ILLINOIS POLLUTION CONTROL BOARD
January 6, 2000

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 96-111
	)	(Enforcement - Water)
JOHN CHALMERS, individually and	)	
d/b/a JOHN CHALMERS HOG FARM,	)	
	)	
Respondent.	)	

THOMAS DAVIS AND DESIREE PERI, ASSISTANT ATTORNEYS GENERAL, ATTORNEY GENERAL'S OFFICE, APPEARED ON BEHALF OF COMPLAINANT; and

HOMER J. TICE, OF GROSBOLL, BECKER, TICE & SMITH, APPEARED ON BEHALF OF RESPONDENT.

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

This matter is before the Board on a complaint filed on November 28, 1995, by the Illinois Attorney General's Office on behalf of the People of the State of Illinois (complainant) against John Chalmers, individually and d/b/a John Chalmers Hog Farm (respondent). Complainant alleges that for approximately two years between May 1992, and July 1994, respondent violated various provisions of the Environmental Protection Act (Act) and the Board's regulations governing water pollution.

For the reasons explained below, the Board finds the following:

1. on May 11, 1992, respondent violated Sections 12(a) and (f) of the Act (415 ILCS 5/12(a), (f) (1998)), and Sections 304.106, 302.203, 501. 404(c)(3) and (c)(4)(A) of the Board's regulations (35 Ill. Adm. Code 304.106, 302.203, 501.404(c)(3), (c)(4)(A));

2. on May 6, 1993, respondent violated Sections 12(a) and (d) of the Act (415 ILCS 5/12(a), (d) (1998)), and Section 302.203 of the Board's regulations (35 Ill. Adm. Code 302.203);

3. on June 15, 1993, respondent violated Sections 12(a), (d), and (f) of the Act (415 ILCS 5/12(a), (d), (f) (1998)), and Section 302.212 of the Board's regulations (35 Ill. Adm. Code 302.212);

4. on February 9, 1994, respondent violated Section 501.404(c)(3) of the Board's regulations, but respondent did not violate Sections 12(a), (d), or (f) of the Act (415 ILCS 12(a), (d), (f) (1998)), nor Section 501.404(c)(4)(A) of the Board's regulations (35 Ill. Adm. Code 501.404(c)(4)(A)); and

5. on February 14, 1994, February 17, 1994, and July 26, 1994, respondent violated Sections 12(a) and (f) of the Act (415 ILCS 5/12(a), (f) (1998)), but respondent did not violate Sections 501.404(c)(3) and (c)(4)(A) of the Board's regulations (35 Ill. Adm. Code 501.404(c)(3), (c)(4)(A)).

The Board orders respondent to pay a civil penalty in the amount of $5,750. In addition the Board orders respondent to cease and desist from further violating the Act and Board regulations, and provide monthly reports to the Illinois Environmental Protection Agency (Agency) describing the freeboard amount of each lagoon.

PROCEDURAL HISTORY

A hearing was held in this matter before Board Hearing Officer John Knittle on June 22, 23, and 24, 1999, in Springfield, Illinois. Complainant's witnesses were two engineers from the Agency, an agricultural advisor from the Agency, and a school bus driver. Respondent called a former employee as a witness and testified on his own behalf.

Complainant filed a posthearing brief on August 12, 1999, and respondent filed a posthearing brief on October 12, 1999. Complainant filed a reply brief on October 26, 1999.

FACTS

Chalmers Site

The John Chalmers Hog Farm (Chalmers site) is located near Oakford, Menard County, Illinois. The Chalmers site consists of 136 acres of contiguous land. Tr. at 26.[1] The site contains 17 confinement buildings, and four lagoons. Tr. at 26, 28.[2] The Chalmers site is bound by county roads on the west and north; the road along the north side of the property, Kay Watkins School Road, is relevant in this matter.

[1] Citations to the hearing transcript will hereinafter be referred to as "Tr. at __."

[2] Although the parties dispute whether three of the lagoons are actually holding ponds, the issue is irrelevant to today's decision. For simplicity, the Board will refer to the areas as lagoons.

Of the 136 acres, approximately 100 acres slope toward a depression that extends diagonally from the southeast to the northwest corner of the Chalmers site. Tr. at 34-35; People's Exhibit B.[3] The depression is marked on the U.S. Geological Survey Topographic map, submitted at hearing, as an intermittent stream. Hearing Officer Exhibit 1. Drainage from the 100 acres is carried down the intermittent stream and exits the Chalmers site at the northwest corner of the site. Tr. at 34-35. The intermittent stream is a tributary to the Sangamon River. Hearing Officer Exhibit 1. Drainage from part of the remaining 36 acres flows off the Chalmers site to the north toward Kay Watkins School Road. Tr. at 34.

John Chalmers (Chalmers) has owned the property since the late 1960s (Tr. at 457), and has operated a hog farm at the site for most of that time. In 1994, the business had between 10,000 to 12,000 swine.[4] Tr. at 559. Chalmers began to scale down his operation in 1995 and ceased his hog operations entirely in 1996. Tr. at 473-474. There have been no hogs at the Chalmers site since November 15, 1996. Tr. at 473. The property has been under foreclosure for 2 1/2 years as of June 1999. Tr. at 474.

Storage and Disposal of Livestock Waste

During the period of time at issue in this action, most of the 17 confinement buildings had an underground pit within which livestock waste accumulated. Tr. at 42. The waste from 14 of the pits was discharged into lagoon #1.[5] Tr. at 42. The other pits discharged into lagoon #3. Tr. at 43. When lagoon #1 filled to capacity, gravity pulled the waste into lagoon #2; lagoon #2 waste flowed into lagoon #3. Tr. at 43. Occasionally the fourth lagoon received waste pumped from lagoon #1. Tr. at 43.

Disposal of the hog waste was accomplished through spray irrigation in two manure application areas. Tr. at 464. For purposes of the instant matter, only the manure application area located adjacent to Kay Watkins School Road in the northwest corner of the Chalmers site is of concern. This area is marked "manure application area" on People's Exhibit A.

Agency Inspections

The complainant's allegations arise from Agency inspections of the site made between May 11, 1992, and July 26, 1994. The Agency submitted reports from the inspections at hearing.[6] Dale

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[3] People's Exhibit B is an enlargement of the original topographical map. Tr. at 88, 134-135. The original topographical map was admitted by the hearing officer as Hearing Officer Exhibit 1 at Tr. 259-260.

[4] People's Exhibit 12 reveals that Chalmers told the Agency during a February 9, 1994 inspection, that the facility had approximately 15,000 swine. People's Exh. 12. Based on this exhibit, it is possible Chalmers underestimated how many swine were on the site in 1994.

[5] Three lagoons are labeled "#1, #2, #3" on People's Exh. A. The fourth lagoon is labeled "Lagoon #4."

[6] The reports are marked "People's Exhibit 2, 4, 6, 7, 12, 13, 14, and 15," respectively.

Brockamp, then an Agency engineer, now with the Illinois Department of Natural Resources, inspected the Chalmers site on each of the inspections, and testified on behalf of complainant regarding his observations. Brockamp holds a Bachelor's of Science in Agricultural Engineering. Tr. at 21. During his employment with the Agency he responded to agricultural complaints regarding livestock waste and agrichemical wastes. Tr. at 22. He estimates he inspected approximately 700 livestock facilities during his tenure with the Agency. Tr. at 24.

Brockamp first inspected the Chalmers site on May 11, 1992. Tr. at 25, 49. Brockamp inspected the site because of a complaint alleging that hog manure had been irrigated too close to Kay Watkins School Road. People's Exh. 2

No spray irrigation was occurring at the time Brockamp visited the Chalmers site. People's Exh. 2. However, Brockamp observed what he believed to be approximately several thousand gallons of hog manure located in the intermittent stream at the northwest corner of the Chalmers site. Tr. at 51, People's Exh. 2. Brockamp spoke with Ron Jackson, the manager of the Chalmers site. People's Exh. 2. Jackson explained that the material in the intermittent stream was related to a lagoon overflow, due to new employees who did not know how to operate the irrigation equipment, and who did not tell Jackson about the problem. People's Exh. 2.

