

ILLINOIS POLLUTION CONTROL BOARD
September 8, 1988

BILL ADEN, JOHN SCHRODER,)
VELMA SCHRODER, JOE KENDALL,)
LAMORN MORRIS, et. al.,)
)
Petitioner,)
)
v.) PCB 86-193
)
CITY OF FREEPORT,)
)
Respondent.)

JAMES L. GITZ AND SIDNEY MARGOLIS APPEARED ON BEHALF OF
COMPLAINANTS OTHER THAN BILL ADEN AND JOE KENDALL, WHO APPEARED
PRO SE.

JOHN GARRITY APPEARED ON BEHALF OF THE RESPONDENT.

SUPPLEMENTAL OPINION AND FINAL ORDER OF THE BOARD (by J. Marlin):

On February 25, 1988, the Board issued an Interim Order in
this matter which found that the City of Freeport (Freeport) had
violated 35 Ill. Adm. Code 306.102(a), 306.303, 306.304. That
same Interim Order required Freeport to submit to the Board, by
May 2, 1988, a "plan for compliance" with Board regulations.
Specifically, the Interim Order stated:

At a minimum, this plan shall include a
schedule detailing steps, with corresponding
dates, that must be taken in order to achieve
compliance. Compliance shall be achieved no
later than October 31, 1990.

Within 30 days after the filing of Freeport's
compliance plan, the Agency and Complainants
may file comments concerning the plan.

On April 29, 1988, Freeport filed a Compliance Plan in
response to the Board's Interim Order. The Complainant's other
than Bill Aden and Joe Kendall (hereafter referred to as the
Responding Complainants) filed their Response, of June 2, 1988.
The Board accepts the Responding Complainants' June 2nd filing.
Although it was filed more than 30 days subsequent to the filing
of Freeport's Compliance Plan, the Board believes that Freeport
has not been prejudiced by this slightly late filing.

On August 2, 1988 the Board received a Motion By Intervenors
for Stay of Proceedings and for Time In Which to File a Petition
for Intervention. The motion was filed by attorneys Gwen V.
Carroll and Julie O. Petrini of the law firm Katten, Muchin &

Zavis. The motion asserts that the "Intervenors are residents of the County of Stephenson residing on property immediately adjacent to the City of Freeport and certain isolated individuals residing on or near the city limits". Essentially, the motion states that the "Intervenors" have a compelling interest in this proceeding. The motion also makes an allegation that Freeport has refused to annex the property of the "Intervenors" thereby denying them City services such as sanitary and storm sewers. It is further claimed that such denial of annexation is racially motivated and discriminatory. The motion seeks a stay of this proceeding to allow a further filing to support the petition for intervention.

Freeport filed a Response to this motion on August 15, 1988. Freeport objects to the motion on several grounds. First, Freeport notes that the motion does not identify the "Intervenors". Secondly, while citing 35 Ill. Adm. Code 103.142, Freeport argues that the motion is untimely because it comes after the hearing has been held on this matter. Finally, Freeport claims that the issues raised in the motion are not germane to this proceeding since the "Intervenors" are not residents of Freeport and an issue of annexation is not within the jurisdiction of the Board.

In a Reply filed on August 17, 1988 by the "Intervenors" seventeen persons are listed as the "Intervenors". The Reply states that three of these people are Freeport residents but the rest are not. The Reply further states that the issue of annexation is not being raised by the "Intervenors"; rather, the "Intervenors" seek to be included in Freeport's compliance plan.

On September 7, 1988, Freeport filed an Answer of City to Reply of Intervenors. Due to the timing of this filing and the fact that Freeport has already had an opportunity to address the intervention issue, the Board has not considered Freeport's September 7th filing.

The Board construes the August 2nd motion as petition to intervene. The petition to intervene is not timely. Section 103.142(a) provides:

Upon timely written application and subject to the necessity to conducting an orderly and expeditious hearing, the Hearing Officer shall permit any person to intervene in an enforcement proceeding when (emphasis added)

Further, Section 103.142(b) states:

Ten (10) copies of a petition for intervention shall be filed with the Board and the applicant shall also serve copies on each party not later than 48 hours prior to

the date set for hearing. The Hearing Officer may permit intervention at any time before the beginning of the hearing when good cause for delay is shown. Upon allowance of intervention the Hearing Officer shall notify the parties and the Clerk and may allow a continuance of the hearing to enable adequate pre-hearing procedures as justice may require. (emphasis added)

It is clear that the Board's procedural rules set forth a system whereby intervention should be sought prior to hearing, or in the least prior to the conclusion of the hearing process.

