ILLINOIS POLLUTION CONTROL BOARD
September 26, 1972

ELSIE M. KELBERGER	)	
	)	
	)	
v.	)	#72-177
	)	
	)	
ENVIRONMENTAL PROTECTION AGENCY	)	

Opinion & Order of the Board (by Mr. Currie):

Mrs. Kelberger's initial petition seeking a variance to permit connection of a new home to Waukegan sewers despite the ban in League of Women Voters v. North Shore Sanitary District, #70-7, 1 PCB 369 (March 31, 1971), was dismissed because, in light of our decision permitting additional connections tributary to the Waukegan and Clavey Road treatment plants (North Shore Sanitary District v. EPA, #71-343, 3 PCB 697 (March 2, 1972)), there appeared to be no need for a variance. Kelberger v. EPA, #72-177, 4 PCB 477 (May 3, 1972). An amended petition was filed with the Agency June 5 and with us on June 14, reciting that the Sanitary District had refused to issue a permit for the connection, notwithstanding the relaxation of our ban, because the sewer into which the new home would discharge had been designated as inadequate to transport its existing waste load to the treatment plant and therefore was ineligible for additional connections. We scheduled no hearing, believing the case was simple enough to be subject to decision upon the petition and the Agency's recommendation. See Minutes of Regular Board Meeting, June 20, 1972.

We received the Agency's recommendation September 19, 1972, 106 days after the amended petition had been filed with the Agency and 97 days after it had been filed with us.

The addition of still more wastes to overloaded sewers, as we pointed out at length in Cook v. EPA, #72-178, 5 PCB ___ (Aug. 29, 1972), can be a very serious matter, as it may result in raw sewage not only in streams but also in streets and in basements, with obviously unsavory implications for public health. The Agency's recommendation tells us that the sewer in question "is subject to excessive flows from

storm water runoff during periods of wet weather . . . (which) have resulted in the past in illegal bypassing of untreated wastes and now result in sewer backups sending untreated wastes into the homes of individuals." The petition says nothing at all about these adverse effects of granting the requested variance, although our procedural rules clearly require "a description of the injury that the grant of the variance would impose on the public," PCB Regs, Ch. 1, Rule 401 (a)(2). This information is necessary because to determine whether or not compliance with the law would impose an "arbitrary or unreasonable hardship," the statutory test for variance, we must balance the benefits as well as the costs of insisting upon compliance, and because the burden of proof is on the petitioner. See EPA v. Lindgren Foundry Co., #70-1, 1 PCB 11 (Sept. 25, 1970). This failure to plead facts constituting an essential part of the petitioner's case would justify dismissal of the petition as inadequate, see Decatur Sanitary District v. EPA, #71-37, 1 PCB 359 (March 22, 1971).

On the merits, the Agency recommends that we deny the petition, inasmuch as many of the actions relied upon to demonstrate hardship--the purchase of a lot, the signing of a contract and making of a deposit relative to building the home, the sale of her former home, and the storage of her furniture--were undertaken with knowledge that the sewer ban was still in effect. Even though these actions were taken on the basis of assurances by the Mayor of Waukegan that the ban would soon be lifted, we have held that persons relying on promises by officials plainly lacking authority to repeal our orders act at their own risk; if the rule were otherwise any municipal official could effectively repeal our orders by announcing a belief that we will repeal them. Cook v. EPA, #72-178, 5 PCB ___ (Aug. 29, 1972). Beyond this, on the basis of precedent the hardships alleged by Mrs. Kelberger, since they fall short of the commencement of construction, would probably be insufficient to justify a variance even if her actions had all taken place before the sewer ban was imposed. Cf. Wagnon v. EPA, #71-85, 2 PCB 131 (July 26, 1971). There are several reasons, therefore, why this petition ought to be dismissed or denied.

The statute, however, is quite clear that "if the Board fails to take final action upon a variance request within 90 days after the filing of the petition, the petitioner may deem the request granted." Environmental Protection Act, section 38. Although the statute itself requires only that a petition be filed with the Agency, (section 37), our procedural rules, adopted pursuant to the statutory authority to adopt "such procedural rules as may be necessary to accomplish the purposes of this Act," section 26, require filing with the Board as well (PCB Regs., Ch. 1, Rule 401 (a). As we said in our opinion adopting the rules, filing a

petition with the Board at the outset of the period in which we must act upon it is indispensable to our proceeding intelligently. In the Matter of Procedural Rules, #R 70-4, 1 PCB 43 (Oct. 8, 1970). Section 26 clearly embraces the power to prescribe the method of filing in the interest of providing adequate notice to all interested persons, including the Board that must make the decision. We believe that under section 38 of the Act a petition should not be deemed to have been filed, for purposes of the running of the 90-day period, until it has been filed with both the Agency and the Board as required by our procedural rules.

Nevertheless, 104 days have elapsed since the amended petition was filed with the Board, and the statutory period has passed. The petition has therefore been granted by the passage of time; it remains for us only to confirm what has already occurred.

The 90-day rule reflects the salutary policy that government agencies must be made to act with reasonable speed upon citizen petitions legitimately brought before them. So far as we know, there is no dissent from this policy; there has been considerable debate over the appropriateness of the draconian remedy of permitting violations of the pollution laws, with consequent injury to the innocent public, if government is slow to act. This Board, without taking sides in that dispute, has several times requested legislation extending the decision period to 120 days, on the basis of extensive experience indicating that 90 days is simply too short a time to permit us in many cases to obtain the facts necessary for an intelligent decision.

