ILLINOIS POLLUTION CONTROL BOARD
February 25, 1993

GOOSE LAKE ASSOCIATION,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 90-170
	)	(Enforcement)
ROBERT J. DRAKE, SR., and	)	
FIRST BANK OF JOLIET as	)	
TRUSTEE, Trust No. 370,	)	
	)	
Respondents.	)	

JAMES W. HOMAN APPEARED ON BEHALF OF COMPLAINANT, AND

PAUL E. ROOT APPEARED ON BEHALF OF RESPONDENTS.

OPINION AND ORDER OF THE BOARD (by J. Anderson):

On August 30, 1990, Goose Lake Association (Association) filed a complaint with the Board. The complaint named Robert J. Drake, Sr. (Drake) and the First National Bank of Joliet as Trustee, Trust No. 370 (FNB), as respondents. Hearings were held on November 4 and 5, 1991, and on December 4, 9 and 12, 1991, in Morris, Illinois. The Association filed its post-hearing brief on February 24, 1992. Respondents filed their response brief on March 23, 1992. The Association filed its reply brief on April 10, 1992. There were members of the public present at the hearing.

In its complaint, the Association alleges that the sewage system proposed for respondents' development (Botomika) will pollute the adjoining lake in violation of Sections 11(a)(1), 11(b), and 12(a)-(d) of the Environmental Protection Act (Act), 415 ILCS 5/11(a)(1), 11(b), 12(a)-(d) (1992).[1] In its petition, the Association requests the Board to enjoin respondents from further developing Botomika until a sewage disposal system for that property is proposed that will not be a serious pollutant to the lake and adjoining well water. In its post-hearing briefs, the Association requests the following relief: order respondents to cease and desist all further activities; order Grundy County (County) and respondents to cease and desist from the issuance of any further sanitary permits until there are adequate ground water levels and more thorough approval and maintenance provisions; order respondents to fill roadside drainage ditches; order respondents to cease and desist from all development

[1]These sections of the Act were previously codified at Ill. Rev.Stat. 1991, ch. 111½, pars. 1011(a)(1), 1011(b), 1012(a)-(d).

activities and the issuance of sanitary system applications; or order respondents to install a community waste treatment facility and fill the ditches.

For the reasons expressed below, the Board finds that neither Mr. Drake nor FNB have violated Sections 11(a)(1), 11(b), or 12(a)-(d) of the Act.

PROCEDURAL HISTORY

As previously stated, the Association filed its complaint on August 30, 1990. On August 31, 1991, respondents filed a motion to dismiss and a memorandum of law in support of their motion. Respondents' motion was premised upon the assertion that Mr. Drake had no ownership interest in Botomika, that the controversy was the subject of a lawsuit pending in Grundy County Circuit Court (circuit court), and that the Board lacked the authority to grant injunctive relief. On September 14, 1990, the Association filed its response to respondents' motion to dismiss. On September 21, 1990, the Association then filed a supplement to its motion to dismiss. On October 25, 1990, the Board denied respondents' motion to dismiss and accepted the case for hearing. More specifically, the Board found that the case was not duplicitous in light of the fact that the suit in the circuit court had been dismissed. The Board also stated that it would rule on respondents' motion to dismiss Mr. Drake when it decided the case and that it construed the Association's request for injunctive relief as a request for a cease and desist order.

On January 23, 1991, the People of the State of Illinois, Grundy County (People), filed a petition to intervene in this matter. On January 31, 1991, respondents filed an objection to the People's petition to intervene. On February 11, 1991, the Association filed its response to the petition to intervene. On February 13, 1991, the People filed a reply to respondents' objection as well as an amended petition to intervene. On March 4, 1991, the hearing officer issued an order denying the People's motion to intervene but allowing the People to file an amicus curiae brief limited to the issues raised at hearing or by stipulation between the Association and respondents.

On March 26, 1991, the Association filed a motion to add the County as an additional defendant in the case. On March 28, 1991, respondents filed an objection to the Association's motion. In addition to objecting to the Association's motion, respondents alleged that the Association was an intervenor-defendant in the circuit court action and was bound by a settlement agreement reached therein. On April 8, 1991, the Association filed a reply to respondents' objection. On April 11, 1991, the Board issued an order granting the Association ten days to file additional information about the issues raised in the circuit court case before ruling on the Association's March 26, 1991 motion. On May

6, 1991, the hearing officer in this matter denied the Association's motion to add the County as a party. On May 9, 1991, the Board issued an order stating that because it did not receive any information regarding the circuit court case, it would accept the matter for hearing. On May 15, 1991, respondents filed a motion seeking to have the Board reconsider its May 9, 1991 order. On June 6, 1991, the Board issued an order denying the motion.

