ILLINOIS POLLUTION CONTROL BOARD
October 13, 1977

DERBY MEADOWS UTILITY COMPANY, Petitioner, and HOMEOWNERS' ASSOCIATION OF PHEASANT HOLLOW & DERBY HILLS, Intervenor, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	PCB 77-153

Ms. Percy L. Angelo and Mr. Louis R. Bertani appeared for Petitioner.
Mr. Theodore E. Cornell, III appeared for Intervenor.
Mr. Arthur B. Muir, Assistant Attorney General, appeared for Respondent.

OPINION OF THE BOARD (by Mr. Young):

This Opinion sets forth the facts and reasons supporting the Board Order of September 15, 1977, entered in this matter which substantially granted the variances requested subject to a number of conditions.

Derby Meadows Utility Company filed a petition with the Board on June 7, 1977, seeking (1) a variance from Rule 404(f) of Chapter 3; (2) a variance to allow the issuance of sewer construction and operating permits for 35 connections in three named subdivisions in Homer Township, Will County, Illinois; and (3) a variance to allow the issuance of additional sewer construction and operating permits in certain named subdivisions until the design capacity of the existing treatment works (750 homes; 3000 P.E.) has been reached.

The Petitioner also filed a Motion for Expedited Consideration on June 7, 1977, citing imminent bankruptcy and foreclosure resulting from inability to make interest or principal payments on a mortgage of $500,000.00 since January of 1977. Petitioner requested the Board to order the Agency to file their response to the Petition for Variance within 10 days and to file any

objections to the petition within 10 days. On June 9, 1977, the Board declined entry of the requested order because such order would conflict with the provisions of Section 37 of the Act; the petition was accepted and held for Agency recommendation pursuant to Procedural Rule 407(b).

An Objection to the Petition for Variance was filed by the Agency on June 27, 1977; on June 28, 1977, the Board ordered a hearing set as soon as possible consistent with Rule 408(b) and appointed a Hearing Officer the same day. Hearing on the petition was set for July 22, 1977.

On July 7, 1977, the Agency filed a recommendation to allow the variance from Rule 404(f) of Chapter 3 subject to certain conditions and to deny all other relief requested by the Petitioner.

On July 28, 1977, an Application for Intervention was filed by the Homeowners' Association of Pheasant Hollow and Derby Hills pursuant to Procedural Rules 310(a) and 310(d); under the facts set forth, intervention is allowed as a matter of right under Rule 310(d).

Hearing, originally set for July 22, 1977, was continued to August 3, 1977, by the Hearing Officer after Motion of July 13 by the Respondent and pre-hearing conference was held on July 26, 1977. On August 3, 1977, a limited hearing was held and the hearing then continued until August 11, 1977, on request of Petitioner and Respondent. Hearings were subsequently held on August 11, 12, 15 and 18, 1977.

The Agency read an amended recommendation into the record (R. 671-675) at the hearing on August 18, 1977; the amended recommendation was also filed with the Board on August 24, 1977. Petitioner waived the 90-day decision requirement of Section 38 of the Act until September 29, 1977. On September 15, 1977, the Board entered an Order granting in part the relief requested subject to a number of conditions and continuing Board jurisdiction until satisfactory completion of the expansion of the Petitioner's sewage treatment plant.

The Petitioner, Derby Meadows Utility Company, located in Will County, Illinois, is a privately-owned, public utility company regulated by the Illinois Commerce Commission which provides sewer and water services to residential subscribers in Orland and Homer Townships in Will and Cook Counties (R. p39). The Utility owns and operates a sewage treatment plant located near 139th and Will-Cook Road in an unincorporated area of Will County and Homer Township. The plant presently has a hydraulic capacity of approximately 300,000 gallons per day (0.3 MGD) (R. 41) and is undergoing expansion from the present 0.3 MGD to 0.6 MGD to be completed in October of 1977 (R. 42). The estimated

cost of construction remaining to be completed as of August 11, 1977, was approximately $50,000.00 (R. 42). As of July 1, 1977, the plant was serving 506 homes utilizing about two-thirds of plant capacity (R. 43) calculated assuming an average of four persons occupying each individual home and an average daily wastewater discharge of 100 gallons for each person (R. p42). The present plant does not have an operating flow meter; a flow meter was on the plant site and was to be installed within a week or two of the hearing (R. 199).

