ILLINOIS POLLUTION CONTROL BOARD
June 4, 2009

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 07-53
	)	(Enforcement – Water)
MOLINE PLACE DEVELOPMENT, LLC, AND CROSSTOWNE PLACE DEVELOPMENT, LLC,	)	
	)	
Respondents.	)	

OPINION AND ORDER OF THE BOARD (by S.D. Lin):

On January 3, 2007, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a complaint against Moline Place Development, L.L.C. (Moline) and CrossTowne Place Development, L.L.C. (CrossTowne) (collectively, respondents). *See* 415 ILCS 5/31(c)(1) (2006)[1]; 35 Ill. Adm. Code 103.204. The People allege that respondents violated Section 12(a) and (f) of the Environmental Protection Act (Act) (415 ILCS 5/12(a) (2006)), and Section 309.102(a) of the Board's water pollution regulations. The People further allege that respondents violated these provisions at two separate residential development projects in Rock Island County by causing water pollution and violations of the National Pollutant Discharge Elimination System (NPDES) permits for those sites issued by the Illinois Environmental Protection Agency (IEPA).

The complaint concerns two residential housing areas, one called One Moline Place located at 6th Street and 11th Avenue in Moline, and a second called CrossTowne Place located near the intersection of 11th Avenue and Hospital Road in Silvis, both in Rock Island County. Counts I and II of the complaint concern Moline Place, and counts III and IV concern CrossTowne Place.

Today the Board decides an uncontested for summary judgment filed by the People on March 5, 2009 against CrossTowne only as to Counts III and IV of the complaint. For the reasons discussed below, the Board grants the People's motion for summary judgment, finds CrossTowne has committed the violations as alleged in the complaint, and grants the relief requested by the People the motion. The Board orders respondent CrossTowne to pay the full $15,000 civil penalty requested, to take actions to mitigate flooding it has caused as described later in this opinion and order, and to cease and desist from further violations.

[1] The pleadings in this case refer to both the 2004 and 2006 versions of the Illinois Complied Statutes. As there is no difference in the relevant sections from the 2004 to the 2006 compilation, the Board will consistently reference the 2006 edition.

Today's ruling concludes the case as to respondent CrossTowne only. The People's case against Moline remains pending and unaffected by this opinion and order.

This opinion and order first reviews the procedural history of this case. It then summarizes the People's complaint and addresses the facts deemed admitted. The opinion and order then sets forth the relevant statutory and regulatory provisions. The Board next describes the standard of review applied by the Board in considering summary judgment motions and then summarizes the People's motion for summary judgment. Next, the order provides the Board's discussion of and ruling on that motion before issuing the Board's order.

PROCEDURAL HISTORY

On January 3, 2007, the People filed a four-count complaint (Comp.) alleging that respondent had committed water pollution violations. In an order dated January 26, 2007, the Board accepted the complaint for hearing. Neither respondent has filed an answer to the complaint.

Review of the docket sheet in this case reveals that, since the complaint was filed, the hearing officer has held 11 telephonic status conferences at roughly 2-3 month intervals.[2] As memorialized in hearing officer orders following each of these telephone status conferences, complainant has participated in all of them, but respondents participated only in the status conference of May 1, 2007. However, it is clear from the hearing officers' orders that the complainant has been in contact with the respondents, that respondents have met with IEPA which has conducted site inspections, and that respondents have agreed to take some but not all suggested remedial actions. *See, e.g.*, People of the State of Illinois v. Moline Place Development, L.L.C. and CrossTowne Place Development, L.L.C., PCB 07-53 (hearing officer orders of Aug. 14 and July 14, 2008).

On October 28, 2008, complainant served CrossTowne with a request to admit facts and genuineness of documents. The hearing officer order summarizing a January 13, 2009 telephonic status conference states that complainant reported that it had received no response to its discovery request.

On March 5, 2009, complainant filed a motion for summary judgment (Mot.) as to CrossTowne only. To date, however, the respondent has not filed an answer to the complaint with the Board and has raised no affirmative defenses. Respondent has filed no response to the People's motion for summary judgment. The Board's procedural rules provide that, "[w]ithin 14 days after service of a motion, a party may file a response to the motion. If no response is filed, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board . . . in its disposition of the motion." 35 Ill. Adm. Code 101.500(d). Respondent's failure to respond to the motion for summary judgment has resulted in waiving any objection to the Board granting the motion.

[2] Telephonic status conferences were held in 2007 on March 1, May 1, July 3, September 11 and November 13, 2007. In 2008, such conferences were held January 13, April 14, July 14, and October 14, while in 2009 they were held January 13 and April 13.

