

ILLINOIS POLLUTION CONTROL BOARD  
April 9, 1992

WONDER VIEW IMPROVEMENT ASSOCIATION,	)	
	)	
Complainant,	)	
	)	
PEOPLE OF THE STATE OF ILLINOIS and ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	PCB 91-48
	)	(Enforcement)
Intervenors,	)	
	)	
v.	)	
	)	
NORTHERN ILLINOIS UTILITIES, INC.,	)	
	)	
Respondent.	)	

MR. DENNIS J. PALYS APPEARED ON BEHALF OF COMPLAINANT;

MR. T.P. MATTHEWS APPEARED ON BEHALF OF RESPONDENT.

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

On March 12, 1992, the Illinois Attorney General filed a motion to intervene and motion for reconsideration in this proceeding on behalf of the People of the State of Illinois and the Illinois Environmental Protection Agency (collectively, "People"). The Board has received no reply to this motion by either the complainant or respondent.

The Board grants the People's motion to intervene. (See Pioneer Processing v. Pollution Control Board (1984), 102 Ill.2d 119.)

The People request that the Board reconsider its February 6, 1992 Opinion and Order finding that the respondent's actions did not violate 35 Ill. Adm. Code 602.101. For the reasons discussed below, the Board grants reconsideration of this matter and reverses its prior determination.

This matter came before the Board upon a complaint filed on April 15, 1991 by Mr. Dennis J. Palys on behalf of the Wonder View Improvement Association (Wonder View). The complaint alleged that respondent installed a "water main" without first

obtaining a construction permit from the Illinois Environmental Protection Agency (Agency), thereby violating the Board's regulations found at 35 Ill. Adm. Code 602.101<sup>1</sup>. Hearing was held October 7, 1991, in McHenry, Illinois.

In its prior order, the Board found that much of what has been alleged and counter-argued in this matter is either irrelevant to the matter or not properly before the Board. The Board found that the proper issue before it is solely whether respondent committed a violation of the Board's regulations at 35 Ill. Adm. Code 602.101.

The Board found that the pertinent facts in this matter are that in December 1990 respondent laid a piece of pipe, of approximately 240 foot length (Tr. 28), along Hickory Drive between Balsam and Elmwood Drives in Wonder Lake, Illinois. At the time of placement the pipe was not connected, and apparently has never been connected, to any other piping or to water distribution facilities. A permit for construction of the piping has not been issued by the Agency.

In pertinent part, Section 602.101 prohibits the "construction of any new public water supply installation" or "the change or addition to any existing public water supply" without a construction permit issued by the Agency. The question is therefore whether respondent's actions constitute either construction of a new public water supply installation or a change or addition to any existing public water supply.

The Board found that "inasmuch as the piping in question has never been connected to or used in any public water supply context", the Board could not find that "the piping constitutes either a new public water supply installation or a change or

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<sup>1</sup> The complaint also alleges violation of unspecified Illinois Commerce Commission regulations and "guidelines of the McHenry Township Road District" (April 15, 1991 response of complainant). The Board has no jurisdiction in either of these arenas, and hence all such allegations are improperly brought before this Board.

addition to an existing public water supply"<sup>2</sup>. (February 6, 1992 opinion at 2.) Therefore the Board dismissed the matter.

The difficulty the Board had was finding that the pipe in question was ever intended to be put to any use for which a construction permit is required. Indeed, there is no need to obtain a construction permit for the emplacement of just any pipe. The pipe must be one covered by Section 602.101.

Where there is question whether any particular pipe (or other installation) is covered by Section 602.101, there are only a limited number of ways in which the matter can be tested. The most obvious test is that the pipe is actually used in a water supply context (e.g., to convey water). In this circumstance, a construction permit is clearly required<sup>3</sup>.

This test does not apply in the instant case.

Absent a demonstrated use of the pipe in a water supply context, the only method of affirming that a particular pipe is covered by Section 602.101 is to ascertain the intent to which the emplacement of the pipe took place. This is potentially a very rocky road. If the pipelayer declares that the pipe is not intended for use in a water supply context, are we to find this declaration false on principle? Who can get into the mind of this pipelayer? The Board is not prepared to declare that we can generally find intent, or that the Agency or any other person is so endowed.

This is the perspective the Board reached in its February 6, 1992 order.