In this instance, intervention is sought after the hearing has been held and after the record has been closed. Consequently, the petition to intervene is untimely.

The petition states that intervention in this instance should be granted as a matter of right pursuant to Section 103.142(a); the Board disagrees. That provision reads:

Whenever a proceeding before the Board may affect the right of the public individually or collectively to the use of community sewer or water facilities provided by a municipally owned or publicly regulated company, all persons claiming an interest shall have the right to intervene as parties pursuant to this section and present evidence of such social and economic impact.

The proceeding at hand does not affect the public's right to use the Freeport's sewer or water facilities. More properly stated, this case affects the way Freeport provides sewer service to its residents. The issues of this proceeding concern the violations of Freeport and remedies for those violations. Although these issues impact upon the quality of life for the residents of Freeport, they do not deal with their rights to be served by the system.

If the persons who are represented by the petition have complaints against Freeport or any other person concerning alleged violations of the Environmental Protection Act (Act) or the regulations promulgated thereunder, they are free to file an appropriate enforcement action pursuant to Section 31(b) of the Act. However, with regard to this case the board hereby denies intervention as requested by the August 2nd filing.

In its April 29th filing, Freeport proposes a compliance plan that outlines steps, with associated completion dates, which it claims will lead to substantial compliance. However, Freeport proposes to complete construction of its improvements by August 31, 1991, thereby achieving substantial compliance. That date is

ten months later than what the Board had ordered in its Interim Order. Freeport offers no explanation for this discrepancy.

The Response filed by the Responding Complainants raises a number of issues. First, the Responding Complainants assert that Freeport has not complied with the Board's Interim Order, because Freeport's Compliance Plan provides for completion of improvements by August 31, 1991 instead of October 31, 1990. Also, the Responding Complainants claim that Freeport's plan only proposes "substantial compliance," which the Responding Complainants believe is also inconsistent with the Board's Interim Order.

Next, the Responding Complainants state that it is possible for Freeport to achieve compliance by October 31, 1990. According to the Responding Complainants, this goal can be attained by altering the compliance plan so that the design and construction of new relief sewers takes place concurrently with the rehabilitation work on existing sewers. The Responding Complainants also claim that an additional three months can be saved if Freeport begins its land and easement acquisition process while simultaneously pursuing construction permits from the Agency.

The substantive provisions of the Compliance Plan are also criticized. The Responding Complainants state that the Sewer System Evaluation Survey (SSES) is deficient in its proposed evaluation of the Hunt Street area. Also, it is stated that the plan allocates no money for sewer rehabilitation in the Cottonwood, Shawnee, and Sheridan areas. In addition, the Responding Complainants are concerned about Freeport's proposed use of "storage basins" which would hold sanitary sewer overflows. The Responding Complainants are not convinced that such basins are appropriate for residential areas or that the basins are a cost effective method for achieving compliance.

Specifically, the Responding Complainants ask the Board to do the following:

- 1) Order the City to comply with the Board's October 31, 1990 compliance deadline and impose fines and sanctions as it deems appropriate;
- 2) Order the City to provide a detailed compliance plan with greater specificity and detail which addresses the issues raised by the Complainants;
- 3) Order the City to provide greater detail on the method of financing improvements and a funding schedule which will implement the Board's Order;

- 4) Strike those portions of the City's compliance plan which reargue the merits of the case in violation of the Board's Order;
- 5) Allow the Complainants to secure professional engineering assistance, at the City's cost, to provide the Board with technical input on the points raised in this Response; and
- 6) Award the Complainants costs and attorneys' fees for this response, since the City's plan is deficient on its face and not in compliance with the Board's Order.

Before responding to the requests of the Responding Complainants, the Board believes that it must address the February 25th Interim Order and the Board's intent behind that Interim Order. It is apparent from the actions of both parties that the scope of the Board's Interim Order has been misconstrued. Both Freeport and the Responding Complainants have sought to present arguments or information that effectively exceeds their respective roles as defined by the Board's February 25th decision.

On February 25, 1988, the Board issued an Opinion and Interim Order in this matter. At that point, as detailed by the Opinion, the Board believed that it had received evidence sufficient to support findings of violation against Freeport. Consequently, in its Interim Order, the Board found Freeport in violation of certain regulations.

However, with regard to the appropriate solution to Freeport's non-compliance, the record was incomplete. In its Opinion, the Board stated:

Unfortunately, the record is not detailed as to the specific types of improvements that are necessary to rectify the overflow problems throughout Freeport.