The hearing officer summarized an April 13, 2009 status conference at which respondents did not appear, but at which complainant reported:

> According to complainant, both of the respondent corporations have been involuntarily dissolved. With respect to respondent Moline Place Development, L.L.C, complainant is considering a motion for summary judgment. With respect to respondent CrossTowne Place Development, L.L.C., complainant is awaiting the Board's ruling on the motion for summary judgment filed on March 5, 2009. PCB 07-53 (hearing officer order of Apr. 13, 2009).

PEOPLE'S COMPLAINT AS TO CROSSTOWNE: COUNTS III AND IV

As previously stated, Counts I and II of the People's largely relate to Moline, and not CrossTowne. Count III realleges the material in paragraphs 1-17 of Count I. Comp. at 10, ¶ 1-17. Material from Count I is summarized here only to the extent that it is relevant to CrossTowne.

Respondent, CrossTowne Place Development, LLC, is an Illinois limited liability company whose registered agent was Michael R . Shamsie. CrossTowne Place owns and is developing a residential housing area called CrossTowne Place located near the intersection of 11th Avenue and Hospital Road, in Silvis, Rock Island County, Illinois. Comp. at 1 (¶5). CrossTowne Place consists of three and 2/10ths (3.2) acres and is to include twelve homes. Comp. at 1 (¶7).

On January 24, 2005, IEPA issued NPDES permit # ILRlOC205 to respondent for CrossTowne Place. Comp. at 2 (¶9). CrossTowne Place discharges storm water into a small unnamed stream that passes along the south side of the site and eventually discharges into the Mississippi River. The unnamed stream adjacent to CrossTowne Place, the Sylvan Slough, and the Mississippi River are "waters" of the State as that term is defined in Section 3 .550 of the Act, 415 ILCS 5/3 .550 (2006). Comp. at 3 (¶11-12). Paragraphs 13-17 of the complaint recite various statutory and regulatory provisions relevant to later alleged violations: Sections 3.545, 12(a) and 12(f) of the Act (defining and prohibiting water pollution at 415 ILCS 5/3.545, 12(a) and (f)(2006)) , 35 Ill. Adm. Code 309.102 (prohibiting point source discharge without NPDES permit), and 40 CFR 122.26, (construction activity including clearing, grading and excavation required to obtain an NPDES permit and to implement a storm water pollution prevention plan (SWPPP)). Comp. at 3-6 (¶11-12).

Count III

The People allege that on November 16 and 17, 2004, Mr. James Kammueller, IEPA Division of Water Pollution Control/Field Operations Section, Peoria Region, inspected the construction site at CrossTowne Place and observed that approximately half the site was barren and without adequate erosion control measures. He noted that storm water drained to the west and south into an unnamed stream and sediment deposits in the stream. He further

observed a small retention pond with sediment deposits upstream of the pond outlet area along barren slopes at the rear of homes. Comp. at 10 (¶18).

The complaint states that, during a phone conversation with Mr. Kammueller on November 22, 2004, Mr. Shamsie, agent for CrossTowne Place, agreed to apply for an NDPES storm water permit (which was lacking as to the CrossTowne site) and to provide additional erosion control measures along the south and west edges of the site. Comp. at 11 (¶19). On January 5, 2005, IEPA sent CrossTowne Place a violation notice (VN) letter citing CrossTowne's failure to obtain coverage under the general NPDES storm water permit, its failure to provide or follow an adequate SWPPP, and the unlawful discharge of contaminants into the environment. Comp. at 11 (¶20).

The People further allege that on January 25, 2005, Mr. Kammueller returned to inspect the status of storm water controls finding that, although the NPDES permit had been applied for, various compliance items remained as noted during the November 16 and 17, 2004 site inspections. Comp. at 11 (¶21). By letter dated February 21, 2005, Mr. Shamsie responded to the January 2005 VN letter, disputing some the recommended compliance items while providing commitments for others yet to be done. Comp. at 11 (¶22). On March 21, 2005, the IEPA sent CrossTowne a letter rejecting its proposed compliance commitment agreement (CCA) due to the nature and seriousness of the violations and because construction was begun prior to obtaining a permit. Comp. at 11 (¶23). On April 25, 2005, Mr. Shamsie sent a response to the CCA rejection, providing certain compliance updates. Comp. at 12 (¶24).

