ILLINOIS POLLUTION CONTROL BOARD
July 22, 1999

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 98-171
	)	(Enforcement - Water)
VICTOR CORY,	)	
	)	
Respondent.	)	

DESIREE D. PERI, ASSISTANT ATTORNEY GENERAL, ATTORNEY GENERAL'S OFFICE, APPEARED ON BEHALF OF THE COMPLAINANT; and

VICTOR CORY APPEARED *PRO SE*.

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

This matter is before the Board on a complaint filed by the Illinois Attorney General's Office on behalf of the People of the State of Illinois (complainant) against Victor Cory (respondent) on June 19, 1998, pursuant to the Illinois Environmental Protection Act (Act), 415 ILCS 5/1 *et seq.* (1998). Complainant alleges that respondent has tended to cause water pollution in violation of Sections 12(a) and 12(f) of the Act by discharging and threatening further discharge of contaminants into a water of the State without a National Pollutant Discharge Elimination System (NPDES) permit. 415 ILCS 5/12(a), (f) (1998). Complainant also alleges that respondent has violated Section 501.404(c) of the Board's rules pertaining to the handling and storage of livestock waste. 35 Ill. Adm. Code 501.404(c).

BACKGROUND

A hearing was held in this matter before the Boar d's hearing officer, Amy L. Jackson, on January 26, 1999, in Springfield, Illinois. Complainant called three engineers from the Illinois Environmental Protection Agency (Agency), and an administrator of livestock waste from the Department of Agriculture (Department) as witnesses. Respondent testified on his own behalf. Based upon the testimony at hearing, complainant filed a motion to conform pleadings to proof on February 11, 1999. Complainant filed a posthearing brief on February 26, 1999, and respondent filed a posthearing brief on March 9, 1999. Complainant filed a reply brief on March 31, 1999, and respondent filed a reply brief on April 6, 1999.

On April 12, 1999, complainant filed a motion to strike respondent's reply brief on the grounds that the Board's enforcement proceeding rules do not provide for the filing of briefs beyond those expressly required by the hearing officer. 35 Ill. Adm. Code 103.101 *et seq.* Complainant asserts that Hearing Officer Jackson limited the briefing schedule to complainant's brief, respondent's brief, and complainant's reply brief. Furthermore, the deadline for respondent's brief had lapsed by the time he submitted his second brief. Complainant argues that the Board's acceptance of respondent's reply would deny complainant an opportunity to respond to the arguments contained therein. The record confirms complainant's assertion that Hearing Officer Jackson did not request a reply brief from respondent, and the deadline for respondent's brief was March 19, 1999. Tr. at 226. Respondent did not file a motion *instanter* to file a reply brief after complainant's reply. The Board grants complainant's motion, and strikes respondent's April 6, 1999 reply brief from the record.

For the reasons stated below, the Board finds that respondent has tended to cause water pollution by the actual discharge, and continued threat of discharge, of livestock waste contaminants into a water of the State without an NPDES permit in violation of Sections 12(a) and 12(f) of the Act. 415 ILCS 5/12(a), (f) (1998).

Furthermore, the Board finds that respondent has failed to maintain the livestock waste lagoons in such a manner as to ensure adequate storage capacity in violation of Section 501.404(c) of the Board's rules. 35 Ill. Adm. Code 501.404(c) (1998). The Board orders respondent to close the livestock waste lagoons, and pay a penalty in the amount of $22,000 as requested by complainant.

FINDINGS OF FACT

Cory Site

Respondent owns a parcel of land located in eastern Adams County (Cory site), approximately 15 miles east of Quincy, Illinois that was used to operate a swine production facility intermittently between 1980 and 1985. Tr. at 12, 13, 149, 174.[1] During this time period, the liquid livestock waste was disposed of in two earthen livestock waste lagoons. Tr. at 13.

The Cory site consists of three buildings arranged in a horseshoe manner facing east. Tr. at 26, 30. Behind the buildings is a hill, and approximately 500 feet down the hill are two lagoons - referred to as the north and south lagoons. *Id.* Each lagoon is circular and approximately 250 feet in diameter. Tr. at 44. The north and west sides of the lagoons are bordered by berms. Tr. at 113. The south and east sides of both lagoons back into the hillside. *Id.*

West of the lagoons, at the bottom of a 70 foot hill, is a natural waterway which is an unnamed tributary of the McKee Creek. Tr. at 26, 30.

The hill is roughly a 10% slope from the buildings to the lagoons, and about a 15% to 20% slope from the lagoons to the tributary. Tr. at 30-31. Water flows in the direction of the slope, towards the tributary. Tr. at 33. Respondent disputes the State's topographical analysis of the site, but he admits that he has no specialized training in surveying. Resp. Br. at 8-9, 17; Tr. at 208-09. Neither party provided a contour survey to show the actual topography of the Cory site to determine the drainage pattern in the vicinity of the lagoons.

Respondent was issued NPDES Permit Number IL0065064 on November 6, 1987. An NPDES permit governs when and how a livestock facility can discharge livestock waste. Tr. at 98. The purpose of the permit is to limit discharges, such as in the event of a catastrophic storm event. Tr. at 149. Respondent's permit only allowed the discharge of waste from the lagoon in the event of a catastrophic or chronic rainfall; *i.e.*, rainfall in excess of a 25-year, 24-hour storm (5.5 inches in 24 hours). Tr. at 152. The permit expired on October 1, 1991. (Tr. at 150.) Respondent asserts that he came to the Agency's Springfield office to discuss the renewal of his NPDES permit, and was told that renewal was not necessary because no hogs were on the premises. Tr. at 126, Resp. Br. at 8. [2]

The Board finds that respondent has not had an NPDES permit since October 1991, and that the permit held prior to expiration did not allow the discharge of livestock waste absent exigent circumstances.

Agency Inspections

Three Agency employees inspected the Cory site over a period of several years: Dale Brockamp, then an environmental protection engineer with the Agency; John Wells, an agricultural engineer with the Agency's Bureau of Water; and David Ginder, an environmental protection engineer for the Agency's Bureau of Water. Tr. at 18-21, 94-96, 146-147.

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[1] Citations to the January 26, 1999 hearing transcript will hereinafter be referred to as: "Tr. at ___."

[2] Citations to Respondent's brief will hereinafter be referred to as: " Resp. Br. at ___."

On November 8, 1995, Brockamp and Ginder visited the facility. They found the buildings empty, and the facility abandoned. Tr. at 34-35. Brockamp discovered an eroded area of the west berm of the south lagoon that had been sloughing down the embankment towards the tributary. Tr. at 36. At this area, the width of the berm was two to three feet wide. Tr. at 36. The remainder of the west side berm was six to eight feet wide. *Id.* In Wells' opinion, a six to eight foot width is the minimum reasonable amount. Tr. at 106.

