

ILLINOIS POLLUTION CONTROL BOARD  
May 21, 1998

DAVID MULVAIN, )  
 )  
 Complainant, )  
 )  
 v. ) PCB 98-114  
 ) (Enforcement - Water - Citizens)  
 VILLAGE OF DURAND, ROCKFORD )  
 BLACKTOP CONSTRUCTION COMPANY,) )  
 INC. and ILLINOIS ENVIRONMENTAL )  
 PROTECTION AGENCY, )  
 )  
 Respondents. )

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

On March 9, 1998, David Mulvain filed a formal complaint with the Board. In that complaint, Mr. Mulvain alleges that the sewer system in the Village of Durand (Durand) is allowing excess infiltration into the sewer system and back-up of sewage into basements. Comp. at 4.<sup>1</sup> The complaint alleges that the sewer system is in violation of the Environmental Protection Act (Act) and the Board's regulations. The complaint further alleges that the Illinois Environmental Protection Agency (Agency) improperly issued a permit (1997-1A-4892) to Rockford Blacktop Construction, Inc. (Rockford Blacktop) which will result in additional overload to the sewer system. The following motions and responses have been filed in this case:

1. On March 24, 1998, Rockford Blacktop filed a motion to dismiss the complaint.
2. On March 24, 1998, the Agency filed a motion for extension of time to file a motion to dismiss.
3. On March 31, 1998, the Agency filed a motion to dismiss.
4. On April 2, 1998, a response to Rockford Blacktop's motion to dismiss was filed by Mr. Mulvain.
5. On April 6, 1998, a motion to file an amended response to Rockford Blacktop's motion to dismiss was filed by Mr. Mulvain.
6. On April 10, 1998, Mr. Mulvain filed a response to the Agency's motion to dismiss and a motion to amend the complaint.
7. On April 15, 1998, Rockford Blacktop filed a motion for rule to show cause asking that the motion to amend be struck.
8. On April 23, 1998, Mr. Mulvain filed a response to the April 15 motion by Rockford Blacktop and filed a second motion to amend the complaint.

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<sup>1</sup> The complaint will be cited as "Comp. at"; the motions will all be cited by the date the motion was received for example the Rockford Blacktop motion to dismiss will be cited as "3/24/98 Mot. at".

The Board will begin by ruling on the non-substantive motions filed by the parties. Then the Board will discuss the motions to amend the complaint and finally discuss the motions to dismiss. In summary, the Board will dismiss the Agency and Rockford Blacktop from the proceeding. However, the Board will not dismiss the complaint in its entirety; but will allow it to proceed to hearing against the Village of Durand only. The Board will also deny the motions to amend the complaint.

### LEGAL FRAMEWORK

Section 33(d) of the Act provides:

Any person may file with the Board a complaint, meeting the requirements of subsection (c) of this Section, against any person allegedly violating this Act or any rule or regulation thereunder or any permit or terms or condition thereof . . . . Unless the Board determines that such complaint is duplicitous or frivolous, it shall schedule a hearing and serve written notice thereof upon the person or persons named therein, in accord with subsection (c) of this Section.

Section 103.124(a) of the Board's procedural rules provides:

. . . If a complaint is filed by a person other than the Agency, the Clerk shall also send a copy to the Agency; the Chairman shall place the matter on the Board agenda for Board determination whether the complaint is duplicitous or frivolous. If the Board rules that the complaint is duplicitous or frivolous, it shall enter an order setting forth its reasons for so ruling and shall notify the parties of its decision. If the Board rules that the complaint is not duplicitous or frivolous, this does not preclude the filing of motions regarding the insufficiency of the pleadings. 35 Ill. Adm. Code 103.124.

An action before the Board is duplicitous if the matter is identical or substantially similar to one brought in another forum. Brandle v. Ropp, PCB 85-68, 64 PCB 263 (1985). An action before the Board is frivolous if it fails to state a cause of action upon which relief can be granted by the Board. Citizens for a Better Environment v. Reynolds Metals Co., PCB 73-173, 8 PCB 46 (1973).

### DISCUSSION

#### Non-substantive Motions

With regards to the motion for extension of time and the motion to file an amended response, the Board grants both motions. Thus, the Board grants the Agency's motion for extension of time filed on March 24, 1998, and accepts the motion to dismiss. The Board also grants Mr. Mulvain's motion to file an amended response filed on April 6, 1998.

#### Motions to Amend Complaint

As noted above, Mr. Mulvain has filed two motions to amend the complaint. The first motion was received by the Board on April 10, 1998, and asks for leave to amend the complaint for clarification. On April 23, 1998, Mr. Mulvain filed a second motion to amend the complaint. The requested amendments seek to allege additional violations against Rockford Blacktop and to amend the prayer for relief by asking the Board to direct the Agency to do certain things.

Rockford Blacktop filed a response to the first motion to amend complaint arguing that there is no specific provision in the Board's rules for such an amendment and that the Illinois Code of Civil Procedure should apply. Rockford Blacktop further argues that the motion to amend does not cure the defects raised by Rockford Blacktop in its motion to dismiss the original complaint and therefore, the motion to amend should be denied.

