ILLINOIS POLLUTION CONTROL BOARD
June 7, 2001

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 00-122
	)	(Enforcement – Public Water Supply)
CITY OF LAWRENCEVILLE, JOHN A. GORDON, P.E., and GORDON & PRICE, INC.,	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by N.J. Melas):

On January 18, 2000, the Attorney General's Office, on behalf of the people of the State of Illinois (complainant) initiated this action by filing a complaint. Complainant alleged that respondents violated various sections of the Environmental Protection Act (Act), the Board's regulations, and a section of the Illinois Environmental Protection Agency's (Agency) regulations. Complainant specifically alleged that respondents constructed a water main and a sewer main too close together. Respondents initially named in the complaint were the City of Lawrenceville (the City), John A. Gordon, P.E. (Gordon), Gordon & Price, Inc. (G&P), David Guillaum d/b/a D&G Construction (Guillaum), and Wayne Lapington d/b/a Lapington Trucking and Excavating (Lapington).

On August 16, 2000, complainant filed a request for relief from the hearing requirement and a stipulation and proposal for settlement with Guillaum and Lapington. On September 21, 2000, the Board granted the request for relief from the hearing requirement and accepted the stipulation and settlement.

This matter is before the Board on a motion for summary judgement (Gordon mot.) and supporting memorandum (memo) filed by respondents Gordon and G&P on February 26, 2001. On February 27, 2001, Gordon and G&P filed a joint stipulation of facts (stip.) on behalf of complainant, Gordon, and G&P. On February 28, 2001, complainant filed a motion for summary judgement and supporting memorandum (comp. mot.). On March 6, 2001, complainant filed a request for leave to file amended pages to its motion for summary judgement. Gordon and G&P did not oppose this request, and the Board grants it. On March 9, 2001, complainant filed a response to Gordon and G&P's motion for summary judgement (comp. resp.). On March 13, 2001, Gordon and G&P filed a response to complainant's motion for summary judgement (Gordon resp.).

For the reasons outlined below, the Board denies complainant's motion for summary judgment. The Board finds that neither Gordon nor G&P violated Section 15(b) of the Act or Section 601.101 of the Board's regulations. The Board therefore grants Gordon and G&P's motion for summary judgment only with respect to Section 15(b) of the Act and Section 601.101 of the Board's regulations.

The Board orders the remaining allegations in the case to hearing consistent with the Board's resources. These allegations include: Sections 12(b), 15(a), 18(a)(1), and 18(a)(2) of the Act; Sections 309.202(a), 602.101, and 607.104(b) of the Board's regulations; and Section 653.119 of the Agency's regulations.

STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings and depositions, together with any affidavits and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 693 N.E.2d 358 (1998). 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, 181 Ill. 2d at 483, 693 N.E.2d at 370.

Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Purtill v. Hess, 111 Ill. 2d 229, 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 a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

UNCONTESTED FACTS

Gordon is a licensed professional engineer in Illinois and is president of G&P, an Illinois corporation with offices in Marion, Illinois. The City owns and operates systems for water distribution and sewage collection. Stip. at 2-3.

Gordon submitted an application on behalf of the City to "construct, own and operate" a lift station and sewer force main[1] from a soon-to-be built industrial facility called Trim Masters to the City's wastewater treatment plant (WWTP). On August 5, 1997, the Agency issued permit number 1997-HB-3903 to the City for construction and operation of the lift station and sewer force main, including 13,100 feet of sewer main. The City employed G&P to "design, inspect, and supervise the construction" of the lift station and sewer force main. Guillaum and Lapington contracted with the City to construct the lift station and sewer force main. Stip. at 3, exh. A.

[1] The Board uses the terms "sewer force main" and "sewer main" interchangeably.

On April 24, 1998, the Illinois Department of Transportation (IDOT) issued a permit to the City to construct a sewer force main, and on May 5, 1998, IDOT issued a permit to the City to construct a water main. No service taps were installed on the water main, and no Agency permit was issued for the construction of the water main. Stip. at 4-5, exh. B and C.

In June 1998, Guillaum, Lapington, and the City "constructed a water main and sewer main in a single trench within approximately 24 inches of each other" about 500 feet south of the location described in Agency permit 1997-HB-3903. Neither Gordon nor G&P constructed the water main or sewer main. Stip. at 4.

On June 15, 1998, Gordon contacted Joe Stuart of the Agency and told him that the City constructed the water main and sewer main less than ten feet from each other. On June 17, 1998, Gordon told a representative of the Agency that the City had not obtained a construction permit before starting construction of the water main. Gordon also told Stuart that the water main was necessary for fire protection at Trim Masters. Gordon told Stuart that the water main and sewer main were made of "water main quality material". Stip. at 5-6.