In Brockamp's opinion, unless the berm is stabilized, it will continue to erode from precipitation and wildlife. Tr. at 38. Brockamp testified that if no dewatering occurs, the amount of precipitation that falls both on top of the lagoons, and runoff from the hillside which drains into the lagoons, will cause the lagoons to overflow. Tr. at 56, 89. Brockamp believes that the entire berm will fail eventually and that the lagoon contents will drain into the tributary. Tr. at 38-39, 78.

In his report of the November 8, 1995 inspection, Brockamp indicated that he would be contacting respondent about repairing the berm. Comp. Exh. 5.[3] While the record refers to a compliance inquiry letter Brockamp sent to respondent on March 12, 1996, advising respondent of the threat of overflow, this letter is not part of the record. Comp. Exh. 6. The record does, however, include a reply letter from respondent dated March 21, 1996, which disputes the Agency's remarks, and asserts that the lagoons are not contaminated, but support aquatic life. Comp. Exh. 6.

Ginder's report of the same inspection noted that the south lagoon discharges into the north lagoon via a connecting pipe, and both lagoons had over two feet of freeboard (the distance between the surface of the water and the top of the berm). Tr. at 77, Comp. Exh. 17. Ginder also commented that rainfall had been minimal for three to four months prior to the inspection. Comp. Exh. 17.

On April 17, 1996, this time in respondent's presence, Brockamp and Ginder again inspected the site, and found the erosion at the south lagoon was slightly worse. Tr. at 41-42. Respondent had made no repair efforts. Tr. at 41. Brockamp advised respondent to repair the berm as soon as possible by a mechanical device, *e.g.*, a bulldozer, or manually by carrying in soil and packing it into the berm. Tr. at 42-43. Brockamp also advised respondent to dewater the lagoons and apply the waste to farm ground at agronomic rates. Tr. at 45. Agronomic rates depend on the crop to be grown, the anticipated yield, the area soil, and how much nitrogen the yield will uptake. Tr. at 82.

Respondent concedes damage to the south lagoon's berm, but argues that the pipe between the two lagoons effectively prevents overflow. Tr. at 179-82.

A year later, on April 17, 1997, when Brockamp again visited the facility, he found no significant change to the eroded area of the south lagoon. Tr. at 50. However, Brockamp did witness two pipes in the north lagoon siphoning water toward the tributary. Tr. at 46. The total flow from the siphoning pipes was about 40 gallons per minute. Tr. at 47. Brockamp's report of this inspection states that the water level of the north lagoon had dropped about three feet, and he estimated that approximately 900,000 gallons of water had been siphoned out of the lagoon. Comp. Exh. 11. The wastes were not applied agronomically, but were discharged in concentrated forms. Tr. at 84-85. Respondent admits that Brockamp told him at this inspection that he should not siphon the lagoon contents to the unnamed tributary. Tr. at 210-11.

Brockamp testified that, since the wastes were never land applied, it is unusual that Brockamp never observed a discharge from either lagoon and that the lagoons always have at least two feet of freeboard. Tr. at 50; Comp. Exh. 11. Wells testified that respondent's lagoons hold water well and do not seep at the bottom, thereby increasing the threat of overflow. Tr. at 117. If there had been no siphoning, the lagoons would have overflowed by now. Tr. at 118.

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[3] Citations to the Complainant's exhibits will hereinafter be referred to as: "Comp. Exh. at ___."

Respondent admits siphoning on April 17, 1997, and one other time approximately six to eight months earlier. Tr. at 210. He admits that the lagoons might have overflowed if he had not siphoned, and also admits that Brockamp told him a year earlier that he should not siphon to the tributary. Tr. at 210-11.

A few days later, on April 22, 1997, Brockamp returned to the site to collect samples of the liquid and sediment from each lagoon. Tr. at 52; Comp. Exh. 11. He could see and smell livestock waste, and the test results confirmed the presence of livestock waste. Tr. at 40; 109-10. At that time, he noticed that the siphon pipes had been removed from the north lagoon. Comp. Exh. 11.

On April 2, 1998, respondent requested an alternate use permit from the Department of Agriculture to stock fish in the two lagoons (which respondent refers to as "ponds") (Tr. at 161-63; Comp. Exh. 18). The letter requests a waiver of any and all lagoon closure requirements. Comp. Exh. 18.

On May 7, 1998, Brad Beaver, livestock waste coordinator for the Department of Agriculture Bureau of Environmental Programs (Department), sent a letter to respondent advising him that the Department would grant him an alternate use waiver to use the lagoons as ponds, provided that he follow proper lagoon closure requirements. Comp. Exh. 19.

Beaver testified that 35 Ill. Adm. Code 506.209 prescribes the requirements for lagoon closure. Tr. at 158, 160. To close a lagoon, one must submit a plan to the Department to empty the contents, including remaining waste sludge plus six inches of soil, fill the hole, and return the landscape to normal. Tr. at 160-161; Comp. Exh. 19. Respondent has not submitted such a plan.

The next year, on May 20, 1998, Wells observed that the lagoons were not discharging, and the area of erosion was about the same. Tr. at 98-99, 104. Wells also observed approximately two feet of freeboard in the north lagoon. Comp. Exh. 14. It did not appear as if any maintenance had been performed on the lagoons or berms. *Id.* Wells' report from the inspection states that erosion still appears to pose a serious threat to the integrity of the berm, and that the steep slope of the berms on both lagoons increases the chance of erosion. Tr. at 105; Comp. Exh. 14. On January 25, 1999, Wells saw only about 15 inches of freeboard in the north lagoon, and a little more erosion to the south lagoon's west berm. Tr. at 121-22.

On September 1, 1998, Wells measured the oxygen content of the lagoons. Tr. at 119. At a depth of approximately one foot, the oxygen count measured less than two parts per million (ppm) in the north lagoon, and less than one-half ppm in the south lagoon. Tr. at 119. Wells' report from that inspection states that he and respondent discussed treating and discharging the lagoon contents which would require, among other things, an NPDES permit. Comp. Exh. 15.

