ILLINOIS POLLUTION CONTROL BOARD
October 3, 1972

CINNAMON CREEK ASSOCIATES	)	
	)	
v.	)	# 72-377
	)	
ENVIRONMENTAL PROTECTION AGENCY	)	
THOMAS I. SIMPSON	)	
	)	
v.	)	# 72-368
	)	
CINNAMON CREEK ASSOCIATES et al	)	

Opinion & Order of the Board on Motion for Emergency Disposition (by Mr. Currie):

Cinnamon Creek, as all parties concede, made a connection to a Waukegan sewer in the summer of 1971, after the entry of our order forbidding such connections because of the unsatisfactory condition of the sewage treatment plants in the North Shore Sanitary District, League of Women Voters v. NSSD, #70-7, 1 PCB 369 (March 31, 1971). The question is what we should do about it.

This question was first raised by a variance petition, #72-340, seeking permission to utilize the connection on grounds of hardship. We dismissed the petition without prejudice for failure to allege the inability to obtain a permit under North Shore Sanitary District v. EPA, #71-343, 3 PCB 541 and 697 (Jan. 31 and March 2, 1972), which allowed a number of connections because of improvements at the treatment plants. Cinnamon Creek Associates v. EPA, #72-340, 5 PCB ___ (Aug. 22, 1972). There followed the filing of Simpson's complaint asking us to order disconnection; Cinnamon Creek's motion for summary judgment in its favor; Simpson's admission of the facts alleged by Cinnamon Creek; the filing of an amended variance petition reciting that no permit can be had because the sewer to which the connection was made has itself been disignated as overloaded pursuant to our decision in #71-343; and a motion for expedited consideration because of the alleged need to proceed with construction before winter. The Agency's recommendation, which is favorable to the petition, was received by telephone September 26.

No hearing has been held.

The immediate question is whether the relevant facts are sufficiency clear to enable us to dispose of these cases without hearing. A detailed consideration of the law and of the present record is necessary.

1. Actions Taken Before the Sewer Ban

In a long line of cases beginning with Wachta v. EPA, #71-77, 2 PCB 117 (July 12, 1971), we have allowed connections to be made despite our general ban orders in cases in which actual construction of the buildings to be connected has been completed or substantially begun prior to the date the ban was imposed. As explained in our opinion in Illinois National Bank of Springfield v. EPA, #72-307, 5 PCB ___ (Oct. 3, 1972), in which a number of the precedents are cited and discussed, actual building construction prior to the ban indicates not only the commitment of substantial resources in good faith expectation that a connection may be made, but also the significant risk, as is alleged in the present case, of damage to the partly completed structures from vermin, vandals, and weather. Even in such cases, recognizing that each case depends upon its own peculiar facts, we have refused to hold that the timely commencement of construction in itself will always suffice for a variance, for we must balance the harm from a denial of a connection against the seriousness of the pollution threat in the event the connection is allowed. See Illinois National Bank v. EPA, cited above. Nevertheless, if buildings are actually built before a ban is imposed, a case can be made for granting a variance without hearing if the Agency suggests no risk of serious pollution in its recommendation.

On the other hand, we have consistently distinguished sharply between actual construction of buildings and preparatory site development such as the installation of streets and sewers. In the Wachta case a varaince was granted as to seven homes already constructed but denied as to other lots in which streets and sewers had been installed at considerable expense. Enjoyment of the fruits of preliminary expenditures, as we have observed, is not necessarily lost if immediate use of municipal sewers is denied; it may be merely postponed, since architectural plans, streets, and sewers may still be there when the ban is lifted: "Petitioner has expended approximately $60,000 for the purchase of the land and for development costs, none of which will be lost to it if it is obliged to wait until the sewage situation in Mattoon has been ameliorated." Pyramid Mobile Estates, Inc. v. EPA, #71-154 (Sept. 16, 1971); see also Wagnon v. EPA, # 71-85, 2 PCB 131 (July 26, 1971).