Brockamp inspected the Chalmers site again on May 6, 1993. Tr. at 51. The inspection was conducted in response to a complaint that liquid manure had been excessively applied in the manure application area and that the waste had drained over the top of Kay Watkins School Road into a neighbor's cornfield to the north of the Chalmers site. Tr. at 53. Brockamp reported finding manure in both the north and south road ditches, as well as on the surface of Kay Watkins School Road. Tr. at 53-55. Brockamp again spoke with Jackson, who explained he was aware of the problem and had sent employees to the scene to remove waste from the road. Exh. 4.

Brockamp conducted a third inspection of the Chalmers site on June 15, 1993. Tr. at 67-68. The inspection was conducted in response to a complaint of strong odors coming from the site, and of manure being excessively applied on the manure application area. Tr. at 68. During the inspection Brockamp witnessed black liquid shooting into the air and onto the ground from three or four irrigation risers. Tr. at 69. Brockamp watched it discharge overland, under Kay Watkins School Road through a culvert, and on to a neighbor's grass waterway. Tr. at 69, 74-75. He concluded that the discharge consisted of liquid livestock manure. Tr. at 69.

Brockamp conducted a fourth inspection of the Chalmers site on February 9, 1994. Tr. at 109. Also in attendance at the inspection were John Chalmers and Agency representatives Tim Kluge, A.G. Taylor, Bud Bridgewater, and Steve Cook. People's Exh. 12. Chalmers gave the men a tour of the operation. People's Exh. 12 at 2. Brockamp testified that during the tour he observed an overflow from lagoon #1, which went over an embankment, and down a hill into a sow lot. Tr. at 110. Brockamp further testified that the discharge was a thick, black liquid that had a livestock odor, and he guessed that the flow ended at the intermittent stream. Tr. at 111. Brockamp's report says that Chalmers explained that a frozen pump caused the discharge. People's Exh. 12 at 2.

On February 14 and 17, 1994, Brockamp and John Wells, also an Agency engineer, took water samples from the intermittent stream downstream from the Chalmers site. Tr. at 111, People's Exh. 13. Brockamp testified that the sampled water flowed directly from Chalmers' property. Tr. at 112. Brockamp testified that chemical analysis of the water samples showed that the concentration of ammonia nitrogen and the biochemical oxygen demand (BOD) were consistent with the presence of liquid livestock waste in the sample. Tr. at 114-115, 119.

On July 26, 1994, Brockamp collected another water sample from the same location as the February 1994 samples. Tr. at 121. Based on the chemical analysis of that sample, Brockamp concluded that it also contained liquid livestock waste. Tr. at 122.

STANDARD OF PROOF

Under the Administrative Procedures Act, unless otherwise provided by law or stated in the agency's rules, the standard of proof in any contested case hearing conducted under the Act by an agency shall be the preponderance of the evidence standard. 5 ILCS 100/10-15 (1998). For example, to prove a violation under Section 12(a) of the Act complainant must show by a preponderance of the evidence that respondent caused, threatened or allowed water pollution. Allaert Rendering, Inc. v. IPCB and IEPA, 91 Ill. App. 3d 153, 414 N.E.2d 492 (3d Dist., 1980). The same standard controls under Section 12(d) of the Act to show that respondent deposited contaminants upon the land so as to create a water pollution hazard. Citizens Against Hampton Township Landfill v. David R. Bledsoe, Dan Ligino, Steven Ligino, and Upper Rock Island County Landfill, Inc. (November 21, 1984), PCB 81-155. Therefore, the standard of proof for all of the claims alleged is the preponderance of the evidence standard.

ARGUMENT, RESPONSE, AND ANALYSIS

May 11, 1992 Agency Inspection

Complainant's Argument

Complainant's first claim alleges that on May 11, 1992, respondent threatened or allowed the discharge of contaminants into a water of the State so as to cause or tend to cause water pollution in Illinois, in violation of Section 12(a) of the Act. 415 ILCS 5/12(a) (1998); Comp. Br. at 7-8.

On May 11, 1992, complainant notes that Brockamp saw and smelled several thousand gallons of liquid swine waste in the intermittent stream located on respondent's property. Comp. Br. at 6. Complainant argues that the intermittent stream, on respondent's property and west of respondent's property, is a water of the State, as that term is used in the Act. Comp. Br. at 6.

In further support of its claim that the May 11, 1992 inspection revealed that respondent violated Section 12(a) of the Act (415 ILCS 5/12(a) (1998)), complainant argues that there were no

livestock farms other than respondent's farm within the 100-acre watershed that draws water into the northwest corner of the parcel. Comp. Br. at 7, citing Tr. at 45-49. Additionally, complainant asserts that Chalmers' farm manager, Jackson, admitted that a lagoon overflow occurred. Comp. Br. at 7. Because respondent allowed swine contaminants to enter a water of the State, and livestock waste is likely to harm aquatic life within the intermittent stream, complainant argues that respondent violated Section 12(a) of the Act.

Complainant also asserts that on May 11, 1992, respondent violated Section 12(f) of the Act (415 ILCS 5/12(f) (1998)), because he did not have a National Pollutant Discharge Elimination System (NPDES) permit authorizing him to discharge livestock waste into a water of the State. Comp. Br. at 8.

Complainant also alleges that on May 11, 1992, respondent violated Sections 304.106 and 302.203 of the Board's regulations (35 Ill. Adm. Code 304.106, 302.203), because respondent caused the presence of fecal solids and putrid odor in a water of the State. Comp. Br. at 8.

Lastly, complainant alleges that on May 11, 1992, respondent violated Sections 501.404(c)(3) and (c)(4)(A) of the Board's regulations because the respondent's lagoons had inadequate storage capacity. Comp. Br. at 8-9. Complainant asserts the inadequacy is evidenced by the thousands of gallons of waste found in the intermittent stream. Comp. Br. at 9.

Response

Respondent challenges whether the intermittent stream ever intersected with the Sangamon River. Resp. Br. at 23. Specifically, respondent claims that complainant never presented evidence that any water from the stream ever traversed "to or near" the Sangamon River. Resp. Br. at 3. Further, respondent argues that the evidence is unclear whether water ever existed except on rare occasions in that portion of the intermittent stream viewed by Brockamp. Resp. Br. at 6.

Respondent also asserts that it is not clear that the intermittent stream is even an intermittent stream, or that it is a water of the State. Resp. Br. at 6. Respondent notes that the only evidence that the water in the area of the Chalmers site was an intermittent stream was testimony from Brockamp that the water would support aquatic life. Resp. Br. at 6. However, respondent noted that bugs and fishing worms, which lived in the area of the site, are the same as found in a yard, *i.e.* lawn, although Brockamp testified that a yard is not an intermittent stream. Resp. Br. at 7.

Respondent also argues that in response to the claim that water at the northwest corner of the site contained six to seven thousand gallons of liquid manure, Brockamp did not determine if any heavy rains occurred before his inspection. Resp. Br. at 5. Respondent concludes that it is "hard to imagine" that one inadvertent overflow of the lagoon, when there are no homes in the area, will cause damage to any individual, groups of individuals, or any element of nature. Resp. Br. at 7.

Board Analysis

Complainant first alleges that respondent violated Section 12(a) of the Act, which states:

> No person shall cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act. 415 ILCS 5/12(a) (1998).

To determine whether respondent violated Section 12(a) of the Act, consideration of three terms in Section 12(a) is particularly important. First, "contaminant" is defined in Section 3.06 of the Act as:

> [A]ny solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source. 415 ILCS 5/3.06 (1998).

Second, "water pollution" is defined in Section 3.55 of the Act as:

> [S]uch alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish or other aquatic life. 415 ILCS 5/3.55 (1998).

