

ILLINOIS POLLUTION CONTROL BOARD

August 7, 2008

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 09-8
)	(Enforcement – Water)
RED SEAL DEVELOPMENT)	
CORPORATION, an Illinois corporation, and)	
LENZINI EXCAVATING COMPANY, an)	
Illinois corporation,)	
)	
Respondents.)	

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

On July 28, 2008, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a five-count complaint against Red Seal Development Corporation and Lenzini Excavating Company (respondents). The complaint concerns respondents’ construction activities on a 14.24-acre parcel of land, known as Deer Park Estates, located at the intersection of Long Grove Road and Quentin Road in Deer Park, Lake 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 respondents violated Sections 12(a), (b), (d), and (f) of the Act (415 ILCS 5/12(a), (b), (d), (f) (2006)), Sections 302.203, 309.102(a), and 309.202(a) of the Board’s water pollution regulations (35 Ill. Adm. Code 302.203, 309.102(a), 309.202(a)), and specified terms and conditions of the general National Pollutant Discharge Elimination System (NPDES) stormwater permit.

The People allege that respondents violated these provisions by (1) causing, threatening or allowing the discharge of contaminants so as to cause or tend to cause water pollution in surrounding wetlands and an unnamed tributary of Buffalo Creek; (2) causing, threatening or allowing the discharge of contaminants that caused unnatural color and turbidity in waters of surrounding wetlands and an unnamed tributary of Buffalo Creek; (3) creating a water pollution hazard by depositing contaminants where they were likely to be carried by stormwater runoff into surrounding wetlands and an unnamed tributary of Buffalo Creek; (4) failing to implement the storm water pollution prevention plan (SWPPP) in violation of their NPDES permit; and (5) constructing the sanitary sewer without obtaining a permit from the Illinois Environmental Protection Agency. The People ask the Board to order respondents to cease and desist from further violations and pay, for counts I-III and V, a civil penalty of \$50,000 per violation and

\$10,000 for each day of violation and, for count IV (NPDES violation), a civil penalty of \$10,000 for each day of 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 a respondent 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 the respondent 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 respondents to do to correct an on-going violation, if any, and, second, whether to order the respondents 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 respondents have subsequently eliminated the violation.

If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondents, 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 respondents showed due diligence in attempting to comply, any economic benefit that the respondents accrued from delaying compliance, and the need to deter further violations by the respondents 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 respondents 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 respondents 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 “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 August 7, 2008, by a vote of 4-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board