

ILLINOIS POLLUTION CONTROL BOARD  
November 20, 2008

PEOPLE OF THE STATE OF ILLINOIS, )  
)  
Complainant, )  
)  
v. ) PCB 09-32  
) (Enforcement – Land, Water)  
WHALEN MANUFACTURING COMPANY, )  
an Illinois corporation, and YETTER )  
MANUFACTURING COMPANY, an Illinois )  
corporation, )  
)  
Respondents. )

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

On November 12, 2008, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a three-count complaint against Whalen Manufacturing Company (Whalen) and Yetter Manufacturing Company (Yetter) (collectively, respondents). The complaint concerns Whalen’s site, located at 1270 East Murray Street in Macomb, McDonough County, and Yetter’s site, located at 109 S. McDonough in Colchester, McDonough County. Whalen allegedly manufactures outdoor fire pits and related equipment and Yetter allegedly manufactures agricultural equipment. 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, count I of the People’s complaint alleges that Yetter violated Section 21(j) of the Act (415 ILCS 5/21(j) (2006)) and Sections 809.201, 809.301, 809.302(b) of the Board’s nonhazardous special waste regulations (35 Ill. Adm. Code 809.201, 809.301, 809.302(b)) by (1) hauling or otherwise transporting nonhazardous special waste generated within Illinois without a current, valid nonhazardous special waste hauling permit; (2) delivering nonhazardous special waste generated within Illinois without concurrently delivering a manifest to a special waste transporter; (3) delivering nonhazardous special waste in Illinois for disposal, storage, or treatment to a person who does not have a current, valid operating permit issued by the Illinois Environmental Protection Agency; and (4) conducting a special waste transportation operation in violation of regulations, standards, or permit requirements adopted by the Board.

County II alleges that Whalen violated Sections 21(d) and 21(e) of the Act (415 ILCS 5/21(d), 21(e) (2006)), Sections 807.201(a) and 807.202(a) of the Board’s solid waste regulations (35 Ill. Adm. Code 807.201(a), 807.202(a)), and Section 809.302(a) of the Board’s nonhazardous special waste regulations (35 Ill. Adm. Code 809.302(a)) by (1) operating, causing, or allowing the development of a solid waste management site without a development permit; (2) accepting

special waste for disposal, storage, or treatment within Illinois from a special waste transporter who does not have a valid nonhazardous special waste hauling permit; (3) conducting a waste storage operation; and (4) disposing, treating, storing, or abandoning waste.

In count III, the People allege that respondents violated Section 12(f) of the Act (415 ILCS 5/12(f) (2006)) and Section 309.204(a) of the Board's water pollution regulations (35 Ill. Adm. Code 309.204(a)) by (1) causing, threatening, or allowing the discharge of contaminants into waters of the State without a valid National Pollutant Discharge Elimination System (NPDES) permit; and (2) causing or allowing the use or operation of a treatment works, pretreatment works, or wastewater source without an NPDES permit.

The People ask the Board to order respondents to cease and desist from further violations and pay civil penalties of not more than the statutory maximum.

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 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 Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 20, 2008, by a vote of 5-0.



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John Therriault, Assistant Clerk  
Illinois Pollution Control Board