

ILLINOIS POLLUTION CONTROL BOARD
November 4, 2010

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 07-53
)	(Enforcement – Water)
MOLINE PLACE DEVELOPMENT, LLC,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by C.K. Zalewski):

On January 3, 2007, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a complaint against Moline Place Development, L.L.C. (Moline Place) and CrossTowne Place Development, L.L.C. (CrossTowne Place) (collectively, respondents). *See* 415 ILCS 5/31(c)(1) (2008)¹; 35 Ill. Adm. Code 103.204. The People alleged that respondents violated Section 12(a) and (f) of the Environmental Protection Act (Act) (415 ILCS 5/12(a) (2008)), and Section 309.102(a) of the Board’s water pollution regulations. The People further alleged that respondents violated these provisions at two separate residential development projects in Rock Island by causing water pollution and violations of the National Pollutant Discharge Elimination System (NPDES) permits for those sites issued by the Illinois Environmental Protection Agency (IEPA).

The complaint concerns two residential housing areas in Rock Island County: One Moline Place located at 6th Street and 11th Avenue in Moline, and CrossTowne Place located near the intersection of 11th Avenue and Hospital Road in Silvis. Counts I and II of the complaint concern Moline Place, and counts III and IV concerned CrossTowne Place.

On June 4, 2009, the Board closed the docket as to CrossTowne Place, entering summary judgment for the People concerning counts III and IV of the complaint on the basis of the People’s March 5, 2009 motion. As requested, the Board assessed a \$15,000 civil penalty. People of the State of Illinois v. Moline Place Development, L.L.C. and CrossTowne Place, PCB 07-53 (June 4, 2009). The People’s case against Moline remained pending and unaffected by that opinion and order.

Today the Board decides an uncontested motion for summary judgment filed by the People on February 24, 2010 against the remaining respondent, Moline Place, as to Counts I and II of the complaint. Moline Place, despite having received multiple extensions of time for the filing of a response in opposition to the motion, has filed nothing in response. For the reasons

¹ The pleadings in this case refer to both the 2004 and 2006 versions of the Illinois Compiled Statutes. As there is no difference in the relevant sections from the 2004 to the 2006 to the 2008 compilations, the Board will consistently reference the 2008 edition.

discussed below, the Board grants the People's motion for summary judgment, finds Moline Place has committed the violations as alleged in the complaint, and grants the relief requested by the People's motion. The Board orders respondent Moline Place to pay the full \$45,000 civil penalty requested, to take actions to finally stabilize the site to prevent erosion and sediment discharges from the site (as described later in this opinion and order), and to cease and desist from further violations.

This opinion and order first reviews the procedural history of this case. It then summarizes the People's complaint and addresses the facts deemed admitted. The opinion and order then sets forth the relevant statutory and regulatory provisions. The Board next describes the standard of review applied by the Board in considering summary judgment motions and then summarizes the People's motion for summary judgment. Next, the order provides the Board's discussion of and ruling on that motion before issuing the Board's order.

PROCEDURAL HISTORY

The procedural history below refers only to actions related to Moline Place. On January 3, 2007, the People filed a four-count complaint (Comp.) alleging that respondent Moline Place had committed water pollution violations. In an order dated January 26, 2007, the Board accepted the complaint for hearing. Some three years after the filing of the complaint, Moline Place filed its answer (Ans.) on February 18, 2010, admitting some allegations in the complaint and denying others.

Review of the docket sheet in this case reveals that, since the complaint was filed through the end of calendar year 2009, the hearing officer held 14 telephonic status conferences at roughly 2-3 month intervals.² As memorialized in hearing officer orders following each of these telephone status conferences, complainant has participated in all of them, but respondent Moline Place participated only in the status conference of May 1, 2007. However, it is clear from the hearing officers' orders that the complainant has been in contact with Moline Place, that respondents have met with IEPA, which has conducted site inspections, and that Moline Place agreed to take some but not all suggested remedial actions. *See, e.g., People of the State of Illinois v. Moline Place Development, L.L.C. and CrossTowne Place Development, L.L.C., PCB 07-53* (hearing officer orders of Aug. 14, July 14, 2008, and July 13 and October 13, 2009)).

On October 30, 2009, complainant filed a request for admission of fact (Req. Adm.) as a precursor to filing a motion for summary judgment. Moline Place's response to the request was due by November 30, 2009. On December 22, 2009, counsel filed an appearance on behalf of Moline Place, along with a motion for extension of time until January 28, 2010 to respond to complainant's request to admit facts.

² Telephonic status conferences were held in 2007 on March 1, May 1, July 3, September 11 and November 13, 2007. In 2008, such conferences were held January 13, April 14, July 14, and October 14, while in 2009 they were held January 13, April 13, July 13, and October 13.

In a January 14, 2010 order memorializing a telephonic status conference that day, the hearing officer reported that Moline Place's principal, Mr. Michael Shamsie, submitted an affidavit stating that

Moline Place had been represented by another attorney in a related circuit court matter until that attorney withdrew on November 20, 2009. Although respondent's lack of participation was documented in hearing officer orders, [respondent's] affidavit implies that he believed that [the other attorney] was representing respondent in the action before the Board [as well as in the circuit court action]. PCB 07-53, slip op. at 1 (hearing officer order of Jan. 14, 2010).

The hearing officer granted Moline Place an extension of time until January 28, 2010 to file responses to the request to admit. *Id.* at 2. Moline Place timely filed responses to the request for admission of fact and genuineness of documents on January 28, 2010. (Resp. Req. Adm.)

On February 8, 2010, Moline Place filed an agreed motion for extension of time until February 19, 2010 to file an answer to the complaint. The hearing officer granted the motion by order of February 9, 2010. Moline Place filed its answer (Ans.) on February 18, 2010, admitting some allegations in the complaint and denying others.

As previously stated, the People filed its motion for summary judgment on February 24, 2010. On March 16, 2010, Moline Place received an extension of time until May 7, 2010 for the filing of a response. PCB 07-53, slip op. at 1 (hearing officer order of Mar. 16, 2010).

In an order reflecting a May 3, 2010 status conference, the hearing officer related that Moline Place's attorney had informed Moline Place's agent by letter and e-mail that the attorney would be withdrawing from the case so that respondent Moline Place would need to retain a new attorney, but that Moline Place had never responded to those letters or e-mails. The hearing officer order set up a new status conference date of June 1, 2010, and further stated:

If respondent retains counsel before the next status conference, the hearing officer will grant additional time to respond to the motion for summary judgment.

However, in light of the fact that respondent has never actively participated in this case, the hearing officer will assume that respondent's failure to retain new counsel before the next status conference means that respondent does not intend to respond to the motion for summary judgment, and will refer the matter to the Board for a ruling. PCB 07-53, slip op. at 1 (hearing officer order of May 3, 2010).

