

ILLINOIS POLLUTION CONTROL BOARD
May 20, 1993

THOMAS J. KONKEL,)
)
Petitioner,)
)
v.) PCB 92-145
) (Enforcement)
CITY OF CREST HILL,)
)
Respondent.)

THOMAS J. KONKEL, PRO SE, APPEARED AS COMPLAINANT;

THOMAS COWGILL, OF BLOCK, KROCKERY, CERNUGEL AND COWGILL APPEARED ON BEHALF OF RESPONDENT.

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

On October 7, 1992, Thomas J. Konkell filed a complaint against the City of Crest Hill (Crest Hill), located in Will County, Illinois. The complaint alleged that Crest Hill violated Sections 12(a), (b), (c), (d), (f) and Section 13(a)(7,8) of the Illinois Environmental Protection Act (Act). Hearing was held on December 21, 1992, at the Will County Court House, Joliet, Illinois. No members of the public attended. Both parties declined to submit written briefs, choosing instead to make an oral summary of their arguments at the close of hearing. (Tr. at 112, 113.¹)

STATUTORY FRAMEWORK

Complainant's authority to bring this action derives from Section 31(b) of the Act which states in pertinent part that: "Any person may file with the Board a complaint... against any person allegedly violating this Act...." Section 31(c) states in pertinent part that "...the burden shall be on the Agency or other complainant to show either that the respondent has caused or threatened to cause air or water pollution or that the respondent has violated or threatened to violate any provision of this Act...."

The subsections of Section 12 that complainant alleged were violated read in pertinent part as follows:

¹The hearing transcript will be cited as "Tr. at ___".
Petitioner's Exhibits will be cited as "Pet. Ex. ___".
Respondent's Exhibits will be cited as "Res. Ex. ___".

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;
- 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;
- c. Increase the quantity or strength of any discharge of contaminants into the waters, or construct or install any sewer or sewage treatment facility or any new outlet for contaminants into the waters of this State, without a permit granted by the Agency;
- d. Deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard;
- f. Cause, threaten or allow the discharge of any contaminant into the waters of the State ... without any NPDES permit"

Section 13(a) of the Act gives the Board statutory authority to adopt regulations to promote the purposes and provisions of this section. Specifically, Sections 13(a)(7) and (8) allow the Board to adopt regulations concerning alert and abatement standards relative to water pollution episodes and requirements for the inspection of equipment that may cause or contribute to water pollution. Since these are statutory prescriptions for the Board on what type of regulations the Board may adopt, it is not possible for Crest Hill to be in violation of these statutes. Therefore, in relation to the complaint, the Board will consider only the allegations that Crest Hill violated Section 12(a)(b)(c)(d)(f) of the Act.

BACKGROUND

On October 29, 1992, the Board set this matter for hearing and ordered Crest Hill to provide the Board with information on what relationship there is between a prior case, Dutton v. City of Crest Hill (45 PCB 523, March 19, 1982, PCB 79-110) and the instant complaint. Specifically, the Board requested a statement on the geographic locations involved in both areas and any interconnections of the sewer system.

0142-0562

The Board's Opinion and Order in PCB 79-110 found that Crest Hill had violated Rules 601(a) and 602 of the Board's Water Pollution Rules and Section 33(c) of the Act. In essence, Crest Hill failed to adequately maintain sewer lines resulting in overflows of the sewers. Crest Hill was ordered to cease and desist from further violations and submit a remediation plan for approval by the Board. At the hearing on December 21, 1992, in the instant case, Crest Hill presented testimony and exhibits to delineate the geographic locations involved in PCB 79-110 and the current case, and interconnections in the sewer system (Tr. at 66-77 and Res. Ex. 1, 2). The Board will consider these issues within the context of the case discussion which follows.

FACTS

Complainant, Thomas Konkel, resides at 1911 Nicholson Street, Crest Hill, Illinois. Mr. Konkel purchased the property in 1989. (Tr. at 17.) On September 9, 1992, complainant's basement filled with water during a rainstorm, from approximately 3:30 p.m. until 10:00 p.m. (Comp. at 3, Tr. at 8.) The basement was equipped with a sump pump, which was running during the rain event, yet the incoming water overflowed the sump pump. (Tr. at 13.) The basement has an area of 1800 square feet and filled with water to a depth of at least 12 inches. (Tr. at 12.) At the hearing on December 21, 1992, Mr. Konkel testified that there were no more flooding episodes since September 9, 1992.

