

ILLINOIS POLLUTION CONTROL BOARD

October 19, 2000

STUART C. NUSS, )  
 )  
 Complainant, )  
 )  
 v. ) PCB 01-30  
 ) (Enforcement - Citizens, Water)  
 VILLAGE OF DURAND, )  
 )  
 Respondent. )

ORDER OF THE BOARD (by C.A. Manning):

On August 14, 2000, Stuart C. Nuss (Nuss) filed a complaint against the Illinois Environmental Protection Agency (Agency) and the Village of Durand (Durand). For the reasons set forth below, the Board dismisses the Agency and grants Nuss leave to file an amended complaint against Durand.

In this order, the Board first describes Nuss' complaint. The Board then addresses, in turn, Nuss' allegations against the Agency and his allegations against Durand.

THE COMPLAINT

Nuss alleges that Durand installed a sewer branch line within 20 feet of a private potable water well on his property. Comp. at 1. He states that the Agency issued a permit to Durand for the installation. *Id.* Nuss further alleges that he contacted the Agency to express "concerns of improper sewer installation" and that the Agency's "limited actions" led him to believe that any Agency "investigation undertaken was far less than complete and/or accurate." *Id.*

Nuss alleges that Durand's construction of the sewer branch line may have violated Agency standards set forth in 35 Ill. Adm. Code 370 "and as detailed in the construction plan, as well as any other applicable regulations." Comp. at 1. Nuss asserts that the "method used to 'bed' the sewer pipe is in question." *Id.* Nuss also alleges that because of these potential violations, underground leaks could develop in the future that would "pose a threat to [Nuss'] potable water supply." *Id.*

Nuss requests that the Board direct the Agency to excavate the area where Durand installed the sewer branch line "to permit a direct physical examination to positively determine whether or not [Agency] standards were implemented in that sewer installation . . . ." Comp. at 1. If Durand violated Agency standards, Nuss further requests that the Board "mandate such repairs as needed to comply with [Agency] standards." *Id.*

Neither the Agency nor Durand has filed an answer or any motion in response to Nuss' complaint.

NUSS' ALLEGATIONS AGAINST THE AGENCY

Nuss alleges that any investigation that the Agency performed regarding Durand's sewer installation was incomplete or inaccurate. It is unclear from the complaint, however, whether Nuss is alleging (1) that the Agency should not have issued the permit to Durand for the sewer installation because the Agency had not first performed an adequate investigation, or (2) that the Agency did not perform an adequate investigation when responding to Nuss' concerns about how Durand installed the sewer. Nevertheless, in either case, Nuss' allegations against the Agency must fail.

As the Board noted in Mulvain v. Village of Durand (May 21, 1998), PCB 98-114, slip op. at 3-4, the Illinois Supreme Court has held that the Board lacks the authority to hear a third-party appeal of an Agency decision to

grant a permit when the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (1998)) fails to specifically authorize the appeal. See Landfill, Inc. v. Pollution Control Board, 74 Ill. 2d 547, 387 N.E.2d 258 (1978). In Landfill, certain individuals and groups filed a complaint with the Board alleging that the Agency had violated the Act when it issued a landfill permit. See Landfill, 74 Ill. 2d at 548, 387 N.E.2d at 259. The Supreme Court held as follows:

Prosecution under the Act . . . is against polluters, not the Agency.

\* \* \*

Whether the basis for the proceeding . . . is that the Agency failed to give adequate consideration to evidence or that the Agency erred by granting a permit on evidence inadequate to show that the landfill would not cause environmental damage, the result of [the] proceeding . . . is to make the Board the permit-granting authority, a usurpation of the Agency's function.

\* \* \*

The Board has authority to hold enforcement hearings only upon separate citizen or Agency complaints, not challenging the Agency's performance of its duties but alleging that the activity contemplated causes or threatens pollution. Landfill, 74 Ill. 2d at 556, 558, 560, 387 N.E.2d at 264-65.

The Board notes that the Act does contain provisions by which third-parties may appeal, to the Board, Agency decisions to grant specified permits, but none of those provisions apply here. See, *e.g.*, 415 ILCS 5/40(e) (1998) (allowing third-party appeals of Agency decisions on National Pollutant Discharge Elimination System permits). Therefore, if the Board construes Nuss' allegations about inadequate Agency investigation as a challenge to the Agency's decision to issue the sewer permit to Durand, the Board, under the Illinois Supreme Court's decision in Landfill, cannot hear the allegations.