Permits issued by the Agency from 1965 or 1966 through June of 1977 (R. 103-104) allow the connection of 715 homes to the sewers tributary to the treatment plant (R. 62). The sewage treatment plant underwent an original expansion from 0.1 MGD to 0.3 MGD under Agency Permit of February 19, 1975; effluent quality standards for the facility established by the permit were 4 mg/l, BOD_5; 5 mg/l, suspended solids; and 200/100 ml, fecal coliform (Pet. Exh. 12; Resp. Gr. Exh. 4). Cost of the expansion to 0.3 MGD was approximately $800,000.00 (R. 120); the expansion began shortly after issuance of the permit in February 1975; the 0.3 MGD plant was put on line December 3, 1976 (R. 102). The current expansion of the plant from 0.3 MGD to 0.6 MGD is estimated to cost approximately $500,000.00 (R. 135). Financing of the expansion to 0.3 MGD was obtained from a loan (R. 124) and a mortgage for $500,000.00 (R. 27), later reduced by $150,000.00 borrowed from the estate of the father of the President of the Utility (R. 86). No financing has been obtained for the construction of the current plant expansion to 0.6 MGD, the work is underway under a contract for approximately $500,000.00 with Migliore Contracting Corporation who have been paid only a very small percentage of the total cost, the balance is expected to be paid from future connection fees (R. 136-138). Evidence concerning the financial condition of the Utility (Exh. C, Petition; Pet. Exh. 1; Pet. Exh. 18); the testimony of the supervising partner of the accounting firm preparing financial statements for the Utility for the past three years (R. 13-37; 220-254); and the testimony of the President of the Utility (R. 85-88; 115-168; 260-270) clearly establishes that the Utility is under considerable financial pressure. Derby Meadows was financially unable to make a $25,000.00 semi-annual interest payment in June of this year to their mortgage-holder (R. 87); suffered a net loss from operations of $49,981.69 in 1976 (Pet. Exh. 1); has no money to pay Migliore Contracting Corporation periodic payments due on a $500,000.00 contract (R. 163-164); and efforts to obtain advance payment of sewer connection fees from the developers of the various subdivisions served had been unsuccessful (R. 145-146). In addition to the financial hardship experienced by the Utility resulting from Agency denial of permits to extend service to additional subdivisions, Intervenor Homeowners' Association of

Pheasant Hollow and Derby Hills presented eight witnesses who testified concerning individual hardship occasioned by the necessity to secure interim housing (R. 311-401). The testimony of each witness disclosed severe family and economic consequences resulting from the inability of Derby Meadows Utility Company to provide sewer service. A statement was also entered into the record on behalf of the developer of Orland Trails detailing the financial hardship experienced by Orland Trail, Inc. as a result of the denial of a permit to construct and operate sewers tributary to the Derby Meadows Utility Company plant (R. 309-311).

The President of the Utility testified that the Utility had connected sewers to the plant which had been installed under construct only permits prior to the receipt of operating permits (R. 103-105), and had constructed sewers in Pheasant Hollow South Unit 2, Derby Hills Unit One and Orland Trails without construction permits (R. 89-90). Evidence in the record also indicates that a compliance conference was held on April 14, 1977, by the Agency with the President of Derby Meadows (R. 55-56) and that a followup letter containing an agreed schedule of compliance was addressed to the President of Derby Meadows Utility dated April 19, 1977 (Pet. Exh. 8). The Utility has complied with the schedule of items necessary to achieve compliance except for certain property fencing delayed by difficulties in laying a trunk line in the same location (R. 57-61).

Although there is conflicting testimony in the record regarding the date that the 0.3 MGD plant began to meet the permitted effluent limitations of 4 mg/l BOD_5 and 5 mg/l suspended solids, operating permits to allow connection of subdivision sewers to the treatment works were issued in June, 1977, on determination by the Agency that the plant was meeting the 4/5 effluent limitations (R. 753).

On August 18, 1977, the final day of hearing in this matter, the hearing began with a statement by the Attorney for the Respondent that the Agency would file an amendment to the recommendation previously filed. In the ensuing statement, and later in the amended recommendation filed August 24, 1977, the Agency recommended that the Petitioner be allowed to connect no more than 750 homes to the 0.3 MGD plant on condition that Petitioner post a $100,000.00 bond to assure adherence to the 750 home connection limitation, in lieu of the performance bond requested as a condition of the prior recommendation to ensure completion of the expansion of the plant to 0.6 MGD. Irrespective of any proof or lack of proof regarding prior unsatisfactory history of compliance and performance by Derby Meadows, the Board is without authority to require such bond. Section 36(a) of the Act specifies the basis upon which the Board has authority to impose a bond as a condition in the grant of a variance; that basis is not found in this case.

Respondent offered a number of documentary exhibits and proffered testimony relative to the operation of the sewage treatment plant prior to the expansion to 0.3 MGD; objections were duly made and sustained, and offers of proof were made. Considering the stated purpose of the offers, the Board finds that the exhibits and testimony were properly excluded by the Hearing Officer.

In view of the testimony in the record, it is not necessary for the Board to find that compliance would work an arbitrary or unreasonable hardship upon the Petitioner before granting a variance to allow the connection of additional homes outside of the subdivisions presently permitted. The Board finds that failure to allow such connections, not to exceed in total of all connections the 0.3 MGD capacity of the existing treatment works, would constitute an arbitrary and unreasonable hardship as to the Intervenors in this case. In order to make certain that the capacity of the existing plant is not exceeded, the Board will require that an appropriate flow meter be immediately installed at the plant; that Derby Meadows Utility Company immediately prepare and deliver a listing of all persons currently connected to the collection system to the Respondent and the Intervenor; that future connections be allocated in accordance with Exhibit B to Petitioner's Exhibit 14 herein; and Derby Meadows Utility Company shall not authorize connection of any home to collection sewers tributary to the treatment works unless a written request to connect has been delivered to, and approved by, the Agency. Finally, in this regard, the Board shall not allow, nor shall Petitioner be authorized to connect, more than 750 homes to the collection system, or allow influent volume to exceed 0.3 MGD, whichever is least, without a further Order of the Board.

