ILLINOIS POLLUTION CONTROL BOARD
March 11, 1993

HERMAN W. PRESCOTT,	)	
	)	
Complainant,	)	
	)	PCB 90-187
v.	)	(Enforcement)
	)	
CITY OF SYCAMORE,	)	
	)	
Respondent.	)	

SUPPLEMENTAL OPINION AND ORDER OF THE BOARD (by R. C. Flemal):

This matter comes before the Board on a motion for reconsideration filed by the complainant, Herman W. Prescott (Prescott or complainant). Prescott asks that the Board reconsider its order of December 17, 1992. In that order, the Board dismissed the complaint finding that the complainant had not brought this action based on applicable law; consequently, it has not been shown that a violation of applicable law has occurred.

The complaint, filed October 16, 1990, by Prescott against the City of Sycamore (Sycamore or respondent), alleges that Sycamore has violated 35 Ill. Adm. Code 653.604 of Subtitle F, Public Water Supplies, by failing to maintain the required amount of chlorine residual in all active parts of the distribution system. Prescott requests that the Board order Sycamore "to supply the Northeast section of the City with a steady supply of chlorine up to standards * * *" and to conform to the recommendations of the Illinois Environmental Protection Agency (Agency), as contained in a letter attached to the complaint. (complaint at ¶9.)

For the reasons stated below, the Board reconsiders its December 17, 1992 opinion and order.

REGULATORY FRAMEWORK

Central to this action is an understanding of the regulations governing disinfection by public water supplies, and the amendments that these regulations have undergone. Parts of this discussion are also contained in the Board's December 17, 1992 opinion and order and are reiterated here for continuity.

The requirement of providing water that is adequately disinfected is a long-standing facet of regulation of public water supplies. However, the manner in which this requirement is manifest has evolved over time as a function of expanding

knowledge of the most beneficial methods and manners of achieving disinfection.

The most recent major revision to disinfection regulations occurred pursuant to requirements of the U.S. Safe Drinking Water Act (SDWA), and to regulations adopted by the U.S. Environmental Protection Agency (USEPA) implementing the SDWA as found at 40 CFR 141, 142, and 143 (1989). These revisions were in turn adopted into Illinois law, as required by the Environmental Protection Act (415 ILCS 5/17.5 (1992)(Act)[1], by Board order[2] of August 9, 1990, with an effective date of September 20, 1990. This date of September 20, 1990 is a watershed date as regards the instant action.

Prior to September 20, 1990 the applicable disinfection requirements occurred at 35 Ill. Adm. Code 604.401 and 653.604. Section 604.401 specified in pertinent part:

> All supplies . . . shall chlorinate the water before it enters the distribution system.
>
> * * *
>
> b) The Agency may set levels and promulgate procedures for chlorination.

The Agency has set chlorine levels at Section 653.604, wherein it is required that:

> A minimum free chlorine residual of 0.2 mg/L or a minimum combined residual of 0.5 mg/L shall be maintained in all active parts of the distribution system at all times.

It is this chlorine residual requirement contained in Section 653.604 that Prescott alleges Sycamore has violated.

Subsequent to September 20, 1990, new disinfection requirements were added at 35 Ill. Adm. Code 611.Subpart B, in particular at Sections 611.240, 611.241, and 611.242. The new requirements are not only substantially more expansive, but also amend (1) the components that constitute residual chlorine, (2) the techniques permissible for measuring residual chlorine, and (3) the numerical standard for residual chlorine from single numeric values to a standard based upon averaging.

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[1] The Act was formerly codified at Ill.Rev.Stat. 1991, ch 111½, par. 1001 et seq.

[2] In re: Safe Drinking Water Act Regulations (August 9, 1990), R88-26, 114 PCB 149-397.

A provision of the change to the new regulations is that the changeover date from the old to the new regulations is dependent upon the nature of the particular public water supply[3]. In the circumstance at hand, the Sycamore public water supply system is a "groundwater system not under the direct influence of surface water", and as such the effective date of the new disinfection requirements is the same as the general effective date of the Part 611 regulations, i.e., September 20, 1990[4]. The Board so found in its dismissal order of December 17, 1992; this finding is not disputed.

September 20, 1990 is prior to October 16, 1990, the date upon which the instant complaint was filed. Accordingly, the complaint was filed after the date upon which Section 604.401 (and Section 653.604 which proceeds from Section 604.401) ceased to be applicable to Sycamore. The consequences that flow from these facts is what remains at issue.