On August 17, 1992, the Association filed a motion asking the Board to supplement its proofs with aerial photographs and letter opinions or to reopen the proofs so that it could submit the new information and allow respondents the opportunity for cross-examination. On August 25, 1992, respondents filed a motion requesting the Board to grant it a 25-day extension to file a response to the Association's motion. On September 17, 1992, the Board issued an order noting that respondents' request for a 25-day extension was moot because respondents filed a response on August 28, 1992. The Board also denied the Association's request to reopen or supplement its proofs.

BACKGROUND

Botomika is a subdivision located in a rural area of Grundy County, Illinois, referred to as Goose Lake. Goose Lake consists of approximately ten subdivisions and includes the following three private lakes: Lincoln Lake, Beaver Lake, and Goose Lake. Goose Lake residents use the lakes for recreational purposes. There are currently approximately 600 residences located in Goose Lake. All of the residences treat their domestic sanitary waste by means of private sewage disposal facilities.

Botomika is located on 96 acres immediately adjacent to the southern portion of Lincoln Lake, the largest of the three lakes. There are 54 one-acre lots in the subdivision, 26 of which front the lake while the remainder are set back from the lake.

In 1987, FNB filed an application with the County for approval of the preliminary plat of subdivision for Botomika. The Association intervened in the subdivision proceedings and opposed Botomika during the planning commission's public hearings. In December 1987, and following hearings in late 1987, the Grundy County Board (County Board) voted to reject Botomika's preliminary plat.

Subsequent to the County Board's rejection, FNB filed suit in circuit court against the County to obtain approval of the plat. The Association intervened in that suit as a defendant and was a participant in the proceedings. After the 1989 trial, a judgment was entered in favor of FNB.

The County and the Association appealed the circuit court's

judgment. The appellate court reversed the circuit court's decision and remanded the matter for "weighing" the evidence rather than applying an "arbitrary and unreasonable standard" to the County's actions. First National Bank of Joliet, as Trustee under Trust No. 370, et al. v. County of Grundy, et al. (3rd Dist. 1990), 197 Ill. App. 3d 660, 554 N.E.2d 1089.

On May 18, 1990, the County and FNB entered into a settlement agreement that provided for the approval of Botomika's preliminary and final plats and regulated the private sewage disposal facilities to be installed in the subdivision. The settlement terminated the litigation between FNB and the County and resulted in the County Board's approval of Botomika's final plat. On September 26, 1991, the appellate court dismissed its case.

On May 18, 1990, the Association filed a complaint against FNB, Robert W. Drake, Jr., Thomas E. Drake, Michael J. Drake, and Robert W. Drake, Sr., as Trustee of the Katherine Lucille Ammer Family Trust, in the circuit court to enjoin development of Botomika. On September 30, 1990, the circuit court dismissed the case.

On April 3, 1991, the Association filed another complaint against FNB, Robert W. Drake, Jr., Thomas E. Drake, Michael J. Drake, and Robert W. Drake, Sr., as Trustee of the Katherine Lucille Ammer Family Trust, in the circuit court. The Association requested that the court declare that no property owners in Botomika could use Lincoln Lake and the other lakes in Goose Lake. On September 20, 1991, the case was dismissed.

On June 20, 1991, the Association filed another complaint in the circuit court. That complaint named Grundy County, the Grundy County Planning, Zoning & Building Department, the Grundy County State's Attorney's Office, and the Grundy County Health Department as defendants. The complaint challenged the drainage of surface waters from Botomika into Lincoln Lake and sedimentation in the lake allegedly caused by Botomika's development. The suit remains pending.

During the summer of 1990, construction of improvements for Botomika commenced. As of December 1991, development of Botomika had not been completed. The most recent work done at that time was the paving of the roads, reshaping of the outfall ditches, placement of fabric, riprap, and seeding blanket in the ditches.