Konkel testified that on the evening of September 9, 1992, during the severe basement flooding episode, he witnessed a fire truck of the Lockport Fire Protection District pumping water out of the manhole at the intersection of Elsie and Nicholson. (Tr. at 39-42.) The hole is labelled "1B5" on Respondent's Exhibit Number 2 (Tr. at 42), which is the diagram labelled "City of Crest Hill, Illinois, Crest Hill Sewerage System".

In addition to his testimony, Konkel offered into the record 26 photographs which were entered as Petitioner's Exhibits 1-26. (Tr. at 58.)

ISSUES

There are two major issues in this case. The first issue concerns the influx of water into Mr. Konkel's home. The second issue involves determining what person or entity is responsible for the pumping activity on September 9, 1992, when Konkel observed Lockport Fire Protection District equipment being used to pump out of the sewer system onto the streets of Crest Hill.

Basement Flooding

Mr. Konkell alleges that raw sewage flooded his basement during the severe rainstorm on September 9, 1992. (Comp. at 3.) Mr. Konkell entered 26 photographs into evidence (Pet. Ex. 1-26) that purported to show the flooding and sewage in his basement. The occurrence of the flooding was not contested by the City of Crest Hill. Mr. Konkell further maintains that several photographs show evidence of raw sewage in his basement. These include Pet. Ex. 13 (Tr. at 27), and Pet. Ex. 9, 10, 17, and 18 (Tr. at 30).

The City of Crest Hill did not contest the occurrence of raw sewage in Mr. Konkell's basement. In addition, the attorney for Crest Hill, Mr. Cowgill, indicated in his closing statement (Tr. at 119) that "the influx of sewage into the basement of Mr. Konkell's home..." was one of the two major issues of this case. The occurrence of raw sewage in Mr. Konkell's basement on the afternoon and evening of September 9, 1992, was not disputed. In view of the testimony and evidence, the Board finds that water and raw sewage flooded Mr. Konkell's basement on September 9, 1992.

Mr. Konkell also alleged that contact with the raw sewage while cleaning his basement was related to a subsequent three-week illness. (Tr. at 36-38.) His physician, Dr. Saur, required him to go through a series of shots and warned against further contact with raw sewage. (Tr. at 37.) Mr. Konkell stated that he had a written statement about his condition from Dr. Saur; however, Mr. Konkell did not produce the statement at hearing. (Tr. at 37.) The Board finds that there is not enough evidence in the record to connect Mr. Konkell's illness to the basement flooding episode, but notes that contact with raw sewage is indisputably a potential health risk.

Mr. Konkell also alleged that sewage backs up through his toilets on a daily basis (Comp. at 3) and that there had been one other basement flooding episode since he purchased the home in 1989. (Tr. at 15.) As evidence of the alleged "sewage back-up through toilets on a daily basis" (Comp. at 3) he offered Photograph 3 (Pet. Ex. No. 3) and a description of the dirt in the toilet. (Tr. at 33.) In regards to the earlier basement flooding episode, he testified that water came up through a drain hole in the basement and led to a small accumulation of a "couple of inches out of the hole...." (Tr. at 15.) An examination of the photograph does show residue on the toilet. However, it is not clear from the photo that the residue is a result of sewer back-up. Further, the water from the drain hole could have been from another source. The Board finds that there is insufficient evidence in the record of a sewage "back-up" into Mr. Konkell's toilet on a daily basis. A factual finding in the March 1992 flooding episode alleged by Mr. Konkell, is not necessary in this case since the September flooding was severe, well-documented, and uncontested. Therefore, we can now proceed to determine

responsibility for the September 9, 1992, influx of water and raw sewage into Mr. Konkel's basement.

Mr. Konkel maintains that his basement was flooded with water and raw sewage on September 9, 1992, and that the sewer system should be structurally corrected so that his home will not be contaminated again (Comp. at 4). He also argues that the pumping he witnessed on September 9, 1992, is evidence that there is a problem with the sanitary and sewer system of Crest Hill. (Tr. at 114-116; Pet. Exh. 20-25.) He contends that he witnessed raw sewage being pumped onto the streets. (Tr. at 34; Pet. Exh. at 20-25.)

