ILLINOIS POLLUTION CONTROL BOARD
April 8, 1993

PEOPLE OF THE STATE OF ILLINOIS,	)	
Complainant,	)	
v.	)	PCB 92-164
	)	(Enforcement)
BERNIECE KERSHAW, DARWIN DALE KERSHAW AND DARRELL KERSHAW d/b/a KERSHAW MOBILE HOME PARK,	)	
Respondent.	)	

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

On October 29, 1992, the Attorney General of Illinois filed a complaint on behalf of the People of Illinois against Berniece Kershaw, Darwin Dale Kershaw, Darrell Kershaw and Kershaw Mobile Home Park, pursuant to Section 31 of the Environmental Protection Act (Act). (415 ILCS 5/31 (1992).)[1] The complaint alleges violations of Sections 12 and 18 of the Act on four counts. The allegations relate to operations at Kershaw Mobile Home Park, located in Henry County, Illinois. The Board did not receive any filing in response to the complaint.

On February 17, 1993, the complainant filed a motion for summary judgment asking the Board to enter judgment in favor of complainant and against Berniece Kershaw, Darwin Dale Kershaw and Kershaw Mobile Home Park. The Board notes that the request for summary judgment did not include respondent Darrell Kershaw. Further, the record indicates that Darrell Kershaw was not served with the October 29, 1992, complaint, the motion for summary judgment or other filings in this proceeding. Therefore, the Board dismisses Darrell Kershaw from this proceeding and the respondents referred to herein are only Berniece and Darwin Dale Kershaw and Kershaw Mobile Home Park.

The motion asks for summary judgment "for the reason that the pleadings, admissions on file and affidavits show that there is no genuine issue as to any material fact and the complainant is entitled to judgment as a matter of law". (Mot. at 1.) The Board has not received a response to the motion for summary judgment from Berniece Kershaw, Darwin Dale Kershaw and Kershaw Mobile Home Park.

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[1]The Act was previously codified at Ill. Rev. Stat. ch. 111 1/2 par. 1001 et seq.

KERSHAW MOBILE HOME PARK

Kershaw Mobile Home Park (KMHP) is owned by Berniece Kershaw and her two sons, Darwin and Darrell Kershaw. The KMHP has a mailing address of Route 3, Box 3, Colona, Henry County, Illinois. Berniece and Darwin Kershaw reside in Colona, Illinois, and Darrell Kershaw resides in Florida. (Comp. at 2.)

KMHP serves an estimated population of 265. (Comp. at 3.) KMHP has its own sewage treatment plant. There are approximately 30 septic tanks, each serving 3 trailers. The effluent from these tanks is delivered by individual sewers to the sewage treatment plant's 3-cell lagoon system. The lagoon system discharges into a backwater slough of the Rock River. (Comp. at 2.)

KMHP has two groundwater wells with associated pressure tanks, mains and piping. One well serves approximately 94 lots and the other approximately 12 lots. The wells also serve 3 houses and a large building, containing stores and a laundry. (Comp. at 2 and 3.)

ALLEGATIONS

Count I

Count I of the complaint alleges violations of Section 12(a) of the Act and 35 Ill. Adm. Code 304.106, 304.120(c) and 304.121(a). These regulations deal with water quality parameters for discharges. Section 304.106 states:

> "In addition to the other requirements of this Part, no effluent shall contain settleable solids, floating debris, visible oil, grease, scum or sludge solids. Color, odor and turbidity must be reduce to below obvious levels."

The complaint alleges that from "at least November 13, 1985, and continuing until at least June 18, 1990" the Kershaws caused or allowed discharges containing settleable solids with obvious odor and turbidity from respondent's sewage treatment plant. "This condition continued until at least March 23, 1992, on which date the Agency inspected the [KMHP] and found that the effluent from the [sewage treatment plant] was green and turbid." (Comp. at 4.)

The Board's water pollution regulations at Section 304.121(a) provides:

> Section 304.121 Bacteria
>
> a) Effluents discharged to all general use waters shall

> not exceed 400 fecal coliforms per 100 ml unless the Illinois Environmental Protection Agency determines that an alternative effluent standard is applicable pursuant to subsection (b).

The fecal coliform limit of 400 per 100 milliliters (ml) was violated at least 5 months between March 1986 and May 1987. The "greatest excessive concentration occurred in March 1986, when the concentration was 87,000 per 100 ml. The Kershaws failed to provide effluent disinfection in order to assure that the effluent did not exceed 400 fecal coliform per 100 ml." (Comp. at 6.)

Section 304.120(c) states:

> Except as provided in Section 306.103, all effluents containing deoxygenating wastes shall meet the following standards:
>
> c) No effluent whose dilution ratio is less than five to one shall exceed 10 mg/l of BOD_5 or 12 mg/l of suspended solids, except that sources employing third-stage treatment lagoons shall be exempt from this subsection (c) provided all of the following conditions are met...

The record shows that "the BOD_5 effluent of 10 mg/l on a monthly average was in fact violated at least 18 months between November 1985 and March 1990". (Mot. at 7.)

