

Pursuant to the April 19, 2001 order, the Board held a hearing on the issue of penalties on May 1, 2002. Michael Ripani appeared for Bentronics on behalf of Dan Biederman who has filed an appearance, and explained that because Bentronics had been a “defunct corporation for quite a number of years” he had “no authority to proceed in this matter” and “just wanted to come here to explain to your honor as a courtesy as well as the agency.” Tr. at 5.¹ Mr. Ripani immediately left the hearing after the hearing officer responded to his comment. On June 13, 2002, complainant filed a post-hearing brief. Respondents did not file a post-hearing brief.

HEARING

The Illinois Environmental Protection Agency (Agency) called three witnesses at the hearing held on May 1, 2002. The Agency’s witnesses were James Mrugacz, a pretreatment inspector with the Village of Bensenville (village); Daniel Rosenwinkel, the wastewater division supervisor with the village; and Jim Clark, an emergency responder with the Illinois Environmental Protection Agency (Agency). The witnesses testified to the conditions that prompted the State to bring this case.

Mrugacz testified that in July 1992, Bentronics requested that the village terminate its wastewater discharge permit because Bentronics was having trouble meeting its permit limits for copper and lead. Comp. Br. at 2; Tr. at 11. Mrugacz testified that Bentronics sealed all the discharge points inside the facility, which the village’s plumbing inspector verified. Comp. Br. at 2; Tr. at 12. Mrugacz testified that Bentronics installed a close loop filter system to reuse the water Bentronics was using and put it back into their process. Mrugacz further testified that the village took samples from the raw influent at the POTW daily, and in 1993 the village detected high levels of copper and lead in the raw influent. Comp. Br. at 3; Tr. at 13. Samples taken upstream from Bentronics showed little copper and lead, but samples taken downstream from Bentronics showed high levels of copper and lead. Comp. Br. at 3; Tr. at 14.

Mrugacz explained that in March 1993, the village inspected inside the Bentronics facility and discovered Bentronics “discharging processed waters to Bensenville through a floor drain.” Comp. Br. at 3; Tr. at 15. The village also discovered a slop sink that was corroded and discolored, and the drain was corroded. Comp. Br. at 3; Tr. at 15. When the village inspectors questioned the Bentronics operations manager, he admitted he was not supposed to be discharging processed waters to the floor drain. Comp. Br. at 3; Tr. at 16. The manager agreed to seal up the floor drains and the sump pit cover and remove the sink. Tr. at 17.

Rosenwinkel testified that in June 1993, the village communication center contacted him regarding the release of hazardous materials into a creek adjacent to the west end of the Bentronics property. Comp. Br. at 4; Tr. at 19. He testified that a lieutenant who was one of

¹ Citations to the hearing transcript will be “Tr. at ___.” Citations to complainants’ brief will be “Comp. Br. at ___.”

the first on the scene told Rosenwinkel that there was a hose was running out the back of the facility, across the parking lot, and draining towards the creek. Comp. Br. at 4; Tr. at 19. He testified that when the village fire department arrived at the facility, the overhead doors were open. Comp. Br. at 4; Tr. at 20. When the firefighters walked up to the building the front door was closed, and someone walked out the back of the building and pulled the hose across the parking lot and back into the building, shutting the rear overhead door. Comp. Br. at 4; Tr. at 20.

Clark testified he received a call from his manager to report to a hazardous materials spill “that week” and went to the Bentrionics facility. Comp. Br. at 4 and 22. He observed a pool of bluish liquid on the north end of the property, which was flowing westward into a creek on the west side of the property. Comp. Br. at 5; Tr. at 23. Clark took samples from the pooled liquid on the north side of the property, the accumulation tank, and the point where the liquid entered the creek. Comp. Br. at 5; Tr. at 23. The three samples tested positive for copper and the sample by the creek tested positive for lead. Comp. Br. at 5; Tr. at 23-24. Clark testified that the discharge limit for copper is .5 milligrams and the limit for lead is .0075 milligrams. Comp. Br. at 5; Tr. at 24. The lead result was 8.38 mg/l, which is 1600 times over the limit. Comp. Br. at 5; Tr. at 24-25. The copper result was 280 mg/l which is approximately 560 times over the limit. Comp. Br. at 5; Tr. at 25. Clark testified that the material drained into the creek, and such high levels are dangerous to the environment and humans, and could pose potential groundwater pollution problems. Comp. Br. at 5; Tr. at 25.