Additionally, "waters" as defined in Section 3.56 of the Act means:

> [A]ll accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State. 415 ILCS 5/3.56 (1998).

Given these definitions, the Board must determine whether Brockamp's investigation on May 11, 1992, shows that respondent violated Section 12(a) of the Act. After considering all of the evidence, the Board concludes that Brockamp's credentials and experience make him qualified to identify livestock waste. The Board further concludes that complainant has shown by a preponderance of the evidence that on May 11, 1992, respondent violated Section 12(a) of the Act. 415 ILCS 5/12(a) (1998).

Brockamp testified that on May 11, 1992, he found six to seven thousand gallons of livestock waste in the northwest section of the site. Tr. at 43. He observed that the waste had a foul, putrid odor. Tr. at 44. He also determined it was untreated waste, as he saw fecal matter in the liquid. Tr. at

44. Brockamp estimated the amount of waste based on his observation; he did not take any measurements. Tr. at 179.

The Board finds that the evidence shows that thousands of gallons of waste is a contaminant for purposes of Section 12(a) of the Act. However, the mere presence of a contaminant is insufficient to establish that water pollution has occurred or is threatened; it must also be shown that the particular quantity and concentration of the contaminant in question is likely to create a nuisance or render the waters harmful, detrimental, or injurious. Jerry Russell Bliss, Inc. v. Illinois Environmental Protection Agency, 138 Ill. App. 3d 699, 704, 485 N.E.2d 1154, 1157 (5th Dist. 1985).

Regarding the quantity of the waste, the Board is unpersuaded by respondent's suggestion that Brockamp did not determine if any heavy rains occurred before his inspection, which would affect the amount of water at the location. Resp. Br. at 5. Regardless of whether rainwater was a component of the gallons of waste witnessed by Brockamp, it is undisputed that Brockamp witnessed untreated waste, with a putrid smell and containing fecal matter. Tr. at 44. Untreated waste creates an oxygen demand on the stream and poses a threat to aquatic life. Additionally, fecal matter may have pathogenic microorganisms. Therefore, because there were thousands of gallons of waste in the stream, the Board finds the quantity of the waste is likely to render the waters harmful, detrimental, or injurious to public health.

The Board notes that the waterway in question is "blue-lined" on the U.S. Geological Survey topographic map of the Chalmers site area (see Hearing Officer Exhibit 1) in the convention used by the U.S. Geological Survey for intermittent streams. But the Board further notes that whether the waterway in question is correctly identified as an intermittent stream is irrelevant. The essential matter is whether the water within the waterway is a water of the State. Because the water within the waterway is an accumulation of surface water within the State, and because the accumulation is located within or flows through a part of the State, it is a water of the State as defined at 415 ILCS 5/3.56 (1998).

The Board further finds that whether the flow in the intermittent stream reaches the Sangamon River is also irrelevant. The term "water of the State" is not limited by whether the water is subject to discharge to any particular body of water; indeed, even an enclosed pond with no discharge whatsoever may be a water of the State.

Therefore, because respondent allowed the discharge of contaminants into the environment so as to cause or tend to cause water pollution in Illinois, the Board finds that respondent violated Section 12(a) of the Act. 415 ILCS 5/12(a) (1998).

Additionally, the Board finds that respondent violated Section 12(f) of the Act because he admits he did not have an NPDES permit between August 1, 1979, and August 14, 1995. Response to Request for Admission of Facts, June 27, 1996, at 1. The Board notes that Section 12(f) of the Act provides that no person shall:

> Cause, threaten or allow the discharge of any contaminant into the waters of the State, as defined herein, including but not limited to, waters to any sewage works, or into any well or from any point source within the State, without an NPDES permit for point source discharges issued by the Agency under Section 39(b) of this Act, or in violation of any term or condition imposed by such permit, or in violation of any NPDES permit filing requirement established under Section 39(b), or in violation of any regulations adopted by the Board with respect to the NPDES program. 415 ILCS 5/12(f) (1998).

In view of respondent's admission that he did not have an NPDES permit between August 1, 1979, and August 14, 1995 (Response to Request for Admission of Facts, June 27, 1996, at 1), during which period the Board finds he allowed the discharge of a contaminant into waters of the State, we further find that respondent violated Section 12(f) of the Act.

The Board also finds that complainant has proven by a preponderance of the evidence that respondent violated Sections 304.106 and 302.203 of the Board's regulations. Section 304.106 provides that:

> [N]o effluent shall contain settleable solids, floating debris, visible oil, grease, scum or sludge solids; color, odor and turbidity must be reduced to below obvious levels. 35 Ill. Adm. Code 304.106.

Section 302.203 provides that:

> Waters of the State shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, color or turbidity of other than natural origin. 35 Ill. Adm. Code 302.203.

Brockamp testified that the liquids he observed had a foul odor and were thick. Tr. at 44. Brockamp also testified that he could see fecal matter in the liquid. Tr. at 44. Respondent does not refute this testimony, but rather argues that the water never joined the Sangamon River. Resp. Br. at 23. Because water discharging through the intermittent stream is a water of the State, irrespective of whether the water eventually reaches the Sangamon River, and because Brockamp's testimony is unrefuted, the Board finds that respondent violated Sections 304.106 and 302.203 of the Board's regulations.

The Board also finds that the preponderance of the evidence shows that respondent violated Sections 501.404(c)(3) and (c)(4)(A) of the Board's regulations. Section 501.404(c)(3) provides that:

> The contents of livestock waste-handling facilities shall be kept at levels such that there is adequate storage capacity so that an overflow does not occur except in the case of precipitation in excess of a 25-year 24-hour storm. 35 Ill. Adm. Code 501.404(c)(3).

Section 501.404(c)(4)(A) provides that:

> A) Existing livestock management facilities which handle the waste in a liquid form shall have adequate storage capacity in a liquid manure-holding tank, lagoon, holding pond, or any combination thereof so as not to cause air or water pollution as defined in the Act or applicable regulations. If inadequate storage time causes or threatens to cause a violation of the Act or applicable regulations, the Agency may require that additional storage time be provided. In such cases, interim pollution prevention measures may be required by the Agency. 35 Ill. Adm. Code 501.404(c)(4)(A).

The Board finds that there is sufficient evidence that an overflow occurred due to lack of storage capacity. Jackson admitted to Brockamp that an overflow occurred. Jackson explained that the contents of one of the lagoons was overflowing the berm, and that the overflow was caused by new employees who did not know how to operate the irrigation equipment. People's Exh. 2. The Board finds that storage capacity, at least for the moment of the overflow, was inadequate. Therefore, the Board finds that the preponderance of the evidence shows respondent violated Section 501.404(c)(3) of the Board's regulations.

The Board also concludes that because there was inadequate storage capacity, the overflow occurred and resulted in water pollution as defined in Section 3.55 of the Act. The Board therefore finds that respondent violated Section 501.404(c)(4)(A) of the Board's regulations.

May 6, 1993 Agency Inspection

Complainant's Argument

Complainant argues that on or before May 6, 1993, respondent violated Sections 12(a), (d), and (f) of the Act (415 ILC 5/12(a), (d), (f) (1998)). Complainant's allegations are based on an Agency inspection conducted on May 6, 1993. On that date, Brockamp visited the Chalmers site in response to a complaint of over-application of livestock waste onto the manure application area, which at the time contained an alfalfa crop. Comp. Br. at 9. The complaining witness, Linda Brown, was a school bus driver whose route included Kay Watkins School Road. Tr. at 208, 604; People's Exh. 2.

Brockamp found that livestock waste had been applied to the alfalfa, and had drained down slope through a field tile into a road ditch along the south side of Kay Watkins School Road, flowed across the road and into a ditch on the north side of the road, and finally drained to a neighbor's field. Comp. Br. at 9, citing Tr. at 53, 55, 59, 65, 208, 268-69, 271, and 302. Brockamp determined that the liquid was waste because of the liquid's grayish color, its path through an irrigated field, and its foul odor. Comp. Br. at 9, citing Tr. 53, 199, 304-305.