Despite the granting of this variance to allow the connections in the previously unpermitted subdivisions, the Board ratifies the action of the Agency in their refusal to permit the construction and operation of sewers which are designed and intended to eventually serve an equivalent population greater than the present permitted operating capacity of the existing sewage treatment works to which the sewers will be tributary. Such action is consistent with the applicable provisions of the Act and the Board regulations. Although there was testimony to the effect that doing so does not take into account normal subdivision developmental practices (R. 70), the Board believes that no development should be undertaken until capacity has been provided to handle the total potential volume of waste to be generated.

In considering the petition for variance from Rule 404(f), the Board is confronted with an unusual set of circumstances and several issues of first impression. Without embarking on a discussion of the extensive testimony in the record, the Board will take notice that the Environmental Protection Agency has proposed

to the Board that Rule 404(f) be deleted (Pet. Exh. 48). The stated justification for the proposal is that the 4 mg/l BOD_5 and 5 mg/l suspended solids effluent limitation requires a level of treatment well beyond the capabilities of conventional tertiary treatment nor has any other economically reasonable process been developed which can consistently produce that effluent quality within the averaging allowances of Rule 404(h) (Pet. Exh. 49 p8). The Board will grant a variance from Rule 404(f) for a period of two years or until earlier terminated by the adoption by the Board of any modification of that Rule which is now in hearing, Docketed as R77-12. An interim limitation to 10 mg/l BOD_5 and 12 mg/l suspended solids will be imposed during the period of the variance.

The record raises a substantial issue regarding the effect of the discharge on the quality of the waters receiving effluent from the treatment works. Both the Petitioner and Respondent agree that based upon the discharge of 0.6 MGD of effluent containing 10 mg/l BOD_5 and 12 mg/l suspended solids, no dissolved oxygen water quality violation is likely in Long Run Creek as predicted by application of the modified Streeter-Phelps Equation (Resp. Exh. 5 p9) for the influence of domestic sewage effluent on the dissolved oxygen profile of a stream (R. 439; R. 855). The parties disagree on the deoxygenating effect of the discharge in that reach of the Illinois and Michigan Canal from the confluence with Long Run Creek downstream to the discharge of the I & M Canal to the Chicago Sanitary and Ship Canal. No water quality sampling data or biological stream survey results of the impacted reach of the I & M Canal appears in the record. There was testimony from an Agency professional engineer that on May 20, 1977, he observed the I & M Canal at several locations, one being the confluence with Long Run Creek and several points downstream and the Canal was a turbid, greenish, muddy color with gas bubbles surfacing from the bottom and splotches of oil floating on the surface (R. 861-862). Based upon the testimony in the record (R. 430-463; 499-503; 842-941) and the exhibits (Pet. Exh. 33-43; Resp. Exh. 28-32), Petitioner has not established that the projected 0.6 MGD discharge will not cause a violation of the dissolved oxygen water quality standard in the I & M Canal. Because of the difficulty in applying WPC-1 (Resp. Exh. 5) as detailed by the Agency (Pet. Exh. 49, p8-9) and because Petitioner has been granted a variance from Rule 404(f) for a period of two years, a variance will be granted from Rules 203(d) and 402 of Chapter 3 for the same period. The variance shall apply only to the general standard for dissolved oxygen in the Illinois and Michigan Canal downstream of the confluence with Long Run Creek. The Board will direct the Petitioner to perform dissolved oxygen monitoring during the period of the variance and would expect that effort to be supplemented by additional Agency monitoring and biological survey.

In granting this variance, the Board is not excusing the past practices of the Utility, which, in some instances, have admittedly been deliberate violations of the Act and Board regulations. Much of the financial hardship of the Utility is self-imposed and the relief granted is predicated largely on the hardship established by the Intervenor insofar as sewer connections in the unpermitted subdivisions are concerned.

Our Order of September 15, 1977, should provide the safeguards necessary to ensure that the present hardship of the individual home purchasers is eliminated and that the load on the present treatment works does not exceed the design capacity. The Order should also make it abundantly clear that the Board will not allow any further connection to the treatment works until the expansion to 0.6 MGD has been completed and is being operated in accordance with permit, Board regulations and the Act. Toward those ends the Board will retain jurisdiction until it is clearly demonstrated that the conditions of the Board Order have been performed.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion was adopted on the 13th day of October, 1977 by a vote of 5-0.

Christan L. Moffett, Clerk
Illinois Pollution Control Board