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slip. op. at 12 (February 25, 1988).

If the Board were to adopt a detailed compliance order, the Board needed to receive more information as to possible methods of compliance. That is why the Board requested that Freeport submit a compliance plan.

The Board's Order was not vague. The Board determined that any compliance plan submitted by Freeport had to provide for compliance by October 31, 1990. Freeport's own engineering

consultant, in a report dated March, 1987 (Missman Report), asserted that city-wide improvements could be accomplished by that date.

The Board believes that it was clear on the issue of the compliance plan. The February 25th Opinion states:

The Board will retain jurisdiction in this matter and order that Freeport submit its plan for compliance with Board regulations. The plan shall outline anticipated steps, with associated dates for completion, which will lead to the rehabilitation of Freeport's sewer system. The Board will require that Freeport achieve substantial compliance by October 31, 1990. The Board will order Freeport to provide its compliance plan to the Agency, the Board and Complainants by May 2, 1988. Given that the preliminary Missman Report has been available since March of 1987, this requirement is viewed as reasonable....The Complainants...may comment upon the plan after it is filed with the Board.

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slip. op. at 13 (February 25, 1988).

In short, the Board by its Interim Order requested more information so that it could address the issue of a remedy from a more informed position. While compliance is the obvious remedy for every finding of violation, the Board wanted to have the option of adopting, as a part of a compliance order, a specific method for achieving compliance.

Notwithstanding the Board's Interim Order, Freeport proposes a compliance plan with a completion date of August 31, 1991.

Instead of providing rationale as to why Freeport would be unable to meet the October 31, 1990 date, Freeport continues to argue that it is not in violation of certain Board regulations. The Board will not consider such arguments anew. The Board already made its determination regarding violations in its February 25th decision. In response to the Interim Order, Freeport was merely to provide the Board with a Compliance Plan which, if followed, would assure substantial compliance by October 31, 1990.

As stated in the Board's previous Opinion, Freeport commissioned engineers in 1987 to conduct a study of Freeport's sewer system. This was done in response to the Agency's threat of an enforcement action for impermissible sewer overflows. The first preliminary report issued by the consulting engineers was delivered to Freeport in February of 1987. (City Exh. #19). A

final report was issued in March 1987. (City Exh. #20). Substantively, the conclusions and recommendations of the February report were essentially the same as those found in the March report. Both reports investigate the existing problems and recommend actions to solve these problems. Consequently, since February, 1987, Freeport has known what actions it must take in order to remedy its sewer problems pursuant to recommendations of its consulting engineers. The March report concluded:

A combination of improvements to the surface drainage system and to the sanitary sewer system including sanitary sewer rehabilitation may have to be accomplished before basement flooding or sewer back up can be relieved.

(City Exh. #25, p. 40)

The Missman Report also recommended a plan of action by which the city-wide improvements could be completed by October 31, 1990. (City Exh. #25, p. 41).

In addition, it is interesting to note that Freeport's own consultants, in March of 1987, recommended that Freeport "should vigorously pursue and make grant/loan application for funds for the recommended sanitary sewer system improvements and/or rehabilitation." Id. However, as noted in the Board's earlier Opinion, Freeport maintained at hearing, in June 1987, that it would not proceed with improvements until it received grant funding.

In their Response, the Responding Complainants suggest that Freeport's proposed compliance date of August 31, 1991, was prompted by Freeport's own inaction in remedying the problem. As support for this conclusion, Responding Complainants have attached to their Response a copy of what is purported to be the minutes of the April 18, 1988 Freeport City Council meeting. The Board has not considered such material since it goes to issues beyond the role of the Complainants pursuant to the Interim Order. It was sufficient for the Responding Complainants to object to late completion dates proposed by Freeport. Any explanations for the proposed late compliance date certainly falls within the responsibility of Freeport, not the Responding Complainants. In addition, minutes of a meeting could be characterized as double hearsay and would not be properly admitted in this manner given that this is a contested case proceeding.

As stated in the Board's earlier Opinion:

The record indicates that the City [of Freeport] has failed to adequately address its sewer problems for many years. While encouraging developments that add to both

surface and sewer flows. In essence, Freeport has long deferred expenditures on the sewer system.

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slip. op. at 12 (February 25, 1988)

Since February 1987, Freeport has known what it generally needs to do in order to correct its sewer problems. Also, it has known since that date that the necessary improvements could be achieved by October 31, 1990. Freeport has not provided any reasons for the late compliance date.

