ILLINOIS POLLUTION CONTROL BOARD
September 20, 2007

RANDY GRANT, DONALD GRANT, and PATRICIA WALLACE,	)	
Complainants,	)	
v.	)	PCB 07-145 (Citizens Enforcement - Noise)
CLINE RESOURCE AND DEVELOPMENT COMPANY and MACH MINING, L.L.C.,	)	
Respondents.	)	

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

On June 20, 2007, Randy Grant, Donald Grant, and Patricia Wallace (collectively, complainants) filed a complaint against Cline Resource and Development Company (Cline) and Mach Mining, L.L.C. (Mach Mining) (collectively, respondents). *See* 415 ILCS 5/31(d) (2006); 35 Ill. Adm. Code 103.204. Complainants allege that respondents violated Section 24 of the Act (415 ILCS 5/24 (2006)) and Sections 900.102, 901.102(a), 901.102(b), and 901.106 of the Board's regulations (35 Ill. Adm. Code 900.102, 901.102(a), 901.102(b), and 901.106). Complainants further allege that respondents violated these provisions in the course of operating a coal mine, coal mine ventilation, and heavy equipment. Complainants seek a Board order directing the respondents to reduce noise levels to a point at which they no longer disturb their health or property and to cease and desist from further violations of applicable statutes and regulations. The complaint concerns respondents' coal mine facility located at Liberty School Road, Johnson City, Williamson County.

In an order dated August 9, 2007, the Board directed respondents to file a certified mail receipt or other proof of service on the respondents by September 10, 2007, or face dismissal of this proceeding. *See* 35 Ill. Adm. Code 101.304(d). On August 15, 2007, complainants filed a certified mail receipt showing service on Mach Mining on June 18, 2007, and a certified mail confirmation showing service on Cline on June 20, 2007. On August 16, 2007, both respondents filed an answer.

Section 31(d)(1) of the Environmental Protection Act (415 ILCS 5/31(d)(1) (2006)) allows any person to file a complaint with the Board. Section 31(d) further provides that "[u]nless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing." *Id.*; *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). Neither respondent has filed such a motion.

The Board notes that the form complaint initiating this proceeding asks complainants to "[i]dentify any identical or substantially similar case you know of that is already pending before the Board or in another forum against this respondent for the same alleged pollution." Complainant's response in its entirety states that

> [a] suit has been filed in Williamson County Court by, Attorney Jay Schafer of 111 West Main Street, Marion, Illinois 618-997-5611 he is under retainer for the family's of Phil Anderson, Shirley Davies, and Roland Rogers all located on Liberty School Road in Williamson County, Marion, Illinois. This Suit was filed in the early 2006.

In the absence of a motion from either of the respondents, the Board cannot conclude on the basis of the complainants' statement that this matter is duplicative. *See* 415 ILCS 5/45(b) (2006); Mather Investment Properties, L.L. C. v. Illinois State Trapshooters Ass'n., Inc., PCB 05-29, slip op. at 4, 11-12 (July 21, 2005) (finding complaints before Board and circuit court are not duplicative). No evidence now before the Board indicates that complainants' complaint is frivolous.

The Board accepts the complaint for hearing. *See* 415 ILCS 5/31(d) (2006); 35 Ill. Adm. Code 103.212(a). The Board notes that Cline and Mach Mining both filed answers on August 16, 2007.

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) (2006). Specifically, the Board considers the Section 33(c) factors in determining, first, what, if anything, to order the respondent to do 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.

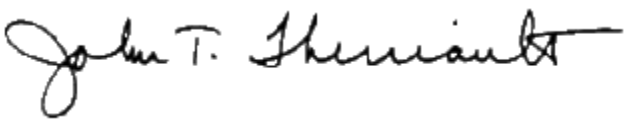
With Public Act 93-575, effective January 1, 2004, the General Assembly changed the Act's civil penalty provisions, amending Section 42(h) and adding a new subsection (i) to Section 42. Section 42(h)(3) now states that any economic benefit to respondent from delayed compliance is to be determined by 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 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 (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, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 20, 2007, by a vote of 4-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board