Based on the May 6, 1993 inspection, complainant alleges respondent violated Section 12(a) of the Act when respondent mismanaged manure land application allowing livestock waste constituents to flow into the ditches bordering Kay Watkins School Road. Comp. Br. at 10. Complainant argues road ditches are waters of the State under Section 3.56 of the Act (415 ILCS 5/3.56 (1998)), and therefore asserts that respondent caused or tended to cause water pollution in violation of Section 12(a) of the Act. Comp. Br. at 10, 415 ILCS 5/12(a) (1998). Complainant also alleges that the discharge of the manure into the waters of the State, without an NPDES permit, was a violation of Section 12(f) of the Act. Comp. Br. at 10; 415 ILCS 5/12(f) (1998).

Complainant further alleges that respondent created a water pollution hazard in violation of Section 12(d) of the Act by causing or allowing livestock waste contaminants to be deposited on land, continuing from the alfalfa field to the northern neighbor's field. Comp. Br. at 10.

Lastly, complainant argues that respondent violated Section 302.203 of the Board's regulations because respondent created an offensive condition in waters of the State by allowing the road ditches to be contaminated with the waste. Comp. Br. at 10.

Response

Respondent challenges the photographic evidence presented by complainant. First, respondent asserts that photo one of People's Exhibit D shows ponded water which existed in the alfalfa field at the site, but that the ponded water was on respondent's farm, and was not claimed to be a water of the State. Resp. Br. at 9. Respondent also alleges that photo two of People's Exhibit D fails to disclose that the "trickle" of alleged liquid manure was discharging into the roadside ditch on the Chalmers' side of Kay Watkins School Road. Resp. Br. at 9.

To further support his denial of complainant's claims, respondent asserts that no visual evidence in the record supports complainant's allegation that the manure traveled from the manure application area and into the ditch on the south side of Kay Watkins School. Resp. Br. at 9. Respondent alleges that photo number three of People's Exhibit D, only shows mud along the side of the "traveled portion" of the road, which could have been from rain. Resp. Br. at 9. Respondent contends that contrary to Brockamp's testimony, the photos do not show that the liquid manure discharged onto the south side of the road. Resp. Br. at 9.

Respondent also challenges Brockamp's conclusion that manure existed in the neighbor's field on the north side of the road. Resp. Br. at 10. Photo four of People's Exhibit D shows the neighbor's field. Respondent noted that Brockamp did not get off the road to personally inspect the field, he did not test the liquid, he did not stick his finger in it, and he did not get closer than approximately 50 feet from the liquid in the field. Resp. Br. at 10, citing Tr. 199-200. Because Brockamp testified that April and May 1993 had been the wettest months in that portion of Illinois in a while, respondent suggests that without more confirmation, the conclusion cannot be made that the liquid in the field on the north side of the road was liquid hog manure. Resp. Br. at 10.

Respondent also noted that Chalmers would not have been irrigating at the time of the inspection because the manure application area was occupied by unharvested alfalfa, and effluent would damage the alfalfa. Resp. Br. at 11, citing Tr. 486-488. Chalmers also denied noticing any manure on either side of Kay Watkins School Road, the traveled portion of the road, or the field north of the road. Resp. Br. at 11, citing Tr. 484-485, 487. Respondent concludes that what Brockamp actually saw was muddy water caused by the field runoff from excessive spring rain. Comp. Br. at 12.

Respondent also asserted that the complaining witness, Linda Brown, never complained to Chalmers or Jackson about the problems she perceived with the manure. Resp. Br. at 12. Also, Brown testified that manure only existed on the south side of the road, or on the ground around the riser. Resp. Br. at 12, citing Tr. at 433. Respondent argues that this testimony supports his conclusion that neither Brockamp nor Chalmers found manure on the road on May 6, 1993. Resp. Br. at 12. Therefore, respondent concludes, if no manure existed on the road, it was not along the sides of the road either. Resp. Br. at 12-13.

Board Analysis

The Board finds that the preponderance of the evidence shows that respondent violated Sections 12(a), (d), and (f) of the Act (415 ILCS 12(a), (d), (f) (1998)), and Section 302.203 of the Board's regulations. 35 Ill. Adm. Code 302.203.

Brockamp testified that during the May 6, 1993 inspection, he observed that livestock waste had been applied in the manure application area so as to allow wastes to flow from the alfalfa field over Kay Watkins School Road and into the neighbor's cornfield north of the road. Tr. at 53. He described the fluid as gray and having a foul odor. Tr. at 53. He also testified that there was not very much waste on the road, but that waste was "fairly concentrated on both sides of the road, meaning that more solids were remaining than probably what were there to begin with." Tr. at 55. Brockamp further testified that although this waste was no threat to the intermittent stream identified in the May 11, 1992 inspection, it was a threat to the road ditch. Tr. at 58. Brockamp testified that he observed that the waste exited the road ditch on the north side of the road and drained into the neighbor's field, because the ditches were small and did not function as they should. Tr. at 59. On cross-examination Brockamp testified that the ditches were only a few inches deep. Tr. at 196.

With regard to photo one, the Board agrees with respondent that the standing liquid is not claimed by complainant to be a water of the State. This is irrelevant, however, in that the alleged violations do not relate to liquid standing in the field, but rather to that liquid that flowed off the field into the adjacent ditches, roadway, and fields. Additionally, the Board agrees that photo two does not show that the liquid discharged into the roadside ditches. However, merely because the photo is inconclusive, is insufficient to refute Brockamp's credible expert testimony that the liquid drained into a ditch on the south side of the road.

With regard to photo three, the Board agrees with respondent's assertion that no visual evidence in the record supports complainant's allegation that the manure traveled to the south side of

Kay Watkins School Road from the Chalmers site. Resp. Br. at 9. However, Brockamp did not testify that the photo of the road, photo three, showed that the waste traveled to the south side of the road. Brockamp testified that the photo shows there is not much of a road ditch at either side of the road, and that the waste discharged into the ditch on the left side of the photo (south side of the road) and eventually crossed onto the right side of the photo (north side of the road). Brockamp did not testify that the photo showed the waste. Tr. 66. Therefore, photo three neither supports or refutes Brockamp's testimony.

The Board finds that a preponderance of the evidence shows complainant violated Section 12(a) of the Act because Brockamp's testimony showed that waste existed in the ditches on both sides of the road. The Board further finds that the water in the ditches conforms to the definition of "waters" at Section 3.56 of the Act, and the waters are therefore waters of the State. 415 ILCS 5/3.56 (1998).

The Board also finds respondent violated Section 12(d) of the Act, which provides that no person shall:

> Deposit any contaminants upon the land in such a place and manner so as to create a water pollution hazard. 415 ILCS 5/12(d) (1998).

A finding of creation of a water pollution hazard requires a finding of the potential for the same effects as are involved in a finding of water pollution: creation of a nuisance or a rendering of waters to be harmful, detrimental, or injurious. The Board finds that respondent also violated Section 12(d) of the Act. Again, based on Brockamp's expert testimony that waste was deposited on the alfalfa field and traveled through the ditches and into the neighbor's field, the preponderance of the evidence shows that respondent rendered waters harmful, detrimental, or injurious. Although Chalmers testified that he did not irrigate the alfalfa field with effluent and did not notice manure on either side of the road, or in his neighbor's field, the Board finds that Brockamp was adequately qualified to identify waste. The Board is persuaded that Brockamp saw waste on the field and on the sides of the road, and therefore respondent deposited contaminants upon the land so as to create a water pollution hazard in violation of Section 12(d) of the Act. 415 ILCS 5/12(d) (1998).