Contents of Lagoon

Complainant alleges that both the north and south lagoons are livestock waste lagoons which presently contain swine waste contaminants. Comp. Br. at 4. [4] In support of its assertions, complainant provided expert testimony and submitted lagoon sampling results. Brockamp testified that the lagoons contain livestock waste manure constituents. Specifically, he stated that the odor, color, and the constituent analysis results support the presence of swine waste contaminant in both north and south lagoons. Tr. at 39-40. Regarding the sampling results, Wells stated that the presence of nitrogen, phosphorus, and potassium are generally associated with livestock waste. Tr. at 108. Wells testified that the April 22, 1997 sampling results indicated the continuing effect of livestock waste on the lagoons' contents. Tr. at 109. In particular, he noted that the sediment phosphorus levels in both lagoons were in the range of approximately 4,000 to 5,000 mg/kg. Tr. at 110. Further, Wells noted that the Agency's Water Planning Section considers that some source of contamination exists if the phosphorus level is 300

[4] Citations to the Complainant's brief will hereinafter be referred to as "Comp. Br. at ___."

mg/kg or more. *Id.* Wells concluded that the presence of phosphorus in the lagoon sediment in the range of 4,000 to 5,000 mg/kg is consistent with the use of lagoons for livestock waste storage. Tr. at 111.

In addition, Wells stated that on September 1, 1998, he measured dissolved oxygen (DO) levels in both lagoons at a depth of approximately one foot. Tr. at 119. He testified that the DO level in the north lagoon was less than 2.0 ppm and the DO level in the south lagoon was less than 0.5 ppm. *Id.* Wells concluded that the low DO levels in the lagoons are consistent with the presence of livestock waste constituents in the lagoons. *Id.* Wells compared the lagoons to a pond in poor condition which would be expected to contain concentrations of DO at eight to ten ppm. Tr. at 128.

Regarding the threat of water pollution, Wells stated that a berm failure would have environmental consequences. Tr. at 106-07. He said that a berm failure could result in the release of the entire contents of the lagoon, including the sludge and bottom sediments, which have a high nutrient content and oxygen demand. Tr. at 107. Wells stated that the oxygen demand of the waste, under certain flow conditions, could use up enough oxygen in the tributary to McKee Creek to kill off any oxygen breathing organisms. *Id.* He also noted that ammonia nitrogen and other constituents in the sludge could be toxic to aquatic life. Tr. at 107-08. Damages may include a loss of fish and other aquatic life, contamination of groundwater, and harm to wildlife and domestic cattle. Tr. at 49.

While respondent believes that the lagoon water is not a contaminant, he has not provided any sampling data or expert testimony to refute the complainant's charges regarding the nature of the lagoons' contents. [5]

It is evident from the sampling results presented by the complainant that both the lagoons still contain livestock waste constituents. While the sampling results indicate low nutrient levels in the lagoon wastewater, the nutrient levels in the sediment samples are in the typical range of nutrients present in livestock waste lagoons. Further, the low DO levels in the lagoon wastewater also indicate the presence of livestock waste constituents.

With regard to the threat of water pollution, the discharge of the lagoon contents into the unnamed tributary due to berm failure or overflow would have a significant impact on the receiving stream. Particularly, a failure of the west side berm of the south lagoon could result in a release of approximately 1.5 million gallons (based on lagoon surface area of 0.75 acres and a depth of 6 feet) of low DO livestock waste into the unnamed tributary. Such a large discharge of low oxygen content waste would have severe impact on the oxygen dependent aquatic life in the unnamed tributary, and may also have an impact on McKee Creek into which the unnamed tributary discharges. In addition, the high nutrient loading from the sediments in the lagoon may also have a toxic effect on aquatic life.

The Board finds that complainant's testimony and the lagoon sampling results show that both the lagoons contain livestock waste constituents. Further, the Board also finds that a discharge of the lagoon contents into the unnamed tributary could have a significant adverse impact on the aquatic life in the stream, and also in McKee Creek into which the tributary flows.

COMPLAINT AND VIOLATIONS

Complainant initially charged respondent with three counts of violations under the Act: count I (violations of Section 12(a)); count II (violations of Section 12(f)); and count III (violations of the Board's rules found at 35 Ill. Adm. Code 501.404 (c)(4)(A)). Comp. at 4-7. After the hearing, complainant filed a "Motion to Conform

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[5] Respondent offered no evidence in support of his position except to explain that he believed that a test conducted by the "State Department of Health" (sic) demonstrated a low parameter for nitrogen. Tr. at 183. Respondent believes that nitrogen is the only nutrient relevant to discharging at an agronomic rate. Tr. at 190. Respondent admits that he has no specialized training in water quality, but argues that the lagoons can (and have, for a period of several hours in 1996 to 1998) supported aquatic life. Tr. at 190, 208; Comp. Exh. 6.

Pleadings to Proof" wherein complainant seeks to add count IV, entitled "Actual Discharge Without NPDES Permit." In count IV, complainant argues that the evidence adduced at hearing demonstrates further that respondent, on April 17, 1997, actually discharged contaminants into the waterway by the siphoning of waste through PVC pipes without an NPDES permit. The Board will allow complainant's motion to conform the pleadings to proof, adding count IV to the original complaint.

Count I: Water Pollution in Violation of Section 12(a) of the Act

Complainant alleges that respondent's actions violated Section 12(a) of the Act which prohibits any person from causing or threatening to pollute Illinois waters. 415 ILCS 5/12(a) (1998). In relevant part, Section 12(a) states that: "[n]o 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 . . . ." *Id.*

Complainant argues that respondent's failure to maintain the earthen berms around his livestock waste lagoons has threatened the discharge of contaminants into McKee Creek and that, by threatening the discharge of contaminants into McKee Creek, respondent has threatened to cause water pollution in violation of Section 12(a). Comp. Br. at 3.

As relief for this violation, and as discussed below, complainant seeks an order requiring respondent to completely dewater the lagoons and to remove all swine waste sludge to agricultural land in accordance with relevant agronomic rates. Complainant also seeks an order requiring respondent to cease and desist from any further violations of the Act. Additionally, complainant requests that the Board order a monetary penalty as allowed by Section 42(a) of the Act, and an award of attorney fees and costs as allowed by Section 42(f) of the Act. 415 ILCS 5/42(a), (f) (1998).

Respondent argues that the expense of dewatering lagoons and cleaning out sludge is $260,000. Tr. at 204. Respondent requests that the Board grant him approval to " dewater both lagoons at an agronomic rate on grass land the EPA currently mis-identifies," (as a water of the State) and bulldoze dirt over the bottom residue. Tr. at 202, 205; Resp. Br. at 3.

Complainant argues that the eroded and unrepaired area of the south lagoon's west berm threatens the overflow of livestock waste contaminants into an unnamed tributary leading to McKee Creek. Comp. Br. at 3, 6. The maintenance of the lagoon berm is a very important factor influencing the continued use of the lagoon, since it affects the structural integrity of the lagoon. The issue of berm deterioration becomes even more significant when the lagoon is located within close proximity to waters of the State.