Although the Agency's recommendation in the present case, evidently based upon allegations in the petition, concludes that "construction commenced prior to March 31, 1971," it appears clear that the supporting information does not refer to the construction of the buildings themselves. Although paragraph 8 of the amended petition alleges that the contractor, in reliance on a building permit issued by the City of Waukegan, "moved onto the site in mid-January, 1971, and commenced construction work," the permit itself referred only to preparatory activities:

"1. Earth moving

2. Construction of on-site water retention basins and lakes

3. All underground utilities including:
   (a) Electric
   (b) Storm Sewers
   (c) Sanitary Sewers
   (d) Water
   (e) Gas

4. Seven building excavations

5. Interior roadways

6. Footings, piers and foundation walls for seven buildings."

Moreover, in its motion for judgment on the citizen complaint Cinnamon Creek states that it was after the sewer ban was imposed that it "installed the sewer connection and commenced construction" (Motion for Summary Judgment, paragraph 6). We therefore find an absence of allegations sufficient to bring this case within the Wachta doctrine insofar as that case strongly favors the grant of variances for buildings under construction when the ban was ordered. The extensive allegations of hardship because of preliminary activities are similar to the hardships we found insufficient in the Wachta case, and we cannot determine without a hearing whether the actual hardships involved justify a varaince in light of the particular facts of the present cases, including the effect of the additional wastes upon the sewer in question.

2. Actions Taken Since the Sewer Ban.

The next question is whether actions taken since the date of the sewer ban entitle Cinnamon Creek to relief without a hearing. The amended petition alleges, and the attached photograph (Exhibit D) confirms, that Cinnamon Creek has now "commenced erection of solid masonry walls," although for how many buildings we cannot without testimony be certain.

As noted above, had construction proceeded this far before the ban was imposed, we would grant the variance unless the result would be very serious pollution. But the relevant date for commencing construction is before, not after the ban is imposed. If the ban is to have any meaning, we must hold, and we have held, that in general one who commences construction after a connection ban is imposed does so at his peril; any hardships resulting from actions taken after that date must be regarded as self-inflicted and entitled to no considerations. To hold otherwise would put it in the power of any potential developer to avoid the ban simply by defying it. See Cook v. EPA, #72-178, 5 PCB ___ (Aug. 29, 1972).

Cinnamon Creek alleges without contradiction, and we accept as a fact, that it began construction and made the sewer connection only after requesting and receiving from the North Shore Sanitary District assurance that, because Cinnamon Creek held a permit to build the sewers that had been issued before the sewer ban, the ban did not apply to Cinnamon Creek.[1] In Glovka v. North Shore Sanitary District, #71-269, 3 PCB 647 (Feb. 17, 1972), we explicitly held that the issuance of a permit prior to the imposition of the ban did not make the ban inapplicable:

> The March 31, 1971 sewer ban prohibited sewer connections irrespective of any pre-existing permits granted by the State or the District itself. The order was unequivocal, plenary and without exception.

The same reasoning applies to permits issued by the City of Waukegan. We further found that the District had acted deliberately and inexcusably in giving an erroneous interpretation of the order:

> The Village of Lake Bluff, by its repeated inquiries of the District, was seeking sanction for what both undoubtedly knew violated the letter and spirit of the March 31, 1971 sewer ban. There is no question that the District took upon itself, unilaterally and in direct defiance of the Board's order, jurisdiction to allow violation of the law by authorizing the Village of Lake Bluff to permit sewer connections.

The District was penalized $5,000 and ordered to revoke all similar authorizations in Lake Bluff and to cause disconnection of any taps actually made pursuant to such authorizations.

One exception was made to this sweeping order, and on this exception Cinnamon Creek places heavy reliance. Six building permits had been issued pursuant to District authorization to Nilles, Inc., and two sewer connections for individual homes had been made by Nilles before the

Glovka case was filed. "Because of the apparent good faith reliance on the acts of the District and the Village," the Board held, "connections made by Nilles, Inc. prior to service of this complaint are excepted from this order" of disconnection. Cinnamon Creek argues that its situation is similar and that, because Nilles was not required to disconnect, it should be affirmatively authorized to use the sewer connection it made, presumably before the Glovka case was filed.

The present case is by no means on all fours with that of Nilles. First, we did not hold that Nilles was free to discharge sewage through the connections that he had made; we held only that he was not required to incur the additional expense of making a physical disconnection. The issue was what remedy to order for violations proved in an enforcement case, not whether a variance should be granted to allow additional wastes to the treatment plant. Nilles's right to discharge sewage was not settled one way or another by the Glovka decision. Second, we dealt in Nilles's case with the connection of two homes to the sewer system; we deal here with seven buildings containing a total of 245 apartments. Cinnamon Creek's own estimate of the load to be added to the municipal sewer is 36,750 gallons per day. As we said in our opinion when we dismissed the original petition in this case, "the large number of apartments here involved (nearly 250) increases the hardship if a connection is denied and also the pollution if one is granted." Cinnamon Creek Associates v. EPA, #72-340, 5 PCB ___ (Aug. 22, 1972. The possible adverse effect of the additional wastes contemplated by the present petition is orders of magnitude removed from that in Nilles; even if actual use of the Nilles connection had been authorized, the precedent would therefore not have been controlling.