The People's complaint asserts that, on May 2, 2005, the IEPA sent CrossTowne Place a notice of intent to pursue legal action (NIPLA) letter, reciting the violations included in the VN letter. Comp. at 12 (¶25). On May 13, 2005, Mr. Shamsie sent Mr. Kammueller a set of photos depicting areas of the site that had been either sodded or hydro-seeded. But, Mr. Shamsie did not request a meeting pursuant to the NIPLA notice. Comp. at 12 (¶26).

The People contend that, on January 27, 2006 Mr. Kammueller re-inspected the CrossTowne Place construction site. He observed that the lots on the west end of the cul-de-sac near the retention pond, were not seeded and did not have sod placement. The vegetation density was also inadequate and the retention pond outfall did not appear to have been modified to allow the pond to hold water. Comp. at 12 (¶27).

Count III concludes with the assertion that the above facts demonstrate that the respondent caused, allowed or threatened to cause water pollution by failing to provide adequate storm water pollution controls, in violation of Section 12(a) of the Act, 415 ILCS 5112(a)(2006), and that these violations occurred repeatedly from at least November 16, 2004 . Comp. at 12 (¶27).

Count IV

In Count IV, the People reallege the facts detailed in paragraphs 1-27 of the complaint, as detailed above. Comp. at 12 (¶27). Count IV concludes with the assertion that the above facts demonstrate that respondent failed to obtain coverage under the general NPDES storm water

permit for construction site activities in violation of 35 Ill. Adm. Code 309.102(a). Moreover, the complaint alleges, by violating 35 Ill. Adm. Code 309.102(a), respondent has violated Section 12(f) of the Act, 415 ILCS 5/12(f)(2006).

STATUTORY AND REGULATORY PROVISIONS

Section 3.545 of the Act provides that

> "[w]ater pollution" is such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such 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, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life. 415 ILCS 5/3.545 (2006).

Section 3.550 of the Act provides that "'[w]aters' means 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 5/3.550 (2006).

Section 12 of the Act provides in pertinent part that no person shall:

> (a) 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, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act.
>
> * * *
>
> (f) Cause, threaten or allow the discharge of any contaminant into the waters of the State, as defined herein, including but not limited to, waters to any sewage works, or into any well or 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 NPDES permit filing requirement established under Section 39(b), or in violation of any regulations adopted by the Board or of any order adopted by the Board with respect to the NPDES program. 415 ILCS 5/12(a), 12(d), 12(f) (2006).

Section 33(c) of the Act provides in its entirety that

> (c) In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved including, but not limited to:

(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) (2006).

Section 42(h) of the Act provides that

In determining the appropriate penalty to be imposed . . . the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors:

(i) the duration and gravity of the violation;

(ii) the presence or absence of due diligence on the part of the respondent in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;

(iii) any economic benefits accrued by the respondent because of delay in compliance with requirements, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance;

(iv) the amount of monetary penalty which will serve to deter further violations by the respondent and to otherwise aid in enhancing voluntary compliance with this Act by the respondent and other persons similarly subject to the Act;

(v) the number, proximity in time, and gravity of previously adjudicated violations of the Act by the respondent;

(vi) whether the respondent voluntarily self-disclosed, in accordance with subsection (i) of this Section, the non-compliance to the Agency; and

(vii) whether the respondent has agreed to undertake a "supplemental environmental project," which means an environmentally beneficial project that a respondent agrees to undertake in settlement of an enforcement action brought under this Act, but which the respondent is not otherwise legally required to perform. 415 ILCS 5/42(h) (2006).

Section 309.102(a) of the Board's water pollution regulations provides in its entirety that "[e]xcept as in compliance with the provisions of the Act, Board regulations, and the CWA [Clean Water Act], and the provisions and conditions of the NPDES permit issued to the discharger, the discharge of any contaminant or pollutant by any person into the waters of the State from a point source or into a well shall be unlawful." 35 Ill. Adm. Code 309.102(a).

Storm water discharges are regulated by 40 CFR 122 .26,[3] which requires a person to obtain an NPDES permit and to implement a storm water pollution prevention plan for construction activity including clearing, grading and excavation. The section provides in pertinent part:

(a) Permit requirement.

(1) Prior to October 1, 1994, discharges composed entirely of storm water shall not be required to obtain a NPDES permit except:

* * *

(ii) A discharge associated with industrial activity (see §122.26(a)(4);

* * *

(4) Discharges through large and medium municipal separate storm sewer systems . . .