In the present context, the testimony of the Agency engineers and the photographs of the south lagoon clearly show that a certain section of the west-side berm has deteriorated over time as a result of erosion and disrepair. Comp. Exh. 3, 4, 9, and 10. The photographs of the berm indicate substantial damage, which may cause the berm to fail. As noted by complainant, there is no way of predicting when the berm will break, but the present condition of the berm and continued erosion significantly increases the threat of failure. A break in the west-side berm of the south lagoon would result in a large volume (approximately 1.5 million gallons based on a lagoon area of 0.75 acres with a depth of 6 feet) of livestock waste being discharged into the unnamed tributary, which is a water of the State.

Complainant further asserts that the threat of overflow is compounded by the Cory site's topography which causes precipitation to drain down slope to the lagoons, thereby increasing the water level. Comp. Br. at 8. With regard to potential lagoon overflow caused by rainfall runoff, the record contains contradicting statements concerning the runoff flowing into the lagoons. While the respondent states that runoff flow is very limited, complainant contends that runoff flow to the lagoons is substantial. Photographs submitted by complainant of the north lagoon being dewatered by siphoning suggest that rainfall runoff does affect the waste level in the lagoons.

Comp. Exh. 8. Furthermore, respondent admitted to siphoning the lagoons' contents on two occasions in order to avoid overflows. Tr. at 181, 210.

Respondent first argues that there has been no water pollution in violation of the Act. He makes several claims in support of this argument. [6] First, respondent argues that any overflow from the lagoons does not discharge into a water of the State or a tributary leading to a water to the State, but rather to a grass-land pasture area, which he claims experts have referred to as a "grass filter strip." [7] Respondent believes that the tributary is a vegetative filter strip between the lagoons and McKee Creek, and that the quality of the lagoon contents is safe to be applied directly to the grassland. Resp. Br. at 3, 7-8.

Although the tributary would filter some nutrients, it would not meet design criteria as a vegetative filter strip for three reasons. First, a vegetative filter strip would need to be bermed off to prevent outside water from over-saturating the filter. Tr. at 216. In the present case, water flows through the water way. *Id.* Second, the area is steeper than is recommended for a vegetative filter strip. Design criteria for vegetative filter strips require not more than a two-hour contact time for water absorption by the soil. Tr. at 217-218. The 40-gallon per minute discharge witnessed on April 17, 1997 (see *infra* p.5), would exceed the recommended contact time. Tr. at 210, 218. The unnamed tributary cannot serve as a vegetative filter because it is not designed to absorb that much material. Tr. at 218. Third, land application design criteria for applying livestock waste do not allow waste to be applied within 200 feet of surface water. Tr. at 217. Since water flows through the drainage way, it is within 200 feet of surface water. *Id.* As a result, the presence of surface water in the drainage way prevents that area from being used as a vegetative filter strip for the application of livestock waste.

The Board is not persuaded by respondent's argument that there was no discharge into a water of the State. The Act defines "waters" as any and "all 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). Although there was no evidence of a direct pipe-to-creek discharge into McKee Creek, the evidence is clear that the material from the lagoon was siphoned to an area appropriately designated a water of the State. The siphoning of the lagoons occurred in such a manner that material flowed into a tributary of McKee Creek. Respondent has presented no convincing evidence that this area has the capacity to hold and receive 40 gallons per minute, or the approximately 900,000 gallons drained from the lagoons. Rather, respondent's actions in siphoning in this manner, against the admonitions of the Agency's engineers, created a situation where liquid from the lagoon became, in essence, artificial surface water which discharged into McKee Creek. Accordingly, the Board finds that the lagoon contents were discharged into a water of the State, and that the tributary is not a vegetative filter strip.

Respondent further argues that the contents of the lagoon are not contaminants, and that the lagoons support aquatic life. More specifically, he argues that regardless of the State's lagoon effluent analyses, lagoon contents may be applied to crop land at the agronomic rate for nitrogen. Respondent suggests that, because the nitrogen content of the lagoons is allegedly low, an unlimited amount per acre may be applied.

The Board is not persuaded by respondent's argument that the waste material in the lagoon is not a contaminant. The Act defines contaminant as "any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source." 415 ILCS 5/3.06 (1998). The liquid material in the lagoon need not exceed any particular established standards to be considered a "contaminant." Rather, the question is whether the contaminant is discharged into waters of the State in such a manner as to cause or tend to cause water pollution.

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[6] Respondent did not present evidence at hearing in support of these claims.

[7] Respondent's testimony refers to a draft stipulation proposal prepared by the Agency in 1986 which is not signed or file stamped. The draft proposal was not admitted into the record at hearing. Tr. 184-186. Respondent also argues that the Adams County ASCS State Engineer, the University of Illinois and the Extension Field Engineer of Western Illinois approved plans which classified the grass land as agricultural crop land, but no evidence supports this claim. Resp. Br. at 21.

The evidence is clear that respondent caused a discharge of contaminants into a water of the State. Whether such actions constituted water pollution in violation of the Act requires the Board to consider the Act's definition of water pollution, which provides the "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 . . . agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life."* (Emphasis added.) 415 ILCS 5/3.55 (1998). The evidence demonstrates that the contaminants present in livestock waste are likely to harm aquatic life.

Less specifically, and citing no authority or evidence for this proposition, respondent argues that the Agency has no jurisdiction over his lagoon, and that it is simply using this case to gain control over an estimated 50,000 abandoned lagoons in Illinois to establish a lucrative source of fines and penalties. Resp. Br. at 3, 12, 21.

Despite respondent's frustrations and protestations, the law is clear that the Agency has authority over any person who pollutes or threatens to pollute the waters of Illinois. Recent legislation concerning the specific treatment of livestock management facilities has not disturbed that basic and well-established proposition.[8] It is the Agency's duty to seek compliance with the Act and, when such compliance is not forthcoming, it is the Agency's responsibility to request that the Office of the Attorney General seek an order of enforcement from this Board or a court of competent jurisdiction. Once the enforcement action has been filed with the Board, it is this Board's function to ascertain whether a violation in fact and in law occurred and, if so, how that violation should be remedied and what, if any, penalty should be imposed.

