ILLINOIS POLLUTION CONTROL BOARD
September 20, 1973

ENVIRONMENTAL PROTECTION AGENCY	)	
v.	)	PCB 73-72
JOHN POPP and GEORGE KACKERT, d/b/a KACKERT ASSOCIATES, and KACKERT ASSOCIATES, a partnership	)	

MESSRS. FREDRIC H. ENTIN and RICHARD COSBY, Assistant Attorney Generals, appeared on behalf of the Complainant;

MESSRS. GEORGE D. KACKERT and JOHN POPP, appeared on their own behalf.

OPINION AND ORDER OF THE BOARD (by Mr. Dumelle)

The Environmental Protection Agency (Agency) filed a complaint on February 23, 1973, alleging that John Popp and George D. Kackert, Respondents, the owners and operators of a housing subdivision located in Yorkville, County of Kendall, Illinois, have violated several sections of the Environmental Protection Act (Act) and the Illinois Pollution Control Board Rules and Regulations (Water Pollution Rules), adopted pursuant to the Act, by constructing, installing, connecting and operating a sanitary sewer system from September 6, 1972 until February 23, 1973 without the required permits being obtained from the Agency.

A unique situation presents itself in that the Respondents claim that they would have initially been issued a permit had the Agency not improperly issued a permit to an earlier developer. The Agency admits that they issued a permit to a developer based upon a report issued by the Yorkville-Bristol Sanitary District (District) which listed the Yorkville-Bristol Sewage Treatment Plant (Plant) to have a capacity of four thousand population equivalent (P.E.) when the Agency's own records showed that plant had a capacity of two thousand one hundred P.E. Agency personnel stated that had they known of their error, they would not have issued the prior permit which exhausted the reserve capacity of the Plant. Had the Agency not issued the prior permit, the Agency through Mr. Darrill Bauer, an engineer employed by the Agency, testified that Respondent's permit application would probably been given final approval as it was the next permit application received and would not have exceeded the capacity of the plant. However, the prior permit was issued with the stipulation that the individual units not be connected or operated if the

plant were overloaded.

The facts in this case are that the Respondent applied for a permit to construct and connect a sanitary sewer system on June 15, 1972. Respondent proceeded with the construction and connection to an existing sewer line during July of 1972 which was prior to receiving any response from the Agency. On August 10, 1972 the Agency rejected the permit because it lacked the signature of the presiding officer of the District. The Agency's letter to Respondents' engineer stated that correction of the signature omission did not necessarily mean that the permit would be forthcoming. The Agency's letter to the Respondents did not contain the above warning. Respondents obtained the signature and resubmitted the application on September 19, 1972.

Sometime during the application process the Agency learned of their earlier error in plant capacity and thus rejected on November 19, 1973 the Respondents' permit application when it was received in proper form based upon the plant not having any reserve capacity. Respondent in December, 1972 after notice of denial based upon lack of capacity and denial of an occupancy permit from the Yorkville City Council, based upon failure to obtain Agency permits allowed the occupancy of four out of the twenty-six units with operation of the sanitary sewers.

The record (PCB 73-72) is not clear, but it appears on page 59 that the District, through its engineer, then submitted additional data to show that the plant had a higher rated capacity than that shown on the Agency records. Subsequently the developer who held the prior permit which exhausted the reserve capacity, scaled down the scope of his development so that there would be enough capacity at the plant to adequately handle the Respondents' development. After resubmittal by the Respondents, the Agency issued a permit on March 30, 1973. It is not clear from the record (page 39) what type of permit was issued.

It is the finding of the Board that the Respondents have from September 6, 1972 until February 23, 1973 violated Section 12(c) of the Act and Rule 901(a) of the Water Pollution Rules by constructing a sanitary sewer without obtaining the necessary construction permit from the Agency. The Board also finds that the Respondents have violated Section 12(b) of the Act and Rule 902 of the Water Pollution Rules by operating or allowing to be operated the sanitary sewer without obtaining an operating permit from the Agency.

The Respondents have essentially built a development and installed the sewer system, and then sought a permit to do what was already done. From the special facts presented in this case

the Board has not levied the maximum fine of $10,000 for each violation and $1,000 per day for each day each violation occurred. The total fine could amount to approximately Three Hundred Seventy-Six Thousand Dollars for the violations present in this case. While equity might tend to motivate the Board toward allowing a developer the economic benefit of operating a sanitary sewer system once the development is built and the sanitary sewer system installed, the Board would clearly be within reason if it were to levy the full or a substantial portion of the fine in the case of the developer who willfully builds and then applies for the necessary permits.

The Board also suggests that in the future that the Agency include in any technical deficiency letter or permit denial letter based upon a technical deficiency language to the effect that complying with the requests made in such a letter should not be construed as an indication that upon resubmittal of the application that a permit will be imminent. Such a clause should tend to warn an applicant that his permit has not been reviewed upon the merits and should help prevent some of the confusion found in this case.

The Board's order in this case is based in part upon the fact that at full occupancy the development will consist of twenty-six units with a projected load of 65 P.E. This small load should have a minimal effect upon the marginally overloaded plant. The Agency did not present any data as the plant's effluent characteristic or its impact upon water quality in the receiving stream.

ORDER

The Pollution Control Board orders that:

1. The Respondents shall apply for and obtain the necessary Construction Permit for their development if not previously obtained.

2. The Respondents shall apply for and obtain the necessary Operational Permit for their development if not previously obtained.

3. The Respondent shall pay to the State of Illinois, within 35 days after receipt of this Order the sum of $500.00 as a penalty for violation of provisions found in the

Board's opinion. Penalty payment by certified check or money order payable to the State of Illinois shall be made to: Fiscal Services Division, Illinois Environmental Protection Agency, 2200 Churchill Road, Springfield, Illinois 62706.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 20th day of September, 1973 by a vote of 5-0.

Christan L. Moffett
Christan L. Moffett, Clerk
Illinois Pollution Control Board