ILLINOIS POLLUTION CONTROL BOARD
March 2, 2000

DAVID MULVAIN,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 98-114
	)	(Enforcement - Citizens, Water)
VILLAGE OF DURAND,	)	
	)	
Respondent.	)	

WARREN H. LARSON APPEARED ON BEHALF OF COMPLAINANT; and

HERBERT I. GREENE APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

On March 9, 1998, complainant David Mulvain (Mulvain) filed a complaint alleging that the sewer system in Durand, Winnebago County, Illinois, is allowing excess infiltration into the sewer system and backup of sewage into basements. The complaint alleged that the sewer system is in violation of the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq*. (1998)) and the Board's regulations. The complaint further alleged that the Illinois Environmental Protection Agency (Agency) improperly issued a permit (1997-1A-4892) to Rockford Blacktop Construction, Inc. (Rockford Blacktop) which will result in additional overload to the sewer system. On May 21, 1998, the Board dismissed Rockford Blacktop and the Agency from this proceeding.

On March 18, 1999, the Board partially granted Mulvain's motion for summary judgment.[1] The Board found that Durand violated Sections 12(a) and 12(f) of the Act and Board regulations at 35 Ill. Adm. Code 306.303 and 306.304 prior to completion of sewer repairs in 1997. The Board directed that this matter proceed to hearing to determine if violations continued after the sewer system was repaired in 1997 and to determine the appropriate remedy for the violations.

Hearing was held on August 10 and 11, 1999, before Board Hearing Officer John Knittle. Mulvain filed his brief on September 24, 1999. Durand's brief was filed on October 27, 1999. The reply brief was filed on February 15, 2000.

[1] The motion for summary judgment is cited as "Mot. at" and the response filed by Durand will be cited as "Resp. at." The transcript from the hearings will be cited at "Tr. at"; Mulvain's brief will be cited as "Comp.Br. at"; the reply brief will be cited as "Reply at"; and Durand's brief will be cited as "Resp.Br. at"; Exhibits will be cited as "Exh. ".

For the reasons discussed below, the Board finds that violations did occur after completion of the repairs to the Durand sewage system in 1997. The Board orders Durand to cease and desist from further violations of the Act. However, at this time the Board assesses no penalty against Durand.

LEGAL FRAMEWORK

Mulvain alleged in his complaint and the Board found on March 18, 1999, that Durand violated Sections 12 (a) and (f) of the Act and Sections 306.303 and 306.304 of the Board's regulations. Sections 12 (a) and (f) provide, in pertinent part:

> 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 contaminants into the waters of the States . . . including, but not limited to waters to any sewage works . . . in violation of any regulations adopted by the Board or of any order adopted by the Board with respect to the NPDES permit program. 415 ILCS 5/12 (a), (f) (1998).

Section 306.303 provides:

> Excess infiltration into sewers shall be eliminated, and the maximum practicable flow shall be conveyed to treatment facilities. 35 Ill. Adm. Code 306.303

Section 306.304 provides:

> Overflows from sanitary sewers are expressly prohibited. 35 Ill. Adm. Code 306.304.

BACKGROUND

Durand is a village with a population of 1,100 located in Winnebago County. Exh. AA, p.5. Low-to-moderate income residents make up 52% of the population. *Id*. Durand is located in an area with a high water table, zero to three feet below grade. Exh. AA, p. 8. Soil saturation and surface water runoff conditions are common during periods of heavy rainfall. *Id*. Much of the sewage collection system was installed in the early 1960's. *Id*.

As previously stated, the Board granted summary judgment in favor of the complainant on March 18, 1999. The Board based its decision granting summary judgment on several factors. One such factor was an Agency compliance report attached to the motion for summary judgment which

supported a finding of violation on the excess infiltration allegation. The Agency report dated December 2, 1998, states:

> There is no known overflow or pumping from manholes or bypassing from lift stations. However, in the past, there was some basement backup, particularly in 1996 due to heavy rainfall. The Village [Durand] is aware of the severe I/I [infiltration and inflow] problem, particularly on North Street and has had Frinks TV some of the sewers periodically. The Village [Durand] has budgeted money for I/I work and sewer replacement which will begin in Spring 1999. Mot. Attachment at 6.

An additional factor in granting summary judgment was the affidavit of Michael Sweet, Superintendent of Public Works for Durand. The affidavit indicates that Sweet observed "a bottle neck in the system causing sewage backups in basements." Exhibit B at 1. Also, Durand admitted that there had been sewer backups although Durand maintained that no backups occurred after repairs were made in 1997. Resp. at 2. Durand also admitted that excessive infiltration had occurred. Resp. at 2.