To establish a violation of Section 12(a), the State must show that a person caused or threatened to cause a discharge of contaminants into waters of the State so as to cause or tend to cause water pollution. In this case, the State has done so. The evidence from the Agency's annual inspections of the site on November 8, 1995, April 17, 1996, April 17, 1997, May 20, 1998, and January 25, 1999, clearly shows that respondent has not maintained the west-side berm of the south lagoon in good condition in order to minimize any threat of berm failure due to erosion. If no action is taken, the berm will inevitably fail, releasing a significant amount of livestock waste into waters of the State. Evidence of the topography of the site further establishes that this water will drain down the slope to the unnamed tributary to McKee Creek, a water of the State. Therefore, inadequate maintenance of the lagoon berm poses an imminent threat of water pollution.

Based on the above, the Board finds that respondent has violated Section 12(a) of the Act (415 ILCS 5/12(a) (1998)).

Counts II and IV: Threatened and Actual Discharge Without an NPDES Permit in Violation of Section 12(f) of the Act

Section 12(f) of the Act prohibits any person from causing or threatening to discharge any contaminant into Illinois waters without an NPDES permit. 415 ILCS 5/12(f) (1998). Specifically, Section 12(f) states that no person shall "cause, threaten or allow the discharge of any contaminant into the waters of the State . . . 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 regulations adopted by the Board." *Id.*

Complainant argues that respondent's NPDES permit expired in 1991 and was not renewed. Complainant argues further that respondent has both threatened and actually allowed the discharge of swine waste contaminants from the lagoons to McKee Creek without an NPDES permit authorizing the discharge, thus violating Section 12(f) of the Act.

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[8] See Section 100 of the Livestock Management Facilities Act (510 ILCS 77/100 (1998)).

As relief for this violation, complainant seeks similar relief to that requested in count I above: a Board order requiring respondent to completely dewater the lagoons and remove all swine waste sludge to agricultural land in accordance with agronomic rates. Comp. at 6. [9] Complainant also seeks an order requiring respondent to cease and desist from any further violations of the Act. Additionally, the complainant requests that the Board order a monetary penalty as allowed by Section 42(a) of the Act and an award of attorney fees and costs as allowed by Section 42(f) of the Act. *Id.*

As set forth above, respondent argues that there was no discharge of contaminants into a water of the State because the tributary is a grassland which acts as a vegetative filter. Tr. at 181-185. Additionally, the respondent claims that when his NPDES permit expired, he was told by someone at the Agency that he did not need another permit. Tr. at 126.

The Board has already made a finding of fact that the unnamed tributary qualifies as a water of the State. In addition, respondent's NPDES permit for both the north and south lagoons identifies the unnamed tributary as the receiving waters for any discharge from the north or south lagoon. Comp. Exh. 16. As a water of the State, any discharge or threatened discharge of livestock waste contaminants to the tributary without a valid NPDES permit would constitute a violation of Section 12(f) of the Act.

The remaining questions are whether the lagoons qualify as a point source (a requirement for finding a violation under Section 12(f)), and if so, whether respondent's actions threatened to discharge, or actually discharged, livestock waste from that point source.

Ginder testified that a point source discharge is a location where a discharge is occurring, such as a pipe, or an overflow point. Tr. at 155. On count II, complainant argues that an overflow from a livestock waste lagoon constitutes a point source discharge because an overflow of the lagoon berm constitutes a point of discharge. Comp. Br. at 10. With respect to count IV, the siphon pipes qualify as a point source. *Id.*

With respect to count II, the Board has already determined in its analysis of count I that respondent threatened to discharge contaminants into a water of the State. The Board hereby finds that this threat of discharge occurred from a point source (the lagoon berm), and without an NPDES permit.

With respect to count IV, the record provides eye-witness testimony to one incident of actual discharge from a point source (siphon pipes), and respondent admits to one additional discharge event after the expiration of his NPDES permit.

Accordingly, the Board finds that respondent has violated Section 12(f) of the Act (415 ILCS 5/12(f) (1998)) by both threatening to, and actually discharging contaminants into a water of the State without a valid NPDES permit allowing him to do so.

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[9] Citations to the Complaint will hereinafter be referred to as: "Comp. at ___."

Count III: Violations of Livestock Waste-Handling Facility Standards

35 Ill. Adm. Code 501.404(c)

Section 501.404(c) of the Board's Agriculture Related Water Pollution Regulations (the "Subtitle E" regulations) requires livestock management facilities which handle liquid waste to have adequate storage capacity. 35 Ill. Adm. Code 501.404(c)(4)(A). Specifically, Section 501.404(c)(4)(A) provides that: "[e] xisting livestock management facilities which handle the waste in a liquid form shall have adequate storage capacity in a . . . lagoon . . . so as not to cause . . . water pollution as defined in the Act or applicable regulations." *Id.* These regulations have not been superseded by the regulations promulgated pursuant to the newer Livestock Management Facilities Act (510 ILCS 77/100 (1998)), but will be the subject of a Board rulemaking to coordinate these older livestock rules derived from the Environmental Protection Act with the newer rules derived from the Livestock Management Facilities Act. See Board Docket Number R98-26. Meanwhile, the Subtitle E regulations remain in full force and effect.

Complainant argues that respondent has violated Section 501.404(c)(4) by failing to manage the lagoon berms in a manner which ensures adequate storage capacity and prevents overflows, thereby causing water pollution. Comp. at 7. As relief for this violation, complainant again seeks an order requiring respondent to completely dewater the lagoons and remove all swine waste sludge to agricultural land in accordance with agronomic rates. *Id.* Complainant also seeks an order requiring respondent to cease and desist from any further violations of the Act. Comp. at 8. Additionally, complainant requests that the Board order a monetary penalty as allowed by Section 42(a) of the Act and an award of attorney fees and costs as allowed by Section 42(f) of the Act. 415 ILCS 5/42(a), (f) (1998).

The storage capacity of a lagoon includes storage volume for livestock waste generated by the facility on an annual basis, storage volume to handle runoff from a 25-year/24-hour storm, and sludge buildup. In order to maintain adequate capacity, the treated waste would be land applied on an ongoing basis. In the present case, since there is no livestock waste being added to the lagoons, the components that affect the storage capacity are the rainfall runoff entering the lagoons and the amount of waste being removed. Since respondent has not properly dewatered the lagoons for an extended period of time, the lagoons may not have adequate storage capacity to handle rainfall runoff. Complainant has shown that, as a result of respondent's failure to properly dewater the lagoons, the lagoons have inadequate storage capacity.

The Board agrees that respondent's lagoons, while not currently accepting waste, constitute an existing livestock management facility due to the presence of livestock waste. Thus, Section 501.404(c) of the Board's regulations applies. While respondent argues that the berms are safely holding water (Resp. Br. at 3), the evidence in the record shows the opposite. The increasing water levels in both lagoons demonstrate the inadequate storage capacity. While the lagoons' freeboard levels were about two feet during the inspection on May 28, 1998, they had decreased to about 15 inches at the inspection on January 25, 1999.

