ILLINOIS POLLUTION CONTROL BOARD
April 20, 1995

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
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| Complainant, | ) | |
| | ) | |
| v. | ) | PCB 92-164 |
| | ) | (Enforcement-Water) |
| BERNIECE KERSHAW and DARWIN DALE KERSHAW d/b/a KERSHAW MOBILE HOME PARK, | ) | |
| | ) | |
| Respondents. | ) | |

OPINION AND ORDER OF THE BOARD UPON RECONSIDERATION OF THE PENALTY (by G. T. Girard):

This action is before the Board on a motion for reconsideration filed on May 12, 1993, by respondents, Berniece Kershaw and Darwin Dale Kershaw d/b/a Kershaw Mobile Home Park (Kershaws). Complainant filed its response in opposition on August 6, 1993, and on August 10, 1993, Kershaws filed a reply clarifying certain agreed language in complainant's response. In a Board order on August 26, 1993, the Board reaffirmed its order finding Kershaws in violation of the Illinois Environmental Protection Act (Act) and Board regulations concerning water treatment and discharges. (See order of April 8, 1993.)[1] As requested by both parties, the Board order of August 26, 1993, reserved ruling on reconsideration of the $250,000 civil penalty levied against Kershaws while the parties continued in

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[1]The Kershaws had violated Sections 12 and 18 of the Act, as well as Board regulations at 35 Ill. Adm. Code 304.106, 304.120(c), 304.121(a), 305.102(b), 305.103, 309.102(a), 309.104(a), 601.101 and Illinois Environmental Protection Agency regulations at 35 Ill. Adm. Code 652.111, 653.105, and 653.118. Section 12 of the Act includes a general prohibition against discharging contaminants into the environment which cause water pollution. Section 18 of the Act includes a general prohibition against distributing water from a public water supply which violates standards adopted by the Board. Kershaws were found to be in violation for water discharges: containing settleable solids with obvious odor and turbidity (304.106); exceeding the effluent limits for $BOD_5$ and suspended solids (304.120(c)); and exceeding the fecal coliform limit (304.121(a)). Kershaws were found to be discharging without a National Pollutant Discharge Elimination System (NPDES) permit, and when they did have a valid permit they failed to perform required monitoring (305.102(b), 305.103, 309.102(a), and 309.104(a)). In addition, Kershaws failed to meet certain public water supply standards (601.101, 652.111, 653.105, and 653.118).

negotiations on penalty and compliance terms. (See order of August 26, 1993, p. 2, 6.)

PROCEDURAL HISTORY

The detailed procedural history leading to the Board order finding Kershaws in violation of the Act and Board regulations can be found in the Board order of April 8, 1993. Because of the unusual nature of this case, some historical highlights bear repeating. The original complaint was filed on October 29, 1992, by the People of the State of Illinois (People) alleging that the Kershaws had violated the Act and Board water regulations on four counts. The Kershaws failed to answer the complaint. On February 17, 1993, the People filed a motion for summary judgement on all four counts. The Kershaws did not file a response to the motion. On April 8, 1993 the Board entered an order granting summary judgement finding the Kershaws in violation as alleged. The Board ordered the Kershaws to cease and desist from further violations and pay a civil penalty of two hundred fifty thousand dollars ($250,000).

On April 27, 1993, Attorney Richard Kuntz filed an appearance on behalf of the Kershaws, and on May 12, 1993, Mr. Kuntz filed the motion for reconsideration of the summary judgement order. On May 6, 1993, the People filed an affidavit of costs and fees incurred by the State in pursuing the case, as directed by the Board order of April 8, 1993. On May 24, 1993, the People filed a motion for extension of time to file a response to the motion for reconsideration as well as a motion to disqualify Mr. Kuntz from representing Kershaws in this proceeding. The motion to disqualify was based on Mr. Kuntz's service as a hearing officer in other Board cases. On May 27, 1993, the Board granted the People's motion for extension of time. On June 8, 1993, Mr. Kuntz filed a memorandum in opposition to the motion to disqualify by and through his attorney, Lee R. Cunningham. Pursuant to leave granted by the Board on June 17, 1993, the People filed a reply in response to Mr. Kuntz's memorandum on June 25, 1993. By order on July 22, 1993, the Board found that there was no conflict of interest in Mr. Kuntz's representation of the Kershaws in this case, and thereby denied complainant's motion to disqualify Mr. Kuntz as counsel to the Kershaws.[2]

Between August 26, 1993, and March 18, 1994, the parties pursued discussions and filed status reports with the Board describing attempts to reach an agreement on the penalty amount, but eventually failed as reported in the March 18, 1994, status

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[2] Mr. Kuntz ended his service to the Board as a hearing officer at the close of fiscal year 1993 (i.e. June 30, 1994).

report to the Board. On March 31, 1994, the Board issued an order directing the parties to file a settlement agreement by April 29, 1994.