* * *

(9) (i) On and after October 1, 1994, for discharges composed entirely of storm water, that are not required by paragraph (a)(1)

[3] The Board does not have the authority to adjudicate violations of federal regulations, unless specifically directed to do so by the Act. *See, e.g.* 415 ILCS 9.1(b)(2006). But, as the People explain in the complaint, the federal Clean Water Act regulates the discharge of pollutants from a point source into navigable waters and prohibits such point source discharges without an NPDES permit. The United States Environmental Protection Agency (USEPA) administers the NPDES program in each State unless the USEPA has delegated authority to do so to that State. The USEPA has authorized the State of Illinois to issue NPDES permits through the IEPA in compliance with federal regulations. Comp. at 2.

of this section to obtain a permit, operators shall be required to obtain a NPDES permit only if :

* * *

(B) The discharge is a storm water discharge associated with small construction activity pursuant to paragraph (b)(15) of this section;

* * *

(b) Definitions.

* * *

(14) Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant . . . . The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14):

* * *

(x) Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area . Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more;

* * *

(15) Storm water discharge associated with small construction activity means the discharge of storm water from:

* * *

(i) Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres . Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres. 40 CFR122.26 (2006).

STANDARD OF DECISION FOR MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E. 2d 358, 370 (1998); *see* 35 Ill. Adm. Code 101.516(b) (Motions for Summary Judgment). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." Dowd & Dowd, 693 N.E.2d at 370 (1998).

Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to relief "is clear and free from doubt." Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E. 2d 358, 370 (1998), citing Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E. 2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

THE PEOPLE'S MOTION FOR SUMMARY JUDGMENT

On March 5, 2009 the People filed a motion for summary judgment. In the motion, the People assert that

> No Answer or responsive pleadings to the Complaint have been filed by CrossTowne and, therefore, no affirmative defenses have been pleaded. Complainant relies upon uncontroverted facts set forth in the Affidavit of James E. Kammueller and in the Request for Admission of Facts Directed to CrossTowne mailed on October 28, 2008. Mot. at 1.

The People go on to state that

> Attached hereto as Exhibit "B" is the [October 29, 2008] Request for Admission of Fact and Genuineness of Documents Directed to CrossTowne Place, L.L.C. CrossTowne failed to respond to the Request for Admission of Fact and Genuineness of Documents. All statements of fact set forth in the Request for Admission of Fact and Genuineness of Documents are admitted. The genuineness of the NPDES permit and NOT [Notice of Termination] attached to the Request for Admission of Fact and Genuineness of Documents is admitted. Section 101.618(f) of the Board's Procedural Rules, 35Ill. Adm. Code 101.618(f).[4] Mot. at 3.

[4] The People's motion for summary judgment is not accompanied by a separate "motion to deem facts admitted" of the type the Board often sees. *See, e.g.* People of the State of Illinois v. Steve Soderberg d/b/a Steve's Concrete and Excavating, PCB 08-87 (Mar. 5,

In addition to failing to respond to the complaint, or the request for admissions, CrossTowne has also failed to respond to the People's motion for summary judgment. [5] Respondent's failure to respond to the motion for summary judgment has resulted in waiving any objection to the Board granting the motion made by the People.

The People argue that, based on the uncontroverted facts, the People have proven all allegations of the complaint. Mot. at 5. The People then assert that the record supports Board issuance of a remedy order, consistent with the factors of Sections 33(c) and 42(h) of the Act. 415 ILCS 5/ 33(c) and 42(h) (2006).

As to the Section 33(c) factors, the People argue:

> The water quality of the unnamed stream at the site and the Mississippi River was adversely affected by the inadequate storm water pollution controls and CrossTowne's failure to comply with the NPDES general storm water permit. There is social and economic benefit in the construction of new homes at the site. Construction activity at the site was suitable for the area in which it occurred. Providing adequate storm water pollution controls and complying with the NPDES general storm water permit were both technically practicable and economically reasonable. Sod placement was done around completed homes but 70% grass cover was not achieved for all the lots. A NOT [Notice of Termination] was submitted by Mr. Shamsie on June 26, 2006 and the permit was terminated on July 11, 2006.
> Mot. at 6.

Concerning Section 42(h) factors, the People state:

2009). But, Section 101.618 does not by its terms require that a motion be filed before facts can be deemed admitted where there is no response to a discovery request. Section 101.618(c) requires that this plain language statement be included in the request to admit:

> Failure to respond to the following requests to admit within 28 days may have severe consequences. Failure to respond to the following requests will result in all the facts requested being deemed admitted as true for this proceeding. 35 Ill. Adm. Code 101.619(c).

Recipients of discovery requests have ample notice of the consequences of their failure to respond without the filing of a separate motion to deem facts admitted.

[5] The Board's procedural rules provide that, "[w]ithin 14 days after service of a motion, a party may file a response to the motion. If no response is filed, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board . . . in its disposition of the motion." 35 Ill. Adm. Code 101.500(d).