The hearing officer report of the June 1, 2010 status conference stated that respondent Moline Place would be meeting with potential new attorneys to discuss the case. The hearing officer set a new status conference date of July 12, 2010, directing Moline Place to have a new attorney file an appearance and to be ready to discuss a date

for the filing of the response to the motion for summary judgment. PCB 07-53, slip op. at 1 (hearing officer order of June 1, 2010).

At the July 12, 2010 status conference, respondent Moline Place's new attorney participated, and was ordered by the hearing officer to file an appearance. The hearing officer order set the next status conference date for October 12, 2010. The order also set a July 26, 2010 due date for the filing of a response to the summary judgment motion, but also stated that "[i]f further time is needed, respondent's attorney is directed to file a written motion for extension of time." PCB 07-53, slip op. at 1 (hearing officer order of July 12, 2010).

On August 27, 2010, Moline Place's attorney filed an appearance and motion for leave to file a response to the summary judgment motion, essentially seeking an extension of time until September 25, 2010 or later. The People filed a response in opposition on August 31, 2010. At the direction of the Board, the hearing officer addressed these filings in an August 31, 2010 order, which reminded the parties that the next status conference date was October 12, 2010. The hearing officer order related that in opposing respondent's latest motion, the People observed that "respondent has gone through several attorneys and has received 5 months of additional time to respond to the motion." PCB 07-53, slip op. at 1 (hearing officer order of Aug. 31, 2010). The order went on to state:

The hearing officer agrees with complainant that respondent has failed to act in a diligent manner, and has relied on delay tactics to postpone the disposition of this case. [Respondent's attorney] shall have 14 days from the date of this order (September 14, 2010) to file a response to the motion for summary judgment. Respondent is advised that no further extensions of time will be granted for this attorney or for any future attorney it may retain. *Id.*

The hearing officer order issued following the October 12, 2010 status conference related that the respondent did not participate, and that the respondent had not filed a response to the motion for summary judgment "so the complainant will wait for the Board's ruling". The next status conference date was set for January 4, 2011. PCB 07-53, slip op. at 1 (hearing officer order of Oct. 12, 2010).

THE COMPLAINT'S ALLEGATIONS AND MOLINE PLACE'S ANSWER

As previously stated, only Counts I and II of the People's complaint relate to Moline Place, so only these are summarized below. Also summarized is Moline Place's January 28, 2010 answer, admitting some allegations, denying others, and declining to respond to paragraphs in the complaint related to CrossTowne Place only (the paragraphs of the answer where the non-responses are made are not cited below). In the interests of clarity, Moline's response to the allegations of the complaint is related immediately following the allegations:

Complaint: Respondent, Moline Place Development, LLC, is an Illinois limited liability company whose registered agent was Michael R. Shamsie. Moline Place owns and is developing a residential housing area called Moline Place located at 6th Street and 11th Avenue in Moline, Rock Island County, Illinois. Comp. at 1 (¶4).

Answer: Moline Place affirmatively stated it is an Illinois limited liability company, and that Michael Shamsie is the registered agent for Moline Place. Respondent "affirmatively states" that Moline Place was inadvertently voluntarily dissolved on December 31, 2009 but that Moline Place submitted documentation to the Illinois Secretary of State requesting reinstatement of Moline Place Development, LLC. Moline Place denies that it is the sole owner of the residential housing area called One Moline Place. Ans. at 1-2 (¶4).

Complaint: Moline Place includes two sites: the site east of 6th Street (the east site) consisting of thirteen acres and the site west of 6th Street (the "west site") consisting of sixteen acres. The east site is to include fourteen homes, seventeen cottages/villas, twenty-four condominiums, and thirty-six townhouses. The west site is to include an existing building (the former nurses' dormitory at Moline Hospital) to be converted into sixty independent living units, eighteen homes, twenty-four condominiums, and fifteen villas. Comp. at 1 (¶6).

Answer: Moline Place admits that One Moline Place includes the two sites of the specified sizes and address, and that Moline Place owns the west site. It denies the other allegations in paragraph 6 of the complaint. Ans. at 2 (¶6). *See also* infra at 14, discussing Resp.; Req. Adm. at 3, regarding identity of property owners.

Complaint: On January 24, 2002, IEPA issued NPDES Permit No. ILR 107509 to respondent for Moline Place. That permit was terminated on August 14, 2003 prior to site stabilization based on Moline Place's representations that construction had been completed and the site stabilized. On May 17, 2004, IEPA issued NPDES Permit No. ILRA460. Comp. at 2 (¶8).

Answer: Moline Place admits the 2002 issuance and 2003 termination of the NPDES permit No. ILR 107509 and issuance of the 2004 permit as identified. But, Moline Place denies the balance of the allegations. Ans. at 2 (¶6).

Complaint: Both the east and west sites of One Moline Place discharge storm water into either a) local streets and from there into City of Moline (City) storm sewers or b) directly into City storm sewers at the site. The City's storm sewer system discharges into a portion of the Mississippi River known as the Sylvan Slough. Sylvan Slough and the Mississippi River are "waters" of the State as that term is defined in Section 3.550 of the Act, 415 ILCS 5/3 .550 (2008). Comp. at 3 (¶10-12).

Answer: Moline Place admits the location of storm water discharges, but claims lack of sufficient knowledge to address whether the City's sewers discharge into Sylvan Slough, and other factual allegations. Ans. at 3 (¶10, 12).

Complaint: Paragraphs 13-17 of the complaint recite various statutory and regulatory provisions relevant to later alleged violations: Sections 3.545, 12(a) and 12(f) of the Act (defining and prohibiting water pollution at 415 ILCS 5/3.545, 12(a) and (f)(2008)), 35 Ill. Adm. Code 309.102 (prohibiting point source discharge without NPDES permit), and 40 CFR 122.26, (construction activity including clearing, grading and excavation required to obtain an NPDES permit and to implement a storm water pollution prevention plan (SWPPP)). Comp. at 3-6 (¶11-17).

Answer: Moline Place has no response to recitation of statutory sections, but denies any allegations of fact in the numbered paragraphs. Ans. at 3-4 (¶13-17).

Complaint: The People allege that on March 24, 2004, Mr. James Kammuehler, IEPA Division of Water Pollution Control/Field Operations Section, Peoria Region, inspected the construction site at One Moline Place and observed that the roadway for the development had been installed and that house construction work was occurring on the east side of 6th Street. Comp. at 6 (¶18) During a phone conversation on March 25, 2004, the City's Public Works Director Mike Waldron advised Mr. Kammuehler that the City had to remove sediment from adjacent public roadways during the construction project, confirming inadequacy of storm water runoff controls. Comp. at 7 (¶19)

Answer: Moline Place stated it had insufficient knowledge to admit or deny these conversations, but denied any allegations of fact. Ans. at 4 (¶18-19).