On April 29, 1994, Kershaws filed some evidence and argument relating to the penalty issue. The evidence included an affidavit by Daniel C. Solchenberger, an engineer providing consulting services to Kershaws since August 1992. On May 5, 1994, the Board ordered the parties to address the penalty issue at hearing. Hearing was scheduled for August 7, 1994, by order of the Board hearing officer. On July 27, 1994, the parties filed a joint motion to waive hearing and to instead set a briefing schedule on the issue of the penalty. On August 1, 1994, the Board issued an order granting the motion and establishing the briefing schedule on the penalty issue.

On August 29, 1994, the parties filed a joint stipulation with the Board which contains financial status information on the Kershaws and also includes copies of engineering studies commissioned by the Kershaws to bring their facility into compliance with the Act. On September 28, 1994, complainant's "brief in support of penalty request" was filed with the Board. Kershaw filed "respondent's response brief" on October 31, 1994. Complainant's reply brief was filed on November 15, 1994.[3]

## STATUTORY FACTORS

In determining the appropriate civil penalty the Board considers factors set forth in Sections 33(c) and 42(h) of the Act (415 ILCS 5/33(c) and 42(h)(1992). A historical review of Board penalty decisions can be found in IEPA v. Allen Barry, individually and d/b/a Allen Barry Livestock, PCB 88-71 (May 10, 1990).) The Section 33(c) factors are more general factors for the Board to consider when issuing final orders and determinations. The Section 42(h) factors govern penalty amounts. (Barry, supra, p. 42.) The Board considered the Section 33(c) and Section 42(h) factors based on the information

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[3] The August 29, 1994, joint stipulation of the parties will be cited as "Stip. at _____". Respondents response brief will be cited as "Res. Br. at _____". Complainant's brief will be cited as "Comp. Br. at _____". Complainant's reply brief will be cited as "Comp. RBr. at _____". Complainants affidavit of costs and fees will be cited as "Comp. Affid. at ____". The Solchenberger Affidavit filed by Respondents on April 29, 1994, will be cited as "Sol. Affid. at _____". The Board opinion and order of April 8, 1993, will be cited as "Board Opinion at _____" or "Board Order at __". The motion for summary judgement filed on February 17, 1993, will be cited as "Mot. Sum. at __".

in the record at the time the Board's order of April 8, 1993, was rendered (see Board Order, April 8, 1993).

Section 33 (c) provides:

> 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:
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> 1) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
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> 2) the social and economic value of the pollution source;
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> 3) 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;
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> 4) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
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> 5) any subsequent compliance.

415 ILCS 5/33(c)

The Board is authorized by Section 42(h) of the Act: "to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors:

> 1. the duration and gravity of the violation;
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> 2. the presence or absence of due diligence on the part of the violator in attempting to comply with the requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act.
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> 3. any economic benefits accrued by the violator because of delay in compliance with requirements;
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> 4. the amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with this Act by the violator and other persons similarly subject to the Act; and

5. the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator.

(415 ILCS 5/42(h))

ARGUMENTS

Complainant argues that "[t]he factual information in the record provides an ample basis for the imposition of a substantial penalty". (Comp. Br. at 1.) Complainant asserts that its position is based on decisions of federal courts regarding penalties under the Clean Water Act as well as Illinois courts and Board interpretations of penalty provisions of the Act. Complainant presents a discussion of the general framework for calculating penalties. (Comp. Br. at 7-12.) Complainant further argues that the duration and gravity of the violations (Comp. Br. at 12-25), as well as Kershaws' bad faith and lack of due diligence (Comp. Br. at 25-32) support imposition of a substantial penalty. Complainant also argues that past Board case law establishes adequate formulas for calculating Kershaws' economic benefit from noncompliance and that the calculation shows that a substantial penalty is warranted. (Comp. Br. at 32-37.) Finally, complainant asserts that a substantial penalty is warranted to deter Kershaws from further violation of the Act. (Comp. Br. at 38-41.) In summary, complainants argue that the $250,000 penalty is justified for the reasons stated above. (Comp. Br. at 41.)