> At the time of the November 16, 2004 inspection, CrossTowne had not applied for NPDES storm water permit coverage for CrossTowne Place although construction had already commenced. Portions of the site were barren without erosion control measures and sediment deposits were present in the unnamed stream and also upstream of the pond outlet. When Mr. Kammueller re-inspected the CrossTowne Place site on September 20, 2006, final stabilization had not been achieved even though the NOT had been submitted by CrossTowne.
>
> After inspector Kammueller visited the site on November 16, 2004 CrossTowne did apply for coverage under the NPDES permit. Subsequent inspections found the storm water pollution controls remained inadequate. A NOT [Notice of Termination] was submitted by CrossTowne in June 2006 even though final stabilization had not been achieved.
>
> CrossTowne delayed or avoided the costs of implementing adequate erosion control measures at the site, delayed obtaining coverage under the general NPDES permit and prematurely terminated the permit. CrossTowne benefitted economically as a result of these acts of non-compliance.
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> * * *
>
> To Complainant's knowledge, CrossTowne has no previously adjudicated violations of the Act.
>
> CrossTowne did not voluntarily disclose the violations involved in this case.
>
> The adjudication of this matter does not include a supplemental environmental project. Mot at 8-9.

The People request that the Board enter an order granting summary judgment in their favor along with a finding that CrossTowne has violated the Act and Board rules as alleged. As a remedy, the People request the Board to impose a $15,000 penalty to aid in enforcement of the Act. Finally, the People request the Board to order respondent to cease and desist from further violations, and to lower the storm water inlet at the southeast corner of the site and to extend the sewer along the south side far enough to the west to avoid flooding of the adjacent Ward Property. Mot. at 9.

DISCUSSION

The Board finds, as the People argued, that the uncontested facts are sufficient to establish that respondent CrossTowne has violated the Act and the Board's regulations as alleged in the Counts III and IV of the complaint. Below, the Board reviews evidence and arguments offered in its support before making its findings and reaching its conclusions.

7

Uncontested Facts Deemed Admitted Due to Failure To Respond to Discovery and As Supported by Affidavit in the Motion

In the following section, the Board sets out the uncontested facts. The Board finds these facts are deemed admitted since CrossTowne has failed to respond to the Complaint, has failed to provide a sworn response to the Request for Admission of Fact and Genuineness of Documents, and has failed to respond to the People's motion and supporting affidavit.

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CrossTowne is an Illinois limited liability company in good standing, whose principal office is located at 455 42nd Avenue, East Moline, Illinois. Michael R. Shamsie is CrossTowne's register agent. Mr. Shamsie is a licensed professional engineer and the president of an engineering firm known as Landmark Engineering Group, Inc. whose principal office is located at 455 42nd Avenue, East Moline, Illinois.

CrossTowne is developing a residential housing area commonly referred to as CrossTowne Place located near the intersection of 11th Avenue and Hospital Road, in Silvis, Rock Island County, Illinois. CrossTowne Place discharges storm water into a small unnamed stream that passes along the south side of the site and eventually discharges into the Mississippi River.

CrossTowne began construction activities at CrossTowne Place without first obtaining coverage under the NPDES permit. CrossTowne failed to maintain in good working order erosion and sediment control measures at CrossTowne Place. CrossTowne caused or allowed sediment deposits to accumulate in the unnamed stream and also upstream of the pond outlet area at the rear of the site. Mot. at 2.

On November 16, 2004, IEPA's James E. Kammueller made his original inspection of the construction site at CrossTowne Place, when 8 homes were currently in some phase of construction. At that time, approximately half of the 3.2 acre site was barren, without erosion control measures; sediment deposits were present in the unnamed stream and also upstream of the pond outlet area at the rear of homes. At the time of this original inspection, CrossTowne had not applied for NPDES storm water permit coverage for CrossTowne Place and had no SWPPP. Mot. at 1.

On January 24, 2005, IEPA issued NPDES permit No. ILR1OC2O5 to CrossTowne after a corrected "Notice of Intent" (NOI) was submitted to it listing CrossTowne, rather than Landmark Engineering, as the site owner. Mot. at 1-2. CrossTowne's NPDES permit required it to develop a SWPPP according to good engineering practices (Permit, Part IV). Implementation of the provisions of the SWPPP is a condition of the NPDES permit. The SWPPP must be completed prior to the start of the construction. (Permit, Part IV.A.1). The SWPPP must be signed and retained on site (Permit, Part IV.B.1).