Furthermore, as also noted in our prior opinion, the large number of apartments here involved "may bring about a greater duty of inquiry into the legality of a connection, since we cannot delegate authority to local officials to undermine or repeal our orders." It is one thing to hold that the ordinary man in the street, or even the builder of two houses, is entitled to rely exclusively upon the opinion of municipal officials as to the meaning of an order issued by another governmental body, and can be in good faith in so doing. It is quite another to imagine that the developer of an apartment complex containing over two hundred units costing over four million dollars to build could be so naive. Cinnamon Creek could hardly have believed the District was in a position to give authoriative interpretations of our orders; ordinary prudence would seem to have suggested to men of good faith and judgment that the way to ascertain one's rights before making extensive expenditures in constructing such a huge project was by filing a petition for

variance, as was done in the Wachta case. We cannot avoid the suspicion, on the facts presently before us, that Cinnamon Creek may have determined to push ahead with its project on the basis of assurances that would not have been found adequate by men of good faith and judgment with responsibility for such large sums of money, in hopes either that the ban would be lifted or reversed before construction was finished or that the Board would take pity and grant a variance after Cinnamon Creek had crawled out on a limb. If such was the case Cinnamon Creek proceeded at its own risk and the hardships created by its subsequent construction of walls that are in danger of collapsing are of its own making. We do not so find without giving the opportunity for proof at a hearing, but the conclusory allegation of "good faith" is not enough to dispel our doubts without a hearing.

3. The Second Sewer Ban Decision.

Thus Cinnamon Creek's position, in this regard, is much like that with which we dealt in Cook v. EPA, #72-178, 5 PCB ___ (Aug. 29, 1972), in which a builder had proceeded to construct a home with knowledge that the sewer ban had been imposed, gambling on the possibility that it would, as predicted by local officials, be lifted in the near future. In fact the ban was relaxed after construction began because of treatment plant improvements, but there as here the relaxation was of no help to the petitioner because it did not extend to sewers with inadequate capacity to carry the wastes to the treatment plant. Cook's petition was denied on the ground that he had taken the risk that the ban would not be lifted and had lost; he and not the public should bear the burden of his erroneous prediction. What was true of a small individual builder like Cook, with only a single home to connect to the overloaded sewer, would appear to be true in spades of a large developer like Connamon Creek: Having knowingly taken a calculated risk for business advantage, it should bear the loss when things go sour.

In Bender v. EPA, #72-324, 5 PCB ___ (Oct. 3, 1972), we have taken another look at the Cook doctrine. Like Cook, Bender began construction knowing he could not connect until the ban was lifted; he admitted he assumed the risk that the treatment plants would not be improved to the Board's satisfaction in time to permit us to relax the ban by the time he was ready to connect. He pointed out, however, that he did not anticipate at the time he began construction that the inadequacy of the sewer itself, of which he had no knowledge, would be taken by the Board as a reason for refusing to lift the ban insofar as it applied to his part of Waukegan. His position with respect to the sewer problem as contrasted with the treatment plant problem, was the same as if there had been no ban based upon the plant's inadequacy; and we have allowed connections where construction began prior to

the imposition of a ban based on the inadequacy of the sewer itself. Illinois National Bank of Springfield v. EPA, #72-307, 5 PCB ___ (Oct. 3, 1972). Bender agreed he should be held to the risk he voluntarily assumed; but that risk, he said, was that the plant improvements would be delayed, not that an unforeseen sewer problem would arise. In the case of an individaul like Bender, constructing his own home in his spare time and contributing only a small amount of additional waste to the sewer, we were convinced by this argument, and the variance was granted.

It is possible that Cinnamon Creek is in the same position as Bender, since it too allegedly began construction at a time when the sewer ban had been based exclusively upon treatment plant problems and since the continuation of the ban is based upon a later designation of the sewer itself as inadequate. Whether a sophisticated developer with millions of dollars at stake and a potential addition of multiple thousands of gallons per day of waste should be given such benefit of the doubt in determining the precise scope of the risk assumed is an question we cannot presume to answer in the abstract without a hearing to determine the precise facts relating to Cinnamon Creek's legitimate expectations at the time and the effect of the discharge on the sewer. It is worthy of consideration that so to hold would place those who proceed in the face of an explicit sewer ban in more favorable position than those who acquiesce in the law.