On July 1, 1998, the City and Gordon entered into an "Agreement for Engineering Services" (Agreement). The Agreement states that G&P "agrees to perform the various professional engineering services for the design and construction of . . . A Water Transmission Line, Booster Pump Station, Sewage Forcemain, Lift Station, and Water Storage Facilities." Stip. at 5, exh. D.

The Agency issued Gordon a violation notice on August 12, 1998. Stip. at 6, exh. E. In December 1998, Gordon, acting on behalf of the City and in his capacity as president of G&P, offered proposals to the Agency to address the alleged violations related to the separation between the water main and sewer main. Stip. at 6-7, exh. E.

In the violation notice, the Agency alleges that Gordon violated Section 309.202(a) of the Board's regulations by "construction of water mains and sanitary (sewer) force main in violation of the 10-foot horizontal separation requirement and construction of the sanitary sewer force main not in accordance with permit #1997-IA-3903". However, the narrative portion of the violation notice reads "a review of the application for construction of the sewer force main indicates that the sewer force main was not constructed as it was permitted by Permit #1997-HB-3903." Stip. at 6, exh. E.

On January 19, 1999, the Agency issued a two-week emergency permit to the City. The emergency permit allowed the City to use the water main at issue to supply potable water for the City after the City's existing mains broke. The water main was not used as a source of potable water while the emergency permit was in effect. Stip. at 7-8, exh. F.

The parties stipulate that "[t]here have been no known injuries to human health as a result of the alleged violations." Stip. at 8.

ALLEGATIONS/ARGUMENTS/DISCUSSION

The complaint stems from Gordon and G&P allegedly allowing the construction of a water main and a sewer main in the same trench within two feet of each other. Complainant alleges that Gordon and G&P violated Sections 12(b), 15, 18(a)(1), and 18(a)(2) of the Act. Complainant alleges that Gordon and G&P violated the following sections of the Board's regulations: 309.202(a), 601.101, 602.101(a), 602.101(b), and 607.104(b). Complainant also alleges that Gordon and G&P violated Section 653.119(a)(1)(A) of the Agency's regulations. Comp. at 8-9; comp. mot. at 9.

The Board will address each alleged violation in turn by describing the allegation, listing the relevant arguments, and discussing the allegation. The Board first addresses a general provision, then a Board regulation on sewers, an Agency regulation on water mains, and, finally, several sections of the Act and the Board's regulations on public water supplies.

Section 12(b) of the Act

Section 12(b) provides:

> 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.

Arguments

Gordon contends that neither he nor G&P constructed, installed, or operated the water main or sewer main. Gordon mot. at 5; memo at 11.

Gordon makes other arguments regarding the definition of equipment, facility, vessel or aircraft; legislative intent; the meaning of Section 12(b) in the context of Title III of the Act; and whether water mains are regulated by Section 12(b) of the Act. Memo at 11-14; Gordon resp. at 21-22. Complainant argues with Gordon on legislative intent. Comp. mot. at 12.

Discussion

The parties stipulate that the City owns and operates a public water distribution system and a sewage collection system. Stip at 3. The parties also stipulate that neither Gordon nor G&P constructed the water main or sewer main. Stip. at 4.

However, other parts of the stipulation are less clear on Gordon and G&P's role in the construction of the water main and sewer main. The Board questions whether Gordon had any role in the construction of the lift station and sewer force main in submitting the application on behalf of the City. See Memo at exh. A. The stipulation also reveals that the City employed G&P to design, inspect, and supervise the construction of the lift station and sewer force main. See stip. at 3. However, the facts are unclear regarding how much of this activity related to the actual construction.

The Board also questions the responsibilities that G&P may have had pursuant to its Agreement for Engineering Services. See stip. at 5, exh. D. The stipulated facts indicate that Gordon performed "engineering services" related to construction of the water main and sewer force main, and those services are delineated in the Agreement. Nevertheless, the Board is concerned about how accurately the Agreement actually reflects the work that G&P performed. The Agreement was signed on July 1, 1998, but the stipulated facts indicate that the construction of the water main and sewer main took place on or about June 16, 1998. See stip. at 4, exh. D.

The Board finds that there is insufficient evidence in the record to find in favor of either party's cross motion for summary judgment on this point. Genuine issues of material fact remain unanswered about the extent of Gordon or G&P's involvement in the construction of the water main and sewer main at issue. The Board directs that the parties present additional evidence with respect to Section 12(b) at hearing.

Section 309.202(a) of the Board's Regulations

Section 309.202(a) of the Board's regulations provides:

Section 309.202 Construction Permits

Except for treatment works or wastewater sources which have or will have discharges for which NPDES Permits are required, and for which NPDES Permits have been issued by the Agency:

a) No person shall cause or allow the construction of any new treatment works, sewer or wastewater source or cause or allow the modification of any existing treatment works, sewer or wastewater source without a construction permit issued by the Agency, except as provided in paragraph (b).

