

ILLINOIS POLLUTION CONTROL BOARD  
February 21, 2002

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 01-150
	)	(Enforcement – Water)
MARC DEVELOPMENT CORPORATION,	)	
an Illinois corporation, and SILVER GLEN	)	
ESTATES HOMEOWNERS’	)	
ASSOCIATION, a not-for-profit corporation,	)	
	)	
Respondents.	)	

INTERIM OPINION AND ORDER OF THE BOARD (by S.T. Lawton, Jr.):

This matter is before the Board on the complainant’s January 9, 2002 motion to deem facts admitted and for summary judgment against respondent, Marc Development Corporation (MDC). The complainant filed a three-count complaint under the Board’s new procedural rules against MDC and Silver Glen Estates Homeowners Association (Silver Glen) on May 4, 2001. The complaint alleges that MDC and Silver Glen failed to properly use and maintain a surface spray irrigation wastewater disposal system facility at the Silver Glen subdivision development, located off of Whispering Trails Road in Elgin, Kane County. The respondents’ conduct allegedly was in violation of Sections 12(a), (b), and (f) of the Environmental Protection Act (Act) (415 ILCS 5/12(a), (b), (f) (2000)), and Sections 306.102(a) and 309.102(a) of the Board’s regulations (35 Ill. Adm. Code 306.102(a), 309.102(a)). MDC has not filed an answer to the complaint, the motion to deem facts admitted, or the motion for summary judgment as of the date of this order. For the reasons stated below, the Board grants the complainant’s motion to deem facts admitted and summary judgment against MDC.

**MOTION TO DEEM FACTS ADMITTED**

Complainant alleges in its motion that, according to Sections 103.204(d) and (e) of the Board’s procedural rules (35 Ill. Adm. Code 103.204(d), (e)), MDC admitted the material allegations asserted in the complaint because it failed to file an answer to the complaint by July 3, 2001, or a motion to stay the 60-day period in which MDC was required to file an answer. Mot. at 3.<sup>1</sup> Sections 103.204(d) and (e) state in relevant part that:

- (d) Except as provided in subsection (e) of this Section, the respondent may file an answer within 60 days after receipt of the complaint if respondent wants to deny any allegations in the complaint. All material allegations of

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<sup>1</sup> The complainant’s January 9, 2002 motion to deem facts admitted and for summary judgment against MDC is referred to as “Mot. at \_\_\_\_.”

the complaint will be taken as admitted if no answer is filed or if not specifically denied by the answer, unless respondent asserts a lack of knowledge sufficient to form a belief . . . .

- (e) If the respondent timely files a motion under Section 103.212(b) or 35 Ill. Adm. Code 101.506, the 60-day period to file an answer described in subsection (d) of this Section will be stayed. The stay will begin when the motion is filed and end when the Board disposes of the motion. 35 Ill. Adm. Code 103.204(d), (e).

MDC failed to file an answer or motion pursuant to 35 Ill. Adm. Code 103.204(d) or (e) as of the date of this order. The Board deems the material allegations concerning MDC in the complaint to be admitted pursuant to 35 Ill. Adm. Code 103.204(d). The Board notes that these facts are only deemed admitted in the matter against MDC. Specifically, the Board finds the following material allegations are admitted:

1. MDC is a corporation in good standing. The last known address of MDC was 1629 Colonial Parkway, Inverness, Illinois 60067. Mot. at 2.
2. MDC is the land developer that developed the Silver Glen residential subdivision. The Silver Glen subdivision development is located off Whispering Trails Road, in Elgin Township, Kane County, Illinois. Mot. at 2.
3. Since at least February 10, 1999, or at a time better known to Silver Glen, it has operated a surface spray irrigation wastewater disposal system facility (facility) at the subdivision. The wastewater disposal system at Silver Glen is permitted to consist of a lift station, comminutor, a two-stage lagoon system, including one aerated lagoon covering 1.1 acres with a working depth of 13 feet and a storage lagoon covering 2.2 acres with a working depth of 20 feet, two intermittent sand filters and chlorine disinfection. Treated wastewater from the system was to be discharged to the ground via spray irrigation to an application area of approximately 11.4 acres, with the land application area monitored by 10 wells. Prior to that time, MDC obtained permits and constructed the facility as it existed on February 10, 1999. The overall permitted function of the facility is to collect wastewater and dispose of the collected wastewater by spraying it onto dry land and allowing it to soak into the ground. Contaminants in the wastewater that would otherwise be harmful to aquatic life and the environment, if discharged directly to waters, are instead discharged onto land and not introduced to local waterways. Mot. at 2-3.
4. On March 16, 1999, the [Illinois Environmental Protection Agency (Agency)] inspected the Silver Glen facility. At that time, the two lagoons only had a few inches of freeboard. On March 16, 1999, a number of design and operational problems were observed at the facility. The lift

station totalizer was out of service, preventing the accurate calculation of flow rates and peak flows, as required by the operating permit. The aerators in the storage lagoon were not working, and the emergency notification system was out of service, preventing any notification of a power failure to the pump system. The automated control for the facility's spray irrigation system was inoperable, forcing the system to be operated manually. Mot. at 3.

