ILLINOIS POLLUTION CONTROL BOARD
November 1, 1973

MR. AND MRS. RAYMOND E. DONALDSON	)	
	)	
	)	#72-389
v.	)	
	)	
CITY OF ELMHURST	)	

MRS. RAYMOND E. DONALDSON APPEARED PRO SE
PETER W. ERNST APPEARED ON BEHALF OF CITY OF ELMHURST

OPINION AND ORDER OF THE BOARD (BY MR. SEAMAN):

This is a citizens' complaint filed against the City of Elmhurst. Because of certain inadequacies in the original complaint, we permitted complainants to file an amended complaint, which was filed on October 17, 1972. Although signed by Mrs. Raymond E. Donaldson, the complaint is filed in the name of Mr. and Mrs. Raymond E. Donaldson and we proceed with both as parties complainants. By our order of January 30, 1973, we held that the complaint, though meager, was neither duplicitious nor frivolous, and scheduled a hearing thereon. The City of Elmhurst filed an answer in the nature of a general denial. The complaint alleges violation of Rule 601 of the newly enacted water pollution regulations, (Chap. III, Water Pollution) which violation is alleged to have caused sewer back-up and sewage deposit in the basements of complainants and others.

Paragraph 3 of the amended complaint specifies as follows:

"Rule or Regulation allegedly violated by Respondent: Page 23, Rule 601 Systems Malfunctions causing our basements to become the sewage reservoir in the time of power failure and an inadequate sewage system. Sewage left in the basements of homes for as long as 4 days after the heavy rains of August 25, 1972. Families had to use public facilities to defacate because they could not flush their toilets."

Rule 601 of the Water Pollution Rules provides as follows:

"Systems Reliability

(a) Malfunctions. All treatment works and associated facilities shall be so constructed and operated as to minimize violations of applicable standards during such contingencies as flooding, adverse weather, power failure, equipment failure, or maintenance, through such measures as multiple units, holding tanks, duplicate power sources, or such other measures as may be appropriate.

(b) Spills. All reasonable measures, including where appropriate the provision of catchment areas, relief vessels, or entrapment dikes, shall be taken to prevent spillage of contaminants from causing water pollution."

It will be noted that the Rule relates to treatment works "and associated facilities" which unquestionably extends the Rule's coverage to storm and sanitary sewers, tributary to the basic sewage treatment plant. Further, the Rule requires that such facilities as are covered by it, be operated so as to minimize "violations of applicable standards." This language is sufficient to embrace all relevant regulatory provisions, as well as the basic provisions of the Environmental Protection Act.

Section 602(b) provides:

"Excess infiltration into sewers shall be eliminated, and the maximum practicable flow shall be conveyed to treatment facilities. Overflows from sanitary sewers are expressly prohibited."

Section 12(a) of the Environmental Protection Act expressly prohibits the causing, threatening or allowing of the discharge of contaminants so as to cause water pollution as therein defined, while Section 12(d) prohibits the deposit of any contaminant on land so as to create a water pollution hazard. From the foregoing, it will be seen that the complaint, while lacking in specificity and detail, does state a cause of action, enabling the Board to take jurisdiction premised on the inadequacies of the Elmhurst sewer system, which, in turn, have resulted in a sewage back-up into the homes of complainants and others residing in the City. We have previously held that a municipality is responsible for the pollutional consequences of sewers within its limits. Environmental Protection Agency v. City of Champaign, #71-51C, PCB (September 16, 1971).

The pervasive problems to which Respondent is subjected that have generated the events complained of in the present proceeding are not unique to Elmhurst. Essentially, we are confronted with two separate but interrelated situations characterizing established municipalities which, in recent years, have experienced accelerated population increases. As typical of many communities, particularly those in DuPage County, the existing sewage treatment facilities are not adequate to accomodate their present sewage disposal needs and are incapable of handling any significant increases resulting from increase in population. Secondly, as a result of sewer deterioration and obsolescense, lax building code enforcement and past indifference to consequences of combined storm and sanitary sewer utilization,

substantial quantities of storm water infiltrate into sanitary sewers during periods of heavy rains or flood conditions, rendering the sewers incapable of accommodating the greatly increased flow and resulting in back-up of sewage effluent into connecting lines and the basements of residents. The combined effect of inadequate sewage treatment facilities to accomodate even normal flows, much less greatly increased discharge resulting from abnormal rains, coupled with inordinate storm water infiltration into sanitary sewers, have unquestionably created the circumstances complained of.