Arguments

Section 31 of the Act. Gordon claims that the Agency failed to provide a "detailed explanation" of the alleged violation of Section 309.202(a) in the violation notice. The violation notice contains no explanation of how the sewer main was inconsistent with its permit. As a result, Gordon claims that the Agency did not comply with Section 31 of the Act (415 ILCS 5/31 (2000)) and that the Board has no jurisdiction over this allegation. Gordon mot. at 10-11; memo at 9, 38-40; Gordon resp. at 25.

Complainant argues that the complaint was brought on its own motion and at the request of the Agency. Where the Attorney General brings its own motion, the notice requirements at Section 31 do not apply. See People v. Eagle-Picher-Boge, L.L.C. (July 22, 1999), PCB 99-152**.** Even if the Board does not find that complainant brought the allegation on its own motion, complainant contends that the Agency's violation notice complied with Section 31 of the Act. Complainant states that the violation notice gave Gordon and G&P clear information on the allegations, and that the allegations in the violation notice are the same as the complaint. Comp. mot. at 14-15.

Gordon's and G&P's Control. Gordon argues that he lacked sufficient control to have caused or allowed the construction of the water main and sewer main. Gordon claims that his lack of control entitles him to summary judgment. Gordon also argues that he had no authority for obtaining permits from the Agency for the City. Complainant disagrees and claims that Gordon did have authority. Gordon mot. at 10-11; memo at 37-38; comp. mot. at 10, 11, exh. A at 16, 19, 27-28, exh. B at 13, 29; Gordon resp. at 4-8, 17, 19; comp. resp. at 1-2, 4; stip at exh. D.

Discussion

Section 31 of the Act. The Board finds that the violation notice complies with the requirements of Section 31 of the Act. Section 31(a)(1)(B) of the Act states that the Agency must provide a "a detailed explanation . . . of the violations alleged." In the violation notice, the Agency clearly explains that it is alleging a violation of 35 Ill. Adm. Code 309.202(a) because construction of the sewer force main violates the ten-foot separation requirement and because construction is not accordance with Gordon's permit.

Gordon and G&P's Control. Illinois law does not impose strict liability on property owners for releases of pollution. To be held accountable for causing or allowing pollution, the accused must exercise "sufficient control" over the source. Phillips Petroleum v. PCB, 72 Ill. App. 3d 217, 220, 390 N.E.2d 620, 623 (2d Dist. 1979); Perkinson v. PCB, 187 Ill. App. 3d 689, 693-695, 543 N.E. 2d 901, 903-904 (3d Dist 1989). In Phillips, the appellate court found that Phillips could not be held liable for causing or allowing air pollution where Phillips owned a rail tank car and the anhydrous ammonia in the rail car. Phillips did not have sufficient control over the source of pollution or the premises when the rail car derailed and released the anhydrous ammonia (the transportation company had control). Phillips, 72 Ill. App. 3d at 217-

220, 390 N.E. 2d at 620-623. The appellate court found defendant Perkinson liable for a release from his swine waste lagoons because Perkinson, the owner and operator of the lagoons, had control of the lagoons at the time of the release. Perkinson, 187 Ill. App. 3d at 689, 694-695, 543 N.E. 2d 901, 904.

In both Phillips and Perkinson, "sufficient control" refers to causing or allowing pollution in violation of the Act. In Section 309.202 of the Board's regulations, "cause or allow" pertains to construction or modification of sewers. If the "sufficient control" test refers to causing or allowing pollution, then "sufficient control" can also refer to causing or allowing construction in this context. The construction and modification at issue may lead to pollution.

The Board refers to its discussion of the alleged violations of Section 12(b) of the Act. See *supra* p. 5. This discussion indicates that the facts are not entirely clear regarding the amount of control that Gordon or G&P may have had over the construction of the sewer main at issue. The Board finds that there is insufficient evidence in the record to find in favor of either party's cross motion for summary judgment on this point. As there are questions of material fact on this point, the Board directs that the parties present additional evidence at hearing with respect to Section 309.202(a) of the Board's regulations.

Section 653.119(a)(1)(A) of the Agency's Regulations

Section 653.119 of the Agency's regulations provides, in pertinent part:

Section 653.119 Protection of Water Main and Water Service Lines
Water mains and water service lines shall be protected from sanitary sewers, storm sewers, combined sewers, house sewer service connections and drains as follows:

a) Water Mains:

1) Horizontal Separation:

A) Water mains shall be laid at least ten feet horizontally from any existing or proposed drain, storm sewer, sanitary sewer, combined sewer or sewer service connection.

B) Water mains may be laid closer than ten feet to a sewer line when:

i) local conditions prevent a lateral separation of ten feet;

ii) the water main invert is at least 18 inches above the crown of the sewer; and

iii) the water main is either in a separate trench or in the same trench on an undisturbed earth shelf located to one side of the sewer.