MOTION FOR RECONSIDERATION

In his motion Prescott asks the Board to reconsider alleged violations prior to September 1990, specifically violations alleged to have occurred between November 22, 1989 and January 22, 1990. Prescott argues that the Board's December 17, 1992 decision would have the effect of barring all enforcement actions where the violation was not occurring at the time of the filing of the complaint[5]. Prescott cites Modine Manufacturing v. PCB (2nd Dist. 1990), 549 N.E.2d 1379, where the court allowed the imposition of penalties for wholly past violations.

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[3] See 35 Ill. Adm. Code 604.401, as amended effective September 20, 1990, and 35 Ill. Adm. Code 611.240. Section 604.401 ceases to be applicable to any particular public water supply though the action of the statement:

> This Section applies until the effective date for the filtration and disinfection requirements of 35 Ill. Adm. Code 611.Subpart B as applicable to each supply.

which was added to Section 604.401 effective September 20, 1990.

[4] See 35 Ill. Adm. Code 611.240(g).

[5] Prescott also argues that retroactive application of the current Part 611 regulations is improper. The Board finds Prescott's arguments on retroactivity inapplicable because the Board never applied nor intends to apply retroactively the Part 611 regulations in this case.

Sycamore filed its response to the motion for reconsideration on January 29, 1993. Sycamore states that since the Board "repealed" Section 604.401 and with it the basis for Section 653.604, and did not provide a "saving clause" to continue the regulation in effect, the Board was correct in dismissing the complaint.

Sycamore argues that under Illinois law, where a remedial statute is repealed without a "saving clause", it stops all pending actions where the repeal finds them. If final relief has not been granted before the repeal goes into effect, it can not be granted afterward. (Shelton v. City of Chicago (1st Dist. 1969), 42 Ill.2d 462, 248 N.E.2d 121; Stefani v. Baird & Warner, Inc. (1st Dist. 1987), 157 Ill.App.3d 167.)

The cases cited by Sycamore deal with statutory amendments that totally extinguish a right of action for damages or to enforce regulations that were promulgated pursuant to that statutory right of action. The effect of the amendments on pending cases brought in exercise of that now extinguished right is that the cases were dismissed. Although in this matter the regulations were changed in response to identical-in-substance directives contained in the Act as discussed above, the Board finds here that the right to bring an action was not totally extinguished in this instance for those alleged violations prior to the effective date of the amendments. Furthermore, although Sycamore asserts that the repealed Board regulations are remedial, it gives no support for that conclusion.

Sycamore incorrectly characterizes the September 20, 1990 action with respect to Section 604.401 as a "repeal". The regulation's provisions were not expunged through a repeal; rather, its provisions ceased to be effective after a date certain. While it is clear that the regulation's provisions are unenforceable for alleged violations occurring after that date, we do not construe its provisions as being unenforceable for past violations that occurred before the regulation's provisions ceased to be effective. We note that we are not making a holding on the enforceability of a repealed regulation, as that issue is not before us. The Board accordingly does not find this facet of Sycamore's arguments persuasive.

Sycamore further argues that the Modine case, cited by Prescott, is not applicable since that case did not deal with the issue of regulatory effectiveness, but rather with subsequent compliance with still applicable regulations. We believe that Sycamore is correct in that in Modine the violator did come into compliance and no regulatory change was involved. However, the effect of the subsequent compliance in Modine is similar to the instant matter. The only difference is that here, if violation is found, the violation could terminate due to subsequent inapplicability of the regulation, rather than subsequent

compliance with the regulation. Again, the Board is not persuaded by Sycamore's arguments.

Prescott is correct that the complaint contains allegations of violations between November 22, 1989 and January 22, 1990. The Board also notes, however, that the complaint and hearing record indicate that complainant sought to present allegations and to seek relief of a continuing violation beyond the dates specified in the motion for reconsideration. Complainant never sought to amend his complaint, and neither party recognized the existence of new regulations governing the actions of respondent[6].

Nevertheless, the Board will reconsider complainant's action, as it pertains to the dates of alleged violations between November 22, 1989 and January 22, 1990, since these dates were presented in the complaint, and are prior to the effective date of the new regulations for this source. Therefore, the Board vacates its prior order only as it pertains to violations that are alleged to have occurred between November 22, 1989 and January 22, 1990.