Although the Board rules do not speak directly to the issue of filing an amended complaint, the Board's rules at 35 Ill. Adm. Code 103.210(a) do provide that pleadings may be amended to conform with the proof introduced at hearing. The Board has allowed amendments of complaints pursuant to that section. See People v. Chemetco, Inc., PCB 96-76 (May 7, 1998). However, in this instance the Board will deny the motion to amend the complaint. The Board denies the motions because the complainant is seeking to amend the complaint as to Rockford Blacktop and the Agency, both of whom the Board dismisses from this proceeding as discussed below. Therefore, the amendments are not germane to the case as it will be allowed to go forward.

#### Motions to Dismiss

Rockford Blacktop argues that the complaint should be dismissed because: 1) it constitutes a permit appeal which Mr. Mulvain lacks standing to bring (3/24/98 Mot. at 4) or 2) it fails to state a cause of action against Rockford Blacktop (3/24/98 Mot. at 8). The Agency asserts that the complaint constitutes a permit appeal and should be dismissed as frivolous. 3/31 Mot. at 2. The Agency also argues that the complaint fails to state a cause of action. 3/31/98 Mot. at 5. Mr. Mulvain responds to the motions to dismiss by maintaining that this action is not brought as a permit appeal and that he has standing to proceed.

In 1978, the Illinois Supreme Court ruled that the Board lacks the statutory authority to review an Agency decision to grant a permit absent a specific statutory grant of the authority to review. Landfill, Inc. v. Pollution Control Board, 74 Ill. 2d 541, 387 N.E.2d 258 (1978). The Court also states:

Whether the basis for the proceeding . . . is that the Agency failed to give adequate consideration to evidence or that the Agency erred by granting a permit on evidence inadequate to show that the landfill would not cause environmental damage, the result of the . . . proceeding is to make the Board the permit-granting authority, a usurpation of the Agency's function. Landfill Inc. 387 N.E.2d 258, 264.

In Citizens Utilities Co. and the Village of Plainfield v. Pollution Control Board, 265 Ill. App. 3d 773, 639 N.E.2d 1306, the Third District Appellate Court held that a third-party appeal of the issuance of a national pollutant discharge elimination system (NPDES) permit was beyond the statutory authority of the Board. Thus, the courts have clearly held that absent a specific grant of authority, the Board may not review the decision of the Agency to grant a permit.

The Act does include exceptions whereby the Board may review the Agency's actions. Those exceptions include a recent legislative amendment to allow the Board to review the issuance of NPDES permits (Section 40(e) of the Act) as well as allowing the Board to review the decision of the Agency when appealed by the permit applicant (Section 40(a) of the Act). The legislature has also included an exception allowing the Board to review the issuance of a development permit for a new pollution control facility for the disposal of hazardous waste (Section 40(c) of the Act) and RCRA permits (Section 40(b) of the Act).

The Board has reviewed the filings in this matter very carefully and finds that the respondents, Rockford Blacktop and the Agency, should be dismissed from this proceeding. The allegations made by Mr. Mulvain against Rockford Blacktop and the Agency all involve the issuance of permits. The allegations against Rockford Blacktop asserted inadequacies in the permit process and problems which may occur as a result of the permits having been issued. The allegations against the Agency asserted that the permit was improperly issued. Clearly, these types of allegations fall within the permit review prohibited in Landfill, Inc. and are not included in the exceptions listed above, so these aspects of the complaint are outside the Board's authority. These issues are not reviewable by the Board and the complaint fails to state a cause of action upon which the Board may grant relief against these two respondents.

The Board notes that Landfill, Inc. also states that the "grant of a permit does not insulate violators of the Act or give them a license to pollute." Landfill Inc. 387 N.E.2d 258, 265. Therefore, if at a later date Rockford Blacktop does violate the Act, the permit is not a shield to an allegation of violation.

The Board will not dismiss the complaint as to respondent, the Village of Durand. The complaint does allege violations which may be pursued regarding the sewer system in Durand. Therefore, this matter may proceed to hearing against Durand.

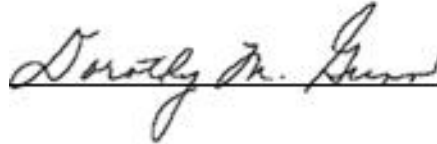
The hearing must be scheduled and completed in a timely manner, consistent with Board practices. The Board will assign a hearing officer to conduct hearings consistent with this order and the Clerk of the Board shall promptly issue appropriate directions to the assigned hearing officer consistent with this order.

The assigned hearing officer shall inform the Clerk of the Board of the time and location of the hearing at least 30 days in advance of hearing so that public notice of hearing may be published. After hearing, the hearing officer shall submit an exhibit list, a statement regarding credibility of witnesses and all actual exhibits to the Board within five days of the hearing. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible.

IT IS SO ORDERED.

Board Member K.M. Hennessey abstains.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 21st day of May 1998 by a vote of 6-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board