If the Board does not interpret Nuss' allegations against the Agency as a permit appeal, the Board can only construe the allegations as a claim that the Agency failed to adequately respond to Nuss' concerns over how Durand installed the sewer. Even when construed this way, however, the allegations fail. In Envirite Corp. v. Pollution Control Board, 239 Ill. App. 3d 1004, 607 N.E.2d 302 (3rd Dist. 1993), *rev'd in part on other grounds*, 158 Ill. 2d 210, 632 N.E.2d 1035 (1994), the appellate court upheld the Board's decision to dismiss the Agency from an enforcement action brought by a waste treatment company against the Agency and another waste treatment company. The appellate court stated that the complainant:

\*\*\* charges that the Agency failed to require original generators of hazardous . . . waste to obtain appropriate Agency authorization and improperly granted the required authorization solely to the treatment facility. In our opinion, these allegations of Agency nonfeasance and malfeasance are the functional equivalent of the objectors' challenges to the Agency's grant of a development permit to the sanitary landfill in the Landfill case. Envirite, 239 Ill. App. 3d at 1010, 607 N.E.2d at 306.

Relying on Landfill, the Envirite court held that "the Agency itself is not subject to a cause of action under this section [31(b)]." Envirite, 239 Ill. App. 3d at 1009, 607 N.E.2d at 306 (referring to Section 31(b) of the Act, now recodified at 415 ILCS 5/31(d) (1998), which allows citizens to bring enforcement actions before the Board). Accordingly, Nuss cannot bring an enforcement action against the Agency.

Because Nuss cannot (1) appeal the Agency's decision to issue a sewer permit to Durand, or (2) bring an enforcement action against the Agency, the Board dismisses the Agency from this proceeding.

#### NUSS' ALLEGATIONS AGAINST DURAND

Nuss alleges that when Durand installed the sewer branch line under the Agency permit, Durand may have

violated Agency standards in 35 Ill. Adm. Code 370 “and as detailed in the construction plan, as well as any other applicable regulations.” Comp. at 1. Nuss specifically questions whether the bedding of the sewer pipe is compliant. *Id.*

The Agency’s Part 370 rules are entitled “Illinois Recommended Standards for Sewage Works.” The Agency issues sewer permits under the Board’s regulations at 35 Ill. Adm. Code 309.Subpart B. See 35 Ill. Adm. Code 309.201. Section 309.262 of those Board regulations (1) provides that the Agency “may adopt criteria for the design, operation, and maintenance of . . . sewers . . .” and (2) expressly acknowledges the Agency’s Part 370 rules. See 35 Ill. Adm. Code 309.262. The Board’s regulations also provide generally that having a permit

issued under Subpart B of Part 309 is not a defense to an alleged violation. See 35 Ill. Adm. Code 309.261.

In addition to indicating that Durand may have violated its permit and regulations with respect to bedding the sewer pipe, Nuss alleges that sewer leaks could occur in the future that would threaten his potable water supply. The Act, however, requires that complaints “specify the provision of the Act or the rule or regulation or permit or term or condition thereof under which [the respondent] is said to be in violation . . . .” 415 ILCS 5/31(c) (1998). Likewise, Section 103.122(c)(1) of the Board’s procedural rules requires that a complaint refer to the provision allegedly violated. See 35 Ill. Adm. Code 103.122(c)(1). These pleading requirements help to ensure that a respondent will have enough information to prepare a defense. See, e.g., Lloyd A. Fry Roofing Co. v. Pollution Control Board, 20 Ill. App. 3d 301, 305, 314 N.E.2d 350, 354 (1st Dist. 1974). (“Charges in an administrative proceeding need not be drawn with the same refinements as pleadings in a court of law, but the charges must be sufficiently clear and specific to allow preparation of a defense.”)

Nuss’ allegations against Durand fail to cite to any specific provision of the Act, regulations, or permit that has been violated. The Board therefore cannot accept this matter for hearing at this time. The Board notes that it can hear a complaint alleging violations with respect to sewer installation and threatened water pollution. See, e.g., 415 ILCS 5/12(b) (1998) (prohibits constructing or installing, in violation of an Agency-issued permit, any equipment or facility capable of causing or contributing to water pollution or designed to prevent water pollution); 415 ILCS 5/12(a) (1998) (prohibits threatening contaminant discharges so as to cause or tend to cause water pollution or so as to violate Board regulations or standards). Allegations must be pled, however, with the specificity required by the Act and the Board’s procedural rules. See 415 ILCS 5/31(c), (d) (1998); 35 Ill. Adm. Code 103.122(c).

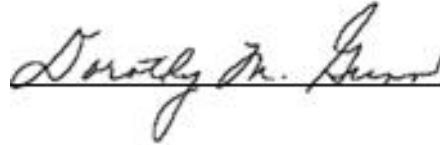
The Board grants Nuss leave to file an amended complaint against Durand. If Nuss wishes to file an amended complaint, he must do so within 30 days of the date of this order.

#### CONCLUSION

The Board dismisses the Agency and amends the caption of this proceeding accordingly. Any future filings must reflect the amended caption in this order. Nuss may file an amended complaint against Durand within 30 days of the date of this order. If Nuss fails to timely file an amended complaint, the Board will dismiss this matter.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 19th day of October 2000 by a vote of 7-0.

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

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board