Mr. Kammueller returned to re-inspect the status of storm water controls on January 25, 2005. He observed that a row of un-secured straw bales had been placed at the edge of the small stream on the south side of the site, but no erosion controls were in place for the barren area to

the west. *Id*. at 2. When Mr. Kammueller re-inspected the CrossTowne Place site on January 27, 2006, the lots on the west end of the cul-de-sac were not seeded, did not have sod placement, and the vegetative density was less than 70%. *Id.*

CrossTowne submitted a "Notice of Termination" (NOT) of its NPDES permit to IEPA, and the permit was terminated on July 11, 2006. Mot. at. 3. By filing a NOT, CrossTowne certified that all disturbed areas of the site had been finally stabilized (Permit, Part II.F.1.d). "Final stabilization" means that a uniform perennial vegetative cover with a density of 70% cover for unpaved areas and areas not covered by permanent structures has been established (Permit, Part VIII). Mot. at 5. But, CrossTowne submitted the NOT for the site without first achieving final stabilization as required by the NPDES general permit. *Id.* When Mr. Kammueller re-inspected the CrossTowne Place site on September 20, 2006, the vegetation cover was not at the minimum 70% density for vacant lots 7, 8, and 9 nor along the very south sides of lots 2, 3, 4, 5, and 6. *Id.*

Adjacent to CrossTowne Place is residential property commonly known as 1128 Hospital Road, Silvis, Illinois, owned by Randall Ward and Toni Ward (the Ward Property). Mot. at 3-4. Due to the higher elevation of the storm water inlet CrossTowne placed at the southeast corner of the site, storm water is caused to back up in the road ditch south along Hospital Road. *Id.* at 4. Because CrossTowne did not extend the outlet for the sewer along the south side of the site far enough to the west, storm water is caused to flood the backyard of the Ward Property. *Id.*

Liability Determination

Counts III and IV of the complaint allege that a) CrossTowne caused, allowed or threatened to cause water pollution by failing to provide adequate storm water pollution controls, in violation of Section 12(a) of the Act, 415 ILCS 5/12(a)(2006); b) CrossTowne failed to obtain coverage under the general NPDES storm water permit prior to commencing construction site activities, in violation of 35 Ill. Adm. Code 309.102(a) and Section 12(f) of the Act, 415 ILCS 5/12(f) (2006); c) CrossTowne failed to prepare and implement an adequate SWPPP in violation of 35 Ill. Adm. Code 309.102(a) and Section 12(f) of the Act, 415 ILCS 5/12(f) (2006); and d) CrossTowne submitted an NOT prior to final stabilization being achieved at the site in violation of 35 Ill. Adm. Code 309.102(a) and Section 12(f) of the Act, 415 ILCS 5/12(f) (2006).

The record demonstrates that the unnamed stream at CrossTowne Place and the Mississippi River are "waters" of the State as that term is defined in Section 3.550 of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/3.550 (2006). The storm water discharged from the CrossTowne Place site constitutes a "contaminant" as defined by Section 3.165 of the Act, 415 ILCS 5/3.165. The storm water system at CrossTowne Place constitutes a "point source" as that term is defined in the federal Clean Water Act, 33 U.S.C. § 1362(14). *Id.*

The record demonstrates that, on January 24, 2005, IEPA issued NPDES permit No. 1LR10C205 to CrossTowne. But, the record also demonstrates CrossTowne commenced construction and development activity at the CrossTowne Place site without first obtaining coverage under the NPDES permit and without a SWPPP. Only after inspector Kammueller visited the site on November 16, 2004 did CrossTowne apply for coverage under the NPDES

permit. During the November 16, 2004 inspection, sediment deposits were observed to be present in the unnamed stream and also upstream of the pond outlet area at the rear of homes.

The record demonstrates that CrossTowne submitted a "Notice of Termination" (NOT) to IEPA, certifying that site stabilization was complete, so that the NPDES permit was terminated on July 11, 2006. But, the record demonstrates that hen Mr. Kammueller re-inspected the CrossTowne Place site on September 20, 2006, after the NOT had been submitted, final stabilization had not been achieved. Because CrossTowne placed the storm water inlet at the southeast corner of site at too high an elevation and did not extend the outlet for the sewer along the south side far enough to the west, storm water from the site is causing damage to the neighboring Ward Property.

The Board finds that the allegations deemed admitted pursuant to Section 101.618 (f) of the Board's procedural rules (35 Ill. Adm. 101.618 (f))) are sufficient to prove that there are no genuine issues of material fact and that the People are entitled to judgment as a matter of law on count III and IV. *See* 35 Ill. Adm. Code 101.516(b). Consequently, the Board grants the People's motion for summary judgment as to Count III and IV and finds that respondent violated Sections 12(a) and (f) of the Act, 415 ILCS 5/12(a) and (f) (2006), 35 Ill. Adm. Code 309.102(a), and 42 CFR 122.