PRELIMINARY MATTERS

As stated above, on August 31, 1990, respondents filed a motion asking that the Board to dismiss Robert W. Drake, Sr. as a

respondent in this matter.[2] In an October 25, 1990 order, the Board held that it would rule on respondents' motion to dismiss when it decided the case.[3]

Respondents allege that, for all relevant times, the beneficial owners of Trust No. 370 have been "Robert W. Drake, Sr. as trustee for his daughter, Katherine Ammer, Robert W. Drake, Jr., Michael Drake, and Thomas Drake". Respondents next allege that Mr. Drake has no beneficial ownership interest in Trust 370, has no legal or equitable ownership in Botomika, has not taken any role in the development of Botomika, and has no financial interest in Botomika. (Motion to Dismiss p. 1 - Affidavit pars. 1, 2, Memorandum of Law in Support of Motion p. 6.)

As support for their arguments, respondents note that the Association's president testified that he was advised by Mr. Drake in the late 1960s that Botomika was owned by Mr. Drake's children. (Resp. Br. p. 25, Tr. 1142.) Respondents also point to the fact that Mr. Drake, in a discovery deposition taken prior to hearing and stipulated into the record by the parties, testified that he was not the developer of Botomika and had no financial interest in the development. (Resp. Br. p. 26, Comp. Ex. 10 p. 5) Finally, respondents note that the Association never named Mr. Drake as a defendant in any of its other lawsuits, but named FNB and the beneficial owner of the land trust. (Resp. Br. p. 26.)

The Association alleges that Mr. Drake controls the power of direction for the land trust in that he is the actual power and authority which guides the trustee in its decision making. (September 14, 1990 Response to Motion to Dismiss par. 1.) In fact, the Association points to evidence adduced at hearing that indicates that Mr. Drake acted as developer for Botomika. Specifically, the Association asserts that Mr. Drake was present at several Grundy County meetings concerning the development, has his personal home phone on the sign which advertises the sale of lots in Botomika, makes sales calls for Botomika, and demanded that a sanitary permit system for Botomika be issued by the Grundy County Health Department. (Reply Br. p. 12; Tr. 915-916, 917-918; Comp. Ex. 10 pp. 9-11, 13-14.) The Association also alleges that Mr. Drake has previously been the principal developer for all of the other residential phases contained in the Association which adjoins the property at issue. (September

---

[2]In an affidavit attached to the motion, Mr. Drake attested that he is the same individual as the named respondent, "Robert J. Drake, Sr.". (Affidavit par. 1.)

[3]The Association, in its reply brief, incorrectly states that the Board already ruled on this issue. (Reply Br. p. 12.)

14, 1990 Response to Motion to Dismiss par. 2.) The Association finally asserts that joinder of Mr. Drake will prevent the situation where the land trust is enjoined from activity but Mr. Drake is free to conduct the activity for which the trust is enjoined. (September 14, 1990 Response to Motion to Dismiss par. 3.)

The Board finds that respondents have cited no authority on why Mr. Drake could not exercise control over the property to stop a violation of the Act and Board's regulations from occurring, should he choose to do so. Turner v. Chicago Title & Trust Co. (February 27, 1992), PCB 91-146 at 2, 16, 130 PCB 227, 228, 242; Turner v. Franke (February 27, 1992), PCB 91-148 at 16, 130 PCB 259, 274. In fact, certain evidence suggests that Mr. Drake has been an active participant in the management of the property. (Tr. 915-916, 917-918; Comp. Ex. 10 pp. 9-11, 13-14.) Accordingly, the Board hereby denies respondents' motion to dismiss Mr. Drake as a respondent in this matter.

DISCUSSION

The issue before the Board is whether respondents caused or violated Sections 11(a)(1), 11(b), 12(a)-(d) of the Act. The Association specifically "challenges the applicability of all currently known individual sanitary systems for use [in Botomika]" and argues that the individual sanitary systems in Botomika, given the soil, existing water table, density of the site, and the site's proximity to Lincoln Lake, will lead to contaminants and effluents that pollute Lincoln Lake. (Association's Br. at 2-9.)

Section 11(a)(1) and (b)

Section 11(a)(1) of the Act states:

> that pollution of the waters of this State constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish, and aquatic life, impairs domestic, agricultural, industrial, recreational, and other legitimate beneficial uses of water, depresses property values, and offends the senses;....