C) Both the water main and drain or sewer shall be constructed of slip-on or mechanical joint cast or ductile iron pipe, asbestos-cement pressure pipe, prestressed concrete pipe, or PVC pipe meeting the requirements of Section 653.111 when it is impossible to meet (A) or (B) above. The drain or sewer shall be pressure tested to the maximum expected surcharge head before backfilling.

***

c) Special Conditions - Alternate solutions shall be presented to the Agency when extreme topographical, geological or existing structural conditions make strict compliance with (a) and (b) above technically and economically impractical. Alternate solutions will be approved provided watertight construction structurally equivalent to approved water main material is proposed.

Complainant cites Section 602.115 of the Board's regulations which provides, in pertinent part:

a) The Agency may adopt criteria, published in the form of Technical Policy Statements, for the design, operation and maintenance of public water supply facilities as necessary to insure safe, adequate and clean water.

Section 651.101 of the Agency's regulations provides, in pertinent part:

Section 651.101 Introduction to Agency Rules for Public Water Supplies

The Agency rules for Public Water Supplies included at 35 Ill. Adm. Code 651 through 654 define the design, operational, and maintenance criteria established by the Agency pursuant to 35 Ill. Adm. Code 602.115 for owners, operators and official custodians of community water supplies. The design, operational, and maintenance criteria are defined and established for persons involved in the design, construction, maintenance or operation of community water supplies…

Arguments

Gordon claims that he cannot be held in violation of Agency design criteria and cites IEPA v. Camerer (February 17, 1982), PCB 81-142 as precedent. Gordon claims that, prior to July 1999 amendments, the regulations at Parts 651 through 654 of the Agency's regulations were intended to provide information and clarify the Agency's administrative procedures. Gordon argues that, in spite of the Board regulation at Section 602.115, there is no alleged violation of the Act or the Board's regulations here. Gordon mot. at 7; memo at 23; Gordon resp. at 12-13. Gordon also points out that none of the Sections of the Act nor the Board's regulations require that water mains and sewer mains be at least ten feet apart. Gordon resp. at 12, 16.

Gordon claims that the "special conditions" provision at Section 653.119(c) of the Agency's rules exempts Gordon and G&P from compliance with Section 653.119(a)(1)(A). Gordon argues that since both mains are built watertight with approved water main material, since all joints on both mains have "Meg-A-Lug" fittings, and since both mains were pressure tested, the ten-foot separation requirement at Section 653.119(a)(1)(A) does not apply. Gordon claims that the provisions of Section 653.119(a)(1)(B) and (C) provide alternatives to the ten-foot separation requirement as well. Memo at 26; Gordon resp. at 14.

Gordon also claims that it was not possible to lay the water main at least ten feet from the sewer main. Gordon claims that placing the lines at least ten feet apart would have violated IDOT policy. Gordon resp. at 9-11, exh. 5; comp. mot., exh. A at 24-25, exh. B at 23-25.

Complainant argues that, in spite of the exceptions to the ten-foot separation rule, Gordon and G&P should have sought approval from the Agency before construction. Gordon and G&P did not seek approval, and thus cannot take advantage of the exceptions. Comp. mot. at 14.

Discussion

The Board is unpursuaded by Gordon's reliance on Camerer as a basis for dismissal of the alleged violation of Section 653.119(a)(1)(A). There is no indication in Camerer that the provision at issue there, WPC-2, was a properly promulgated Agency regulation. Camerer at 4. The Board chooses to follow its holding in Herman Prescott v. City of Sycamore (March 11, 1993), PCB 90-187. In that case, the Board considered an alleged violation of an Agency regulation addressing residual chlorine levels. Section 604.401 of the Board's regulations allowed the Agency to set acceptable levels of chlorine in finished water which the Agency set according to its regulations at 35 Ill. Adm. Code 653.604. The Board ultimately dismissed the complaint, but did so for reasons unrelated to the fact that the chlorine levels were Agency regulations. Prescott at 2, 11.

Here, the Board regulation at 35 Ill. Adm. Code. 602.115 and the Agency regulation at 35 Ill. Adm. Code 651.101 provide the basis for the Agency setting the ten-foot separation rule

at 35 Ill. Adm. Code 653.119(a)(1)(A). Specifically, the phrase in 35 Ill. Adm. Code 651.101 which states that "the design . . . criteria are defined . . . for persons involved in the design... of community water supplies" applies the Agency regulations at 35 Ill. Adm. Code 653.119(a)(1)(A) to engineers like Gordon and G&P.

It is undisputed that the water main and sewer main are closer than ten feet from each other. The Board now examines the regulatory exceptions to the ten-foot rule.