The Board finds that the nine-inch increase in water levels over an eight-month period, combined with the berm erosion indicates an inadequate storage capacity for the lagoons, which threatens to cause water pollution in violation of 35 Ill. Adm. Code 501.404(c)(4)(A).

Thus, the Board finds that respondent has violated Section 501.404 (c) of the Board's regulations concerning livestock waste.

REMEDY

Closure of Lagoons

Having found that respondent has caused or allowed the threat of water pollution to McKee Creek in violation of Sections 12(a) and 12(f) of the Act (415 ILCS 5/12(a),(f) (1998)) and 35 Ill. Adm. Code 501.404(c), the Board must now consider the appropriate remedy.

To ensure long term compliance with the Act, complainant requests that the Board order respondent to properly close the lagoons in accordance with the Livestock Management Facilities Act (LMFA) (510 ILCS 77/1 *et seq.* (1998) and the rules promulgated by the Board pursuant thereto (Board's LMFA rules) (35 Ill. Adm. Code 506.209). Comp. Br. at 12.[10] Respondent's failure to repair the berm erosion, and his desire to continue to dewater the north lagoon to the unnamed tributary indicates his lack of appreciation for the threat of water pollution. *Id.* Complainant argues that in order to eliminate the question of future compliance, the Board should require immediate closure of the lagoons in accordance with the lagoon closure rules at 35 Ill. Adm. Code 506.209. Compliance with the rules would require respondent to completely remove the lagoon contents, sludge, and an additional six inches of soil from the lagoon bottom, and then apply the contents to crop fields at an agronomic rate. Comp. Br. at 12-13.

At hearing, respondent asserted that closing the lagoons would cause a financial hardship, but he did not present any documentary evidence to support this claim. Respondent stated that he did not realize that he needed to present documentation to the Board because he had already submitted tax returns, and other financial information pursuant to complainant's discovery request. Resp. Br. at 10. Complainant presented evidence that respondent may be able to trade the north confinement building for some repair work to the berm. Comp. Exh. 15.

Complainant argues that Illinois courts do not recognize financial hardship as a legal defense to compliance with the Act. Chicago Magnesium Casting Co. v. Illinois Pollution Control Board, 22 Ill. App. 3d 489, 317 N.E.2d 689 (1st Dist. 1974). Comp. Br. at 13. At a minimum, complainant argues that respondent should be required to repair all berm erosion; perform routine maintenance on the berms; routinely dewater the lagoon contents to crop fields at agronomic rates so that at least two feet of freeboard is maintained in each lagoon; report the freeboard levels to the Agency on a monthly basis; and construct and maintain storm water diversions to minimize run off flow to the lagoons. Comp. Br. at 13-14.

Section 15(e) of the LMFA (510 ILCS 77/15(e)(1998)) provides that "[w]hen any earthen livestock waste lagoon is removed from service, it shall be completely emptied. Appropriate closure procedures shall be followed as determined by rule." Although Part 506 of the Board's LMFA rules (35 Ill. Adm. Code 506) does not specifically apply to respondent, the rules set forth reasonable and environmentally appropriate procedures for closure. Section 506.209(a) provides that "[w]hen any earthen livestock waste lagoon is removed from service, it shall be completely emptied, and appropriate closure procedures shall be followed." *Id.*

Once a lagoon is removed from service, Section 506.209 requires the implementation of appropriate closure procedures. Specifically, the rules require the owner or operator to submit closure plan to the Department for review and approval. Again, although the rule is not directly applicable to respondent, the LMFA requires closure, and the Board finds that procedures set forth in Section 506.209 are reasonable and fitting in this case. The closure plan should include:

(A) The sampling, analy sis, and reporting of results of all remaining livestock waste, sludge and minimum six-inch thickness of soil from throughout the lagoon interior;

(B) The removal of all remaining livestock waste including sludge, the removal of a minimum six-inch thickness of soil from throughout the lagoon interior, and the application of these materials to crop land at agronomic rates consistent with the

[10] The Board notes that Part 506 (35 Ill. Adm. Code 506) was promulgated by the Board, not the Department, as stated in complainant's brief.

provision of the site livestock waste management plan or their otherwise proper disposal;

(C) The removal of all associated appurtenances, including but not limited to transfer lines, ramps, pumping ports and other waste conveyance structures;

(D) The proper management of any impounded precipitation in the remaining excavation if it is not immediately filled and the area immediately returned to its pre-construction condition; and

(E) The proper abandonment of any monitoring wells installed which shall be conducted pursuant to the Illinois Water Well Construction Code at 77 Ill. Adm. Code 920.120.

Respondent alleges that he received an estimate of $260,000 for this manner of lagoon closure. Tr. at 204. Respondent requests that the Board allow him to dewater the liquid lagoon contents in concentrated form to the "grassland" west of the lagoons (*i.e.*, the unnamed tributary), and bulldoze dirt over the sediment remaining in the lagoons. Tr. at 202, 205; Resp. Br. at 3. The Board denies respondent's suggested remedy.

The Board's LMFA rules prescribe the closure procedures with which respondent must comply. Therefore, the Board orders respondent to, within 60 days of this order, submit to the Department and to the Agency a closure plan which is consistent with Section 506.209 of the Board's LMFA rules (35 Ill. Adm. Code 506.209). Further, the Board orders closure to be completed by April 1, 2000.

Civil Penalty and Costs

In determining whether a penalty should be ordered against respondent, the Board must consider the factors set forth in Section 33(c) of the Act (415 ILCS 5/33(c) (1998)):

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).

The following is a discussion of each of the Section 33(c) factors as applied to the facts and circumstances in this matter.

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 the respondent's failure to properly maintain the lagoons and respondent's siphoning of lagoon water toward the unnamed tributary of the McKee Creek has created a real threat of water pollution. Complainant offered evidence that the discharge of the lagoon contents into the unnamed tributary of McKee Creek could consume the oxygen necessary to support aquatic life. The contamination may also harm indigenous wildlife. The Board also finds that the character and degree of interference with the protection of health, general welfare, and physical property of the people is a factor in

aggravation of the penalty to be imposed.

The Social and Economic Value of the Pollution Source

Typically, a pollution source has a social and economic value that must be weighed against the source's potential effect on the environment. Here, however, the value of this pollution source is no longer at issue since the respondent disbanded the hog farming business in 1985. Since then, the farm has not produced any agricultural product.