Durand completed repairs to the sewer system on November 20, 1997, at a cost of $141,615.65. Tr. at 210. On April 20, 1999, Durand started a second repair of the system at a cost of $500,000. The 1999 repairs were made possible because of a $400,000 grant from the Department of Commerce and Community Affairs. Durand paid the remaining portion of the costs. Tr. at 147-148. The repairs were completed on July 28, 1999. *Id*.

ISSUES

As the Board has already found that Durand was in violation of the Act and Board regulations, this matter was sent to hearing for two purposes: first, to establish if there were violations after the 1997 repairs were completed; and second to determine the appropriate remedy. These are the only two issues the Board will decide in this opinion.

Post-1997 Allegations of Violation

According to the testimony of Mulvain, there were three additional incidents of overflow after completion of the repairs on November 10, 1997. Those incidents occurred in June 1998 (Tr. at 158), April 23, 1999 (*Id*.), and April 27, 1999 (*Id*.). Mulvain asserted that each of those incidents were reported to Sweet. Tr. at 162. Sweet does not dispute that Mulvain reported a backup to him in June 1998. Tr. at 84. However, he did not investigate the alleged backup. Tr. at 262. Durand disputes that the June 1998 incident was a "backup" and submitted a video tape (R. Exh. 5) to compromise Mulvain's assertions. The video tape shows an interview of Mulvain wherein Mulvain indicated that he had "groundwater" in his basement. Tr. at 261. Mulvain later explained that his use of the word "groundwater" was meant to include a sewer backup. Tr. at 352 and 353.

With regards to the April 1999 incidents, Sweet asserts that Mulvain did not report the incidents to him. Tr. at 264-265. In fact, Sweet was out of town on April 23, 1999, at a seminar. Tr. at 212. Mulvain remains adamant that he did tell Sweet of the incidents. Tr. at 333. In addition, Mulvain

offered several photographs developed on April 30, 1999, which he asserts show the backup of April 23, 1999. Tr. at 333-343.

In addition to Mulvain's assertions of backups, Sweet and Marion Miller, an employee of Durand, testified that "Rhonda Wells," a resident of Durand, "had a couple inches of water in their [sic] basement" in June 1999. Tr. at 217. Miller did not enter the house because when he arrived, "there was a hose stuck in the sewer. Rockford Blacktop had been pumping from one manhole to the other manhole." Tr. at 217.

The alleged backups were not the only problems experienced by Durand. Sweet testified that, since completion of the 1997 repairs, there had been 24 incidents where effluent entered the receiving stream in excess of permit levels. Tr. at 52. Sweet also testified that since the completion of the 1997 repairs, there have been violations of permit levels for CBOD and suspended solids. Tr. at 58.

Remedy

The second issue that the Board considered at hearing was the proper remedy in this proceeding. In the Board's March 18, 1999 order, the Board stated that:

> In making determinations regarding remedy, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act. People v. Berniece Kershaw and Darwin Dale Kershaw d/b/a Kershaw Mobile Home Park (April 20, 1994), (hereinafter Kershaw) PCB 92-164; IEPA v. Allen Barry, individually and d/b/a Allen Barry Livestock (May 10, 1990), (hereinafter Barry) PCB 88-71. The Board must take into account factors outlined in Section 33(c) of the Act in determining the unreasonableness of the alleged pollution. Wells Manufacturing Company v. Pollution Control Board, 73 Ill. 2d 226, 383 N.E.2d 148 (1978). The Board is expressly authorized by statute to consider the factors in Section 42(h) of the Act in determining an appropriate civil penalty. In addition, the Board must bear in mind that no formula exists, and all facts and circumstances must be reviewed. Kershaw at 14; Barry at 62-63.

Mulvain is not asking that a monetary penalty be assessed against Durand. Reply at 12 and 13; Tr. at 8, 173, 185 and 202. Instead, Mulvain is asking that the Board place a "limit on new hookups to the system" and retain jurisdiction over this complaint for the "period of the coming permit renewal." Comp.Br. at 8 and Tr. at 173-174. In addition, Mulvain is asking the Board to:

1. place the Durand system on "Critical Review" pursuant to 35 Ill. Adm Code 306.403;

2. prioritize and expedite any loan applications from Durand for sewer repairs;

3. require annual reporting to the Board;

4. limit expenditures from sewer fees, grants and other sources of revenue to the Sewer Department to administration and operations of the sewer collection and treatment system; and

5. act as the mediator between Durand and the complainant.