The Board agrees with complainant that Gordon and G&P may not rely on Section 653.119(c) of the Agency's regulations as a means of avoiding the ten-foot requirement. Section 653.119(c) states that "alternate solutions shall be presented to the Agency." Neither Gordon nor G&P presented any alternate solutions to the Agency prior to construction of the water main, and thus may not rely on this provision to claim an exemption from the Agency's ten-foot requirement at Section 653.119(a)(1)(A). Even if the ten-foot requirement violates IDOT policy, Gordon and G&P should have approached the Agency before designing the water main and requested an exemption pursuant to Section 653.119(c). As Gordon and G&P failed to approach the Agency to request an exemption, Gordon cannot claim a possible violation of IDOT regulations as a defense to an alleged violation of Section 653.119(a)(1)(A).

Gordon also claims that he can meet the exceptions to the ten-foot separation rule at Section 653.119(a)(1)(B) and (C) of the Agency's regulations. However, the stipulated facts do not reveal what the "local conditions" at Section 653.119(a)(1)(B) are that would provide relief from the ten-foot separation rule. In addition, the stipulated facts state that the water main and sewer main are made of "water main quality material", but it is not clear if the mains meet the requirements specified at Section 653.119(a)(1)(C).

The Board finds that there is insufficient evidence in the record to find in favor of either party's cross motion for summary judgment on this point. As there are questions of material fact which preclude the Board from determining if Gordon and G&P qualify for the exemptions at Sections 653.119(a)(1)(B) and (C) of the Agency's regulations, the Board orders that the parties present additional evidence regarding this alleged violation at hearing.

Section 601.101 of the Board's Regulations

Section 601.101 of the Board's regulations provides

Section 601.101 General Requirements

> Owners and official custodians of a public water supply in the State of Illinois shall provide pursuant to the Environmental Protection Act [415 ILCS 5] (Act), the Pollution Control Board (Board) Rules, and the Safe Drinking Water Act (42 U.S.C. 300f et seq.) continuous operation and maintenance of public water supply facilities so that the water shall be assuredly safe in quality, clean,

adequate in quantity, and of satisfactory mineral characteristics for ordinary domestic consumption.

Arguments

Gordon claims that he is not regulated by Section 601.101 of the Board's regulations because he is not an owner or an official custodian of the City's public water supply. Gordon points out that the City is the owner. Gordon mot. at 8; memo at 27. Complainant does not rebut Gordon's arguments.

Discussion

The stipulated facts indicate that the City owns the public water supply, and the Board can find nothing in the record to refute the City's ownership. Stip. at 3. An "official custodian" is defined as "any officer of an organization which is the owner or operator of a public water supply, and who has direct administrative responsibility for the supply." 35 Ill. Adm. Code 601.105. There is no indication in the record that either Gordon or G&P serve as City officials.

Even considering the allegation in a light favorable to complainant, the Board finds that neither Gordon nor G&P are the owner or official custodian of the City's public water supply. Thus, neither Gordon nor G&P violated Section 601.101 of the Board's regulations. The Board finds in favor of Gordon and G&P's motion for summary judgment on this point and finds against complainant's motion for summary judgment on this point.

Section 602.101 of the Board's Regulations

Section 602.101 of the Board's regulations provides, in pertinent part:

Section 602.101 Construction Permit

a) No person shall cause or allow the construction of any new public water supply installation or cause or allow the change of or addition to any existing public water supply, without a construction permit issued by the Environmental Protection Agency (Agency). Public water supply installation, change, or addition shall not include routine maintenance, service pipe connections, hydrants and valves, or replacement of equipment, pipe, and appurtenances with equivalent equipment, pipe, and appurtenances.

b) All work performed on a public water supply shall be in accordance with accepted engineering practices.

"Public water supply" is defined at Section 3.28 of the Act as:

> [A]ll mains, pipes, and structures through which water is obtained and distributed to the public, including wells and well structures, intakes and cribs, pumping stations, treatment plants, reservoirs, storage tanks and appurtenances, collectively or severally, actually used or intended for use for the purpose of furnishing water for drinking or general domestic use which serve at least 15 service connections or which regularly serve at least 25 persons at least 60 days per year. A public water supply is either a "community water supply" or a "non-community water supply". 415 ILCS 5/3.28 (2000).

"Service connection" is defined at 415 ILCS 45/5(e) (2000) and at Section 601.105 of the Board's regulations as "the opening, including all fittings and appurtenances, at the water main through which water is supplied to the user."

Arguments

Gordon points to the definition of public water supply and argues that the water main at issue is not used or even intended for use as a source of domestic or potable water. Gordon asserts that the water main is used and intended to be used for fire protection only and, as such, is not a public water supply installation, a change to a public water supply, or an addition to a public water supply. Gordon claims that possible future goals of changing the use of the water main do not transform it into a public water supply. Gordon mot. at 9; memo at 31-32, 35.