Furthermore, any social or economic value the facility may have had in the past is undermined by respondent's continued failure to maintain the lagoon berms and properly dispose of the lagoon contents. The continuing threat of discharge of contaminants to a water of the State makes the facility a social and economic liability rather than an asset.

Accordingly, the Board concludes that this factor weighs in aggravation of any penalty to be imposed.

The Suitability or Unsuitability of the Pollution Source to the Area

This factor requires the Board to look at the location of the Cory site, particularly the lagoons, and determine its suitability to the area.

The Cory site is situated on a hill which slopes down toward a tributary to the McKee Creek. Complainant offered evidence that precipitation, as well as run-off from surrounding land, can raise the lagoon water level. Without stringent berm maintenance and proper dewatering, the lagoons may overflow. Due to the topography of the site, any overflows would drain into the unnamed tributary. Respondent disputes the Agency's topographical analysis, but concedes that he has no specialized training in this field.

Due to the Cory site's topography, the present condition of the lagoons is not suitable to the location. For this reason, the Board finds that the location of the lagoons is unsuitable and that this factor weighs in aggravation of any penalty to be imposed.

Technical Practicability and Economic Reasonableness of Reducing or Eliminating Pollution

Complainant asserts that respondent should be ordered to close the lagoons in accordance with the lagoon closure rules (35 Ill. Adm. Code 506.209). Respondent's failure to appreciate the threat of water pollution is clear by his repeated denials regarding lagoon contamination, regarding the status of the unnamed tributary as a water of the State, and regarding his admission to siphoning the lagoons. Complainant argues that lagoon closure would assure long term compliance with the Act. Comp. Br. at 13.

At a minimum, complainant argues that the berms should be repaired and maintained, and the lagoon contents should be routinely dewatered to ensure at least two feet of freeboard is maintained in each lagoon. Comp. Br. at 13-14. Complainant also argues that respondent should report the freeboard levels to the Agency on a monthly basis and construct and maintain storm water diversions to minimize run-off flow to the lagoons. *Id.*

There is no evidence regarding the cost of berm repair and maintenance, or the cost of installing storm water diversions. At one time, respondent believed that he might be able to trade a farm building for berm repair, but there is no further evidence in support of this claim. With respect to lagoon closure, respondent testified that he obtained an estimate for $260,000. Tr. at 204.

Due to the potentially high cost of lagoon closure, the Board neither weighs this factor for, nor against, the imposition of a penalty.

Subsequent Compliance

The record shows that respondent has done nothing to eliminate the threat of lagoon overflow despite repeated warnings by the Agency to repair the berm erosion. In fact, respondent siphoned the lagoons directly toward the tributary, in defiance of Agency instructions. The Board accordingly finds that this factor weighs in aggravation of any penalty to be imposed.

Determination of Penalty Amount

Having considered the Section 33(c) factors with the evidence of the case, the Board finds that a penalty is appropriate in this matter. Complainant requested a civil penalty of $22,000. See *infra* p. 20. Comp. Br. at 17.

In determining an appropriate penalty amount, the Board must consider what type of amount is likely to ensure that respondent achieves compliance with the Act and Board regulations.

The Board now considers the factors found at Section 42(h) of the Act as they relate to the $22,000 penalty requested by the complainant. Section 42(h) provides:

> [T]he Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors:
>
> 1. the duration and gravity of the violation;
>
> 2. the presence or absence of due diligence on the part of the violator in attempting to comply with the requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;
>
> 3. any economic benefits accrued by the violator because of delay in compliance with requirements;
>
> 4. the amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with this Act by the violator and other persons similarly subject to the Act; and
>
> 5. the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator. 415 ILCS 5/42(h) (1998).

The Duration and Gravity of the Violations

Based on the evidence before the Board, the violations have been ongoing since at least November 1985, the date of the first Agency inspection described in the record. Additionally, there is evidence of at least two siphoning events, which resulted in the discharge of more than 900,000 gallons of water from the livestock lagoons.

Regarding the gravity of the violations, the quality of the violations is serious. The gravity of the violations is enhanced by respondent's failure to appreciate or acknowledge the environmental harm threatened by the current condition of the livestock waste lagoons.

The Board concludes that this factor weighs in aggravation of the penalty to be imposed.

Due Diligence on the Part of the Violator

The Board believes that respondent has not exercised due diligence. Specifically troubling is respondent's refusal to repair and maintain the lagoon berms despite Agency warnings. Respondent continues to insist that the best solution is for him to do nothing, and let the berms erode naturally. Respondent has not shown any due

diligence in attempting to resolve the problems continuously cited by the Agency over the years, nor has he expressed a willingness to assume the long-term commitment necessary to solve the problems at the site.

The Board finds that this factor weighs in aggravation of the penalty to be asses sed.

Economic Benefit

This factor requires that the Board consider any economic benefits accrued by the violator because of a delay in compliance with the requirements. Respondent has undoubtedly saved an indeterminate amount of money by not complying with the Act and Board rules by undertaking any regular maintenance or repair work on the berms. Respondent has certainly accrued economic benefits by failing to take any action. In this context, the Board finds that this factor weighs in aggravation of the penalty to be assessed.

Monetary Penalty Which Will Serve to Deter Further Violations

The Act requires that adverse effects upon the environment must be "fully considered and borne by those who cause them" (415 ILCS 5/2(b) (1998)). In this matter, aside from ordering respondent to close the lagoons, the other type of remedy which the Board will impose is a monetary penalty. The penalty amount should be sufficient to serve as a deterrent for respondent. Considering that the respondent has thus far repeatedly chosen to ignore requests for compliance, the seriousness of the violations and the potential for harm to the environment require that a penalty be imposed. Accordingly, the Board concludes that this factor weighs in aggravation of the penalty we would normally assess.

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

Complainant does not allege any prior adjudicated violations involving respondent. The Board weighs this factor in mitigation of the penalty to be assessed.

Total Penalty

The statutory maximum as set forth in Section 42(a) of the Act is $50,000 for any violation of the Act or the Board's rules and an additional $10,000 for each day during which the violation continues. See 415 ILCS 5/42(a) (1998). Based upon the statutory maximum, the penalty amount in this matter could be quite substantial. In its prosecution of this case, however, the complainant has not requested the maximum penalty. Rather, complainant requests a penalty in the amount of $22,000.

The complainant arrives at this $22,000 figure by calculating the penalty amount as follows:

Four thousand five hundred dollars ($1,500/year since at least 1995) for the water pollution threat from improper maintenance of the north and south livestock waste lagoons; $3,000 ($1,000/year since at least 1995) for the threatened discharge of contaminants into the waters of the State without an NPDES permit; $4,500 ($1,500/year since at least 1995) for violations of livestock waste handling facility standards; and $10,000 ($5,000 for each of the two siphoning incidents admitted by respondent) for the discharge of livestock waste contaminants into waters of the State without an NPDES permit. Comp. Br. at 16-17.