PENALTY ANALYSIS

In its April 19, 2001 order, the Board found respondents violated Sections 12(a), (d), and (f) of the Environmental Protection Act (Act) (415 ILCS 5/12(a), (d) and (f) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002), and 35 Ill. Adm. Code 307.1101(a)(1), 307.2301(c)(1) and (2). Having found violations, the Board must now determine the penalty to be assessed.

In determining the appropriate civil penalty, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act. ESG Watts, Inc. v. PCB and People of the State of Illinois, 282 Ill. App. 3d 43; 668 N.E.2d 1015 (4th Dist. 1996); People v. Berniece Kershaw and Darwin Dale Kershaw d/b/a Kershaw Mobile Home Park, PCB 92-164 (Apr. 20, 1994); IEPA v. Allen Barry, individually and d/b/a Allen Barry Livestock, PCB 88-71 (May 10, 1990). The Board must take into account factors outlined in Section 33(c) of the Act in determining the unreasonableness of the alleged pollution. Wells Manufacturing Company v. PCB, 73 Ill. 2d 226, 383 N.E.2d 148 (1978). The Board is expressly authorized by statute to consider the factors in Section 42(h) of the Act in determining an appropriate penalty. In addition, the Board must remember that no formula exists, and all facts and circumstances must be reviewed. Kershaw, PCB 92-164, slip. op. at 14; Barry, PCB 88-71, slip. op. at 62-63.

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, PCB 88-71, slip. op. at 72. The formula for calculating the maximum penalty is contained in Section 42(a) and (b) of the Act. 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.

Complainants argue that the Act authorizes the Board to impose a \$100,000 penalty for violating Sections 12(a) and (d) of the Act (\$50,000 multiplied by 2) and a \$530,000 penalty for violation Section 12(a) from February 1993 when the village discovered the lead and copper contamination to March 25, 1993, when the operations manager promised not to discharge any more untreated contaminants in the village’s sanitary sewer system (\$10,00 x 53 (days violation lasted)). Comp. Br. at 11-12. Complainants further state that Bentronics is alleged to have violated Section 12(f) of the Act and 35 Ill. Adm. Code 307.1101(a)(1) and 307.203(c) for one day in June 13, 1993 for a penalty of \$10,000. Comp. Br. at 12-13. Complainants conclude that Bentronics is potentially liable for \$640,000 in penalties and attorney fees and costs. Comp. Br. at 12-13. However, complainants only seek the statutory maximum for the violations of Sections 12(a), (d) and (f) of the Act, for a total of \$110,000 plus attorney fees and costs. The Board now examines the appropriate penalty for these violations.

Section 33(c) Factors

The Act states that the Board must consider all facts and circumstances involved in an enforcement order including, but not limited to, the factors in Section 33(c). 415 ILCS 5/33(c) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002. These factors include:

- i. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
- ii. the social and economic value of the pollution source;
- iii. 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;
- iv. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
- v. any subsequent compliance.

Other factors, such as good faith, may also be considered. IEPA v. Allen Barry d/b/a Allen Barry Livestock, PCB 88-71 (May 10, 1990).

Section 33(c)(i) - Injury to Health, Welfare, and Property

Evidence was presented that Bentronics discharged dangerous levels of copper and lead into the creek, which are dangerous to the environment and humans, and could pose potential groundwater pollution problems. The Board weighs this factor against Bentronics.

Sections 33(c)(ii) and 33(c)(iii) - Social/Economic Value and Suitability to the Area

The record does not address any facts that might impact upon this consideration. The Board cannot weigh these factors for or against respondents.

Section 33(c)(iv) - Economic Reasonableness of Reducing Emissions

This factor is not relevant to this matter.

Section 33(c)(v) - Subsequent Compliance

The record does not address this issue.

Section 42(h) Factors

Complainants seek a total penalty of \$110,000. Comp. Br. at 130. In determining a penalty, Section 33(c) lists general factors for the Board to consider when issuing final orders and determinations, while Section 42(h) specifically governs penalty amounts. 415 ILCS 5/42(h) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002; People v. Kershaw, PCB 92-164 (Apr. 20, 1995). Section 42(h) states, in pertinent part:

In determining the appropriate civil penalty to be imposed . . . the Board is authorized 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;
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;
3. any economic benefits accrued by the violator because of delay in compliance with requirements;
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) (2000) *amended by P.A. 92-0574, eff. June 26, 2002.*

Section 42(h)(1) - Duration and Gravity

The record shows that Bentronics discharged contaminants into the environment through a slop sink and through a hose. The contaminants were deliberately discharged, and can have a negative impact on the environment and people's health. Bentronics had the option of using the closed loop system it installed to eliminate the discharge and instead Bentronics chose to intentionally discharge directly into the creek, ground and sewer system. The contamination that was discovered from the slop sink lasted at least 53 days.