The Board also finds that respondent violated Section 12(f) of the Act, because he did not have an NPDES permit when he allowed the waste to travel from the manure application area, into the ditch on the south side of the road, to the north side of the road, and into the neighbor's field. Response to Request for Admission of Facts, June 27, 1996, at 1. Respondent failed to respond to this claim in his brief. Brockamp's testimony supports a finding that respondent violated Section 12(f) of the Act. Therefore, the preponderance of the evidence shows that respondent violated Section 12(f) of the Act. 415 ILCS 5/12(f) (1998).

The Board further finds that respondent violated Section 302.203 of the Board's regulations. 35 Ill. Adm. Code 302.203. Section 302.203 provides in pertinent part:

> Waters of the State shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, color or turbidity of other than natural origin. 35 Ill. Adm. Code 302.203.

Brockamp testified that the waste that crossed the road had a foul odor. Tr. at 53. Chalmers denied that any waste existed on the road or in the ditches (Tr. at 485), in the neighbor's field (Tr. at 487), or in his own alfalfa field (Tr. at 488). Chalmers denied smelling waste in the neighbor's field. Tr. at 487. The Board is persuaded by Brockamp's testimony that the waste had a foul odor. Therefore, the Board finds that respondent violated Section 302.203 of the Board's regulations. 35 Ill. Adm. Code 302.203.

June 15, 1993 Agency Inspection

Complainant's Argument

Complainant asserts that respondent violated Sections 12(a) and (d) of the Act when respondent caused or allowed a discharge of liquid livestock waste from his property into a water of the State, thereby causing or tending to cause water pollution and create a water pollution hazard. 415 ILCS 5/12(a), (d) (1998); Comp. Br. at 13. The basis for complainant's allegations is Brockamp's June 15, 1993 inspection.

Brockamp testified that on June 15, 1993, he returned to the Chalmers site and witnessed irrigation risers spraying a black fluid onto fields at the site. Comp. Br. at 11, citing Tr. at 69. He further testified that some of the irrigated liquid flowed downhill and through a channel toward Kay Watkins School Road at a rate of approximately 40-50 gallons per minute. Comp. Br. at 11, citing Tr. at 80-81, 225. Brockamp then saw the liquid go through a corrugated metal culvert at the south side of the road, and continue to flow from the culvert into a grassy waterway that is a tributary of the Sangamon River. Comp. Br. at 11, citing Tr. at 69, 85-86, 91-92, 94-95. Chalmers testified that the risers were operating that day, and they were spraying effluent that contained some component of sediment and possibly 100% holding pond liquid. Comp. Br. at 11, citing Tr. at 575-576.

Tests performed on a water sample collected from the black stream running from the culvert to the grassy waterway confirmed the presence of livestock waste contaminants in the water. Comp. Br. at 12, citing Tr. at 71, 74, People's Exh. 6 and 7. The sample also contained ammonia nitrogen, BOD, phosphorous, and dissolved oxygen in concentrations consistent with livestock waste. Comp. Br. at 12, citing Tr. at 107-108, 249, People's Exh. 7 and F.

Complainant further alleges that respondent violated Section 12(f) of the Act (415 ILCS 5/12(f) (1998)), because respondent did not have an NPDES permit for the discharge of the waste on June 15, 1993. Comp. Br. at 13. Additionally, complainant charges that respondent violated Section 302.212 of the Board's regulations because he caused or allowed a water of the State to contain ammonia nitrogen levels in excess of the State water quality standard. Comp. Br. at 13.

Response

Respondent does not deny that effluent escaped through the culvert, but rather denies the problem was of the magnitude described by complainant. Resp. Br. at 15. Respondent also notes that the risers in the field are located too far from the road to allow for spraying directly on to the road. Resp. Br. at 15. Rather, respondent asserts the problem was an excessive irrigation of effluent from one irrigation riser located in one area of the field. Resp. Br. at 15.

Respondent notes that Brockamp did not measure the distance that the effluent traveled through the neighbor's field. Resp. Br. at 16. Brockamp also did not try to determine if the effluent dissipated in the neighbor's field. Resp. Br. at 16. Chalmers testified that he measured the effluent from the road to the point where it diffused into the soil; and it measured 18 feet. Resp. Br. at 17, citing Tr. at 491-492. Chalmers could not find any indication of liquid beyond the diffusion point. Resp. Br. at 17, citing Tr. at 494-495. Chalmers made corrections in the irrigation system after this occurrence. Resp. Br. at 17. Respondent notes that since 1993, there have not been any further complaints about over-irrigation of effluent from the Chalmers site. Resp. Br. at 17.

Board's Analysis

The Board finds that complainant has proven by a preponderance of the evidence that respondent violated Sections 12(a), (d), and (f) of the Act (415 ILCS 5/12(a), (d), (f)(1998)), and Section 302.212 of the Board's regulations. 35 Ill. Adm. Code 302.212. First, Chalmers testified that on June 15, 1993, liquid waste left his farm and flowed to the north side of the road, which was a neighbor's property. Tr. at 491. Further, he testified that in response to this problem, he specifically changed protocol so that the employee in charge of irrigating was supervised. Tr. 496.

Second, the Board is persuaded by Brockamp's testimony, People's Exhibit E, and the results of water samples taken by the Agency. Brockamp testified that he witnessed the irrigation risers shooting black liquid into the air, and that waste from the Chalmers site entered a culvert, discharged on the other side of the road and onto a neighbor's grass waterway. Tr. at 69. The photos that were taken during the investigation clearly show the irrigation risers shooting a dark substance, which trailed through a culvert, exiting respondent's property. People's Exh. E. Additionally, analysis of the water sample collected by the Agency, revealing very elevated BOD and ammonia nitrogen levels (6,270 mg/L and 2,113 mg/L, respectively), confirms the existence of livestock waste contaminants.

The Board finds that the liquid manure that escaped the application area was a contaminant for purposes of Section 3.06 of the Act. 415 ILCS 5/3.06 (1998). Also, since the liquid was flowing at a rate of 40-50 gallons per minute toward the road, the Board finds that the evidence shows that the quantity of the waste was likely to render the waters harmful, detrimental, or injurious to public health, pursuant to Section 3.55 of the Act. 415 ILCS 5/3.55 (1998). The Board sees no merit in respondent's argument that the risers were too far from the road to cause the manure to be directly sprayed into the ditch or roadway. Resp. Br. at 15. Rather, the allegation, which the Board finds proven by a preponderance of the evidence, is that excessively applied liquid manure flowed overland

into the south ditch through a metal culvert, to the north side of the road, and into a grassy waterway on the neighbor's property. Tr. 69. Lastly, the Board finds that the liquid that went into a grassy waterway that was a tributary to the Sangamon River, was a water of the State, because the waterway was an accumulation of natural surface water, within this State. Therefore, the Board finds that respondent violated Section 12(a) of the Act. 415 ILCS 5/12(a) (1998).

The Board also finds that respondent violated Section 12(d) of the Act. By allowing liquid manure to exit the spray irrigation area, the preponderance of the evidence shows that respondent rendered waters harmful, detrimental, or injurious, pursuant to Section 12(d) of the Act. 415 ILCS 5/12(d) (1998). Respondent's argument that according to his measurement, the effluent that traveled to the neighbor's field only went 18 feet from the roadway and then dissipated into the soil, does not refute complainant's claim that respondent violated Section 12(d) of the Act. Since the claim is not refuted, the Board is persuaded that respondent violated Section 12(d) of the Act. 415 ILCS 5/12(d) (1998).

The Board further finds that respondent violated Section 12(f) of the Act because he admits he did not have an NPDES permit between August 1, 1979, and August 14, 1995. Response to Request for Admission of Facts, June 27, 1996, at 1. Because respondent violated Section 12(a) of the Act and did not have an NPDES permit, respondent violated Section 12(f) of the Act. 415 ILCS 5/12(f) (1998).

Lastly, inasmuch as sample analysis shows that the ammonia nitrogen concentration in the waters of the north road ditch was 2,000 mg/L,[7] the Board finds that respondent violated Section 302.212 of the Board's regulations, which provides in pertinent part that in waters of the State:

> (a) Total ammonia nitrogen (as N: STORET Number 00610) shall in no case exceed 15 mg/L. 35 Ill. Adm. Code 302.212(a).