Count II

Count II of the complaint alleges violations of Sections 12(a) and (f) of the Act and 35 Ill. Adm. Code 305.102(b) and 305.103. The complaint alleges that the respondents had no National Pollutant Discharge Elimination System (NPDES) permit from May 1, 1983, through March 6, 1991. Further, the complaint alleges that respondents failed to perform tests and monitoring as required by their previous NPDES permit. (Comp. at 9-10.)

Count III

Count III alleges violations of Section 12(f) of the Act and 35 Ill. Adm. Code 309.102(a) and 309.104(a). Specifically, the allegation is that respondents operated their facility without a NPDES permit. (Comp. at 12-13.)

Count IV

Count IV alleges violations of Section 18(a) of the Act and 35 Ill. Adm. Code 601.101, 653.109, and 653.118 as well as Part

7.2.4 of the Recommended Standards for Water Works (1982).[2] The complaint alleges that the respondents are a public water supply. (Comp. at 15.) As a public water supply the complaint alleges that respondents failed to keep proper air pressure in the tanks. (Comp. at 18.) In addition, the complaint alleges that one of respondent's water wells was located within 5 feet of the restroom stool and cast iron sewer line. (Comp. at 19.)

MOTION FOR SUMMARY JUDGMENT

The motion for summary judgment includes full affidavits and supporting documents from the Illinois Environmental Protection Agency files. (See attachments B-F.) These affidavits and documents support the allegations set forth in the complaint. In addition, the motion includes a request for admission of facts which was served upon respondents Berniece Kershaw and Darwin Dale Kershaw on December 3, 1992. (Mot. Attch. A.) The admission of facts was not answered by respondent. Therefore, pursuant to 35 Ill. Adm. Code 103.162(c) the facts are deemed admitted.

The facts which are admitted by respondents include that respondents operated the sewage treatment plant without a NPDES permit. (Mot. Attch. A at 3.) In addition, respondents admit ownership of the facility as well as ownership of the wells and water supply. (Mot. Attch. B at 2.)

The complainant has presented substantial evidence in support of its allegations. Further, the respondents' failure to respond to the request for admission of facts has resulted in material facts being deemed admitted. Therefore, the Board finds that there are no genuine issues of fact to be determined. Further, the Board finds that the complainant has presented sufficient evidence to warrant granting of summary judgment in complainant's favor and that as a matter of law complainants are entitled to judgment. Thus, the Board finds respondents in violation as alleged in each of the four counts of the complaint.

PENALTY

Having found violation, the Board must now determine the penalty to be assessed. The complainant points out that the total maximum penalty which could be assessed is seven hundred sixteen million one hundred thousand dollars ($716,100,000.00). (Mot. at 25.) Complainant is however only asking for two hundred fifty thousand dollars ($250,000.00). The motion states that

[2] This standard is incorporated in the Agency's regualtions at 35 Ill. Adm. Code 652.111.

complainant has determined that such penalty "will serve to deter further violations and aid in future voluntary enforcement of the Act and Board regulations". (Mot. at 25.) In determining the unreasonableness of the alleged pollution, the Board must take into account factors outlined in Section 33(c) of the Act. (Wells Manufacturing Company v. Pollution Control Board, 73 Ill.2d 226, 383 N.E.2d 148 (1978).) In addition, the Board is authorized by statute to consider the factors in Section 42(h) of the Act in determining an appropriate penalty.

Section 33(c) Factors

Section 33(c) sets forth five factors which 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.

Section 33(c)(1)-(4) The complainant states that the Kershaws have created a "nuisance and caused actual or potential harm to human health". (Mot. at 22.) In addition, the complainant indicates that the mobile home park does have "moderate social and economic value" and is suitable to the rural area in which it is located. (Mot. at 22.) Further, complying with the requirements of the Act and regulations is technically feasible and economically reasonable according to complainant. (Mot. at 22.)

Section 33(c)(5) The complainant also discusses whether or not there has been subsequent compliance. On December 17, 1985, an enforcement letter was mailed to the Kershaws and a subsequent meeting resulted in a tentative settlement agreement. However, the Kershaws failed to perform their obligations under the settlement. (Mot. at 22.) In 1987, 1990 and 1991 further meetings took place with the Kershaws. On May 23, 1992, "the IEPA inspected the facility and found that conditions there were essentially unchanged from those noted in a May 1990 inspection".

(Mot. at 23.) In July 1992, the Kershaws retained an engineering consultant to recommend changes to bring the facility into compliance. (Mot. at 23.)

Section 42(h) Factors

Section 42(h) 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.