Section 11(b) of the Act states, in part, as follows:

> [i]t is the purpose of this Title to restore, maintain, and enhance the purity of the waters of this State in order to protect health, welfare, property, and the quality of life, and to assure that no contaminants are discharged 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 source

> within the state of Illinois, without being given the degree of treatment or control necessary to prevent pollution, or without being made subject to such conditions as are required to achieve and maintain compliance with State and federal law....

As can be seen above, Section 11(a)(1) and (b) of the Act set forth legislative declarations, and do not enumerate prohibited acts. Accordingly, the Board hereby finds that Mr. Drake and FNB can not violate Section 11(a)(1) and (b) of the Act.

Section 12(a)

Section 12(a) of the Act states:

> 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;...

Subsection (a) prohibits a person from causing, threatening, or allowing the discharge of any contaminants into the environment so as to 1) cause or tend to cause water pollution in Illinois, or 2) violate regulations or standards adopted by the Board pursuant to the Act.

First, we will address the Association's allegation that respondents cause or allow the discharge of any contaminants into the environment so as to cause or tend to cause water pollution in Illinois. Section 3.55 of the Act defines "water pollution" as:

> ...[an] alteration of the physical, thermal, chemical, biological or radioactive properties of any water 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.

In those court cases that discuss the meaning of the phrase "cause or allow", the courts have determined that the phrase

relates to a person's past or ongoing acts or omissions. Perkinson v. IPCB (3rd Dist. 1989), 187 Ill. App. 3d 689, 543 N.E.2d 901; Hindman v. EPA (5th Dist. 1976), 42 Ill. App. 3d 766, 356 N.E.2d 669; Freeman Coal Mining Corp. v. IPCB (3rd Dist. 1974), 21 Ill. App. 3d 157, 313 N.E.2d 616; Meadowlark Farms v. IPCB (5th Dist. 1974), 17 Ill. App. 3d 851, 308 N.E.2d 829; Bath, Inc. v. IPCB (4th Dist. 1973), 10 Ill. App. 3d 507, 294 N.E.2d 778. (see also Turner v. Chicago, Title & Trust Co. (February 27, 1992), PCB 91-146, 130 PCB 227; Turner v. Franke (February 27, 1992), PCB 91-148, 130 PCB 259; County of Jackson v. Taylor (1991), AC 89-258, 118 PCB 37.)

The Association, in presenting its case, questions only the effect of individual sanitary systems in light of the existing conditions at Botomika (i.e., soil, ground water levels, drainage, density, and proximity to Lincoln Lake). Because no private sewage disposal systems were installed in Botomika as of the date the complaint was filed, respondents have not thus far caused or allowed the discharge of any contaminants into the environment so as to cause or tend to cause water pollution.

In fact, the Association notes only that there are currently six roadside ditch entrances on the property and that such entrances currently cause roadside ditch runoff to go directly into Lincoln Lake. (Association's Br. p. 8, Tr. 34.) The Association, however, has offered no evidence showing a discharge of any specific contaminants from the ditches themselves. In fact, the Association notes only that water quality testing indicates that Lincoln Lake is showing some effects (i.e., increases in ammonia and nitrogen) from septic systems in existing residential areas. (Association's Br. p. 9; Tr. 444; Resp. Ex. 15.) Moreover, even though the Association also asserts that there is increased fecal coliform level in the lake, there is no assertion that respondents' activities caused the increase. (Association's Br. 9; Tr. 416; Resp. Ex. 15.)

The Board next turns to the issue of whether respondents threaten to discharge any contaminants into the environment so as to cause or tend to cause water pollution. Although the above-mentioned cases discuss the meaning of the phrase "cause or allow", we believe that the holdings in those cases are dispositive on the issue of whether respondents threaten to discharge contaminants in the instant case.

Freeman Coal Mining Corp. v. IPCB (3rd Dist. 1974), 21 Ill. App. 3d 157, 313 N.E.2d 616, involved a petitioner who was an owner of a coal mine that maintained a mine refuse pile. Rainfall upon the pile resulted in an acidic contaminant which washed into an unnamed waterway causing water pollution. The petitioner argued that it could not be held liable for "allowing such discharges because the discharges were the result of a natural force beyond the control of the petitioner." The court

found that the Act is malum prohibitum and that no proof of guilty knowledge or mens rea is necessary to a finding of guilt. Id. at 621. The court went on to say that the fact that the discharges were unintentional, or occurred despite efforts to prevent them, is not a defense. Id. The owner of the property that creates the pollution has a duty, imposed by the legislature, to take all prudent measures to prevent the pollution. The efforts by the landowner to control or treat the pollution go to the issue of mitigation, not to the primary issue of liability. Id.