Complainant argues that the water main at issue is connected to the City's public and potable water supply system and is capable of being used to supply potable water. Comp. mot. at 10-11. Complainant also states that that although the water main is not currently used to carry potable water, it could be used for potable water in very short order. Comp. resp. at 2, 3. Gordon responds that there is no "capability" rule in either the Act or the Board's regulations. Gordon resp. at 20.

Gordon claims that since the water main has not been intended for use as a supply of potable or domestic water, the provisions of Section 602.101(b) do not apply to him. Gordon mot. at 10; memo at 35.

The water main at issue, Gordon argues, should be properly defined as a service connection, since it provides water to one user, Trim Masters. Gordon admits, however, that fire hydrants were installed along the length of the pipe, but claims that hydrants are not installations, changes, or additions. Memo at 32-34. Complainant argues that the water main at issue is not a service connection; it was initially intended to be accessible to other users. Comp. resp. at 3.

Gordon claims that he did not construct either the water main or the sewer main. Gordon also claims that he was not responsible for securing the City's water main construction

permit from the Agency. Gordon claims that he did not have the authority or the responsibility to apply for a permit. Gordon claims that the City had sufficient control over the water main and sewer main and as such should be held liable as the owner, not Gordon or G&P. Gordon mot. at 8-9; memo at 28-29.

Discussion

Section 602.101(a). The parties stipulated that Gordon told Stuart that the water main was necessary for fire protection. The parties also stipulated that the water main was not used for drinking water during the duration of the emergency permit. Stip. at 6, 8-9. However, the Board finds it significant that the Agency issued the permit allowing the water main to be used as a potable water source. Nothing in the stipulated facts indicates that the water main has never and will never be used as a source of potable water. The Board finds that the water main was, at one time, intended for use for furnishing potable water and that the water main could be used to furnish potable water again.

The Board does not agree with Gordon's argument that the water main at issue is simply a service connection. The Board acknowledges that the water main currently provides water to one user. However, a service connection is defined as "the opening . . . at the water main" where water is supplied to the user. The Board will not classify the entire water main as a service connection.

The definition of public water supply includes all "mains, pipes, and structures" through which water is distributed. 415 ILCS 5/3.28 (2000). Even though the water main at issue currently serves only one user, it is properly classified as part of the public water supply.

The Board again refers to its discussion of the alleged violations of Section 12(b) of the Act. See *supra* p. 5. This discussion indicates that the facts are not entirely clear regarding the amount of control that Gordon or G&P may have had over the construction of the water main at issue. The Board finds that there is insufficient evidence in the record to find in favor of either party's cross motion for summary judgment on this point. As there are questions of material fact on this point, the Board directs that the parties present additional evidence at hearing with respect to Section 602.101(a) of the Board's regulations.

Section 602.101(b). There is no discussion or evidence in the record about accepted engineering practices or about Gordon or G&P following these practices. Again, the Board finds that there is insufficient evidence in the record to find in favor of either party's cross motion for summary judgment on this point. As a result, the Board directs that the parties present additional evidence at hearing with respect to Section 602.101(b) of the Board's regulations.

Section 607.104(b) of the Board's Regulations

Section 607.104(b) of the Board's regulations provides, in pertinent part:

Section 607.104 Cross Connections

***

b) There shall be no arrangement or connection by which an unsafe substance may enter a supply.

Arguments

Gordon claims that constructing a water main and a sewer main within two feet of each other "does not, in itself, allow unsafe substances to enter the public water supply, when both lines were constructed of water main quality material" and the water main at issue never carried potable water. Gordon mot. at 10; memo at 36.

Complainant finds no merit in Gordon's argument and accuses Gordon of making his own "personal decision" on how to comply with the regulations. Comp. resp. at 4.

Discussion

The "supply" in Section 607.104 of the Board's regulations is a public water supply. See 35 Ill. Adm. Code 601.105.

Nothing in the record indicates that an unsafe substance has yet entered the public water supply. Nevertheless, the wording of Section 607.104 of the Board's regulations indicates that no arrangement or connection should potentially allow for an unsafe substance to enter a public water supply. The Board denies both complainant's and respondents' cross motions for summary judgement on this point. The Board directs that the parties present additional evidence at hearing on this point.

Section 15 of the Act

Section 15 states, in pertinent part:

Sec. 15. Plans and specifications; demonstration of capability.

(a) Owners of public water supplies, their authorized representative, or legal custodians, shall submit plans and specifications to the Agency and obtain written approval before construction of any proposed public water supply installations, changes, or additions is started. Plans and specifications shall be complete and of sufficient detail to show all proposed construction, changes, or additions that may affect sanitary quality, mineral quality, or adequacy of the public water supply; and, where necessary, said plans and specifications shall be accompanied by supplemental

data as may be required by the Agency to permit a complete review thereof.