Therefore, the amount of ammonia in the sample was far in excess of the allowed limit.

February 9, 1994 Agency Inspection

Complainant's Argument

Complainant alleges respondent violated Sections 12(a), (d), and (f) of the Act, when an overflow of lagoon #1 threatened to discharge waste into a water of the State, threatened livestock

[7] The Board notes that at hearing, respondent disputed whether the water sample was reliable, since Brockamp did not personally test the samples he took, and instead sent them to the Agency's laboratory in Champaign, Illinois. Tr. at 104. The hearing officer admitted the lab results, and advised respondent that he could make his chain-of-custody arguments to the Board. Tr. at 106. Respondent has neither challenged the hearing officer's ruling nor presented the Board with a chain-of-custody argument. The Board therefore need not address this issue, and will give the water sample evidence full weight.

waste discharge without an NPDES permit, and caused or allowed swine waste to be deposited on land to create a water pollution hazard. Comp. Br. at 15.

Additionally, complainant alleges that respondent violated Sections 501.404(c)(3) and (c)(4)(A) of the Board's regulations. Specifically, complainant charges respondent violated Section 501.404(c)(3) in that the Section requires livestock facility owners and operators to maintain the contents of livestock waste handling facilities at such levels that there is adequate storage capacity so that an overflow does not occur except in the case of a 25-year 24-hour storm. Comp. Br. at 15. Further, complainant charges that respondent violated Section 501.404(c)(4)(A) in that the Section requires facility owners that handle the waste in liquid form to have adequate storage capacity to prevent water pollution. Comp. Br. at 15.

In support of its claims, complainant argues that a continuous flow from lagoon #1 drained over an embankment toward a sow lot located south of the intermittent stream. Comp. Br. at 14, citing Tr. at 110. The estimated volume of the flow was approximately 10-15 gallons per minute. Comp. Br. at 14, citing Tr. at 276. Complainant argues that it is "more likely than not" that a stream of liquid flowing at such a volume will reach the intermittent stream. Comp. Br. at 14. Complainant fails to cite any support in the record for this conclusion.

Complainant also argues that Brockamp saw no structure (such as a berm) between the lagoon and the intermittent stream that would have prevented the flow from entering the stream, nor did respondent produce photographs of any such structure. Comp. Br. at 14.

Response

Respondent notes that Chalmers was present with the Agency inspectors on the day of the investigation. Resp. Br. at 18. Chalmers himself testified that the overflow occurred because extremely cold weather from the previous night prevented pumping from the lagoon. Resp. Br. at 18. Respondent contends that the waste never entered the intermittent stream due to the presence of a berm located between lagoon #1 and the sow lot. Resp. Br. at 18. Respondent contends that Brockamp was not certain that the flow went into the intermittent stream because he did not investigate the site further. Resp. Br. at 19. Respondent also notes that Brockamp did not measure the freeboard at the site's lagoons, which shows Brockamp was not concerned about Chalmers being in compliance. Resp. Br. at 20.

Moreover, respondent argues that Brockamp did not deny that there was a berm that could have prevented the waste from traveling, but rather, Brockamp did not know if there was a berm because he did not look for one. Resp. Br. at 19, citing Tr. at 234. Additionally, Brockamp admitted on cross-examination that he did not see any waste on the northwest corner of the property and did not stay at the site long enough to see if the waste would reach the northwest corner of the property. Resp. Br. at 20, citing Tr. at 240-241.

Board's Analysis

The Board finds that complainant has failed to prove by a preponderance of the evidence that the overflow from lagoon #1 observed on February 9, 1994, is proof that respondent violated Sections 12(a), (d), and (f) of the Act. 415 ILCS 5/12 (a), (d), (f) (1998). The Board recognizes that there is no factual dispute that an overflow occurred from lagoon #1. Response to Request for Admission of Facts, June 27, 1996, at 2. However, the mere fact that an overflow occurred, without additional evidence, is insufficient to substantiate the claims asserted by complainant. In this case Brockamp's belief that the overflow was likely to continue into the intermittent stream is controverted by Chalmers' assertion that the flow went into a bermed area designed specifically to receive overflows from lagoon #1. In view of these facts, we find that complainant has not proven that respondent violated Sections 12(a), (d), and (f) of the Act.

However, the Board finds that respondent violated Section 501.404(c)(3), but not Section 501.404(c)(4)(A) of the Board's regulations. 35 Ill. Adm. Code 501.404(c)(3), (c)(4)(A). There is no dispute that this overflow occurred. Chalmers testified that he observed the overflow. Tr. at 502. Moreover, Brockamp testified that Chalmers explained that the overflow was caused by a frozen pump that could not remove waste to one of the other lagoons. Tr. at 239. Pursuant to Section 501.404(c)(3), the contents of the facility had to be "kept at such levels such that there is adequate storage capacity so that an overflow does not occur except in the case of precipitation in excess of a 25-year 24-hour storm." 35 Ill. Adm. Code 501.404(c)(3). In this case, there was an overflow and no storm. The Board therefore concludes that in this instance the storage capacity of the facility was insufficient, regardless of whether a frozen pipe caused the overflow.

Regarding Section 501.404(c)(4)(A), however, the Board finds that because complainant failed to prove that respondent caused water pollution, respondent did not violate Section 501.404(c)(4)(A). 35 Ill. Adm. Code 501.404(c)(4)(A). That section specifically notes that facilities "shall have adequate storage capacity . . . so as not to cause air or water pollution as defined by the Act or applicable regulations." 35 Ill. Adm. Code. 501.404(c)(4)(A). Since the Board found respondent did not cause water pollution in this instance, the Board also finds that respondent did not violate Section 501.404(c)(4)(A) of the Board's regulations.

February 14, 1994, February 17, 1994, and July 26, 1994 Water Samples

Complainant's Argument

Complainant argues that water samples taken from the intermittent stream at the northwest corner of the Chalmers site on February 14, 1994, February 17, 1994, and July 26, 1994, demonstrate that respondent violated Sections 12(a) and (f) of the Act and Sections 501.404(c)(3) and (c)(4)(A) of the Board's regulations. 415 ILCS 5/12(a), (f) (1998); 35 Ill. Adm. Code 501.404(c)(3), (c)(4)(A); Comp. Br. at 16.

Brockamp testified that the February 14, 1994 samples contained an excessive concentration of ammonia nitrogen and high BOD. Comp. Br. at 16, citing Tr. at 115. Brockamp further testified that

the February 17, 1994, and July 26, 1994 samples contained swine waste constituents above State standards. Comp. Br. at 16. Additionally, all the samples had a strong livestock odor and were dark, which complainant contends verified that the samples contained waste. Comp. Br. at 16.

Response

Respondent does not dispute the sample results. Comp. Br. at 20. Rather, respondent argues that the samples each reflect "constant improvement." Comp. Br. at 20. The remainder of his response focused on the results from inspections in 1998 and 1999, which showed no violations of the Board's regulations.

Board's Analysis

The Board finds that the sample results show that the concentration of ammonia nitrogen in each of the samples exceeds the maximum allowable concentration of 15 mg/L set by Board regulations. Specifically, Section 302.212(a) of the Board's regulations provides that total ammonia nitrogen in a water of the State shall not exceed 15 mg/L. 35 Ill. Adm. Code 302.212(a). In the samples taken by the Agency on the three days in question, ammonia nitrogen levels measured 186, 85, and 82 mg/L. People's Exh. 13-15.

The water from which the samples were taken flowed directly from respondent's property through the intermittent stream. Tr. at 112. To find a Section 12(a) violation, the Board must conclude that respondent either caused or threatened or allowed the discharge of contaminants into the environment so as to cause or tend to cause water pollution, or so as to violate regulations or standards adopted by the Board. See 415 ILCS 5/12(a) (1998). The Board finds that respondent allowed the discharge of contaminants into the environment, because the testimony establishes the samples came from water discharging from respondent's property. Additionally, the Board finds that because the samples showed contaminants exceeding Board standards, respondent violated Section 12(a) of the Act.