Complaint: The complaint goes on to recount the contents of a phone conversation on April 2, 2004. Mr. Kammuehler advised Mr. Shamsie, agent for Moline Place, to renew the previously terminated terminated NPDES storm water permit or obtain new coverage until final stabilization was achieved at the site, to modify the Storm Water Pollution Prevention Plan ("SWPPP"), and to include the washing of tires on construction-related vehicles to reduce tracking of mud onto public roadways. Comp. at 7 (¶20).

Answer: Moline Place admitted that a telephone conversation occurred, but stated it had insufficient knowledge or recollection of specific topics, and so denied any allegations of fact. Ans. at 4 (¶20).

Complaint: On May 12, 2004, IEPA sent Moline Place a violation notice (VN) letter citing Moline Place's failure to obtain coverage under the general NPDES storm water permit, its failure to provide or follow an adequate SWPPP, and the unlawful discharge of contaminants onto public roadways and into City storm sewers. Comp. at 7 (¶21).

Answer: Moline Place admitted receiving the VN and its contents, but denied any further allegations of fact. Ans. at 4 (¶21).

Complaint: On May 20, 2004, Mr. Kammuehler returned to One Moline Place. He met with Mr. Shamsie and reported that the failure to control erosion continued to be a problem with sediment leaving the site at numerous locations and entering City streets, sidewalks, and storm inlets. Comp. at 7 (¶22).

By letter dated June 21, 2004, Mr. Shamsie responded to the VN letter, and included with this letter a new Notice of Intent (NOI) submitted April 12, 2004, notice of coverage under the general NPDES storm water permit dated May 17, 2004, a revised SWPPP addressing expected construction activities for the project, and additional documentation. Comp. at 7 (¶23).

Answer: Moline Place admitted the allegations of both above paragraphs. Ans. at 4-5 (¶22-23).

Complaint: On July 23, 2004, IEPA rejected Moline Place's proposed Compliance Commitment Agreement (CCA). An August 24, 2004 inspection report noted some work on erosion controls, but also that sediment was still leaving the site. Comp. at 8 (¶24).

Answer: Moline Place admitted receiving the CCA rejection, but denied any further allegations of fact. Ans. at 5 (¶24).

Complaint: The People's complaint asserts that, on March 9, 2005, the IEPA sent Moline Place a notice of intent to pursue legal action (NIPLA) letter, reciting the violations included in the VN letter. Comp. at 8 (¶25).

Answer: Moline Place admitted receiving the NIPLA. Ans. at 5 (¶25).

Complaint: On March 23, 2005, Mr. Kammuehler re-inspected the One Moline Place construction site. He noted continuing inadequacies in storm water controls, and found that sediment was still discharging from both the east and west sites. Comp. at 8 (¶26).

Answer: Moline Place stated it had insufficient knowledge to admit or deny IEPA observations, and so denied any allegations of fact. Ans. at 5 (¶26).

Complaint: Following a March 28, 2005 telephone conference meeting of the parties concerning the NIPLA letter, on April 22, 2005, Mr. Shamsie submitted a revised SWPPP. Comp. at 8 (¶27-28).

Answer: Moline Place admitted these facts. Ans. at 5 (¶27-28).

Complaint: On June 2, 2005, Mr. Shamsie forwarded "copies of agreements purporting to transfer liability for storm water pollution prevention for 18 lots to other builders"; the complaint stated IEPA believed this transfer affected less than 50% of the 31-acre site. Comp. at 8 (¶29). IEPA responded by letter of August 16, 2005 that it believed that respondent remained responsible, under the terms of the NPDES permit, for storm water controls and sediment releases from the site. Comp. at 8 (¶30).

Answer: Moline Place admitted sending and receiving these letters, but denied the remaining allegations. Ans. at 5 (¶29-30).

Complaint: The People contend that Mr. Kammuehler re-inspected the One Moline Place construction site on November 9, 2005, January 27, 2006, and March 23, 2006. He observed that earlier violations continued. Comp. at 8 (¶31).

Answer: Moline Place stated it had insufficient knowledge to admit or deny IEPA observations, and so denied any allegations of fact. Ans. at 5-6 (¶31).

Complaint: The People allege that that the respondent caused, allowed or threatened to cause water pollution by failing to provide adequate storm water pollution controls, in violation of Section 12(a) of the Act, 415 ILCS 5112(a)(2008), and that these violations occurred repeatedly from at least March 24, 2004 through the time of the filing of the complaint. Comp. at 9 (¶32-33).

Answer: Moline Place denies these allegations. Ans. at 6 (¶32-33).

Count II

Complaint: In Count II, the People reallege the facts detailed in paragraphs 1-31 of the complaint, as detailed above. Comp. at 9. Count II concludes with the assertion that respondent failed to obtain coverage under the general NPDES storm water permit for construction site activities in violation of 35 III . Adm. Code 309.102(a). Moreover, the complaint alleges, by violating 35 Ill. Adm. Code 309.102(a), respondent has violated Section 12(f) of the Act, 415 ILCS 5/12(f)(2008).

Answer: Moline Place reasserts its prior answers as to paragraphs 1-31 of the complaint, and denied the rest of the allegations. Ans. at 6 (¶1-31, 32-33).

STATUTORY AND REGULATORY PROVISIONS

Section 3.545 of the Act provides that

“[w]ater pollution” is such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life. 415 ILCS 5/3.545 (2008).

Section 3.550 of the Act provides that “[w]aters’ means all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State.” 415 ILCS 5/3.550 (2008).

Section 12 of the Act provides in pertinent part that no person shall:

- (a) Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act.

* * *

- (f) Cause, threaten or allow the discharge of any contaminant into the waters of the State, as defined herein, including but not limited to, waters to any sewage works, or into any well or from any point source within the State, without an NPDES permit for point source discharges issued by the Agency under Section 39(b) of this Act, or in violation of any term or condition imposed by such permit, or in violation of any NPDES permit filing requirement established under Section 39(b), or in violation of any regulations adopted by the Board or of any order adopted by the Board with respect to the NPDES program. 415 ILCS 5/12(a), 12(d), 12(f) (2008).

Section 33(c) of the Act provides in its entirety that

- (c) In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved including, but not limited to:
 - (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
 - (ii) the social and economic value of the pollution source;
 - (iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
 - (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
 - (v) any subsequent compliance. 415 ILCS 5/33(c) (2008).