Count I

With regard to the water pollution threat due to improper maintenance of the north and south lagoons, the Board determines that respondent has been aware of this situation since at least 1995. The Board further finds that the failure to maintain the berms poses a substantial threat to the surrounding environment. Despite respondent's assertion that he cannot afford to close the lagoons or repair the berms, the Board finds that economic hardship should not deter compliance with the Act. Respondent economically benefited from failing to maintain

the berms, and denied that this action threatened water pollution. Complainant requests that the Board impose a penalty in the amount of $4,500 ($1,500/year) for violations since 1995.

In this case, the Board finds that complainant's request is reasonable and consistent with prior Board decisions (*e.g.*, People of the State of Illinois v. Johnnie Mae Hendricks (June 17, 1998), PCB 97-31 and People of the State of Illinois v. Wayne Berger and Berger Waste Management (May 6, 1999.), PCB 94-373.)[11]

Thus, the Board imposes a penalty of $4,500 for respondent's failure to properly maintain the lagoon berms, which has created the threat of pollution to a water of the State.

Count II

With regard to the threatened discharge of contaminants into a water of the State without an NPDES permit, the Board determines that respondent has been aware of this since at least 1995. Based on the record before us, complainant requests that the Board impose a penalty of $3,000 ($1,000/year) for the threatened discharge of contaminants into a water of the State without an NPDES permit. The Board agrees that $3,000 is a reasonable penalty for this violation.

Count III

With regard to the violations of the Board's rules pertaining to the adequate storage capacity in the livestock waste lagoons (35 Ill. Adm. Code 501.404(c)), complainant requests that the Board impose a penalty in the amount of $4,500 ($1,500/year) for violations since 1995. The Board agrees that $4,500 is a reasonable penalty for this violation.

Count IV

Finally, with regard to the actual discharge of livestock waste contaminants into a water of the State without an NPDES permit, complainant requests that the Board impose a penalty of $10,000 ($5,000 for each of the two siphoning incidents admitted by respondent).

Ten years ago, the court upheld a penalty of $10,000 for swine waste discharged into a stream and the violation of an NPDES permit, and imposed an additional $10,376 for the value of 101,219 fish killed. Russel Perkinson, d/b/a Porkville v. PCB, 135 Ill.Dec. 333, 543 N.E.2d 901 (1989). In 1990, the Board imposed a $10,000 penalty on an individual who had discharged livestock waste to an unnamed tributary to Mill Creek between 1982-1988. IEPA v. Allen Barry d/b/a Allen Barry Livestock (May 10, 1990), PCB 88-71.

The Board finds that a fine of $10,000 is appropriate for the actual discharge of swine waste due to respondent's flagrant disregard of Agency warnings not to siphon the waste.

As a result of the discussion above, and respondent's refusal to cooperate with the Agency despite repeated warnings, the Board imposes a total penalty amount of $22,000. In addition to the monetary penalty, the Board orders respondent to cease and desist from further violations of the Act and corresponding regulations, and to close the lagoons pursuant to an approved plan under 35 Ill. Adm. Code 506.209.

Attorney Fees/Costs

The complaint requests reasonable attorney and expert witness fees pursuant to Section 42(f) of the Act. That Section permits the Board to assess attorney fees in enforcement actions where the complainant has *prevailed*

[11] This case is currently on appeal.

against a person who has committed a willful, knowing or repeated violation of the Act. (Emphasis added.) *Id.* While the Board finds that many of the violations in this matter were willful, the Board declines to award attorney fees in this matter. Given the nature of this case, the remedy ordered and the penalty assessed, the Board believes that a further award of attorney fees will not aid in compliance with the Act. Accordingly, the Board will not require the respondent to pay the complainant's attorney fees in this matter.

CONCLUSION

As discussed above, the Board finds respondent in violation of Sections 12(a) and 12(f) of the Act (415 ILCS 5/12(a), (f) (1998)) and corresponding regulations pertaining to the threatened and actual discharge of livestock waste contaminants into a water of the State without an NPDES permit (35 Ill. Adm. Code 501.404(c)). Accordingly, respondent must pay a penalty in the amount of $22,000.

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)) by failing to maintain his lagoon berms 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(f) of the Illinois Environmental Protection Act (415 ILCS 5/12(f) (1998)) by both threatening to, and actually discharging contaminants into a water of the State without an NPDES permit.

3. The Board finds that respondent has violated Section 501.404(c) of the Board's livestock waste rules (35 Ill. Adm. Code 501.404(c)) due to the inadequate storage capacity of the lagoons.

4. The Board orders respondent to, within 60 days of this order, submit to the Department of Agriculture and the Illinois Environmental Protection Agency a closure plan for the north and south lagoons at the site which is consistent with Section 506.209 of the Board's LMFA rules (35 Ill. Adm. Code 506.209). The Board further orders closure to be completed by April 1, 2000. The closure plan should include:

    a. The sampling, analysis, and reporting of results of all remaining livestock waste, s ludge, and minimum six-inch thickness of soil from throughout the lagoon interior;

    b. The removal of all remaining livestock waste including sludge, the removal of a minimum six-inch thickness of soil from throughout the lagoon interior, and the application of these materials to crop land at agronomic rates consistent with the provision of the site livestock waste management plan or their otherwise proper disposal;

    c. The removal of all associated appurtenances, including but not limited to transfer lines, ramps, pumping ports, and other waste conveyance structures;

    d. The proper management of any impounded precipitation in the remaining excavation if it is not immediately filled and the area immediately returned to its preconstruction condition; and

    e. The proper abandonment of any monitoring wells installed, which shall be conducted pursuant to the Illinois Water Well Construction Code at 77 Ill. Adm. Code 920.120.

5. The Board orders respondent to pay a civil penalty in the amount of $22,000 by certified c heck or money order made payable to the Environmental Protection Trust Fund. Respondent shall send the payment no later than August 22, 1999, 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

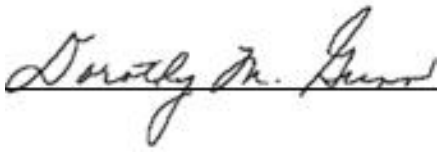
Respondent shall write the case name and number (People of the State of Illinois v. Victor Cory , PCB 98-171), and his social security number on the certified check or money order.

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.

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 22nd day of July 1999 by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board