During the time that the Board has deliberated upon Freeport's proposed compliance plan and the Responding Complainants comments, there may have been some uncertainty on the part to Freeport as to what specific actions the Board would require of Freeport. As a result, the Board will extend the compliance deadline to account for time that the Board has consumed by its deliberations on a remedy. Therefore, the Board will require that Freeport achieve compliance by December 31, 1990.

The Board believes that it should not in any way reward Freeport for its dilatory actions. Municipalities, like other persons in this State, have a duty as such to comply with the Act and Board regulations. While a community sometimes finds itself in a situation where immediate compliance is impossible, such a situation does not obviate the community's duty to vigorously pursue compliance. This is especially true when lack of compliance directly and negatively impacts upon the health and welfare of the community's citizens.

Given the record in this matter, it is clear that Freeport has not been driven to achieve compliance with environmental regulations. The sewer improvements are long overdue. If Freeport has delayed action in implementing the recommendation of its consultants to the extent that compliance by the December 31, 1990 deadline creates a hardship, then the hardship suffered by Freeport is self-imposed. Again, it must be emphasized that Freeport in its April 29th Compliance Plan has not explained its rationale for proposing a compliance date which is ten months later than that ordered by the Board. To allow Freeport to extend its period of non-compliance, as it is implicitly requesting, would have the effect of promoting "inaction" as an acceptable alternative to compliance. It would also justifiably offend the hundreds of communities throughout the State which have worked long and hard to achieve compliance with Board regulations as well as give other non-compliant communities further incentive to disregard the environmental laws of the State.

Since Freeport's compliance plan provides an untimely completion date, the Board cannot adopt the plan as part of a

compliance order. Responding Complainants have requested that the Board require Freeport to provide greater detail in its Compliance Plan and that the Responding Complainants be allowed to "secure engineering assistance, at the City's cost, to provide the Board with technical input" on various issues they have raised concerning the Compliance Plan. In short, it appears that Responding Complainants want the Board to devise a detailed compliance plan in response to additional technical information that will be supplied at a later date.

The Board does not wish to drag this proceeding out any longer. The Board's primary objective in this proceeding is to ensure that Freeport achieves compliance as expeditiously as possible. How Freeport accomplishes this task is of secondary importance. Any detailed technical information with regard to how compliance may be achieved would have to come into the record via more hearings, or in the least verified pleadings. For these reasons, the Board will not entertain further information as to the adequacy of a specific compliance plan. Neither will the Board attempt to devise a particular plan of its own. The Board's Order today will require Freeport to achieve compliance by a date certain. In this instance, such an Order is sufficient.

The Board makes no finding as to the adequacy of the proposed compliance plan and will not require that it be adopted as proposed. Accordingly Freeport may make adjustments to the plan as it deems appropriate consistent with the requirement that compliance be achieved. The Board notes that the Responding Complainants do not believe the plan adequately addresses the problem, particularly in the Hunt, Cottonwood, Shawnee and Sheridan areas. Freeport may ignore such concerns at its own risk. The Board assumes that Freeport is continuing its interaction with the Environmental Protection Agency regarding sewer system problems.

The Board believes that Freeport's persistent non-compliance would normally warrant a large monetary penalty. However, the principal reason for the imposition of penalties under the Act is to aid in the enforcement of the Act. Punitive considerations are secondary. Metropolitan Sanitary District, Pollution Control Board, 61 Ill. 2d 38, 338 N.E. 2d 392, 397 (1975).

Under Section 42 of the Act, Freeport may be assessed a penalty of \$10,000 per violation and up to \$1000 for each day a violation continues. Given the time over which the violations have occurred a massive penalty could be assessed in this instance. The Board believes that a large penalty in this matter would be counterproductive and will instead impose a penalty of \$10,000 to aid in the enforcement of the Act. The penalty is to be paid to the Environmental Trust Fund. The Board notes that it discussed the factors set forth by Section 33(c) of the Act in the Board's Opinion of February 25, 1988.

In addition, the Board's Order today may not provide for a penalty which would have to be paid only if Freeport fails to achieve compliance by the relevant date. See Tri-County Landfill Company v. Pollution Control Board, 41 Ill. App. 3d 249, [cite] (2d Dist. 1976). Consequently, if Freeport fails to achieve compliance by the date prescribed in today's Order or otherwise violates any other provision of the Order, a subsequent enforcement action would have to be brought before the Board or circuit court would be able to impose an additional penalty against Freeport.