4. The Effect of the Discharge.

As we have repeatedly held, it is an essential part of the petitioner's case to plead and prove facts to demonstrate that the adverse effects of a variance grant will be greatly outweighted by the hardships of a denial, see, e.g., Decatur Sanitary Dist. v. EPA, #71-37, 1 PCB 359 (March 22, 1971), and our procedural rules are explicit in requiring a statement of the anticipated adverse effects of the discharge. PCB Regs., Ch. 1, Rule 401(a)(2). There is very little in the petition on this question, although an in-depth exploration of the extent to which admitting an additional 36,750 gpd to an already overloaded sewer would result in more raw sewage in streets and basements is an obviously critical part of the balance we must make in this case. See the extensive factual examination of this issue in Cook v. EPA, cited above. Cinnamon Creek's allegations on this point revolve around the construction of a stormwater retention pond that allegedly will avoid any worsening of the present problem. The extent of that problem is not discussed.

Paragraph 13 of the amended petition recites that "petitioners constructed a large water retention basin, which functions to contain storm water during peak rainfall periods, consisting of about seven acres . . . ." Exhibit C is a consulting engineers' report indicating that this basin will provide retention capacity for "300% of the additional run-off which will result from the development of this project area." By reducing stormwater runoff from the area, it is opined, the basin will "reduce flooding and the attendant hydraulic load on the City's existing sanitary collection system in the vicinity of the development during rainstorms." The report concludes on an optimistic note:

> We have no data available which would indicate hydraulic loads on the existing sanitary collection system prior to the construction of the project and we know of no method of mathematical computation which would relate the improvement in the storm disposal system directly to a reduction of the hydraulic loading conditions in the sanitary collection system. However, it is not unreasonable, in our opinion, to assume that the volume of storm water not entering the sanitary collection system by virtue of the construction of the storm retention facilities will exceed the volume of additional dry weather flow that will be discharged to the system by this development.

Having asserted that the only problem with the sewer is during wet weather, the report thus concludes that no harm will be done.

On anything resembling close observation this promising conclusion, which is elevated to the status of fact in the petitioner's allegations (amended petition, ll 23(b)), reveals itself as no more than a blind guess. It should be noted at the outset that the basin will not retain the sewage generated by the apartments at Cinnamon Creek, as was proposed in Mars Devel. Corp. v. EPA, # 71-218, 2 PCB 689 (Oct. 26, 1971); it will retain only stormwater that would otherwise run off from the land. It is being built, as the report says, to capture "the additional runoff which will result from the development of this project area"-- presumably because the paving over of portions of the land will make storm runoff greater than it was before. The basin is to capture this additional runoff, and some of the original runoff, to aid in flood control. If the sewer into which Cinnamon Creek has tapped were a combined sanitary and strom sewer into which all the captured runoff would otherwise have run, the retention of an amount of original runoff greater than the amount of sewage discharged from the project would demonstrate that the net effect of construction would be a reduction in the

frequency and quantity of overflows, though not of their pollutant concentration. But there is no such allegation. The apartments are to discharge into what the report describes as a "sanitary collection system," not a combined one, and the report makes clear the inapplicability of such a simple formula to the present case. It is plainly implied that the storm water is expected to go elsewhere, and the estimated effect of the retention basin is based upon assumptions as to the present degree of accidental infiltration of a certain portion of stormwater from this local area into sewers meant to carry only domestic wastes. No facts whatever are given to substantiate the "assumption," which so happily coincides with the builder's wishes, that the reduction in infiltration will more than counterbalance the added wastes from the apartments themselves. For all that is alleged or proved, the overload problem might be caused entirely by illegal connections of stormwater sources directly to the sanitary sewer elsewhere in Waukegan, and if that were the case stormwater retention at Cinnamon Creek would be of no value at all insofar as the sanitary sewer problem is concerned. Cf. Illinois National Bank of Springfield v. EPA, #72-300, 5 PCB ___ (Oct. 3, 1972).

We think Cinnamon Creek should be given the opportunity to prove its contention that no significant net wet-weather load would be placed on the sanitary sewer if the variance were granted, but we do not have adequate information before us today to support either that claim or the clearly relevant allegation, see Illinois National Bank of Springfield v. EPA, #72-300, 5 PCB ___ (Oct. 3, 1972), that the city's program for sewer improvements will soon relieve the situation.