Furthermore, respondent did not have an NPDES permit allowing the release of the discharge of the contaminants, in violation of Section 12(f) of the Act. 415 ILCS 5/129(a), (f) (1998).

Complainant has failed to show, however, that respondent had inadequate storage capacity, which caused the ammonia nitrogen's presence in the water samples. Therefore, complainant has not proven by a preponderance of the evidence that the water sample results demonstrate that respondent violated Sections 501.404(c)(3) or (c)(4)(A) of the Board's regulations. Both of the relevant sections address the need for facilities to have adequate storage capacity, either to prevent an overflow (Section 501.404(c)(3)), or water pollution (Section 501.404(c)(4)(A)). Complainant has failed to put forth any evidence that the samples were the result of an overflow, in violation of Section 501.404(c)(3), or that water pollution was caused by a lack of storage capacity, in violation of 501.404(c)(4)(A).

REASONABLENESS OF RESPONDENT'S ACTIVITIES

In making a determination regarding the appropriate order to issue in an enforcement action, the Board is required to "take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved" (415 ILCS 5/33(c) (1998)). Further, the Board is required to consider a minimum of five factors that bear on the matter of reasonableness, as follows:

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. 415 ILCS 5/33(c) (1998).

Neither complainant nor respondent provides any argument regarding how the Board should weigh these factors. This notwithstanding, the Board considers the five factors as follows.

Character and Degree of Injury to or Interference with the Protection of the Health, General Welfare, and Physical Property of the People

The complainant's evidence convinces the Board that respondent failed, on at least four occasions between 1992 and 1994, to properly manage livestock waste at the site. The result was violations of various provisions of the Act and of the Board's water quality regulations. Notwithstanding the absence of any demonstrated ecological damage or any demonstrated injury to humans, the result of these failures was to cause or tend to cause water pollution, and thereby to interfere with the protection of health, general welfare, and physical property of the People.

The Social and Economic Value of the Pollution Source

During the time at issue in this matter, respondent operated an agribusiness at the site. The Board finds that in so doing respondent's operation was both a social and economic asset of a high level. The Board further finds, however, that the value of this asset was diminished as a result of the management practices that led to the violations found herein.

The Suitability or Unsuitability of the Pollution Source to the Area

To the degree that respondent's operation consisted of an agribusiness situated in an agricultural area, the Board finds that the operation was conducted at a site fully suitable for the activity. The record does not allow the Board to determine whether the particular parcel of land, given its size, its topography, nature of its soils, etc., was appropriate to the particulars of the hog operation that respondent conducted.

Technical Practicability and Economic Reasonableness of Reducing or Eliminating Pollution

The Board finds that the events that led to the violations found herein were due to mismanagement, and accordingly were preventable had there been proper management. Moreover, respondent had the proper technology at the site to avoid violations. The Board further finds that avoiding the violations should have been economically reasonable.

Subsequent Compliance

There is no evidence that respondent has violated the laws and regulations at issue since July 26, 1994. Additionally, the record shows respondent sought outside expert help from the University of Illinois, College of Agriculture, Cooperative Extension Service, and on that basis implemented a pollution control plan for the site. Respondent's Exh. 7.

Summary

In light of our consideration of the requirements imposed by Section 33(c), and the factors listed therein, we find that the appropriate order in this case includes imposition of a civil penalty, and an instruction to cease and desist from all violations. We next determine the appropriate penalty amount.

CIVIL PENALTY

Potential Penalty

The maximum penalty provided by law is established in Section 42(a) of the Act, which provides in pertinent part:

> [A]ny person that violates any provision of this Act or any regulation adopted by the Board . . . shall be liable to a civil penalty not to exceed $50,000 for the violation and an additional civil penalty not to exceed $10,000 for each day during which the violation continues . . . . 415 ILCS 5/42(a) (1998).

This is a potential penalty only. The Board is authorized under the Act to review the circumstances of each violation, and to impose a penalty appropriate to the circumstances. 415 ILCS 5/42 (1998). It

has also been held that the severity of the penalty should bear some relationship to the seriousness of the infraction, that the imposition of a penalty is not required in every case and when a civil penalty is imposed, the primary purpose must be to aid enforcement of the Act and punitive considerations must be secondary. Southern Illinois Asphalt Co. v. Pollution Control Board, 60 Ill. 2d 204, 326 N.E.2d 406 (1975).

Section 42(h) Factors

In determining an appropriate penalty, the Act authorizes the Board to consider any matters of record in mitigation or aggravation of penalty, including but not limited to:

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) (1998).

The Duration and Gravity of the Violations

The violations found herein occurred on six specific dates during a period of approximately 26 and a half months, beginning in May 1992 and ending in July 1994. We find that the record indicates that the various violations differ in their gravity, as measured both by the potential and actual magnitude of the violations' environmental impact.

Due Diligence on the Part of the Violator

The record supports that respondent sought outside expert help from the University of Illinois, College of Agriculture, Cooperative Extension Service, and on that basis implemented a pollution control plan for the site. Respondent's Exh. 7. In counterpoint, the record indicates that during the 26.5 month inspection period, the Agency found new violations at each inspection.

Economic Benefit

Any time a person avoids or delays investing in the equipment or procedures necessary to comply with environmental regulations, the person accrues an economic benefit at the expense of the environment. However, in this case, the record contains little specific information that allows the Board to weigh the economic benefits that flowed to respondent. There are no allegations that at any time respondent had storage or disposal facilities inadequate to the task of proper handling of the hog waste generated at this site. Rather, the violations are all related to improper management of the facilities and handling of the wastes.

Monetary Penalty Which Will Serve to Deter Further Violations

Respondent is no longer in the hog farm business. Moreover, the record indicates that the original hog waste lagoons are still present at the site, and that they may contain residual hog wastes.

Number, Proximity in Time, and Gravity of Previously Adjudicated Violations by the Violator

Complainant does not allege any prior adjudicated violations involving respondent, nor is the Board aware of any.

Penalty Disposition

Complainant has requested no specific penalty in this matter. Complainant offers that $22,000 is a reasonable reference point, because $22,000 was the penalty in People of the State of Illinois v. Victor Cory (July 22, 1999), PCB 98-171, which has "some similarities" to the instant case. Comp. Reply Br. at 10.

The Board agrees with complainant that there are some similarities between Cory and the instant case. Both cases address waste management problems at hog farms. Nevertheless, the Board is more struck by the dissimilarities than it is by the similarities between the two cases.

There are a number of significant factual differences between the two cases. In Cory, the Board found that Cory ignored Agency instructions to repair a berm erosion problem and dewater his lagoons. Cory (July 22, 1999), PCB 98-171, slip op. at 4, 19. In the instant case, there is no evidence that respondent intentionally defied Agency instructions. Additionally, the Agency determined the Cory site to be abandoned. Cory (July 22, 1999), PCB 98-171, slip. op. at 3. Chalmers, in contrast, still lives at the site, and there is no suggestion in the record that Chalmers has abandoned his responsibilities to the site. In Cory, the Agency was concerned that Cory's berm would completely fail, resulting in the release of all the contents of the lagoon. Cory (July 22, 1999), PCB 98-171, slip op. at 3. This concern was reflected by the Board's findings that the discharge of the lagoon contents due to a berm failure or overflow would have significant impact on the receiving stream. Cory (July 22, 1999), PCB 98-171, slip op. at 7. Complainant has expressed no similar concern in this case. Moreover, the Board further found the violations in Cory had been ongoing since at least November 1985. Cory (July 22, 1999), PCB 98-171, slip op. at 19. There is no evidence that the violations in the instant case are ongoing. Rather, the evidence suggests that the violations were different at each inspection, and isolated

events. The Board found Cory allowed the discharge of more than 900,000 gallons of water from a lagoon. Cory, (July 22, 1999), PCB 98-171, slip op. at 19. In the instant case, the most severe violation caused by respondent was the release of six to seven thousand gallons of livestock waste.