(b) All new public water supplies established after October 1, 1999 shall demonstrate technical, financial, and managerial capacity as a condition for issuance of a construction or operation permit by the Agency or its designee. The demonstration shall be consistent with the technical, financial, and managerial provisions of the federal Safe Drinking Water Act (P.L. 93-532), as now or hereafter amended. The Agency is authorized to adopt rules in accordance with the Illinois Administrative Procedure Act to implement the purposes of this subsection. Such rules must take into account the need for the facility, facility size, sophistication of treatment of the water supply, and financial requirements needed for operation of the facility.

Section 15(a)

Arguments. Gordon argues that he cannot be held liable under Section 15(a) of the Act for the City's failure to receive a construction permit from the Agency. Gordon claims that neither he nor G&P are the owner or legal custodian of the City's public water supply. Gordon also claims that neither he nor G&P are an "authorized representative" of the City for purposes of obtaining permits from the Agency. The permit applications for the water main and sewer main were submitted by the City and signed by the Mayor, which demonstrate that the City had responsibility and authority for obtaining permits. Gordon claims his signature on the water main and sewer main permit applications "is solely as the design engineer." Gordon mot. at 7; memo at 18, 21, exh. A, D.

Gordon also argues that the water main is not a part of the public water supply because it is not intended to furnish drinking water for domestic use. Memo at 22.

Discussion. The Board has already found that the water main at issue is a part of the City's public water supply. In addition, the Board has already determined that neither Gordon nor G&P are the owner of the City's public water supply. The term "legal custodian" is not defined in the Act, but the Board will look to the definition of "official custodian" at 35 Ill. Adm. Code 601.105 for guidance. Nothing in the record indicates that Gordon or G&P are the legal custodians of the City's water supply. It is clear that neither Gordon nor G&P are the owner nor the legal custodian of the City's public water supply.

However, it is less clear if Gordon and G&P are authorized representatives of the City. Stip. at exh. D. The term "authorized representative" is not defined in the Act.

The Board notes that Gordon's name, address, and signature are on the August 19, 1998 construction permit application for the water main. Gordon's signature appears as the design engineer underneath the text "Certificate by Design Engineer . . . I certify that I am

familiar with the information contained in this application, and that to the best of my knowledge and belief such information is true, complete and accurate." Memo at exh. D.

The Board also notes the June 1998 meeting and conversations that Gordon had with Agency personnel regarding the construction and the proximity of the water main and sewer main. Stip. at 5-6. Although it appears that Gordon was representing the City in the meeting and during the conversations, it is not clear how much authority the City had given Gordon.

Both complainant and Gordon argued the merits of an agent's liability to a third party in the context of the alleged violation of Section 15(a) of the Act. The Board finds that these arguments are relevant in determining Gordon or G&P's status as an authorized representative. See Gordon mot. at 7; comp. mot. at 10; memo at 19-20.

Despite the arguments and facts presented, the Board finds that there are still questions of fact regarding Gordon's or G&P's status as an authorized representative. The Board finds that there is insufficient evidence in the record to find in favor of either party's cross motion for summary judgment on this point. The Board directs that the parties present additional evidence at hearing on this matter.

Section 15(b)

Arguments. Gordon argues that Section 15(b) of the Act does not give the Agency the authority to regulate the construction of public water supply installations, additions, or changes. The Board was granted this authority by Section 17(a) of the Act. Memo at 23.

Discussion. Section 15(b) addresses only new public water supplies constructed after October 1, 1999. The parties stipulated that the water main at issue was constructed in June of 1998. Thus, the Board finds that neither Gordon nor G&P violated Section 15(b) of the Act. The Board finds in favor of Gordon and G&P's motion for summary judgment on this point and finds against complainant's motion for summary judgment on this point.

Section 18 of the Act

Section 18 provides, in pertinent part:

> Sec. 18. Prohibitions; plugging requirements.
>
> (a) No person shall:
>
> (1) Knowingly cause, threaten or allow the distribution of water from any public water supply of such quality or quantity as to be injurious to human health; or

> (2) Violate regulations or standards adopted by the Agency pursuant to Section 15(b) of this Act or by the Board under this Act; or . . .

Section 18(a)(1)

Arguments Gordon argues that he did not cause or allow the distribution of water so as to be injurious to human health. Gordon mot. at 6; memo at 15.

Gordon acknowledges that Section 18(a) of the Act forbids a person from allowing or threatening water distribution that is injurious. However, Gordon claims that Section 18(a) does not forbid allowing others to threaten water distribution that is injurious. Since Gordon claims that he did not construct the water main or sewer main, he cannot be in violation of Section 18(a)(1). Gordon mot. at 5-6; memo at 15.

Gordon also argues that the water in the water main and the sewer main was not public and was not injurious to human health. Gordon mot. at 6; memo at 15; Gordon resp. at 23.

