

ILLINOIS POLLUTION CONTROL BOARD
November 10, 1977

C. A. HEMPHILL & ASSOCIATES,)
)
) Petitioner,)
)
)
) v.) PCB 77-204
)
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) ILLINOIS ENVIRONMENTAL PROTECTION)
) AGENCY,)
)
) Respondent.)

MR. GEORGE BULLWINKEL & MS. SUSAN W. McMILLAN OF KECK, CUSHMAN, MAHIN & CATE, APPEARED ON BEHALF OF PETITIONER;
MS. CAROL PEARCE & MS. LORETTA WEBER, ASSISTANT ATTORNEYS GENERAL, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by Mr. Goodman):

On July 29, 1977 C.A. Hemphill and Associates (Hemphill) filed an appeal from a permit denial by the Illinois Environmental Protection Agency (Agency). A hearing was held on October 14, 1977, briefs were waived by both parties, and Petitioner requested expedited consideration and decision by the Board.

The Board will first consider some procedural issues which arose in this case. On October 11, 1977 Hemphill filed Petitioner's first amended appeal from a permit denial. The Board holds that this action starts anew the 90 day period within which the Board must act on a permit denial petition. Hemphill disagrees, noting that there is no provision in the Procedural Rules governing permit appeals such as exists for variances with respect to this issue. It appears obvious to the Board that a voluntary amendment to a petition before this Board effectively waives the Petitioner's rights with regard to the time period established by the original petition, and re-starts the 90 day period. Unlike a permit denial petition, a variance petition will frequently be amended by Petitioner on an involuntary basis, under a Board Order requesting additional information. Since it is not obvious that an involuntary

amendment of a variance petition starts the 90 day time period anew, the Board found it expedient to promulgate a Rule concerning that specific situation. The Board therefore finds the due date for this case to be 90 days from the date of the filing of the amendment or January 5, 1978.

The Hearing Officer herein accepted an open waiver by one of Hemphill's attorneys at a pre-hearing conference (R.85). At the hearing, Hemphill's attorney questioned whether this original waiver was actually an open waiver, and on October 24, 1977 filed with the Board a waiver of the 90 day Rule until November 17, 1977, purporting, in addition, to revoke any and all previous waivers. The Board rejects the notion that a waiver once given can be subsequently revoked. A waiver once given is relied upon by the Board and the other parties with regard to work flow and times for decision. To allow revocation of this waiver without leave of the Board would prejudice the rights of the other parties and the Board.

A considerable amount of evidence was adduced at the hearing concerning hardships visited upon Hemphill due to the permit denial by the Agency. The Board agrees with the Agency's attorney with respect to the admission of such evidence that this evidence is not relevant to the narrow issue of whether the Agency was correct in denying the permit application. Insofar as this evidence goes to the issue of reliance by Hemphill on Agency actions however, the Board accepts the evidence as relevant to this proceeding.

The appeal itself concerns a permit for a sewer extension to serve twelve single family homes in The Oaks of Lake Bluff Sub-division. The permit application was denied by the Agency due to sewer surcharging and resultant basement flooding during periods of heavy rains. Hemphill admits the surcharging and basement flooding but contends that the problem is caused by infiltration and that the addition to the waste flow would be de minimus, even to the point of being unmeasurable. The Agency, on the other hand, relies on their duty to refrain from issuing permits which would, as stated in Section 12(a) of the Environmental Protection Act, cause or threaten or allow the discharge of any contaminants into the environment so as to cause water pollution either alone or in combination with matter from other sources.

The Board finds that Hemphill's contention with respect to the alleged lack of potential, measurable environmental damage, even if true, does not address the problem. If the Agency were to allow "variance" from the Act and the Regulations based upon the fact that the individual increments of pollution would do no practical environmental damage, where could it logically draw the line? How large an increment results in no damage to the environment? How many of these

increments do you allow before the environment is damaged by the total? How do you finally deny a permit when the final increment is no greater than the original increment? And finally, where is the incentive for the City to solve their environmental problems? The Board finds that the Agency correctly denied Hemphill's permit application based upon the admitted facts in this record. Whether or not Hemphill is entitled to a variance based upon the equities, potential harm, and period of time involved is a matter for the Board to decide in a variance proceeding. The Agency, as the permitting arm of the environmental protection scheme in the State of Illinois, cannot and should not make these decisions.

As a final issue, Hemphill alleges reliance upon an Agency publication known as the Restricted Status List. This list contains the statement "those facilities not listed may be assumed to be satisfactory for permit to extend this system. However please note that these lists are continually being revised to reflect the current situation. This listing reflects the status as of May 16, 1977." It is apparent that in an ongoing situation such as the restricted status list, any particular list is obsolete at the moment that it is printed. That fact plus the proviso contained in the second sentence quoted above convinces the Board that reliance upon the list for purpose of entering contracts or starting construction is, at best, ill advised. In addition, as this case illustrates, the list could not hope to cover all potential problem areas in the State; the prudent man would therefore not consider himself in a permitted condition until after the Agency had reviewed his permit application.

This Opinion constitutes the finding of fact and conclusions of law of the Board in this matter.

ORDER

It is the Order of the Pollution Control Board that the June 22, 1977 denial by the Illinois Environmental Protection Agency of a permit for the Village of Lake Bluff to construct and connect a sewer extension to a development known as Oaks of Lake Bluff was correct and that decision be and is hereby affirmed.

Mr. Young concurs.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 10th day of November, 1977 by a vote of 5-0.


Christan L. Moffett, Clerk
Illinois Pollution Control Board