Kershaws assert that the $250,000 penalty is not warranted by the facts of the case, the penalty guidelines established by the Act, the case law applying penalty provisions of the Act, or prior Board penalty decisions. (Res. Br. at 1-2.) Kershaws argue that they should be allowed to marshall their meager resources to meet the financial obligations necessary to bring their mobile home park into full compliance with the Act. (Res. Br. at 2.) Kershaws bolster their arguments by: reviewing Board penalty decisions from 1971 to present (Res. Br. at 3-5); discussing two Third District Appellate Court cases concerning Board penalty cases (Res. Br. at 5-6); examining federal Clean Water Act case law (Res. Br. at 6-8); exploring Kershaws' ability to pay the penalty (Res. Br. at 8-11); disputing the environmental impact of the illegal discharges (Res. Br. at 11-13); asserting that Kershaws have realized very little economic benefit from delayed compliance (Res. Br. at 13-14); and declaring that the Kershaws' mobile home park has considerable social and economic value by providing low-income housing. (Res. Br. at 14-15.) Kershaws also argue that legal costs incurred by Kershaws in litigating the complainant's motion to disqualify counsel should be taken into account when determining the civil penalty. (Res. Br. at 19.) In summary, Kershaws argue that the penalty should not exceed $10,000. (Res. Br. at 20.)

## DISCUSSION

### Penalty Range

The Board has stated that the statutory maximum penalty "is a natural or logical benchmark from which to begin considering factors in aggravation and mitigation of the penalty amounts". (Barry, supra, p. 72.) The formula for calculating the maximum penalty is contained in Section 42(a) and (b) of the Act (415 ILCS 5/42(a) and (b) (1992)). Section 42(a) provides for a civil penalty not to exceed $50,000 for violating a provision of the Act and an additional civil penalty not to exceed $10,000 for each day during which the violation continues. Section 42(b) provides a maximum civil penalty of $10,000 per day of violation of Section 12(f) of the Act on any NPDES permit or permit condition.

The People assert that the statutory maximum penalty for all violations alleged in the complaint is $53,866,000. (Comp. Br. at 12.) Kershaws note that the People appear to be calculating the maximum penalty by including alleged violations after the complaint was filed on October 29, 1992. (Res. Br. at 18.) The Board agrees that some of the violation dates used in the penalty calculations occur after the complaint was brought on October 29, 1992. (See Comp. Br. at 8-12.) Since complainant did not amend the complaint pursuant to 35 Ill. Adm. Code 103.210(b), the Board therefore will recalculate the maximum penalty by subtracting penalties for those dates after October 29, 1992. Using the same principles as complainant (Comp. Br. at 8-12), and subtracting those penalty amounts applied to dates after October 29, 1992, the Board recalculates the maximum penalty as $48,006,000.

Kershaws did not directly contest the maximum penalty calculation presented by the People. Kershaws did argue that no penalties should be imposed for violations alleged to have occurred prior to two years before the commencement of the People's action in October 1992. (Res. Br. at 16.) Respondents recognized that Illinois courts have generally held that statutes of limitations do not apply to the State when the State is asserting public rights (City of Shelbyville v. Shelbyville Restorium, 96 Ill.2d 457, 451 N.E. 2d 874 (1983)). However, Kershaws "respectfully maintain" that this case presents a "perfect opportunity" for the Board to re-examine the statute of limitations in regards to civil penalties in environmental cases. (Res. Br. at 16.)

The Board is not persuaded that this case is a "perfect opportunity" to re-examine the statute of limitations for civil

penalties in environmental cases and declines to do so.[4] The Board agrees with the parties in the instant case that the appropriate penalty lies somewhere between a minimum of $10,000 as advocated by Kershaws (Res. Br. at 20) and a maximum of $250,000 as advocated by complainants. (Comp. Br. at 41, 45-49.) Further, the Board agrees with complainants that the wastewater treatment and permit violations are the most significant of the violations for which the Kershaws are liable. (Comp. Br. at 13.)

## Statutory Penalty Factors

### Section 33(c)(2)(3)(4)(5) and 42(h)(5) Factors

The Board has reviewed the statutory penalty factors at Sections 33(c) and 42(h) for the purposes of reconsidering the penalty in light of the new evidence entered in this case. Several statutory factors can be dealt with swiftly at the outset of this discussion. No new evidence has been entered into the record in regards to social and economic value (Section 33(c)(2)), suitability of location (Section 33(c)(3)), technical practicability and economic reasonableness of compliance alternatives (Section 33(c)(4)), any subsequent compliance (Section 33(c)(5)), and previously adjudicated violation of the Act (Section 42(h)(5)). The Board opinion of April 8, 1993 found that the Kershaws' mobile home park does have "moderate social and economic value" and is suitable to its rural location. (Board Opinion at 5.) The Board has also found that complying with the Act and applicable regulations is technically feasible and economically reasonable. (Board Opinion at 5.) There is no new evidence in the record that the Kershaws are presently in compliance with the Act and applicable regulations. There is no evidence in the record of previous violations of the Act or applicable regulations by the Kershaws.