Complainant argues that the regulations maintaining separation between water mains and sewer mains are in place to reduce the possibility that sewage wastewater and potable water could commingle if the sewer main ruptured. Complainant calls the threat to human health "obvious". Comp. mot. at 12. Gordon responds that there is only the "possibility of a threat" which is not prohibited by Section 18(a) of the Act. Gordon resp. at 24. Gordon also argues that a ten-foot distance between water mains and sewer mains does not prevent a sewer main from rupturing or leaking. Gordon resp. at 23-24.

Gordon claims that the Agency has conceded, by issuing the temporary emergency permit, that the proximity of the water main and sewer main does not threaten human health. Memo at 16-17; Gordon resp. at 24. Complainant responds that the Agency could have concluded that the risk of providing no water to Lawrenceville was greater than the risk of consuming water from the water main at issue. See People *ex. rel.* Ryan v. McHenry Shores Water Co., 295 Ill.App.3d 628, 635-636, 693 N.E.2d 393, 398 (2nd Dist. 1998); comp. mot. at 12-13.

Discussion. The Board has already determined that the water main is part of the City's public water supply.

As stated above, to be held accountable for causing or allowing pollution, the accused must exercise "sufficient control" over the source. Phillips, 72 Ill. App. 3d at 220, 390 N.E.2d at 623; Perkinson, 187 Ill. App. 3d at 693-695, 543 N.E. 2d at 903-904. The appellate court in Phillips also extended the "sufficient control" test to parties accused of threatening the release of pollution. Phillips, 72 Ill. App. 3d at 220, 390 N.E.2d at 623. The Board finds that a threat and the "possibility of a threat" are, for the purposes of Section 18, the same. Both concepts refer to a potentially dangerous or hazardous situation that has not yet occurred. Thus, the Board need not address the "possibility of a threat" nor does the Board

need to address Gordon's arguments regarding allowing a threat and allowing others to threaten.

Previously in this order the Board has examined the sufficient control test as it pertains to construction or installation of the water main and sewer main at issue. Section 18 of the Act is limited to the distribution of water. The City hired Gordon and G&P primarily to provide engineering services related to the construction of the water main and sewer main. Stip at 3-7. An item in the Agreement indicates that G&P could play a role in the operation the City's water supply, which could entail the distribution of water. In Section D of the Agreement, item 15 states that G&P may provide special analysis of the City's operation needs. However, G&P would only provide such analysis upon prior written authorization of the City. Stip at exh. D at 6-7.

The record does not contain the prior written authorization, if it exists. Also, it is not clear if the special analysis of the City's operation needs includes the distribution of water. Furthermore, there is a question of fact regarding the degree of control that G&P would have under this provision in the agreement.

The stipulated facts state that there have been not injuries to human health resulting from the alleged violations. Stip at 8. However, the stipulated facts make no mention of any potential threat to human health.

The Board finds that issues of material fact remain regarding G&P's role in the distribution of water and the potential threat to human health resulting from the alleged violation of Section 18(a)(1) of the Act. The Board finds that there is insufficient evidence in the record to find in favor of either party's cross motion for summary judgment on this point. The Board orders that the parties present additional evidence at hearing on these matters.

Section 18(a)(2)

Arguments. Gordon implies that since he did not violate any of the Board's regulations listed in the complaint, he did not violate Section 18(a)(2) of the Act. Memo at 26-27.

Discussion. The Board has already found that neither Gordon nor G&P violated Section 15(b) of the Act. Section 18(a)(2) of the Act states that no person shall violate Agency regulations pursuant to Section 15(b) of the Act. Thus, neither Gordon nor G&P could have violated Section 18(a)(2) with respect to Agency regulations adopted under Section 15(b) of the Act.

Section 18(a)(2) of the Act also states that no person shall violate "regulations or standards adopted . . . by the Board under this Act." In this order, the Board has found that there are three Board regulations that must be further addressed at hearing (see below). The Board, therefore, cannot make a determination on the alleged violation of Section 18(a)(2) of

the Act until after hearing. The Board finds that there is insufficient evidence in the record to find in favor of either party's cross motion for summary judgment on this point

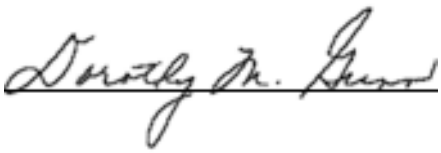
CONCLUSION

The Board denies complainant's motion for summary judgment. The Board finds that neither Gordon nor G&P violated Section 15(b) of the Act or Section 601.101 of the Board's regulations. The Board therefore grants Gordon and G&P's motion for summary judgment only with respect to Section 15(b) of the Act and Section 601.101 of the Board's regulations.

The Board orders the remaining allegations in the case to hearing consistent with the Board's resources. These allegations include Sections 12(b), 15(a), 18(a)(1), and 18(a)(2) of the Act; Sections 309.202(a), 602.101 and 607.104(b) of the Board's regulations; and Section 653.119 of the Agency's regulations.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 7th day of June 2001 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board