Crest Hill argues that apparently the flooding of Mr. Konkel's basement is due to an illegal connection of Mr. Konkel's perimeter drain tile into the sanitary sewer system. (Tr. at 121.) Crest Hill supports its argument by noting that Mr. Konkel described the basement flooding as originating at the sump pump. (Tr. at 121.²) The sump pump in a basement should be part of a system designed to convey water from a groundwater collection system, including the basement perimeter. Mr. Konkel testified that people he hired to work on his downspouts and rain gutters confirmed that his home footing drains are connected into the sump. (Tr. at 53.) Crest Hill argued that sewage could only flow back through a sump pump if there was an illegal connection to the sanitary sewer.

Crest Hill called as a witness, John Djerf, a licensed professional engineer in Illinois. Mr. Djerf testified on the engineering specifications of the Crest Hill Sanitary System. He also described a video produced by television inspection of the eight-inch sanitary sewer in the vicinity of Mr. Konkel's service connection to the system. The video was entered as Respondent's Exhibit No. 4. (Tr. at 93.)

Mr. Djerf provided commentary, while viewing the video (Res. Ex. No. 4) at hearing, on the condition of the service connecting to Mr. Konkel's home at 1911 Nicholson. (Tr. at 90-92.) Mr. Djerf's testimony upon viewing the video indicated that the service to Mr. Konkel's home was probably a six-inch connection. (Tr. at 91, 97.) According to Mr. Djerf, it was difficult to

²The Board notes that Mr. Konkel's testimony about the origin of floodwaters in his basement is not consistent. At one point, he testified that the sewage entered through "my toilets, my sinks, my sump pump hole" (Tr. at 8). At another point, Mr. Konkel testifies that the sewage was "coming from the toilet and from the sump pump. It was overflowing the sump pump is what it was doing." (Tr. at 13.) In later testimony, Mr. Konkel was talking about the basement toilet and stated, "This is the same toilet that raw sewage came out of on September". (Tr. at 33.)

determine the grade of the service connection from the eight-inch sanitary sewer to Mr. Konkkel's house. (Tr. at 91.)

Mr. Djerf testified about the eight-inch sewer line between 1911 Nicholson and its interception with manhole 1B5 at Elsie Avenue. He stated that it appeared "to be in reasonably good condition....The light roots that were encountered would be common on lines of this age. They did not appear to be of a nature that with {sic} cause a blockage if closed down". (Tr. at 95.) Mr. Djerf further testified about the water elevations that would be needed to cause a back-up at Mr. Konkkel's service connection. (Tr. at 95-97.) He testified that the water would have to be approximately seven feet deep at manhole 1B5 before it would affect Mr. Konkkel's property at 1911 Nicholson. (Tr. at 96-97.)

After considering the testimony and exhibits in this case, the Board does not find sufficient evidence that a design flaw in the Crest Hill Sanitary Sewer was responsible for the water and sewage flooding into Mr. Konkkel's basement on September 9, 1992.

Pumping Onto the Street

Mr. Konkkel's testimony and photographs provide evidence that equipment belonging to the Lockport Fire Protection District pumped water and sewage out of manhole 1B5 onto the street. (Tr. at 10, 30, 31, 34, 40, 41, 42; Pet. Exhs. 20, 21, 22, 23, 24, 25.) According to Respondent's Exhibit #1, entitled "City of Crest Hill, Illinois, Crest Hill Sewage System", the manhole where Mr. Konkkel observed the pump operating, labeled 1B5 at the corner of Elsie and Nicholson streets (Tr. at 42), opens into the sanitary sewer system. Therefore, there is ample evidence that water in the sanitary sewer was being pumped onto the street on the evening of September 9, 1992. This is clearly a violation of Sections 12(a), (b), (c), (d) and (f) of the Act.

Crest Hill argues that the evidence shows that Lockport Fire Protection District may be in violation, but there is no evidence that the City of Crest Hill was involved. (Tr. at 120.) Crest Hill maintains that it should not be responsible for a violation by another entity. (Tr. at 120.)

Despite the arguments of Crest Hill, there is ample evidence in the record to find Crest Hill in violation. The activities of the Mayor of Crest Hill on the evening of September 9, 1992, provide such evidence. Mr. Konkkel stated that Photograph 25 (Res. Ex. 25) showed the Mayor involved with the pumping activity. (Tr. at 31.) The Mayor was dressed in a fireman's uniform. (Tr. at 39-41.) Despite the fireman's uniform, there is nothing in the record to indicate that the Mayor was not acting in his official capacity as a legal representative of Crest Hill on that evening.