FACTS

The essential facts in this matter have been set out in the December 17, 1992 Board opinion. Among these are:

Prescott lives at 462 East Exchange Street in the northeast section of the City of Sycamore. The dwelling is one in a group of condominiums in the area. Prescott moved to the location in November 1988. The evidence at hearing established that the Prescott residence receives water through a six-inch pipe connected to a water main (hereinafter, "water main extension"). The pipe extends for approximately 230 feet until it dead ends at a hydrant. (Tr. at 45, 145, 339-340.) Various tests of the water in the area were conducted for chlorine content by Prescott, Agency personnel, and Sycamore personnel both before and after the complaint was filed.

Whether this pipe system is owned and controlled by the condominium residents or Sycamore such that one or the other would carry the responsibility of maintaining and operating the water main extension and hydrant system is at issue in this

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[6] The Board is bemused by complainant's insinuations that the Board adopted revised disinfection regulations to somehow circumvent complainant's case. (Compl. motion at 4). The revision was not only mandated by federal and state law, but occurred prior to the filing of the instant complaint. See above.

proceeding. Whether the tests conducted (pertaining to dates between November 22, 1989 and January 22, 1990) indicate that a violation of the applicable standards has occurred is also at issue in the proceeding.

DISCUSSION

Ownership

In defense of the action, the respondent alleges that the developer of the property, and subsequently Prescott, owns the water main extension. Therefore, any liability for violation of regulations due to inadequate maintenance of the water main extension and hydrant should be borne by Prescott and the other condominium owners.

Prescott argues that Sycamore is solely responsible for the operation and maintenance of the water main extension, and is the official custodian of the public water supply including the water main and its extensions.

Pertinent regulations in effect between November 22, 1989 and January 22, 1990 state:

> Section 601.101 General Requirements
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> Owners and official custodians of a public water supply in the State of Illinois shall provide pursuant to the Environmental Protection Act * * *, the Pollution Control Board * * * Rules, and the Safe Drinking Water Act * * * 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.
>
> Section 601.102 Applicability
>
> The provisions of this Chapter shall apply to public water supplies, as defined in the Act, except for those designated as non-community water supplies. A public water supply shall be considered to end at each service connection.
>
> Section 601.105 Definitions
>
> * * *
>
> "Service Connection" is the opening, including all fittings and appurtenances, at the water main through which water is supplied to the user.

Also, the parties presented evidence and testimony on the ownership/liability issue. Prior to Prescott's residency at the property, a developer of the property, Donald J. Kohler, applied to the Illinois Environmental Protection Agency for a construction permit for the water supply system. (Compl. Exh. 1.) Correspondence from the Agency to Warner Engineering dated April 8, 1988 indicates that the Agency viewed the six-inch water main extension as a water main, and reported to the developer that his organization would be viewed as a public water supply if it retained ownership of the water main extension. The Agency further informed the developer of minimum compliance requirements for public water supplies. The Agency then suggested two alternatives for the developer in order to avoid being viewed as a public water supply:

> The situation of the proposed Exchange Street townhouses[7] being a public water supply may be avoided if the necessary easements could be granted with ownership of the proposed 6 inch watermain being turned over to the City of Sycamore. If this is to be the case, a revised page 3 of the Application for Construction Permit must be submitted citing the City of Sycamore as the owner of the completed project.
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> Another acceptable alternative would be for Donald J. Kohler, * * * to retain ownership of the proposed watermains (sic), and enter into an agreement with the City of Sycamore where the official representatives of the City would supervise operation, maintenance and repair of the proposed watermain. Any cost incurred would be borne by the terms of an agreement accepted and signed by the respective officials. (Compl. Exh. 1.)

Correspondence from Sycamore[8] indicates that the second option was chosen and a revised page 3 of the application was submitted to the Agency which states in pertinent part:

> Agreement to Furnish Water
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> * * *

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[7] The subject property is referred to in the record as both townhouses and condominium property. The record indicates that the property is condominium property and that the area through which the water main runs is part of the common elements of the condominium property. (Tr. 46-47; Resp. Exh. J).

[8] Letter from Sycamore to the Agency dated April 15, 1988, Compl. Exh. 1.