Remedies

The People here have requested multiple remedies: a remediation order, a cease and desist order, and a civil penalty. In fashioning all of its orders, the Board must consider the factors of Section 33(c) of the Act. If the Board determines a penalty is appropriate, the Board must also consider the factors of Section 42 (h) of the Act.

Section 33(c)

Addressing the factors at Section 33(c) of the Act (415 ILCS 5/33(c) (2006)), the People suggested that the water quality of the unnamed stream at the site and the Mississippi River was adversely affected by CrossTowne's activities. Mot. at 7. The Board finds that CrossTowne's failure to apply for and receive a permit prior to the start of construction, as well as its use of inadequate erosion and sediment control measures resulted in a significant "injury to or interference with the protection of the health, general welfare and physical property of the people" and weighs this factor in favor of requiring remedies sought by the People. *See* 415 ILCS 5/33(c)(1) (2006). It is clear that without an order from the Board, that the Ward Property will continue to suffer damage, in addition to that caused to the waters of the State.

Regarding "the social and economic value of the pollution source," the People suggest that new home construction has social value. Mot. at 7; *see* 415 ILCS 5/33(c)(2) (2006). On the issue of "the suitability or unsuitability of the pollution source to the area in which it is located," the People also claim that the site was suitable for construction." *Id.*; *see* 415 ILCS 5/33(c)(3) (2006). There is nothing in the record to refute these claims. But, the Board notes that one facet of these values and site suitability considerations must be that construction is properly performed

after receipt of, and in compliance with, all required permits. As this has not been the case with CrossTowne, the Board weighs these two factors in favor of remedies sought by the People.

The People also argue that "[p]roviding adequate storm water pollution controls and complying with the general storm water permit was both technically practicable and economically reasonable." Mot. at 7; *see* 415 ILCS 5/33(c)(4) (2006). Respondent has in no way opposed this argument, and the Board finds that this factor weighs in favor of remedies sought by the People.

Addressing the final factor of any subsequent compliance, *see* 415 ILCS 5/33(c)(5) (2006), the People state that the site has not been completely remediated: while sod placement was completed, the required 70% grass cover has not been completed for all lots. Mot. at 7. Moreover, stormwater continues to flood the backyard of the ward property. *Id.* at 4. The Board finds that this factor weighs in favor of respondent.

The Board finds on the basis of the record before it that the Section 33(c) factors weigh in favor of granting all of the relief requested by the People, including a civil penalty. In reaching this finding, the Board places considerable emphasis on CrossTowne's failure to apply for and comply with required permits, and the fact that water pollution continues to occur.

To determine the appropriate penalty amount, the Board below considers factors listed in Section 42(h) of the Act. *See* 415 ILCS 5/42(h) (2006).

Section 42

The Board notes that, under Section 42(a) of the Act, violators are liable for a civil penalty of up to $50,000 for each violation and an additional penalty of $10,000 for each day that the violations continues. *See* 415 ILCS 5/42(a) (2006). The People suggest that a $15,000 penalty is appropriate here "based upon the specific facts of this matter". Mot at 9.

Section 42(h) articulates the aggravating and mitigating factors that the Board weighs in determining an appropriate civil penalty (*see* 415 ILCS 5/42(h) (2006)). The first two factors relate to the duration and gravity of the violation, and any due diligence of respondent in attempting to comply. See 415 ILCS 5/42(h)(1) and (2) (2006). As to these, the People allege that CrossTowne began construction in 2004 without the required permit and SWPPP, applied for same only after a site visit by the IEPA inspector, filed the NOT of that permit in 2006 signifying compliance with its terms, but had not completed the site stabilization that the NOT required. Mot. at 8-9. The Board notes that the record indicates the permit violations have persisted, as does the resulting water pollution to the waters of the State and the Ward Property. The Board weighs this "gravity and duration" factor against respondent.

On the issue of respondent's diligence, the Board finds that this factor mainly weighs against respondent. S*ee* 415 ILCS 5/42(h)(2) (2006). While respondent did eventually apply for the required permit, he terminated it without fully complying with conditions.

The People contend that that respondent has accrued economic benefit as a result of the violations, since it has

> delayed or avoided the costs of implementing adequate erosion control measures at the site, delayed obtaining coverage under the general NPDES permit and prematurely terminated the permit. Mot. at 9; *see* 415 ILCS 5/42(h)(3) (2006).