Reply at 14-16.

Durand argues that a fine would not be appropriate under the circumstances of this case because it voluntarily began an extensive program of sewer repairs prior to the filing of this complaint. Durand also argues that restriction of hookups is not necessary. Durand offers the testimony of Erwin Toerber in support of this argument. Toerber testified that: 1) the excursions that occurred since completion of the 1997 construction project do not warrant the placing of restrictions on Durand concerning additional hookups; and 2) that seven excursions over a period of three years is a good record. Tr. at 309-310; 322. Toerber also testified that Durand's system after completion of the 1999 improvements is either comparable or far ahead of other systems of the same size. Tr. at 309.

DISCUSSION

As previously discussed, this matter was sent to hearing to discuss two issues: the issue of alleged violations after November 20, 1997, and the issue of appropriate remedy. We will first discuss whether violations have occurred since November 20, 1997. Finally, we will address the appropriate remedy in this proceeding.

Violations

The Board finds that there have been violations since the 1997 repairs were completed. In June 1998, Mulvain reported a sewer backup in his basement to Sweet. Sweet did not go into the basement to investigate. However, Durand relies on statements made in a television video report (R. Exh. 5) to impeach Mulvain's testimony. The Board finds that Mulvain's use of the term groundwater did not exclude a sewer backup. Therefore, we find that the evidence indicates that a sewer backup occurred in Mulvain's basement in June 1998.

Concerning the April 1999, incidents, we note that there are conflicting comments on whether Mulvain reported the two incidents to Durand; however, Mulvain provided pictures which show a backup in his basement. In addition, the only testimony which disputes Mulvain's claims of backups in 1999 is that no one else reported any problems. The Board finds Mulvain and his pictures convincing. Therefore, the Board finds that sewer backups did occur in Mulvain's basement in April 1999.

Finally, the testimony of Durand's employees indicate that a couple inches of water was reported in the basement of Durand resident "Rhonda Wells" in June 1999. Upon investigation, Durand's employee witnessed Rockford Blacktop pumping from one manhole to the other manhole. The Board finds that the evidence is sufficient to support a finding that the water in "Rhonda Wells'" basement was a sewer backup. The Board finds that the sewer backups in 1998 and 1999 were violations of Section 12(a) and (f) of the Act and 35 Ill. Adm. Code 306.303 and 306.304.

Remedy/Penalty

Having found violation, the Board must now determine the remedy including what penalty is to be assessed, if any. The Board will look to the factors set forth in Sections 33(c) and 42(h) of the Act.

Section 33(c) Factors

Section 33(c) sets forth five factors that the Board must consider in making its determinations:

1. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;

2. the social and economic value of the pollution source;

3. 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;

4. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and

5. any subsequent compliance.

The Character And Degree Of Injury To, Or Interference With The Protection Of The Health, General Welfare And Physical Property Of The People.

A backup of sewage into the basement of a home can include organisms which are detrimental to human health. Tr. at 146. Although no ill effects were reported in this proceeding, the Board finds that the periodic backups into basements is an interference with the protection of the health of the people and this factor weighs against Durand.

The Social And Economic Value Of The Pollution Source.

The Board finds that this factor weighs in support of Durand. The sewer system clearly has social and economic value.

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.

The sewer system including lagoons are appropriately placed and therefore this factor weighs in support of Durand. Exhibit 9.

The Technical Practicability And Economic Reasonableness Of Reducing Or Eliminating The Emissions, Discharges Or Deposits Resulting From Such Pollution Source.

Durand has spent over $600,000 in repairing its sewer system to alleviate the problem of sewer backup. Thus, it was reasonable to correct the problem, and this factor weighs against Durand.

Any Subsequent Compliance.

The record is insufficient to determine if Durand is currently in compliance. The record does show that violations did continue after completion of the 1997 repairs. However, the record also shows that Durand had been working toward compliance including seeking funds to continue the repairs. Those repairs were completed in July 1999. Therefore, we will not weigh this factor either for or against Durand.

Section 42(h) Factors

Section 42(h) of the Act sets forth factors to be considered in determining the appropriate amount of the civil penalty. Those factors are:

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.

After considering the five factors enumerated in Section 42(h) of the Act, the Board finds that a civil penalty is not warranted in this case. First, the Board notes that although any violation of the Act is grave, the violations occurring here were of a short-term nature. And although the sewer backups have continued, so has the work to correct problems. The Board has no knowledge of sewer backups after completion of the sewer work in July 1999.