5. On March 16, 1999, the facility lacked the land space to receive the spray irrigation flows as required by the operating permits for the facility, 1995-GO-2854, 1992-GO-0035, and 1991-GO-2901. Although irrigation was not occurring at the facility and the area was snow covered on that date, some of the ditches had water flowing in them during the inspection. All of the ditches were tributary to a pond that was overflowing to a storm sewer tributary to the Fox River. Mot. at 3-4.
6. On April 27, 1999, the [Agency] again inspected the facility. The [Agency] had received a telephone call from the contract operator the day before advising that a manhole on the system was overflowing wastewater. The [Agency] inspector confirmed a steady, continuous discharge from a manhole into a ditch tributary to the Fox River. On information and belief, the wastewater came from a connection between the treatment and storage lagoons or from a bypass line of the treatment lagoon apparently designed to divert raw sewage to the storage lagoon. Mot. at 4.
7. The water flowing in the ditch was composed in part of bypassed wastewater. The rest of the water was from the spray irrigation system. Mot. at 4.
8. Approximately 60% of the spray heads in operation were installed to directly discharge into the drainage ditch, which flowed freely to a pond and overflowed to a creek tributary to the Fox River, instead of onto dry land as permitted. Some of the sprays were installed to spray directly into the storm water retention ponds on the site, as opposed to dry land surface as permitted. An area of Silver Glen did contain prairie grasses and mixed hardwoods as proposed and permitted for all the spray areas, but no sprays were installed in that area. Mot. at 4.
9. On July 16, 1999, the [Agency] sent MDC a violation notice letter outlining the alleged violations. Mot. at 4.
10. On August 30, 1999, MDC submitted a proposed compliance commitment agreement (CCA), which the [Agency] rejected on September 28, 1999. Mot. at 5.

11. On April 4, 2000, the [Agency] sent MDC a notice of intent to pursue legal action. No response from MDC was received by the [Agency]. Mot. at 5.
12. [MDC] fail[ed] to construct the wastewater treatment system at Silver Glen so as to minimize violations during adverse weather conditions and equipment failures . . . . Mot. at 6-7.
13. [MDC] caus[ed] and allow[ed] wastewater to discharge to tributaries of and into the Fox River, on or before April 27, 1999 until at least May 11, 1999 . . . . Mot. at 7.
14. [MDC]fail[ed] to properly design the system the system to provide adequate land space for the spray irrigation flows, in compliance with the construction and operating permits issued for the facility . . . . Mot. at 8-9.
15. [MDC] fail[ed] to properly install many of the irrigation spray heads to discharge to dry land in compliance with the construction and operating permits issued for the facility, and instead allowing the spray heads to discharge directly to waters of the State . . . . Mot. at 9.
16. [MDC] construct[ed] and operat[ed] the spray irrigation system such that it threatened and in fact discharged to waters of the State, without first obtaining an NDPES permit to so discharge . . . . Mot. at 11.

The Board notes that it only finds these material allegations to be deemed admitted in the case against respondent, MDC. This holding does not extend to the case against respondent, Silver Glen. Since the Board finds that the facts concerning MDC are deemed to be admitted, it next addresses whether to grant complainant's motion for summary judgment.

### **MOTION FOR SUMMARY JUDGMENT**

Complainant alleges in its January 8, 2002 motion for summary judgement that if MDC admits all material allegations in the complaint, then no genuine issue of material fact remains in the case, and the complainant is entitled to summary judgment in its favor as a matter of law. Mot. at 4. MDC has not filed a response to the complainant's motion as of the date of this order. The Board grants complainant's motion for summary judgment for the reasons expressed below.

### **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. See 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 only be granted 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).

### **Discussion**

The Board finds that the allegations that are deemed admitted pursuant to 35 Ill. Adm. Code 103.204(d) are sufficient to prove that complainant is entitled to a judgment in its favor under 35 Ill. Adm. Code 101.506(b). The Board discusses how these allegations support each of the three counts of the complaint in turn.