When petitions come to us they are placed on the agenda for the next weekly meeting for a decision whether or not to authorize a hearing. If a hearing is authorized, a hearing officer must be appointed, a hearing date set after consultation with the parties, and at least 21 days' notice of the hearing given to parties and public. The Agency is required by statute to investigate the petition and file with us its recommendation. Although we have required by rule that this be done within 21 days after the petition is filed, the Agency has regularly been unable to meet the deadline. We have often urged the Agency to act more quickly, see, e.g., Metropolitan Sanitary District v. EPA #72-110 (5 PCB), decided today, but the 21-day period may be unrealistically short. Once the recommendation is filed a reasonable time should in fairness be given the petitioner to respond, whether in writing or in the hearing. After the hearing we must await receipt of the transcript, which we have in most cases been unable to obtain in less than two or three weeks at best because of the heavy workload our cases impose upon court reporters. If the

parties wish to file briefs, as is their right, they cannot very well do so until after they have received the transcript. At each weekly meeting we place on the next week's discussion agenda all cases in which final transcripts and briefs have been received during the preceding week. After discussion a Board member is assigned to draft an opinion and order for decision, in the usual course, the following week.

Given this schedule of events, the 90-day rule has proved impossibly tight in actual practice. If all goes well a hearing can be held within the first 40 days and transcripts and briefs be received in another month, leaving us 20 days to study and decide the case. With that we could live reasonably well. But all too often matters are not that simple. An inadequate petition must be amended. A recommendation is not ready in time to give notice before the hearing. The parties are not available or ready for hearing at the desired time. Additional hearings must be held, and the hearing officer, who is fully employed elsewhere, cannot sit this week. The transcript is not received on schedule. Reply briefs are required. The case is a difficult one requiring extensive Board deliberation. The list of complicating factors could go on. Suffice it to say that in a very substantial percentage of petitions filed, perhaps approaching 50%, the case is not ready for considered decision within 90 days after filing.

Requests for legislative relief have so far foundered upon the unrelated debate over whether the result of our inaction should be a grant or a denial of the variance. Though all seem to concede that we need an extra 30 days to perform our duties adequately, we are forced to make do with the 90-day rule. We have in general met with considerable cooperation from petitioners, recognizing the desirability of our deciding on an adequate record rather than on whatever materials might be before us at the end of 90 days, who have been willing to waive for a reasonable period their right to a decision within 90 days. Whenever possible we have avoided requesting such waivers, for we do not think it desirable for the Board to be put in the position of begging a party for special consideration. To avoid grants by the passage of time we have in a number of cases rendered decisions prior to the writing of opinions, a practice that is not conducive to intelligent judgment since our understanding of a case is often sharpened by the discipline of explaining our decision. On occasion we have been required to render decisions on the very day on which a transcript or recommendation was received, which obviously does not afford adequate time for thoughtful consideration of difficult cases. Too often, as in today's Metropolitan

Sanitary District case, cited above, we have had to decide without benefit of the Agency's recommendation, on the basis of a record made by only one party.

By dint of these unpleasant and unsatisfactory compromises with good judicial practice, we have until today, so far as we are aware, managed to avoid the ultimate public misfortune of having variances granted by default without consideration of the merits. We have done so only at considerable risk to the soundness of our decisions, and we once again reiterate our urgent request to the General Assembly to put aside the unrelated debate over the effect of our inaction and give us a reasonable time period in which to decide cases.

Notwithstanding the above excursion, the present case is not one in which there was any reasonable need for more than the allotted 90 days for decision. The time often consumed by a hearing was saved, since no hearing was scheduled. The case was and remains a simple one that could and should have been disposed of within less than half the statutory time. We cannot fathom how the Agency and Attorney General managed to take over 100 days after receiving this petition to prepare and file the two-page recommendation in this case, especially since the recommendation consists solely of a recitation of the allegations in the petition, a statement drawn from Agency records as to why the sewer was designated inadequate, and a one-paragraph opinion, without so much as citation of authorities, as to why the petition should be denied. Perhaps an hour's work was involved in preparing it. Something simply must be done about the late filing of recommendations.

It was within the Board's power, as we have done on other occasions, to decide the case without the recommendation. Although this is contrary to the strong statutory policy favoring independent evaluation of the facts, it is better than granting a variance by default. Our process of discussion and decision is triggered by receipt of the final materials on which we are to decide, such as transcripts, briefs, and recommendations, which it is the parties' responsibility to provide in time for us to act. We have supplemented this trigger with independent searches of the docket by both the Clerk and the Chairman to discover petitions on which the 90 days are about to elapse. Unfortunately, it has not been the Board's consistent practice to assign new docket numbers to amended petitions filed after dismissals or denials, and with its old number this case escaped notice in ascertaining cases requiring an early September decision. We have directed that new numbers be

assigned in such situations, and that petitions as filed be placed upon tentative agendas for decision just before the end of the 90-day period, to minimize the risk that cases will slip past us in the future. It would also help if recommendations were filed in time to be considered.

ORDER

Ninety days and more having elapsed since the filing of the petition without final action by the Board, the petition is declared to have been granted by default, and Mrs. Kelberger may be issued a permit to connect the proposed home in the 600 block of Frolic Avenue to the adjacent sewer notwithstanding this Board's ban on sewer connections.

I, Christan Moffett, Clerk of the Pollution Control Board, certify that the Board adopted the above Opinion & Order this _____ day of _____, 1972, by a vote of _____.

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