In this case, the Board considers the social and economic value of a trailer park containing 75 mobile homes (Stip. at 328), serving low and moderate income residents, to be of sufficient value to mitigate against a maximum penalty. Suitability of location is a neutral factor in this case. The availability of technically practicable and economically reasonable compliance alternatives is a factor pointing to a

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[4]The Board notes that applying a two year statute of limitations in the present case does not help the Kershaws avoid a substantial penalty. By using the People's method of calculation per count of the violations (Comp. Br. at 8-12), the Board calculates the maximum penalty for violations between October 29, 1990, and October 29, 1992, to be as follows: Count I, $500,000; Count II, $8,590,000; Count IV, $5,557,000; for a total maximum civil penalty of $14,197,000.

higher penalty amount. Present lack of compliance may indicate that a higher penalty amount is appropriate. No evidence of prior violations weighs in the balance toward a lower penalty figure.

Section 33(c)(1) and 42(h)(1) Factors (Harm, Duration and Gravity)

The Board is directed by Sections 33(c)(1) and 42(h)(1) of the Act to examine the environmental impact of the violations in fashioning a penalty. In the instant case, complainants maintain that the facts in the record demonstrate that the ongoing wastewater treatment violations at the Kershaws' mobile home park have existed for at least nine years, and the violation for failing to obtain an NPDES permit lasted for eight years. (Comp. Br. at 12.) Complainants point to the IEPA inspection reports of November 13, 1985, and March 23, 1992 (Motion for Summary Judgement, Appendix B) for a description of the offensive character of the effluent.[5] Complainants used data from the Agency grab samples and Kershaws' effluent discharge reports (Sol. Affid. at App. A), to calculate that 60% of the documented violations of the 10 mg/l limit for $BOD_5$ were two times or more in excess of the limit. Complainants also calculated that 79% of the documented violations of the 12 mg/l limit for suspended solids were two times or more in excess of the limit. (Comp. Br. at 13.) The People contend that the violations did cause the potential for environmental harm and did cause environmental harm. (Comp. Br. at 15-16.) Complainants opine that "[w]astewater containing settleable solids and obvious color, odor, and turbidity and concentrations of $BOD_5$ and suspended solids in excess of the regulatory limits may not be as immediately dangerous or toxic as some materials, but nevertheless these contaminants deplete the available oxygen in the river and destroy the chemical, physical, and biological integrity of the river" and thus are harmful to the environment. (Comp. Br. at 17-18.)

Kershaws argue that there is no evidence in the record that Kershaws' effluent had any measurable impact on the Rock River and present calculations by their engineer (Sol. Affid. at 3) asserting that there was a "miniscule hypothetical maximum loading into the river". (Res. Br. at 12.) Kershaws state "that the engineer's affidavit openly acknowledged that violations occurred, but demonstrated that the violations resulted in

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[5]The inspection report for the November 13, 1985, inspection described the effluent as "green cloudy". (Mot. Sum., App. B at 16.) The inspection report for the March 23, 1992, inspection described the effluent as "green and turbid". (Mot. Sum., App. B at 21.)

minimal impact on the ultimate receiving stream". (Res. Br. at 12.) Kershaws further argue that the People failed to demonstrate any material harm. (Res. Br. at 12.)

The Board is not persuaded by the Kershaws' arguments that their engineer has demonstrated in the Solchenberger Affidavit that the violations resulted in minimal impact on the ultimate receiving stream. Further, the engineer's attempt to suggest that the unnamed tributary which receives the initial effluent discharge provides "treatment benefits" (Sol. Affid. at 1, paragraph 3) is misplaced. The current NPDES permit for the Kershaw's facility notes that the effluent discharges into an unnamed tributary that flows approximately 100 feet into the Rock Rivers. (Stip. at 360.) Even though the Illinois Environmental Protection Agency (Agency) has categorized this waterway as "unsuited to support primary contact activities (swimming)" (Stip. at 360), this does not relieve the Kershaws from discharge limits for $BOD_5$ and suspended solids, or provide their engineer with justification to indirectly suggest that this short waterway is part of the treatment process.[6] The Board reaffirms its finding that by operating without an NPDES permit for eight years, and violating discharge standards for $BOD_5$ and suspended solids for at least nine years, the Kershaws harmed the environment in a way that warrants a high penalty.