Section 42(h)(2) - Due Diligence

The record shows that Bentronics was not diligent in complying with the Act and Board regulations. Although Bentronics asked the village to terminate Bentronics' discharge permit and Bentronics installed a closed loop system, Bentronics decided to disregard the closed loop system, the Act, and the Board regulations and discharged harmful copper and lead into the creek, ground and sewer system.

Section 42(h)(3) - Economic Benefits

Complainants allege Bentronics benefited by not timely paying the user fees to the village (because Bentronics was not connected to the village's system) and by not paying fees to a third party hauler by directly discharging the contaminants into the sink, creek and ground. Comp. Br. at 11. The Board agrees that Bentronics economically benefited from terminating its wastewater discharge permit.

Section 42(h)(4) - Deterring Further Violations

Complainants note that the act authorizes a fine of \$640,000. Comp. Br. at 12. Complainants also argue that only a high enough penalty will deter a violator like Bentronics. Comp. Br. at 11. The Board agrees that a monetary penalty is appropriate to deter future violations.

Section 42(h)(5) - Previous Violations of the Act

Complainants introduced evidence that Bentronics previously was found guilty and fined \$14,000 by the 18th Judicial Circuit Court of violating village ordinances. Comp. Br. at 12; Hearing Exh. F. However, there is no evidence that the village ordinance violations were also violations of the Act.

Penalty

The record must demonstrate an adequate rationale for the imposition of the penalty, and the penalty must be "commensurate with the seriousness of the infraction." ESG Watts, Inc. v. PCB, 282 Ill. App. 3d 43, 668 N.E.2d 1015 (4th Dist. 1996), citing Trilla Steel Drum Corp. v. PCB, 180 Ill. App. 3d 1010, 1013, 536 N.E.2d 788, 790 (1st Dist. 1989). However, the Act clearly authorizes the Board to assess civil penalties for violations regardless of whether those violations resulted in actual pollution. Park Crematory, Inc. v. PCB, 264 Ill. App. 3d 498, 501-02, 637 N.E.2d 520, 523 (1st Dist.1994).

In this case, there is evidence of pollution and harm to the environment. There is also evidence that the pollution was willful and knowing. In light of these facts, the Board grants the penalty requested by the Attorney General and imposes a \$110,000 penalty on respondents to deter future violations of the Act and Code.

Attorney Fees

Section 42(f) of the Act allows the Board to assess attorney fees in cases where a person "has committed a willful, knowing or repeated violation of the Act." 415 ILCS 5/42(f) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002. The record shows that Bentronics willfully and knowingly violated the permitting procedures of the Act and Code. Therefore the Board finds the awarding of attorney fees appropriate. Although complainants request attorney fees and costs, complainants have not provided any information regarding what those fees and costs should be. Complainant must file an affidavit with the Board by September 5, 2002, indicating what complainant believes is an appropriate amount.

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

- 1) The Board previously found that Bentronics Corporation has violated Sections 12(a), (d) and (f) of the Act (415 ILCS 5/12(a), (d) and (f) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002), and 35 Ill. Adm. Code 307.1101(a)(1), 307.2301(c)(1) and (2) of the Board's water pollution regulations. The Board imposes a civil penalty of \$110,000 on Bentronics.
- 2) Bentronics Corporation must pay this penalty within 30 days of the date of this order. Such payment must be made by certified check or money order payable to the Treasurer of the State of Illinois, designated to the Illinois Environmental Protection Trust Fund, and must be sent by first class mail to:

Illinois Environmental Protection Agency
Fiscal Services Division
1021 North Grand Avenue East

P.O. Box 19276
Springfield Illinois 62794-9276

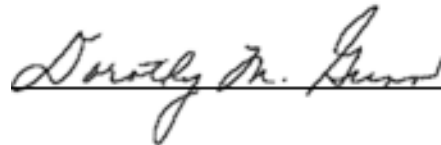
The certified check or money order must clearly indicate on its face this case name and docket number. Penalties unpaid within the time prescribed will accrue interest under Section 42(g) of the Environmental Protection Act (415 ILCS 5/42(g) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002) at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a) (2000)).

- 3) Attorneys for Complainant must file an affidavit in support of their request for fees by September 5, 2002. Respondents must file a response to the affidavit by September 19, 2002.

IT IS SO ORDERED.

Board Member W.A. Marovitz dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the Board adopted the above interim opinion and order on September 5, 2002, by a vote of 6-1.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board