Section 42(h) of the Act provides that

In determining the appropriate penalty to be imposed . . . the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors:

- (i) the duration and gravity of the violation;
- (ii) the presence or absence of due diligence on the part of the respondent in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;
- (iii) any economic benefits accrued by the respondent because of delay in compliance with requirements, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance;
- (iv) the amount of monetary penalty which will serve to deter further violations by the respondent and to otherwise aid in enhancing voluntary compliance with this Act by the respondent and other persons similarly subject to the Act;
- (v) the number, proximity in time, and gravity of previously adjudicated violations of the Act by the respondent;
- (vi) whether the respondent voluntarily self-disclosed, in accordance with subsection (i) of this Section, the non-compliance to the Agency; and
- (vii) whether the respondent has agreed to undertake a “supplemental environmental project,” which means an environmentally beneficial project that a respondent agrees to undertake in settlement of an enforcement action brought under this Act, but which the respondent is not otherwise legally required to perform. 415 ILCS 5/42(h) (2008).

Section 309.102(a) of the Board’s water pollution regulations provides in its entirety that “[e]xcept as in compliance with the provisions of the Act, Board regulations, and the CWA [Clean Water Act], and the provisions and conditions of the NPDES permit issued to the discharger, the discharge of any contaminant or pollutant by any person into the waters of the State from a point source or into a well shall be unlawful.” 35 Ill. Adm. Code 309.102(a).

Storm water discharges are regulated by 40 CFR 122.26,³ which requires a person to obtain an NPDES permit and to implement a SWPPP for construction activity including clearing, grading and excavation. The section provides in pertinent part:

³ The Board does not have the authority to adjudicate violations of federal regulations. But, as the People explain in the complaint, the federal Clean Water Act regulates the discharge of pollutants from a point source into navigable waters and prohibits such point source discharges without an NPDES permit. The United States Environmental Protection Agency (USEPA) administers the NPDES program in each State unless the USEPA has delegated authority to do

(a) Permit requirement.

- (1) Prior to October 1, 1994, discharges composed entirely of storm water shall not be required to obtain a NPDES permit except:

* * *

- (ii) A discharge associated with industrial activity (see §122.26(a)(4);

* * *

- (4) Discharges through large and medium municipal separate storm sewer systems . . .

* * *

- (9) (i) On and after October 1, 1994, for discharges composed entirely of storm water, that are not required by paragraph (a)(1) of this section to obtain a permit, operators shall be required to obtain a NPDES permit only if :

* * *

- (B) The discharge is a storm water discharge associated with small construction activity pursuant to paragraph (b)(15) of this section;

* * *

(b) Definitions.

* * *

- (14) Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14):

* * *

so to that State. The USEPA has authorized the State of Illinois to issue NPDES permits through the IEPA in compliance with federal regulations. Comp. at 2.

(x) Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area . Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more;

* * *

(15) Storm water discharge associated with small construction activity means the discharge of storm water from:

* * *

(i) Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres. 40 CFR 122.26 (2008).

STANDARD OF REVIEW FOR MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E. 2d 358, 370 (1998); *see* 35 Ill. Adm. Code 101.516(b) (Motions for Summary Judgment). In ruling on a motion for summary judgment, the Board “must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party.” Dowd & Dowd, 693 N.E.2d at 370 (1998).

Summary judgment “is a drastic means of disposing of litigation,” and therefore it should be granted only when the movant’s right to relief “is clear and free from doubt.” Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E. 2d 358, 370 (1998), citing Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E. 2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must “present a factual basis which would arguably entitle [it] to judgment.” Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

motion

THE PEOPLE’S MOTION FOR SUMMARY JUDGMENT

On February 24, 2010, the People filed a motion for summary judgment. In the motion, after reciting the pleadings filed, the People assert that

Moline Place has filed no affirmative defenses. Complainant relies upon uncontroverted facts set forth in the Affidavit of James E. Kammuegger (Exhibit “A” hereto”). Mot. at 1.

Mr. Kammuegger’s affidavit is accompanied by 26-unnumbered pages of documents. These pages are mainly memoranda from Mr. Kammuegger’s files documenting site visits (including site sketches) and summaries of contacts with Moline Place’s agent. Also included are various other documents, including permit correspondence sent to and from IEPA and Moline Place, and a notice and order from the City to Moline Place.

Despite having received several extensions of time (through various attorneys) in which to file a response in opposition, Moline Place has failed to respond to the People’s motion for summary judgment.⁴ Respondent’s failure to respond to the motion for summary judgment has resulted in respondent’s waiving any objection to the Board granting the motion made by the People.

FACTS RELIED UPON IN THE MOTION

The motion relates that the People rely on uncontroverted facts. These facts are essentially the same as those contained in its October 30, 2009 request to admit facts, but modified to eliminate certain factual assertions denied by Moline Place.

The chief eliminated item concerns the ownership of the entire site occupied by One Moline Place. The complaint had alleged that Moline Place owned the entire 30 acre site. But, in its response to Item 5 of the request to admit, Moline Place stated as follows:

5.[REQUEST TO ADMIT] One Moline Place consists of two sites: one of approximately thirteen acres on the east side of 7th Street and the second of approximately sixteen acres on the west side of 7th Street.

ANSWER: Respondent admits that Moline Place Development owned real property in two locations, and that one location was approximately thirteen acres on the east side of 7th Street, and the second location was approximately sixteen acres on the west side of 7th Street. Respondent affirmatively states that title to all of the

⁴ The Board’s procedural rules provide that, “[w]ithin 14 days after service of a motion, a party may file a response to the motion. If no response is filed, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board . . . in its disposition of the motion.” 35 Ill. Adm. Code 101.500(d).

parcels in Phase I to different builders and developers [sic—verb omission in original], and the remaining undeveloped parcels of property are being transferred to the City of Moline. Respondent lacks sufficient information to admit or deny whether "One Moline Place," as referred to in Complainant's Requests to Admit, is the same real property owned by Moline Place Development. Resp. Req. Adm. at 3.

This is consistent with Moline Place's answer to the complaint. See Ans. at 2 ((¶6). But, whether or not Moline Place is the owner of the entirety of the property at One Moline Place, the record is clear that Moline Place as developer was the holder of the NPDES permits for the entirety of the site.

Michael R. Shamsie, the registered agent for Moline Place, is a licensed professional engineer and the president of an engineering firm known as Landmark Engineering Group, Inc. in East Moline. Mot. at 2.

Moline Place purchased property located at 7th Street and 11th Avenue, in Moline, Rock Island County, Illinois, for the purpose of developing a residential housing area commonly referred to as One Moline Place. One Moline Place consists of two sites: one of approximately thirteen acres on the east side of 7th Street and the second of approximately sixteen acres on the west side of 7th Street. One Moline Place discharges storm water either to local streets and from there into the municipal storm sewers, or directly into the municipal storm sewers at the site. The municipal storm sewer system discharges into a swift flowing portion of the Mississippi River known as the Sylvan Slough. Mot. at 2.