> The undersigned acknowledges the public water supply's responsibility for examining the plans and specifications to determine that the proposed extensions meet local laws, regulations and ordinances. The City of Sycamore shall have the sole responsibility for the "Supervision" and "Operation" of all water main extensions upon completion of installation and in perpetuity.
>
> [signed by Harold Johnson, as the mayor of the City of Sycamore]
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> * * *
>
> * * * I/We hereby agree to accept ownership of the project upon satisfactory completion, subject to the City of Sycamore having sole responsibility for "Supervision" and "Operation" of all water main extensions upon completion of installation and in perpetuity. Actual maintenance costs shall be borne by Owner.
>
> [signed by Donald Kohler as owner of the completed project] (Compl. Exh. 1.) (underlining in original)

The above agreement indicates that the developer would retain ownership of the completed project. That the agreement was reached is supported by testimony. John Brady, city engineer, testified that no "formal" agreement was entered into and that page three was not in the form of an agreement. However, he acknowledged that page three of the application was signed by the mayor of Sycamore and Mr. Kohler, and that it contains the language as suggested by the Agency for option 2. (Tr. 346-347.)

The permit application, by which this agreement was submitted, was not approved by the Agency. (Compl. Exh. 1.) The Board finds that the fact that the permit application was not approved at some later time does not affect the contents of the agreement, nor does it affect the fact that it is valid as entered into between the parties. The Board further finds that the agreement is not inconsistent with the applicable regulations cited above.

The Board finds that Prescott is co-owner of the water main extension, and that the terms of the agreement between Sycamore and Kohler passed with all rights and claims to the owners of the condominiums. When ownership of the condominium property unit passed to Mr. & Mrs. Prescott, a percentage of the ownership of the common elements also passed to Mr. and Mrs. Prescott, together with the appurtenances belonging to the property. (Resp. Exh. J.) The deed was entered into within the

contemplation of the Illinois Condominium Property Act, 765 ILCS 605/1 et seq. (Condominium Property Act)[9].

Even if the agreement were not valid, Prescott would be co-owner, as no easements have been given to Sycamore, and no subsequent transfer of ownership of the water main extension has taken place. The situation would merely be as it was prior to the entering of the agreement: i.e. the owner(s) of the property would be owner(s) of the water main. Moreover, Prescott agreed that if the water main extension were not dedicated to Sycamore and there were no easements given to Sycamore, he would be considered part owner as he is a member of the condominium association. (Tr. at 46-47.) In addition, the Condominium Property Act states that unit owners (or a percentage thereof) "may elect to dedicate a portion of the common elements to a public body for use as, or in connection with, a street or utility". (765 ILCS 605/14.2) There is no evidence in the record that dedication of the water main extension to Sycamore has ever taken place.

Since Prescott is part-owner and Sycamore has sole authority to supervise and operate the water main extension, any liability for violations would be per the terms of the agreement. Since Sycamore has sole responsibility for supervision and operation, Sycamore would be responsible for violations involving supervision and operations. If the maintenance is necessary for operation of the main, Sycamore, as solely responsible for operations, would have to perform that maintenance. Any maintenance costs incurred would be borne by the condominium owners as stated in the agreement.

Alleged Violations

As stated in the complaint, Prescott alleges Sycamore violated Section 653.604 by failing to maintain a minimum free chlorine residual of 0.2 mg/L or a minimum combined chlorine residual of 0.5 mg/L in all active parts of the distribution system at all times. As noted above, the dates of the alleged violations were to have occurred between November 22, 1989 and January 22, 1990.

Mr. Prescott submitted test results he conducted for total chlorine[10] using a Hach test kit. He recorded results ranging

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[9] This Act was formerly codified at Ill. Rev. Stat. 1991, ch. 30, pars. 301 et seq.

[10] Total chlorine is the sum of free and combined chlorine. (Tr. at 98, 388). An accurate total chlorine measurement under 0.5 mg/L would thus indicate combined chlorine under 0.5 mg/L.

from 0.0 to 0.4 on days between November 22, 1989 and January 22, 1990. (Compl. Exh. 3).

Prescott testified that in conducting the tests, he ran water through a vinyl hose (Resp. Exh. A) connected to an faucet outside his residence. He testified that he filled the test vial with water and put it in the kit, added material from a capsule to the water in the vial, covered the vial with his index finger to shake it, and then waited three minutes or less before taking the reading. (Tr. at 55-57, 68.) He testified that he waited no longer than three minutes, but that he sometimes waited 2½ minutes. He could not recall how many times he took readings at 2½ minutes. (Tr. at 68, 71.)

