ILLINOIS POLLUTION CONTROL BOARD
September 22, 2011

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 12-48
	)	(Enforcement – Water)
PHOENIX CORPORATION OF THE QUAD CITIES,	)	
	)	
	)	
Respondent.	)	

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

On September 9, 2011, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a four-count complaint against Phoenix Corporation of the Quad Cities (Phoenix). The complaint concerns a construction site where Phoenix was performing excavation and grading on a road construction project in the vicinity of the intersection of Illinois Route78 ("Route 78") and Illinois Route 64/United States Route 52 ('Route 64") in Mount Carroll, Carroll County. For the reasons below, the Board accepts the complaint for hearing.

Under the Environmental Protection Act (Act) (415 ILCS 5 (2010)), 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 (2010); 35 Ill. Adm. Code 103. In this case, the People allege that Phoenix violated the following sections in the manner described: Section 12(a) of the Act (415 ILCS 5/12(a) (2010))by pumping soil, sediment, and sediment-laden storm water to the drainage ditches, storm sewer, and the ravine leading to Carroll Creek; Section 12(d) of the Act (415 ILCS 5/12(d) (2010))by depositing soil and sediment onto land, uncontrolled and in such manner as to allow the migration of the soil and sediment into the storm sewer, the water-filled ravine, and Carroll Creek; Section 302.203 of the Board Water Pollution regulations (35 Ill. Adm. Code 302.203) by causing or allowing the pumping of soil and sediment-laden storm water, resulting in unnatural sludge and bottom deposits in the water-filled ravine leading to Carroll Creek; and Section 12(f) of the Act (415 ILCS 5/12(f) (2010))by discharging sediment-laden storm water into the storm sewer running under Rout 64 though a "point source" (a water hose), without first applying for and obtaining an national pollutant discharge elimination system (NPDES) Permit from Illinois Environmental Protection Agency.

The People ask the Board to order Phoenix to cease and desist from any further violations of the Act and regulations, pay civil penalties of $50,000 for each violation of the Act, pay additional penalties of $10,000 for each day during which each violation continued, and that the Board award the People their costs and reasonable attorney fees.

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 Phoenix 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 Phoenix 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) (2010). 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 of unreasonable financial hardship."

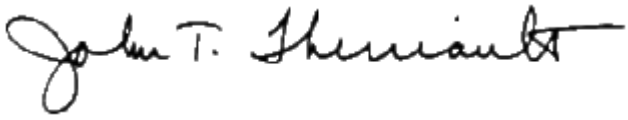
Under these amendments, the Board may also order a penalty lower than a respondent's economic benefit from delayed compliance if the respondent agrees to perform a "supplemental environmental project" (SEP). A SEP is defined in Section 42(h)(7) as an "environmentally beneficial project" that a respondent "agrees to undertake in settlement of an enforcement action . . . but which the respondent is not otherwise legally required to perform." SEPs are also added

as a new Section 42(h) factor (Section 42(h)(7)), as is whether a respondent has "voluntary self-disclosed . . . the non-compliance to the [Illinois Environmental Protection] Agency" (Section 42(h)(6)). A new Section 42(i) lists nine criteria for establishing voluntary self-disclosure of non-compliance. A respondent establishing these criteria is entitled to a "reduction in the portion of the penalty that is not based on the economic benefit of non-compliance."

Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any (including whether to impose a civil penalty), and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if any (including a specific total dollar amount and the portion of that amount attributable to the respondent's economic benefit, if any, from delayed compliance), and supporting its position with facts and arguments that address any or all of the Section 42(h) factors. The Board also directs the hearing officer to advise the parties to address these issues in any stipulation and proposed settlement that may be filed with the Board.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 22, 2011, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board