On December 22, 1997, Moline Place submitted a Notice of Intent (NOI) to the IEPA for the One Moline Place project and was granted coverage under the general permit for storm water discharges associated with construction site activities as NPDES Permit No. ILR103796. Mot. at 2. On November 6, 2002, Moline Place submitted a NOI to IEPA for the One Moline Place project and was granted coverage under NPDES permit No. ILR107509.

On July 23, 2003, NPDES permit No. ILR103796 was terminated after Moline Place submitted to IEPA a Notice of Termination (NOT) of coverage dated July 16, 2003 and signed by Mr. Shamsie. *Id.* at 3 and Exh. B. On August 14, 2003, NPDES permit No. ILR 107509 was terminated after Moline Place submitted to Illinois EPA a NOT of coverage dated August 5, 2003 and signed by Mr. Shamsie. *Id.* at 3 and Exh. C. When he submitted the July 16, 2003 and August 5, 2003 NOT's on behalf of Moline Place, Mr. Shamsie certified under penalty of law that all disturbed soils at One Moline Place had been finally stabilized or that all storm water discharges associated with industrial activity from One Moline Place had been eliminated.

But, when Moline Place submitted the July 16, 2003 and the August 5, 2003 NOT's, all disturbed soils at One Moline Place had not been finally stabilized, and all storm water discharges associated with the project had not been eliminated. Construction activities were actually continuing at the site. Mot. at 3. On March 24, 2004, IEPA's Mr. Kammuller first inspected the construction site at One Moline Place. At that time, roadway installation had

commenced and house construction work was occurring on the east site. Sediment was collecting on the sidewalks and public streets as well as entering storm water inlets. The City had been required to remove sediment from public roadways adjacent to One Moline Place since construction work had begun. Sediment leaving the One Moline Place construction site flowed down bluffs and down 6th Street onto 4th Avenue (Rte. 92) causing a traffic hazard. *Id.*

On May 17, 2004, IEPA issued NPDES permit No. ILR10A460 to Moline Place after Moline Place submitted a third NOI dated April 12, 2004 and signed by Mr. Shamsie. From August 14, 2003 through May 17, 2004 Moline Place had no coverage under the NPDES general permit for construction site activities although construction activities were proceeding at One Moline Place. Mot. at 4.

On May 20, 2004, Mr. Kammuehler re-inspected One Moline Place. At that time, construction work was occurring on the east site and some demolition work concerning a former dormitory building was occurring on the west site. Sediment continued leaving the site at numerous locations and entering city streets, sidewalks, and storm inlets. Erosion gullies were present near the storm water inlets. Mot. at 4.

On March 23, 2005, Mr. Kammuehler re-inspected the construction site at One Moline Place. Sediment was still discharging from both the east and west sites to streets, sidewalks, and storm inlets. Most of the east site was still barren and vegetation cover that was present was not at seventy percent (70%) density. On the east site there were erosion channels, storm inlets covered with sediment, a severely damaged area of the straw bale system and off site sediment on the sidewalk and street. Yet, Moline Place had filed no "Incidence of Noncompliance" (ION) reports. Mot. at 4.

On November 9, 2005, Mr. Kammuehler re-inspected the construction site at One Moline Place. Sediment was still discharging to streets, sidewalks, and storm inlets. Vegetation cover was not at 70% density. The straw bales in place were old and deteriorated. There was intentional bypassing of erosion controls at inlet no. 1. No ION reports had been submitted by Moline Place. Mot. at 4.

On January 27, 2006, Mr. Kammuehler re-inspected the construction site at One Moline Place. Mot. at 4-5. No erosion controls were in place for construction activity areas and additional soil areas had been disturbed. Unprotected dirt dump-sites were present. Vegetation cover was not at 70% density. No ION reports had been submitted by Moline Place. *Id.* at 5.

On March 23, 2006, Mr. Kammuehler re-inspected the construction site at One Moline Place. Storm inlets were not protected. Sediment was leaving the site and entering nearby storm inlets. The only interim erosion controls were deteriorated straw bales. Mot. at 5.

On September 13, 2007, Mr. Kammuehler re-inspected the construction site at One Moline Place. At that time, the old and deteriorated straw bales at the site were not protecting storm water inlets. Storm water inlets were covered with sediment. New construction activity areas were not protected to keep sediment out of the public streets. Demolition of the dormitory

building was underway and no erosion controls were provided to keep demolition debris run-off from the streets and storm water inlets. Mot. at 5.

In response to a June 29, 2009 citizen complaint, the City inspected and confirmed that sediment was continuing to leave the One Moline Place construction site, areas of the site lacked erosion controls, and erosion controls in place were ineffective. On June 30, 2009, the City issued its Notice and Order to Moline Place pursuant to the City's Storm Water Ordinance for continuing storm water violations at One Moline Place. Mot. at 5 and Exh. D.

The NPDES permits issued to Moline Place required it to develop a SWPPP according to good engineering practices, and to implement that SWPPP. Moline Place conducted construction site activities at One Moline Place without NPDES permit coverage during 2003 and 2004. Mot. at 5. Moline Place caused or allowed large amounts of sediment from the One Moline Place site to collect on sidewalks and public streets and enter the municipal storm water system from at least March 24, 2004 through at least June 29, 2009 due to inadequate storm water erosion controls. *Id.* at 5-6.

At One Moline Place, Moline Place failed to a) properly operate and maintain erosion and sediment control measures, b) have disturbed portions of the site construction where activities had temporarily or permanently ceased stabilized with appropriate measures no later than 14 days after the last construction activity, c) have qualified personnel perform inspections of disturbed areas of the construction site that had not been finally stabilized, of structural control measures, and of locations where vehicles enter or exit the site at least every seven calendar days and within 24 hours of the end of a storm that is 0.5 inches or greater or of an equivalent snow, and failed to submit ION reports for violations of the SWPPP observed during a periodic inspection. Mot. at 6.

The People argue that there is no genuine issue of material fact as to any of the following:

Moline Place caused, allowed or threatened to cause water pollution by failing to provide adequate storm water pollution controls, in violation of Section 12(a) of the Act, 415 ILCS 5/12(a)(2008); b) Moline Place continued construction site activities at the One Moline Place site without coverage under the general NPDES storm water permit, in violation of 35Ill. Adm. Code 309.1 02(a) and Section 12(f) of the Act, 415 ILCS 5/12(f) (2008); c) Moline Place failed to implement an adequate SWPPP in violation of 35Ill. Adm. Code 309.1 02(a) and Section 12(f) of the Act, 415 ILCS 5/12(f) (2008); and d) Moline Place submitted NOT's prior to final stabilization being achieved at the site in violation of 35 Ill. Adm. Code 309.1 02(a) and Section 12(f) of the Act, 415 ILCS 5/12(f) (2008). Mot. at 8-9.

