ILLINOIS POLLUTION CONTROL BOARD
August 8, 2002

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 96-256
	)	(Enforcement – Water)
CRIER DEVELOPMENT COMPANY,	)	
and BRADLEY S. COWELL,	)	
	)	
Respondents.	)	

ZEHEMHERET BEREKET-AB, ASSISTANT ATTORNEY GENERAL, OFFICE OF THE ATTORNEY GENERAL, APPEARED ON BEHALF OF COMPLAINANT.

INTERIM OPINION AND ORDER OF THE BOARD (by R.C. Flemal):

On May 3, 2001, the Board granted summary judgment in favor of complainant and sent the case to hearing on the issue of penalties. Complainant alleged respondents, Crier Development Company (Crier), a general building contractor, and Bradley S. Cowell, Crier's vice-president, violated Section 12(b) of the Environmental Protection Act (Act) (415 ILCS 5/12(b) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002), and 35 Ill. Adm. Code 309.202(a) of the Board's water pollution regulations by installing a sewer without a construction permit. For the reasons stated below, the Board orders respondents to pay a penalty in the amount of $25,000.

BACKGROUND

In a June 19, 1996 one-count complaint, the complainant asserted that respondents violated Section 12(b) of the Act because they caused or allowed the construction of a sanitary sewer without an Illinois Environmental Protection Agency (Agency) construction permit. Additionally, complainant alleged that respondents violated Section 309.202(a) of the Board's water pollution regulations which prohibits, among other things, persons from causing or allowing construction of any sewer without a construction permit from the Agency.

On May 3, 2001, after respondents failed to respond to complainant's request to admit facts, the Board deemed the facts admitted pursuant to former 35 Ill. Adm. Code 103.162(c), which was in effect when the request to admit was filed. Former 35 Ill. Adm. Code 103.162(c) stated:

> Each of the matters of fact and the genuineness of each document of which admission is requested is admitted unless . . . the party to whom the request is

> directed serves upon the party requesting the admission a sworn statement denying specifically the matters . . . (35 Ill. Adm. Code 103.162(c)).

On April 11, 2002, the Board held a hearing in this matter. Respondents did not appear. On May 31, 2002, complainant filed a post-hearing brief. Respondents did not file a post-hearing brief.

PRELIMINARY MATTER

Before determining the proper penalty in this case, the Board examines respondents' failure to participate in these proceedings since September 15, 1997. Hearing officer orders indicate that the hearing officer advised respondents on September 15, 1997, that an appearance by an attorney must be filed. Subsequent hearing officer orders reveal that respondents have not participated in another status hearing, nor filed an appearance, nor filed an answer to the complaint, nor attended the hearing.

Complainant asserts that a notice of filing of the complaint was mailed via certified mail to Crier Development Corporation, 1084 Hudson Court, Bartlett, Illinois, and to Bradley Cowell at 0N071 Cedar Court, Winfield, Illinois. Comp. Br. at 1. Cowell accepted service on behalf of the corporation and personally. Comp. Br. at 2, Exh. 1.

Complainant attaches as Exhibit 2 to its brief, a letter from Cowell, written on company letterhead with the 1084 Hudson Court address. Comp. Br. 2, Exh. 1. In the letter, Cowell asked for an extension, requested a meeting with complainant and denied installing a sewer or water hook-up without a permit. Exh. 2. The complainant argues that the signatures on the certified mail receipt and the Cowell letter seem to be identical. Comp. Br. at 2. Also, Cowell sent a fax to complainant on September 23, 1997 using the 1084 Hudson Court address. Exh. 4.

Complainant argues that Cowell personally and as a corporate officer of Crier knew of the complaint and of the Board proceedings.

Pursuant to Section 101.143(3) of the Board's procedural rules, service of filings is proved by:

> In case of service by registered or certified mail, by registered or certified mail receipt; or . . . (35 Ill. Adm. Code 101.143(3)).

In this case, there is a certified mail receipt in the record. See Exh. 1. The Board finds that respondents were properly served.

HEARING

Respondents did not appear at the hearing. The Agency called two witnesses at the hearing held on April 11, 2002. The Agency's two witnesses were Frank H. Gorham, P.E.,

President of Robert H. Anderson & Associates, Inc, and Maureen A. Brehmer, an engineer and inspector with the Agency. Gorham testified that Crier entered into a service contract with Gorham's firm to prepare final engineering plans for the Hudson Hills subdivision project. Comp. Br. at 3.[1] Gorham testified that he did not personally meet Cowell, but met Randy Forest, who represented Crier and was Gorham's contact as they proceeded with the Hudson Hills project. Comp. Br. at 3; Tr. at 16. One of the terms of the contract for the project was to get Agency permits for both the water main and sanitary sewer. Comp. Br. at 3. Gorham's firm prepared the permit applications and, after getting the necessary signatures from Crier's trust officer, the permits were prepared and forwarded to the Agency in the summer of 1992. Comp. Br. at 3; Tr. at 16-17.

The Agency returned the applications because it wanted more information. Tr. at 18. Crier took no further action after the Agency rejected the permits. Comp. Br. at 4; Tr. at 17. Gorham testified that he became aware that the construction was completed without getting the necessary permit in the summer of 1993, and notified the Agency. Comp. Br. at 4; Tr. at 18. Gorham also stated that although both permits were obtained later, his firm did not participate in that permitting process.[2] Tr. at 19.

