

ILLINOIS POLLUTION CONTROL BOARD
February 23, 1989

VILLAGE OF KILDEER,)
)
 Complainant,)
)
 v.) PCB 88-173
)
 VILLAGE OF LAKE ZURICH,)
 LIBERTY LAKE PARTNERSHIP,)
 ESR/ANDEN CORPORATION,)
 LEXINGTON DEVELOPMENT CO.,)
 LEXINGTON HOMES, INC.,)
)
 Respondents.)

ORDER OF THE BOARD (by J. Theodore Meyer):

This matter is before the Board on a January 10, 1989 motion by complainant the Village of Kildeer (Kildeer) seeking interim relief. On January 19, 1989, the Board granted respondents an extension of time until February 6, 1989 to file their responses. Respondents the Village of Lake Zurich (Lake Zurich), ESR/Anden Corporation (ESR/Anden), and Liberty Lake Partnership (Liberty Lake) filed their responses on February 6. On February 7, 1989, respondent Lexington Development Corporation (Lexington) filed its response, along with a motion to file instanter. That motion to file instanter states that Lexington's response was one day late because of a delay in the transmission of executed affidavits in support of the response. In view of Lexington's minimal delay in filing its response, and because no party was prejudiced by the delay, the motion to file instanter is granted.

Kildeer's motion for interim relief arises from its October 24, 1988 enforcement complaint against respondents. That complaint alleges various effluent and water quality violations at Lake Zurich's Southeast Treatment Plant, and in its receiving stream, Buffalo Creek. Kildeer alleges that these violations will be exacerbated by permits issued by the Illinois Environmental Protection Agency (Agency) to respondents ESR/Anden, Liberty Lake, and Lexington for sewer extensions which will increase the flow to the Southeast Plant. No hearing has yet been held on this complaint. In this motion for interim relief, Kildeer asks that the Board enter an order prohibiting the construction of the sewer extensions, and prohibiting Lake Zurich from accepting wastewater from those extensions, pending a final order of the Board in this enforcement proceeding. Kildeer contends that if flows from the sewer extensions are directed to the Southeast plant, the alleged violations will become more

severe and more frequent. Kildeer also maintains that if the sewer extensions are constructed before the Board issues a final ruling on the enforcement complaint, the doctrine of equitable estoppel might bar the Board from granting some of the relief requested by Kildeer, i.e. the revocation of the permits allowing the construction of the extensions. Wachta v. Pollution Control Board (2d Dist. 1972), 8 Ill. App. 3d 436, 289 N.E.2d 484. Kildeer argues that the Board has authority to grant the interim relief pursuant to its "cease and desist" powers under Section 33(b) of the Illinois Environmental Protection Act (Act). Ill. Rev. Stat. 1987, ch. 111^{1/2}, par. 1033(b). Indeed, Kildeer contends that it must seek this relief from the Board before initiating an action for injunctive relief in the circuit court under Section 45(b) of the Act.

In opposition to Kildeer's motion, all respondents argue that the motion for interim relief should be denied because the Board lacks authority under the Act to grant the requested relief. Respondents contend that the Board's "cease and desist" powers under Section 33(b) can only be used in final orders entered by the Board after a hearing on the merits of the complaint, and point out that no hearing has been held on the enforcement complaint. Furthermore, respondents maintain that Kildeer's statement that it must seek interim relief from this Board before initiating an action in circuit court pursuant to Section 45(b) is unfounded. Respondents state that a person may seek injunctive relief pursuant to Section 45(b) only after he is denied relief under Section 31(b), which contemplates the entry of a final order after hearing. Respondents therefore contend that because no hearing has been held and there has been no decision on the merits of the enforcement complaint, the motion for interim relief has nothing to do with Kildeer's right to pursue injunctive relief in the courts. Finally, respondents argue that Kildeer is not entitled to interim relief on the merits of its request.

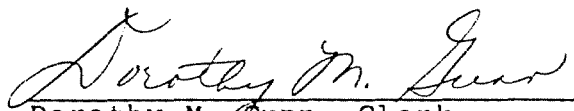
The Board agrees with respondents' claim that it has no authority to grant the requested interim relief, and thus must deny the motion. The "cease and desist" authority granted to the Board in Section 33(b) of the Act is clearly to be used only in final orders pursuant to Section 33(a). It is just as clear that a Section 33(a) final order can only be entered after hearing on the merits of an enforcement complaint. No hearing has been held in this proceeding, and thus the Board cannot at this time issue any cease and desist order. See Illinois Environmental Protection Agency v. Fitz-Mar, Inc., PCB 86-160 (July 16, 1987); Greenland v. City of Lake Forest, PCB 84-155 (June 13, 1985). Kildeer's motion is denied.

Finally, on February 17, 1989, Kildeer filed a reply to respondents' responses. In its January 19, 1989 order the Board allowed Kildeer to file a reply by February 14, 1989. The

certificate of service on Kildeer's reply states that the reply was mailed on February 14, 1989. However, the reply was not received by the Clerk's office until February 17. The reply is late and will not be accepted. In Interstate Pollution Control v. Illinois Environmental Protection Agency, PCB 86-19 (March 27, 1986), this Board declined to apply the mailbox rule, except in cases where a statutory appeal period is involved. That is not the case here. No motion to file instanter accompanied the reply, and thus the reply is not accepted. The Board notes, however, that the reply contains nothing which would change its decision to deny Kildeer's motion for interim relief.

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 23rd day of February, 1989, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board