At minimum, Crest Hill is in violation of Sections 12(a) and (f) of the Act. Both subsections state that "No person shall: cause, threaten, or allow the discharge of any contaminant...." Crest Hill is the owner of its sanitary system. The Board has previously found that merely allowing an activity to occur is sufficient cause for a finding of violation. (IEPA v. Bill Hammond, April 22, 1993, AC 92-62, ___ PCB ___.)

The Board finds that Crest Hill is in violation of Section 12(a) and (f) of the Act by allowing the discharge of water and raw sewage pumped from manhole 1B5 onto the street on the evening of September 9, 1992. In addition, the Board finds that Crest Hill is in violation of a prior Board Order, issued October 4, 1979, in a case entitled Dutton v. City of Crest Hill (PCB 79-110). In that decision, Crest Hill was ordered to cease and desist from further violations of Rules 601(a) and 602 of Chapter 3, Water Pollution.

In fashioning a final order in an enforcement case, the Board is directed to consider the factors outlined in Section 33(c) of the Act. Section 33(c) of the Act provides that:

In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved including, but not limited to:

1. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
2. the social and economic value of the pollution source;
3. the suitability or unsuitability of the pollution source to the area in which it is locate, including the question of priority of location in the area involved;
4. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
5. any subsequent compliance.

* * *

In considering the aforementioned factors, the Board notes that, as this was a temporary "source", Section 33(c)(2), (3) and

0142-0567

(4) are not applicable. The record indicates that the pumping of sanitary flow onto the street occurred only on September 9, 1992, therefore, the city has subsequently complied with the Act and Board regulation. (Section 33(c)(5) of the Act.) Although pumping raw sewage onto the street is a significant health threat, there is no indication in the record that the pumping resulted in health problems in the area³. However, the health risk of such a possibility of contact with raw sewage is significant. (Section 33(c)(1).) Therefore, the Board finds that a remedy to insure that the type of action does not occur in the future is necessary.

Having found a violation, the Board must now proceed to a consideration of what remedy is appropriate. The Board may order any number of remedies in an enforcement action including ordering Crest Hill to cease and desist from violation or ordering a civil penalty. To determine the level of civil penalty, the Board must consider the five factors given in Section 42(h) of the Act before determining the level of civil penalty that may be warranted. Section 42(a) and (b) of the Act allow the Board to assess a civil penalty not to exceed \$50,000 for each violation and an additional civil penalty not to exceed \$10,000 for each day during which the violation continued.

SECTION 42(h) FACTORS

Section 42(h) provides:

In determining the appropriate civil penalty to be imposed under subdivisions (a), (b)(1), (b)(2), (b)(3), or (b)(5) of this Section, the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors:

1. the duration and gravity of the violation;
2. the presence or absence of due diligence on the part of the violator in attempting to comply with the requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;
3. any economic benefits accrued by the violator because of delay in compliance with requirements;

³Mr. Konkel testified to health problems, but related that to the back-up in his basement. (Tr. at 36-38.)

4. the amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with this Act by the violator and other persons similarly subject to the Act; and
5. the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator.

The record indicates that the pumping occurred only on the night of September 9, 1992. (Section 42(h)(1).) The record also indicates that Crest Hill has taken several steps to cure problems which previously resulted in a finding of violation. (Section 42(h)(2).) However, there is no evidence that Crest Hill reaped economic benefit by its action on September 9, 1992. (Section 42(h)(3).) Further, the previous violations of the Act occurred over 10 years prior to this violation. (Section 42(h)(5).)

Crest Hill has previously been found in violation of the Act. Since that violation, Crest Hill has taken steps to correct the problem and has followed the dictates of the previous Board order for over 10 years. Therefore, the Board finds that a fine, in this instant matter, would not aid in the enforcement of the Act. The Board will refrain from fining Crest Hill on this violation and directs Crest Hill to cease and desist from further violation of Section 12(a) and (f) of the Act.

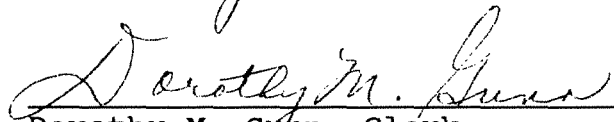
ORDER

The City of Crest Hill is directed to cease and desist any or all actions resulting in violation of Section 12(a) and (f) of the Environmental Protection Act.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1992)) provides for the appeal of final orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246, Motion for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 20th day of May, 1993, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board