

ILLINOIS POLLUTION CONTROL BOARD

December 15, 2005

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 06-82
) (Enforcement - Water)
BARGER ENGINEERING, INC., an Indiana)
corporation,)
)
Respondent.)

ORDER OF THE BOARD (by G.T. Girard):

On December 1, 2005, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a complaint against Barger Engineering, Inc. (Barger Engineering). See 415 ILCS 5/31(c)(1) (2004); 35 Ill. Adm. Code 103.204. The complaint concerns Barger Engineering's Phillipstown Unit Water Flood Plant approximately five miles south of Crossville, White County. For the reasons below, the Board accepts the complaint for hearing.

Under the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (2004)), 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 (2004); 35 Ill. Adm. Code 103. In this case, the People allege that Barger Engineering violated Section 12(a) and (f) of the Act (415 ILCS 5/12(a) and (f) (2004)) and 35 Ill. Adm. Code 302.203 and 302.208(g). The People further allege that Barger Engineering violated these provisions by (1) causing the chloride content of the stream to exceed the water quality standard; (2) discharging pollutants without a National Pollutant Discharge Elimination System permit; and (3) causing or tending to cause water pollution. The violations resulted from the rupture of a PVC transfer line. This allowed the release of 1,000 to 1,500 barrels of salt water and 10 to 20 barrels of crude oil that traveled approximately 1½ miles downstream into a drainageway and unnamed stream that flows into the Wabash River. This created a milky white precipitate and crude oil staining in the stream. This resulted in (1) offensive conditions of sludge and floating debris; (2) the death of several small fish in the stream; and (3) chloride concentrations in the stream above the water quality standard. The People ask the Board to order Barger Engineering 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 Barger Engineering 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 Barger Engineering 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) (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."

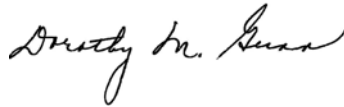
Under these amendments, the Board may also order a penalty lower than a respondent's economic benefit from delayed compliance if the respondent agrees to perform a "supplemental environmental project" (SEP). A SEP is defined in Section 42(h)(7) as an "environmentally beneficial project" that a respondent "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 December 15, 2005, by a vote of 4-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board