The principal complainant, Mrs. Donaldson, testified at length with respect to sewage back-up in her home and those of neighbors during the summer and fall of 1972 (R. 12-35), as well as in prior years. Other citizens recounted similar experiences (R. 36-37), most of whom live in areas of low elevation and high water table, generating flood conditions and poor drainage. While the complaint relates specifically to the heavy rains of August 25, the evidence indicates sewer back-ups experienced by her and her neighbors during the summer months preceeding this date, and during September, 1972. (R. 20, 21, 36, 133). Nor is there any significant dispute in the record that infiltration into the sanitary sewers has been taking place. (R. 137). As early as 1958, the municipality at that time having combined sanitary and storm sewers, embarked on a program to separate these facilities The danger of continuing combined sanitary and storm sewers had already become evident. The consulting engineer cautioned that a separation of sewers in itself would not achieve a satisfactory result, if, in fact, sources of storm water flow continue to infiltrate sanitary sewers, particularly, if as contemplated, the existing combination sewers would continue to be used after separation, pursuant to the new program. In the report, Baxter & Woodman, Compl. Ex. 2, pp. 26-27, the following language appears:

> "There is one hazard involved in separation. In a community which has always had combined sewers, merely putting the inlets and catch basins on one set of sewers and the house services on another does not automatically separate all sources of storm water from the latter system, because roof drains, footing drains, yard drains, etc. are connected to the house sewers. The flow from these sources of storm water would completely flood the sanitary sewer system, even with the inlets and catch basins disconnected. Therefore, a carefully executed program of legislation, inspection and enforcement is needed to get all sources of storm water disconnected from the new sanitary sewer system. Even with such a program, there will always be a substantial increase in flow in the new sanitary sewers during storms as a result of undetected connections. For this reason, we have allowed five times dry weather flow, or 625 gallons per person per day in designing the separate sanitary sewers.

"In working out the separation of sewers, maximum use of all existing combined sewers has been made. In some cases, it is proposed to convert the existing sewer into a sanitary sewer; in other cases into a storm sewer, depending on which would produce the best and result for the least cost. Every section of sewer in the City has been carefully studied to determine how it could best be fitted into the separation program."

The program of sewer separation appears to have proceeded over the next ten years aided, in part, by a successful referendum generating funds to finance this project. As a result, the combined sewers have been separated and all storm and sanitary effluent flows are conveyed during normal periods into storm and sanitary sewers, respectively. However, the record discloses that in periods of excessive rainfall, storm water infiltration does continue into the sanitary sewers creating conditions of overflow, plant by-pass and sewage in basements, as alleged, notwithstanding the sewer separation program. Infiltration appears to result from a multiplicity of causes, including the following: connection of downspouts into the sanitary sewer, pumpage from sump pumps and drainage footings into the sanitary sewer, possible breaks in the sanitary sewer tile, overflow from storm sewers into the sanitary sewer manholes, ground water flows into sanitary sewers and the failure of pumps, particularly at the McKinley Avenue pumping station which serves complainant's area (R. 131, 137, 158, 171, 209, 210). These situations are prevalent during periods of heavy rain, which did, in fact, occur during August and September, 1972 (R. 163) and became accentuated as a consequence of the underlying inadequacy of the Elmhurst sewage treatment plant, which inadequacy has been previously and independently determined by the Environmental Protection Agency (Comp. Ex. 14).

On the state of the record, therefore, it is manifest that the Elmhurst sewage treatment plant is presently inadequate to accomodate the volume of flow being generated by the areas serviced by it (R. 80-86). Further, the sanitary sewers, although no longer combined with storm sewers, were, during the periods alleged, being infiltrated with storm water, rendering them incapable of handling the combined flow and causing the back-up, particularly on the McKinley Avenue sewer line, that complainants allege. Additionally, the evidence is undisputed that on several occasions, the pumping facilities of the McKinley Avenue station, have broken down with the expected and consequential back-up of sewage.

We believe that complainants have adequately established their burden of proof, demonstrating malfunction of the associated facilities of the treatment works and excess infiltration into sewers, and that Rules 601 and 602(b) have accordingly been violated during the period alleged. The circumstances above-described further manifest the creating of a threat of water pollution, in violation of Section

12(a) of the Act and the deposit of contaminants on land creating a water pollution hazard in violation of Sec. 12(d). The record further substantiates that the City of Elmhurst has, by interconnecting sanitary sewers, connecting sanitary sewers to storm sewers and permitting flow from storm sewers into sanitary sewers, violated the relevant Regulations and statutory provisions. We conclude that the complainants have established the violations as alleged.