Mr. Leonard Lindstrom, Regional Manager of the Agency's Division of Public Water Supplies, testified on behalf of complainant. He testified regarding field or lab testing in general that, if, for example, he wants a certified test, he uses a lab test. He stated that to test what they think is present, he uses a field test. (Tr. 164-165.) He characterized the Hach test as a field test that "is not one in which there are a lot of doubts about what the results are". (Tr. at 165.) He stated that he has not taken any chlorine tests to the lab. (Tr. at 165.) Mr. Lindstrom described the reaction in the test, and stated that the color or lack of color would be readily apparent. (Tr. at 158.) He also stated that one would not have to wait the full three minutes "to get most of the residual". (Tr. at 167.)

Kevin Lookis, vice president of Hydronics, Inc., testified on behalf of Sycamore. He testified that the Hach test had a margin of error of plus or minus 20% to 25% and is not suitable for detecting very low levels of chlorine, such as .2 parts per million. (Tr. at 375-377.) He stated that factors that could adversely affect the accuracy of the Hach test for total chlorine include not allowing enough time for the reagent to react, the condition of the eyes, the condition of the reagent powder, and the sample size. (Tr. at 378-380.) Mr. Lookis testified that the hose used by complainant contained a film indicating a buildup of iron which could create a chlorine demand that could use up or reduce some of the chlorine during testing. (Tr. at 380-383.)

Thomas Mangan, president of Prairie Environmental Specialists, also testified on behalf of Sycamore. He testified that the Hach test was considered a qualitative test, i.e., a test used to give benchmark readings subject to field conditions. He stated that the Hach test has a 10% to 20% margin of error. (Tr. at 417-418.) He also stated factors that could affect the accuracy of the test as not waiting the full three minutes as recommended by the manufacturer, covering the tube with a finger when mixing the reagent in the vial, and the use of a rubber or vinyl hose. (Tr. at 420-422.) Mr. Mangan testified that he

would recommend that a quantitative test be conducted if a field test indicated a .0 residual. (Tr. at 432.) He stated that in doing the quantitative test, certain procedures had to be followed due to the fact that chlorine dissipates quickly. (Tr. at 432-433.)

Based on the above, the Board finds that the test results presented by Prescott do not give the definitive indication of the level of free or combined chlorine needed to conclude that a violation of Section 653.604 has occurred. The respondent's witnesses rebutted the accuracy of the results yielded by the method of field testing used by Prescott. The Board is particularly persuaded that the test results do not accurately depict a violation based on the fact that the Hach test is a qualitative field test that the respondent's witnesses testified has a margin of error ranging between 10% and 25%, and that it is particularly suspect at lower levels of detection. Also, testimony indicates that complainant did not wait the full three minutes on some occasions, and that he could not recall how many times he did not wait the full three minutes. At best the test results are suggestive of a problem and would lead one to further investigate whether a violation is occurring, but are not accurate enough to prove that a violation actually occurred.

The fact that Sycamore officials or officials of other water supplies use the Hach test to check chlorine residual (Tr. at 260, 270; 396-7), or that the test colors are apparent as stated by Mr. Lindstrom, and as argued by complainant, does not bear on the lack of accuracy of the Hach test for a definitive finding of violation. Also, the fact that chlorine dissipates quickly and that certain procedures need to be followed to conduct a quantitative test does not mean it cannot be done, nor does this bear on the lack of accuracy of the field test conducted here. Complainant mischaracterizes respondent's witness as stating that the tests for chlorine residual "must" be run at the site. (Compl. brief at 5.) The correct responses were affirmative answers to questions concerning quick dissipation of chlorine as one of the reasons why these tests are "generally" done at the site. (Tr. at 433.)

The Board finds that the complainant has failed to show that a violation of 35 Ill. Adm. Code 653.604 has occurred between November 22, 1989 and January 22, 1990.

This supplemental opinion, and the December 17, 1992 opinion (as modified in today's opinion) constitute the Board's findings of fact and conclusions of law in this matter.

ORDER

The complainant has failed to show that the violation as alleged has occurred. Therefore, this complaint is dismissed.

IT IS SO ORDERED.

Board Member Bill Forcade dissented.

Section 41 of the Environmental Protection Act, 415 ILCS 5/41 (1992), 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 35 Ill. Adm. Code 101.246, Motions for Reconsideration, and 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 supplemental opinion and order was adopted on the 17th day of March, 1993, by a vote of 5-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board