Section 42(h)(2) Factor (Due Diligence)

Complainant asserts that the record reveals a pattern of bad faith and absence of diligence by the Kershaws, including years of procrastination and broken promises in bringing their wastewater treatment facility into compliance. (Comp. Br. at 25-27.) The People argue that Kershaws' behavior demonstrates bad faith and absence of due diligence which precludes any mitigation of the maximum penalty. (Comp. Br. at 31.) Complainant cites the following chain of events to support its contention: (1) the Agency first notified the Kershaws of the water pollution violation at their mobile home park in December, 1985; (2) five meetings were held over the next nine years with state officials discussing compliance alternatives; (3) at least four separate commitments were made by the Kershaws to bring their wastewater

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[6]Paragraph 3 of the Solchenberger Affidavit stated that: "[t]he wastewater treatment facility discharges to an open ditch that then discharges to a backwater slough of the Rock River. The open ditch is located in a low lying area that is subject to frequent flooding. The effluent should reap some treatment benefits from being discharged to this ditch and backwater slough area. There are wastewater treatment systems that use "constructed wetlands" as their primary treatment process or incorporate the process into an existing system".

system into compliance; (4) Kershaws failed to hire an engineering consultant until July[7] or August, 1992; and (5) there is no evidence in the record that Kershaws are presently in compliance with the wastewater regulations. (Comp. Br. at 30-31.)

Kershaws do not directly dispute the People's arguments that the Kershaws' behavior does not demonstrate good faith and due diligence. Kershaws do state that the record reflects that Kershaws have "responded promptly and voluntarily to every information request from the Attorney General...". (Res. Br. at 8.) Kershaw's engineer stated that Kershaws have been reluctant to tackle some of the problems facing their wastewater treatment system because of the possibility that the Illinois Department of Transportation (IDOT) may construct Colona Road from John Deere Road (IL 5) through the mobile home park to FAI Route 80. (Sol. Affid. at 4 and Appendices B & C.) Kershaw's engineer opines that if IDOT purchases right-of-way from the Kershaws, the prospect of recouping capital improvements on the Kershaws' property is uncertain. (Sol. Affid. at 4.)

The Board has noted that "[t]he courts have found evidence of the presence or absence of good faith to be a very significant determinant of a penalty...[G]ood faith has been inferred from behavior which reflects diligence and which is reasonably directed towards the goal of achieving compliance. The acceptable efforts have included hiring engineers to find a cure for pollution, attempting to secure permits, installing pollution control equipment at considerable expense, and abandoning offensive practices altogether." Illinois EPA v. Allen Barry, PCB No. 88-71, p. 35 (May 10, 1990) citing City of Chicago v. Illinois Pollution Control Board, 57 Ill.App.3d 517, 373 N.E.2d 512 (1st Dist. 1978); Harris-Hub Company, Inc. v. Illinois Pollution Control Board, 50 Ill.App.3d 608, 365 N.E.2d 1071 (1st Dist. 1977); Midland v. Illinois Pollution Control Board, 119 Ill.App.3d 428, 456 N.E.2d 914 (4th Dist. 1983); and Modine Manufacturing Company v. Pollution Control Board, 193 Ill.App.3d 643, 549 N.E.2d 1379 (2nd Dist. 1990).

The Board can find nothing in the enhanced record of this case to change our finding in the April 8, 1993, opinion that Kershaws have not been diligent in their efforts to correct their wastewater treatment problems. Kershaw's efforts have been characterized by delay and procrastination, rather than good faith and diligence. Kershaws did not hire an engineer until

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[7]The Board notes that the People give the hiring date as July 1992 (Comp. Br. at 31), while the affidavit of Kershaws' engineer states that he has been providing consulting engineering service to Kershaws since August 7, 1992. (Sol. Affid. at 1.)

almost seven years after their first notification by the Agency of water pollution violations at their mobile home park and only three months before the instant enforcement proceeding was filed by the People. There were numerous conferences with state employees over the years attempting to bring their facility into compliance. Correspondence with IDOT shows that "the actual construction date of the [road] project[8] is unknown at this time". (Sol. Affid. at 13.) In summary, there is no justification for the Kershaws' pattern of delay and procrastination in bringing their wastewater treatment system into compliance with the Act and applicable regulations, and this pattern of behaviors points toward a higher penalty.

