ILLINOIS POLLUTION CONTROL BOARD
October 18, 2007

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 08-29
	)	(Enforcement – Water, Land, Air)
GATEWAY BOBCAT OF HERBERER EQUIPMENT CO., INC. d/b/a BOBCAT OF ST. LOUIS, a Missouri corporation,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by A.S. Moore):

On October 3, 2007, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a five-count complaint against the Gateway Bobcat of Herberer Equipment Co., Inc. d/b/a Bobcat of St. Louis (Gateway Bobcat). The complaint concerns the wash bay at Gateway Bobcat's facility located at 9801 W. State Route 161 in Fairview Heights, St. Clair 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 in counts I and II of the complaint that Gateway Bobcat violated Sections 12(a), (b), (d), and (f) of the Act (415 ILCS 5/12(a), (b), (d), (f) (2006)) and Sections 302.203, 309.102(a), 309.243, and 304.106 of the Board's water pollution regulations (35 Ill. Adm. Code 302.203, 209.102(a), 309.243, 304.106) as follows: (1) by discharging untreated wastewater into waters of the State, causing, threatening or allowing water pollution; (2) by causing, allowing, or threatening the discharge of wastewater from its wash bay into waters of the State so as to cause or tend to cause offensive conditions in the unnamed tributary of Schoenberger Creek; (3) by violating water quality standards; (4) by operating equipment capable of contributing to water pollution without a permit granted by the Illinois Environmental Protection Agency (Agency); (5) by depositing a contaminant upon the land in such place and manner so as to create a water pollution hazard; (6) by causing, allowing, or threatening the discharge of contaminants into waters of the State without a National Pollutant Discharge Elimination System (NPDES) permit; (7) by failing to apply for an NPDES permit; and (8) by discharging effluent that contained settleable solids and turbidity.

In counts III and IV of the complaint, the People allege that Gateway Bobcat violated Sections 21(a), (e), (p)(1), (p)(3), and 9(c) of the Act (415 ILCS 5/21(a), (e), (p)(1), 9(c) (2006)) as follows: (1) by causing or allowing the open dumping of waste; (2) by disposing, abandoning, storing, or transporting waste at or to a site that does not meet the requirements of the Act and of the standards and regulations promulgated under the Act; (3) by causing or allowing the open

dumping of waste in a manner that resulted in litter at or from the dumpsite; (4) by causing or allowing the open burning of refuse on its property; and (5) by causing or allowing the open dumping of waste in a manner that resulted in open burning.

Count V of the complaint alleges that Gateway Bobcat violated Section 21(d)(2) of the Act (415 ILCS 5/21(d)(2) (2006)) and Sections 739.122(d), 722.111, and 808.121 of the Board's waste disposal and used oil management regulations (35 Ill. Adm. Code 739.122(d), 722.111, 808.121) as follows: (1) by failing to make a hazardous waste determination; (2) by failing to make a special waste determination; and (3) by failing to perform proper cleanup after releasing used oil into the environment and causing or allowing used oil to remain on and in the soil at the facility.

The People ask the Board to order Gateway Bobcat to cease and desist from further violations of the Act and Board regulations and pay a civil penalty of $50,000 for each violation and an additional $10,000 per day for each day the violations 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 Gateway Bobcat 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 Gateway Bobcat 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.

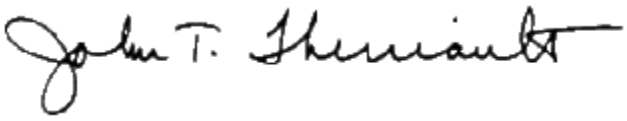
With Public Act 93-575, effective January 1, 2004, the General Assembly changed the Act's civil penalty provisions, amending Section 42(h) and adding a new subsection (i) to Section 42. Section 42(h)(3) now states that any economic benefit to respondent from delayed compliance is to be determined by 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 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 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 18, 2007, by a vote of 4-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board