ILLINOIS POLLUTION CONTROL BOARD
October 4, 2007

LORETTA THIGPEN,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 08-12
	)	(Citizens Enforcement – PWS)
MORTON MOBILE HOME PARK, LLC, d/b/a EDGEWOOD TERRACE MOBILE HOME PARK,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by N.J. Melas):

On July 30, 2007, Loretta Thigpen filed a complaint (Comp.) against Morton Mobile Home Park, LLC, an Illinois limited liability company, d/b/a Edgewood Terrace Mobile Home Park (Mobile Home Park). *See* 415 ILCS 5/31(d)(1) (2006); 35 Ill. Adm. Code 103.204. In her 3-count complaint, Loretta Thigpen alleges that she resides in Edgewood Terrace Mobile Home Park operated by respondent, and receives her drinking water from the public water supply also operated there by respondent. Complainant Thigpen alleges that, in 2006-2007, respondent Mobile Home Park delivered drinking water containing arsenic in excess of the maximum contaminant level, and failed to make required notification of the exceedences in violation of Section 18 of the Environmental Protection Act (Act) (415 ILCS 5/18 (2006)) and Sections 611.121(a), 611.301(b) and 611.903 of the Board's public water supply regulations. 35 Ill. Adm. Code 611.121(a), 611.301(b) and 611.903. Edgewood Terrace Mobile Home Park is located in the Village of Morton, Tazewell County.

Section 31(d)(1) of the Act allows any person to file a complaint with the Board. 415 ILCS 5/31(d)(1) (2006). The Board's procedural rules provide that "[p]roof of service of initial filings must be filed with the Board upon completion of service." 35 Ill. Adm. Code 101.304(b). In response to the Board's September 6, 2007 order, on September 14, 2007 complainant's counsel filed proof that service was made on the respondent. Complainant's filing indicates that the requested certified mail "green card" return receipt had not been received from the United States Postal Service (USPS). In lieu of this indicia of service, complainant provided the USPS numbered receipt for the parcel, a printout of the "track and confirm" page from the USPS website showing service on August 3, 2007, and e-mail dated September 11, 2007 between complainant's and respondent's attorneys. The Board accordingly finds that the complaint was properly served.

Section 31(d)(1) further provides that "[u]nless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing." 415 ILCS 5/31(d)(1)(2006); *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). Any motion by respondent was accordingly due under the rules on or before September 2, 2007. But, in his September 11, 2007 e-mail to respondent's attorney concerning service, complainant's attorney said that he would not object to the timeliness of any motion or filing concerning duplicative or frivolous issues respondent might file by September 25, 2007. To date, respondent has made no motion concerning these issues. No evidence before the Board indicates that the complaint is duplicative or frivolous. Accordingly, the Board now accepts the complaint for hearing. *See* 415 ILCS 5/31(d)(1) (2006); 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 respondents fail 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 respondents 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) (2006). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an on-going 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.

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). 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 "voluntarily 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 October 4, 2007, by a vote of 4-0.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board