Meadowlark Farms v. IPCB (5th Dist. 1974), 17 Ill. App. 3d 851, 308 N.E.2d 829, involved a situation where iron pyrites, in the form of refuse piles on a surface estate, were abandoned by the owner of the mineral estate. Ownership of the property, excepting the mineral estate lying beneath the surface, was transferred to petitioner via a warranty deed. The court concluded that the refuse piles remained part of the mineral estate on or above the surface of the property. Id. at 835. The court, however, held that petitioner was the owner of the refuse piles, and thus was responsible for the pollutional discharge emanating from the piles since the ownership of the property, excepting the mineral estate lying beneath the surface, was transferred to the petitioner via a warranty deed. Id. at 836. Accordingly, the court affirmed the Board's finding that petitioner had violated Section 12(a) of the Act. The court specifically stated:

> [p]etitioner further argues that it has not caused, threatened or allowed the discharge of contaminants within the meaning of section 12(a) of the Act...Petitioner contends that its mere ownership of the surface estate from which the discharge originates is the only relationship to the transaction responsible for the discharge and that to expect the petitioner to exercise control to prevent pollution would be unreasonable. In conjunction, the petitioner states that its lack of knowledge that the discharge of contaminants was occurring is a defense to the complaint. We find these arguments without merit. To clarify this issue, it should be noted that the petitioner was charged with causing or allowing the discharge of contaminants so as to cause or tend to cause water pollution...in violation of Section 12(a) of the...Act....Petitioner was not charged with creating the refuse piles or with responsibility for the creation of the refuse pile. The...Board merely found that the petitioner had ownership of the surface rights of the property which was the source of the violation, that the evidence showed that the pollution had its source on that property and that fish were killed, and that the petitioner had the capability of

controlling the pollutional discharge. Therefore, petitioner was found to have violated section 12(a) of the Act, as well as violating the other rules and regulations related to water pollution. The findings of the Board were correct.

We have found that the petitioner was the owner of the refuse piles which were the source of the pollutional discharge, but to see how the petitioner violated the Act, we must look to the Act itself. Section 12(a), which petitioner was found guilty of violating, states that:

* * * *

Petitioner admits that seepage from the refuse pile containing AMD had created a flow in the tributary of Brush Creek and that the fish died as a result of the AMD seepage. Furthermore, soon after the petitioner was given notice of its violation, Amax Coal Co., a division of the petitioner's parent company, investigated the charges and began an abatement program. The unquestioned pollution proves sufficiently that the petitioner allowed the discharge within the meaning of section 12(a).

(Id. at 836.)

Perkinson v. IPCB (3rd Dist. 1989), 187 Ill. App. 3d 689, 543 N.E.2d 901, involved a petitioner who was an owner and operator of a swine farm. Liquid swine waste escaped, via a man-made trench, from a lagoon where the waste was accumulated from the swine buildings. The waste then entered a tributary causing water pollution. Petitioner did not cause or authorize the trench and had no knowledge of who was responsible for it. The petitioner argued that he was not guilty of "causing or allowing" the discharge because the trench was dug by a trespassing vandal. In affirming the Board's finding of violation of Section 12(a)-(f) of the Act, the court specifically stated:

The case before us is controlled by the long line of precedent in Illinois which holds that the owner of the source of the pollution causes or allows the pollution within the meaning of the statute and is responsible for that pollution unless the facts established the owner either lacked the capability to control the source, as in Phillips Petroleum or had undertaken extensive precautions to prevent vandalism or other intervening causes, as in Union Petroleum. Here Perkinson plainly had control of the lagoon and the land where the pollution discharge occurred. The PCB concluded that he is liable for the pollution that had

> its source on his land and in a waste facility under his control. Under well-established Illinois law, that is sufficient to support a finding of a violation of the Environmental Protection Act.
>
> (Id. at 336.)