The Responding Complainants also request that the Board order Freeport to provide more details as to how it will finance the sewer system improvements. Evidently, the Responding Complainants ultimately desire the Board to issue an Order addressing Freeport's financing. The Responding Complainants state, "It is essential for the Board to require the City to come up with financing at an earlier date, if the Board's compliance date is to be met." (Response, p. 9). However, the Illinois Supreme Court has stated:

Neither under Section 46 of the Environmental Protection Act nor under Section 9 of the Sanitary District Act of 1911 is authority conferred upon the Board to order the issuance of bonds.... The board has the authority to order the abatement of pollution practices.

North Shore Sanitary District v. Pollution Control Board, 55 Ill. 2d 101, 105, 302, N.E. 2d 50 (1973).

The Board, then, will order Freeport to abate its violations of the Act and regulations promulgated thereunder. However, Freeport is free to choose how it will finance its actions of abatement. As in the previous Opinion, the Board refers Freeport to Section 46 of the Act as one available method of financing. Once again, Freeport is directed to proceed even though State or Federal funds may not be available.

Finally, the Responding Complainants seek an award of costs and attorneys' fees incurred by their efforts in preparing their Response, since Freeport's plan was deficient on its face. The Board notes that the Interim Order merely allows the Complainants to respond to Freeport's Compliance Plan. The Interim Order did not require a response. Most importantly, the Act does not provide for an award of costs and attorneys' fees in enforcement cases brought by citizen complainants. Such costs and fees are allowed by Section 42(f) of the Act only when the Attorney General or a State's Attorney prevail in an enforcement action on behalf of the People of the State of Illinois.

In summary, the Board will require Freeport to abate further violations of the Act and regulations promulgated thereunder. In

addition, Freeport must take steps to achieve compliance by December 31, 1990. Freeport must also submit progress reports to the Agency and the Complainant every three months. Each report shall briefly summarize steps toward compliance which Freeport has taken in the three months prior to the date of the progress report and which Freeport plans to take in the three months subsequent to the date of the progress report. This will allow interested persons to monitor Freeport's progress in achieving compliance.

In this case, the Board has used the terms "substantial compliance" and "compliance" almost interchangeably. However, complete compliance is the mandated goal for Freeport. Freeport's problems are widespread and have developed over many years. Realistically, minor and insignificant instances of non-compliance might occasionally still occur even after improvements. Freeport's actions in achieving overall compliance could be viewed as mitigating factors in any subsequent enforcement action based on such instances of non-compliance. Nonetheless, today's Order still requires that Freeport achieve compliance by December 31, 1990.

This Supplemental Opinion and the Board's Opinion of February 25, 1988 constitute the Board's findings of fact and conclusions of law in this matter.

FINAL ORDER

It is the Order of the Pollution Control Board that:

1. The City of Freeport (Freeport) has violated 35 Ill. Adm. Code 306.102(a), 306.303, and 306.304.
2. Consistent with the terms of this Order, Freeport shall abate its violations of the Illinois Environmental Protection Act (Act) and regulations promulgated thereunder.
3. Freeport shall take appropriate actions, including but not limited to sewer rehabilitation and the implementation of other improvements as necessary, in order to achieve compliance with the Act and regulations promulgated thereunder by December 31, 1990.
4. Three months after the date of this Order, and every three months thereafter until December 31, 1990, Freeport shall submit a Progress Report to the Illinois Environmental Protection Agency, Enforcement Programs, 2200 Churchill Road, P.O. Box 19276, Springfield, IL 62794-9275, and each of the Complainants. Each Progress Report shall briefly summarize steps toward compliance which Freeport has taken during the three months prior to the date of the Progress Report and which Freeport expects to take during the three months subsequent to the date of the Progress Report.

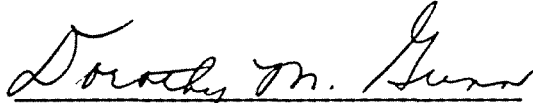
5. Freeport shall, by certified check or money order payable to the State of Illinois and designated for deposit into the Environmental Protection Trust Fund, pay a civil penalty of \$10,000. Freeport shall pay this penalty within forty-five (45) days of the date of this Order to:

Illinois Environmental Protection Agency
 Fiscal Services Division
 2200 Churchill Road
 P.O. Box 19276
 Springfield, IL 62794-9276

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1985 ch. 111 1/2 par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Supplemental Opinion and Final Order was adopted on the 8th day of September, 1988, by a vote of 7-0.



Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board