Brehmer testified she inspected the Hudson Hills project in August 1993 after Gorham notified the Agency about the construction. Comp. Br. at 4; Tr. at 20. Upon inspecting the site, she was told by one of Crier's contractors that the sanitary sewers were installed in March of 1993. Comp. Br. at 4; Tr. at 20. Brehmer asked Cowell why he built the sanitary sewer without a construction permit. Comp. Br. at 4; Tr. at 22. Brehmer testified that Cowell's response was "what difference does it make because you aren't going to do anything about it anyway." Tr. at 22. Brehmer also testified that Cowell told her the Village of Bartlett told him he could put the sewer in without a permit. Comp. Br. at 4-5; Tr. at 22-23. Brehmer contacted Kevin Meyers, an Agency permit section engineer, and George Wentworth at the Village of Bartlett, and both men told her that Cowell was not telling the truth. Comp. Br. at 5; Tr. at 23.

Brehmer testified that the Agency issued the construction permit on August 3, 1993. Tr. at 24.

PENALTY ANALYSIS

In its May 3, 2001 order, the Board found respondents violated Section 12(b) of the Act (415 ILCS 5 *et seq.* (2000) *amended by* P.A. 92-0574, eff. June 26, 2002), and 35 Ill. Adm. Code 309.202(a) of the Board's water pollution regulations. Having found violations, the Board must now determine the penalty to be assessed.

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[1] The sewer hookup occurred at the subdivision project.

[2] The record does not contain information regarding who filed the subsequent permit applications, or when the applications were filed.

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 $50,000 penalty for violating Section 12(b) of the Act and a $1,500,000 total penalty for each day of violation from March 1993 when the construction of the sewer was completed until the end of July 1993 (150 days multiplied by $10,000). Comp. Br. at 9. Despite the fact that the Act authorizes such a penalty, complainants seek a $50,000 total penalty for a violation of Section 12(b) of the Act or 35 Ill. Adm. Code 309.202(a). Comp. Br. at 10. 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

No evidence or testimony has been presented to indicate that any injury to health, welfare and property occurred as a result of these violations. In the absence of any evidence, the Board cannot weigh these factors for or against respondents.

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

Although there is evidence that the Agency issued a permit on August 3, 1993, there is also evidence that the sewer construction was completed in March 1993, well before the permit was issued. Respondents could not subsequently comply when the construction occurred before the permit issued.

Section 42(h) Factors

Complainants seek a total penalty of $50,000. Comp. Br. at 10. 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 (April 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 respondents did not have a permit to install the sewer in March 1993, and the permit issued on August 3, 1993. Respondents were in violation of the Act and Code during that time. The record also shows that although Crier hired Robert H. Anderson & Associates, Inc, to, among other things, get the permits for the sewer, Crier did not wait for the permit before beginning and completing construction on the sewer. The duration of the violation was approximately 5 months.

By violating the permitting process, respondents jeopardized the health and safety of the subdivision residents, although there is no evidence that any residents suffered from the illegally installed sewer.

Section 42(h)(2) - Due Diligence

The record shows that Crier was not diligent in complying with the Act and Board regulations. Although Crier hired an engineering company to design the sewer system and complete the appropriate permit applications, Crier did not wait for the permits before installing the sewer. Furthermore, Colwell showed disregard for the process when he asked Brehmer what difference installing the sewer without the permit made because she would not do anything about it.

Section 42(h)(3) - Economic Benefits

Complainants allege respondents benefited by not timely paying the necessary permit application fees and engineering service fees on time. Comp. Br. at 8. Complainants also allege respondents benefited by receiving payment for their work from the homebuilders of Hudson Hills subdivision Comp. Br. at 8. Complainants did not allege specific numerical amounts. Because the Agency eventually issued a permit to Crier, the Board does not find that

Crier economically benefited from the illegal installation. Crier must have paid the appropriate permitting fees, since a permit was issued.

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

Complainants note that the act authorizes a fine of $50,000 for violating section 12(b) or 35 Ill. Adm. Code 309.202(a). Comp. Br. at 9. Complainants also note that at a rate of $10,000 per day for each day the violation continues (per Section 42(a) of the Act), an additional fine of $1,500,000 is authorized (150 days multiplied by $10,000). The Board agrees that a monetary penalty is appropriate to deter future violations.

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

Complainants do not have any record of respondents committing any prior violations.

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, 201 Ill. Dec. 931 (1st Dist.1994).

In this case, while there was no evidence of pollution, the Board does not take respondents' violation of the permitting procedures lightly. The fact that respondents have not participated in this case since 1997 suggests they have little regard for the administrative procedures that are necessary to protect the environment. In light of these facts, the Boards imposes a $25,000 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 respondents 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 August 22, 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 Crier and Cowell have violated Section 12(b) of the Act and 35 Ill. Adm. Code 309.202(a) of the Board's water pollution regulations by installing a sewer without a construction permit. The Board imposes a civil penalty of $25,000 on respondents.

2) Respondents 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

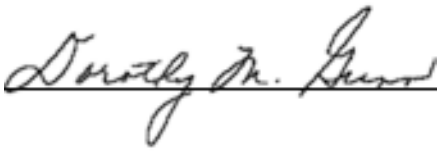
The certified check or money order must clearly indicate on its face this case name and docket number. Penalties unpaid within the time prescribed will accrue interest under Section 42(g) of the Environmental Protection Act (415 ILCS 5/42(g) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002) at the 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 August 22, 2002. Respondents must file a response to the affidavit by September 5, 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 opinion and order on August 8, 2002, by a vote of 6-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board