The record contains no evidence to the contrary, and the Board weighs this factor against respondent.

The People state that respondent "has no previously adjudicated violations" of the Act. Mot. at 9; *see* 415 ILCS 5/42(h)(5) (2006). The Board weighs this factor in favor of respondent.

With regard to self-disclosure, the People claim that respondent "did not voluntarily disclose the to the IEPA under Section 42(i). Mot. at 9; *see* 415 ILCS 5/42(h)(6) (2006); *see also* 415 ILCS 5/42(i) (2006) (providing for reduction in penalty for voluntary self-disclosure of non-compliance discovered through audit to Agency). The Board weighs this factor against respondent.

Finally, the People stated that respondent has not offered to perform a supplemental environmental project. Mot. at 9; *see* 415 ILCS 5/42(h)(7) (2006). The Board weights this factor against respondent.

Finally, on the issue of deterrence, the People argue that a maximum civil penalty of $15,000 "will serve to deter further violations and aid in future voluntary compliance". Mot. at 9; *see* 415 ILCS 5/42(h)(4) (2006). Respondent has offered no facts or arguments to dispute this.

The Board finds that the Section 42(h) factors justify the imposition of the $15,000 penalty on respondent as proposed by the People. *See* People v. Ogoco, Inc., PCB 06-16, slip op. at 10 (Sept. 21, 2006) (imposing People's unopposed penalty request), citing People v. J&F Hauling, Inc., PCB 02-21 (Feb. 6, 2003). In reaching this finding, the Board places particular weight on the duration and gravity of the violation and on respondent's lack of due diligence in attempting to comply with the Act and the Board's regulations. The Board notes that this sum is in line with recent penalties for uncontested water pollution violations. *See, e.g.* Illinois v. Steve Soderberg d/b/a Steve's Concrete and Excavating, PCB 08-87 (Mar. 5, 2009) (summary judgment order imposing $12,000 penalty).

CONCLUSION

The Board grants the People's unopposed motion for summary judgment, deeming facts admitted under 35 Ill. Adm. Code 101.618(f). The Board finds that respondent CrossTowne violated the Act and the Board's regulations as alleged in the two counts of the complaint directed against it (Counts III and IV). The Board orders CrossTowne to perform site remediation as detailed below and imposes the People's requested civil penalty of $15,000 on respondent. In addition, the Board requires respondent to cease and desist from further violations of the Act and the Board's regulations.

This opinion constitutes the Board's findings of fact and conclusions of law as to CrossTowne Place only. The case against Moline Place continues to remain open.

ORDER

1. The Board grants the Office of the Attorney General, on behalf of the People of the State of Illinois, summary judgment on Counts III and IV of the complaint as alleged against respondent CrossTowne Place Development, LLC. The Board thus finds that respondent has violated Sections 12(a) and 12(f) of the Environmental Protection Act (Act) (415 ILCS 5/12(a) and 12(f) (2006)) and Sections 309.102(a) of the Board's water pollution regulations (35 Ill. Adm. Code 309.102(a).

2. Respondent CrossTowne must pay a civil penalty of $15,000 no later than Monday, July 6, 2009, which is the first business day after 30 days from the date of this order. Such payment must be made by certified check, money order, or electronic transfer of funds, payable to the Environmental Protection Trust Fund. The case number, case name, and CrossTowne's social security number or federal employer identification number must be included on the certified check or money order.

3. Respondent CrossTowne must send the certified check, money order, or confirmation of electronic funds transfer to:

   Illinois Environmental Protection Agency
   Fiscal Services Division
   1021 North Grand Avenue East
   P.O. Box 19276
   Springfield, Illinois 62794-9276

4. Penalties unpaid within the time prescribed will accrue interest under Section 42(g) of the Environmental Protection Act (415 ILCS 5/42(g) (2006)) at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a) (2006)).

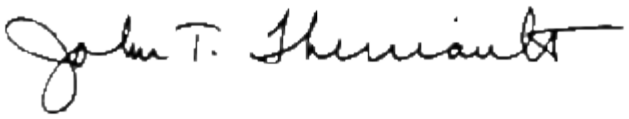
5. Respondent CrossTowne must lower the storm water inlet at the southeast corner of the site and to extend the sewer along the south side far enough to the west to avoid flooding of property at 1128 Hospital Road, Silvis, Illinois owned by Randall Ward and Toni Ward.

6. Respondent CrossTowne must cease and desist from further violations of the Act and the Board's regulations.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2006); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on June 4, 2009, by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board