ILLINOIS POLLUTION CONTROL BOARD
October 15, 2009

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 10-22
	)	(Land – Enforcement)
WESTERN SAND & GRAVEL COMPANY,	)	
LLC, an Illinois corporation,	)	
	)	
Respondent.	)	

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

On September 30, 2009, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed three-count complaint against Western Sand & Gravel Company, LLC (WS&G). The complaint concerns WS&G's clean construction or demolition debris (CCDD) facility located at the intersection of IL-178 and I-80, LaSalle, LaSalle County. For the reasons below, the Board accepts the complaint for hearing.

Under the Environmental Protection Act (Act) (415 ILCS 5 (2008)), 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 (2008); 35 Ill. Adm. Code 103. In this case, the People allege that WS&G violated Section 21(d)(2) and (e), and 22.51(a) of the Act (415 ILCS 5/21(d)(2), 21(e), 22.51(a) (2008)) and Sections 1100.201(a), 1100.205(a)(1), (b)(1), (c), (g), and (h), 1100.207(a) and (b), and 1100.210 of the Board's CCDD regulations (35 Ill. Adm. Code 1100.201(a), 1100.205(a)(1), (b)(1), (c), (g), (h), 1100.207(a), (b), 1100.210).

According to the complaint, WS&G violated these provisions under count I by failing to: (1) conduct visual inspections, inspections with a photo ionization detection (PID) instrument for each incoming load, and discharge inspections of at least one randomly selected load delivered to the facility each day, (2) failing to retain records evidencing that a load checking program is being used at the facility, (3) failing to properly train its personnel at the facility to identify material that is not CCDD, and (4) failing to keep and maintain a calibrated PID instrument at the facility for checking loads of CCDD. The complaint alleges under count II that WS&G failed to; (1) restrict unauthorized vehicular access to the working face of the facility and (2) post a permanent sign at the entrance to the facility stating that only CCDD is accepted for use as fill. Count III alleges that WS&G failed to maintain an operating record at the facility. The People ask the Board to order WS&G to cease and desist from any further violations, and pay a civil penalty of $50,000 per violation and an additional penalty of $10,000 per day during which each violation continued.

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 WS&G 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 WS&G 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) (2008). 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."

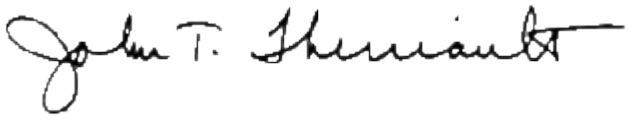
Under these amendments, the Board may also order a penalty lower than a respondent's economic benefit from delayed compliance if the respondent agrees to perform a "supplemental environmental project" (SEP). A SEP is defined in Section 42(h)(7) as an "environmentally beneficial project" that a respondent "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 October 15, 2009, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board