Section 42(h)(3)(Economic Benefits)

Complainant argues that Kershaws derived economic benefits from delayed compliance that should be factored into a penalty determination. (Comp. Br. at 32-41.) Complainant calculated the economic benefits to Kershaws based on the formula in the Barry opinion[9] and the construction cost estimates provided by

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[8]The Board notes that a variance would be the proper proceeding to determine whether or not a potential project, such as a road, would impose an arbitrary or unreasonable hardship on the Kershaws in their compliance efforts (415 ILCS 5/35 (a)(1992)). In a variance proceeding, the burden is upon the petitioner to show that its claimed hardship outweighs the public interest in attaining compliance with regulations designed to protect the public. (Willowbrook Motel v. Pollution Control Board (1985), 135 Ill.App.3d 343, 481 N.E.2d 1032.) Only with such a showing can the claimed hardship rise to the level of arbitrary or unreasonable hardship. A further feature of a variance is that it is, by its nature, a temporary reprieve from compliance with the Board's regulations, and compliance is to be sought regardless of the hardship which the task of eventual compliance presents an individual polluter. (Monsanto Co. v. IPCB (1977), 67 Ill.2d 276, 367 N.E.2d 684.) Accordingly, except in certain special circumstances, a variance petitioner is required, as a condition to grant of variance, to commit to a plan which is reasonably calculated to achieve compliance within the term of the variance.

[9]"The cost savings of delayed compliance take into account the time-value of money. This is to say that by postponing capital improvements or operating and maintenance costs for pollution control, those funds are available for other uses or investments or to reduce the need to borrow, creating a better position relative to competitors who voluntarily comply. Some rate of return (an interest rate factor) can be used to calculate an economic savings or benefit from not expending capital and

Kershaws' engineer. (Comp. Br. at 32-33; Stip. at 375.) The two most recent compliance cost estimates submitted by the Kershaws (Stip. at 375) range from a low of $77,260 (1994 estimate for connecting to the City of Green Rock sewer line) to a high of $466,900 (1994 estimate for upgrading the current facility). Assuming a 6% rate of return, the People calculated that the annual cost savings to Kershaws was $4,635.60 (6% of $77,260) to $28,014 (6% of $466,900). Complainants calculated the total savings to Kershaws for a nine-year period from 1985 through 1994 as ranging from $41,720.40 ($4,635.600 X 9) to $252,126 ($28,014 X 9). (Comp. Br. at 36.) The People disagreed with the conclusion of Kershaws' engineer that "the Kershaw Mobile Home Park realized very little economic benefit from delayed compliance". (Comp. Br. at 37, quoting Sol. Affid. at 4, paragraph 19.) Complainant contends that Kershaws' engineer did not support his statement with "any real analysis or discussion of specific items of cost savings and expenditures". (Comp. Br. at 37.)

Complainant further asserts that Illinois courts have held that penalties should reflect the economic benefit of noncompliance especially where the violator has exhibited a "continuous blatant disregard for requirements and procedures designed to protect the environment". Wasteland, Inc. v. Illinois Pollution Control Board, 118 Ill.App.3d 1041, 456 N.E.2d 964, 976 (3rd Dist. 1983); Midland v. Illinois Pollution Control Board, 119 Ill.App.3d 428, 456 N.E.2d 914, 920 (4th Dist. 1983). The People argue that the Kershaws have shown a continuous blatant disregard of the requirements of the Act and Water Pollution Regulations and of the State's requests to correct the wastewater treatment violations. Therefore, the penalty assessed by the Board must be greater than the Kershaws' economic benefit. (Comp. Br. at 37.)

Kershaws contend that the People cannot extend the time period for calculation of penalties beyond the 1992 filing date of the complaint. (Res. Br. at 14.) Kershaws also assert that the complainant has not rebutted the conclusion of Kershaw's engineer that the Kershaws' mobile home park realized very little economic benefit from delayed compliance. (Res. Br. at 13.)

The Board finds that the Barry formula for determing economic benefits of noncompliance is applicable to this case as presented by complainant. However, as discussed earlier in this opinion, the Board agrees with Kershaws that we will only consider violations occurring before the complaint was filed in October, 1992. Therefore, we will use the same assumptions as complainants in our calculations, except that we will multiply

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operating funds at an earlier point in time." (Barry, supra, p. 77.)

the annual savings by seven years as advocated by Kershaws, rather than nine years as asserted by complainants. The recalculated total savings to Kershaws for the seven year period form 1985 through 1992 range from $32,449.20 ($4,635.60 X 7) to $196,098 ($28,014 X 7). The Board agrees with complainants that the circumstances of this case support the argument that the penalty assessed in this case should be greater than the Kershaws' economic benefit. Therefore, based on this fact, the appropriate penalty in this case should range from approximately $32,000 to $196,000.