The People then assert that the record supports Board issuance of a remedy order, consistent with the factors of Sections 33(c) and 42(h) of the Act. 415 ILCS 5/ 33(c) and 42(h) (2008).

As to the Section 33(c) factors, the People argue:

The water quality of the Mississippi River was adversely affected by the inadequate storm water pollution controls and Moline Place's failure to comply with the NPDES general storm water permit.

There is social and economic benefit in the construction of new homes at the site. Construction activity at the site was suitable for the area in which it occurred. Providing adequate storm water pollution controls and complying with the NPDES general storm water permit were both technically practicable and economically reasonable. Some efforts were made by Moline Place to provide and maintain additional erosion controls at the site but sediment continued to leave the site at numerous locations and entered city streets, sidewalks, and storm inlets. NPDES permit coverage was terminated for the site in 2003 although final stabilization had not been achieved and construction activities continued. Mot. at 9-10.

Concerning Section 42(h) factors, the People state:

When James Kammueller first inspected the construction site at One Moline Place on March 24, 2004, sediment was collecting on the sidewalks and public streets as well as entering storm water inlets. Mr. Kammueller performed follow-up inspections at the site on May 20, 2004, March 23, 2005, November 9, 2005, January 27, 2006, March 23, 2006, and September 13, 2000. On each follow-up inspection Mr. Kammueller observed continuing violations. On June 30, 2009, the City of Moline issued its Notice and Order to Moline Place as a result of storm water ordinance violations observed by a city inspector on June 29, 2009. Large amounts of sediment from the One Moline Place site collected on sidewalks and public streets and entered the municipal storm water system from at least March 24, 2004 through at least June 29, 2009.

Moline Place did not act with due diligence to resolve these violations. Although subsequent to Mr. Kammueller's initial inspection on March 24, 2004, some efforts were made by Moline Place to provide and maintain additional erosion controls, numerous inadequacies in the measures were observed during Illinois EPA inspections. Following Mr. Kammueller's March 2004 inspection, Moline Place did submit a third NOI for coverage under the general NPDES permit dated April 12, 2004, and NPDES permit No. ILR10A460 was issued to Moline Place on May 17, 2004. The City of Moline inspection on June 29, 2009, confirmed that sediment was continuing to leave the One Moline Place construction site, that areas of the site lacked erosion controls, and that erosion controls in place were ineffective.

Moline Place delayed or avoided the costs of implementing adequate erosion control measures at the site for, at minimum, a period exceeding five years, prematurely terminated the NPDES permit coverage for the site, and delayed obtaining new coverage under the general NPDES permit. Moline Place benefitted economically as a result of these acts of non-compliance.

Complainant has determined, based upon the specific facts of this matter, that a penalty of Forty-Five Thousand Dollars (\$45,000.00) will serve to deter further violations and aid in future voluntary compliance with the Act and Board Regulations. On June 4, 2009, the Board awarded a penalty of \$15,000.00 against co-defendant, CROSSTOWNE PLACE DEVELOPMENT, L.L.C., concerning a smaller site with violations of a shorter duration.

To Complainant's knowledge, Moline Place has no previously adjudicated violations of the Act.

Moline Place did not voluntarily disclose the violations involved in this case.

The adjudication of this matter does not include a supplemental environmental project. Mot at 11-12.

In summary, the People request that the Board enter an order granting summary judgment in their favor along with a finding that Moline Place has violated the Act and Board rules as alleged. As a remedy, the People request the Board to impose a \$45,000 penalty to aid in enforcement of the Act. Finally, the People request the Board to order respondent to cease and desist from further violations, and to properly implement the SWPPP, comply with all requirements of the NPDES permit, and, when final stabilization of the site has been accomplished and all storm water discharges from construction activities have been eliminated, to submit an NOT to IEPA. Mot. at 12-13.

DISCUSSION

The Board finds, as the People argued, that the uncontested facts are sufficient to establish that respondent Moline Place has violated the Act and the Board's regulations as alleged in the Counts I and II of the complaint. Below, the Board reviews evidence and arguments offered in its support before making its findings and reaching its conclusions.

Uncontested Facts Admitted and As Supported by Affidavit in the Motion

In the following section, the Board sets out the uncontested facts. In addition to those facts, which Moline Place has failed to contest in its responses to the People's request to admit and in its answer, the Board relies on the facts contained in the People's motion and supporting affidavit, to which Moline Place failed to respond.

Liability Determination

Counts I & II of the complaint allege that a) Moline Place caused, allowed or threatened to cause water pollution by failing to provide adequate storm water pollution controls, in violation of Section 12(a) of the Act, 415 ILCS 5/12(a)(2008); b) Moline Place failed to obtain coverage under the general NPDES storm water permit prior to commencing construction site activities, in violation of 35 Ill. Adm. Code 309.102(a) and Section 12(f) of the Act, 415 ILCS

5/12(f) (2008); c) Moline Place failed to prepare and implement an adequate SWPPP in violation of 35 Ill. Adm. Code 309.102(a) and Section 12(f) of the Act, 415 ILCS 5/12(f) (2008); and d) Moline Place submitted an NOT prior to final stabilization being achieved at the site in violation of 35 Ill. Adm. Code 309.102(a) and Section 12(f) of the Act, 415 ILCS 5/12(f) (2008).

The record demonstrates that the unnamed stream at One Moline Place and the Mississippi River are “waters” of the State as that term is defined in Section 3.550 of the Illinois Environmental Protection Act (“Act”), 415 ILCS 5/3.550 (2008). The storm water discharged from the One Moline Place site constitutes a “contaminant” as defined by Section 3.165 of the Act, 415 ILCS 5/3.165. The storm water system at One Moline Place constitutes a “point source” as that term is defined in the federal Clean Water Act, 33 U.S.C. § 1362(14). *Id.*

The record is clear that Moline Place owns some, if not all, of the 30 acres site know as One Moline Place. The issue of who is the owner of the entirety of the property at One Moline Place is immaterial to the uncontroverted fact that Moline Place as developer was the holder of the NPDES permits for the site.

The record demonstrates that IEPA issued NPDES permit No. ILR 103796 to respondent in December 1997 for storm water discharges related to One Moline Place; this permit was terminated July 23, 2003. A second NPDES permit, No. ILR107509, was issued in November 2002, and this was terminated on August 24, 2003. Both permits were terminated based on certified representations in Moline Place’s July 16 and August 5, 2003 NOTs “that all disturbed soils at One Moline Place had been finally stabilized or that all storm water discharges associated with industrial activity from One Moline Place had been eliminated.”

But, the record also demonstrates that construction activities were ongoing at the One Moline Place site when IEPA inspector Kammuehler visited the site on March 24, 2004. During that inspection, the inspector observed that sediment was collecting on streets and sidewalks, and entering storm water inlets, requiring the City to remove it to mitigate traffic hazards.