Section 42(h)(1) The Board finds that the Complainants requested penalty of two hundred fifty thousand dollars ($250,000) is appropriate given the number of years of violation, the serious nature of the violations, the number of people at risk, the varied violations, and the many meetings with Agency officials attempting to bring the facility into compliance. The respondents have been in violation of the Act since October 1978 through at least October 1992. (Mot. at 24.) When records were available, they showed serious violation of water discharge standards, including standards for suspended solids, BOD_5, and fecal coliform. (Comp. at 4-6.) Respondents also failed to perform required tests so determining the full magnitude of their non-compliance is frustrated by respondent's noncompliance with Board regulations. From October 14, 1978, through October 29, 1992, respondents "failed to perform flow measurement and monitor effluent discharge as required by their NPDES permit". (Comp. at 9.) Respondent's also violated public water supply regulations, including siting a restroom stool a distance of five feet from a well serving over 200 people. (Comp. at 19.) The Board notes that KMHP serves a community population estimated at 265. (Comp. at 3.) The unhealthy discharges from the sewage treatment plant,

and the violation of public water supply regulations (Comp. at 14-19), put that large community at risk.

Section 42(h)(2)-(4) The Agency and the Attorney General's Office have stated in the record that there have been several meetings over the years with respondents. At those meetings "the state has made numerous attempts to bring the Kershaws into compliance with the Act". (Mot. at 24.) Further, the Kershaws "accrued a substantial economic benefit by not making the improvements necessary to bring the [KMHP] wastewater treatment plant into compliance". (Mot. at 25.) Complainant believes "that a total penalty of Two Hundred Fifty Thousand Dollars ($250,000) will serve to deter further violations and aid in future voluntary enforcement of the Act and Board regulations. (Mot. at 25.)

Section 42(h)(5) The complainant notes that in 1990, the Illinois Department of Public Health suspended the respondents' license to run the mobile home park because a licensing inspection "revealed numerous problems with the sewage treatment plant". (Mot. at 26.) The complainant notes that the following year the license was reinstated. (Mot. at 26.) However, despite the long term nature of the violations, there are no "previously adjudicated violations of this Act by the violator".

Conclusion

After considering the record in this case and the factors outlined in Section 33(c) and 42(h) of the Act, the Board finds that the penalty requested by the complainant is reasonable. The Board will order respondents to pay a penalty of two hundred fifty thousand dollars ($250,000).

COSTS AND FEES

The complaint asked that the respondents be ordered to pay all costs including attorney, expert witness and consultant fees, expended by the State in pursuit of this action. (Comp. at 9,13,15,21.) The Attorney General's motion (Comp. at 26) states that documentation of costs and fees will be provided if the Board so requests. Under Section 42(f) of the Act, the Board may award "costs and reasonable attorney's fees, including the reasonable costs of expert witnesses and consultants" in a case where the Attorney General has prevailed "against a person who has committed a willful, knowing or repeated violation of the Act". Such monies are to be deposited in the Hazardous Waste Fund created in Section 22.2 of the Act. Implementation of Section 42(f) requires certain findings which must be based on the record. In cases where the Attorney General asks to recover costs and fees it would be most helpful if the complaint would request them pursuant to Section 42(f). Additionally, a

discussion of which evidence specifically supports a finding of willful, knowing or repeated violations should be presented.

The record indicates that respondents committed additional violations of the Act even after being notified that the operation of respondents' facility was in violation of the Act. (See Mot. at 22-24.)[3] Thus, the Board finds that the respondent committed repeated and knowing violations of the Act. Therefore the Board will open a Docket B in this proceeding to assess reasonable costs and fees to the respondents as provided in Section 42(f) of the Act. Complainants are directed to file an affidavit of costs and fees with the clerk of the Board within 30 days of this date.

ORDER

The respondents shall pay Two Hundred Fifty Thousand Dollars ($250,000) within 30 days of the date of this Order.

Such payment shall be made by certified check or money order payable to the Treasurer of the State of Illinois, designated to the Environmental Protection Trust Fund, and shall be sent by First Class mail to:

Illinois Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road
P.O. Box 19276
Springfield, IL 62794-9276

Respondents shall also write its Federal Employer Identification Number or Social Security Number on the certified check or money order. Any such penalty not paid within the time prescribed shall incur interest at the rate set forth in subsection (a) of Section 1003 of the Illinois Income Tax Act, (35 ILCS 5/1003), as now or hereafter amended, from the date payment is due until the date payment is received. Interest shall not accrue during the pendency of an appeal during which payment of the penalty has been stayed.

Respondent shall cease and desist from the alleged violations.

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[3]The Board notes that this case is distinguishable from Chicago Heights Refuse Depot (cite) wherein the Board determined that there is a distinction between "continuing" violations and "repeated" violations. In the instant matter the respondents were first notified of violations in 1985 and yet as late as 1992, the respondents were in violation for failure to perform required test procedures. (Comp. at 9.)

The Board hereby opens Docket B in this proceeding. Complainants are directed to file an affidavit of costs and fees with the Clerk of the Board within 30 days of the date of this Order.

IT IS SO ORDERED.

Board Member Joan Anderson concurs.

Section 41 of the Environmental Protection Act (415 ILCS 5/41) provides for the appeal of final Board orders within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also, 35 Ill. Adm. Code 101.246, Motions for Reconsideration, and Casteneda v. Illinois Human Rights Commission (1989), 132 Ill. 2d 304, 547 N.E.2d 437; Strube v. Illinois Pollution Control Board, No. 3-92-0468, slip op. at 4-5 (3d Dist. March 15, 1993).)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 8th day of April, 1993, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board