### **Water Pollution**

Complainant first alleges that MDC violated water pollution provisions of the Act and Board regulations. Specifically, the complaint states that MDC violated Section 12(a) of the Act (415 ILCS 5/12(a) (2000)) and Section 306.102(a) of the Board regulations (35 Ill. Adm. Code 306.102(a)) respectively by: (1) causing and allowing wastewater to discharge to tributaries of and into the Fox River on dates including April 27, 1999 through May 11, 1999; and (2) failing to construct the wastewater treatment system at Silver Glen so as to minimize violations during adverse weather conditions and equipment failures. Comp. at 6-7.

Section 12(a) of the Act states that:

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. 415 ILCS 5/12(a) (2000).

MDC, as an Illinois corporation in good standing, is a “person” as defined by Section 3.26 of the Act (415 ILCS 5/3.26 (2000)). The ditch, pond, and creek tributaries to the Fox River are “waters” of the State, which is defined as “all accumulations of water, surface and underground, natural and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State.” 415 ILCS 5/3.56 (2000). The wastewater discharge contains “contaminants” which are defined by the Act as “any solid, liquid, or gaseous matter, any odor or any form of energy, from whatever source.” 415 ILCS 5/3.06 (2000).

The Board in this order deemed admitted the allegation that MDC caused or allowed wastewater to discharge into the Fox River and its tributaries from at least April 27, 1999 until

May 11, 1999. Over half of the spray heads to the irrigation system that were in operation on April 27, 1999, were installed to directly discharge into a drainage ditch, which flowed into a pond, and ultimately into a creek tributary to the Fox River. *See supra* at 3. The Agency witnessed wastewater overflowing on this path during its March 16, 1999 and April 27, 1999 inspections. *Id.* The Board finds, in light of these facts, that MDC violated Section 12(a) of the Act (415 ILCS 5/12(a) (2000)).

The complainant also alleges in count one of its complaint that MDC violated Section 306.102(a) of the Board regulations concerning systems reliability, which provides as follows:

**Malfunctions:** All treatment works and associated facilities shall be so constructed and operated as to minimize violations of applicable standards during such contingencies as flooding, adverse weather, power failure, equipment failure, or maintenance, through such measures as multiple units, holding tanks, duplicate power sources, or such other measures as may be appropriate. 35 Ill. Adm. Code 306.102(a).

The Board deemed admitted the allegation that MDC failed to construct the Silver Glen wastewater treatment system in a manner that minimized violations during adverse weather conditions. *See supra* at 4. MDC obtained permits and constructed the Silver Glen facility as it existed on February 10, 1999. *See supra* at 2. When the Agency inspector visited the Silver Glen facility on March 16, 1999, he allegedly saw that, although irrigation was not occurring at the facility and the area was covered with snow, water flowed through ditches that led to a pond and ultimately a tributary to the Fox River. *See supra* at 3.

When the Agency examined the spray irrigation system again on April 27, 1999, he witnessed a steady flow of wastewater from a manhole into a ditch tributary of the Fox River. *See supra* at 3. The wastewater was a combination of bypassed wastewater and water from the spray irrigation system. *Id.* The inspector also found that some of the spray heads from the irrigation system were installed to either directly discharge into a drainage ditch or storm water retention ponds on the site, as opposed to dry land surface as permitted. *Id.* Although an area of Silver Glen was available for use as a spray area as proposed and permitted, no spray heads were installed in that area. *Id.*

The Board finds that these facts, as deemed admitted, are sufficient to find that MDC violated Section 306.102(a) of the Board regulations. *See* 35 Ill. Adm. Code 306.102(a). The spray irrigation system, with spray heads inappropriately placed and positioned to discharge directly into ditches leading to a Fox River tributary, was not maintained or constructed to minimize violations. Moreover, the bypass witnessed by the Agency inspector on April 27, 1999, which originated from either a connection between treatment and storage lagoons or a bypass line to divert raw sewage, is also an example of construction that does not minimize violations.

### **Operation and Construction Permit Violations**

Complainant alleged in the second count of its complaint that MDC violated Section 12(b) of the Act (415 ILCS 5/12(b) 2000), which states that:

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. 415 ILCS 5/12(b) (2000).

Complainant alleges that MDC violated the above section for two reasons. First, MDC failed to properly design the system at Silver Glen to provide adequate land space for the spray irrigation flows, in compliance with construction and operating permits, 1995-GO02854, 1992-GO-0035, and 1991-GO-2901, issued for the facility. *See supra* at 3. Second, the complainant alleges that MDC violated Section 12(b) of the Act (415 ILCS 5/12(b) (2000)) by failing to properly install many of the irrigation spray heads to discharge to dry land in compliance with the construction and operating permits issued for the facility. Although an area did exist that was permitted as a spray area, no sprays were installed on that part of the property. *Id.* The Board finds that the above allegations deemed admitted in this order sufficiently support the conclusion that MDC violated Section 12(b) of the Act (415 ILCS 5/12(b) (2000)).