The Board finds that Moline Place had no NPDES permit from the site from August 14, 2003 through May 17, 2004, when One Moline Place filed a third NOI for the site. During inspections from May 20, 2004 through June 29, 2009, sediment continued to leave the site, erosion controls were either deficient or lacking, and final stabilization had not been achieved. Finally, the Board notes that it is unclear from this record whether compliance with the permit’s final stabilization requirements had been achieved at the time of the filing of the motion for summary judgment in February 2010, or at any subsequent time.

Based on all of these facts, the Board finds that there are no genuine issues of material fact and that the People are entitled to judgment as a matter of law on counts I and II. *See* 35 Ill. Adm. Code 101.516(b). Consequently, the Board grants the People’s motion for summary judgment as to Count I and II and finds that respondent violated Sections 12(a) and (f) of the Act, 415 ILCS 5/12(a) and (f) (2008), 35 Ill. Adm. Code 309.102(a), and 40 CFR 122.

Remedies

The People here have requested multiple remedies: a remediation order, a cease and desist order, and a civil penalty. In fashioning all of its orders, the Board must consider the factors of Section 33(c) of the Act. If the Board determines a penalty is appropriate, the Board must also consider the factors of Section 42 (h) of the Act.

Section 33(c)

Addressing the factors at Section 33(c) of the Act (415 ILCS 5/33(c) (2008)), the People suggested that the water quality of the Mississippi River was adversely affected by Moline Place's activities. Mot. at 9. The Board finds that Moline Place's failure to use adequate erosion and sediment control measures, repeated failure to comply with permit terms and to finally stabilize the site despite certifications that it had done so, and operation without any NPDES permit at all for portions of 2003 and 2004 resulted in a significant "injury to or interference with the protection of the health, general welfare and physical property of the people" and weighs this factor in favor of requiring remedies sought by the People. *See* 415 ILCS 5/33(c)(1) (2008). This is underscored by the fact that the City of Moline was forced to itself remove sediment from the public way in 2004 to mitigate traffic hazards, and again in 2009 to cite Moline Place for sediment issues in response to citizen complaints. It is unclear from the record whether these sediment and erosion problems, including impairment to the waters of the State, will be resolved absent an order from the Board.

Regarding "the social and economic value of the pollution source," the People suggest that new home construction has social value. Mot. at 9; *see* 415 ILCS 5/33(c)(2) (2008). On the issue of "the suitability or unsuitability of the pollution source to the area in which it is located," the People also claim that the site was suitable for construction." *Id.*; *see* 415 ILCS 5/33(c)(3) (2008). There is nothing in the record to refute these claims. But, the Board notes that one facet of these values and site suitability considerations must be that construction is properly performed after receipt of, and in compliance with, all required permits. As this has not been the case with Moline Place, the Board weighs these two factors in favor of remedies sought by the People.

The People also argue that "[p]roviding adequate storm water pollution controls and complying with the general storm water permit was both technically practicable and economically reasonable." Mot. at 7; *see* 415 ILCS 5/33(c)(4) (2008). Respondent has in no way opposed this argument, and the Board finds that this factor weighs in favor of remedies sought by the People.

Addressing the final factor of any subsequent compliance, *see* 415 ILCS 5/33(c)(5) (2008), the record is unclear, as the People stated that

Some efforts were made by Moline Place to provide and maintain additional erosion controls at the site but sediment continued to leave the site at numerous locations and entered city streets, sidewalks, and storm inlets. NPDES permit coverage was terminated for the site in 2003 although final stabilization had not been achieved and construction activities continued. Mot. at 10.

Under these circumstances, the Board cannot find that this factor weighs in favor of Moline Place.

The Board finds on the basis of the record before it that the Section 33(c) factors weigh in favor of granting all of the relief requested by the People, including a civil penalty. In reaching this finding, the Board places considerable emphasis on Moline Place's failure to have a permit from August 14, 2003 through May 17, 2004, its failure to comply with required permits, and the fact that there is no evidence that site stabilization has been achieved or that water pollution has ceased to occur.

To determine the appropriate penalty amount, the Board below considers factors listed in Section 42(h) of the Act. *See* 415 ILCS 5/42(h) (2008).

Section 42

The Board notes that, under Section 42(a) of the Act, violators are liable for a civil penalty of up to \$50,000 for each violation and an additional penalty of \$10,000 for each day that the violations continues. *See* 415 ILCS 5/42(a) (2008). The People suggest that a \$45,000 penalty is appropriate here "based upon the specific facts of this matter". Mot. at 12. The People additionally noted that the co-respondent in the original case, CrossTowne Place, was fined \$15,000 for a smaller site with violations of a shorter duration. People of the State of Illinois v. Moline Place Development, L.L.C. and CrossTowne Place, PCB 07-53 (June 4, 2009) (13.2 acre site of 12 homes, violations commencing November 2004, apparently continuing through date of order).

Section 42(h) articulates the aggravating and mitigating factors that the Board weighs in determining an appropriate civil penalty (*see* 415 ILCS 5/42(h) (2008)). The first two factors relate to the duration and gravity of the violation, and any due diligence of respondent in attempting to comply. *See* 415 ILCS 5/42(h)(1) and (2) (2008). The record demonstrates that Moline Place had certified that construction had been completed and the site stabilized in July and August of 2003, when it requested termination of the NPDES permits issued in 1997 and 2002. Yet, when IEPA inspector Kammuller began his visits to the One Moline Place construction sites in March 2004, sediment was exiting the sites and collecting on streets and sidewalks as well as entering storm water inlets. The same violations continued during six subsequent IEPA inspections on various named dates in 2004 through 2007, and during a June 2009 inspection by the City resulting in a municipal citation. Although Moline Place made some effort in 2004 to improve erosion controls, these proved to be inadequate. Mot. at 8-9. The Board notes that the record indicates that the escape of sediment from the site, erosion problems, and permit violations have persisted for at least a five year period, as did the resulting water pollution to the waters of the State. Moreover, Moline Place operated without a permit from August 14, 2003 through May 17, 2004. The Board weighs this "gravity and duration" factor against Moline Place.

On the issue of respondent's diligence, the Board finds that this factor mainly weighs against Moline Place. *See* 415 ILCS 5/42(h)(2) (2008). Moline Place did eventually apply for

the required permit after terminating the prior permits. But, Moline did not fully comply with permit requirements concerning sediment control and site stabilization.

The People contend that that respondent has accrued economic benefit as a result of the violations, since it has

delayed or avoided the costs of implementing adequate erosion control measures at the site, delayed obtaining coverage under the general NPDES permit and prematurely terminated the permit. Mot. at 9; *see* 415 ILCS 5/42(h)(3) (2008).

The record contains no evidence to the contrary, and the Board weighs this factor against Moline Place.