Section 42(h)(4) (Deterrence and Ability to Pay)

Complainant argues that a discussion of penalties that provide deterrence necessarily centers on the violator's ability to pay a penalty. (Comp. Br. at 38.) Complainant further states that inability to pay is not a bar to a penalty, but is a mitigating factor. (Comp. Br. at 38-39, citing to Standard Scrap Metal Company v. Pollution Control Board, 142 Ill.App.3d 655, 491 N.E.2d 1251, 1258 (1st Dist. 1986); Midland v. Illinois Pollution Control Board, 119 Ill.App.3d 428, 456 N.E.2d 914, 920 (4th Dist. 1983).) The People calculate that the Kershaws received a total of $178,817 in personal income from the mobile home park by examining their federal income tax returns from 1985 to 1992. (Stip. at 10, 75, 77, 119, 121, 138, 161, 173, 184, 186, 187, 189, 199.) In 1992, Berniece Kershaw had an adjusted gross income of $22,461 and Darwin Dale Kershaw had an adjusted gross income of $60,054. (Stip. at 214, 297.) The People acknowledged that the 1992 adjusted gross income for the Kershaws does not by itself support the imposition of a six figure penalty. (Comp. Br. at 40.) However, complainant further asserts that the Kershaws own the mobile home park, and the value of their property should be considered in a penalty determination. (Comp. Br. at 40-41.) Finally, complainants argue that the penalty should be as high as possible, in light of the willful and repeated nature of the violations and in keeping with the ruling in Standard Scrap. (Comp. Br. at 41.)

Kershaws maintain that the People did not cite Illinois case law to show that respondents have the burden of demonstrating inability to pay. (Res. Br. at 9.) Kershaws argue that the People have not met their burden of demonstrating that the Kershaws have the ability both to pay a substantial penalty and to bring their wastewater treatment system into compliance. Kershaws assert that "since the record before the Board demonstrates that the Kershaws do not have these means, the Board should take this inability to pay into account in mitigating any penalty it chooses in impose". (Res. Br. at 9.) Kershaws further argue that a variance for $BOD_5$ and suspended solid effluent standards granted by the Board to Atlanta Meadows trailer park in 1994 (Atlanta Meadows v. IEPA, PCB93-72 (January

20, 1994)) is similar to the instant case and supports mitigation of the Kershaws' penalty. (Res. Br. at 9-10.) Kershaws also argue that the situation of a trailer park resembles a small government or utility in that residents bear the costs of improvements (Res. Br. at 10) and therefore the penalty should be reduced. (Barry, supra, p. 39, citing to City of Moline v. Pollution Control Board, 133 Ill.App.3d 431 (3rd Dist. 1985).)

After careful review of the record, the Board finds that the Kershaws have the ability both to pay a sizeable monetary penalty and to pay for improvements to their wastewater treatment system. Kershaws derive approximately $25,000 to $30,000 per year in personal income from the mobile home park. (Stip. at 10, 75, 77, 119, 121, 138, 161, 173, 184, 186, 187, 189, 199.) Further, the record shows that they have had sufficient income to make the improvements at an earlier date. Kershaw's engineer estimated that it would have cost $56,000 to bring the waste water treatment system into compliance in 1980. (Sol. Affid. at 18 (Appendix D).) The Board does not agree with Kershaw's contention that the variance granted in Atlanta Meadows should mitigate the penalty in this case. Contrary to the Kershaw's case, the variance granted in Atlanta Meadows shows that the Kershaws had other compliance alternatives than the strategy of delay and procrastination that they employed in complying with the Act. In summary, the record shows that a penalty higher than the $10,000 advocated by Kershaws is necessary to facilitate compliance and deter future violations.

## CONCLUSION

In an extensive review of Board penalties, the Barry opinion had two conclusions: (1) the heart of the penalty decision must include review of "all the facts and circumstances", both in aggravation and mitigation; and (2) no formulae exist, so the Board must make case-by-case penalty determinations. (Barry, supra, p. 35, 62-63.) In determining an appropriate penalty in this case, the Board has carefully considered all the facts and circumstances in the record. The Board finds that the $250,000 penalty levied against Kershaws in the April 8, 1993, Board Order is not appropriate in light of the new evidence in the record. The Board finds that a penalty of $30,000 will be sufficient to accomplish the purposes of the Act in regard to this matter.