We believe, based upon this comparison of Cory and the instant matter, that Cory stands for imposition of a significantly lower penalty. Below, we proceed to find appropriate penalty amounts.

May 11, 1992

The Board found that respondent violated both the Act and the Board's regulations on May 11, 1992. Respondent allowed thousands of gallons of untreated waste to travel to a water of the State. Respondent's only explanation for the presence of waste was that perhaps heavy rains contributed to the great amount of waste that the Agency inspector witnessed. Resp. Br. at 5. We find that this is the most serious of the violations, because of the amount of waste and its potential for causing environmental harm.

Considering all of the evidence and factors in this case, the Board imposes a penalty of $3,000 for respondent's failure to properly manage the waste generated at the site, which resulted in violations of the Act and regulations.

May 6, 1993

The Board found that respondent violated both the Act and the Board's regulations on May 6, 1993. Respondent allowed animal waste to flow to the adjacent ditches, roadway, and fields.

Considering all of the evidence and factors in this case, the Board imposes a penalty of $500 for respondent's failure to properly manage the waste created at the site, which resulted in violations of the Act and regulations.

June 15, 1993

The Board found that respondent violated both the Act and the Board's regulations on June 15, 1993. Respondent allowed waste to travel to a neighbor's property.

Considering all of the evidence and factors in this case, the Board imposes a penalty of $500 for respondent's failure to manage the waste created at the site, which resulted in violations of the Act and regulations..

February 9, 1994

The Board found that respondent violated one section of the Board's regulations on February 9, 1994. Respondent allowed an overflow to occur from one of the lagoons at the site.

Considering all of the evidence and factors in this case, the Board imposes a penalty of $250 for respondent's failure to manage the lagoon, in violation of the Board's regulations.

February 14, 1994, February 17, 1994, and July 26, 1994

The Board found that respondent violated two sections of the Act on February 14, 1994, February 17, 1994, and July 26, 1994. Samples of water that discharged from respondent's property showed violations of Sections 12(a) and (f) of the Act. 415 ILCS 5/12(a), (f) (1998).

Considering all of the evidence and factors in this case, the Board imposes a penalty of $1500.

As a result of the discussion above, the Board imposes a total penalty amount of $5,750.

OTHER REQUESTED RELIEF

In addition to a civil penalty, complainant requests that the Board require respondent to provide monthly reports to the Agency describing the freeboard amounts in each of the four lagoons at the Chalmers site. The Board will so do because it believes that the reports will work toward assuring that any wastes remaining in the lagoons will not overflow from the lagoons.

Complainant's request provides for no termination of the reporting requirement. The Board will not impose such a requirement in perpetuity. We do find it reasonable that the reporting requirement terminate in two years, or upon proper closure of the lagoons, which ever occurs first. If the lagoons are not closed, and the Agency, based upon the twenty-four reports it will have received as a consequence of this requirement, believes that the respondent's management of the lagoons constitutes a violation of the Act or regulations, it has the discretion to take appropriate enforcement actions.

The Board also orders respondent to cease and desist from further violations of the Act and corresponding regulations.

ATTORNEY FEES/COSTS

The complaint requests reasonable attorney and expert witness fees pursuant to Section 42(f) of the Act. 415 ILCS 5/42(f) (1998). Section 42(f) permits the Board to assess attorney fees in enforcement actions where the complainant has prevailed against a person who has committed a wilful, knowing or repeated violation of the Act. 415 ILCS 5/42(f) (1998). The Board, in its discretion granted by Section 42(f), declines to award attorney fees in this matter.

CONCLUSION

The Board finds that respondent violated Sections 12(a), (d), and (f) of the Act (415 ILCS 5/12(a), (d), (f) (1998)), and Sections 302.203, 302.212, 304.106, and 501.404 of the Board's regulations. Accordingly, respondent must pay a penalty in the amount of $5,750.

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

ORDER

1. The Board finds that respondent violated Section 12(a) of the Illinois Environmental Protection Act (415 ILCS 5/12(a) (1998)) on May 11, 1992, May 6, 1993, June 15, 1993, February 14, 1994, February 17, 1994, and July 26, 1994, by failing to maintain the waste created at the Chalmers site in such a manner as to prevent the threat of pollution to a water of the State.

2. The Board finds that respondent violated Section 12(d) of the Illinois Environmental Protection Act (415 ILCS 5/12(d) (1998)) on May 6, 1993, and June 15, 1993, by depositing contaminants upon the land in such a place and manner so as to create a water pollution hazard.

3. The Board finds that respondent violated Section 12(f) of the Illinois Environmental Protection Act (415 ILCS 5/12(f) (1998)) on May 11, 1992, June 15, 1993, February 14, 1994, February 17, 1994, and July 26, 1994, by discharging contaminants into a water of the State without an NPDES permit.

4. The Board finds that respondent violated Section 302.203 of the Board's regulations (35 Ill. Adm. Code 302.203) on May 11, 1992, and May 6, 1993, by failing to keep the waters of the State free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, color or turbidity of other than natural origin.

5. The Board finds that respondent violated Section 302.212 of the Board's regulations (35 Ill. Adm. Code 302.212) on June 15, 1993, by contaminating a water of the State with ammonia nitrogen in excess of the 15 mg/L allowed.

6. The Board finds that respondent violated Section 304.106 of the Board's regulations (35 Ill. Adm. Code 304.106) on May 11, 1992, by allowing effluent to contain settleable solids, floating debris, visible oil, grease, scum or sludge solids.

7. The Board finds that respondent violated Section 501.404(c)(3) of the Board's regulations (35 Ill. Adm. Code 501.404(c)(3)) on February 9, 1994, due to the overflow of lagoon #1.

8. The Board finds that respondent violated Sections 501.404(c)(3) and (c)(4)(A) of the Board's regulations on May 11, 1992, by allowing a lagoon overflow to occur, which caused water pollution.

9. The Board orders respondent to cease and desist from all further violations of the Act and Board regulations.

10. The Board orders respondent to provide monthly reports to the Illinois Environmental Protection Agency, at the Agency's regional Springfield office, describing the freeboard amounts of each of the four lagoons. The first report shall be due one month after the date of this order and the subsequent 23 reports will be due on each monthly anniversary thereafter for a total of two years, or until the lagoons are closed according to applicable law, whichever occurs first.

11. The Board orders respondent to pay a civil penalty in the amount of $5,750 by certified check or money order made payable to the Environmental Protection Trust Fund. Respondent shall send the payment no later than February 6, 2000, at 4:30 p.m. by first class mail to:

    Illinois Environmental Protection Agency
    Fiscal Services Division
    1021 North Grand Avenue East
    P.O. Box 19276
    Springfield, IL 62794-9276

12. Respondent shall write the case name and number (People of the State of Illinois v. John Chalmers, Individually and d/b/a John Chalmers Hog Farm, PCB 96-111), and his social security number on the certified check or money order.

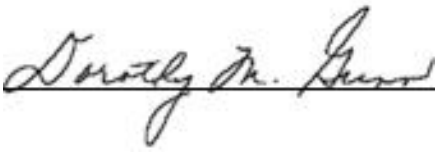
13. If the penalty is not paid within the time prescribed, it shall incur interest at the rate set forth in subsection (a) of Section 1003 of the Illinois Income Tax Act (35 ILCS 5/1003 (1998)) as now or hereafter amended, from the date payment is due until the date payment is received. Interest shall not accrue during the pendency of an appeal during which payment of the penalty has been stayed.

IT IS SO ORDERED.

Chairman C.A. Manning and Board Member E.Z. Kezelis concurred.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1998)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 172 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 6th day of January 2000 by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board