The "intent or use" concept is embodied in the definition of public water supply:

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<sup>2</sup> In its motion, the People object to the alleged implication derived from the Board's finding that "a construction permit is not required until the connection or use of the pipes takes place." (motion at 3). The People express concern over whether such a finding indicates a belief that a construction permit is not required prior to issuance of an operating permit.

The Board underscores that it does not now find, nor has it ever found, that construction permits are unnecessary prior to issuance of operating permits. The requirement for construction permits is a Board regulation, and there is nothing in the case at bar that would lead the Board to repudiate its own regulation.

<sup>3</sup> This permit is required prior to construction, else enforcement may be brought against the operator.

"PUBLIC WATER SUPPLY" means all mains \* \* \* through which water is obtained and distributed to the public \* \* \* actually used or intended for use for the purpose of furnishing water for drinking or general domestic use \* \* \*. (Ill. Rev. Stat. 1991, ch. 111½, par. 1003.28 (Act), emphasis added.)

Intent can be determined in the circumstance when the pipelayer himself attests to the intent. The Board finds that the respondent in this case admitted its intent to connect the pipe for public water supply purposes at a future time after permits were obtained (Tr. 7, 42). Since the respondent's intent to use the pipe as a water main at a future time is apparent from the record, the Board finds that respondent failed to obtain a construction permit prior to installing the main in violation of Section 602.101 of the Board's regulations. The need to obtain a construction permit prior to the laying of this water main in this case is also apparent when reading Section 602.101 in conjunction with Section 15 of the Act, which requires approval of plans and specifications by the Agency before construction starts.

Therefore, the Board grants the People's motion for reconsideration, changes its determination, and finds the Northern Illinois Utilities, Inc., violated Section 602.101 of the Board's regulations.

In making its determination, the Board proceeds to consider "all facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved." (Section 33(c) of the Act.) Although there are no emissions, discharges, or deposits involved in this case, the Board will consider the factors set forth in Section 33(c) of the Act, to the degree that the factors are applicable.

1. The character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people.

The record does not disclose the degree of any harm to the physical property of the people at this time. Interference with the use of the road along which the water main was laid has been alleged by the complainant, but there is no evidence that the laying of the main actually interfered with the physical property of the people as a result of a violation of the Act or Board regulations. Had the respondent applied for a construction permit, more information pertaining to this factor may have been ascertained.

2. The social and economic value of the pollution source.

The water main may have social and economic value if it is connected to a water supply system and supplies water to customers.

3. The suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved.

The complainant has made allegations that the placement of the water main is unsuitable in its present location. However, these allegations pertain to Illinois Commerce Commission rules over which, as noted earlier, the Board has no jurisdiction. Had the respondent applied for a permit, information on whether the main is properly placed under Board regulations would be ascertainable. Wonder View has priority of location.

4. The technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source.

Although the instant matter does not deal with a "pollution source", it is clear that the respondent could cease violations by applying for and receiving a construction permit.

5. Any subsequent compliance.

The record discloses that the respondent has never applied for nor received a construction permit for the placement of the water main.

The complainant has asked that the Board either declare the pipe abandoned (complaint at 3), or that the Board issue a cease and desist order that would prohibit the respondent from using the pipe or installing new sections of main already in the ground (April 15, 1991 response of complainant). The People do not ask for any specific remedy, but solely for a finding that the respondent's actions required a construction permit, and that respondent therefore violated Section 602.101. After consideration of the record and Section 33(c) factors, the Board believes that a cease and desist order is appropriate in this matter, and will so order. Accordingly, the respondent must obtain a construction permit and otherwise comply with 35 Ill. Adm. Code 602.101. The respondent continues to be prohibited under the Act and Board regulations from using the pipe or installing new sections of main without first obtaining the requisite construction and operating permits.

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

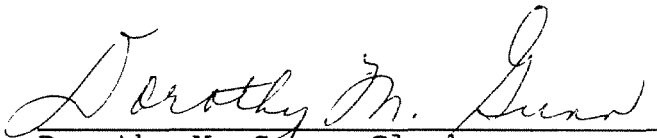
ORDER

1. The respondent, Northern Illinois Utilities, Inc., has violated 35 Ill. Adm. Code 602.101 of the Board's regulations.
2. Northern Illinois Utilities, Inc., is hereby ordered to cease and desist from all violations of the Board's regulations.

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

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 9<sup>th</sup> day of April, 1992, by a vote of 7-0.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board