ILLINOIS POLLUTION CONTROL BOARD
August 5, 1971

JOHN CIANCIO AND MARGARET CIANCIO	)	
	)	
	)	
v.	)	# 71-100
	)	
	)	
ENVIRONMENTAL PROTECTION AGENCY	)	

Dissenting Opinion (by Mr. Currie):

My reasons for dissenting from a series of variance grants involving the North Shore sewer ban are given in my separate opinion in Wachta v. EPA, #71-77 (July 12, 1971). In this case, however, there are additional considerations as well.

First, we denied a variance in very similar circumstances in Wagnon v. EPA # 71-85 (July 26, 1971). In neither case had construction of the house begun at the time of the sewer ban; in both cases money had been invested in plans. In Monyek we said this was insufficient, partly because the money spent is not lost; the plans will be there when the ban is lifted. Today's action, I think, does not overrule Monyek, since the deciding vote is based upon a distinction of that case, not its repudiation. The distinctions mentioned are that living conditions are crowded for the Ciancios and that they will proceed to construct a septic tank and to move into the new house if the variance is denied, at the cost of several oaks that must be cut down to permit construction of the tank. These hardships are indeed unfortunate, but it seems to me they are less than those in Monyek; for the Ciancios will have their new house and Monyek will not. In both cases I think that while the hardships are unfortunate the overriding need is to prevent a worsening of the pollution of air and water that is now occurring in the District, as further spelled out in my Wachta dissent.

But there is another aspect that leads me to find today's decision irreconcilable with precedent. It was not our March 31 order that suddenly interfered without warning with the connection of the new house to the sewer. This case involves the extension of the sewer itself, an act requiring a permit from the Environmental Protection Agency. In fact such a permit was sought and was denied by the Agency in February 1971, before our order was entered. The Board today apparently reverses the Agency's denial, although the issue is not discussed in either opinion supporting the grant, thus setting aside not only our own order but also the Agency's long-standing policy of refusing permits for extensions serving

overloaded plants. It seems to me that it is only prudent for people to investigate whether a sewer connection will be permitted before making substantial expenditures on the expectation of such a permit. An inquiry here would have revealed--indeed it did when the permit was denied--that a sewer ban was already in effect in February. Moreover, the denial of that permit should not have come as an unfair surprise because this way by no means the first time the Agency had denied a permit on the basis of a plant overload. I think people can reasonably be expected to make themselves aware of important government policies and precedents governing the issuance of a permit before undertaking expenditures in reliance on the absence of any restriction. There was no showing here that the Agency's denial came as an unfair surprise, and therefore I think even on the majority's test this petition should have been denied.

Finally, with respect to the issue of surprise generally, it seems to me that it was quite clear before our March 31 order that the addition of new waste sources to an already overloaded plant will cause a violation of the relevant effluent standards and of the statutory prohibition of water pollution. I think we said as much in our March 31 opinion (League of Women Voters v. North Shore Sanitary District, # 70-7). I do not think it is unconstitutionally surprising, as suggested in one opinion in the Wachta case (# 71-77, July 12, 1971), to find oneself prohibited from causing a violation of the regulations and of the statute. Our sewer ban order, in my opinion, merely made clear what the law already forbade. This point becomes clearer if one asks whether it would have been unconstitutional for this Board to find, in an enforcement proceeding against a person about to attach a new source to an overloaded facility, that the connection must be prohibited since it would cause water pollution. I think the answer is that it would not be unconstitutional, any more than is the application of existing law to any new waste source. And I think that is the effect of the Board's decision.

Apart from the constitutional issue, perhaps it is time to expect people to inquire before committing themselves to substantial expenditures whether or not their sewage will be adequately treated. It is time we collectively recognized that the problem of sewage disposal is not solved just because we put the waste into a pipe that carries it away from the house. In this connection it should help for us to put our rule as to sewer bans into the regulations, as we have proposed (# R 71-14) so as to make it better known.

In fact the ban did come as a surprise to many people, and therefore has created considerable hardship. The Board has responded by relaxing the ban in part, and we have also scheduled inquiry hearings that may result in an entirely revised rule. But whatever comes of this particular ban as a result of the surprise with which it was imposed, I think it clear that our rule and policy, at least prospectively, must be that people are not to build new

waste sources where there are inadequate treatment facilities. Anything else and this Board, which was created to reduce pollution, will allow pollution to get worse instead of better.

David P. Currie

I, Regina E. Ryan, Clerk of the Pollution Control Board, certify that the above opinion was filed on the 5th day of August, 1971.

Regina E. Ryan