### **Discharge Without a Permit**

Complainant alleged in its third count of the complaint that MDC violated Section 12(f) of the Act (415 ILCS 5/12(f) (2000) and Section 309.102(a) of the Board regulations. Section 12(f) of the Act states in pertinent that:

No person shall:

- f. Cause, threaten, or allow the discharge of any contaminant 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 point source within the State, without an NPDES permit for point source discharges issued by the Agency under Section 39(b) of this Act, or in violation of any term or condition imposed by such permit, or in violation of any NPDES permit filing requirement established under Section 39(b), or in violation of any regulation adopted by the Board or of any order adopted by the Board with respect to the NPDES program. 415 ILCS 5/12(f) (2000).

Section 309.102(a) of the Board regulations pertains to the requirements of a National Pollutant Discharge Elimination System (NPDES) permit, stating that:

Except as in compliance with the provisions of the Act, Board regulations and the CWA, and the provisions and conditions of the NPDES permit issued to the discharger, the discharge of any contaminant or pollutant by

any person into the waters of the State from a point source or into a well shall be unlawful. 35 Ill. Adm. Code 309.102(a).

Complainant alleges that MDC violated Section 12(f) of the Act (415 ILCS 5/12(f) (2000)) and Section 309.102(a) of the Board regulations (35 Ill. Adm. Code 309.102(a)) by “constructing and operating the spray irrigation system such that it threatened and in fact discharged [contaminants] to waters of the State, without first obtaining an NPDES permit to so discharge.” Comp. at 11. The Agency allegedly witnessed the discharge of contaminants in the form of wastewater into a ditch that eventually led to a Fox River tributary on April 27, 1999. The Board, in this order, deemed admitted the fact that MDC did so without first obtaining an NPDES permit. *See supra* at 4. In light of these facts, the Board finds that MDC violated Section 12(f) of the Act (415 ILCS 5/12(f) (2000)) and 35 Ill. Adm. Code 309.102(a).

### **CONCLUSION**

The Board deems admitted the material allegations set forth in the complaint in this matter. The Board also grants complainant’s motion for summary judgment against MDC. The Board finds that MDC violated Sections 12(a), (b), and (f) of the Act (415 ILCS 5/12(a), (b), (f) (2000)), and Sections 306.102(a) and 309.102(a) of the Board regulations. The Board also finds that MDC may be liable for all costs, pursuant to 42(f) of the Act, including attorney, expert witness, and consultant fees, expended by the State in pursuit of this action against MDC.

The Board directs the parties to hearing as expeditiously as practicable on the specific issue of the appropriate penalty amount, costs, and attorney fees in this matter. The parties are only to present testimony and evidence that are relevant to the factors as set forth in Sections 33(c), 42(f), and 42(h) of the Act (415 ILCS 5/33(c), 42(f), (h) (2000)).

This opinion constitutes the Board’s finding of facts and conclusions of law.

### **ORDER**

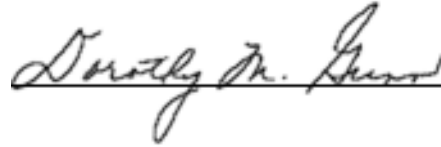
1. The Board grants complainant’s motion to deem admitted the material allegations in its May 4, 2001 complaint, as set forth in the opinion above.
2. The Board grants complainant’s motion for summary judgment, and finds MDC in violation of Sections 12(a), (b), and (f) of the Act (415 ILCS 5/12(a), (b), (f) (2000)), and Sections 306.102(a) and 309.102(a) of the Board regulations (35 Ill. Adm. Code 306.102(a), 309.102(a)).
3. The Board orders MDC to cease and desist from further violations of Sections 12(a), (b), and (f) of the Act (415 ILCS 5/12(a), (b), (f) (2000)), and Sections 306.102(a) and 309.102(a) of the Board regulations (35 Ill. Adm. Code 306.102(a), 309.102(a)).
4. The Board directs the parties to hearing on the specific issue of the appropriate penalty amount, costs, and attorney’s fees in this matter. The parties are only to



present testimony and evidence that are relevant to the factors and costs that are set forth in Sections 33(c), 42(f) and 42(h) of the Act (415 ILCS 5/33(c), 42(f), (h) (2000)). The Board directs the parties to provide specific figures for proposed penalties and proposed justification for such figures.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on February 21, 2002, by a vote of 7-0.

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

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board