board now terminates the stay. Accordingly, any motion by Webb to strike, dismiss, or challenge the sufficiency of the complaint is now due to be filed by January 17, 2006, which is the first business day following the 30th day after the date of this order. Any answer by Webb to the complaint must be filed by February 14, 2006, which is the first business day following the 60th day after the date of this order. A respondent's failure to timely file an answer to a

complaint may have severe consequences. Generally, if Webb fails within the deadline 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 Webb to have admitted the allegation. 35 Ill. Adm. Code 103.204(d), (e).

The Board directs the hearing officer to proceed expeditiously to hearing on the remaining counts of the complaint, counts I and III. 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 to correct an ongoing 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). An 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 (415 ILCS 5/42(h)(7) (2004)), as is whether a respondent has "voluntary self-disclosed . . . the non-compliance to the [Illinois Environmental Protection] Agency." 415 ILCS 5/42(h)(6) (2004). A new Section 42(i) lists nine criteria for establishing voluntary self-disclosure of non-compliance. 415 ILCS 5/42(i) (2004). 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 December 15, 2005, by a vote of 4-0.

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Dorothy M. Gunn, Clerk Illinois Pollution Control Board