The remaining problem, of course, is what steps the City should take to abate the conditions complained of. With respect to the basic upgrading and improvement of the Elmhurst sewage treatment plant, this matter is the subject of the comprehensive regionalization program embarked upon by the Board in 1971. A proposed final Order for Region II of which the Elmhurst sewage treatment plant will be one of the two principal plants, was entered by the Pollution Control Board on July 12, 1973. Independently, the City of Elmhurst has progressed with its program of sewage treatment plant improvement so that the facility will be capable of handling a greatly increased flow (R. 76, 220). This program when completed will unquestionably have a salutory effect on the problems plaguing complainants and their neighbors, constituting the subject matter of this proceeding. It is not the purpose of this opinion and order to go into any substantial detail with respect to the Elmhurst sewage treatment plant improvement program other than to note, as was brought out in the record in this proceeding, that the expansion and modification program is moving forward. The program, being in implementation of the comprehensive DuPage Regionalization regulations, will be subject to the continuing jurisdiction of the Board. More importantly, so far as the present proceeding is concerned, the immediate problem respecting storm infiltration into the sanitary sewers is being addressed by the municipality. The City has embarked on a program specifically designed to ameliorate this condition (R. 171, 181, 203). Included in this program is consideration for additional standby pumping facilities to minimize the likelihood of back-up in the event of pump failure (R. 189), the enlargement of storm water sewer intake facilities enabling better street drainage and flow during periods of heavy rainfall, and the improvement and modification of sanitary sewer manhole covers, lessening storm water infiltration into these sewers.

In addition, and perhaps of even greater significance, the City has renewed its efforts to terminate infiltration from downspouts and footing drains into sanitary sewers (R. 222). This program has already achieved some success although it would appear that much remains to be done. The city manager has stated that those who made such connections subsequent to the separation of sewers have been directed to disconnect but has also expressed the fear that those who have made connections prior to sewer separations could not be legally directed to disconnect, viewing such order as being a retroactive application of a building code requirement. These homeowners instead are subject to an increased sewer charge (R. 223).

We do not believe that the Illinois law is so limiting and suggest that the municipality has the legal right and, indeed, the duty to direct such disconnection, notwithstanding its retroactive application, where the public health and safety dictate the need for such action. See Kaukas v. City of Chicago, 27 Ill. 2nd 197, 188 N. E. 2nd, 700 (1963), Appeal Dismissed, 375 U. S. 811 LEd 2nd, 40, 84 S. Ct. 67, permitting retroactive enforcement of fire code requirements. We believe the same rationale would be applicable in the present situation.

Viewing the totality of this proceeding, we do not believe any useful purpose would be served by the imposition of a penalty. Furthermore, we believe that the City has embarked upon a dual program of improvement that will achieve the results sought by complainants. Undoubtedly, the sewage treatment plant upgrading and modification will create a substantial improvement in the flow of sanitary sewage, lessening the likelihood of back-up with resulting consequences as demonstrated in this proceeding. Furthermore, we expect that the City will continue its efforts to abate the conditions that have, in the past, caused or permitted storm water infiltration. We anticipate that the City will take more aggressive steps to terminate the illegal connections of downspouts and footing drains to sanitary sewers, take remedial action in improving its storm water sewers and lessening the likelihood of overflow and infiltration into the sanitary sewers and will take all necessary steps to minimize the loss of power and pumping capability where such circumstances have previously resulted. We would also expect that unauthorized cross-connections between sewers will be discontinued, if this has not already occurred.

We will order that the City report to the Pollution Control Board within sixty days from the date of this Order, the status of all of the foregoing improvements, modifications and changes as above set forth, together with any incidents of sewer back-up into basements that have occurred during the intervening period and the reasons therefor.

In entering the foregoing order, we are not unmindful that by taking jurisdiction of the issues presently in contention, we are subjecting the Board to a possible proliferation of suits of a similar nature, recognizing the pervasiveness of the conditions upon which the present complaint is based. This fact should in no way serve as a basis for our declining jurisdiction in a matter so clearly proscribed by the terms of the Environmental Protection Act and the relevant regulations. The Pollution Control Board is mandated by the Act to enforce the law and it will not retreat from this duty no matter how burdensome its workload may become, in view of the new avenue of complaint having been recognized. We feel that such a view is particularly compelling in consideration of the factual situation in the instant case where the burdens on the community and its residents are manifest and the possibility of resolution by Board action is available. If an aggrieved citizen cannot place a case before us, where else can he go? The legislature has created a means of relief that is expeditious, inexpensive and plenary and which has the capability of achieving the desired results. We intend to fulfill this mandate.

This Opinion constitutes the findings of fact and conclusions of law of the Board.

ORDER

IT IS THE ORDER of the Pollution Control Board that:

1. The City of Elmhurst shall report to the Pollution Control Board, through the Agency, within sixty days from the date of this Order the status of all improvements, modifications and changes relative to the upgrading of its sewage treatment plant, its progress in abatement of storm water infiltration and its program for termination of all illegal connections to sanitary sewers, together with all remedial action taken to improve its storm water sewers and to lessen the likelihood of overflow into sanitary sewers, its termination of cross-connection between sanitary sewers and its program to assure against recurrence of power loss and diminished pumping capacity as has occurred previously.

2. The City of Elmhurst shall report all incidents of sewer back-up into basements that have occurred during the intervening period and the reasons therefor.

3. The Board retains jurisdiction for the entry of such other and further orders as may be appropriate in the premises, based upon the submission made by the City, as hereinabove directed.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, certify that the above Opinion and Order was adopted this 15th day of November, 1973 by a vote of 5 to 0.

Christan L. Moffett