The People state that respondent “has no previously adjudicated violations” of the Act. Mot. at 9; *see* 415 ILCS 5/42(h)(5) (2008). The Board weighs this factor in favor of respondent.

With regard to self-disclosure, the People claim that respondent “did not voluntarily disclose to the IEPA under Section 42(i). Mot. at 9; *see* 415 ILCS 5/42(h)(6) (2008); *see also* 415 ILCS 5/42(i) (2008) (providing for reduction in penalty for voluntary self-disclosure of non-compliance discovered through audit to Agency). The Board weighs this factor against Moline Place, as there is no evidence of any self-audit or disclosure.

Finally, the People stated that respondent has not offered to perform a supplemental environmental project (SEP). Mot. at 9; *see* 415 ILCS 5/42(h)(7) (2008). The Board weighs this factor neither for nor against respondent. Section 42(h)(7) by its terms defines a SEP as “an environmenally beneficial project that a respondent agrees to undertake in settlement of an enforcement action” , and there is no settlement proposed here.

On the issue of deterrence, the People argue that a maximum civil penalty of \$45,000 “will serve to deter further violations and aid in future voluntary compliance”. Mot. at 9; *see* 415 ILCS 5/42(h)(4) (2008). Respondent has offered no facts or arguments to dispute this assertion or suggested penalty amount.

Penalty Computation

For the reasons stated below, the Board finds that the Section 42(h) factors justify the imposition of the full \$45,000 penalty on respondent as proposed by the People. In reaching this finding, the Board places particular weight on the duration and gravity of the violation and on respondent’s lack of due diligence in attempting to comply with the Act and the Board’s regulations.

When contemplating assessment of civil penalties, and the reasonableness of penalties requested by complainants, the Board first looks to the amount of the statutory penalty. Under Section 42(a), any person that

violates any provision of this Act or any regulation adopted by the Board, or

any regulation adopted by the Board, or any permit or term or condition thereof, . . . shall be liable for a civil penalty of not to exceed \$50,000 for the violation and an additional civil penalty of not to exceed \$10,000 for each day the violation continues; . . . 415 ILCS 5/42(a).

Under Section 42(b) of the Act, any person that violates Section 12(f) of the Act or any NPDES permit condition is “liable for a civil penalty of not to exceed \$10,000 per day of violation.” 415 ILCS 5/42(b).

Based on a violation period beginning March 24, 2004 and running through today, the Board calculates that the maximum daily statutory penalty for one violation of Section 12(f) is roughly \$18.8 million. The Board found three violations of Section 12(f). *See, infra* at 18-19. Since the Board also found one violation of Sections 12(a) of the Act, requiring an additional \$50,000 penalty for that violation in addition to the daily penalty, this would result in a maximum possible penalty of roughly \$71.7 million.

Next, the Board looks to the penalty “floor” established in Section 42(h) (3), requiring the Board to recapture any economic benefits from non-compliance. Here, the People have not attempted to quantify Moline Place’s economic benefit, so that there is no minimum penalty figure established in this record.

Since there was a penalty assessed against a co-respondent in this case, the Board next looks to the amount of that penalty. As previously noted, some 15 months ago, the Board assessed a civil penalty of \$15,000 against respondent CrossTowne in the context of an uncontested motion for summary judgment. In so doing, the Board noted that in other cases the People were awarded the full amount of the penalty requested in some uncontested cases, and that the award against CrossTowne was in line with other water penalties. People of the State of Illinois v. Moline Place Development, L.L.C. and CrossTowne Place, PCB 07-53, slip op at 16 (and cases cited there) (June 4, 2009) (3.2 acre site of 12 homes, violations commencing November 2004, apparently continuing through date of order).

Comparing the cases as to each respondent, the One Moline Place construction sites total 30 acres, to CrossTowne’s 3.2 acres. Moline Place’s violation began eight months before CrossTowne’s, and has continued 15 months longer (based on the date of today’s order). Finally, Moline Place caused traffic hazards in addition to water pollution, requiring action by the City to remove the sediment from the public way (in addition to causing it to treat sediment-laden waters tributary to the City’s sewer system). In contrast, CrossTowne caused flooding on one neighboring property in addition to causing water pollution.

As previously noted, Moline Place sought and received (through various attorneys) several extensions of time in which to file a response in opposition to the motion and penalty request, but in the end failed to make any filing. While respondent CrossTowne was assessed a third of the penalty requested by the People here, the One Moline Place site is ten times the size, and its poor site management has impacted the City’s traffic and sewage treatment operations, in addition to causing water pollution. Finally, construction activities at One Moline Place continued for 9 months in 2003-2004 without benefit of NPDES permit, after Moline Place had

requested termination of previous NPDES permits, certifying that the site had been stabilized and construction completed.

CONCLUSION

The Board grants the People's unopposed motion for summary judgment. The Board finds that respondent Moline Place violated the Act and the Board's regulations as alleged in the two counts of the complaint directed against it (Counts I and II). The Board orders Moline Place to perform site remediation as detailed below and imposes the People's requested civil penalty of \$45,000 on respondent. In addition, the Board requires respondent to cease and desist from further violations of the Act and the Board's regulations.

This opinion constitutes the Board's findings of fact and conclusions of law as to Moline Place only. But, as Moline Place is the sole remaining respondent, this closes the docket.

ORDER

1. The Board grants the Office of the Attorney General, on behalf of the People of the State of Illinois, summary judgment on Counts I and II of the complaint as alleged against respondent Moline Place Development, LLC. The Board thus finds that respondent has violated Sections 12(a) and 12(f) of the Environmental Protection Act (Act) (415 ILCS 5/12(a) and 12(f) (2008)) and Sections 309.102(a) of the Board's water pollution regulations (35 Ill. Adm. Code 309.102(a)).
2. Respondent Moline Place must pay a civil penalty of \$45,000 no later than Monday, December 6, 2010 which is the first business day after 30 days from the date of this order. Such payment must be made by certified check, money order, or electronic transfer of funds, payable to the Environmental Protection Trust Fund. The case number, case name, and Moline Place's federal employer identification number must be included on the certified check or money order.
3. Respondent must send the certified check, money order, or confirmation of electronic funds transfer to:

Illinois Environmental Protection Agency
Fiscal Services Division
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
4. Penalties unpaid within the time prescribed will accrue interest under Section 42(g) of the Environmental Protection Act (415 ILCS 5/42(g) (2008)) at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a) (2008)).

5. Respondent Moline Place must properly implement the SWPPP in its NPDES permit, and comply with all other requirements of that permit. When final site stabilization has been accomplished and all storm water discharges from construction activities have been eliminated, Moline Place must promptly submit a Notice of Termination to IEPA.
6. Respondent Moline Place must cease and desist from further violations of the Act and the Board's regulations.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2008); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on November 4, 2010, by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board