5. Conclusion.

We are asked to dispense with a hearing on the ground that time is of the essence. We have stated at length why we believe we do not have the facts to enable us to render an informed decision without hearing. We think the importance of an early decision is a consideration that should have been taken into account by Cinnamon Creek itself in determining when to file its variance petition. The sewer ban order was entered a year and a half ago, the decision to continue the ban for overloaded sewers in January of this year, the Glovka decision making clear that a prior permit did not afford an exception in February, and the Agency's designation of the inadequate sewers was made in April. Yet Cinnamon Creek, which now is in such a hurry for a decision, waited until August to file its first variance petition. Had time really been of the essence, Cinnamon Creek could have come before us some time ago, so that we would have had time to ascertain all the relevant facts before acting on the petition.

Instead these proceedings have been pressed at the last minute, according to the petitioner's own estimate, in great haste. The first response to our dismissal for inadequate information, on grounds that had been made clear in decisions dating back for five months (e.g., Robert E. Nilles, Inc. v. EPA, #72-97, 4 PCB 123 (March 28, 1972), was the filing of a citizen suit, followed within three days by a motion for summary judgment to which a response admitting the facts as Cinnamon Creek alleged them was filed on the very same day. At the developer's request we sought and obtained the Agency's views within fifteen days, and the telephoned, cryptic recommendation we received shows the haste with which the Agency was forced to work in preparing its response.

Cinnamon Creek's counsel appeared before the Board on September 26 to urge an immediate decision. Informed that the law requires passage of 21 days for citizen comment on the variance petition, he offered to withdraw it to enable the Board to pass immediately on the issue as raised by the acquiescent citizen's complaint.

We could not grant Cinnamon Creek the relief it seeks on the basis of the citizen complaint alone. Should we refuse to order disconnection as requested by the complainant, that would not give Cinnamon Creek the right to use its connection, for reasons stated above. Nor are there sufficient allegations, much less proof, in the citizen case to indicate the hardships claimed to justify the grant of a variance; there is only reliance on the Nilles case, which we have held cannot help Cinnamon Creek without the proof of additional facts at a hearing.

More important, the requirement that we allow 21 days for public comment in variance cases expresses an important policy that we not allow deviation from pollution requirements without giving the affected public the right to have its say. That policy is not lightly to be undermined by disposing of the same issues on the basis of a friendly citizen suit that frustrates the spirit of the rule. We have already received a comment from the Lake County Health Department of possible adverse effects if the connection is approved. We view this as a statement in opposition to the variance, which requires us to hold a public hearing under section 37 of the Act. We think it would be in disregard of our obligation under that section to moot the hearing by passing on the same issue in the meantime on the basis of the citizen complaint.

Finally, although the developer's factual allegations are conveniently admitted by the cooperative Mr. Simpson, that is by no means the same as having them proved in a public hearing. Even when the Environmental Protection Agency is complainant, our rules require that the Board independently evaluate the case rather than blindly accepting settlements agreed to by the parties. PCB Regs, Ch. 1, Rule 333; see GAF Corp. v. EPA, #71-11, 5 PCB ___ (Oct. 3, 1972). We can do no less when a citizen is complainant, lest a procedure intended to provide for increased enforcement against polluters be perverted into an instrument for whitewashing them. For us to accept stipulations uncritically in such cases would enable anyone engaged in illegal activities to insulate himself from prosecution by finding a complacent citizen to institute a paper complaint against him and then to admit away all the facts. Because of the importance of the present case, the haste with which it has been pursued, the remarkable harmony of action between complainant and respondent, and the inadequacy of the agreed facts to enable us to make a reasoned decision, we think Cinnamon Creek must be put to its proof.

The motion for emergency disposition is hereby denied and the two cases are consolidated for a prompt hearing. Under the authority of EPA v. City of Springfield, #70-9, ___PCB___ (May 26, 1971), we think the 21-day notice given for the hearing initially set on the citizen complaint satisfies the statutory requirement of notice to allow time for citizens to prepare comments on the responsive variance petition. A hearing may be held upon brief public notice of time and place.

I, Christan Moffett, Clerk of the Pollution Control Board, certify that the Board adopted the above Opinion & Order this 3rd day of October, 1972, by a vote of 5-0.

Christan L. Moffett