ILLINOIS POLLUTION CONTROL BOARD April 2, 2009

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB No. 09-69
)	(Enforcement - Water)
PAR DEVELOPMENT INC., an Illinois)	
Corporation,)	
)	
Respondent.)	

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

On March 30, 2009, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a five-count complaint against Par Development Inc., an Illinois Corporation (Par Development). The complaint concerns Par Development's retail business development project called "Lake Pointe," located at the northeast corner of Algonquin Road and Lakewood Road in Lake in the Hills, McHenry County. For the reasons below, the Board accepts the complaint for hearing.

Under the Environmental Protection Act (Act) (415 ILCS 5 (2006)), 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 (2006); 35 Ill. Adm. Code 103. In this case, the People allege that Par Development violated Sections 12(a), 12(d), and 12(f) of the Act (415 ILCS 5/12(a), 12(d), and 12(f) (2006)), Section 309.102(a) of the Board's water pollution regulations (35 Ill. Adm. Code 309.102(a)), and conditions of the National Pollutant Discharge Elimination System (NPDES) general stormwater permit. According to the complaint, Par Development violated these provisions by allowing contaminants to enter the waters of the State after failing to install adequate erosion and stormwater run-off control measures at the development site (count I); by depositing piles of debris and concrete at the site in such a place and manner as to create a water pollution hazard (count II); by discharging soil and sediment-laden runoff from the site (count III); by failing to post at the site notification of coverage under the NPDES permit (count IV); and by failing to maintain at the site a copy of the Stormwater Pollution Prevention Plan (SWPPP) (count V).

As to counts I and II, the People ask the Board to order Par Development to cease and desist from any further violations of the Act, and pay a civil penalty of \$50,000 for each violation and an additional \$10,000 for each day during which each violation continues. As to counts III, IV, and V, the People ask the Board to order Par Development to cease and desist from any further violations of the NPDES permit, the Act, and associated regulations, and pay a civil penalty of \$10,000 for each day of each violation.

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 Par Development 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 it 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). 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 proposal for settlement that may be filed with the Board.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 2, 2009, by a vote of 5-0.

John Therriault, Assistant Clerk Illinois Pollution Control Board