(See also Hindman v. EPA (5th Dist. 1976), 42 Ill. App. 3d 766, 356 N.E.2d 669; Bath, Inc. v. IPCB (4th Dist. 1973), 10 Ill. App. 3d 507, 294 N.E.2d 778; Turner v. Chicago, Title & Trust Co. (February 27, 1992), PCB 91-146, 130 PCB 227; Turner v. Franke (February 27, 1992), PCB 91-148, 130 PCB 259; County of Jackson v. Taylor (January 10, 1991), AC 89-258, 118 PCB 37.)

As can be seen from the above cases, in order to find that a person "caused or allowed" pollution, a person must have an ownership interest in the source of the pollution, whether that source is located on real property or is the real property itself. Likewise, in order to determine whether a person "threatens" to discharge a contaminant, it must be proven that a person has or will have an ownership interest in the source of the pollution at the time that the pollution occurs.

In an enforcement proceeding before the Board, the burden of proof is a preponderance of the evidence. Lefton Iron & Metal Company, Inc. v. City of East St. Louis (April 12, 1990), PCB 89-53 at 3, 110 PCB 19, 21; Bachert v. Village of Toledo Illinois, et al. (November 7, 1985), PCB 85-80 at 3, 66 PCB 279, 281; Industrial Salvage Inc. v. County of Marion (August 2, 1984), PCB 83-173 at 3-4, 59 PCB 233, 235-236, citing Arrington v. Water E. Heller International Corp. (1st Dist. 1975), 30 Ill. App. 3d 631, 333 N.E.2d 50. 58. A proposition is proved by a preponderance of the evidence when it is more probably true than not. Industrial Salvage at 4, 59, 233, 236, citing Estate of Ragen (1st Dist. 1979), 79 Ill. App. 3d 8, 198 N.E.2d 198, 203. It is complainant's burden to prove a proposition by a preponderance of the evidence.

As previously stated, the Association questions only the effect of individual sanitary systems in light of the existing conditions at Botomika. The Association, however, has failed to adduce any evidence that respondents will own the private sewage disposal systems or the property in which the systems will be installed, or that respondents will otherwise be responsible for the systems or have the capability of controlling discharges, if any, from the systems.

It appears that the Association is attempting to stop respondents from developing Botomika and selling the lots to buyers who will install sanitary systems that may generate pollution in the future. In other words, the Association is attempting to guard against pollution that prospective buyers may

generate. Even if we were to hold respondents somehow responsible for the sanitary systems, we emphasize that there is no indication in the record that all types of sanitary systems would be inappropriate for the property. For example, evidence was adduced at hearing, from both the Association's and respondents' experts, that there are systems (e.g., the "Wisconsin mound" sanitary system) that, with proper modifications or safeguards, could be safely utilized at the site. (Tr. 556-559, 559-561, 565-566, 615-616, 644-49, 691-692, 1210-1212, 1223-1226; Resp. Ex. 16.) The Association's only argument in rebuttal is that there is no assurance that the Wisconsin mound system will be the selected system in Botomika because the choice of sanitary system is left to the individual discretion of each property owner and the County rather than respondents. (Reply Br. p. 9.) Although there is no guarantee that prospective buyers will utilize the Wisconsin mound system, there is no proof that buyers will refuse to use such a system.

We emphasize that we are not making a finding that a sanitary system can never result in pollution or that, in this instance, the owners of the sanitary systems can never be held liable for a violation of Section 12(a) of the Act. Nor does the Board wish to infer in any manner that it has a lack of concern over problems caused by sanitary systems, especially those located near lakes. The owners who install the sanitary systems in Botomika are well cautioned to install systems that will not result in pollution.

The Association also has offered no evidence that the roadside ditches themselves could be construed as a source of pollution in the future. Even if it could be determined that the ditches were a source of pollution, however, it has not been shown that respondents will have any ownership interest in the ditches or other common areas at Botomika once the subdivision is completed and all of the individual lots are sold.