The diligence of this community to correct the problems and the over $600,000 already spent also indicate that no penalty is necessary. The record does not demonstrate that Durand received any

economic benefit from noncompliance. And in fact there were comments filed which indicated that Durand had been saving money to update the sewers for sometime. Tr. at 363. Additionally, Durand has already been working toward compliance voluntarily, and this also indicates that no fine is necessary. Finally, the record contains no evidence that Durand was previously adjudicated in violation of the Act.

The Board is also persuaded by the fact that the complainant is not seeking a monetary penalty. Rather, the complainant is asking that the Board order specific remedies. Therefore, based on the record in this case, wherein the complainant has expended substantial resources to correct problems with its sewer system in a diligent manner, the Board will not impose a civil penalty.

Mulvain has asked for very specific remedies from the Board in this matter. With regards to Mulvain's requests to expedite loan requests and limit expenditures to administration and operation of the sewer system, the Board declines to order such remedies. The record does not indicate that there are any loan applications pending, nor does the record indicate that sewer funds have been misspent. Further, the Board is without authority to direct nonparties to expedite consideration of loan applications.

Mulvain's request that the Board require annual reporting is unnecessary at this time. Durand currently holds a permit issued pursuant to 35 Ill. Adm. Code 309 and Sections 13 and 13.3 of the Act. 415 ILCS 5/13 and 13.3. As this record indicates, Durand is already filing reports with the Agency (see Agency compliance report attached to the motion for summary judgment).

Mulvain also asks that the Board place Durand on critical review and limit hook-ups. The Board's rules at 35 Ill. Adm. Code 306.403 address the placement of a system on the critical review list. Section 306.403 states:

> Critical review shall be defined as the Agency determination pursuant to Section 39 of the Act and Section 309.421, that a sewer is a approaching hydraulic capacity or that a sewer treatment plant is approaching design capacity, such that additional sewer connection permit applications will require close scrutiny to determine whether issuance would result in a violation of the Act or regulations. 35 Ill. Adm. Code 306.403.

Thus, the Board's rules authorize the Agency to make the decision whether to place a system on critical review and as a result limit hook-ups. Because this record is silent as to the current condition of the Durand system, the Agency can better determine, through the ongoing evaluation of Durand's permits, whether or not critical review of the Durand system is necessary. The Board will mail a copy of this opinion and order to the Agency so that the Agency may determine whether any further action is appropriate.

Finally, Mulvain asks that the Board act as mediator and retain jurisdiction over this matter. The Board is reluctant to retain jurisdiction where a final order can achieve the same goal. In this case, we will direct that Durand cease and desist from violations of the Act and the Board's rules. If Durand fails

to cease and desist, Mulvain may again file a new enforcement action alleging that Durand has violated this order as well as any other alleged violations. Thus, the Board need not retain jurisdiction.

Therefore, the Board finds that directing Durand to cease and desist from further violations of the Act and Board regulations is the most appropriate way to remedy these violations and provide Mulvain with the remedy he desires. The Board directs that the Village of Durand cease and desist from further violations of Section 12 of the Act and 35 Ill. Adm. Code 306.303 and 306.304.

CONCLUSION

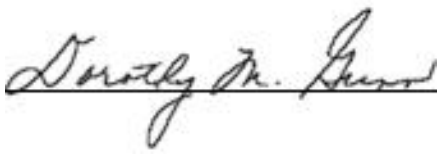
The Board finds that Durand continued violating Sections 12(a) and (f) of the Act and 35 Ill. Adm. Code 306.303 and 306.304, after November 20, 1997. In a previous order, the Board had found that Durand had violated Sections 12(a) and (f) of the Act and 35 Ill. Adm. Code 306.303 and 306.304 prior to November 20, 1997. See, Mulvain v. Village of Durand (March 18, 1999), PCB 98-114. After careful review of the Section 33(c) and 42(h) factors (415 ILCS 5/33(c) and 42(h)), the Board finds that a civil penalty is not necessary in this case. Therefore, the Board directs Durand to cease and desist from further violations of Sections 12(a) and (f) of the Act and 35 Ill. Adm. Code 306.303 and 306.304.

ORDER

The Village of Durand is hereby ordered to cease and desist from any further violations of Section 12(a) and (f) of the Environmental Protection Act (415 ILCS 5/12(a) and (f)) and 35 Ill. Adm. Code 306.303 and 306.304. The Board directs the Clerk to mail a copy of this opinion and order to the Illinois Environmental Protection Agency so that the Illinois Environmental Protection Agency may determine whether any further action is appropriate.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 2nd day of March 2000 by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board