Several factors stand out to the Board in determining that the $30,000 penalty is appropriate in this case. First, the Kershaws have realized at least $30,000 in benefits because of delayed compliance, and noncompliance with environmental regulations should not benefit violators. Second, the $30,000 penalty is appropriate because of the history of delay and procrastination demonstrated by the Kershaws' actions and the harmful nature of the discharges. Third, the $30,000 penalty equals the approximate annual income from the Kershaws' mobile

home park. Finally, the record shows that the Kershaws are capable of paying this penalty. The Board will not impose a higher penalty because the Kershaws will be making substantial expenditures ranging from approximately $80,000 to $470,000 to bring their facility into compliance as required by the Board's cease and desist order. (Stip. at 373-375.) A penalty amount that approximates their net yearly income from the mobile home park should be a sufficient deterrent against future violations without adversely affecting their ability to finance the necessary improvements. In addition, the Board will order the Kershaws to pay the costs and fees incurred by the State as discussed in the section below.

## COST AND FEES

In the original Board decision order issued April 8, 1993, a Docket B was opened in this proceeding to assess reasonable costs and fees to complainant as provided in Section 42(f) of the Act. Complainant filed an affidavit with the Board on May 6, 1993, which outlined the People's costs in pursuing this matter. Kershaws did not respond directly to Complainant's Affidavit of Costs, but, instead, responded that Kershaws' costs in litigating the attorney disqualification issue should be a mitigating factor in the final penalty assessment. (Res. Br. at 19.) The expenses presented by the People total $5,190.69. (Comp. Affid. at 1.) The major cost categories include: $1,791.39 for attorney's fees; $3,123.49 for expert witness and consultant fees; $58.85 for clerical costs; and $216.96 for other costs. (Comp. Affid. at 1.) The Board notes that attorney's fees in the People's affidavit are charged at rates ranging from 15 to 53 dollars per hour, which is below the reasonable rate of $100 per hour as determined in a prior Board opinion. (See, People v. Freedom Oil (May 6, 1994) PCB 93-59, Stip. Op. at 11 and supplemental opinion, People v. Freedom Oil (June 6, 1994) PCB 93-59.) The Board finds these costs to be reasonable and will award the Office of the Attorney General five thousand one hundred ninety dollars and sixty nine cents ($5,190.69). Kershaws will be ordered to pay this sum to the Hazardous Waste Fund, created in Section 22.2 of the Act, as required by Section 42(f) of the Act.

This opinion on the penalty amount constitutes the Board's findings of fact and conclusions of law in this matter.

## ORDER

1) The Board reiterates that the respondents, Berniece Kershaw and Darwin Dale Kershaw d/b/a Kershaw Mobile Home Park (Kershaws), were found in violation of Sections 12 and 18 of the Illinois Environmental Protection Act and the Kershaws shall cease and desist from violation of the Act.

2) The Board hereby vacates the first paragraph of the April 8, 1993 order, which assessed a penalty of $250,000 against Kershaws, and substitutes today's order.

3) Kershaws shall pay Thirty Thousand Dollars ($30,000) within 60 days of the date of this Order. Such payment shall be made by certified check or money order payable to the Treasurer of the State of Illinois, designated to the Environmental Protection Trust Fund, and shall be sent by First Class mail to:

Illinois Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road
P.O. Box 19276
Springfield, IL 62794-9276

Respondents shall also write their Federal Employer Identification Number or Social Security Number on the certified check or money order. Any such penalty not paid within the time prescribed shall incur interest at the rate set forth in subsection (a) of Section 1003 of the Illinois Income Tax Act, (35 ILCS 5/1003), as now or hereafter amended, from the date payment is due until the date payment is received. Interest shall not accrue during the pendency of an appeal during which payment of the penalty has been stayed.

4) Kershaws shall pay five thousand one hundred ninety dollars and sixty-nine cents ($5,190.69) as fees and costs awarded to the Attorney General's Office. Such payment shall be made within 60 days of the date of this order by certified check or money order payable to the Treasurer of the State of Illinois, designated for deposit to the Hazardous Waste Fund, and shall be sent by First Class mail to:

Illinois Environmental Protection Agency
Fiscal Service Division
2200 Churchill Road
Springfield, IL 62706

The certified check or money order shall clearly indicate on its face, the case name and number, Kershaw Mobile Home Park's federal employer identification number or the social security number for Berniece Kershaw and Darwin Dale Kershaw, and that payment is directed to the Hazardous Waste Fund.

5) Dockets A and B in this matter are closed.

Board Member J. Theodore Meyer dissented.

IT IS SO ORDERED

Section 41 of the Environmental Protection Act (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1041) provides for the appeal of final Board orders within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 20th day of April, 1995, by a vote of 6-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board