Finally, the Board will address the Association's allegation that respondents cause, threaten, or allow the discharge of any contaminants into the environment so as to violate specific Board regulations or standards. This Board has looked with disfavor upon any reliance on general prohibitions that reference the Board's regulations or standards without citation to such regulations or standards. ESG Watts, Inc. v. IEPA (October 29, 1992), PCB 92-54 at 9. In ESG Watts, the Agency cited to Section 21(d)(2) of the Act as a basis for its denial of Watts' waste stream permit applications. That section prohibits a person from conducting a waste-disposal operation in "violation of any regulations or standards adopted by the Board under [the] Act." The Board held that "...without citation to any regulation or standard, the Agency cannot rely on this general prohibition, which by its very terms is dependent on the provisions of a regulation or standard, as a basis for permit denial." (Id.)

Just as the Agency is prohibited from basing a permit denial on a provision that contains a general reference to the Board's regulations or standards, a complainant cannot rely on a general provision as the basis of an enforcement action without more. A complainant must actually allege the specific Board regulations or standards that are being violated. If this were not the case, a respondent would be placed in the position of defending itself against unspecified violations.

Based on the above, the Board finds that there is no factual basis to support the allegation that Mr. Drake or FNB have caused, threatened, or allowed the discharge of any contaminants into the environment so as to 1) cause or tend to cause water pollution, or 2) violate the Board's regulations or standards. As a result, there is no factual basis to support the allegation that Mr. Drake or FNB have violated Section 12(a) of the Act.

Section 12(b) and (c)

Section 12(b) and (c) of the Act state:

No person shall:

* * *

b. Construct, install, or operate any equipment, facility, vessel, or aircraft capable of causing or contributing to water pollution, or designed to prevent water pollution, of any type designated by Board regulations, without a permit granted by the Agency, or in violation of any conditions imposed by such permit;

c. Increase the quantity or strength of any discharge of contaminants into the waters, or construct or install any sewer or sewage treatment facility or any new outlet for contaminants into the waters of this state, without a permit granted by the Agency;

Section 12(b) and (c) address a person's failure to obtain a permit required by the Environmental Protection Agency (Agency) to conduct specific activities. The Association has failed to adduce any evidence at hearing that Mr. Drake or FNB were required to obtain permits from the Agency. Rather, the Association, in its post-hearing briefs, only refers to permits issued by the Grundy County Health Department or by the County. (Reply Br. pp. 13-14.) Accordingly, the Board finds that there is no factual allegations that Mr. Drake or FNB have violated Sections 12(b) or (c) of the Act in that the Association has failed to allege that respondents were required to obtain any

Agency permits.

Section 12(d)

Section 12(d) of the Act states:

No person shall:

* * *

d. Deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard....

Again, the Association, in presenting its case, questions only the effect of individual sanitary systems in light of the existing conditions at Botomika (i.e., soil, ground water levels, drainage, density, and proximity to Lincoln Lake). Because no private sewage disposal systems were installed in Botomika as of the date the complaint was filed, respondents have not thus far deposited any contaminants on the land via sanitary systems.

The Association notes only that, thus far, Lincoln Lake is connected to six roadside ditch entrances on the property and that such entrances currently cause roadside ditch runoff to go directly into the lake. (Association's Br. p. 8, Tr. 34.) The Association, however, has offered no evidence that respondents otherwise have deposited any contaminants on the land or that such contaminants are being discharged via the ditches. The Association notes only that water quality testing indicates that Lincoln Lake is showing some effects (i.e., increases in ammonia and nitrogen) from septic systems in existing residential areas. (Association's Br. p. 9; Tr. 444; Resp. Ex. 15.) Moreover, even though the Association also asserts that there is increased fecal coliform level in the lake, there is no assertion that respondents' activities caused the increase. (Association's Br. 9; Tr. 416; Resp. Ex. 15.) Accordingly, the Board finds that there is no factual basis to support the allegation that Mr. Drake or FNB have violated Section 12(d) of the Act.

For the foregoing reasons, the Board hereby finds that Mr. Drake or FNB have not violated Sections 11(a)(1), 11(b), or 12 (a)-(d) of the Act.

The above opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

The Board hereby finds that neither Robert J. Drake, Sr. or the First National Bank of Joliet as Trustee, Trust No. 370, have

violated Sections 11(a)(1), 11(b), or 12(a)-(d) of the Environmental Protection Act.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act, 415 ILCS 5/41 (1992 State Bar Edition), provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also Castenada v. Illinois Human Rights Commission (1989), 132 Ill.2d 304, 547 N.E.2d 437).

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 25th day of February, 1993, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board